中国海洋法学评论

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CHINA OCEANS LAW REVIEW

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卷首语

本期《中国海洋法学评论》是全面改版为中英双语全文对照学术期刊之后的第二次出版。现在,评论已经为 Westlaw、万律、北大法宝、台湾华艺数位、维普等电子数据库所收录,读者能够更便利地接触并阅读我们所刊登的作品。编辑部希望,这些变化能为大中华区以及世界各地的作者和读者提供一个更为直接的学术交流平台和更为优质的学术资源。本期内容集中在水下文化遗产保护的相关法律问题、中日东海关系问题、共同开发的理论和实务等方面。

对于海峡两岸水下文化遗产保护法律问题的探讨是本期的重要特色。联合国教科文组织通过的《保护水下文化遗产公约》已经于 2009 年生效。作为最重要的世界文明古国之一,中国水下文化遗产保护问题的重要性毋庸赘言。海峡两岸也在就相关的法律问题进行理论研讨,并推动实务的修法或立法工作。2010 年 6 月,上海交大海洋法律与政策研究中心组织两岸相关学者就此问题进行了专题研讨,成果斐然。本期评论中收录了其中几篇大作以及研讨会的综述。台湾的邱文彦博士、台湾文建会的李丽芳组长以及华南理工大学的赵亚娟副教授等几位专家分别从不同的角度讨论了这个问题,对两岸相关政策和法律或有启示意义。

中日东海关系的发展、现状及其争端解决,一直是中国所面临的难题之一。英国中央兰开夏大学法学院邹克渊教授和外交学院国际法系龚迎春博士的论文,对这一问题进行了详细解读,并且其观点可以作为有趣的对照。二位作者均为海洋法领域特别是东海问题的资深研究者,相信读者可以从文中一睹中日海洋关系的全貌。

比利时根特大学法学院国际法系刘能冶博士生详细论述了船源污染的国际法律框架,包括相关的国际海事公约、国际海事组织以及它们和《联合国海洋法公约》的关系,并指出在此领域内国际法面对的

挑战。

海洋边界划定之前，在争议区域达成相关的临时安排，“搁置争议，共同开发”，一直是中国在这个问题上的基本立场。本期评论中也收录了两篇和共同开发相关的论文。其中，尼日利亚乌约(Uyo)大学法律系的Kingsley Ekwere博士分析了在尼日利亚和加纳之争议海域进行共同开发的必要性，文章虽短，但颇有见解。“他山之石，可以攻玉”，其他国家的理论和实践应该能够为我们所借鉴。

作为大中华区唯一专注于海洋法律和政策的学术刊物，《中国海洋法学评论》会继续坚持促进学术交流和提升学术水平的办刊方向，并乐于成为推动世界海洋事业进步的一种力量。改版之后的组稿和编辑工作固然有颇多困难和曲折，但各界专家学者给予我们很大的支持，在此一并表示衷心的感谢！编辑部全体成员现在能做的，就是尽心竭力办好评论。筚路蓝缕，终会有所成就，希望这个过程，一直能得到各位作者和读者的支持。

编辑部　谨识

EDITOR'S NOTE

This has been the second issue since China Oceans Law Review stepped forward to be a Chinese-English bilingual academic journal. At present, the journal has been indexed by several digital databases such as *Westlaw*, *Westlaw China*, *China-lawinfo*, *Lawchinainfo*, *Airiti*, *Cqvip*. This makes it easier for our readers to access the articles published by the journal. By making all these changes, the editorial board is dedicated to provide a platform for better and more convenient academic exchange. The focuses of this issue are on the underwater cultural heritage protection, the Sino-Japanese maritime relations and the theory and practice of joint development in the disputed maritime zones.

This issue is particularly characterized with the discussion on the underwater cultural heritage protection across the Taiwan Strait. Since the UNESCO Convention on the Underwater Cultural Heritage Protection entered into force in 2009, the topic of UCH protection has become more significant to China which has been a great nation of ancient civilization with profound underwater cultural relics. Both sides across the Taiwan Strait have been engaged in discussing the legal aspects of the UCH protection and pushing forward the legislation progress. In June 2010, Shanghai Jiao Tong University Center for Oceans Law and Policy organized a seminar on this subject and achieved some realistic conclusions among the participants from both Taiwan and Mainland. Some of the papers and the seminar summary have been included in this Issue. Dr. Wen-yan CHIAU, Ms. Lee-fang LI and Dr. ZHAO Yajuan contributed their papers on this subject matter from different aspects. These papers should be very valuable for our readers of related practitioners, policy makers and lawyers.

The Sino-Japanese maritime conflicts and their possible resolutions have long been real difficulties faced by these two countries. Prof. ZOU Keyuan of University of Central Lancashire and Prof. GONG Yingchun of China Foreign Affairs University both give their substantial analysis on the subject in this

new issue of COLR. Their comments could be read together as an interesting contrast. Our readers might therefore be able to find a better angle to view the panorama of the whole matter between these two major East Asian countries.

Mr. LIU Nengye analyzes the international legal framework on the prevention and governance of vessel-sourced pollution, including the relevant international maritime conventions, the related international organizations and their relationship with the UN Convention on the Law of the Sea. His paper also addresses the challenges that the international community is confronted with the subject.

Making provisional arrangements in disputed areas before finalized maritime boundary delimitations, "shelving disputes and seeking for joint development", have always been the basic stance of China. Dr. Kingsley Ekwere of Uyo University provides his observance and insights in his paper on the necessity of jointly developing the disputed maritime areas between Nigeria and Ghana. The paper, which is a brief one, might be of some real value for people in other regions of the world.

As the only academic journal which focuses on maritime law, law of the sea and marine policy studies in the Greater China Region, COLR is dedicated to promote academic exchange and to upgrade the academic qualifications for the purpose of bettering the world's ocean business. We would also like to extend our sincere thanks to all those who have provided generous helps to this journal. We shall never stop our steps forward and would hope our readers could always be with us and be supporting us.

Editors

目　录

卷首语

论文

台北港环境影响评估与水下文物保护
——兼论海峡两岸合作的展望…… 邱文彦（1）
台湾水下文化资产保存政策与国际合作…… 李丽芳（35）
海峡两岸保护水下文化遗产的法律基础
——比较大陆的现行法制与台湾的立法草案…… 赵亚娟（98）
台湾海峡水下文物保护合作研讨会综述…… 刘　斌（131）
中日海洋问题及其解决前景…… 邹克渊（175）
中日东海海洋争端的进展和现状…… 龚迎春（219）
预防船舶污染的国际法律实践…… 刘能冶（264）
南海油气共同开发制度关键问题探讨
——以其他海域共同开发经验为鉴…… 罗婷婷（284）
跨界资源管理之需
——尼日利亚—加纳共同开发区…… Kingsley Ekwere（325）

新发展与新文献

中华人民共和国外交部声明……（330）
海岛名称管理办法……（331）
省级海岛保护规划编制管理办法……（335）
海洋特别保护区管理办法……（338）
中国海监海洋环境保护执法工作实施办法……（347）
中华人民共和国船舶及其有关作业活动污染海洋环境防治管理规定……（352）
中华人民共和国船舶油污损害民事责任保险实施办法……（362）
国际海事组织新闻简报……（367）

附录

《中国海洋法学评论》稿约……（372）
《中国海洋法学评论》引证体例……（374）
《中国海洋法学评论》总目录（1－11期）……（378）

Table of Contents

Editor's Note

Articles

Environmental Impact Assessment and Protection of Underwater Cultural Heritage in the Port of Taipei, as Well as Prospects for Cooperation between the Two Sides of the Taiwan Strait ········ Wen-Yan CHIAU (15)

Underwater Cultural Heritage Conservation Policy and International Cooperation in Taiwan ········ Lee-Fang LI (59)

On the Legal Basis of the UCH Protection on the Two Sides of Taiwan Strait—A Comparative Study of the Current Mainland UCH Law and the Related Taiwanese Draft Law ······ ZHAO Yajuan (112)

A Conference Summary on Cooperation Over Underwater Cultural Heritage Protection in the Taiwan Strait ········ LIU Bin (139)

Maritime Issues between China and Japan and the Prospect for Resolution ········ ZOU Keyuan (152)

The Development and Current Status of Maritime Disputes in the East China Sea ········ GONG Yingchun (191)

International Legal Framework on the Prevention of Vessel-Sourced Pollution ········ LIU Nengye (238)

On Key Issues for a Regime of Joint Development in the South China Sea ——with the Experiences of Other Sea Areas ········ LUO Tingting (298)

Transboundary Resources Management: The Need for a Joint Development Zone between Nigeria and Ghana ········ Kingsley Ekwere (319)

Recent Developments and Documents

The Statement of the PRC Foreign Ministry ········ (330)

Regulations on the Naming of Sea Islands ········ (331)

Regulations on Provincial Plans Over Sea Island Protection ········ (335)

Regulations on Special Marine Protected Areas ········ (338)

The Implementation Regulations for China Marine Surveillance Law Enforcement on Marine Environmental Protection ········ (347)

The PRC Rules on the Prevention of Marine Environmental Pollution from the Vessels and Their Related Operations ········ (352)

PRC Implementation Regulations on Insurance for the Civil Liability for Oil Pollution from the Vessels ········ (362)

IMO News Briefings ········ (367)

Appendix

COLR Call For Papers ········ (372)

COLR Standard System of Citation ········ (374)

CHINA OCEANS LAW REVIEW GENERAL TABLE OF CONTENTS (ISSUE 1—11) ········ (378)

台北港环境影响评估与水下文物保护

——兼论海峡两岸合作的展望

邱文彦*

内容摘要：人类长久以来已能在水面航行与捕鱼，许多水下的文化遗存深度关连了一个族群或地域的文化特征，并蕴藏了人类高度的智慧，应该获得适当的保护。尤其，联合国教科文组织《水下文化遗产保护公约》于2009年1月2日正式生效后，水下文物的保护应予高度重视并妥善规划良善长效的机制。台湾自1994年12月30日通过《环境影响评估法》，实施至今已有十五年经验，但对于文化部分的探讨、调查和评估相较有限；水下文化资产部分更显不足。本论文以台北港为实例，叙论台湾环境保护署在环评过程中，如何将水下文化资产保护的议题纳入考虑，如何促使相关当局采取具体的调查、协商和整合措施。本案堪称台湾制定水下文化资产保护专法前，通过环评体制，要求开发者保护水下文化资产的重要里程碑和典范。另鉴于水下文化资产为人类之共同资产，本论文亦提出未来两岸合作之展望与建议。

关键词：水下文化资产　环境影响评估　环境保护署　台湾　台北港

一、前　言

"文化"是人类共同的遗产。它存在众多的定义，如文化涉及：(1)对于优良艺术和人文科学的高雅品味，即为众所周知的高雅文化；(2)整合人类对于抽象思维和社会学习能力的知识、信仰和行为；(3)某机构、组织或群体中一系列共享的态度、价值、目标及实践而形成的特性。在二十世纪，"文化"以一种重要和统一的人类学概念形式在美国出现，此处它最常用的意义常涉及人类对于分类和抽象行为的文字化以及通过文字化的抽象社会实践进行沟通的普通能力。[①] 换言之，文化包括不同的概念、价值和(或)一个人、一个集体、一个社会或一个国家

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① 维基百科，文化，下载于 http://en.wikipedia.org/wiki/Culture，2010年8月25日。

的行为规范。从正式的方面观之,文化的特点与语言、书写文字、思维和(或)人类行为紧密相关。就考古学而言,文化常代表对于遗物和(或)遗迹的区分,同样的工具、用具或制造技术也会形成同一时期一群人的同一种文化特征。文化由物质和非物质部分组成,包含用具、材料、产品、技能、技术、概念、意识形态和体制机制。一般而言,文化遗产是一种与当地文化紧密相关的形体表征。

陈国栋(2007年)也持类似看法,正如其文章中所言,文化被认为是人类生活内容的总集成或这个总集成的一部分,它包括工作与休闲、物质与精神、也包括当下的存在与历史的记忆。他进一步提及"海洋文化",认为是人类与海洋互动所产生的生活内容。因此,在此背景下海洋文化可研究的主题甚广,并可被区分为七大范畴:(1)渔场与渔业,(2)船舶与运输,(3)海洋运输与移民,(4)海岸管理与治理,(5)海盗与走私,(6)海洋环境和生态系统,(7)海洋人文与艺术活动。由于海洋文化代表了人与海互动的全部,所以他的范围和内容极为多元和丰富。[①]

由于频繁的环境变化、历史变迁和(或)灾难性事件,一部分重要的文化被覆没于海洋之中。正如联合国教科文组织(UNESCO)制定的《保护水下文化遗产公约》(Convention on the Protection of the Underwater Cultural Heritage;以下简称《公约》)所言,水下文化遗产(underwater cultural heritage;以下简称UCH)被认为是人类文化遗产的重要组成部分,并且是某群体和国家以及他们之间相互关系的历史中极为重要的因素,UCH也常被作为链接人类智慧、历史和自然环境的"时空胶囊"。《公约》强调了UCH保护和保存的重要性,并要求各国承担此种义务。此外,《公约》表明各国、国际组织、科研机构、专业组织、考古学家、潜水员以及其他利益相关方和普通公众之间的合作对于UCH的保护十分重要。它也呼吁在国际、区域和国家层次采取有效措施对UCH实施就地保护,如果必要也可为科研或保护目的对之进行发掘和精心复原。[②] 由于《公约》于2009年1月2日正式实施,UCH的保护应优先提上国家文化的议事日程。

二、台湾文化事务概况

1981年11月11日台湾成立了"文化建设委员会"(Council for Cultural Affairs;以下简称CCA)作为文化设施规划和监督的最高主管机构。CCA在文化

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① 陈国栋:《海洋文化研究的多元特色》,载于《海洋文化学刊》2007年第3卷,第11~18页。另参见 http://ntouioc.ntou.edu.tw/webfm_send/50,2010年8月20日。

② UNESCO, Convention on the Protection of the Underwater Cultural Heritage, at http://unesdoc.unesco.org/images/0012/001260/126065e.pdf, 25 August 2010.

促进和保护的政策制定、规划以及贯彻实施方面扮演了关键的角色。CCA 的施政主轴因主任委员的背景和兴趣而不同，[①]如依据该会 2010 年度施政目标与重点，系以“扶植艺文产业，形塑文创品牌”、“活化文化资产、厚植观光资源”、“检讨各种法规之适用性，推动组织再造，充实文化设施”等多项关键策略目标，强化台湾的文化建设。CCA 将于 2012 年并入新成立的“文化部”，这是当今台湾文化主管机构的要务之一。[②]

过去数十年，CCA 比较关注于各地文化设施的硬件建设和表演活动而非法令机制改进和基础研究调查，例如“大台北新剧院兴建计划”“高雄海洋文化及流行音乐中心计划”“卫武营艺术文化中心兴建计划”等显例。主要原因是许多现存的博物馆和艺术中心使用率低以至于被讥讽为“蚊子中心”——那里没有人只有蚊子。依据 CCA2009 年工作报告，有关文物保护部分仍属有限。如“文化资产保存与观光－2009 国际博物馆日系列活动”“文化资产保存科学讲座”。至于水下文化部分，该会于 2009 年也仅办理过“水下考古科学仪器调查及分析人才培训课程”、“水下考古特展－水下文化资产国际交流座谈会”等少数活动，[③]据信是因预算经费缺乏及对于 UCH 的政策关注不够所致。

有关文化资产的保护法制部分，台湾系以“文化资产保存法”(Cultural Heritage Preservation Act：以下简称 CHPA)为主要依据；[④]对于 UCH 部分尚未单独立法，过去也未予高度重视。然而，UCH 的概念已经逐步植根于现存的法律和实施细则之中。例如，最近 CCA 所修订了“文化资产保存法施行细则”第 3 条条文，并于 2010 年 6 月 15 日发布实施。该修订的施行细则将自然遗物的范围扩大至古生物化石，包含近些年发现于台湾海峡海床上的 UCH。第 3 条所定遗物、遗迹及其所定着之空间，包括陆地及水下。[⑤]

基于 CHPA 第 11 条，CCA 于 2006 年组建了文化资产总管理处筹备处(the Headquarters Administration of Cultural Heritage：以下简称 HACH)主管文化遗产相关事务。[⑥] 此后，HACH 便积极从事 UCH 的相关事务。例如，从 2006

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① Council for Cultural Affairs，Administrative Organization，at http://www.cca.gov.tw/about.do? method=list&id=2，4 September，2010.

② Council for Cultural Affairs，2010 Policy Goals and Objectives，at http://www.cca.gov.tw/ccaImages/adminstration/0/99target.pdf，20 June 2010.

③ Council for Cultural Affairs，Performance Report of 2009，at http://www.cca.gov.tw/ccaImages/result/1222766685264/20100308.pdf，20 June 2010.

④ Council for Cultural Affairs，Cultural Heritage Preservation Act，at http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx? PCODE=H0170001，5 September 2010.

⑤ 文建会：《〈文化资产保护法实施细则〉第 3 条的修订》，下载于 http://www.hach.gov.tw/hach/frontsite/expservice/expServiceDetailAction.do? method=doViewNewsDetail&contentId=4300&isAddHitRate=true&relationPk=4300&tableName=content&iscancel=true&siteId=101，2010 年 6 月 20 日。

⑥ 文建会编：《文化遗产》，下载于 http://www.cca.gov.tw/business.do? method=list&id=2，2010 年 8 月 20 日。

年 9 月 1 日开始，HACH 委托“中央研究院”（以下简称“中研院”）和高雄“中山大学”进行为期三年的“马公商港疑似古沉船勘探开发及水下文化遗产保护与保存研究人员培训项目”。自 2007 年开始，该项目在澎湖海域也实施了水下考古勘测。[①] 这是在台湾海峡针对 UCH 实施的首次研究和调查，亦为试点项目。该项目采用了诸如多束声纳和磁强计等系列手段和科技。2008 年，出版了《海洋台湾新视界——台法合作水下文化资产调查及人才培训成果专辑》[②]和《海洋台湾新视界——澎湖马公商港疑似沉船遗址调查评估报告》[③]等两本书籍。在台北县十三行博物馆主办了关于水下考古的国际研讨会。经 HACH 委托，“中研院”于 2009 年 6 月发表了名为《台湾海岸水域 2 水下文化遗产的历史性研究》的终期报告。前述这些都证明了台湾处于 UCH 现场勘测研究的开展阶段。很明显，在人力、经费、计划项目及其实施成果方面仍属有限，因此，在 UCH 的保护上还需要更多的努力。

三、台北港环境影响评估的相关作业

台湾于 1994 年 12 月 30 日颁布了“环境影响评估法”（以下简称“环评法”）。该法意在阻止和减缓开发活动中对环境的负面影响，以实现环境保护目的。依据“环评法”第 4 条第 1 项第 2 款的规定，“环境影响评估系指开发行为或政府政策对环境包括生活环境、自然环境、社会环境及经济、文化、生态等可能影响之程度及范围，事前以科学、客观、综合之调查、预测、分析及评定，提出环境管理计划，并公开说明及审查。”本法还规定，环评工作程序包括诸如环评第一、二阶段、复核以及后续评估等。各层级的主管部门都应建立环评核查委员会和必要的特别工作组以核查与环评相关的报告。[④] 很清楚，环评的范围包括对于文化和文化遗产的影响。

虽然“环评法”在台湾已经实施近二十年，对于文化部分的探讨、调查和评估相较有限，UCH 部分更显不足。例如，有证据表明在台湾古代有三个主要贸易

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① 臧振华、刘金源：《台湾水下考古学的启动：近年来澎湖海域水下考古调查》，下载于 http://140.121.175.164/Registration/tosmpart/%E6%91%98%E8%A6%81_%E8%87%A7%E6%8C%AF%E8%8F%AF.doc，2010 年 8 月 24 日。

② 文建会文化资产总管理处筹备处编：《海洋台湾新视界——台法合作水下文化资产调查及人才培训成果专辑》，2008 年。

③ 文建会文化资产总管理处筹备处编：《海洋台湾新视界——澎湖马公商港疑似沉船遗址调查评估报告》，2008 年。

④ “环境影响评估法”，下载于 http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=O0090001，2010 年 8 月 17 日。

枢纽,即"一府(台南府)、二鹿(今彰化县鹿港镇)、三艋舺(今台北市万华区)",[①]据信其周边应有不少沉船或海洋文化遗址。位于台湾东南部的台南市和台南县,该市在十七世纪荷兰殖民时代曾是首府。荷兰人在现今的台南市安平区建造了城堡——热兰遮城,那里现在是个著名的旅游区。附近区域是古老的台江内海,该海域中大部分区域在短时间内受到了数次严重的泥石流以及城市发展的损害。鹿港是位于台湾中部彰化县的港口,也是著名的历史海港。然而,目前沿岸却已填埋为"彰滨工业区"。此外,艋舺是现今台北市万华区的旧名,它源于本地原住民对独木舟的称呼。不幸的是,在这些区域潮间带的开垦以及沿岸项目的开发都缺乏对 UCH 的调查。因此,在当前环评程序中对 UCH 的保护工作被忽视了。就此点而言,台北港 UCH 调查工作的开展在台湾环评工作中具有里程碑式的重要意义。

(一)台北港开发过程与环评

台北港位于台湾北部(参见图 1)。处于淡水河出海口西南部,范围延展至林口乡沿岸,面朝台湾海峡,背靠观音山。东距基隆港 34 海里,南距台中港 87 海里,西距大陆福州 134 海里。因此,台北港适于成为台湾北部海上旅行和跨海峡直航的港口。[②]

淡水港于 1993 年开始进行第一期工程,于 1998 年底完工。1995 年,台湾推动实施附属于海事中心的项目——亚太区域营运中心,并确定该港作为基隆港的后备港。在 2004 年,"交通部"宣布并指定淡水港作为基隆港的附属港。1999 年,"行政院"(相当于内阁)批准并实施"淡水港综合规划及未来发展计划",以及第二期工程的第一个五年计划(1996—2001),并将淡水港改名为台北港。2002 年,该工程的第二个五年计划(2002—2006)被批准并予以实施。经全面的检讨和修订之后,该工程第三个五年计划(2007—2011)将于 2011 年完成。台北港第三期工程(2012—2021)以及长期发展规划(2022 年之后)将被充分的讨论并依据未来海事发展的需要以及私人投资的意愿来制定。[③] 依据该计划,台北港的所占陆地面积为 1038 公顷,水域面积 2064 公顷,总计 3102 公顷。[④](图 2 为台北港的鸟瞰图)

① A Bird's Eye View of Wanhua-The Long History of the Monga Bowl,at http://61.57.40.108/OCAC/web/News/uptNews.aspx? Item0=2&c0=23&p0=4508,17 August 2010.

② About Port of Taipei,Location,at http://www.tpport.gov.tw/tpport/EnRedirectForward.do,17 August 2010.

③ 《关于台北港:台北港的历史》,下载于 http://www.tpport.gov.tw/tpport/EnRedirectForward.do,2010 年 8 月 17 日。

④ 《关于台北港:全面规划及未来发展计划》,下载于 http://www.tpport.gov.tw/tpport/EnRedirectForward.do,2010 年 8 月 17 日。

依据“环评法”,基隆港向负责环境管理的主管机构以及负责台湾环评的中央主管机关——台湾“环境保护署”(以下简称 EPA)——递交了台北港第二期工程环评报告,以评估港口建设的影响。经缜密的评估之后,EPA 于 1997 年 3 月 8 日批准并公布了环评结论。应“行政院”要求,建设计划应每五年进行一次评估及修改。此外,该港口已将修订的《台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书》(2007—2011)提交 EPA,EPA 批准并于 2005 年 3 月 11 日公告了审查结论。

由于该港口的南外廓防波堤至远期南外堤间之水域为以往渔民捕捞“鳗苗”之重要渔场,此开发项目可能阻碍鱼类为成长的目的洄游至淡水河口。另外,在过去的数十年中,该新港口的南部海岸已经受到严重的侵蚀,北部沿岸存在沉降问题。因此,在台北港的建设开发与保护之间存在一个日益突出的平衡问题。此外,淡水河口地带是台湾的一个具有重要历史意义的地域。此处文化遗址多而丰富,如十三行遗址[①]和下罟坑文化遗址[②],基隆港务局于所提环评书件中亦清楚指出该区域陆上文化资产丰硕。最近数年当地报纸曾广泛报导,居住当地一位环保人士张新福先生在附近海岸捡拾到相当多的珍贵文物,[③]故而推测该侵蚀性海域中可能也蕴藏着丰富的文化遗产。张先生也引述其父于二次大战期间,曾目睹日本船舰飞机沉没该海域。[④] 目前,仅完成第一期工程,第二期正进行建设中,大部分范围均尚未开发,还有机会对 UCH 进行调查、研究和抢救。在基隆港务局所提环境影响说明书中也载明“遗址主管单位或学者专家仍认为有必要办理现场履勘,本局将配合主动办理现勘相关作业。”有鉴于文物和文化遗址具有高度的重要性,经作者建议,“环境保护署”遂着手启动于环评作业中首度要求进行 UCH 保护工作。

(二)台北港水下考古座谈会

2009 年 5 月 7 日上午,“环境保护署”于基隆港务局台北港分局(TPBB)召

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① 维基百科,《十三行文化遗址》,下载于 http://zh.wikipedia.org/zh-tw/%E5%8D%81%E4%B8%89%E8%A1%8C%E9%81%BA%E5%9D%80,2010 年 9 月 4 日。

② 《台湾百科:下罟坑文化遗址》,下载于 http://taiwanpedia.culture.tw/web/content? ID=15101,2010 年 9 月 4 日。

③ 《专家确认在林口乡存在史前文化遗址》,载于《中国时报》1997 年 10 月 18 日;《充分证据表明在林口乡和巴里沿岸存在文化遗址》,载于《联合报》2000 年 7 月 7 日;《陆地沉降及台北港南外廓防波堤建设可能破坏史前文化遗址》,载于《台湾时报》2001 年 8 月 9 日;《宋文薰确认张新福搜集的文物与长滨文化遗址文物具有相同的制作方式》,载于《台湾时报》2001 年 8 月 9 日;《环保人士阿福是一名化石专家》,载于《中国时报》2006 年 7 月 20 日。

④ 张新福个人专访,2009 年 5 月 7 日。

开“台北港兴建工程整体规划环境影响评估及水下考古座谈会”。除了对鳗苗实施保护外，还就水下考古议题进行探讨，以预先了解该区域文化遗址初步分布状况，并邀请专家学者提供水下考古探测技术之建议，希望透过各方意见，供该局后续开发的参考，并作为“环境保护署”未来进行环评时兼顾UCH保护的重要参据。此次会议由作者主持并获致相关结论如下：(1)依目前相关数据显示，本区域之UCH部分，有进行调查之必要，建议可在港区内先进行；(2)台北港之文化资产部分，应有配套作法，可朝向营造生态港、文化港的概念来规划。为更好的实现对UCH的保护，“环境保护署”要求于2009年6月20日前针对文化遗址提出环境调查报告送署审查。①

(三)台北港第二期工程通盘检讨计划的环评审议

2009年9月8日“环境保护署”对台北港提交的《台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书》组织了首次专案小组审查会议，会议由作者主持。在项目小组审查会中，有关UCH保护部分，决议要求开发单位依下列事项补充、修正后，于2009年11月30日前再送专案小组审查：(1)港区及施工范围有丰富之文化资产，开发单位应委托专业团队就施工优先性，分期分区进行水下文化资产调查；(2)本案部分施工区与下罟坑遗址范围重迭，应提出因应对策送台北县政府审查；(3)亲水区规划与发现文物之保存、展示计划建议考虑与台北县立十三行博物馆合作；(4)未来填海范围与发展需求，建议依文化资产调查(特别为UCH调查)结果做必要之调整。另外，为强化法令依据，该次会议引述“环评法”第18条第3项：“主管机关发现对环境造成不良影响时，应命开发单位限时提出因应对策，于经主管机关核准后，切实执行。”②此举使得如在周边区域发现有文化遗址存在的证据，则为“环境保护署”要求在港区进行UCH调查预留了法源和伏笔。

2009年12月30日环保署继续就《台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书》进行第二次专案小组审议，有关UCH保护部分，决议请开发单位依照下列事项补充、修正后，送项目小组审查。对TPBB的指示如下：(1)下罟坑遗址

① “环境保护署”：《2009年5月7日台北港环评及水下考古圆桌会议记录》，“环境保护署”综合规划文件2010年5月19日第0980043333号。

② “环境保护署”：《〈台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书〉首次审查小组会议决议》，“环境保护署”综合规划文件2009年9月23日第0980086103号。

与本地区海岸变迁相关,该遗址遗物已扩散至南外廓防波堤,[1]基于保护本地区之 UCH 有其必要性,“交通部”基隆港务局应再加强调查,并优先于港区范围进行全面调查。(2)亲水游憩区之护岸形式、定线应避免影响文化遗址,堤岸设计应结合视觉、亲水、安全等功能。然而,由于 TPBB 对于水下文物调查一无经验、二无意愿、三在短期间内也经费无着,为了协协调相关作业和经费问题,该次审查会议另决议:“就台北港区、亲水游憩区文化资产保护工作之执行及经费运用,本署将邀集 CCA、台北县政府(文化局、城乡发展局)、台北县立十三行博物馆等单位召开协调会,以有效整合行政资源。”[2]

依据前述决议,2010 年 3 月 11 日上午,“环境保护署”召开“台北港区文化资产调查事宜”协商会议。该次会议由作者主持,除各相关机构代表外,并有台湾考古专家“中央研究院”刘益昌、陈光祖两位研究人员参加。刘益昌先生对于台北港的相关研究,建议:(1)UCH 调查宜着重宋元时代以来可能的沉船遗留,荷西、明郑以来历史时代人群活动、战争所造成的遗留。(2)陆地或海滩的陆域调查,可着重于史前时代遗址或遗留,基于环境变异宜考虑遗址形成过程。(3)此一区域山侧(林口台地边缘)为著名化石产地,应注意古生物化石(含古人类化石)的出土状态。陈光祖先生则认为:(1)本案虽为环境影响评估引发的文化资产调查,但 CCA 及台北县文化局既为文化资产主管机关,亦应积极介入参与,甚或主动进行相关出土采集资料的保存维护或周边地区的调查工作。(2)台北港目前进行的潮间带与陆上调查,并未考虑古脊椎动物(可能与人类体质遗留有关)的调查,亦应进行工作并有所说明。(3)亲水游憩区的原始设计并未包括可能的文化资产的保存区或展示区等,建议 TPBB 及早规划因应(采集文物相当多)。(4)UCH 调查分期分区进行,宜在该区工程之前完成。(5)挖浚工程进行时,宜由 TPBB 邀请考古人员定时监看检视,避免工程人员不认识而持续施工破坏。这些详细的考古专业意见对于文化遗产的发掘和保护极具参考价值,其间的许多内容都出现于先前的台湾环评案例中。[3]

在参与会议的各部会代表中,HACH 亦提出若干重要意见。包括:(1)在尚未有涉及水下文化资产相关的环评规范前,该处先提供《水下文化资产调查研究阶段作业原则》草案,以及国外相关文献供参。(2)未来 TPBB 实际进行相关调查工作有需要时,该处将提供协助。(3)HACH 近年来分阶段进行海域水下资

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① “环境保护署”:《〈台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书〉第二次审查小组会议决议》,“环境保护署”综合规划文件 2010 年 1 月 19 日第 0990007010 号。

② “环境保护署”:《〈台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书〉第二次审查小组会议决议》,“环境保护署”综合规划文件 2010 年 1 月 19 日第 0990007010 号。

③ “环境保护署”:《文化遗产调查协调会议决议》,“环境保护署”综合规划文件 2010 年 3 月 25 日第 0990026039 号。

产的普查,主要目的为积极主动发现,并遵守国际原则作“原地保存”;因“文资法”对开发工程应作文化资产的调查及保护等有所规定,因此台北港工程宜由开发单位依相关规定办理。(4)未来水下考古调查如有遗物,因其保存技术与陆上遗物不同,可由该处专业人员提供协助保存修护。(5)调查至施工期间应预留如有重大发现时的处理时间,如“紧急抢救”等;另建议于必要时亦应思考“原地保存”的可行性。[①]

依据TPBB提交的补充报告,《台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书》进行了第二次项目专案小组审议,得出下列最终结论:(1)台北港及其周边为文化资产敏感地区,未来应重视文化资产保护之相关事宜。(2)请基隆港务局将台北港有关作业期程、内容,定期告知“环境保护署”(环境督察总队),并于航道浚深前完成第一阶段(港区)UCH调查。(3)TPBB对于UCH的调查请依HACH标准作业方式进行,并请HACH提供专业上之协助。(4)亲水游憩区之护岸开发应注意下罟子遗址,如有重大发现,应立即通知CCA、台北县政府文化局,并副知“环境保护署”(环境督察总队)。(5)游憩区之规划,建议以“文化为导向”,未来使用开发时,请台北县政府城乡发展局与观光旅游局共同协调本区域土地利用方式,以妥善保护本文化资产敏感区域。(6)建议TPBB逐年编列预算,完成所辖全区内研沿岸及水下文化资产之调查工作,朝文化、生态港方向迈进。[②]

(四)台北港经验及后续影响

2007年随着媒体对位于大陆广东省阳江市南海一号古沉船打捞,以及当地人士要求对UCH保护的广泛报导,在台湾也掀起了对UCH了解和保护的热潮。[③] 毫无疑问,前述项目专案小组审议会议对于《台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书》的审查结论被“环境保护署”环评委员会所接受。很明显,台北港环评案例突显了几个问题:(1)UCH的保护工作牵涉非常复杂,相关权责十分分散分歧,协调统合有相当的困难;(2)至今相关部会或单位对于UCH的认知还是极为有限,保护观念尚未建立;(3)台湾目前还缺乏科学和系统的调查方法,

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① “环境保护署”:《文化遗产调查协调会议决议》,“环境保护署”综合规划文件2010年3月25日第0990026039号。

② “环境保护署”:《〈台北港第二期工程通盘检讨计划(北淤沙区、南外廓防波堤、亲水游憩区及东码头区公务码头等整建工程)环境影响说明书〉第二次审查小组会议决议》,“环境保护署”综合规划文件2010年1月19日第0990007010号。

③ Exploration of the Nanhai No. 1, at http://www.china.org.cn/english/culture/222723.htm, 5 September 2010.

UCH保护人才的教育、训练和技术的培养十分需要；(4)开发单位起初并无意愿进行研究调查，之前也没有适当预编经费可以进行深入之调查，起步十分不易，因此台湾需要建立长效有力的法令机制，才能落实UCH保护的工作。

在劝服TPBB实施UCH调查的一年多后，台北港环评须进行水下考古和保护文物的案例也逐渐产生"波及效果"，例如，台北港所提的另一案，《台北港南外堤内侧码头区填海造陆开发计划环境影响说明书》项目专案小组于2010年3月16日进行第二次初审会议时，由"中研院"刘益昌研究员主持，该次会议就呼应了上述案例之理念，决议要求开发单位于"施工前应完成UCH调查，并依'文化资产保存法'规定办理。"[1]在2010年早期，"环境保护署"审查《国光石化工业区环境影响评估报告书》时，因该计划位于彰化县海洋文化敏感之地带，如建设位于沿海区和(或)海洋环境区，则在其环境影响评估的作业规范中，将要求开发单位进行UCH的研究和勘查。

有关台北港开发计划的最新进展，基隆港务局表述如下：(1)有关亲水游憩区下罟坑遗址部分，该局已将试掘调查报告送台北县政府文化局，并于2010年6月10日召开会议审查。(2)有关台北港港区UCH调查部分，业经TPBB委托"中华水下考古协会"办理，相关作业已报CCA审查中。虽然对于UCH的保护在台湾没有专门的法律，但台北港的水下文物调查与保护工作实践显示，这些工作可通过环评程序逐步落实。

四、在台湾建立更好的UCH保护机制

1989年10月20日中国大陆颁布了《中华人民共和国水下文物保护管理条例》，[2]界定了UCH的定义、权属和相关作业规范，并逐步建立水下文物保护的机制体系。相较之下，台湾对于水下文物的保护还在萌芽阶段，尚未完成单独立法。目前，有关文物保护的最重要依据，仍然是"文化资产保存法"的相关规定。然而，该法更多的关注于历史遗址、建筑、设施、风景区和其他陆地遗迹，而非海洋中的类似物体，长期以来UCH都被忽视了。由于UCH问题的特殊性以及海洋环境的复杂性，有必要颁布新的法律以更好的对台湾周边水域的UCH实施更有效的保护。

依据最新信息，CCA正加强对UCH保护的立法工作。例如，"文化资产保存法施行细则"已于2010年6月被修订，将其适用范围扩展至水下历史遗迹及

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① "环境保护署"：《〈台北港南外堤内侧码头区填海造陆开发计划环境影响说明书〉第二次审查小组会议决议》，"环境保护署"综合规划文件2010年3月26日第0990026311号。

② 《中华人民共和国水下文物保护管理条例》，下载于http://www.gov.cn/banshi/2005-08/21/content_25089.htm，2010年6月19日。

定居点。由于古生物化石常被发现于台湾海峡的海床，因此此次修订也将其列为保护目标。在过去的五年中，政府已经委托研究机构起草“水下文化资产保护法草案”，并组织实施文化遗产保护培训项目，[①]以及在台湾海峡澎湖水域的古沉船进行研究与调查。在单独立法颁布之前，为更好的对UCH实施保护，CCA正准备进一步加强对UCH的评估和勘探活动进行指导。然而，前述的立法进程可能需要数年时间。

近来，CCA征询相关部会对于该新法，即“水下文化资产保护法草案”的意见。作为回应，“环境保护署”建议草案第12条条文修正之文字内容如下：“涉及填海造地之开发行为、港湾开发或浚渫，依环境影响评估法认定应实施环境影响评估者，应将水下文化资产列入评估项目。”很明显，如此法付诸实施时，该条规定将更强力地结合环评制度和UCH保护的机制。换言之，未来的“水下文化资产保护法”与目前的“环评法”将充分的相互结合以更好的对UCH实施保护。

随着环评与UCH保护的结合的实施，使得台北港环评案例在台湾具有了里程碑的意义。紧随此先例，近来出现了UCH保护的立法趋势，据信在台湾未来的重大工程中将必须于项目被批准前对UCH实施研究、调查和保护工作。即使UCH保护单独立法未获“立法院”通过，可以预料，未来相关工作开发单位恐已再无回避UCH保护及调查义务的空间了。

五、海峡两岸水下文物保护合作的展望

海峡两岸有深厚的和共同的文化根基，因此，文化遗产保护工作应置于双方的政策日程。随着两岸关系的大幅开展，两岸不久会在许多领域有更为务实和具体的交流合作。[②] 至于UCH的保护议题，以下建议供两岸相关各方参考，意图实现双方建立更为密切关系以有效的对UCH进行保护。

概念教育

第一，UCH的保护应建立在“共同资产”(Common Heritage)的概念上。正如联合国教科文组织《水下文化遗产保护公约》所主张，UCH作为人类文化遗产的组成部分，以及对于群体、民族并关涉他们相互间共同文化的特别重要的因

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① 文建会：《2010年文化遗产保护法律、条例及实践研讨会》，下载于http://163.21.191.2/academic/upload/%E6%95%99%E5%AD%B8%E7%B5%84%E9%95%B7/2010%E5%B9%B4%E6%96%87%E5%8C%96%E8%B3%87%E7%94%A2%E6%B3%95%E4%BB%A4%E8%88%87%E5%AF%A6%E5%8B%99%E7%A0%94%E7%BF%92%E6%9C%83%E5%A0%B1%E5%90%8D%E7%B0%A1%E7%AB%A0.doc，2010年8月22日。

② 邱文彦：《台湾海洋文化遗产问题及海峡两岸合作展望》，载于《两岸海洋文化事务研讨会》2010年版，第169～175页。

素。在已经意识到保护和保存UCH重要性的情况下,各国都须承担该项义务。而且公约相信,各国、国际组织、科研机构、专业组织、考古学家、潜水员以及其他利益相关方和公众之间的合作对于UCH的保护是必要的。海峡两岸和南海的UCH十分丰富,两岸应该对此给予更密切的关注,并进行合作以保护这些中华民族的共同遗产。

第二,协力推动海洋文化教育。海洋文化是人们对于海洋的认识、态度、价值观和生活方式。长期以来的观点是,促进海洋文化教育对于提升公众对于海洋的了解以及UCH的保护是为根本大计。因此,两岸应鼓励开办、编撰适当课程和(或)教材;出版海洋文化经典、期刊、通俗性海洋刊物;定期举办两岸海洋教育会议、办理交换学者和学生。目的是向我们的人民群众宣传必要的海洋文化知识和理念,以鼓励他们积极投身于UCH的保护之中去。

法政机制

第三,研拟《海峡两岸海洋文化合作与保护白皮书》。鼓励两岸通过协商,由学术机构包括学校、学会或协会,共同研拟两岸海洋文化合作保护的白皮书,区分短、中、长期的具体项目,并可作为未来的政策指南,以合作与保护包含UCH在内的文化遗产。

第四,充实UCH保护法令。在水下文物保护的法令方面,大陆起步较台湾早,颁布了《中华人民共和国水下文物保护管理条例》,也建立了相关机制。相较而言,台湾对于UCH的相关法令还处于草案阶段。然而,在环评制度上台湾却有超过二十年的实践经验,可供大陆参考。通过相互交流学习,两岸可逐步充实UCH及相关法令的建置。

具体作为

第五,进行南海海洋考古合作。众多的著作指出,在台湾海峡及南海存在丰富的UCH,被世人公认为是有UCH(或水下考古)潜力的区域之一。一方面,多年来中国大陆在海洋考古方面实施了几个项目,并获得了相当成就。[①] 例如,在广东省水域勘探“南海一号”古沉船的计划,以及西沙“华光礁一号”的海洋考古工作。[②] 另一方面,由于仍处于水下考古的初级阶段,台湾可在立法、技术以及基础研究领域受益于大陆的经验。由于两岸文化一脉相传,海域相连,海洋文化界应考虑进行海洋考古的合作。南海政治情况复杂,如在两岸相互支持,致力保护人类文化的“共同资产”的前提下开展,在国际上应该能够获得更多的支持。

第六,合作探究中国古沉船复原技术。海洋科技与文化和船舶的关系是密

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① For example, *see* The underwater archaeology of Nanau No. 1 initiated, at http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/2010-04/09/c_1225355.htm, 19 June 2010; *also see* Underwater Archaeology in China, at http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/politics/2010-05/28/c_12150953.htm, 19 June 2010.

② Huaguang Reef No. 1, at http://www.hq.xinhuanet.com/news/2009-01/12/content_15428889.htm, 4 May 2010.

不可分的。最近，中国古沉船的研究、倡议和行动，在台湾都受到关注。包括，1955 年由台湾扬帆航向美国旧金山的“基隆号”(后改名“自由中国号”)的抢救行动、[①]2009 年“太平公主号”由美返航在台湾海域被撞沉，[②]以及 2010 年台南明郑古船复原下水等都引起高度兴趣。[③] 由于两岸历史一脉，所以古船复原技术的很多研究和实践，对于振兴从明朝以降的航海科学技术，以及海洋文化的相关研究，应该都有重大的价值。

第七，加强海洋文史交流研究。两岸定期海洋文化会议对于双方分享海洋文化遗产保护经验是必要的。建立珍稀古籍数字化与分享机制在海洋文化的基础研究领域可扮演重要的角色。甚至可考虑有两岸创立“海洋文化研究与发展基金”，或提供若干奖学金以鼓励青年学子和专家参与文化遗产保护与研究的相关事务。

第八，加强两岸水下考古人才的培训与合作。合格并有经验水下考古人才的教育和培训需要较长的时间。因此，有必要建立机制，共同办理水下考古人才的培训、实习。两岸可发展适当的试点共同合作，以分享人力资源、研究活动、探勘、打捞以及 UCH 的保护工作。两岸水下考古专家人才，应该建档并强化其联系网络。

如果前述建议能够实施，相信两岸双方在 UCH 保护方面必能做出更多的贡献并获取更大的成就。

六、结　论

“海洋文化”的内涵十分多元，它含括了经史典籍、古迹遗址、传统祭典、科学技术和生活方式等。而在其中，UCH 可说是海洋文化中最为具体有形的表征之一，具体地连结了历史、地理、人文和科技。就此点而言，认真保护 UCH 对两岸具有重要意义。尤其，两岸海域共通，历史相连，脉络与共。随着两岸关系和缓，互信增加，双方都鼓励并促进环评及 UCH 保护的交流与合作，对极为重要的海洋环境及文化遗产的共同分享将使全体中国人民受益。

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① Tsang Su-Ming, Saving “Free China” and Saving Cultural Heritage, United Daily News, 4 April 2009, also at http://tw.myblog.yahoo.com/issp-maritime/article?mid=1270&prev=1273&next=-1, 4 May 2010.

② Taiping Princess Struck and Submerged, Apple Daily News, 28 April 2009, at http://tw.nextmedia.com/applenews/article/art_id/31582312/IssueID/20090428, 4 May 2009.

③ Mining Dynasty junk launched in Tainan, at http://www.cdnews.com.tw, 4 May 2010.

图 1　台北港位置

(http://www.tpport.gov.tw/tpport/EnRedirectForward.do)

图 2　台北港鸟瞰

(http://www.tpport.gov.tw/tpport/EnRedirectForward.do)

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Environmental Impact Assessment and Protection of Underwater Cultural Heritage in the Port of Taipei, as Well as Prospects for Cooperation between the Two Sides of the Taiwan Strait

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Abstract: Man has a long history of navigation and fishing and has left countless sites containing underwater cultural heritage (UCH). These cultural remains are closely related to the cultural characteristics of a society and/or a region as well as to the cultural advanced wisdom and thus should be protected. In particular, the *UNESCO Convention of the Protection of the Underwater Cultural Heritage* came into effect on 2 January 2009. UCH deserves priority, and long-term effective mechanisms need to be established for its protection. Taiwan promulgated the *Environmental Impact Assessment* (*EIA*) *Act* on 30 December 1994. Although with the practical experience for more than 15 years, the exploration, survey, and assessment of cultural heritage are still limited. This is particularly true when considering UCH. Taking the Port of Taipei in Taiwan as a case study, this paper demonstrates and discusses how the Environmental Protection Administration includes the issue of UCH in the EIA process and how it facilitates coordination and integration among related agencies for surveys and protection of UCH in the port area. This case was deemed an important milestone and a model before the enactment of an exclusive UCH law in that a developer was requested to protect UCH through the EIA process. Based on the concept of "common heritage", this paper also explores the prospects and proposes recommendations for the two sides of the Taiwan Strait for cooperation and collaboration in protecting UCH.

Key Words: Underwater Cultural Heritage (UCH); Environmental Impact Assessment (EIA); Environmental Protection Administration (EPA); Taiwan;

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the Port of Taipei (Taipei Port)

Ⅰ. Introduction

"Culture" is the common heritage of mankind. There are numerous definitions of it. For instance, culture refers to: (1) excellence of taste in the fine arts and humanities, also known as high culture; (2) integrated patterns of human knowledge, beliefs, and behaviors that depend upon the capacity for symbolic thought and social learning; and (3) the set of shared attitudes, values, goals, and practices that characterizes an institution, organization, or group. In the 20th century, "culture" emerged as a central and unifying concept of American anthropology, where it most commonly referred to the universal human capacity to classify and encode experiences symbolically, and communicate symbolically encoded experiences socially. ① In other words, culture includes different concepts, values, and/or codes of conduct of a people, a community, a society, or a country. From formal aspects, cultural characteristics are closely associated with language, written characters, images, and/or human behaviors. For archaeologists, culture often represents the distinctiveness in remaining artifacts and/or settlements. The same tools, instruments, and manufacturing technologies may illustrate unique cultural characteristics of a people of a specific period of time. Culture also consists of physical and non-physical portions, which include instruments, materials, products, skills, technologies, concepts, ideologies, and institutional mechanisms. Very often, cultural heritage is a superficial symbol that is closely related to local culture.

Chen (2007) echoed the above broad definition. As illustrated in his paper, culture is regarded as the assembly or a portion of this assembly of human life, which includes work and leisure, material and spirit, existing reality and historic memory. He further refers to "marine culture" as the life contents of man and the ocean, which include people's expectations, memories, and descriptions of the ocean. Therefore, the research themes of marine culture are broad in this context and can be categorized into seven subfields: (1) fishing grounds and fishing; (2) ships and shipping; (3) maritime trade and immigration; (4) coastal management and governance; (5) piracy and illegal smuggling; (6) marine environment and ecosystems; and (7) maritime humanity and art activities. Since marine cul-

① Wikipedia, Culture, at http://en.wikipedia.org/wiki/Culture, 25 August 2010.

ture represents the interaction as a whole between man and the ocean, its scope and contents are therefore extremely abundant and diverse. ①

Due to frequent environmental changes, historical events, and/or devastating incidents, a significant portion of cultural remains are covered or submerged in the marine environment. As acknowledged in the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, underwater cultural heritage (UCH) is recognized as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples and nations, and their relations with each other concerning their common heritage. UCH is also often described as a "time capsule" strongly linking human wisdom, history, and the natural environment. The above convention thus highlights the importance of protecting and preserving UCH and indicates that the responsibility thereby rests with all states. In addition, the convention states that cooperation among states, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties, and the public at large is essential for protecting UCH. It also urges that improvements be made in the effectiveness of measures at the international, regional, and national levels for the preservation *in situ* or, if necessary for scientific or protective purposes, the careful recovery of UCH. ② Since the Convention went into effect on 2 January 2009, the protection of UCH deserves priority on the national cultural agenda.

Ⅱ. Cultural Affairs in Taiwan

On November 11, 1981, Taiwan established the Council for Cultural Affairs (CCA) as its highest institution for the planning and oversight of cultural establishments. The CCA thus plays a key role as policy-maker, planner, and implementer in promoting and protecting culture. The CCA has its different policy themes according to the background and interests of its ministers. ③ For example, the policy goals and themes in 2010 include promoting cultural and

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① Chen Kuo-tung, The diverse characteristics of oceanic cultural research, *Oceanic Culture Journal*, vol. 3, 2007, pp. 11-18; also available at http://ntouioc.ntou.edu.tw/webfm_send/50, 20 August 2010.

② UNESCO, Convention on the Protection of the Underwater Cultural Heritage, at http://unesdoc.unesco.org/images/0012/001260/126065e.pdf, 25 August 2010.

③ Council for Cultural Affairs, Administrative Organization, at http://www.cca.gov.tw/about.do?method=list&id=2, 4 September, 2010.

creative industries, revitalizing cultural heritage and tourism culture resources, reviewing existing laws and regulations, and promoting the reorganization and improvement of cultural facilities. Following a governmental reorganization, i. e., the CCA will be incorporated into the brand-new Ministry of Culture in 2012 and this is one of the major tasks for the lead agency of culture in Taiwan for the moment. ①

During the past decade, the CCA was often criticized for paying more attention to the construction of infrastructure and performance programs rather than institutional improvements and fundamental research. Examples are the promotion of the *Construction Plan of the New Taipei Theater*, the *Plan of the Kaohsiung Maritime Culture and Popular Music Center*, and the *Construction Plan of the Wei Wu Ying Center for the Arts* in recent years. The major reason is that many existing museums and art centers have low use rates and are criticized as being "mosquito's centers", i. e., no one there but mosquitoes. Based on the CCA's performance report of 2009, there were limited additional activities related to the protection of cultural heritage. In addition to a celebration program on International Museum Day and a Workshop on Cultural Heritage Preservation, the CCA only organized a Training Program for UCH Scientific Survey and Analysis and a Special Exhibition and the International Workshop on UCH that year. ② It is believed that the lack of a sufficient budget and policy focus on UCH contributed to the inactivity of the agency.

Currently, the *Cultural Heritage Preservation Act* is the only law which focuses on protecting various types of cultural heritage in Taiwan. ③ There is still no exclusive law on UCH protection, and the issue has been neglected for a long time. However, the concept of UCH has gradually been taking root in the existing laws and enforcement regulations. For instance, the CCA amended and promulgated Article 3 of the *Enforcement Rules of the CHPA* on 15 June 2010. The amended enforcement regulations extend the definition of natural remains to cover fossils of ancient wildlife, which were discovered by researchers on the seabed of the Taiwan Strait in recent years and contribute to an integral part of UCH. Article 3 also regulates the "space" of remaining artifacts and hu-

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① Council for Cultural Affairs, 2010 Policy Goals and Objectives, at http://www.cca.gov.tw/ccaImages/adminstration/0/99target.pdf, 20 June 2010.

② Council for Cultural Affairs, Performance Report of 2009, at http://www.cca.gov.tw/ccaImages/result/1222766685264/20100308.pdf, 20 June 2010.

③ Council for Cultural Affairs, Cultural Heritage Preservation Act, at http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx? PCODE=H0170001, 5 September 2010.

man settlements including those on land and underwater. [①]

Based on Article 11 of the *CHPA*, the CCA created the Headquarters Administration of Cultural Heritage (HACH) in 2006 in charge of affairs related to cultural heritage. [②] Since then, the HACH has been actively engaged in UCH affairs. Since 1 September 2006, for instance, the HACH commissioned Academia Sinica and National Sun Yat-sen University to conduct a three-year project entitled the "Project for the Exploration and Excavation of Ancient Shipwrecks in Makung Harbor and for the Training of Research Staff of Underwater Cultural Heritage Preservation and Conservation". Starting in 2007, the project also carried out underwater archaeological reconnaissance in waters of the Penghu Archipelago. [③] This is the first ever pilot project on researching and investigating UCH in Taiwan, which employs a systematic approach and scientific technology such as multi-beam sonar and magnetometers. In 2008, the two-volume report entitled the *New Vision of an Oceanic Taiwan*, namely *A Special Report on the Achievements of the Taiwan-French Cooperation on Survey of Underwater Cultural Heritage and Professional Training* [④] and *Investigation Report on Potential Historic Shipwrecks in Makung Harbor, Penghu* [⑤], were published. An International Symposium on Underwater Archaeology was also organized at Shihsanhang Museum, Taipei County. After being commissioned by the HACH, Academia Sinica presented its final report entitled *A Historic Research on Underwater Cultural Heritage in the Coastal Wa-*

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① Council for Cultural Affairs, the Amended Article 3 of the "Enforcement Rules of the Cultural Heritage Preservation Act", at http://www.hach.gov.tw/hach/frontsite/expservice/expServiceDetailAction.do?method=doViewNewsDetail&contentId=4300&isAddHitRate=true&relationPk=4300&tableName=content&iscancel=true&siteId=101, 20 June 2010.

② Council for Cultural Affairs, Cultural Heritage, at http://www.cca.gov.tw/business.do?method=list&id=2, 20 August 2010.

③ Tsang Cheng-hwa and Liu Jin-Yuan, Starting up the Underwater Archaeology in Taiwan: Recent Underwater Archaeological Reconnaissance in the Waters of the Penghu, at http://140.121.175.164/Registration/tosmpart/%E6%91%98%E8%A6%81_%E8%87%A7%E6%8C%AF%E8%8F%AF.doc, 24 August 2010.

④ Headquarters Administration of Cultural Heritage (HACH), Council for Cultural Affairs, New Vision of an Oceanic Taiwan—A Special Report on the Achievements of the Taiwan-French Cooperation on Survey of Underwater Cultural Heritage and Professional Training, 2008.

⑤ Headquarters Administration of Cultural Heritage (HACH), Council for Cultural Affairs, New Vision of an Oceanic Taiwan—A Project for the Exploration and Excavation of ancient shipwrecks in the Makung Harbor and for the Training of Research Staffs of Underwater Cultural Heritage Preservation and Conservation, 2008.

ters of Taiwan in June 2009. All of these demonstrate the first stage of initiatives of research and on-site surveys of UCH in Taiwan. It is obvious that the manpower, funding, projects, and implementation performance on this topic are still limited, and therefore, more efforts on protecting UCH are needed.

Ⅲ. EIA in the Port of Taipei

Taiwan promulgated its *Environmental Impact Assessment (EIA) Act* on 30 December 2004. This act was formulated to prevent and mitigate the adverse impacts of development activities on the environment in order to achieve the goal of environmental protection. Pursuant to Section 2 of Article 4, EIA means an environmental management plan based on scientific, objective, and comprehensive surveys, forecasting, analyses, and evaluations conducted prior to project implementation in order to determine the degree and scope of the potential impacts of development activities or government policies on the environment (including the living, natural, and social environments), economy, culture, and ecology, and the public explanation and review of such a plan. The act also stipulates that EIA work includes such procedures as phase I and II EIAs, reviews, and follow-up evaluations. Competent authorities at all levels shall establish an EIA Review Committee and necessary taskforces to review matters related to EIA reports. ① Clearly, the scope of EIAs includes impacts on culture and cultural heritage.

Although the act has been in force for nearly 20 years in Taiwan, the research, investigation, and assessment of development impacts on culture are limited. This is particularly true of the issue of UCH. For instance, there were three major trading hubs in ancient Taiwan, as evidenced from the expression, "Tainan number one, Lukang number two, and Monga number three."② It is believed that these harbor areas possess numerous shipwrecks and marine cultural heritage. Tainan City and County are located in southwestern Taiwan, and the city was the capital during the Dutch colonization period of the 17th century. The Dutch built the castle, Zeelandia, in Anping District of Tainan City which is now a famous and popular tourism site. The nearby area was the old

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① Environmental Impact Assessment Act, at http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=O0090001, 17 August 2010.

② A Bird's Eye View of Wanhua—The Long History of the Monga Bowl, at http://61.57.40.108/OCAC/web/News/uptNews.aspx?Item0=2&c0=23&p0=4508, 17 August 2010.

Taijiang Inner Sea, and a significant portion of the sea experienced several severe mudflows and was claimed for urban development over the past few centuries. Lukang is a historical harbor city in Chunghua County of central Taiwan and was also a historical port. Nevertheless, its coastal area was claimed for the Chunghua Seashore Industrial Park. Mokeover, Monga is the old name for the Wanhua District of Taipei City and originates from the indigenous word for canoe. Unfortunately, tideland reclamation and coastal development projects in these areas lacked investigations of UCH. Protecting UCH has therefore been neglected to the present during the EIA process. In this regard, the initiative of UCH investigation in the Harbor of Taipei is an important milestone in Taiwan's EIA review process.

A. *Development Progess and EIA Initiatives at Taipei Port*

The Port of Taipei is located in the northern part of Taiwan (Figure 1). It lies on the southwestern estuary of the Tamsui River, extending up to the coast of Xi-Ko of Rhei-Su Kun of Linkou Township, and faces west onto the Taiwan Strait with Guan-Yin Mountain as the background. The Port of Keelung lies 34 nautical miles east; the Port of Taichung is 87 nautical miles south, and the Port of Fuchou, China is 134 nautical miles to the west. Therefore, the Port of Taipei is suitable to become a port in northern Taiwan for ocean crusing and cross-strait direct cruises. [1]

The port of Tamsui launched a Program of Construction Phase I in 1993, and it was completed at the end of 1998. In 1995, Taiwan propelled the sub-plan Maritime Center of the program, Asia-Pacific Regional Operations Center (APROC), and agreed to orient the development of the port as a strong backup for Keelung Port. In 2004, the Ministry of Transportation and Communications officially announced and designated Tamsui Port as an auxiliary port of Keelung Port. In 1999, the Executive Yuan (equivalent to the Cabinet) approved and implemented "Overall Planning of Tamsui Port and Programs for Future Development," as well as the First Five-year Program of Construction Phase II (1996—2001), and renamed Tamsui Port Taipei Port. In 2002, the Second Five-year Program (2002—2006) of Construction Phase II for Taipei Port was approved and implemented. After overall discussions and amendments, the Third

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[1] About Port of Taipei, Location, at http://www.tpport.gov.tw/tpport/EnRedirectForward.do, 17 August 2010.

Five-year Program (2007 — 2011) of Construction Phase II continued as planned, and is scheduled for completion by 2011. The Program of Construction Phase III (2012—2021) for Taipei Port and the Long-term Development Programs (after the year 2022) will be fully discussed and promoted depending on the needs for future maritime development and the willingness of investments from the private sector. [①] Based on the plan, the land area of Taipei Port will be 1,038 ha and the water area will be 2,064 ha, for a total of 3,102 ha. [②] Figure 2 shows an aerial view of Taipei Port.

Pursuant to the *EIA Act*, the Keelung Port Harbor Bureau submitted its *EIA Statement of Construction Phase II for Taipei Port* to the EPA, which is the lead agency of overall environmental management and the central competent authority of EIAs in Taiwan, to review the impact of harbor construction. After a thorough review, the EPA approved the plan and promulgated EIA conclusions on 8 March 1997. As requested by the Executive Yuan, the construction plan was to be reviewed and altered every five years. Furthermore, the port authority again sent the amnended *EIA Statement of Construction Phase II* (2007—2011) *for Taipei Port* to the EPA and obtained approval and EIA conclusions for the construction on 11 March 2005.

Since the coastal waters around the port's south outlying breakwaters is a traiditional fishing ground of elvers, the reclamation project may possibly block them from migrating to the freshwater estuary for growth. Moreover, the coastal zone of this new harbor has been experiencing significant erosion in the south and sedimentation in the north in the past few decades. Thus, there is increasing concern over the balance between conservation and development with construction of Taipei Port. Additionally, the area of the Tamsui Estuary is recognized as one of the important historical sites in Taiwan. The Shihsanhang[③] and Xiagukeng[④] cultural sites serve as examples indicating the abundance of cultural heritage in the surrounding area. This was reaffirmed in the above EIA

① About Port of Taipei, History of Taipei Port, at http://www.tpport.gov.tw/tpport/EnRedirectForward.do, 17 August 2010.

② About Port of Taipei, Overall planning and future development plan, at http://www.tpport.gov.tw/tpport/EnRedirectForward.do, 17 August 2010.

③ Wikipedia, Shihsanhang Cultural Remain Site, at http://zh.wikipedia.org/zh—tw/%E5%8D%81%E4%B8%89%E8%A1%8C%E9%81%BA%E5%9D%80, 4 September 2010.

④ Encyclopedia of Taiwan, Xiagu-Dapu Cultural Remain Site, at http://taiwanpedia.culture.tw/web/content? ID=15101, 4 September 2010.

statement and related reports. During the past several years, the local media published significant reports revealing that Mr. Shin-Fu Chang, a resident of the esturarine area, has found countless precious cultural artifacts on the beach. [①] Chang also cited his father's observation, during World War II, that several warships and airplanes of Japan were attacked and are submerged in the coastal waters. [②] At present, only phase I of construction of Taipei Port has been completed; phase II is now in progress, and the remaining sea has not been relaimed yet. Thus, there is still an opportunity to conduct necessary investigations, research, and salvage of UCH. Moreover, the EIA statement for Taipei Port declares that if the cultural authority and/or experts recognize the necessity to conduct on-site investigations, the port authority will initiate the necessary surveys as requested. Recognizing the importance of cultural sites and remains as a UCH investigation was called for by the author of this report, the EPA finally began a milestone initiative integrating the concept of UCH protection into the EIA procedure.

B. A Roundtable Meeting on UCH in Taipei Port

In collaboration with the Port of Taipei Branch Bureau (PTBB), the EPA held a Roundtable Meeting on the EIA and Underwater Archaeology for the Construction of Taipei Port on 5 May 2009. In addition to discussions on protecting the elvers, the meeting also focused on the distribution of cultural heritage sites in the region, adequate technologies for underwater archaeology, and related recommendations for the PTBB and EPA to adopt. The meeting was chaired by the author and reached the following conclusions: (1) there is a necessity to conduct underwater archaeology based on known literature and available information, and the port waters deserve priority; and (2) it is essential to develop a comprehensive plan to guide Taipei Port to achieve the recommended goal of be-

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① Experts confirm the existence of prehistoric cultural remain site in Linkou, China Times, 18 October 1997; Abundance shown in the cultural remain sites in Linkou and Pali Coast, *United Daily News*, 7 July 2000; Land subsidence and the construction of southern outlying breakwater of Taipei Port may damage the prehistoric cultural remain sites, *Taiwan Times*, 9 August 2001; Sung Wen-hsun confirms the collected cultural remains by Chang shin-Fu have the same knocking method with that in Chungbing Cultural Site, *Taiwan Times*, 9 August 2001; and Environmentalist A-Fu being an expert of fossil, *China Times*, 20 July 2006.

② Personal interview with Chang Shin-Fu on 7 May 2009.

coming an eco-port and a cultural port. For better protection of UCH, the EPA also requested that the port authority conduct necessary surveys and prepare a report on the cultural heritage in the port area by 20 June 2009. ①

C. EIA Review of Phase II of Construction of Taipei Port

Based on the report submitted by Taipei Port, the EPA held the first task-force meeting to review the *EIA Statement of the Comprehensive Plan of Construction Phase II (North Sedimentaion Area, South Outlying Breakwater, Water-Oriented Recreation Area, and East Official Wharf) of Taipei Port*. The then chair, the author of this paper, drew the following conclusions on protecting UCH and requested the PTBB supplement and submit its amended report by 20 November 2009 for further review. (1) Based on the priority of construction, the developer (PTBB) was urged to conduct UCH investigations by stages and areas. (2) The construction area overlaps the known site of Xiagukeng cultural remains, and thus integrated response strategies for better protection of cultural heritage should be developed and submitted to Taipei County Government for further review. (3) Collaboration with the Shihsanhang Museum of Taipei County was suggested for the planning of the water-based recreation area and preservation and exhibition of any discovered cultural remains. (4) The future reclamation area and development needs of Taipei Port are recommended to make necessary adjustments based on the investigation results of cultural heritage, especially UCH. In addition to that, the meeting cited Section 3 of Article 18 of the *EIA Act* which stipulates that: "When the competent authority discovers that development activity has adversely impacted the environment, it shall order the developer to submit response strategies within a limited time period and to strictly implement these strategies after approval by the competent authority." ② With the confidence of the existing evidence of cultural heritage and remains discovered in the surronding areas,

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① Environmental Protection Administration, The Roundtable Meeting Record on the Environmental Impact Assessment and Underwater Archaeology for the Construction of Taipei Port on 7 May 2009, EPA Inspection Official Letter No. 0980043333, 19 May 2010.

② Environmental Protection Administration, *The First Task Force Meeting Conclusions on the Environmental Impact Statement on the "EIA Statement of Comprehensive Plan of Construction Phase II (North Sedimentation Area, South Outlying Breakwater, Water-oriented Recreation Area and East Official Wharf) in Taipei Port*, EPA Comprehensive Planning Official Letter No. 0980086103, 23 September 2009.

the EPA has clearly laid a legal basis in advance to force the TPBB to conduct a thorough UCH survey in the port area.

On 30 December 2009, the EPA held the second review meeting on the *EIA Statement of Comprehensive Plan of Construction Phase II (North Sedimentation Area, South Outlying Breakwater, Water-oriented Recreation Area, and East Official Wharf) in Taipei Port*. As for protecting UCH, the meeting concluded that the TPBB should make necessary supplementation and amendments to the above EIA statement for the next review meeting. The directions for TPBB were as described here. (1) There is a close relationship between the Xiagukeng cultural site and nearby coastline changes, because many remains have been found scattered in the coastal waters of the south outlying breakwater. [①] To enhance protection of local UCH, the port authority should conduct a UCH survery and prioritize the in-depth investigation of port channels before dredging. (2) The design of the revetment in the water-based recreation area should pay close attention to protecting cultural heritage and therefore its design should combine the functions of landscaping, recreation, and safety. However, the TPBB has no experience, willingness, or budget for UCH affairs. In response, the meeting also made another resolution that "the EPA will invite the CCA, Taipei County Government, and Shihsanhang Museum to attend a coordination meeting to integrate administrative resources as well as for seeking a budget for implementing future UCH affairs." [②]

Following the above resolution, the EPA held a Coordination Meeting on UCH Survey in Taipei Port Area on 11 March 2010. In addition to the present author (chair) and representatives from related agencies, two famous archaeologists of Academia Sinica, Yi-Chang Liu and Kwang-tzuu Chen, also attended. On the related research of Taipei Port, Mr. Liu suggested that: (1) the UCH survey to be conducted should focus on possible shipwrecks after the Sung and Yun Dynasties as well as activities and war remains of the Dutch-colonial and

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① Environmental Protection Administration, *The Second Task Force Meeting Conclusions on the EIA Statement of Comprehensive Plan of Construction Phase II (North Sedimentation Area, South Outlying Breakwater, Water-oriented Recreation Area and East Official Wharf) in Taipei Port*, EPA Comprehensive Planning Official Letter No. 0990007010, 19 January 2010.

② Environmental Protection Administration, The Second Task Force Meeting Conclusions on the *EIA Statement of Comprehensive Plan of Construction Phase II (North Sedimentation Area, South Outlying Breakwater, Water-oriented Recreation Area and East Official Wharf) in Taipei Port*, EPA Comprehensive Planning Official Letter No. 0990007010, 19 January 2010.

Ming-Chang periods;(2) on the land and seashore, the survey should pay close attention to pre-historical remains and the formation of these remains with environmental changes; and (3) the mountain area (i. e., the rim of Linko Plateau) is a well-known site of fossils, which should be seriously explored for ancient wildlife and human fossils. Mr. Chen also provided his opinion as follows: (1) although this case was derived from the EIA review, the CCA and the Cultural Bureau of Taipei County must share responsibility of protecting cultural heritage with the EPA and actively participate in the survey and preservation of cultural remains; (2) the survery undertaken in the tidal zone and on land areas has neglected ancient remains of vertebrates and thus should include them in future investigations; (3) the original design of the water-based recreation area did not establish a preservation area and the display site of possibly discovered cultural remains and therefore the TPBB should prepare a revised plan to accommodate this need; (4) the UCH survey should be conducted in stages and by area before construction of the port; and (5) the TPBB should invite archaeologists to conduct on-site inspections while dredging the channels so that the cultural heritage will not be damaged by engineers who may have no expertise in cultural heritage. These detailed suggestions can serve as valuable references for protecting cultural heritage, and a few of them were included in previous conclusions of EIA cases in Taiwan. ①

Among the related agencies, the representatives of the HACH also responded as follows: (1) before elaboration of the EIA review guidelines on UCH, the HACH will provide the Draft *Operational Principles of Conducting Survey on Underwater Cultural Heritage at the Research Stage* and related domestic and international literature for reference; (2) the HACH will provide assistance to TPBB when it needs to conduct UCH surveys; (3) the HACH serves as an example that follows the international principle of "in-situ preservation" and has conducted serval stages of UCH surveys in the past several years and therefore urged the TPBB to follow the regulations of the *CHPA* to investigate and protect UCH during the constrution phases; (4) due to differences in preserving cultural remains between land and sea, TPBB should ask HACH for assistance when it finds underwater remains; and (5) there is a necessity to have some flexibility in scheduling during construction to urgently

① Environmental Protection Administration, *The Meeting Conclusions on the Coordination of Cultural Heritage Survey*, EPA Comprehensive Planning Official Letter No. 0990026039, 25March 2010.

handle the discovery of important cultural heritage and to consider the possibility of in-situ preservation of the heritage site and/or remains. ①

Based on the supplmentary report prepared by the TPBB, the task team meeting of the *EIA Statement of the Comprehensive Plan of Construction Phase II (North Sedimentation Area, South Outlying Breakwater, Water-oriented Recreation Area, and East Official Wharf) in Taipei Port* made the final conclusions: (1) Taipei Port and neighboring areas are a sensitive area of cultural heritage and deserve priority for protecting the cultural heritage; (2) the port authority is requested to regularly inform the EPA about the stage and contents of port construction and should conduct the first-stage UCH survey before channel dredging; (3) the UCH survey should follow standard operating procedures recommended by the HACH, and HACH is invited to provide necessary assistance to the TPBB; (4) the development of the water-based recreation area should pay close attention to the Xiagukeng cultural site and make an immediate report to the CCA, Cultural Bureau of Taipei County, and EPA when important remains are found; (5) a "culture-oriented" planning of the water-based recreation area is suggested, and the Urban and Rural Devleopment Bureau and the Tourism Bureau of Taipei County are urged to work together to coordinate the land use patterns to better protect the local cultural heritage; and (6) the TPBB is recommended to plan its annual budget to accommodate the need to conduct a UCH survey for the entire area and to achieve the goals of an eco-port and cultural port. ②

D. *Follow-up of the Taipei Port Experience*

With wide coverage by the media of the 2007 salvage of the ancient merchant ship, *Nanhai* (South China Sea) *No.* 1, in Yangjiang, Guangdong, China and the continuing appeal for protection of UCH by local elites, there is rising

① Environmental Protection Administration, *The Meeting Conclusions on the Coordination of Cultural Heritage Survey*, EPA Comprehensive Planning Official Letter No. 0990026039, 25March 2010.

② Environmental Protection Administration, *The Second Task Force Meeting Conclusions on the EIA Statement of Comprehensive Plan of Construction Phase II (North Sedimentation Area, South Outlying Breakwater, Water-oriented Recreation Area and East Official Wharf) in Taipei Port*, EPA Comprehensive Planning Official Letter No. 0990007010, 19 January 2010.

awareness about the importance of protecting UCH recently in Taiwan.[1] With no doubt, the above meeting conclusions of *EIA Statement of Comprehensive Plan of Construction Phase II (North Sedimentation Area, South Outlying Breakwater, Water-oriented Recreation Area, and East Official Wharf) in Taipei Port* were later accepted by the EIA Committee of the EPA. Obviously, the case of Taipei Port EIA highlights several points that: (1) UCH affairs are complicated, there is ambiguous jurisdiction among related agencies, and, therefore, every effort must be made to coordinate and integrate related agencies; (2) the related agencies still lack an understanding and knowledge of the importance of UCH and thus their concepts and awareness of protecting UCH need to be raised; (3) Taiwan still lacks scientific and systematic approaches for UCH and definitely needs to place greater emphasis on training, education, and technologies to protect UCH; and (4) very often the developer has no willingness or budget to conduct UCH research and surveys and therefore a long-term effective legal mechanism for better protecting UCH is essential.

After more than a year of trying to pursuade the TPBB to conduct a UCH survey, the "spread effect" of the EIA in Taipei Port which integrated UCH protection emerged. For instance, another taskforce chaired by Yi-Chang Liu that was reviewing the *EIA Statement of the Reclamation at the Inner Wharf of the South Outlying Breakwater in Taipei Port* on 16 March 2010 echoed the same concepts and concluded that "the developer should be pursuant to the regulations of *CHPA* and conduct a UCH survey before construction."[2] In early 2010, when the EPA discussed the scoping of the *EIA Report of Kuokuang Petrochemical Industrial Complex*, the developer was also requested to conduct UCH research and a survey because the industrial area as planned was located in a sensitive site of cultural heritage in Chunghua County. It is believed that similar requirements will be followed in future EIA cases if a site is located in a coastal zone and/or in the marine environment.

According to updated information on recent progress of the UCH survey in Taipei Port, the Keelung Harbor Bureau indicated that: (1) a pilot UCH survey was conducted at the Xiagukeng cultural site within the water-based rec-

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① Exploration of the Nanhai No. 1, at http://www.china.org.cn/english/culture/222723.htm, 5 September 2010.

② Environmental Protection Administration, *The Second Task Team Meeting Conclusions on the EIA Statement of the Reclamation at the Inner Wharf of South Outlying Breakwater in Taipei Port*, EPA Comprehensive Planning Official Letter No. 0990026311, 26 March 2010.

reation area and its results were sent to the Cultural Bureau of Taipei County for discussion on 10 June 2010; and (2) the TPBB commissioned the Chinese Association of Underwater Cultural Heritage to initiate the first-ever UCH survey project in the port area, and those related affairs were sent to the CCA for review. Although with no exclusive law on protecting UCH in Taiwan, the Taipei Port experience demonstrates a practical approach that the goal of UCH protection can be achieved through an elaboration of the EIA procedures.

Ⅳ. Establishing a Better Mechanism to Protect UCH in Taiwan

China promulgated its *PRC Underwater Cultural Heritage Protection Act* on 20 October 1989. [①] The law provides definition, ownership, and related management measures of UCH. Comparatively, the protection of UCH in Taiwan is still in an early stage and lacks an exclusive law on the issue. For now, the basic legislative foundation rests on the *CHPA*. However, this law focuses more on protecting historical sites, buildings, settlements, landscapes, and other heritage of terrestrial areas rather than those in marine environments. UCH has been neglected for a long time. Due to the special characteristics of UCH issues and the complexity of the marine environment, it is essential to enact a new law to better protect UCH in the surrounding waters of Taiwan.

Based on updated information, the CCA of Taiwan is strengthening its legislative system to protect UCH. For instance, the *Implementation Regulations of CHPA* was amended in June 2010 and broadens its coverage to historical sites and settlements under water. Ancient wildlife fossils that are often found in the seabed of the Taiwan Strait are also included as a target for protection. During the past five years, the authority has commissioned projects with academic institutions to draw up a draft bill of *Underwater Cultural Heritage Preservation Act* (*UCHPA*), organize training program on cultural heritage protection, [②] and conduct research and investigation of ancient wrecks in the

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① Underwater Cultural Heritage Protection Act of Peoples' Republic of China, at http://www.gov.cn/banshi/2005—08/21/content_25089.htm, 19 June 2010.

② Council for Cultural Affairs, The 2010 Workshop on Cultural Heritage Laws, Regulations and Practices, at http://163.21.191.2/academic/upload/%E6%95%99%E5%AD%B8%E7%B5%84%E9%95%B7/2010%E5%B9%B4%E6%96%87%E5%8C%96%E8%B3%87%E7%94%A2%E6%B3%95%E4%BB%A4%E8%88%87%E5%AF%A6%E5%8B%99%E7%A0%94%E7%BF%92%E6%9C%83%E5%A0%B1%E5%90%8D%E7%B0%A1%E7%AB%A0.doc, 22 August 2010.

Penghu (Pescadores) area of the Taiwan Strait. To better protect UCH before the passage of an exclusive law, the CCA is furthermore preparing guidelines for value assessment and exploration of UCH. Nevertheless, several years may pass before the above legislative processes take effect.

Recently, the CCA called for comments from related agencies on its new bill, the *UCHPA*. As requested, the EPA suggested that Article 12 regulates: "Projects related to tideland reclamation, harbor development and dredging, which are subjected to the targets of *Environmental Impact Assessment Act*, should include the assessment of underwater cultural heritage." When the law is put into effect, clearly, this article will strongly integrate related mechanisms between EIA and protection of UCH. Namely, the future *UCHPA* and the existing *EIA Act* will substantially connect each other for better protection of UCH.

With the integration of the EIA and protection of UCH, the case of Taipei Port is a milestone in Taiwan. Following this precedence as well as the recent trends of legislation for protecting UCH, it is believed that future major projects in Taiwan will have to conduct research, surveys, and protection of UCH before they will be approved. Even though the exclusive law on protecting UCH has not passed by the Legislative Yuan (Congress), it can be expected the developers will have no room to avoid the responsibility to investigate and protect UCH in the future.

Ⅴ. Prospects for Cooperation on Protection of UCH between the Two Sides of the Taiwan Strait

The two sides of the Taiwan Strait share a profound and common cultural heritage. The protection of cultural heritage, therefore, deserves priority on their policy agenda. With the recent significant progress in cross-strait relationships between China and Taiwan, there are numerous practical affairs on which both sides can cooperate and collaborate together in the near future.[①] As for the protecting UCH, the following strategies are recommended for both sides to seek to forge stronger and closer ties on protecting UCH.

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① Chiau, Wen-Yan, The Issues of Protecting Marine Cultural Heritage in Taiwan and the Prospects for Cooperation of Both Sides of Taiwan Strait, *Cross-Strait Conference Proceeding on Marine Culture*, 2010, pp. 169-175.

Concepts and Education

1. Protecting UCH based on a rooted concept of a "common heritage". As acknowledged in the UNESCO *Convention on the Protection of Underwater Cultural Heritage*, UCH is an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage. Having realized the importance of protecting and preserving UCH, the responsibility therefore rests with all states. Moreover, the convention believes that cooperation among states, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties, and the public at large is essential to protect UCH. With the abundance of UCH in the Taiwan Strait and South China Sea, the two sides of the Taiwan Strait should pay closer attention to this issue and have every reason to work hand-in-hand to protect this heritage of all Chinese people.

2. Promoting marine cultural education. Marine culture includes the awareness, attitudes, values, and lives of people that are related to the ocean. From a long-term viewpoint, promoting marine cultural education is believed to be the most fundamental measure to raise public awareness of the ocean as well as protecting UCH. Thus, both sides of the Taiwan Strait are urged to work out adequate curriculum and/or teaching materials; publish classics, journals, and popular magazines related to marine culture; and regularly organize cross-strait conferences, and scholar and student exchanges. The purposes of these are to provide our people necessary knowledge and concepts on marine culture and to encourage them to actively participate in protecting UCH.

Institutional Mechanisms

3. Drawing up a *Cross-Strait White Paper on Cooperation and Protection of Marine Cultural Heritage*. Through negotiation, academic institutions of both sides including universities, societies, and associations are encouraged to develop a white paper on protecting marine culture. This can be elaborated into short-term, mid-term, and long-term action programs and can serve as policy guidelines for future cooperation and protection of cultural heritage including UCH.

4. Improving laws and regulations on protecting UCH. With promulgation of the exclusive *PRC Underwater Cultural Heritage Protection Act*, China has made better progress on UCH protection mechanisms than Taiwan. The exclusive law on protecting UCH of Taiwan is still in the draft stage. However, Taiwan has more than 20 years experience with EIAs and can share its experience

with China. Through learning from each other, both sides of Taiwan Strait can establish comprehensive and competent institutions for protecting UCH.

Practical Actions

5. Conducting cooperative projects of underwater archaeology in the South China Sea. Much literature indicates the abundance of UCH in the Taiwan Strait and South China Sea. These waters are also recognized as one of the potential regions of UCH in the world. For many years, China has initiated several projects of underwater archaeology and obtained significant achievements. ① For instance, the exploration of ancient submerged ships *South China Sea No.* 1 in Guangdong waters and *Huaguang Reef No.* 1 in the Xisha (Paracel) Islands serve as examples. ② On the other hand, Taiwan is still at an early stage of underwater archaeology, and it would be beneficial to learn more about the legislation, technology, and fundamental research from China. Because China and Taiwan share the same cultural heritage and neighboring seas, it is necessary for marine cultural academia of both sides to work together to conduct underwater archaeology. Based on the protection of a common heritage, both sides of the Taiwan Strait are particularly encouraged to cooperate on UCG research, exploration, and protection in the South China Sea to mitigate the political complexities in the region and to win support from the international community.

6. Cooperating on restoration technology of Chinese junks. Marine technology and culture are closely related to ancient junks. Recently, the research, initiation, and actions on preserving ancient China junks have been the focus of public attention. The old junk *Keelung* (the name was later changed to *Free China*) sailed from Taiwan to San Francisco, CA, U. S. A. in 1955, ③ a model ancient junk, *Tai-Ping Princess*, was struck and submerged in Taiwan waters in 2009④, and the launching of another model Ming Dynasty junk in Tainan in

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① For example, *see* The underwater archaeology of Nanau No. 1 initiated, at http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/2010-04/09/c_1225355.htm, 19 June 2010; also see *Underwater Archaeology in China*, at http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/politics/2010-05/28/c_12150953.htm, 19 June 2010.

② Huaguang Reef No. 1, at http://www.hq.xinhuanet.com/news/2009-01/12/content_15428889.htm, 4 May 2010.

③ Tsang Su-Ming, Saving "Free China" and Saving Cultural Heritage, *United Daily News*, 4 April 2009, also at http://tw.myblog.yahoo.com/issp-maritime/article?mid=1270&prev=1273&next=-1, 4 May 2010.

④ Taiping Princess Struck and Submerged, Apple Daily News, 28 April 2009, at http://tw.nextmedia.com/applenews/article/art_id/31582312/IssueID/20090428, 4 May 2009.

2010 are good examples.[①] Due to the coherence of historical background, the research and practices of restoring ancient junks will be invaluable to promoting maritime science, technology, and culture since the Ming Dynasty of China.

7. Facilitating exchange programs on marine culture. A regular cross-strait conference on marine culture is essential for both sides to share experiences on protecting marine cultural heritage. Digitalizing and sharing of rare literature can play an important role in fundamental studies of marine culture. It is also recommended to consider the possibility of establishing a Foundation on Research and Development of Marine Culture or to provide scholarships to encourage youth and experts to participate in related research and protection affairs of cultural heritage.

8. Strengthening training and cooperation of underwater archaeologists. The education and training of certified and experienced underwater archaeologists take a long time. Therefore, it is necessary to establish adequate mechanisms of training, practices, and collaboration of underwater archaeologists. Both sides can develop several pilot studies to share their human resources and conduct research, exploration, salvage, and protection of UCH. Inventories and networking of underwater archaeologists need to be conducted on both sides of the Taiwan Strait.

Following the above strategies and a dialogue consensus, it is believed that both sides of the Taiwan Strait can make more contributions and obtain significant achievements on UCG protection.

Ⅵ. Conclusions

Marine culture includes broad contents. Thus, marine culture heritage consists of literature, historic sites, traditional ceremonies, scientific technologies, and lifestyles. Among them, UCH is an integral part of the marine cultural heritage and is closely linked to history, geography, humanities, science, and technology. In this regard, seriously protecting UCH is meaningful for both sides of the Taiwan Strait. Particularly, both sides share the same seas, history, and human assets. With recent significant progress in relationships and trust between the two sides, China and Taiwan are encouraged to facilitate exchanges and cooperation on EIAs and the protection of UCH. Sharing their invaluable marine

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① Mining Dynasty junk launched in Tainan, at http://www.cdnews.com.tw, 4 May 2010.

environment and cultural heritage will be beneficial to all Chinese people.

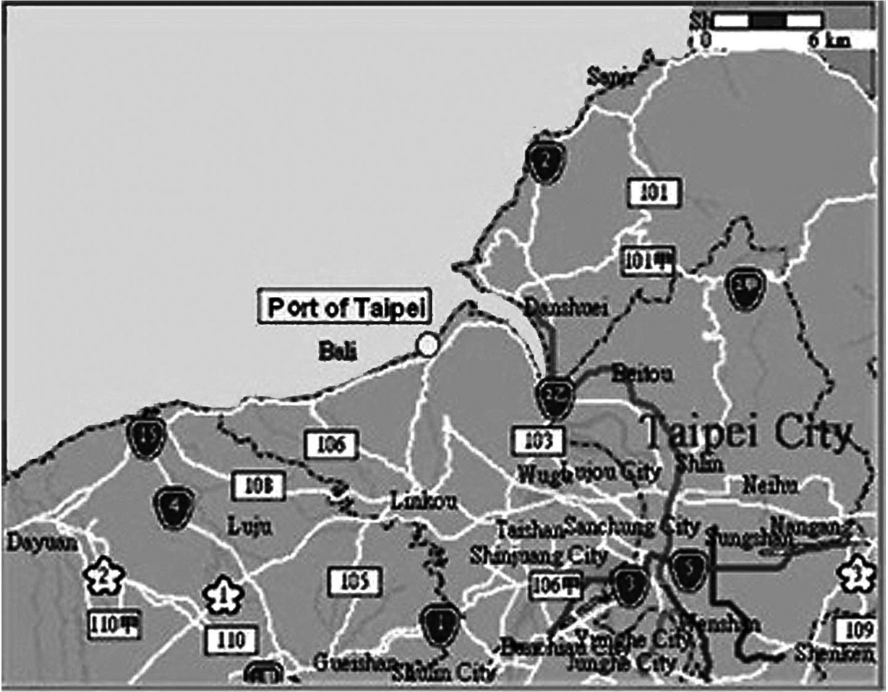

Figure 1. The location of Taipei Port.

(http://www.tpport.gov.tw/tpport/EnRedirectForward.do)

Figure 2. An aerial view of Taipei Port.

(http://www.tpport.gov.tw/tpport/EnRedirectForward.do)

(Editor: Deng Yuncheng;
English Editor: Luke Molvarec)

台湾水下文化资产保存政策与国际合作

李丽芳*

内容摘要:水下文化资产的特质在于它是一项重要的国际资源。大部分的水下文化资产系位于国际场域而且是衍生于国际贸易与交流之中,如果能够被敏感地经营管理,将能够在促进再创造与观光方面扮演积极的角色。制定政策者应该提升对于水下文化资产的了解与重视并推动国际合作,本文期从保存政策与国际合作方面来探讨台湾的水下文化资产发展。

关键词:保存　水下文化资产　水下考古　国际合作

一、前　言

近年来水下文化资产之发掘已有愈来愈多的趋势,文化资产的登录资料亦日益增加,不只显示世人已越来越重视水下文化资产,[①]也表示保护水下文化资产责任重大。水下文化资产的种类繁多,包括内陆水域之水下遗址、陆地下沉后产生的遗址,以及沉船遗址等,其中沉船遗址的调查与发掘最为受到世人的瞩目。世界上沉船较为集中的地区大多是古代海上交通较为发达的地区,像是地中海海域,欧洲到北美的航线,中国到东南亚航线,以及中国到日本航线的海域。内陆水下考古则对于领土的变化及认识具有重要的意义,例如中国大陆1974年从泉州湾后渚港发掘沉没700多年的南宋沉船,以及法国阿尔卑斯山的大湖泊区等都是重要的例子。

由于人们对水下文化遗产日益频繁的商业开发和多年来对水下文化遗产的严重破坏,联合国教科文组织认为有必要根据国际法和国际惯例,编纂有关保护和保存水下文化遗产的法典和逐步制定这方面的规章制度。于2009年1月2

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① 又称为"水底文化遗产"或"水下文化遗产",本文除引用原文献外,统一以"水下文化资产"配合台湾目前文化资产保存法相关用语。

日生效的《水下文化遗产保护公约》(Convention on the Protection of the Underwater Cultural Heritage)主要目的便在于确立及加强国际之间在保护水下文化遗产方面的合作。公约中对水下文化遗产进行了明确定义，规定水下文化遗产是指至少100年以来，周期性地或连续性地，部分或全部位于水下的具有文化、历史或考古价值的所有人类生存的遗迹，如遗址、建筑、工艺品、人的遗骸、船只、飞行器，及有考古价值的环境和自然环境等。公约中指出，水下文化遗产是人类文化遗产的一个组成部分，所有国家都应负起保护水下文化遗产的责任，并强调，制定公约之目的就是要确保和加强对水下文化遗产的保护。为使公众了解、欣赏和保护水下文化遗产，应该鼓励人们以负责的和非闯入的方式进入仍在水下的文化遗产，以对其进行考察或建立档案数据，这些活动不能妨碍对水下文化遗产的保护和管理，更不能对水下文化遗产进行商业开发。考虑到对水下文化遗产进行科学的勘测、发掘和保护必须拥有高度的专业知识和先进的技术设备，公约中特别建议缔约国开展合作，进行水下考古、水下文化遗产保存技术等方面的交流和培训，并依据彼此商定的条件进行与水下文化遗产研究、保护有关的技术进行合作。

二、水下文化资产保存的政策方向

水下文化资产保存所牵涉的层面相当广泛，政策的制定是其中不可或缺的基础，所谓“政策”系指行动的方向或原则。对于水下资产保存方才起步的台湾而言，虽然无法于短期间制定所有相关的政策，然而仍可参考国外相关发展经验先制定一些原则加以遵循，包括政策制定的目的、需求内容、保存的对象与方法等。保存工作的成功取决于政策，然而政策往往难以独立规划完成，未来仍有赖领域专家学者的参与。[①]

（一）政策制定之目的及保存对象

台湾位于世界最大陆地及最大海洋的交界，是东方文明与西方文明的接触地带，亦是大陆文明与海洋文明交会之处。在台湾及澎湖分别发现许多宋元及明清的贸易瓷，北台湾的十三行遗址出土来自中国的瓷器与唐宋钱币，以及源自东南亚菲律宾及沙劳越一带的铁器及与玻璃珠，都说明了当时南中国海与台湾、澎湖、南洋、日本及朝鲜间，这个所谓“亚洲的地中海”频繁的海上贸易。自古迄今，无论是捕鱼谋生、通商贸易、移民拓垦或是海权争战，都在这片无际汪洋不断

① 目前中山大学（台湾高雄）海洋事务研究所李祖迪以《台湾水下文化资产保护保存及再利用之政策研究》为硕士论文题目。

重复发生。台湾的内陆水下考古则包括有台南县麻豆镇发现的荷兰时期水堀头古水道遗址、日月潭水下遗址,以及宜兰县河道水面下所发现的淇武兰遗址等重要的水下文化资产。

有鉴于水下文化资产保存维护与推广为世界各国日益重视的课题,文建会文化资产总管理处自 2006 年承接相关业务开始便积极推动从澎湖至台湾海域的长期水下文化资产普查工作,并期望从法令的制定来保护水下资产不受到破坏及偷盗,从相关历史文献的搜集来辅助研究,设置专业的实验室及修护室来保存修护出水文物,并培育专业的水下调查、摄影、发掘及修护人才,同时积极建立全民对于海洋文化资产的认识,尤其是“就地保护”与“防止偷盗”等国际观念,来与世界接轨。[①]

(二)政策之内容及推动方法

1. 主管机关的确立与法制之建立

1990 年《考古遗址保护与经营管理宪章》(Charter for the Protection and Management of Archaeological Heritage)第 3 条中阐明了考古遗址之保护应该被视为所有人类的一项道德义务,它也是一项集体的公共责任。此项义务必须经由适当的立法而被认知,同时提供足够的资金支持。[②]从各国实际的经验可以发现,水下文化资产之保存大多是经过数十年冗长而复杂之过程,许多国家是先从渔民或潜水者偶然的发现沉船或是遗物开始,之后才有政府相关部门研拟立法、设置主管机关,以及有计划与有目的进行水下文化资产的调查、发掘和保护管理工作。

(1)水下文化资产主管机关与专责机构设立的重要性

在《水下文化遗产保护公约》完成国际立法程序之前,国际社会为了保护水下文化遗产,已经完成了多项国际协议或文件,其中包括 1956 年联合国教科文组织通过的《关于适用于考古发掘之国际原则建议》(Recommendation on International Principles Applicable to Archaeological Excavations)[③]、1982 年《联合国海洋法公约》(United Nations Convention on the Law of the Sea),以及 1996 年国际纪念碑与遗址委员会(ICOMOS-The International Council of Monuments and Sites)《水下文化遗产保护管理宪章》(Charter on the Protection and

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① 李丽芳主编:《台湾水下遗珍探索》,载于《海洋台湾新世界:台法合作水下文化资产调查及人才培训成果专辑》,第 17~21 页。

② 傅朝卿译,《国际历史保存及古迹维护:宪章.宣言.决议文.建议文》,台南市:台湾建筑文化资产出版社,2002 年 11 月版,第 54 页。

③ 《关于适用于考古发掘之国际原则建议》(Recommendation on International Principles Applicable to Archaeological Excavations)中定义考古之地理范围包括内陆水域或领海之海床底土。

Management of Underwater Cultural Heritage)。《水下文化遗产保护公约》第22条明定为了确保公约的有效实施,缔约国应设立水下文化资产的主管机关,并应将其机关名称及地址告知联合国教科文组织以共同加强对于水下文化资产目录的编制、保存和更新工作,以对水下文化资产进行有效的保护、保存、展示和管理,并展开有关的科研和教育推广活动,由此可见水下文化资产主管机关确立的重要性。[①]

目前全球各国水下文化资产保护的体制并不完全一致,在美国系由美国联邦政府内政部国家公园局所属国家文化资源中心以及商务部的国家海洋暨大气总署下设之国家海洋局分别负责水下文化遗产及海洋庇护区的业务。[②] 法国为全世界第二大的水下考古国家,1680年陆续发现一些沉船,1989年订定了相关法规。法国利用潜水艇及声纳技术等科技协助水下考古,近年更有利用机械人来协助,迄今已发现12,000艘沉船中,已确定有2,500艘为二次世界大战以前的沉船;此外,1,100艘的沉船则借由船上钱币、壶等文物得以确定年代,发现当时不同地区的文化发展及海上贸易的情形。法国在文化部的监督下,于1966年成立惟一的一所马赛水下考古中心(DRASS)负责全法国包括海外省的水下考古。最初分为两个水下考古部门,一个是淡水河湖为主,另一个以海下为主,1996年将二个部门合并。法国马赛水下考古中心,掌管法国领海内所有的水下文化资产事务,是全世界第一个可以自主独立运作的水下文化资产官方组织,该中心已经有40多年历史,负责统筹法国水下文化资产业务;不仅需处理法国国内及涉外的相关行政事务,最主要的工作包括水下文化资产登录、水下文化资产科学研究、水下文化资产研究方向的研订、核发民间团体水下发掘申请之许可证、水下文化资产保护,以及负责法国国内及协助世界各国进行水下考古人才培训。[③] 中国大陆则是由中央的国家文物局委托中国历史博物馆(国家博物馆前身)设立的水下考古研究中心负责统筹指导,此外还在广州阳江市、山东青岛、浙江的宁波及舟山,分别都设有水下考古工作站。由于各国水下文化资产保护体制的现况各不相同,容易产生争执,因此《保护水下文化遗产公约》特别强调需以和平协商的方式来解决国际争端。[④]

台湾的文化资产保存法于1982年公布施行以来,由于文化资产业务分散于内政部、教育部、文建会及农委会等机关,常有权责难以厘清之困扰,2005年借

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① 蔺明忠著:《沉没世界探索启示录:当印第安纳琼斯遇上海洋》,台北市:三艺文化有限公司2003年版,第363页。

② 胡念祖著:《实地访查美国水下文化资产保护体制》,中山大学(台湾高雄)海洋政策研究中心,(台湾)文化资产总管理处筹备处委托研究计划报告书。

③ 李祖迪:《台湾水下文化资产保护保存及再利用之政策研究》,中山大学(台湾高雄)海洋事务研究所,硕士论文,第61页。

④ 《水下文化遗产保护公约》(Convention on the Protection of the Underwater Cultural Heritage)第25条。

由文资法第五次修法的机会将文化事权统一,除了自然地景由农委会负责外,其余的古物、遗址、古迹历史建筑及聚落、传统艺术、民俗及有关文物、文化景观等文化资产业务均由文建会掌管。文建会并依文化资产保存法第11条于2007年10月设置专责机构行政院文化建设委员会文化资产总管理处筹备处(以下简称文资总处),以积极推动文化资产之保存、教育、推广及研究等工作。由于水下文化资产有可能是古物、遗址、古迹、历史建筑及聚落、文化景观,相关保护业务自然应该由具备文化资产专业知识者进行调查研究后,由主管机关依据文化资产保存法就其价值、保存现状等分别进行登录、指定及保护管理,以上工作目前由文建会所属文资总处依据所掌管的文化资产保存法负责推动。

参考世界各国的发展,台湾要发展水下文化资产,首要之务,除了明确水下文化资产主管机关事权之外,如能另外设立专责机构,将更能以充足的经费及专业人力来积极推动相关工作。

(2)水下文化资产保存法制化的推动

发展水下文化资产保存业务,首要之务即为订定相关法令,以为业务权责机关执行之准则。法国的文化资产保存法令除了1913年的《历史纪念性建筑保存法令》及1930年的《纪念性自然景观与自然风景区保存法令》等法令之外,还专门订定有保护海洋文化资产相关的法令,并随着国际的发展逐步修改以符合实际需要。中国大陆与水下文物保护有关的法律包括有1981年实施的《文物保护法》和1989年的《水下文物保护管理条例》,中国大陆近年随着国际形势的发展,由国家文物局根据新修订的《文物保护法》修订相关条例及施行细则,包括水下文物的考古探勘和发掘活动许可等规定,也准备配合联合国教科文组织的《保护水下文化遗产公约》的精神执行相关工作,除了有利于促进水下文化遗产的保护工作,还能使一些有争议海域的水下文物管辖更明确,制止其他国家的偷盗与发掘。

在台湾,近年来关于水下文化资产保护立法的研究已经蔚然成风,[①]相关学者研究内容多就水下资产发展的国家如英、法、澳及中国大陆等各国法制与发展现况以及国际法方面进行译介,并建议将国际思潮内国法化。作为台湾目前水下文化资产保存维护执法依据的文化资产保护法,目前仍以文化资产保存法作为执行依据,其立法架构及意涵,倾向于陆域的概念,对水域内的文化资产并无

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① 包括林育赐著:《从国际实践层面论水下文化遗产之保护与管理》,中山大学(台湾高雄)中山学术研究所硕士论文,1999年;魏明哲著:《水下文化遗产立法保护管理之研究》,台湾海洋大学海洋法律研究所硕士论文,1999年;蔺明忠著:《水下考古活动发展与水下文化遗产保护法制之研究》,台湾海洋大学海洋法律研究所硕士论文,2003年;李应冠著:《我国海洋保护区设立之研究》,台湾海洋大学海洋法律学系硕士论文,2004年;傅崐成著:《水下文化遗产的国际法保护:2001年联合国教科文组织保护水下文化遗产公约解析》,法律出版社,2006年版。

明确及详细的规范。[①] 文建会文资总处有鉴于当国际组织逐渐发展及丰富水下文化遗产或在海洋发现之考古及历史文物的保护与管理法律体制时，台湾对水下文化资产的保存、保护与管理法律体制相形薄弱，因此自掌管相关业务以来便重视此一议题，立即委托中山大学(台湾高雄)胡念祖教授检视台湾现行法规之缺失，并参考国际社会主流趋势以及各国将《水下文化遗产保护公约》内国法化之经验，研拟完成《水下文化资产保存法(草案)》，期望就保护之客体 (水下文化资产的定义)、权利所及之海域及权利内容、所有权的厘清、保护措施 (包括就地保护的原则、保护区的划设、遗物出水的准则及保存维护程序、展示推广与再利用等)、发现者之义务与奖励以及罚则等，明确加以规范。由于该草案内容许多系参考国外经验，与文化资产保存法之间的关系以及如何内国法化等问题，尚须进一步召开会议讨论建立共识，目前正由文资总处法制科负责后续推动法制化的相关作业，以建构水下文化资产专法。[②]

(3)水下文化资产保存经费预算的编列

海底普查、探勘及发掘所需经费甚巨，除了调查船之外，尚须先进的探测设备和潜水设备，以及出水遗物保存修复及管理维护的设备，此外训练水下考古相关人员更需要长期大量经费的支持，然而各国在执行水下资产保存工作时往往受到资金和技术等方面的限制。以法国为例，马赛水下考古中心每一年的预算约相当于新台币 1 亿 3 千万元，除了年度预算外，该中心也从地方政府获得经费支持，有些个案则从企业界获得经费赞助。早期中国大陆政府也并未十分重视水下考古领域，每年经费仅有数十万人民币，目前中国大陆每年水下考古的固定经费逐渐增加至一千多万人民币，近年也开始购置一些较为先进的设备。在台湾，目前文资总处每年约编列 2,000 万元台币进行水下文化资产普查、历史文献搜集与数据库建立、人才培训、展览、推广、出版，以及国际合作与法令制定等业务，并逐年购置探测及出水遗物保存修复相关设备，待水下考古有具体重大发现时则将进一步争取编列专款支应后续相关工作所需经费。

2. 推动水下文化资产普查与建立数据库

1996 年的《水底文化遗产保护管理宪章》第 6 条中强调水下资产调查团队之所有成员必须要有适当的资格与经验，而且所有侵入性的调查必须在具有公

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① 依据行政院文化建设委员会文化法规数据库文化资产类所列数据，从法律层次讨论，现有《文化资产保存法》全文 104 条中并无“水下”二字，“水下文化资产”一词之意涵乃系隐含在相关条文中。及至法规命令层次，《文化资产保存法施行细则》第二十一条：“本法第七十四条所定发见具古物价值无主物之范围，包含陆地及水下，其所有权之归属依国有财产法规定。”始有明列“包含陆地及水下”之法规文字，另于《遗址发掘资格条件审查办法》第二条“本办法适用于中华民国领土及领海之遗址发掘”；连同在行政规则层次之“遗址审议委员会设置要点” “二、本委员会之任务如下：(六)水下考古及其他本法规定有关遗址重大事项之审议”，乃使“水下文化资产”之法规基础轮廓具体出现。

② 胡念祖著：《水下文化遗产立法草案研议》(1999 年)，以及《水下文化资产法令研拟计划委托研究案》。

认资格有适切经验的著名水下考古专家的指导与监控下才能进行。[①]

(1)水下文化资产普查及建立水下考古地图

①普查的重要性

澳洲建立有国家沉船基础数据库 NSD(National Shipwrecks database)来支持水下文化资产的保存及研究工作。目前这个系统注册表有关澳洲沉船约 7,665 处,如南澳博物馆所在地的 Adelaide 地区经过文献与调查共有 600 处疑似沉船遗址,200 多处经实际探勘后确定有沉船遗址的存在。在法国水下考古文化资产遗址资料中则有 20,000 个标志点,并不代表都是疑似沉船遗址,而是具有研究价值的潜力点,基于人力经费及其他考虑并不会探测所有标志点,到目前为其中 900 个点进行探勘,300 个进行发掘,相关资料只提供给经过申请的研究人员做研究使用。

中国大陆则是从 19 世纪 80 年代中期以来就已陆续在福建、广东沿海及西沙群岛附近海域开始了水下文化资产调查并发现 100 多处的疑似遗址。2007 年中国大陆将内海、内河及内湖的水下文化资产普查列为第三次全国文物普查中一个专门的推动项目,这也是第一次对于水下文化资产进行全国性的普查。在这个目标下,广东、海南、福建、浙江、山东、辽宁等许多省份已开始进行。此外,随着中国大陆的大运河保护工程以及南水北调等工程的实施,一些沿河的省份也开始展开内陆水域的水下文化资产调查,以避免工程开发建设造成文化资产的浩劫,在法国这种预防性考古的重要性远比抢救性考古要来得积极与重要。[②]

水下文化资产普查应建立与渔民之间的关系,也应与海军、海关、海巡与警政等单位建立合作关系,以中国大陆的经验为例,进行普查时,文物部门多会同海军以及海洋、国土资源、科技、石油勘探等部门展开多方合作,不仅有助于水下遗址位置的确定,还可积极依据其价值指定后公布为水下文物保护单位或水下文物保护区,文物部门还会依据实际水下文物保存状况采取紧急保护等措施。

②普查的优先级

进行全面的普查必定要投入大量的人力与财力,因此必须先有研究规划后制定执行策略。以法国为例,水下考古系从地中海开始发展,因为其海域能见度高、浪小,法国将水下考古的范围从这里扩充到大西洋海岸,大西洋有海潮,甚至海浪可达十公尺,能见度很低,因此发展水下考古的困难度很高。台湾的海岸线长达一千余公里,[③]在水下考古的开端主要起源自黄加进先生于澎湖海域捞获沉船遗物,而由教育部指示由(台湾)历史博物馆于 1995 至 1998 年间进行三次

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① 李丽芳主编:《台湾水下遗珍探索》,载于《海洋台湾新世界:台法合作水下文化资产调查及人才培训成果专辑》,第 71 页。

② 李丽芳著:《法国文化资产保存维护考察报告》,台南:台湾文化资产保存研究中心筹备处,2005 年,第 9 页。

③ 参见维基百科所载台湾全岛南北纵长约 395 公里,东西宽度最大约 144 公里,环岛海岸线长约 1139 公里,含澎湖群岛总长约 1,520 公里。

的勘查与试掘。内政部在推动“东沙海洋国家公园计划”时,因西澳海洋博物馆 Jeremy Green 博士曾提供东沙有 1609 年葡萄牙波古西号等不同年代船只 7 艘,以及仍有待考证之多艘不明商船沉没等信息,因而特别委托中山大学刘金源及陈阳益教授以测扫声纳及水下定位等仪器进行过东沙环礁水下探测,并推测过去各国船舶经常来往于南海水域,且交错于东沙附近海域,应该存在有丰富的水下文化资产。台湾真正展开水下文化资产全面性的普查工作,应始自 2006 年由文建会所属文化资产保存研究中心筹备处(现经组织整并为文资总处)所委托中研院臧振华先生进行的“澎湖马公港古沉船调查发掘及水下资产研究保存科学人才培育计划”,本项调查研究计划目前先从历史文化及考古资料丰富的澎湖海域开始,预计在为期三年的第一阶段工作完成后,初步建立了台湾水下考古优先调查敏感区决策支持系统,并提出未来台湾水下文化资产保存发展方向的建议。[①] 随着计划推动,文资总处除了针对普查所需租用科学调查船与工作站外,并逐年编列预算购置包括磁力仪、测扫声纳及水下定位系统等仪器,期望有系统地建构水下文化资产普查系统。

(2)建立水下考古地图数据库

①水下考古地图的建置与运用

法国的马赛水下考古中心希望忠实的呈现海洋历史,只是根据史料,并无法清楚看见过去海洋历史的发展,因此该中心 20 年前便有发展水下文化资产地图的计划,直到 2005 年在计算机科技的支持下,才逐步开始。目前文资总处所推动的台湾水下文化资产保存维护发展计划,其中项目也包括委托中研院人文社会科学研究中心汤熙勇副研究员办理“台湾附近海域水下文化遗产历史研究计划”,借由渔民访谈、调阅国防部档案,搜集清代宫中档、军机档等历史文献来重建水下考古地图,提供水下资产考古调查与发掘结果比对之基础数据库。此外,文资总处在推动计划之初便规划结合所委托中研院范毅军研究员及刘益昌研究员规划的“台湾考古遗址地理信息系统建置计划”,逐步将调查所得数据汇入整合提供未来绘制水下考古地图的依据。

参考法国发展经验系先长期搜集分散各地的数据经整理后建立有系统的文化资产数据库,内容包括:遗址地点、描述、年表、照片图片、保存文物的地点、有关文物的档案源数据、研究参考书目等,再利用地理信息系统进一步将相关信息建置成水下文化资产数据库及绘制水下考古地图,以利提供研究查询与运用。“台湾附近海域水下文化遗产历史研究计划”未来推动可参考法国经验加强搜集古地图,以掌握过去地形及海域状况,并比对现代海军所使用的地图,研究后可了解危险地区及掌握海域状况,并可归纳海难可能发生的地方。此外,文献收集和史料研究也可以进一步扩及档案范围之外,并利用科技定位协助标示明确的

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① 臧振华著:《澎湖马公港古沉船调查发掘及水下资产研究保存科学人才培育计划》,期末报告,2006 年,第 2～3 页。

位置于水下考古地图上。此外,亦可运用澎湖将军一号所发掘的相关数据作为系统建置及地图绘制的测试数据。

②数据库的建立与管理运用

参考国外包括法国及澳洲等都投注相当多的资源于水下文化资产数据库的建立,以保护水下文化资产,包括提供相关公共建设及工程开发之前的环境影响评估参考;在学术运用方面,也可以据以评估哪个区域或是类型的水下文化资产值得发展?何处的研究已经足够?何处尚不足?借以确立研究方向,减少学术资源的重迭浪费以及避免造成水下文化资产的被干预或破坏。在增进国际合作方面,自古迄今南中国海与台湾、澎湖、南洋、日本及朝鲜间,这个所谓"亚洲的地中海",数据库的建立对于相关国家而言都富有重要的意义。

在数据库的建置与管理使用方面,文资总处目前采取委托中研院"台湾考古遗址地理信息系统建置计划"的方式进行,未来长期发展仍建议如法国马赛水下考古中心由中心本身统筹,以掌握数据的正确性、完整性,以及管理维护与权限。

3. 水下考古调查发掘技术发展暨国际合作

联合国教科文组织有鉴于水下文化遗产科学勘测、发掘和保护必须拥有高度的专业知识和先进的技术设备,因此在「水下文化遗产保护公约」中特别建议缔约国开展合作,进行水下考古、水下文化遗产保存技术等方面的交流和培训,并按彼此商定的条件进行与水下文化遗产研究、保护有关的技术移转。[①]

(1)发展水下考古调查技术

水下考古是陆地考古工作向水域及海洋的延伸,与陆地考古一样,考古工作者必需亲临水下现场从事调查与发掘,不能像捞宝者只雇用职业潜水员在水下工作,[②]然而由于水下考古作业涉及不同水域环境的水流、潮汐、水温、能见度及水底地貌等因素,所以不论是搜寻、定位、绘图摄影与纪录、设立探方、勘测及发掘等,都需要专门的技术与设备。此外,水下考古发掘,除了常受到海域环境、气候以及人员实际潜水时间的局限,沉船遗址常是海难发生的区域,加上水域能见度不佳、暗流与礁石、渔网等危险因素,均使得相关工作难度相当高。

水下考古工作要依赖不同的专业,需有良好的规划准备,否则也是破坏遗址的行为,实际工作时一般可分为调查发掘、测绘纪录、水下摄录像、技术设备与后勤安全等专业配合团队。文资总处目前委托中央研究院臧振华先生进行的调查研究案除了使用文资总处逐年购置的设备之外并结合中山大学海科院的专业团队及相关设备,澎湖科技大学也提供后勤安全的支持,持续展开台湾首次有系统

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① 《水下文化遗产保护公约》第 21 条。

② 吴春明在其《海洋考古学》中认为韩国新安沉船遗址的发掘由于完全是职业潜水员的打捞活动,不能算是真正的水下考古,详见第 50—51 页;陆泰龙在其《台湾水下考古的展望——从将军一号谈起》文中,也检讨指出当年参与者多为史博馆研究人员及专业潜水人员,由于缺乏水下考古知识而无法对所发现的遗物或现象做出及时的判断,详见第 76 页。

的普查工作，目前已经迈入第四年，工作惟由于台湾仅有十多年前的澎湖将军一号沉船遗址时多年前的发掘经验，无论在调查技术及资料判读等方面均有与国际经验交流的发展空间。

(2)建立文化资产价值评估标准

水下考古工作必需先评估该遗址或遗物的文化资产价值以及进行探勘与发掘的必要性及风险，做好相关准备工作后才能进行发掘，文资总处目前正委托臧振华先生参考国外经验建立一套水下文化资产价值评估的标准，提供未来登录及指定与推动相关保护、保存及再利用的参考依据。[①] 此外，评估发掘时除了文化资产本身的价值与安全性考虑之外，是否值得花费所须的经费与人力进行，以及发掘之目的与后续的保护保存及管理再利用的可行性等，也应一并审慎评估。

4. 出水遗物的保存修复暨国际合作

以法国为例，水下考古发掘由各地发现人向马赛水下考古中心提报后，一般由该中心负责发掘，如果有申请发掘者则须提出发掘要求所需的资格及文件外，马赛水下考古中心还会就申请者对于出水遗物保存科学研究及修复的专业能力、设备，以及未来相关的展示与推广规划、预算来源等，审核确定后才同意其发掘工作。此外，法国的马赛水下考古中与地中海地区、西亚、埃及和阿拉伯等均有以国际合作的方式进行出水遗物的鉴定及保存修复。目前文资总处南部办公室拥有保存科学实验室及修复室，并且已经就宜兰淇武兰遗址及澎湖马公港等遗址出水遗物进行保存修复的协助及提供技术咨询。

(1)遗物发掘出水及保存计划

水中的遗物有很多种，例如发生空难的飞机，即便是现代的遗物，如果对于历史文化具有重要性也将有机会被指定为文化资产。遗物是否发掘出水应该视遗物所具备的文化历史及研究价值以及保存状况而定，有的遗物经研究修护后可送到博物馆展示，有的则应视状况被放回原有水下遗址现址，让后人有继续研究及认识的机会。法国马赛水下考古中心对于可以进行抢救修护的遗物订有明确的标准及规范，如果不知道遗物是否会被损坏，则不能随意取出，需配合保存科学人员作判定。文资总处委托胡念祖教授研拟完成的《水下文化资产保存法(草案)》，其中内容便企图订定水下文化资产发掘出水标准，提供未来相关工作执行时的参考依据。[②]

由于出水遗物中的有机物以及金属、动植物、玻璃等材质，往往出水便立即会有损坏的危险，因此，包括在水下的保护包装材料及方法、出水后的紧急处理

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① 就水下文化资产的表征属性(类型与特性、工艺技术与科学性、艺术性、代表性等)，以及文化属性、可陈述属性以及结构评估属性等计划建立一套水下文化资产价值评估的标准。详见李丽芳著:《法国文化资产保存维护考察报告》，台南:台湾文化资产保存研究中心筹备处，2005 年，第 65～69 页。

② 胡念祖著:《水下文化资产法令研拟计划》，第 101～102 页。

与包装运送方法，以及后续的保存、加固与脱盐等修复、典藏与展示推广等都应该有完整的计划经过审核通过再执行。遗物是否适合出水及后续保存均应该由保存科学专家于水下立即进行判断，于发掘前即已拟定好处理方法并设置所需设备及场所，以及安排好后续修复、典藏单位再进行发掘出水工作。

(2)出水遗物的保存修复技术

就地保护而言，最重要的是预防性保存。出水遗物的保存修复方面，由于出水遗物类型十分多元，包括有陶瓷器、木质文物，以及金属文物等等，所需要的保存修复技术及材料各有不同，应由各领域的保存科学及修复专家来进行。以法国为例，法国马赛水下考古中心与南特的 ARC' Antique Lab 合作，由其支持出水金属文物的处理，以及与格勒诺勃的核能考古技术部门合作，由其支持出水木质文物，包括大型沉船的修复处理。

位于法国南特的 ARC' Antique Lab 为法国唯一负责水下考古金属、陶瓷及玻璃类文物保存修复最大的实验室，成立于 1989 年，为协会型态的组织，服务对象主要为法国两个大区的博物馆，以及协助法国水下考古文物中金属、陶瓷、玻璃等水下文物的保存修复，并包括法国之外的法国水下文物修复工作。该单位的特色为研究与修复工作结合，针对修复技术与材料等进行研究，共有 12 名人员。主要部门包括金属、陶瓷、玻璃、水下文物的保存修复，以及应展示推广等需要进行文物的复制，目前已经进行 20 多个水下考古工作。该实验室的人员并不实际进行潜水的水下考古工作，但每年也设有培训业余考古潜水人员相关保存理论约 3～5 天的课程(通常在每年冬季)。目前的研究项目包括如何有效进行出水铁器氯离子置换的问题，以及含铅文物的处理、考古青铜器表面清洁技术，以及用激光技术清洁陶瓷器表面与除盐研究。由于出水遗物修复需要很长的时间，又因出水遗物往往体积很大需要很大的处理空间，因此该实验室目前采取以邻近水下考古现场就近处理而以计算机监控的方式进行，相关的水下考古人员及学生也可以学习。

法国格勒诺勃(Grenoble) 市 1989 年成立的 ARC' Nucleart 核能考古技术部门，则是全法国惟一使用核能处理文物保存修复的公共机构，隶属于地方而非中央(却与文化部及核能委员会携手合作)。该工作室以出水木质文物的保存修复闻名，1991 年发现了公元前 4200 年的船，核能考古技术部门采用 polyester 树脂或是伽玛射线处理树脂来加固(用伽玛射线主要以处理干的文物，湿的要用 PEG 法处理)。用 PEG 法二次浸泡约需一至一年半，干躁又要二年半至三年，空间需要很大，有些大型文物尚没有时间处理则必须先不断用洒水系统保持其湿度。此外，该单位近年研发使用高压喷雾 PEG 方式的加固法来替代浸泡式，一方面较经济，另一方面也避免一些构件因用浸泡法而造成分离。法国之外，英国、瑞典及日本也运用 PEG 的技术来处理出水的木材，但近年来发现此方法也有缺点，如北欧的船用此方法之后 10 年，因展示环境的湿度超过 80%而有劣化现象，目前乃研究是否有其他更适合的树脂，用 PEG 处理后仍要注意光线、相对

湿度及温度等问题。该工作室空间共有3000平方，包括修复、摄影部门及典藏库等，目前已经处理过35只船以及550件文物，经费来自于文化部、大区政府、市政府、核能所及自筹。[①]

目前文资总处已经让实验室持续协助处理台湾有关出水陶瓷及木质文物的保存修复工作，并进行相关课题的研究计划。

5. 水下资产的保存维护、经营管理与再利用

1996年的《水底文化遗产保护管理宪章》第10条特别指出应对水下遗址善尽经营管理与监管保护的责任，除非与保护及经营管理有所冲突，公众性地接近水下文化遗产应该被推动。第14条则强调公众对于调查的认知及对水下文化资产的意义应该利用不同的媒体用通俗的方式来推动，并强调与小区、团体、博物馆及相关机构间的合作。1999年的《国际观光宪章》中则提出了文化资产必须被经营管理并与当地居民与外来访客相互沟通，台湾及国际观光已经成为文化交流的最主要媒介，借此地球村的人可认识自我也认识其他文化，然而文化观光也必须有所规范即绝对不能伤害文化资产本身，也必须对当地居民与小区有所帮助。[②]

(1)就地保护的观念

联合国教科文组织通过的《水下文化遗产保护公约》便在目标及总则指出，在允许或进行任何开发水下文化资产活动之前，就地保护应作为首选，并不得对水下文化资产进行以商业为目的之开发活动。[③]

(2)保护区的划设与管理维护

国外包括加拿大、美国及澳洲等国家均有海洋保护区（或称海洋庇护区）的划设，台湾相关的研究也不少，其划设应考虑生态环境、社会经济、急迫性、受威胁性以及管理有效性等评量指标，[④]以及顾及相关单位职权与民众的权益，以及管理维护执行层面等问题。海洋保护区在实质的管理上，常面临财政和因财政缺乏所衍生的管理能力、执法和监测的问题，未来台湾如何加强各主管机关间的合作及对于民众的推广教育，应该是保护区划设时应考虑的重点。

(3)水下文化资产的经营管理与再利用

目前，世界各地沉船及水下考古博物馆不少，例如澳洲的海事博物馆以及瑞

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① 李丽芳著:《法国文化资产保存维护考察报告》，台南：台湾文化资产保存研究中心筹备处，2005年版，第11～12及29～33页。

② 李丽芳主编:《台湾水下遗珍探索》，载于《海洋台湾新世界：台法合作水下文化资产调查及人才培训成果专辑》，第74～75及93页。

③ 《水下文化遗产保护公约》第2条。

④ 见刘淑玲著:《海洋保护区划设之冲突管理与公私伙伴关系之研究——以澎湖县青湾内湾海域为例》，2003年中山大学（台湾高雄）公共事务管理研究所硕士论文；吴祥坚著:《美国佛罗里达珊瑚礁屿群国家海洋庇护区之经营管理》，2008年9月23日海洋国家公园管理处报告；李晨光著:《区域计划与海岸保护及海洋资源管理》，2008年3月20日内政部营建署市乡规划局报告。

典的沉船博物馆等，而位于水下的遗址现址博物馆，案例其实并不多见，因为沉船通常是在危险的浪潮区，如要开放观光，游客的安全以及遗址、遗物的监管维护，都必须审慎评估。近年来中国大陆为了发掘及保存“南海一号”沉船所兴建的海上丝绸之路博物馆，以及全球瞩目的白鹤梁水下博物馆一一即将开放。埃及政府1994年也在古亚历山大东部港口的挖掘工作中由潜水人员发现了数千件历史文物，因而正计划建造一座巨型水下博物馆，让游客穿过水下玻璃纤维隧道，体验丰富的水下遗址与遗物，这项计划也获得了联合国教科文组织的支持。

水下文化资产的经营管理也有促进国际合作的作用，除了荷兰沉船“巴达维亚号”(The Batavia)的发掘与保存对于荷兰与澳洲的贡献为人传颂的例子之外，1998年在文莱王国附近发现一艘15世纪正驶往文莱途中的沉没货船，经由文莱王国、法国文化部以及爱尔夫阿魁丹公司共同签署一份合作协议所完成的考古发掘行动，成为中国海有史以来进行最大规模的考古研究计划，发掘出10，000至15，000件不同的遗物，提供了当时广泛而组织完善的贸易网络存在的直接证据，也说明了连结婆罗洲与南中国海其他区域间的海洋贸易航线。

法国水下文化资产均属于法国国家所有，一般在进行考古发掘之前，马赛水下考古中心会先联系当地的博物馆询问其未来是否有典藏及展示的意愿，如该馆有意愿则可由其出资支持相关工作。[①] 在台湾，依据文化资产保存法规定主管机关对经指定之遗址应拟具管理维护计划，进行监管保护，内容应包括遗址基本数据、权责规划及通报机制、日常维护、紧急维护、教育及倡导、经营管理、遗址既有设施或建筑物之管理规划、委托管理规划及其他相关事项。[②] 近年来遗产廊道(heritage corridor)的概念，未来也可以运用在水下文化资产的保存、保护与经营管理方面，结合自然和文化遗产的保存与发展，将本来呈零星状态的特殊景观、生态和乡土文化，以连续的廊道连结起来，进行整体性的解说和展示，将游憩、生态和文化保护等多目标相互结合。

6. 水下文化资产专业人才培训暨国际合作

人才培训的需求不只是单一国家的需要，更是全球共同的问题。《水下文化遗产保护公约》特别揭示专业的水下考古人才培育的重要性，其中第21条提出各国应该合作培训专业的水下考古人才，将水下考古经验传承发扬。水下专业考古人才需要具备的条件除了科学素养、技术训练与健全的心理与生理机能外，最好兼具陆地考古相关经验。复由于水下考古在潜水工作时的特殊性，以及长时间的海上航程，都必需借由团队合作才能达成任务，因此团队精神及伦理操守极为重要。目前水下考古人才培训在法国是由国家的马赛水下考古中心负责；中国大陆则由国家博物馆水下考古研究中心负责；美国夏威夷大学及德州农工大学于相关系所开设有课程；英国除了南安普敦大学之外，还有非政府组织的水

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① 陆泰龙著:《台湾水下考古的展望——从将军一号谈起》,第26页。

② 参见《遗址监管保护办法》。

下考古协会(Nautical Archaeology Society);澳洲早期是由博物馆负责,近年才正式成立有关水下考古、文化资产保存的学校机构,例如西澳大学及雪梨大学的水下考古学系、Flinders 大学的水下考古学系则设有学士、硕士、博士等学位课程。有些亚洲国家则交由私人集团担任相关培训工作。[①]

(1)全世界水下考古人才不足的窘境

最近十多年来,水下考古在全球渐受重视,但每个国家都出现人才不足与专业断层的窘境。以法国而言,陆上的考古学家约有 2,000 名,水下的考古学家却仅有 20 多位,人才明显不足。法国的海域很广,约一千一百万平方海浬,法国马赛水下考古研究中心的人力包括研究人员、技术人员及行政人员却仅有 30 位,为解决人力不足问题,该中心和法国其他研究机构与单位也有合作关系,这类合作关系的研究人员约有十几位。中国大陆方面经过数次的专业培训目前水下考古队员仍只有 40 多名,面对 1.8 万公里的大陆海岸线,广阔的海域,庞大的工作量,人力远远不够,中国大陆因而实行水下考古人员不受一胎化生育限制的优惠政策来鼓励人才的投入。[②]

(2)水下考古爱好者与潜水者在其间扮演的角色

许多国家也有将水下考古发掘或是培训工作交付给私人潜水学会的情形,全球也有许多水下考古的"爱好者",实际上无论潜水学会会员或是水下考古爱好者往往因缺乏文化资产及考古方面专业背景,其行动常导致水下文化遗址受到侵扰或是遗物擅自被出水而受损与盗卖等严重的问题。目前国际间共同讨论水下文化资产议题所达成的共识,便是要更严肃的对待水下考古,主动以政府的力量推动培训的架构,组织这些爱好者成为志工,提供他们专业的训练并扮演适当的角色。[③] 水下考古的涉外性质极高,例如美国民间打捞公司奥德赛海洋探勘公司(Odyssey Marine Exploration),宣称在英吉利海峡的海峡群岛附近海域发现 1774 年沉没的英国皇家海军胜利号(HMS Victory)战舰船骸,并已经捞起两门大炮而引起哗然恐引起国际纠纷,因该船属于军事沉船,英国政府主张在未获得其同意前不得进行任何侵入性行动。[④]

(3)各国水下考古人才培训的现状

①法国的水下考古人才培训现状及所面临问题

法国马赛水下考古中心由于工作十分繁重,已无多余人力负担专业讲师的工作。目前采取每年让 10 多位学员到 20 多个考古现场参与工作,其优点为学

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① 李祖迪著:《台湾水下文化资产保护保存及再利用之政策研究》,中山大学(台湾高雄)海洋事务研究所硕士论文,第 67～71 页;以及朱崇锐、刘金源著:《全球海下考古相关学术研究机构简介》,载于《海洋技术季刊》,2004 年第十四卷,第四期,第 29～32 页。

② 李丽芳著:《大陆水下文化资产保查技术考察交流报告》,第 45 页。

③ 李祖迪著:《台湾水下文化资产保护保存及再利用之政策研究》,中山大学(台湾高雄)海洋事务研究所硕士论文,第 68 页。

④ 林家群:《美打捞英沉舰胜利号 恐爆主权纠纷》,载于《中国时报》,2009 年 2 月 3 日,A3 版。

员直接在考古现场学习不同的状况处理问题，但往往沉船遗址深度太深时会无法让学员实习，以及受现场天候等突发状况而影响培训课程。此外，由于考古现场在一天中需要十多个小时的长时间工作，学员常无法充分讨论取得理论的验证，尤其在水中工作时是无法交谈的。[①]

②英国的水下考古人才培训现状及所面临问题

英国南安普敦大学 1997 年成立有海下考古中心，此外 1960 年代于普兹茅斯（Portsmouth）创立的水下考古协会（Nautical Archaeology Society）系以非政府组织对专业潜水员提供考古专业培训，理论课程外还有实习及工具操作训练。NAS 以会员组织运作，会员接受培训后取得不同层级证照成为教练并在全世界建立有丰富的人才网络。NAS 协会对于增进大众对水下考古领域的认识有所贡献，但并非提供真正专业水下考古人员所需的训练，复因课程参加人数过多，使得专业教练人力不足，而以较不具经验的聘用教练担任，结训后学员自认所学已足够而引起相关专业不足问题。[②]

③中国大陆的水下考古人才培训现状及所面临问题

中国大陆由国家博物馆水下考古研究中心负责人才培训，并于 2001 年由国家文物局批准在广东海陵岛设置国家级的水下考古科研培训基地，同时进行南海一号的进一步发掘与沿海水下文物的普查。中国大陆在发展水下考古之初，便在俞伟超的卓见下为水下考古制定了一系列方针步骤，采取“走出去，引进来”的办法，其中“走出去”便是于 1987 年派中国国家文物局的杨林和中国历史博物馆的张威分别前往荷兰考察，学习北海沉船调查与发掘、绘图、摄影、清理等工作，两人并于 1989 年到美国与学习水下考古理论及专业技术。1988 年则派中国国家文物局的王军到日本学习水下考古。另一方面的“引进来”，就是邀请国外如澳洲的专家来讲学，并与国外机构合作，如 2007 年在广东阳江中国水下考古科研与培训基地由国家文物局主办第四期全国水下考古培训班，肯亚也派两名学员来学习观摩，张威也曾亲自赴肯亚指导，中国大陆在水下考古慢慢开始有“技术输出”的能力，并得以借此建立文化外交关系。[③] 中国大陆水下考古虽然 20 年来在水下实务已经逐渐有了本土经验，但同样面临人才缺乏的问题，因年龄和其他原因，部分学员已不参加水下考古工作，从事水下遗址发掘及抢救时，往往面临被征调者各自有工作岗位的实际困难。

④台湾的水下考古人才培训现状及所面临问题

在台湾，自从文建会文资总处（整并前为文资中心业务）开始推动水下文化

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① 李祖迪著：《台湾水下文化资产保护保存及再利用之政策研究》，中山大学（台湾高雄）海洋事务研究所硕士论文，第 68～69 页。

② 陆泰龙著：《台湾水下考古的展望——从将军一号谈起》，第 26 页。

③ 吴祥坚著：《美国佛罗里达珊瑚礁屿群国家海洋庇护区之经营管理》，2008 年 9 月 23 日海洋国家公园管理处报告，第 46 页。

资产保存业务起,便积极同步规划水下考古及保存与管理维护人才的培训(详见附录表1),目前除了文资总处的同仁,以及中央研究院与中山大学的调查团队之外,已经培训20多位种子学员,包括邀请台湾内外法令、潜水、考古及保存科学、调查技术等领域专家,分期规划初阶与进阶课程,以及现场实习训练。然而由于学员学习经历及潜水技术等背景不一,复来自不同的工作领域,参与者多基于个人兴趣,因而目前培训后能真正参与水下考古工作的人员比例尚不足。由于普查工作量已经十分吃重,同时推动人才培训工作也有困难之处,而学员接受培训后若未实际参与相关工作专业,再次培训时技术也会因而生疏,未来可结合中华水下考古学会的民间力量协助潜水培训工作,并规划由政府设置专门的培训基地,广邀国际不同领域的专家强化专业课程。水下考古正在发展之际,台湾一千多公里海岸线所可能拥有的海洋及内陆水下文化资产究竟需要各领域相关人才的数量应先作全盘思考。[①]

(4)建立世界或亚洲水下考古中心的前景

联合国教科文组织为了让亚洲地区文化资产管理人才培训不落后于欧美国家,因而特别在泰国的曼谷设立有亚洲文化资产管理学院(Asian Academy for Heritage Management,简称 AAHM),在 UNESCO 及 ICCROM 的指导下,利用网络及相关资源建立交流平台以强化在教育推广、人才培训及研究方面的专业资源,提供亚洲及太平洋地区在有形及无形文化资产管理人力培训方面的协助。[②] 国际合作对于水下文化资产的保护与经营管理也是极为重要的,因此1996年的《水下文化遗产保护管理宪章》第15条在国际合作方面特别提到专业人员的交换计划应该被视为传播的最佳执行手段。[③]

法国在1980年代为水下考古发展的高峰期,大约有10～15个国家的人员曾经到马赛水下考古中心接受相关的培训,目前该中心规划有短、长期的实习培训课程,近年分别有来自台湾、突尼西亚和埃及的学员接受为期3周至3年的训练。2003年法国文化部开始请马赛水下考古中心筹划成立一个世界水下考古中心,以因应全球在此领域的需要。法国马赛水下考古中心主任路荷先生于来台合作时也曾经建议台湾思考成立一个亚洲水下考古培训基地,针对日本有鹰岛沉船、韩国有新安沉船、东南亚的越南有会安沉船等亚洲国家的需求,规划设计相关的培训课程,国际培训基地的设置可使得相关领域学者们有讨论与实务交流的场所,并增加国际合作的机会。国际培训基地系利用全年均可从事训练

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① 参见《新台湾新闻周刊》第36期,许惠佑在《告别锁国时代让人民亲近海洋》一文中提到目前台湾海巡人数约一万六千人,但执法的海岸线长度达十万八千公尺,执法面积超过五十万平方公里,其症结不只是人数的问题,同时也反应在软件和硬件装备上的问题。

② 亚洲文化资产管理学院(Asian Academy for Heritage Managemen),下载于 http://www.unescobkk.org/index.php?id=470,2009年3月18日。

③ 李丽芳主编:《台湾水下遗珍探索》,载于《海洋台湾新世界:台法合作水下文化资产调查及人才培训成果专辑》,第75页。

的基地环境，加上附近有大学等资源，让学员能就近参考足够的文献与修习海洋历史、船只结构与船舶史及国际贸易等知识。基地位置需方便培训人员前来并拥有多样的海岸形貌，以促供多样的潜水训练。结业学员可取得具国际认可的文凭，多国语言的教学方式，方便习得各个领域的知识，不必为了某个专门学科，而求教于遥远国家的学者。[①]

在一个水下考古现场，很难学到所有的状况，因此法国马赛水下考古中心正考虑成立一个虚拟的考古训练场地，使学员能经历到各种海潮与天候的状况，不必担心学员会误损水下遗物或是遗址，也可重复演练。除了考古专业训练外，还因应实际需要设计海上调查设备操作与修缮的课程，以培养专业人员自行修缮的能力。

(5)人才培训的相关配套措施

①课程与教材

法国的马赛水下考古中心迄今除了协助各国培训人才之外，并为15个国家提供过有关鉴定及发掘方法的咨询，该中心所编写的水下考古基础训练教材－NAS Training也翻译成阿拉伯文版，以提供阿语系国家人才培训之需。中国大陆除了在海陵岛设置水下考古及科研基地之外，也开始出版相关的基础教材，如吴春明着、张威所主编的《海洋考古学》，以及《东海平潭碗礁一号出水瓷器》与《西沙水下考古(1998—1999)》等中国水下考古报告系列丛书。宁波水下考古工作站除了与宁波文物考古研究所合作，对东海海域进行水下考古调查发掘和出水遗物保护研究之外，也计划出版有关水下考古技术标准的专书。文资总处目前也陆续编辑出版包括《海洋台湾新视界—台法合作水下文化资产调查及人才培训成果专辑》、《澎湖马公商港疑似沉船遗址调查评估报告》二书，并取得法国授权翻译出版《沉没的宝藏—文莱古沉船发掘调查实录》纪录像片光盘，但在专业教材及课程方面仍有待台湾内外专家学者协助进一步规划。

②培育对象

水下考古单位本身所需专业人才之外，也应针对水下考古有兴趣者，给予短期训练及激发其兴趣的培训课程，对潜水爱好者及工作者可安排为期二至三周的考古训练课程，使未来参与水下考古时协助辅助性的工作。其他如海警及水下资产保存科学及修复人员等也可以规划适当的课程，以利未来协助水下文化资产的保护监管及遗物保存修复工作。

③就业职场及证照、回训制度的建立

欧洲许多国家已自行发展水下文化资产人才培育计划，但不论在文凭还是证照的推动上，仍面临许多瓶颈。水下考古人才需要长期养成与训练，除了少数国家设有专门科系，多数受训学员及实习生常需自费接受训练，复因多缺乏国家体制的支持，未来的就业及薪资常缺乏保障。在台湾，相关人才培训未来有待政

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① 李祖迪著：《台湾水下文化资产保护保存及再利用之政策研究》，中山大学(台湾高雄)海洋事务研究所，硕士论文，第67～71页。

府部门进一步的规划，包括培育对象及需求、场所、课程规划与教材、师资以及未来就业与证照制度等，目前文资总处也在长程人才培育计划中纳入此领域的需求进行规划。

7. 水下文化资产教育推广

(1)教育推广的重要性

联合国教科文组织通过的《水下文化遗产保护公约》第20条便强调应采取一切可行的措施来提高公众对水下文化资产的价值与意义的认识，以及对于保护水下文化资产重要性的认知。保护水下文化资产的方法应该让每个人都成为海关，并让大众了解水下文化资产的重要性。教育民众水下文化资产是公共所有，应由大众一起保护此人类共同的遗产。

水下资产保存除了须由中央统筹相关事务之外，更应积极结合地方政府与民众，让保存成为大家共同的事务，并透过各种方式结合各级学校课外教学、小区活动、新闻媒体等，让全民建立保存水下文化资产的共识。此外，水下文化资产管理维护的有效推动，除了水下资产的调查与发掘技术的发展外，更需要法令制度与行政管理制度的配套，以及地质、物理、机械、航海、历史、信息等不同领域人才的合作，因此，让不同领域的人才认识水下文化资产的价值与意义也有助于保存工作的推展。

(2)教育推广的方式

教育推广可以依据对象的不同来设计，除了研讨会、研习会、工作坊等较为专业的教育活动之外，包括利用博物馆及水下遗址现址举办展示及巡回展览、拍摄电影，出版宣传导览手册或专业刊物介绍等，都能让不同层面的民众更了解水下考古工作、发现和意义，重建海洋文化的历史记忆。

(3)国际的跨域合作

制定政策者应该提升大众对于水下文化资产的了解与重视并推动国家、国际组织、科学机构、专业组织、考古学家、潜水者、保存者、其他有关部门及广大公众对于水下文化资产的保护。政府部门应该对于保护和捐赠文物的行为，应该大力的奖励及宣传。目前各国多以奖励的方式，来鼓励水下文化资产的提报并协调军警、海关、海巡等单位，合作进行水下沉船与遗址保护和考古调查与发掘相关工作，并明订罚则有效禁止以商业为目的进行开发活动与防止水下资产盗掘以及进出口贩卖。例如，1989年起法国规定水下文物都属于国家所有，并给予发现人奖金。法国目前提报网络的进行，采取发放制式表格给地方人士的方式，一旦有人发现遗迹或遗物，须在48小时内填妥表格向该地的海巡警察提报，再由海巡警察陈报给水下考古中心进行解读评估。除了提报制度，也会给在地文史工作者另外一种简单文件以方便民众填报。法国借由奖励政策鼓舞渔民主动提报有关水下文化资产的讯息。西澳洲《一九七六年历史沉船法》中则规定任何人持有、监督或控制相关历史沉船或古物应在公告宣布30天内通知部长（通讯、信息技术及艺术部部长），而部长依据通知结果如果找到发现物或是发现地

点，则将分别给予提报者奖金、奖章或是复制品以资奖励。[①] 即便如此，许多沉船遗址及古物仍常遭遇盗掘贩卖等被破坏的命运，因而今年生效的《保护水下文化遗产公约》宗旨便强调应更有效地保护水下文化遗产，控制日益增多的劫掠和毁坏水下文化资产的活动。因此，建立文化资产保存的全民共识才是根本之道。

三、建构台湾水下文化资产发展的特色与愿景

(一)水下考古不同的区域特性

有“世界水下考古之父”之称的美国得克萨斯 A&M 大学乔治·巴斯(George F. Bass)教授曾谈到：“每艘沉船都有最适合的打捞方法”。[②] 充分反映了水下考古存在不同国家或区域的特性，因此地区性的合作及信息交流也是《保护水下文化遗产公约》主张的重点之一。例如法国主要有大西洋及地中海两个海岸，来往地中海的船只受到中南欧的影响，大西洋则受到北欧影响较大，文化的不同不仅展现于船体结构上，其所运载的货物也会有所不同，借由相关的调查发掘及考证，可以重建当时人类生活与贸易交通的面貌。

经过中国南方各个港口如广州、泉州等乘船西行到达东南亚、印度、阿拉伯，甚至更远地区的这条“海上丝绸之路”，对于中国大陆及世界的海洋交通贸易与历史文化的发展都扮演着重要的角色。因此，南海诸岛考古项目是中国国家文物局规划的水下考古重要项目，包括西沙水下考古、碗礁一号、南海一号及南海二号等丰富且珍贵的水下资产都是最重要的历史见证。南海一号被发现以前，中国大陆对于古沉船考古所采用的技术和手段都是向外国学习的通用方法，随着南海一号的出现，中国为了发掘和保护文物，逐渐研究出了一套先进的技术方法，结合了相关领域的专业人才进行中国大陆本世纪最重要的文化工程。经过20年的发展，中国大陆的水下考古在国际上也具备一定的水平，尤其是浊水考古有很多其他地区缺乏的实务经验，此对于水下考古环境能见度也不佳的台湾，值得参考借镜。

(二)发展台湾水下考古的特色

距今5,000至6,000年前开始分批进入台湾的南岛语族、渡海来台的汉人，

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① 胡念祖著：《水下文化遗产立法草案研议》，中山大学(台湾高雄)海洋政策研究室，行政院文化建设委员会委托研究计划报告书，第47～49页。

② 吴祥坚著：《美国佛罗里达珊瑚礁屿群国家海洋庇护区之经营管理》，2008年9月23日海洋国家公园管理处报告，第52页。

以及 16 世纪大航海时代开始，西方海上强权国家包括英国、西班牙、葡萄牙及荷兰等纷纷寻找“亚洲地中海”的贸易市场及基地，17 世纪的澎湖与台湾先后在当时国际贸易竞逐的舞台扮演重要的淡水补给站及基地角色，也是中国与日本贸易的中介点。除了澎湖风柜尾的红毛城、台南的安平古堡与热兰遮城等古迹与遗址外，透过水下考古的发掘，将更能为这段激烈的海上争夺史揭开更丰富的神秘面纱。

自古迄今，台湾这个弹丸之地便是个进可攻、退可守的重要据点。明末郑芝龙拥有 1,000 艘帆船而称霸南中国海。郑成功自澎湖退守转征台湾时则动员了 300 艘船只与强大海军，其子郑经更利用台湾作为国际贸易的中心，透过英国进口鎗炮及火药来巩固抗清基地。19 世纪英法联军战后，台湾的基隆、淡水与台南、高雄被迫开放通商，各国纷纷在台湾设置洋行，继早年出口的鹿皮外，台湾的茶叶、稻米、蔗糖及樟脑此时也借由出口转运至世界各地。移民渡台开垦也带来不同的生活信仰与文化。黑水沟的暗潮汹涌，船只常发生船难，因此海神妈祖等信仰在台湾及中国南方特别兴盛，“唐山过台湾 心肝结归丸”为时人最贴切的心情写照。日本统治台湾之初，一些不愿归化日本籍的汉人纷纷渡海回到大陆原乡。日治时期，则因在台湾本岛受教育及工作机会的不平等，一些文艺之士纷纷选择赴日本留学。无数“留下，或者离开”的人生剧目，来回在波涛汹涌的海域反复上演。过尽千帆，古今多少事，俱覆浪涛中。其中 1943 年二次大战期间，从日本出发开往基隆的客轮“高千穗丸”号，在基隆外海为美军鱼雷击沉，船上许多留日青年永远无法再登陆福尔摩沙这个宝岛，这些历史与过往，悠悠地记录了台湾那段流离岁月的记忆。

臧振华先生在《水下考古在台湾：资源、课题与机会》一文中曾提出可从台湾与大陆旧石器时代的关系问题、早期新石器文化的来台路径和遗址分布问题、新石器时代台湾海峡两岸的互动问题、华人经营台湾的年代问题、澎湖海域作为贸易航线的问题，以及台湾与中国海外贸易史等相关课题来做研究。[1] 相信台湾的水下考古未来在更多领域专家的投入后，将能够从调查发掘技术、研究课题以及保存维护与推广等不同层面进一步建构台湾水下考古的特色。

四、发展国际合作保护水下文化资产

《水底文化遗产保护管理宪章》第 15 条有关国际合作内容特别提到国际合作对于水下文化资产的保护与经营管理是必要的，并应在调查与研究高标准的关注下来推动。国际合作应该被鼓励在水下文化资产之考古及其他专业方面，

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① 臧振华：《水下考古在台湾：资源、课题与机会》，载于《2008 水下考古国际研讨会》成果报告书，第 7～10 页。

专业人员的交换计划应被视为传播最佳执业的一种手段。《水下文化遗产保护公约》的第19条合作与讯息共享条文中，也特别强调国际间应在水下文化资产保护与管理相关的工作包括调查、发掘、保存研究和展示等展开合作，并分享相关讯息及防止非法打捞等破坏行为。文建会文资总处自承接业务以来便积极朝此目标推动，主要成果整理如附录表1。

五、结论与建议

水下文化资产保存工作必须结合官方与民间的力量，建立跨领域、跨部会之协商平台。台湾起步虽晚，却也因目前尚未有重大的沉船遗址发现而有机会按部就班地依据所拟定的阶段性计划持续推动不同面向的相关工作。文建会文资总处2008年所委托之中央研究院臧振华研究员及其团队在台湾澎湖海域初步已探得一些目标物，待有具体发现后，将联合跨领域专家学者的力量，以及整合近年所培训的水下考古种子人才与结合民间团体的力量，共同推动相关工作。此外，将依据研究计划所提出的建议制定长期性之策略及制度，未来在国际交流方面，也将持续邀请具经验之国外专家来台办理调查、发掘、研究及人才培训合作，文资总处于2009年则办理了潜进历史—水下考古特展，未来更计划延伸国际触角，主动积极地对外输出台湾水下文化资产保存的本土经验。

在台湾要具体推动水下文化资产保存，首先需要将文化资产保存纳入整个政府重要的政策并受到重视。从政府的观点而言，水下文化资产必然是地方重要的文化资产，就台湾观光发展而言，原地保存且无污染的水下文化遗址或是保护区将是重要的观光资源，并提供最佳的休憩场所。从人民的立场而论，水下丰富的资源是让大众有机会去缅怀历史展望未来的凭借。水下文化资产保存政策的制定，在整个保存工作中扮演重要的角色，适时地加以制定可以为保存工作提供符合需求且一致性的原则，保存政策的规划与形成必须先分析它的特质与内容，进而探讨其合法化，以及政策执行与绩效评估。在四面环海的台湾，除了积极发挥海洋资产所带来的价值与机会，并可经由海洋文化的形塑与推广，以及深耕海洋科学研究、培育海洋文化资产相关优秀人才，养成台湾各领域人士对于海洋社会人文领域的关怀与情操；此外，明了海洋权益与社会发展之关系，强化海洋政策与组织机制，以及建立海洋法政基本观念与落实海域执法和维护海上安全等，都是今后推动水下文化资产保存所不可偏废的重点工作。

政策制定是一件复杂且需要持续修定的工作，有赖考古、法律、历史、艺术及科学人才的跨领域合作。目前政府文化部门在保存水下文化资产的政策目标下，由负责执行的文资总处依据本文前述的发展策略方向订定有中长程的施政方案与计划，虽然在组织编制及经费方面相较于其他地区仍明显不足；然而承接是项工作在短短的三至四年期间，在政府、学界与民间以及国际专家团队的持续

合作下，台湾的水下文化资产保存工作已经扬帆待发。基础及全面性普查为重要工作，但未来如何借由发现重要沉船遗址或其他水下文化资产的机会，善加运用媒体广大营销的力量来争取各界甚至世界的支持，也是不可轻忽的。台湾，被方向不同的洋流拉扯着，地理位置让它有绝佳的现代化机会，历史的命运却使得它走了多年曲折崎岖的道路，[①]同时也蕴育了丰富而多元的海洋文化。台湾在水下文化资产保存的起步虽然较晚，只要方向正确，必能走在对的道路上。

六、附　录

表 1　文资总处水下文化资产保存国际交流合作大事纪

（李丽芳制表）

2005/11—2007/10 由原文建会所属文化资产保存研究中心筹备处承接内政部遗址及教育部古物业务

2007/10—迄今 由文建会文化资产总管理处继续负责相关业务

类别	时间	国家	内　容	人员	成　果
考察交流	2005/09/11—09/25	法国	拜会法国文化部及参观法国马赛水下考古中心、南特的 ARC' Antique Lab 水下考古文物修复实验室、Grenoble 市的 ARC' Nucle-art 核能考古技术部门	李丽芳	获得台法趋势奖助赴法考察及洽谈合作
技术咨询	2006/05/14—/0515	法国	于澎湖马公港进行疑似古沉船遗址水下实地探勘及水下考古技术咨询	法国 Arc'Antique 水下考古修复专家 Jean-Bernard Memet 先生	来台探勘及提供水下考古技术咨询
国际研讨会	2006/05/19—/05/20	法国及日本	参加研讨会并交流出水遗物保存修复方法	法国 Jean-Bernard Memet 先生、日本大和智教授、村田忠繁先生	交流出水遗物保存修复方法
技术咨询	2006/09/08—09/13	法国	于澎湖马公港进行疑似古沉船遗址水下实地探勘及水下考古技术咨询	法国马赛水下考古研究中心（DRASSM）主任玛西	来台探勘及提供水下考古技术咨询
考察交流	2006/09/25—10/06	美国联邦政府国家公园局及商务部国家海洋暨大气总署	实地访察美国水下文化资产保护体制	胡念祖教授及蔡长清富教授与林郁玲女士	交流并邀请专家来台办理国际会议

① 殷允芃等著：《发现台湾》，台北：天下杂志，1992 年版，第 104 页。

续表 1

类别	时间	国家	内容	人员	成果
国际研讨会	2006/11/15—11/16	澳洲及美国	来台出席水下文化资产保护国际圆桌会议	澳洲国家大学Lyndel Prott教授与Patrick Joseph O'Keefe教授，美国商务部国家海洋暨大气总署国家海洋局海洋遗产计划经理John Broadwater、美国海洋考古协会执行长James Delgado博士	研讨国际相关法令及交流经验
人才培育	2007/02/26—03/10	澳洲、日本、菲律宾及英国等专家	水下考古种子人才培育课程专业课程训练	澳洲Jeremy Green、Corioli Souter、Jon Carpenter、日本林田宪三理事长、菲律宾Rey Santiego及英国Sarah Ward等专家	包括潜水技术及水下考古专业概念、理论、方法和技术，以及出水文物维护和相关法规制度等课程的训练。
技术咨询及人才培训与推广教育	2007/03/18—03/29	法国	台法合作水下文化资产保存维护人才培训课程	法国马赛水下考古中心Mr. Michel L'HOUR、Mr. Yves BILLAUD、Mr. Frédéric LEROY、Mrs Olivia HULOT、Mrs ZHAO Bing、Mr. Teddy SEGUIN、Mr. Denis METZGER	协助于澎湖马公港疑似沉船遗址调查及在台南办理台法合作水下文化资产保存维护人才培训课程
保存国际研讨会暨工作坊	2007/06/27—06/29	日本及瑞典	出水文物紧急维护与保存国际研讨会暨工作坊	日本泽田正昭教授、今津节生室长及瑞典Emma Hocker专家	讲授海底出土船体的保存、出水铁器文物之保存处理技术；九州岛岛岛博物馆今津节生室长讲授考古遗物的最新保存技术、出水木质文物之保存处理技术；瑞典国立海洋博物馆Vasa号保存科学部Emma Hocker女士分享“瑞典瓦萨号战舰之保存与维护”等实务经验。
国际水下考古培训交流	2007/06/29—07/24	法国	在法国文化部及法国在台协会、马赛水下考古中心等协助下参加法国西北部沈船遗址发掘培训	由文建会推荐文资总处蔡育林及中研院史语所计划助理王瑜参加	参加法国提供国际水下考古培训

续表2

类别	时间	国家	内　容	人员	成　果
签署台法行政协议书	2007/07/23	法国	与马赛水下考古中心签署台法行政协议书	由文建会前副主委吴锦发及文资总处施国隆副主任赴法签署	进一步落实台法系列交流合作
考察交流	2007/12/16—12/25	中国	参观泉州湾古船博物馆、广东阳江博物馆与南海一号遗址及海上丝绸之路博物馆	文资总处施国隆副主任、李丽芳组长、中研院史语所臧振华先生及计划助理王瑜	拜会中国国家博物馆水下考古负责人及参观海陵岛的水下考古培训基地
参观及出席国际会议	2008/07/05—07/16	英国	出席英国第三届国际水下考古大会(IKUWA3)及参观Mary Rose号沉船及其博物馆与实验室以及Royal Nautical博物馆	中研院史语所臧振华先生及计划助理王瑜参加	进行国际交流
国际研讨会	2008/12/05—12/06	英国、荷兰、澳洲、美国、中国	2008水下考古国际研讨会	邀请英国、荷兰、澳洲、美国、中国大陆以及台湾参与重要水下考古遗址调查与发掘学者专家	以专题演讲及实务案例研讨的方式分享水下考古发展、水下文化遗产保存与管理、科技应用、田野技术及案例研究等议题之探讨与经验
考察交流	2008/12/13—12/19	澳洲	参观、拜会南澳国家海事博物馆、南澳博物馆、西澳海事博物馆、西澳沉船展示馆博物馆、西澳历史与艺术博物馆、潜艇展示场、海事技术学院	文资总处郑明水、邵庆旺	进行国际交流
国际展览	2008/10月—12月	办理“潜进历史”水下考古特展			进行国际交流及提高公众认识
考察交流	2009/12	日本	南澳洲参观鹰岛沉船发掘展示及与日本水中考古学会交流	李丽芳、周志明	进行国际交流

（责任编辑：曹　旎）

Underwater Cultural Heritage Conservation Policy and International Cooperation in Taiwan

Lee-fang Li *

Abstract: The underwater cultural heritage by its very character is an important international resource. A large part of the underwater cultural heritage is located in international setting and derives from international trade and communication. If managed sensitively, underwater cultural heritage can play a positive role in the promotion of recreation and tourism. Policy makers should enhance the appreciation and understanding of underwater cultural heritage and promote international cooperation. This article discusses conservation policy and international cooperation of underwater cultural heritage in Taiwan.

Key Words: Conservation; Underwater cultural heritage; Underwater archaeology; International cooperation

Ⅰ. Preface

In recent years, more and more underwater cultural heritage has been excavated and the recorded information has been increasing, which not only indicates the increasing importance attached to underwater cultural heritage[①], but also implicates the heavy responsibility for protecting it. There is a wide variety of underwater cultural heritage, including underwater archaeological remains in inland waters, remains resulting from land subsidence and remains of shipwreck, etc. Among those the investigation and excavation of shipwreck remains

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① Also called "水底文化遗产" or "水下文化遗产". Except for quotations from other documents, "水下文化资产" (Underwater cultural heritage) is used in this article to match the relevant wording in the current cultural heritage conservation law in Taiwan.

have drawn the most extensive attention. Places where shipwrecks are most concentrated are mainly regions with developed sea transportation in ancient times, such as the Mediterranean Sea, and sea areas of sea routes from Europe to North America, from China to Southeast Asia and from China to Japan. Inland underwater archaeology is of great significance to the change and understanding of the territory. Important examples are the ship of Southern Song, sunken for over 700 years and salvaged in 1971 in Houzhu Port of Quanzhou Bay in Mainland China, and the Alpine Great Lakes of France, among others.

In view of the increasingly frequent commercial exploitation of underwater cultural heritage and its serious destruction over many years, the UNESCO deemed it necessary to codify and progressively develop rules for the protection and conservation of underwater cultural heritage in conformity with international law and practice. The main objective of the Convention on the Protection of the Underwater Cultural Heritage, which took effect on January 2, 2009, is to establish and strengthen international cooperation with regard to the protection of the heritage. The Convention clearly defines the underwater cultural heritage as all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously for a least 100 years such as sites, structures, buildings, artifacts and human remains, vessels, aircraft, other vehicles, together with their archaeological and natural context, etc. The Convention points out that underwater cultural heritage is an integral part of the cultural heritage of humanity and the responsibility for protecting it rests with all States, and stresses that the Convention aims to ensure and strengthen the protection of underwater cultural heritage. Responsible non-intrusive access to observe or document in situ underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management, or leads to commercial exploitation of such heritage. Surveying, excavation and protection of underwater cultural heritage necessitate the availability and application of a high degree of professional specialization and the use of advanced techniques and equipment. Accordingly, the Convention especially recommends that State Parties shall cooperate and assist each other to communicate and provide training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology related to the study and protection of underwater cultural heritage.

Ⅱ. Policy orientation of conservation of underwater cultural heritage

As the conservation of underwater cultural heritage involves an extensive network of interested parties, policy making is an indispensable foundation. Policy means direction or principle for action. In the case of Taiwan, all needed policies could not be formulated within short term at the inception of the conservation of underwater cultural heritage. Thus some principles were set with reference to related development experience overseas, including the objectives of policy making, contents of demand, objects and methodology of conservation, among others. The success of conservation depends on policies, while policies can hardly be planned and completed independently, requiring future participation of experts from various fields in Taiwan. ①

A. *Objectives of policy making and objects of conservation*

Located on the boundary of the largest continent and the largest ocean in the world, Taiwan is a zone where Eastern civilization contacts Western civilization, and also where continental civilization converges with oceanic civilization. Many trade porcelain works from the Song, Yuan, Ming and Qing dynasties have been discovered in Taiwan and the Pescadores. In the Thirteen Hongs of North Taiwan, porcelains and Tang and Song coins, as well as ironware and beadings from Southeastern Philippines and Sarawak have been excavated, which demonstrate frequent sea trade in the so-called "Mediterranean Sea in Asia" between South China Sea and Taiwan, the Pescadores, Southeast Asia, Japan and Korea. Living by fishing, engagement in trade and commerce, migration and pioneering or wars for sea sovereignty have kept occurring repeatedly in this vast sea area. The inland underwater archaeology includes important underwater cultural heritage such as aquatic ancient waterway sites from the Dutch colonial period discovered in Madou Town of Tainan County and underwater site in the Sun Moon Lake and Kivulan Sites discovered in the river way of Yilan County.

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① Zu-Di Li of the Maritime Affairs Research Institute of the National Sun Yat-sen University has been writing on the policy research of conservation and re-utilization of underwater cultural heritage in Taiwan as his master's thesis.

As the conservation, maintenance and promotion of underwater cultural heritage have become a topic which draws worldwide attention, the Headquarters Administration of Cultural Heritage of the Council for Cultural Affairs has started to actively promote the long-term underwater cultural heritage survey from the Pescadores to Taiwan sea area in 2006. These activities include formulating laws and regulations to protect underwater heritage from destruction or looting, assisting research by collection of historical literature, setting up specialized laboratories and maintenance workshops to protect and maintain cultural relics excavated from underwater, training professionals in underwater survey, photography, excavation and maintenance. At the same time, active efforts have been made to enhance the public's awareness of ocean cultural heritage, in particular, the international concepts of "in situ protection" and "preventing looting."①

B. Contents of policies and method of promotion

1. Setup of competent authorities and establishment of legal system

According to Article 3 of the Charter for the Protection and Management of Archaeological Heritage adopted in 1990, the protection of archaeological sites shall be deemed as a moral obligation of all humans, as well as a collective public responsibility. This obligation must be affirmed by appropriate legislation and shall also be sufficiently funded.② Given the experience of various countries, the conservation of underwater cultural heritage is mostly a lengthy and complicated process which takes several decades. In many countries, accidental discovery of sunken ships or relics by fishers or divers preceded research and preparation of legislation of related government department, setup of competent authorities, and planned and purposeful investigation, excavation and administration for protection of underwater cultural heritage.

a. The competent authorities for underwater cultural heritage and the importance of setting up a special agency

Before the international legislative proceedings are completed for the Con-

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① Lee-fang Li, ed., Exploration of Underwater Cultural Heritage in Taiwan, *New World of Maritime Taiwan: A Special Collection of Results of Taiwan-French Underwater Cultural Heritage Investigation and Personnel Training*, pp. 17-21.

② Chao-Qing Fu, *International History Conservation and Historic Site Maintenance: Charter, Declaration, Resolution and Suggestions*, Tainan: Taiwan Architecture Cultural Asset Press, 2002, p. 54.

vention on the Protection of the Underwater Cultural Heritage, several international agreements or documents have been completed to protect underwater cultural heritage. They include the Recommendation on International Principles Applicable to Archaeological Excavations[①] adopted by the UNESCO, the United Nations Convention on the Law of the Sea in 1982 and the Charter on the Protection and Management of Underwater Cultural Heritage of the International Council of Monuments and Sites (ICOMOS) in 1996. Article 22 of the Convention on the Protection of the Underwater Cultural Heritage has specified that in order to ensure the proper implementation of this Convention, States Parties shall establish competent authorities and communicate to the Director-General the names and addresses of their competent authorities related to underwater cultural heritage. This procedure has the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education. Hence, it is very important to establish competent authorities for underwater cultural heritage.[②]

Currently, the systems for protecting underwater cultural heritage in various countries are not entirely consistent. In the United States, the National Cultural Resource Center of the National Park Service and the National Ocean Service under the National Oceanic and Atmospheric Administration are responsible for underwater cultural heritage and ocean reserves.[③] France is the second largest country in underwater archeology. Shipwrecks were discovered successively in 1980, and related regulations were formulated in 1989. Submarines and sonar technologies, and recently robots, have been used to assist underwater archeology in France. Among the 12,000 shipwrecks discovered by far, 2,500 have been determined to be shipwrecks before the Second World War. Furthermore, the age of 1,100 shipwrecks was determined by the cultur-

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① The geographical scope defined in *Recommendation on International Principles Applicable to Archaeological Excavations* includes the seabed subsoil of inland waters or territorial sea.

② Ming-Zhong Lin, *Revelation of Exploration of the Sunken World: When Indiana Jones Encountered Ocean*, Taipei: Sanyi Cultural Co. Ltd., p. 363.

③ Nien-Tsu Alfred Hu, *Site Visit and Survey of Underwater Cultural Heritage Protection System in the United States*. Report of Research Program Authorized by the Maritime Policy Research Office of Sun Yat-sun University (Taiwan) and Council for Cultural Affairs of the Executive Yuan.

al relics on the ships such as coins and kettles, to discover the cultural developments of different regions and the trends of sea trade.

Under the supervision of the French Ministry of Culture, the Direction Régionale des Affaires Sanitaires et Sociales (DRASS) was established in 1966 to assume responsibility for underwater archeology in France including overseas provinces. In the beginning, there were two underwater departments under DRASS—one focusing on freshwater rivers and lakes and the other on undersea resources; the two were merged in 1996. The DRASS was in charge of all affairs of underwater cultural heritage within the French territorial waters and was the first official organization for underwater cultural heritage that operated independently. The center with over 40 years' history is responsible for coordination of affairs concerning underwater cultural heritage in French, and it has to deal with the related administrative affairs inside and outside France. Its primary work includes registration of underwater cultural heritage, scientific research of underwater cultural heritage, formulation of research directions for underwater cultural heritage, approval and issuing permits for application of non-governmental organizations for underwater excavation, protection of underwater cultural heritage and responsible for training underwater archeological professionals from France and other countries worldwide. ①

In mainland China, the State Administration of Cultural Heritage authorizes the Underwater Archeological Research Center under the Museum of Chinese History (the predecessor of the National Museum of China) to manage underwater archeology. Underwater archeological work stations have been set up in Yangjiang of Guangzhou Province, Qingdao of Shandong Province and Ningbo and Zhoushan of Zhejiang Province. The differences of current systems for underwater cultural heritage protection in different countries tend to give rise to disputes. Therefore, the Convention on the Protection of the Underwater Cultural Heritage especially stresses that international disputes shall be settled through peaceful negotiations. ②

Since the promulgation of the Cultural Heritage Conservation Law in Taiwan, confusion has frequently arisen in clarifying responsibility and authority because cultural heritage affairs were dispersed in various departments such as

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① *See* Zu-Di Li, *The Policy Research of Conservation and Re-utilization of Underuater Cultural Heritage in Taiwan*, the Maritime Affairs Research Instituts of the National Sun Yat-sen University, master thesis, p. 61.

② Convention on the Protection of the Underwater Cultural Heritage, Article 25.

the Interior Department, the Education Department, and the Council for Cultural Affairs and the Council of Agriculture. In 2005, on the occasion of the fifth amendment of the Cultural Heritage Law, the authority for cultural affairs was centralized. Except for natural landscape, which is a prerogative of the Council of Agriculture, the cultural heritage affairs of antiques, remains, historic sites, historic buildings and settlements, traditional arts, folk customs and relevant cultural heritage and cultural landscape are managed by the Council for Cultural Affairs. Competent authorities, that is, the Headquarters Administration of Cultural Heritage of the Council for Cultural Affairs, were set up by the Council for Cultural Affairs in October 2007 according to Article 11 of the Convention on the Protection of the Underwater Cultural Heritage to promote the perseveration, education, promotion and research of cultural heritage. The management and protection of underwater cultural heritage defined as antiques, remains, historic sites, historic buildings and settlements, or cultural landscape, the competent authorities shall register and specify their value and current conservation conditions according to the Cultural Heritage Conservation Law. This work is within the responsibilities of the Headquarters Administration of Cultural Heritage of the Council for Cultural Affairs according to the Cultural Heritage Conservation Law.

Given the experience in different countries, the priority tasks in the development of underwater cultural heritage in Taiwan are specifying the obligations and rights of the competent authorities and setting up a dedicated agency to actively manage the heritage with more adequate funding and professional human resources.

b. Promotion of legislation of underwater cultural heritage conservation

The top priority in developing underwater cultural heritage conservation is to formulate relevant laws and acts as guidelines for the competent authorities' implementation of their rights and responsibilities. In France, in addition to the Law on Protection of Historic Buildings in 1913 and the Law of Protection of Natural Beauties in 1930, laws on protecting oceanic cultural heritage have been formulated, which have been subject to gradual amendment with international developments to meet practical demand. In mainland China, laws relevant to underwater cultural heritage protection include the Law on the Protection of Cultural Relics implemented in 1981 and the Regulations on the Protection of Underwater Cultural Relics in 1989. With the development of the international situation in recent years, the relevant regulations and detailed rules have been amended according to the newly-amended Law on the Protection of Cultural

Relics, including regulations on permission of archeological explorations and excavations of underwater cultural relics. Meanwhile, relevant work is to be done in line with the spirit of the UNESCO's Convention on the Protection of the Underwater Cultural Heritage, which facilitates the protection of underwater cultural heritage and further specifies the jurisdiction of underwater cultural heritage in some disputed waters, so as to put an end to the pillage and excavations by other countries.

Research on legislation of protection of underwater cultural heritage has become very popular in recent years in Taiwan. ① Research work is focused on translation and introduction of the legal systems and current developments in countries like the United Kingdom, France, Australia and mainland China as well as international laws, and scholars also suggest setting domestic laws according to international theory and practice. The Cultural Heritage Protection Law, as the current basis for law enforcement of underwater cultural heritage conservation, still takes the Cultural Heritage Conservation Law as the basis for implementation, which is influenced by concepts in the land-based areas, without clear and detailed specification on the cultural heritage in the water areas. ②(the footnote is a mess, needs to be clarified by the author) International organizations are gradually developing and enriching the legal system on the

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① Including Yu-Ci Lin, *Protection and Management of Underwater Cultural Heritage from the Perspective of International Practice*; Ming-Zhe Wei, *Studies of Protection and Management of Under Water Cultural Heritage by Legislation*; and Ming-Zhong Lin, *Studies of Underwater Archaeological Activities and Underwater Cultural Heritage Protection Legal System*; Ying-Guan Li, *Studies of Establishment of Marine Conservation Area in China*; and Kuen-Chen Fu, *Protection of Underwater Cultural Heritage by International Law: analysis of the* 2001 *UNESCO Convention on the Protection of Underwater Cultural Heritage*.

② According to the data listed in cultural heritage of the law database of the Council for Cultural Affairs of the Executive Yuan, in terms of law, "underwater" (水下) has not appeared in any of the 104 articles in the current Cultural Heritage Conservation Law. The meaning of the phrase "underwater cultural heritage" is implied in relevant articles; in terms of regulations and orders, wording of "including land and underwater" is expressly indicated in Article 21 of the Detailed Rules for Implementing the Cultural Heritage Conservation Law: the ownership of any ownerless ancient relics including on land and underwater shall follow the provisions in the property law; Article 2 of the Measures for Examination of Qualifications for Site Excavation sets out that "these measures apply for site excavation of the territory and territorial seas of the Republic of China; in addition to the "Ⅱ. the tasks of the committee are as follows: (Ⅵ) review of major issues concerning underwater archaeology and other relevant issues concerning historic sites" in the Key Points of Setup of the Site Review Committee, the basics outline of law and regulation on "underwater cultural heritage" are outlined.

protection and management of underwater cultural heritage or archeological and historic relics discovered in oceans. By contrast, the legal system in Taiwan in terms of the conservation, protection and management of underwater cultural heritage appears weak. Hence, the Headquarters Administration of Cultural Heritage of the Council for Cultural Affairs attached great importance to this issue since it took charge, and immediately entrusted Professor Nien-Tsu Alfred Hu of the National Sun Yat-sen University to investigate the absence of current laws and regulations in Taiwan. The administration aimed at adapting the Convention on the Protection of the Underwater Cultural Heritage to the domestic law in view of international experience. It also planned to complete the Underwater Cultural Heritage Conservation Law (Draft). The administration was to specify the following issues: "objects of protection" (definition of underwater cultural heritage), "sea areas involved in the rights and contents of rights," "clarification of ownership," "protective measures" (including principle of in situ protection, designation of protective zone, principle for recovery of remains and conservation and maintenance procedure, and exhibition, promotion and reutilization etc.), "discoverer's obligation and reward," penalties, etc.

As the contents of the draft mostly draw on overseas experience, meetings shall be held for further discussions to reach consensus on issues such as the relationship with the Cultural Heritage Conservation Law and how to localize the law. At present, the Legal System Department of the Headquarters Administration of Cultural Heritage is responsible for promoting relevant follow-up tasks of legislation in an attempt to establish a special law on underwater cultural heritage. ①

c. *Budgeting of funds for conservation of underwater cultural heritage*

Seabed survey, prospecting and excavation require a huge amount of funds. I addition to research vessels, the requirements include equipment for advanced prospecting, diving, conservation, repair, management and maintenance of recovered remains. Furthermore, training of personnel for underwater archeology requires the substantial funding on a long-term basis. However, various countries tend to experience financial and technological constraints in implementing underwater heritage conservation. For example, in France, the annual budget of the DRASS is equivalent to TWD 130 million. Besides the an-

① Nien-Tsu Alfred Hu, Discussion on Legislation Draft of Underwater Cultural Heritage and Draft Plan for Underwater Cultural Heritage Law.

nual budget, this Center is also funded by the local government and some projects are sponsored by the business circles. In the past, the government in mainland China did not attach much importance to the underwater archeology field, providing a fund of only several hundred thousand yuan each year. Now, the fixed annual funds for underwater archeology in mainland China have gradually risen to over RMB 10 million, and some advanced equipments have been purchased in recent years. In Taiwan, the Headquarters Administration of Cultural Heritage sets aside about TWD 20 million every year for underwater cultural heritage exploration, collection of historical documents and establishment of database, personnel training, exhibitions, promotion, publishing, international cooperation, and introduction of laws and decrees. In addition, the administration purchases relevant equipment for prospecting, conservation and repair of recovered remains every year. When there is any significant discovery in underwater archaeology, efforts will be made for securing special funds for follow-up work.

2. Promoting underwater cultural heritage survey and establishing database

Article 6 of the 1996 Charter on Protection and Management of Underwater Cultural Heritage emphasizes that all members of the underwater heritage investigation team must have appropriate qualifications and experience, and all investigations must be conducted under the guidance and monitoring by famous underwater archaeologists with recognized qualifications and pertinent experience. [①]

a. Survey of underwater cultural heritage and establishing underwater archaeological map

(a) Importance of survey

In Australia, the National Shipwrecks Database (NSD) has been established to support the conservation and research of underwater cultural heritage. Until now, 7,665 Australian shipwrecks have been registered with this system. For example, 600 suspected shipwreck sites have been discovered through document research and investigation in the Adelaide region where the South Australia Museum is located, and over 200 sites have been confirmed with presence of shipwrecks after actual prospecting. According to French data on underwater archaeological cultural heritage, there are 20,000 marked sites,

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① *See* Lee-fang Li ed., Exploration of Underwater Cultural Heritage in Taiwan, *Nesw World of Maritime Taiwan: A Special Collection of results of Taiwan-French Underwater Cultural Heritage Investigation and Personnel Training*, p. 71.

which are not necessarily suspected shipwrecks, but all have potential research value. Due to labor, financial and other issues, not all marked points are probed. By far, 900 points have been explored, and 300 points have been excavated. The related information is provided only to research personnel who have applied for the purpose of research.

Mainland China launched underwater cultural heritage survey in coastal Fujian and Guangdong areas as well as territorial seas near Paracel Islands in the mid—1980s. As a result, over 100 suspected sites have been discovered. In 2007, the underwater cultural heritage investigation of inland seas, rivers and lakes was listed as a special promotion project in the third national cultural heritage survey, which was also the first national survey of underwater cultural heritage in mainland China. Accordingly, the survey has started in many provinces such as Guangdong, Hainan, Fujian, Zhejiang, Shandong and Liaoning. In addition, with the implementation of the Grand Canal protection project and the South-to-North Water Diversion Project, some riverside provinces have also started underwater cultural heritage surveys of inland waters in order to prevent damage to cultural heritage caused by project development and construction. In France, the importance of such preventive archaeology is far more proactive and more important than rescue archaeology. ①

For the purposes of underwater cultural heritage survey, we should establish relationship with fishermen and partnership with the navy, the customs, coastguards and police administration. For example, at a time of survey, the cultural heritage department in mainland China often cooperates with multiple departments, such as the navy and administrations of ocean, national land resources, science and technology and oil prospecting. Such cooperation not only helps locate underwater sites but also helps to define them as underwater cultural heritage conservation entities or underwater cultural heritage conservation areas according to their designated value. The cultural heritage department also adopts measures such as emergency protection according to the actual conditions of underwater cultural heritage.

① Lee-fang Li, *Report on Investigation into Preservation and Maintenance of French Cultural Heritage*, the Maritime Affairs Research Institute of the National Sun Yat-sen University, master thesis, p. 9.

(b) Order of priority in survey

Comprehensive survey requires a large amount of labor and financial resources, so research planning must precede the preparation of implementation strategy. In France, for instance, underwater archaeology started to develop from the Mediterranean Sea, which has high visibility and small waves. The scope of underwater archaeology then expanded to the coastal area of the Atlantic, where it is very difficult to develop underwater archaeology due to its very low visibility and tides and sea waves as high as ten meters. The coastline of Taiwan is over 1,000 km long. [①] Underwater archaeology originated mainly from three explorations and trial excavations conducted from 1995 to 1998 by the National Museum of History following instructions from the Department of Education after Mr. Jiajin Huang retrieved shipwreck remains in the Penghu Sea Area. The Department of the Interior promoted the "Taungtha Sea National Park Program" after Dr. Jeremy Green of the WA Maritime Museum provided information about the sinking of seven ships of different ages such as the Portuguese ship in 1609 in Taungtha as well as the sinking of several unknown merchant ships which were to be verified. Professors Jinyuan Liu and Yangyi Chen were authorized to conduct underwater exploration in the Taungtha Lagoon with sidescan sonar and underwater location devices. The two scholars inferred that ships from various countries often passed the South Sea, crisscrossing the waters near Taungtha, where there should be rich underwater cultural heritage.

The comprehensive underwater cultural heritage survey in Taiwan started from the "Plan for Penghu Magong Port Ancient Shipwreck Investigation and Excavation and Training of Professionals for Underwater Heritage Research and Conservation" conducted by Mr. Cheng-hwa Tsang with the authorization of the Preparatory Office of the Taiwan Cultural Heritage Conservation Research Center of the Council for Cultural Affairs (currently consolidated into the Headquarters Administration of Cultural Heritage) in 2006. The investigation and research plan currently starts from the Penghu Sea Area with rich historical, cultural and archaeological information. The first three-year phase of the project is to establish the Taiwan underwater archaeology priority investigation sensitive zone decision-making support system, and suggest future de-

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① According to the record in Wikipedia, the main island of Taiwan is about 395 km long from north to south and about 144 km wide from east to west; the coastline surrounding the island is about 1,139 km, and about 1,520 km including the Pescadores.

velopment of underwater cultural heritage conservation. [1] For the promotion of the plan, the Headquarters Administration of Cultural Heritage rents research vessels and work stations needed for the survey and secures annual budget to purchase instruments, such as magnetometer, sidescan sonar and underwater positioning system, in the hope of systematically construct an underwater cultural heritage survey system.

(c) Building and application of underwater archaeological map

The DRASS in France wished to faithfully present the maritime history, but the development of maritime history could not be clearly seen based on historical materials alone. Therefore, the Center was planning to develop underwater cultural heritage map twenty years ago, but did not start until 2005 with the support of computer science. At present, the Taiwan underwater cultural heritage conservation, maintenance and development plan promoted by the Headquarters Administration of Cultural Heritage also includes the "Research Program for Underwater Cultural Heritage History in Sea Areas near Taiwan" entrusted to Associate Researcher Shi-Yeoung Tang of the Research Center for Humanities and Social Sciences. This program reconstructs underwater archaeological map and creates basic database for comparing underwater heritage archaeological investigation and excavation results through interviews with fishermen, retrieval of documents in the Department of National Defense and collection of historical documents such as documents in the palace and the Privy Council of the Qing Dynasty. Furthermore, the Headquarters Administration of Cultural Heritage planned to gradually consolidate the data from investigations from the "Plan for Establishing the Geological Information System for Archaeological Sites in Taiwan," assigned to Researcher Yijun Fan and Yichang Liu, as the basis for drawing underwater archaeological map in the future.

Given development experience in France, a systematic cultural heritage database will be established after data scattered in various places are collected and arranged in Taiwan. The data includes: heritage site, description, chronology, pictures, sites of cultural heritage conservation, archival sources of related relics and research references, etc. The research program will re-use geographical information system to further build relevant information into underwater cultur-

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[1] Cheng-hwa Tsang, *Investigation and Excavation of Penghu Magong Port Ancient Shipwreck and Personnel Training Plan for Underwater Heritage Research and Conservation Science*, pp. 2-3.

al heritage database and draw underwater archaeological map, to research inquiry and application. The future promotion of the "Research Program for Underwater Cultural Heritage History of Sea Areas near Taiwan" may draw on the French experience to strengthen collection of ancient maps, to grasp the landform and sea area conditions in the past. Dangerous spots and sea area conditions can be grasped and places where sea disasters may occur can be identified through comparison with maps used by the modern navy. In addition, the program can further expand document collection and studies of historical materials beyond the scope of archives, and might use technological positioning to mark definite positions on underwater archaeological maps. Related data excavated by Penghu General No. 1 may be employed as testing data for system building and map drawing.

(d) Establishment of database and its management and application

Most foreign countries including France and Australia devote substantial resources to the establishment of underwater cultural heritage database, including environmental impact assessment reference before relevant public construction and project development. In terms of academic application, the database may be used to evaluate which area or type of underwater cultural heritage is worthwhile developing, which research is adequate or inadequate. The database is used to establish research direction, reduce repeated waste of academic resources and avoid interference with or destruction of underwater cultural heritage. In terms of increasing international cooperation, from ancient time to the present, the creation of database is of great importance to all countries in the so-called "Mediterranean Sea in Asia" between South China Sea and Taiwan, Penghu, Southeast Asia, Japan and Korea.

The Headquarters Administration of Cultural Heritage authorizes the Academia Sinica to carry out the "Program for Establishing the Geological Information System for Archaeological Sites in Taiwan" for the purposes of establishment, management and use of database. Future long-term development is to be coordinated by the center itself like the DRASS in France to assess the accuracy and completeness of data and as maintenance authority.

3. Underwater archaeological investigation and excavation technology development and international cooperation

Underwater cultural heritage scientific reconnaissance, excavation and conservation require advanced expertise and technical equipment, so the UNESCO suggests that State Parties carry out cooperation through the Convention on the Protection of the Underwater Cultural Heritage. They also shall carry out

communication and training for underwater archaeology, underwater cultural heritage conservation technology and carry out technical transfer to facilitate underwater cultural heritage research and conservation according to agreed conditions. ①

a. Developing underwater archaeological investigation technology

Underwater archaeology is extension of land archaeology work to waters and seas. Like land archaeology, archaeologists must go down to underwater sites in person to engage in investigation and excavation, unlike treasure hunters who only employ professional divers to work under water. ② However, search, orientation, photocartography and record making, excavation, reconnaissance and excavation, etc., all require special technologies and equipments. Underwater archaeological excavation is limited by sea area environment, climate and personnel's actual diving time. The archeological work is quite difficult, given that shipwreck sites are accident-prone areas, compounded by dangerous factors such as bad water visibility, undercurrents, reefs and fishing nets.

Underwater archaeology relies on different specialties, and requires good planning and preparation; otherwise, it could destroy the site. Actual work may generally be done by professional coordination teams to manage investigation and excavation, surveying and mapping record, underwater camcorder, technical equipment and logistical security. When the Headquarters Administration for Cultural Heritage entrusted investigation and research to Mr. Cheng-hwa Tsang of the Academia Sinica, it purchased the needed equipment year by year were. Also, the project was supported by the professional team and relevant equipment of the Sea Science College of the Sun Yat-sen University. The National Penghu University also provided logistical support and safety measures to carry out the first systematic survey in China, which is in its fourth year now. Domestic excavation started in recent years in the Penghu General No. 1 Shipwreck Site and there was need for international experience in investigation

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① Convention on the Protection of Underwater Cultural Heritage, Article 21.

② Chun-Ming Wu in his *Maritime Archaeology* thinks that the excavation of the Xin-an wreck site of Korea was completely professional divers' work, and cannot be deemed as underwater archaeology in the real sense. *See* pp. 50-51 for details. Tai-Long Lu in his *Prospect of Underwater Archaeology in Taiwan-Discussion from General No*. 1 also points out that participants at that time were mostly museum researchers and professional divers, and were unable to make timely judgment on the relics or phenomena discovered due to lack of underwater archaeological knowledge. *See* p. 76 for details.

technology and information reading.

b. Establishing norms for cultural assets value evaluation

Excavation for underwater archaeology may be carried out only after the cultural heritage value of the site or the relic is assessed and the necessity and risk of reconnaissance and excavation are evaluated. The Headquarters Administration for Cultural Heritage is currently authorizing Mr. Cheng-hwa Tsang to establish a set of standards for assessment of underwater cultural heritage as a reference for future registration and designation as well as promoting relevant protection, conservation and reutilization. [①] During excavation evaluation, in addition to considering the value and safety of cultural heritage, other factors to be assessed are the adequacy of funds and labor, the objective of excavation, the follow-up protection, conservation and the feasibility of management and reutilization.

4. Protection, maintenance and international cooperation of relics and international cooperation

For example, in France, after underwater archaeological excavations are reported by discoverers of various places to the DRASS, generally, the Center is responsible for excavation. Anyone applying for excavation shall file the qualifications and documents needed for excavation. Furthermore, before approving excavation the DRASS examines and confirms the professional skills and equipments of scientific research and repair of relics and exhibition and promotion planning, budget sources, and others. Besides, the DRASS carries out appraisal, conservation and repair of recovered relics in the form of international cooperation with the Mediterranean Region, West Asia, Egypt and other Arab countries. At present, the southern office of the Headquarters Administration for Cultural Heritage has a scientific laboratory and repair room. The administration has provided conservation and repair assistance and technical consulting for recovered relics from sites like Kivulan Sites and Magong Port Penghu.

a. Relic excavation rule and conservation plan

There is a wide variety of relics under water. For example, a crashed aircraft, even as modern relic, might be designated as cultural heritage due to its

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① Establishing a set of standards for evaluation of underwater cultural heritage according to the surface characteristics (type and characteristics, techniques and scientific property, artistic features and representativeness etc.), cultural property, presentable property and structural evaluation property. *See* Lee-fang Li, *Report on Investigation into Preservation and Maintenance of French Cultural Heritage*, pp. 65-69.

importance to historical culture. Whether a relic should be recovered from water shall be determined by its value for cultural history and research as well as its conservation conditions. Some relics may be sent to museums for exhibition after research and repair, and some should be returned to original underwater sites as per their conditions, so that future generations will have the opportunity to continue research and appreciation. The DRASS has formulated express standards and norms for relics which can be rescued and repaired, setting out that any relic may not be removed at random and should be subject to the judgment of conservation scientists. The "Underwater Cultural Heritage Conservation Law (Draft)" attempts to set out standard for recovery of underwater cultural heritage excavation as reference point in implementation of relevant work in the future. ①

Organic substances and materials like metal, glass, animals and plants in recovered relics may be immediately exposed to damage once out of water. Therefore, responsible organs should carry out adequate measures as follows: thorough conservation planning, underwater protective packing materials and methods, emergency treatment and packing and transportation methods after recovery from water, subsequent conservation, consolidation and desalination, collection and exhibition promotion. Conservation scientists and experts shall determine immediately underwater whether it is suitable to recover any relic from water and whether it should be preserved subsequently. Before excavation, treatment method should be prepared and suitable equipments and venues should be set up, as well as arrangement of subsequent repair and collection unit.

b. Conservation and repair technology and relics recovered from water

The most important issue for in situ conservation is preventive conservation. Relics recovered from water are many types, including ceramics, wood relics, metal relics, and so forth. They require different conservation and repair technologies and materials as well as experts in conservation and repair in various fields. In France, for example, the DRASS cooperated with ARC' Antique Lab in Nantes in treatment of recovered metal relics. The DRASS also cooperated with the Nuclear Archaeological Technology Department of Grenoble for the repair and treatment of recovered wood relics, including large shipwrecks.

ARC' Antique Lab in Nantes is the largest laboratory in France responsi-

① Draft Plan for Underwater Cultural Heritage Law, pp. 101-102.

ble for conservation and repair of underwater archaeological metals, ceramics and glass. Established in 1989, it is an organization of association form, mainly serving museums in two major regions of France and underwater relic repair beyond France. The lab has a staff of twelve and combines research and repair with studies on repair technologies and materials. Its main departments include conservation and repair of metals, ceramics, glass and underwater relics, and copy of relics for exhibition and promotion. By far, the lab has completed work on over twenty underwater archaeology sites. The personnel of the laboratory do not actually engage in diving underwater archaeology, but every winter it organizes courses for about 3-5 days to train amateur archeology divers on relevant conservation theories and practices. The present research projects include methods to effectively replace chloride ion for ironware recovered from water, treatment of lead-containing relics, archaeological bronze surface cleaning technology, laser technology cleaning ceramic surface, and salination studies. It takes very long time to repair recovered relics, and recovered relics are usually very big, requiring large treatment space. Thus the laboratory currently adopts the method of treatment close to the underwater archaeological site with computer monitoring, which underwater archaeological personnel and students can learn.

ARC' Nucleart, established in Grenoble of France in 1989, is the only public institution using nuclear energy to preserve and repair relics in France. It is affiliated to the local government instead of central government, but cooperates with the Ministry of Culture and the Nuclear Energy Commission. This workshop is famous for preserving and repairing wooden relics recovered from water. In 1991, a ship of 4200 BC was discovered, and the ARC' Nucleart consolidated it with polyester resin or gamma ray treated resin (gamma ray was mainly used to treat dry relics and PEG method is used to treat wet ones). Secondary soaking with PEG method requires one year to one and a half year, and drying requires two and a half years to three years. It also demands very large space for treatment. For some large relics, the sprinkling system must be constantly used to maintain its humidity if there is no time to treat them. The institution has developed the consolidation method with high pressure spray PEG technique to replace the soaking technique. This method is economical and can prevent separation of some parts caused by the soaking method. Outside France, the PEG technology is used to treat recovered wood from water in the UK, Sweden and Japan. But recently, it has been discovered that this method has shortcomings. For example, ten years after the method was applied to

ships in northern Europe, their condition has deteriorated because the humidity of the exhibition environment surpasses 80 percent. At present, specialists are studying whether there is more suitable resin and if attention should still be paid to light, relative humidity and temperature after PEG treatment. ARC' Nucleart is 3,000 square meters large, including repair and photography departments and collection repository. The workshop has tearted 35 ships and 550 relics so far, funded by the Ministry of Culture, the regional government, the municipal government, the nuclear power research institute and through self-financing. ①

At present, the Headquarters Administration of Cultural Heritage constantly assists the treatment of relevant ceramic and wooden relics recovered from water with laboratories. It also carries out research programs on relevant topics.

5. Conservation, maintenance, management and re-utilization of underwater cultural heritage

Article 10 of the Charter for the Protection and Management of Underwater Cultural Heritage in 1996 specified that we should fulfill our due responsibility for management, supervision and protection of underwater sites, and that public access to in situ underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management. Article 14 stresses that the public's awareness of survey and the significance of underwater cultural heritage shall be promoted by informal methods with different media; it also stresses cooperation with communities, organizations, museums and relevant institutions. The "International Tourism Charter" of 1999 states that cultural heritage must be managed and communicated with local residents and external visitors. Domestic and international tourism has become the primary medium for cultural exchange through which people can have a better understanding of themselves and other cultures in the global village. However, cultural tourism must be regulated and shall absolutely not damage cultural heritage itself, and shall be beneficial to local residents and communities. ②

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① *See* Lee-fang Li, *Report on Investigation into Preservation and Maintenance of French Cultural Heritage*, pp. 11-12, 29-33.

② *See* Lee-fang Li, Exploration of Underwater Cultural Heritage in Taiwan, *New World of Maritime Taiwan: A Special Collection of results of Taiwan-French Underwater Cultural Heritage Investigation and Personnel Training*, pp. 74-75, 93.

a. Concept of in situ protection

The Convention on the Protection of the Underwater Cultural Heritage adopted by the UNESC points out in the section of objectives and principle that the protection of underwater cultural heritage through in situ conservation shall be considered as the first option and commercial exploitation of underwater cultural heritage shall be prohibited. ①

b. Establishment, management and maintenance of conservation area

In countries like Canada, the United States and Australia, oceanic conservation areas (or the so-called "oceanic reserves") have been established. Relevant research shall address evaluation indexes such as ecological environment, social economy, potential threats, and management efficiency. ② Other issues to be evaluated are power of relevant institutions and rights and interests of the public as well as management and maintenance. In actual operations the oceanic conservation areas are often confronted with issues such as management capacity, law enforcement and monitoring as a result of fiscal policy or due to fiscal deficiency. The key goals in establishing conservation areas in Taiwan should be strengthening of cooperation among various authorities and education for the public.

c. Management and reutilization of underwater cultural heritage

There are many shipwrecks and underwater archaeological museums across the world, such as Australia's Maritime Museum and Sweden's Shipwreck Museum, among others. But cases of underwater site museums are rare, as shipwrecks occur usually in dangerous tidal wave areas, so tourists' safety and supervision and maintenance of sites and relics must be prudently evaluated before opening them up for sightseeing. In recently years, the Maritime Silk Road Museum established for excavating and preserving the "South Sea No. 1" shipwreck and the "Baiheliang Underwater Museum" have been opened and drawn global attention. Because divers discovered several thousand histori-

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① Convention on the Protection of Underwater Cultural Heritage, Article 2.

② *See* Shu-Ling Liu, *Studies on Conflict Management of Maritime Conservation Area Set-up and Public and Private Partnership—Take the Inner Bay Sea Area of Qing Bay of Penghu County for Example*, master's thesis of the Research Institute of Public Affair Management of the National Sun Yat-sen University in 2003; Xiang-Jian Wu, *Management of the National Maritime Conservation Area of the Florida Coral Reefs in the United States*, the overseas study tour report of the National Maritime Park Administrative Office on September 23, 2008; Chen-Guang Li, *Regional Plan and Coast Protection and Maritime Resource Management*, overseas study tour report of the Urban-Rural Planning Bureau of the Construction Division of the Department of Interior on March 20, 2008.

cal relics in excavation of the east port of ancient Alexandria, the Egyptian government is planning to establish a huge underwater museum to let tourists pass through underwater glass fiber tunnel to experience rich underwater site and relics. The plan has been supported by the UNESCO.

The management of underwater cultural heritage plays a role in promoting international cooperation. The excavation and conservation of The Batavia of Holland is widely praised case which contributed to cooperation between the Netherlands and Australia. The Kingdom of Brunei, the French Ministry of Culture and ELF Company signed a cooperation agreement to conduct archeological escalation of sunken cargo ship which was on the way to Brunei in the 15th century and discovered near the Kingdom of Brunei in 1998. It became the largest archaeological research project in the history of the South China Sea, excavating 10,000 to 15,000 different relics and providing direct evidence for the existence of extensive and well-organized trading network at that time. The project also illustrated the sea trade route connecting Borneo and other areas in the South China Sea.

The underwater cultural heritage of France belongs to the state. Generally, before archaeological excavation, the DRASS contacts local museum to see whether it is willing to collect and exhibit in the future, and if the museum is willing, it may sponsor relevant work. [①] In Taiwan, according to the provisions of the Cultural Heritage Conservation Law, the concerned authorities shall prepare management and maintenance plan on the designated sites. Their activities include supervision and protection of basic site data, planning of power and responsibility and reporting mechanism, daily maintenance, emergency maintenance, education and advocacy, management, management planning, authorized management planning and other relevant issues on the existing facilities on site or structures. [②] The concept of heritage corridor in recent years may be applied in conservation, protection and management of underwater cultural heritage in the future. The idea connects originally scattered special landscapes, ecology and native culture with a continuous corridor in line with the conservation and development of natural and cultural heritage, and combines multiple objectives of tourism, ecology and cultural conservation through integral explanations and exhibitions.

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① Tai-Long Lu, *Prospect of Underwater Archaeology in Taiwan-Discussion from General No.* 1, p. 26.

② *See* the Measures on Site Supervision and Protection.

6. Training of underwater cultural heritage professionals and international cooperation

The demand for personnel training is not a need of a single country but a common global issue. The Convention on the Protection of the Underwater Cultural Heritage especially unveils the importance of training underwater archaeological professionals. Article 21 sets out that States Parties shall cooperate in the providing training for underwater archaeology and sharing the experiences on underwater cultural heritage. The qualifications that underwater archaeology professionals should have not only include scientific training, skill training and sound psychological and physiological mechanism, but also land archaeology experience. Also, teamwork can accomplish related tasks due to the special requirement of diving work of underwater archaeology and sea voyage lasting for a long time. Therefore teamwork spirit and ethical integrity are extremely important. Currently, training of underwater archaeology professionals in France is a responsibility of the DRASS. In mainland China, it is in the charge of the Underwater Archaeological Research Center of the National Museum is in charge of training. In the United States, there are courses in the Hawaii University and the Texas A and M University. In the United Kingdom, besides the University of Southampton, there is a non-governmental organization, Nautical Archaeology Society. in Australia, the training was responsibility of museums at the early stage, and only in recent years schools and institutions on underwater archaeology and cultural heritage conservation have been formally established. For example, the Underwater Archaeology Department of the University of Western Australia and the University of Sydney and the Underwater Archaeology Department of Flinders University have undergraduate, master's and doctoral courses. In some Asian countries, private groups undertake the needed training job. ①

a. Predicament of deficiency of underwater archaeology professionals in the world

For over ten years underwater archaeology has gradually attracted worldwide attention, but in each country lacks professionals and specialized expert-

① *See* Zu-Di Li, *The Policy Research of Conservation and Re-utilization of Underwater cutural Heritage*, the Maritime Affairs Research Institute of the National Sun Yat-sen University, master thesis, pp. 67-71; also Chung-Ray Chu and Jin-Yuan Liu (2004), Introduction to Undersea Archaeology Academic Research Institutes in the World, *Maritime Technology Quarterly*, vol. 14, issue 4, pp. 29-32.

ise. In France, there are about 2,000 land archaeologists, but only twenty underwater archaeologists, which is obviously an insufficient number. France has a very extensive sea territory, about 1,100 square nautical miles. The French DRASS includes only thirty research, administrative and technical staff members. To solve the problem of labor inadequacy, the Center also cooperates with other research institutes and units in France, which adds ten research professionals. In mainland China, there are only about forty underwater archaeologists who have undergone several professional trainings, but the number is far from adequate for a coastal line of 18 thousand kilometers, broad sea areas and huge work load. Therefore, the preferential policy of underwater archaeologists is not restricted by one-child birth policy to encourage personnel input. ①

b. The role of underwater archaeology amateurs and divers

Many countries hand over underwater archaeology excavation or training to private diving societies and there are many underwater archaeology "amateurs" in the world. In fact, diving society members or underwater archaeology amateurs often cause damage of underwater cultural sites and pilferage or selling of relics recovered from water without authorization. At present, the consensus reached from international discussions on underwater cultural heritage is to treat underwater archaeology more seriously, promote training structure with governmental efforts proactively, organize these amateurs into volunteers and provide them with professional training and with appropriate roles. ② The foreign involvement of underwater archaeology is very high. For example, Odyssey Marine Exploration, a US private wrecking company, announced the discovery of the HMS Victory warship wreck sunken in 1774 near the Channel Islands of the England Channel, and that it pulled out two cannons, which gave rise to controversy and international dispute. As the ship was a military wreck, the British government asserted that non-intrusive action was allowed before its approval. ③

c. Current situation of underwater archaeology professionals in various countries

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① Lee-fang Li, *Report on Investigation and Communication on Underwater Cultural Heritage Conservation in Mainland China*, p. 45.

② *See* Zu-Di Li, *The Policy Research of Conservation and Re-utilization of Underwater cutural Heritage*, the Maritime Affairs Research Institute of the National Sun Yat-sen University, master thesis, p. 68.

③ Jia-Qun Lin (2009), The United States Wrecking the British Shipwreck Victory, Likely to Cause Sovereignty Dispute, *China Times*, February 3, Page A3.

(a) Current situation and problems concerning training of underwater archaeology professionals in France

The DRASS lacks manpower to carry out the job of specialized instructors due to its heavy work load. Currently, the Center sends from ten to twenty students to participate in work at archaeological sites. The advantage is that students can learn treatment problems in different conditions on the spot. However, the shipwreck sites are often too deep, so students cannot practice, and the training courses are often affected by emergencies like site bad weather. Furthermore, students cannot discuss thoroughly their experiences and theories, because over ten hours' work is required per day at an archaeological site and because they cannot talk while working underwater. ①

(b) Current situation and problems concerning training of underwater archaeology professionals in the United Kingdom

The University of Southampton established the Undersea Archaeology Center in 1997. Besides, the Nautical Archaeology Society (NAS), established at Portsmouth in the 1960s, provides professional divers with professional training in archaeology as a non-governmental organization, with practice and tool operation training in addition theoretical courses. Members of NAS become coaches after obtaining different levels of certificates upon training, thus forming a diversified personnel network worldwide. The NAS has contributed to the public awareness of the underwater archaeology, but has not provided training required for truly professional archaeologists. Too many people participate in the courses, so professional coaches are insufficient and some inexperienced coaches teach instead, leading to problems of inadequate professional qualifications of trainees, who believe that they have learned enough. ②

(c) Current situation and problems concerning training of underwater archaeology professionals in Mainland China

In mainland China, the Underwater Archaeological Research Center of the National Museum is responsible for personnel training. In 2001, the Administration of Cultural Heritage approved of the setup of an underwater archaeological research and training base in Guangdong Hailing Island and, at the same

① *See* Zu-Di Li, *The Policy Research of Conservation and Re-utilization of Underwater cutural Heritage*, the Maritime Affairs Research Institute of the National Sun Yat-sen University, master thesis, pp. 68-69.

② *See* Tai-Long Lu, Prospect of Underwater Archaeology in Taiwan-Discussion form General No. 1, p. 26.

time, carries out further excavation of South Sea No. 1 and the survey of coastal underwater cultural heritage. At the inception of underwater archaeology in mainland China, a series of guidelines and steps have been prepared with Yu Weichao's foresight, and the approach of "going out and bringing in" is adopted. Yang Lin from the Administration of Cultural Heritage and Zhang Wei from the Chinese Museum of History were dispatched to Holland to study the wreck investigation and excavation, photography and clearing in the North Sea. The two specialists went to the United States in 1989 to study underwater archaeology theories and special technologies. In 1988, Wang Jun from the Administration of Cultural Heritage was dispatched to Japan to study underwater archaeology. "Bringing in" approach means inviting foreign experts like those from Australia to lecture in China and cooperating with foreign institutions as well. For instance, in 2007, the Administration of Cultural Heritage held the fourth national underwater archaeology training program at the Guangdong Yangjiang National Underwater Archaeology Research and Training Base, and Kenya dispatched two students. Zhang Wei once went to Kenya to instruct in person. Mainland China gradually assumes the ability of "technical export" in underground archaeology and establishes cultural diplomatic ties. [1] Though native experience has been gradually accumulated in the field underwater archaeology over twenty years, the problem of personnel deficiency still persists in mainland China. Due to age and other causes, some students no longer participate in underwater archaeology. A practical difficulty is that those called up for underwater excavation operations have their own jobs.

(d) Current situation and problems concerning training of underwater archaeology professionals in Taiwan

In Taiwan, since the Headquarters Administration of Cultural Heritage (Cultural Heritage Center before consolidation) started to promote the underwater cultural heritage conservation, underwater archaeology, conservation, and training of management and maintenance personnel have been planned proactively and simultaneously (*see* Attached Table 1 for details). At present, besides the colleagues of the Headquarters Administration of Cultural Heritage and the investigation team of the Central Research Institute and the Sun Yat-sen University, over twenty seed students have been trained. Their education

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① Xiang-Jian Wu, *Management of the National Maritime Conservation Area of the Florida Coral Reefs in the United States*, the overseas study tour report of the National Maritime Park Administrative Office on September 23, 2008, p. 46.

included invitation of domestic and overseas law experts and teaching courses in diving, archaeology and conservation science, and investigation technology. The program also included planning preliminary and advanced courses and site practice and training. However, students differ in their experience and diving technology skills and come from different professional areas, mostly based on their individual interest, so the proportion of people who can actively participate in underwater archaeology work after training is still inadequate. The survey work load is very heavy and it is difficult to promote personnel training. If students have not participated in practical activities after receiving training, their skill may grow rusty in re-training program. In the future, the human resources of the Chinese Underwater Archaeology Society may be used to assist diving training and plan the creation of training base, which will include domestic and international experts from different fields to intensify specialized courses. While developing underwater archaeology, we should first give comprehensive consideration to the amount of professionals in various fields required for the underwater cultural heritage of the coastal line of over 1,000 km and inland. ①

d. Prospect of establishing a world or Asian underwater archaeology center

UNESCO has established the Asian Academy for Heritage Management (AAHM) in Bangkok, Thailand, so that heritage personnel training in Asia does not lag behind Europe and North America. Under the guidance of UNESCO and ICCROM, the AAHM utilizes the network and relevant resources in establishing communication platform in order to enrich professional resources in education and promotion, personnel training and research, and to provide assistance for training of human resources in management of tangible and intangible cultural heritage in Asia and the Pacific region. ② International cooperation is of great importance to the protection and management of underwater cultural heritage. Therefore, Article 15 of the Underwater Cultural Heritage Protection and Management Charter in 1996 states that exchange program of professionals shall be deemed as the best practical measures for coop-

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① *See* Hui-You Xu, Farewell to the Close-Door Age and Draw People Close to the Sea in *New Taiwan News Weekly*, vol. 36. The article mentions that the amount of sea guards in Taiwan is about 16,000, but the length of coastline for law enforcement is 180,000 meters and the area exceeds 50 square kilometers. The stick is not just the problem of amount of people, but also in software and hardware equipment.

② At http://www.unescobkk.org/index.php?id=470, Retrieval date was March 18, 2009.

eration. [1]

In the peak period of underwater archaeology development in the 1980s in France, about 10-5 countries sent representatives the DRASS for training. At present, this center has short-term and long-term training courses. Students from Taiwan, Tunisia and Egypt have received training from three weeks to three years in recent years. In 2003, the French Ministry of Culture encouraged the DRASS to plan the establishment of world underwater archaeology center to cope with global needs in this field. During his visit of Taiwan, Mr. Leroy from DRASS also suggested that Taiwan think of establishing an Asian underwater archaeology training base. Such facility is to address the demands of Asian sites like Eagle Island Wreck in Japan, the Xin'an Wreck in Korea and the Hoi An Wreck in Vietnam. It would also plan relevant training courses. The setup of international training bases may enable experts in relevant fields to have a venue for discussion and practical communication and to increase opportunities for international cooperation. The year-round international training base would make use of nearby resources like universities, so that employees can have access to literature and study ocean history, ship structure, ship history and international trade. The base location shall facilitate training personnel's access to information and has diversified coast morphology to provide comprehensive diving training. Students who complete the program may acquire internationally accredited diploma. The multilingual teaching method facilitates the acquisition of knowledge in various fields and students do not have to seek instruction from remote countries for a special subject. [2]

It is very difficult to learn all conditions at one underwater archaeology site. Therefore, the DRASS is considering establishing a virtual archaeology training base so that students can experience various tidal waves and weathers without having to worry about mistaken damage of underwater relic or site. Also, drilling can be carried out repeatedly. Besides professional archaeology training, courses on marine investigation equipment should be designed to train students to operate and repair devices by themselves.

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① *See* Lee-fang Li, Exploration of Underwater Cultural Heritage in Taiwan, in *New World of Maritime: A Special Collection of Results of Taiwan-French Underwater Cultural Heritage Investigation and Personnel Training*, p. 75.

② *See* Zu-Di Li, *The Policy Research of Conservation and Re-utilization of Underuater Cultural Heritage in Taiwan*, the Maritime Affairs Research Institute of the National Sun Yat-sen University, master thesis, pp. 67-71.

e. Related supporting facilities of personnel training

(a) Courses and textbooks

The RDASS has assisted various countries in personnel training and provided fifteen countries with consultation on verification and excavation methods by far. The center compiled the NAS Training as a basic training textbook for underwater archaeology, which has been translated into Arabic language for the personnel training in Arab countries. Mainland China runs underwater archaeology and research base in Hailing Island and has published relevant textbooks, such as *Maritime Archaeology* edited by Chun-Ming Wu and Wei Wang and the Chinese underwater archaeological report series books including *Porcelains from East Sea Pingtanwan Reef No*. 1 and *Xisha Underwater Archaeology* (1998—1999). The Ningbo Underwater Archaeology Work Station cooperates with the Ningbo Cultural Heritage Archaeology Research Institute to carry out underwater archaeology investigation and excavation of the East Sea and studies on protection of relics recovered from water. The station is also planning to publish books on underwater archaeology technical standard. The Headquarters Administration of Cultural Heritage is successively publishing two books—*New Perspective of Maritime Taiwan—Special Edition of Results of Taiwan-France Cooperation in Underwater Cultural Heritage Investigation and Personnel Training* and *Evaluation Report on Investigation into the Suspected Wreck Site at Penghu Magongshang Port*. The administration received the rights from France to translate and publish the documentary video tape Sunken Treasures-Documentary on Excavation and Investigation of the Ancient Shipwreck of Brunei. However, in terms of professional textbooks and courses, we are looking forward to assistance of domestic and overseas experts and scholars for future projects.

(b) Training objects

Underwater archaeology institutes shall train professionals and also provide short-term training and courses for stimulating interests of people with an interest in underwater archaeology. Archaeology training courses of two to three weeks can be arranged for diving enthusiasts and workers, so that they may participate in auxiliary work of underwater archaeology in the future. Appropriate courses may also be planned for coast guards and personnel on underwater heritage conservation science and maintenance, so as to facilitate future protection, supervision and relic conservation and maintenance of underwater cultural heritage.

(c) Establishment of jobs, certificate and training system

Many European countries have developed underwater cultural heritage personnel training programs, but confronted problems like certificates and licenses. Underwater archaeology personnel require long-term training. Except for a few countries with specialized departments, many students and interns have to receive training at their own expenses, and their future employment and salary are often not secured due to the absence of support of national system. In Taiwan, the personnel training is to be further developed by the authorities, including training materials and requirements, sites, course planning, textbooks, teachers, future employment, and certificate system. At present, the Headquarters Administration of Cultural Heritage is planning to incorporate the demands of this field into the long-term personnel training program.

7. Promotion of education on underwater cultural heritage

a. Importance of education promotion

Article 20 of the Convention on the Protection of the Underwater Cultural Heritage adopted by the UNESCO stresses that each State Party shall take all practical measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under the Convention. The method of protecting underwater cultural heritage is to make everyone a "custom house"(?) and help the public learn the importance of heritage. We should let the public be aware that underwater cultural heritage is public property and the public shall jointly protect the common heritage of mankind.

Besides the Central Government's coordination of related affairs for underwater heritage conservation, we should cooperate with local governments and the public to make conservation a joint responsibility. We shall also reach consensus in society on conservation of underwater cultural heritage by various methods and in conjunction with extracurricular activities in schools, community activities and news media. The effective management and maintenance of underwater cultural heritage requires heritage investigation and development of excavation technology. The management needs the support of legal and administrative system and cooperation of professionals in different fields, such as geology, physics, mechanics, navigation, history and information. Therefore, people's awareness of the value and significance of underwater cultural heritage helps the development of conservation work.

b. Method of educational promotion

Educational promotion can be designed according to different formats.

Professional educational activities include seminars, workshops, exhibitions, exhibition tours, and film shooting. Publishing of brochures or professional journals can help people from different fields appreciate underwater archaeology work and rebuild historical memory of maritime culture.

c. International inter-disciplinary cooperation

Policy makers should enhance the public's awareness and appreciation of underwater cultural heritage and promote the protection of underwater cultural heritage by engaging the state, international organizations, scientific research institutes, professional organizations, archaeologists, divers, preservers, other relevant departments and the public. The government should reward and publicize protection or donation of cultural relics. Currently, various countries mostly provides rewards to encourage the reporting of underwater cultural heritage and coordinate coast guards, customs and beach patrol officers to cooperate in protection of underwater shipwrecks, sites, archaeological investigation and excavation. Also, penalty provisions have been introduced to prohibit exploitation of heritage for commercial purpose and to prevent its pilferage and sale. For example, in 1989, French authorities declared that underwater cultural heritage belongs to the state and reward will be granted to discoverers. At present, the reporting network relies on issuing forms to local people. Anyone who discovered site or relic should report it to the local coast guard within 48 hours, and the coast guard will report to the underwater archaeology center for assessment. In addition, a simple document is issued to workers in the fields of geography, literature and history to facilitate reporting. France encourages fishermen through reward policy to actively report information about underwater cultural heritage. The 1976 Law of Shipwrecks in History of West Australia states that anyone holding, supervising or controlling relevant historic shipwrecks or cultural relics shall, within 30 days after announcement, notify the ministers of communication, information technology and arts. The latter in turn would give the reporter money award, medal or duplicate of the relic when the contents of the report are verified. [①] Despite the reward system, many shipwreck sites and relics are subject to damages such as pilferage and selling. Therefore, the Convention on the Protection of Underwater Cultural Heritage

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① Nien-Tsu Alfred Hu, *Discussion on Legislation Draft of Underwater Cultural Heritage*. Report of Research Program Authorized by the Maritime Policy Research Office of National Sun Yat-sun University and Council for Cultural Affairs of the Executive Yuan, pp. 47-49.

which takes effect this year stresses more effective protection of underwater cultural heritage and containment of its increasing pilferage and damage. The solution is to establish consensus on cultural heritage conservation among all people.

Ⅲ. Characteristics and Vision for Developing Underwater Cultural Heritage

A. Different regional characteristics of underwater archaeology

Professor George F. Bass of Texas A & M University, known as "father of world underwater archaeology," once remarked that "each shipwreck has its most appropriate wrecking method."[①] This remark fully reflects the national or regional specific characteristics of underwater archaeology. Therefore, regional cooperation and information communication are also key points advocated in the (?). For example, there are two coasts in France, one by the Atlantic and the other by the Mediterranean Sea. Ships traveling over the Mediterranean Sea are influenced by trends in central and southern Europe, and those traveling over the Atlantic are more subject to influence of northern Europe. Cultural differences are not only reflected in hull structure of the ships, but also in cargoes they carry. The appearance of human life and trade transportation can be reconstructed according to relevant investigation, excavation and textual research.

The "Silk Road on the Sea"—from various southern ports of China like Guangzhou and Quanzhou west to Southeast Asia, India, Arab region and even remoter region—plays an important role in the maritime transportation, trade and historical culture of mainland China and the world. Therefore, the South Sea Island Archaeology Project is a key project planned by the State Administration of Cultural Heritage in China. Underwater discoveries, such as Xisha Underwater Archaeology, Wanjiao No. 1, South Sea No. 1 and South Sea No. 2 are rear historical assets. Before the discovery of South Sea No. 1, the technologies and measures adopted for ancient shipwreck archaeology in mainland China were general methods learned from foreign countries. China has gradually

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① *See* Xiang-Jian Wu, *Management of the National Maritime Conservation Area of the Florida Coral Reefs in the United States*, the overseas study tour report of the National Maritime Park Administrative Office on September 23, 2008, p. 52.

developed a set of advanced technical methods supported by professionals of relevant fields to carry out the most important cultural project in Mainland in this century, namely South Sea No. 1. Underwater archaeology has reached a considerable level in mainland China as a result of twenty-year development. Its achievements are especially notable in the area of turgid water archaeology, which has practical value to Taiwan in the context of poor archaeological environment visibility.

B. Characteristics of Underwater Archaeology Development in Taiwan

Between 5,000 and 6,000 years ago, the Austronesians started to enter Taiwan in groups and the Han people arrived in Taiwan by crossing the Straits. From the Great Navigation Age in the 16th century, Western sea powers, including the United Kingdom, Spain, Portugal and Holland started to look for trade market and bases in the "Asian Mediterranean Sea." In the 17th century, Penghu and Taiwan successively functioned as freshwater replenishment station and base on the international arena of trade competition, and were also intermediary points of trade between China and Japan. In addition to ancient sites such as Port Santo Domingo of End of Fenggui in Penghu, Anping Ancient Castle and Zeelandia in South Taiwan, underwater archaeological excavation can disclose a more mysterious veil for the intensive history of sea contest.

From ancient times to the present, Taiwan has always been an important stronghold good both for attack and defense. At the end of the Ming Dynasty, Zheng Zhilong dominated the China Sea with 1,000 sailing boats. Zheng Chenggong mobilized 300 ships and powerful navy when retreating from Penghu to conquer Taiwan. His son Zheng Jing took advantage of Taiwan as an international trade center and consolidated his anti-Qing base with guns and powder imported from the United Kingdom. After the British and French joint war in the 19th century, Jilong, Danshui and Tainan, Gaoxiong in Taiwan were forced to open for commerce. Various countries successively set up foreign stores in Taiwan. Deerskin was first exported from Taiwan. Then tea leaves, rice, sugar and camphor were also shipped to various places in world. Different beliefs and cultures were brought in by immigrants to Taiwan. As ships were frequently subject to accidents due to surging hidden tides of Heishui Gulf, beliefs like Sea Goddess Mazu became prevalent in Taiwan and southern China. "When mainland Chinese left for Taiwan, they were caught at a state of dread and alarm, yearning for return." This saying accurately reflects people's feel-

ings. In the early period of Japan's occupation of Taiwan, some Chinese were unwilling to be naturalized as Japanese and crossed the Straits to return to the mainland. During the Japanese rule, due to inequality of education and job opportunities, some men chose to study in Japan. Many life dramas of "stay or leave" were repeatedly staged in the turbulent sea area. In 1943, during the Second World War, the Passenger Liner "Gao Qian Shui wan" leaving Japan for Keelung was struck and sunken by a US army fish torpedo. As a result, many young people on the ship could not make it to the Treasure Island of Formosa. Such events shaped memories of Taiwan in the age of diaspora.

Mr. Cheng-hwa Tsang asserts in his paper "Underwater Archaeology in Taiwan: Resources, Topics and Opportunities" that research can be done on the following issues: connection between Taiwan and mainland China in the Paleolithic Age, path to Taiwan and site distribution of early Neolithic Culture, periods when Chinese operated Taiwan, Penghu Sea Areas as a trade course and Taiwan, and overseas Chinese trade history. [①] We believe that with the help of more experts from different fields we can further build up unique features for underwater archaeology in Taiwan in the areas of investigation and excavation technology, research topics, conservation, maintenance and promotion.

Ⅳ. Developing International Cooperation to Protect Underwater Cultural Heritage

Article 15 of the Charter for the Protection and Management of Archaeological Heritage states that international cooperation is necessary for the protection and management of underwater cultural heritage and should be promoted with high standard of investigation and research. International cooperation should be encouraged in underwater cultural heritage archaeology and other specialties, and the exchange programs of professionals are a means for spreading best practices. Article 19 of the Convention on the Protection of the Underwater Cultural Heritage also stresses that State Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage, including collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage. The Convention also calls for sharing relevant information and prevention of illegal wrecking. The

① Cheng-hwa Tsang, Underwater Archaeology in Taiwan: Resources, Topics and Opportunities. 2008 *Underwater Archaeology International Seminar*, pp. 7-10.

Headquarters Administration of Cultural Heritage has been actively moving towards this objective since its inception. *See* attached Table 1 for its main achievements.

Ⅴ. Conclusion and Suggestions

Official and civil institutions and groups must cooperate to establish interdisciplinary and cross-departmental consultation platforms for conservation of underwater cultural heritage. Although Taiwan has a late start, it has an opportunity to continuously promote work in different related fields according to the periodical plan, for there is no discovery of major wreck site at present. Mr. Cheng-hwa Tsang and his team, acting on behalf of the Headquarters Administration of Cultural Heritage since 2008, have found some targets in the Taiwan and Penghu sea areas. Experts from different fields, underwater archaeology seed talents and non-government organizations will join forces after substantial discovery is made. In addition, long-term strategy and system will be prepared according to the suggestions made in research programs. In the field of of international cooperation, experienced foreign experts will be invited to Taiwan for investigation, excavation, research, and personnel training. The Headquarters Administration of Cultural Heritage held the Hidden History-Underwater Archaeology Special Exhibition in 2009. In the future, the international cooperation will be extended, and we will take initiative to export Taiwan's local experience in conservation of underwater cultural heritage.

The top priority in the conservation of cultural heritage in Taiwan is to incorporate it into the overall government policies. From the government perspective, underwater cultural heritage must be an important cultural heritage. From the perspective of tourism development, in situ and pollution-free underwater cultural sites or conservation areas will be important tourist attractions that provide the best place for relaxation. From people's perspective, rich underwater resources provide the public with the opportunity to learn from history and look forward to the future. The shaping of conservation policy plays an important role in the overall conservation work, and the timely preparation will provide consistent principles which meet the requirements of conservation work. During the policy planning we must first analyze its property and contents and then explore its legitmation, execution and performance evaluation. Taiwan is surrounded by seas in all directions, so we should fully utilize the maritime assets. We must cultivate people's awareness and care for the mari-

time culture by expanding maritime science research and training excellent personnel in maritime cultural heritage. Other key elements of future work on marine cultural heritage conservation in Taiwan include: clarifying the relationship between maritime rights and social development, strengthening maritime policy and organizational mechanism, establishing the basic concept of maritime law administration, enforcing sea area laws, and maintaining maritime safety.

Policy planning requires constant amendments and inter-disciplinary cooperation of specialists in the fields of archaeology, law, history, art and science. At present, with the policy objective of preserving underwater cultural heritage, the Headquarters Administration of Cultural Heritage responsible for implementing the plans for the preservation of the underwater cultural heritage. For this purpose it works out mid-term and long-term administrative schemes and implementation schedule. Even though the conservation of heritage lacks enough staff and funding, it will make good progress through the continuous cooperation among the government, academic circles, private and international expert terms in a matter of just three to four years after starting work. Basic and comprehensive investigation is important, but media promotion should not be ignored in the quest for support from various circles and even the world. Taiwan has been endowed with excellent opportunities for modernization by its geographical location, but it has experienced long and tortuous path of modernization[①] in its attempts to build rich and diversified maritime culture. Although Taiwan has a late start in conservation of underwater culture heritage, it will surely succeed so long as it follows a right direction.

Ⅵ. Appendix

Table 1 Chronicle of Events of International Exchange and Cooperation on Underwater Cultural Heritage Conservation of the Headquarters Administration of Cultural Heritage

(Prepared by Lee-fang Li)

November 2005 — October 2007 The former Preparatory Office of the Cultural Heritage Preservation Research Center affiliated to the Council for Cultural Affairs undertook the affairs for historic sites of the Department of Interior and ancient relics of the Department of Education.

October 2007 — the present The Headquarters Administration of Cultural Heritage of the Council for Cultural Affairs continues to be responsible for relevant affairs.

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① Yun-Peng Yin et al, *Discover Taiwan*, p. 104.

Type	Time	Country	Contents	Personnel	Results
Study tour and exchange	2005 09/11—09/25	France	Visit with the French Ministry of Culture and visit the DRASS, Underwater Archaeology Cultural Relic Repair Laboratory of ARC' Antique Lab of Nantes and the Nuclear Archaeology Technology Department of ARC' Nucleart of Grenoble City	Lee-fang Li	Visited France for study tour and negotiation sponsored by the Taiwan-France Trend Award
Technical consultation	2006 05/14—05/15	France	Technical consultation for underwater site exploration and underwater archaeology technology of suspected ancient wreck sites of Penghu Magong Port	Mr. Jean-Bernard Memet, underwater archaeology repair expert of French Arc'Antique	Visited Taiwan to explore and provide technical consultation on underwater archaeology
International symposium	2006 05/19—05/20	France and Japan	Participated in symposium and communicated on preservation and repair method of relics recovered from water	Mr. Jean-Bernard Memet of France and Professor Yamato, Satoshi and Mr. Murata, Tadashige	Communicated on preservation and repair method of relics recovered from water
Technical consultation	2006 09/08—09/13	France	Technical consultation on underwater site exploration and underwater archaeology technology of suspected ancient wreck sites of Penghu Magong Port	Director of DRASSM	Visited Taiwan to explore and provide underwater archaeology technical consultation
Study tour and exchange	2006 09/25—10/06	The United States, the National Park Service and the National Ocean Service under the National Oceanic and Atmospheric Administration of the US federal government	Study tour of the underwater cultural heritage protection system in the United States	Professor Nien-Tzu Hu and Professor Qingfu Caichang and Ms. Yu-Ling Lin	Communicated and invited experts to Taiwan for holding an international conference
International symposium	2006 11/15—11/16	Australia and the United States	Visited Taiwan to attend the International Roundtable Conference on Underwater Cultural Heritage Conservation	Professor Lyndel Prott and Professor Patrick Joseph O'Keefe of the Australian National University, Manager John Broadwater of the Maritime Heritage Program of the National Ocean Service under the National Oceanic and Atmospheric Administration of the Department of Commerce of the United States and Doctor James Delgado of the Institute of Nautical Archaeology of the United States	Discussed relevant international laws and exchanged experience

Renewal table 1

Type	Time	Country	Contents	Personnel	Results
Personnel training	2007 02/26—03/10	Experts from Australia, Japan, the Philippines and the United Kingdom	Training of specialty courses of underwater archaeology seed talents	Jeremy Green, Corioli Souter and Jon Carpenter from Australia, Director Kenzo Hayashida of Japan, Rey Santiego of the Philippines and Sarah Ward from the United Kingdom	Included training courses, such as theory, methodology and technology of diving technology and underwater archaeology, and courses on maintenance of cultural relics recovered from water and relevant legal systems
Technical consultation, personnel training and promotion and education	2007 03/18—03/29	France	Taiwan-France cooperation training courses for underwater cultural heritage conservation and maintenance personnel	Mr. Michel L'HOUR, Mr. Yves BILLAUD, Mr. Frédéric LEROY, Mrs Olivia HULOT, Mrs ZHAO Bing, Mr. Teddy SEGUIN and Mr. Denis METZGER of the French DRASSM	Assisted wit the investigation into the suspected wreck site of the Penghu Magong Port and handling the "Training Course of Taiwan-France Cooperation Underwater Cultural Heritage Conservation and Maintenance"
International symposium on Conservation and Workshop	2007 06/27—06/29	Japan and Sweden	International Symposium and Workshop on emergency maintenance and conservation of cultural heritage recovered from water	Professor Masaaki Sawada and Director Imazu Setsuo of Japan and Emma Hocker of Sweden	Gave two lectures: "Conservation of Hulls Excavated from Seabed;" and "Conservation and Treatment Technology of Ironware Recovered from Water;" Director Imazu Setsuo of Kyushu Museum lectured on the Latest Conservation Technology of Wood Relics Recovered from Water; Ms. Emma Hocker of the Vasa Conservation Science Department of the National Marine Museum of Sweden shared with us practical experience about "Conservation and Maintenance of Vasa Battleship of Sweden."
Training and exchange on international underwater archaeology	2007 06/29—07/24	France	Participated in training on Northwest Shipwreck Site Excavation Training of France sponsored by the French Ministry of Culture, French Institute in Taiwan and the DRASSM	The Council for Cultural Affairs recommended Yu-Lin Cai of the Headquarters Administration of Cultural Heritage and Yu Wang, planning assistant of the Institute of History and Philology to participate	Participated in international underwater archaeology training provided by France

Renewal table 2

Type	Time	Country	Contents	Personnel	Results
Signed the Taiwan-France Administrative Agreement	2007/07/23	France	Signed the Taiwan-France Administrative Agreement with the DRASSM	Jin-Fa Wu, former Vice Director of the Council for Cultural Affairs and Guo-Long Shi, Vice Directory of the Headquarters Administration of Cultural Heritage, went to France to sign the agreement	Further implemented the Taiwan-France series of communication and cooperation
Study tour and exchange	2007 12/16—12/25	China	Visited Quanzhou Bay Ancient Ship Museum, Guangdong Yangjiang Museum and South Sea No. 1 Site as well as the Marine Silk Route Museum	Vice Director Guo-Long Shi of the Headquarters Administration of Cultural Heritage, Group Leader Lee-fang Li, Mr. Cheng-hwa Tsang and planning assistant Yu Wang of the Institute of History and Philology	Visited with underwater archaeology principal of the National Museum of mainland China and visited the underwater archaeology training base of Hailing Island
Visit and attending international conference	2008 07/05—07/16	The United Kingdom	Attended the third international underwater archaeology conference (IKUWA3) and visited Mary Rose Shipwreck and its museum as well as laboratory, and the Royal Nautical Museum	Mr. Cheng-hwa Tsang and planning assistant Yu Wang of the Institute of History and Philology attended the conference	International exchange
International symposium	2008 12/05—12/06	The United Kingdom, Holland, Australia, the United States and mainland China	2008 Underwater Archaeology International Symposium	Invited experts participating in important underwater archaeological site investigation and excavation from the United Kingdom, Holland, Australia, the United States and China	Discussed topics such as underwater archaeology development, underwater cultural heritage conservation and management, technological application, field technologies and case study and sharing experience
Study tour and exchange	2008 12/13—12/19	Australia	Visited the South Australia National Maritime Museum, South Australia Museum, West Australia Maritime Museum, West Australia Shipwreck Exhibition Museum, West Australia Museum of Art and History, Submarine Exhibition Yard and Maritime Technical Institute	Ming-Shui Zheng and Qing-Qang Shao of the Headquarters Administration of Cultural Heritage	International exchange

Renewal table 3

Type	Time	Country	Contents	Personnel	Results
International exhibition	2008/Oct. — Dec.	Staged Hidden History Underwater Archaeology Exhibition			International exchange and enhancing public awareness
Study tour and exchange	2009/12	Japan	South Australia Visited the Eagle Island Shipwreck excavation exhibition and communicated with the Japanese Underwater Archaeology Society	Lee-fang Li and Zhi-Ming Zhou	International exchange

(Translator: CHEN Xiaoshuang;
Editor: CAO Ni; English Editor: Avram Agov)

海峡两岸保护水下文化遗产的法律基础

——比较大陆的现行法制与台湾的立法草案

赵亚娟*

内容摘要:联合国教科文组织通过的《水下文化遗产保护公约》已经于2009年生效。作为文明古国之一,中国的水域内有非常丰富的水下文化遗产资源,但是这些资源正面临严重威胁甚至已经受到严重破坏,因此加强水下文化遗产保护已经非常必要。本文通过对大陆现行立法和台湾立法草案之间的比较研究,为两岸水下文化遗产提供了若干思路。

关键词:中国大陆　台湾　水下文化遗产保护　法律　比较研究

水下文化遗产指上百年来沉没于水下的人类生存遗迹,比如沉船、沉物、陷落水下的先民们的居住遗址等。[①]水下文化遗产保护是近年来国际社会关注的一个热点问题,联合国教科文组织专门通过了《保护水下文化遗产公约》以期加强对水下文化遗产的保护。[②]中国水域内有着十分丰富的水下文化遗产资源,但非法发掘活动使这些宝贵遗产面临着严重威胁,有些已经遭到了严重破坏。此外,一些合法活动,比如港口疏浚、填海造田工程等也会在无意中对遗产造成不利影响甚至是严重破坏。本文通过对两岸相关立法进行比较研究,试图为加强

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① 《保护水下文化遗产公约》第1条将"水下文化遗产"界定为"至少100年来,周期性地或连续地,部分或全部位于水下的具有文化、历史或考古价值的所有人类生存的遗迹,比如:(i遗址、建筑、房屋、人工制品(artifacts)和人类遗骸,及其有考古价值的环境和自然环境;(ii)船舶、飞行器、其他运输工具或其任何部分,所载货物或其他物品,及其有考古价值的环境和自然环境;(iii)具有史前意义的物品……"

② 该公约已经于2009年1月2日生效,目前已有意大利等37个国家批准或加入了公约。参见 http://portal.unesco.org/la/convention.asp? KO=13520&language=E&order=alpha,2011年7月2日访问。虽然这只是一个框架性公约,但已为全球水域内的水下文化遗产建立了一套较为明确、有效的保护制度,指明了未来国际法的发展方向。有关对公约的评析可见傅崐成:《联合国教科文组织〈保护水下文化遗产公约〉评析》,载傅崐成著:《海洋法专题研究》,厦门大学出版社2004年版。*See* also Kuen-chen FU, Some Comments on the UNESCO Convention on the Protection of the Underwater Cultural Heritage—A Chinese Perspective, in *International Journal of Marine and Coastal Law*, vol. 18, No. 1, 2003.

水下文化遗产保护提供若干思路。应指出，虽然两岸立法分别采用了“水下文物”和“水下文化资产”的措辞，但为方便计，除非明确指出，本文假定二者内涵与《保护水下文化遗产公约》界定的“水下文化遗产”相一致。

一、大陆地区的相关立法

大陆立法采用的是“文物”的措辞，有关立法主要是《文物保护法》和《水下文物保护管理条例》。

(一)《文物保护法》

2002年修订后的《文物保护法》，界定了受法律保护之文物的范围，并明确规定“境内地下、内水和领海中遗存的一切文物”，均“属于国家所有”。[①] 虽然相关立法没有界定“文物”的内涵，但根据《文物保护法》，文物分为可移动文物和不可移动文物两大类：前者包括历史上各时代的艺术品、工艺美术品、手稿、图书资料、代表性实物等，后者包括具有历史、艺术、科学价值的古文化遗址[②]、古墓葬、古建筑、[③]石窟寺、石刻、壁画，具有纪念、教育意义或史料价值的近现代重要史迹和代表性建筑等；具有科学价值的古脊椎动物化石和古人类化石同文物一样受国家保护。[④] 不可移动文物可以分为文物保护单位——经政府核定公布的单个或群体的不可整体移动的文物，和尚未核定公布为文物保护单位的一般不可移动文物。[⑤] 水下文物属于不可移动文物。[⑥]

同时，根据该法，国家文物局主管全国文物保护工作；地方县级以上人民政府负责本行政区内的文物保护工作，其文物保护工作部门对文物保护实施监督

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① 《文物保护法》第2和5条。

② “古文化遗址”指古人的建筑废墟及对自然环境改造利用后的遗留痕迹，主要包括古代的城堡、宫殿、村落、居室、作坊、寺庙遗址。此外还包括当时的矿穴、采石坑、窑穴、仓库、水区、水井、窑址等经济性建筑遗存；和壕沟、栅栏、围墙、边塞烽燧、长城、界壕等防御性设施遗存。范敬宜，张春生，徐玉麟，单霁翔著：《文物保护法律指南》，中国城市出版社2003年版，第111页。

③ “古建筑”指保存至今的古代各时期的房屋、桥梁、水坝、隧道等建筑物。同上。

④ 《文物保护法》第2～3条。

⑤ 《文物保护法》第13条。实践中公布的全国重点文物保护单位按其性质分为革命遗址和历史纪念建筑物、石窟寺、古建筑及其历史纪念建筑物、古遗址、古墓葬、石刻、近现代重要史迹及代表性建筑和其他。参见范敬宜，张春生，徐玉麟，单霁翔著：《文物保护法律指南》，中国城市出版社2003年版，第116页。

⑥ 对于陷落水下的古人类居住遗址，可以归入“古文化遗址”；但对于沉船沉物，似乎难以简单归入上述八类。在将水下文物按照文物保护单位加以保护时可以归入“其他”类别。这也合乎《水下文物保护管理条例》第5条的规定。

管理。其他有关部门,比如公安、工商行政管理部门、海关等,也在职责范围内管理和监督文物保护工作。[①]

(二)《水下文物保护管理条例》

1989年颁布的《水下文物保护管理条例》(下称"《条例》")就水下文物的范围、相关主管机构、水下文物的考古勘探和发掘活动等作了规定,为水下文物保护规定了一套较为详细的法律机制。[②]

1. 权利主张和范围

《条例》根据起源国和文物所在水域的性质,规定了不同的所有权和管辖权。

依其规定,中国内水、领海内的一切水下遗存、领海以外其他管辖水域内(即毗连区、专属经济区和大陆架)起源于中国和起源国不明的水下遗存,都属于国家所有,国家对其行使管辖权;对于外国领海以外的其他管辖海域以及公海区域内的起源于中国的文物,国家享有辨认器物物主的权利。[③]

应指出,虽然《条例》对水下文物的管辖权和所有权主张逾越了《文物保护法》的规定,但却是比较合理、克制的。不过,《条例》没有对中国管辖海域内遗存的享有豁免权的外国国家船舶和飞机做出特殊规定,当这些遗产的登记注册地国提出所有权主张或豁免主张时,就会和中国的主张相冲突。此外,"保留辨认器物物主的权利"之措辞有失含混。即使中国不是器物物主,只要和文物具有历史、考古或文化联系,也可依法享有优先权。[④]

表一 《水下文物保护管理条例》对水下文物所有权和管辖权的规定

位置	起源国	所有权人	管辖权	备注
内水和领海	中国 不明 外国	中国	中国	
毗连区	中国 不明	中国	中国	
专属经济区和大陆架	中国 不明	中国	中国	
"区域"和公海	中国			保有辨认器物物主的权利

① 《文物保护法》第8条。
② 参见傅崐成:《联合国教科文组织〈保护水下文化遗产公约〉评析》,载傅崐成著:《海洋法专题研究》,厦门大学出版社2004年版,第2页。
③ 《水下文物保护管理条例》第2～3条。
④ 《联合国海洋法公约》第149条。

续表1

位置	起源国	所有权人	管辖权	备注
外国内水、群岛水域和领海	未提及	未提及	未提及	
外国毗连区	中国			保有辨认器物物主的权利
外国专属经济区和大陆架	中国			保有辨认器物物主的权利

2. 水下文物的保护和管理机构

《条例》基本上重申了《文物保护法》的有关规定：国家文物局主管水下文物的登记注册、保护管理以及有关考古勘探和发掘工作的审批工作，未经其批准，任何单位或个人不得以任何方式私自勘探或发掘；国务院、省、自治区、直辖市的人民政府可以根据《文物保护法》的规定，并依照水下文物的价值，确定并公布全国或省级水下文物保护单位、水下文物保护区，禁止在这些保护单位或保护区内进行危及水下文物安全的捕捞、爆破等活动。[①]

3. 水下文物的发现和上缴

对于由国家所有并行使管辖权的那部分水下文物，发现者应当及时报告和上缴国家文物局或地方文物行政管理部门；对于享有辨认器物物主权利的那部分水下文物，发现者应当及时报告国家文物局或地方文物行政管理部门，已经打捞出水的，则及时提供给这些部门辨认和鉴定。[②]

但《条例》没有为水下文物的发现者规定"维持现场完整"的义务，可能会使发现者为追求主管部门奖励或其他目的而多次打捞文物，导致遗址被破坏。

4. 水下文物的考古勘探和发掘活动

水下文物的考古勘探和发掘活动，应当以文物保护和科学研究为目的，且必须向国家文物局提出申请并得到其批准后进行；如果外方（外国国家、外国法人或自然人、国际组织）要在中国管辖水域进行考古勘探和发掘，必须与中方合作，其申请由国家文物局报国务院特别许可。[③] 结合《条例》第2～3条，对于中国领海以外管辖海域（即毗连区、专属经济区和大陆架）内起源于外国的文物，《条例》虽然不主张所有权，也没有明确主张管辖权，但至少对有关的考古勘探或发掘活动享有管辖权。

在具体实施水下考古勘探和发掘活动时，还必须与其他相关部门，比如港务监督部门等，进行协调。考古勘探和发掘活动应防止水体的环境污染，保护水下生物资源和其他自然资源不受损害；保护水面、水下的一切设施；不得妨碍交通

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① 《水下文物保护管理条例》第4、5、7条。

② 《水下文物保护管理条例》第6条。

③ 《水下文物保护管理条例》第7条。

运输、渔业生产、军事训练以及其他正常的水面、水下作业活动。[①] 这些规定似乎暗示交通运输、渔捞、军事训练等活动优先于水下考古勘探和发掘活动。

此外，《条例》表彰、奖励保护水下文物有突出贡献者，并对破坏水下文物，私自勘探、发掘、打捞水下文物，或者隐匿、私分、贩运、非法出售、非法出口水下文物等违犯行为追究行政或刑事责任。[②]

二、台湾地区的相关立法

（一）现行立法

台湾立法采用的是“文化资产”而非“文化遗产”的措辞。相关立法散见于《文化资产保存法》、《文化资产保存法实施细则》和《领海及邻接区法》等。[③]

如《领海及邻接区法》第16条规定，于“中华民国”领海及邻接区中进行考古、科学研究、或其它任何活动所发现之历史文物或遗迹等，属于“中华民国”所有，并得由“中华民国”政府依相关法令加以处置。由此，对于领海及邻接区内起源于“中华民国”、外国和不明国家的所有历史文物或遗迹，所有权均属于“中华民国”。

《文化资产保存法》是主管文化资产保存、维护与管理的大法。2005年修订后的《文化资产保存法》全文共104条。根据该法，文化资产是指“具有历史、文化、艺术、科学等价值，并经指定或登录的资产”，包括古迹、历史建筑、聚落，遗址，文化景观，传统艺术，民俗及有关文物，古物和自然地景七类；[④]其中，自然地景类的主管机关为“行政院农业委员会”及地方的县或市政府，其他六类的主管机关则为“行政院文化建设委员会”及地方的县或市政府。[⑤]

遗憾的是，该法囿于陆上文化资产保存和维护的思维方式，没有考虑水下文化资产问题。仅在第46条规定，外国人不得在领土及领海范围内调查及发掘遗址。由此，对于内水和领海内的水下遗址，外国人非经“行政院文化建设委员会”许可且与“中华民国国内”学术机构或专业机构合作，不得予以调查和发掘。

2010年修订后的《文化资产保存法实施细则》试图通过扩大解释《文化资产

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① 《水下文物保护管理条例》第8～9条。

② 《水下文物保护管理条例》第10条。

③ 两岸相关法律术语的表述略有差异。台湾地区所称的“邻接区”、“大陆礁层”分别即大陆所称的“毗连区”、“大陆架”，二者分别是对英文“contiguous zone”、“continental shelf”的不同翻译。本文为行文方便没有进行统一。

④ 《文化资产保存法》第3条。其中，“遗址”是蕴藏过去人类生活所遗留具历史文化意义之遗物、遗迹及其所定着之空间。“古物”指各时代、各族群经人为加工具有文化意义之艺术作品、生活及仪礼器物及图书文献等。

⑤ 《文化资产保存法》第4条。

保存法》规定的"遗址"从而明确将水下文化资产纳入保护。该细则第3条规定，"本法第三条第二款所称遗迹，指过去人类各种活动所构筑或产生之非移动性结构或痕迹。本法第三条第二款所定遗物、遗迹及其所定着之空间，包括陆地及水下。"也即，遗址包括陆上遗址和水下遗址。但就文义而言，"所构筑或产生之非移动性结构或痕迹"似乎应仅限于陷落水下的先民们的居住遗址，不包括沉船——而沉船是数量最为丰富的一种水下文化遗产。[①] 加之水下文化资产在管辖、保护、管理与发掘等事项上与陆上文化资产有诸多不同，欲使秉承陆上文化资产保护思路的《文化资产保存法》有效保护水下文化资产，着实勉强。[②]

显然，台湾地区的现行立法对水下文化遗产的保护十分薄弱。要有效保护珍贵的水下文化遗产资源，必须完善现行立法。

(二)《水下文化资产保存法草案》

《水下文化资产保存法草案》(下称"《法案》")是主管水下文化资产保存、维护与管理的大法，全文共46条，分为总则，权利归属与国际合作，水下文化资产活动之申请、进行及监督，水下文化资产保护区，发掘出水，罚则和附则等7章。

1. 对水下文化文化资产的界定

水下文化资产指全部或部分且周期性或连续性位于水下的遗留于"中华民国"管辖权所及水域内、外，具有历史、文化、考古、艺术及科学等价值，并与人类生存有关"的资产，包括遗址、结构物、建筑物、工艺品及人类遗骸，并包括其周遭之考古脉络及自然脉络；船舶、飞机及其它载具，及该载具之相关组件或装载物，并包括其周遭之考古脉络及自然脉络；和具有史前意义之物品；但海底铺设或建造之电缆、管道、人工岛屿、设施及结构除外。[③]

2. 对水下文化资产的所有权和管辖权主张

《法案》对水下文化资产的所有权和管辖权主张是一大亮点。

(1)内水和领海[④]

《法案》对内水和领海内起源于"中华民国"[⑤]或起源国不明的水下文化资产，主张所有权和管辖权，但外国国家船舶和飞机除外。事实上，如果是可辨认国籍的外国国家船舶和飞机，主管机关还应通知有关注册国以便以最佳方式合作保护该资产。对于其他起源于外国的水下文化资产，《法案》主动放弃了所有权。

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① 《水下文化资产保存法草案总说明》第2～3页。
② 《水下文化资产保存法草案总说明》第2～3页。
③ 《水下文化资产保存法草案》第3条。
④ 《水下文化资产保存法草案》第14条。
⑤ 在起源国上，《水下文化资产保存法草案》原文均采用了"起源于我国"的措辞。

而"'中华民国'于行使主权时,拥有规范、授权或许可于'中华民国'内水、领海内水下文化资产活动之专属排他管辖权"之措辞,表明《法案》并没有放弃对其他起源于外国的水下文化资产的管辖权。这就可能产生一些问题:如果外国所有权人知晓该水下文化资产并主张所有权时,如何与我方管辖权相协调?似可认为,一方面应尊重所有权人的权利,但如果涉及水下文化资产活动,则应接受"中国民国"的专属排他管辖权。另外,《法案》仅主张对"水下文化资产活动"享有专属排他管辖权,未主张对"影响水下文化资产的活动"的专属排他管辖权,这可能不利于水下文化资产保护。

(2)邻接区①

《法案》对邻接区内起源于"中华民国"或起源国不明的水下文化资产,主张所有权和管辖权,但外国国家船舶和飞机除外。与《领海及邻接区法》第16条的规定相比,《法案》主动放弃了对其他起源于外国的水下文化资产的所有权。

对于其他起源于外国的水下文化资产,"'中华民国'拥有规范、授权或许可于'中华民国'邻接区内水下文化资产活动之专属排他管辖权"之措辞,表明《法案》并没有放弃相应的管辖权。主管机关对发现的这类水下文化资产或有意进行的调查、研究或发掘,应与所有根据相关国际公约(即《保护水下文化遗产公约》)提出声明之国家,共同谘商保护该水下文化资产之最佳方式;并作为协调国,对前款谘商进行协调。②

不过,可能出现的一个问题是,如果有关国家不是"相关国际公约"缔约国,没有根据公约提出声明,则主管机关似乎没有义务通知该有关国家。是否由此可以认为,主管机关有权自行对该水下文化资产进行调查、研究或发掘?

(3)专属经济区和大陆架③

对于专属经济区内和大陆架上起源于"中华民国"或起源国不明的水下文化资产,《法案》没有主张所有权,仅主张排他管辖权——主管机关得禁止、授权或许可其中的水下文化资产活动。对于其中的"中华民国"国家船舶和飞机,"中华民国"保留所有权。

对于起源于外国的水下文化资产,《法案》主张的是一种共享的管辖权:主管机关对发现的这类水下文化资产或有意进行的调查、研究或发掘,应与所有根据相关国际公约(即《保护水下文化遗产公约》)提出声明之国家,共同谘商保护该水下文化资产之最佳方式;并作为协调国,对前款谘商进行协调。

不过,可能出现的一个问题是,与邻接区相比,《法案》对于其中的外国国家船舶和飞机,并没有排除管辖权。这就可能与注册国的主权豁免主张相冲突。

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① 《水下文化资产保存法草案》第15条。
② 《水下文化资产保存法草案》第16条。由于邻接区与部分专属经济区海域和大陆架完全重合,第16条有关专属经济区内和大陆架上水下文化资产保护的规定也适用于邻接区。
③ 《水下文化资产保存法草案》第16条。

(4)"区域"[①]

对于"区域"中起源于"中华民国"的水下文化资产,《法案》仅主张保有文化、历史或考古方面的优先权。主管机关对发现的这类水下文化资产或有意进行的调查、研究或发掘,应与所有根据相关国际公约(即《保护水下文化遗产公约》提出声明之国家,共同谘商保护该水下文化资产之最佳方式;并作为协调国,对前款谘商进行协调。

对于"区域"中与"中华民国"确有文化、历史或考古联系的水下文化资产,主管机关可向相关国际组织表示愿意参加谘商。

不过,此处的问题是:如何界定"起源于'中华民国'"的水下文化资产和"与'中华民国'确有文化、历史或考古联系"的水下文化资产?

(5)外国主张管辖权的水域

对位于外国内水、群岛水域、领海和邻接区内起源于"中华民国"的水下文化资产,《法案》主张保有文化、历史或考古等方面的优先权。[②] 对于其中的"中华民国"国家船舶和飞机,"中华民国"保留所有权。[③]

对位于外国专属经济区内和大陆架上的与"中华民国"确有文化、历史或考古联系的水下文化资产,"中华民国"保有文化、历史或考古方面的优先权。[④] 对于其中的"中华民国"国国家船舶和飞机,《法案》保留所有权。[⑤]

简单而言,《法案》依据水下文化资产是否为国家船舶和飞机、起源国和所处水域性质的不同而提出了不同的权利主张。首先,根据主权豁免原则,"中华民国"原则上不对外国国家船舶和飞机主张管辖权或所有权,但主张对于专属经济区内和大陆架上的外国国家船舶和飞机行使排他管辖权(见前述);对于"中华民国"的国家船舶和飞机,不论其位于何处,"中华民国"作为所有权人均主张所有权。其次,对于其他的水下文化资产,如果起源于"中华民国"或起源国不明,并位于"中华民国"的内水、领海和邻接区内,则"中华民国"享有所有权和专属排他管辖权;如果位于专属经济区内或大陆架上,"中华民国"仅主张专属排他管辖权。对起源于某一外国的水下文化资产,《法案》既尊重起源国的权利,亦对相关水下文化资产活动主张管辖权。再次,对于"中华民国"管辖水域外的水下文化资产,《法案》仅对起源于"中华民国"或与"中华民国"确有文化、历史或考古联系的资产,保有文化、历史或考古方面的优先权。

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① 《水下文化资产保存法草案》第 18 条。不过,该条采用的措辞是"国家管辖权所及水域外海床、洋底及其底土"而非"国际海底区域"。逻辑上而言,有两个问题值得推敲:一是可能存在水下文化资产的"公海"被排除在外;二是外国的领海和邻接区海床、专属经济区海床和大陆架则被包括在内。相形之下,直接采用"公海和国际海底区域"的措辞更可取。

② 《水下文化资产保存法草案》第 14～15 条。

③ 《水下文化资产保存法草案》第 19 条。

④ 《水下文化资产保存法草案》第 16 条。

⑤ 《水下文化资产保存法草案》第 19 条。

不过，因为发现水下文化资产才是主张管辖权、所有权或优先权的前提条件，由于《法案》规定的水下文化资产的发现报告制度并不完善，可能影响上述权利主张。比如，《法案》仅要求“中华民国”国民或悬挂“中华民国”国旗的船舶的船长在其他国家专属经济海域内或大陆架上发现水下文化资产时，应即通知主管机关，以转知该其他国家。[①] 对于“中华民国”管辖海域内的水下文化资产，却没有规定类似的报告发现义务。

表二　《水下文化资产保存法草案》对水下文化资产所有权和管辖权的规定

位置	起源国	所有权人	管辖权	备　注
内水和领海	“中华民国”不明	“中华民国”	“中华民国”（规范、授权或许可水下文化资产活动）的专属排他管辖权	外国国家船舶和飞机被排除，主管机关有义务通知可辨认国籍的外国国家船舶和飞机的旗国
邻接区	“中华民国”不明	“中华民国”	“中华民国”（规范、授权或许可水下文化资产活动）的专属排他管辖权	外国国家船舶和飞机被排除
专属经济区和大陆架	“中华民国”不明	未提及，但对“中华民国”的国家船舶和飞机，保留所有权	“中华民国”	主管机关发现起源于他国的水下文化资产，或有意对其调查、研究或发掘时，可以作为协调国协调与有关国家的谘商
“区域”	“中华民国”	未提及，但对“中华民国”的国家船舶和飞机，保留所有权		保有文化、历史或考古方面的优先权； 对与中华民国确有文化、历史或考古联系的水下文化资产，可向相关国际组织表示愿意参加谘商
外国内水、群岛水域和领海	“中华民国”	未提及，但对“中华民国”的国家船舶和飞机，保留所有权		保有文化、历史或考古方面的优先权

① 《水下文化资产保存法草案》第 17 条。

续表 1

位置	起源国	所有权人	管辖权	备　注
外国邻接区	“中华民国”	未提及，但对“中华民国”的国家船舶和飞机，保留所有权		保有文化、历史或考古方面的优先权
外国专属经济区和大陆架		未提及，但对“中华民国”的国家船舶和飞机，保留所有权		对与“中华民国”确有文化、历史或考古联系的水下文化资产，保有文化、历史或考古方面的优先权

3. 对水下文化资产的保护

整体来看，《法案》对水下文化资产的保护颇为周密。

首先，《法案》对“水下文化资产”的界定非常宽泛，且没有采纳各国国内法中常见的 100 年时限标准，这就将绝大部分的水下遗迹纳入了保护范围。

其次，根据对水下文化资产影响或破坏的严重性，《法案》将有关活动分为“影响水下文化资产活动”和“水下文化资产活动”两类，分别予以规范。

影响水下文化资产活动指“非以水下文化资产为主要标的或标的之一，但有对其造成干扰或破坏之虞”的活动，比如海底管道铺设、资源勘探等。由于这些活动通常都是合法活动，只是可能会对水下文化资产带来干扰或破坏，故《法案》的要求比较宽松：仅要求政府机关或公营事业在从事这类活动时应先行调查所涉水域有无疑似水下文化资产，必要时应将水下文化资产纳入环境影响评估项目。[①] 可能出现的一个问题是：如果私人主体在进行这类活动时发现水下文化资产则应如何处理？由于《法案》没有明确规定，就可能留下一个保护上的漏洞。[②]

水下文化资产活动指“以水下文化资产为其主要标的，并可能直接或间接对其造成干扰或破坏”的活动。对于这类活动，《法案》确立了若干原则：不得从事商业开发；不得不必要干扰人类遗骸；不适用捞救法和发现物法。[③]《法案》第三章专门规范了水下文化资产活动的申请、进行和监督。据此，专职水下考古机构

① 《水下文化资产保存法草案》第 11～12 条。

② 《文化资产保存法》第 29～30、50、74～75 等条分别规定了发现（疑似）古迹、遗址和古物时的处理，但如前所述，欲将上述规定适用于水下文化资产，着实勉强。

③ 《水下文化资产保存法草案》第 5～7、13、36 条。

和私人都可以向水下文化资产审议会[①]申请从事水下文化资产活动，得到其批准和主管机关核定后，方可从事此类活动。[②] 外国人原则上不得从事水下文化资产活动。[③] 在活动进行期间，相关人员应依照计划书定期制作活动内容报告送主管机关备查；主管机关亦应履行监督职责，可派员进行现场检查。不过，《法案》第 28 条的规定却显得异常突兀：既然是针对水下文化资产的调查、研究、保存乃至发掘活动，发现疑似水下文化资产的可能性极高。而按照该条要求，一旦发现疑似水下文化资产，“应即停止任何影响该疑似水下文化资产之活动，以维持现场完整性，并立即通报主管机关处理”；主管机关可采取临时性保护措施，并可“指示水下考古专责机构进行必要之调查、研究及其它相关水下工作”。这些规定显然与水下文化资产活动的申请与审批程序自相矛盾。

针对水下文化资产发掘活动，《法案》明确提出，仅在规定的例外情形下方可将资产发掘出水。[④] 但发掘活动不得为商业性开发，不适用捞救法和发现物法，必须在征得有关部门的批准后方可进行，且应提交水下文化资产保存维护计划书，不得采用破坏性发掘方法和技术，并按照规定提交发掘品和发掘记录等。[⑤]

再次，对于具有重要历史、文化、考古、艺术和科学等价值的水下文化资产，主管机关可以划定水下文化资产保护区，就地保存和管理。[⑥] 非经主管机关许可，不得擅自进入保护区。在保护区内，不仅禁止打捞水下文化资产的活动，一些影响水下文化资产的合法活动，比如拖网捕鱼、潜水、矿藏探勘、航道开挖等，也同样被禁止，除非事先取得主管机关的许可。[⑦]

最后，对于对水下文化资产保存、保护及管理工作有所贡献者，《法案》要求主管机关给予奖励或补助。对于各种违犯行为，《法案》还规定了罚款、拘役或 5 年以下有期徒刑等行政和刑事处罚措施。其中，对于窃取或毁损水下文化资产，非法将“中华民国”所有的水下文化资产运出国外，或擅自发掘水下文化资产者，除没收非法发掘品外，应追究其刑事责任，而无论是个人犯罪抑或单位犯罪，亦无论未遂或既遂。如果非法发掘品全部或部分无法追缴，则应追征其价额或以犯罪者其他财产充抵。[⑧] 不过，如果是从主管机关不知晓的水下遗址中窃取且有关发掘品已流失无法追缴，则计算追征款项的数额可能会成为一个难题。

由此，按照《法案》的规定，“中华民国”管辖范围内的水下文化资产将得益于

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① 根据《水下文化资产保存法案》第 9 条，主管机关得邀集学者专家、学术与专业机构及机关代表等，组成水下文化资产审议会，审议水下文化资产之调查、研究、发掘、保存、修复、水下文化资产保护区之划设、管理维护等重大事项。

② 《水下文化资产保存法草案》第 24～25 条。

③ 《水下文化资产保存法草案》第 26 条。该条与《文化资产保存法》第 46 条相一致。

④ 《水下文化资产保存法草案》第 36 条。

⑤ 《水下文化资产保存法草案》第 37～38 条。

⑥ 《水下文化资产保存法草案》第 32 条。

⑦ 《水下文化资产保存法草案》第 33 条。

⑧ 《水下文化资产保存法草案》第 39 条。

就地保存原则，这就将扰乱或破坏水下文化资产的可能性降到了最低点。对于不以水下文化资产为主要标的的勘探、军事演习、港口疏浚等合法活动，如果是由政府机关或公营事业从事这类活动，则应先行调查所涉水域有无疑似水下文化资产，必要时应将水下文化资产纳入环境影响评估项目。

对于以水下文化资产为标的的调查、研究等活动，应提交申请，在征得有关部门的批准后方可进行，且应严格按照申请提交报告和接受主管部门的(现场)监督。必要时，主管机关可以划设水下文化资产保护区，以保全和管理水下文化资产。仅在例外情形下方可将资产发掘出水。但发掘活动不得为商业性开发，不适用捞救法和发现物法，必须在征得有关部门的批准后方可进行，且应提交水下文化资产保存维护计划书，不得采用破坏性发掘方法和技术，并按照规定提交发掘品和发掘记录等。对于各种违犯行为，《法案》规定了较为严厉的处罚措施。

综上，《法案》的规定较为全面且先进，相信能够有力促进台湾的水下文化资产保护。

三、对两岸相关立法的比较

有西方学者在研究了《条例》后认为，就有关水下文化遗产的法律与政策而言，大陆地区的法律“处于领先地位。这是在经过认真分析他国所采取的行动，并认真思索如何最佳利用经济激励措施以鼓励个人保护此一资源之后所取得的成就。”[①]虽然如此，这项只有 13 条的《条例》现在看来不免显得单薄和概括，且赋予行政单位相当大的自由裁量权，又极度欠缺配套的实施细则，难以有效解决实践中暴露出来的问题。[②]

与《条例》相比，台湾的现行立法显然过于简陋、粗疏。但《法案》的制定则使《条例》相形见绌。兹比较如下：

(一)保护对象的界定

《条例》没有界定“水下文物”。如前述，虽然可以套用《文物保护法》对“文物”的规定，但并不准确，且过于强调“物”，没有突出其所在的具有考古价值的周遭环境和自然环境。

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① Porter Hoagland，China，in Sarah Dromgoole ed.，*Legal Protection of the Underwater Cultural Heritage：National and International Perspectives*，Hague：Kluwer Law International，1999，p. 35.

② 参见傅崐成：《保护水下文化遗产——两岸相关法律亟待增修》，载傅崐成著：《海洋法专题研究》，厦门大学出版社 2004 年版，第 61 页。

《法案》则准确界定了“水下文化资产”，并在定义中强调了资产“周遭之考古脉络及自然脉络”。

（二）相关权利主张

无论是《条例》抑或《法案》，都是根据起源国和遗产所在水域的性质，规定了不同的所有权和管辖权。基本上，两部法律都对管辖水域内起源于中国和起源国不明的水下文化遗产主张所有权和管辖权，并对管辖范围外水域内起源于中国的水下文化遗产保留一定的优先权。两部法律的规定都十分克制，对于领海外海域内（即毗连区、专属经济区和大陆架）起源于外国的水下文化遗产至少都主动放弃了部分管辖权。

《条例》对水下文物的权利主张过于狭隘。首先，《条例》对外国内水、领海和群岛水域内的水下文物完全放弃了管辖权和所有权。至少《条例》应坚持对起源于中国的船舶和飞机享有所有权和管辖豁免权。其次，《条例》对中国的国家船舶和飞机没有做出特殊规定。再次，对于管辖海域外起源于中国的水下文物，《条例》主张的“辨认器物物主的权利”有失狭隘，不如《法案》主张的“保有文化、历史或考古方面的优先权”全面。事实上，依照 1982 年《联合国海洋法公约》的规定，为控制贩运在海洋发现的考古和历史文物，如未经沿海国许可而将文物移出毗连区海床，沿海国即可推定违反了其有关毗连区的法律和规章。[①] 换言之，至少就毗连区内起源于外国的水下文物而言，《条例》完全可以对非法发掘行为主张管辖权。至于专属经济区内和大陆架上的水下文物，当前的趋势是沿海国纷纷扩大管辖权，以便更有力地保护这种不可再生资源，如《保护水下文化遗产公约》就赋予了沿海国对专属经济区内和大陆架上水下文化遗产的管辖权，《条例》也没有必要单方做出自我限制。[②]

《法案》提出的权利主张相对更加全面、合理。比如，《法案》对国家船舶和飞机做出了特殊规定：来自“中华民国”的国家船舶和飞机不论位于何处，均保留所有权；对“中华民国”内水、领海和毗连区内的外国国家船舶和飞机排除管辖权。对于外国内水、群岛水域和领海内的起源于“中华民国”的水下文化资产“保有文化、历史或考古方面的优先权”。

但如前所述，两部法律在水下文化遗产发现报告制度上都存在一些不足。

（三）对水下文化遗产的保护

《条例》和《法案》对考古勘探、发掘活动都做了严格规定，均要求出于文物

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① 《联合国海洋法公约》第 303 条第 2 款。
② 《保护水下文化遗产公约》第 9～10 条。

“保护和研究目的”，并获得主管部门的批准，外国人原则上不得在管辖水域内从事此类活动。两部法律均规定，出于保护目的，可以划设水下文化遗产保护区。同时，两部法律均赋予了主管机关较大的自由裁量权。整体上，《法案》的规定更加细致全面。

此外，如前所述，《法案》规定了就地保护原则和禁止商业性开发原则等若干原则，至少理论上将水下文化遗产开发活动降到了最低，且在例外的开发活动中亦不得出于商业目的。对于已经批准的水下文化遗产活动，《法案》强调主管机关的（全程）现场派员监督职责。对于可能对水下文化遗产产生不利影响甚至损害的一些合法活动，《法案》要求政府机关或公营事业在进行疏浚、填海、建造等工程时应现行调查所涉水域内是否有疑似水下文物，必要时进行环境影响评估。但《条例》对此鲜有涉及乃至完全沉默。

（四）奖励和制裁措施

《条例》和《法案》都奖善罚恶。对于促进水下文化遗产保护的，予以奖励；对于违犯行为则追究行政乃至刑事责任。相比而言，《条例》的处罚过于宽松，应当加大处罚力度，至少应增加收缴非法所得的水下文化遗产这一处罚，以便从根源上遏制非法发掘活动。

整体上，两岸都重视水下文化遗产保护工作。《条例》和《法案》的很多规定都相同或相似，深刻表明两岸在水下文化遗产保护问题上的立法思路和取向高度一致，未来两岸在合作推进水下文化遗产保护问题上并不存在大的法律障碍。

（责任编辑：苏宝清）

On the Legal Basis of the UCH Protection on the Two Sides of Taiwan Strait

——A Comparative Study of the Current Mainland UCH Law and the Related Taiwanese Draft Law

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Abstract: The UNESCO Convention on the Underwater Cultural Heritage Protection has entered into force since 2009. As one of the major ancient civilized countries, China is very rich in the underwater cultural heritage within its waters. However, those cultural resources are under severe threat of being damaged or even extinct now, which makes it urgently necessary to strengthen the UCH protection. The present paper provides some suggestion to both sides of the Taiwan Strait in this regard by conducting a comparative study on the current laws of Mainland China and the draft of Taiwan.

Key Words: Mainland China; Taiwan; UCH Protection; law; Comparative study

Underwater cultural heritage ("UCH") means traces of human existence having a cultural, historical or archaeological character which have been under water for hundreds of years, such as vessels, artifacts and human settlements.[①] UCH protection has been for a hot issue for the international community especially since the adoption of the UNESCO *Convention on the Protection of the*

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① *See* Convention on the Protection of the Underwater Cultural Heritage, Art. 1.

Underwater Cultural Heritage.[①] China is rich in UCH resources, which have been threatened by illicit removal or salvage activities. Some sites have already been seriously damaged. Moreover, some activities such as fishing and construction operations, despite being legal, may affect or damage UCH incidentally. This article attempts to compare the current laws and regulations including draft of Mainland China and Taiwan. It should be noted that, though the phrases "underwater cultural relics" and "underwater cultural property" instead of "underwater cultural heritage" are employed by the laws and regulations of the two sides respectively, this article holds that they have the same meaning as the "underwater cultural heritage" defined by the UNESCO *Convention on the Protection of the Underwater Cultural Heritage* unless indicated otherwise.

Ⅰ. Current Laws and Regulations of Mainland China

The terms "cultural relics" and "underwater cultural relics" are employed by the current laws and regulations of Mainland China, the most important of which are the *Law on the Protection of Cultural Relics* (《文物保护法》) and *the Regulations on the Protection of Underwater Cultural Relics* (《水下文物保护管理条例》) (hereinafter "the Regulations").

A. *The Law on the Protection of Cultural Relics*

Though the *Law on the Protection of Cultural Relics* as revised in 2007 fails to concretely define "cultural relics", it does classify them into "movable cultural relics" and "immovable cultural relics" and includes various examples of the two categories.[②] According to this law, underwater cultural relics are regarded as immovable cultural relics. It is also stipulated that "all cultural relics remaining underground or in the inland waters or territorial seas" within the

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① That convention has been in force since Jan. 2, 2009. Currently, there are 40 contracting States including Spain and Italy. *See* the website of UNESCO http://portal.unesco.org/la/convention.asp? KO=13520&language=E&order=alpha, last visited on Sep. 16, 2011. Being a framework convention, it has nevertheless established a set of new rules for preserving UCH located in various maritime zones. For analysis of the convention, *see* Kuen-chen FU, A Chinese Perspective on the UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, vol. 18, No. 1, 2003, pp. 111-121.

② The Law on the Protection of Cultural Relics, Art. 2-3.

boundaries of China are "owned by the State".[1] The *Law on the Protection of Cultural Relics* provides for administrative penalty and criminal punishment against offenders that destroy, excavate and salvage UCH without authorization, or engage in construction, drilling, digging, or explosion in a reserve.[2] Regarding the administrative institutions in charge of cultural relics protection, the State Administration of Cultural Relics (国家文物局) is the competent authority on the national plane.[3]

Regretfully, despite the fact that the *Law on the Protection of Cultural Relics* was revised in 2007, it treats UCH in the same way as terrestrial relics, failing to take into consideration the special situation of UCH.

B. The Regulations

The Regulations, promulgated by the State Council in 1989, set forth enforcement rules for the *Law on the Protection of Cultural Relics*. Though the set of Regulations contains only 13 articles, it provides a relatively detailed scheme for UCH protection.[4]

1. Titles and Jurisdictions over UCH

The Regulations claim title and jurisdiction over UCH depending on its place of origin and current location. Firstly, China has title over all UCH lying in the Chinese inland waters and territorial waters, as well as those of Chinese or unidentified origin in sea areas outside the Chinese territorial waters but under its jurisdiction, i. e., the contiguous zone, EEZ and the continental shelf. Secondly, China retains "the right to identify the owners of the [UCH] objects" of Chinese origin that remain in the high seas or sea areas beyond the territorial waters of any foreign state but under the jurisdiction of a certain state, i. e., the contiguous zone, EEZ or continental shelf of a foreign state.[5]

It should be noted that such claims are reasonable and demonstrate self-restraint, though they may have gone beyond the provisions of the *Law on the Protection of Cultural Relics*. However, no special treatment for foreign State

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① The Law on the Protection of Cultural Relics, Art. 5.

② The Law on the Protection of Cultural Relics, Art. 64-66.

③ The Law on the Protection of Cultural Relics, Art. 8.

④ *See* Kuen-chen FU, A Chinese Perspective on the UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, vol. 18, No. 1, 2003, p. 110

⑤ The Regulations, Art. 2-3.

vessels and aircraft located within China's jurisdiction could be found in the Regulations, which may lead to conflicts when the flag state concerned claims title or immunity over a relic. Furthermore, "the right to identify the owners of the [UCH] objects" of Chinese origin seems too simple and self-restrained: even if China is not the owner of a specific UCH, it nevertheless enjoys preferential rights if there is a historical, archaeological or cultural link with the UCH. ①

Table one: Titles and jurisdictions over UCH as provided for in the Regulations

Location	State of origin	Owner	Jurisdiction	Remarks
Internal waters and territorial sea	China Unidentifiable Known foreign	State of China	China	
The contiguous zone	China Unidentifiable	State of China	China	
EEZ and the continental shelf	China Unidentifiable	State of China	China	
The Area and the High seas	China			China retains the right to identify the owners of the objects.
Foreign internal waters, archipelagic waters and territorial sea	(no reference)	(no reference)	(no reference)	
Foreign contiguous zone	China			China retains the right to identify the owners of the objects.
Foreign EEZ and continental shelf	China			China retains the right to identify the owners of the objects.

2. Institutions in Charge of UCH Protection and Management

As for institutions in charge of UCH protection and management, the Regulations reaffirm the provisions of the *Law on the Protection of Cultural Relics*: The State Administration of Cultural Relics is the competent authority in charge of the registration, protection and management of UCH as well as approval of UCH archaeological exploration and excavation activities; under no circumstances may an entity or individual conduct unauthorized exploration or

① The United Nations Convention on the Law of the Sea, Art. 149.

excavation; the State Council, the local governments of the provinces, autonomous regions and municipalities directly under the central government may, in accordance with the pertinent procedures specified in the provisions of the *Law on the Protection of Cultural Relics*, determine and announce UCH protection areas or UCH reserves at the national or provincial level depending on the historical, commercial or other value of UCH concerned; also, any activities that might jeopardize the safety of the UCH, such as fishing and demolition, shall be prohibited. ①

3. Discovery and Hand-over of UCH

Regarding the UCH owned by China and under its jurisdiction, finders shall report promptly to the State Administration of Cultural Relics or local administrative departments for cultural relics and hand over the items recovered; regarding the UCH of which the right to identify the owners of the objects is retained by China, finders shall also report promptly to the State Administration of Cultural Relics or local administrative departments for cultural relics and turn in the items recovered for identification and assessment. ②

Unfortunately, finders are not required to "[keep] integrity of the site", (citation?) which may prompt finders to excavate UCH items for administrative commendation and awards, possibly causing irreversible damage to the site.

4. Archaeological Exploration and Excavation Activities of UCH

UCH archaeological exploration and excavation activities shall be carried out for the purposes of protection and scientific research and be authorized by the State Administration of Cultural Relics. Foreigners, including foreign States, foreign juridical persons and international organizations wishing to conduct such activities in the waters under Chinese jurisdiction shall do so in cooperation with the Chinese government by first submitting the application to the State Administration of Cultural Relics, which shall then refer it to the State Council for special approval. ③ Read together with articles 2 and 3 of the Regulations, a conclusion may be drawn that though the Regulations do not explicitly claim title or jurisdiction over the UCH of foreign origin located within China's jurisdiction but beyond the territorial sea, i. e., the contiguous zone, EEZ and the continental shelf, China does enjoy jurisdiction over the archaeo-

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① The Regulations, Art. 4, 5 and 7.

② The Regulations, Art. 6.

③ The Regulations, Art. 7.

logical exploration and excavation of the UCH.

When carrying out archaeological exploration and excavation activities, participants shall coordinate with other administrative institutions, such as the port authority (港务监督部门), as well as prevent environmental pollution and damage to underwater biological and natural resources.① They shall also protect any surface or underwater man-made facilities and may not obstruct communications and transportation, fishery production, military drills and other normal surface and underwater operations and activities.② Therefore, communication and transportation, fishing, military drills and other normal surface and underwater operations seem to prevail over UCH exploration and excavation activities.

Finally, the Regulations also provide commendation and awards for those who have contributed to UCH preservation, and administrative and criminal sanctions for offenders who damage UCH, or explore, excavate UCH without authorization, or hide, share secretly, traffic in, illicitly sell or export UCH.③

Ⅱ. Current Laws and Regulations of Taiwan

The phrase "cultural property" instead of "cultural heritage" is employed in current relevant laws of Taiwan, which include the "*Cultural Properties Preservation Act*" (《文化资产保存法》), "*Enforcement Rules of the Cultural Properties Preservation Act*" (《文化资产保存法实施细则》) and the "*Law on the Territorial Sea and Contiguous Zone*" (《领海及邻接区法》).

A. *The Law on the Territorial Sea and Contiguous Zone*

According to article 16 of the *Law on the Territorial Sea and Contiguous Zone*, the historical objects or relics (历史文物或遗迹) found within the ROC's territorial sea or contiguous zone in the course of archaeological, scientific research or any other activities are owned by the "State of ROC" and may be disposed of in accordance with relevant laws and regulations of the ROC government.

Clearly, ownership over the UCH found within the territorial sea and con-

① The Regulations, Art. 8.
② The Regulations, Art. 9.
③ The Regulations, Art. 10.

tiguous zone is asserted by the ROC government irrespective of its origin.

B. *The Cultural Properties Preservation Act*

The *Cultural Properties Preservation Act* deals with the preservation, protection and management of cultural properties. The latest revision of that act, promulgated on February 5, 2005 includes 104 articles.

According to article 3, "cultural property" means "designated or registered assets having historic, cultural, artistic and/or scientific value", and includes seven categories such as monuments, historic buildings and settlements; (古迹、历史建筑、聚落); sites (遗址); cultural landscapes (文化景观); traditional arts (传统艺术); folk customs and cultural related artifacts (民俗及有关文物); antiquities (古物) and natural landscapes (自然地景). ① To the detriment of UCH, this latest revision still lumps them together with terrestrial cultural heritage, failing to take into account the special physical environment or unique preservation and protection requirements associated with UCH. Only article 46 provides that foreigners shall not investigate and excavate historical sites within the limits of the territory or territorial sea.

C. *The Enforcement Rules of the Cultural Properties Preservation Act*

The *Enforcement Rules of the Cultural Properties Preservation Act* as revised in 2010 attempts to fill the gap by expanding the scope of "site" to include the UCH. Paragraph 3 of article 3 provides that the "relics (遗物), vestiges (遗迹) and the space in which they reside as referred to in paragraph 2, article 3 of the Act include **terrain and underwater** ". In other words, "sites" include both terrestrial and underwater ones.

Besides these few articles, there are some other substantive laws and regulations in other policy domains that may touch on the preservation, protection and management of the UCH, but none deals comprehensively and effectively with the discovery, protection, preservation, excavation and management of UCH. It is in view of this awkward situation that the *Underwater Cultural Property Preservation Act* (Draft) (hereinafter "the UCP Draft") has been drafted.

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① Paragraph 2 of Art. 3 of the Cultural Properties Preservation Act stipulates that "Site" includes "relics (遗物), vestiges (遗迹) and the space in which they reside".

Ⅲ. The UCP Draft of Taiwan

This UCP Draft, a comprehensive act addressing UCH protection, conservation and management, includes forty-six articles divided into seven chapters: general provisions, distribution of rights and jurisdictions and international cooperation, application, operation and supervision of activities directed at UCH, reserve of UCH, excavation, penalties and supplementary provisions.

A. *Subject of Protection*

Article 3 of the Draft reads:

> *Underwater cultural property means all traces of human existence located in the zones under or beyond ROC's jurisdiction having a historical, cultural, archaeological, artistic or scientific character which have been partially or totally under water, periodically or continuously, and may include sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and objects of prehistoric character. Pipelines, cables, artificial islands, installations and structures placed on the seabed shall not be considered as underwater cultural heritage.*

B. *Rights and Jurisdictions over UCH*

The provisions of title and jurisdiction over UCH are commendable.

1. Internal Waters and the Territorial Sea [1]

The UCP Draft claims title and jurisdiction over UCH of Chinese origin, [2] or artifacts of unidentified origin that remain in the internal waters and territorial sea except for state vessels and aircraft. In fact, if the origin of state vessels and aircraft is identifiable, the competent authority shall notify the flag

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① The UCP Draft, Art. 14.

② The original text of UCP Draft employs the phrase "underwater cultural property originating from our State" (起源于我国), for convenience, this paper uses "of Chinese origin" instead.

state and request its cooperation in protecting the UCH.

The UCP Draft abstains from claiming jurisdiction over UCH of a foreign origin. However, article 14 provides:

> *ROC, in the exercise of her sovereignty, has the exclusive right to regulate and authorize activities directed at underwater cultural heritage in her internal waters and territorial sea.*

Clearly, ROC does not give up jurisdiction over activities directed at UCH of a foreign origin that take place in its internal waters or territorial sea, and so conflicts may arise. If the owner of UCH of a foreign origin knows the location and claims ownership, how should the competing claims be coordinated? The conclusion may be that on one hand the claim to ownership shall be respected, and on the other, ROC's jurisdiction over activities directed at the UCH in question shall also be maintained. Furthermore, the UCP Draft claims exclusive jurisdiction over activities directed at UCH alone excluding activities incidentally affecting UCH, which may affect its protection.

2. The Contiguous Zone [1]

The UCP Draft claims title and jurisdiction over UCH artifacts of Chinese origin, or of unidentified origin that remain in the contiguous zone except for state vessels and aircraft. Unlike article 16 of the *Act on the Territorial Sea and Contiguous Zone*, the UCP Draft stops short of claiming jurisdiction over UCH of a foreign origin.

Regarding UCH of a foreign origin located in the contiguous zone, the provision that "ROC has the exclusive right to regulate and authorize activities directed at underwater cultural heritage in her contiguous zone" indicates that the UCP Draft does not relinquish jurisdiction over activities in its contiguous zone directed at UCH of a foreign origin. Where there is a discovery of UCH, or if the competent authority intends to investigate, study or excavate the UCH, it shall consult all other states which have declared an interest in accordance the relevant convention, i. e., the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, on how best to protect the UCH, and coordinate such consultations as "Coordinating State". [2]

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[1] The UCP Draft, Art. 15.

[2] The UCP Draft, Art. 16. As the contiguous zone overlaps a portion of the EEZ, article 16 applies to UCH located in the contiguous zone.

A potential complication may be that if a state concerned is not party to the UNESCO *Convention on the Protection of the Underwater Cultural Heritage* and fails to declare an interest in accordance with its provisions, it would appear that the competent ROC authority is not obliged under international law to inform that state, which might otherwise have an interest in the UCH. Under these circumstances, may the competent authority investigate, study or excavate the UCH of its own volition? So far the answer is not clear.

3. The EEZ and the Continental Shelf ①

With regard to UCH of Chinese origin, or of unidentified origin that remains in the EEZ and on the continental shelf, the UCP Draft merely claims jurisdiction over them. Meanwhile, the competent authority may forbid, authorize or give permit to activities directed at the UCH located in the EEZ and on the continental shelf. Furthermore, the ROC retains title over its state vessels and aircraft.

The UCP Draft claims joint jurisdiction over UCH of a foreign origin located in its EEZ or on its continental shelf, so when there is a discovery of UCH, or if the competent authority intends to investigate, study or excavate the UCH, it shall consult all other states which have declared an interest in accordance with the relevant convention, i. e., the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, on how best to protect the UCH, and coordinate such consultations as "Coordinating State".

A problem may be that the UCP Draft does not waive ROC jurisdiction over foreign state vessels and aircraft found in these zones, which may conflict with sovereign immunity claims of a foreign flag state.

4. The Area ②

Regarding UCH of Chinese origin that remains in the Area, the UCP Draft claims cultural, historical or archaeological preferential rights. Where there is a discovery of UCH, or if the competent ROC authority intends to investigate, study or excavate the UCH, it shall consult all other states which have declared an interest in accordance with the relevant convention, i. e., the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, on how best to

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① The UCP Draft, Art. 16.

② The UCP Draft, Art. 18. The original text of the UCP Draft employs the phrase "the seabed, ocean floor and subsoil of the waters beyond the State's jurisdiction" instead of "the international deep seabed area". This paper holds that the phrase "the high seas and the international seabed area" is preferable.

protect the UCH, and coordinate such consultations as "Coordinating State".

With regard to UCH that has a verifiable cultural, historical or archaeological link to the ROC, the UCP Draft provides that the competent authority may declare an interest to the relevant international organization in being consulted on how to ensure the effective protection of the UCH in question.

Yet how does one distinguish between "UCH of Chinese origin" and "UCH that has a verifiable cultural, historical or archaeological link with ROC"? Again, Taiwan cannot accede to the UNESCO Convention on the Protection of the Underwater Cultural Heritage due to political realities, so how can Taiwan declare its interest to the competent international organization in being consulted on how to ensure the effective protection of that UCH? The answers are not clear.

5. Waters under Foreign Jurisdiction

As for UCH of Chinese origin that remains in the internal waters, archipelagic waters, territorial sea or contiguous zone of a foreign country, the UCP Draft claims cultural, historical or archaeological preferential rights. [1] The Draft also claims title over ROC state vessels and aircraft located in these waters. [2]

With regard to UCH having a verifiable cultural, historical or archaeological link with the ROC that remains in a foreign country's EEZ or on its continental shelf, the UCP Draft claims cultural, historical or archaeological preferential rights. [3] The Draft also claims title over ROC state vessels and aircraft located in another state's EEZ or on its continental shelf. [4]

In short, the UCP Draft bases its claims on three criteria: The location and origin of UCH as well as its status as private or state-owned vessel or aircraft. Firstly, according to the sovereign immunity principle, the ROC abstains from claiming jurisdiction or title over foreign State vessels and aircrafts, but claims jurisdiction over such UCH located in her EEZ and on her continental shelf. For ROC state vessels and aircraft, the title thereto is retained by the ROC irrespective of location. Secondly, for other UCH with a Chinese origin or an unidentified origin located in the internal waters, territorial sea and contiguous zone of the ROC, it retains the title and exclusive jurisdiction thereof. If the UCH is located in the ROC's EEZ or on its continental shelf, ROC shall enjoy

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① The UCP Draft, Art. 14-15.
② The UCP Draft, Art. 19.
③ The UCP Draft, Art. 16.
④ The UCP Draft, Art. 19.

exclusive jurisdiction. For other UCH with a foreign origin but located in ROC territory, the UCP Draft respects the rights of the state of origin but claims jurisdiction over activities directed at that UCH. Thirdly, for UCH located in waters beyond its jurisdiction, ROC only claims preferential rights over those of Chinese origin or with a verifiable cultural, historical or archaeological link to the ROC.

As such claims and jurisdictions are based on the UCH discovery reports, they may be adversely affected because the discovery report provisions of the UCP Draft are incomplete. For example, the Draft requires that when an ROC national or a vessel flying her flag discovers UCH located in a **foreign** (emphasis added) EEZ or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to the competent authority. [1] No such report is required for UCH discovered in the EEZ or on the continental shelf of the ROC.

Table two: Titles and jurisdictions over UCH as provided for in the UCP Draft

Location	state of origin	owner	Jurisdiction	Remarks
Internal waters and territorial sea	"ROC" or unidentifiable	"ROC"	"ROC" (exclusive jurisdiction to regulate, authorize or give permit to activities directed at UCH	Foreign State vessels and aircraft are excluded. The competent authority is obliged to inform the flag state of an identified foreign State vessels and aircraft.
The contiguous zone	"ROC" or unidentifiable	"ROC"	"ROC" (exclusive jurisdiction to regulate, authorize or give permit to activities directed at UCH	Foreign State vessels and aircraft are excluded.
The EEZ and continental shelf	"ROC" or unidentifiable	(No reference) Title over "ROC" State vessels and aircraft is retained.	"ROC"	Where there is a discovery of UCH, or if the competent authority intends to investigate, study or excavate the UCH, it shall consult all other states as the coordinating State.

① The UCP Draft, Art. 17.

Renewal table 1

Location	state of origin	owner	Jurisdiction	Remarks
The Area	"ROC"	(No reference) Title over "ROC" State vessels and aircraft is retained.		Cultural, historical or archaeological preferential rights are retained; For UCH with a verifiable cultural, historical or archaeological link with "ROC", interest may be declared to the competent international organization.
Foreign internal waters, archipelagic waters and territorial sea	"ROC"	(No reference) Title over "ROC" State vessels and aircraft is retained.		Cultural, historical or archaeological preferential rights are retained
Foreign contiguous zone	"ROC"	(No reference) Title over "ROC" State vessels and aircraft is retained.		Cultural, historical or archaeological preferential rights are retained
Foreign EEZ and continental shelf		(No reference) Title over "ROC" State vessels and aircraft is retained.		For UCH having a cultural, historical or archaeological link with "ROC", cultural, historical or archaeological preferential rights are retained.

C. Protection and Management of UCH

The UCP Draft has devised a full set of measures to protect UCH. Firstly, with the "100-year" limit removed, the definition of UCH stipulated by the Draft is broad enough to include nearly all traces of human existence for protection.

Secondly, the UCP Draft makes a clear distinction between activities directed at UCH and those incidentally affecting UCH dependent upon the damages caused to UCH, and imposes different obligations, which helps the competent authority to curtail illicit salvage of UCH.

According to the UCP Draft, "activities incidentally affecting UCH" means "activities which, despite not having UCH as their primary object or one

of their objects, may physically disturb or otherwise damage UCH", such as pipeline laying operations and fishing. As these activities are normally legal yet may incidentally affect UCH, the obligation is comparatively straightforward: When government institutions or public enterprises engage in such activities, they shall investigate in advance the waters involved for UCH or relics suspected to be UCH, and incorporate considerations regarding the UCH into the environmental impact assessment project when necessary. ① The UCP Draft is completely silent, however, on private parties engaging in such activities, which may be a loophole that undermines UCH protection. ②

"Activities directed at UCH" means "activities having UCH as their primary object and which may, directly or indirectly, physically disturb or otherwise damage UCH". ③ The UCP Draft established several principles to regulate such activities: commercial exploitation of UCH is prohibited, proper respect for all human remains must be accorded and salvage laws and the law of finds subjugated to Draft provisions. ④ Application, operation and supervision of activities directed at UCH are specially regulated in chapter 3 of the UCP Draft. According to chapter 3, professional underwater archaeological institutions and private parties may apply to the UCH Deliberation Commission⑤(水下文化资产审议会) regarding plans to engage in activities directed at UCH, and shall carry out the activities with both the ratification of the UCH Deliberation Commission and the approval of the competent authority. ⑥ Foreigners generally shall not be permitted to engage in activities directed at UCH. ⑦ Meanwhile, individuals or enterprises authorized to conduct such activities shall periodically submit reports on the details of their progress in accordance with the plan sub-

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① The UCP Draft, Art. 11-12.

② The treatment uncovered monuments, sites and antiquities and items suspected to be monuments, sites and antiquities is addressed in articles 29, 30, 50, 74 and 75 of *the Cultural Properties Preservation Act*. Yet such application to UCH is difficult and inappropriate for the reasons as mentioned above.

③ The UCP Draft, Art. 4.

④ The UCP Draft, Art. 5-7, 13, 36.

⑤ According to article 9 of the UCP Draft, the competent authority may invite scholars, representatives of academic, professional and administrative institutions and so on to form the UCH Deliberation Commission, conduct the investigation, study, excavation, preservation, and repair of underwater cultural property, and oversee the establishment, management and maintenance of reserves in addition to other important matters.

⑥ The UCP Draft, Art. 24-25.

⑦ The UCP Draft, Art. 26. This article is identical with Art. 46 of the *Cultural Properties Preservation Act*.

mitted to the competent authority; the authority shall keep the activity under supervision and may send supervisors for on-site inspection.

Yet the placement of article 28 seems conspicuously awkward: Since the activities directed at UCH are investigations, studies, preservation and even excavations of UCH, the discovery of UCH or relics suspected to be UCH is highly likely. As article 28 reads, once relics suspected to be UCH are discovered, "any activity that might affect [the] relics suspected to be UCH shall be suspended to keep integrity of the site" and the discovery "shall be reported to the competent authority for treatment", such as imposing temporary protective measures and instructing "professional underwater archaeological institutions to undertake investigations, studies or other relevant underwater works as necessary". These provisions are obviously in conflict with the application and approval procedures provided for in previous articles.

As for excavations, the UCP Draft provides that only in exceptional cases may UCH be excavated. [①] Meanwhile, excavation shall not result in commercial exploitation and must be performed with the authorization of the competent authority. Salvage laws and law of finds shall not be applied. UCH preservation plans, and items removed as well as excavation records shall be submitted following the excavation. Moreover, the methods and techniques used must be as non-destructive as possible. [②]

Thirdly, for UCH of important historical, cultural, archaeological, artistic or scientific value, the competent authority may establish a reserve for *in situ* preservation and management. [③] Entrance to the reserve shall only be permitted with the authorization of the competent authority. Salvage operations for UCH and other activities incidentally affecting UCH such as trawling, diving and mineral resources exploitation activities shall be prohibited unless they are authorized by the competent authority in advance. [④]

Finally, the competent authority shall award those who have made significant contributions to UCH preservation, protection, and management. By the same token, both administrative and criminal sanctions such as fines, criminal detention or imprisonment are imposed for various violations involving UCH. Specifically, those who have stolen or damaged UCH will be held criminally li-

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① The UCP Draft, Art. 36.

② The UCP Draft, Art. 37-38.

③ The UCP Draft, Art. 32.

④ The UCP Draft, Art. 33.

able;also,UCH items belonging to the ROC that have been illegally recovered or trafficked,including outside its territory,shall be seized,regardless of criminal intent,completion of the crime,or whether the agent is an individual or organization. If part or all of the items illegally recovered cannot be seized,compensation shall be mandatory. [1] In practice,though,if the items are recovered from a site unknown to the competent authority and cannot be seized,it may be hard to assess the amount of compensation.

Accordingly,all UCH located in waters within the jurisdiction of ROC shall be preserved *in situ*, which will theoretically minimize the likelihood of disturbing or damaging the UCH. Other activities not having UCH as their primary object or one of their objects such as military exercises and fishing shall also be properly regulated. Investigations and studies having UCH as their primary object shall be authorized by the competent authority,carried out in strict conformity with the application and kept under supervision,including such measures as on-site inspections. The competent authority may establish a reserve when necessary to preserve and manage UCH. Only on exceptional occasions may UCH be excavated. The excavation shall not involve commercial exploitation and the methods and techniques used must be as non-destructive as possible. Severe sanctions are imposed for offenders. Taken as a whole,the UCP Draft has established a set of comprehensive and scientific rules that will strengthen UCH preservation in Taiwan.

Ⅳ. Comparison of the Regulations and the UCP Draft

The design of mainland China's Regulations has been regarded by some Western scholars as the result of careful analysis of the actions taken by other countries,thus positioning Mainland China at the vanguard. [2] Even so,the Regulations,adopted 20 more years ago,are too simplistic and generous,granting excessive scope of administrative discretion to the competent authorities. [3] The current laws and regulations of Taiwan are even looser and loophole-rid-

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① The UCP Draft,Art. 39.

② Porter Hoagland,"China",in Sarah Dromgoole ed.,*Legal Protection of the Underwater Cultural Heritage*:*National and International Perspectives*,Hague:Kluwer Law International,1999,p. 35.

③ *See* Kuenchen FU,Protection of the Underwater Cultural Heritage-An Urgent Need to Revise the Related Laws and Regulations Across the Taiwan Strait,in Kuenchen FU,*A Study on the Law of the Sea*,Xiamen University Press,2004,p. 61.

den. This section will compare and contrast the Regulations and the UCP Draft.

A. *Subject of Protection*

The subject of the Regulations is "underwater cultural relics", which the Regulations fail to define. The meaning of "relics" is not set forth in the *Law on the Protection of Cultural Relics* either. The categories as listed in the *Law on the Protection of Cultural Relics* may be helpful, but cannot include the archaeological and natural context of UCH. On the other hand, the UCP Draft provides a precise definition of "underwater cultural property" including the archaeological and natural context thereof.

B. *Rights and Jurisdictions over UCH*

Generally, both the Regulations and the UCP Draft base their claims on the origin and location of the UCH. Basically, these two legal documents claim title and jurisdiction over the UCH of Chinese origin and an unidentified origin that remains in waters within their jurisdictions, and retain certain preferential rights over the UCH of Chinese origin that remains beyond their jurisdictions. Moreover, both are self-restrained, giving up at least some jurisdiction over UCH of a foreign origin that remains outside of the territorial sea, i. e., in the contiguous zone, EEZ or on the continental shelf.

The claims advanced by the Regulations are much too modest. Firstly, the Regulations give up jurisdiction over UCH located in foreign internal waters, archipelagic waters and territorial sea. At least it should claim title over and immunity of Chinese state vessels and aircraft located in these zones. Secondly, the Regulations fail to make a distinction between state vessels and aircraft and other UCH. Thirdly, for underwater cultural relics of Chinese origin that remain beyond China's jurisdiction, the "right to identify the owners of such relics" as claimed by the Regulations is inadequate. In contrast, the "cultural, historical or archaeological preferential rights" as retained by the UCP Draft is more precise and comprehensive. In practical terms, coastal states may presume that removal of UCH from the seabed of the contiguous zone without its approval would result in an infringement within its territory or territorial sea of

the laws and regulations related to the zone. [1] Clearly, the Regulations should claim jurisdiction over illegal removal of UCH of a foreign origin out of the seabed of the contiguous zone, which is fully in accordance with UNCLOS. Regarding UCH located in the EEZ or on the continental shelf, coastal states tend to enlarge their jurisdiction to include these areas by legislating and enforcing measures there to effectively protect this non-renewable resource. The UNESCO *Convention on the Protection of the Underwater Cultural Heritage* has affirmed and reinforced this practice (at which article(s)?); it is therefore unnecessary for the Regulations to make timid claims in that regard. [2]

Compared with the Regulations, the provisions of the UCP Draft are more rational and complete. For example, the UCP Draft distinguishes between state vessels and aircraft and other UCH: Title over ROC state vessels and aircraft is retained irrespective of the location of their discovery; likewise, jurisdiction over foreign state vessels and aircraft located in ROC internal waters, territorial sea and contiguous zone is excluded.

Notably, both the Regulations and the UCP Draft neglect to establish a complete UCH discovery report regime.

C. *Protection and Preservation of UCH*

Both the Regulations and the UCP Draft impose strict control over underwater archaeological exploration and excavation. Such activities shall be for the purpose of "UCH protection and scientific research" and must be authorized by the competent authority. Foreigners generally are not allowed to engage in such activities in waters within the coastal state's jurisdiction. Both documents authorize the competent authorities to establish reserves for UCH. Though the Regulations and the UCP Draft allow significant scope of discretion for the competent authorities, the latter is more detailed and specific.

Furthermore, the UCP Draft stipulates several principles such as *in situ* preservation and a ban on commercial exploitation of UCH, hypothetically minimizing activities directed at UCH. Further, the Draft directs the competent authority to maintain supervision over authorized activities directed at UCH by methods such as on-site inspection. As for activities incidentally affecting UCH, the UCP Draft also provides for proper protection. In contrast, the Reg-

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① The United Nations Convention on the Law of the Sea, Art. 303(2).

② Convention on the Protection of the Underwater Cultural Heritage, Art. 9-10.

ulations completely fail to address these issues.

D. Awards and Sanctions

Both the Regulations and the UCP Draft provide for awards for those who have contributed to UCH protection and preservation as well as administrative and criminal sanctions for offenders. Compared with the UCP Draft, sanctions as provided for in the Regulations are not severe enough to deter illicit removal. Seizure of items removed without prior authorization should be incorporated.

Ⅴ. Conclusion

Rich in UCH resources, both mainland China and Taiwan have been concerned with UCH protection and have made efforts to protect and preserve them via effective legislation. Many provisions of the Regulations and the UCP Draft are identical or almost so, indicating that the two sides have taken similar approaches in UCH protection and management. It is foreseeable that the two sides will cooperate on UCH protection and preservation especially regarding UCH located in the Taiwan Strait and the South China Sea. Fortunately, they will face few legal difficulties in the process.

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台湾海峡水下文物保护合作研讨会综述

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2001 年 11 月《保护水下文化遗产公约》得到联合国教科文组织(UNESCO)的通过,并在 2009 年 1 月正式生效,虽然中国目前还没有批准该公约,但是有关部门正在研究修改法律,台湾地区的主管官员也正在研究相关问题。在此背景下,《中国海洋法学评论》、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、台湾中山大学海洋事务研究所于 2010 年 6 月 26 日—27 日举办"台湾海峡水下文化保护合作研讨会",两岸十八位专家在陈瑞球楼 117 演讲厅进行了深入的研讨。上海交通大学凯原法学院海洋法律与政策研究中心综合了与会专家以及国内外相关研究的观点,对于台湾海峡水下文物保护合作研讨会综述如下,以备进一步研究参考。

引 言

水下文化遗产作为人类文化遗产的一个组成部分,在人类历史上发挥着重要作用。联合国教科文组织(United Nations Educational,Scientific and Cultural Organization,UNESCO)于 2001 年 10 月 15 日—11 月 3 日在法国巴黎召开第 31 次会议,通过了《保护水下文化遗产公约》(Convention on the Protection of the Underwater Cultural Heritage)。公约在 2009 年 1 月 2 日正式生效,其中对水下文化遗产进行了明确定义,规定水下文化遗产是至少 100 年以来,周期性地或连续性地,部分或全部位于水下的具有文化、历史或考古价值的所有人类生存的遗迹,如遗址、建筑、工艺品、人的遗骸、船只、飞行器,及其有考古价值的环境和自然环境等。

作为世界上历史最悠久的文化古国之一,中国对于《保护水下文化遗产公约》的态度始终是各国所密切关注的。两岸之间的和平友好交流已经达到了一个新的台阶,保护水下文化遗产需要两岸进一步合作,建立长效性保护机制,提高公众意识,开展有关的科研和教育活动。

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一、台湾海峡水下文物现状

（一）台湾水下考古最近的发展

台湾位于世界最大陆地及最大海洋的交界，是东方文明与西方文明的接触地带，亦是大陆文明与海洋文明交会之处。在台湾及澎湖分别发现许多宋元及明清的贸易瓷，北台湾的十三行遗址出土来自中国的瓷器与唐宋钱币，以及源自东南亚菲律宾及沙劳越一带的铁器及与玻璃珠，都说明了当时南中国海与台湾、澎湖、南洋、日本及朝鲜间，这个所谓“亚洲的地中海”频繁的海上贸易。自古迄今，无论是捕鱼谋生、通商贸易、移民拓垦或是海权争战，都在这片无际汪洋，不断重复发生。[①]

台湾海峡礁石密布，季风强烈、波涛汹涌，通常是船难的发生地。对于考古学家而言，台湾海峡是水下考古的极佳场所，其中蕴藏的水下考古资源，包括陆地时期旧石器时代人类活动遗迹、冰期之后新石器时代被海水淹没的人类聚落、为数众多的古沉船等。台湾的历史与海洋关系密切，从事水下考古可谓是了解台湾海洋文化发展过程的最佳途径之一。[②]

保护水下文化资产是世界性趋势，而台湾四面环海，有丰富的水下文化遗产，常有渔民、潜水人员发现与打捞，急需有效保护与积极管理。根据相关海洋政策以及“水下文化资产保存发展计划”，台湾地区积极推动法规制定，历史资料研究，水下考古调查。

在2006年—2009年澎湖水域水下文化遗产调查中，以澎湖水域作为台湾周边海域水下文化遗产初步调查工作的起点。澎湖水域的水下考古初步调查工作，以至少沉没一百年以上的历史沉船或其他考古遗址作为发现目标。然而，鉴于澎湖在清末时期海战史上丰富的历史背景，以及二十世纪初以来，数次重要海上战役在澎湖水域留下记录，推测该水域中潜藏了未满一百年之战争沉船、飞行器等，对近代战争历史也具有重要意义，因此将之也一并纳入水下文化遗产的调查。[③]

调查发现的水下文化遗产必须进行价值评估工作，首先需要参酌国际上已有的水下文化遗产，并根据台湾水域水下文化遗产的特性，拟定一套适用台湾水

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① 李丽芳：《台湾水下文化资产保护政策与国际合作》，台湾海峡水下文物保护合作研讨会，上海，第2～3页。

② 李丽芳：《台湾水下文化资产保护政策与国际合作》，台湾海峡水下文物保护合作研讨会，上海，第2～3页。

③ 臧振华：《台湾水下考古的发展》，台湾海峡水下文物保护合作研讨会，上海，第10页。

域的水下文化遗产价值评估标准,以作为保存与处理水下文化遗产的基础。[①]

参考各国有关沉船价值或意义评估的原则与标准,就目前的发现成果,作为评估发现物的价值依据,参考标准包括船体形态及结构、文化脉络、陈述展示、观光经济以及资讯整合。在所发现的目标物中,截止2009年,评估显示具体目标物共23处,其中属于沉船或沉船散落物的有21处,另2处分别为疑似水雷及铁质油柜。根据文化遗产价值标准评估,沉船中有明清中国船2艘,19世纪英国船1艘,日本船6艘,其中2艘为19世纪,4艘为日本二次世界大战时的军舰。[②]

水下考古与水下文化遗产保护,具有技术复杂、人力与财力耗费大的特点,展望台湾水下考古工作,需要继续建立水下考古团队,持续培养人才;对于水下调查、发掘、研究和出水文物维护能力,已经初步建立,仍须积累经验,精准探测水下及较深水域;在制度与法律允许下,与国际团队合作,引进民间力量参与;进行持续的保护水下文化遗产宣传和教育。

(二)福建沿海水下考古发现及其相关问题

福建省地处我国大陆东南沿海、台湾海峡西岸,是“海上丝绸之路”的主要区段之一。福建地区海岸曲折漫长、岛礁星罗棋布、潮流汹涌、航道蜿蜒,加之季风变幻、台风多发,也因此在这一海域留下了数量众多的沉船,积淀了丰厚的水下文化遗产。[③]

2007年起,中国国家博物馆水下考古研究中心与福建博物院文物考古研究所合作,组织全国各地的水下考古专业人员对福建的漳州、莆田、福州等水下文化遗产丰富的海域进行了水下考古重点调查,发现一批较重要的水下文化遗产。

漳州地区沿海的水下文化遗产主要分布在东山、漳浦、龙海一带海域,发现主要有龙海半洋礁一号宋代沉船遗址、半洋礁二号宋代水下文物点、漳浦县沙洲岛元代沉船遗址、龙海白屿清代水下文物点和龙海九节礁清代水下文化遗址;莆田地区的水下文化遗产主要分布在湄州湾和兴化湾海域,已调查发现的有东吴门峡仔宋代水下文物点、湄州湾文甲大屿元代水下文物点、湄州湾大竹岛清代沉船遗址、南日岛北土龟礁一号宋代沉船遗址、北土龟礁二号元代沉船遗址、北土龟三号明代沉船遗址、北日岩一号宋代沉船遗址、北日岩二号清代水下文物点、北日岩三号清代沉船遗址和北日岩四号元代沉船遗址;福州地区的水下文化遗产主要分布在平潭海域一带,已调查发现的有平潭分流尾屿五代沉船遗址、大练岛西南屿宋代沉船遗址、小练岛东礁宋末元初沉船遗址、大练岛元代沉船遗址、九梁礁明代沉船遗址、“东海平潭碗礁Ⅰ号”清代沉船遗址和平潭“碗礁二号”水

① 臧振华:《台湾水下考古的发展》,台湾海峡水下文物保护合作研讨会,上海,第10页。
② 臧振华:《台湾水下考古的发展》,台湾海峡水下文物保护合作研讨会,上海,第10页。
③ 栗建安:《福建沿海水下文物普查的新发现及相关问题(2007—2010)》,台湾海峡水下文物保护合作研讨会,上海,第10页。

下文物点。[①]

存在的相关问题：一、水下文化遗产的分布规律，二、水下文化遗产面临的严峻形势，三、水下文化遗产保护的方式方法，四、水下文化遗产调查发掘的相关法律法规，五、水下文化遗产的保护利用。[②]

二、两岸水下文物保护相关法律制度的比较和完善

（一）1989年《中华人民共和国水下文物保护管理条例》

《中华人民共和国水下文物保护管理条例》于1989年10月20日颁布，第七条规定水下文物的考古勘探和发掘活动应当以文物保护和科学研究为目的。任何单位或者个人在中国管辖水域进行水下文物的考古勘探或者发掘活动，必须向国家文物局提出申请，并提供有关资料。未经国家文物局批准，任何单位或者个人不得以任何方式私自勘探或者发掘。

外国国家、国际组织、外国法人或者自然人在中国管辖水域进行水下文物的考古勘探或者发掘活动，必须采取与中国合作的方式进行，其向国家文物局提出的申请，须由国家文物局报经国务院特别许可。

（二）台湾地区《文化资产保存法》及其《施行细则》

《文化资产保存法》第四十六条规定，外国人不得在我国领土及领海范围内调查及发掘遗址。但与国内学术或专业机构合作，经中央主管机关许可者，不在此限。

2010年6月15日颁布的《文化资产保护法施行细则》第三条修正，本法第三条第二款所定遗物，指下列各款之一：一、文化遗物，指各类石器、陶器、骨器、贝器、木器或金属器等过去人类制造、使用之器物。二、自然遗物，指动物、植物、岩石、土壤或古生物化石等与过去人类所生存生态环境有关之遗物。所称遗迹，指过去人类各种活动所构筑或产生之非移动性结构或痕迹。所定遗物、遗迹及其所定着之空间，包括陆地及水下。

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① 栗建安：《福建沿海水下文物普查的新发现及相关问题（2007—2010）》，台湾海峡水下文物保护合作研讨会，上海，第10页。

② 栗建安：《福建沿海水下文物普查的新发现及相关问题（2007—2010）》，台湾海峡水下文物保护合作研讨会，上海，第10页。

(三)台湾地区《水下文化资产保护条例(草案)》

2010年6月3日,台湾地区《水下文化资产保护条例(草案)》第五次法规会审议条文,第一条、第五条、第十一条分别规定,“为保存、保护及管理水下文化资产,建构国民与历史之联系,发扬海洋国家之特质,制定本法”,“水下文化资产活动应以保存、保护、管理或研究水下文化资产为目的,并以就地保存为原则”,“为保护水下文化资产,政府机关或公营事业于海域或水下进行影响水下文化资产活动者,应先行调查所涉水域有无疑似水下文化资产;如有发现,应即通报主管机关……”。可见,台湾地区强调就地保护,加强国际合作以防止商业开发的通道,追求历史年代的脉络。

根据《水下文化遗产保护公约》以及相关公约规定,比较两岸水下文物保护的法律制度及其实践,可以完善推进以下七个方面[①]。

第一,主管机关的确立与法制之建立。《水下文化遗产保护公约》第22条规定,为了确保公约的有效实施,缔约国应设立水下文化遗产的主管机关,并应将其机关名称及地址告知联合国教科文组织以共同加强对于水下文化遗产目录的编制、保存和更新工作,以对水下文化遗产进行有效的保护、保存、展示和管理,并展开有关的科研和教育推广活动,由此可见水下文化遗产主管机关确立的重要性。中国大陆目前水下文化遗产保护体制是由中央的国家文物局委托中国历史博物馆设立的水下考古研究中心负责统筹指导,此外还在广州阳江市、山东青岛、浙江的宁波及舟山,分别设立水下考古工作站;台湾地区的工作目前由文建会所属文资总处依据所掌管的文化资产保存法负责推动。关于水下文化遗产保护法制化的推动,中国大陆与水下文物保护有关的法律包括有1981年实施的《文物保护法》和1989年《水下文物保护管理条例》,中国大陆近年随着国际形势的发展,由国家文物局根据新修订的《文物保护法》修订相关条例及施行细则,包括水下文物的考古探勘和发掘活动许可等规定,结合《保护水下文化遗产公约》的精神执行相关工作;台湾地区参考国际社会主流趋势以及各国将《水下文化遗产保护公约》内国法化之经验,研究拟定完成《水下文化资产保存法(草案)》。在水下文化遗产保护经费预算的编列方面,目前中国大陆每年水下考古的固定经费逐渐增加至一千多万人民币,近年开始购置一些较为先进的设备;在台湾,目前文资总处每年约编列2,000万元台币进行普查研究等相关工作,并逐年购置探测及出水遗物保存修复相关设备。

第二,推动水下文化遗产普查与建立数据库。1996年《水底文化遗产保护管理宪章》第六条中强调水下遗产调查团队的所有成员必须要有适当的资格与

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① 李丽芳:《台湾水下文化资产保护政策与国际合作》,台湾海峡水下文物保护合作研讨会,上海,第2～3页。

经验,而且所有侵入性的调查必须在具有公认资格、适合经验的著名水下考古专家的指导与监控下才能进行。中国大陆是从 19 世纪 80 年代中期以来,陆续在福建、广东沿海及西沙群岛附近海域开始了水下文化遗产调查,并发现 100 多处的疑似遗址。2007 年中国大陆将内海、内河及内湖的水下文化资产普查列为第三次全国文物普查中一个专门的推动项目,这也是第一次对于水下文化资产进行全国性的普查。在这个目标下,广东、海南、福建、浙江、山东、辽宁等许多省市已开始进行;台湾自 2006 年由文建会所属国立文化资产保存研究中心筹备处所委托中研院进行的"澎湖马公港古沉船调查发掘及水下资产研究保存科学人才培育计划"展开水下文化遗产全面性的普查工作。目前文资总处所推动的台湾水下文化遗产保存维护发展计划,其中项目包括"台湾附近海域水下文化遗产历史研究计划"及"台湾考古遗址地理信息系统建置计划"。在增进国际合作方面,数据库的建立对于相关国家都富有重要的意义。

第三,水下考古调查发掘技术发展暨国际合作。《水下文化遗产保护公约》第 21 条中特别建议缔约国开展合作,进行水下考古、水下文化遗产保护技术等方面的交流和培训,并按彼此商定的条件进行与水下文化遗产研究、保护有关的技术移转。因此,可以进一步提高水下考古调查技术,建立文化资产价值评估标准。

第四,出水遗物的保存修复暨国际合作。制定遗物发掘出水准则及保护计划,发展出水遗物的保存修复技术。

第五,水下遗产的保存维护、经营管理与再利用。1996 年《水底文化遗产保护管理宪章》第 10 条特别指出应对水下遗址进行经营管理与监管保护的责任,除非与保护及经营管理有所冲突,公众接近水下文化遗产应该被推动。第 14 条则强调公众对于调查的认知及对水下文化遗产的意义应该利用不同的媒体用通俗的方式来推动,并强调与社区、团体、博物馆及相关机构间的合作。1999 年《国际观光宪章》中则提出了文化遗产必须被经营管理并与当地居民与外来访客相互沟通,国内及国际观光已经成为文化交流的最主要媒介,然而文化观光也必须有所规范即绝对不能伤害文化遗产本身,也必须对当地居民与社区有所助益。《水下文化遗产保护公约》在目标及总则指出在允许或进行任何开发水下文化遗产活动之前,就地保护应作为首选,并不得对水下文化遗产进行以商业为目的的开发活动。同时,进行保护区的划设与管理维护,对于水下文化遗产的经营管理与再利用。

第六,水下文化遗产专业人才培训暨国际合作。《水下文化遗产保护公约》特别指出专业的水下考古人才培育的重要性,其中第 21 条提出各国应该合作培训专业的水下考古人才,将水下考古经验传承发扬。水下专业考古人才需要具备的条件除了科学素养、技术训练与健全的心理与生理机能外,最好兼具陆地考古相关经验。目前,全世界都存在水下考古人才不足的窘境,而水下考古爱好者与潜水者通过专业的训练,在其间扮演适当的角色。中国大陆的水下考古人才

培训由国家博物馆水下考古研究中心负责，并于2001年由国家文物局批准在广东海陵岛设置国家级的水下考古科研培训基地，同时进行南海一号的进一步发掘与沿海水下文物的普查。虽然20年来，中国大陆在水下实务已经逐渐有了本土经验，但面临了人才缺乏的问题，因年龄和其它原因，部分学员已不参加水下考古工作，从事水下遗址发掘及抢救时，往往面临被征调者各自有工作岗位的实际困难；在台湾，自从文建会文资总处开始推动水下文化遗产保护起，便积极同步规划水下考古及保存与管理维护人才的培训，但由于普查工作量十分沉重，推动人才培训工作也存在困难之处。同时，有必要建立世界或亚洲水下考古中心，提高人才培训的相关措施。

第七，水下文化遗产教育推广。《水下文化遗产保护公约》第20条强调应采取一切可行的措施来提高公众对水下文化遗产的价值与意义的认识，以及对于保护水下文化遗产重要性的认知。保护水下文化遗产的方法应该让每个人都成为海关，并让大众了解水下文化遗产的重要性。教育民众水下文化遗产是公共所有，应由大众一起保护人类共同的遗产。在开展教育推广中，可以结合各种方式，进行国际的跨域合作。

三、台湾海峡水下文物保护合作长效机制

根据《水下文化遗产保护公约》规定，所有国家都应负起保护水下文化遗产的责任，强调公约目的在于要确保和加强对水下文化遗产的保护，并特别建议缔约国开展合作，进行水下考古、水下文化遗产保存技术等方面的交流和培训，并依据彼此商定的条件进行与水下文化遗产研究、保护有关的技术进行合作。

两岸文化上同根同源，水下文物是人类共同遗产，人类文化不可分割的一个部分，秉承“交流、互信、合作、双赢”的原则，展望两岸水下文物保护合作。

第一，协作推动海洋文化教育，由两岸创立“海洋文化研究与发展基金”，或由现有基金提供若干奖学金与研究金，开放两岸提出申请，以鼓励对于海洋文化有兴趣的青年学子交流学习，或由专家学者提出专题研究计划申请。

第二，研究拟定《海峡两岸文化合作与保护白皮书》，海洋文化发展存在海洋史观没有建立、海洋文化遗产缺乏、海洋文化意识欠缺、海洋文化的沦落、海洋教育没有深化、海洋生活文化没有落实和海洋文化教育体系有待建立七个课题，为此台湾地区制定了重建海洋历史图像、保存传扬海洋文化、塑造海洋生活意象、以及打造海洋空间特色四大策略。

第三，充实水下文物保护法令。根据台湾地区《水下文化资产保护条例（草案）》第四十条规定，对于水下文化遗产保存、保护及管理工作有所贡献或经许可进行各类水下文化遗产活动者，主管机关给予奖励或补助。

第四，进行试点海洋考古合作。定期举办海峡两岸学术会议，加强双边、多

边的合作研究,开展探究古船复原技术的合作。

第五,加强海洋文史交流研究。经常和定期地举办文学和史料交流研讨,建立珍惜古籍书画的分享机制。

第六,加强两岸水下考古人员的培训与合作。两岸共同办理水下考古人员的培训和实习,并在适当时共同合作,进行水下文物研究、勘探、打捞和保护工作;建立水下文物的专家档案,强化联系网络。①

第七,建立台湾海峡水下文化遗产保护的长效性合作机制。首先,两岸同胞应共同对台湾海峡及附近的水下文物共同维护、保护、保存,达成基本的共识;其次,以各种可行的方式对水下文物普查进行合作;再次,两岸对《保护水下文化遗产公约》生效后的水下文化遗产相关立法工作进行合作;复次,对于南海中沙、东沙、南沙附近的水下文化遗产,双方应寻求一些适当的示范区、示范点进行合作,避开军方敏感区域;最后,两岸就相关主题进一步推进水下文化遗产的合作交流,例如以两年一次,轮流主办的方式,在这期间加强相关教育推广例如鼓励青年朋友交流,鼓励民间力量例如考古协会等参与公众教育与培训等。

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① 邱文彦:《台北港环评与水下文物保护》,台湾海峡水下文物保护合作研讨会,上海,第13～17页。

A Conference Summary on Cooperation Over Underwater Cultural Heritage Protection in the Taiwan Strait

LIU Bin*

The "*Treaty on Protecting Underwater Cultural Heritage*" was passed by UNESCO in November, 2001 and became effective in January, 2009. Although Beijing has not approved the Treaty, relevant government agencies are studying perfection of the laws. Government officials in Taipei are also studying the matter. Given this background, a "Conference on cooperation for underwater cultural relics protection in Taiwan Strait", which was held on June 26—27, 2010. Cosponsors included the *China Oceans Law Review*, Oceans Policy and Law Center of Xiamen University, the Oceans Law and Policy Research Center of Shanghai Jiao Tong University, C. Y. Tung's International Centre for Maritime Studies of Hong Kong Polytechnic University, and the National Sun Yat-sen University Institute of Marine Affairs in Taiwan. Eighteen experts from both sides of the strait, held in-depth discussions at Lecture Hall 117 of R. C. Chen's Building. The Oceans Law and Policy Research Center at the KoGuan Law School, Shanghai Jiao Tong University summarized the opinions of the participating experts and those expressed in related studies. They issued a general statement on cooperation over underwater cultural relics protection in the Taiwan strait for future reference.

Introduction

As a component of human culture heritage, underwater cultural heritage plays an important role in human history. UNESCO held its 31st meeting in Paris between October 15 and November 3, 2001. It passed the "*Convention on*

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the Protection of the Underwater Cultural Heritage", which became effective on January 2, 2009. This Convention defines underwater cultural heritage as the vestiges human existence and activities that are valuable culturally, historically or archeologically. These vestiges and sites must be periodically or continually, partially or completely under water and have existed for at least 100 years. These include abandoned sites, architecture, art works, human remains, ships, aircraft, and natural environments.

As a country with one of the longest cultural histories in the world, China's attitude toward the "*Convention on the Protection of the Underwater Cultural Heritage*" has been closely watched by other countries. Cross-strait peace and friendship are facilitating further cooperation in the protection of our underwater cultural heritage. It is enabling the establishment of long-term protection mechanisms, the raising of public awareness, and the promotion of relevant scientific research and educational activities.

Ⅰ. The current status of underwater relics in the Taiwan Strait

A. *Recent developments in underwater archeology in Taiwan*

Taiwan is situated between the largest continent and the largest ocean in the world. It is also a contact zone for eastern and western civilizations. Taiwan is where continental and oceanic civilizations have converged. Many traded porcelains of the Song-Yuan Dynasties and Ming-Qing Dynasties have been uncovered in Taiwan and Penghu. At the "Thirteen Lines" site in northern Taiwan, porcelains from mainland China, coins from the Tang-Song Dynasties, iron tools and glass beads from the Philippines and Sarawak in southeast Asia, have been excavated. These indicate frequent trade activities in the "Asian Mediterranean Sea", including the South China Sea, Taiwan, Penghu, Southeast Asia, Japan, and Korea. Fishing, trade, immigration, planting, reclamation, and fighting for marine rights, have taken place repeatedly in this vast region of the sea since time immemorial. ①

Coral reefs, strong monsoons and high sea with giant waves have made the

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① Lee Lifang, Protection Policy and international cooperation on underwater cultural resources in Taiwan, in convention on Protection and Cooperation of Underwater cultural relics in Taiwan Strait, Shanghai, pp. 2-3.

Taiwan Strait the site of frequent shipwrecks. To archeologists, Taiwan strait is an excellent place to study underwater archeology. The underwater archeological resources include sites where Paleolithic human activities were imprinted, where post-glacial Neolithic communities were submerged, and where many ancient shipwrecks occurred. The history of Taiwan is closely related to the ocean. Therefore studying underwater archeology is one of the best ways to understand marine cultural development in Taiwan. ①

Protection of underwater cultural resources is a global trend. Taiwan is surrounded by water, and has an abundant underwater cultural heritage. Effective protection and management of these relics are essential, to avoid their removal or damage by fishermen and divers. Laws and regulations based on relevant ocean policy and the "Development Plan on Protection of Underwater Cultural Resources" are being actively promoted on Taiwan. The historic data is being studied, and underwater archeological surveys are also being conducted.

Between 2006 and 2009, authorities conducted a survey of the Penghu area's underwater cultural heritage. The survey was part of a preliminary survey of the underwater cultural heritage in the waters surrounding Taiwan. The initial survey concentrated on shipwrecks and other archeological sites over 100 years old. But many wars were fought in Penghu waters during late Qing Dynasty and in the early twentieth century. Those shipwrecks and aircraft are less than 100 years old. But they have important implications for the history of recent wars. Therefore they were also included in the survey. ②

The underwater cultural relics recovered must undergo evaluation, based primarily on relics recovered internationally, and on the characteristics of underwater cultural relics in Taiwan waters. Evaluation standards must be drafted that address the underwater cultural heritage recovered from Taiwan waters. At his will enable it to serve as a basis for future protection and treatment of the underwater cultural heritage. ③

Discovered objects are evakyated based on previously discovered results and the value of other countries' shipwreck evaluation standards. These stand-

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① Lee Lifang, Protection Policy and international cooperation on underwater cultural resources in Taiwan, in convention on Protection and Cooperation of Underwater cultural relics in Taiwan Strait, Shanghai, pp. 2-3.

② Dai Zhenhua, Development of Underwater Archeology in Taiwan, in conference on cooperation of Underwater Cultural Relics Protection, Shanghai, p. 10.

③ Dai Zhenhua, Development of Underwater Archeology in Taiwan, in conference on cooperation of Underwater Cultural Relics Protection, Shanghai, p. 10.

ards include the shape and structure of the ship, cultural venation, exhibition statement, sightseeing economy and the integration of information. Evaluation of the discovered objects has yielded 23 sites with specific targets. Twenty-one sites had shipwrecks and scattered parts. The remaining two included, respectively torpedo-like objects and iron oil tanks. Standard cultural heritage evaluation yielded two shipwrecks from China from the Ming-Qing Dynasties, one from England from the 19th century, six from Japan (two from the 19th century, and four warships from the World War II period). ①

Underwater archeology and the protection of our underwater cultural heritage requires complex technology, considerable manpower, and generous funding. The approach on Taiwan is to form underwater archeological teams with expertise in the field. Archeologists now have the ability to protect survey, excavate, and study uncovered cultural relics. More experience is required, especially in accurately detecting objects in deeper water . By following such rules and laws, the studies will promote international cooperation and public participation. Information and education is required to protect our underwater cultural heritage.

B. *Underwater archeological discoveries and related problems along the Fujian coast*

Fujian Province is located at the southeast coastal zone of China and to the west of the Taiwan strait. It is one of the principal sections of the so-called "Silk Road of the Sea". In this region, the coastline is long and irregular, with abundant coral reef islands. Strong tidal currents, meandering shipping channels, monsoon winds, and frequent typhoons have caused large numbers of shipwrecks and the accumulation of abundant underwater cultural relics. ②

The Underwater Archeology Research Center of the National Chinese Museum and the Institute of Archeology of the Fujian Museum have been cooperating since 2007. These institutes have organized underwater archeology professionals from all over the country to conduct selected surveys at Zhangzhou, Pu-

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① Dai Zhenhua, Development of Underwater Archeology in Taiwan, in conference on cooperation of Underwater Cultural Relics Protection, Shanghai, p. 10

② Li Jianhua, New discovery from surveys for underwater cultural relics along Fujian coastal zone and related problems (2007 — 2010), in Conference on Cooperation of Underwater Cultural Relics Protection, Shanghai, p. 10.

tian and Fuzhou, where underwater cultural relics are known to be located. They have discovered a number of important underwater cultural heritage sites.

Underwater cultural relics in the coastal Zhangzhou area are mainly located near the Dongshan, Zhangpu and Longhai areas, where several sites and relics have been discovered. They include Longhai Banyang Reef No. 1, a Song Dynasty shipwreck site, Banyang Reef No. 2, a Song Dynasty shipwreck site, Shazhou island, a Yuan Dynasty shipwreck site in the Zhangpu area, underwater relics from the Qing Dynasty at Longhai Baiyu, and underwater relics from the Qing Dynasty at Longhai Jiujie Reef. The underwater cultural heritage in the Putian area is distributed along Meizhou Bay and Xinghua Bay, where relics from the Song Dynasty, called Dongwumen Xiazai were discovered, and where relics from the Yuan Dynasty, called Meizhou Bay Wenjia Dayu were also discovered. The Putian area also includes a shipwreck site from the Qing Dynasty at Dazhu island in Meizhou Bay, a shipwreck site from the Song Dynasty, named North Turtle Reef No. 1, at Nanri island, another shipwreck site from the Yuan Dynasty, named North Turtle Reef No. 2, and another, fourth shipwreck from the Ming Dynasty, named North Turtle No. 3. Also included are the Beiriyan No. 1 shipwreck site from the Song Dynasty, and Qing Dynasty relics from the Beiriyan No. 2 shipwreck site, the Beiriyan No. 3 shipwreck from the Qing Dynasty and the Beiriyan No. 4 shipwreck from the Yuan Dynasty. The underwater cultural heritage in Fuzhou area is mainly distributed along Pingzhang coastal sea. The sites discovered include a shipwreck from the "Five Dynasties" at Pingzhang Fengliu weiyu, shipwrecks from the Song Dynasty at Dalian Island, and shipwrecks from the Song-Yuan period at Xiaolian Island, the shipwrecks of the Yuan Dynasty at Dalian island, and another shipwreck from the Ming Dynasty at Jiuliang Reef. This area includes the site where the "Donghai Pingzhang Bowl Reef No. 1" shipwreck during Qing Dynasty occurred, and the site where the relics from the "Bowl Reef No. 2" were uncovered. ①

Related questions include: (1) Distribution pattern of the underwater cultural heritage; (2) Serious threats to the underwater cultural heritage; (3) How to protect the underwater cultural heritage; (4) The laws and regulations

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① Li Jianhua, New discovery from surveys for underwater cultural relics along Fujian coastal zone and related problems (2007 — 2010), in Conference on Cooperation of Underwater Cultural Relics Protection, Shanghai, p. 10.

governing the survey and discovery of the underwater cultural heritage; (5) Protection and utilization of the underwater cultural heritage. [①]

Ⅱ. Comparison and perfection of the law relating to underwater cultural heritage protection across the Taiwan Strait

A. "*Management Regulation for Protection of Underwater Cultural Heritage*" *issued by P. R. C in 1989*

This law was issued and became effective on October. 20, 1989. Regulation of No. 7 of the law states that the purpose for archeological exploration and excavation of the underwater cultural relics is to protect and scientifically study them. Any individual or organization that intends to conduct archeological exploration or excavation for underwater cultural relics within the jurisdiction of China, must apply for permit from the National Bureau of Cultural Relics and provide relevant information. Without such a permit from the Bureau, no individual or organization may carry out exploration or excavation by any means or any methods.

Any foreign country, international organization, foreigner by nature or by law that intends to conduct archeological exploration or excavation for underwater cultural relics in any area under Chinese jurisdiction must seek cooperation with China to proceed. The application submitted to the National Bureau of Cultural Relics must be forwarded to the National Affairs Office for approval.

B. *The* "*Cultural Heritage Protection Law*" *and its* "*Detailed Application Rules*" *in Taiwan*

According to Regulation 46 of the "Cultural Heritage Protection Law", foreigners are not allowed to survey or excavate any heritage site within the land and ocean areas of Taiwan. However, those in collaboration with domestic research and professional organization are not restricted when they are ap-

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① Li Jianhua, New discovery from surveys for underwater cultural relics along Fujian coastal zone and related problems (2007—2010), in Conference on Cooperation of Underwater Cultural Relics Protection, Shanghai, p. 10.

proved by the agency of the Central government in charge.

The revised rules of the "Cultural Heritage Protection Law" were declared effective on June 15,2010. Rule No. 3 Section 2 defines relics as:(1) Cultural relics such as stone tools,ceramics,carved bones,shell tools and wooden or metallic tools produced and used by human beings;(2) Natural remains,such as animals,plants,rocks,soils or paleontological fossils related to the human ecological environment. The archeological sites refer to non-movable structures or traces due to human activities in the past. The relics and remained sites cover both on land and underwater spaces.

C. *"Draft of Underwater Cultural Heritage Protection Law" in Taiwan*

This Draft was revised on June 3,2010,based on the fifth review meeting by the regulatory committee. Rules of Art. 1,5 and 11 were revised as follows:

> *Art. 1 The purpose of this law is to protect and manage the underwater cultural heritage,to serve as a connection between citizens and history,and to strengthen the characteristics of a maritime nation.*
>
> *Art. 5 Activities involving the underwater cultural heritage should protect,manage or study underwater cultural heritage and uphold the* in site *principle.*
>
> *Art. 11 In order to protect the underwater cultural relics,government agencies or public enterprises must survey the site for possible underwater cultural relics before conducting any underwater activities. If any discoveries are made,they must be reported to the agency in charge….*

In-situ protection and international cooperation are enhanced to avoid commercial development and to enable one to trace its its historical background.

Based on the "Underwater Cultural Heritage Protection Agreement" and related regulations,as well as the laws for underwater cultural heritage protection and law enforcement across the Taiwan Strait,the following seven areas will be promoted. ①

① Lee Lifang, Protection Policy and international cooperation on underwater cultural resources in Taiwan, in convention on Protection and Cooperation of Underwater cultural relics in Taiwan Strait,Shanghai,pp. 2-3.

(a) Ensure that the agency in charge maintains law and order. The "Underwater Cultural Heritage Protection Agreement", item No. 22 requires that each country that has signed the agreement must have an agency in charge of underwater cultural heritage. The name and address of this agency should be reported to UNESCO to enable the cataloging, editing, preserving, and reviewing of tasks, and so that the underwater cultural heritage will be effectively protected, preserved, exhibited, managed, and developed for the purpose of research and education. It is important to put an agency in charge of the underwater cultural heritage. The underwater cultural heritage in mainland China is under the direction of the Underwater Archeological Center established by the Museum of Chinese History. It is sponsored by the Cultural Heritage Bureau of the Central Government. Underwater archeological work stations have also been established at Yangjiang in Guangzhou City, Qingdao in Shangdong Province, Ningbo, and Zhoushan in Zhejiang Province. The underwater cultural heritage on Taiwan is under the direction of the Culture and Information Division of the Culture Construction Council, in accordance with the laws for cultural heritage protection. To promote the laws and regulations for underwater cultural heritage protection in mainland China, the relevant laws include the "Cultural Relics Protection Law", which went into effect in 1981, and the "Management Rules for Underwater Cultural Relics Protection", which went into effect in 1989. In accordance with recent international developments, the "Cultural Relics Protection Law" was revised by the Cultural Heritage Bureau. It is now based on rules for detailed operations, which regulate archeological exploration and the excavation of underwater cultural relics. The relevant tasks must be conducted in accordance with the spirit of the "Underwater Cultural Heritage Protection Agreement". On Taiwan the "Underwater Cultural Heritage Protection Law (Draft)" was based on many countries' experience with the the "Underwater Cultural Heritage Protection Agreements," and with reference to major trends in the international community. Regarding budgeting for underwater cultural heritage protection, the fixed fund for underwater archeology has been gradually increased to more than 10 million RMB on mainland China. Advanced facilities have been purchased in recent years. On Taiwan twenty million NTD has been budgeted each year for general surveys, research, and related tasks. Facilities for exploration, recovery, repair and protection of underwater heritage sites and relics have been gradually purchased.

(b) Promoting general surveys of the underwater cultural heritage and the establishment of a data bank. Item 6 of the "Underwater Cultural Heritage

Protection and Management Charters" in 1996 requires that all the members of the team for underwater heritage survey must be qualified and experienced. Any invasive survey must be conducted under the supervision and direction of a well known, qualified and experienced underwater archeologist. Since the mid 1980s, underwater cultural heritage surveys have begun in China along the coastal zone of Fujian and Guangdong province and Xisha Island. More than 100 sites have been discovered. The special promotion program during the third national cultural heritage survey focused on the seas, rivers and lakes of the inland area during 2007. This was the first national survey of our underwater cultural heritage. Guangdong, Hainan, Fujian, Zhejiang, Shandong and Liaoning provinces have begun surveys. The underwater cultural heritage survey on Taiwan was conducted in 2006 by the Academia Sinica, and sponsored by the Center for Cultural Heritage Protection and Research, which belongs to the Council of Culture Reconstruction. The survey and uncovering of ancient shipwrecks in Magong Harbor in the Penghu area also trained scientists in the research and preservation of our underwater cultural heritage. Programs for promoting our underwater cultural heritage, preservation and development on Taiwan include "History Study on Underwater Cultural Heritage in the Sea around Taiwan "and "Establishment of GIS for Archeological Sites of Taiwan", The promotion of international cooperation and the construction of a data bank has significant implications for the affected countries.

(c) Technological development and international cooperation for underwater archeological survey and excavation. Article 21 of the "Underwater Cultural Heritage Protection Agreement" recommends cooperation among the countries that have signed the agreement for technology exchanges and training for underwater cultural heritage protection. Based on the negotiated conditions, technology exchanges or transfers may take place in underwater cultural heritage study and protection. This will improve the technology for underwater archeological survey and establish evaluation standards for our cultural heritage.

(d) Preservation, repair and international cooperation for recovered relics. Procedures and protection protocols for recovered relics must be established, and technology for preservation and repair of the relics must be developed.

(e) Protection, management and reuse of underwater relics. Article 10 of the "Underwater Cultural Heritage Protection and Management Charter" details responsibilities during the management of underwater heritage sites as well as their supervision and protection. We must promote a public approach to underwater cultural heritage protection, unless it conflicts with the require-

ments for their protection and management. Article 14 of the Charter promotes public awareness of calls for the underwater cultural heritage. Public awareness should be promoted through the media using easily understandable language. We should also promote cooperation with community organizationism museums, and related agencies. The 1999 "International Sightseeing Charter" urges communication among managers of the cultural heritage, local residents and foreign visitors . Domestic and international tourism has become the main medium for cultural exchange, but cultural tourism must be regulated to avoid any damage to the cultural relics. It must also be beneficial to local residents and the community. The goals and general rules of the "Underwater Cultural Heritage Protection Agreement" specify that before conducting any underwater cultural heritage activity, one must first to protect it in-situ. Any development activity for commercial purpose is prohibited. The underwater cultural heritage must be designated a protected site and must be managed, maintained, and reuse.

(f) Training of professionals for underwater cultural heritage and international cooperation. The "Underwater Cultural Heritage Protection Agreement" stresses the importance of training underwater archeological professionals. Article 21 of the Agreement proposes cooperation among countries to train underwater archeological professionals so that their experience can be passed on to others. Underwater archeological professionals must be scientifically and technically trained. They must be mentally and physically fit. They must be experienced in terrestrial archeology. Underwater archeology professionals are currently in short supply. Therefore amateur underwater archeologists and divers can play limited roles after professional training. The training of underwater archeology professionals is conducted by the Underwater Archeology Research Center of the National Museum in China. A training base for underwater archeology research at the national level was established at Hailing Island, Guangdong Province in 2001, and approved by the National Bureau of Cultural Relics. Further excavations and surveys for underwater relics were also conducted with Vessel Nanhai No. 1. Mainland China has accumulated considerable experience in underwater archeology over the past 20 years. However, many of these professionals are too old to participate in underwater archeological work. When underwater archeological excavation and rescue is required, those temporarily drafted often have other commitments. Underwater cultural heritage protection was initiated by the Bureau of Cultural Heritage of the Council for Cultural Reconstruction on Taiwan. The training of professionals

for the protection, maintenance, and management of underwater archeological work has been planned and conducted aggressively. But the work load for those conducting general surveys is too heavy, making the training professionals difficult. Therefore it is necessary to establish an underwater archeological center of Asian or world level to promote and raise the training for more professionals.

(g) Extension of underwater cultural heritage education. Article 20 of the "Convention on the Protection of the Underwater Cultural Heritage " stresses that all means available should be used to increase public awareness of the value of our underwater cultural heritage. We must recognize the importance of heritage protection. Everyone should learn how to protect our underwater cultural heritage, just as if they were customs inspectors. The public must be educated about our underwater cultural heritage in order to protect mankind's common heritage. A variety of methods may be used to educate the public, including international cooperation.

Ⅲ. Long-term Cooperation Mechanism for Underwater Cultural Heritage Protection in the Taiwan Strait

According to the "Underwater Cultural Heritage Protection Agreement", each country must be responsible for the protection of its underwater cultural heritage. The purpose of the agreement is to ensure the protection of this heritage. It urges cooperation among countries that have signed the agreements to commit to underwater archeology and protection technology, and for the exchange and training of professionals. Cooperation on the technology of underwater cultural heritage protection and research should be based on the terms negotiated.

The cultural across the strait has the same root and origin, and underwater cultural relics belong to common human heritage, which is a part of inseparable culture. The cooperation across the strait on underwater cultural heritage protection should be based on principles of exchange, mutual trust, cooperation and win-win condition.

(a) To promote education on marine culture, the "Foundation for marine cultural research and development" should be established by both sides in addition to currently existent foundations to provide scholarships and research funds for application by both sides to encourage young people who are interested in marine culture to learn from each other. Research projects may be sub-

mitted by scholars or professionals to apply for support.

(b) Drafting a "White paper on cultural cooperation and protection across the strait". There are seven topics on marine culture that need to be addressed: Non-establishment of marine history in perspective; Lack of marine cultural heritages; Senselessness in marine culture; Negligence of marine culture; Lack of in-depth marine education; Non-realization of marine culture in life; and The need to establish an educational system for marine culture. Four major strategies have been adopted in Taiwan: Reconstruction of marine history images; Preservation and spreading of marine culture; Formulation of marine life perception; and Creation of marine space characteristics.

(c) To enrich the laws on underwater cultural heritage protection. Based on Item 40 of the "Law on Underwater Cultural Heritage Protection (Draft)", those who have contributed to the protection and management of underwater cultural heritage and those who have committed activities on various underwater cultural heritage with permission, the agency in charge should offer reward or financial support.

(d) Cooperation on test-point marine archeology. Academic conferences across the strait can be held regularly to enhance research cooperation between two sides and many sides and to initiate cooperation on technology for restoration of ancient ships.

(e) Enhancement of marine cultural and historical exchange and research. Conference on literature and historical data exchange may be held regularly in order to establish the shared mechanism on rare, ancient books and painting.

(f) Enhancement of training and cooperation on underwater archeology staff across the strait. Training and practice of underwater archeology staff may be conducted by both sides cooperatively. Cooperation on research, exploration, fishing and protection of underwater artifacts maybe proceeded at suitable time. Files of professionals on underwater cultural heritage may be established to strengthen connectivity. ①

(g) Establishment of long-term effective cooperation mechanism for underwater cultural heritage protection in Taiwan strait. (1) People across the strait should protect and preserve underwater cultural relics in Taiwan Strait and adjacent areas jointly to reach a basic consensus; (2) Cooperation in any

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① Chiu Wenyan, Environmental Assessment and underwater cultural heritage protection at Taibei harbor, in Cooperative conference on Underwater Cultural Heritage Protection in Taiwan Strait, Shanghai, pp. 13-17.

feasible way to conduct underwater cultural relics may be proceeded;(3) Cooperation on law dealing with underwater cultural heritage after the "Underwater Cultural Heritage Protection Agreements" becomes effective for both sides. (4) Concerning the underwater cultural heritage in South China Sea (Those island groups), both sides should seek some suitable areas or spots for cooperation. These should avoid military-sensitive areas; (5) Cooperation and exchange across the strait on relevant subjects of the underwater cultural heritage should be advanced. For example, the conference may be held once in two years, and sponsored alternatively by both sides, During this time, promotion of relevant education can be strengthened, for example, by encouraging exchange among young people, and encouraging non-official power such as archeological society, to participate in public education and training, etc.

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Maritime Issues between China and Japan and the Prospect for Resolution

ZOU Keyuan *

Abstract: China and Japan are close neighbors in East Asia and their maritime encounters and communications can be traced back several thousands of years. In recent years, the two countries have developed their maritime relations in various ways, including, inter alia, marine fishery management, joint marine scientific research, and joint efforts in the protection of the marine environment. Although there is much cooperation between the two sides in the maritime sector, tensions and even conflicts do exist in their maritime relations.

Both countries are major maritime powers in East Asia and keen to uphold or even expand their rights and interests in their adjacent oceans. They both joined the 1982 UN Convention on the Law of the Sea and enacted accordingly the relevant laws governing the territorial sea, contiguous zone, exclusive economic zone (EEZ) and continental shelf at the domestic level. The extension of national maritime zones inevitably caused tensions and conflicts between neighbouring countries. The East China Sea, where the disputed Diaoyu/Senkaku Islands are located, is home to the most salient maritime disputes between China and Japan. In addition, the two sides are at odds over maritime boundary delimitation and offshore oil and gas development in the East China Sea.

This paper attempts to review the recent developments of the maritime relations between China and Japan. While maritime cooperation will be addressed in some detail, the paper will focus more on the maritime disputes between the two sides and aims to suggest possible solutions.

Key words: China; Japan; Maritime issues; Prospect for resolution

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Ⅰ. Introduction

China and Japan are separated by the East China Sea, which is defined in the 1982 United Nations Convention on the Law of the Sea (LOS Convention) as a semi-enclosed sea. [①] It covers about 480,000 sq mi (1,243,190 sq km) and is bounded by the islands of Cheju (north), Kyushu (northeast), Ryukyu (east) and Taiwan (south) and by Mainland China (west). [②] It is a marginal sea with a wide continental shelf, and its average depth is 370 metres with a maximum of 2,719 metres. In recent years, the East China Sea has shown unrest not only in its tidal waves and natural movements, but also in political and legal confrontations particularly between China and Japan.

The LOS Convention was adopted in 1982 and entered into force in 1994. Both China and Japan ratified the Convention in 1996. China has taken several legislative moves in response to the implementation of the LOS Convention. In 1992 China promulgated the Law on the Territorial Sea and the Contiguous Zone[③]—which has improved the territorial sea regime established under the 1958 Declaration on the Territorial Sea—defining the limits of its territorial sea and contiguous zone at a breadth of 12 nm of 24 nm, respectively, measuring from the coastal baselines. This law applies to all of China, including Taiwan and the various islands located in adjacent seas under Chinese jurisdiction.

Another fundamental Chinese maritime statute is the Law on the Exclusive Economic Zone and the Continental Shelf, adopted by the National

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① According to Article 122 of the LOS 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. Text is reprinted in 21 I. L. M. (1982) 1261. During the debate on the issue of enclosed and semi-enclosed seas at the second session of the Third United Nations Conference on the Law of the Sea in 1974, the East China Sea was referred to within the general classification of enclosed and semi-enclosed seas. *See* Michael W. Lodge, "The Fisheries Regimes of Enclosed and Semi-enclosed Seas and High Seas Enclaves", in Ellen Hey (ed.), *Developments in International Fisheries Law* (The Hague: Kluwer Law International, 1999), p. 197.

② "East China Sea", in *The New Encyclopaedia Britannica*, 15th Edition, vol. 3, Encyclopaedia Britannica, Inc., 1984, p. 756.

③ The English version may be found in Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State, *Limits in the Seas*, No. 117 (Straight Baselines Claim: China), July 9, 1996, pp. 11-14.

People's Congress in 1998.[①] This law is designed to guarantee China's exercise of sovereign rights and jurisdiction over its exclusive economic zone (EEZ) and continental shelf, and to safeguard its maritime rights and interests. According to this law, China's EEZ consists of the area beyond and adjacent to China's territorial sea, extending up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. As for China's continental shelf, it comprises the sea-bed and subsoil of the submarine areas that extend beyond China's territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[②] It is interesting to note that although the provision to define the EEZ is just a copy of the relevant provision of the LOS Convention, the provision regarding the continental shelf has something new with Chinese characteristics, that is, the emphasis on the natural prolongation of China's rights to the continental shelf, which bears strong implications for the delimitation of the continental shelf in the East China Sea.[③] The Law further provides that EEZs and continental shelves with overlapping claims between China and the countries with opposite or adjacent coasts should be determined by agreement in accordance with the equitable principle on the basis of international law.

In May 1996 when China was ratifying the LOS Convention, China issued a declaration on its baselines. China uses the method of straight baselines to define the limits of its territorial sea around part of the mainland and the Xisha (Paracel) Islands.[④] Meanwhile, China stated that it would announce the remaining baselines of its territorial sea at another time.

In the Decision on the Ratification of the United Nations Convention on the Law of the Sea, China made a statement that:

> 1. *In accordance with the provisions of the United Nations Conven-*

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① The Chinese text is reprinted in People's Daily (in Chinese), 30 June 1998. An English translation may be found in *Law of the Sea Bulletin*, No. 38, 1998, pp. 28-31.

② Article 2 of the Law on EEZ and Continental Shelf.

③ Zou Keyuan, *China's Marine Legal System and the Law of the Sea* Leiden: Martinus Nijhoff, 2005, p. 94.

④ Declaration on the Baseline of the Territorial Sea of the People's Republic of China, 15 May 1996, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf, 17 December 2009.

tion on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.

2. The People's Republic of China will effect, through consultations, the delimitation of the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability.

3. The People's Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992. ①

The above statement clearly shows the official position of China regarding the maritime boundary delimitation and reiterates its claims to the disputed islands in the East China Sea.

Japan took a similar domestic legislation process. In 1977 it adopted the Law on Territorial Sea and in 1996 the Law on EEZ and Continental Shelf. Unlike China, though, it also promulgated the Basic Ocean Law in 2007, which provides legal guidance for a unified and comprehensive ocean policy and administration. ② Regarding maritime boundary delimitation with neighbouring countries, Japan has advocated the application of the median line as a delimitation line for the EEZ and the continental shelf in the absence of an agreed line with the opposite country. This is reflected in its 1996 EEZ Law. ③ Thus, the ratification of the LOS Convention and the adoption of relevant domestic laws and regulations offer a legal basis for present-day maritime interactions between China and Japan.

Ⅱ. Bilateral Fishery Relations

In order to avoid fishery conflicts and to maintain a normal fishing order in

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① The declaration is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification, 29 July 2009.

② A Chinese translated version is available at *China Oceans Law Review*, 2008, No. 1, pp. 128-133.

③ *See* Article 1 (2) and Article 2 (2) of the Law on the Exclusive Economic Zone and the Continental Shelf (Law No. 74 of 1996), *Law of the Sea Bulletin*, No. 33, 1997, pp. 94-95.

the East China Sea, China and Japan began to discuss such matters as early as the 1950s. Since there were no official diplomatic ties between the two, the authorized parties for negotiation were non-governmental entities backed by both their governments. In June 1955, a first (non-governmental) fishery agreement was reached between the Japan-China Fisheries Council (originally known as Japan-China Fisheries Enterprise Association) and the China Fisheries Association. From 1955 to 1975, excluding five years from June 1958 to November 1963, three non-governmental fishery agreements (1955, 1963 and 1965) were negotiated and implemented, and they played a very critical role in establishing and developing fishery relations between China and Japan.

The non-governmental agreement established fishing zones (6 zones for trawling and 3 for seine operations) by way of limiting the maximum number of fishing boats and fishing seasons. For some areas, the horsepower of fishing boats was also limited. Limitations on the length of fish and the mesh size of fishing nets were imposed. The agreement also established a joint commission, composed of three members from each country, which helped to implement the agreement. [①] The total allowable catch (TAC) for trawlers under the agreement was limited to 200,000 tons, covering a variety of demersal species, such as croaker and hairtail, and the amount for purse seine catches was 300,000 tons centering on mackerel and jack mackerel. [②] Remarkably, the fishery agreement established conservation zones in the East China Sea in the 1950s, a time when the idea of sustainable development had not come into being. It is also notable that such conservations zones covered areas in the high seas.

Following the establishment of diplomatic ties, the two countries commenced consultations on a governmental fishery agreement. The Fishery Agreement between the Government of the People's Republic of China and the Government of Japan was finally signed on 15 August 1975, and came into force on 23 December 1975. [③] Meanwhile, the non-governmental agreement was

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① The Japanese side proposed that the commission conduct a joint scientific survey, but China refused this on the ground of its three principles, i. e., self-reliance, independence, and achievement of a planned economy. *See* Shoichi Tanaka, Japanese Fisheries and Fishery Resources in the Northwest Pacific, *Ocean Development and International Law*, vol. 6, 1979, p. 184.

② Shoichi Tanaka, Japanese Fisheries and Fishery Resources in the Northwest Pacific, *Ocean Development and International Law*, vol. 6, 1979, p. 184.

③ Text in Fishery Administrative Bureau, Ministry of Agriculture, PRC (ed.), *Sino-Japanese Governmental Fishery Agreements and Non-Governmental Protocols on the Safety of Fishing Operations* (in Chinese), April 1993, 1-19.

terminated. The 1975 Agreement was revised in 1978 and 1985. [①] Although the 1975 agreement introduced more rigid protective measures than the previous non-governmental agreements, in other aspects it was largely the same.

The entry into force of the LOS Convention in 1994 ushered in a new era of fishery relations between China and Japan. Both countries established their EEZs based on the relevant provisions of the LOS Convention through their respective domestic legislations. Since the broadest width of the East China Sea is less than 400 nm, the whole sea area consists of EEZs that are shared by China, Japan and Korea. The fishery relationship between the two sides inevitably needed a new adjustment. After several rounds of negotiation, the two sides finally reached agreement in September 1997 regarding fishery management in the East China Sea. [②] The new agreement came into force on 1 June 2000.

The agreement contains some significant provisions in response to the changed situation: (a) affirming the principle of fishery resources conservation and protection: Pursuant to the relevant provisions in the LOS Convention and environmental requirements from Agenda 21 and others, the Agreement contains as one of its purposes the establishment of a new fishery order in accordance with the LOS Convention, conserving and utilising rationally marine living resources of common concern, and maintaining the normal operation order at sea. Both sides agree to cooperate to conduct scientific research regarding fishery and to conserve marine living resources. [③] Each should adopt necessary measures to ensure compliance by their nationals and fishing vessels with the provisions of the Fishery Agreement and the conservation measures and other conditions provided for in the relevant laws and regulations of the other Party when engaging in fishery activities in the other's EEZ, and should inform each other of such conservation measures and other conditions provided for in its relevant laws and regulations. [④] (b) Providing reciprocal fishing rights: The A-

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① They are concerned with the establishment of a horsepower restriction line inside which trawlers and purse seiners of 600 hp or more are prohibited to enter; closed areas or suspension areas which are completely closed during designated periods; and fishing restrictions concerning minimum body length, minimum mesh size, light intensity fish-attracting devices, incidental catch limit. *See* Mark J. Valencia, *A Maritime Regime for Northeast Asia* Hong Kong: Oxford University Press, 1996, p. 258.

② Fishery Agreement between the People's Republic of China and Japan, 11 November 1997. An unofficial English translation is available in Zou Keyuan, *Law of the Sea in East Asia: Issues and Prospects* London: Routledge, 2005, pp. 175-180.

③ Article 10 of the Sino-Japanese Fishery Agreement.

④ Article 4 of the Sino-Japanese Fishery Agreement.

greement applies to large portions of the two countries' EEZs, but specifically excludes the EEZ area south of 27°N, and west of 125°30′E in the East China Sea where Taiwan and the disputed Diaoyu/Senkaku Islands are located. Within the EEZ, China and Japan grant each other's nationals and fishing vessels the right to fish in each other's EEZs pursuant to the principle of reciprocity, the Fishery Agreement and their relevant domestic laws and regulations. The competent authorities of each Party issue fishing permits to nationals and fishing vessels of the other Party, and may levy appropriate fees upon issuance of such permits. The issuance of fishing permits to fishermen of the other nation should follow the relevant provisions of the Agreement. How many permits should be issued and how many tons of fish may be caught in the opposite party's EEZ is a complicated and difficult matter that requires bilateral discussion and agreement. (c) Establishing the Provisional Measures Zone (PMZ): The Agreement creates the PMZ, which is located in the middle of the East China Sea, 52 nm from the baselines of mainland China's territorial seas and an equal distance from the coast of the Ryukyu Islands; its northern limit lies at a latitude of 30°40′N and its southern limit at 27°N. For conservation and quantity of fishery resources in the PMZ, both sides should adopt, based on decisions made by the Sino-Japanese Fishery Joint Committee, appropriate management measures in order to protect marine living resources from overexploitation. Each party should take administrative and other necessary measures for their nationals and fishing vessels fishing in the PMZ, and should not impose administrative and other measures on nationals and fishing vessels of the other party in this area. The establishment of a common fishery zone is a typical form of fishery cooperation for shared waters between any two countries; there are many such arrangements in the world, the Sino-Japanese PMZ is but one example. The PMZ is the first such zone between China and Japan, though there was some degree of fishery cooperation between the two sides before its establishment. It indicates that the fishery cooperation between these two countries has entered into a new era. (d) Maintaining the Joint Fishery Committee: In order to implement the fishery agreement as well as to coordinate respective fishery management procedures, both sides decided to establish the Joint Fishery Committee which consists of four members, two appointed by each Party. The decision-making mechanism is based on the unanimous consent of the committee members. Both sides have to respect recommendations made by the Joint Fishery Committee, and adopt necessary measures in accordance with its decisions. The Committee may be convened annually either in

China or in Japan and temporary meetings, if necessary, may also be held. [①]

Ⅲ. Cooperation in Handling Maritime Issues in the EEZ

The EEZ is a new maritime zone created by the LOS Convention and issues inevitably arise regarding activities in that zone. China and Japan had a dispute over Chinese scientific research vessels conducting marine scientific research (MSR) in the East China Sea. Japan accused China of violating Japan's sovereignty and maritime interests. China argued that the boundary between the two countries had not yet been delimitated in that sea. As we know, freedom of marine scientific research is guaranteed under the legal regime of the high seas. Before the LOS Convention and the establishment of EEZs by China and Japan, scientific research could be conducted in the East China Sea beyond the territorial seas of the two countries freely. But after the LOS Convention, the legal status of certain sea areas previously considered high seas had changed: maritime scientific research in another country's EEZ is subject to the consent of the coastal State as provided for in the LOS Convention. No EEZ boundary has been fixed between China and Japan, and there remain some areas in the East China Sea with overlapping claims.

In order to defuse the tension resulting from scientific research in overlapping areas in the EEZ, the two sides held talks on 15 September 2000 aiming to establish a framework for mutual prior notification of any marine survey activities in the waters around the two countries. As a result, an agreement was reached in 2001 on prior notification of any MSR activities in the disputed waters including the following main points: (a) notification is to take place two months in advance of any scheduled MSR investigation to be undertaken in the sea area adjacent to the jurisdictional waters of the other side; and (b) notification is to include the name of the institution and of the vessel involved in the MSR investigation, the purpose and contents of the investigation, and the period and the area of the investigation. [②] The arrangement is a provisional measure pending the maritime boundary settlement between the two states, but it should ease any unnecessary tension resulting from MSR activities.

Another incident in the EEZ involving maritime interaction between the two countries occurred on 22 December 2001: an unidentified vessel was pur-

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① Article 11 of the Sino-Japanese Fishery Agreement.

② *See Hong Kong Economic Journal* (in Chinese), 9 February 2001, p. 10.

sued by Japan's Coast Guard in the East China Sea for encroaching on Japan's EEZ sank after being fired upon by four Japanese coast guard patrol vessels. ① All 15 crewmembers on board lost their lives. During the six-hour pursuit, the Japanese vessels fired more than 500 rounds. It is reported that Japan fired the first shot. ② The sinking of the mysterious ship took place within China's EEZ, some 260 kilometers from China's territorial sea. ③ China expressed its regrets for those killed or wounded and was concerned about Japan's use of military force in the East China Sea. ④

After the incident, Japan requested to salvage the sunken ship as a necessary step to investigate the whole matter and China gave its consent to Japan's proposal. According to the spokesman of the Chinese Foreign Ministry, consent was based on the LOS Convention and relevant Chinese domestic laws, and China had the right to monitor the whole salvage. ⑤ For the negative impact on normal fishery order and the monetary loss Chinese fishermen sustained due to salvage efforts, Japan agreed to compensate a total of 150,000,000 yen. ⑥

Ⅳ. Dispute in Oil and Gas Exploration and Exploitation

However, more serious issues than scientific research or salvage exist in the East China Sea, such as oil and gas exploration and development. After China began to explore the Chunxiao gas field, Japan expressed its discontent and accused China of encroaching upon Japan's rights in the East China Sea. The two sides held consultations on 25 October 2004. At the sixth round of consultations in July 2006, the two sides agreed to establish a hotline to deal

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① According to some other reports, Japan sent altogether 25 patrol vessels and 14 aircraft to chase the mysterious boat. *See* Lu Lude, Japan cannot do as it pleases in China's EEZ, *China Ocean News* (in Chinese), 8 March 2002.

② *See* Peter Landers, Conflict Shows a Gray Area in Japan Law—Tokyo Weighs Revision to Boost Defense Measures, *Asian Wall Street Journal*, 26 December 2001, p. 3.

③ China asks Japan to provide more information about sinking of unidentified ship, *BBC Monitoring*, 23 December 2001.

④ Boat sinks after being hit by Japanese fire, *China Daily*, 24 December 2001; and China reiterates concern over Japan's use of force, *Kyodo News*, 25 December 2001.

⑤ *See* "Chinese side monitor under the law Japan's investigation of the sunken ship in the East China Sea", *People's Daily* (in Chinese), 30 April 2002, p. 4.

⑥ The two sides reached the agreement on 27 December 2002 after five rounds of consultation. *See* http://www.fmprc.gov.cn/chn/gxh/zlb/tyfg/t5905.htm, 28 July 2009.

with unexpected maritime matters.[①] During the following meeting, China introduced two proposals on joint development in the East China Sea but Japan only considered the one pertaining to the northern sea area.[②] After 11 rounds of consultations (*see* Table 1), the two countries finally reached a consensus agreement on 17 June 2008. They pledged to cooperate in the East China Sea and turn it into a sea of peace, cooperation and friendship. A joint development scheme was created and a small patch of joint development zone was demarcated. In addition, China gave permission for Japanese legal persons to participate in the development of Chunxiao Oil and Gas Field in accordance with Chinese laws.[③]

The conclusion of this agreement is in line with the spirit and provisions of the LOS Convention, which encourages States to work out provisional arrangements including cooperation on joint development pending the settlement of their maritime boundary disputes.

Ⅴ. Issues concerning the Outer Limit of Continental Shelf

Article 76 of the LOS Convention provides the criteria to determine the outer limit of the continental shelf up to 350 nm from the baselines from which the breadth of the territorial sea is measured or 100 nm from the 2,500 metre isobath:

> (*i*) *a line delineated by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope*; *or*
>
> (*ii*) *a line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope*.

The deadline for any submission from a coastal State that became party to

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① China and Japan reached the principle consensus on establishing maritime hotline, available at http://world.people.com.cn/GB/4572649.html, 30 August 2006.

② Japan considers accepting the proposal on joint development in the northern sea area in the East China Sea, 15 May 2006, available at http://world.people.com.cn/GB/1029/42354/4371017.html, 16 May 2006.

③ China, Japan reach principled consensus on East China Sea issue, 18 June 2008, available at http://www.chinadaily.com.cn/china/2008-06/18/content_6774860.htm, 13 May 2009.

the LOS Convention before 13 May 1999, on its outer continental shelf to the Commission on the Limits of the Continental Shelf was 13 May 2009 (for East Asian countries, *see* Table 2). For all others, the submission deadline is ten years from the date of ratification or accession to the treaty. The Commission considers the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and makes recommendations in accordance with Article 76 of the LOS Convention and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea. Japan submitted its claim on 12 November 2008.

On 6 February 2009, China lodged its objection to part of the Japanese submission regarding the Oki-no-Tori Shima, which, in China's view, is in fact a rock that generates no EEZ or continental shelf and requests that the Commission not take any action on the portions extended from that rock. ① South Korea shared the same view as the Chinese. However, the Commission is not a judicial body, thus it lacks the competence to interpret the provisions of the LOS Convention, such as Article 121 of the Convention. ② Furthermore, if there is a dispute regarding a submission between different countries, the Commission has no mandate to review it.

Ⅵ. Territorial Dispute over the Diaoyu/Senkaku Islands

The dispute over the Diaoyu/Senkaku Islands between China and Japan has now become a thorn in the two countries' side, so to speak. Located in the East China Sea, the Diaoyus/Senkakus have a total land area of 7 sq km with the Diaoyudao or Uotsuri Jima being the largest among this group of islands.

As we know, the Diaoyu/Senkaku issue was circumvented in the fishery agreement by providing that both sides respect the current fishing operations in the part of the East China Sea in the north of the PMZ, pay due consideration to the traditional fishing of the other country and the amount of resources available, and not unduly damage the interest of fishing of the other country in

① China's Objection is available at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf, 10 December 2009.

② Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/64, 1 October 2009, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/536/21/PDF/N0953621.pdf? OpenElement, 10 December 2009.

the said area.[①] As explained by the Japanese side, the purpose of the fishery agreement was to establish a fishing order between Japan and the PRC and had no direct relationship with the issue of sovereignty over the Senkaku Islands. The territorial waters of the Senkaku Islands are not an area where the agreement applies or would affect its status.[②] At present, the Diaoyu/Senkaku Islands are under Japan's control, but the dispute goes back over a century.[③] There is no immediate prospect that the dispute will be solved in the near future.

Ⅶ. Maritime Boundary Delimitation

The boundary delimitation of the EEZ and continental shelf between China and Japan is very complicated. As we know, Japan has advocated the application of the median line as a delimitation line for the EEZ and the continental shelf with three main reasons:

> (1) *It would be inappropriate if the outer limit of the EEZ remained undecided while delimitation talks failed to reach any agreement.*
>
> (2) *The traditional position of Japan that delimitation of the EEZ should be made in accordance with the median line principle should be maintained.*
>
> (3) *It is appropriate to maintain consistency with the Law on the Provisional Measures related to the Fishery Zone of 1977, which adopted the median line principle.*[④]

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① Agreed Minutes between the Government of the People's Republic of China and the Government of Japan, 11 September 1997.

② *See* Nobukatsu Kanehara and Yutaka Arima, New Fishing Order—Japan's New Agreements on Fisheries with the Republic of Korea and with the People's Republic of China, *Japanese Annual of International Law*, vol. 42, 1999, pp. 27-28.

③ For the official positions of both governments, *see* The Basic View on the Sovereignty over the Senkaku Islands, available at http://www.mofa.go.jp/region/asia—paci/senkaku/senkaku.html, 4 July 2002; and "The Issue of Diaoyu Islands", available at http://www.fmprc.gov.cn/eng/3790.html, 26 July 2002.

④ Toshihisa Takasa, The Conclusion by Japan of the United Nations Convention on the Law of the Sea (UNCLOS) and the Adjustment of Maritime Legal Regime, *Japanese Annual of International Law*, No. 39, 1996, p. 139.

However, China's position is different and does not hold the equidistance method to be the only criterion for delimitation. Instead, it has advocated the application of the natural prolongation principle for the delimitation of the continental shelf with Japan. [①] As early as the 1970s, when Japan and South Korea concluded the agreement for joint development in the East China Sea, China sent its strong protest against such a deal on the grounds that it encroached upon the sovereignty of China over its legitimate continental shelf. [②] Natural prolongation is quite meaningful for China because, at least in the East China Sea, the continental shelf extending from the mainland is very broad, and China has used the concept of natural prolongation to support its claim to the continental shelf in the East China Sea. Since the general trend in state practice concerning boundary delimitation of the EEZ/continental shelf is towards a single line to delimit the two different and closely associated maritime zones, it is reasonable to wonder whether natural prolongation could still play a significant role in such delimitation. A single but adjusted line may be more practical.

As to the EEZ delimitation, it seems that China will agree to the median line for the two countries. If China insists on natural prolongation for the delimitation of the continental shelf while agreeing to the median line as the line of delimitation of the EEZ, then there would be two different delimitation lines in the East China Sea with Japan; this would give rise to difficulties in law enforcement and the exercise of jurisdiction for both countries.

Nevertheless, some agreements relating to maritime boundary delimitation have been reached between China and Japan. The 1997 Fishery Agreement recognized the undisputed parts of the EEZs in the East China Sea and established a Provisional Measures Zone, a step towards final settlement of the EEZ delimitation. Despite its nature as provisional, the Agreement has narrowed the disputed area in the East China Sea between the two countries. The consensus agreement reached in June 2008 regarding joint development in the East China

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① As is stated, China adheres to the following principles for the delimitation of the continental shelf: (1) application of the concept of natural prolongation; (2) delimitation through negotiation or consultation; and (3) consultation regarding equitable principles taking into account all relevant circumstances. *See* Wang Tieya, "China and the Law of the Sea", in Douglas M. Johnston & Norman G. Letalik eds., *The Law of the Sea and Ocean Industry: New Opportunities and Restraints* (Honolulu: Law of the Sea Institute, University of Hawaii, 1984), p. 587.

② For reference, *see* Wei-chin Lee, Troubles under the Water: Sino-Japanese Conflict of Sovereignty on the Continental Shelf in the East China Sea, *Ocean Development and International Law*, vol. 18 (5), 1987, pp. 585-611.

Sea is also relevant to maritime boundary delimitation.

It has to be noted that there is a very important and even critical factor affecting the maritime boundary delimitation, i. e. the dispute over the Diaoyu/Senkaku Islands. Currently, Japan has maintained a tight control over the islands. As is observed, China did not lodge protests until the very late 1960s and early 1970s. This may affect the effectiveness of its claims to the islands.[①] Nevertheless, the determination of sovereignty over the disputed islands must take many factors into consideration. This can be seen from the recent judicial rulings of the International Court of Justice (ICJ), which awarded islands to the existing occupiers in the cases of the *Sovereignty over Pulau Litigan and Pulau Sipadan* (Malaysia/Indonesia) and the *Sovereignty over Pedra Branca, Middle Rocks and South Ledge* (Malaysia/Singapore) but transferred the legal title of the Bakassi Peninsula (which had been occupied by Nigeria) to Cameroon in the case of *Land and Maritime Boundary between Cameroon and Nigeria*.[②]

It is obvious that whoever owns these islands will also gain control over a large area of maritime zones that they generate. Based on the LOS Convention, a small islet can generate a large area of maritime zone around it (12—nm territorial sea, and in some cases 200—nm EEZ from the baselines from which the breadth of the territorial sea is measured). In that case, no country would give up its claims to the disputed islands but would maintain a firm position of asserting sovereignty over them. Slightly complicating the situation is the fact that these territorial claims are intricately connected to nationalism. This can be seen from recent mass protests in China regarding the Diaoyu Islands against Japan. Thus any settlement of these maritime territorial disputes remains a remote possibility.

Ⅷ. Third Party Interests

Maritime issues often affect the interests of third parties. In the East China Sea, China lodged a strong protest against the establishment of a Japan-Korea Joint Development Zone in the East China Sea in the 1970s. Likewise, the

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① *See* Steven Wei Su, The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update, *Ocean Development and International Law*, vol. 36, 2005, p. 55.

② For details of these cases, *see* the ICJ website: http://www.icj—cij.org/homepage/index.php? lang=en, 5 December 2009.

bilateral fishery agreement between China and Japan or between Japan and Korea also affected the interests of the third party since they share the same sea area and use the same pool of marine living resources.

When Japan and Korea concluded their new fishery agreement, China considered that the Japan-Korea Fishery Agreement infringed on China's sovereign rights over its EEZ in the border areas among the three countries and stated that China's rights and interests in the EEZ and its fishery activities should not be subject to the limitations of that agreement. China maintained that the delimitation of the overlapping area among the three countries should be subject to consultations among the parties concerned, and exclusion of any party from the delimitation negotiations would be a violation of international law.① Similarly, South Korea also expressed its dissatisfaction with the Sino-Japanese Fishery Agreement by asking China and Japan to explain how they drew the northern-limit line of their joint fishing area. They should have consulted South Korea before reaching the agreement.②

On the other hand, it should be realised that the fishery agreements either between China and Japan, or China and South Korea, or Japan and South Korea are bilateral ones. They have limitations and also do not completely cover the areas in the East China Sea and the Yellow Sea. Second, because of their bilateral nature, they may affect the interests of a third party as illustrated above in the Japan-Korean Fishery Agreement. Third, bilateral agreements only regulate bilateral relations and not the fishing activities of third parties. This is particularly true where Taiwan is concerned. Finally, many fishery resources in the East China Sea and the Yellow Sea are migratory species belonging to the same marine ecosystem. In that sense, the East Asian seas urgently need a regional and multilateral fishery arrangement to more effectively conserve and manage the fishery resources therein, and the newly concluded bilateral fishery agreements including the Sino-Japanese one could be the basis for such regional

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① MF Spokesman expresses that the Japan-Korea Fishery Agreement encroaches on China's sovereign rights over its EEZ, *People's Daily* (in Chinese), 23 January 1999. For further reference, *see* Fan Xiaoli, Comments on the New Japan-Korea Fishery Agreement, *Ocean Development and Management* (in Chinese), vol. 17 (1), 2000, pp. 68-70.

② *See* Chi Young Pak, Resettlement of the Fisheries Order in Northeast Asia resulting from the New Fisheries Agreements among Korea, Japan and China, *Korea Observer*, vol. 30 (4), 1999, pp. 614-615. For another related reference, *see* Mark J. Valencia and Yong Hee Lee, The South Korea-Russia-Japan Fisheries Imbroglio, *Marine Policy*, vol. 26, 2002, pp. 337-343.

cooperation.

In addition, in May 2009 China and the Republic of Korea both submitted preliminary information regarding their outer continental shelves in the East China Sea to the Commission on the Limits of the Continental Shelf in accordance with relevant provisions of the LOS Convention and other decisions made by the State Parties Conferences on the Law of the Sea. ① The submission of the preliminary information enables them to make their full submissions at a later time. Since such preliminary information indicates that both China and Korea's outer continental shelf claims are in the East China Sea, it surely affects the interests of Japan. Furthermore, because the two apparently did not coordinate prior to submission, their respective claims in the East China Sea are conflicting as well.

Ⅸ. Possible Settlement

In international law, there are a number of mechanisms for the settlement of maritime disputes, including such political means as negotiation and consultation, mediation and good offices, conciliation, investigation, and such judicial means as arbitration and international adjudication. Most of them are listed in the Charter of the United Nations. ② In addition, international organizations, whether global or regional, can play an active role in dispute settlement. Judicial settlement of maritime disputes is usually within the competence of the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). Among East Asian countries, China's attitude is most worthy of a close observation. China always prefers bilateral negotiation and consultation for dispute settlement between States. In the international arena, China has advocated negotiation as the most practical means of dispute resolution. In practice, China has resolved a number of bilateral disputes between itself and other countries via negotiation and consultation, on border disputes, nationality, etc.

Nevertheless, for the resort of judicial means, China's attitude is rather

① For details on China's submission, *see* http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf and on Korea's submission, *see* http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/kor_2009preliminaryinformation.pdf, 17 December 2009.

② Article 33, para. 1 of the UN Charter.

conservative. During the Sino-India border conflict in 1962, China refused India's proposal to submit the border dispute to arbitration, stating that "the Sino-India border dispute is an important matter concerning the sovereignty of the two countries, and the vast size of more than 100,000 square kilometers of territories. It is self-evident that it can only be resolved through direct bilateral negotiations. It is never possible to seek a settlement from any form of international arbitration".① There are some likely reasons behind this passivity: first, China, having suffered tremendously from Western colonization and aggression in history, did not trust the international judiciary centered on the Western legal principles and doctrines; and second, China stood in alignment with other communist countries, holding the perception that the world was in a perpetual state of conflict between capitalist States and socialist States and since the interests and policies of these States were so opposed, it was not possible to resolve any dispute through impartial adjudication.②

However, after the 1980s, China changed its policy towards international arbitration by consenting to arbitration in treaties China concluded and acceded to, but confined only to economic, trade, scientific, transport, environment, and health areas. In practice China has to evaluate whether such a submission would endanger its national interest and sovereignty, and other factors that might not be in its favor. China's hesitation in this respect was manifested in its attitude towards the dispute settlement mechanism set forth in the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. During the negotiations, China expressed its concerns over any arrangement for compulsory dispute settlement mechanism. The Chinese representative stated that "China was not opposed to binding procedures, only to the adoption of such procedures without the consent of the parties".③ In other words, China will not accept any compulsory mechanism.

Some conventions require the contracting States to accept compulsory ju-

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① *See* Gao Yanping, International Dispute Settlement, in Wang Tieya ed., *International Law*, Beijing: Law Press, 1995 (in Chinese), pp. 611-612.

② *See* Paul R. William, International Law and the Resolution of Central and East European Transboundary Environmental Disputes, Macmillan Press, 2000, p. 199.

③ *See* UN Doc. A/C. 6/51/SR. 59 (1997), para. 3, at 3; cited in Attila Tanzi, "Recent Trends in International Water Law Dispute Settlement", in International Bureau of the Permanent Court of Arbitration ed., *International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms*, The Hague: Kluwer Law International, 2001, p. 139.

dicial dispute settlement procedures, such as the LOS Convention. Upon the ratification of the LOS Convention, China did not identify which compulsory mechanism it had accepted. Under such circumstances, it was deemed to have accepted the mechanism of arbitration. ①

Meanwhile, China's attitude towards the role of international courts in dispute settlement is even more passive. China has usually made a reservation about the clause of judicial settlement by ICJ in the treaties to which China is a party. On 5 September 1972, China formally declared that it did not recognize the Statement of the former Chinese Government on Acceptance of the Compulsory Jurisdiction of the International Court of Justice. In fact, for some time China refused to settle any dispute with other countries through ICJ. ② In recent years, some scholars suggested that China accept international judicial settlement to some degree so as to improve China's international image. ③ On the other hand, as a UN Security Council member, China has nominated judges of Chinese nationality to ICJ as well as to other international courts, even though Chinese judges have had little influence over the judicial process and judgments of the international courts.

In order to be involved in dealing with the world ocean affairs, including the mechanism for dispute settlement stipulated in the LOS Convention and to safeguard its own maritime interest, China ratified the LOS Convention on 15 May 1996, which made it eligible to nominate a candidate to be one of the ITLOS judges. It is to be noted that in August 2006 China made a declaration to exclude certain disputes including those concerning maritime boundary delimitation from compulsory third-party settlement procedures in accordance with Article 298 of the LOS Convention. ④ This was not a surprise and follows China's long-standing tradition of abstinence from any international judicial body in resolving its disputes. Often when China accedes to or ratifies a treaty, it makes a reservation on the clause concerning compulsory jurisdiction of the

① Article 287 (3) of the LOS Convention provides that "A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex Ⅷ".

② *See* Gao Yanping, International Dispute Settlement, in Wang Tieya ed., *International Law*, Beijing: Law Press, 1995 (in Chinese), p. 612.

③ *See* Shen Wei, Dispute Settlement Mechanism of the UN Convention on the Law of the Sea, *Ocean Development and Management* (in Chinese), vol. 13 (3), 1996, pp. 53-54.

④ The full text is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification, 16 December 2009.

ICJ. However, the settlement mechanism in the LOS Convention is much more tricky. First, a State has to accept one of four juridical methods. Therefore disputes regarding the application and interpretation of the LOS Convention to which China is a party are subject to arbitration at least, except for those matters to be excluded by the Chinese statement. Second, even if China excludes certain specific disputes, they will still be subject to the third-party conciliation mechanism, which can produce tremendous pressure on the States concerned to find a way of solving their disputes.

Therefore, China's attitude towards the international judiciary is somewhat ambivalent. On the one hand, as a world power, China would like to play a part in that arena. Yet it lacks sufficient qualified legal experts who to provide adequate services in the international judiciary, though this would presumably benefit its own interests. Furthermore, due to the fact that most judges are from Western developed countries, developing countries including China are doubtful whether the international judiciary can uphold the necessary impartiality and justice. Only when China has cherished enough confidence in that field can it play its due role. Recent domestic legal reform in China may provide some impetus to push China closer to the international rule of law and enhance China's willingness to resort to the international judiciary for dispute settlement.

In comparison, Japan's attitude is more active and positive. It accepted ICJ's compulsory jurisdiction as early as 1958. Accordingly, Japan recognized compulsory jurisdiction "over all disputes". This statement is very generous, but may exclude disputes "which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement". [1] As reported, Japan's attitude towards international adjudication completely transformed after World War Ⅱ. It adopted the policy of submitting a dispute to adjudication unless it could be resolved through negotiations. [2] In the 1950s, Japan proposed to submit a dispute with Australia concerning Japan's pearl fishing activities in the Timor and Arafura Seas, situated off the northern coast of Australia beyond its territorial waters but within its continental shelf

① *See* Japan's Declaration of 15 September 1958, *ICJ Yearbook*, 1994—1995, p. 95.

② *See* K. Yokota, International Adjudication and Japan, *Japanese Annual of International Law*, vol. 17, 1973, p. 20.

claim.[1] Since Japan has accepted the compulsory jurisdiction of the ICJ, if China wishes to use the ICJ in resolving the territorial disputes over the abovementioned islands, it may have some advantages when presenting its case.

Although Japan did not choose a compulsory dispute settlement mechanism under the LOS Convention upon its ratification, it has been a party in three cases before the ITLOS: two concerning prompt release and one requesting provisional measures. The two prompt release cases both involved Japanese vessels detained by Russia in its EEZ for alleged illegal fishing. In the "*Hoshinmaru*" case, the two parties were not in agreement over the amount of the security bond imposed by the Russian authorities. The Tribunal's judgment in August 2007 settled the dispute by adjusting this amount.[2] In the "*Tomimaru*" case submitted by Japan in 2007, the Tribunal simply ruled that there was no object on which it needed to be called upon for a decision since the Japanese vessel in question had already been confiscated by the Russian authorities.[3]

In the case of *Southern Bluefin Tuna* (New Zealand/Australia v. Japan), Japan was forced to respond to the case submitted by Australia and New Zealand in July 1999. The two Southern Ocean countries requested the Tribunal to render provisional measures (an interim injunction) to stop Japan's unilateral experimental fishing of southern bluefin tuna (SBT) in 1999. In its response Japan asked the Tribunal to deny the provisional measures requested by Australia and New Zealand. In Japan's view, the two countries did not meet the conditions set forth in international law. In August 1999, the Tribunal rendered an order containing several decisions: first, the three countries concerned should not aggravate or extend the dispute and their annual catches should not exceed the annual national allocations at the levels last agreed by the parties. They should refrain from conducting an experimental fishing programme involving the catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is deducted from its annual national allocation, and resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna. Secondly, each party should submit the initial report to ITLOS and further reports and information upon request. Thirdly, the provisional measures pre-

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① *See* P. Macalister-Smith, Pearl Fisheries, *Encyclopedia of Public International Law*, vol. 11, p. 257.

② For details, *see* http://www.itlos.org/start2_en.html, 5 September 2009.

③ For details, *see* http://www.itlos.org/start2_en.html, 5 September 2009.

scribed in the order should be notified by the Registrar through appropriate means to all States Parties to the Convention participating in the fishery for southern bluefin tuna. ①

Some existing examples in East Asia may be learned by the countries in question to settle their disputes. There are two recent cases submitted by East Asian countries before the ICJ: the case of *Sovereignty over Pulau Litigan and Pulau Sipadan* (Malaysia/Indonesia) (1998—2002) and the case on *Sovereignty over Pedra Branca, Middle Rocks and South Ledge* (Malaysia/Singapore) (2003—2008). Both cases concern maritime territorial disputes. In the judgment on *Sovereignty over Pulau Litigan and Pulau Sipadan*, ICJ granted the disputed islands to Malaysia, while in the latter case, the Court awarded Predra Branca to Singapore and Middle Rocks to Malaysia. ②

Another case relating to East Asia is the *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (*Malaysia v. Singapore*). The case was first submitted to the ITLOS in September 2003 by Malaysia requesting the Tribunal to impose provisional measures to stop Singapore's land reclamation activities — both in the vicinity of the maritime boundary between the two states and areas claimed as territorial waters by Malaysia — pending the decision of the Arbitral Tribunal. ③ The Tribunal issued an order in October 2003 prescribing that Malaysia and Singapore should cooperate to establish a group of independent experts to study and prepare an interim report on the subject matter, directing that Singapore should not "conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts" and deciding that "Malaysia and Singapore shall each submit the initial report referred to in article 95, paragraph 1, of the Rules, not later than 9 January 2004 to this Tribunal and to the Annex Ⅶ arbitral tribunal, unless the arbitral tribunal decides other-

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① For details about the case, *see* http://www.itlos.org/start2_en.html, 16 December 2009.

② For details on these two cases, *see* respectively http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=inma&case=102&k=df and http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=masi&case=130&k=2b, 17 December 2009.

③ Due to its scarcity of land, Singapore actively carries out land reclamation. According to a statistic, Singapore's land area increased from 581 km2 in 1966 to 695 km2 in 2003. *See* Kog Yue-Choong, Environmental Management and Conflict in Southeast Asia: Land Reclamation and Its Political Impact, *IDSS Working Paper*, No. 101 (Institute for Defence and Strategic Studies, Nanyang Technological University, Singapore), January 2006, p. 7.

wise" (the references to "Art. 95, paragraph 1 of Rules" and "Annex Ⅶ arbitral tribunal" might be superfluous here, not to mention slightly confusing. Consider omitting them and using ellipses in the quote).① Following ITLOS's order, the two sides jointly established a group of experts, which submitted its final report to the two sides on 5 November 2004. Based on the report, the two sides reached a resolution on 26 April 2005, agreeing to terminate the case through several arrangements including Singapore's modification of the final design of the shoreline of its land reclamation, Singapore's compensation to affected Malaysia fishermen, and the discussion and monitoring of the environmental impacts in the Straits of Johor by the Malaysia-Singapore Joint Committee on the Environment (MSJCE).②

Ⅹ. Conclusion

In light of the above observations, a few concluding remarks may be made. First, as neighbouring countries maritime encounters and interactions are inevitable between China and Japan, so too are maritime disputes. Second, it can be seen that while maritime cooperation has been carried out between the two sides, there are a number of maritime disputes yet to be resolved. The disputes are embedded in a historical context of frequent maritime interactions between the two nations and have been exacerbated by the new legal regime of the oceans based on the LOS Convention. Third, apparently both sides prefer a solution to their disputes by peaceful means and third party judicial settlement is thus recommended. Finally, as both sides exert their sincere efforts towards the settlement of their maritime and territorial disputes, the East China Sea is expected to become a sea of peace and cooperation, rather than one of conflict and tension.

① Order on the Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore): Request for Provisional Measures, *ibid.*, para 104, at http://www.itlos.org/start2_en.html, 17 December 2009.

② *See* Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore): Settlement Agreement (on file with the author).

Table 1: Rounds of Negotiation on the East China Sea Dispute

Round	Time	Venue
1	25 October 2004	Beijing
2	30—31 May 2005	Beijing
3	30 Sept. —1 Oct. 2005	Tokyo
4	6—7 March 2006	Beijing
5	18 May 2006	Tokyo
6	8—9 July 2006	Beijing
7	29 March 2007	Tokyo
8	25 May 2007	Beijing
9	26 June 2007	Tokyo
10	11 October 2007	Beijing
11	14 November 2007	Tokyo

Source: compiled by the author.

Table 2: Dates of Submission in East Asia

(should it be noted what kind of submissions these are and to whom they were submitted?)

State	Dates	Submission
Brunei	12/05/09	Preliminary Info
China	11/05/09	Preliminary Info
Indonesia	16/06/08	Partial Submission
Japan	12/11/08	Full Submission
Malaysia	06/05/09	Joint Submission
Philippines	08/04/09	Partial Submission
South Korea	11/05/09	Preliminary Info
Vietnam	06/05/09	Joint Submission
	07/05/09	Partial Submission

Source: compiled by the author.

(Editor: DENG Yuncheng;
English Editor: Joshua Owens)

中日海洋问题及其解决前景

邹克渊*

内容摘要：中国和日本是东亚地区的近邻，两国之间的海洋交往可以上溯至几千年前。近年来，两国通过多种形式发展了海洋关系，特别是在海洋渔业管理、联合进行海洋科学研究以及共同保护海洋环境等方面加强了合作。但是，尽管两国在广泛的领域开展了合作，其海洋关系方面的紧张态势乃至冲突仍然存在。

中日两国都是东亚地区的海洋大国，并且都积极扩张和维护其邻近海域的权利和利益。两国都是《联合国海洋法公约》的缔约国，并且都颁布了有关领海、毗连区、专属经济区和大陆架的国内法。国家管辖海域的扩张不可避免地会导致相邻国家之间的紧张局势甚至是冲突。中日两国之间海洋争端突出表现在东海及钓鱼岛主权的争端，以及两国在东海海洋划界和油气资源开发方面的争端。

本文试图对中日两国海洋关系的新发展作出评论。本文在具体谈到某些方面的海洋合作的同时，重点仍在对两国之间的海洋争端进行分析，并提出解决争端的方法。

关键词：中国　日本　海洋问题　争端解决前景

一、引　言

中日两国隔东海相望。按照1982年《联合国海洋法公约》的定义，东海是一个半闭海。[①]东海的面积为480,000平方英里（1,243,190平方公里），其边界北至济州岛（Cheju），东北至九州岛（Kyushu），东至琉球群岛（Ryukyu），南至中国

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① 按照《联合国海洋法公约》第122条的规定，"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和专属经济区构成的海湾、海盆或海域。1974年联合国第三次海洋法会议的辩论中，东（中国）海被归为"闭海和半闭海"的范畴。参见 Michael W. Lodge, The Fisheries Regimes of Enclosed and Semi-enclosed Seas and High Seas Enclaves, in Ellen Hey ed., *Developments in International Fisheries Law*, Hague: Kluwer Law International, 1999, p. 197.

台湾岛,西至中国大陆。[①] 作为一个大陆架宽阔的边缘海,东海的平均水深为370米,最深处达2,719米。近年来,东海极不平静,不仅在于其潮汐或者其他的自然运动,更在于周边国家之间的政治和法律观点的差异,特别是中日两国之间的差异。

《联合国海洋法公约》于1982年签订,1994年生效。中国和日本都于1996年批准该公约。为实施海洋法公约的内容,中国还进行了相关的国内立法活动。1992年,中国颁布了《中华人民共和国领海和毗连区法》,[②]完善了1958年《中华人民共和国政府关于领海的声明》所确立的领海法律制度。中国确立其领海和毗连区的宽度,分别为从领海基线量起12海里和24海里。《领海和毗连区法》适用于中国整体,包括台湾和邻近海域中的其他岛屿。

中国另外一个海洋基本立法是1998年由全国人大通过的《中华人民共和国专属经济区和大陆架法》。[③] 该法是为确保中国行使其对专属经济区和大陆架的主权权利和管辖权。按照该法,中华人民共和国的专属经济区是领海以外并邻接领海的区域,从测算领海宽度的基线量起延至二百海里。中华人民共和国的大陆架,为中华人民共和国领海以外依本国陆地领土的全部自然延伸,扩展到大陆边外缘的海底区域的海床和底土;如果从测算领海宽度的基线量起至大陆边外缘的距离不足二百海里,则扩展至二百海里。[④]有趣的是,尽管本条对于专属经济区的定义和海洋法公约相关条款的定义完全一致,但是其关于大陆架的条款却有一些中国特色,也即是,强调中国依自然延伸原则对于大陆架的权利,这对于东海大陆架划界具有重大的意义。[⑤]该法还进一步规定,中华人民共和国与海岸相邻或者相向国家关于专属经济区和大陆架的主张重叠的,在国际法的基础上按照公平原则以协议划定界限。

1996年5月,当中国批准《海洋法公约》时,中国颁布了《中华人民共和国政府关于领海基线的声明》。中国采用直线基线的方式确定其大陆周边海域和西沙群岛的领海。[⑥]同时,中国还说明将再行宣布其余的领海基线。

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① "East China Sea", in *The New Encyclopaedia Britannica*, 15th Edition, vol. 3, Encyclopaedia Britannica, Inc., 1984, p. 756.

② The English version may be found in Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State, *Limits in the Seas*, No. 117 (Straight Baselines Claim: China), July 9, 1996, pp. 11-14.

③ The Chinese text is reprinted in People's Daily (in Chinese), 30 June 1998. An English translation may be found in *Law of the Sea Bulletin*, No. 38, 1998, pp. 28-31.

④ 《中华人民共和国专属经济区和大陆架法》第2条。

⑤ Zou Keyuan, *China's Marine Legal System and the Law of the Sea* Leiden: Martinus Nijhoff, 2005, p. 94.

⑥ Declaration on the Baseline of the Territorial Sea of the People's Republic of China, 15 May 1996, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf, 17 December 2009.

在全国人大常委会《关于批准〈联合国海洋法公约〉的决定》中，中国还作出了如下三点声明：

> （一）按照《联合国海洋法公约》的规定，中华人民共和国享有二百海里专属经济区和大陆架的主权权利和管辖权。
>
> （二）中华人民共和国将与海岸相向或相邻的国家，通过协商，在国际法基础上，按照公平原则划定各自海洋管辖权界限。
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> （三）中华人民共和国重申对1992年2月25日颁布的《中华人民共和国领海及毗连区法》第二条所列各群岛及岛屿的主权。[①]

上述声明清楚地表明了中国对于海洋划界问题的官方立场，并且重申了其对于东海争议岛屿的权利主张。

日本也进行了相似的国内立法进程。1977年，日本通过了《领海法》，1996年通过了《专属经济区和大陆架法》。日本比中国还多作出一个立法，2007年，日本颁布了其《海洋基本法》，对一个统一和全面的海洋政策与管理措施作出法律的指导。[②] 关于和邻国之间的海洋划界问题，日本主张，海岸相对的国家之间如果不能达成相关协议，应适用中间线作为专属经济区和大陆架的界线。这个观点反映在其1996年《专属经济区和大陆架法》中。[③]因此，批准《联合国海洋法公约》以及据此进行的国内海洋立法，构成了当代中日海洋关系的法律基础。

二、双边渔业关系

为了避免渔业争端，并维护东海的正常渔业秩序，中日两国自1950年代就开始讨论渔业问题。因为当时双方没有建立正式的外交关系，协商的主体是政府支持的非政府团体。1955年6月，日中渔业委员会（最初被称为日中渔业企业协会，Japan-China Fisheries Council，originally known as Japan-China Fisheries Enterprise Association）和中国渔业协会达成第一个非官方的渔业协定。从1955年至1975年（除1958年6月至1963年11月这段时期），双方协商达成并实施了三个非官方的渔业协定。这三个协定对于建立和发展中日之间的渔业关系发挥了重要作用。

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① The declaration is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification，29 July 2009.

② 中文译文参见《中国海洋法学评论》2008年第1期，第128～133页。

③ 参见 Article 1 (2) and Article 2 (2) of the Law on the Exclusive Economic Zone and the Continental Shelf (Law No. 74 of 1996)，*Law of the Sea Bulletin*，No. 33，1997，pp. 94-95.

非官方协定通过限制渔船的数量和渔季的方式,建立了渔区(6 个拖网渔区和 3 个拉网作业区)。在某些区域,渔船的马力也被限制。渔获物的长度以及渔网筛孔的尺寸也被限制。协议还建立了一个包含双方各三名成员组成的联合渔业委员会,帮助实施协议。[①]协议规定拖网渔获量为 20 万吨,包括很多海底鱼类,如石首鱼(croaker)和带鱼(hairtail)等;拉网渔获量为 30 万吨,主要是鲭鱼(mackerel)和茄克竹荚鱼(jack mackerel)。[②] 值得注意的是,1950 年代的渔业协定中就设立了保护区,而当时可持续发展以及其他环境原则尚未形成。还应该注意的是,此类保护区还包括了公海的某些部分。

随着外交关系的建立,两国开始就政府间的渔业协定进行协商。1975 年 8 月 15 日,《中华人民共和国政府和日本国政府渔业协定》最终签署,并于 1975 年 12 月 23 日生效。[③]与此同时,两国之间的非政府协定被废止。1975 年的渔业协定分别在 1978 年和 1985 年进行了修改。[④]尽管 1975 年的协定引入了更严厉的保护性措施,其内容和非政府间的协议并无太大的差别。

1994 年《联合国海洋法公约》的生效开启了中日两国渔业关系的新时代。两国都根据公约及各自国内法建立了专属经济区。因为东海最宽处不足 400 海里,因此其全部海域都成为中国、日本和韩国的专属经济区。双方之间的渔业关系不可避免地需要做出新的调整。经过几轮谈判,双方最终于 1997 年 9 月就东海的渔业管理问题达成协定。[⑤]新协定于 2000 年 6 月 1 日生效。

协定包含了一些因应形势变化的重要条款:(1)强调渔业资源养护和保护的原则:按照《海洋法公约》的相关条款、《21 世纪议程》和其他国际文件的环境要求,协定将按照《海洋法公约》建立新的渔业秩序作为其目的之一,养护和合理利用共同关切的海洋生物资源,维护海上的正常秩序。双方同意为渔业科学研究和海洋生物资源的养护进行合作。[⑥] 缔约双方应采取必要措施,确保本国国民

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① 日本方面建议委员会进行联合科学调查,但是中国基于"独立自主、自力更生和实现计划经济"的三个原则拒绝了这个建议。参见 Shoichi Tanaka,"Japanese Fisheries and Fishery Resources in the Northwest Pacific",*Ocean Development and International Law*,vol. 6,1979,p. 184.

② Shoichi Tanaka,"Japanese Fisheries and Fishery Resources in the Northwest Pacific",*Ocean Development and International Law*,vol. 6,1979,p. 184.

③ 中华人民共和国农业部渔业局编:《中日政府间渔业协定及民间渔业安全作业议定书(中文)》,1993 年 4 月,第 1～19 页。

④ 这些修改包括设立:限制渔船马力的作业线,600 马力以上的拖网和围网渔船禁止入内;封闭区域或者指定期间完全封闭的暂停区域;有关渔获物长度、大小,吸引鱼群的强光装置和偶然捕获物等方面的限制。参见 Mark J. Valencia,*A Maritime Regime for Northeast Asia* Hong Kong:Oxford University Press,1996,p. 258.

⑤ 《中华人民共和国和日本国渔业协定》,1997 年 11 月 11 日。非官方的英文译本参见 Zou Keyuan,*Law of the Sea in East Asia*:*Issues and Prospects* London:Routledge,2005,pp. 175-180.

⑥ 《中华人民共和国和日本国渔业协定》第 10 条,1997 年 11 月 11 日。

及渔船在缔约另一方专属经济区从事渔业活动时，遵守本协定的规定以及缔约另一方有关法令所规定的海洋生物资源的养护措施及其他条件。缔约一方应及时向对方通报本国有关法令所规定的海洋生物资源的养护措施及其他条件。[①] (2)规定互惠的渔业权利：协定适用于双方的专属经济区。但是，其适用范围并不包括专属经济区的全部，因为协定排除了台湾岛和有争议的钓鱼岛所在的北纬 27°以南及东经 125°30′以西的东海海域。缔约双方根据互惠原则，按照本协定及本国有关法令，准许另一缔约方的国民及渔船在本国专属经济区从事渔业活动。一缔约方的授权机关，向另一方的国民及渔船颁发有关入渔的许可证，并可就颁发许可证收取适当费用。向另一方的渔民颁发入渔许可证应该遵守协定的相关条款。颁发的入渔许可证书的数量以及另一方在专属经济区内的捕捞量是一个复杂和困难的问题，需要双方共同协商并达成协议。(3)建立暂定措施水域(Provisional Measures Zone，PMZ)：协定在东海的中部建立了暂定措施水域，该水域的位置在北纬 30°40′和北纬 27°之间，东西分别距离日本九州岛和中国大陆的领海基线均为 52 海里。为了养护和增加暂定措施水域渔业资源量，双方应该在中日渔业联合委员会决定的基础上采取适当的管理措施，以保护海洋生物资源不受过度开发的危害。缔约双方应对在暂定措施水域从事渔业活动的本国国民及渔船采取管理及其他必要措施。缔约双方在该水域中，不对从事渔业活动的另一方国民及渔船采取管理和其他措施。建立共同渔区是国家之间在共享水域内进行渔业合作的典型形式。世界上已有很多先例，中日暂定措施水域仅仅是新增加的一个。暂定措施水域的不同之处在于，尽管历史上双方已有一些形式的渔业合作，此种区域还是第一次建立。这表明两国之间的渔业合作进入了一个新时期。(4)设立了联合渔业委员会：为了实施渔业协定，并协调各自的渔业管理措施，双方决定建立由四名委员组成的联合渔业委员会，双方各自任命两名委员。委员会的决策机制建立在四名委员一致同意的基础上。双方必须尊重联合渔业委员会作出的建议，并且根据建议采取必要的措施。委员会每年在中国或日本召开一次会议，如有必要，也可以召开临时会议。[②]

三、应对专属经济区海洋问题的合作

专属经济区是海洋法公约新创制的一个海洋区域，因此，在专属经济区内活动也不可避免地产生问题。中日两国就中国科研船舶在东海进行海洋科学研究的问题上存在争议。日本指责中国侵犯了其主权和海洋利益。中国认为两国之间在东海现在还未明确划定海洋边界。众所周知，海洋科学研究自由是公海的

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① 《中华人民共和国和日本国渔业协定》第 4 条，1997 年 11 月 11 日。

② 《中华人民共和国和日本国渔业协定》第 11 条，1997 年 11 月 11 日。

基本自由之一。在海洋法公约及中日两国建立专属经济区之前，在两国领海之外的东海区域可以自由进行科学研究。但是，海洋法公约生效后，原本属于公海的部分海洋区域的法律地位已经改变，公约规定，在专属经济区内进行海洋科学研究需要沿海国的同意。中日在东海专属经济区的主张存在重叠，现在还没有划定明确的边界。

为了缓和专属经济区重叠海域内科学研究问题造成的紧张态势，双方于 2000 年 9 月 15 日举行会谈，以建立一个在两国海域内进行海洋调查活动时的提前通报机制的框架。2001 年，双方达成协议，规定在争议海域内进行海洋科学研究时应提前通报，要点如下：(1)双方在邻近另一方管辖区的海域计划进行海洋科学研究调查活动时，应提前 2 个月通知对方；(2)通报的内容包括开展海洋科学研究活动的机构和船舶的名称、调查的目的和内容、调查的期限和区域。[①]这个安排是两国在解决海洋边界问题前达成的临时措施，但是应该可以消减因为海洋科学研究活动而造成的不必要的紧张态势。

两国在专属经济区问题上进行互动的另外一个事件发生于 2001 年 12 月 22 日，日本海上保安厅在东海追捕并开火击沉了一艘侵入日本专属经济区的不明船舶。[②]该船上的 15 名船员丧命。在 6 个小时的追逐过程中，日本船舶开火超过 500 次。据相关报道称，日本船舶首先开火。[③]这艘神秘的船舶沉没的地点位于中国专属经济区内，因为该地点距中国领海为 260 公里。[④]中国对那些死伤人员表示遗憾，并且非常关注日本在东海使用武力的事实。[⑤]

之后，日本要求打捞沉没的船舶，以调查整个事件，中国同意了日本的请求。中国外交部发言人表示，中国是根据海洋法公约和国内法做出同意的，并且中国有权对打捞过程进行监督。[⑥] 为补偿打捞活动对正常渔业秩序带来的消极影响和对中国渔民造成的损失，日本同意为此支付 150，000，000 日元的补偿。[⑦]

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① 参见《信报经济月刊》(中文)，2001 年 2 月 9 日，第 10 页。

② 根据另外一些报道，日本派出了 25 艘巡逻船和 14 架飞机追赶这条神秘船舶。参见 Lu Lude，"Japan cannot do as it pleases in China's EEZ"，*China Ocean News* (in Chinese)，8 March 2002.

③ 参见 Peter Landers，Conflict Shows a Gray Area in Japan Law－Tokyo Weighs Revision to Boost Defense Measures，*Asian Wall Street Journal*，26 December 2001，p. 3.

④ "China asks Japan to provide more information about sinking of unidentified ship"，*BBC Monitoring*，23 December 2001.

⑤ Boat sinks after being hit by Japanese fire，*China Daily*，24 December 2001；and China reiterates concern over Japan's use of force，*Kyodo News*，25 December 2001.

⑥ "中国将依法对日本东海沉船调查活动进行监管"，载于《人民日报》2002 年 4 月 30 日，第 4 版。

⑦ 2002 年 12 月 27 日，双方在 5 轮谈判后达成协议，下载于 http://www.fmprc.gov.cn/chn/gxh/zlb/tyfg/t5905.htm，2009 年 7 月 28 日。

四、油气资源勘探和开发的争端

然而，在东海还有比科学研究和船舶救难更为重要的问题，比如油气资源的勘探和开发。中国开始勘探春晓油气田之后，日本表达了不满，指责中国侵犯了其在东海的权利。双方于2004年10月25日进行了协商。2006年7月进行的第六轮磋商中，双方达成共识，决定建立一个海上热线沟通机制，应对意外事件。[①]在后续的磋商中，中国提出两个在东海的共同开发方案，但是日本只考虑了北部海域的一个。[②] 经过11轮的磋商（见图表一），两国终于在2008年6月17日达成协议。两国承诺在东海进行合作，使其成为"和平之海、合作之海、友谊之海"。两国还设立了共同开发的方案，并且划定了一小块共同开发区。此外，中国允许日本法人按照中国法律的规定，参与春晓油气田的开发。[③]

这项共同开发协议符合海洋法公约鼓励相关国家在解决海洋边界争端前达成临时安排，包括达成共同开发协议的精神和相关条款。

五、外大陆架外部界限的问题

海洋法公约第76条规定了确定从测算领海宽度的基线量起350海里或者2,500米等深线外100海里的外大陆架外部界限的标准：

> (1)以最外各定点为准划定界线，每一定点上沉积岩厚度至少为从该点至大陆坡脚最短距离的百分之一；或
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> (2)以离大陆坡脚的距离不超过60海里的各定点为准划定界线。

在1999年5月13日前成为海洋法公约缔约国的沿海国，应在2009年5月13日之前向外大陆架委员会提交其外大陆架主张（东亚国家的相关情况，见图表二）。委员会的功能是考虑沿海国提交的其200海里之外大陆架相关的数据和其他资料，并根据公约第76条和1980年8月29日联合国第三次海洋法会议

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① "中日东海问题磋商就建立海上热线达成原则共识"，下载于 http://world.people.com.cn/GB/4572649.html，2006年8月30日。

② "日考虑接受共同开发东海北侧海域方案"，2006年5月15日，下载于 http://world.people.com.cn/GB/1029/42354/4371017.html，2006年5月16日。

③ "China, Japan reach principled consensus on East China Sea issue", 18 June 2008, at http://www.chinadaily.com.cn/china/2008-06/18/content_6774860.htm，2009年5月13日。

达成的谅解声明作出建议。根据以上规定,日本于 2008 年 11 月 12 日提交了其外大陆架主张。

2009 年 2 月 6 日,中国对日本的主张中有关冲之鸟礁(Oki－no－Tori Shima)的部分提出反对意见。中国认为,冲之鸟实际只是一块礁石,不能成为主张大陆架的基础,要求委员会对从冲之鸟延伸的部分不予审议。[①]韩国持和中国同样的观点。但是,委员会并不是有权解释海洋法公约条款的机关,它重申自己无权对公约第 121 条进行法律解释。[②]另外一方面,如果不同国家对外大陆架主张存在争议,则委员会不会对此主张进行审议。

六、钓鱼岛主权争端

中日间关于钓鱼岛主权的争端现在已经成为影响两国关系的重要问题。位于东海的钓鱼岛群岛,陆地面积共 7 平方公里,其中钓鱼岛(日本称 Senkaku 或 Uotsuri Jima)为最大岛屿。

我们知道,钓鱼岛的主权问题在中日渔业协定中被冻结,协定规定两国在考虑传统的和相互合作的渔业关系时,应在东海暂定措施水域北部部分尊重渔业活动的现状,适当考虑和顾及对方传统的渔业利益和资源形势,不应不适当地损害对方的渔业利益。[③]日本方面对此的解释是,渔业协定的目的是建立日本和中国之间的渔业秩序,和钓鱼岛的主权并不直接相关。协议的规定不适用于钓鱼岛的领海,也不影响其地位。[④]目前,钓鱼岛由日方实际控制,但是围绕其主权的争议已经持续超过一个世纪。[⑤]在短期内解决该争议的希望不大。

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① China's Objection is available at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf,10 December 2009.

② "Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission",CLCS/64,1 October 2009,available athttp://daccess－dds－ny.un.org/doc/UNDOC/GEN/N09/536/21/PDF/N0953621.pdf?OpenElement,10 December 2009.

③ Agreed Minutes between the Government of the People's Republic of China and the Government of Japan,11 September 1997.

④ 参见 Nobukatsu Kanehara and Yutaka Arima,New Fishing Order－Japan's New Agreements on Fisheries with the Republic of Korea and with the People's Republic of China, *Japanese Annual of International Law*,vol.42,1999,pp.27-28.

⑤ 两国政府的官方立场,参见"The Basic View on the Sovereignty over the Senkaku Islands",at http://www.mofa.go.jp/region/asia－paci/senkaku/senkaku.html,2002 年 7 月 4 日;"钓鱼岛问题",下载于 http://www.fmprc.gov.cn/eng/3790.html,2002 年 7 月 26 日。

七、海洋划界问题

中日间的专属经济区和大陆架划界问题非常复杂。众所周知，日本主张按照中间线原则划定专属经济区和大陆架的边界，其原因有三：

(1)划界谈判长期不能达成协议，导致专属经济区外部边界悬而不决是不适当的。

(2)日本坚持按照中间线原则划定专属经济区边界的传统立场。

(3)应坚持1977年有关渔区的临时措施法采取的中间线原则。[①]

但是，中国的立场与此不同。中国认为等距离线(中间线)方法并不是划界的唯一标准。相反，中国在和日本的大陆架划界问题上坚持按照自然延伸原则。[②]早在1970年代，当日本和韩国缔结东海共同开发协议时，中国就表示强烈反对，认为日韩之间的协定侵犯了中国在东海大陆架的合法权利。[③]自然延伸对中国意义重大，因为至少是在东海，中国大陆拥有非常宽阔的大陆架，中国也利用自然延伸原则支持其在东海的大陆架主张。因为关于专属经济区和大陆架划界的国家实践的总体趋势是以一条单一边界划定这两个不同但是却密切联系的海洋区域，那么自然延伸原则在划界中是否还能发挥重要作用就值得提出疑问。一条单一的调整线作为专属经济区和大陆架的边界可能更为实际。

关于专属经济区划界，中国看起来同意接受中间线。如果中国在东海大陆架划界问题上坚持自然延伸原则，而在专属经济区问题上接受中间线原则的话，中日在东海就存在两条海洋边界，因此会给双方在执法和行使管理权等方面造成困难。

尽管如此，中日之间还是已经就海洋划界问题达成了一些协议。1997年渔业协定中，双方承认了各自在东海专属经济区的无争议地区，并在主张重叠区域

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① Toshihisa Takasa, The Conclusion by Japan of the United Nations Convention on the Law of the Sea (UNCLOS) and the Adjustment of Maritime Legal Regime, *Japanese Annual of International Law*, No. 39, 1996, p. 139.

② 就大陆架划界问题，中国坚持以下原则：(1)适用自然延伸的概念；(2)通过谈判协商解决划界问题；(3)在考虑各种相关因素的衡平原则的基础上进行协商。参见 Wang Tieya, "China and the Law of the Sea", in Douglas M. Johnston & Norman G. Letalik eds., *The Law of the Sea and Ocean Industry: New Opportunities and Restraints* (Honolulu: Law of the Sea Institute, University of Hawaii, 1984), p. 587.

③ 相关材料，参见 Wei-chin Lee, Troubles under the Water: Sino-Japanese Conflict of Sovereignty on the Continental Shelf in the East China Sea, *Ocean Development and International Law*, vol. 18 (5), 1987, pp. 585-611.

建立了暂定措施水域，其划界问题留待以后最终解决。尽管其性质为临时性的，协定还是尽量缩小了两国在东海争议区的范围。2008 年 6 月，两国达成的东海共同开发的共识协议也和海洋划界问题相关。

必须注意的是，钓鱼岛主权的争议对于东海海洋划界非常重要，甚至是其中最关键的因素。目前，日本牢牢控制这这些岛屿。我们也可以看到，中国一直到 1960 年代晚期和 1970 年代早期开始对日本的控制提出反对。这可能影响其对钓鱼岛主张的效力。[①]尽管如此，确定钓鱼岛的主权还是需要建立在各种因素和原因的基础上。这可以从国际法院近期的判决中观察，在马来西亚/印度尼西亚“利吉丹岛和西巴丹岛主权案”（the *Sovereignty over Pulau Litigan and Pulau Sipadan*）和马来西亚/新加坡“白礁岛案”（the *Sovereignty over Pedra Branca, Middle Rocks and South Ledge*）中，国际法院判决争议岛屿的主权归属现在的实际控制者所有，但是在喀麦隆和尼日利亚“陆地和海洋边界案”（Land and Maritime Boundary between Cameroon and Nigeria）的判决中，国际法院又判决双方争议的巴卡西半岛（Bakassi Peninsula，尼日利亚实际控制）的主权归属喀麦隆所有。[②]

很明显，谁拥有了岛屿，谁就能拥有根据岛屿生成的大片海域。根据海洋法公约，一个小岛可以被赋予其周围的大面积海域（12 海里领海，某些情况下还可以拥有从领海基线量起 200 海里的专属经济区）。在这种情况下，任何国家都不会放弃其对争议岛屿的主权主张，而是坚持对岛屿主权的强硬立场。当这些主权主张和民族主义相互交织时，情况就变得更为复杂。从中国国内反对日本钓鱼岛立场的大规模抗议即可看出这一点。因此，解决这些海洋主权争议的可能性看起来仍然很遥远。

八、第三方利益

海洋问题常常会影响到第三方的利益。1970 年代日韩两国在东海建立的共同开发区就遭到中国的强烈反对。同样地，中日双边渔业协定或者日韩双边渔业协定也影响到其他国家的利益，任何双边安排都可能影响到其他国家之间的关系和利益，因为他们共享同一水域，并利用同样的海洋生物资源。

日韩缔结新的渔业安排时，中国认为日韩渔业协定侵犯了其专属经济区权利，并声明中国在专属经济区内的权利和利益及渔业活动不受日韩双边协定的

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① 参见 Steven Wei Su, The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update, *Ocean Development and International Law*, vol. 36, 2005, p. 55.

② 这些案件的详情，参见国际法院官网 http://www.icj－cij.org/homepage/index.php?lang＝en，2009 年 12 月 5 日。

限制。中国认为三国主张的重叠海域的划界问题应该通过相关方之间的谈判解决,将任何一方排除在谈判之外都违反了国际法。[①] 另一方面,韩国对于中日渔业协定也表示不满,要求中国和日本解释双方划定的联合渔区北部界限的依据,认为在两国达成协议前,应当先咨询韩国的意见。[②]

另一方面,我们还应当意识到,无论是中日渔业协定、中韩渔业协定,还是日韩渔业协定都是双边协议。这些协议都涉及到有限的范围,并未完全覆盖东海和黄海的全部海域。其次,因为其性质为双边协议,他们还可能影响到第三方的利益,这一点在上述日韩渔业协定中已经提及。第三,因为双边协议仅规范双边关系,第三方的渔业活动并不受双边协议的调整。这一点对于台湾来说特别重要。最后,东海和黄海的很多渔业资源是迁徙物种,因此属于同一个海洋生态系统。在这个意义上,东亚海区域亟需一个区域性的多边渔业安排,以更有效地养护和管理渔业资源。最新缔结的中日双边渔业协定可以作为此种区域安排的基础。

另外,2009 年 5 月,中国和韩国都依据海洋法公约的相关条款和海洋法公约缔约国会议的其他决议,分别向大陆架界限委员会提交了在东海的外大陆架初步信息(preliminary information)。[③]两国据此满足了公约的要求,并且其提交的初步信息还确保其以后可以提交完整的划界案。因为这些初步信息表明,中韩两国在东海都有外大陆架主张,这也必将影响到日本在此海域的利益。而且,因为初步信息都是涉及东海,两国的主张之间也相互冲突。

九、可能的解决方式

国际法上有多种解决海洋争端的方式,包括谈判协商、调停和斡旋、调解、调查等政治方式,也包括仲裁和国际裁判等司法方式。这些方式大部分都是规定

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① 《外交部发言人表示日韩渔业协定侵犯了中国专属经济区主权权利》,载于《人民日报》1999 年 1 月 23 日;详细可进一步参考,范晓莉:《日韩新渔业协定评述》,载于《海洋开发与管理》,2000 年第 1 期,第 68~70 页。

② 参见 Chi Young Pak, Resettlement of the Fisheries Order in Northeast Asia resulting from the New Fisheries Agreements among Korea, Japan and China, *Korea Observer*, vol. 30 (4), 1999, pp. 614-615. For other related reference, 参见 Mark J. Valencia and Yong Hee Lee, The South Korea－Russia－Japan Fisheries Imbroglio, *Marine Policy*, vol. 26, 2002, pp. 337-343.

③ 中国提交的外大陆架主张的详情,参见 http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf,韩国提交的外大陆架主张的详情,参见 http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/kor_2009preliminaryinformation.pdf,2009 年 12 月 17 日。

在《联合国宪章》之中。[①]此外,全球性或者区域性的国际组织,在解决争端方面也能发挥积极作用。海洋争端的司法解决方式通常是通过国际法院和国际海洋法法庭。在东亚国家中,中国的态度最值得密切关注。中国一贯主张通过双边谈判协商解决国家之间的争端。在国际场合,中国提倡谈判是解决争端最有效的方式。在实践中,中国也已经通过谈判协商解决了和他国之间的双边争议,诸如边界问题,民族问题,等等。

尽管如此,对于诉诸司法解决争端,中国的态度较为保守。1962 年的中印边界冲突中,中国就拒绝了印度提出的通过仲裁解决边界争端的建议,认为"中印边界争端是关系两国主权的重大事项,涉及到超过 10 万平方公里的领土。显然,这个争议只能通过双方直接谈判解决,绝不可能通过任何形式的国际仲裁来解决"。[②]中国在这个问题上的消极态度,可能有如下的原因:首先,中国在历史上曾饱受西方殖民侵略,因此对建立在西方法律原则和学说基础上的国际司法机构不信任;其次,中国和其他共产主义国家一道,认为世界就是资本主义国家和社会主义国家之间永恒冲突的状态,而这些国家之间的利益和政策严重对立,因此不可能通过不公正的裁判解决争端。[③]

但是,1980 年代以后,中国改变了这种政策,转而同意其缔结或加入的条约中所规定的仲裁条款,但是这仅限于经贸、科技、交通、环境和卫生领域。实践中,中国还需要评估提交仲裁是否会危害其国家利益、国家主权以及其他可能对其不利的因素。中国在这个方面的犹豫,反映在其对待 1997 年《非航行利用国际水道法公约》(Convention on the Law of the Non－Navigational Uses of International Watercourses)所规定的争端解决机制的态度上。在谈判过程中,中国就表达了其对强制解决机制的关切。中国谈判代表表示,"除非这种程序经缔约方一致同意,否则中国不接受强制解决程序"。[④]这意味着,中国不接受任何形式的强制解决机制。

某些国际公约要求缔约国接受强制司法解决程序,如海洋法公约。在批准海洋法公约时,中国没有说明其接受何种形式的强制程序。这种情况下,可以认为中国接受强制仲裁。[⑤]

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① 《联合国宪章》第 33 条第一段。

② 参见王铁崖编:《国际法》,法律出版社 1995 年版,第 611～612 页。

③ 参见 Paul R. William, International Law and the Resolution of Central and East European Transboundary Environmental Disputes, Macmillan Press, 2000, p. 199.

④ 参见 UN Doc. A/C. 6/51/SR. 59 (1997), para. 3, at 3; cited in Attila Tanzi, "Recent Trends in International Water Law Dispute Settlement", in International Bureau of the Permanent Court of Arbitration ed., *International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms*, The Hague: Kluwer Law International, 2001, p. 139.

⑤ 《联合国海洋法公约》第 287 条第 3 款规定:缔约国如为有效声明所未包括的争端的一方,应视为已接受附件七所规定的仲裁。

与此同时,中国对国际法庭在争端解决中的作用持更为消极的态度。中国通常在其缔结的条约中对国际法院的管辖权作出保留。1972年9月5日,中国正式宣布其不承认前中华民国政府作出的接受国际法院强制管辖权的声明。实际上,中国也拒绝通过国际法院解决与他国之间的争端。[①] 为此,近年来有一些学者建议中国在某种程度上接受国际司法解决机制,以提升中国的国际形象。[②] 另一方面,作为联合国安理会成员,中国也已经向国际法院及其他国际法庭指派了中国籍法官,尽管法官的国籍对于国际法庭的司法程序和判决并无很大影响。

为了参与世界海洋事务,包括海洋法公约规定的争端解决机制,维护自身的海洋权益,中国于1996年5月15日批准了海洋法公约,使其有资格向国际海洋法法庭指派一名法官候选人。应注意的是,2006年8月,中国根据海洋法公约第298条的规定作出声明,排除适用包括海洋划界问题在内的几个问题上的第三方强制管辖程序。[③]这并不奇怪,并且符合中国一贯坚持的涉及中国的争端排除外国干涉的传统。中国签署或者加入条约时,总是对国际法院的管辖权作出保留条款。但是,海洋法公约所规定的争端解决机制非常复杂。首先,缔约国必须接受四种司法解决方式之一。这意味着,中国涉及的有关解释和适用公约的争端至少要受仲裁的约束,除了中国声明排除的事项。第二,即使中国在某些事项上排除适用强制解决机制,它仍然要受强制第三方调解机制的约束,这也会对寻求解决争端的国家产生巨大的压力。

因此,中国对待国际司法机构的态度是相当矛盾的。一方面,作为一个大国,中国希望在区域事务中发挥影响。另一方面,能够在国际司法机关发挥作用的法律专家有助于维护其利益,但是这方面的人才还相当缺乏。更重要的是,由于国际司法机构的法官主要是西方人,包括中国在内的发展中国家怀疑其是否能够维护必要的公平和公正。只有中国具备了足够的自信时,它才能在此领域发挥应有的作用。中国国内的法制改革可能推动中国更接近国际法治,增强中国诉诸国际司法机关解决争端的意愿。

相比之下,日本的态度就较为积极主动。它早在1958年就接受了国际法院的强制管辖权。相应地,日本也承认在"所有争端"上都适用强制管辖权。此项声明相当开放,但是可能排除了那些"相关争端方已经同意或者将要同意寻求通过仲裁或者司法达成最终有约束力的裁判"的争端。[④]据报道,二战后日本对待国际裁判的态度根本转变,它奉行的政策是,如果不能通过谈判解决争端,则将

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① 参见王铁崖编:《国际法》,法律出版社1995年版,第612页。

② 沈伟:《论〈联合国海洋法公约〉的争端解决机制》,载于《海洋开发与管理》1996年第3期,第53～54页。

③ 中国所作声明的全文参见 http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification,2009年12月16日。

④ 参见 Japan's Declaration of 15 September 1958, *ICJ Yearbook*, 1994－1995, p. 95.

争端提交国际司法解决。① 1950 年代，针对其在澳大利亚海岸以北的领海之外，但位于澳大利亚主张的大陆架之内的帝汶海和阿拉弗拉海（Timor and Arafura seas）进行采集珍珠活动而和澳大利亚产生的争端，日本主张提交国际司法解决。② 由于日本接受国际法院的强制管辖权，如果中国同意通过国际法院解决上述岛屿争端，日本就很可能将争端提交国际法院。

尽管日本在批准海洋法公约时，也没有选择强制争端解决机制，但是，国际海洋法法庭已经有三个判决涉及到日本：两个关于船舶的迅速释放，一个要求法庭采取临时措施。涉及日本的两个迅速释放船舶案件都是关于日本船舶在俄国专属经济区内因被指非法捕鱼而被扣押。在“Hoshinmaru”案中，争端双方就俄方提出的保释金数额不能达成一致。2007 年 8 月，法庭判决通过调整保释金额解决了该争端。③ 2007 年日本提交的“Tomimaru”案中，法庭简单判定，没有需要法庭作出决定的标的物，因为日本船舶已经被俄国当局没收。④

1999 年 7 月，新西兰和澳大利亚提交的“南方金枪鱼案”（Southern Bluefin Tuna），日本作为被告被迫回应。这两个南方海洋国家要求法庭采取临时措施（临时禁令），禁止日本对南方蓝鳍金枪鱼进行实验性捕获的活动。在回应中，日本请求法庭不颁布新西兰和澳大利亚两国所提出的禁令。日本认为，这两个国家的主张不符合国际法规定的要求。1999 年 8 月，法庭发布了一项命令，包含了以下几项决定：首先，三国不应激化和扩大争端，它们的年捕获量不应超过最后达成的捕捞量配额。除非其他国家同意，它们不应进行捕获南方蓝鳍金枪鱼的实验性捕捞计划，或者是把实验性捕捞量计入其年度捕捞配额中，并应毫不延迟地恢复谈判，以达成养护和管理南方蓝鳍金枪鱼的协议。其次，任一方都应向法庭提交最初的报告，并根据要求提交进一步报告和信息。第三，命令中所载的临时措施应该由秘书处通过适当方式通知所有参与南方金枪鱼渔业协定的缔约国。⑤

东亚有一些现成的例子可供国家参考，以解决其争议。东亚国家近几年向国际法院提交了两个案件：“利吉丹岛和西巴丹岛主权案”（Sovereignty over Pulau Litigan and Pulau Sipadan，马来西亚诉印尼，1998－2002）和“白礁岛主权案”（Sovereignty over Pedra Branca，Middle Rocks and South Ledge，马来西亚诉新加坡，2003－2008）。两个案件都和海洋领土争端相关。在前一个案件的判决中，国际法院判决争议岛屿的主权归属马来西亚，后一个案件的判决中，法院

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① 参见 K. Yokota，International Adjudication and Japan，*Japanese Annual of International Law*，vol. 17，1973，p. 20.

② 参见 P. Macalister－Smith，Pearl Fisheries，*Encyclopedia of Public International Law*，vol. 11，p. 257.

③ 参见 http://www.itlos.org/start2_en.html，2009 年 9 月 5 日。

④ 参见 http://www.itlos.org/start2_en.html，2009 年 9 月 5 日。

⑤ 参见 http://www.itlos.org/start2_en.html，2009 年 12 月 16 日。

则判决白礁岛(Predra Branca)主权归属新加坡,而中岩礁(Middle Rocks)主权归属马来西亚。①

和东亚国家相关的另外一个案件是新加坡在柔佛海峡"围海造地案"(Case Concerning Land Reclamation by Singapore in and around the straits of Johor,马来西亚诉新加坡)。2003年,马来西亚向国际海洋法法庭提交此案,请求法庭发出临时措施,制止新加坡在两国海洋边界附近以及马来西亚主张的领海(尚待仲裁庭的决定)范围内进行围海造地活动。② 2003年10月,法庭发布命令,指示马来西亚和新加坡两国应该联合建立一个独立的专家组,对所涉事项进行研究并提出临时报告,并指明新加坡"应特别考虑独立专家组报告,不进行可能对马来西亚的权利造成不可弥补的损害或严重危害海洋环境的围海造地活动",还决定,"马来西亚和新加坡最迟应在2004年1月9日前向法庭和根据附件七组成的仲裁庭提交根据法庭规则第一段第95条所规定的初步报告,除非仲裁庭另有决定"。③根据法庭的命令,双方共同组成了独立的专家组,并于2004年11月5日提交了最终报告。根据这份报告,双方于2005年4月26日达成解决争端的协议。根据协议,双方同意根据几项安排,终止此案的诉讼程序,包括新加坡修改其围海造地的最终设计方案,赔偿对马来西亚渔民造成的损失以及由马来西亚和新加坡联合环境委员会讨论和监管柔佛海峡内的环境影响。④

十、结　论

通过上述观察,可以得出以下结论:首先,作为邻国,中日之间不可避免地在海洋问题上产生碰撞和互动,同样也难以避免产生争端。其次,可以看到,在两国开展海洋合作的同时,仍有很多海洋争端需要解决。这些海洋争端有历史的原因,更有以海洋法公约为代表的新的海洋法律制度带来的影响。第三,显然,

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① 两个案件的详情,分别参见 http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=inma&case=102&k=df 和 http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=masi&case=130&k=2b,2009年12月17日。

② 由于其陆地面积小,新加坡积极进行填海造地。据统计,新加坡的陆地面积从1996年的581平方公里已经增至2003年的695平方公里。参见 Kog Yue-Choong, Environmental Management and Conflict in Southeast Asia: Land Reclamation and Its Political Impact, *IDSS Working Paper*, No. 101 (Institute for Defence and Strategic Studies, Nanyang Technological University, Singapore), January 2006, p. 7.

③ Order on the Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore): Request for Provisional Measures, *ibid.*, para 104, at http://www.itlos.org/start2_en.html, 17 December 2009.

④ 参见 Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore): Settlement Agreement (on file with the author).

双方都希望通过和平的方式解决争端，因此作者建议双方通过第三方司法进行解决。最后，由于双方都秉持诚意朝着解决海洋和领土争端的方向努力，东海可望成为和平之海、合作之海，而非冲突和紧张之海。

回合	时间	地点
1	2004年10月25日	北京
2	2005年5月30—31日	北京
3	2005年9月30日—10月1日	东京
4	2006年3月6日—7日	北京
5	2006年5月18日	东京
6	2006年7月8—9日	北京
7	2007年3月29日	东京
8	2007年5月25日	北京
9	2007年6月26日	东京
10	2007年10月11日	北京
11	2007年11月14日	东京

图表一：中日东海谈判的回合

来源：作者整理编辑

国家	日期	提交信息
文莱	2009年5月12日	初步信息
中国	2009年5月11日	初步信息
印度尼西亚	2008年6月16日	部分划界案
日本	2008年11月12日	全部划界案
马来西亚	2009年5月6日	联合（越南）划界案
菲律宾	2009年4月8日	部分划界案
韩国	2009年5月11日	初步信息
越南	2009年5月6日	联合（马来西亚）划界案
	2009年5月7日	部分划界案

图表二：东亚国家提交外大陆架划界案的日期

来源：作者整理编辑

（中译：赵伟；责任编辑：邓云成）

The Development and Current Status of Maritime Disputes in the East China Sea

GONG Yingchun*

Abstract: Sino-Japanese maritime disputes in the East China Sea concern two issues: the territorial sovereignty of the Diaoyu Islands and maritime delimitation. The sovereignty dispute over the Diaoyu Islands has been an unavoidable, key factor in negotiations on East China Sea issues. The change of legal attitude from median—line to 200 nautical miles distance and the reluctance to admit the fact of sovereignty dispute over Diaoyu islands constitute the main obstacles to the promotion of energy cooperation in the East China Sea. A resolution to the delimitation issue will likely take the form of joint development, further sincere negotiations or international judicial settlement. But judicial settlement may only be possible if the two countries agree to submit their disputes, also a mutually acceptable arrangement over the Diaoyu Islands is essential.

Key words: East China Sea; Diaoyu Islands; Sovereignty dispute; Maritime delimitation dispute; Cooperation; Disputed water; Dispute settlement

Ⅰ. Executive Summary

This essay examines the historical context, current developments, and future perspectives of the Sino-Japanese maritime disputes in the East China Sea.

A. *Main Argument*

Sino-Japanese maritime disputes in the East China Sea concern two issues:

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the territorial sovereignty of the Diaoyu Islands (called the Senkaku Islands in Japanese) and maritime delimitation. The sovereignty dispute over the Diaoyu Islands has always been a key factor in negotiations on East China Sea issues. If this dispute can be disentangled from the maritime delimitation issue through an agreement to exclude the Diaoyu Islands as a basis for generating exclusive economic zones (EEZ) or continental shelf claims, then the maritime delimitation issue might be handled more easily, since most confrontations and reciprocal distrust to date are rooted in the sovereignty dispute. A resolution to the delimitation issue will likely take the form of joint development of the East China Sea, further negotiations or a judicial settlement. The 2008 China—Japan Principled Consensus on the East China Sea Issue is a major step toward cooperation on maritime energy resources, but further compromise and political conditions is required. If China and Japan cannot reach a consensus on the scope of the disputed waters, a judicial settlement may provide another choice of dispute settlement.

B. Policy Implications

1. If Japan insists on the unrealistic stance that no sovereignty dispute exists concerning the Diaoyu Islands, the East China Sea issues will remain unresolved and the confrontations over the sovereignty of the islands will very likely escalate.

2. China and Japan should agree to exclude the Diaoyu Islands as a basis for generating EEZ or continental shelf claims in order to facilitate a resolution of the maritime delimitation issue.

3. If both countries effectively promote the 2008 principle consensus, then the establishment of joint development zones near the Diaoyu Islands could accelerate the process of cooperation.

4. The two countries need to be flexible on the method of dispute settlement. A clearly delimited maritime boundary reached through a judicial settlement or further sincere negotiations would encourage Sino-Japanese cooperation in scientific research, environmental protection, and other issues in the East China Sea.

Ⅱ. Introduction

On May 8, 2008, Chinese President Hu Jintao and Japanese Prime Minister

Yasuo Fukuda signed a Sino-Japanese joint statement promising comprehensive promotion of strategic and mutually beneficial relations. In the statement, the two sides both agreed that the Sino-Japanese relationship is one of their most important bilateral ties. Concerning the East China Sea issues, the two nations "pledge[d] to work together and make the East China Sea a sea of peace, cooperation and friendship."[①]

In order to realize the goal set forward in the statement, leaders of the two countries signed the China-Japan Principled Consensus on the East China Sea on June 18, 2008, indicating a bright and promising future toward peaceful settlement of both the long-standing territorial disputes and the maritime delimitation negotiations pertaining to the East China Sea. Since the principled consensus itself is not a legally binding agreement, the realization of joint development and cooperative development depends on the conclusion of a treaty and an exchange of notes between the two governments.

However, talks to finalize such a treaty have stalled since the June 2008 agreement. Increasingly impatient, the Japanese government has criticized China for breaching the principled consensus agreement by starting unilateral operations on the Chinese side of the median line. Meanwhile, China has responded by claiming that the Chunxiao oil and gas field is located in waters where China has inherent sovereign rights over the natural prolongation of its continental shelf.

Other incidents occurred in the East China Sea recently, causing observers to wonder whether tension in that body of water is mounting. In early May 2010 a Chinese vessel approached a ship belonging to the Japanese Coast Guard and asked its personnel to stop undertaking geographical surveys in the area, which China claims as its continental shelf and Japan claims as its exclusive economic zone (EEZ).

These arguments, confrontations, and tensions seem to indicate that despite the conclusion of a principled consensus, disagreements over the key issues of the East China Sea remain and continually re-emerge, upsetting Sino-Japanese relations from time to time. What are the main legal and political obstacles that hinder the progress of the resolution of the East China Sea dis-

① Joint Statement between the Government of Japan and the Government of the People's Republic of China on Comprehensive Promotion of a 'Mutually Beneficial Relationship Based on Common Strategic Interests', Ministry of Foreign Affairs of Japan website, at http://www.mofa.go.jp/region/asia—paci/china/joint0805.html.

putes? What is the outlook for a principled consensus? Is there any possibility of resolving the maritime delimitation dispute through judicial methods, as the Japanese side recently suggested? Through an examination of these questions, this essay will propose a range of conflict-avoiding measures and a road map to possible solutions.

Ⅲ. Historical Context: Conflicting Claims on the Sovereignty of the Diaoyu Islands

The East China Sea is an area of 480,000 square miles to the east of mainland China, north of Taiwan, west of Japan's Ryukyu Islands, and south of South Korea. Within the area, there exists both a sovereignty dispute over the Diaoyu Islands and maritime delimitation disputes over the continental shelves and the EEZs among China, Japan, and South Korea. Japan and South Korea reached an agreement on the joint development of the continental shelf in 1974, which China strongly contested:

> *The Chinese Government holds that, according to the principle that the continental shelf is the natural extension of the continent, it stands to reason that the question of how to divide the continental shelf in the East China Sea should be decided by China and the other countries concerned through consultations. But now the Japanese Government and the South Korean authorities have marked off a so-called … "joint development zone" … behind China's back. This is an infringement on China's sovereignty.* ①

Thus, in the northern part of the East China Sea, the three countries need to negotiate with each other to settle the dispute.

Regarding the sovereignty dispute over the Diaoyu Islands, although the stance of the Taiwanese authorities does not differ from that of the Chinese government, their position is certainly a relevant factor in the Sino-Japanese sovereignty dispute. China claims that the Diaoyu Islands belong to the Taiwan archipelago, and that the waters near the Diaoyu Islands have been a traditional fishing ground of Chinese fishermen for centuries, especially those from Tai-

① Hsinhua Weekly, 11 *February* 1974, *p*. 27.

wan.[①]

When addressing the context of the Sino-Japanese maritime dispute in the East China Sea, it is necessary to consider two trends: the historical background of the sovereignty dispute over the Diaoyu Islands and the progress of the Sino-Japanese negotiations on maritime delimitation issues.

The Diaoyu Islands are a group of eight uninhabited islands, the largest of which is Diaoyu Island, which covers roughly eight hectares and lies 170 kilometers (km) northeast of Taiwan and 410 km west of Okinawa. Although none of the islands has ever been inhabited, they are considered important for strategic and political reasons. Both Japan and China use claims of ownership over the islands to bolster their claims to the surrounding sea and its resources. Both claim historical sovereignty over them by citing theories of international law, especially theories on the acquisition of additional territory.

The sovereignty dispute over the Diaoyu Islands has constantly been a key factor in Sino-Japanese negotiations on maritime delimitation. For China, it is hardly acceptable that Japan uses these disputed islands as a basis for a full EEZ and continental shelf, while simultaneously refusing to discuss the Diaoyu Islands issue in talks on East China Sea issues. Beijing's attitude toward the territorial dispute on the Diaoyu Islands has been to "shelv[e] disputes and establish… joint development zones." It is obvious that for China, within the package of "shelved disputes," there are not only legal confrontations on the principle of delimitation of the continental shelf and EEZ, but also conflicting sovereignty claims over the Diaoyu Islands. Japan's reluctance to admit even the existence of the sovereignty dispute will surely cast a shadow over the Sino-Japanese negotiations on joint development in the East China Sea.

The Diaoyu Islands issue itself comprises two parts: a politically sensitive sovereignty dispute and a legal disagreement over the function of these islands in maritime delimitation in the East China Sea. Regarding the effect of the Diaoyu Islands on Sino-Japanese maritime delimitation, Japan tends to give them full effect. This attitude is inconsistent with Japan's claims over Okinotorishima, Takeshima (Dokdo in South Korea), and Minamitorishima.[②] In China, on

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① Spokesperson Liu Jianchao's Comment on Japan's Forcible Expulsion of Taiwanese Fishermen near the Diaoyu Islands, Consulate-General of the People's Republic of China in New York website, at http://www.nyconsulate.prchina.org/eng/fyrth/t199477.htm.

② What Is the Problem with the Claim of the South Korea on Dokuto as a Basis for EEZ and Continental Shelf: Interview on ITLOS Judge Park, Choon-Ho, *Chosun Online*, 6 May 2006, at http://www.chosunonline.com/article/20060506000006.

the other hand, the general academic opinion is that as a midway, uninhabited, and disputed territory, the Diaoyu Islands should not be a factor in delimitation.[①] This opinion, however, does not necessarily mean that China considers the Diaoyu Islands to be "rocks" per the guidelines of Article 121, paragraph (3) of the United Nations Convention on the Law of the Sea (UNCLOS). Rather, China's view is that setting the islands aside creates a rational and realistic arrangement for Sino-Japanese maritime delimitation.

The Diaoyu Islands are islands both according to international law, specified by Article 121, paragraph (1) of UNCLOS, and also according to China's domestic sea island protection law, which went into effect in March 2010.

A. *Japan's Claim*

The Japanese attitude on the Diaoyu Islands issue consists mainly of the following four points.[②]

First, Japan claims that the Diaoyu Islands were not transferred to Japan under the Treaty of Shimonoseki in 1895. Instead, they were discovered by Japan as *terra nullius* and incorporated into Okinawa in 1895, after the country had conducted several field investigations and confirmed no sign of governance by the Qing Dynasty in China.

Second, from 1895 to 1971, the Diaoyu Islands were always treated as part of Okinawa. During this 75—year period, China did not protest Japanese incorporation and governance until a report of the UN Economic Commission for Asia and the Far East suggested possible petroleum deposits under the East China Sea in 1968, and offshore oil exploration began in the 1970s.

Third, the Diaoyu Islands were not included in the areas to which Japan renounced all right, title, and claim in Article 2 of the 1951 San Francisco Peace Treaty.[③] Instead, according to Article 3 of the treaty, the Diaoyu Islands were part of Nansei Shoto and placed under the administrative authority of the Unit-

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① Ji Guoxing, The Diaoyu (Senkaku) Disputes and Prospects for Settlement, *Korean Journal of Defense Analysis*, vol. 6, no. 2 (Winter 1994), p. 306.

② The Basic View on the Sovereignty over the Senkaku Islands, Ministry of Foreign Affairs of Japan website, at http://www.mofa.go.jp/region/asia—paci/senkaku/senkaku.html.

③ Article 2 (b) states, "Japan renounces all right, title and claim to Formosa and the Pescadores."

ed States. [1]

Fourth, the 1971 Ryukyu (Okinawa) reversion agreement with the United States validated the status of the Diaoyu Islands as Japanese territory. [2]

B. *China's Claim*

First, China claims that it discovered the Diaoyu Islands in the fourteenth century, when the norms of international law had not yet emerged. China used the isolated islands as navigational aids for two centuries and incorporated them into the network of it maritime defense in 1556. According to this account, Japan could not have been the first to discover the islands because China had already discovered them more than five hundred years earlier. On this account, the Diaoyu Islands were then "stolen" by Japan in January 1895 through the secret administrative measure of incorporation to Okinawa, when Japan was emerging as the victor of the 1894—1895 Sino-Japanese War. What is more, the Japanese government was well aware of the fact that the Diaoyu Islands belonged to China in 1885, ten years prior to the surreptitious incorporation. [3]

Second, the Treaty of Maguan (known in Japanese as the Treaty of Shimonoseki) in 1895 forced China to cede Taiwan to Japan. For the next 50 years, the Diaoyu Islands, together with other subordinate islands of Taiwan, were under the colonial governance of Japan.

Third, Japan surrendered the Diaoyu Islands and returned them to China's

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[1] Article 3 states, "Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters."

[2] Toshio Okuhara, The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf, *Japanese Annual of International Law*, vol. 15, 1971, pp. 97-102; Thomas R. Ragland, A Harbinger: The Senkaku Islands, *San Diego Law Review*, vol. 10, May 1973, pp. 668-69; J. R. V. Prescott, Maritime Jurisdiction, in Joseph Morgan and Mark J. Valencia ed., *Atlas for Marine Policy in East Asian Seas*. Berkeley: University of California Press, 1992, pp. 31-32.

[3] Zhong Yan, China's Claim to Diaoyu Island Chain Indisputable, *Beijing Review* 39, no. 45, 4—10 November 1996, pp. 14-19.

control under the provisions of both the 1943 Cairo Communiqué[①] and the 1945 Potsdam Proclamation.[②] From 1945 to 1971, the United States exercised governance and administrative rights over the Diaoyu Islands. This fact conflicts with the Japanese claim that for the 75-year period from 1895 to 1971, the Diaoyu Islands were under Japan's uninterrupted, effective control.

Fourth, three documents—Article 3 of the San Francisco Peace Treaty; Civil Administration Proclamation No. 27, issued on December 25, 1953 by the American government;[③] and the 1971 Japan-U. S. Ryukyu Islands Reversion Agreement—have been cited by the Japanese side as evidence proving that the Diaoyu Islands are part of Okinawa. The aforementioned documents claim that the Diaoyu Islands were included in the geographical boundaries of the Ryukyu Islands, within which the United States exercised "all and any powers of administration, legislation and jurisdiction." However, during the U. S. Senate's ratification of the reversion agreement, the United States specified that the agreement did not affect the determination of sovereignty over disputed islands.[④] This attitude is clearly manifested in Article 1, which provides that "with respect to the Ryukyu Islands and the Daito Islands, the United States of America relinquishes in favor of Japan all rights and interests under Article 3 of the Treaty of Peace with Japan signed at the city of San Francisco" and "full responsibility and authority for the exercise of all powers of administration, legislation and jurisdiction over the territory and inhabitants" of the said

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① The communiqué states, "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China." For full text, *see* "Cairo Communiqué, December 1, 1943," National Diet Library, http://www.ndl.go.jp/constitution/e/shiryo/01/002_46shoshi.html.

② According to the proclamation, "(8) The terms of the Cairo declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."

③ U. S. Civil Administration of the Ryukyu Islands, Office of the Deputy Governor, Civil Administration Proclamation No. 27, Geographical Boundaries of the Ryukyu Islands, 25 December 1953, at http://www.niraikanai.wwma.net/pages/archive/caproc27.html.

④ Senate Committee on Foreign Relations, *Hearings on the Okinawa Reversion Treaty before the Senate Committee on Foreign Relations*, 92nd Congress, 1st sess., 1971, p. 11.

islands.[1]

Among the rights and interests relinquished to Japan, there were no rights of possession and disposition, which are essential elements of sovereignty. Moreover, even the United States received administrative rights only, not sovereignty, over the islands mentioned in Article 3 of the San Francisco Peace Treaty.

C. U. S. Administration of the Diaoyu Islands

U. S. administration of the Diaoyu Islands officially began in 1953 after the issuance of the U. S. Civil Administration of the Ryukyu Islands Proclamation No. 27, which defined the Diaoyu Islands as within the boundaries of the Ryukyu Islands.[2] In the proclamation, the United States declared that "the geographic boundaries of the U. S. Civil Administration and the Government of the Ryukyu Islands as heretofore set forth in the Proclamations," is "in conformity with the terms of the Japanese Treaty of Peace, signed 8 September 1951."[3] There was, however, no explicit mention of the Diaoyu Islands in Article 3 of the San Francisco Peace Treaty, which provided that:

> *Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.*[4]

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① Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands, "The World and Japan" Database Project, Database of Japanese Politics and International Relations, Institute of Oriental Culture, University of Tokyo, at http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19710617.T1E.html.

② Senate Committee on Foreign Relations, *Okinawa Reversion Treaty*, p. 149, 152.

③ Civil Administration of the Ryukyu Islands, Geographical Boundaries of the Ryukyu Islands.

④ Treaty of Peace with Japan, 8 September 1951, *United Nations Treaty Series* 1952, no. 1832, pp. 46-164.

At the time of the signing of the Okinawa reversion treaty, several U. S. State Department officials asserted that although Article 3 of the San Francisco Peace Treaty did not mention the Diaoyu Islands, "the United States and Japan understood the wording of Nansei Shoto south of 29 degrees north latitude to include the Senkaku Islands". ①

From the Chinese perspective, this assertion is not rational and reliable because China was not a party state to any of the three agreements. The decisive factor for China is not how the United States or Japan interpreted or understood the relevant provisions, but that the three documents did not have any binding effect on China, since the general rule of international law is that "a treaty does not create either obligations or rights for a third State without its consent." ②

Ⅳ. Cooperation of the Coastal States of the Semi-enclosed East China Sea

The East China Sea is surrounded by three coastal countries and connected to the Western Pacific Ocean by several straits within the so-called first island chain. Moreover, the water column of the East China Sea itself consists entirely of the territorial seas and EEZs of China, Japan, and South Korea.

According to Article 122 of UNCLOS, the East China Sea is a semi-enclosed sea, which is defined as "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." ③ Article 123 of UNCLOS provides for four specific areas of cooperation among states bordering enclosed or semi-enclosed seas:

> *1. to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;*

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① Larry A. Niksch, Senkaku (Diaoyu) Islands Dispute: The U. S. Legal Relationship and Obligations, CRS Report for Congress, Report 96—798, 30 September 1996.

② United Nations, Vienna Convention on the Law of Treaties, *Treaty Series* 1155, Art. 34.

③ Jim-Hyun Paik, Exploitation of Natural Resources: Potential for Conflicts in Northeast Asia, in Sam Bateman and Stephen Bates ed., *Calming the Waters: Initiatives for Asia Pacific Maritime Cooperation*. Canberra: Strategic and Defence Studies Centre, Research School of Pacific and Asian Studies, Australian National University, 1996.

2. to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

3. to coordinate their scientific research policies and undertake where appropriate joint programs of scientific research in the area;

4. to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article. [①]

With regard to cooperation in the management, conservation, exploration, and exploitation of the living resources of the East China Sea, there already exists the 1997 Sino-Japanese Fishery Agreement. In order to implement the partnership described in Article 123, however, China and Japan need to combine this agreement with enhanced cooperation on the protection and preservation of the marine environment and scientific research. To this end, the two countries have already made an effort to build a "conflict avoidance regime on scientific research." [②]On February 13, 2001, China and Japan exchanged a *note verbale* proposing the establishment of a mutual prior notification system on scientific research in the East China Sea, [③] but the system did not work successfully for at least two reasons. First, China has been cautious from the very beginning about Japan's suggestion for establishing such a system, due to the lack of an agreed-upon boundary in the East China Sea. [④] The 2001 note verbale on mutual prior notification on scientific research is not a treaty. Chinese Foreign Ministry spokesperson Jiang Yu's remarks on February 8, 2007, show that China is not considering prior notification on scientific research within its own EEZ and continental shelf as an obligation, but only as an optional measure taken by each side, aiming at strengthening the mutual confidence and bilateral relations, and it should not affect the attitudes of both sides on the issues concerning the law of the sea. Scientific research in the surrounding waters of the Diaoyu Islands is an exercise of Chinese sovereign right, which has nothing to do

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① UN Convention on the Law of the Sea, Part IX, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

② Mark J. Valencia and Yoshihisa Amae, Regime Building in the East China Sea, *Ocean Development & International Law*, vol. 34, no. 2, 2003, p. 198.

③ Japan, China Agreement on Maritime Notice System Detailed, BBC Monitoring Asia Pacific, 13 February 2001.

④ *Supra note*, p. 198.

with the "mutual prior notification system."[①]

Second, there is no clear proposition on the scope of application of the prior notification system. The note verbale simply states that each side must inform the other at least two months before its research ships plan to enter waters near the other country if it is an area in which that country "takes interest."[②]

However, China and Japan must be very cautious about inviting, in the words of UNCLOS, "other interested states or international organizations to cooperate with them in furtherance of the provisions of this article," since the maritime issues and disputes in the East China Sea are almost totally bilateral. South Korea is also pertinent to the delimitation of the continental shelf and fisheries activities, but the Korean claims cover a very limited area. The obligation to cooperate provided in Article 123 of UNCLOS is, after all, an obligation to "endeavor," which encourages mainly regional and bilateral cooperation of the coastal states of an enclosed or semi-enclosed sea.

Ⅴ. Overlapping Claims in the East China Sea and the 1982 UNCLOS

A. *Japan's Claim on Maritime Boundaries: From Median Line to Two Hundred Nautical Miles*

Japan ratified UNCLOS on June 20, 1996. In its domestic laws, Japan claims on maritime boundaries as follows: a system of straight baselines; a twelve nautical mile territorial sea extending from the strait baselines; three nautical miles of territorial sea in the Soya, Tsugaru, Osumi, Tsushima, and Korea straits; and a two-hundred nautical mile EEZ from the straight baselines, with the Diaoyu Islands as the basis for a full EEZ and continental shelf.[③]

Beginning in the 1970s, the well-known Japanese attitude on the maritime boundary in the East China Sea was "the median line principle." The Japanese

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① Sino-Japanese Prior Notification System on Scientific Research Aiming at Strengthening Mutual Confidence and Bilateral Relations, *Xinhua News*, 8 February 2007, at http://news.xinhuanet.com/world/2007—02/08/content_5715679.htm.

② Mark J. Valencia, The East China Sea Dispute: Context, Claims Issues and Possible Solutions, *Asian Perspective*, vol. 31, no. 1, 2007, pp. 127-128.

③ Mark J. Valencia, The East China Sea Dispute: Context, Claims Issues and Possible Solutions, *Asian Perspective*, vol. 31, no. 1, 2007, p. 142.

government had insisted that Japan's unilaterally drawn median line should be the delimitation boundary both for the EEZs and for the continental shelves of China and Japan in the East China Sea. The western side of the median line has been recognized internationally as an undisputed area. China rejects the median line as legally binding since no Sino-Japanese agreement exists on the boundary of the EEZ, and according to Article 74 of the UNCLOS, "the delimitation of the exclusive economic zone between States…shall be effected by agreement on the basis of international law." However, in order to avoid creating tensions, since the 1970s China has limited its exploration and exploitation of natural gas and oil to the non-disputed areas.[①] In June 2004, however, Japan raised its first objections to Chinese activities at the Chunxiao gas and oil field, the undisputed area where China had been conducting exploration of resources for about 30 years, on the grounds that China may siphon off resources that may lie on its side of the line. Furthermore, Japan began to claim that Chunxiao—together with other Chinese gas and oil fields—are also located in the disputed waters.[②]

B. *China's Claim: An Inflexible Natural Prolongation Attitude?*

China ratified UNCLOS on June 7, 1996. On June 26, 1998, China adopted the Exclusive Economic Zone and Continental Shelf Act, declaring a two-hundred nautical mile EEZ. As far as the breadth of the continental shelf, Article 2 of the EEZ and Continental Shelf Law provides that:

> *The Continental shelf of the People's Republic of China comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to the distance of 200 nautical miles from the baselines from which the breath of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.*

Where is the "outer edge of the continental margin" in the East China Sea according to Chinese claims? China's official stance on this point became clear

① Mark J. Valencia and Yoshihisa Amae, Regime Building in the East China Sea, *Ocean Development & International Law*, vol. 34, no. 2, 2003, p. 191.

② Kosuke Takahashi, Gas and Oil Rivalry in the East China Sea, *Asia Times*, 27 July 2004.

on May 11, 2009, when it submitted the preliminary survey findings on the outer limits of its continental shelf to the UN Commission on the Limits of the Continental Shelf (CLCS). In its submission, China claims an extended continental shelf beyond two hundred nautical miles to the western slope of the Okinawa Trough. ① However, China's claim on the breadth of the continental shelf is flexible. Consistent with Article 2 of the 1998 EEZ and Continental Shelf Law, China reiterated in the submission its intent to, "through peaceful negotiation, delimit the continental shelf with States with opposite or adjacent coasts by agreement on the basis of the international law and the equitable principle."

In the 1992 Law on the Territorial Sea and the Contiguous Zone, China made the following claims: straight baselines connecting base-points on the mainland coast and the outermost coastal islands; a territorial sea extending twelve nautical miles from these baselines and from offshore islands, including specifically the Diaoyu Islands; a contiguous zone extending twelve nautical miles from the outer limit of the territorial sea; and sovereignty over the Diaoyu Islands. ②

China has never accepted the Japanese median line as even a preliminary line for the negotiation on the delimitation of the continental shelf and EEZ, because Japan drew the median line unilaterally, with the Diaoyu Islands as baseline points. China opposes the Japanese median line not only because China does not believe that the method of equidistance has developed into a rule of customary international law in maritime delimitation, but also because the median line itself was drawn without consultation with China.

Ⅳ. Current Positive Developments in the East China Sea

Despite the sovereignty dispute and the legal confrontations on the princi-

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① Foreign Ministry Spokesperson Ma Zhaoxu's Remarks on China's Submission of Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles, Ministry of Foreign Affairs of the People's Republic of China website, at http://www.fmprc.gov.cn/eng/xwfw/s2510/t562208.htm; UN Division for Ocean Affairs and the Law of the Sea, Preliminary Information on the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China, 11 May 2009, at http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf.

② Mark J. Valencia, The East China Sea Dispute: Context, Claims Issues and Possible Solutions, *Asian Perspective*, vol. 31, no. 1, 2007, p. 139.

ple of delimitation, there are still several positive developments in Sino-Japanese maritime issues. The political and diplomatic efforts of both sides point to a bilateral to settle the maritime delimitation dispute peacefully and on the basis of international law. According to Articles 74 and 84 of UNCLOS:

> *The delimitation of the exclusive economic zone and the continental shelf shall be effected by agreement on the basis of international law, in order to achieve an equitable solution. Pending agreement, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.*

The Sino-Japanese Fishery Agreement, which went into effect in 2000, is the first specific and legally binding provisional arrangement on the living resources in the two countries' EEZs.[①] The two nations took another positive step on June 18, 2008. After more than three years of arduous consultations, China and Japan reached a consensus on the East China Sea issue. Since the nature of the principled consensus currently relies on the political willingness of the two countries, practical arrangements on joint development will hinge on the conclusion of a bilateral treaty with legally binding effect. The participation of Japanese legal authorities in the development of the Chunxiao oil and gas field in accordance with relevant Chinese laws will depend on an agreement and subsequent exchange of notes as well as the fulfillment by both sides of their respective domestic procedures. Different interpretations of the principled consensus and other passive factors, however, have posed challenges to the process of consultation.

A. *The New Sino-Japanese Fishery Agreement*

Cooperation on fisheries relations between China and Japan began in 1955, before the two countries had established formal diplomatic relations. In 1955, 1963, and 1965, China and Japan concluded three fisheries agreements, which

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① David Rosenberg, China, Neighbors Progress in Fishery Agreements, *Asia Times*, 19 August 2005, at http://www.atimes.com/atimes/China/GH19Ad02.html.

were all nongovernmental in nature. [1] In 1975, after the normalization of diplomatic relations in 1972, China and Japan concluded a governmental fisheries treaty, which went into effect on August 15, 1975, and guided fisheries relations in the East China Sea and Yellow Sea between the two countries until June 1, 2000, when the new China-Japan Fishery Agreement came into effect.

The scope of application of the new fisheries agreement includes the EEZs of China and Japan in the East China Sea. Up to 52 miles from their respective baselines in the area between 27° north latitude and 30. 4° north latitude, the principle of coastal state jurisdiction is applied, because this area is the undisputed area. According to Article 62 of UNCLOS:

> *The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.*

Article 123 of UNCLOS also provides the obligation to "endeavor" to coordinate the management, conservation, exploration, and exploitation of the living resources of the sea among the coastal states of a semi-enclosed sea. The agreement stipulates that every year Japan and China must determine the catch quotas, fishing areas, and other terms of fishing for the nationals and fishing vessels of the other signatory states allowed to fish in its EEZ. In their determinations, the countries must take into account the condition of the living resources, their own capacities to harvest the living resources, traditional fishing operations, and other related matters. In doing so, however, each state must observe the recommendations of the China-Japan Joint Fisheries Commission. [2] The agreement also provides that each party may take necessary measures in its own EEZ in accordance with international law to ensure that the nationals and fishing vessels of the other state observe the countries' joint conser-

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[1] Park Hee Kwon ed., *The Law of the Sea and Northeast Asia: A Challenge for Cooperation*, The Hague: Kluwer Law International, 2000, p. 51.

[2] Sino-Japanese Fishery Agreement, art. 2-3.

vation measures.[①]

While the boundary between the EEZs has not been delimited, three fisheries zones were set up under the agreement. Within the three zones, special regimes and jurisdictions are applied. The first area, called the central zone, is located in the area north of 30.4° north latitude and between 124.45° and 127.3° east longitude, within which fishing ships from both countries may conduct fishing activities without obtaining licenses from the other side. Flag state jurisdiction is applied in this zone.

The second zone is called the provisional measures zone, and is located between 27° and 34.4° north latitude, 52 nautical miles beyond the respective basic territorial sea lines of the two countries. In this zone, the principle of flag state jurisdiction is applied to the management of living resources, but to a limited extent, the two parties exercise joint control or enforcement measures by taking appropriate conservation and quantitative management measures, pursuant to the decision made by the China-Japan Joint Fisheries Committee. In the provisional measures zone, if a violation of the operational rules and regulations by the nationals and fishing vessels of the other party is found, the contracting party may call the attention of such nationals and vessels to the fact of the violation and notify the other party of the violation. The latter party shall take necessary measures and notify the former of the result.[②]

The third zone is the area south of 27° north latitude and west of 125.3° east longitude. Due to the presence of the Diaoyu Islands and Taiwan in this region, the agreement is not applied here, and the existing fisheries regime is maintained.

The 2000 Sino-Japanese Fishery Agreement is a provisional arrangement on the usage and protection of the living resources of the EEZs of the two countries in the East China Sea. Provisions concerning the right of jurisdiction focused solely on fishery matters and on fishing ships flying Japanese and Chinese flags. The agreement did not address which side should exercise jurisdictions on illegal activities operated by other countries, the protection and preservation of the marine environment, and other issues in the fishery zones, such as the exploration and exploitation of nonliving resources, marine scientific research, or the establishment and use of artificial islands, installations, and structures. Thus, in the aforementioned fishery zones, potential conflict over

① Sino-Japanese Fishery Agreement, art. 5.
② Sino-Japanese Fishery Agreement, art. 7, para. 2-3.

jurisdiction remains, and may occasionally trigger tensions and confrontations.

B. 2008 Sino-Japanese "Principled Consensus"

On June 18, 2008, Chinese President Hu Jintao and Japanese Prime Minister Yasuo Fukuda reached a principled consensus on turning the East China Sea into "a sea of peace, friendship, and cooperation."[①] China and Japan agreed that "the two sides will conduct cooperation in the transitional period prior to delimitation without prejudicing their respective legal positions." The announcement included the following three points: cooperation between China and Japan in the East China Sea, understanding between China and Japan on joint development of the East China Sea, and understanding on the participation of Japanese legal person in the development of Chunxiao oil and gas field in accordance with Chinese laws.

The process of joint development involves multiple steps. First, under the principle of mutual benefit, the two sides must consult with each other in order to decide specific matters concerning joint development. Then, according to the conditions provided in the agreement, the two sides will carry out joint exploration in the areas within the block for joint development. Next, the two countries must select specific areas for joint development within the block. Thus, the precondition of joint development is the conclusion of a bilateral agreement.

With regard to the Chunxiao oil and gas field, the consensus provided that:

> *Chinese enterprises welcome the participation of Japanese legal person in the development of the existing oil and gas field in Chunxiao in accordance with the relevant laws of China governing cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources.* [②]

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① China, Japan Reach Principled Consensus on East China Sea Issue, *Xinhua News*, 19 June 2008, at http://www.china.org.cn/international/weekly_review/2008－06/19/content_15863263.htm.

② China, Japan reach principled consensus on East China Sea issue, *Xinhua News*, 18 June 2008, at http://news.xinhuanet.com/english/2008－06/18/content_8394206.htm

Accordingly, if any Japanese legal figure is interested in participating in the development of the Chunxiao oil and gas field, they must consult with the Chinese enterprise.

Thus, it seems that the first step concerning joint development in the East China Sea should be business talks between the two parties. On the other hand, both governments must also confirm these talks and their results, and for that purpose, the two governments must work to reach an agreement on an exchange of notes in the near future. Also, the two sides will "fulfill their respective domestic procedures", as required in the principled consensus[①]. Anyway, there is still some ambiguity on the meaning of the "domestic procedures" concerning the Chunxiao oil and gas field. Some may argue that business talks themselves should satisfy the requirement of "domestic procedures," and that the two governments need to start the consultation first.

Ⅶ. Current Problematic Developments

A. *Competing Jurisdictional Claims in the East China Sea*

In disputed waters with overlapping claims on the continental shelf and the EEZ, joint development of resources could be useful in placing in abeyance the tension caused by competing assertions. Nevertheless, the joint development in disputed waters is, after all, only a provisional arrangement during the transitional period prior to the final delimitation. Agreements mainly designed to arrange the usage and allocation of the resources in question tend to leave other sovereign rights and jurisdictions belonging to the coastal states in an ambiguous and uncertain situation. Thus, the potential for conflicts between the competing states still exists whenever either side exercises its sovereign rights or jurisdictions.

For example, in the 2000 Sino-Japanese Fishery Agreement, there is no mention on the following sovereign rights and jurisdictions: the sovereign right of coastal states over the production of energy from the water, currents, and winds; jurisdictions on the establishment and use of artificial islands, installations, and structures; marine scientific research; and the protection and preser-

① (c) To carry out the above-mentioned joint development, the two sides will work to fulfill their respective domestic procedures and arrive at the necessary bilateral agreement at an early date. Ibid.

vation of the marine environment.

The situation will be the same with the joint development zone originally set up in the 2008 principled consensus if a future bilateral agreement does not contain specific provisions on jurisdictional issues.

Another example is the case of competing jurisdictions arising from the sovereignty dispute over the Diaoyu Islands. ① On December 8, 2008, two patrol vessels belonging to the China Marine Surveillance patrolled in the territorial waters of the Diaoyu Islands for about nine hours. The Japanese government communicated its protest, but the Chinese government dismissed the complaint, saying that the ships were "justified in conducting usual patrol in waters within China's jurisdiction." A Foreign Ministry spokesperson added that "the Diaoyu Islands and its adjacent islets have been China's inalienable territory since ancient times. The activities of China's Marine Surveillance ships are completely legitimate and undisputable."② This incident marked the first time that China had sent patrol vessels in the territorial waters of the disputed islands, but the Japanese government prefers to downplay the effect and significance of this action by emphasizing that the two patrol vessels were survey ships.

In future Sino-Japanese consultations on joint development issues, the Diaoyu Islands will continue to be a key element, since these islands and islets are relevant to the selection of the joint development zones and the final delimitation agreement. According to the Japanese newspaper *Sankei Shimbun*, during the fourth Sino-Japanese meeting on East China Sea issues held in Beijing on March 6—7, 2006, China proposed the inclusion of the Diaoyu Islands in the joint development zones. Japan, however, rejected the proposal. Since the principled consensus provides that "the two sides have agreed to continue consultations for the early realization of joint development in other parts of the East China Sea,"③ it is quite possible that China will present the proposal again in future talks.

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① Japan Protests Chinese Survey Ships, *Asian Surveying and Mapping*, 18 December 2008, at http://www.asmmag.com/20081218308/japan—protests—chinese—survey—ships.html.

② Foreign Ministry Spokesperson Liu Jianchao's Regular Press Conference on 9 December 2008, Permanent Mission of the People's Republic of China to the UN website, at http://www.china—un.org/eng/fyrth/t525645.htm.

③ China, Japan reach principled consensus on East China Sea issue, *Xinhua News*, 18 June 2008, at http://news.xinhuanet.com/english/2008—06/18/content_8394206.htm

B. Conflicting Assertions to Outer Continental Shelf Rights

On May 11,2009,China submitted "initial information on the outer limits of the continental shelf beyond 200 nautical miles of some sea areas of the East China Sea" to the UN secretary general. China based its report on the principle of natural prolongation,which has been the legal basis for the country to assert its continental shelf claim in the East China Sea under Article 76 of the 1982 UNCLOS. However,China has always stressed that it "will delimitate maritime boundary under the principle of fairness through peaceful negotiations with neighboring countries connected on the sea," which indicates that the claim of the continental shelf to the margin of Okinawa Trough is not ultimate and decisive. [①] China is ready to talk with Japan and to adjust the claim. The submission reaffirmed China's legal position on the delimitation of the continental shelf. The UNCLOS will not discuss China's submission because the submission itself is only at a preliminary stage,and also because there exist delimitation and territorial disputes between China and Japan in the East China Sea.

China's assertion on the continental shelf conflicts with Japan's claim on the continental shelf and the EEZ,which is based on the principle of equidistance. Nevertheless,it seems that Japan has modified its legal position on the basis for its continental shelf and EEZ in recent years by stressing that,according to Article 76 of the 1982 UNCLOS,Japan has a potential right to assert two hundred nautical miles of continental shelf and EEZ in the East China Sea. Accordingly,the Chunxiao,Tianwaitian,and Duanqiao oil and gas fields,which are located on the Chinese side of the median line drawn by Japan,have become "disputed waters." Based on this new legal position,some Japanese scholars have claimed that the whole East China Sea can be considered "disputed waters."[②] The new basis of the Japanese claim shatters the implicit consensus that the disputed sea areas lie between the median line claimed by Japan and the Okinawa Trough claimed by China. Where are the disputed sea areas between China and Japan in the East China Sea? This will be the first problem

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① China to Delimitate Maritime Boundary through Peaceful Negotiations: Foreign Ministry Spokesman, *Xinhua News*, 12 May 2009, at http://www.gov.cn/misc/2009-05/12/content_1311390.htm.

② Shinya Murase, The Legal Issues of the Delimitation of the Continental Shelf between Japan and China, *Kokusai Mondai*, no. 365, p. 2.

that negotiators have to resolve in the near future.

C. *Protests over Japan's Claim on the Islet of Okinotorishima as a Basis for Extensive Maritime Claims*

On September 15, 2009, China confirmed its hard opposition to Japan's application to the UN CLCS in November 2008, which asked for recognition of Japan's continental shelf based on *Okinotorishima*, which China terms "Okinotori rocks." A subpanel of the UN commission began to examine the submission by Japan that caused China to lodge its opposition. China's Foreign Ministry spokesperson Jiang Yu stated at a news briefing that "China's position on the issue is consistent, and we hope the UN Commission on the Limits of the Continental Shelf will handle the problem properly."

On the Okinotorishima issue, the Sino-Japanese dispute centers on the legal status of the small atolls and the interpretation of Article 121 of the 1982 UNCLOS. According to Article 121, paragraph 3, of UNCLOS, "rocks which cannot sustain human habitation or economic life of their own should have no exclusive economic zone or continental shelf."[1] The Okinotorishima issue is a legal dispute concerning the interpretation of Article 121 of the UNCLOS. The dispute is by no means only between Japan and China; rather, it includes the claims of all coastal states on Okinotorishima's continental shelf beyond two hundred nautical miles and the interests and rights of the other party states of the 1982 UNCLOS under legal regimes of the high seas and the area. The Okinotorishima issue is not directly connected with the joint development and cooperation in the East China Sea, but China's maritime interests, including the freedom of the high seas provided in Article 87 of the UNCLOS and the activities in the area, will be hindered if Japan has its way. In that sense, the Okinotorishima matter is another passive factor affecting the consultation process of joint development in the East China Sea.

In addition to the recent problematic developments, the existence of the sovereignty dispute over the Diaoyu Islands, and the lack of consensus on the function of the Diaoyu Islands in maritime delimitation, other legal and political obstacles may impede cooperation on joint development of energy resources in the East China Sea.

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① UNCLOS, Art. 121, para. 3.

The lack of a Sino-Japanese consensus on the legal status of the Chunxiao oil and gas field is causing new tension. On January 17, 2010, Japanese Foreign Minister Katsuya Okada told his Chinese counterpart, Chinese Foreign Minister Yang Jiechi, that Japan will "take certain action" if Beijing violates a 2008 agreement over disputed gas exploration projects. Minister Yang expressed strong opposition after Okada suggested that Japan may start development on its own in the area.[①] What the Japanese side mentioned as "the disputed gas exploration project" is clearly the Chunxiao and Tianwaitian gas and oil fields. According to the principled consensus, a Japanese legal person must participate in the development of the Chunxiao oil and gas field under Chinese law. The opposing attitudes on the legal status of the Chunxiao oil field result from the lack of a consensus on the disputed areas in the East China Sea. Japan formerly claimed that the Japanese-drawn median line should be the line of delimitation. However, as mentioned above, Japan changed its attitude on the rule of maritime delimitation from the well-known median line to two hundred nautical miles. However, an incident at the end of 2001 showed that at least at that time, Japan did not consider the area on the west side of the median line to be disputed waters. Japan reported the incident as follows:

> *On 21 December 2001, Tokyo scrambled 20 patrol vessels and 14 planes in pursuit of a suspected North Korean Spy Boat that was cruising within Japan's Exclusive Economic Zone (EEZ). The ship, which did not appear to be carrying any fishing gear, ignored repeated orders to stop. According to Japanese Coast Guard (JCG) officials, its patrol boats fired 13 warning shots from 20mm machine guns. On the evening of 22 December, the ship's stern caught fire, reportedly from a round fired by one of the coast guard patrol boats and came to halt 90 minutes later after it was surrounded by four Japanese vessels. While held at bay, the suspect crew used submachine guns to fire back at the patrol boats and injured two coast guard sailors. The boat sank abruptly at 22:13 local time within China's EEZ in approximately 90 meters (297 feet) of water.*[②]

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① Okada Warns China on Gas-Drilling Pact, *Japan Times*, 18 January 2010, at http://www.japantimes.co.jp/cgi—bin/nn20100118a2.html.

② Japan Maritime Self Defence Force, GlobalSecurity.org, at http://www.globalsecurity.org/military/world/japan/jmsdf.htm.

The location where the suspicious boat sank was on the western side of the median line. In order to salvage the sank boat, Japanese government negotiated with the Chinese government for several months and paid more than 100 million yen to satisfy the Chinese side, because China announced that the area where Japan was operating the salvage was within China's EEZ. China claimed that Japan's activity in that region had prevented China from exercising its sovereign right over living resources and jurisdiction over marine environmental protection. The settlement of that incident indicated that Japan did not consider the sea area on the western side of the median line as its EEZ, nor as its continental shelf. The overlapping Sino-Japanese continental shelf should be the seabed between the median line claimed by Japan and the Okinawa Trough claimed by China.

Ⅷ. Recommendations

Sino-Japanese cooperation on maritime energy resources is facing a dilemma. Nonetheless, although challenges remain, previous efforts to build a cooperative framework and positive signs following Chinese Premier Wen Jiabao's visit to Japan in May 2010 indicate that opportunities exist to resolve East China Sea issues, especially the delimitation of maritime boundaries. During Premier Wen's talks with his Japanese counterpart, Prime Minister Yukio Hatoyama, the leaders agreed to re-establish a hot line between the two premiers, launch negotiations on implementing the principled consensus on the East China Sea, expedite the establishment of a maritime communication mechanism between the countries' defense departments, and sign an agreement on maritime rescue. ①

The conclusion of the 2008 Sino-Japanese principled consensus is a major step toward future cooperation on maritime energy resources, but it is only the initial stage in a larger process. Both joint development as a whole and the cooperative development of the Chunxiao oil and gas field require further negotiation. In other words, the 2008 agreement only made an outline for future negotiation. In order to advance the process of cooperation, necessary conditions and mutual compromise are required.

① Highlights of Chinese Premier's Tour in Japan, *China Daily*, 1 June 2010, at http://www.chinadaily.com.cn/china/2010wentour/2010-06/01/content_9917026.htm.

First, the two countries must continue to exchange views, either officially or unofficially, in order to enhance mutual understanding and lessen distrust. There is no legal obligation under the agreement that China or Japan must promise to hold successful negotiations, but according to Article 283, section 2, of UNCLOS, the exchange of views is an obligation of party states:

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

Therefore, no matter how many differences and confrontations exist in their respective legal positions, China and Japan, as party states of UNCLOS, have the obligation to keep exchanging views on their maritime disputes.

Second, China and Japan must reach an arrangement on the disputed territory of the Diaoyu Islands. International lawyers have suggested that the countries need to establish an agreement to remove use of the Diaoyu Islands as a basis for their EEZ or continental shelf claims. In this way, the sovereignty dispute can be separated from the maritime delimitation issue. ①

Third, if both countries can promote the principled consensus smoothly, then the establishment of joint development zones near the Diaoyu Islands could accelerate the process of cooperation. China proposed these zones during the fourth round of the Sino-Japanese talks on East China Sea issues, but the Japanese side rejected the proposal. ② According to the 2008 consensus, "[t]he two sides have agreed to continue consultations for the early realization of joint development in other parts of the East China Sea." The 2008 agreement does not directly mention the Diaoyu Islands issue, but its absence does not mean that the matter is irrelevant to the Sino-Japanese maritime dispute in the East China Sea. On the contrary, the Diaoyu Islands issue is the most essential feature of the dispute. Either through the model of joint development or a legal

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① Mark J. Valencia, The East China Sea Dispute: Context, Claims Issues and Possible Solutions, *Asian Perspective*, vol. 31, no. 1, 2007, p. 158; Guoxing Ji, *Zhongguo de hai yang an quan he hai yu guan xia* [China's Marine Security and Maritime Jurisdiction], Shanghai: Shanghai ren min chu ban she, 2009, p. 295.

② Kung-wing Au, The East China Sea Issue: Japan-China Talks for Oil and Gas, *East Asia*, vol. 25, no. 3, September 2008, pp. 223-41.

solution, China and Japan need to make arrangements to resolve the sovereignty dispute, which constitutes the basis and even the pre-condition for the smooth settlement of the delimitation issue in the East China Sea.

Fourth, the two countries should consider the possibility of resolving the maritime delimitation dispute through an international judicial settlement. On February 22, 2010, Japanese Chief Cabinet Secretary Hirofumi Hirano said that Japan may take its dispute with China over the development of a natural gas field in the East China Sea to an international maritime tribunal: "Naturally, we may consider taking appropriate action if the agreement isn't observed… We'll negotiate with China as to what specific things might be done."[①] In any case, Japan cannot take China to any tribunal or arbitration unless China agrees to do the same, since China has a written declaration under Article 298 (optional exceptions to applicability of section 2) that "the Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."[②] Accordingly, Japan cannot take China to any international court or tribunal—namely, the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), or an arbitral tribunal—or submit the East China Sea disputes unilaterally, unless China withdraws the above declaration, or the two countries reach an agreement on the submission.[③] This is primarily because Article 299 of UNCLOS requires that a dispute "excepted by a declaration made under Article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute."

China has not responded directly to the Japanese proposal. Is Japan suggesting that it is willing to resolve all East China Sea issues, including the sovereignty dispute over the Diaoyu Islands, through international judicial settle-

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① Takashi Hirokawa and Sachiko Sakamaki, Japan May Take China to Tribunal over East China Sea Gas Field, Bloomberg, 21 February 2010, at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aojEN5zUTRGU.

② International Tribunal for the Law of the Sea (ITLOS), Declaration of States Parties Relating to Settlement of Disputes in Accordance with Article 298 (Optional Exceptions to the Applicability of Part XV, Section 2, of the Convention, at http://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf.

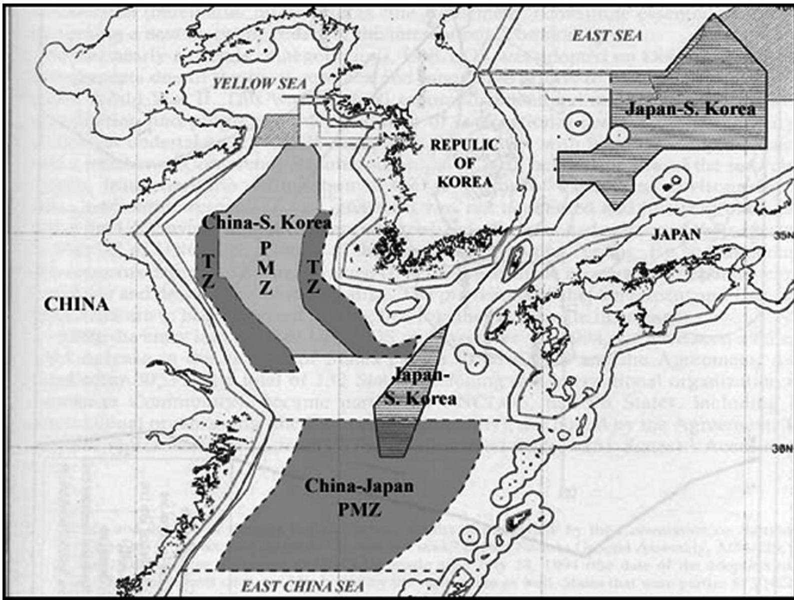
③ UNCLOS Art. 298 (2) provides that "A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention."

ment? Or does Japan only intend to separate the maritime delimitation issue from the sovereignty dispute? In either case, the suggestion of taking the entire to an international court may lead to an exit from the dilemma, but only if the two countries can reach a mutually acceptable arrangement over the Diaoyu Islands.

Historically, China has avoided resolving disputes through the international court system. This attitude was understandable in the past years, when China was isolated from the rest of the world. But the situation is different now in light of China's increased global engagement and the presence of Chinese judges in the ICJ, the ITLOS, and the International Permanent Court of Arbitration (IPCA). Moreover, the East China Sea delimitation issue differs from disputes in the South China Sea, where overlapping claims on sovereignty disputes and maritime delimitations among six parties are far too complicated to be settled legally through international courts.

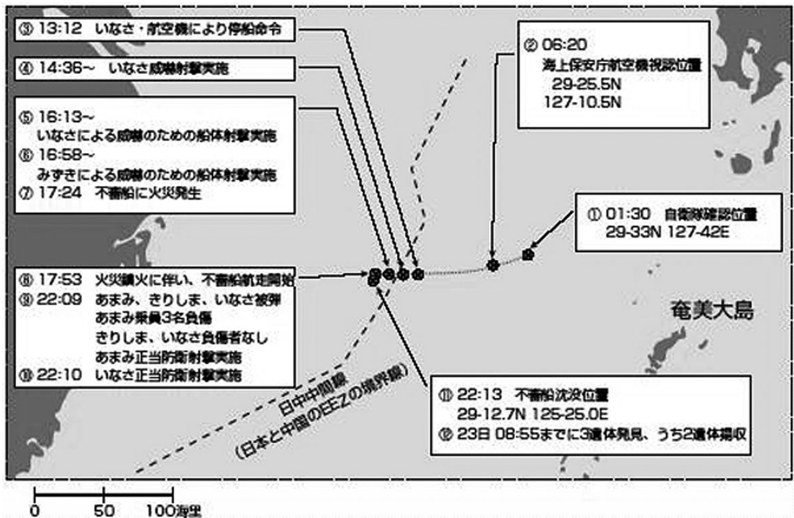
If China and Japan are unable to reach a consensus on the scope of the disputed waters or the difference between joint development and cooperative development, then there seems no reason to adhere to the joint development model. A clearly delimited maritime boundary in the East China Sea will be more favorable for Sino-Japanese cooperation in scientific research, environmental protection, and in other fields. The problem of potential jurisdictional conflict over issues such as illegal fishing and other unlawful activities operated by ships of a third state can be dissolved naturally. Clearly, China and Japan need a new approach to resolve their legal disputes.

TABLE 1



Source: Xue, Gui Fang, China's Response to International Fisheries Law and Policy: National Action and Regional Cooperation, University of Wollongong, Centre for Maritime Policy, October, 2004.

TABLE 2



Source: 2003 Report of Japan Coast Guard.

http://www.kaiho.mlit.go.jp/info/books/report2003/special01/01_01.html

(Editor: JIANG Jiadong;
English Editor: Joshua Owens)

中日东海海洋争端的进展和现状

龚迎春*

内容摘要：中日东海海洋争端包括钓鱼岛及其附属岛屿的主权争议和东海专属经济区和大陆架划界的法律原则争议两个部分。钓鱼岛主权争议的存在是中日东海问题谈判中无法回避的关键问题。日本在海域划界问题上法律立场从中间线改变为200海里距离以及否定钓鱼岛主权争议的存在，是阻碍中日东海能源合作的主要障碍。中日东海海域划界争端解决的途径包括继续进行有诚意的双边谈判，共同开发以及司法解决。但是，司法解决只能基于双方的自愿，并且双方首先需就钓鱼岛主权争议的存在及其在划界中的地位达成一个双方都能接受的安排。

关键词：东海　钓鱼岛　主权争议　海域划界争议　合作　争议海域　争端解决

一、概　要

本文主要考察中日东海海洋争端的历史背景、现状和未来进展前景。

（一）主要争议

中日东海海洋争端主要有两个方面：钓鱼岛及其附属岛屿（日本称之为尖阁列岛）的领土主权争议，以及海域划界问题。钓鱼岛主权争议一直以来就是中日双方在东海问题谈判中的一个关键因素。如果中日双方能够达成一项协议，不以钓鱼岛主张专属经济区或大陆架权利，把主权争议与海域划界问题区分开来，那么海域划界问题的处理可能会更加顺利，因为双方大多数的冲突和相互不信任主要来自于主权争议。双方争端的解决途径包括采取共同开发、进一步谈判或者司法解决的形式。对于未来中日双方在东海能源开发合作方面而言，2008年双方达成的《原则共识》无疑是一个重大的进步，但是其推动仍然需要具备其

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他政治条件和相互妥协。如果中日双方甚至在争议海域的范围上都不能达成一致意见，那么就应考虑司法解决途径也可以为争端的最终解决提供另一个选择。

（二）政策意义

1.如果日本坚持中日之间不存在钓鱼岛主权争议这样的不现实的立场，中日东海争议将持续存在，双方围绕钓鱼岛主权的对抗很有可能继续升级。

2.如果中日双方能够达成协议，不将钓鱼岛作为主张专属经济区或大陆架权利的基础，那么主权争议将与海域划界问题区别开来。

3.如果 2008 年《原则共识》能够得到顺利推进，那么钓鱼岛附近共同开发区的建立将会加速双方合作的进程。

4.中日两国应该对争端解决途径采取灵活的态度。通过进一步富有诚意的谈判或通过司法解决划定双方明确的海域边界，将更有利于中日双方在东海上进行科学研究、环境保护等方面的合作。

二、引　言

2008 年 5 月 8 日，中国国家主席胡锦涛和日本首相福田康夫共同签署了关于全面推进两国战略互惠关系的联合声明。在该联合声明中，两国都认为中日关系是两国最重要的双边关系之一。关于东海问题，两国“保证将共同努力，使东海成为和平、友好、合作之海。”①

为了实现上述联合声明中提出的目标，2008 年 6 月 18 日，两国领导人共同签署了《关于中日东海问题的原则共识》（以下简称《原则共识》），为和平解决中日双方在东海长期存在的领土主张和海域划界问题指明了良好的发展前景。但是《原则共识》本身并不是一份具有操作性的协议，共同开发和合作开发的实现还需要两国政府签署达成一份具体的条约。

但是在 2008 年 6 月达成《原则共识》之后，两国进一步签署条约的谈判进程却止步不前，日本政府指责中方违反《原则共识》，在中间线中方一侧单方面开采春晓油气田。同时，中方回应声明春晓油气田位于中国大陆架的自然延伸之上，中方对其资源享有固有的主权权利。近期在该区域还发生了其他一些事件，有观察家认为东海局势变得日趋紧张。2010 年 5 月初，在中日双方争议海域，一

① Joint Statement between the Government of Japan and the Government of the People's Republic of China on Comprehensive Promotion of a “Mutually Beneficial Relationship Based on Common Strategic Interests”, Ministry of Foreign Affairs of Japan, at http://www.mofa.go.jp/region/asia－paci/china/joint0805.html.

艘中国船舶靠近一艘隶属于日本海上保安厅的船舶，要求船上人员停止其在该海域的地质调查。

所有这些争端、冲突和紧张局势似乎表明，尽管达成了《原则共识》，但是双方在东海关键问题上的分歧依然存在，而且可能时常导致中日关系出现波澜。

阻碍双方解决东海问题的主要法律和政治障碍是什么？《原则共识》的前景如何？是否有可能通过如日方近期提出的司法手段来解决海域划界争端？通过对这些问题的解释说明，本文试图提出一些避免冲突的措施，以及达成可能的解决方案的路线图。

三、历史背景：钓鱼岛的主权争议

东海面积 480,000 平方英里，位于中国大陆以东、台湾岛北面、日本琉球群岛以西以及韩国南面。在这片海域之中，同时存在着钓鱼岛的主权争议，以及中日韩三国之间的大陆架和专属经济区海域划界的争议。

东海海域划界问题涉及三个国家：中国、日本和韩国。日本和韩国在 1974 年签署了一份关于大陆架共同开发的协议，遭到中国政府的强烈抗议：

> 中国政府认为，依照大陆架是大陆的自然延伸的原则，东海大陆架如何进行划分应当由中国和其他相关国家通过磋商解决。但是现在日本政府和韩国当局背着中国政府划分出一个所谓的……“共同开发区”……。这是对中国主权的侵犯。[①]

因此，关于东海北部的大陆架划界问题，三个国家需要通过谈判来解决这一问题。

关于钓鱼岛主权争议问题，台湾当局的立场与中国政府没有什么不同，显然，台湾当局的态度也是影响中日钓鱼岛主权争议的一个重要因素。中国政府主张钓鱼岛是台湾岛及其附属岛屿的一部分，而且几个世纪以来钓鱼岛周边海域就是中国渔民，尤其是我国台湾渔民的传统捕鱼场所。[②]

在探讨中日东海海洋争端的历史背景时，有必要从两条主线进行考察。：钓鱼岛主权争议的历史背景和中日双方关于海域划界问题的谈判过程。

钓鱼岛及其附属岛屿由 8 个无人居住的小岛组成，其中最大的一个称为钓

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① 《新华周刊》，1974 年 2 月 11 日，第 27 页。

② Spokesperson Liu Jianchao's Comment on Japan's Forcible Expulsion of Taiwanese Fishermen near the Diaoyu Islands, 10 June 2005, at http://www.nyconsulate.prchina.org/eng/fyrth/t199477.htm.

鱼岛，面积大概只有 8 公顷，位于台湾东北 170 公里，日本冲绳以西 410 公里。尽管这些小岛都无人居住，但是它们具有重要的战略和政治意义。钓鱼岛所有权的主张可以用以支撑对其周边海域及其资源的所有权主张。中日双方都通过引用国际法理论，特别是领土取得的理论，主张历史上即对钓鱼岛拥有主权。

在中日双方关于东海海域划界的谈判过程中，钓鱼岛的主权争议一直以来就是其中的关键因素。对于中方而言，它很难接受日方使用这些争议岛屿作为其主张全部专属经济区和大陆架权利的基点，同时拒绝在东海问题的谈判中讨论钓鱼岛问题。中方对于钓鱼岛领土争议的立场"搁置争议，共同开发"。很明显，在中方提议搁置的"争议"中，不仅包括双方在大陆架和专属经济区划界原则上的法律冲突，而且包括钓鱼岛的主权争议。但是现在日本竟然拒绝承认存在主权争议这一事实。日方这一态度给中日双方在东海共同开发的谈判增添了一层阴影。

钓鱼岛主权争议问题本身也包含两个方面：即具有政治敏感性的主权争议的存在和争议岛礁在海域划界中的作用的法律争议的存在。关于钓鱼岛在中日东海海域划界中的作用，日方倾向于认为它们具有全部效力。这一立场与日方在冲之鸟礁、竹岛（韩国称为独岛）和南鸟岛问题上的主张不一致。[①] 另一方面，在中国，普遍的学术观点是作为大洋之中无人居住并且有争议的岛屿，钓鱼岛在中日海域划界中不应有任何效力。[②] 但是，这种观点并不必然意味着钓鱼岛被认为是《联合国海洋法公约》（以下简称 UNCLOS）第 121 条第 3 款中规定的"岩礁"。中方的观点应理解为，在中日海域划界中不考虑钓鱼岛在划界中的作用将有利于达成一个合理并且现实的安排。

无论是根据 UNCLOS 第 121 条第 3 款的规定，还是根据中国国内法，即 2010 年 3 月生效的《中华人民共和国海岛保护法》的规定，钓鱼岛都被认为是岛屿。

（一）日方的主张

日方在钓鱼岛问题上的态度主要包含以下四点：[③]

第一，日方主张钓鱼岛不是通过 1895 年《马关条约》才割让给日本的。相反，钓鱼岛是作为无主地被日本发现并于 1895 年并入冲绳县，在此之前日本实地调查了好几次，并且确认并无中国清朝政府统治的标记。

第二，从 1895 年到 1971 年，钓鱼岛一直被认为是冲绳县的一部分。在长达

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① What Is the Problem with the Claim of the South Korea on Dokuto as a Basis for EEZ and Continental Shelf: Interview on ITLOS Judge Park, Choon-Ho, Chosun Online, 6 May 2006, at http://www.chosunonline.com/article/20060506000006.

② Ji Guoxing, The Diaoyu (Senkaku) Disputes and Prospects for Settlement, *Korean Journal of Defense Analysis*, vol. 6, no. 2 (Winter 1994), p. 306.

③ The Basic View on the Sovereignty over the Senkaku Islands, Ministry of Foreign Affairs of Japan, at http://www.mofa.go.jp/region/asia－paci/senkaku/senkaku.html.

75年的时期内，日方的合并和统治并未遭到中方的反对，直到1968年联合国亚洲及远东经济委员会的一份报告中称东海可能蕴藏石油资源，并且于1970年代出现近海石油勘探。

第三，钓鱼岛不包含在日本根据1951年《旧金山和平条约》第2条宣布放弃一切权利、权利名义与要求的地区之中。[①]相反，根据该条约第3条的规定，钓鱼岛是琉球群岛的一部分，接受美国政府管理。[②]

第四，1971年日美签署归还琉球群岛的协议，确认了钓鱼岛是日本的领土。[③]

(二)中方的主张

第一，中方主张中国在14世纪就发现了钓鱼岛，当时国际法规则还尚未出现。之后两百多年中国将这些孤岛作为航标，并于1556年将其纳入中国海防。日本不可能是最早发现钓鱼岛的，因为钓鱼岛早在500多年前就已经被中国发现了。日本是在1895年1月通过秘密的行政措施将钓鱼岛并入冲绳县从而“窃取”了钓鱼岛，当时日本已经意识到自己即将成为1894—1895年中日甲午战争的胜利者。事实上，日本政府在秘密合并的十年前——即1885年就已经很清楚地知道钓鱼岛是属于中国的。[④]

第二，1895年《马关条约》(日本称之为《下关条约》)迫使中国将台湾割让给日本。之后的50年，钓鱼岛连同台湾及其周边岛屿一直都处于日本的殖民统治之下。

第三，按照1943年《开罗宣言》[⑤]和1945年《波茨坦公告》[⑥]的相关条款，日本放弃了钓鱼岛并归还中国。从1945年到1971年，美国行使对钓鱼岛的管理

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① 第二条b款：日本放弃对台湾、澎湖之所有权利、权利名义和请求权。

② 第三条：日本同意美国对北纬29度以南之西南群岛(含琉球群岛与大东诸岛)、孀妇岩南方之南方各岛(含小笠原群岛、西之与火山群岛)，和冲之鸟岛以及南鸟岛等地送交联合国之信托统治制度提议。在此提案获得通过之前，美国对上述地区、所属居民与所属海域得拥有实施行政、立法、司法之权利。

③ Toshio Okuhara, The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf, *Japanese Annual of International Law*, vol. 15, 1971, pp. 97-102; Thomas R. Ragland, A Harbinger: The Senkaku Islands, *San Diego Law Review*, *vol*. 10, *May* 1973, *pp*. 668-69; *J. R. V. Prescott*, *Maritime Jurisdiction*, *in Joseph Morgan and Mark J. Valencia ed.*, Atlas for Marine Policy in East Asian Seas. *Berkeley*: *University of California Press*, 1992, *pp*. 31-32.

④ Zhong Yan, China's Claim to Diaoyu Island Chain Indisputable, *Beijing Review* 39, No. 45, 4—10 November 1996, pp. 14-19.

⑤ “剥夺日本从1914年第一次世界大战爆发后，在太平洋上夺得或占领的一切岛屿，并使日本强占的中国领土，例如东北地区、台湾和澎湖群岛等归还中国。”

⑥ (8)开罗宣言之条件必将实施，而日本之主权必将限于本州、北海道、九州、四国及吾人所决定其他小岛之内。

和行政权力。这一事实与日本主张的从 1895 年到 1971 年的 75 年间，钓鱼岛一直位于其不间断的、实际有效控制之下相矛盾。

第四，下面三个文件及其相关条款，即《旧金山和约》第 3 条，美国政府 1953 年 12 月 25 日颁布的《民政府公告第 27 号》，[①]以及 1971 签署的《日美归还琉球群岛协议》是被日方引用以证明钓鱼岛是冲绳的一部分的证据。上述文件声称钓鱼岛包含在琉球群岛的地理范围之内，而当时琉球群岛是由美国行使"全部的行政、立法和司法权力"。

但是，在美国参议院批准《日美归还琉球群岛协议》期间，美国政府特别指出该协议并不对争议岛屿主权的确定构成影响。[②] 这一态度清楚地体现在《日美归还琉球群岛协议》第 1 条之中，该条规定"关于琉球群岛和大东诸岛，美国根据《旧金山和约》第 3 条的规定将所有的权利和利益让渡给日本"，并且"对上述岛屿的领土和居民的全部所有行政、立法和司法权力行使的责任和权力也一并让渡"。[③]

在上述让渡给日本的权利和利益之中，并不包括占有权和处置权，而这是构成主权的根本要素。事实上，按照《旧金山和约》第 3 条的规定，美国也只是通过该条约获得了施政权，而非主权。

（三）美国对钓鱼岛的施政统治

1953 年美国颁布了《琉球美国民政府公告第 27 号》，将钓鱼岛划入琉球群岛的地理界线之内，美国正式开始对钓鱼岛的管理。[④] 在该公告中，美国声明到目前为止美国民政府和琉球群岛政府的地理界线符合 1951 年 9 月 8 日签署的《旧金山和约》中的规定。[⑤] 但事实上，《旧金山和约》第 3 条并未提及钓鱼岛，该条规定：

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① Civil Administration Proclamation No. 27, Geographical Boundaries of the Ryukyu Islands, at http://www.niraikanai.wwma.net/pages/archive/caproc27.html

② Senate Committee on Foreign Relations, *Hearings on the Okinawa Reversion Treaty before the Senate Committee on Foreign Relations*, 92nd Congress, 1st sess., 1971, p. 11.

③ Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands, "The World and Japan" Database Project, Database of Japanese Politics and International Relations, Institute of Oriental Culture, University of Tokyo, at http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19710617.T1E.html.

④ U.S. Congress. Senate Committee on Foreign Relations. *Okinawa Reversion Treaty*. 92nd Cong., 1st Sess. October 27, 28, and 29, 1971. Washington, U.S. Govt. Print. Office, 1971, p. 149, 152.

⑤ United States Civil Administration of The Ryukyu Islands, Office of the Deputy Governor APO 719, 25 December 1953, Civil Administration Proclamation No. 27, Geographical Boundaries of The Ryukyu Islands, at http://www.niraikanai.wwma.net/pages/archive/caproc27.html

> 日本同意美国对北纬29度以南之西南群岛(含琉球群岛与大东诸岛)、孀妇岩南方之南方各岛(含小笠原群岛、西之与火山群岛),和冲之鸟岛以及南鸟岛等地送交联合国之信托统治制度提议。在此提案获得通过之前,美国对上述地区、所属居民与所属海域得拥有实施行政、立法、司法之权利。

在签署《归还协议》时,美国国务院的官员曾主张"尽管《旧金山和约》第3条没有直接提及钓鱼岛,但是美国和日本都认为"北纬29度以南之西南群岛"的措辞应包括尖阁列岛在内"。[①] 从中方的观点来看,这种主张既不合理,也不可作为依据,因为中国不是上述三项协议的缔约方。问题的关键不在于美国或日本如何解释或理解相关条款,而在于上述协议对中国没有任何约束力,因为国际法的一般原则是"条约非经第三国同意,不为该国创设义务或权利"。[②]

四、东海沿岸国家的合作

东海由三个沿岸国家围绕,并通过所谓第一岛链的一些海峡与西太平洋相连。东海的水域部分完全由中国、日本和韩国三个沿岸国的领海和专属经济区构成。

按照UNCLOS第122条的规定,东海是一个半闭海。该条款规定:半封闭海是指"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和专属经济区构成的海湾、海盆或海域"。[③] UNCLOS第123条规定了闭海或半闭海沿岸国在四个特定领域的合作:

> 1. 协调海洋生物资源的管理、养护、勘探和开发;
> 2. 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;
> 3. 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;
> 4. 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。

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① Larry A. Niksch, Senkaku (Diaoyu) Islands Dispute: The U. S. Legal Relationship and Obligations, CRS Report for Congress, Report 96-798, 30 September 1996.

② 《维也纳条约法公约》,第34条。

③ Jim-Hyun Paik, Exploitation of Natural Resources: Potential for Conflicts in Northeast Asia, in Sam Bateman and Stephen Bates ed., *Calming the Waters: Initiatives for Asia Pacific Maritime Cooperation*. Canberra: Strategic and Defence Studies Centre, Research School of Pacific and Asian Studies, Australian National University, 1996.

关于东海生物资源管理、养护、勘探和开发方面的合作，中日双方在2000年签署了《中日渔业协定》。然而，为了落实UNCLOS第123条中所规定的合作关系，中日双方需要将该协定与海洋环境的保护和保存及科学研究方面的加强合作联系起来。实际上，双方也曾努力建立一个“在科学研究方面避免冲突的机制”。2001年2月13日，中日双方交换了一个普通照会，提议在东海科学研究方面建立一个相互事先通报机制，[①]但是基于至少两点原因该机制未能成功运作。第一，在日方一开始提议建立这一机制时，中方就审慎地认为东海尚未通过协议划进行海域划定。[②] 2001年关于科学研究的相互事先通报的普通照会并不是条约。中国外交部发言人姜瑜2007年2月8日发表的评论表明，中方并不认为在其专属经济区和大陆架将科学研究的事先通报机制是一项条约义务，但是“相互通报机制是着眼于两国关系大局，为增进双方相互信任而确定的自主措施，并不影响双方关于海洋法诸问题的立场。中方有关船只在钓鱼岛附近海域进行正常的科考活动是行使中方正当的主权权利，与‘事先通报机制’没有关系”。[③] 第二，事先通报机制的适用范围没有明确规定。上述照会只是简单声明，如果一方的海洋调查船计划进入另一方“关切”的海域，必须至少提前两个月通知另一方。[④]

但是，中日双方在邀请“其他有关国家或国际组织与其合作以推行本条的规定”上需要十分谨慎，因为东海的海洋问题和争端基本上都是双边的。韩国也与该海域的大陆架划界和渔业活动有关，但是韩国的主张只涉及有限的范围。UNCLOS第123条毕竟只是规定了一项鼓励闭海或半闭海沿岸国“努力”(an obligation to endeavor)进行地区性或者双边合作的义务。

五、东海的重叠主张和1982年《联合国海洋法公约》

(一)日本关于海洋边界的主张：从中间线到200海里

日本于1996年6月20日批准了UNCLOS。日本在其国内法中，关于海域界限的主张主要有：采用直线基线作为领海基线；主张12海里的领海，但宗谷、津轻、大隅、对马和朝鲜海峡保持3海里领海宽度；主张从直线基线量起向海方

① Japan, China Agreement on Maritime Notice System Detailed, BBC Monitoring Asia Pacific-Political, 13 February 2001.

② Mark J. Valencia and Yoshihisa Amae, Regime Building in the East China Sea, *Ocean Development & International Law*, vol. 34, no. 2, 2003, p. 198.

③ 新华网，中日关于海洋调查活动的相互通报制度旨在增进双方信任，2007年2月8日。http://news.xinhuanet.com/world/2007－02/08/content_5715679.htm

④ Mark J. Valencia, The East China Sea Dispute: Context, Claims Issues and Possible Solutions, *Asian Perspective*, vol. 31, no. 1, 2007, p. 128.

向200海里专属经济区;以钓鱼岛为基点主张全部专属经济区和大陆架权利。[①]

从1970年代开始,日方在东海海域划界问题上采取广为人知的“中间线原则”。日本政府坚持其单方面划定的中间线应当成为划分中日双方东海专属经济区和大陆架的分界线。中间线西侧海域因此在国际上被广泛视为无争议地区。同时,中方从未承认日方单方面划定的中间线对其有法律上的约束力,因为中日双方并未签署关于专属经济区划界的协议,而按照UNCLOS第74条的规定:“……国家间专属经济区的界限,应在国际法的基础上以协议划定。”但是,为了避免紧张局势,从1970年代开始,中方即将其海域勘探和开发天然气和石油资源的活动限于无争议的中间线中国一侧海域。[②] 2004年6月,日方第一次对中国在春晓油气田的活动提出抗议,而中方已经在这片无争议海域勘探了大约30年,日方声称“中方的开采可能会对中间线日方一侧的资源产生虹吸效应”,并且日方开始主张春晓油气田和其他中方的油气田同样也处于争议海域。[③]

(二)中方的主张:绝对不妥协的自然延伸的立场?

中国于1996年6月7日批准了UNCLOS。1998年6月26日,中国通过了《中华人民共和国专属经济区和大陆架法》,主张200海里专属经济区。关于大陆架的宽度,该法第2条规定如下:

> 中华人民共和国的大陆架,为中华人民共和国领海以外依本国陆地领土的全部自然延伸,扩展到大陆边外缘的海底区域的海床和底土;如果从测算领海宽度的基线量起至大陆边外缘的距离不足二百海里,则扩展至二百海里。

按照中方的主张,东海的“大陆边外缘”位于何处?中国官方在2009年5月11日阐明了在这一问题上的态度,当时中方向联合国大陆架界限委员会(CLCS)提交了对其大陆架外部界限的初步调查结果。在提交的报告中,中方主张200海里以外的大陆架延伸至冲绳海槽西侧大陆坡。[④] 但是中方在大陆架宽

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① Mark J. Valencia, The East China Sea Dispute: Context, Claims Issues and Possible Solutions, *Asian Perspective*, vol. 31, no. 1, 2007, p. 142.

② Mark J. Valencia and Yoshihisa Amae, Regime Building in the East China Sea, *Ocean Development & International Law*, vol. 34, no. 2, 2003, p. 191.

③ Kosuke Takahashi, Gas and oil rivalry in the East China Sea, *Asia Times*, 27 July 2004.

④ Foreign Ministry Spokesperson Ma Zhaoxu's Remarks on China's Submission of Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles, at http://www.fmprc.gov.cn/eng/xwfw/s2510/t562208.htm, May 13, 2009; Preliminary Information on the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China.

度上的主张并非绝对不可妥协。正如1998年《专属经济区与大陆架法》第2条中所规定的那样,中方在提交的报告中再次提到,中国将“通过和平谈判,与海岸相邻或者相向国家,在国际法的基础上按照公平原则以协议划定大陆架的界限”。

在1992年《中华人民共和国领海及毗连区法》中,中方提出了下列主张:连接大陆海岸和最外围海岛上的各基点的直线组成直线基线;从这些基线和包括钓鱼岛在内的海岛量起向海延伸12海里为领海;领海以外邻接领海向海延伸12海里为毗连区;对钓鱼岛的主权等。①

中方从未接受日方以中间线作为大陆架和专属经济区划界谈判的初步界线,因为中间线是日方以钓鱼岛为基点单方面划定的。中方反对日方的中间线,不仅因为中方不认为等距离方法已经发展成为海洋划界中的习惯国际法规则,还因为中间线本身的划定并未与中方进行协商。

六、目前在东海已经取得的积极进展

尽管存在主权和划界原则的争议,但是中日海洋争端仍然有了一些积极的进展。双方的政治上和外交上的努力表明,中日双方愿意在国际法的基础上和平解决海洋划界争端。按照UNCLOS第74条和第84条的规定:

> 专属经济区和大陆架的界限,应在国际法的基础上以协议划定,以便得到公平解决。有关各国应基于谅解和合作精神,尽一切努力作出实际性的临时安排,并在此过渡期间内,不危害或阻碍最后协议的达成。这种安排应不妨碍最后界限的划定。

2000年生效的《中日渔业协定》即为两国在专属经济区生物资源方面签署的第一份特定的有法律约束力的临时性安排。② 另一个积极进展是2008年6月18日达成的《原则共识》。经过三年多艰苦谈判之后,中日双方在东海问题上达成的《原则共识》目前只是体现两国的政治互信,共同开发的具体安排还需要双方达成一份具有法律约束力的双边条约。此外,日本法人根据中国法律参与春晓油气田的合作开发也需要两国先缔结换文,并履行两国各自的国内手续。但是,对《原则共识》的不同解释和其他一些消极因素使得之后的磋商进程并不是十分顺利。

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① Mark J. Valencia, The East China Sea Dispute: Context, Claims Issues and Possible Solutions, *Asian Perspective*, vol. 31, no. 1, 2007, p. 139.

② David Rosenberg, China, neighbors progress in fishery agreements, *Asia Times*, 19 August 2005, at http://www.atimes.com/atimes/China/GH19Ad02.html.

(一)新的《中日渔业协定》

中日双方在渔业关系上的合作始于1955年,当时两国尚未建立外交关系。1955年、1963年和1965年,中日双方达成了三项渔业协定,但都是民间性质的非政府间协定。[①] 1972年两国外交关系正常化之后,1975年两国达成一项政府间渔业条约,于1975年8月15日生效,该条约一直指导两国在东海和黄海上的渔业关系,直到2000年7月1日新的《中日渔业协定》生效。

新渔业协定的适用范围是中日两国在东海的专属经济区内。在北纬27度和北纬34度40分之间、以及两国各自领海基线量起向海52海里的范围内,适用沿岸国管辖原则,因为这是两国之间无争议的海域。按照UNCLOS第62条的规定:

> 沿海国应决定其捕捞专属经济区内生物资源的能力。沿海国在没有能力捕捞全部可捕量的情形下,应通过协定或其他安排,并根据第4款所指的条款、条件、法律和规章,准许其他国家捕捞可捕量的剩余部分,特别顾及第六十九和第七十条的规定,尤其是关于其中所提到的发展中国家的部分。

UNCLOS第123条也规定了半闭海沿岸国之间应"尽力"协调海洋生物资源的管理、养护、勘探和开发。该协定规定,缔约各方考虑到本国专属经济区生物资源状况、本国捕捞能力、传统渔业活动及其他相关因素,每年决定在本国专属经济区的缔约另一方国民及渔船的渔获配额、作业区域及其他作业条件。[②] 该协定还规定,缔约各方确保缔约另一方的国民及渔船遵守本国养护措施,可根据国际法在本国专属经济区采取必要措施。[③]

鉴于专属经济区的边界尚未划定,该协定建立了三类渔区。三个渔区分别适用不同制度和管辖权。第一块渔区称为中间水域,位于北纬30度40分以北、东经124度45分至东经127度30分之间,在中间水域,中日双方的渔船不需要对方许可就可以进行捕鱼活动。中间水域内适用船旗国管辖。

第二块渔区称为暂定措施水域,南北位于北纬27度和北纬34度40分之间、东西位于从两国领海基线起各自向海52海里线之间的海域。在暂定措施水域,生物资源的管理适用船旗国管辖,但是在一定范围内,缔约各方根据中日渔业联合委员会的决定,通过采取适当的养护及捕获量的管理措施,实施共同的管

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① Park Hee Kwon ed., *The Law of the Sea and Northeast Asia: A Challenge for Cooperation*, The Hague: Kluwer Law International, 2000, p. 51.

② 《中日渔业协定》第2条,第3条。

③ 《中日渔业协定》第5条。

理和执行措施。在暂定措施水域,如果缔约一方发现缔约另一方国民及渔船违反操作规则和规定时,可就该事实提醒该国民及渔船注意,并将有关事实及情况通报缔约另一方。缔约另一方应采取必要措施并将处理的结果通报该方。[①]

第三块渔业区位于北纬27度以南和东经125度30分以西海域。考虑到钓鱼岛和台湾位于这片海域之中,协定不适用于该海域,在该海域维持原有的捕鱼制度。

2000年《中日渔业协定》是两国在东海专属经济区生物资源利用和保护方面的一个临时性安排。与管辖权有关的条款只涉及渔业活动和悬挂中日两国国旗的渔船。该协定不涉及在渔区内对第三国的管辖权的归属问题、海洋环境的保护和保全及其他事项的管辖,如非生物资源的勘探和开发、海洋科学研究和人工岛屿、设施和结构的建造和使用等。因此,在上述渔区中,管辖权的潜在冲突依然存在,并可能会引发紧张和对抗。

(二)2008年中日《原则共识》

2008年6月18日,胡锦涛主席和福田康夫首相共同签署《关于中日东海问题的原则共识》,希望将东海变为"和平、友好、合作之海"。[②] 中日双方一致同意"在实现划界前的过渡期间,在不损害双方法律立场的情况下进行合作"。《原则共识》包括以下三个部分:第一,关于中日在东海的合作;第二,中日关于东海共同开发的谅解;第三,关于日本法人依照中国法律参加春晓油气田开发的谅解。

共同开发的过程有许多步骤。首先,本着互惠原则,双方为确定共同开发的有关事项需要进行相互磋商。其次,根据该协议中规定的条件,双方在共同开发区块中进行联合勘探。第三,双方在指定区块中选择地点进行共同开发。因此,共同开发的先决条件是双边协议的达成。

关于春晓油气田的开发,《原则共识》规定如下:

> 中国企业欢迎日本法人依照中国对外合作开采海洋石油资源的有关法律,参加对春晓现有油气田的开发。

因此,如果有日本法人有兴趣参加春晓油气田的开发,那么它们需要与中国企业进行磋商。如此看来,第一步应该是两个企业之间的商业会谈。另一方面,这种商业会谈及其会谈结果同时也需要两国政府的批准,并且为此目的,两国政

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① 《中日渔业协定》第7条第2款和第3款。

② China, Japan Reach Principled Consensus on East China Sea Issue, *Xinhua News*, 19 June 2008, at http://www.china.org.cn/international/weekly_review/2008-06/19/content_15863263.htm.

府应努力早日换文缔结协议,并各自履行必要的国内手续。无论如何,关于春晓油气田的"国内程序"含义上还存在一些模糊的地方。有人认为启动商业会谈本身就需要符合"国内程序"的要求,因而两国政府应先进行磋商。

七、目前在东海存在的消极进展

(一)东海管辖权主张的竞争

在大陆架和专属经济区主张重叠的争议海域,资源的共同开发有利于缓和各方相冲突的主张引发的紧张局势。但是,争议海域内的共同开发毕竟只是最终划界前过渡时期内的临时性安排。共同开发的协议主要是就相关资源的使用和分配作出安排,而沿岸国的其他主权权利和管辖权的归属仍处于模糊和不确定的状态。因此,任何一方在争议海域行使主权权利或管辖权,争端国之间发生冲突的潜在可能性就会一直存在。

例如,在2000年生效的《中日渔业协定》中,下列主权权利和管辖权并未被提及:沿海国利用海水、海流和风力生产能源的主权权利;人工岛屿、设施和结构的建造和使用的管辖权;海洋科学研究;以及海洋环境的保护和保全。

相同的情况将会发生在2008年《原则共识》建立的共同开发中,如果未来双边协议中没有涵盖管辖权问题的特定条款。

另一个例子是由钓鱼岛主权争议引发的管辖权冲突的情况。[1] 2008年12月8日,两艘隶属于中国海监的巡逻船在钓鱼岛周边的领海海域巡逻了大约9个小时。日本政府提出抗议,但是中国政府驳斥了日本的抗议,指出巡逻船是"在中国管辖海域内执行日常巡逻任务。"外交部发言人发表声明表示:"钓鱼岛及其周边岛屿自古以来就是中国不可分割的领土。中国海监船只的行动是完全合法及无可争议的。"[2]这是中方首次派遣巡逻船只前往钓鱼岛的领海,但是日本政府则倾向于通过强调这两艘巡逻船是同以往一样的调查船,来降低此次巡航的影响和意义。

未来中日双方就共同开发问题进行协商时,钓鱼岛仍将是重要因素,因为这些岛屿不可能不涉及到共同开发区的选址和最终划界。据日本《产经新闻》报道,2006年5月6—7日在北京举行的第四轮中日东海问题磋商中,中方曾建议

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① Japan Protests Chinese Survey Ships, *Asian Surveying and Mapping*, 18 December 2008, at http://www.asmmag.com/20081218308/japan－protests－chinese－survey－ships.html.

② Foreign Ministry Spokesperson Liu Jianchao's Regular Press Conference on 9 December 2008, Permanent Mission of the People's Republic of China to the UN website, at http://www.china－un.org/eng/fyrth/t525645.htm.

将钓鱼岛纳入共同开发区中。但是日方拒绝了这项建议。而《原则共识》中规定“双方同意,为尽早实现在东海其他海域的共同开发继续磋商”,[①]因此中方在未来磋商中可能会再次提出此项建议。

(二)外大陆架权利主张的冲突

2009年5月11日,中国向联合国秘书长提交了“东海部分海域200海里外大陆架外部界限的初步信息”。此项主张基于自然延伸原则,该原则是根据1982年UNCLOS第76条的规定中国主张其大陆架的法律基础。另一方面,中国政府一直主张“将与海上邻国在公平原则下通过和平谈判来解决海域划界问题”,这表明了大陆架延伸至冲绳海槽边缘的主张并不是最终的和决定性的。[②]中国有意与日本谈判并调整自己的主张。提交初步信息的作用在于重申中国在大陆架划界上的法律立场。联合国大陆架界限委员会将不会讨论中国提交的信息,因为此次提交的只是初步信息,而且中日两国在东海还存在领土和划界争端。

日方在大陆架和专属经济区上的主张是基于等距离原则,这与中方在大陆架上的法律主张相冲突。不过,日方近几年似乎改变了其在大陆架和专属经济区上的基本法律立场,强调其根据1982年UNCLOS第76条,具有在东海主张拥有200海里大陆架和专属经济区的潜在权利。原本位于日方划定的中间线中方一侧的春晓、天外天和断桥油气田因为日方立场的改变而变成位于“争议海域”之中。基于这一新的法律立场,一些日本学者甚至主张整个东海都是争议海域。[③] 日方的新主张打破了争议海域位于日方主张的中间线与中方主张的冲绳海槽之间的这一潜在共识。中日双方东海上的争议海域到底在哪里?这将是近期谈判中面临的第一个问题。

(三)对日方将冲之鸟礁作为申请大面积管辖海域的主张的反对

2009年9月15日,中方重申了对日方2008年11月向联合国大陆架界限

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① China, Japan reach principled consensus on East China Sea issue, China.com, 19 June 2008, at http://english.china.com/zh_cn/news/china/11020307/20080619/14917421.html.

② China to Delimitate Maritime Boundary through Peaceful Negotiations: Foreign Ministry Spokesman, *Xinhua News*, 12 May 2009, at http://www.gov.cn/misc/2009-05/12/content_1311390.htm.

③ Shinya Murase, The Legal Issues of the Delimitation of the Continental Shelf between Japan and China, *Kokusai Mondai*, no.365, p.2.

委员会提交的申请的坚决反对，在这份申请中，日方要求大陆架界限委员会承认其基于冲之鸟礁划定的大陆架。联合国大陆架界限委员会的一个小组开始对日方提交的申请进行审核，中方对此提出反对。中国外交部发言人姜瑜一个新闻发布会上说："中国在这一问题上的立场是坚定不移的，并且我们希望联合国大陆架界限委员会能够妥善地处理这个问题。"

在冲之鸟礁问题上，中日双方的争议在于这个小型环礁的法律地位和对1982年UNCLOS第121条的解释。根据UNCLOS第121条第3款的规定，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。冲之鸟礁问题是关于UNCLOS第121条解释的法律问题。这个争议并不仅仅涉及中日两国；相反，它还涉及周边其他沿海国对200海里外大陆架的主张以及UNCLOS缔约国在该海域本应享有公海和国际海底区域制度下的利益和权利。冲之鸟礁问题并不与东海共同开发与合作问题直接相关，但是如果日本的主张得以实现，那么中国的海洋权益，包括UNCLOS第87条规定的公海自由和在国际海底区域的活动等都将受到影响。在这个意义上说，冲之鸟礁问题是影响东海共同开发谈判进程的另外一个不利因素。

除了上述在东海存在的近期的消极进展之外、钓鱼岛主权争议的存在、以及对海域划界中钓鱼岛的地位缺乏共识之外，还存在一些其他法律和政治上的障碍，可能阻碍东海能源的共同开发和合作。

中日双方未能就春晓油气田的法律地位达成共识引发了新的紧张。2010年1月17日，日本外务大臣冈田克也会见中国外交部长杨洁篪时表示，如果中国在争议油气开发项目上违反2008年的协议，那么日本将"采取某种行动"。冈田外相表示日方将在同一海域进行自主开发，对此，中国外长杨洁篪部长表示了强烈的反对。[①] 日方提到的"争议油气开发项目"很明显是指春晓和天外天油气田。根据《原则共识》的规定，日本法人要依照中国法律才能参加春晓油气田开发。对春晓油气田法律地位的相反观点来源于对东海争议海域的范围缺乏一致的共识。日方过去经常主张日方中间线应该是海域划界线。但是，如上所述，日方改变了它的态度，在海域划界规则上将众所周知的中间线立场转变成200海里距离标准。然而，2001年底发生的一件突发事件表明，至少在当时，日方并不认为中间线西侧海域是争议海域。日方对这一事件的报道如下：

> 2001年12月21日，东京紧急出动20艘巡逻船和14架飞机对一艘在日本专属经济区内航行的嫌疑朝鲜间谍船实施紧追。这艘嫌疑船只看上去没有装载任何渔具，无视日本不断发出的停船命令。据日本海上保安厅官员反映，其巡逻船用20mm机枪发射了13发子弹以示警告。12月22日

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① Okada Warns China on Gas-Drilling Pact, *Japan Times*, 18 January 2010, at http://www.japantimes.co.jp/cgi－bin/nn20100118a2.html.

晚，在遭到一艘进行迂回夹击的海上保安厅船只射击后，嫌疑船只船尾着火，遭到四艘日本船只包围 90 分钟后，嫌疑船只被迫停船。在受到牵制后，嫌疑船只上的船员用冲锋枪对巡逻船进行回击，并打伤两名海上保安厅人员。当地时间 22:13，嫌疑船只在中国专属经济区大约 90 米(297 英尺)深的海域突然沉没。[①]

嫌疑船只沉没的地点位于中间线西侧。日本政府在谈判取得中国政府同意后，用了几个月时间打捞沉船，并支付超过一亿日元来补偿中方，因为日方实施打捞作业的区域位于中方专属经济区内。中方主张日方在该海域内的行动影响到了中方对生物资源实施主权权利以及对海洋环境保护的管辖权。这一事件的解决表明日方并不认为中间线西侧海域是日本的专属经济区和大陆架。中日大陆架重叠部分应该是位于日方主张的中间线和中方主张的冲绳海槽之间的海床。

八、一些建议

中日双方在海洋能源上的合作似乎进入了一个困境。但是先前在避免争端的制度建设的努力，以及 2010 年 5 月温家宝总理访问日本后的一些积极信号表明，尽管仍然存在挑战，但是解决东海问题，特别是海域划界问题的机会也有所增加。在温家宝总理与日本首相鸠山由纪夫会谈中，两位领导人同意重建两国总理热线，正式启动落实东海问题原则共识的政府间换文谈判，加快建立两国防卫部门海上联络机制，并尽快商签海上搜救协定。[②]

2008 年中日《原则共识》的达成是未来进行海洋能源开发合作的重要步骤，但它也仅仅是第一步。春晓油气田的共同开发和合作开发需要就细节内容进一步进行谈判。换句话说，《原则共识》只是为未来谈判确定了纲领。为了推动合作进程，还需要一些必要条件和互相让步。

第一，为了增加互信和避免不信任，两国需要继续交换意见，不论是官方的还是非官方的。依照《原则共识》中日双方没有承诺进行成功谈判的法律义务，但是根据 UNCLOS 第 283 条第 2 款，交换意见是缔约国的一项义务：

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

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① Japan Maritime Self Defence Force，GlobalSecurity. org，at http://www. globalsecurity. org/military/world/japan/jmsdf. htm.

② Highlights of Chinese Premier's Tour in Japan，*China Daily*，1 June 2010，at http://www. chinadaily. com. cn/china/2010wentour/2010－06/01/content_9917026. htm.

速着手交换意见。

因此,不管在法律立场上存在多少困难和冲突,作为 UNCLOS 的缔约国,中日两国都有义务在海洋争端上保持交换意见。

第二,中日两国在争议领土——钓鱼岛问题上达成协议。国际法学者建议,中日两国应达成协议不使用钓鱼岛作为主张专属经济区或大陆架的基点。这样,海域划界问题就能够与主权问题区分开来。①

第三,如果《原则共识》能够顺利推动,那么钓鱼岛附近共同开发区的建立就能加快合作的进程。中方在第四轮中日东海问题磋商中提出此项建议,但是遭到日方的拒绝。② 根据 2008 年《原则共识》的规定:“双方同意为尽早实现在东海其他海域的共同开发继续磋商。”2008 年《原则共识》中没有直接提到钓鱼岛问题,但是这并不意味着它与中日东海海洋争端无关。相反,钓鱼岛问题是争端中最重要的部分。中方一直尝试“搁置争议,共同开发”,但不是“建立存在被忽视的主权争议的共同开发区”。不论是通过共同开发的方式还是司法解决的途径,中日双方需要做出一些安排来解决主权争议,因为这是东海划界问题得以顺利解决的基础,甚至是前提条件。

第四,中日两国需要考虑通过国际司法解决的途径来处理海域划界争议的可能性。2010 年 2 月 22 日,日本内阁官房长官平野博文在东京告诉记者们,日本可能将与中国在东海油气田开发上的争议提交给一个国际海洋法庭,声称“如果协议未被遵守,我们自然可能考虑采取适当的行动……我们将与中方就能做什么特定的事情进行谈判。”③但是,日方不能将中方“提交”给任何的法庭或仲裁庭,除非中方也有相同的想法,因为中方已经依据 UNCLOS 第 298 条(适用第二节的任择性例外)的规定提交了书面声明:

> 对于《公约》第 298 条第 1 款(a)、(b)和(c)项所述的任何争端(即涉及海洋划界、领土争端、军事活动等争端),中国政府不接受《公约》第 15 部分

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① Mark J. Valencia, The East China Sea Dispute: Context, Claims Issues and Possible Solutions, Asian Perspective, vol. 31, no. 1, 2007, p. 158;季国兴著:《中国的海洋安全和海域管辖》,上海:上海人民出版社 2009 年 9 月版,第 295 页。

② Kung-wing Au, The East China Sea Issue: Japan-China Talks for Oil and Gas, *East Asia*, vol. 25, no. 3, September 2008, pp. 223-241.

③ Takashi Hirokawa and Sachiko Sakamaki, Japan May Take China to Tribunal over East China Sea Gas Field, Bloomberg, 21 February 2010, at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aojEN5zUTRGU.

第 2 节规定的任何国际司法或仲裁管辖。[①]

因此，日方不能将中方起诉到任何国际法庭或者提请国际仲裁庭仲裁（即国际法院、国际海洋法法庭或者某一仲裁庭），也不能单方面将东海争端提交法庭，除非中方撤销上述声明，或者两国达成协议同意提交。[②] 这主要是因为 UNCLOS 第 299 条规定："……以一项按照第 298 条发表的声明予以除外，不依第二节所规定的解决争端程序处理的争端，只有经争端各方协议，才可提交这种程序。"

中方并未直接回应日方的这项建议。日方是否准备将东海的所有问题，包括钓鱼岛主权争议在内都通过司法程序解决？或者日方是否只是打算将海域划界问题与主权争议区分开？无论是哪一种，此种建议都可能为当前的困境局面提供一个出路，但是首先要两国在钓鱼岛问题上能够达成双方都能接受的安排。

从历史上看，中国一直避免通过国际法院系统来解决争端。这种态度在以前中国被其他国家孤立的时候可以理解。但是现在形势已经完全改变了，因为现在中国已经熟悉了外部世界，并且在国际法院、国际海洋法法庭和国际常设仲裁法院都有中国籍法官。而且，东海海域划界问题不像南海争端，后者涉及六方的重叠主张太过复杂，很难通过司法程序加以解决。如果中日两国不能在争议海域的范围或者共同开发和合作开发之间的区别问题上达成共识，那么坚持共同开发模式似乎也缺乏充分的理由。东海上清楚划定的海域分界线将更有助于中日双方在科学研究、环境保护和其他领域的合作。渔业区中针对第三国船舶的违法捕鱼或其他违法活动的潜在的管辖权冲突问题也自然得以解决。显然，中日双方需要通过新的途径解决两国之间的法律争端。

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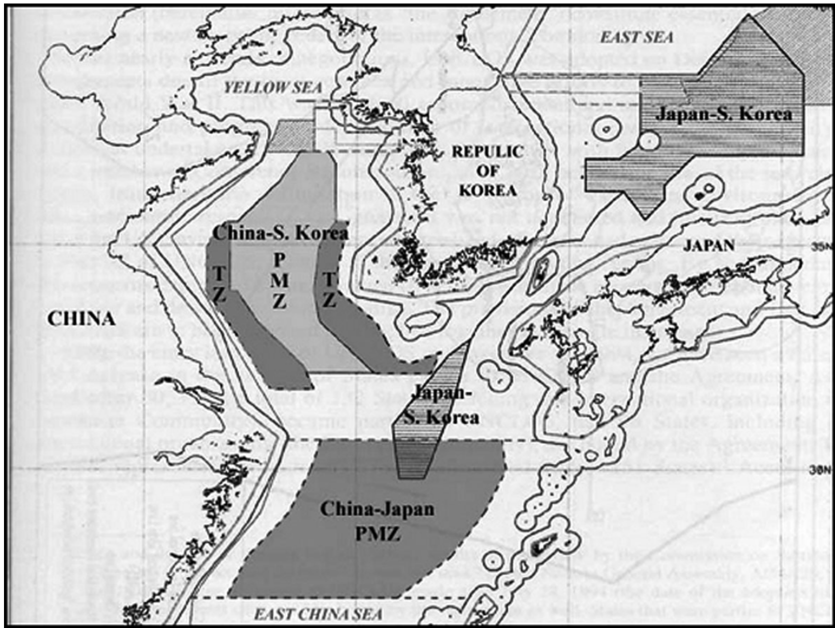
① International Tribunal for the Law of the Sea (TLOS), Declaration of States Parties Relating to Settlement of Disputes in Accordance with Article 298 (Optional Exceptions to the Applicability of Part XV, Section 2, of the Convention, at http://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf.

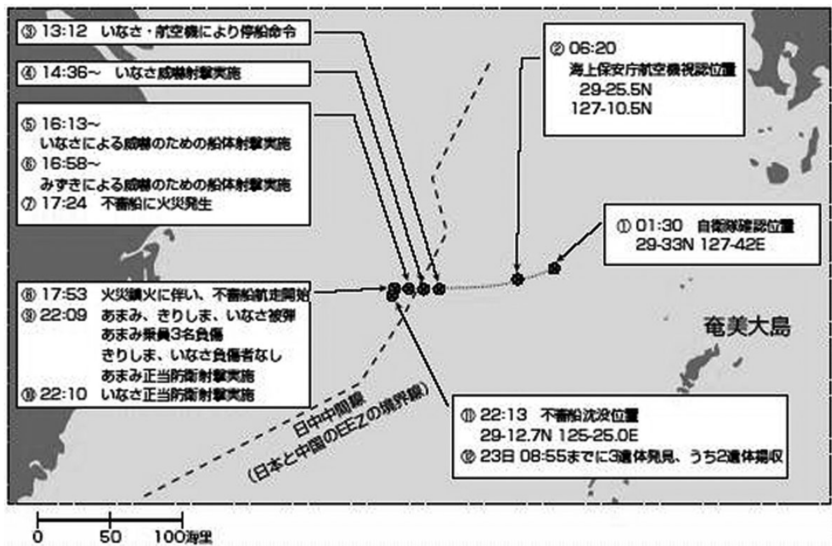
② 第 298 条第 2 款规定："根据第 1 款作出声明的缔约国，可随时撤回声明，或同意将该声明所排除的争端提交本公约规定的任何程序。"

TABLE 1



Source：Xue，Gui Fang，China's Response to International Fisheries Law and Policy：National Action and Regional Cooperation，University of Wollongong，Centre for Maritime Policy，October，2004.

TABLE 2



Source：2003 Report of Japan Coast Guard.
http：//www.kaiho.mlit.go.jp/info/books/report2003/special01/01_01.html

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International Legal Framework on the Prevention of Vessel-Sourced Pollution

LIU Nengye*

Abstract: This paper examines the international legal framework of the prevention of vessel-source marine pollution. It provides an overview of current international framework. First, the study introduces International Maritime Organization (IMO) and the Law of the Sea Convention (LOSC). Second, it analyzes the relation between Conventions adopted under the auspices of the IMO (IMO Conventions) and the LOSC. Third, it discusses major IMO Conventions dealing with prevention of vessel-source pollution. Finally, this paper addresses challenges of the international legal framework.

Key words: Vessel-source pollution; Freedom of navigation; IMO; Law of the Sea

Ⅰ. Introduction

Nowadays, the protection of the marine environment is one of the most important ecological issues, next to climate change effects and freshwater scarcity. However, nearly 30 years after the adoption of the United Nations Convention on the Law of the Sea (LOSC),[①] the state of the world's oceans con-

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① The Third United Nations Conference on the Law of the Sea (UNCLOS III) was convened in New York in 1973. It ended nine years later with the adoption in 1982 of a constitution for the seas—the United Nations Convention on the Law of the Sea. *See* United Nations Division for Ocean Affairs and the Law of the Sea (DOLAS), *United Nations Convention on the Law of the Sea (a historical perspective)*, at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective, 1 May 2011.

tinues to deteriorate.[①] Global climate change is also further exacerbating adverse impacts on coastal and ocean ecosystems, partly caused by green house gas (GHG) emission from shipping.

The LOSC distinguishes sources of marine pollution as land-based activities, dumping, vessels, sea-bed activities, activities in the area, and those from or through the atmosphere. Maritime transport is only responsible for some 12% of the total.[②] However, this pollution often affects more than one single state. Furthermore, shipping is an activity with intensive communication between different states and individuals and is regulated by international conventions and the United Nations Convention on the Law of the Sea (LOSC).[③] Except LOSC, vessel-source pollution is mainly governed by conventions concluded under the auspices of the International Maritime Organization (IMO Conventions). On the international level, standard-setting efforts to prevent vessel-source pollution are mainly focused on the discharge and emission standards, construction, design, equipment and manning (CDEM) standards and Navigational standards.[④] The IMO has established a series of conventions, including the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL), the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on the Control of Harmful Anti-fouling Systems on Ships (Anti-Fouling Convention) and the International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM Convention). In addition, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) regulates hazardous wastes carried by ships.

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① United Nations Convention on the Law of the Sea 20th Anniversary (1982—2002), *Oceans: The Source of Life*, p. 3, at http://www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf, 1 May 2011.

② Shipping Facts, at http://www.marisec.org/shippingfacts/environmental/small—contribution—to—overall—marine—pollution.php, 2 May 2011.

③ Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998, pp. 18-19.

④ *See* Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998, pp. 21-25.

Vessel-source pollution can be either accidental or operational pollution.[①] Although accidental pollution is the most well-known due to several oil tanker spills (*Torrey Canyon* (1967), *Amoco Cadiz* (1987), *Exxon Valdez* (1989), *Erika* (1999) and *Prestige* (2002), it contributes a relatively small part to the total marine pollution caused by vessels. This paper focuses on the international legal framework of the prevention of vessel-source pollution, especially its fast development and challenges in the last decade. It is also an attempt at providing a better understanding of the international legal regime.

Ⅱ. IMO and the Law of the Sea Convention

A. *International Maritime Organization*

The United Nations and related international organizations ha the ability to influence the international policy-making agenda, and to initiate or facilitate many of the most important law-making developments.[②] This is the case for the IMO. The main purposes of the IMO are to provide a platform for co-operation among governments in the field of governmental regulation and practices related to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.[③] Originally the functions of the IMO were to be only "consultative and advisory." With the entry into force of the 1982 amendments to the Convention on the International Maritime Organization (IMO Convention), the IMO can also perform functions "assigned to it by or under international instruments relating to maritime matters and the effect of shipping on the marine environment."[④] The expression "competent international organization" in singular in the United Nations Law of the Sea Convention (LOSC) applies exclusively to the IMO, bear-

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① *See* Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998, p. 20. Molenaar distinguishes vessel-source pollution into three types: accidental, operational and vessel-source air pollution. However, the author believes that air pollution is also emitted during the operation of a vessel and thus should be treated as operational pollution too.

② Patricia Birnie and Alan Boyle, *International Law and The Environment*, 2nd ed., Oxford: Oxford University Press, 2002, p. 35.

③ Art. 1(a), Convention on the International Maritime Organization.

④ Art. 2(d) of the IMO Convention.

ing in mind the global mandate of the Organization as a specialized agency within the United Nations system established by the IMO Convention. [①]

Nowadays, the IMO has six main bodies concerned with the adoption or implementation of conventions. The Assembly and Council are the main organs, and committees involved are the Maritime Safety Committee (MSC), the Marine Environment Protection Committee (MEPC), the Legal Committee and the Facilitation Committee. The formal sessions of negotiating committees involve debates and decisions, but the general IMO approach is to establish treaties by consensus. [②] After the adoption of a convention, sometimes it still takes long time to wait for its enforcement. Each convention has to meet certain conditions in order to come into force. In general, there are various conditions, but the two main issues are the number of ratifications and the representative of world's gross tonnage. They become more stringent depending on the complexity of the document. [③]The IMO has improved its procedures over the years to ensure that changes can be introduced more quickly after the adoption of legally binding international instruments, mainly annexes to conventions. One of the most successful of these has been the process known as "tacit acceptance". It means that the body which adopts the amendment to an annex by a majority vote determines the start of enforcement and the time within which the contracting parties have the opportunity to notify their rejection of the amendment. A decision taken by majority will be binding for States that did not support the decision, unless they explicitly opt out within the foreseen period. In case there are no objections the amendment is considered accepted by the party. [④] The procedure is so popular that it is incorporated in many important IMO conventions such as MARPOL and SOLAS.

The enforcement of IMO conventions depends on member States. According to the LOSC, the States should control and set penalties for ships flying their own flags or of their registry. Moreover, port States and coastal States also have certain powers for regulating foreign vessels, which will be discussed

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① IMO LEG/MISC/6, 10 September 2008, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, a study by the Secretariat of the IMO, 7.

② Nicholas Gaskell, Decision Making and the Legal Committee of the International Maritime Organization, *International Journal of Marine and Coastal Law*, vol. 18, 2003, p. 186.

③ Z. Oya Ozcayir, IMO Conventions: The Tacit Consent Procedure and Some Recent Examples, *Journal of International Maritime Law*, vol. 10, 2004, p. 205.

④ IMO LEGXII / 8 Annex II, 8.

below.

B. The Law of the Sea Convention

Called by Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, as "A Constitution for the Oceans," the LOSC was signed on 10 December 1982 and enforced on 28 July 1996. ① The regime for preventing vessel-source pollution is aptly described in the Part XII of LOSC as "Protection and Preservation of the Marine Environment," Part II "Territorial Sea and Contiguous Zone" and Part V "Exclusive Economic Zone." In the LOSC, legislative or enforcement jurisdiction that a State has in respect of a particular vessel varies depending on whether it is a flag, coastal or port State. ② The LOSC allocated State jurisdiction among flag, coastal and port States, thus created a jurisdictional regime and a safety net for the prevention of vessel-source pollution. The jurisdictional regime attempts to balance the interests of flag States in a system which safeguards the freedom of navigation and is globally uniform. It also takes into account the interests of coastal States which can exercise jurisdiction for the protection and preservation of the marine environment. ③ It reflects a carefully balanced compromise between States with maritime interests and States with coastal interests. ④

The flag States' duty to exercise effective prescriptive and enforcement ju-

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① *See* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective, 3 May 2011.

② Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 344. Flag State is the State whose nationality a particular vessel has. LOSC does not define "port" or "coastal" State. According to Churchill and Lowe, coastal State is the State in one of whose maritime zones a particular vessel lies; port State is the State in one of whose ports a particular vessel lies. However, Molenaar thinks that account should not only be taken of the type of enforcement (in-port or at sea), but also the locus of the violation and the type of standard subject to enforcement. What should nevertheless be clear is that port or coastal State jurisdiction always implies jurisdiction over foreign vessels. *See* Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998, pp. 92-93.

③ *See* Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998, p. 135.

④ *See* Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 346.

risdiction over its ships is laid down in general terms in Art. 94 (1).[①][②] According to Art. 211 of LOSC, flag States are required to enact legislation that "shall at least have the same effect as" that of generally accepted international rules and standards. International standards therefore only form a minimum threshold for legislative jurisdiction of flag States. When it comes to enforcement jurisdiction, Art. 217 provides that flag States must enforce violations of pollution laws applying to their ships wherever committed. Moreover, under Art. 228, if the flag State institute its own proceeding, any coastal State shall suspend its proceedings to impose penalties with respect to any violation of applicable laws and regulations or international rules and standards related to the prevention, reduction and control of pollution from vessels committed by a foreign vessel beyond its territorial sea. The LOSC provides Flag States with the main duty to prevent vessel-source pollution. However, in reality, the effectiveness of flag States jurisdiction is always not satisfactory. [③] It still needs coastal States and port States jurisdiction to enhance the so-called safety net on the prevention of vessel-source pollution.

With respect to coastal State jurisdiction, it varies in different maritime zones divided by the LOSC. [④] For the legislative jurisdiction, the coastal State may adopt laws and regulations in the territorial sea without hampering innocent passage of foreign vessels for protecting marine environment (Art. 21

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① It reads that every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

② For a recent analysis of flag State jurisdiction, *see* Nivedita M. Hosanee, A Critical Analysis of Flag State Duties as Laid Down under Article 94 of the 1982 United Nations Convention on the Law of the Sea, at http://www.un.org/Depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/hosanee_0910_mauritious.pdf, 5 May 2011.

③ For the lack of incentives for flag State enforcement, *see* Alan Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2006, pp. 47-61. *See* also, Awni Behnam and Peter Faust, Twilight of Flag State Control, *Ocean Yearbook*, vol. 17, 2003, pp. 167～192.

④ For more discussion, *see* Christopher P. Mooradian, Protecting "Sovereign Rights": The Case for Increased *Coastal State Jurisdiction over Vessel-Source Pollution* in the Exclusive Economic Zone, *Boston University Law Review*, vol. 82, 2002, pp. 767-816. Julian Roberts and Martin Tsamenyi, The Regulation of Navigation under International Law: a Tool for Protecting Sensitive Marine Environments, in Tafsir Malick Ndiaye and Rudiger Wolfrum ed., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007, pp. 787-810. *See* also Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998, pp. 18-19.

(1)). However, such laws and regulations cannot apply to design, construction, manning or equipment (CDEM) of foreign ships unless they give effect to generally accepted international rules or standards (Art. 21 (2)). In the Exclusive Economic Zone (EEZ), the coastal State legislative jurisdiction is even more restricted. Under Art. 211 (5) a coastal State may adopt pollution legislation for its EEZ which conforms and gives effect to "generally accepted international rules and standards established through the competent international organization or general diplomatic conference."

As for the enforcement, coastal States are governed by Art. 220 of the LOSC. When there are clear grounds for believing that a foreign vessel navigating in the territorial sea has violated laws and regulations of that coastal State, costal States may undertake physical inspection of the vessel and may, when the evidence so warrants, institute proceedings, including detention (Art. 220(2)). When an alleged violation happened in the EEZ, coastal States may require the vessel within its territorial sea or EEZ to give information regarding its identity and port of registry, its last and next port of call and other relevant information required to establish whether a violation has occurred (Art. 220 (3)). If the violation in the EEZ has resulted in "a substantial discharge causing or threatening significant pollution of the marine environment," the coastal State may undertake physical inspection of the vessel for matters related to the violation if the vessel has refused to provide information or if the given information is manifestly incorrect (Art. 220 (5)). In case the violation has resulted in "a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or EEZ," the coastal State may institute proceedings, including detention of the vessel (Art. 220 (6)). Nevertheless, terms like "substantial discharge" and "major damage" are quite vague.

The most radical innovations made to the enforcement of marine pollution standards by the LOSC concern the powers given to port States. [1] Ports lie wholly within a state's territory and therefore fall under its territorial sovereignty. Customary international law acknowledges a port state's wide discretion in exercising jurisdiction over its port. [2] The International Court of Justice

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[1] *See* Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 350.

[2] Erik Jaap. Molenaar, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, *Ocean Development & International Law*, vol. 38, 2007, p. 227.

in the Nicaragua case states that it is by virtue of its sovereignty that the coastal state may regulate access to its ports. ① This is implicitly confirmed by Art. 25 (2), 211 (3) and 255 of the LOSC. It is generally agreed that a vessel's right of access to ports is only a presumption, not an obligation for port states. ② This provides a legal basis for port State Jurisdiction. Port State Jurisdiction and Port State Control are different. Port State Jurisdiction concerns the port State's powers to investigate ships and impose fines on them for violation of international rules and standards. In the full sense of port State jurisdiction, it also relates to prosecution for offences committed beyond the maritime zones of the (coastal) state under Art. 218 of the LOSC. With Port State Control, the port State limits itself in taking an administrative measures of control, such as detaining a ship in port until various corrective measures have been taken or ordering it to proceed to the nearest shipyard for repairs. ③ Under Art. 218 of the LOSC, ④ the port State has jurisdiction (optional, not mandatory) over any discharge/offence from a vessel, even when it occurs outside its internal waters, territorial sea or EEZ, and if applicable international rules and standards like MARPOL are violated. ⑤

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① Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), [1986] I. C. J. Rep., at. 111, para. 123.

② *See* Erik Jaap Molenaar, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, *Ocean Development & International Law* vol. 38, 2007, p. 227. *See* also Louis De La Fayette, Access to Ports in International Law, *International Journal of Marine and Coastal Law*, vol. 11, 1996, pp. 1-21. Ted L. McDorman, Regional Port State Control Agreemtns: Some Issues of International Law, *Ocean and Coastal Law Journal*, vol. 5, 2000, pp. 217-218.

③ Ho-Sam Bang, Is Port State Control an Effective Means to Combat Vessel-Source Pollution? An Empirical Survey of the Practical Exercise by Port States of Their Powers of Control, *International Journal of Marine and Coastal Law*, vol. 23, 2008, p. 717. For details about Port State Control, *see* Z. Oya Ozcayir, The Use of Port State Control in Maritime Industry and Application of the Paris MOU, *Ocean and Coastal Law Journal*, vol. 14, 2008—2009, pp. 201-239. *See* also, Z. Oya Ozcayir, *Port State Control*, LLP, 2001.

④ A Critique of Art. 218, *see* H. S. Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea, 40 (2009) 291—309.

⑤ Michael G. Faure and James Hu, *Prevention and Compensation of Marine Pollution Damage: Recent Development in Europe, China and the US*, Alphen aan den Rijn: Kluwer Law International, 2006, p. 46.

Ⅲ. IMO Conventions Interface with the Law of the Sea Convention

As defined by Shabtai Rosenne, the IMO interface with the LOSC. Interface means that independent and often incompatible systems interact or communicate with each other. [①]

A. *Historical Overviews* [②]

There are four main periods in the evolution of the interrelation between the IMO safety and antipollution regulations and development of the LOSC. From 1959 to 1973, intense treaty making was in progress at the IMO without any comprehensive law of the sea treaty framework. Between 1973 and 1982, UNCLOS III was in parallel to the adoption of the most important IMO treaties. From its adoption until its enforcement (1992—1994), the LOSC served as an important reference to the on-going regulatory work undertaken by the IMO. The last period is from 1994 to present, which features the dynamic interaction between the LOSC in force and the IMO treaties.

B. *Binding Nature of the LOSC references to IMO Regulations*

In terms of State jurisdiction, the LOSC defines the features and extent of the concepts of flag, coastal and port State jurisdiction, while the IMO instruments specify how State jurisdiction should be exercised to ensure compliance with safety and antipollution shipping regulations. [③]

The LOSC is acknowledged to be an "umbrella convention" because most of its provisions, being of a general kind, can be implemented only through spe-

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① Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 251.

② For details, *see* Augustin Blanco-Bazan, IMO Interface with the Law of the Sea Convention, at http://www.imo.org/INFOrESOURCE/mainframe.asp? topic_id=406&doc_id=1077, 11 May 2011. *See also* Erik Jaap. Molenaar, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, *Ocean Development & International Law*, vol. 38, 2007, pp. 269-275.

③ LEG/MISC/6, 10 September 2008, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, a study by the Secretariat of the IMO, p. 13.

cific operative regulations in other international agreements.[①] Several provisions of the LOSC require States to "take into account," "conform to," "give effect to" or "implement" relevant international rules or standards which are referred to as "applicable international rules and standards," "internationally agreed rules, standards, and recommended practices and procedures," "generally accepted international rules and standards," "generally accepted international regulations," "applicable international instruments" or "generally accepted international regulations, procedures and practices" developed by or through the "competent international organization (IMO)." These provisions clearly establish an obligation for the LOSC States Parties to apply IMO rules and standards. However, two questions are raised. Firstly, whether parties to the LOSC should implement generally accepted IMO rules and standards irrespective of whether they are or not party to the treaty where these rules and standards are contained. Secondly, the first question also results in confusion for the meaning of "general."

The first question is about "incorporation by reference."[②] It can be argued that it is irrelevant for States parties to the LOSC to become parties to basic IMO treaties since the LOSC includes obligations to comply with all generally accepted IMO rules and standards. However, the problem is that this interpretation will encourage many States seek to enforce IMO rules and standards in respect of foreign vessels as national legislation without complying with their obligations, e. g. without providing the corresponding reception facilities prescribed by MARPOL. Moreover, the LOSC obligations to apply IMO rules and standards should not be considered in a unilateral way, otherwise it will break the treaty law structure and the legal certainty. Furthermore, since the "umbrella" provisions are different from the extremely precise IMO regulations, a violation of MARPOL rules absolutely can not be treated as a violation of the LOSC.

The need to consider IMO rules and standards intrinsically associated with the treaty in which they are contained is also relevant for consistent legal inter-

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① LEG/MISC/6, 10 September 2008, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, a study by the Secretariat of the IMO, p. 8.

② The method of making one document of any kind becomes a part of another separate document by alluding to the former in the latter and declaring that the former shall be taken and considered as a part of the latter the same as if it were completely set out therein.

pretation of the requirement of their "general acceptance."[①] It was well analyzed in the London 2000 Conference Report, put together by the Former Committee on Coastal State Jurisdiction Related to Marine Pollution of the International Law Association. According to the report, the purpose of the concept of "generally accepted international rules and standards" within the framework of the LOSC is to give expression to the "umbrella" function of Part XII, which aims at securing the primacy of international rules and standards over national laws and regulations.[②] Based on the drafting history of the notion of generally accepted international rules and standards, the application of this concept to the environmental sphere in the 1982 Convention is believed to retain the same ultimate objective, namely to make compulsory for all states certain rules which had not taken the form of an international convention in force for the states concerned, but which were nevertheless respected by most states. Generally accepted international rules and standards cannot be equated with customary law or with legal instruments in force for the states concerned. Instead, they are primarily based on state practice, attaching only secondary importance to the nature and status of the instrument containing the respective rule or standard.[③]

C. *Environmental LOSC and IMO rules and standards*

For the protection of marine environment, the LOSC as "umbrella convention" has been greatly altered in Part XII, which includes specific provisions of an operative kind and can be directly implemented. Therefore, these provisions can be interpreted together with IMO treaties, especially MARPOL.

Both the LOSC and the MARPOL are dealing with the protection of marine pollution by ensuring that anti-pollution preventative measures are properly implemented. However, while the LOSC focuses more on illegal discharge, the MARPOL also pays attention to Construction, Design, Equipment and Manning (CDEM) measures on board irrespective of whether discharges take place or not. The distinction has important consequences in connection with

① *See* Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 282.

② Conference Report London 2000, pp. 31-32, at http://www.ila—hq.org/en/committees/index.cfm/cid/12, 13 May 2011.

③ Conference Report London 2000, p. 34, at http://www.ila—hq.org/en/committees/index.cfm/cid/12, 13 May 2011.

the application of penalties.[①] According to Art. 230 of the LOSC, penalties other than monetary ones can be imposed only in case of "a willful and serious act of pollution in the territorial sea." In other words, violations of MARPOL rules resulting in substandard navigation without both willful misconduct and polluting discharges can be sanctioned only with monetary penalties.

Ⅳ. Post－UNCED

Since the 1992 United Nations Conference on Environment and Development (UNCED), two important treaties have been adopted: the Convention on Biological Diversity (CBD) and the United Framework Convention on Climate Change (UNFCCC). The UNCED has also issued two non-binding documents: the official Declaration of the Conference (Rio Declaration) and Agenda 21. These instruments have now entered into the process of international law-making. They are being applied in various formulations throughout the UN system and in all bodies involved in environmental protection, including protection of marine environment and achievement of sustainable development outside this system, as well as in States' national legislation.[②] The international law on the protection of marine environment lies in an overlapping area between the law of the sea and the international environmental law, containing elements of each and belonging to both.[③]

As the general terms in the Part XII of LOSC require interpretation and further development, they now should be interpreted in the context of the UNCED principles, which aim at achieving the general notion of "sustainable development."[④] The precautionary principle has also been applied in the field of marine environment protection as part of international environment law.[⑤]

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① *See.* Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 285.

② *See.* Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 361.

③ Louis De La Fayette, The Marine Environment Protection Committee: The Conjunction of the Law of the Sea and International Environmental Law, *The International Journal of Marine and Coastal Law*, vol. 16, 2001, p. 158.

④ *See.* Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 362.

⑤ Benedicte Sage, Precautionary Coastal States' Jurisdiction, *Ocean Development and International* Law, vol. 37, 2006, pp. 359-371. *See* also David Vanderzwaag, The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides, *Ocean Development and International* Law, vol. 33, 2002, pp. 165-188.

Moreover, the IMO has both the institutional machinery and powers necessary to fulfill most of the demands resulting from the application of the Rio Declaration, Agenda 21 and the new convention, if its Member States are willing to use them for these purposes. ①

Ⅴ. IMO Conventions

A. *MARPOL 73/78*

Art. 211(1) of the LOSC lays down a general obligation for states, acting through the competent international organization (IMO) or general diplomatic conference, to establish international rules and standards regarding vessel-sourced pollution, and to re-examine them from time to time as necessary. The main IMO treaty in this area is MARPOL, which is a combination of two treaties adopted in 1973 and 1978 respectively and updated by amendments through the years. Art. 2 (2) and (3) of MARPOL includes a definition of "harmful substances" which is entirely compatible with the definition of "pollution of the marine environment" included in article 1(4) of LOSC. Both definitions refer to the introduction of substances into the marine environment which results or can result in hazards to human health, harm to resources and hindrance to legitimate use of the sea. While the definition included in the LOSC applies to all sources of marine pollution, the MARPOL deals only with pollution from vessels and accordingly includes a definition of "discharges" from ships.

The enforcement of MARPOL relies primarily on the exercise of flag State jurisdiction regarding the features of CDEM of ships. The MARPOL also includes regulations on the inspection of foreign ships voluntarily in port to ensure that they comply with antipollution rules and standards and to prevent the ship from sailing if these requirements are not met. Furthermore, the MARPOL entitles port States to institute proceedings in accordance with their law. Provisions on the institution of proceedings in this regard should be read together with the regulations included in Art. 228 of the LOSC.

The MARPOL and its amendments cover all technical aspects to prevent and reduce pollution from ships, except the disposal of waste into the sea by dumping, and apply to ships of all types, although it does not apply to pollution

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① *See*. Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 369.

from offshore exploration and exploitation. The MARPOL has two Protocols dealing with Reports on Incidents involving Harmful Substances and Arbitration, and six Annexes that contain regulations for the prevention of various forms of pollution:

Annex I deals with pollution by oil. It introduces discharge limits for oil and oil contaminated water from ships of more than 400 tons gross tonnage; equipment regulations to fulfil he discharge standards (15 ppm oil-discharge monitoring and control system, oil-water separating equipment and a filtering system, slop tanks, sludge tanks, piping and pumping arrangements separated from the cargo pipes); technical standards for oil tankers to limit oil spills after an accident-collision, stranding or grounding — such as subdivision of cargo spaces; damage stability requirements and the double hull concept; segregated ballast tanks (SBT) and dedicated clean ballast tanks (CBT) to avoid ballasting in tanks used for oil cargo; crude oil washing (COW) instead of water washing; and an International Oil Pollution Prevention Certificate (IOPPC).

Amendments to the MARPOL imposing double hull or equivalent design requirements for oil tankers delivered on or after 6 July 1996 were adopted by the IMO on 6 March 1992 and enforced on 6 July 1993. Within these amendments, a phasing-out scheme for single hull oil tankers delivered before that date took effect from 6 July 1995 requiring tankers delivered before 1 June 1982 to comply with the double hull or equivalent design standards not later than 25 years and, in some cases, 30 years after the date of their delivery. Such existing single hull oil tankers would not be allowed to operate beyond 2007 and, in some cases, 2012 unless they comply with the double hull or equivalent design requirements of Regulation 13F of Annex I of MARPOL 73/78. For existing single hull oil tankers delivered after 1 June 1982 or those delivered before 1 June 1982 and which are converted, complying with the requirements of MARPOL 73/78 on segregated ballast tanks and their protective location, this deadline would be 2026 at the latest. [①] After the "Erika" disaster in 1999 the European Union (EU) believes that the normal framework for international action on maritime safety under the auspices of the International Maritime Organization falls short of what is needed to tackle the causes of such disasters ef-

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① Regulation (EC) No 417/2002 (On the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94), O. J. L 64, 7. 3. 2002, 2.

fectively.[1] The EU decided to accelerate phasing out single hull tankers internally. As part of the Erika I package Regulation (EC) No. 417/2002 was adopted (Art. 3,4) with deadlines for three categories of single hull tankers. Meanwhile, member States submitted a joint proposal to the IMO with the intention to amend the MARPOL. Despite facing controversial debate, the EU's joint proposal was passed finally and MARPOL was amended in 2001, adopting the same deadlines as the EU for phasing out single hull tankers. In 2003 in the aftermath of the "Prestige" disaster, the EU enacted Regulation (EC) No. 1726/2003, which for the second time accelerated the deadlines set by Regulation (EC) No. 417/2002. Subsequently, a joint proposal from EU Member States was on the table of IMO for decision-making. It was extensively discussed at the 50th MEPC and raised great concern from the outside world. Concerns were raised that the EU's unilateral approach undermined the authority of the IMO and created pressure for other countries, especially developing countries. However, once again the IMO accepted the EU Member States' proposal. The MARPOL amendment, entered into force by tacit acceptance procedure with the same deadline as the EU regulation.[2]

Annex II deals with pollution by noxious liquid substances carried in bulk. Discharge criteria are established for different types of chemicals in different operating environments, and standards have been established for tank washing and associated pumping and piping arrangements. Initially some 250 substances were evaluated and included in the list appended to the Convention. The discharge of residues of those chemical substances is allowed only to reception facilities until certain concentrations and conditions (which vary with the category of substances) are complied with. In any case, no discharge of residues containing noxious substances is permitted within 12 miles of the nearest land.

Annex III is the first of the convention's optional annexes and deals with pollution by harmful substances carried in packages, portable tanks, freight containers, road or rail tank wagons, etc. It contains general requirements for the issuing of detailed standards on packing, marking, labelling, documenta-

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① COM (2000)142 final, 2.

② For details about EU's initiatives and response in the IMO, *see* Veronique Frank, Consequences of the Prestige sinking for European and international law, *International Journal of Marine and Coastal Law*, vol. 20, 2005, pp. 18-21. For more details about the phase-out single hull tankers in IMO, *see* Alan Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2006, pp. 139-155.

tion, stowage, quantity limitations, exceptions and notifications for preventing pollution by harmful substances. "Harmful substances" covered by Annex III are those substances which are identified as marine pollutants in the IMO International Maritime Dangerous Goods Code (IMDG Code).

Annex IV contains requirements to control pollution of the sea by sewage. Annex V on pollution by garbage from ships, deals with different types of garbage and specifies the distances from land and the manner in which they may be disposed of. Perhaps the most important feature of the Annex is the complete ban imposed on the dumping into the sea of all forms of plastic.

A Protocol adopted at the Conference of the Parties in September 1997 introduced a new Annex VI, amending MARPOL 73/78. Annex VI entered into force on 19 May 2005 and deals with regulations for the prevention of air pollution from ships. March 2010 amendments to Annex VI were enforced on 1 August 2011. It formally established a North American Emission Control Area, in which emissions of sulphur oxides (SOx), nitrogen oxides (NOx) and particulate matter from ships are subject to more stringent controls than the limits that apply globally. ①

Annexes I, II, and V of MAPOL contain special mandatory requirements for certain areas (special areas) regarding the prevention of operational discharges of harmful substances. In general terms, the requirements for discharges in special areas are stricter than those outside them. ② A comparison between areas requiring special mandatory measures mentioned in Art. 211 (6) of UNCLOS and provisions on Special Areas under MARPOL indicates that, while the former are restricted in jurisdictional scope to the EEZ, the MARPOL Special Area provisions cover enclosed or semi-enclosed areas which may include parts of the territorial sea, the EEZ and the high seas. While MARPOL special requirements only apply to the discharge of harmful substances, Art. 211 (6) of UNCLOS does not contain any specification as to the kind of measures that may be taken.

Moreover, the Special Area is different from Particularly Sensitive Areas

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① *See* http://www.imo.org/About/Conventions/Pages/Action—Dates.aspx, 16 May 2011.

② JingJing Xu, The Public Law Framework of Ship-Source Oil Pollution, *Journal of International Maritime Law*, vol. 13, 2007, p. 423.

(PSSAs) *that are contained in the* IMO R*esolution* A. 927 (22)[1] and A. 982 (24)[2].[3] PSSA is an area which needs special protection through action by the IMO because of its significance for recognized ecological, socio-economic or scientific reasons; it may be vulnerable to damage by international shipping activities. PSSA is like an "empty vessel" as it entails no inherent protective mechanisms,[4] but needs to be accompanied by specific Associated Protective Measures (APM). Currently, the most famous PSSA is the West European PSSA, which covers a vast area from the Shetland Islands north of Scotland to the southern Portuguese-Spanish border in the respective States' EEZ and territorial seas.

B. SOLAS

Chapter V of SOLAS requires ships to carry voyage data recorders (VDRs). The regulations entered into force on 1 July 2002 and all new ships built on or after that date have to be equipped with VDRs. Like the black boxes carried on aircraft, VDRs enable accident investigators to review procedures and instructions in the moments before an incident and to help identify the cause of any accident. Chapter V also makes it mandatory for certain ships to carry an automatic identification system (AIS).

In accordance with Art. 22(3)(a) of the LOSC, coastal states must, in the designation of sea lanes and the prescription of traffic separation schemes in territorial sea, "take into account", *inter alia*, "the recommendations of the competent international organization"(IMO). In the case of sea lanes, the relevant IMO's provisions are contained in SOLAS regulation V/8. Regulation V/8 establishes that ships' routeing systems "are recommended for use by, and may be made mandatory for, all ships, certain categories of ships or ships carrying certain cargoes, when adopted and implemented in accordance with the

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① IMO Assembly, Resolution A. 927(22) adopted on 29 November 2001. Guidelines for the designation of special areas under MARPOL 73/78 and guidelines for the identification and designation of particularly sensitive sea areas. A 22/Res . 927, 15 January 2002.

② Resolution A. 982(24) revokes annex 2 of resolution A. 927(22). IMO Assembly, Resolution A. 982(24) adopted on 1 December 2005. Revised guidelines for the identification and designation of particularly sensitive sea areas. A 24/Res. 982, 6 February 2006.

③ For details, *see* Nihan Unlu, Particularly Sensitive Sea Areas: Past, Present and Future, *WMU Journal of Maritime Affairs*, vol. 3, 2004, pp. 159-169.

④ Markus Detjen, The Western European PSSA-testing a unique international concept to protect imperiled marine ecosystems, *Marine Policy*, vol. 30, 2006, pp. 442-453.

guidelines and criteria developed by the Organization"(IMO). paragraph (d) of regulation V/8 acknowledges that the initiation of establishing ships' routeing system is the responsibility of the Governments or Government concerned, which should take into account the guidelines and criteria developed by the IMO.

SOLAS regulation V/8-1 enables States to adopt and implement mandatory ship reporting in accordance with guidelines and criteria developed by the IMO. The regulation makes it mandatory for ships entering areas covered by ship reporting systems to report in to the coastal authorities giving details of sailing plans. Other information may be also required in case of certain categories of ships and ships carrying certain cargoes. SOLAS regulation V/8-2 deals with vessel traffic services and provides that the use of a VTS may only be made mandatory in sea areas within the territorial sea of a coastal State.

Ships carrying dangerous cargo are subject to chapter Ⅶ of SOLAS, which regulates safety measures, including their safe packaging and stowage, applicable to the carriage of dangerous goods by sea. This chapter is supplemented by several IMO codes, namely: the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code), the International Code for the Construction and Equipment of Ships Carrying Liquified Gases in Bulk (IGC Code) (regulation Ⅶ/13), the International Maritime Dangerous Goods Code (IMDG Code), and the Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships (INF Code).

C. *Anti-Fouling Convention*

Anti-fouling paints are used to coat the bottoms of ships to prevent sea life such as algae and molluscs attaching themselves to the hull-thereby slowing down the ship and increasing fuel consumption. In the early days of sailing ships, lime and later arsenic were used to coat ships' hulls, until the modern chemicals industry developed effective anti-fouling paints using metallic compounds. These compounds slowly "leach" into the seawater, killing barnacles and other marine life that have attached to the ship. But studies have shown that these compounds persist in the water, killing sea life, harming the environment and possibly entering the food chain. One of the most effective anti-fouling paints, developed in the 1960s, contains the organotin tributylin (TBT), which has been proven to cause deformations in oysters and sex changes in

whelks.

The harmful environmental effects of organotin compounds were recognized by the IMO in 1989. In 1990 IMO's Marine Environment Protection Committee (MEPC) adopted a resolution which recommended that Governments adopt measures to eliminate the use of anti-fouling paint containing TBT on non-aluminium hulled vessels of less than 25 metres in length and eliminate the use of anti-fouling paints with a leaching rate of more than four microgram's of TBT per day. In November 1999, the IMO adopted an Assembly resolution that called on the MEPC to develop an instrument, legally binding throughout the world, to address the harmful effects of anti-fouling systems used on ships. The resolution called for a global prohibition on the application of organotin compounds which act as biocides in anti-fouling systems on ships by 1 January 2003, and a complete prohibition by 1 January 2008.

The new Convention adopted on 5 October 2001 (entry into force 17 Sept 2008) defines "anti-fouling systems" as "a coating, paint, surface treatment, surface or device that is used on a ship to control or prevent attachment of unwanted organisms." Under the terms of the new Convention, Parties to the Convention are required to prohibit and/or restrict the use of harmful anti-fouling systems on ships flying their flag, as well as ships not entitled to fly their flag but which operate under their authority and all ships that enter a port, shipyard or offshore terminal of a Party. Ships of above 400 gross tonnage and above engaged in international voyages (excluding fixed or floating platforms, FSUs and FPSOs) are required to undergo an initial survey before the ship is put into service or before the International Anti-fouling System Certificate is issued for the first time; and a survey when the anti-fouling systems are changed or replaced. Ships of 24 metres or more in length but less than 400 gross tonnage engaged in international voyages (excluding fixed or floating platforms, floating storage units (FSUs) and Floating Production Storage and Offtake units (FPSOs) have to carry a Declaration on Anti-fouling Systems signed by the owner or authorized agent. The Declaration will have to be accompanied by appropriate documentation such as a paint receipt or contractor Invoice.

Anti-fouling systems to be prohibited or controlled will be listed in an annex (Annex I) to the Convention, which will be updated as and when necessary. Annex I attached to the Convention states that by an effective date of 1 January 2003, all ships shall not apply or re-apply organotin compounds which act as biocides in anti-fouling systems. By 1 January 2008 (effective date),

ships either: (a) shall not bear such compounds on their hulls or external parts or surfaces; or (b) shall bear a coating that forms a barrier to such compounds leaching from the underlying non-compliant anti-fouling systems. This applies to all ships, including fixed and floating platforms, FSUs, and FPSOs. The Convention includes a clause in Article 13 stating that a ship shall be entitled to compensation if it is unduly detained or delayed while undergoing inspection for possible violations of the Convention. The Convention provides for the establishment of a "technical group" of experts to review proposals for other substances used in anti-fouling systems to be prohibited or restricted. Article 6 on the Process of Proposing Amendments to controls of Anti-fouling systems sets out the evaluation method of an anti-fouling system.

D. BWM Convention

One of the earliest references to marine alien species in an international instrument can be found in Article 196(1) of the LOSC. ① It provides that States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction and control, or from intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.

However, since 1982 the evolution of global comprehension of the relationship between human activities and environment, and the concept of sustainable development has taken the next step to an even more holistic or integral approach based on an ecosystemic view. ② The 1992 Convention on Biological Diversity (CBD) was adopted and widely accepted by States. ③ According to the Article 8(h), each Contracting Party shall, as far as possible and as appropriate, prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.

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① Karen Scott, Defending the World below the Brine, Managing Invasive Species under the 2004 Ballast Water Convention — A New Zealand Perspective, *Journal of International Maritime Law*, vol. 14, 2008, p. 309.

② Moira L. McConnell, Ballast and Biosecurity: The Legal, Economic and Safety Implications of the Developing International Regime to Prevent the Spread of Harmful Aquatic Organisms and Pathogens in Ships' Ballast Water, *Ocean Yearbook*, vol. 17, 2003, p. 238.

③ Until now, there are 193 parties of the CBD, *See* http://www.cbd.int/convention/parties/list/, 20 May 2011.

The IMO first adopted the 1973 International Convention for the Prevention of Pollution from Ships. It was amended by the 1978 Protocol (MARPOL) in order to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances.[①] Three aspects of MARPOL are of particular relevance to the BWM Convention through the establishment of special control in certain areas, certification and inspection regimes, and the provision of reception facilities.[②] Then, the IMO published the non-binding Guidelines for Preventing the Introduction of Unwanted Organisms and Pathogens from Ships' Ballast Water and Sediment Discharges, Resolution A. 774 (18) as interim solution in 1993; it was as revised by Resolution A. 868 (20) in 1997. The guidelines were an important development because they set forth internationally agreed management practices and called for uniform action by states. However, they rely heavily on the mid-ocean exchange of waters taken up from coastal waters in the vicinity of the port of origin for oceanic waters; and provide little incentive for treatment innovation.[③] Finally, the BWM Convention was adopted in 2004, which specifically focuses on invasive species from ballast water.

The BWM Convention will enter into force 12 months after the ratification of 30 states representing at least 35 per cent of gross tonnage of the world's merchant shipping.[④] Until 31 August 2011, 28 countries already ratified the convention, including some EU Member States (Sweden, Netherlands, France and Spain), shipping powers (Norway and South Korea), small islands countries (Maldives, Cook Islands, Marshall Islands and Tuvalu), developing countries (Mexico, Brazil, Egypt, Kenya, South Africa and etc), and Canada. Eleven countries ratified the BWM Convention during the period Sept 2009 — Sept 2010, which shows an emerging acceptance of the BWM Convention within international community. The BWM Convention established a two-tier process for ballast water management, including standards set by the Convention and more stringent rules from coastal States. The BWM Convention, together with

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① Para. 5, Preamble, MARPOL73/78.

② Maria Helena Fonseca De Souza Rolim, *The International Law on Ballast Water. Preventing Biopollution*, Leiden: Martinus Nijhoff Publishers, 2008, p. 54.

③ Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development and International Law*, vol. 36, 2005, p. 294.

④ Article 18(1), BWM Convention.

its Annex and supplementary guidelines, identifies four discrete elements integral to ballast water management: planning and record keeping; management of sediment uptake and discharge; management of ballast water uptake and discharge; and special area requirements. It also sets forth additional obligations related to notification and the provision of information, research and development, cooperation, enforcement and compliance. ① Furthermore, as recommended by the World Health Organization (WHO), the BWM Convention cross-references with Guide to Ship Sanitation and International Health Regulations, since there is a potential public health risk associated with the presence of pathogens in ballast water. ②

Ⅵ. Challenges for International Legal Regime

There is no doubt that a comprehensive international legal regime has been established for the prevention of vessel-source pollution during the past decades. However, great challenges still exist.

The need to enhance effective implementation and enforcement of international legal regime continues to be a challenge for the international community. Although lack of capacity and technical knowledge contributes to this issue, insufficient political will and lack of long-term integrated planning also plays a role. ③ The IMO is sometimes called "toothless tiger," since it has very limited powers to directly enforce international measures adopted under its ae-

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① *See* Resolution A. 982(24) revokes annex 2 of resolution A. 927(22). IMO Assembly, Resolution A. 982(24) adopted on 1 December 2005. Revised guidelines for the identification and designation of particularly sensitive sea areas. A 24/Res. 982, 6 February 2006, 312.

② For details, *see* Moira L. McConnell, Ballast and Biosecurity: The Legal, Economic and Safety Implications of the Developing International Regime to Prevent the Spread of Harmful Aquatic Organisms and Pathogens in Ships' Ballast Water, *Ocean Yearbook*, vol. 17, 2003, pp. 48-51.

③ Unedited reporting material on the topic of focus at the twelfth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, entitled: "Contributing to the assessment, in the context of the United Nations Conference on Sustainable Development, of progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges." A/66/70/Add. 1.

gis.[①] It is up to the domestic legal system to decide the position and the effect of an international norm within its territory.[②] Nevertheless, two major problems are addressed in relation to the effectiveness of international law. First, the states are expected to implement and comply with the stipulations of international conventions with little consideration for their capacity to do so. Second, the current international legal framework is state-centric, that is focusing on the efforts of states to control international oil pollution.[③] Progress has so far been slow and existing procedure still appear to be inadequate to bring about full compliance, which ultimately depends on the State parties.[④]

The absolute primacy of freedom of navigation is under challenge. Undoubtedly, freedom of navigation is enshrined in the LOSC. As mentioned above, the LOSC intends to establish a delicate balance between the freedom of navigation and coastal state jurisdiction. Nevertheless, it is believed that the concept of flag state jurisdiction cannot adequately address contemporary maritime concerns, including those related to marine environmental protection.[⑤] As pointed out by Alan Tan, the fundamental weakness of flag state jurisdiction is the fact that most flag states-whose vessels rarely venture into their own waters-have never had the incentive to regulate the activities of these vessels which cause harm to or affect the interests of other states.[⑥] It is believed that the current regime weighs too heavily in favor of the freedom of navigation. Coastal states lack the ability to impose or enforce effective antipollution meas-

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① E. g. In order to improve implementation and enforcement by flag States, the IMO approved the Voluntary IMO Member States Audit Scheme to provide a comprehensive and objective assessment of how effectively flag States administer and implement the mandatory IMO instruments covered by the Audit Scheme. In 2009, the IMO Assembly endorsed the decision of the IMO Council and agreed to make the Audit Scheme an institutionalized, mandatory scheme, which will only be phased in through the introduction of amendments to IMO instruments in 2013, for entry into force in Jan 2015. *See*. A/65/69/Add. 2, Paras. 73-74.

② Armin von Bogdandy, Pluralism, Direct Effect, and the Ultimate Say: on the Relationship. between International and Domestic Constitutional Law, *International Journal of Constitutional Law*, vol. 6, 2008, p. 397.

③ Emeka Duruigbo, Reforming the International Law and Policy on Marine Oil Pollution, *Journal of Maritime Law and Commerce*, vol. 31, 2000, pp. 81-85.

④ Veronique Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea, Implementing Global Obligations at the Regional Level*, Leiden: Martinus Nijhoff Publishers, 2007, p. 40.

⑤ *See* Alan Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2006, p. 18.

⑥ *See* Alan Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2006, p. 18.

ures before catastrophic accidents occur, even in EEZ areas with special ecological significance.[①] Accompanied with more concerns of marine environment, nowadays a creeping jurisdiction of costal states can be noticed in practice. This sometimes results in tension between regional/national law and international law. A typical case is the "Intertanko case (Case C308/06)" within the European Court of Justice in 2008. The shipping industry challenged the legality of European Union Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, particularly criminal penalties, for infringements. It is believed by the shipping industry that the Directive 2005/35/EC is in violation of the LOSC and the MARPOL and may cause heavier burden for shipping industry in European waters.[②]

Prevention of vessel-source pollution in areas beyond national jurisdiction is another issue which needs to be addressed. Under the current international legal regime, it is basically flag State's responsibility to prevent vessel-source pollution in the high sea. Coastal State plays a very limited role to protect marine environment in sea areas beyond their jurisdiction. Therefore, the marine environment in the high sea is becoming a "common tragedy."[③] How to effectively deal with vessel-source pollution in high sea? This is a question waiting for international and regional response.

Finally, green house gas emission from shipping is also a type of vessel-source pollution, which greatly contributes to global warming/climate change. The Second IMO Greenhouse Gas (GHG) Study 2009 estimates that 1,046 million tons of CO2 were emitted from shipping in 2007. This corresponds to 3.3 percent of the global emissions that year. International shipping is estimated to have emitted 870 million tons, or about 2.7 percent of the global emissions of CO2 in 2007. In the absence of measures to control emissions from ships emissions may grow from 150 percent to 250 percent of 2007 emissions by 2050 as a result of the growth in shipping.[④] Despite great efforts made by the IMO in recent years, there is still no binding international legal instrument dealing with reduction of GHG emission from shipping. The main question is

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① Chelsea Purvis, Coastal State Jurisdiction under UNCLOS: the Shen Neng 1 Grounding on the Great Barrier Reef, *Yale Journal of International Law*, vol. 36, 2011, p. 208.

② Case C308/06, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0308:EN:HTML, 29 May 2011.

③ Garret Hardin, The Tragedy of the Commons, *Science*, vol. 162, 1968, pp. 1243-1248.

④ Second IMO GHG Study 2009, Update of the 2000 IMO GHG Study, Executive Summary, MEPC 59/4/7, 9 April 2009.

how to apply the principle of "common but differentiated responsibility (CBDR)" to the shipping industry.① A proposal to include shipping emissions in the Copenhagen climate agreement was blocked by China, India, Saudi Arabia and Bahamas during the Copenhagen Climate Change Conference in 2009.② China's position is that the IMO should only consider technical issues, and leave political, legal, and economic matters to be decided by the Conference of Parties of the United Nations Framework Convention on Climate Change (UNFCCC).③ Moreover, China insists that the CBDR principle should be the key principle in the negotiation process within the IMO.④

Ⅷ. Conclusions

During the past decades, the international community has been making great effort to establish a comprehensive international legal regime for the prevention of vessel-source pollution. The LOSC is an "umbrella convention," which delicately divides jurisdiction between flag, coastal and port States. The IMO Conventions (MARPOL, SOLAS, BWM Convention, Anti-Fouling Convention and etc) are more technical. The LOSC and IMO conventions interface with each other and have extensively addressed the issue of vessel-source pollution. However, the main problem of international law is the implementation and enforcement of international law by sovereign States/regional power. Moreover, a rethinking of the relation between freedom of navigation and coastal

① Principle 7 of the Rio Declaration provides the first formulation of the CBDR, and it states: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." For the application of CBDR in shipping industry, one of the major problems is that a huge number of ships operate under flags of convenience. In that case, ship. owners from developed countries can easily disguise their identity. *See* Saiful Karim and Shawkat Alam, Climate Change and Reduction of Emissions of Greenhouse Gases from Ships: An Appraisal, *Asian Journal of International Law*, vol. 1, 2011, pp. 131-148.

② *See* http://www.seas—at—risk.org/news_n2.php? page=273, 29 May 2011.

③ Para. 5, Report of the Marine Environment Protection Committee on its 59th Session, statement by the Delegation of China on GHG Issues, MEPC 59/24Add. I (2009), Annex 13.

④ Report of the Marine Environment Protection Committee on its 60th Session, MEPC 60/22 (2010), Annex 4.

State jurisdiction is gaining much more support. Finally, serious issues such as prevention of vessel-source pollution in the high seas and reduction of GHG emission from shipping are not fully addressed by the international law.

(Editor: HUANG Haiqi;
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预防船舶污染的国际法律实践

刘能冶[*]

内容摘要:本文对预防船舶污染的国际法律框架进行了评析。第一部分重点讨论国际海事组织和《联合国海洋法公约》的关系。第二部分则分析了国际海事公约与《联合国海洋法公约》的关系。第三部分介评了相关的国际海事公约。最后,本文分析了预防船舶污染的国际法所面临的挑战。

关键词:船舶污染 航行自由 国际海事组织 海洋法公约

一、绪 论

保护海洋环境是当代的三大生态问题之一(另两大问题分别是气候变化和淡水资源短缺)。迄今,《联合国海洋法公约》通过已经接近30年,[①]然而世界海洋环境状况依然在持续恶化。[②]

《联合国海洋法公约》界定了几种主要的海洋污染源。其中包括陆源污染、倾废、船舶污染、海底活动的污染以及大气污染。来自船舶的污染大致占到海洋污染总量的12%。[③]由于航运业承担了国际贸易90%的运输量,因此船舶污染

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① The Third United Nations Conference on the Law of the Sea (UNCLOS III) was convened in New York in 1973. It ended nine years later with the adoption in 1982 of a constitution for the seas—the United Nations Convention on the Law of the Sea. *See* United Nations Division for Ocean Affairs and the Law of the Sea (DOLAS), *United Nations Convention on the Law of the Sea (a historical perspective)*, at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective, 1 May 2011.

② United Nations Convention on the Law of the Sea 20th Anniversary (1982—2002), *Oceans: The Source of Life*, p. 3, at http://www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf, 1 May 2011.

③ Shipping Facts, at http://www.marisec.org/shippingfacts/environmental/small-contribution-to-overall-marine-pollution.php, 2 May 2011.

也具有国际性的特点并受到发达的国际公约的规制。[1]除《联合国海洋法公约》之外，船舶污染主要受到国际海事组织制定的一系列国际条约的规制（以下统称国际海事公约）。在国际层面上，为预防船舶污染所设定的标准主要针对的是船舶的排放、船舶的建造、设计、装备和人员（CDEM）以及船舶的航行。[2]国际海事组织为此制定了《预防船舶污染公约》（MARPOL）、《海上人命安全公约》（SOLAS）、《船舶防污底公约》（Anti-Fouling Convention）以及《船舶压载水和沉积物管理与控制公约》（BWM Convention）等一系列国际公约。此外，《控制危险废料越境转移及其处置巴塞尔公约》.（Basel Convention）对船舶载运危险废物也进行了规范。

船舶污染可大致分为事故污染和营运污染。[3]船舶事故造成的污染通常为人们所熟知。比如 1967 年的 *Torrey Canyon* 号油轮沉没事故、1987 年的 *Amoco Cadiz* 号油轮泄漏事故、1989 年的 美国阿拉斯加 *Exxon Valdez* 号事故、1999 年 *Erika* 号 和 2002 年 *Prestige* 号油轮沉没事故。实际上，事故污染只占船舶污染海洋的一小部分。本文将重点介评预防船舶污染国际法律框架，以期加深读者对该法律框架的了解。

二、国际海事组织与《联合国海洋法公约》

（一）国际海事组织

联合国及其专门机构具有影响国际决策的能力。对于国际立法的发展往往起到推动和促进的作用。[4]在国际海事立法领域，国际海事组织（IMO）无疑扮演着这一重要角色。国家海事组织的主要目标是为各国政府对国际航运的规范提供合作平台并鼓励和促进海事安全、航行效率以及预防、控制和减少船舶污染。[5]最初，国际海事组织仅仅具备咨询和建议的权能。随着《建立国际海事组

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① Erik Jaap. Molenaar，*Coastal State Jurisdiction over Vessel-Source Pollution*，Hague：Kluwer Law International，1998，pp. 18-19.

② *See* Erik Jaap. Molenaar，*Coastal State Jurisdiction over Vessel-Source Pollution*，Hague：Kluwer Law International，1998，pp. 21-25.

③ *See* Erik Jaap. Molenaar，*Coastal State Jurisdiction over Vessel-Source Pollution*，Hague：Kluwer Law International，1998，p. 20. Molenaar distinguishes vessel-source pollution into three types：accidental，operational and vessel-source air pollution. However，the author believes that air pollution is also emitted during the operation of a vessel and thus should be treated as operational pollution too.

④ Patricia Birnie and Alan Boyle，*International Law and The Environment*，2nd ed.，Oxford：Oxford University Press，2002，p. 35.

⑤ Art. 1(a)，Convention on the International Maritime Organization.

织公约》1982 年修正案的生效，国际海事组织的权能扩展到了进行国际公约授权的海事活动以及规制航运业对海洋环境造成的影响。[①]作为国际海事领域唯一的联合国专门机构，《联合国海洋法公约》211 条第 2 款所称的“主管国际组织”（competent international organization）即指国际海事组织。[②]

国际海事组织设有大会和理事会，以及海上安全、法律、海上环境保护、技术合作、便利运输等 5 个委员会和一个秘书处。在各委员会的定期会议上，成员国可以对彼此关注的议题进行辩论，但国际海事公约的制定通常需要成员国达成共识（consensus）。[③] 国际海事公约制定之后，公约的生效往往需要更长的时间。每个国际海事公约都有其自己规定的生效条件。总的来说，批准条约的国家数及其所代表的世界航运业的吨位数是两个最重要的条件。[④] 为了使国际海事公约及其附件的修正案能够尽快生效，国际海事组织采用所谓默认生效（tacit acceptance）的机制。默认生效是指某个国际海事公约的附件修正案通过时，同时规定该修正案的生效时间。如果在规定的时间内没有成员国提出反对，则该修正案将自动生效，保持沉默的成员将被视为接受该修正案。[⑤]默认生效的机制大大提高了公约修正案的生效速度，因此被各国际海事公约（MARPOL、SOLAS 等）所广泛采用。

国际海事公约的适用和执行则有赖于各成员国，国际海事组织本身并不具备执行的全能。《联合国海洋法公约》将成员国分为船旗国、沿岸国和港口国。船旗国需对悬挂本国国旗的船舶实施管理。沿岸国和港口国亦对外国船舶造成的本国海域的污染拥有管辖权。具体内容，后文将详细论述。

（二）《联合国海洋法公约》

第三次联合国海洋法大会的主席，新加坡巡回大使许通美把《联合国海洋法公约》称为“人类的海洋宪章”。历经近十年的谈判，《联合国海洋法公约》于 1982 年 12 月 10 日向世界各国开放签署并最终于 1996 年 7 月 28 日生效。[⑥]第 12 章“海洋环境的保护与保全”对预防船舶污染进行了详细的规定。此外，第 2

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① Art. 2(d) of the IMO Convention.

② IMO LEG/MISC/6, 10 September 2008, “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, a study by the Secretariat of the IMO”, 7.

③ Nicholas Gaskell, Decision Making and the Legal Committee of the International Maritime Organization, *International Journal of Marine and Coastal Law*, vol. 18, 2003, p. 186.

④ Z. Oya Ozcayir, IMO Conventions: The Tacit Consent Procedure and Some Recent Examples, *Journal of International Maritime Law*, vol. 10, 2004, p. 205.

⑤ IMO LEGXII / 8 Annex II, 8.

⑥ *See* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective, 3 May 2011.

章“领海与毗连区”，第 5 章“专属经济区”也涉及到了预防船舶污染的内容。在《联合国海洋法公约》中，一国对船舶的立法和执行权限因其是船旗国、沿岸国还是港口国而有所不同。[①]《联合国海洋法公约》创设一个由船旗国、沿岸国和港口国组成的管辖权体系，并据此构建了预防船舶污染的所谓安全网(safety net)。这一管辖权体系尝试平衡船旗国(航行自由及全球统一的航运标准)和沿岸国(保护和保全海洋环境)的不同利益。[②]同时，这一体系也反映了海运大国与沿岸国之间的利益的微妙平衡。[③]

《联合国海洋法公约》第 94 条第 1 款规定了船旗国对于船舶行使有效的立法和执法管辖权的职责。[④][⑤]根据《联合国海洋法公约》第 211 条第 2 款，各国应制定法律和规章，以防止、减少和控制悬挂其旗帜或在其国内登记的船只对海洋环境的污染。这种法律和规章至少应具有与通过主管国际组织或一般外交会议制订的一般接受的国际规则和标准相同的效力。第 217 条则规定船旗国应作出规定使这种规则、标准、法律和规章得到有效执行，不论违反行为在何处发生。此外，第 228 条规定，对于外国船只在提起司法程序的国家的领海外所犯任何违反关于防止、减少和控制来自船只的污染的可适用的法律和规章或国际规则和标准的行为诉请加以处罚的司法程序，于船旗国在这种程序最初提起之日起六个月内就同样控告提出加以处罚的司法程序时，应即暂停进行，除非这种程序涉及沿海国遭受重大损害的案件或有关船旗国一再不顾其对本国船只的违反行为有效地执行可适用的国际规则和标准的义务。由此可见，船旗国被《联合国海洋

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① Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 344. Flag State is the State whose nationality a particular vessel has. LOSC does not define "port" or "coastal" State. According to Churchill and Lowe, coastal State is the State in one of whose maritime zones a particular vessel lies; port State is the State in one of whose ports a particular vessel lies. However, Molenaar thinks that account should not only be taken of the type of enforcement (in-port or at sea), but also the locus of the violation and the type of standard subject to enforcement. What should nevertheless be clear is that port or coastal State jurisdiction always implies jurisdiction over foreign vessels. *See* Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998, pp. 92-93.

② *See* Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998, p. 135.

③ *See* Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 346.

④ It reads that every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

⑤ For a recent analysis of flag State jurisdiction, *see* Nivedita M. Hosanee, A Critical Analysis of Flag State Duties as Laid Down under Article 94 of the 1982 United Nations Convention on the Law of the Sea, at http://www.un.org/Depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/hosanee_0910_mauritious.pdf, 5 May 2011.

法公约》赋予了预防船舶污染的主要职责。但是，现实中船旗国管辖的情况却并不尽如人意。[①]

沿岸国管辖权（立法权和执行权）在依照《联合国海洋法公约》划分的不同海域内并不相同。[②]就立法权而言，沿岸国在其领海内可以制定任何不影响外国船舶无害通过的保护海洋环境的法律法规（第 21 条第 1 款）。但这种法律和规章除使一般接受的国际规则或标准有效外，不应适用于外国船舶的设计、构造、人员配备或装备（第 21 条第 2 款）。沿岸国在其专属经济区内的立法权较领海受到更大的限制。《联合国海洋法公约》第 211 条第 5 款规定，沿岸国可对其专属经济区制定法律和规章，以防止、减少和控制来自船只的污染。这种法律和规章应符合通过主管国际组织或一般外交会议制订的一般接受的国际规则和标准，并使其有效。

《联合国海洋法公约》第 220 条详细规定了沿岸国的执行权：如有明显根据认为在一国领海内航行的船只，在通过领海时，违反关于防止、减少和控制来自船只的污染的该国按照本公约制定的法律和规章或可适用的国际规则和标准，该国可就违反行为对该船进行实际检查，并可在有充分证据时，按照该国法律提起司法程序，包括对该船的拘留在内（第 220 条第 2 款）。如有明显根据认为在一国专属经济区或领海内航行的船只，在专属经济区内违反关于防止、减少和控制来自船只的污染的可适用的国际规则和标准或符合这种国际规则和标准并使其有效的该国的法律和规章，该国可要求该船提供关于该船的识别标志、登记港口、上次停泊和下次停泊的港口，以及其他必要的有关情报，以确定是否已有违反行为发生（第 220 条第 3 款）。如有明显根据认为在一国专属经济区或领海内航行的船只，在专属经济区内犯有第 3 款所指的违反行为而导致大量排放，对海洋环境造成重大污染（significant pollution）或有造成重大污染的威胁，该国在该船拒不提供情况，或所提供的情报与明显的实际情况显然不符，并且依案件情况确有进行检查的理由时，可就有关违反行为的事项对该船进行实际检查（第

① For the lack of incentives for flag State enforcement, *see* Alan Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2006, pp. 47-61. *See* also, Awni Behnam and Peter Faust, Twilight of Flag State Control, *Ocean Yearbook*, vol. 17, 2003, pp. 167-192.

② For more discussion, *see* Christopher p. Mooradian, Protecting "Sovereign Rights": The Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone, *Boston University Law Review*, vol. 82, 2002, pp. 767-816. Julian Roberts and Martin Tsamenyi, The Regulation of Navigation under International Law: a Tool for Protecting Sensitive Marine Environments, in Tafsir Malick Ndiaye and Rudiger Wolfrum ed., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007, pp. 787-810. *See* also Erik Jaap. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, The Hague, Kluwer Law International, 1998, pp. 18-19.

220 条第 5 款)。如有明显客观证据证明在一国专属经济区或领海内航行的船只,在专属经济区内犯有第 3 款所指的违反行为而导致排放,对沿海国的海岸或有关利益,或对其领海或专属经济区内的任何资源,造成重大损害(major damage)或有造成重大损害的威胁,该国在有充分证据时,可在第七节限制下,按照该国法律提起司法程序,包括对该船的拘留在内。(第 220 条第 6 款)。然而,《海洋法公约》并没有具体界定何为"重大污染"和"重大损害"。

港口国管辖权是《海洋法公约》在预防船舶污染方面的最大的创新。[①]港口通常完全位于一国领土之内,属于其主权范畴。习惯国际法确认了港口国在其港口内可以行使广泛的管辖权。[②]国际法院在尼加拉瓜案中也表明港口国管理船舶进出其港口属于其主权管辖范围。[③]《海洋法公约》的 25 条第 2 款、211 条第 3 款和 255 条再次确认了港口国管辖权。外国船舶并不享有自由进出一国港口的权利因而成为国际法上的共识。[④]上述习惯法、条约和案例为港口国管辖权提供了法律基础。不过,港口国管辖权与港口国监控并不等同。港口国管辖权主要关注的是港口国对于违反国际法律法规的外国船舶的起诉和处罚。广义的港口国管辖权还包括对外国船舶在国家管辖海域范围以外的违法行为的起诉和处罚(第 218 条)。而港口国监控仅限于对船舶采取的行政措施。比如滞留船舶直到该船整改达标或要求船舶驶往最近的船坞进行修理等等。[⑤]根据《联合国海洋法公约》第 218 条,[⑥]港口国对于任何船舶的非法排污和其他违法行为拥有非

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① *See* Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 350.

② Erik Jaap. Molenaar, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, *Ocean Development & International Law*, vol. 38, 2007, p. 227.

③ Case concerning Military and paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), [1986] I. C. J. Rep., p. 111, para. 123.

④ *See* Erik Jaap Molenaar, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, *Ocean Development & International Law* vol. 38, 2007, p. 227. *See* also Louis De La Fayette, Access to Ports in International Law, *International Journal of Marine and Coastal Law*, vol. 11, 1996, pp. 1-21. Ted L. McDorman, Regional Port State Control Agreemtns: Some Issues of International Law, *Ocean and Coastal Law Journal*, vol. 5, 2000, pp. 217-218.

⑤ Ho-Sam Bang, Is Port State Control an Effective Means to Combat Vessel-Source Pollution? An Empirical Survey of the Practical Exercise by Port States of Their Powers of Control, *International Journal of Marine and Coastal Law*, vol. 23, 2008, p. 717. For details about Port State Control, *see* Z. Oya Ozcayir, The Use of Port State Control in Maritime Industry and Application of the Paris MOU, *Ocean and Coastal Law Journal*, vol. 14, 2008—2009, pp. 201-239. *See* also, Z. Oya Ozcayir, Port State Control, LLP, 2001.

⑥ A Critique of Art. 218, *see* H. S. Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea, 40 (2009) 291—309.

强制性的管辖权,无论该违法行为发生于内水、领海还是专属经济区。[①]

三、国际海事公约与《联合国海洋法公约》的相互作用

正如已故的以色列海洋法权威 Shabtai Rosenne 教授所言,在预防船舶污染这一问题上,国际海事公约与《联合国海洋法公约》相互配合、相互协调,共同发挥着作用。[②]

(一)历史概览[③]

国际海事公约与《联合国海洋法公约》相互关系的发展大致经历了四个阶段。第一阶段从 1959 年到 1973 年,一批国际海事公约在这一阶段被制定出来,而制订海洋发公约的谈判尚未开始。第二阶段从 1973 年到 1982 年,第三次联合国海洋法大会开始编纂海洋法公约,而同时一系列国际海事公约也在这一时期出台(比如 MARPOL)。第三阶段从 1982 年到 1994 年《联合国海洋公约》生效,在这一阶段,《联合国海洋法公约》成为制定国际海事公约的重要指南。最后一个阶段则是从 1994 年至今,也是国际海事公约与《联合国海洋法公约》互动最为频繁的阶段。

(二)《联合国海洋法公约》对于国际海事公约的约束力

就行使国家管辖权而言,《联合国海洋法公约》界定了船旗国、沿岸国和港口国管辖权的概念和范围,而国际海事公约则具体细化了如何行使国家管辖权以保证船舶遵守海事安全和预防污染的法律法规。[④]

《联合国海洋法公约》被认为是所谓"总体性公约"(umbrella convention)。

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① Michael G. Faure and James Hu, *Prevention and Compensation of Marine Pollution Damage: Recent Development in Europe, China and the US*, Alphen aan den Rijn: Kluwer Law International, 2006, p. 46.

② Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 251.

③ For details, *see* Augustin Blanco-Bazan, IMO Interface with the Law of the Sea Convention, at http://www.imo.org/INFOrESOURCE/mainframe.asp? topic_id=406&doc_id=1077, 11 May 2011. *See* also Erik Jaap. Molenaar, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, *Ocean Development & International Law*, vol. 38, 2007, pp. 269-275.

④ LEG/MISC/6, 10 September 2008, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, a study by the Secretariat of the IMO, p. 13.

原因在于其大部分的条款都属于概括性的规定，需要通过其他具体的国际法律规范来细化和执行。[①]不少《海洋法公约》的条款都要求成员国考虑(take account of)、遵循(conform to)、使生效(give effect to)或适用(implement)相关的国际规则或标准。也就是所谓的通过主管国际组织或一般外交会议制订的“applicable international rules and standards”、“internationally agreed rules，standards，and recommended practices and procedures”、“generally accepted international rules and standards”、“generally accepted international regulations”、“applicable international instruments” or “generally accepted international regulations，procedures and practices”。这些条款明确了《海洋法公约》成员国适用国际海事公约的义务。但是，由此引发了两个问题。第一、《海洋法公约》的成员国如果不是国际海事公约的成员国，是否也需要适用该国际海事公约所包含的一般接受的国际规则和标准 (generally accepted international rules and standards)。第二、何谓“一般接受”(generally accepted)?

第一个问题实际上是一个条约解释问题，即所谓“以引用的方式并入文本”(incorporation by reference)。[②]有一种观点认为，无论《海洋法公约》的成员国是否加入了国际海事公约，都负有遵守一般接受的国际海事规则和标准的义务。这一观点的弊病在于可能会鼓励成员国在未加入国际海事公约的情况下通过本国法律要求外国船舶国际海事规则和标准，同时却逃避本国所应承担的义务和责任。例如，不在该国港口提供 MARPOL 公约所规定的船舶废弃物接收设施(reception facilities)。此外，《海洋法公约》所规定的适用国际海事公约的义务也不应作单边的理解，否则将会影响国际条约体系和法律的稳定性。最后，《海洋法公约》的一般条款(“umbrella” provisions)也不同于国际海事公约中的具体规定，因此，对国际海事公约具体规定的违反亦不能绝对视为对《海洋法公约》的违反。

对“一般接受”的统一的法律解释，关系判断到国际海事公约中的规则和标准与《海洋法公约》是否具有内在联系。[③]国际法协会前沿岸国海洋污染管辖权委员会 2000 年伦敦报告对这一问题进行了详尽的分析。伦敦报告指出，《海洋法公约》中使用一般接受的国际法规则和标准表明了《海洋法公约》第 12 部分的

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① LEG/MISC/6，10 September 2008，Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization，a study by the Secretariat of the IMO，p. 8.

② The method of making one document of any kind become a part of another separate document by alluding to the former in the latter and declaring that the former shall be taken and considered as a part of the latter the same as if it were completely set out therein.

③ *See* Myron H. Nordquist and John Norton Moore ed. ，*Current Maritime Issues and the International Maritime Organization*，Leiden：Martinus Nijhoff Publishers，1999，p. 282.

总体功能。其目的在于确保国际法高于国内法的法律地位。[①]根据《海洋法公约》的编纂历史，将一般接受的国际规则和标准这一概念应用于第 12 部分海洋环境保护，意在使某些为大多数国家所尊重但并未被所有国家所接受的特定的规则对所有国家具有强制力。一般接受的国际规则和标准不等同于习惯国际法。相反，一般接受的界定主要基于国家实践。[②]

（三）绿色《海洋法公约》与国际海事公约的规则与标准

为了保护海洋环境，《海洋法公约》的第 12 章并没有完全反映其总体性特点。相反，第 12 章包含了不少具体的，可以被直接适用的条款。因此，这些条款可以与国际海事公约尤其是 MARPOL 联系起来阅读。

《海洋法公约》和 MARPOL 公约在保护海洋环境方面目标一致，即确保防污染的预防措施能够得到有效的实施。然而，《海洋法公约》主要关注船舶的非法排污。MARPOL 公约除了规制非法排污外，还涉及船舶的建造、设计、装备和人员标准。两者关注对象的不同与处罚的适用有着重要联系。[③]根据《海洋法公约》第 230 条，对外国船只在领海内所犯违反关于防止、减少和控制海洋环境污染的国内法律和规章或可适用的国际规则和标准的行为，仅可处以罚款，但在领海内故意和严重地造成污染的行为除外。也就是说，船舶即使违反了 MARPOL 公约的要求进行航行，只要未故意造成严重污染，该船舶只能被处以罚款。

四、后联合国环境与发展大会时代（Post -UNCED）

1992 年联合国环境与发展大会（UNCED）召开之后，先后有两个重要的环境公约问世。其一是《生物多样性公约》（CBD），其二为《联合国气候变化框架公约》（UNFCCC）。此外，联合国环境与发展大会还通过了两个非强制性的文件：《里约热内卢宣言》（Rio Declaration）和《21 世纪议程》（Agenda 21）。上述公约和文件已经被联合国系统及所有涉及环境保护的专门机构和各国国内法律体系所适用并在国际法律制定的过程中发挥重要作用。[④]当今时代，保护海洋环境的

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① Conference Report London 2000，at http://www.ila－hq.org/en/committees/index.cfm/cid/12，13 May 2011，pp. 31-32.

② Conference Report London 2000，at http://www.ila－hq.org/en/committees/index.cfm/cid/12，13 May 2011，p. 34.

③ *See* Myron H. Nordquist and John Norton Moore ed.，*Current Maritime Issues and the International Maritime Organization*，Leiden：Martinus Nijhoff Publishers，1999，p. 285.

④ *See* Myron H. Nordquist and John Norton Moore ed.，*Current Maritime Issues and the International Maritime Organization*，Leiden：Martinus Nijhoff Publishers，1999，p. 361.

国际法属于国际海洋法和国际环境法的交叉部分。[①]

《海洋法公约》第12部分的解释和发展,也应当考虑联合国环境与发展大会所确立的可持续发展原则。[②]同时,预防性原则(precautionary principle)作为国际环境法的原则之一,也适用于海洋环境保护领域。此外,如果国际海事组织的成员国愿意,国际海事组织完全有能力实现《里约热内卢宣言》、《21世纪议程》以及其他国际环境条约的要求。[③]

五、国际海事公约

(一)MARPOL 73/78

《联合国海洋法公约》第211条第1款规定,各国应通过主管国际组织或一般外交会议采取行动,制订国际规则和标准,以防止、减少和控制船只对海洋环境的污染,并于适当情形下以同样方式促进对划定制度的采用,以期尽量减少可能对海洋环境,包括地海岸造成污染和对沿海国的有关利益可能造成污染损害的意外事件的威胁。这种规则和标准应根据需要随时以同样方式重新审查。在预防船舶污染领域最主要的国际公约无疑是MARPOL1973公约及其1978年议定书,简称MARPOL 73/78。MARPOL公约第2条第2款和第3款界定了"有害物质"(harmful substances),从而廓清了《海洋法公约》第1条第4款造成海洋环境污染的"物质"(substance)的概念。MARPOL公约和《海洋法公约》所称的物质均指引入海洋环境造成或可能造成损害生物资源和海洋生物、危害人类健康、妨碍包括捕鱼和海洋的其他正当用途在内的各种海洋活动、损坏海水使用质量和减损环境优美等有害影响。《海洋法公约》界定的概念适用于各种类型的海洋污染。而MARPOL公约则专门针对船舶污染并包含了船舶"排放"(discharges)的概念。

MARPOL公约的执行主要有赖于船旗国管辖权对于船舶建造、设计、装备和人员配备标准的监督。同时,MARPOL公约也要求港口国对自愿停泊在其港口的外国船舶进行检查,以保证船舶遵守防污染的规则和标准并防止不合格船舶出港航行。此外,MARPOL公约授权港口国依照其本国法律提起司法程

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① Louis De La Fayette, The Marine Environment Protection Committee: The Conjunction of the Law of the Sea and International Environmental Law, *The International Journal of Marine and Coastal Law*, vol. 16, 2001, p. 158.

② *See* Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 362.

③ *See* Myron H. Nordquist and John Norton Moore ed., *Current Maritime Issues and the International Maritime Organization*, Leiden: Martinus Nijhoff Publishers, 1999, p. 369.

序。当然，提起司法程序需遵循《海洋法公约》第 228 条的规定。

MARPOL 公约及其附则修正案几乎涵盖了预防和减少船舶污染的所有技术方面并几乎适用于所有船舶。然而，对于船舶倾废，国际上有专门的公约进行规制，因而并不在 MARPOL 公约的适用范围之内。此外，MARPOL 公约也不适用于近海勘探开发（钻井平台）所造成的海洋污染。除了公约正文外，MARPOL 公约还包含 2 个议定书（包含有害物质的事故报告和仲裁）和 6 个附则。其中，附则 1 和附则 2 是成员国批准 MARPOL 公约时必须接受的附则，而是否接受其他附则可由成员国自己决定。

附则 1 规制的是石油污染。该附件设定了 400 总吨以上船舶原油及含油污水的排放标准、为达到排放标准所应配备的装备（15 ppm 原油排放监督与控制系统、油水分离器、污油罐、污泥槽以及与货运管道分离的污水泵和管道系统）、限制油轮事故（碰撞、触礁和搁浅）后原油泄漏的技术标准（诸如货位分舱、破舱稳性要求、双壳船）、配备专用压载舱（SBT）和清洁压载舱（CBT）、使用原油洗舱（COW）以及携带国际石油污染预防证书（IOPPC）。

1992 年 3 月 6 日，国际海事组织通过了 MARPOL 公约附则 1 的修正案，要求所有 1996 年 7 月 6 日以后的新造油轮必须为双壳船（或与双壳等同的其他设计）。该修正案于 1993 年 7 月 6 日生效。根据该修正案，单壳油轮将逐步被淘汰出航运市场。从 1995 年 7 月 6 日起算，1982 年 6 月 1 日以前建造的单壳油轮在 25 年内（某些特定情况下，30 年内）必须换装成双壳船或等同的设计。如果达不到附件 1 第 13 条 F 款换装双壳船的要求，这些现存的单壳油轮将于 2007 年被禁止航行（某些特定情况下，到 2012 年）。对于建于 1982 年 6 月 1 日以后的现存单壳船，如果已经配有专用压载舱及保护位置（protective location），其淘汰期限为 2026 年。[①] 1999 年法国"艾瑞卡"号油轮泄漏事故发生后，欧盟认为，现行的国际海事公约体系不足以有效应付大的船舶污染事故。[②]因此，欧盟决定在盟内加快淘汰单壳船的进度。欧盟制定了 Regulation（EC）No. 417/2002，第 3 条第 4 款规定了三种类型的单壳油轮的新的淘汰期限。同时，欧盟成员国向国际海事组织提交了一份修改 MARPOL 公约的共同提案。尽管该提案在国际海事组织内部引起了激烈的辩论，但仍最终被通过并修改了 MARPOL 公约关于淘汰单壳油轮的期限，使其与欧盟设定的期限一致。2003 年，西班牙"威望号"事故发生之后，欧盟制定了 Regulation（EC）No. 1726/2003，再次加快了单壳油轮的淘汰期限。同样，欧盟的共同提案在 IMO 海洋环保委员会第 50 次会议上引起了轩然大波。欧盟以外的成员国担心，欧盟的单边行动会损害国际海

① Regulation（EC）No 417/2002（On the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation（EC）No 2978/94），O. J. L 64，7. 3. 2002，2.

② COM（2000）142 final，2.

事组织的权威并给其他国家尤其是发展中国家造成经济和履约方面的压力。但该共同提案依旧获得了通过并再次修改了 MARPOL 附则 1 以保持与欧盟的一致。[①]

附则 2 规制的是散装有毒液体物质的污染。该附则设立了不同种类的化学品在不同环境下的排放标准。同时也设立了洗舱、污水泵和管道系统的标准。最初,公约附列了 250 种化学物质。这些化学物质残留必须经过特殊条件处理之后方能排放入接收设施。在任何情况,近岸 12 海里以内均不得排放任何含有毒物质的残留物。

附则 3 是 MARPOL 公约的第一个非强制性附则,规制以包装形式运输有害物质造成的污染。该附则包含了详细的包装、标记、标签、记录、堆载、数量限制、例外情形以及通知的要求,以预防有害物质造成的污染。附则 3 所指的"有害物质"则由国际海事组织制定的《国际海运危险货物规则》确定。

附则 4 规制的是船舶污水(sewage)所造成的污染。附则 5 规制的则是船舶垃圾造成的污染。附则 5 最显著的特点是完全禁止将任何形式的塑料丢弃入海。

1997 年 9 月新的 MARPOL 公约附则 6 出台,并于 2005 年 5 月 19 日通过。附则 6 主要是针对船舶造成的大气污染。2011 年 8 月 1 日,2010 年 3 月修正案生效,建立了北美船舶废气排放控制区。在控制区内,船舶排放二氧化硫和二氧化氮的标准将严于全球排放标准。[②]

MARPOL 公约的附则 1、2、5 为预防船舶运营过程中排放危险物质设立"特别区域"(special areas),在区域内对船舶实施特殊强制性要求。总的来说,船舶在特殊区域内的排放标准大大严于区域外。[③]对比《海洋法公约》第 211 条第 6 款所称的特殊区域和 MARPOL 公约确立的特殊区域,可以看出,依照《海洋法公约》设立的特殊区域仅限于沿岸国专属经济区之内。而依照 MARPOL 公约,特殊区域可以涵盖整个闭海或半闭海,也即可以囊括沿岸国的部分领海、专属经济区以及公海。此外,MARPOL 公约对于特殊区域内的要求仅限于船舶危险物质的排放,而《海洋法公约》则未对具体的措施作出任何规定。

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① For details about EU's initiatives and response in the IMO, *see* Veronique Frank, Consequences of the Prestige sinking for European and international law, *International Journal of Marine and Coastal Law*, vol. 20, 2005, pp. 18-21. For more details about the phase-out single hull tankers in IMO, *see* Alan Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2006, pp. 139-155.

② *See* http://www.imo.org/About/Conventions/Pages/Action — Dates.aspx, 16 May 2011.

③ JingJing Xu, The Public Law Framework of Ship-Source Oil Pollution, *Journal of International Maritime Law*, vol. 13, 2007, p. 423.

值得指出的是,以上所称的"特殊区域"也不同于IMO A.927 (22)决议[1]和A.982 (24)[2][3]决议中所提到的"特别敏感海域"制度。所谓"特别敏感海域"(Particularly Sensitive Areas (PSSAs)),是指由于其公认的生态、社会经济或科学的重要性且易受国际航运活动损害而需要IMO通过行动特别保护的海域。"特别敏感海域"这一制度本身如同一艘空船,[4]而需要沿岸国在区域内另行制定具体的保护措施(Associated Protective Measures (APM))。目前,国际上最著名的"特别敏感海域"当属西欧PSSA。这一海域包括了北起苏格兰北部设德兰群岛,南至葡萄牙、西班牙领海和专属经济区的大片海域。

(二)SOLAS

根据SOLAS公约第5章要求,所有2002年7月1日期建造的船舶都要配备航行数据记录仪(voyage data recorders (VDRs))。如同飞机上的"黑匣子",VDR使船舶事故调查人员可以审查事故发生前船员的操作规程和指令,从有利于确定事故原因。此外,SOLAS公约第5章还强制性要求船舶配备自动定位系统(automatic identification system (AIS))。

《海洋法公约》第22条第3款a项规定,沿海国考虑到航行安全认为必要时,可要求行使无害通过其领海权利的外国船舶使用其为管制船舶通过而指定或规定的海道(sea lanes)和分道通航制(traffic separation scheme),但沿海国根据本条指定海道和规定分道通航制时,应考虑到主管国际组织的建议。

关于指定海道的规定主要见于SOLAS公约regulation V/8。该条规定:与国际海事组织决议和指南的标准相符的海道制度应当推荐给所有船舶使用,对于特定的船舶或载运特定货物的船舶,可以强制适用。Regulation V/8的d段明确了制定海道制度是政府的责任。政府在制定海道时应当考虑IMO的相关指南和标准。

SOLAS regulation V/8－1授权各国在考虑IMO相关指南和标准的前提下制定和实施船舶强制报告制度。船舶进入报告区后必须向沿岸国主管机关报告详细的航行计划。对某些特定船舶或装在特定货物的船舶,主管机关还可以

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① IMO Assembly, Resolution A. 927(22) adopted on 29 November 2001. Guidelines for the designation of special areas under MARPOL 73/78 and guidelines for the identification and designation of particularly sensitive sea areas. A 22/Res. 927, 15 January 2002.

② Resolution A. 982(24) revokes annex 2 of resolution A. 927(22). IMO Assembly, Resolution A. 982(24) adopted on 1 December 2005. Revised guidelines for the identification and designation of particularly sensitive sea areas. A 24/Res. 982, 6 February 2006.

③ For details, *see* Nihan Unlu, Particularly Sensitive Sea Areas: Past, Present and Future, *WMU Journal of Maritime Affairs*, vol. 3, 2004, pp. 159-169.

④ Markus Detjen, The Western European PSSA－testing a unique international concept to protect imperiled marine ecosystems, *Marine Policy*, vol. 30, 2006, pp. 442-453.

要求报告其他信息。SOLAS 公约 regulation V/8－2 则是关于船舶交通服务(vessel traffic services)。该条规定只有在沿岸国的领海内才可以设立强制的船舶交通服务。

SOLAS 公约第 7 章规制的是船舶载运危险货物。该章主要关注了船舶载运危险货物时所应采取的安全措施,比如安全包装和堆载等等。本章的规定亦得到其他 IMO 法规的补充。这些法规包括:《危险化学品散装船建设和装备规则》(the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code)),《液化气散装船建设和装备规则》(International Code for the Construction and Equipment of Ships Carrying Liquified Gases in Bulk (IGC Code) (regulation Ⅶ/13)),《国际海运危险货物规则》(the International Maritime Dangerous Goods Code (IMDG Code))以及《船舶安全载运核燃料、钚和高等级放射性废物规则》(the Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships (INF Code))。

(三)Anti-Fouling Convention

防污底漆被广泛用于船舶底部以防止海洋生物(诸如海藻、软体动物等)附着于船壳从而减慢船舶的航行速度和增加燃料消耗。早期船舶通常使用石灰或砷涂于船壳表面。现代化学工业发展之后,金属化合物作为有效的防污底漆开始被适用。这些化合物会慢慢渗入海水中,杀死船壳或船底附着的甲壳类动物和其他海洋生物。然而,研究表明,防污底漆中的化合物会持续的存在与海水中,杀死其他海洋生物、损害海洋环境并很有可能会进入人类的食物链。1960 年代研发的迄今最有效的防污底漆之一含有有机锡化合物(organotin tributylin (TBT))。便被证实造成了蚝类动物的畸形以及海螺性状的改变。

1989 年 IMO 确认有机锡对于环境具有损害作用。1990 年 IMO 海洋环保委员会通过一项决议建议政府采取措施减少含有机锡的防污底漆用于短于 25 米的非铝壳船舶。同时减少浸出率大于每天 4 微克有机锡的防污底漆的使用。1999 年 11 月,IMO 通过大会决议,要求海洋环保委员会制定全球性的法律以应对船舶防污底系统的有害影响。该决议呼吁在 2003 年 1 月 1 日前在全球范围内初步禁止、在 2008 年 1 月 1 日前完全禁止船舶使用含有无机锡的防污底系统。

新的《防污底公约》于 2001 年 10 月 5 日通过,2008 年 9 月 17 日生效。公约将“防污底系统”界定为用于船舶以控制和防止不利生物附着的涂层、油漆、表面处理、表面或装置。公约适用于有权悬挂当事国船旗的船舶、无权悬挂当事国船旗,但在该当事国权力下营运的船舶、以及进入当事国港口、船厂、或近海装卸站的其他船舶(第 3 条第 1 款)。从事国际航行的 400 总吨及以上的船舶,不包括

固定或浮动式平台、浮动式存储装置(FSU)、浮动式生产、储存和卸货装置(FPSO),须在船舶投入营运前或《国际防污底证书》(证书)第一次签发前进行初次检验。此外,在改变或替换防污底系统时也应进行检验并须签注在《国际防污底证书》上(附件4第1条第1款)。长度24米及以上但小于400总吨的国际航行船舶(不包括固定或浮动式平台、FSU和FPSO)携带一份由船舶所有人或船舶所有人的授权代理所签署的声明。该声明还须辅以适当的单证(例如油漆收据或承包商的发票)或包括适当的签字(附件4第5条第1款)。

被禁止和控制的防污底系统由公约的附件1列出,并可根据需要进行更新。根据附件1的规定,自2003年1月1日始,所有船舶不得施涂或重新施涂在防污底系统中充当杀虫剂的有机锡化合物。自2008年1月1日始,所有船舶(2003年1月1日前建造并在2003年1月1日或以后未曾坞修的固定或浮动式平台、浮动式储存装置(FSU)、浮动式生产、储存和卸货装置(FPSO)除外)须:(1)在船壳上或外部构件或表面上不得有此类化合物;或(2)应有一个阻挡底层不符合要求防污底系统渗出此类化合物的隔离层。此外,为了保障船舶的合法权益,《防污底公约》第13条第2款规定,如果在执行本公约第11和12条时船舶受到不当滞留或延误,该船有权要求对其受到的任何损失或损害予以赔偿。

(四)WM Convention

国际法上对于海洋外来物种的规制最早可见于《海洋法公约》第196条第1款。[①] 该条规定各国应采取一切必要措施以防止、减少和控制由于在其管辖或控制下使用技术而造成的海洋环境污染,或由于故意或偶然在海洋环境某一特定部分引进外来的或新物种致使海洋环境可能发生重大和有害的变化。

然而,自1982年《海洋法公约》通过以来,国际社会对于全球人类活动和环境的关系的理解更加深入,可持续发展的理念更加深入人心。生态系统的理论使得国际社会可以从更加全面的角度来看待海洋外来物种问题。[②]尤其是1992年《生物多样性公约》的通过,并获得世界各国的广泛认可和支持。[③]《生物多样性公约》第8条第h款规定,每一缔约国应尽可能并酌情防止引进、控制或消除那些威胁到生态系统、生境或物种的外来物种。

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① Karen Scott, Defending the World below the Brine, Managing Invasive Species under the 2004 Ballast Water Convention — A New Zealand Perspective, *Journal of International Maritime Law*, vol. 14, 2008, p. 309.

② Moira L. McConnell, Ballast and Biosecurity: The Legal, Economic and Safety Implications of the Developing International Regime to Prevent the Spread of Harmful Aquatic Organisms and Pathogens in Ships' Ballast Water, *Ocean Yearbook*, vol. 17, 2003, p. 238.

③ Until now, there are 193 Parties of the CBD, *see* http://www.cbd.int/convention/parties/list/, 20 May 2011.

如前文所述,IMO 在 1973 年通过了 MARPOL 公约以彻底清除来自船舶营运造成的石油和其他有害物质对于海洋环境的污染并尽量减少船舶事故所造成的海洋污染。[①]尽管 MARPOL 公约本身并不规制压载水导致的外来物种入侵,但公约主要在 3 个方面为后来的《压载水公约》提供了可借鉴的制度:(1)建立特殊区域;(2)证书和检验机制;(3)提供接收设施。[②] 1993 年,作为过渡性措施,IMO 通过了 A.774 (18)号决议(预防船舶压载水和沉积物引入外来物种和病原体指南)。该决议随后在 1997 年被 IMO A.868 (20)决议修改。上述指南尽管不具有法律约束力,但其确立了国际公认的压载水管理实践并呼吁各国统一预防压载水引发外来物种入侵的实践。需要指出的是,IMO 指南所规定的预防压载水引发外来物种入侵主要依赖压载水的深海交换(mid-ocean exchange),而并未关注压载水处理技术的研发和应用。[③]

2004 年《压载水公约》获得通过。该公约将在代表全世界航运业总吨位 35%的 30 个国际加入的 12 月后生效。[④]截至 2011 年 8 月 31 日,全世界共有 28 个国家加入了《压载水公约》,占到全世界航运业总吨位的 26.37%。这其中包括诸如瑞典、荷兰、法国和西班牙、加拿大在内的欧美国家,也包括挪威、韩国等航运强国,还有马尔代夫、库克群岛等小岛国,以及墨西哥、巴西、埃及、肯尼亚、南非等发展中国家。从 2009 年 9 月到 2010 年 9 月,短短的 1 年时间就有 11 个国家批准加入《压载水公约》。这些无疑都显示了《压载水公约》被国际社会接受是大势所趋。《压载水公约》为压载水管理提供了两重标准,即公约规定的最低标准和授权沿岸国制定更高的标准。《压载水公约》及其附则和补充指南为压载水管理确立了 4 项基本要素。即计划与记录 (planning and record keeping)、沉积物摄入和排放管理(management of sediment uptake and discharge)、压载水摄入和排放管理以及特殊海域要求。此外,《压载水公约》还规定了其他义务,比如通知和提供信息、研发、合作以及执行机制等。[⑤]由于压载水中所含的外来物种可能会对公共健康造成威胁,因此《压载水公约》在适用和执行过程中也需要参考世界卫生组织制定的《国际卫生守则》(International Health Regulations)

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① Preamble, MARPOL73/78. para. 5.

② Maria Helena Fonseca De Souza Rolim, *The International Law on Ballast Water, Preventing Biopollution*, Leiden: Martinus Nijhoff Publishers, 2008, p. 54.

③ Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development and International Law*, vol. 36, 2005, p. 294.

④ BWM Convention. Article 18(1).

⑤ *See* IMO Assembly, Resolution A. 982(24) revokes annex 2 of resolution A. 927(22). Resolution A. 982(24) adopted on 1 December 2005. Revised guidelines for the identification and designation of particularly sensitive sea areas, A 24/Res. 982, 6 February 2006, p. 312.

和其他船舶卫生规定。[①]

六、国际法律体系所面临的挑战

毫无疑问,在过去的几十年里,国际社会制定了广泛而详尽的预防船舶污染的法律体系。然而,挑战仍然存在。

预防船舶污染的国际法法律体系所面临的首要挑战就是如何增强国际法在各国的有效适用和执行。国际海事公约的实施成效几乎完全依赖各成员国的国内法律体系。[②]缺乏能力、缺乏相应的技术知识、缺少政治意愿、没有长期全面的规划都构成了国际法无法在各国有效实施的原因。[③] IMO有时被戏称为"无牙的老虎",其原因就在于IMO几乎无法监督其制定的国际公约在各成员国的适用和执行。[④]这其实也是整个国际法所面临的共同问题。关于国际法的有效性,有两大问题值得关注:(1)在国际法制定的过程中,国家适用和遵守相关国际法的能力大小几乎被完全忽略了。(2)当今国际法律框架依然是以国家为中心,集中关注的是国家如何控制和预防船舶污染海洋。[⑤]目前,国际社会对于如何提高国际法律体系的有效性这一问题依然束手无策。现行的程序和机制难以保证各

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① For details, *see* Moira L. McConnell, Ballast and Biosecurity: The Legal, Economic and Safety Implications of the Developing International Regime to Prevent the Spread of Harmful Aquatic Organisms and Pathogens in Ships' Ballast Water, *Ocean Yearbook*, vol. 17, 2003, pp. 48-51.

② Armin von Bogdandy, Pluralism, Direct Effect, and the Ultimate Say: on the Relationship. between International and Domestic Constitutional Law, *International Journal of Constitutional Law*, vol. 6, 2008, p. 397.

③ Unedited reporting material on the topic of focus of the twelfth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, entitled: "Contributing to the assessment, in the context of the United Nations Conference on Sustainable Development, of progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges. A/66/70/Add. 1.

④ E. g. In order to improve implementation and enforcement by flag States, the IMO approved the Voluntary IMO Member States Audit Scheme to provide a comprehensive and objective assessment of how effectively flag States administer and implement the mandatory IMO instruments covered by the Audit Scheme. In 2009, the IMO Assembly endorsed the decision of the IMO Council and agreed to make the Audit Scheme an institutionalized, mandatory scheme, which will only be phased in through the introduction of amendments to IMO instruments in 2013, for entry into force in Jan 2015. *See* A/65/69/Add. 2, paras. 73-74.

⑤ Emeka Duruigbo, Reforming the International Law and Policy on Marine Oil Pollution, *Journal of Maritime Law and Commerce*, vol. 31, 2000, pp. 81-85.

国充分完全遵守国际法。[①]

预防船舶污染的国际法律体系所面临的第二大挑战是如何平衡沿岸国管辖权与船舶航行自由权利之间的冲突。船舶航行自由的权利一直被《海洋法公约》奉为圭臬。如前文所述,《海洋法公约》试图在航行自由和沿岸国管辖权之间建立起一种微妙的平衡。然而,单纯依靠船旗国管辖权并不足以有效的预防船舶污染,保护海洋环境。[②]新加坡国立大学法学院的 Alan Tan 教授分析到,船旗国管辖权的最大缺陷在于,大多数船旗国的旗下船舶并不进入其自身管辖的海域,而对船舶造成其他国家管辖海域的污染,船旗国显然没有太大的动力去加以规制。[③]因此,有一种观点认为,预防船舶污染的国际法律体系太过偏向于保护船舶的航行自由权利。沿岸国缺乏制定和执行有效的防污法规的权能。国际法的发展和沿岸国权能的扩张,往往是在大的船难事故发生之后。[④]值得关注的是,沿岸国已经开始在实践中逐步扩张其管辖权以保护海洋环境。这一趋势往往可能导致区域/国内法与国际法之间的关系的紧张。最典型的案例无疑是国际航运公会(Intertanko)2008 年在欧盟法院起诉欧盟委员会案(Case C308/06)。该案中,国际航运公会认为欧盟 2005/35/EC 关于对船舶污染施加刑事责任的指令违反了现行国际法(《海洋法公约》和 MARPOL 公约),应当予以撤销。国际航运公会担心欧盟的法令会使得通过欧盟水域的船舶承担较世界其他区域更加严格的法律责任。[⑤]

船舶造成公海的污染如何预防,是国际法律体系所面临的第三大挑战。当前的国际法律体系主要依靠船旗国管辖预防公海的船舶污染。沿岸国对于船舶在公海的行为几乎没有管辖权。因此,公海的海洋环境有成为"公有悲剧"(common tragedy)的趋势[⑥]。如何有效的预防公海的船舶污染?依然有待国际法和区域/国内法的发展。

最后,如何减少船舶的温室气体排放以应对气候变化,亦是国际法律体系当前的一大挑战。2009 年第 2 次 IMO 温室气体研究报告估计,仅 2007 年全球航运业排放的二氧化碳就达到 10 亿 4 千 6 百万吨,占到全球温室气体排放总量的

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① Veronique Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea, Implementing Global Obligations at the Regional Level*, Leiden: Martinus Nijhoff Publishers, 2007, p. 40.

② *See* Alan Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2006, p. 18.

③ Alan Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2006, p. 18.

④ Chelsea Purvis, *Coastal State Jurisdiction under UNCLOS: the Shen Neng 1 Grounding on the Great Barrier Reef*, *Yale Journal of International Law*, vol. 36, 2011, p. 208.

⑤ Case C308/06, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0308:EN:HTML, 29 May 2011.

⑥ Garret Hardin, The Tragedy of the Commons, *Science*, vol. 162, 1968, pp. 1243-1248.

3.3%。而其中国际航行的船舶的二氧化碳排放量为8亿7千万吨,占到全球排放总量的2.7%。如果不采取有效的措施控制船舶的温室气体排放,那么到2050年,全球航运业的排放量将可能达到2007年排放量的1.5到2.5倍。[①]客观的说,IMO在过去的几年中为航运业减排做出了巨大的努力,但迄今尚无有约束力的国际法律文件出台。立法制定中遇到的最大难题是如何在航运业中适用《联合国气候变化框架公约》所确定"共同但有区别原则""(common but differentiated responsibility (CBDR)?.[②] 2008年哥本哈根气候变化大会上,挪威提交的将航运减排纳入到会议最终达成协议的提案遭到了中国、印度、沙特阿拉伯以及巴哈马反对。该提案因此无疾而终。[③]中国在航运减排问题上的立场是IMO应当扮演技术性的角色,而将政治、法律和经济问题交由《联合国气候变化框架公约》成员国会议来讨论。[④]此外,中国坚持"共同但又区别原则"应当是IMO关于航运减排谈判的关键性原则。[⑤]

七、结　论

在过去的几十年里,国际社会制定了广泛而详尽的预防船舶污染的法律体系。《联合国海洋公约》是总体性公约。它确立船旗国、沿岸国和港口国的管辖权体系。国际海事公约(MARPOL,SOLAS,BWM Convention,Anti-Fouling Convention and etc)则更加具有技术性,具体规制了预防船舶污染的各项标准和操作程序。《联合国海洋法公约》和国际海事公约互相作用,共同致力于预防

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① Second IMO GHG Study 2009, Update of the 2000 IMO GHG Study, Executive Summary, MEPC 59/4/7, 9 April 2009.

② Principle 7 of the Rio Declaration provides the first formulation of the CBDR, and it states: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." For the application of CBDR in shipping industry, one of the major problems is that a huge number of ships operate under flags of convenience. In that case, ship. owners from developed countries can easily disguise their identity. *See* Saiful Karim and Shawkat Alam, *Climate Change and Reduction of Emissions of Greenhouse Gases from Ships: An Appraisal*, *Asian Journal of International Law*, vol. 1, 2011, pp. 131-148.

③ *See* http://www. seas—at—risk. org/news_n2. php? page=273, 29 May 2011.

④ Report of the Marine Environment Protection Committee on its 59th Session, statement by the Delegation of China on GHG Issues, MEPC 59/24Add. I (2009), Annex 13. para. 5.

⑤ Report of the Marine Environment Protection Committee on its 60th Session, MEPC 60/22 (2010), Annex 4.

船舶污染海洋。然而，国际法律体系所面临的最大难题无疑是如何在各成员国有效的适用和执行。此外，重新思考船舶航行自由和沿岸国管辖权的关系日益获得国际社会的支持。而如何在公海预防船舶污染，保护公海的海洋环境和如何减少航运业的温室气体排放以应对气候变化，依旧需要国际法尽快做出更加有力的回应。

（责任编辑：黄海奇）

南海油气共同开发制度关键问题探讨
——以其他海域共同开发经验为鉴

罗婷婷*

内容摘要:在南海岛礁争端和划界问题尚难解决的情况下,推进油气资源的共同开发是缓和南海紧张局势、和平利用资源的必由之路;而南海油气共同开发活动的开展,需要一定的制度设计来规范各方的权利义务。本文旨在通过对其他海域共同开发协议制度的比较研究并结合南海局势的特点来讨论南海油气共同开发制度中的几个关键问题,并分析这些问题可能的解决方式。

关键词:南海油气共同开发 制度 关键问题 借鉴

引 言

南海权益争端的实质是岛礁主权和海域管辖权之争,而南海丰富的油气资源是南海权益争端复杂化和敏感化的重要诱因。在南海岛礁争端和划界问题尚难解决的情况下,南海油气共同开发作为划界前的一种临时安排,有助于促进南海地区紧张局势的缓解和稳定、实现资源利用的多赢,并为南海各国最终确定相互间的海洋边界创造良好的外部条件。

目前,国内外关于南海共同开发的研究成果主要集中在两个方面:一是从国际关系的角度研究南海共同开发的必要性、可行性以及所面临的困难。二是从权益划分的角度提出南海共同开发的方案。其中不乏南海周边国家及一些西方学者提出的方案。[①](菲律宾1988年提出过"北海模式"、1999年提出"南极条约"模式。越南1992年提出了"U"型方案,1994年提出"环形方案"。印尼1993年提出"印(尼)澳航路模式",1994年提出"南海甜甜圈"方案。1990年马来西亚战

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① 王志坚:《"共同开发"是解决南海问题的最现实方案》,下载于 http://hhlawaid.blog.hexun.com/6886645_d.html,2010年11月17日。

略与国际研究所学者汉萨提出“建立共同开发署”方案。1992 年美国夏威夷东西方研究中心研究员马克·瓦伦西亚研究员提出了“一人一份”方案。)但是,这些研究成果多是在宏观的层面讨论南海共同开发问题,并未涉及南海共同开发具体制度的分析。笔者认为,虽然南海共同开发的可行性、权益划分问题是首先有待解决的问题,但是南海共同开发作为国际合作的一种具体的形式,与其他海域的海上油气共同开发活动一样,也需要一定的制度来规范各方的权利义务。今后,在与南海周边国家就共同开发问题进行的谈判中,制度的设计和安排是迟早需要落实的内容。正是基于这种考虑,笔者选择就南海共同开发的管理制度进行探讨。

由于每个共同开发个案所涉及的海域、开发对象、政治、经济、法律等因素不同,有关国家的历史文化及国际关系状况也千差万别,这就导致了每个共同开发协定都有其特殊的制度设计和机制安排。目前,并不存在着一个通用于世界上所有海域的共同开发的模式范本。正如英国国际法和比较法学院在 1989 年编制的《近海石油和天然气共同开发》一书中指出的,共同开发案例“每一个都可能有很多的变化形式,似乎尚未有一个案例能值得不同政治经济制度、冲突传统和民族敏感性的国家普遍接受。”[①]但是,从迄今为止国际上已经存在的海上石油共同开发协定来看,对于共同开发活动的管理存在着一些政策性和原则性的共同规定,将这些共同的规定归纳和总结出来,可以得出海上石油共同开发管理制度的一些基本的内容。该书总结了现存海上石油共同开发协定已建立的和需要完善的制度内容,具体包括:对主权问题的处理、第三方地位和角色的处理、共同开发区的划定、共同开发区的管理机制、开发方式、费用负担与收益分配、税收制度、管辖权的分配及法律适用、海洋环境的保护和污染的防治以及争端解决程序、共同开发的有效期及其终止等。而从国际实践中已有的海上油气资源共同开发协议来看,基本上也是围绕着上述内容展开的,可以说这些方面构成了海上油气共同开发管理制度的基本组成部分。[②]

笔者认为,南海油气共同开发制度的设计同样需要围绕着上述方面展开,而其中有五个问题是最为核心和紧迫的,必须先对其作出合理的安排。这五个问题是——对岛礁主权和划界问题的处理、处理第三方的先存权、共同开发区的划定、采纳何种管理模式、就管辖权的分配与法律适用达成一致。之所以认为这五个问题是南海共同开发管理制度中的关键,源于对南海目前复杂的形势及共同开发本质的考虑。首先,南海目前的权益争端错综复杂,涉及六国七方,岛礁主权与海域划界争端相互交织,周边国家对我国“断续国界线”内油气资源的开采

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① Hazel Fox QC and Paul McDade et al, *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary*, British Institute of international and Comparative Law(BIICL), 1989, p. 115.

② 萧建国著:《国际海洋边界石油的共同开发》,海洋出版社 2006 年版,第 233～254 页。

力度正在持续加大；其次，共同开发在本质上是极具政治色彩的国际合作。争议方对争议海域推进共同开发的共识是实现共同开发必要的政治条件。[①] 世界银行的能源专家史哈塔（Ibrahim Shihata）与美国的奥诺拉托（William Onorato）将共同开发定义为“一种搁置整个边界争端问题的制度，因而从开始就营造政治合作的发展氛围”。[②]日本学者三友（Masahiro Miyoshi）曾指出，“共同开发是临时性质的政府间安排，是一种以功利为目的的共同勘探或开发的设计。”有鉴于此，在南海目前的复杂格局下，要使各国参与到油气共同开发这种实现功利目的的政治合作中来，首先需要对影响各国合作意愿的关键性问题做出合理安排，只有这样，共同开发活动才能进一步开展。上述五个问题直指参与国的核心利益，是各方矛盾冲突的集中点，极大地影响着其参与共同开发合作方的政治意愿，较其他问题而言更为敏感和复杂。可以说，这五个问题的合理解决直接关系到南海共同开发能否顺利推进，是其他问题得以充分解决的前提和基础。

有鉴于此，本文将选择对南海油气共同开发管理制度中的这五个关键问题进行探讨，并通过对世界其他海域油气共同开发制度的比较分析，结合南海油气共同开发面临的现实问题，对这五个关键问题可能的处理方式进行阐释。

一、对岛礁主权和划界问题的立场

共同开发是划界协议达成前双方为了实现资源的有效利用而作出的一种临时安排。在共同开发协定的谈判及实施过程中，当事国一般都希望保留自己对有关海域划界的立场和主张，这点在争议海区的共同开发中显得尤为突出。因此，双方需要在彼此承认主权和划界争议的基础上搁置争议、冻结主张。这种做法体现在共同开发协定中的做法就是订立“不影响主权或划界立场的条款”。[③]

在现有的许多海上石油开发协议中都定有“不影响主权或划界立场的条款”。但是不同的开发协议在语言表述上存在一定的差别，如 1958 年《巴林和沙特阿拉伯划分波斯湾大陆架边界协定》的第 2 条特别指出：对法斯特布沙法油田的安排“无损于沙特阿拉伯政府对上述地区所拥有的主权和行政管辖权。” 1974 年《日韩共同开发大陆架协定》第 28 条指出：“本协定的任何规定均不应视为对共同开发区全部或任何部分的主权权利问题所作的确定，也不应视为对各方关于划分大陆架立场的偏向和歧见。”1992 年马来西亚与越南《关于涉及两国大陆

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① 蔡鹏鸿：《中日东海争议现状与共同开发前景》，载于《现代国际关系》2008 年第 3 期，第 45 页。

② I. F. I. Shihata and W. Onorato, *Joint Development of International Petroleum Resources in Undefined and Disputed Areas*, (paper delivered at the International Conference of the LAWASIA Energy Section, Kuala Lumpur, 18－22 October 1992), p. 6.

③ 萧建国著：《国际海洋边界石油的共同开发》，海洋出版社 2006 年版，第 105～106 页。

架的划定区域勘探和开发石油的谅解备忘录》第4条第1款也规定:“本备忘录的任何条款均不得以任何方式被解释为:影响任何一方对‘划定区域’的立场和主张。”从而表明了协议的目的是搁置主权争端,共同开发油气资源。此外,类似的条款在1995年英国与阿根廷关于在西南太平洋共同开发的联合声明、1989年澳大利亚和印度尼西亚《帝汶缺口条约》中也有所表述。可以说,由于这一条款对于保护各方的立场、打消猜疑具有积极的促进作用。因此,很容易被各方所接受。

在南海海域,我国与周边国家越南、马来西亚、印度尼西亚、菲律宾、文莱六国存在着岛屿和划界方面错综复杂的矛盾,且在这些国家相互之间也存在着重叠的主权要求。对于南海争端的解决途径,我国始终倡导和支持“搁置争议、共同开发”。“搁置争议、共同开发”的思想是由邓小平同志在会见美国乔治城大学战略与国际问题研究中心代表团时提出的,并于其后得到进一步的阐释和发展。邓小平通过关于“搁置争议、共同开发”的思想主要有如下内容:(1)主权属我。这是“搁置争议、共同开发”的前提。(2)尊重现实、搁置争议。考虑到解决领土和划界问题的复杂性和困难性。在不具备彻底解决的条件下,可以先不谈主权归属,把争议搁置起来,但搁置绝不等于放弃。(3)互利合作。共同开发是一种不涉及主权或主权权利争议的共同性安排,可以从经济角度来考虑进行开发合作。(4)共同开发的目的是,通过合作增进相互了解,为最终解决主权归属和海域划界问题创造条件。[①]我国提出的“搁置争议、共同开发”的思想虽然主要是针对与周边国家存在岛礁主权和海域划界争端的事实,但是这与共同开发的特征是完全吻合的,即肯定了共同开发作为一种功能性的临时安排不影响各方在主权归属和划界问题上的立场。

2010年中国社科院发布的《亚太蓝皮书》指出,国际社会对中国的炒作从“中国威胁论”到“中国责任论”,从“利益相关者”到G2,在一定程度上又加剧了周边国家对中国的猜疑和担忧。2009年G2成为国际社会的一个炒作热点,这不仅高估了中国对国际事务的影响力,而且也误判了中国不称霸的对外政策基本导向。更重要的是,还导致一些周边国家试图推动区域内大国和引入区域外大国来平衡力量或制衡中国。[②] 在这种情势之下,与南海邻国的油气共同开发协议中,更有必要写入“不影响主权或划界立场的条款”,表示共同开发活动并不影响共同开发方对南海岛礁主权及划界问题的主张,以表明我国共同开发的诚意和决心,打消其猜疑和顾虑。

可以参考的比较典型的措辞是“本协定的任何条款不得解释为任何一缔约国放弃有关该区域的任何权利或要求,或承认或支持另一缔约国有关该区域的

① 萧建国著:《国际海洋边界石油的共同开发》,海洋出版社2006年版,第204～205页。

② 陈玉萍:《中国面临3大安全风险源:周边国家对华猜疑加剧》,下载于http://news.dayoo.com/china/201004/07/53868_12447964.htm,2010年11月14日。

任何权利或要求的立场;由本协定或履行协定所发生的行为或活动不构成主张、支持或否定任何缔约国有关该区域的权利或要求的立场。”[①]当然,在不同的协定中,这一条款的措辞会有所差别。但是,无论是简要或者详细,该条款的法律效力——共同开发协定及实施不影响各自政府关于领土主权和海域划界主张的立场都应得到明确的体现。

二、对第三方先存权的处理

先存权(Pre-existing right)指共同开发区建立之前,签约一方在原有争议海域地区勘探、开发期间,已经授予第三方所属经营机构勘探开发许可权,允许其参与该有争议海域的共同开发活动,由此而使第三方对该地区获得某种经营开发的权利。[②]

对第三方先存权的处理,是在争议海域进行共同开发必须予以重视和解决的问题。先存权的出现往往是基于以下几种原因:第一种是颁发许可证的一方对该海域资源(特别是油气资源)分布和存储情况不明,出于调研评估资源的目的使第三方尽早进入争议区进行勘探开发活动,为其提供必要的数据和资料。第二种是发现了有商业开采价值的油气田,同时又有其他方愿意投资,出于获取经济利益的动机而颁发许可证。第三种是颁发许可证的国家通过有计划有目的先行活动,将国际上相关财团和公司也纳入其中,在国际社会制造其对争议海域有效管辖的的印象,增加在以后在争议海域共同开发谈判中的影响力。无论是出于何种原因,先存权对于以后有争议海域协商共同开发都可能产生较为严重的困难。[③]

正因为如此,两国在签订共同开发协议而面临先存权处理问题时,一般会在征求已持有许可证的当事方的意见同时对此进行专门的处理。

国际上现有的共同开发案例在处理第三方的“先存权”问题时,主要采用以下两种方式:第一种是明确承认先存权的存在。如《泰马共同开发协定》第三条第二款就规定:“联合委员会的权利和义务不得以任何方式或影响或缩短任何一方迄今作出的安排,已达成的协议或已签发的许可证或作出让步的有效期限。”第二种是不承认先存权的存在,而要求具有许可证的第三方在新的条件下参与勘探开发。苏丹与沙特阿拉伯的共同开发协定以及日韩的共同开发协定是这种

① 萧建国著:《国际海洋边界石油的共同开发》,海洋出版社2006年版,第236页。

② 蔡鹏鸿著:《争议海域共同开发的管理模式:比较研究》,上海社会科学出版社1998年版,第17页。

③ 蔡鹏鸿著:《争议海域共同开发的管理模式:比较研究》,上海社会科学出版社1998年版,第18～19页。

方式的典型。

但与苏丹及沙特共同开发协定不同的是，日韩共同开发协定采取的是一种更为灵活的变通处理方式。根据协定的规定，双方同是共同开发区各分区许可证的颁发者，因此双方均可以向既有的许可证持有人重新颁发许可证。这种方式虽未正式承认先存权，但双方在实践中又等于承认了这种权利。通过这种机制，既从法律上澄清了先存权拥有者原有的法律地位，又不需要对签约国的任何一方现有的石油经营体制作出实质性的改变。

这种对第三方先存权灵活的处理方式对南海共同开发具有很好的借鉴意义。我国“断续国界线”内的油气资源储量约为 $1.38\times10^{10}-1.65\times10^{10}$ t 油当量。[①] 截至 2009 年 8 月，越南、菲律宾、马来西亚、文莱、印尼等南海周边国家，已经与埃克森—美孚、英荷壳牌等 200 多家西方公司在南海海域合作钻探了约 1380 口钻井，年石油产量达 5000 万吨，大约有 8～9 成位于南海海域。[②] 尤其是越南，其已将南沙海域划分为上百个油气招标区，在该地区迅速招标，合作开采石油和天然气。近几年来，已分别与美国、俄罗斯、法国、英国、德国等签订了勘探、开采石油和天然气合同。大量的石油公司存在于南海海域，必然涉及到第三方先存权的处理。在南海海域采取单方面的行为是不可取的，在开始执行共同开发区计划之前我国必须就此问题与其他国家达成一致。

正如前文所述，南海争议海域“先存权”产生也是有其深刻原因的。目前，海上油气资源开发已成为南海劳动密集型国家摆脱金融危机影响、实现经济复苏的强大动力。以经济为中心的安全政策的制定必然导致对油气资源重视程度的提高，尤其是对依赖石油能源以促进工业发展的南海国家更是如此。对南海国家而言，追求和保护紧缺的油气资源被认为是国家的首要安全功能之一，而利用西方的资金和设备进行油气开采则是实现上述目标的重要途径。此外，通过外国公司和企业参与勘探开发，一方面加强了对所占领岛礁和所控制海域的经营，形成“实际占领”的局面。另一方面，通过油气资源的开采间接将区域外大国拉入南海地区，使南海争议国际化，这也正是许多周边国家的南海政策。

基于此，我国作为南海资源开发的后期加入者，不承认第三方的先存权固然更有利于海洋权益的维护，但是必然影响到周边国家及其他区域外国家的既得利益。对于已经先行开发的周边国家而言，本来就不存在与中国共同开发的紧迫性，如果否认其先存权，可能会对共同开发造成严重的障碍。因此，如果某周边国家已经投入开发运作的油气田被划入争议海域共同开发区域内，在双方一致认可的情况下，共同开发区建立之前签约的开发商可继续经营这些油气田，同

① 专项综合报告编写组：《我国专属经济区和大陆架勘探专项综合报告》，海洋出版社 2002 年版，第 120 页。

② 《新武器保护强建千余外国油井 中国未得一桶南沙油》，载于《国际先驱导报》2009 年 8 月 25 日。

时依据商业开采方式与要求，同我方开发商协商未来新开发油气田的运作方式。我们可以借鉴日韩共同开发协定的这种灵活的方式，即在共同开发的协议中并不明确规定承认先存权，但是在实际操作中，可以规定我国与其他共同开发的合作方都有向各分区颁发许可证的权利。虽然这可能有利于原有的许可证持有人，但是通过这种方式，也能让我方的石油公司加入到共同开发的进程中来，从一方面减少与周边国家开展共同开发的阻力。

三、划定共同开发区

划定一个地理区域作为开展共同开发活动的范围，这是共同开发制度最基本的一个方面。国际上争议海域有数百个，范围大小不一，如波斯湾地区的争议海域面积达到20万平方公里以上，扬马延争议海域面积为45,470平方公里，泰国湾争议海域面积为7250平方公里等等。[①] 从全球现有20余个争议海域共同开发的案例看，对于共同开发区的划定，其可能采取以下几种方式：第一，将整个争议的区域或管辖权重叠区全部划为共同开发区；第二，将部分争议区域划定为共同开发区；第三，在跨界情况下，如果尚未发现矿藏，国家实践一般是在双方边界线的两侧划出大致对等的两块区域作为开发区。这种情形是指，虽然两国已经划定了海洋边界，但均认为在边界线附近海域可能存在跨越了边界的油气构造，而提前就共同开发区做出安排。

将整个争议区或重叠区划分为共同开发区，首先需要解决的问题是认定争议海区或重叠区的范围。重叠区的认定需要双方对各自的主权归属和权利范围产生共识，如1974年苏丹与沙特阿拉伯就红海争议海域共同开发案中，双方就把整个争议海域圈定为共同开发区。这种方案在双方达成共识且没有涉及第三方的情况下是可以考虑的办法。其次若争议范围太大，双方达成了共识后还必须具备一定的开发能力才能进行整个区域的开发。

如果两国担心可能遭致第三国的反对或者开发能力有限不适宜对整个争议海域进行共同开发，则可以考虑将争议区或主权重叠区的部分作为共同开发区。例如在泰国湾，泰国、马来西亚和越南三国有两国相互重叠甚至是三国主张重叠的水域，因此泰马、马越之间的共同开发区，面积都不大，都严格限制在双边争议的区域内。又如印尼与澳大利亚在1989年签署共同开发协议前，双方对其中一块富有开发潜力的油田实施共同开发。

至于第三种方式，实际上是在未发现矿藏情况下双方作出的一种平等安排。如法国和西班牙所划共同开发区在边界线两侧的面积大致相等，这种安排看似

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① 蔡鹏鸿：《中日东海争议现状与共同开发前景》，载于《现代国际关系》2008年第3期，第45页。

合理,但是却蕴含不确定因素。一旦油气资源被发现,原本对等安排的共同开发区可能被否认,重新确定争议区的问题又浮出水面。

笔者认为,要想在南海油气共同开发上有实质性的进展,确定重叠区是不得不面对的问题。第三种方式仅适用于未发现矿藏的特殊情况,且需要以边界线的确定为前提,不能从本质上解决我们推动南海共同开发、加快资源利用的现实需要。当然,南海重叠区的认定必定是一个棘手的问题。我国与南海周边国家基本上都是依据《公约》来主张自己的海洋权益,由于《公约》对岛屿制度的规定并不十分明确,对大陆架和专属经济区的划界也规定得较为原则,这就导致像南海这样涉及六国七方的海域单是确定两国之间的争议海域就已经十分困难,更不用说三方以上的重叠区。

出于不同目的,一些国家和学者海提出了在南海的共同开发的方案,这些方案大都提到了共同开发区的划定,其中影响较大的是以下几种方案。[①]

(1)“环形方案”。这是印度尼西亚在 1994 年提出来的。根据此方案,南海沿岸国从其领海基线量起 200 海里的范围为各国的专属经济区,连接各国专属经济区的外部界限而形成的环形中间区域(包括南沙群岛及其周围海域)为潜在的共同开发区。这种方案完全无视中国的传统海疆线,是我国所不能接受的,同时印尼的东盟伙伴也反映冷淡。

(2)“一人一份”方案(又称“适用于每一方”方案)。这是美国海事问题学者瓦伦西亚提出来的,即争议各方搁置对南沙群岛的主权要求,在没有争议的领土与有争议的岛屿之间划一条中间线,中间线以内的区域为共同管理区。这个区域也可以是各国 200 海里以外的区域(不考虑西沙和南沙群岛)。这种方案实际上是划界方案,并将我国有确定权利的海域划入共同管理区。

(3)“南海甜甜圈”方案。此模式是由印度尼西亚前驻德国大使贾拉尔(Hasjim Djalal)于 1994 年 5 月提出的共同开发南海的方案。其内容为:各南海外围国家向南海划 200 海里专属经济区,南海中心部份不属各国专属经济区范围,建议将该中心部份作为“共同开发区”,南海沿海国不得在专属经济区之外主张大陆架权利。在“共同开发区”内的岛屿或礁石,应开放给南海沿海国的人民,许其自由登陆。作为共同开发之用的岛屿或礁石,不能作为军事基地或军事用途,不能享有领海、邻接区、专属经济区或大陆礁层之权利。“共同开发区”只作为和平用途,不能作为军事目的或在此举行演习。“共同开发区”的使用以五十年为限,必要时有关国家可以协议再加以延长。此方案同样忽视了中国的主权。

(4)“南海海域三层级”方案,这是台湾学者傅崐成提出的。他认为我国在南海的“U”形线应具有三个层级的效力,第一层级为整个“半闭海”的“南中国海”,各国可依照 1982 年《联合国海洋法公约》第 123 条的规定,与周边国家对南海生

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① 李国强:《对解决南沙群岛主权争议几个方案的解析》,载于《中国边疆史地研究》2000 年 9 月第 3 期。

物资源、环境、航运及科学研究事务进行合作;第二层级为1947年我国官方所划定的“U”形线内为中国人的“历史性水域”,中国享有种种优先权利;第三层级为西沙、南沙群岛以直线划出两三“群岛水域”,中国可在此水域内享有完整排他的主权,但并不妨碍他国的通行权利。[①]

综上,前三种划定共同开发区的方案都未能充分尊重中国的主权。其或者把南沙群岛等同于无主地,或者以目前占领的现状确定岛礁的主权归属,以对南沙群岛及其资源进行再分配,实质是把南海问题推向国际化,把南沙群岛宣布为“国际海洋保留区”,或转变为“国际海洋公园”。[②] 第四种方案在维护我国南海主权上是可取的,但其具有原则性,并未涉及具体的共同开发区划定事项,且在南沙岛礁和海域被邻国大量占领的情况下,具有执行上的困难。

笔者认为,在南海目前的形势下,要解决共同开发区划定这一复杂的具体事项,应本着从实际出发,先易后难、循序渐进的原则。一般而言,在解决国际争端中,双边的谈判更容易取得成功,多边机制的建立往往需要一个长期的过程。国际海域共同开发的实践表明,不涉及第三方的小范围的争议区的双边开发往往是开启共同开发的第一步。如在泰国湾,泰国、马来西亚和越南三国有部分相互重叠甚至是三国主张重叠的水域。无论是马来西亚与越南还是泰国与马来西亚的共同开发区,设立的面积都不大,均是严格限制在双边争议的区域内。在南海问题上,我们可以考虑先在仅仅涉及两个国家的争议区域建立双边性共同开发区,在条件成熟时再扩大到多国的争议区域。具体而言:

首先,在礼乐盆地东部,可与菲律宾进行共同开发。礼乐盆地属陆缘—裂离断块盆地,面积约3.9万平方千米。礼乐盆地具备油气成藏的6大要素条件,盆地中、东部断裂发育区是油气运聚成藏的优势前景区域。其中,礼乐滩虽然勘探成本较小,但并不是优势成藏区域。在今后油气勘探中,应在盆地中、东部先找深大断裂,以便发现大油气田。[③]

其次,在曾母暗沙盆地,可以与马来西亚进行共同开发。该盆地位于沙捞越陆架上,面积18.3万平方千米(属我传统海疆线内的12.7万平方千米)。目前已发现72个油气田和含油气构造。从较粗略的沉积岩体积法计算,原地矿部广州海洋地质调查局认为油气资源量为107.2亿吨,在我传统疆界线内为77.4亿吨,其中天然气资源量为7万亿立方米。

再次,在文莱盆地和万安滩盆地,可与越南进行共同开发。文莱—沙巴盆地走向北东,面积9.4万平方千米(属我传统海疆线内3.3万平方千米),海相沉积

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① 《傅崐成教授就南海问题作学术讲座》,下载于 http://www.sjtu.edu.cn/news/shownews.php?id=27893,2010年11月14日。

② 李金明:《南沙海域的石油开发及争端的处理前景》,载《厦门大学学报》(哲学社会科学版),2002年第4期,第56页。

③ 孙龙涛等:《南沙海域礼乐盆地油气资源潜力》,载《地球科学——中国地质大学学报》,2010年1月(第35卷第1期),第137、143页。

超过万米。目前已发现61个油气田或含油气的构造,以产油为主,其中巴罗尼亚油田可采储量达2974万立方米、天然气356亿立方米,安帕西南油田可采储量1.44亿吨。据原中国海洋石油探勘开发研究中心测算,文莱—沙巴盆地资源量为85亿吨,而原地矿部估算文莱—沙巴盆地的油气资源量为55.6亿吨,在我传统疆界线内为18.5亿吨,约为三分之一。①

万安滩盆地位于南沙海域西南部,该盆地长轴近南北向,南北长约600千米,面积8.5万平方千米。至少有21个构造被钻井证实为含油气构造,另有21个构造见油气显示。估计盆地资源量为41亿吨,而在我国传统疆界线内资源量约为27亿吨。②

总之,在难度较小区域的双边共同开发,可以减少开展共同开发的阻力,为各广阔领域的多边共同开发提供示范和推动力。

四、采用的管理模式

共同开发区的管理模式,此处可界定为经营管理和行政管理模式,是双方进行共同开发时必须加以明确的问题,它贯穿于共同开发的全部过程。由于共同开发区既具有主权属性,又伴随着合作经营的性质,这就要求共同开发区的管理既要达到行政监管的作用,又要满足合作经营的需要。对现有的共同开发案例进行分析和归纳,实践中海洋油气共同开发的管理模式大致有以下四种:

第一种是代理制模式。在该模式下,签约双方中的一方代理另一方,实施或全面管理整个争议区的石油资源开发活动,并将本国的授予许可和管理机制适用于该区域。早期的共同开发案中多采取代理制的模式,如1958年沙特阿拉伯与巴林的共同开发协定、1969年卡塔尔和阿布扎比共同开发协定等;第二种是联合经营模式。即双方政府授权各自的租让权人进入共同开发区,要求双方租让权人订立共同经营协议,以合资机构的形式对共同开发区内的资源进行勘探开发。共同经营协议须经双方政府批准。采取这一模式的例子有:1974年法国和西班牙关于比斯开湾的共同开发协定、1992年马来西亚和越南共同开发泰国湾的协议、1995年英国和阿根廷共同开发西南大西洋的协议等;第三种是"超国家"机构管理模式。在这种模式下,双方政府各自委派相同数目的代表组成具有法律人格的国际联合管理机构。联合管理机构有权代表国家在共同开发区直接授予勘探许可权、规定勘探开发条件等全部管理工作。实践中采取这类模式有:马来西亚与泰国共同开发协定、1993年和1995年几内亚比绍与塞内加尔先后

① 许以和:《南海国土油气资源开发设想.》,载《南海国土资源开发问题研究专题报告》,1996年,第109页。

② 张训华等著:《中国海域构造地质学》,海洋出版社2008年版,第303~311页。

签署的《管理和合作协定》及其《议定书》等。

代理制模式在共同开发的实践中并不多见，这一模式一般仅适用于两国有着长期睦邻友好关系、共同开发区的区块较小而建立复杂管理机制会造成不合理费用开支的区域。联合经营模式具有简单、务实的优点，特别适合于历史上民族经济利益有冲突的地区以及对自然资源有不同开采方式的国家之间。但是国家仅仅保留授予租让许可的权利，具体经营都是由租让权人负责，国家对于共同开发的控制力不强。“超国家”机构管理模式是最复杂和最制度化的，它要求更高水平的合作，如果两个国家在某些重要事项上有较大差异，或者急切想开发石油资源，这种模式便会缺乏吸引力。[①]

以上三种模式各有利弊，如果能够兼采其优点，将有助于平衡合作各方的利益。混合管理模式则将以上模式结合运用。《帝汶缺口条约》就是这样的例子：将最有开发前景的A区作为共同开发的主区域，并设立B、C两个辅助开发区，作为对主开发区利益分配的一种微调和补充，减少和减弱设立单一性质的开发区所带来的利益要求的平衡难度，从而更容易被争议双方所接受。它给共同开发带来了新的启示——共同开发区可以同时有不同的层次，划分为利益份额有所差异的子区域，在每一个区域适用各自的规则。这种混合管理模式，对于南海这片争议颇为复杂的地区，具有积极的借鉴作用。[②]

首先，对于南海争议海域中资源开发前景良好，涉及重大经济利益的核心区域，可以优先考虑采用“超国家”机构管理模式，由两国组成联合管理局进行勘探开发和管理。因为这种更高水平的合作有利于实现共同开发的效率，并较好地稳定双方之间达成的信任。但是，如果双方分歧比较大，预见在相当长的一段时间内难以就开发制度、法律适用、财政税收等前期关键问题达成一致，则可退而考虑联合经营模式。这种模式具有公正、全面的优点，且具体经营由租让人负责的特点能较成功的吸引投资。代理制的开发模式则在核心区域的共同开发中并不可取，原因是一方代理另一方行使资源的主权权利，而此时另一方可能顾虑两方没有平等地位，甚至认为自己对这一资源的主权权利受到损害或丧失，尤其是对于南海争议海域的核心区域，会担心另一方的实际管理和管辖造成一种默认主权的事实。

其次，对于主要接近一国且该国已经在此进行一定规模开采活动的争议海域，则可以考虑采用代理制模式，由该国继续经营管理，一国则按照一定的比例获取一定的收益。在南海某些争议海域，越南、印度尼西亚和菲律宾等国已经与美国、俄罗斯、法国、德国等国家签订油气开采合同，并且从中获得了巨大的利

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① 萧建国著：《国际海洋边界石油的共同开发》，海洋出版社2006年版，第123～127页。

② Onorato, W. T. and Valencia, M. J., International Cooperation for Petroleum Development: The Timor Gap Treaty, *ICSID Review: Foreign Investment Law Journal*, Vol 5, No 1, Spring 1990, p. 21.

润。在这种情况下,我国尊重其勘探开发的现状,不涉入管理活动,通过收益分成的手段灵活处理在这些海域的共同开发的问题不失为一种策略。

最后,对于极可能遭受来自第三方强烈反对和质疑的海域则应优先考虑联合经营模式。目前,国际上现有的共同开发协定几乎都是双边的,但是,建立共同开发区的争议海域,很多情况下往往涉及第三方或者更多。现有国际实践在处理第三国主权或主权权利时的做法主要有三种,即回避第三方、排斥第三方、在共同开发协定中规定对第三国开放或者第三国加入的程序。在南海各争议海域的双边共同开发中具体应怎样处理第三方的权利问题,本文在此不深入讨论。这一类型的争议海域应优先考虑联合经营模式,是因为这种模式更方便第三方的加入。它是由双方授权的租让权人订立共同经营协议,以合资机构形式对共同开发区进行开发,国家掌握授予许可的实质性权力,其他的具体经营则由租让权人全面负责。国家的公权利主要体现在授予许可的控制环节,其他的则更多的是平等民事主体之间私权利的平衡,第三方以授予本国租让权人的方式加入共同开发对现有制度的冲击和改变相对较小,也较易被共同开发的双方所接受。

当然,南海争议海域并不能简单地分割为以上三种情形,因为南海争端利益关系错综复杂,这就使得共同开发管理模式的选择不能简单的一刀切,而应该根据该海域具体的状况以及所涉国家的意愿综合考虑,最关键的是能较好地平衡各方的利益,积极地推进共同开发。因此,上述几种模式可能同时出现在南海不同海域的共同开发活动中,而且在一定情形下由于共同开发局势的变化,不同模式之间可能互相转化,这都需要我们根据实际出现的情况灵活地选择和处理,并适时地进行合理变通。

五、共同开发区的管辖权分配和法律适用方式

共同开发区内存在着诸多的权利义务关系需要调整,如进入共同开发区的经营人之间的关系、政府与经营人之间的关系、经营人与承包商之间的关系、承包商与第三方直接的关系等等。由哪一方进行管辖、依据什么样的法律进行管辖?既要遵守国际法的规定又不能损害沿海国对该海域的管辖权。在谈判、签订和执行共同开发协议时,各国都希望尽量地扩大本国的管辖范围,并努力将本国的法律制度适用于共同开发区,因此在共同开发的管辖权分配与法律适用问题上需要有关国家协商解决。

目前,在现有的共同开发案例中,共同开发区管辖权的行使和法律适用主要有四种类型:(1)由一国单独管辖并适用本国法律。如 1958 年巴林和沙特阿拉伯共同开发波斯湾协议中,规定由沙特阿拉伯单独管辖。这种情形一般出现在早期的共同开发协定中。(2)将共同开发区分为两个部分,在边界线各自一侧行使管辖并适用自己的法律。如法国与西班牙、冰岛与挪威扬马延共同开发案都

是采取这种方式。这种方式可以避免不同法律体系适用的冲突。(3)在重叠区情况下共同行使管辖。共同管辖往往与双方当事国所选择的超国家管理模式有关。如马泰共同开发案中，两国对共同开发区的海床、底土的非生物资源的勘探、开发和控制等由代表双方的联合管理局行使。(4)在重叠区情况下作业者所属国管辖。日韩共同开发协定就属于这种类型。在谈判之初，日韩两国曾想就共同开发区专门制定一套法律，但这种做法不仅耗时而且十分复杂。这两国也曾设想过将开发区一分为二、分别管辖，但这似乎与协定搁置争议、不影响各自划界的指导思想相悖。最终，双方决定将共同开发区划分为若干个区块，每一个作业分区块由经营者的所属国管辖，即经营者只受本国法律约束。如《协定》第19 条规定，除协定另有规定外，如果一方已经同意承租人作为分区块的经营者，有关该区块内自然资源的勘探或开发事项应适用该国法律规章。日韩共同开发协定在管辖和法律适用上体现出了平等、简易的特点，避免了两国法律相互冲突的问题。这就是通常所称的“经营者准则(operator formula)”。这种特殊的制度经两国的实践证明是成功的，比较适宜于文化背景和法律制度差异不大的国家之间。[①]

笔者认为，南海某些海域的共同开发可以借鉴这种模式，但它并不完全适用于整个南海共同开发中。管辖权的分配和法律适用方式不是一个单一的独立的问题，它必须与共同开发区的管理模式结合起来考量。南海海域大概有三种情形，因此，在不同的海域应该考虑采取不同的管辖权分配和法律适用方式。

第一，资源开发前景良好、涉及重大经济利益的核心区域。这种情形优先考虑的是“超国家”机构管理模式，即由两国组成联合管理局进行勘探开发和管理。在这种情况下，选择共同管辖将有助于联合管理局职能的充分发挥和共同开发活动的顺利开展。当然，如果全面的共同管辖不能够实现，可以考虑仅仅在某些事务上适用。如马泰的共同开发案中，两国虽然规定对海床、底土的非生物资源的勘探和开发等由联合管理局共同管辖，但是有关捕鱼、航行、科学研究、防止污染以及其他事项的管辖权两国均各自行使。为避免刑事管辖的冲突，双方还在共同开发区专门划出了一条刑事司法管辖权的分界线。

第二，对于主要接近一国，且该国已经在此进行一定规模开采活动的争议海域，优先考虑的是代理制模式，即由该国继续经营管理，合理的方式是由一国单独管辖并适用该国法律。如 1958 年巴林和沙特阿拉伯共同开发协议，沙特阿拉伯行使管辖权无损巴林分享油田的一半收入。

第三、对于存在多方争议而考虑联合经营模式的海域，应参考日韩的“作业者所属国管辖”方式。存在多方争议的海域，往往可能遭受来自共同开发方之外的压力和干扰，因此，联合经营模式的灵活性有助于应对各种突发的因素。而在

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① 萧建国著:《国际海洋边界石油的共同开发》，海洋出版社 2006 年版，第 150 页。

管辖权和法律适用上，也应该遵循这一思路，一方面，“作业者所属国管辖”方式可以体现当事国法律的平等性；另一方面，如果对不同的作业者适用不同的法律，那么如下的困境将得以解决：在共同开发活动开始以后，又有其他国家加入该共同开发协定将对现有法律框架造成冲击。

结　语

面对南海油气共同开发这样一个繁复问题，本文的工作仅仅在于通过借鉴其他海域共同开发的经验对其中关键敏感的问题进行讨论，并依此提出一些建议和对策。当然，每一个海上油气共同开发协定都有其自身的特点，这种单纯的借鉴是否可行乃至成功恐怕还需要时间加以检验。更何况南海油气共同开发或许只是南海诸多争议问题中的一个，其本身的廓清必将依赖与之相关的其他问题。不过，“千里之行始于足下”，无论如何，笔者希望此种对个别问题的具体讨论能够有助于我们解决最终的问题。

（责任编辑：苏宝清）

On Key Issues for a Regime of Joint Development in the South China Sea

——with the Experiences of Other Sea Areas

LUO Ting-ting*

Abstract: With disputes over islands and maritime delimitations unresolved, joint development of oil and gas will be inevitable for the détente of relationships between neighbor States and peaceful use of resources in the South China Sea. Such joint development shall be under a formal regime to settle down rights and obligations for all related States. This article explores key issues of the future analogous regime in the South China Sea and proposes optional approaches to resolve such issues by referring to practices in other areas and by analyzing the situation in the South China Sea.

Key words: Joint development of oil and gas; South China Sea; Key issues

Introduction

Disputes over rights and interests in the South China Sea are essentially disputes over sovereignty and jurisdiction on islands, which become mostly complicate and delicate due to proven rich oil and gas resources. Since disputes over islands and maritime delimitations remain unresolved, joint development of resources, if arranged and accomplished, will undoubtedly contribute to the détente and stabilization of regional relations and to the achievement of win-win ideal in the exploration of the South China Sea region. Consequently, favorable and solid grounds will be laid down for all riparian States to delimit maritime boundaries.

At present, research works on joint development in the South China Sea focus mainly on two aspects. The first one is the necessity and possibility of

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joint development and related difficulties. The second one is possible arrangements for joint development. Arrangements proposed by scholars from the riparian States and Western States are commonplace.[①] (The Philippines proposed "North Sea Model" in 1988 and "Antarctic Convention Model" in 1999. Vietnam proposed "U-shape" in 1992 and "Annular" in 1994. Indonesia proposed "Indo-Australia Sea Lane" in 1993 and "South China Sea Donut" in 1994. B. A. Hamzah from the Institute of Strategic and International Studies in Malaysia proposed the "establishment of a Joint-development Agency." Mark J. Valencia from the East-West Center at Hawaii University proposed "devising a shared regime that will serve the interests of each party" in 1992.) Nonetheless, all these proposals are focusing on joint development from a macro perspective. Although the feasibility of joint development and clearance of rights and interests are *inter alia* to be decided in the first place, this author takes the view that joint development in the South China Sea should be managed in accordance to a certain regime to ensure the rights and obligations of all Parties, just like oil and gas exploitation in other seas. For the future, consideration and arrangement for the regime are to be decided first or last in the South China Sea. Given these considerations, the research focus of this article is the administrating regime for the South China Sea.

Joint development agreements possess unique frames and regime assignments due to the diversity of sea regions, resources, politics, economics laws, historical and cultural backgrounds, and relations between States. Therefore, there is no universal model for joint development for all seas. As indicated in the book *Joint development of offshore Oil and Gas* by British Institute of International and Comparative Law:

> *Each of these models has a number of possible variations yet none seems capable of commanding universal acceptance due to differing political and economic systems, traditions of conflict and degrees of national sensitivity.*[②]

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① Wang Zhijian, Joint development is the most realistic solution to the South China Sea Issues, avaliable at http://hhlawaid.blog.hexun.com/6886645_d.html, Nov. 17 2010.

② Hazel Fox QC and Paul McDade et al, *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary*, British Institute of international and Comparative Law (BIICL), 1989, p. 115.

Still, some general policies and principles of joint development can be outlined, based on existing international agreements on joint development of offshore oil. Such policies and principles will shed light on the basic content of joint development regime of offshore oil and gas. The above mentioned book summarizes the existing international legal instruments, which are: sovereignty disputes resolution, role and position of the third Party, establishment of joint development zones, administration of joint development zones, pattern of development, financial arrangements and revenues distribution, tax arrangements, distribution of jurisdiction and law application, protection of marine environment and pollution prevention and disputes resolution, duration of joint development and its expiration, etc. These practices can be viewed as fundamental contents of a regime of joint development of offshore oil and gas. [①]

According to the author, a regime of joint development of oil and gas in the South China Sea should also be based on the above mentioned components. There are *inter alia* five basic issues which have to be taken into consideration in establishing joint development regime in the area: resolution of sovereignty over islands and boundary delimitation, guarantee of pre-existing rights of the third Party, establishment of joint development zones, administrative pattern, consensus of jurisdiction distribution and law application. From the outset, disputes over rights and interests in the South China Sea have become increasingly complicated and delicate, as they involve six States and seven Parties. Sovereignty over islands gets entangled with maritime delimitations, and other coastal States are more and more engaging in explorations of oil and gas within Chinese Traditional Maritime Boundary Line (the U-shaped line). Furthermore, the essential nature of joint development is a cooperation which is based on political will. Consensus between disputing Parties is the political ground for the realization of joint development. [②] Ibrahim Shihata and Willam Onorato from the World Bank define the concept of joint development as "a regime under which the entire boundary dispute issue is set aside, thus creating an ambient development atmosphere of political cooperation from the outset." [③] The Japa-

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① XIAO Jianguo, the Joint Development of the Oil Deposits across the International Maritime Boundaries, Ocean Press, 2006, pp. 233-254.

② CAI Penghong, the Current Status of Sino-Japanese Disputes in the East China Sea and the Prospect for Joint Development, *Contemporary International Relations*, 2008(3), p. 45.

③ I. F. I. Shihata and W. Onorato, *Joint Development of International Petroleum Resources in Undefined and Disputed Areas*, (paper delivered at the International Conference of the LAWASIA Energy Section, Kuala Lumpur, 18-22 October 1992), p. 6.

nese scholar Masahiro Miyoshi pointed out that "joint development is a provisional arrangement between governments, an arrangement of Utilitarianism on joint exploration and exploitation." Due to the complicated South China Sea circumstances, the key factor for cooperation is political will of all riparian States participate in the joint development, which is a combination of political cooperation and utilitarianism. The above mentioned five issues are undoubtedly centered on vital state interests, which may provoke conflicts and deeply affect the political will of participating States. In other words, successful resolution of those five issues could decide whether joint development in the South China Sea will proceed smoothly and could also function as a tool for tackling other issues.

This paper will explore these five key issues of the regime of joint development of oil and gas in the South China Sea. Consequently, possible approaches to these issues will be analyzed through comparative study of analogous regimes in other sea regions and practical conditions in the South China Sea.

Ⅰ. Standpoint on Sovereignty over Islands and Maritime Delimitation

Joint development is a provisional arrangement for optimal use of resources before agreements on delimitation are reached between related States. During negotiation and enforcement of a joint development agreement, involved States hope to preserve their legal standpoints and claims on maritime delimitation, which are especially notable in joint development in disputed sea areas. Therefore, related States will have to put aside disputes and freeze territorial claims on the ground of acknowledging disputes over sovereignty and delimitations. Such practice is reflected in agreements on joint development as a clause "without prejudice against sovereignty or delimitation standpoints."[①]

All the existing agreements on joint development of offshore oil and gas have the clause "without prejudice against sovereignty or delimitation standpoints," which varies in specific wording. The second clause of Bahrain-Saudi Arabia Boundary Agreement of 22 February 1958, states that arrangement on the Fasht-Abu-Sa'fah oil field "does not infringe the right of sovereignty of the Government of Saudi Arabia nor the right of administration over this above-

① XIAO Jianguo, the Joint Development of the Oil Deposits across the International Maritime Boundaries, Ocean Press, 2006, pp. 105-106.

mentioned area."

Article 28 of 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 of 30 January 1974 states:

> *Nothing in this Agreement shall be regarded as determining the question of sovereignty rights over all or any portion of the Joint Development Zone or as prejudicing the positions of the respective Parties with respect to the delimitation of the continental shelf.*

Article 4(a) in the Malaysia-Vietnam Memorandum of Understanding of 5 June 1992 similarly provides that the positions and claims of the two countries in relation to and over the defined area are not to be prejudiced by any provisions in the Memorandum, which explicitly defines the purpose of this legal instrument as putting aside sovereignty disputes and pursuing joint development of oil and gas deposits. In addition, there are other similar provisions in the 1995 Joint Declaration on developing the South-west Pacific region between the Great Britain and Argentina, and the 1989 Timor Gap Treaty between Australia and Indonesia. This clause has been generally accepted by various Parties, because it protects their respective standpoints and eliminates fears or misgivings.

In the South China Sea, complex and delicate disputes between China and other riparian States, such as Vietnam, Malaysia, Indonesia, the Philippines and Brunei are real and add to the overlapping sovereignty claims among these countries. For the resolution of disputes in the South China Sea, China has consistently proposed and purported the principle of "putting aside disputes and engaging in joint development." Deng Xiaoping articulated this concept during a meeting with delegates from the Center for Strategic and International Studies at Georgetown University, and it was expounded and promoted later. The contents of putting aside disputes and engaging in joint development can be summarized as four major points First, sovereignty of China shall be put forward as a priority. Second, parties should respect the *status quo* and putting aside disputes. Given the complication and difficulties in dispute resolution over territory and delimitations, sovereignty claims may be put aside, which does not mean renouncing sovereignty. Third, municipal cooperation is the perspective for joint development. Joint development does not relate to sovereignty or sovereignty rights, therefore such a joint arrangement can be actively promoted

in the economic field. Fourth, the purpose of joint development is to deepen mutual understanding through cooperation so as to lay down foundations for final resolution of sovereignty and delimitation issues.[①] The original idea of "putting aside disputes and engaging in development" is directed toward the sovereignty disputes over islands and maritime delimitations, while it is entirely correspondent to the nature of joint development. Such an idea implicates that joint development, as a provisional arrangement, does not prejudice against the respective standpoints on sovereignty or delimitation.

The Blue Book on Asia and Pacific 2010 released by Chinese Academy of Social Science noted that the international community has shifted their notions of China from threatening by China to obligations of China, from a stakeholder to G2, which has been to a certain degree aggravating misgivings or fears of neighboring States towards China. In 2009, the concept of G2 became a hotspot in the international community which overestimated China's influence in the international affairs and misjudged Chinese fundamental foreign policy orientation. What is more critical is that some neighboring States which have such misgivings or fears have been attempting to use outside powers to balance or check the influence of China.[②] Under such circumstances, it is much more desirable to include a clause "without prejudice against standpoints and positions on sovereignty or delimitation." This clause will guarantee that joint development will have no effect on respective Parties' claims of sovereignty over islands or delimitations, which will explicitly demonstrate Chinese good will and determination on joint development and will remove concerns of neighbors.

The classic wording for reference is as the following:

> *Any provisions in the Agreement shall not be interpreted in the way as proof for renunciation of rights or claims to the defined area by the respective Parties, or as acknowledgement or endorsement to the other Party's position on sovereignty or claim to the defined area; activities or conducts due to the Agreement or enforcing the Agreement shall not be*

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① XIAO Jianguo, the Joint Development of the Oil Deposits across the International Maritime Boundaries, Ocean Press, 2006, pp. 204-205.

② CHEN Yuping, China faces 3 Sources for Security Risks: the Surrounding Countries are more Suspicious, avaliable at: http://news. dayoo. com/china/201004/07/53868_12447964. htm, Nov 14, 2010.

viewed as the proof for claiming or sustaining or denying any Parties' positions on sovereignty or claims to the defined area.[①]

The specific wording of the clause will be varying. Nonetheless, brief or detailed, its binding force, the conclusion and enforcement of an agreement on joint development shall not prejudice against respective Parties' standpoints and positions on sovereignty and delimitation, shall be expressed explicitly.

Ⅱ. Pre-existing Rights of the Third Party

Pre-existing rights are rights to explore and exploit by an enterprise of third Party, whose permission to explore and exploit in the disputed area is granted by a signing Party before a joint development zone is established. Thereafter, the third Party will have the right of exploitation in the area.[②]

Pre-existing rights of the third Party are to be taken into account when conducting joint development in a disputed area. Pre-existing rights become validated for a number of reasons. Firstly, a State granting its permission does not mean distribution or deposits of natural resources, *inter alia* oil and gas, in the area. For the purpose of research and deposits evaluation, the State grants its permission to the third Party to explore and exploit so that it may receive necessary data and statistics. Secondly, if a State (third Party) has explored and ascertained a commercially exploitable oil or gas field and secured investments from other Parties, thus the granting State will give its permission for economic ends. Thirdly, a granting State gives its permission with specific intention and purpose which is to engage with international consortia and groups. And by such activities, the State will impress the international community with its jurisdiction over disputed areas and thus increase its influence over future negotiations on joint development of the disputed area. Due to various reasons, pre-existing rights might give rise to serious discrepancies between involved States when negotiating joint development in the disputed area.[③] Therefore, when concluding an agreement on joint development and being con-

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① XIAO Jianguo, the Joint Development of the Oil Deposits across the International Maritime Boundaries, Ocean Press, 2006, p. 236.

② CAI Penghong, The Management Mode for Joint Development in the Disputed Maritime Zones: A Comparative Study, Shanghai Social Science Press, 1998, p. 17.

③ CAI Penghong, The Management Mode for Joint Development in the Disputed Maritime Zones: A Comparative Study, Shanghai Social Science Press, 1998, pp. 18-19.

fronted with pre-existing rights, negotiating States will consult with the granted Parties and make specific arrangements.

As for arrangements on pre-existing rights, the existing Agreements on joint development are generally taking two paths. One is to acknowledge pre-existing rights explicitly, as it is stated in article 3(2) of the Malaysia/Thailand Joint Development Agreement:

> *The assumption of such rights and responsibilities by the Joint Authority shall in no way affect or curtail the validity of concessions or licenses hitherto issued or agreements or arrangements hitherto made by each party.*

The other option is to deny pre-existing rights while requesting a granted third Party to participate in joint development under new conditions and terms. Typical examples of this type of agreement are the Joint Development Agreement between Sultan and Saudi Arabia and the Agreement between Japan and Korea.

Compared to the Agreement between Sultan and Saudi Arabia, the Japanese-Korean Agreement takes more flexible approach, according to which the two Parties are competent authorities for licensing in the sub-zone of the joint development zone and thus may re-license former permitted parties. In such way, pre-existing rights are practically acknowledged, which legally defines the status of former pre-existing rights owners without substantial difference from existing administration frames of either signing Party.

The flexible way of arranging pre-existing rights of third Party will serve as a great inspiration for the South China Sea region. Oil and gas deposits within Chinese traditional maritime boundary line are estimated at about $1.38 \times 10^{10} - 1.65 \times 10^{10}$ t. of oil.① By August 2009, riparian States such as Vietnam, the Philippians, Malaysia, Brunei and Indonesia have cooperated with over 200 western Corporations such as Exxon-Mobil and Shell to build about 1,380 rigs with annual output of fifty million tons. About eighty to ninety percent of the rigs are located in the South China Sea.② Vietnam is especially active, as it

① A Special Comprehensive Report Writing Group, A Comprehensive Report on China's EEZ and Continental Shelf Exploration, Ocean Press, 2002, p. 120.

② More than One Thousand Oil Wells Built by Use of Force, China Gets Nothing from Nansha Islands, *International Herald Tribune*, Aug. 25, 2009.

defined over 100 zones of oil and gas for public bidding in Nansha Island (Spratly Island) region. Public biddings have been invited soon after and cooperative explorations have been launched. In recent years, contracts on cooperative exploration of oil and gas have been concluded with companies from the United States, Russia, France, the Great Britain and German, etc. With so many oil companies present in the South China Sea, arrangements for pre-existing rights of the third Party are inevitable. Unilateral activities will be excluded. China and other Party shall reach consensus before carrying out plans for joint development.

As demonstrated above, pre-existing rights in disputed zones of the South China Sea are due to deeply rooted reasons. At present, oil and gas development has been one of the most desirable impetuses for States with intensive labor to counter impacts from financial crisis and revitalize their economic development. Economy-based security policies result in attaching more importance to oil and gas resources. It is more so for the riparian States dependent on oil energy for industrial development. For the riparian States in short supply of oil one of the principal national security objectives is securing energy resources. One way to realize such goal is to take advantage of western investment and equipment for oil and gas development. In addition, by permitting foreign companies to participate in exploration and exploitation of resources, a State promotes operations in controlled island and sea areas, which thus will result in *ipso facto* occupation. On the other hand, powers outside the region are involved indirectly into the South China Sea though engagement of foreign companies in the development of resources. This in turn, may internationalize the disputes in the South China Sea, which may be exactly their strategy in the South China Sea.

Whereupon, as a latter participant in exploring the South China Sea, China will definitely benefit without admitting pre-existing rights of the third Party, while it will definitely have great impact on the interests of other riparian States and extra-regional States. For States which are already engaged in exploration, there is no urgent need for them to develop jointly resources. By denying their pre-existing rights, China might be confronted with great difficulties in joint development. Therefore, if an area is defined as a joint development zone, the two contracted operators before the establishment of the zone shall continue the operations with mutual consensus. Operation terms for future exploration shall be consulted with China on the basis of terms and conditions of commercial explorations. Whereby, the Japan-Korea Joint Develop-

ment Agreement could be modified, because it does not explicitly define pre-existing rights. Clauses may grant China with power to license in all subzones just like the other Parties. Such an arrangement will be beneficial to existing licensee while it may allow participation of Chinese oil companies in joint development, and resolve problems on joint development between China and other riparian States.

Ⅲ. Defining A Joint Development Zone

Defining the geological scope of a joint development zone is the most fundamental component in the joint development project. There are more than a hundred internationally disputed sea areas which vary in scope. The disputed area in the Persian Gulf is over 200,000 km^2, in Jan Mayen—45,470 km^2, and in the Thailand Gulf—7,250 km^2.[①] We can define a joint development zone in three ways according to analysis of joint development projects in more than twenty disputed areas. The first one is to define the whole disputed area or overlapping jurisdiction area as a joint development zone. The second approach is to define part of the disputed area as a joint development zone. And the third one is to define a joint development zone with equivalent of two parts across the boundary line. Such approach is adopted usually when deposits are still undetected. Although the two involved States have decided boundary line delimitation, they share a common viewpoint that there might be potential oil and gas structures across the boundary line. Therefore, they are prone to make arrangements in advance for joint development.

In order to define the whole disputed area or overlapping jurisdiction area as a joint development zone two Parties have to determine the scope of a disputed or overlapping area at the outset, which relies on consensus on their respective sovereignty and rights. In the 1974 Sultan-Saudi Arabia joint development project in a disputed area in the Red Sea, the two Parties defined the whole disputed area as a joint development zone. Such an approach may be adopted when there is consensus and no third Party involved. If the disputed area is large, the realization of the joint development after reaching consensus will depend on the Parties' real capabilities.

For an area possibly involving with a third Party or in which the two Par-

① CAI Penghong, the Current Status of Sino-Japanese Disputes in the East China Sea and the Prospect for Joint Development, *Contemporary International Relations*, 2008(3), p. 45.

ties being incapable to develop the whole zone, it will be worthwhile considered to take part of the disputed or overlapping area as a joint development zone (unclear sentence). In the Thailand Gulf, there are areas with overlapping claims among Thailand, Malaysia and Vietnam. Joint development zones between Thailand and Malaysia, and between Malaysia and Vietnam are with limited scope and within the bilaterally disputed areas. In the case between Indonesia and Australia, the two Parties undertook joint development activities in a prospective oil field before the joint development Agreement was concluded in 1989.

The third approach is an equivalent arrangement before deposits are proven. In the case between France and Spain, the joint development zone consists of two parts across the boundary line. Such an arrangement appears to be reasonable while there are uncertain factors. Once oil and gas deposits are proven, such an arrangement might be denied, so the two Parties have to define the disputed area again.

In the author's view, defining overlapping areas in the South China Sea is essential for making real progress in joint development. Since the third approach is applicable only when deposits are unproven, it will not satisfy our needs to promote joint development and to expedite resources exploitation. No doubt, defining the overlapping zones in the South China Sea will not be easy. China and other riparian States are all making claims on marine rights and interests in accordance with the Untied Nations Convention on the Law of the Sea (hereafter referred as the Convention). The Convention is not very precise in regulating islands and only consists of principles on delimitating Continental Shelf and Exclusive Economic Zone. Whereof, defining disputed areas in the South China Sea which relates to the six States or seven Parties will be quite difficult between two Parties, let alone among more Parties.

For various purposes, some States and scholars have made proposals for joint development in the South China Sea, including joint development zones. Here are some of the significant influential proposals. ①

1. Annular Arrangement

Annular Arrangement was proposed in 1994 by Indonesia. According to the agreemnt, all riparian States may claim 200 nautical miles from the baseline from which the breadth of territorial sea is measured. The seaward line of the

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① Li Guoqiang, Analysis on Some Solutions to the Disputes Over Nansha Islands Sovereignty, *Studies on the History and Geography of Chinese Frontiers*, 2000(3).

outer limit of the Exclusive Economic Zones may form a circle line. Annular area, including Nansha Islands (Spratly Islands) and the surrounding sea area, circled by that line shall be a potential joint development zone. Such a proposal completely denies Chinese traditional boundary line and shall be unacceptable. Other ASEAN Parties are all indifferent to this proposal.

2. Sharing Resources Arrangement/Applicable to Each Party Arrangement

The concept of Sharing Resources Arrangement or the so-called Applicable to Each Party Arrangement was proposed by the American scholar Mark J. Valencia. According to this arrangement, all disputing Parties should put aside sovereignty claims over Nansha Islands and draw an equidistance line between undisputed territory and disputed islands. The area within the equidistance line shall be a joint development zone, which may be outside the 200 nautical miles zone of each Party, excluding the Xisha Archipelagoes (Paracel Islands) or the Nansha Islands. Such an arrangement in fact delimits maritime zones and includes sea areas over which China enjoys definite rights.

3. South China Sea Donut Arrangement

The South China Sea Donut Arrangement was proposed by an Indonesian Ambassador in Germany Hasjim Djalal in May 1994. According to it, all riparian States could claim 200 nautical miles Exclusive Economic Zones. The central part of the South China Sea is way beyond the scope of all Exclusive Economic Zones and is proposed as a joint development zone. All riparian States shall not claim continental shelves beyond Exclusive Economic Zones. Islands or rocks in the zone are accessible for people from all coastal States, as they are permitted to land there freely. Islands or rocks which are designated for joint development shall not be used for military bases or other related purposes and shall exclude any maritime zones, such as territorial sea, contiguous zone, Exclusive Economic Zone or continental shelf. The joint development zone shall be used only for peaceful purposes, excluding military purposes such as drills. Duration of the joint development zone shall be limited to fifty years, which can be extended by the Parties. This proposed arrangement also neglected Chinese sovereignty.

4. Three-dimension in the South China Sea

The idea of Three-dimension in the South China Sea is proposed by Kuen-chen Fu. In his views, there should be three dimensions to be considered in the binding forces of the U-shape Line. The first dimension is the whole South China Sea as a semi-enclosed sea. In accordance with Article 123 of the Convention, all riparian States may cooperate with each other on living resources

management, marine environment, shipping and scientific research. The second dimension is the "historical waters" of China within the U-shape line according to Chinese governmental conduct in 1947, where China is enjoying all privileges. The third dimension is archipelagic waters formed by straight baselines of the Xisha Archipelago and the Nansha Islands, where China has integrate exclusive sovereignty without prejudice against passage rights of other States. ①

In other words, the three above mentioned proposals do not fully respect Chinese sovereignty. According to them, the Nansha Islands are either equivalent to an area of *res nullius*, or thier sovereignty to be defined based on *status quo* to redistribute their deposits. In fact, the Nansha Islands are being internationalized, which makes Nansha Islands region a reserved international area or an international ocean park. ② The fourth proposal aims at maintaining Chinese sovereignty and is of principle nature. However, there is no specific definition of joint development zone, which makes the proposal difficult to implement since the Nansha Islands and sea area are occupied by other neighboring States.

In order to resolve so complicate and delicate issue of defining a joint development zone in the South China Sea under the present circumstances, the author takes the view that practical principles should be applied, starting with the easiest one to implement. Generally speaking, in resolving international disputes, bilateral negotiation will be more successful, while multilateral format could be employed in the long term. According to the practice of joint development in international seas, bilateral development in a relatively small disputed area without a third Party involved could be the first step for starting joint development. Precedents may be found in overlapping areas among Thailand, Malaysia and Vietnam in the Gulf of Thailand. Joint development zones between Malaysia and Vietnam and between Thailand and Malaysia are defined with appropriate scale, limited within bilaterally disputed areas. As for in the South China Sea, at first we may consider establishment of bilateral joint development zones, which could be extended to multilateral zones when conditions are favorable.

Here are some specific suggestions. Firstly, the eastern part of the Lile

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① Prof. Kuenchen FU's Academic Lecture on the South China Sea Issues, avaliable at: http://www.sjtu.edu.cn/news/shownews.php? id=27893, Nov. 14, 2010.

② Li Jinming, The Oil Resources Development in Nansha Islands Area and the Prospect for Resolving the Disputes, *Xiamen University Journal (Philosophy and Social Science Edition)*, 2002(4), p. 56.

Basin could be jointly developed with the Philippines. The Lile Basin is a land of Epicontinental Cleavage with an area of 39,000 km^2 which meets the six requirements for oil and gas deposits. The central and eastern fracture parts are believed to have oil and gas deposits. Although exploration in Lile Sand may be more economically acceptable, it is not an ideal area of rich deposits. In future explorations, deep and large fractures should be detected in the central and eastern parts to find large oil and gas fields. ①

Secondly, the James Shoal Basin may be jointly developed with Malaysia. This Basin is located on the Sarawak continental shelf with a size of 183,000 km^2, of which 127,000 km^2 are within Chinese Traditional Boundary Line. At present, there are 72 oil and gas fields and structures detected. Roughly calculated by using volumetric method of sedimentary rock, Guangzhou Marine Geological Survey of the Ministry of Geology and Mineral Resources estimates that the total oil and gas deposits are 10.72 billion tons, of which 7.74 billion tons are within Chinese Traditional Boundary Line, including 0.7 billion cubic meters natural gas.

Thirdly, the Brunei Basin and the Vanguard Bank Basin could be jointly developed with Vietnam. The Brunei-Sabah Basin stretches 940,000 km^2 from north to east, including 33,000 km^2 within Chinese Traditional Boundary Line, while the sedimentary marine facies are over 10,000 meters. At present, there are 72 oil and gas fields and structures detected, in which oil is the major product. The Virginia Barrow Oilfield has deposits of 29.74 million cubic meters oil and 35.6 billion cubic meters natural gas. The Pablo Southwest Oilfield is estimated to have 144 million tons of oil deposits. According to an estimation made by China Offshore Oil Exploration Research and Development Center deposits of the Brunei-Sabah Basin are 8.5 billion tons, while the Ministry of Geology and Mineral Resources estimated them at 5.56 billion tons. About 1.85 billion tons or one third of the deposits are located within Chinese Traditional Boundary Line.

The Vanguard Bank Basin is located southwest of the Nansha Islands, whose long axis north to south is 600 km long and with area of 85,000 km^2. There are at least 21 proven structures with oil and gas, and another 21 structures are appear also to be filled with oil and gas deposits. Estimated deposits

① Sun Longtao, The Potential of the Oil and Gas Resources in the Liyue Bank of Nansha Islands Area, *Geoscience-China University of Geology Journal*, Jan, 2010 (vol. 35(1)), p. 137 and p. 143.

are 4.1 billion tons, among which 2.7 billion tons are within the Chinese Traditional Boundary line.[①]

In conclusion, bilateral joint development in a more defined area will confront fewer difficulties, which may serve as example and impetus for multilateral joint development in broader areas.

Ⅳ. Management Patterns

The management pattern in joint development zone can be divided into operational pattern and administrative pattern, which are key issues to be clarified by Parties in joint development throughout the whole term. Since a joint development zone bears nature of sovereignty rights as well as cooperative operations, its management shall meet the needs of administrative supervision and cooperative operation. Upon analyzing joint development cases, we can identify four management patterns in jointly developing offshore oil and gas.

The first pattern is when one state manages joint zone on behalf of both Parties, or may be viewed as an agent of the other Party. The agent Party carries out or manages joint development of oil and gas in the defined zone and apply its own domestic laws on licensing and administration. This pattern was usually adopted in early cases of joint development. Its examples can be found in the 1958 Bahrain-Saudi Arabia Joint Development Agreement and the 1969 joint development Agreement between Qatar and Abu Dhabi. The second pattern is joint management. Under such a pattern, the two Parties can license their own concessionaires. The concessionaires shall conclude an agreement on joint operation, conducting exploitations and explorations in the zone through a joint venture. The agreement on joint operation shall be approved by governments of the Parties. Examples of such a pattern are the 1974 France-Spain Joint Development Agreement on the Gulf of Biscay, the 1992 Malaysia-Vietnam Joint Development Agreement on the Gulf of Thailand and the 1995 Britain-Argentina Joint Development Agreement on Southwest Atlantic. The third pattern is "Super-national authority" management. Under such an arrangement, the Parties establish International Authority with legal entity with the same number of delegates from each Party to take all responsibilities on licensing exploitations and setting down terms and conditions for explorations and

① Zhang Xunhua, The Geological Formation of Chinese Seas, Ocean Press, 2008, pp. 303-311.

exploitations in the zone. In practice, this model is reflected in the Malaysia-Thailand Joint Development Agreement, the Agreement on Management and Cooperation between Guinea Bissau and Senegal in 1993 and 1995.

Agent pattern is rarely seen in practice. Such a pattern will be fitting in limited number of cases. States have long-standing good and friendly neighboring relationship, and the joint development zone between them is on comparatively small scale, which may make complicated management arrangement serve non-economic ends as well. Joint operation pattern has the merit of simplicity and practicality, which fits in zones with historical conflicts of economic interests and in zones where neighboring States adopt different models in exploiting natural resources. States are limited to rights of licensing while specific operations are left to the concessionaires. In that sense States will have very limited control over joint development. Super-national Authority pattern is the most complicated and institutionalized one, which will demand cooperation at a much higher level. Such a pattern appears to be less attractive unless the two Parties have great discrepancies on some key matters or are eager to pursue oil and gas development. ①

The above mentioned three patterns have both advantages and disadvantages. If all advantages are focused in one zone, both Parties can balance their interests more successfully. The Timor Gap Treaty is such an example, in which the most promising zone A is defined as a major zone of joint development with zones B and C are defined as auxiliary zones. The auxiliary zones are taken as a micro adaptation and supplementation to the major zone, so as to minimize difficulties in balancing interests and be more acceptable by the disputing Parties. The advantage of this pattern is that a joint development zone can have different layers of organization, be divided into subzones with different interest shares, and apply different rules. Such a mixed management pattern will be a great inspiration for the countries of the South China Sea—a region of heated disputes. ②

First of all, for prospecting core zones with rich resources and important economic interests, Super-national Authority pattern is worthwhile considering,

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① Xiao Jianguo, the Joint Development of the Oil Deposits across the International Maritime Boundaries, Ocean Press, 2006, pp. 123-127.

② Onorato, W. T. and Valencia, M. J., "International Cooperation for Petroleum Development: The Timor Gap Treaty", *ICSID Review: Foreign Investment Law Journal*, vol. 5, No 1, Spring 1990, p. 21.

according to which a Joint Authority shall be established for exploration, exploitation and management. Such cooperation on a high level can contributiee to the efficiency of joint development and to the enhancement of mutual trust. Nonetheless, if it is difficult to reach a consensus on key matters such as framework of development, law application, financial arrangement and taxes at an early stage, joint operation pattern will be preferable as the second best choice. This pattern has merit of full scale project, which will attract investment since concessionaires undertake specific operations. Agent pattern won't be fitting in joint development of core zones. Firstly, one Party acting as an agent on behalf of the other Party in exercising sovereignty rights will make the latter Party uneasy about potential unequal position, or even feel that its own sovereignty rights over the resources are being prejudiced against or diminished. In the South China Sea, practical management and jurisdiction exercised in core zones might *inter alia* make one Party fear that sovereignty *ipso facto* is acknowledged.

Secondly, for a disputed zone in the vicinity of one Party which explores it to a certain degree, agent pattern might be taken into consideration. The Party will carry on managing operations with a certain share of revenues generated by the other Party. In some disputed zones of the South China Sea, Vietnam, Indonesia and the Philippines have concluded contracts on developing oil and gas with the United States, Russia, France and German, and thus have gained enormously. Under such circumstances, China shall respect the *status quo* explorations and not get involved in the management of the zones. Alternative approach to joint development in the zones is revenue sharing, which is more adaptable.

Thirdly, for zones with potential strong opposition and contention from third Parties, joint operation pattern shall be considered. At present, existing joint development agreements are almost all bilateral, while establishing a joint development zone in a disputed region will always be related to a third Party or Parties. Existing practices of coping with sovereignty or sovereignty rights of third Party or Parties have three options, which are avoiding third Party or Parties, excluding the third Party/Parties, or providing for procedures on how third Party/Parties shall participate in the agreements. We will not elaborate further on how to cope with rights of third Party/Parties in joint development in disputed zones of the South China Sea. Joint operation pattern shall be favorably considered for such zones, for it is more adaptable to inclusion of third Party or Parties. According to this pattern, licensed concessionaires by the two

Parties will conclude an Agreement on joint operations. Joint development will be undertaken through a joint venture. States have powers on licensing, while daily operations will be left to the concessionaires. Public powers are reflected in licensing, and equal private rights are reflected at later stages. The third Party participates in joint development by licensing its domestic concessionaires, which will have the least impact on established regimes and more easily accepted by the two Parties engaging in joint development.

It is certain that disputed zones in the South China Sea shall not be sub-divided into the above mentioned three categories. Choosing management pattern of joint development will not be easy due to the complex situation in the South China Sea. The will of all related States shall be taken into account on case-by-case basis in specific zones. The most important task is to balance all interests and promote joint development. Whereupon all above mentioned patterns might be applied to joint development in different zones. Furthermore, such patterns could be replaced by each other in the same zone due to changes of circumstances in joint development. Therefore, the selection shall be made according to changing circumstances and shall be readjusted in time.

Ⅴ. Jurisdiction over a Joint Development Zone and Law Application

There are plenty of rights and obligations to be regulated in a joint development zone, including legal relationships between operators in the zone, between the government and operators, between operators and contractors, between contractors and the third Party. Who shall exercise jurisdiction on what conditions shall be bound by international rules without jeopardizing coastal State's jurisdiction over the sea area? When negotiating, signing and enforcing a joint development agreement, member States hope to expand their jurisdiction and enforce their domestic laws in the zone. Whereas, jurisdiction over and law application in joint development are to be resolved through negotiation between involved States.

At present, we can identify four types of jurisdiction and law application in a joint development zone. One is sole jurisdiction by one State and application of its domestic laws, which can be seen in the 1958 Bahrain-Saudi Arabia agreement on joint development in the Persian Gulf. The agreement stipulated that jurisdiction was to be solely exercised by Saudi Arabia, and it was a typical agreement in early times. Another type is to divide the zone into two parts, in

which each Party shall exercise its jurisdiction and apply its domestic law from its coast line to the delimiting line. Joint development between France and Spain, and the agreement between Iceland and Norway on joint development of Jan mayen are such cases, in which way conflicts of law application will be avoided. A third type of jurisdiction is condominium in overlapping area. Condominium mostly relates to the Super-national Authority adopted by member States. In the joint development between Malaysia and Thailand, the two Parties established a Joint Authority in charge of exploration, exploitation and control of non-living resources in seabed and subsoil of the area. The last type is jurisdiction by the operator's Home State in overlapping area. The joint development agreement between Japan and Korea can serve as an example. When starting negotiation, the two Parties attempted to make a specific set of legal rules for the joint development zone, which proved very time-consuming and complicated. The two Parties also tried to divide the zone into two parts and exercise jurisdiction respectively, which appeared to be contradicting with the guiding idea of the agreement to put aside disputes and be without prejudice against delimitation. In the end, the two Parties decided to divide the joint development zone into several subareas, each of which would be under the jurisdiction of the operator's Home State. In other words, operators should be bound by their domestic laws. In article 19 of the Agreement it is stated:

> *Except where otherwise provided in this Agreement, the laws and regulations of one Party shall apply with respect to matters relating to exploration or exploitation of natural resources in the subzones with respect to which that Party has authorized concessionaires designated and acting as operators.*

The Agreement between Japan and Korea on joint development is featured with equality and simplicity, avoiding law conflicts between the two Parties, which is known as "operator formula" and proved fruitful, inter alia for States with similar cultural background and legal regime. [①]

In the author's views, joint development in some areas of the South China Sea may use such a model, as it won't be applicable to the whole South China Sea region. Jurisdiction and law application cannot be an isolated issue and

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① Xiao Jianguo, the Joint Development of the Oil Deposits across the International Maritime Boundaries, Ocean Press, 2006, p. 150.

should be considered in combination with the administrative regime of a joint development zone. As for the South China Sea, there are generally three areas or subzones, which require a unique way of jurisdiction and law application.

The first subzone has potential for development and involves critical economic interests. Under such circumstances, a Supra-national Authority will be a suitable administrative model, according to which explorations and exploitations are under a joint Authority established by member States. Condominium thereof will contribute to the Authority fulfilling its duties and carrying out development activities. If overall condominium is difficult to realize, the Parties could consider condominium over specific affairs. In the joint development between Malaysia and Thailand, the two Parties set up condominium for the joint Authority over exploring and exploiting non-living resources on the seabed and subsoil, while jurisdiction over fishing, navigation, scientific research, pollution prevention and other issues is still solely exercised by each State. The two Parties drew a delimitation line in the zone in order to avoid conflicts over penal jurisdiction.

The second subzone is in the vicinity of a State which has explored the disputed area to a certain degree. A preferable approach in this case is the agent pattern, according to which the State is responsible for management and exercises sole jurisdiction by applying its domestic laws. In the 1958 Bahrain-Saudi Arabia joint development agreement, jurisdiction by Saudi Arabia does not jeopardize the right of Bahrain to get half of the revenues from the oil field.

The third subzone has disputes among several States. Jurisdiction by the operator's Home State set by the Agreement between Japan and Korea is a benchmark for joint development in such subzone. Disputed zones are often put under pressure from external Powers, so joint operation pattern is more adaptable to unexpected changes. As for jurisdiction and law application, such an approach is also worthwhile considering. On one hand, jurisdiction by the operator's Home State is based on the premise that all involved States' laws are equal. On the other hand, applying different laws to different operators might stimulate the resolution of such problem due to the impact on existing regimes of joint development brought by new Parties of the Agreement.

Ⅵ. Conclusion

This paper examined key issues on joint development of oil and gas in the South China Sea, while taking into account experiences and precedents in other

sea areas. Accordingly, it offered some solutions and approaches. Needless to say, each Agreement on joint development of offshore oil and gas is marked with its own unique characteristics. It remains to be seen whether such simple modifications are applicable to the South China Sea. Furthermore, joint development of oil and gas in the South China Sea is only one of the disputed themes in the region, and its resolution is linked to other themes. Nonetheless, a journey of a thousand miles begins with a single step. This author hopes to contribute to the final resolution by exploring a specific theme.

(Senior Editor: ZHANG Xiangjun;
Editor: SU Baoqing; English Editor: Avram Agov)

Transboundary Resource Management: The Need for A Joint Development Zone between Nigeria and Ghana

Kingsley Ekwere*

INTRODUCTION

The configuration of Nigeria's coastline to the east of Nigeria/Benin line produces a stretch of line which goes out to the full 200 miles where Nigeria and Ghana have a common maritime boundary (unclear location and directions; Ghana is located west from Nigeria/Benin border for instance). Statistical evaluation by the International Seabed Authority indicates the likelihood of thick sediment on the seabed of both countries with reasonable prospect of each being able to claim an extended continental shelf. The Report further indicates a considerable overlap of mineral resources especially oil and gas straddling the maritime boundary of both countries. From this perspective, I examine the need for transboundary natural resource management to address the challenge of managing resources that are shared across the international boundary of both countries. I find that the formation of a cooperative regime to develop and manage shared resources facilitates and improves the management of natural resources to the benefit of all parties. It also helps to improve conservation and sustainable use of shared resources. A further justification for transboundary initiative between the two countries is peace and security. This study is organised in three parts. Part one offers a definition of joint development and gives a brief history of the concept. It also includes background analysis of the Gulf of Guinea. Part two examines Nigeria—Ghana maritime boundary, focusing on the current negotiations towards the delimitation of their Exclusive Economic Zones (EEZs) and Continental Shelves (CSs). We will provide strong reasons why

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both countries and other nations of the Gulf of Guinea should establish a cooperative regime to manage their shared resources. Part three will consider issues which need to be addressed during negotiations of joint development zone.

Ⅰ. DEFINITION OF JOINT DEVELOPMENT AND BACKGROUND ON THE GULF OF GUINEA

A. *Definition of Joint Development*

The fluid nature of petroleum or natural gas sometimes results in deposits lying across the boundary line of two or more neighbouring countries. When this happens, one country's extraction of the deposit may undermine the potential share of other countries. Therefore it becomes necessary for these countries to agree on some form of cooperation in the exploitation of the resource. For the purpose of this study, joint development may be defined as an arrangement between governments or between government and private oil company or consortium of private companies, designed for purposes of joint exploration or exploitation of hydrocarbon resources that lie across boundary lines and straddles different jurisdictions. What comes out rather clear from this definition is that deposits of fluid petroleum or natural gas should be regarded as a single deposit and jointly managed if it straddles common boundary line. Four types of cooperative arrangement may be distinguished: (1) cooperative regime for the exploitation and management of shared resources without the necessity of a boundary line; (2) the establishment of joint exploitation zone for resources which straddles the boundary; (3) arrangements for the exploitation of resources lying across the boundary line; and (4) cooperative arrangements to facilitate the management of transboundary resources. ①

This study will only concentrate on the first category i. e. where states fail to reach an agreement on the general line of the boundary and decide instead to establish, either provisionally or on a long-term basis, a zone in all or part of the area where their zones overlap.

B. *Origin of Joint Development*

The idea of parties deciding on a co-operative regime to exploit resources

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① Churchill and Lowe, *The Law of the Sea*, 3rd. ed., Manchester: Manchester University Press, 1999.

in overlapping areas was first given by the International Court of Justice (ICJ) in the *North Sea Continental Shelf* cases in 1969 when the Court made reference to "*a regime of joint jurisdiction, use, or exploitation for the zones of overlap or any part of them.*"① In particular, reference is made of the extensive discussion on the topic by Judge Jessup in his separate opinion②, which itself was inspired by the pioneering work on the subject by William T. Onotato in 1968.③ However, as early as the 1930s, the idea of joint development was already known in the United States.④ The first application of the concept of joint development of offshore oil was the Joint Development Agreement between Japan and South Korea enforced in 1974, following their disagreement on boundary delimitation over their continental shelves.⑤ The Japan-Korea model later became a working document for hydrocarbon potential and the possibilities of establishing cooperative regime in Asian countries and even in the West. A ground-breaking study of joint development of offshore oil and gas organised by the British Institute of International and Comparative Law is recognised at present as the most comprehensive treatment of the subject.

C. *Background on the Gulf of Guinea*

The Gulf of Guinea is one of the richest hydrocarbon areas in the world with oil and gas discoveries estimated at more than 10Bbbl(?) and a tremendous potential beyond that level. It encompasses a large number of countries from West to Central Africa: Angola, Benin, Cameroon, Central African Republic (CAR), Cote d'lvoire, the Democratic Republic of Congo (DRC), Equatorial Guinea, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Nigeria, Republic of Congo, Sao Tome and Principe, Senegal, Sierra Leone, and Togo.

The region is one of the richest offshore oil producing regions in the world. Once considered unimportant and nonstrategic, the region now plays host to major consumers of oil with increased ability to explore and extract oil in ever deeper waters. This has resulted in increase of disputes and conflicts over ownership of the territory among the region's countries. Moreover, taking

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① ICJ Report 1969, p. 53, para. 101(c)(2).

② ICJ Report 1969, pp. 66-84.

③ Onorato, W. T., Appointment of an International Common Petroleum Deposit, *International and Comparative Law Quarterly*, vol. 17, 1968, pp. 85-101.

④ *See* American Institute of Mining and Metallurgical Engineers, 1930.

⑤ For the text of the Agreement, *see* Charney and Alexander, 1993, pp. 1073-1089.

into account the geographic setting that characterises the Gulf of Guinea, the maritime claims and entitlements of some countries in the region overlap considerably. For instance, countries like Nigeria, Sao Tome and Principe and Equatorial Guinea have already taken steps to settle disputes in areas of their overlapping claims through joint development zone and utilization agreements.

Ⅱ. NIGERIA-GHANA MARITIME BOUNDARY

Although Nigeria and Ghana are separated by the Republics of Benin and Togo, they nevertheless share the same maritime boundaries owing to the unique geomorphology of their coastlines. Both countries have signed and ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS 111)[①] which gives them the right to 200 mile EEZ. While the two governments have commenced negotiations on the delimitation of the boundary between them, there is as yet no broad agreement on the general line of their common boundary. It is undisputed, of course, that both nations have the right to a 200 mile EEZ under the Convention. However, insisting on a 200-mile EEZ may result in claiming an area which enters considerably into each other's zone. It would be appropriate under these circumstances to turn the affected area, measured approximately 8—12 nautical miles, into a Joint Development Zone (JDZ).

Joint development is increasingly used in overlapping boundary areas to set aside contentious issues and promote resource development. The basis for a JDZ is provided in Article 74 (3) UNCLOS III which states that:

> *Pending agreement as provided for in Paragraph 1, the States concerned in the spirit of understanding and co-operation shall make every effort to enter into provisional agreements of practical nature and during the transitional period not jeopardize or hamper the reaching of final agreement. Such agreements shall be without prejudice to final delimitation.*

The establishment of a co-operative regime between Nigeria and Ghana

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① United Nations Convention on the Law of the Sea, opened for signature on December 10, 1982, in force on November 16, 1994, 1833 U. N. T. S. 396, reprinted in UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E. 83. V. 5) [hereinafter "UNCLOS111"].

has several advantages. Some of these advantages are listed below:

(a)Development takes precedence over politics.

International boundaries are political issues. Governments often find it difficult to reach a compromise on boundary disputes. Joint Development Zone puts development before politics and allows countries to set aside maritime boundary claims to concentrate on exploration and exploitation of resources for the benefit of their people. It underscores the need to exploit and share resources before demarcating boundaries. Less emphasis is placed on actual boundaries while energies are channelled towards unlocking the resources of the sea and the seabed.

Nigeria and Ghana share several things in common. Apart from emerging from almost the same colonial history, they enjoy the best of diplomatic, economic and cultural ties. These gains could be enhanced further if both countries could explore ways of jointly developing their shared resources before demarcating boundaries.

(b) Formation of a co-operative regime improves the management of shared resources.

Shared resources or straddling stocks are those resources distributed over or crossing the maritime boundary between two or more national boundaries. Co-operative development is an important step towards the management of these resources.

(c)It leads to conservation and sustainable use of shared resources.

Shared resources always have the misfortune of depletion, and overuse ultimately ruins them. Without proper management, shared resources can become a free-for-all where individuals benefit from taking as much as they could, while leaving the costs of exploitation and depletion to others. A shared resources framework offers a better approach in the management of these resources for the benefit of both present and future generations. The establishment of a JDZ between the two countries will greatly reduce the pressure on shared resources for the benefit of all.

(d)Peace and security.

Disputed boundaries may lead to skirmishes or outright war. Shared resources must be a connector and not a divider. Cooperative arrangement to jointly develop, manage and protect shared resources optimizes their utilization and defuses any potential conflict. JDZ promotes peaceful cooperation and encourages the development of synergies between different users. Peace and security is the key to sustainable management of shared resources. Thus, con-

flicts which are likely to emerge from the exploitation and management of shared resources between the two countries may be avoided with the establishment of a JDZ.

The above mentioned benefits of JDZ, though not exhaustive, are an encouragement for states to set aside the intricate issues of delimitation in favour of more immediate economic or practical interests. Once resources are known to lie in geological structures straddling an international boundary line, its effective exploitation should be undertaken by a single regime based on agreed cooperation between the concerned parties.

Ⅲ. ISSUES TO BE ADDRESSED WHILE NEGOTIATING JOINT DEVELOPMENT ZONE

Once a cooperative regime has been agreed upon, the next vital step is for the parties to address a wide range of issues, such as the definition of the size, extent, and boundary of the proposed JDZ, the duration of the zone, the administrative structure and control mechanism, revenue sharing formula, licensing rounds, prevention of pollution and protection of the marine environment, protection of third states and their nationals, security and policing within the zone, and settlement disputes between the participating governments and their licensees.

The issues highlighted above are very complex, and need to be handled with skill and care. A series of complex compromises between different claims and interests, both governmental and commercial, are generally required. In practice, the spirit of give-and-take is the bedrock of JDZ, since parties are always expected to settle for less.

Ⅳ. CONCLUSION

The nature of straddling deposits in the seabed area of the continental shelf between Nigeria and Ghana, presents an opportunity for both countries to put in place a JDZ, especially as they are known to have the prospects of claiming an extended continental shelf. The economic benefits can be very considerable.

(Editor: HUANG Haiqi;
English Editor: Avram Agov)

跨界资源管理之需:尼日利亚—加纳共同开发区

Kingsley Ekwere*

导　言

尼日利亚海岸线到尼日利亚/贝宁线以东的布局,构成了尼日利亚和加纳在满 200 海里开外共享一条海洋边界线。国际海底管理局的统计评估报告表明这两国海床上厚厚的沉积物存在相似性,这有理由导致双方都能够对此主张外大陆架的权利。该报告进一步表明跨越两国海洋边界的矿物资源尤其是石油和天然气有相当大范围的重叠。基于这些看法,笔者审视了为应对管理两国跨界共有资源的挑战实现跨界自然资源管理的必需举措。笔者认为,建立开发并管理共有资源的合作制度将促进和改善对自然资源的管理,符合所有当事方的利益。它同样将改善对共有资源的保护和可持续利用。两国跨界主动合作的进一步理由是和平与安全。本文由三个部分组成。第一部分对共同开发做出了定义并对此概念做了一个简单的历史回顾。在此部分中同样也对几内亚湾周边概况进行了分析。第二部分聚焦两国当前的专属经济区(EEZs)和大陆架(CSs)划界谈判,审视了尼日利亚—加纳的海洋边界问题。笔者将给出具有说服力的理由说明为什么这两国以及几内亚湾周边的其他国家应当建立一种管理它们共有资源的合作制度。第三部分将考虑为谈判建立共同开发区需要处理的一些问题。

一、共同开发的定义和几内亚湾的周边概况

(一)共同开发的定义

石油或天然气的流动属性有时会最终成为跨越两个或更多相邻国家的沉积

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资源。当其发生时,一个国家开发该资源就可能会损害其他国家的潜在份额。因此这些国家有必要协议达成在资源开发上某种形式的合作。基于本研究的目的,共同开发可以被定义为政府间或政府与私人石油公司或私人公司财团间的,旨在共同勘探或开发跨界及跨越不同管辖权的碳氢化合物资源一种安排。根据该定义,那么这样的结论是相当明显的:如果流动的石油或天然气跨越共同边界线,它应当被视为单一沉积资源并被共同管理。如果它能被这样定义,我们可以区别出四种合作安排模式:(1)无需划界的共有资源开发和管理的合作制;(2)建立跨界资源共同开发区的模式;(3)开发跨越边界线资源的安排模式;和(4)促进跨界资源管理的合作安排模式。[①]

本文将只关注第一种模式,即当国家无法对基本的边界线达成协议时,它们决定另行在它们重叠区域的全部或部分地区建立或临时或长期的共同开发区。

(二)共同开发的源起

当事方在重叠区域合作开发资源的理念,是由国际法院(ICJ)在 1969 年的北海大陆架案中最先提出的,当时法庭提及了“共同管辖、使用,或开发重叠区域或部分重叠区域的一种制度。”[②]它是杰赛普法官在他的个别意见[③]中基于对这一主题的广泛讨论上提出的,而这份个别意见自身是受到威廉. T. 奥罗塔坨于 1968 年在这方面的开创性工作启发的结果。[④] 然而,早在 20 世纪 30 年代时,美国人就已经有了共同开发的理念。[⑤] 共同开发海上石油理念的第一例适用是日本与韩国在大陆架划界谈判失败后于 1974 年订立的共同开发协议。[⑥] 日韩模式后来成为了对可能存在的油气资源建立合作开发制的亚洲国家乃至西方国家学习的成功范例。一个由英国国际法和比较法研究所主导的海上石油和天然气共同开发的突破性研究被认为是当代最佳的综合处理方式。

(三)几内亚湾周边概况

几内亚湾是世界上拥有油气资源最丰富的地区之一,已发现的油气超过了 100 亿桶,而事实极有可能远超这一水平。其包含了从西非到中非的许多国家:

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① Churchill and Lowe, The Law of the Sea, 3rd. ed., Manchester: Manchester University Press, 1999.

② ICJ Report 1969, p. 53, para. 101(c)(2).

③ ICJ Report 1969, pp. 66-84.

④ Onorato, W. T., Appointment of an International Common Petroleum Deposit, *International and Comparative Law Quarterly*, vol. 17, 1968, pp. 85-101.

⑤ *See* American Institute of Mining and Metallurgical Engineers, 1930.

⑥ For the text of the Agreement, *see* Charney and Alexander, 1993, pp. 1073-1089.

安哥拉、贝宁、喀麦隆、中非共和国(CAR)、科特迪瓦、刚果民主共和国(DRC)、赤道几内亚、加蓬、冈比亚、加纳、几内亚、几内亚比绍、利比里亚、尼日利亚、刚果共和国、圣多美与普林希比共和国、塞内加尔、塞拉利昂以及多哥。

这一地区是世界上海上石油产量最丰富的地区之一。该地区曾被认为是不重要的且不具有战略意义。然而,随着人们对深海石油勘探与开发能力的增强,该地区如今扮演着主要石油消费国的卖家角色。随之而来的是在这一地区国家对领土所有权的争端与冲突增多。此外,考虑到几内亚湾的独特地理特质,该地区好些国家的海洋主张和权利重叠很严重。例如,像尼日利亚、圣多美与普林希比共和国及赤道几内亚等国家已采取措施通过建立共同开发区和签订开发协议的方式,来解决它们重叠主张。

二、尼日利亚—加纳海洋边界

尽管尼日利亚和加纳被贝宁共和国、多哥共和国所割裂,但是它们由于它们海岸线的独特地貌共享同一海洋边界。两国都签署和批准了1982年的《联合国海洋法公约》[①],其给予了它们200海里专属经济区的权利(《联合国海洋法公约》第111条)。虽然两国政府对两国边界划界已经开始了谈判,但是它们对它们的共同边界线却仍未达成一个基本的协议。当然,两国根据《公约》享有200海里专属经济区的权利是毫无疑问的。但是,坚持200海里专属经济区的做法,可能会导致一种深入各自区域、对区域的主张大量重叠的结果。在这种情况下将测量到的大约8至12海里受影响区域变为共同开发区(JDZ)将是恰当的。

对边界主张重叠问题,人们正越来越多利用共同开发模式以搁置争议和允许资源开发。共同开发区的基础是《联合国海洋法公约》第74条第3款的规定,其规定如下:

> 在达成第1款规定的协议以前,有关各国应基于谅解和合作的精神,尽一切努力作出实际性的临时安排,并在此过渡期间内,不危害或阻碍最后协议的达成。这种安排应不妨害最后界限的划定。

尼日利亚和加纳建立合作制具有几个优点。其中一些优点列举如下:

(1)发展优先于政治。

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① United Nations Convention on the Law of the Sea, opened for signature 10 Dec. 1982, in force 16 Nov. 1994, 1833 U.N.T.S. 396, reprinted in UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5) [hereinafter "UNCLOS111"].

国际边界问题是政治问题。政府们常常感到对边界问题达成妥协是困难的。共同开发区将开发置于政治之前并允许国家搁置海洋边界主张，为了它们人民的利益而集中精力进行勘探及开发。它强调对开发和共享资源的需求优先于边界划定。更少对事实边界问题的强调也能使得其精力被引导到开发海洋和海床资源上。

尼日利亚和加纳在很多方面有共同之处。除了共同经历过几乎相同的被殖民历史，他们有着紧密的外交、经济和文化往来。如果两国能探寻共同开发它们的共有资源直至划定边界，那么它们将能获益更多。

(2)建立合作制将改善对共有资源的管理。

共有资源或跨域资源是指那些分布于或跨越两个或多个国家海洋边界的资源。合作开发是迈向管理这些资源的重要一步。

(3)它将促进对共有资源的保护和可持续使用。

共有资源总会面临被耗尽的不幸以及最后将毁灭资源的过度使用。没有适当的管理，共有资源将会变成一个“公有地”，为此每个人都将尽可能攫取利益，同时把耗竭的代价留给他人。引进共有资源的框架能为现在和未来几代人的利益而管理这些资源提供一个更好的方法。两国共同开发区的建立将为现在和未来几代人的利益极大地减少对共有资源需求的压力。

(4)和平与安全。

争议边界可能导致冲突或全面战争。共有资源必须成为一个联姻者而非分化者。共同开发、管理和保护共有资源的合作安排将使得对它们的利用更优并平息任何潜在的使用者之间的冲突。共同开发区促进不同使用者和平合作并鼓励它们协同开发。和平与安全是可持续管理共有资源的关键。这样，可能源于两国间对共有资源的利用和管理的冲突将能由于共同开发区的建立得以避免。

上述尚未悉数列举的共同开发区的优点，是为国家搁置复杂的划界问题、有利于创造更多直接的经济或实际利益的一种激励。一旦了解资源在地理结构上跨越国际边界，对其的有效开发应当由基于有关当事方协议合作的单一机构进行。

三、谈判建立共同开发区需要处理的一些问题

一旦就合作制度达成协议，下一关键步骤是为当事方处理一系列问题诸如计划的共同开发区大小、范围和边界的界定，区域的存续时间，行政架构和控制机制，利益分配问题，许可范围，污染预防和海洋环境保护，在该区域内第三国家及其国民的保护、区域内的安全和监管，以及参与政府和被许可人间的纠纷解决。

以上强调的问题是非常复杂的，需要经验和细心来加以处理。其也要求人们普遍达成在不同主张和不同利益间、政府的和商业的一系列综合妥协。实践

中，由于当事方总是期待需要处理的问题更少，取舍的精神将是共同开发区的根基。

四、结 论

尼日利亚和加纳间大陆架的海床的跨区域资源性质，向两国展现了一个建立共同开发区的机会，特别是它们都了解各自都可能主张外大陆架。经济利益将十分可观。

（中译：邓云成；责任编辑：黄海奇）

中华人民共和国外交部声明

2010 年 9 月 7 日，日方在钓鱼岛海域非法抓扣中国 15 名渔民和渔船，并将船长扣押至 9 月 24 日。对这一严重侵犯中国领土主权和中国公民人权的行径，中国政府表示强烈抗议。

钓鱼岛及其附属岛屿自古以来就是中国的固有领土，中国对此拥有无可争辩的主权。日方对中国渔民渔船的扣押、调查以及任何形式的司法举措都是非法和无效的。日方必须就此次事件向中方作出道歉和赔偿。

中日两国互为近邻，坚持发展战略互惠关系的方向，符合两国人民的根本利益。双方应通过对话协商解决中日关系中的问题，维护两国关系大局。中方的这一立场没有也不会改变。

二〇一〇年九月二十五日

关于印发《海岛名称管理办法》的通知

（国海发〔2010〕16号）

沿海各省、自治区、直辖市海洋厅(局)：

为了贯彻落实《中华人民共和国海岛保护法》，加强对海岛名称的管理，适应海岛开发、建设、保护与管理的需要，现将《海岛名称管理办法》印发给你们，请遵照执行。

国家海洋局

二〇一〇年六月二十八日

海岛名称管理办法

第一章　总　则

第一条　为了加强对海岛名称的管理，适应海岛开发、建设、保护与管理的需要，依据《中华人民共和国海岛保护法》及其他有关法律法规，制定本办法。

第二条　中华人民共和国所属海岛(有乡级以上人民政府驻地的海岛除外)的名称管理，适用本办法。

第三条　国家海洋局负责全国海岛名称管理。沿海县级以上人民政府海洋主管部门负责管辖区域内海岛名称管理。

海岛名称管理包括海岛命名、更名、名称注销、名称登记、名称发布与使用、名称标志设置等有关工作。

第四条　沿海县级以上人民政府海洋主管部门应当对海岛名称及其标志建立档案管理和地名信息数据库系统，提供公共查询服务。

第二章　海岛命名

第五条　属于下列情形之一的，应当命名：

(一)无名海岛；

(二)因自然或人为原因新形成的海岛；

(三)其他应当命名的情况。

第六条 沿海县级以上人民政府海洋主管部门应当会同有关部门,拟定管辖区域内海岛命名申请表,由省级人民政府海洋主管部门依据海岛名称命名原则审查,并报同级人民政府同意后报国家海洋局。

第七条 海岛命名遵循下列原则:

(一)有利于维护国家海洋权益和安全;

(二)尊重当地群众的愿望;

(三)与已经登记的海岛不重名,避免使用同音字。

(四)使用规范文字,避免使用生僻字,不得使用阿拉伯数字和外国文字,不得使用带有侮辱性质、歧视性质和极端庸俗的文字;

(五)名称文字简洁,一般不超过五个字;

(六)使用本办法规定的海岛通名。

第八条 国家海洋局对海岛命名申请进行审查,符合命名原则的,按照本办法规定予以登记。

第三章 海岛更名

第九条 属于下列情形之一的,应当更名:

(一)不利于维护国家海洋权益和安全;

(二)使用带有侮辱性质、歧视性质和极端庸俗的文字。

属于下列情形之一的,可以更名:

(一)使用文字不规范,或者使用生僻字;

(二)名字超过五个字;

(三)未使用本办法规定的海岛通名;

(四)重名;

(五)国家海洋局规定的其他可以更名的情形。

第十条 沿海县级以上人民政府海洋主管部门应当会同有关部门,拟定管辖区域内海岛更名申请表,由省级人民政府海洋主管部门依据海岛名称更名原则审查,并报同级人民政府同意后报国家海洋局。

第十一条 海岛更名应遵循下列原则:

(一)从历史和现状出发,保持名称的相对稳定;

(二)严格限制有居民海岛更名;

(三)海岛更名应当遵循海岛命名的各项原则。

第十二条 国家海洋局对海岛更名申请进行审查,符合更名原则的,按照本办法规定办理变更登记。

第四章 海岛名称注销

第十三条 因自然或者人为原因造成海岛消失的，应当注销海岛名称。

第十四条 沿海县级以上人民政府海洋主管部门应当会同有关部门，拟定管辖区域内海岛名称注销申请表，由省级人民政府海洋主管部门审查，并报同级人民政府同意后报国家海洋局。

第十五条 国家海洋局对海岛名称注销申请进行审查，符合要求的，按照本办法规定办理注销登记。

第十六条 海岛名称注销后，该名称不得在其他海岛再次使用。

第五章 海岛名称登记

第十七条 国家建立海岛名称登记制度。

称名称登记制度海岛名称登记是指对海岛的名称的登记，包括初始登记、变更登记、注销登记等。

第十八条 海岛名称登记遵循下列原则：

（一）有利于维护国家海洋权益和安全；

（二）不得使用带有侮辱性质、歧视性质和极端庸俗的文字；

（三）海岛名称没有争议；

（四）初始登记的海岛名称在所在地省级管辖区域内不重名；

（五）尊重现状，尊重当地群众的愿望。

第十九条 沿海县级以上人民政府海洋主管部门应当组织开展海岛名称普查，编制管辖区域内海岛名称初始登记表（册），由省级人民政府海洋主管部门依据海岛名称登记原则审查，并报同级人民政府同意后报国家海洋局。

第二十条 国家海洋局负责对海岛名称初始登记表（册）进行审查，符合海岛名称登记原则的，予以登记。

第二十一条 海岛命名、更名和名称注销经批准后，由国家海洋局予以登记。

领海基点海岛及其他涉及海洋权益、国防、外交事务海岛需要命名、更名的，国家海洋局报国务院批准后，予以登记。

国家海洋局根据海岛名称登记情况，发布海岛标准名录。

第二十二条 沿海县级以上人民政府海洋主管部门应当组织编印管辖区域内海岛标准名称出版物，及时向社会提供和推广使用海岛标准名称。

任何单位和个人使用海岛名称时，必须使用国家公布的标准名称。

各级海洋主管部门应当加强对海岛名称使用的监督检查,对使用不规范海岛名称的行为,应当予以纠正。

第六章　海岛名称标志设置

第二十三条　沿海县级以上人民政府海洋主管部门,负责管辖区域内的海岛名称标志设置和管理工作。

沿海县级以上人民政府海洋主管部门,应当根据国家公布的海岛标准名录和海岛名称标志设置规范,设置海岛名称标志。

第二十四条　海岛名称标志的主要内容包括:

(一)海岛标准名称的汉字、汉语拼音;

(二)设置单位和设置时间;

(三)其他有关内容。

第二十五条　沿海县级以上人民政府海洋主管部门应当定期对海岛名称标志进行巡视和维护,发现海岛名称标志损坏的,应当及时维修或者更换。

任何单位和个人都有保护海岛名称标志的义务,不得破坏或者擅自移动海岛名称标志;对破坏或者擅自移动海岛名称标志,造成财产损失的,依法承担赔偿责任;触犯刑法的,依法承担刑事责任。

第七章　附　则

第二十六条　海岛命名、更名、名称注销、名称登记等有关文书格式由国家海洋局统一制定。

第二十七条　群岛、列岛、低潮高地、暗礁、暗沙、人工岛名称和海域地名比照本办法管理。

第二十八条　海岛名称包括专名和通名两部分。

海岛专名通过关联法、形象法或者其他方法确定,一岛一专名。

海岛通名根据地理实体属性,分别使用群岛、列岛、岛、礁、沙、暗礁、暗沙。海岛通名的具体含义如下:

(一)群岛是指彼此相距较近,成群分布在一起的岛群;

(二)列岛是指呈线形或者弧形排列分布的岛链;

(三)岛是指四面环水并在高潮时高于水面的陆地区域;

(四)礁(沙)是指高潮时淹没、低潮时出露的礁石(沙洲);

(五)暗礁(暗沙)是指低潮时不出露的礁石(沙洲)。

第二十九条　本办法自发布之日起施行。

关于印发《省级海岛保护规划编制管理办法》的通知

沿海各省、自治区、直辖市海洋厅(局)：

为了贯彻落实《中华人民共和国海岛保护法》，规范省级海岛保护规划编制工作，提高海岛保护规划编制的科学性，现将《省级海岛保护规划编制管理办法》印发给你们，请遵照执行。

各省、自治区、直辖市应当按照本办法规定和各地实际情况，抓紧启动省级海岛保护规划编制工作。

国家海洋局

二〇一〇年八月二十五日

省级海岛保护规划编制管理办法

第一条 为了规范省级海岛保护规划编制工作，提高省级海岛保护规划编制的科学性，依据《中华人民共和国海岛保护法》及相关法规，制定本办法。

第二条 省级海岛保护规划的编制、评审、审查、批准和修编适用本办法。

本办法所称省级海岛保护规划，包括省域海岛保护规划和直辖市海岛保护专项规划。

第三条 国家海洋局负责指导、协调和监督省级海岛保护规划编制工作。

沿海省、自治区人民政府海洋主管部门会同本级人民政府有关部门、军事机关，组织编制省域海岛保护规划；沿海直辖市人民政府组织编制直辖市海岛保护专项规划。

第四条 省级海岛保护规划编制依据：

(一)全国海岛保护规划；

(二)省级国民经济和社会发展规划；

(三)省级海洋功能区划；

(四)省域城镇体系规划和省、自治区土地利用总体规划；

(五)国家有关政策、法律法规、技术标准和规范。

第五条 省级海岛保护规划编制应当坚持国家指导、政府组织、部门合作、公众参与、科学决策的原则。

第六条 省级海岛保护规划主要内容包括：

(一)提出海岛保护的目标和原则；

(二)明确海岛分类保护的具体措施；

(三)确定分区原则、保护的主要方向和措施;

(四)根据海岛保护需要,安排海岛重点保护工程;

(五)规划实施保障措施。

第七条 省级海岛保护规划期限应当与全国海岛保护规划、省级国民经济和社会发展规划相适应,不应少于五年。

第八条 国家海洋局组织成立全国海岛保护规划委员会。

全国海岛保护规划委员会负责海岛保护规划编制的技术指导,发布海岛保护规划编制技术单位推荐名录。

第九条 省级海洋主管部门按照国家的统一部署和要求启动规划编制工作;省级海洋主管部门也可以根据本办法规定,提出规划编制计划,报经省级人民政府和国家海洋局同意后启动规划编制工作。

第十条 省级海洋主管部门应当从海岛保护规划编制技术单位推荐名录中选择规划编制工作承担单位。承担单位的规划编制人员应该参加国家组织的海岛保护规划编制专业培训。

第十一条 规划成果编制完成后,省级海洋主管部门应当组织专家评审,专家组组长由全国海岛保护规划委员会的成员担任。

第十二条 规划成果经评审通过后,由省级海洋主管部门征求政府有关部门、军事机关、下一级人民政府、有关专家和公众的意见。

第十三条 省级海岛保护规划成果包括:规划文本、图件、编制说明、规划研究报告等。

规划成果包括纸质和电子文件两种介质形式。

第十四条 省级海洋主管部门应当将省级海岛保护规划成果报送国家海洋局审查。

第十五条 国家海洋局组织召开全国海岛保护规划委员会会议,对省级海岛保护规划进行审议。国家海洋局根据审议结果,出具审查意见。

省级海洋主管部门应当按照国家海洋局审查意见修改省级海岛保护规划。其中,审查意见有明确要求的,应当重新报送国家海洋局审查。

第十六条 经国家海洋局审查同意的省级海岛保护规划,由省级海洋主管部门报送省、自治区、直辖市人民政府。

其中,省域海岛保护规划由省、自治区人民政府审查批准,并报国务院备案,同时抄送国家海洋局。

直辖市海岛保护专项规划经直辖市人民政府审查同意后,纳入直辖市城市总体规划,依法报国务院审批,同时抄送国家海洋局。

第十七条 省级海岛保护规划的评审、审议内容如下:

(一)是否符合国家有关海岛政策、法律法规、技术标准和规范;

(二)是否符合全国海岛保护规划,是否与省级国民经济和社会发展规划、省级海洋功能区划、省域城镇体系规划和省、自治区土地利用总体规划相衔接,是

否与其他有关区划、规划相协调；

（三）海岛保护的具体措施是否具有针对性和可操作性；

（四）规划实施保障措施是否全面、合理、有效；

（五）是否做到统筹兼顾，是否有利于海岛经济社会的可持续发展；

（六）是否与相邻地区省级海岛保护规划相协调。

第十八条 省级海岛保护规划经批准后，应当及时向社会公布。但是，涉及国家秘密的除外。

第十九条 省级海岛保护规划一经批准，不得擅自修改。

经国务院批准，因公共利益、国防安全或者大型能源、交通等基础设施建设，需要修改海岛保护规划的，按照批准文件修改省级海岛保护规划。

全国海岛保护规划修编涉及省级海岛保护规划修改的，或者规划期十年及以上应当进行定期滚动修订的，按照本办法规定的编制和审批程序，修改省级海岛保护规划。

第二十条 沿海省、自治区、直辖市人民政府应当将省级海岛保护规划组织编制经费纳入本级财政预算。

第二十一条 省级海洋主管部门及规划编制承担单位应当加强规划档案的管理。

第二十二条 省级海洋主管部门应当依法给予查询申请人查询经批准的省级海岛保护规划。

第二十三条 本办法自发布之日起施行。

关于印发《海洋特别保护区管理办法》、《国家级海洋特别保护区评审委员会工作规则》和《国家级海洋公园评审标准》的通知

（国海发〔2010〕21号）

沿海各省、自治区、直辖市及计划单列市海洋厅(局)，局属各单位：

为了进一步健全开发与保护相协调的海洋生态保护法规制度，根据《中华人民共和国海洋环境保护法》第二十三条的规定以及国务院"三定"规定赋予我局"监督管理海洋自然保护区和海洋特别保护区"的职责，我局在认真总结海洋特别保护区建设和管理经验、分析不足和问题的基础上，对《海洋特别保护区管理暂行办法》进行了修改完善，形成了《海洋特别保护区管理办法》，以及《国家级海洋特别保护区评审委员会工作规则》、《国家级海洋公园评审标准》等配套文件，现印发给你们，请遵照执行，原《海洋特别保护区管理暂行办法(国海发[2005]24号)》同时废止。

二〇一〇年八月三十一日

海洋特别保护区管理办法

第一章　总　则

第一条　为了保护和恢复特定海洋区域的生态系统及其功能，科学、合理利用海洋资源，促进海洋经济与社会的持续发展，根据《中华人民共和国海洋环境保护法》、《中华人民共和国海岛保护法》和国务院"三定"规定，制定本办法。

第二条　本办法所称海洋特别保护区，是指具有特殊地理条件、生态系统、生物与非生物资源及海洋开发利用特殊要求，需要采取有效的保护措施和科学的开发方式进行特殊管理的区域。

第三条　中华人民共和国内水、领海、毗连区、专属经济区、大陆架以及中华人民共和国管辖的其他海域和海岛建立、建设、管理海洋特别保护区，适用本办法。

第四条　国家对海洋特别保护区实行科学规划、统一管理、保护优先、适度

利用的原则。海洋特别保护区应当采取科学、合理、有效的措施，保护和恢复海洋生态，维护海洋权益，利用海洋资源。

第五条 国家海洋局负责全国海洋特别保护区的监督管理，会同沿海省、自治区、直辖市人民政府和国务院有关部门制定国家级海洋特别保护区建设发展规划并监督实施，指导地方级海洋特别保护区的建设发展。

沿海省、自治区、直辖市人民政府海洋行政主管部门根据国家级海洋特别保护区建设发展规划，建立、建设和管理本行政区近岸海域国家级海洋特别保护区；组织制定本行政区地方级海洋特别保护区建设发展规划并监督实施；建立、建设和管理省（自治区、直辖市）级海洋特别保护区。

国家海洋局派出机构根据国家级海洋特别保护区建设发展规划，建立、建设和管理本海区领海以外的或者跨省、自治区、直辖市近岸海域的国家级海洋特别保护区。

沿海市、县级人民政府根据地方级海洋特别保护区建设发展规划，建立、建设和管理本行政区近岸海域地方级海洋特别保护区。

第六条 国家保障和推动海洋特别保护区建设，促进海洋特别保护区的综合管理和科学研究。

沿海各级人民政府应当切实履行海洋生态系统保护职责，保障对海洋特别保护区建设的投入，加强海洋特别保护区的宣传、教育，促进海洋特别保护区建设事业的发展。

对于在海洋特别保护区建设、管理和保护中做出突出贡献的单位和个人，沿海县级以上人民政府应当予以奖励。

第七条 沿海县级以上人民政府海洋行政主管部门会同同级财政部门设立海洋生态保护专项资金，用于海洋特别保护区的选划、建设和管理。

第八条 国家海洋局从国家海洋生态保护专项资金中对国家级海洋特别保护区的建设、管理给予一定的补助。

第九条 任何单位和个人都有保护海洋生态系统、协助和支持海洋特别保护区建设和管理的义务，并有权对破坏、侵占海洋特别保护区的单位和个人进行检举和控告。

第二章 建 区

第十条 根据海洋特别保护区的地理区位、资源环境状况、海洋开发利用现状和社会经济发展的需要，海洋特别保护区可以分为海洋特殊地理条件保护区、海洋生态保护区、海洋公园、海洋资源保护区等类型。

在具有重要海洋权益价值、特殊海洋水文动力条件的海域和海岛建立海洋特殊地理条件保护区。

为保护海洋生物多样性和生态系统服务功能，在珍稀濒危物种自然分布区、典型生态系统集中分布区及其他生态敏感脆弱区或生态修复区建立海洋生态保护区。

为保护海洋生态与历史文化价值，发挥其生态旅游功能，在特殊海洋生态景观、历史文化遗迹、独特地质地貌景观及其周边海域建立海洋公园。

为促进海洋资源可持续利用，在重要海洋生物资源、矿产资源、油气资源及海洋能等资源开发预留区域、海洋生态产业区及各类海洋资源开发协调区建立海洋资源保护区。

第十一条　具有重大海洋生态保护、生态旅游、重要资源开发价值、涉及维护国家海洋权益的海洋特别保护区列为国家级海洋特别保护区。

除前款之外的其他海洋特别保护区列为地方级海洋特别保护区。

第十二条　国家建立海洋特别保护区评审制度。建立海洋特别保护区应当经过海洋特别保护区评审委员会的评审论证。

海洋特别保护区评审委员会由海洋行政主管部门会同有关部门组织成立。

海洋特别保护区评审委员会由相关专业的专家和管理部门的代表组成。

第十三条　沿海省、自治区、直辖市近岸海域内国家级海洋特别保护区的建立由沿海省、自治区、直辖市人民政府海洋行政主管部门提出申请，经沿海同级人民政府同意后，报国家海洋局批准设立。

领海以外海域和跨省、自治区、直辖市近岸海域国家级海洋特别保护区的建立由国家海洋局派出机构提出申请，报国家海洋局批准设立。

国家海洋局依据相关法律法规，根据国家级海洋特别保护区评审委员会评审结论，审批国家级海洋特别保护区。

地方级海洋特别保护区的建立由沿海县级以上人民政府海洋行政主管部门提出申请，经地方级海洋特别保护区评审委员会评审后，报沿海同级人民政府批准设立。

跨区域地方级海洋特别保护区的建立，由所在地相关地方各人民政府共同的上一级海洋行政主管部门协调，经相关海洋特别保护区评审委员会评审，并由各相关地方人民政府同意后，报共同的上一级人民政府批准设立。

建立海洋特别保护区，应当在报请批准机关批准之前，由提出申请的机关向社会公示，征求公众意见。

第十四条　沿海县级以上人民政府海洋行政主管部门根据海洋功能区划、海洋资源环境状况、海洋经济发展状况，选划并申报建立海洋特别保护区。

海洋特别保护区选划工作应当符合海洋特别保护区选划论证技术标准的有关要求。

第十五条　申请建立海洋特别保护区应当按本办法附件的要求填写建立海洋特别保护区申报书，并提交海洋特别保护区选划论证报告。

第十六条　海洋特别保护区的调整、撤销，应当按照第十二、十三条规定的

程序办理，由原批准机关批准。

第十七条 海洋特别保护区建立后，其管理机构应当按照批准的海洋特别保护区的范围和界线，在适当位置设立界标和标牌，标牌应公布海洋特别保护区边界坐标，并公布海洋特别保护区管理的规章、制度、措施等相关信息。

任何单位和个人不得移动、污损和破坏海洋特别保护区界标和标牌。

第三章 管理制度

第十八条 已经批准建立的海洋特别保护区所在地的县级以上人民政府应当加强对海洋特别保护区的管理，建立管理机构。必要时可以在海洋特别保护区管理机构内设立中国海监机构，履行海洋执法职责，并接受中国海监上级机构的管理和指导。

第十九条 海洋特别保护区管理机构的主要职责包括：

（一）贯彻落实国家及地方有关海洋生态保护和资源开发利用的法律法规与方针政策；

（二）制订实施海洋特别保护区管理制度；

（三）制订实施海洋特别保护区总体规划和年度工作计划，并采取有针对性的管理措施；

（四）组织建设海洋特别保护区管护、监测、科研、旅游及宣传教育设施；

（五）组织开展海洋特别保护区日常巡护管理；

（六）组织制订海洋特别保护区生态补偿方案、生态保护与恢复规划、计划，落实生态补偿、生态保护和恢复措施；

（七）组织实施和协调海洋特别保护区保护、利用和权益维护等各项活动；

（八）组织管理海洋特别保护区内的生态旅游活动；

（九）组织开展海洋特别保护区监测、监视、评价、科学研究活动；

（十）组织开展海洋特别保护区宣传、教育、培训及国际合作交流等活动；

（十一）建立海洋特别保护区资源环境及管理信息档案；

（十二）发布海洋特别保护区相关信息；

（十三）其他应当由海洋特别保护区管理机构履行的职责。

第二十条 海洋特别保护区管理机构应当在成立后一年内，组织编制完成海洋特别保护区总体规划，报请该海洋特别保护区的设立机关批准。

国家级海洋特别保护区的总体规划由国家海洋局批准。

海洋特别保护区总体规划应当按照《海洋特别保护区功能分区和总体规划编制技术导则》的要求编制。

海洋特别保护区内的保护与利用活动应当符合海洋特别保护区总体规划。

第二十一条 沿海县级以上人民政府海洋行政主管部门应当为保护和适度

利用海洋特别保护区海洋资源、公益性海洋生态与资源恢复活动提供实施场所和指导。

海洋特别保护区内从事海洋生态与资源恢复活动的单位和个人，应当按照沿海县级以上人民政府海洋行政主管部门的管理要求实施有关活动。

第二十二条 沿海县级以上人民政府海洋行政主管部门负责组织建立由政府有关部门及利益相关者组成的海洋特别保护区协调机制，负责协调解决保护区管理机构职责以外的各类涉海活动；审议保护区内的执法巡护方案、重大生态保护项目、生态旅游及其他资源开发活动方案和涉及社区公众利益的重大事件。

第二十三条 海洋特别保护区内保护与利用活动使用海域的应当按照《中华人民共和国海域使用管理法》等有关法律规定进行。

第二十四条 经依法批准在海洋特别保护区内实施开发利用活动者应当制订并落实生态恢复方案或生态补偿措施，区内外排污及围填海等活动造成海洋特别保护区生态环境受损的应当支付生态补偿金。

第二十五条 海洋特别保护区管理机构应当根据有关技术标准，定期组织实施保护区内的社会经济状况、资源开发利用现状调查和生态环境监测、监视和评价工作。

第二十六条 海洋特别保护区实行管理评估制度。海洋行政主管部门应当对海洋特别保护区进行监督检查，组织开展海洋特别保护区建设和管理评估。

海洋特别保护区管理评估办法由国家海洋局另行制定。

第二十七条 沿海县级以上人民政府海洋行政主管部门及其所属中国海监机构，依照《中华人民共和国海洋环境保护法》、《中华人民共和国海域使用管理法》和《中华人民共和国海岛保护法》等相关法律法规的规定，负责海洋特别保护区内的监督检查，依法查处违法行为。检查人员在履行执法检查职责时，应当向被检查人员出示执法证件；被检查人员应当配合检查人员的检查工作。

第二十八条 海洋特别保护区管理机构应当组织区内的单位和个人参加海洋特别保护区的建设和管理，吸收当地社区居民参与海洋特别保护区的共管共护，共同制定区内的合作项目计划、社区发展计划、总体规划和管理计划。

第二十九条 国家鼓励单位和个人在自愿的前提下，捐资或者以其他形式参与海洋特别保护区建设与管理。

第三十条 海洋行政主管部门负责组织建立海洋特别保护区应急系统，制定保护区及其周围区域应急预案。发生海洋环境污染、生态破坏事故和自然灾害时，海洋行政主管部门应当与有关部门和单位配合，按照应急预案采取措施，消除或者减轻灾害。

海洋特别保护区内应当配备应急设备和设施，并进行定期检查和维护。

第三十一条 海洋特别保护区实行功能分区管理，可以根据生态环境及资源的特点和管理需要，适当划分出重点保护区、适度利用区、生态与资源恢复区和预留区。

海洋特别保护区的功能区划遵循以下原则：

（一）以自然属性为主兼顾社会属性的原则；

（二）有利于促进海洋经济和社会发展原则；

（三）有利于海洋综合管理和资源可持续利用原则；

（四）国家主权权益和国防安全优先原则。

第三十二条 海洋特别保护区生态保护、恢复及资源利用活动应当符合其功能区管理要求。

在重点保护区内，实行严格的保护制度，禁止实施各种与保护无关的工程建设活动。

在适度利用区内，在确保海洋生态系统安全的前提下，允许适度利用海洋资源。鼓励实施与保护区保护目标相一致的生态型资源利用活动，发展生态旅游、生态养殖等海洋生态产业。

在生态与资源恢复区内，根据科学研究结果，可以采取适当的人工生态整治与修复措施，恢复海洋生态、资源与关键生境。

在预留区内，严格控制人为干扰，禁止实施改变区内自然生态条件的生产活动和任何形式的工程建设活动。

第四章 保 护

第三十三条 严格保护典型海洋生态系统分布区、自然景观、历史遗迹、珍稀濒危海洋生物物种及重要海洋生物的洄游通道、产卵场、索饵场、越冬场、栖息地等各类重要海洋生态区域。

任何单位和个人不得擅自改变海洋特别保护区内海岸、海底地形地貌及其他自然生态环境条件；确需改变的，应当经科学论证后，报有批准权的海洋行政主管部门批准。

第三十四条 严格限制将外来物种引入海洋特别保护区；确需引入的，由海洋特别保护区管理机构组织论证后，报物种主管部门批准，物种主管部门在批准前应当征求同级海洋行政主管部门的意见。

第三十五条 任何单位和个人不得破坏海洋特别保护区内领海基点等海洋权益保护标志和设施。经依法批准，在海洋特别保护区内从事保护、恢复和资源利用等活动，不得影响领海基点的安全。

第三十六条 禁止在海洋特别保护区内进行下列活动：

（一）狩猎、采拾鸟卵；

（二）砍伐红树林、采挖珊瑚和破坏珊瑚礁；

（三）炸鱼、毒鱼、电鱼；

（四）直接向海域排放污染物；

（五）擅自采集、加工、销售野生动植物及矿物质制品；

（六）移动、污损和破坏海洋特别保护区设施。

第五章　适度利用

第三十七条　根据海洋特别保护区生态环境及资源特点，经有审批权的部门批准后允许适度开展下列活动：

（一）生态养殖业；

（二）人工繁育海洋生物物种；

（三）生态旅游业；

（四）休闲渔业；

（五）无害化科学试验；

（六）海洋教育宣传活动；

（七）其他经依法批准的开发利用活动。

第三十八条　海洋特别保护区内严格控制各类建设项目或开发活动，符合海洋特别保护区总体规划的重点建设项目，须经保护区管理机构同意后，按照相关法律法规的要求进行海洋工程环境影响评价和海域使用论证。海洋工程环境影响报告和海域使用论证报告应当设专章编写生态环境保护、生态修复恢复和生态补偿赔偿方案及具体措施。

第三十九条　严格限制在海洋特别保护区内实施采石、挖砂、围垦滩涂、围海、填海等严重影响海洋生态的利用活动。确需实施上述活动的，应当进行科学论证，并按照有关法律法规的规定报批。

第四十条　应当按照养殖容量从事海水养殖业，合理控制养殖规模，推广健康的养殖技术，合理投饵、施肥，养殖用药应当符合国家和地方有关农药、兽药安全使用的规定和标准，防止养殖自身污染。

第四十一条　应当科学确定旅游区的游客容量，合理控制游客流量，加强自然景观和旅游景点的保护。禁止超过允许容量接纳游客和在没有安全保障的区域开展游览活动。

在海洋公园组织参观、旅游活动的，必须按照经批准的方案进行，并加强管理；进入海洋特别保护区参观、旅游的单位和个人，应当服从海洋公园管理机构的管理。

禁止开设与海洋公园保护目标不一致的参观、旅游项目。

第四十二条　进入海洋特别保护区拍摄影视片、采集标本的单位或个人，应当严格遵守国家有关规定，经海洋特别保护区管理机构同意并报负责批准建立该保护区的海洋行政主管部门备案。

从事前款活动的单位或个人，应当将其活动成果的副本提交海洋特别保护

区管理机构。

第四十三条 海洋公园内可以建设管护、宣教和旅游配套设施,设施建设必须按照总体规划实施,并与景观相协调,不得污染环境、破坏生态。重点保护区、重要景观及景点分布区,除必要的保护和附属设施外,不得建设宾馆、招待所、疗养院和其他工程设施。

第四十四条 海洋特别保护区可以作为海洋生态保护和资源可持续利用的科研、教学和实验基地。

在海洋特别保护区内从事科研、教学及其相关活动,建设实验基地的人员,不得破坏海洋生态系统。

在海洋特别保护区内开展的科学研究成果应当与保护区管理机构共享,并向保护区管理机构提交副本。

第四十五条 在海洋特别保护区内开展活动,需要调整已经确定的海洋特别保护区生态保护方案和资源利用方案的,在调整前,应当报请海洋特别保护区管理机构批准。

第四十六条 海洋特别保护区内的经营性开发利用活动,可以依照有关法律法规和海洋特别保护区管理制度及总体规划,由海洋特别保护区管理机构实施,也可以在海洋特别保护区管理机构监管下,采用公开招标方式授权企业经营。授权企业经营的,海洋特别保护区管理机构应当与企业签订特许经营协议,实行资源有偿使用制度,有偿使用收入应当专门用于海洋特别保护区的保护和管理以及对有关权利人损失的补偿。

在海洋特别保护区内发生事故和突发性事件对保护区造成污染和损害的单位和个人必须及时采取处理措施,减少或消除对海洋特别保护区生态与资源的影响,并对所破坏的海洋景观给予恢复。

第六章 法律责任

第四十七条 违反本办法,对海洋特别保护区造成破坏的,由县级以上人民政府海洋行政主管部门及其所属的中国海监机构依照《中华人民共和国海洋环境保护法》第七十六条的规定,责令限期改正和采取补救措施,并处一万元以上十万元以下的罚款;有违法所得的,没收其违法所得。

第四十八条 海洋特别保护区内从事资源开发利用活动的单位和个人造成领海基点及其周围环境被侵蚀、淤积或者损害的,由县级以上人民政府海洋行政主管部门依照《中华人民共和国防治海洋工程建设项目污染损害海洋环境管理条例》第四十九规定,责令停止建设、运行,限期恢复原状;逾期未恢复原状的,海洋行政主管部门及其所属的中国海监机构可以指定具有相应资质的单位代为恢复原状,所需费用由建设单位承担,并处恢复原状所需费用的1倍以上2倍以下

的罚款。

第四十九条 海洋特别保护区内从事海水养殖，对海洋环境造成污染或者严重影响海洋景观的，由县级以上人民政府海洋行政主管部门及其所属的中国海监机构依照《中华人民共和国防治海洋工程建设项目污染损害海洋环境管理条例》第五十四的规定，责令限期改正；逾期不改正的，责令停止养殖活动，并处清理污染或者恢复海洋景观所需费用1倍以上2倍以下的罚款。

第五十条 对破坏海洋特别保护区，给国家造成重大损失的，按照《中华人民共和国海洋环境保护法》第九十条规定，由行使海洋环境监督管理权的部门代表国家对责任者提出损害赔偿要求。

第五十一条 海洋行政主管部门、海洋特别保护区内其他行政管理部门、沿海县级以上人民政府及其工作人员违反本办法规定，情节轻微的，对直接负责的主管人员和其他直接责任人员，依法给予行政处分。

第七章 附 则

第五十二条 沿海省、自治区、直辖市人民政府海洋行政主管部门根据本办法，结合当地实际情况，制定具体的管理规定。

第五十三条 本办法自发布之日起施行。

关于印发《中国海监海洋环境保护执法工作实施办法》的通知

（国海办字〔2010〕824 号）

沿海省（自治区、直辖市）海洋厅（局）、各分局、中国海监总队：

现将《中国海监海洋环境保护执法工作实施办法》印发给你们，请认真遵照执行。

二〇一〇年十二月二十二日

中国海监海洋环境保护执法工作实施办法

为规范海洋环境保护执法工作，进一步明确各级海监机构的区域管辖、层级管理和案件查处等问题，全面提升海洋环境保护执法工作效率和水平。依据《中华人民共和国海洋环境保护法》、《防治海洋工程建设项目污染损害海洋环境管理条例》、《海洋石油勘探开发环境保护管理条例》、《海洋倾废管理条例》、《自然保护区条例》及相关政策规定，现就中国海监海洋环境保护执法工作提出以下办法：

一、区域管辖

中国海监各级机构开展海洋环境保护执法工作实行区域管辖制度，各级执法机构的区域管辖范围如下：

中国海监总队负责我国内水、领海、毗连区、专属经济区、大陆架及管辖的其他海域的海洋环境保护执法工作。

中国海监北海区总队负责辽宁省、河北省、天津市、山东省管辖海域的海洋环保执法工作，同时负责上述省（市）相邻专属经济区、大陆架等的海洋环保执法工作。

中国海监东海区总队负责江苏省、浙江省、上海市、福建省管辖海域的海洋环保执法工作，同时负责上述省（市）相邻专属经济区、大陆架等的海洋环保执法工作。

中国海监南海区总队负责广东省、广西区、海南省管辖海域的海洋环保执法

工作，同时负责上述省（市）相邻专属经济区、大陆架等的海洋环保执法工作。

中国海监各海区总队所属的海区支队，按海区总队的分工，负责相关海域内的海洋环保执法工作。

各省、市、县级海监机构负责本辖区内的海洋环保执法工作。

中国海监各保护区海监机构负责本保护区内的海洋环保执法工作。

根据工作需要，上级海监机构可以指定下级海监机构开展特定海域的海洋环保执法工作。

二、层级管理

中国海监各级机构开展海洋环保执法工作实行层级管理制度。各级海监机构层级管理如下：

中国海监总队负责全国海洋环保执法工作的领导和监督检查，制定全国海洋环保执法工作的方针政策，组织重大的海洋环保执法行动，办理有必要由中国海监总队直接查处的案件。

中国海监各海区总队负责组织协调和监督指导本辖区内各级海监机构的海洋环保执法工作，组织开展本辖区内的重大海洋环保执法行动。负责本辖区内海洋油气勘探开发执法检查；负责由国家海洋行政主管部门核准环评的海洋工程的执法检查；负责由国家海洋行政主管部门批准的 100 万方以上的海洋倾废活动的执法检查；负责港、澳和涉外的海洋倾废活动的执法检查；对国家级海洋自然保护区和特别保护区的开发活动实施执法检查。有权查处各类海洋环境违法案件。

中国海监各海区总队所属支队根据海区总队的分工，负责本辖区内的海洋环保执法检查和案件查处工作，对省、市、县级海监机构的海洋环保执法工作进行监督。

省、市、县级海监机构负责本辖区的海洋环保执法工作，制定本辖区内海洋环保执法工作的规划和计划，组织本辖区内海洋环保执法检查和违法案件的查处工作。省级海监机构负责由本省海洋行政主管部门核准环评的海洋工程的执法检查；负责由本省海洋行政主管部门批准的 100 万方以下的海洋倾废活动的执法检查；与保护区海监机构共同负责国家级海洋自然保护区和特别保护区的执法检查；负责本辖区入海排污口的监督检查。查处除明确规定由海区总队管辖外的各类海洋环境违法案件。

地方级海洋自然保护区和特别保护区的海洋环保执法检查和案件查处工作由保护区海监机构和设立保护区的海洋行政主管部门所属的海监机构共同负责。

必要时，中国海监各级机构可以根据需要，按照效率和就近管理的原则，指

定下级海监机构实施监督检查和案件查处工作。

三、检查内容

中国海监依法对海洋保护区、海洋工程、海洋倾废、海洋油气勘探开发、入海排污口等领域进行海洋环境保护监督检查。检查内容如下：

(一)海洋保护区(包括海洋自然保护区和海洋特别保护区)

1.保护区内的各类开发活动是否经有权部门批准、审核。

2.是否遵守《自然保护区条例》规定的相关内容。

3.是否遵守《海洋环境保护法》及相关法律、法规规定的内容。

(二)海洋工程

1.是否遵守环境影响评价制度及“三同时”制度。

2.环保设施及污染物排放等是否符合相关管理规定和要求。

3.污染防治措施及污染事故的预防和处理措施是否落实等。

(三)海洋倾废

1.倾废船舶是否取得海洋废弃物倾倒许可证。

2.废弃物装载后是否报主管部门核实以及是否按规定进行记录。

3.船舶倾废是否到指定区域以及倾倒方式、条件等是否符合规定。

(四)海洋油气勘探开发

1.是否遵守环境影响评价制度、“三同时”制度及项目竣工验收制度等。

2.环保设施及防污染措施等是否符合相关规定和要求。

3.法律、法规规定的有关报告制度是否执行。

4.溢油应急管理相关规定及应急设备是否落实。

5.平台、管道等弃置管理是否符合相关规定。

(五)入海排污口

1.入海排污口的设置是否符合规定和要求。

2.污染物的排放是否超标等。

3.排污口排污对临近海洋环境是否造成破坏。

(六)海洋生态系统

是否对红树林、珊瑚礁、海湾、入海河口、滨海湿地等具有典型性、代表性的海洋生态系统造成破坏。

四、检查方式

各级海监机构开展海洋环保执法工作，可采取卫星遥感、航空巡视、船舶巡

航和实地检查相结合的手段进行。必要时,应与所辖区域内的海洋监测机构相互配合,建立联合执法检查工作机制。根据不同领域海洋环保执法工作的特点和需要,海洋环保执法检查主要采取以下方式:

(一)定期执法检查

各级海监机构要建立定期执法检查制度,对于本辖区内各领域的环保执法工作,每年应开展不少于两次全面的执法检查,对特殊领域可联合海洋监测机构定期开展。并将执法检查工作的情况报上级海监机构,同时向下级海监机构通报。

(二)不定期执法检查

各级海监机构根据海洋工程、海洋倾废等施工运营的海洋环境保护要求及项目海域海洋环境质量状况变化,开展不定期的执法检查工作。不定期执法检查主要是配合海洋环保管理部门的工作要求,立足于纠正和改进本地区比较突出的海洋环境保护方面的问题。不定期执法检查应作为各级海监机构履行海洋环保执法职能的一种常规工作形式。

(三)专项执法检查

各级海监机构对于本辖区内比较严重的海洋环保事件和违法行为,可采取专项执法行动。开展专项执法行动必须有明确的执法检查任务,有效的组织机构,制定详细的专项执法检查方案并报上级海监机构备案。

(四)联合执法检查

各级海监机构在开展执法检查或其他执法行动时,可采取本辖区内各级海监机构联合执法的方式,也可以采取海监机构与其他部门联合执法的方式。联合执法检查行动可以采取统一组织、统一检查的形式进行,也可以采取统一组织、分区或分类检查的形式进行。对在联合执法检查行动中发现的违法行为,可以以组织该行动的海监机构的名义查处,也可以由有管辖权的海监机构查处。

(五)应急执法检查

对海上突发的环境污染事件,各级海监机构应在主管该事件的海监机构统一领导下启动应急执法工作。必要时,主管的海监机构可以越级直接指挥。

五、案件查处

各级海监机构的海洋环境违法案件查处工作,实行层级管理和"谁发现谁查处"相结合的原则。除已有明确规定外,实行"谁发现谁查处"的原则,即先发现违法行为的海监机构可以直接进行查处,也可以将案件移交给有管辖权的海监机构查处。直接进行查处的,要将查处结果通报有管辖权的海监机构。对法律明确规定专属管辖的违法案件,应移交有管辖权的海监机构进行查处。

各级海监机构查处的违法案件,可以采取以下管理方法:

（一）移交查处：下级海监机构如认为确有必要，可以把海洋环境违法案件报请上一级海监机构查处；上级海监机构认为确有必要，可以把海洋环境违法案件移交下级海监机构查处；各级海监机构发现的不属于中国海监管辖的违法行为，应移送给有管辖权的部门处理。

（二）指定查处：各级海监机构已立案的案件，立案的海监机构认为不宜由本级海监机构查处的，可以请求上级海监机构指定其他海监机构查处。上级海监机构认为不宜由立案海监机构查处的，可以指定其他海监机构查处。对跨辖区的海洋环境违法行为，出现管辖权争议时，应提请共同的上一级海监机构指定管辖。

（三）挂牌督办：对于造成恶劣或者重大社会影响的海洋环境违法行为，由中国海监总队实行挂牌督办。挂牌督办案件的办案机关由中国海监总队指定，办案机关必须按照中国海监总队规定的时限等要求执行。中国海监总队对挂牌督办案件实行全过程的跟踪、指导和监督，对工作不力的办案机关要按照相关规定追究责任。

（四）案件通报：各级海监机构应加强海洋环境违法案件的通报工作，每季度将案件查处情况向上级海监机构和同级海洋环保管理部门及相关部门书面通报，重大海洋环境违法案件的处理应及时通报。对执法中发现的重大问题和有关情况提请海洋环保管理部门会商。

（五）办案时限：海洋环境违法案件应当在立案之日起三个月内办结。如有特殊情况需要延期的，需向上级海监机构书面说明理由。自立案起期满六个月尚未作出行政处罚决定的海洋环境违法案件，上级海监机构可以要求案件承办机构限期办结或移交查处。

各级海洋行政主管部门要高度重视海洋环保执法工作，加强组织和指导，落实分管领导责任制。中国海监各级机构要依据《海洋环境保护法》及相关法律法规和规定，明确职责与任务，加强沟通和配合，形成执法合力，切实履行好法律赋予的职责，保证各项海洋环境保护执法工作落到实处。

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题注：《中华人民共和国船舶及其有关作业活动污染海洋环境防治管理规定》已于 2010 年 10 月 8 日经第 9 次部务会议通过，现予公布，自 2011 年 2 月 1 日起施行。

部　长　李盛霖
二〇一〇年十一月十六日

中华人民共和国船舶及其有关作业活动污染海洋环境防治管理规定

第一章　总　则

第一条　为了防治船舶及其有关作业活动污染海洋环境，根据《中华人民共和国海洋环境保护法》、《中华人民共和国防治船舶污染海洋环境管理条例》和中华人民共和国缔结或者加入的国际条约，制定本规定。

第二条　防治船舶及其有关作业活动污染中华人民共和国管辖海域适用本规定。

本规定所称有关作业活动，是指船舶装卸、过驳、清舱、洗舱、油料供受、修造、打捞、拆解、污染危害性货物装箱、充罐、污染清除以及其他水上水下船舶施工作业等活动。

第三条　国务院交通运输主管部门主管全国船舶及其有关作业活动污染海洋环境的防治工作。

国家海事管理机构负责监督管理全国船舶及其有关作业活动污染海洋环境的防治工作。

各级海事管理机构根据职责权限，具体负责监督管理本辖区船舶及其有关作业活动污染海洋环境的防治工作。

第二章　一般规定

第四条　船舶的结构、设备、器材应当符合国家有关防治船舶污染海洋环境的船舶检验规范以及中华人民共和国缔结或者加入的国际条约的要求，并按照国家规定取得相应的合格证书。

第五条　船舶应当依照法律、行政法规、国务院交通运输主管部门的规定以及中华人民共和国缔结或者加入的国际条约的要求，取得并随船携带相应的防治船舶污染海洋环境的证书、文书。

海事管理机构应当向社会公布本条第一款规定的证书、文书目录，并及时更新。

第六条　中国籍船舶持有的防治船舶污染海洋环境的证书、文书由国家海事管理机构或者其认可的机构签发；外国籍船舶持有的防治船舶污染海洋环境

的证书、文书应当符合中华人民共和国缔结或者加入的国际条约的要求。

第七条 船员应当具有相应的防治船舶污染海洋环境的专业知识和技能，并按照有关法律、行政法规、规章的规定参加相应的培训、考试，持有有效的适任证书或者相应的培训合格证明。

从事有关作业活动的单位应当组织本单位作业人员进行操作技能、设备使用、作业程序、安全防护和应急反应等专业培训，确保作业人员具备相关安全和防治污染的专业知识和技能。

第八条 港口、码头、装卸站和从事船舶修造作业的单位应当按照国家有关标准配备相应的污染监视设施和污染物接收设施。

港口、码头、装卸站以及从事船舶修造、打捞、拆解等有关作业活动的其他单位应当按照国家有关标准配备相应的防治污染设备和器材。

第九条 船舶从事下列作业活动，应当按照《中华人民共和国海事行政许可条件规定》的规定，取得海事管理机构的许可，并遵守相关操作规程，落实安全和防治污染措施：

(一)在沿海港口进行舷外拷铲、油漆作业或者使用焚烧炉的；

(二)在港区水域内洗舱、清舱、驱气以及排放压载水的；

(三)冲洗沾有污染物、有毒有害物质的甲板的；

(四)进行船舶水上拆解、打捞、修造和其他水上、水下船舶施工作业的。

第十条 海事管理机构在依法审批3万载重吨以上油轮的货舱清舱、1万吨以上散装液体污染危害性货物过驳以及沉船打捞、油轮拆解等存在较大污染风险的作业活动时，可以要求申请人进行作业方案可行性研究。

第十一条 任何单位和个人发现船舶及其有关作业活动造成或者可能造成海洋环境污染的，应当立即就近向海事管理机构报告。

第三章　船舶污染物的排放与接收

第十二条 在中华人民共和国管辖海域航行、停泊、作业的船舶排放船舶垃圾、生活污水、含油污水、含有毒有害物质污水、废气等污染物以及压载水，应当符合法律、行政法规、有关标准以及中华人民共和国缔结或者加入的国际条约的规定。

第十三条 船舶不得向依法划定的海洋自然保护区、海洋特别保护区、海滨风景名胜区、重要渔业水域以及其他需要特别保护的海域排放污染物。

依法设立本条第一款规定的需要特别保护的海域的，应当在适当的区域配套设置船舶污染物接收设施和应急设备器材。

第十四条 船舶应当将不符合第十二条规定排放要求以及依法禁止向海域排放的污染物，排入具备相应接收能力的港口接收设施或者委托具备相应接收

能力的船舶污染物接收单位接收。

船舶委托船舶污染物接收单位进行污染物接收作业的，其船舶经营人应当在作业前明确指定所委托的船舶污染物接收单位。

第十五条 船舶污染物接收单位进行船舶垃圾、残油、含油污水、含有毒有害物质污水接收作业，应当具有与其作业风险相适应的预防和清除污染的能力，并经海事管理机构批准。

第十六条 船舶污染物接收作业单位应当落实安全与防污染管理制度。进行污染物接收作业的，应当遵守国家有关标准、规程，并采取有效的防污染措施，防止污染物溢漏。

第十七条 船舶污染物接收单位应当在污染物接收作业完毕后，向船舶出具污染物接收单证，如实填写所接收的污染物种类和数量，并由船长签字确认。船舶污染物接收单证上应当注明作业单位名称，作业双方船名，作业开始和结束的时间、地点，以及污染物种类、数量等内容。

船舶应当携带相应的记录簿和船舶污染物接收单证到海事管理机构办理船舶污染物接收证明，并将船舶污染物接收证明保存在相应的记录簿中。

第十八条 国际航行船舶在驶离国内港口前应当将船上污染物清理干净，并在办理出口岸手续时向海事管理机构出示有效的污染物接收证明。

第十九条 船舶进行涉及污染物处置的作业，应当在相应的记录簿内规范填写、如实记录，真实反映船舶运行过程中产生的污染物数量、处置过程和去向。按照法律、行政法规、国务院交通运输主管部门的规定以及中华人民共和国缔结或者加入的国际条约的要求，不需要配备记录簿的，应当将有关情况在作业当日的航海日志或者轮机日志中如实记载。

船舶应当将使用完毕的船舶垃圾记录簿在船舶上保留2年；将使用完毕的含油污水、含有毒有害物质污水记录簿在船舶上保留3年。

第二十条 船舶污染物接收单位应当将接收的污染物交由具有国家规定资质的污染物处理单位进行处理，并每月将船舶污染物的接收和处理情况报海事管理机构备案。

第二十一条 接收处理含有有毒有害物质或者其他危险成份的船舶污染物的，应当符合国家有关危险废物的管理规定。来自疫区船舶产生的污染物，应当经有关检疫部门检疫处理后方可进行接收和处理。

第二十二条 船舶应当配备有盖、不渗漏、不外溢的垃圾储存容器，或者对垃圾实行袋装。

船舶应当对垃圾进行分类收集和存放，对含有有毒有害物质或者其他危险成分的垃圾应当单独存放。

船舶将含有有毒有害物质或者其他危险成分的垃圾排入港口接收设施或者委托船舶污染物接收单位接收的，应当向对方说明此类垃圾所含物质的名称、性质和数量等情况。

第二十三条 船舶应当按照国家有关规定以及中华人民共和国缔结或者加入的国际条约的要求，设置与生活污水产生量相适应的处理装置或者储存容器。

第四章 船舶载运污染危害性货物及其有关作业

第二十四条 本规定所称污染危害性货物，是指直接或者间接进入水体，会损害水体质量和环境质量，从而产生损害生物资源、危害人体健康等有害影响的货物。

国家海事管理机构应当向社会公布污染危害性货物的名录，并根据需要及时更新。

第二十五条 船舶载运污染危害性货物进出港口，承运人或者代理人应当在进出港24小时前(航程不足24小时的，在驶离上一港口时)向海事管理机构办理船舶适载申报手续；货物所有人或者代理人应当在船舶适载申报之前向海事管理机构办理货物适运申报手续。

货物适运申报和船舶适载申报经海事管理机构审核同意后，船舶方可进出港口、过境停留或者进行装卸作业。

第二十六条 交付运输的污染危害性货物的特性、包装以及针对货物采取的风险防范和应急措施等应当符合国家有关标准、规定以及中华人民共和国缔结或者加入的国际条约的要求；需要经国家有关主管部门依法批准后方可载运的，还需要取得有关主管部门的批准。

船舶适载的条件按照《中华人民共和国海事行政许可条件规定》关于船舶载运危险货物的适载条件执行。

第二十七条 货物所有人或者代理人办理货物适运申报手续的，应当向海事管理机构提交下列材料：

(一)货物适运申报单，包括货物所有人或者代理人有关情况以及货物名称、种类、特性等基本信息；

(二)由代理人办理货物适运申报手续的，应当提供货物所有人出具的有效授权证明；

(三)相应的污染危害性货物安全技术说明书，安全作业注意事项、防范和应急措施等有关材料；

(四)需要经国家有关主管部门依法批准后方可载运的污染危害性货物，应当持有有效的批准文件；

(五)交付运输下列污染危害性货物的，还应当提交下列材料：

1.载运包装污染危害性货物的，应当提供包装和中型散装容器检验合格证明或者压力容器检验合格证明；

2.使用可移动罐柜装载污染危害性货物的，应当提供罐柜检验合格证明；

3.载运放射性污染危害性货物的，应当提交放射性剂量证明；

4.货物中添加抑止剂或者稳定剂的，应当提交抑止剂或者稳定剂的名称、数量、温度、有效期以及超过有效期时应当采取的措施；

5.载运限量污染危害性货物的，应当提交限量危险货物证明；

6.载运污染危害性不明货物的，应当提交符合第三十一条规定的污染危害性评估报告。

第二十八条 承运人或者代理人办理船舶适载申报手续的，应当向海事管理机构提交下列材料：

（一）船舶载运污染危害性货物申报单，包括承运人或者代理人有关情况以及货物名称、种类、特性等基本信息；

（二）海事管理机构批准的货物适运证明；

（三）由代理人办理船舶适载申报手续的，应当提供承运人出具的有效授权证明；

（四）防止油污证书、船舶适载证书、船舶油污损害民事责任保险或者其他财务保证证书；

（五）载运污染危害性货物的船舶在运输途中发生过意外情况的，还应当在船舶载运污染危害性货物申报单内扼要说明所发生意外情况的原因、已采取的控制措施和目前状况等有关情况，并于抵港后送交详细报告；

（六）列明实际装载情况的清单、舱单或者积载图；

（七）拟进行装卸作业的港口、码头、装卸站。

定船舶、定航线、定货种的船舶可以办理不超过一个月期限的船舶定期适载申报手续。办理船舶定期适载申报手续的，除应当提交本条第一款规定的材料外，还应当提交能够证明固定船舶在固定航线上运输固定污染危害性货物的有关材料。

第二十九条 海事管理机构收到货物适运申报、船舶适载申报后，应当根据第二十六条规定的条件在24小时内作出批准或者不批准的决定；办理船舶定期适载申报的，应当在7日内作出批准或者不批准的决定。

第三十条 货物所有人或者代理人交付船舶载运污染危害性货物，应当采取有效的防治污染措施，确保货物的包装与标志的规格、比例、色度、持久性等符合国家有关安全与防治污染的要求，并在运输单证上如实注明该货物的技术名称、数量、类别、性质、预防和应急措施等内容。

第三十一条 货物所有人或者代理人交付船舶载运污染危害性不明的货物，应当由国家海事管理机构认定的评估机构进行污染危害性评估，明确货物的污染危害性质和船舶载运技术条件，并经海事管理机构确认后方可交付船舶运输。

国家海事管理机构应当根据下列标准认定并定期公布本条第一款规定的评估机构名单：

（一）有固定的办公场所，并配备必要的检测、鉴定等设施、设备；

（二）具有与污染危害性货物评估相适应技术能力的专业人员；

（三）有符合污染危害性货物评估要求的管理制度。

第三十二条 曾经载运污染危害性货物的空容器和运输组件，应当彻底清洗并消除危害，取得由具有国家规定资质的检测机构出具的清洁证明后，方可按照普通货物交付船舶运输。在未彻底清洗并消除危害之前，应当按照原所装货物的要求进行运输。

第三十三条 海事管理机构认为交付船舶载运的货物应当按照污染危害性货物申报而未申报的，或者申报的内容不符合实际情况的，经海事管理机构负责人批准，可以采取开箱等方式查验。

海事管理机构在实施开箱查验时，货物所有人或者代理人应当到场，并负责搬移货物，开拆和重封货物的包装。海事管理机构认为必要时，可以径行开验、复验或者提取货样。有关单位和个人应当配合。

第三十四条 船舶不符合污染危害性货物适载要求的，不得载运污染危害性货物，码头、装卸站不得为其进行装卸作业。

发现船舶及其有关作业活动可能对海洋环境造成污染危害的，码头、装卸站、船舶应当立即采取相应的应急措施，并向海事管理机构报告。

第三十五条 从事污染危害性货物装卸作业的码头、装卸站，应当符合安全装卸和污染物处理的相关标准，并向海事管理机构提交安全装卸和污染物处理能力情况的有关材料。海事管理机构应当将具有相应安全装卸和污染物处理能力的码头、装卸站向社会公布。

载运污染危害性货物的船舶应当在海事管理机构公布的具有相应安全装卸和污染物处理能力的码头、装卸站进行装卸作业。

第三十六条 船舶进行散装液体污染危害性货物过驳作业的，应当符合国家海上交通安全和防治船舶海洋污染环境的管理规定和技术规范，选择缓流、避风、水深、底质等条件较好的水域，远离人口密集区、船舶通航密集区、航道、重要的民用目标或者设施、军用水域，制定安全和防治污染的措施和应急计划并保证有效实施。

第三十七条 进行散装液体污染危害性货物过驳作业的船舶，其承运人、货物所有人或者代理人应当向海事管理机构提交下列申请材料：

（一）船舶作业申请书，内容包括作业船舶资料、联系人、联系方式、作业时间、作业地点、过驳种类和数量等基本情况；

（二）船舶作业方案、拟采取的监护和防治污染措施；

（三）船舶作业应急预案；

（四）对船舶作业水域通航安全和污染风险的分析报告；

（五）与具有相应资质的污染清除作业单位签订的污染清除作业协议。

以过驳方式进行油料供受作业的，应当提交本条第一款第（一）、（二）、（三）、（五）项规定的材料。

海事管理机构应当自受理申请之日起 2 日内根据第三十六条规定的条件作出批准或者不予批准的决定。2 日内无法作出决定的，经海事管理机构负责人批准，可以延长 5 日。

第三十八条　从事船舶油料供受作业的单位应当向海事管理机构备案，并提交下列备案材料：

(一)工商营业执照；

(二)安全与防治污染制度文件、应急预案、应急设备物资清单、输油软管耐压检测证明以及作业人员参加培训情况；

(三)通过船舶进行油料供受作业的，还应当提交船舶相关证书、船上油污应急计划、作业船舶油污责任保险凭证以及船员适任证书；

(四)燃油质量承诺书；从事成品油供受作业的单位应当同时提交有关部门依法批准的成品油批发或者零售经营的证书。

第三十九条　进行船舶油料供受作业的，作业双方应当采取满足安全和防治污染要求的供受油作业管理措施，同时应当遵守下列规定：

(一)作业前，应当做到：

1. 检查管路、阀门，做好准备工作，堵好甲板排水孔，关好有关通海阀；

2. 检查油类作业的有关设备，使其处于良好状态；

3. 对可能发生溢漏的地方，设置集油容器；

4. 供受油双方以受方为主商定联系信号，双方均应切实执行。

(二)作业中，要有足够人员值班，当班人员要坚守岗位，严格执行操作规程，掌握作业进度，防止跑油、漏油；

(三)停止作业时，必须有效关闭有关阀门；

(四)收解输油软管时，必须事先用盲板将软管有效封闭，或者采取其他有效措施，防止软管存油倒流入海。

海事管理机构应当对船舶油料供受作业进行监督检查，发现不符合安全和防治污染要求的，应当予以制止。

第四十条　船舶燃油供给单位应当如实填写燃油供受单证，并向船舶提供燃油供受单证和燃油样品。燃油供受单证应当包括受油船船名，船舶识别号或国际海事组织编号，作业时间、地点，燃油供应商的名称、地址和联系方式以及燃油种类、数量、密度和含硫量等内容。船舶和燃油供给单位应当将燃油供受单证保存 3 年，将燃油样品妥善保存 1 年。

燃油供给单位应当确保所供燃油的质量符合相关标准要求，并将所供燃油送交取得国家规定资质的燃油检测单位检测。燃油质量的检测报告应当留存在作业船舶上备查。

第四十一条　船舶从事 300 吨及以上的油类或者比重小于 1 且不溶、微溶于水的散装有毒液体物质的装卸、过驳作业，应当布设围油栏。

布设围油栏方案应当在作业前报海事管理机构备案。因受自然条件或者其

他原因限制，不适合布设围油栏的，可以采用其他防治污染替代措施，但应当将拟采取的替代措施和理由在作业前报海事管理机构同意。

第四十二条 载运污染危害性货物的船舶进出港口和通过桥区、交通管制区、通航密集区以及航行条件受限制的区域，或者载运剧毒、爆炸、放射性货物的船舶进出港口，应当遵守海事管理机构的特别规定，并采取必要的安全和防治污染保障措施。

第四十三条 船舶载运散发有毒有害气体或者粉尘物质等货物的，应当采取密闭或者其他防护措施。对有封闭作业要求的污染危害性货物，在运输和作业过程中应当采取措施回收有毒有害气体。

第五章 船舶拆解、打捞、修造和其他水上水下船舶施工作业

第四十四条 进行船舶修造、水上拆解作业的，应当在海事管理机构确定并公布的地点进行。

禁止采取冲滩方式进行船舶拆解作业。

第四十五条 进行船舶拆解、打捞、修造和其他水上水下船舶施工作业的，应当遵守相关操作规程，并采取必要的安全和防治污染措施。

第四十六条 在进行船舶拆解和船舶油舱修理作业前，作业单位应当将船舶上的残余物和废弃物进行有效处置，将燃油舱、货油舱中的存油驳出，进行洗舱、清舱、测爆等工作，并按照规定取得船舶污染物接收证明和有效的测爆证书。

船舶燃油舱、货油舱中的存油需要通过过驳方式交付储存的，应当交由船舶污染物接收单位或者依法获得船舶油料供受作业资质的单位储存，并按照第三十七条的规定经过海事管理机构的批准。

第四十七条 在船坞内进行船舶修造作业的，修造船厂应当将坞内污染物清理完毕，确认不会造成水域污染后，方可沉起浮船坞或者开启坞门。

第四十八条 船舶拆解、打捞、修造或者其他水上水下船舶施工作业结束后，应当及时清除污染物，并将作业全过程产生的污染物的清除处理情况一并向海事管理机构报告，海事管理机构可以视情况进行现场核实。

第六章 法律责任

第四十九条 海事管理机构发现船舶、有关作业单位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。

第五十条　违反本规定，船舶的结构不符合国家有关防治船舶污染海洋环境的船舶检验规范或者有关国际条约要求的，由海事管理机构处10万元以上30万元以下的罚款。

第五十一条　违反本规定，船舶、港口、码头和装卸站未配备防治污染设施、设备、器材，有下列情形之一的，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：

(一)配备的防治污染设施、设备、器材数量不能满足法律、行政法规、规章、有关标准以及我国缔结或者参加的国际条约要求的；

(二)配备的防治污染设施、设备、器材技术性能不能满足法律、行政法规、规章、有关标准以及我国缔结或者参加的国际条约要求的。

第五十二条　违反本规定，船舶未持有防治船舶污染海洋环境的证书、文书的，由海事管理机构予以警告，或者处2万元以下的罚款。

第五十三条　违反本规定，船舶向海域排放本规定禁止排放的污染物的，由海事管理机构处3万元以上20万元以下的罚款。

第五十四条　违反本规定，船舶排放或者处置污染物，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)超过标准向海域排放污染物的；

(二)未按照规定在船上留存船舶污染物排放或者处置记录的；

(三)船舶污染物处置记录与船舶运行过程中产生的污染物数量不符合的。

第五十五条　违反本规定，船舶污染物接收单位未经海事管理机构批准，擅自进行船舶垃圾、残油、含油污水、含有毒有害物质污水接收作业的，由海事管理机构处1万元以上5万元以下的罚款；造成海洋环境污染的，处5万元以上25万元以下的罚款。

第五十六条　违反本规定，船舶、船舶污染物接收单位接收处理污染物，有下列第(一)项情形的，由海事管理机构予以警告，或者处2万元以下的罚款；有下列第(二)项、第(三)项情形的，由海事管理机构处2万元以下的罚款：

(一)船舶未如实记录污染物处置情况的；

(二)船舶未按照规定办理污染物接收证明的；

(三)船舶污染物接收单位未按照规定将船舶污染物的接收和处理情况报海事管理机构备案的。

第五十七条　违反本规定，未经海事管理机构批准，船舶载运污染危害性货物进出港口、过境停留、进行装卸的，由海事管理机构对其承运人、货物所有人或者代理人处1万元以上5万元以下的罚款；未经海事管理机构批准，船舶进行散装液体污染危害性货物过驳作业的，由海事管理机构对船舶处1万元以上5万元以下的罚款。

第五十八条　违反本规定，有下列第(一)项情形的，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；有下列第(二)项、第(三)项、第(四)

项情形的，由海事管理机构处2万元以上10万元以下的罚款：

（一）船舶载运的污染危害性货物不具备适运条件的；

（二）载运污染危害性货物的船舶不符合污染危害性货物适载要求的；

（三）载运污染危害性货物的船舶未在具有相应安全装卸和污染物处理能力的码头、装卸站进行装卸作业的；

（四）货物所有人或者代理人未按照规定对污染危害性不明的货物进行污染危害性评估的。

第五十九条 违反本规定，有下列情形之一的，由海事管理机构处2000元以上1万元以下的罚款：

（一）船舶未按照规定保存污染物接收证明的；

（二）船舶油料供受单位未如实填写燃油供受单证的；

（三）船舶油料供受单位未按照规定向船舶提供燃油供受单证和燃油样品的；

（四）船舶和船舶油料供受单位未按照规定保存燃油供受单证和燃油样品的。

第六十条 违反本规定，进行船舶水上拆解、旧船改装、打捞和其他水上水下船舶施工作业，造成海洋环境污染损害的，由海事管理机构予以警告，或者处5万元以上20万元以下的罚款。

第七章 附 则

第六十一条 军事船舶以及国务院交通运输主管部门所辖港区水域外渔业船舶污染海洋环境的防治工作，不适用本规定。

第六十二条 本规定自2011年2月1日起施行。

发布机关：交通运输部
发布文号：交通运输部令2010年第3号
发布日期：2010年8月19日
实施日期：2010年10月1日
时 效 性：有效

题注：《中华人民共和国船舶油污损害民事责任保险实施办法》已于2010年7月9日经第6次部务会议通过，现予公布，自2010年10月1日起施行。

部 长 李盛霖
二〇一〇年八月十九日

中华人民共和国船舶油污损害民事责任保险实施办法

第一章　总　则

第一条　为完善船舶污染事故损害赔偿机制,建立船舶油污损害民事责任保险制度,根据《中华人民共和国海洋环境保护法》、《中华人民共和国海商法》、《中华人民共和国防治船舶污染海洋环境管理条例》等法律、行政法规和我国缔结或者参加的有关国际条约,制定本办法。

第二条　在中华人民共和国管辖海域内航行的载运油类物质的船舶和1000总吨以上载运非油类物质的船舶,其所有人应当按照本办法的规定投保船舶油污损害民事责任保险或者取得相应的财务担保。

承担船舶油污损害民事责任保险的商业性保险机构和互助性保险机构,应当遵守本办法。

第三条　国务院交通运输主管部门负责统一管理全国船舶油污损害民事责任保险工作。

国家海事管理机构负责组织实施全国船舶油污损害民事责任保险工作。

沿海各级海事管理机构依照各自职责负责具体实施船舶油污损害民事责任保险工作。

第二章　船舶油污损害民事责任保险及额度

第四条　在中华人民共和国管辖海域内航行的船舶应当按照以下规定投保油污损害民事责任保险或者取得其他财务保证:

(一)载运散装持久性油类物质的船舶,投保油污损害民事责任保险,其保险标的应当包括持久性油类物质造成的污染损害;

(二)1000总吨以上载运非持久性油类物质的船舶,投保油污损害民事责任保险,其保险标的应当包括非持久性油类物质造成的污染损害和燃油造成的污染损害;

(三)1000总吨以上载运非油类物质的船舶,投保油污损害民事责任保险,其保险标的应当包括燃油造成的污染损害;

(四)1000 总吨以下载运非持久性油类物质的船舶,投保油污损害民事责任保险,其保险标的应当包括非持久性油类物质造成的污染损害。

第五条 在中华人民共和国管辖海域内航行的载运散装持久性油类物质的船舶,投保油污损害民事责任保险或者取得其他财务保证,应当不低于以下额度:

(一)5000 总吨以下的船舶为 451 万特别提款权;

(二)5000 总吨以上的船舶,除前项所规定的数额外,每增加一吨,增加 631 特别提款权,但是,此总额度在任何情况下不超过 8977 万特别提款权。

第六条 在中华人民共和国管辖海域内航行的载运非持久性油类物质的船舶,以及 1000 总吨以上载运非油类物质的船舶,投保油污损害民事责任保险或者取得其他财务保证,应当不低于以下额度:

(一)20 总吨以上、21 总吨以下的船舶,为 27500 特别提款权;

(二)21 总吨以上、300 总吨以下的船舶,除第(一)项所规定的数额外,每增加一吨,增加 500 特别提款权;

(三)300 总吨至 500 总吨的船舶,为 167000 特别提款权;

(四)501 总吨至 30000 总吨的船舶,除第(三)项所规定的数额外,每增加一吨,增加 167 特别提款权;

(五)30001 总吨至 70000 总吨的船舶,除第(四)项所规定的数额外,每增加一吨,增加 125 特别提款权;

(六)70001 总吨以上的船舶,除第(五)项所规定的数额外,每增加一吨,增加 83 特别提款权。

第七条 从事中华人民共和国港口之间货物运输或者沿海作业的船舶,投保油污损害民事责任保险或者取得其他财务保证,其额度按照第六条所规定额度的 50%计算。

第三章 船舶油污损害民事责任保险机构

第八条 中国籍船舶应当向经国家海事管理机构确定并公布的保险机构投保船舶油污损害民事责任保险,或者取得经国家海事管理机构确定并公布的保险机构以及境内银行等金融机构所出具的保函、信用证等其他财务保证。

第九条 承担中国籍船舶油污损害民事责任保险的互助性保险机构应当符合以下要求:

(一)在我国境内注册或者在我国境内设有代表机构或者代理机构;

(二)上一年度净基金超过 1 亿美元或每吨净基金超过 3 美元;

(三)保险条款符合我国法律、行政法规、规章以及我国批准或者加入的国际条约的有关规定。

第十条 承担中国籍船舶油污损害民事责任保险的商业性保险机构应当符合以下要求：

(一)应当依法经国务院保险监督管理机构批准设立、取得经营保险业务许可证，并已向工商行政管理机关办理登记，取得营业执照；

(二)上一年度净资产超过7亿元人民币；

(三)上一年度偿付能力超过100%；

(四)保险条款符合我国法律、行政法规、规章以及我国批准或者加入的国际条约的有关规定。

第十一条 从事中国籍船舶油污损害民事责任保险的保险机构应在每年10月15日前向国家海事管理机构提交以下材料：

(一)注册证明、营业执照、经营保险业务许可证以及其他合法开业证明等证明材料，境外互助性保险机构还应当提交在我国境内设立代表机构或者代理机构的证明材料；境外互助性保险机构所提供的营业执照、注册登记证明以及其他合法开业证明为复印件的，应当经其所在国家或者地区依法设立的公证机构公证并经中国驻该国使、领馆认证；

(二)上一年度的经注册会计师审计的资产负债表、损益表；

(三)上一年度船舶油污损害民事责任保险的偿付能力(仅针对商业性保险机构)；

(四)上一年度承保船舶油污损害民事责任保险的总吨位；

(五)上一年度承保的中国籍船舶名单；

(六)上一年度所承保中国籍船舶的理赔情况；

(七)船舶油污损害民事责任保险合同样本；

(八)船舶油污损害民事责任保险业务的负责人、联系人以及联络方式；境外互助性保险机构还应当提交其在中华人民共和国境内代表机构或者代理机构的负责人、联系人以及联络方式；

(九)需要说明的其他背景材料。

第十二条 国家海事管理机构应当及时对保险机构提交的材料进行核实，在征求国务院保险监督管理机构意见后，对符合本办法规定的保险机构予以确定，并于每年11月30日前向社会公布。

第四章 船舶油污损害民事责任保险证书

第十三条 中国籍船舶投保船舶油污损害民事责任保险或者取得其他财务保证之后，应当按以下规定向船籍港所在地的直属海事管理机构申请办理相应船舶油污损害民事责任保险证书：

(一)载运持久性油类物质的船舶，应当办理《油污损害民事责任保险或其他

财务保证证书》；

（二）1000总吨以上的载运非持久性油类物质的船舶，应当办理《燃油污染损害民事责任保险或其他财务保证证书》和《非持久性油类污染损害民事责任保险或其他财务保证证书》；

（三）1000总吨以下的载运非持久性油类的船舶，应当办理《非持久性油类污染损害民事责任保险或其他财务保证证书》；

（四）1000总吨以上的载运非油类物质的船舶，应当办理《燃油污染损害民事责任保险或其他财务保证证书》。

第十四条 中国籍船舶申请办理船舶油污损害民事责任保险证书，应向海事管理机构提交以下材料：

（一）申请书；

（二）有效的船舶油污损害民事责任保险单证或者其他财务保证证明；

（三）船舶国籍证书。

第十五条 海事管理机构应当对申请材料进行审核，对符合本办法规定的，在受理之日起7个工作日内，向船舶签发相应的船舶油污损害民事责任保险证书。

船舶油污损害民事责任保险证书的有效期不得超过船舶油污损害民事责任保险合同或者其他财务保证证明的期限。

第十六条 船舶油污损害民事责任保险证书不得伪造、涂改，并应当随船携带，以备海事管理机构查验。

船舶油污损害民事责任保险证书遗失的，应当书面说明理由，附具有关证明文件，向原发证机关申请补发。

第十七条 在我国管辖海域内航行的外国籍船舶应当符合以下规定：

（一）适用《1992年国际油污损害民事责任公约》的，应当持有缔约国主管机关或其授权机构签发的《油污损害民事责任保险或其他财务保证证书》。

（二）适用《2001年国际燃油污染损害民事责任公约》的，应当持有缔约国主管机关或其授权机构签发的《燃油污染损害民事责任保险或其他财务保证证书》。

（三）1000总吨以下载运非持久性油类物质的船舶，应当持有有效的非持久性油类污染民事责任保险单证或其他财务保证证明。

第十八条 海事管理机构应当加强对船舶油污损害民事责任保险证书、保险单证或其他财务保证证明的查验。

第五章 法律责任

第十九条 有下列情形之一的，由海事管理机构责令改正，并处1万元以上

5万元以下的罚款;拒不改正的,责令停航、禁止进出港或者过境停留,并处5万元以上25万元以下的罚款:

(一)在我国管辖海域内航行的船舶,其所有人未按照规定投保船舶油污损害民事责任保险或者取得其他财务保证的;

(二)船舶所有人投保油污损害民事责任保险或者取得其他财务保证的额度低于本办法规定的。

下列情形视为船舶未按照规定投保船舶油污损害民事责任保险或者取得其他财务保证:

(一)未取得相应的船舶油污损害民事责任保险证书;

(二)伪造、涂改船舶油污损害民事责任保险证书;

(三)所持有的船舶油污损害民事责任保险证书超过有效期;

(四)所持有的船舶油污损害民事责任保险证书与船舶实际情况不相符。

船舶伪造、涂改船舶油污损害民事责任保险证书的,海事管理机构还应当对已签发的船舶油污损害民事责任保险证书予以撤销。

第二十条 从事船舶油污损害民事责任保险的保险机构有下列情形之一的,自发现之年次年起三年内海事管理机构对其不得予以确定和公布:

(一)在生效的法院判决、仲裁裁决书或仲裁调解书规定的履行期间届满后拒不执行,未向所承保船舶赔付;(二)向海事管理机构提交虚假材料。

第二十一条 海事管理人员滥用职权、徇私舞弊、玩忽职守、严重失职的,由所在单位或者上级机关给予行政处分;构成犯罪的,依法追究刑事责任。

第六章 附 则

第二十二条 本办法所称的“以上”包括本数,所称的“以下”不包括本数。

第二十三条 本法中下列用语的含义是:

“油类”是指任何类型的油及其炼制品。

“持久性油类”是指任何持久性烃类矿物油,例如原油、燃油、重柴油和润滑油等。

“非持久性油类”是指持久性油类以外的任何油类。

第二十四条 本办法自2010年10月1日起实施。

在中华人民共和国海域内航行的1200总吨以下载运散装持久性油类物质的船舶,其油污损害民事责任保险制度自本办法生效1年后实行。

IMO News Briefings

Marine Environment Protection Committee (MEPC)—61st session: 27 September —1 October, 2010

Covering a packed agenda when it met for its 61st session from 27 September to 1 October, 2010 in London, the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO), progressed its work on a number of important issues, including the adoption of the revised MARPOL Annex III, the approval of a revised text for MARPOL Annex V, the implementation of the ballast water and ship recycling conventions and the reduction of emissions of greenhouse gases from ships (*see* Briefing 48/2010).

Revised MARPOL Annex III to prevent pollution from packaged goods adopted

The revised MARPOL Annex III Regulations for the prevention of pollution by harmful substances carried by sea in packaged form was adopted by consensus during the session and is expected to enter into force on 1 January 2014 in order for changes to the Annex to coincide with the next update of the mandatory International Maritime Dangerous Goods (IMDG) Code, specifying that goods should be shipped in accordance with relevant provisions.

Revised MARPOL Annex V text approved

The MEPC approved, with a view to adoption at its next session, amendments to revise and update MARPOL Annex V Regulations for the prevention of pollution by garbage from ships, following a comprehensive review of this Annex.

The main changes include the updating of definitions; the inclusion of a new requirement specifying that discharge of all garbage into the sea is prohibited, except as expressly provided otherwise (the discharges permitted in certain circumstances include food wastes, cargo residues and water used for washing deck and external surfaces containing cleaning agents or additives which are not harmful to the marine environment); expansion of the requirements for plac-

ards and garbage management plans to fixed and floating platforms engaged in exploration and exploitation of the sea—bed; and the proposed addition of discharge requirements covering animal carcasses.

Ballast water management systems approved

After consideration of the reports of the thirteenth and fourteenth meetings of the Joint Group of Experts on the Scientific Aspects of Marine Environment Protection (GESAMP) Ballast Water Working Group, which met in May and July 2010, respectively, the MEPC granted Final Approval to six ballast water management systems that make use of active substances and Basic Approval to three such systems.

The MEPC also approved circulars on the Framework for determining when a Basic Approval granted to one BWMS may be applied to another system that uses the same Active Substance or Preparation and Guidance for Administrations on the type approval process for ballast water management systems in accordance with the G8 Guidelines (for approval of ballast water management systems).

The MEPC reiterated the need for countries to ratify the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, to achieve its entry into force at the earliest opportunity. To date, 27 States, with an aggregate merchant shipping tonnage of 25.32 per cent of the world total, have ratified the Convention. The Convention will enter into force twelve months after the date on which not fewer than 30 States, the combined merchant fleets of which constitute not less than 35 percent of the gross tonnage of the world's merchant shipping, have become Parties to it.

The MEPC noted the conclusion of the Review Group on Ballast Water Treatment Technologies (BWRG) that, for ships with ballast water capacity up to 5,000 cubic metres, including those constructed in 2011, there are sufficient technologies available to meet the requirements of the Convention and their number is increasing.

Maritime Safety Committee (MSC), 88th session: 24 November — 3 December 2010

Amendments to the International Convention for the Safety of Life at Sea (SOLAS) to make mandatory the International Code for the Application of Fire Test Procedures (2010 FTP Code) were adopted when IMO's Maritime Safety Committee (MSC) met at the Organization's London Headquarters for

its 88th session from 24 November to 3 December 2010.

The busy agenda also included discussion on piracy and armed robbery against ships off the coast of Somalia and the approval of a revised resolution on principles of safe manning.

2010 FTP Code adopted

The 2010 FTP Code, along with relevant SOLAS amendments to make it mandatory, was adopted, with an expected entry into force date of 1 July 2012.

The 2010 FTP Code provides the international requirements for laboratory testing, type—approval and fire test procedures for products referenced under SOLAS chapter II—2. It comprehensively revises and updates the current Code, adopted by the MSC in 1996.

The 2010 FTP Code includes the following: test for non—combustibility; test for smoke and toxicity; test for "A", "B" and "F" class divisions; test for fire door control systems; test for surface flammability (surface materials and primary deck coverings); test for vertically supported textiles and films; test for upholstered furniture; test for bedding components; test for fire—restricting materials for high—speed craft; and test for fire—resisting divisions of high—speed craft.

It also includes annexes on Products which may be installed without testing and/or approval and on Fire protection materials and required approval test methods.

Other amendments adopted

The MSC also adopted:

- amendments to SOLAS regulation V/18 to require annual testing of automatic identification systems (AIS);
- amendments to SOLAS regulation V/23 on pilot transfer arrangements, to update and to improve safety aspects for pilot transfer;
- amendments to safety certificates in the SOLAS appendix and SOLAS Protocol of 1988, relating to references to alternative design and arrangements;
- amendments to the International Convention for Safe Containers, 1972, to include addition of new paragraphs in Regulation 1 Safety Approval Plate, specifying the validity of and elements to be included in approved examination programmes; the addition of a new test for containers being approved for operation with one door removed; and the addition of a new annex III Control and Verification, which provides specific control measures to enable author-

ized officers to assess the integrity of structurally sensitive components of containers and to help them decide whether a container is safe to continue in transportation or whether it should be stopped until remedial action has been taken; and a new chapter 9 of the International Code for Fire Safety Systems (FSS Code), related to fixed fire detection and fire alarm systems.

New international passenger ship safety regulations enter into force

A comprehensive package of amendments to the international regulations affecting new passenger ships enters into force on 1 July 2010. Increased emphasis is placed on reducing the chance of accidents occurring and on improved survivability, embracing the concept of the ship as 'its own best lifeboat'.

The amendments affect passenger ship regulations in the International Convention for the Safety of Life at Sea (SOLAS), and came about as the result of a comprehensive review of passenger ship safety initiated in 2000 by the International Maritime Organization (IMO), the United Nations specialized agency with responsibility for safety and security of shipping and the prevention of marine pollution from ships.

The aim of the review was to assess whether the existing regulations were adequate to meet future challenges, in particular to address issues related to the increased size of passenger ships now being built. The amendments were adopted in 2006.

The guiding philosophy behind this important review was based on the dual premise that the regulatory framework should place more emphasis on the prevention of a casualty from occurring in the first place and that future passenger ships should be designed for improved survivability so that, in the event of a casualty, persons can stay safely on board, in a 'safe area' as the ship proceeds to port.

The amendments include new concepts such as the incorporation of design criteria for the casualty threshold (the amount of damage a ship is able to withstand, according to the design basis, and still safely return to port) into SOLAS chapters II-1 and II-2. The amendments also provide regulatory flexibility so that ship designers can meet future safety challenges.

The amendments, which largely affect new ships built from 1 July 2010, include:

- alternative designs and arrangements;
- provision of safe areas and the essential systems to be maintained while a ship proceeds to port after a casualty, which will require redundancy of pro-

pulsion and other essential systems;

- on－board safety centres, from where safety systems can be controlled, operated and monitored;
- fixed fire detection and alarm systems, including requirements for fire detectors and manually operated call points to be capable of being remotely and individually identified;
- fire prevention, including amendments aimed at enhancing the fire safety of atriums, the means of escape in case of fire and ventilation systems; and
- time for orderly evacuation and abandonment, including requirements for the essential systems that must remain operational in case any one main vertical zone is unserviceable due to fire.

（责任编辑：曹　旎）

《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：

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3.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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《中国海洋法学评论》编辑部

《中国海洋法学评论》引证体例

为了统一《中国海洋法学评论》来稿格式,特制定本引证体例:

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1. 来稿由题目(中英文)、作者姓名及简介、内容摘要、关键词和正文构成。

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(2)司玉琢、朱曾杰:《有关海事国际公约与国内法关系的立法建议》,载于《海商法年刊》1999年卷,大连海事大学出版社2000年版,第5页。

(3)傅崐成:《联合国教科文组织2001年〈水下文化遗产保护公约〉评析》,载于厦门大学海洋法律研究中心编:《纪念〈联合国海洋法公约〉签署20周年学术研讨会论文集》(2002年),第58页。——载于论文集中的论文。

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(2)Connie Peck and Yoy S. Lee ed.,*Increasing the Effectiveness of the International Court of Justice*,Hague:Martinus Nijhoff Publishers,1997,pp. 109-110. ——编著应以“ed.”标出。

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Website: law.sjtu.edu.cn/Article1502.aspx

《中国海洋法学评论》总目录(1—11期)

2005年第1期(总1期)

目　录

卷首语

论文

周忠海:论国际海洋法法庭的管辖权
金永明:国际海洋法法庭与国际法院比较研究——以法庭在组成、管辖权、程序及判决方面的特征为中心
傅崐成:南(中国)海渔业资源区域合作护养管理研究
刘　彬:WTO渔业补贴议题进展与制度改革分析
慕亚平　江颖:从“公海捕鱼自由”原则的演变看海洋渔业制度的发展趋势
余民才:紧追权的实施与我国海上执法
何丽新:承运人对无单放货的抗辩事由分析——从165份生效判决书说起
赵亚娟:对日本秘密海运极端危险核物质的法律思考
洪　农:浅析美国对《联合国海洋法公约》的立场演变
罗曼丽:海域规范管理方法论
尹年长:突发性海洋环境事件处理对策的法律分析
徐文君　胡增祥:论我国海洋环境保护中的公众参与
聂　鑫:国际公约、政策、法律、管理——生物安全比较研究

案例

赵秋丹:《联合国海洋法公约》附件七仲裁庭第一案的启示——南方金枪鱼案评析
熊良敏　译:圣文森特及格林纳丁斯向国际海洋法法庭申请几内亚比绍立即释放“Juno Trader”号一案
熊良敏:马来西亚诉新加坡围海造地案

动态

Myron Nordquist 演讲,卢佳译:海上执法
“历史性水域”和“群岛制度”研讨会综述
水下文化遗产保护专家研讨会综述

新文献
中国人民共和国和越南社会主义共和国关于两国在北部湾领海、专属经济区和大陆架的划界协定
中华人民共和国政府和越南社会主义共和国政府北部湾渔业合作协定
北部湾共同渔区渔业资源养护和管理规定
《中华人民共和国政府和越南社会主义共和国政府北部湾渔业合作协定》补充议定书
中华人民共和国农业部关于实施《中越北部湾渔业合作协定》的通告
中华人民共和国渔业法
中华人民共和国海关行政处罚实施条例
港口经营管理规定

2005年第2期(总2期)

目　录

卷首语

论文
赵建文:论《联合国海洋法公约》缔约国关于军舰通过领海问题的解释性声明
刘振民:The Basic Position of China on the Settlement of Maritime Disputes through Negotiations
吴士存 任怀锋:我国的能源安全与南海争议区的油气开发
张新军:日本国际法学界大陆架划界问题的文献和观点初探
张良福:中国与海洋邻国初步建立新型渔业关系
郭文路 黄硕琳:东海区渔业资源区域合作管理研究
薛桂芳 马英杰 胡增祥:论中国海岛立法的必要性
徐祥民 周　晨 李懋宁:无居民海岛立法中的几个问题
陈海波:"塔斯曼海"轮船舶碰撞海洋油污损害赔偿系列案评析
彭晋平 刘先鸣:中国船舶油污损害赔偿基金法律制度研究
杨运福 林翠珠:在中国水域发生的船舶油污损害赔偿损失范围
Patrick Holloway:South Africa's Practical Approach to Dealing with Oil Pollution Prevention and Ships in Need of Assistance
文伯屏:论环境资源法律体系
张清姬:简评《UNCITRAL货物运输法草案》
朱作贤 王晓凌 蒋跃川:论《UNCITRAL运输法草案》对凭单放货规则的改革
张丽英:Conflict of Jurisdictions of Maritime Disputes in China
徐　峻:论欧盟对班轮公会反垄断豁免的审查
徐锦堂:关于海底沉没物相关法律问题的几点思考

金永明：人类共同继承财产概念特质研究
梅　宏：可持续发展观与海法的关系

法规和动态
海事局关于执行《关于 1973 年国际防止船舶造成污染公约的 1978 年议定书》新修订的第 13G 条和新增第 13H 条的通知
卫生部关于发布《深海石油作业职业卫生管理办法》的通知
中华人民共和国防治船舶污染内河水域环境管理规定
中华人民共和国可再生能源法
水产苗种管理办法
The 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing

2006 年第 1 期（总 3 期）

目　录

卷首语

论文
Erik Franckx：Maritime Delimitation in the Caspian Sea：Legal Issues
王可菊：钓鱼岛及其在东海划界中的地位
宋玉祥：中日钓鱼岛争端的解决方式问题
贾　宇：中国东海二百海里外大陆架法律问题初探
方银霞 周建平：《联合国海洋法公约》大陆架的法理和应用条件
董玉鹏：论大陆架共有
张湘兰 朱　强：《保护水下文化遗产公约》评析
Vijay Sakhuja：Recycling of Maritime Vessels：Issues of Governance and Policy
傅崐成 刘先鸣：台湾海峡船源污染法律问题刍议
王小晖：核材料海上秘密运输的国际法问题
梁永刚 李忠胜：试论取消航海过失免责中的管船过失免责
周忠海：论海上紧追权的权利内涵及其实践
王　震 沙云飞：海盗罪及其在我国国内立法问题
龚迎春：海洋领域非传统安全因素对海洋法律秩序的影响——以日本构建多边海上安全机制为例
刘　兰 李永祺 任　洁：无居民海岛立法的权属问题分析
刘中民 黎兴亚：海底政治与国际法：巴里·布赞的《海底政治》述评——兼论国际海底政治的新发展

法规和动态
中华人民共和国高速客船安全管理规则

国务院关于印发《中国水生生物资源养护行动纲要》的通知
国家海上搜救应急预案
海洋石油安全生产规定
杨立敏 申政武 孙娜 译:日本水产业协会法(一)

2006年第2期(总4期)

目　录

卷首语

论文

Kuen-chen FU:Military Survey and liquid Cargo Transfer in the EEZ:Some Undefined Rights of the Coastal States
张海文:沿海国海洋科学研究管辖权与军事测量的冲突问题
邢广梅:海上自卫权及相关法律问题初探
韩立新 宣　行 刘东铖:对我国远洋渔船行政处罚问题研究
曹志英 张志华 任　洁:论"一事不再罚"原则在海洋行政处罚中的适用
郭　萍:海商法解释原则及解释方法问题研究
林明华:船舶燃油污染损害赔偿责任研究
巩　固:海域使用权法律性质与价值功能的双重性
朱晓勤 董　琳:保护海洋环境免受陆源污染全球行动计划(GPA)第二次政府间审查会议综述
江家栋 吴林涛:"小三通对大三通的启示"学术研讨会综述
赵　伟:国际法院解决海洋争端的最新发展
本刊课题组:2006年中国海洋法学研究综述

法规与动态

海域使用权管理规定
防治海洋工程建设项目污染损害海洋环境管理条例
International Principles for Responsible Shrimp Farming
杨立敏 申政武 孙娜 译:日本水产业协会法(三之二)

2007年第1期(总5期)

目　录

卷首语

论文

田士臣:从伊朗扣押英国水兵事件看中国对其领海内的外国军用船舶的管理
金永明:日本在海洋问题上的动向及对我国的启示

魏荣辉 傅崐成:中国大陆私人游艇的现状分析及其发展构想
赵亚娟:论海难救助制度与水下文化遗产的保护——兼评《保护水下文化遗产公约》的相关规定
褚晓琳:风险预防原则发展历程的研究
韦经建 姚 莹:公共运输领域中回归契约自由的尝试——评 UNCITRAL《运输法公约》(草案)对于海运服务协议的调整思路
徐伟力:试析沿海国防止船舶污染管辖权
关 晶:论国际海洋法法庭的临时措施管辖权
徐曾沧 卢建祥:《联合国海洋法公约》争端解决机制十年:成就、不足与发展——以与常设国际仲裁法庭、国际法院的比较实证分析为视角

述评

阮贞艳 董 琳:"厦金海域管理问题"研讨会综述
徐祥民 孔晓明:日本《濑户内海环境保护特别措施法》的成功经验——兼论对我国渤海治理的启示
范云鹏:论大陆架界限委员会的法律地位
徐洪霖 王建兰:海事赔偿责任限制基金程序面临的困境和解决

法规与动态

中国依《联合国海洋法公约》第 298 条规定提交排除性声明
ITLOS Forms A Standing Special Chamber to Deal with Maritime Delimitation Disputes
Interim Measures Adopted by Participants in Negotiations to Establish South Pacific Regional Fisheries Management Organization
中华人民共和国水文条例
中华人民共和国船员条例
中华人民共和国国际船舶保安规则
最高人民法院关于审理海上保险纠纷案件若干问题的规定
杨立敏 申政武 孙娜 译:日本水产业协会法(三之三)

2007 年第 2 期(总 6 期)

目 录

卷首语

论文

WU Shicun:"Joint Development": An Ad Hoc Solution to the South China Sea Dispute
古俊峰:中国根据《联合国海洋法公约》第 298 条发表排除性声明的法律效果分析

田士臣:外国军舰在领海的法律地位
江家栋:国际海底区域遗传资源管理法律问题
褚晓琳:论“Precautionary Principle”一词的中文翻译
林婉玲:试论两岸对于台湾海峡海洋环保合作机制之构建——以闽台合作为中心
李佳丽:海峡两岸在水下文化遗产保护方面的合作研究
ZHANG Liying:The Validity of Arbitration Clause in Bill of Lading:A Chinese Perspective
韩　冰:试析海事与刑事交叉案件的审理机制
徐曾沧:中国海事法院船舶及船载货物的拍卖:现行做法、存在问题与解决方法
杨　轶:托运危险货物的义务与责任

述评
赵　伟:尼加拉瓜和洪都拉斯在加勒比海的领土和海洋边界争端案(尼加拉瓜诉洪都拉斯,1999—2007)
本刊课题组:2007年中国海洋法学研究综述

法规与动态
美国参议院外交关系委员会赞成美国加入联合国海洋法公约
Text of the Convention Concerning Work in the Fishing Sector
中华人民共和国防治海岸工程建设项目污染损害海洋环境管理条例
公安机关海上执法工作规定
中华人民共和国港口设施保安规则
中华人民共和国航运公司安全与防污染管理规定
海洋功能区划管理规定
中国正式成为南极海洋生物资源养护委员会成员

稿约
书写技术规范

2008年第1期(总7期)
目　录

卷首语

论文
高健军:200海里以外大陆架外部界限的划定:目前为止的实践论述
郭　渊:论海洋法中的“历史性权利”
熊良敏:白礁岛主权争议案评论
罗婷婷:“九段线”法律地位探析——以四种学说为中心

曹志英 范晓婷：再论海洋倾废概念
管　松：《控制和管理船舶压载水和沉积物国际公约》研究
黄西武：论海事强制令的适用与完善——从民事保全理论出发
刘本荣：我国船舶物权登记对抗主义的实际运行与匡正

述评

金永明：日本《海洋基本计划草案》述评

法规与动态

庄玉友 译 金永明 校：日本《海洋基本法》（中译本）
港口规划管理规定
海洋听证办法
海洋计量工作管理规定
Mr. GAO Zhiguo (China) Elected as New Member of the Tribunal
中华人民共和国水污染防治法
中华人民共和国海关进出境运输工具舱单管理办法
海域使用管理违法违纪行为处分规定
最高人民法院关于审理船舶碰撞纠纷案件若干问题的规定

2008 年第 2 期（总 8 期）

目　录

卷首语

论文

杨泽伟：防扩散安全倡议：国际法的挑战与影响
杨　帆：全球海盗和武装劫船犯罪问题及其应对
史克功：海上安全形势变化对海洋法秩序的影响
吴春庆：构建亚太地区海上通道安全合作的法律框架
龚迎春：争议海域的权利冲突及其解决途径
王泽林：从国际海洋法的视角看海上风力发电的环境影响
刘孜文：论引航的民事责任
徐　英：《UNCITRAL 运输法草案》下发货人法律地位之研究
周　虹：浅析《UNCITRAL 运输法草案》中的电子提单

述评

张相君：迅速释放案件中沿海国与渔业国之间的利益平衡——国际海洋法庭第 14 号和第 15 号案件评述
王泽林：日本《海洋构筑物安全水域设定法》评析

法规与动态

金永明 译:日本《海洋构筑物安全水域设定法》(中译本)

太平洋深海海底结核矿带的生物多样性、物种分布和基因流动:预测和管理深海海底采矿的影响(ISBA/14/C/2)

关于大陆架界限委员会和国际海洋法法庭席位分配问题的决定(SPLOS/182)

中日就东海问题达成原则共识

中华人民共和国船员服务管理规定

游艇安全管理规定

2009 年第 1 期(总 9 期)

目 录

卷首语

论文

黄硕林 刘艳红:海洋渔业执法的国际合作——我国大陆的执法实践

贾 宇:试论中日东海共同开发与中国 200 海里以外大陆架的关系

金永明:日本外大陆架划界申请案内涵与中国的立场

余民才:中日东海问题原则共识述评

王泽林:钓鱼岛海域渔业资源与划界之争分析

梅 宏:海域有偿使用制度的法理分析

李荣存 陈敬招:《物权法》下的船舶登记制度

周美荣 杨 铁 谭 威:期租合同中留置权条款相关法律问题分析

李金蓉 方银霞 周建平:《联合国海洋法公约》三个制度的对比研究及其对海底资源影响分析

述评

本刊课题组:2008 年中国海洋法学研究综述

王泽林 徐 鹏 董 琳:2008 年海峡两岸海洋合作问题研讨会综述

Vijay Sakhuja:The Indian Coast Guard:Shaping For the Future

季 烨 译:美国与《联合国海洋法公约》

法规与动态

Submissions,through the Secretary-General of the UN,to the CLCS,pursuant to article 76,paragraph 8,of the UNCLOS of 10 December 1982

中国对越南提交外大陆架申请之声明

中国对马来西亚和越南联合提交外大陆架申请之声明

中国对日本提交外大陆架申请之声明

交通部关于国际海事组织《2001 年国际燃油污染损害民事责任公约》生效的公

告
关于国际海事组织经修正的《1974年国际海上人命安全公约》和《国际船舶和港口设施保安规则》的修正案生效的公告
关于加强船舶防范海岛工作有关事项的公告
国际集装箱班轮运价备案实施办法
关于修改《中华人民共和国水路运输服务业管理规定》的决定
关于修改《国内船舶管理业规定》的决定
水生生物增殖放流管理规定

附录

《中国海洋法学评论》稿约
《中国海洋法学评论》书写技术规范

2009年第2期（总10期）

目　录

卷首语

论文

龚迎春：专属经济区内的管辖权问题研究——特别区域、冰封区域和特别敏感海域
丘　君 柳文华：冲之鸟礁是否应有大陆架？——200海里以外大陆架划界案中无居民岛礁的对比研究
张卫彬：2009年罗马尼亚诉乌克兰黑海划界案评析
Owen Tang：Takings Clause Analysis on the Fishery Closure Case in Palmyra Atoll
王炳蔚 高　蕾：论海洋环境污染索赔案件中国家行政机关原告地位的判定
Adam Schempp Kathryn Mengerink Jay Austin 著 桂静 编译：美国环境法协会发布《扩大海洋生态系统管理在海岸带管理法中的作用》白皮书
姜玉环 方珑杰：中国海岸带管理法的完善思路：以美国为借鉴
林　菁：马六甲海峡海盗和武装抢劫防治机制研究

述评

唐建业：《港口国措施协定》评析

案例

周　瑶：2006年毒污泥倾废案案件报告

新发展与新文献

防治船舶污染海洋环境管理条例

港口经营管理规定
哥本哈根协议文件
IMO 在吉布提通过关于打击海盗及海上武装抢劫行为守则
IMO 批准 HNS 议定书草案以推动 1996HNS 公约生效
国际海洋法法庭修改法庭规则
《关于预防制止、制止和消除非法、不报告和不管制捕捞的港口国措施协定》
庄玉友 译:日本《处罚与应对海盗行为法》

附录
《中国海洋法学评论》稿约
《中国海洋法学评论》书写技术规范

2010 年第 1 期(总 11 期)

目　录

卷首语

论文
Erik Franckx,Marco Benatar,Nkeiru Joe and Koen Van den Bossche:从国际法的角度看海洋地物的命名
Anthony A. Lucky:特立尼达和多巴哥对大陆架机制发展的贡献
桂　静:外大陆架划界中的不确定因素及其在北极的国际实践
孔令杰:《联合国海洋法公约》的完善
姜　丽 张　洁:浅析群岛制度的适用及南海划界
梅　宏 陈志英:论创设船舶溢油应急反应机制资金保障制度
巩　固:生态系统方法与海洋环境保护法创新——以渤海治理为例

新发展与新文献
中华人民共和国海岛保护法
海洋特别保护区管理办法
无居民海岛使用权证书管理办法
中国海监海岛保护与利用执法工作实施办法
国际海事组织通过船舶建造规范(新闻稿)

附录
《中国海洋法学评论》稿约
《中国海洋法学评论》引证体例

CHINA OCEANS LAW REVIEW GENERAL TABLE OF CONTENTS (ISSUE 1—11)

2005 NO. 1 (ISSUE 1) TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

Zhou Zhonghai *Jurisdiction of the International Tribunal for the Law of the Sea*

Jin Yongming *Comparative Studies on the International Tribunal for the Law of the Sea and International Court of Justice——Centered on the Characteristics of the Tribunal Composition, Jurisdiction, Procedure and Judgment*

Kuen-chen Fu *Regional Cooperation and Conservation of Fishery Resources in the South China Sea*

Liu Bin *An Analysis on the Progress of the Negotiation and the Institutional Reform on the Issue of Fishery Subsidies in WTO*

Mu Yaping Jiang Ying *Development of Ocean Fishery Management and the Principle of "Freedom of Fishing at High Sea"*

Yu Mincai *Execution of the Right of Hot Pursuit and the Law Enforcement at Sea in China*

He Lixin *An Analysis of Deraignment of Carrier Against Delivery Without B/L*

Zhao Yajuan *Some Legal Thoughts about the Secret Shipping of Extreme Hazardous Nuclear Materials by Japan*

Hong Nong *Some Observation of the Evolution of America's Position on UNCLOS*

Luo Manli *Methodology of Regulating the Sea Areas*

Yin Nianchang *Legal Analysis of the Policies of Managing Sudden Ocean Environment Incidents*

Xu Wenjun Hu Zengxiang *Citizen Participation in Marine Environmental Protection*

Nie Xin *International Convention, Policy, Law and Management——A Comparative Study on Biosafety*

CASES

Zhao Qiudan Illumination of the First Case of the UNCLOS Annex Ⅶ Arbitral
Tribunal——A Review on the Southern Bluefin Tuna Case
Translated by *Xiong Liangmin* The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau Application for Prompt Release)
Xiong Liangmin Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)

DEVELOPMENT

Myron Nordquist Lectured, Translated by *Lu Jia* Law Enforcement at the Sea
Summary of A Seminar on the Historical Water and the Archipelagic System
Summary of A Seminar on the Protection of the Underwater Cultural Heritage

CURRENT DOCUMENTS

Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on Demarcation of Beibu Gulf Territorial Waters, Exclusive Economic Zones and Continental Shelves
Agreement between the Government of the People's Republic of China and the Government of the Socialist Republic of Viet Nam on Fishing Cooperation in the Beibu Bay Regulations of
Conservation and Management of Fisheries Resources in Common Fishing Zone of the Beibu Bay
The Complementary Protocol on the China—Vietnam Agreement on Fishery Cooperation in Beibu Bay
Announcement of the Ministry of Agriculture on the Implementation of the Agreement on fishery Cooperation in Beibu Bay between the People's Republic of China and the Socialist Republic of Vietnam
Fisheries Law of the People's Republic of China (2004 Revision)
Regulations of the People's Republic of China on Implementing Customs Administrative Penalties
Provisions on Administration of Business Operation of Ports

2005 NO. 2 (ISSUE 2)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

ZHAO Jianwen On the Interpretative Declarations of UNCLOS Contracting Parties Concerning Warship Passage in the Territorial Seas

LIU Zhenmin The Basic Position of China on the Settlement of Maritime Disputes through Negotiations

WU Shicun Energy Security in China and Petroleum Exploration in the Controversial Area of South China Sea

ZHANG Xinjun Japanese International Lawyers' Perspectives on Maritime Delimitation: Literatures and Arguments

ZHANG Liangfu The New Fishery Order between China and Its Neighboring Countries

GUO Wenlu *HUANG Shuolin* A Study on Regional Cooperation of Fishery Resources in the East China Sea

XUE Guifang *MA Yingjie* *HU Zengxiang* An Analysis on the Significance of China's Island Legislation

XU Xiangmin *ZHOU Chen* *LI Maoning* Several Issues On No-resident Island Legislation

CHEN Haibo A Review of the Cases Pertaining to Marine Pollution Damage Claims against The Tasman Sea

PENG Jinping *LIU Xianming* A Study on the Legal Regime of Oil Pollution Compensation Fund in China

YANG Yunfu LIN Cuizhu Scope of Compensation for Damages Due to Oil Pollution of Ships in Chineses Waters

Patrick Holloway South Africa's Practical Approach to Dealing with Oil Pollution Prevention and Ships in Need of Assistance

WEN Boping On Legal System of Environment and Resources Law

ZHANG Qingji A Brief Review of the UNCITRAL(CMI) Draft Instrument on Transport Law

ZHU Zuoxian *WANG Xiaoling* *JIANG Yuecnuan* UNCITRAL Draft Instrument on Transport Law and the Reform of the Rules Concerning Delivering Goods against Surrender of B/L

ZHANG Liying Conflict of Jurisdictions of Maritime Disputes

XU Jun On Review of the Liner Conferences' Antitrust Exemption By EU

XU Jintang Some Legal Issues Concerning Sunken Objects under the Sea

JIN Yongming On Nature of the Concept of the Common Heritage of Mankind

MEI Hong On Law on the Sea from the Perspective of Sustainable Development

CURRENT DEVELOPMENT AND DOCUMENTS

Announcement of the Maritime Safety Administration of the People's Republic of China on Implementing Revised Article 13G and New Article 13H of the Protocol of 1978 Relating to the International Convention for Prevention of Pollution From Ships1973

Circular of the Ministry of Health of the People's Republic of China on Publishing Measures for the Administration of Occupational Health of Deep-Sea Petroleum Operation

Regulations of the People's Republic of China on the Prevention of Vessel-Induced Inland River Pollution

Renewable Energy Resources Law of the People's Republic of China

Measures for the Administration of Aquatic Fingerlings

2005 Rome Declaration on Illegal,Unreported and Unregulated (lUU) Fishing

2006 NO. 1 (ISSUE 3)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

Erik Franckx Maritime Delimitation in the Caspian Sea:Legal Issues

WANG Keju Diaoyudao Islands and Its Position in the East China Sea Maritime Boundary Delimitation

Song Yuxiang On Various Forms of the Settlement of Disputes between China and Japan on Diaoyudao Islands

JIA Yu Some Legal Issues Concerning Continental Shelves Beyond the 200 Nautical Miles Limits in the East China Sea

FANG Yinxia, ZHOU Jianping Legal Theories and Applicable Terms of Continental Shelf in the UNCLOS

DONG Yupeng On Common Ownership of Continental Shelves

ZHANG Xianglan,ZHU Qiang A Review of the Convention on the Protection of the Underwater Cultural Heritage

Vijay Sakhuja Recycling of Maritime Platforms: Issues of Governance and Policy

FU Kuenchen, LIU Xianming Some Legal Issues Concerning Vessel — Sourced Pollution in theTaiwan Strait Area

WANG Xiaohui International Legal Issues on Secret Shipping of Nuclear Materials at the Sea

LIANG Yonggang, LI Zhongsheng On Cancelling the Exception of Negli-

gence in Ship Management from the Exceptions of Nautical Faults
ZHOU Zhonghai On Hot Pursuit:Legal Nature and Practice of the Right
WANG Zheng,*SHANG Yunfei* Piracy and Its Domestic Legislative Issues in China
GONG Yingchun Effect of Non—traditional Safety Factors on the Legal Order of the Sea
LIU Lan,*LI Yongqi*,*Ren Jie* An Analysis of the Rights of Non—resident Islands in the Proposed Legislation
LIU Zhongmin,*LI Xingya* Seabed Politics and International Law:A Review of Barry Buzan's Seabed Politics

CURRENT DEVELOPMENT AND DOCUMENTS

Rules of the People's Republic of China for the Safety Management of High-speed Passenger Ships
Notice of China's State Council on The Aquatic Resource Conservation Action Project
National Maritime Search and Rescue Contingency Plans
Offshore Oil Production Safety Regulations
Translated by *YANG Limin*,*SHEN Zhengwu*,*SUN Na* Japanese Fisheries Law

2006 NO. 2 (ISSUE 4)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES AND NOTES

Kuen-chen FU Military Survey and Liquid Cargo Transfer in the EEZ:Some Undefined Rights of the Coastal States
ZHANG Haiwen Conflicts between Coastal State's Jurisdiction over Marine Scientific Research and Military Survey
XING Guangmei On the Right of Self-defence at the Sea and Its Pertaining Issues
HAN Lixin *XUAN Xing* *LIU DOngcheng* A Study on China's Administrative Punishment on Ocean Fishing Vessels
CAO Yingzhi *ZHANG Zhihua* *REN Jie* On Application of the Principle of ne bis in idem in Marine Administrative Punishment
Gui Ping A Study on the Principles and Methods for Maritime Law Interpretation

LIN MInhua Civil Liability for Bunker Oil Pollution Damage

GONG Gu Dual Characteristic of the Right of Sea Areas Usage: Its Legal Nature and Its Value Functions

ZHU Xiaoqin *DONG Lin* Summery of the Second Inter-Governmental Review Conference on the Global Program of Action (GPA) for the Protection of the Marine Environment from Land-Sourced Pollution

JIANG Jiadong *Wu Lintao* Summery of A Cross-Strait Seminar on the Small Three Communications and Its Implication to the Real Three Communications

ZHAO Wei Recent Developments of Marine Dispute Settlement in the ICJ

COLR Working Group Review on China's Oceans Law Research in 2006

RECENT DEVELOPMENTS

Provisions on the Administration of the Right of Sea Areas Usage

Administrative Regulation on the Prevention and Treatment of Marine Environment Pollution and Damages Caused by Marine Construction Projects

International Principles for Responsible Shrimp Farming

Translated by *YANG Limin* *SHEN Zhenwu* *SUN Na* Japanese Fisheries Association Law (Ⅱ)

2007 NO. 1 (ISSUE 5)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

TIAN Shichen On China's Regulating Foreign Military Vessels in Her Territorial Sea: Some Reflections on the Incident of Iran's Seizure of British Navy Soldiers

JIN Yongming Japan's New Moves on the Marine Issues and Their Revelations to China

WEI Ronghui *Kuen-chen FU* Current Situation of Private Yachting in China Mainland and Some Proposals for Future Developments

ZHAO Yajuan On Shipwrecks Salvation and the Protection of Underwater Cultural Heritage

CHU Xioalin A Reviewing of the Evolution History of the Precautionary Principle

WEI Jingjian *YAO Ying* Attempts to Return to Freedom of Contract in the Arena of Public Transportation

GUAN Jing An Analysis of Coastal States' Jurisdiction on Vessel Sourced Pollution

XU Zengcang LU Jianxiang Ten Years of the UNCLOS Dispute Settlement Mechanism: Achievement, Insufficiency and Developmnet

NOTES

RUAN Zhenyan DONG Lie Summery of Symposium on Management of the Xiamen-Jinmen Waters

XU Xiangmin KONG Xiaoming An Introduction to Japan's Law of Special Measures faor Environment Protection of the Seto Inland Sea

FAN Yunpeng Legal Status of the Commission on the Limits of the Continental Shelf (CLCS)

XU Honglin WANG Jianlan Problems of and Solutions to the Procedures of Maritime Claims Limitation Fund

RECENT DEVELOPMENTS

China's Exclusion Declaration Issued According to Art. 298 of the UNCLOS

ITLOS Forms A Standing Special Chamber to Deal with Maritime Delimitation Disputes

Interim Measures Adopted by Participants in Negotiations to Establish South Pacific Regional Fisheries Management Organization

Regulations on Hydrography of the People's Republic of China

Regulations on Crew of the People's Republic of China

Rules on International Ship Security of the People's Republic of China

Some Provisions of the Supreme People's Court on Hearing Marine Insurance Cases

Translated by *YANG Limin SHEN Zhenwu SUN Na* Japanese Fisheries Association Law (Ⅲ)

2007 NO. 2 (ISSUE 6)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

WU Shicun "Joint Development": An Ad Hoc Solution to the South China Sea Dispute

GU Junfeng An Analysis on the Legal Effect of Exception Declaration Delivered by PRC According to Article 298 of UNCLOS

TIAN Shichen Legal Status of Foreign Warships in Territorial Seas

JIANG Jiadong Legal Issues of Genetic Resources Management in the International Seabed Area
CHU Xiaolin On the Chinese Translation of "Precautionary Principle"
LIN Wanling On Establishment of a Cooperation Scheme for Cross Taiwan Strait Marine Environmental Protection: Centred at Fujian—Taiwan Cooperation
LI Jiali On Cross-Strait Cooperation for Protection of Underwater Culture Heritage
ZHANG Liying The Validity of Arbitration Clause in Bill of Lading: A Chinese Perspective
HAN Bing On the Trial Mechanism of Maritime and Criminal Integrated Disputes
XU Zengcang Auction of Ships and Cargos on Board in a Chinese Maritime Court: Current Practise, Issues and Solutions
YANG Yi Obligations and Liabilities on Shipment of Dangerous Goods

NOTES
ZHAO Wei Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua V. Honduras, 1997—2000)
COLR Working Group Review on China's Oceans Law Research in 2007
REGULATIONS AND RECENT DEVELOPMENTS
Senate Foreign Relations Committee of the United States Approved the UN Convention on the Law of the Sea
Text of the Convention Concerning Work in the Fishing Sector
Administrative Regulations of People's Republic of China on the Prevention and Control of Marine Environmental Pollution and Damages Caused by Coastal Construction Projects
Regulations on Marine Law Enforcement by Public Security Agencies
Rules of People's Republic of China on Security of Port Facilities
Regulations of People's Republic of China on Management of Shipping Companies' Security and Pollution Control
Regulations on Management of Ocean Functional Division
China Joined the Commission of Convention for the Conservation Antarctic Marine Living Resources

NOTICE TO CONTRIBUTORS
TECHNICAL RULES OF WRITING

2008 NO. 1 (ISSUE 7)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

GAO Jianjun Demarcation of the Outer Limit of the Continental Shelf beyond 200 NauticalMiles: Submissions to Date

GUO Yuan On "Historic Rights" in the Law of the Sea

XIONG Liangmin Comments on the Case of Savereignty Disputes over Pedra Branca/Pulau

Batu Puteh

LUO Tingting On the Legal Status of "the Nine-Sectioned-Lines"——Focusing on Four Theories

CAO Yingzhi *FAN Xiaoting* Rethinking the Concept of Ocean Dumping

GUAN Song A Study on the International Convention for the Control and Management of Ships' Ballast Water and Sediments

HUANG Xiwu On Application and Improvement of Marine Injunction—A Perspective of Civil Preservation Theory

LIU Benrong The Practice and Adjustment of Anti-Third Party Principle for Ship Registration in China

NOTES

JIN Yongming An Introduction to Japan's Draft Basic Ocean Plan

RECENT DEVELOPMENTS

ZHUANG Yuyou JIN Yongming The Chinese Version of Japan's Basic Law of the Ocean

Port Planning Administrative Provisions

Measures for Public Hearings of the Sea

Regulations on Management of Marine Measurement

Mr. GAO Zhiguo (China) Elected as New Member of the Tribunal

People's Republic of China Law of the Prevention and Control of Water Pollution

People's Republic of China Management Measures of the Customs for Control of the Inbound and Outbound Transportation Vehicles Cargo Manifest

Regulations on Punishment of Acts Violating the Rules of Sea Area Utilization Management

Provisions of the Supreme People's Court on Some Issues about the Trial of

Cases Pertainig
to Ship Collision Disputes

2008 NO. 2 (ISSUE 8)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

Yang Zewei The Proliferation Security Initiative: Challenges and Influence of International Law

YANG Fan Global Piracy and Armed Robbery against Ships: Problems and Responses

SHI Kegong Effect of Security Factors on the Legal Order of the Sea

WU Chunqing On Establishment of A Legal Framework for Asia-Pacific Sea Lane Security Cooperation

GONG Yingchun Conflict of Rights in the Disputed Sea Areas and Its Resolution

WANG Zelin Environmental Impacts of Offshore Wind Power Generation: A Perspective of the International Law of Sea

LIU Ziwen On Civil Liability of Pilotage

XU Ying A Study on the Legal Status of Consignor in UNCITRAL Draft Transport Law

ZHOU Hong Electronic Bill Of Lading in UNCITRAL Draft Transport Law

NOTES

ZHANG Xiangjun Balance of Interests between Coastal States and Fishery States in Prompt Release Cases: Comments on Cases No. 14 and 15 by ITLOS

WANG Zelin A Comment on Japan's New Law on the Establishment of Security Water Area for Ocean Structures

RECENT DEVELOPMENTS

JIN Yongming A Chinese Version of Japan's Law on the Establishment of Security Water Area for Ocean Structures

Biodiversity, Species Range and Gene Flow in the Abyssal Pacific Nodule Province: Predicting and Managing the Impacts of Deep Seabed Mining

Decision on the Allocation of Seats of the Commission on the Limits of Continental Shelves and the International Tribunal for the Law of the Sea

China and Japan Reached Consensus in Principle on East China Sea Issues

People's Republic of China Regulations on Crew Service Management
Regulations on Management of Yachting Safety

2009 NO. 1 (ISSUE 9)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

HUANG Shuolin LIU Yanhong International Cooperation for Fishery Law Enforcement at the Sea——Practice of China

JIA Yu Sino-Japan Joint Development in the East China Sea and the Outer Continental Shelf of China

JIN Yongming Content of the Japanese Outer Continental Shelf Application Cas and the Position of China

YU Mincai Commentary on the Consensus Reached by China and Japan in Principle on the East China Sea Issues

WANG Zelin An Analysis on the Disputes of Fishery Resources and Maritime Boundary Delimitation of DiaoyuDao Islands

MEI Hong An Analysis of the Jurisprudence of Compensated Utilization of the Sea Areas

LI Rongcun CHEN Jingzhao On Ship Registration System under the New Property Law of the People's Republic of China

ZHOU Meirong YANG Yi TAN Wei An Analysis on the Legal Issues of Lien Clause under T/C

LI Jinrong FANG Yinxia ZHOU Jianping The Three Systems Provided for in the UNCLOS and Their Impact on the Seabed Resources

NOTES

COLR Working Group A Review of China's Oceans Law Studies in 2008

WANG Zelin XU Peng DONG Lin A Summary of the 2008 Symposium on Marine Cooperation Across the Taiwan Strait

Vijay Sakhuja The Indian Coast Guard: Shaping for the Future

Translated by *JI Ye* The United States and the Law of the Sea Convention

REGULATIONS AND RECENT DEVELOPMENTS

Submissions, through the Secretary-General of the UN, to the CLCS, pursuant to article 76, paragraph 8, of the UNCLOS of 10 December 1982

China's Declaration Issued against Vietnam's Submission on Outer Limits of the Continental Shelf

China's Declaration Issued against Malaysia and Vietnam's Joint Submission on Outer Limits of the Continental Shelf
China's Declaration Issued against Japan's Submission on Outer Limits of the Continental Shelf
IMO 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage Enter Into Force in China
Notice of the Entry into Force of the IMO SOLAS Amendments and the ISPS Code for China
Notice on Strengthening Piracy-Prevention Measures for ships
Implementation Measures for the Tariff Filing of International Container Liner Transport(Draft)
Decision on Amending the Regulations of People's Republic of China on the Administration of Waterway Transportation Service Industries
Decision on Amending the Regulations of the People's Republic of China on Domestic Vessel Management Industries
Regulations on Administration of Aquatic Organisms' Enhancement and Release

APPENDIX
Manuscripts Submission
Standard System of Citation

2009 NO. 2 (ISSUE 10)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES
Gong Yinchun Research on the Jurisdiction in Exclusive Economic Zone—Particular Areas, Ice-covered Zones and Particularly Sensitive Sea Areas
Qiu Jun、*Liu Wenhua* Should Okinotori Shima Be Entitled to Have Continental Shelf? A Comparative Study on the Delimitation of Continental Shelf of Uninhabited
Zhang Weibin A Review Concerning 2009 Maritime Delimitation in the Black Sea
Owen Tang Takings Clause Analysis on the Fishery Closure Case in Palmyra Atoll
Wang Bingwei On Determination of the Legal Status of State Administrative Department as the Plaintiffs in Claims for Marine Environment Damages

Gui Jing White Paper Issued by ELI on Expanding the Use of Ecosystem-Based Management in the Coastal Zone Management Act

Jiang Yuhuan、*Fang Longjie* New Ideas to Perfect China's Coastal Zone Management Regulations: Based on the Enlightenment from the United States

Lin Jing Cooperative Mechanisms for Combating Piracy and Armed Robbery against Ships in the Malacca Strait

NOTE

Tang Jiangye Port State Measures Agreement: A Critique

CASE

Zhou Yao 2006 SLOP Case Report

RECENT DEVELOPMENTS AND DOCUMENTS

The Regulations on Administration of Prevention and Control of Pollution to the Marine Environment by Vessels

Port Management Regulations

Copenhagen Accord

The Code of Practice for Suppressing Piracy and Armed Robbery against Ships Adopted by IMO in Djibouti

Draft of HNS Protocol Approved by IMO Aimed at Bringing 1996 HNS Convention into Effect

Court Rules of the International Tribunal for the Law of the Sea Modified

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

Translated by *ZHUANG Yuyou* The Law Concerning the Punishment of Piracy and Anti-piracy Missions

APPENDIX

Manuscripts Submission

Standard System of Citation

2010 NO. 1 (ISSUE 11)
TABLE OF CONTENTS

EDITOR'S NOTE

ARTICLES

Erik Franckx, *Marco Benatar*, *Nkeiru Joe and Koen Van den Bossche* The Naming of Maritime Features Viewed from an International Law Perspec-

tive

Anthony A. Lucky The Contribution of Trinidad and Tobago in the Development of the Regime of the Continental Shelf

GUI Jing Uncertain Factors in the Delimitation of the Outer Continental Shelf and Its International Practice in the Arctic

KONG Lingjie To Improve the Efficacy of the UN Convention on the Law of the Sea

JIANG Li, ZHANG Jie A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea

MEI Hong, CHEN Zhiying On the Establishment of a Fund Guarantee System for Emergency Response Mechanism to Shipboard Oil Spill in China

GONG Gu The "Eco-system Approach" and the Innovation of Marine Environment Protection Law——A Case Study of Management in the Bohai Sea

RECENT DEVELOPMENTS AND DOCUMENTS

The PRC Law on Sea Island Protection

Regulations on Special Marine Protected Area Administration

Regulations on Certificate of Uninhabited Sea Island Utilization Rights

The Implementation Regulations for China Marine Surveillance Law Enforcement on Sea Island Protection and Utilization

IMO Safety Committee Adopts Historic Ship Construction Regulations (press release)

APPENDIX

COLR Call For Papers

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