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编辑部

CHINA OCEANS LAW REVIEW

Volume 2016 Number 1

EDITORIAL BOARD

卷首语

本期的《中国海洋法学评论》信息量巨大，既有学术性很强的文章，也有与实践紧密相连的学术探讨，既有针对“中国特色”的海洋法问题，又有世界性的难题。

除《联合国海洋法公约》及其执行协定之外，规范“区域”资源勘探开发的国际法律制度还包括多金属结核、富钴结壳和硫化物的勘探规章。而国际海洋法法庭就第17号案发表的“咨询意见”，更是催生了一些国家的相关国内法，中国也于今年2月出台了《中华人民共和国深海海底区域资源勘探开发法》。在此情况下，研究员贾宇梳理了该法的发展背景，并对其内容作了详尽介绍，提出该法为中国企业参与国际海底区域资源勘探和开发活动提供了有力保障。

学者费杰和赖忠平报道了新发现的14幅记录有钓鱼岛及其附属岛屿的18—19世纪（1895年以前）的英文和法文地图。在这些地图中，钓鱼岛的名称都以中文地名的音译标注。这些新发现的第三方历史地图和地名证据证明，在1895年《马关条约》签订以前，钓鱼岛已被中国人发现和命名，并且这一事实得到欧美社会的广泛认可。

针对近两年出现的船舶超航区航行情况下产生的保险理赔争议，李荣存和李澜律师明确了船舶超航区航行的含义，指出其属于一种行政违法行为，依法应承担相应的行政责任。同时，船舶超航区航行也有可能面临保险人拒赔的风险。而我国现行海事司法实践中倾向于认定船舶超航区航行构成船舶不适航，但若保险人意图以此为由拒赔，则应举证证明承保船舶存在超航区航行的事实、以及与保险事故之间存在因果关系。

面对索马里海域日益猖獗的海盗和海上武装抢劫活动，安理会呼吁各国在国内法中将此种行为定罪入刑，并起诉海盗嫌疑人，打击海盗有罪不罚的现象。然而，中国目前的国内法却无法完全满足这一需求。首先，中国刑法尚未将海盗行为定罪；此外，中国刑事诉讼法中的相关规定，使得法院难以起诉在公海或国家管辖范围以外的区域抓获的海盗罪犯。因此，学者林蓁提出了修订中国刑法和刑事诉讼法的一些建议。

海底电缆网络已成为现代生活的主要推动者，但通信革命却给脆弱的海洋生态系统和生物多样性带来了巨大压力，尽管目前尚不明显。尼日利亚学

者 Kingsley Ekwere 探究了海底电缆和海底生态系统之间的相互作用，认为在保全、保护、可持续管理或利用沿海水域和深海海域方面，我们面临的主要挑战是使通信革命所带来的惠益与潜在的环境影响之间保持平衡。此外，作者还认为电缆作业对海洋环境的影响是相对良性的，并指出通信电缆运营商和其他海底使用者之间和谐的相互作用，对实现环境的可持续性发展、海洋环境的保全和保护至关重要。

《联合国海洋法公约》制定之前，港口国责任通常限于对在港外国船舶的调查权。《公约》将港口国的责任扩大为对停靠其港口的外国船舶在公海或其他国家管辖水域内的污染行为执行可适用的国际法。而港口国监督制度又在实践中发挥了防止和处置船舶污染的作用。学者江家栋、蒋围认为，在应对船舶污染方面，港口国相对于船旗国和沿海国而言，具有一些无可比拟的优势；但是港口国应对船舶污染的责任仍存在不足之处，亟需予以完善。

我们一直致力于为学者提供海洋法学术交流的平台，如果各位读者能在这些文章中找到感兴趣的部分，将是对我们最大的鼓励。

编辑部 谨识

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万律 http://www.westlawchina.com/index_cn.html

中国知网 http://www.cnki.net/

北大法律信息网 http://www.chinalawinfo.com/

台湾华艺数位 http://www.airitilibrary.com/

维普 http://www.cqvip.com/

超星法源 http://www.lawy.com.cn/

Heinonline http://home.heinonline.org/

EDITOR'S NOTE

This Issue of *China Oceans Law Review* is informative. It contains both scholarly articles and those having a closer relation to practice. These articles deal with a wide range of issues, including the law of the sea issues that are particular to China, and the challenges that are common globally.

The international legal regimes designed to regulate the exploration and exploitation of resources in the Area, apart from the United Nations Convention on the Law of the Sea (UNCLOS) and the Agreement Relating to the Implementation thereof, include regulations adopted on prospecting and exploration for polymetallic nodules, cobalt-rich crusts and polymetallic sulphides. The "Advisory Opinion", which was rendered by the International Tribunal for the Law of the Sea with respect to Case No. 17, has prompted some States to promulgate national laws in this regard. Against this backdrop, China enacted the Law of the People's Republic of China on the Exploration and Exploitation of Resources in Deep Seabed Area in February this year. Before embarking on the contents of this law, JIA Yu, a Chinese researcher, first reviews its background. She then argues that this law has strongly underpinned the Chinese enterprises' participation in the exploration and exploitation activities in the international seabed area.

FEI Jie and LAI Zhongping report the new discovery of 14 maps from the 18-19th centuries (prior to 1895) concerning Diaoyu/Senkaku Island and its affiliated islands in English and French. Each of these maps refers to the Diaoyu Islands by using transliterations of their Chinese place names. This newly discovered, third party historical cartographic and toponymic evidence supports the claim that the Diaoyu Islands were discovered and named by the Chinese prior to the 1895 Treaty of Shimonoseki, and this fact was widely known in Europe and America.

LI Rongcun and LI Lan, two Chinese lawyers, attempt to clarify the definition of ships sailing beyond their designated navigation zones in respect to insurance claims disputes over the past two years. Considered as an illegal act under administrative law, sailing beyond navigation zones will give rise to

a corresponding administrative liability. Meanwhile, such sailing would likely risk the insurer repudiating any claims made by the insured ship and its owners. In China's maritime judicial practices, ships sailing beyond navigation zones are often identified as unseaworthy. If the insurer intends to refuse claims on these grounds, it should provide evidence to prove that the ship has sailed beyond its navigation zone and should causally link such sailing and the accident under investigation.

Facing the rampant piracy and armed robbery at sea off the coast of Somalia, the Security Council has called on all States to criminalize such offenses in their domestic laws and prosecute the presumed pirates, so as to combat impunity of the crimes. However, the current domestic legislation of China might not be sufficient to meet this need. First, piracy is not criminalized by the criminal law of China. Additionally, the criminal procedural law of China makes it difficult to prosecute offenders caught on the high seas or in a place beyond national jurisdiction. In order to solve these problems, LIN Zhen puts forward some proposals on the revision to the criminal law and criminal procedural law of China.

Submarine cable network has become key facilitators of modern life. However, the communications revolution has resulted in great pressure on vulnerable marine ecosystems and biodiversity, although not apparent currently. Against this background, Kingsley Ekwere, a scholar from Nigeria, explores the interactions of submarine cables with seabed ecosystems. In his view, the key challenge for conservation, protection and sustainable management/use of coastal seas and deep offshore waters is to balance the benefits of the communications revolution against any potential environmental impact. Demonstrating that cable operations are benign to the marine environment, the author further contends that the harmonious interactions between operators of telecommunication cables and other seabed users are critical in advancing the goals to reach environmental sustainability, and protect and conserve the marine environment.

Prior to the 1982 UNCLOS, a port State was only granted the power to investigate a foreign vessel within one of its ports, while the flag State had the right to institute proceedings against the vessel. UNCLOS expanded the responsibilities of port States in this regard, saying that port States could enforce applicable international law against visiting foreign vessels for pollution offences committed on the high seas or in the waters under the

jurisdiction of other States. Moreover, the port State control regime has played a positive role in preventing and controlling vessel-source pollution. JIANG Jiadong and JIANG Wei believe that Port States have unparalleled advantages over flag and coastal States in vessel-source pollution prevention, reduction and control. However, there are still deficiencies in port State control of vessel-source pollution; and these deficiencies desperately need to be improved.

We have consistently committed to providing a platform for researchers and scholars to exchange their academic views in the realm of oceans law. And we hope readers will find these articles useful and beneficial.

COLR Editorial

Databases:

Westlaw China http://www.westlawchina.com/index_cn.html
CNKI http://www.cnki.net/
Lawinfochina.com http://www.lawinfochina.com/
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“区域”资源开发与担保国责任问题——中国深海法制建设的新发展

贾 宇*

内容摘要: 规范“区域”资源勘探开发的国际法律制度发展较快，除《联合国海洋法公约》及其执行协定之外，已经制定了关于多金属结核、富钴结壳和硫化物的勘探规章。国际海洋法法庭就第17号案发表的“咨询意见”，催生了一些国家，特别是发展中国家关于担保国责任的国内法。在此背景下，中国出台了《中华人民共和国深海海底区域资源勘探开发法》，该法是中国首部关于“区域”资源勘探和开发的专门立法，对适用范围、“区域”资源的勘探开发、环境保护、海洋科研与资源调查、监督检查及法律责任等方面做出了规定，为中国企业参与国际海底区域资源勘探和开发活动提供了有力保障。

关键词: “区域” 资源开发 担保国的责任 深海法

2016年2月26日，《中华人民共和国深海海底区域资源勘探开发法》（以下简称“《深海法》”）由第十二届全国人民代表大会常务委员会第十九次会议通过，并于2016年5月1日起施行。[1]《深海法》的颁布施行使我国在全面参与国际海底区域资源开发活动中有法可依，对保障国家海洋权益、参与相关国际事务具有重要的现实意义。本文将从《深海法》立法的缘起、背景、制度设计和主要内容，以及《深海法》的特点等方面予以分析和阐述。

一、“区域”法律制度的发展

“国际海底区域”（以下简称“区域”）是指国家管辖范围以外的海床和洋底

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1 《中华人民共和国深海海底区域资源勘探开发法》于2015年10月31日提请十二届全国人大常委会第十七会议初次审议；2015年11月6日至12月5日公开征求意见；2016年2月26日十二届全国人大常委会第十九次会议通过，国家主席习近平签署第42号国家主席令予以公布，5月1日起施行。

及其底土。[2] 按照《联合国海洋法公约》（以下简称“《公约》”）有关制度的规定，如果各沿海国的管辖海域为 200 海里，则“区域”面积约 2.517 亿平方公里，约占海洋总面积的 65%、地球表面积的 49%，具体包括沿海国大陆架（包括 200 海里外大陆架）之外的海床、洋底及其底土，不包括上覆水域及水域的上空。“区域资源”是指“区域”内在海床及其下原来位置的一切固体、液体或气体矿物资源。[3]“区域”内蕴藏着丰富的矿物资源，主要包括多金属结核、富钴结壳以及多金属热液硫化物。[4] 此外，生活于深海热泉区的生物，因其基因有许多特殊价值，已引起国际社会的高度重视，一些发达国家已有专门机构从事研究开发。世界各大洋中（包括“区域”和国家管辖海域）的天然气水合物，是一种潜力很大、可供 21 世纪开发的新型能源。

《公约》以及《关于执行 1982 年 12 月 10 日〈联合国海洋法公约〉第十一部分的协定》（以下简称“《执行协定》”）[5] 确立了以“人类共同继承财产原则”为基础，以“平行开发制”为特征的区域法律制度。“区域”及其资源是人类的共同继承财产，[6] 任何国家不应对“区域”的任何部分或其资源主张或行使主权或主权权利，任何国家、自然人或法人也不应将“区域”或其资源的任何部分据为己有。[7] 对“区域”内资源的一切权利属于全人类，由国际海底管理局（以下简称“管理局”）代表全人类行使。[8] 在人类共同继承财产原则下，一方面，“区域”资源的开发由代表全人类利益的管理局通过其企业部直接进行；另一方面，由缔约国或在缔约国担保下的具有缔约国国籍或由这类国家或其国民有效控制的国营企业、自然人、法人或符合条件的上述各方的组合，与管理局以协作方式进行。[9]

经过管理局的积极推动，在国际社会的共同努力下，《“区域”内多金属结核

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2 《联合国海洋法公约》第 1 条第 1 款。

3 《公约》第 133 条第 a 款。

4 多金属结核是由铁、锰的氧化物以及淤泥矿物的自然积聚形成，生成地壳一般在水深 4000~5000 米不等。已查明多金属结核富含矿物种类 60 种，主要是锰结核、铁结核、硅结核和碳结核等，总储量约 5000 亿吨。富钴结壳所含金属主要包括钴、锰和镍。富钴结壳矿床多集中在海山、海脊和海台的斜坡和顶部。大约 635 万平方千米的海底为富钴结壳所覆盖。据此推算，钴总量约为 10 亿吨。多金属热液硫化物是一种海底矿物质，含有锌、铅、金、银等多种元素，一般形成在水深 3700 米处，分布于东太平洋海隆、东南太平洋海隆和东北太平洋海隆，大西洋中脊和印度洋也有一些矿床。参见国家海洋局海洋发展战略研究所课题组：《中国海洋发展报告（2010）》，北京：海洋出版社 2010 年版，第 347~348 页。

5 《执行协定》从“缔约国的费用和体制安排”、“企业部”、“决策”、“审查会议”、“技术转让”、“生产政策”、“经济援助”等 9 个方面对《公约》第十一部分的内容作了实质性的修改和补充。根据协定规定，《执行协定》和《公约》应作为单一的文本来解释和适用，如果《执行协定》与《公约》第十一部分有任何不一致的地方，应以《执行协定》的规定为准。

6 《公约》第 136 条。

7 《公约》第 137 条第 1 款。

8 《公约》第 137 条第 2 款。

9 《公约》第 153 条。

勘探规章》、《“区域”内多金属硫化物勘探规章》和《“区域”内富钴结壳勘探规章》分别于 2000 年、2010 年和 2012 年在管理局理事会上获得通过。这 3 个规章进一步明确了承包者和管理局的权利、义务和职权，并对探矿、勘探工作计划申请、勘探合同和保护保全海洋环境等问题做出详细规定。并且，《“区域”内多金属硫化物勘探规章》和《“区域”内富钴结壳勘探规章》对平行开发制度有了进一步发展，提出申请者除选择保留区外，还可以选择提供一个联合企业安排的股份。以《公约》、《执行协定》和上述 3 个规章为主要内容的“区域”制度，为国际社会管理、开发和利用“区域”及其资源提供了法律依据。

二、担保国责任问题

截至 2016 年 5 月 1 日，管理局共批准了 27 个勘探工作计划，与承包者签订了 22 个勘探合同。其中，14 个合同涉及多金属结核勘探，5 个涉及多金属硫化物勘探，3 个涉及富钴结壳勘探。在这些勘探合同的担保国中，不乏瑙鲁、汤加这样的发展中小国。事实上，包括瑙鲁在内的许多发展中国家不具备在“区域”进行资源勘探和开发的技术能力和经济实力，客观上无法真正参与“区域”内活动，需要寻求全球私营部门或实体的参与。作为担保国，若因其所担保的承包者在“区域”内的活动而面临重大赔偿责任，这种损失可能超过该国的承受能力。[10]

2008 年，瑙鲁海洋资源公司和汤加近海采矿有限公司向管理局提交请求核准在克拉里昂—克利伯顿中央太平洋断裂带多金属结核保留区内开展勘探多金属结核工作计划的申请书，[11] 瑙鲁和汤加作为担保国。2009 年 5 月 5 日，瑙鲁海洋资源公司和汤加近海采矿有限公司表示，决定请求推迟考虑其勘探多金属结核工作计划的申请。[12]

2010 年，瑙鲁代表团向管理局提交了《就担保国的责任和赔偿责任问题请国际海洋法法庭海底争端分庭提供咨询意见的提议》。提议认为，瑙鲁同其他许多发展中国家一样，不具备在“区域”进行海底采矿的技术能力和经济实力，为有效参与“区域”内活动，这些缔约国需发动全球私营部门实体参与。如果发展中国家因“区域”内活动而被追究责任，则有些国家可能无力承担与此相关的法律风险，因此产生的赔偿责任或费用在某些情况下可能远远超过诸如瑙鲁这样的发展中国

10 Proposal to Seek an Advisory Opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on Matters Regarding Sponsoring State Responsibility and Liability, 5 March 2010, ISBA/16/C/6.

11 《瑙鲁海洋资源公司请求核准勘探工作计划的申请书执行摘要》（ISBA/14/LTC/L.2），《汤加近海采矿有限公司勘探工作计划报批申请书执行摘要》（ISBA/14/LTC/L.3）。

12 法律和技术委员会主席关于第十六届会议期间委员会工作的总结报告（ISBA/16/C/7）。

家的经济实力。[13] 虽然《公约》中有相关条款涉及到担保国的责任和义务问题，但仍有必要进一步明晰。

2010 年 5 月 6 日，管理局理事会通过第 ISBA/16/C/13 号决定，请求国际海洋法法庭海底争端分庭就如下问题发表咨询意见：

> 1.《公约》缔约国在依照《公约》特别是依照第十一部分以及 1994 年《关于执行 1982 年 12 月 10 日〈联合国海洋法公约〉第 11 部分协定》担保“区域”内的活动方面有哪些法律责任和义务?
>
> 2.如果某个缔约国依照《公约》第 153 条第 2(b) 款担保的实体没有遵守《公约》特别是第 11 部分以及 1994 年《协定》的规定，该缔约国应担负何种程度的赔偿责任
>
> 3. 担保国必须采取何种适当措施来履行《公约》特别是第 139 条和附件三以及 1994 年《协定》为其规定的义务?

国际海洋法法庭接受了管理局关于就上述问题发表咨询意见的请求，将其列为第 17 号案。

根据《公约》，缔约国有责任确保其国籍下的自然人或者法人依照公约开展“区域”内活动，并对此活动提供担保。担保国应确保被担保的承包者遵守合同条款和《公约》及相关法律文书中所规定的义务，这是一种“尽职”的义务。对承包者因没有履行《公约》规定的义务而造成的损害，担保国负有赔偿责任。但是，如果担保国已经制定法律和规章，并采取行政措施有效管控其担保的承包者在“区域”内的活动，则担保国应无赔偿责任。

2011 年 2 月 1 日，国际海洋法法庭就“区域”内活动担保国的法律责任和义务问题出具的“咨询意见”进一步指出：如果担保国已经采取了国内立法、规章和行政措施等“一切必要和适当的措施”，以确保被担保的承包者有效履行其合同义务，防止减少资源开发对环境的损害，则可免除担保国的法律和赔偿责任。如果担保国未能履行其通过国内立法、规章和行政措施对承包者有效管控的义务，担保国应对承包者不法行为所造成的损害，承担法律和赔偿责任。[14] 此外，担保国最重要的直接义务还包括：根据《公约》第 153 条第 4 款的规定协助管理局的义务，采取预防性措施的义务，采用“最佳环境做法”的义务，在管理局为保护海洋环境发布紧急命令的情形下，有采取措施确保履行担保条款的义务，以及提供追索赔

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13 《就担保国的责任和赔偿责任问题请国际海洋法法庭海底争端分庭提供咨询意见的提议》（ISBA/16/C/6）。

14 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Disputes Chamber of the International Tribunal of the law of the Sea, Case No. 17, 1 February 2011.

偿的义务。

国际海洋法法庭作为最重要的国际司法机构之一，就关于国家担保个人和实体在“区域”内活动的责任和义务所发表的咨询意见，作为最有力的“软法”的作用是毋庸置疑的。从以往的国际司法实践看，国际法庭的咨询意见往往被视为对一般国际法的主导性的权威陈述。国际海洋法法庭发表的关于第 17 号案的“咨询意见”是许多国家加速制定、修改相关国内法的动因之一。[15]

三、中国制定《深海法》的背景

1991 年 3 月 5 日，中国大洋协会在东北太平洋国际海底获得了 15 万平方公里的多金属结核开辟区，1999 年 3 月 5 日完成了开辟区 50% 区域放弃义务。2001 年 5 月 22 日，中国大洋协会与管理局签订了《多金属结核勘探合同》，获得了 7.5 万平方公里具有专属勘探权和优先商业开采权的多金属结核勘探合同区。2011 年 7 月 19 日，管理局第 17 届理事会会议核准了中国大洋协会提出的多金属硫化物勘探工作计划。同年 11 月 18 日，中国大洋协会与管理局在北京签订《多金属硫化物勘探合同》，在西南印度洋国际海底获得 1 万平方公里具有专属勘探权和优先商业开采权的多金属硫化物勘探合同区。

2013 年 7 月 19 日，管理局理事会第 18 届会议核准了中国大洋协会提出的富钴结壳勘探工作计划。2014 年 4 月 29 日，中国大洋协会与管理局在北京签订《富钴结壳勘探合同》，在西北太平洋国际海底获得 3000 平方公里具有专属勘探权和优先商业开采权的富钴结壳勘探合同区。

2015 年 7 月 20 日，管理局理事会第 21 届会议核准了中国五矿集团提出的东北太平洋国际海底多金属结核保留区勘探工作计划。至此，中国的申请主体在国际海底区域共获得 4 块矿区。

“区域”内活动难度大、风险高，尤其是对深海环境的影响难以预料。一旦承包者违规作业并造成损害，有无国内立法将是担保国是否承担赔偿责任的关键因素。尽管中国不乏相关法规，但《中华人民共和国矿产资源法》、《中华人民共和国矿产资源法实施细则》、《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》等法律法规，其适用范围限于中国的国家管辖海域。制定《深海法》之前，中国并无关于深海资源勘探开发的专门性法律。[16]中国作为 4 个勘探合同的担保国，有责任采取一切必要和适当的措施，确保被担

15 例如，汤加于 2014 年制定《海底矿产资源法》，斐济于 2013 年制定《国际海底资源管理法》，库克群岛于 2009 年制定《海底矿产资源法》，捷克于 2000 年制定《国家管辖外海洋矿产资源探矿、勘探和开发法》，英国于 2014 年修订《深海采矿法》，德国于 2010 年修订《海底采矿法》。

16 At https://www.isa.org.jm/national-legislation-database, 1 April 2016.

保的承包者在从事“区域”内活动时遵守《公约》等的规定。制定大洋资源勘探开发的国内法是我国作为担保国应履行的法律义务，也是免除我国政府承担赔偿责任的必要法定条件。

四、《深海法》的主要内容

《深海法》共七章二十九条。第一章总则部分明确了立法目的、适用范围、从事深海海底区域资源勘探开发活动应遵循的原则等内容；第二章至第六章具体针对资源的勘探和开发、海洋环境保护、科学技术研究和资源调查、监督检查及法律责任作出规定；最后一章是附则，对相关术语进行了界定，对开发活动的涉税事项以及法律的生效进行了规定。

（一）适用范围

在地理适用范围上，该法所规范的海上活动集中于“区域”之内。“区域”的法律地位极为特殊，它不仅完全位于我国管辖海域（内水、领海、专属经济区和大陆架）之外，也位于其他国家管辖海域之外。在适用时间上，每块矿区的勘探合同时间为 15 年；进行商业性开采的时间，需执行我国（企业）将来与管理局另行签订的开采合同。

（二）勘探、开发

《深海法》对“区域”资源勘探、开发活动做出规范和管控，是《公约》及《执行协定》、管理局规章和“咨询意见”对缔约国的基本要求。为了保证深海海底资源勘探和开发活动的承包者有序、安全、合理地开展“区域”资源勘探、开发活动，《深海法》第二章规定了勘探、开发的主要内容，包括：承包者在向管理局提交申请前，应当向国务院海洋主管部门提出申请，并提交规定的材料；国务院海洋主管部门对申请者提交的材料进行审查，对于符合规定条件的应予以许可；承包者对合同区域内特定资源享有专属勘探及开发权，在从事深海资源勘探和开发过程中应当履行保障作业人员的人身安全、保护海洋环境、保护作业区域内的文物和铺设物、遵守中华人民共和国有关安全生产和劳动保护的法律法规的义务；勘探、开发合同转让、变更及终止的相关规定；承包者在勘探开发过程中面对突发事件，应按照本章规定启动应急预案并采取相应的应急措施。[17]

17 《深海法》第 7~11 条。

（三）环境保护

在深海资源勘探开发过程中，若对相关活动管控不当，会造成“区域”内及其相关范围的海洋环境破坏，特别是对海洋生态系统的破坏。《深海法》在第三章对环境保护作了专门规定，包括利用可获得的先进技术保护海洋环境、环境影响评估报告、环境检测方案、保护和保全海洋环境及海洋资源。[18]

（四）科学技术研究与资源调查

为提高深海科学技术研究水平和深海资源勘探开发能力，《深海法》第四章“科学技术研究与资源调查”，就深海科学技术研究和资源勘探开发能力建设等进行专门规定：国家支持深海科学技术研究和专业人才培养，支持深海科学技术研究的公共平台建设，鼓励有关单位和个人开展深海科学普及活动，还强调了深海海底资源勘探、开发和资源调查活动后的资料汇交与共享问题。[19]

（五）监督检查及法律责任

《深海法》专设监督检查和法律责任两个章节，明确了监督主体和监督检查范围，规定了承包者报告制度。为保证《深海法》中多项制度的有效实施，进一步强化对“区域”行为的有效控制，法律责任部分明确了造成海洋环境污染损害或者作业区域内文物、铺设物等损害的法律责任及其他违法行为的法律责任。[20]

《深海法》秉承了《公约》及《执行协定》、管理局规章和“咨询意见”中高度重视海洋环境保护的精神，专章规制海洋环境保护行为，鼓励海洋科学研究和资源调查活动，强调资料的汇总和分享，重视保护海底文物，比较充分地体现了《公约》及《执行协定》、管理局规章内容和要求。《深海法》基本涵盖了“咨询意见”中关于“直接义务”的内容，也通过监查和法律责任等强制手段在一定程度上满足了“确保遵守义务”的要求。

五、《深海法》重要意义和特点

《深海法》是第一部规范我国公民、法人或者其他组织在该区域从事相关活动的有涉外因素的独特的国内法。《深海法》以“区域”及其资源是全人类的共同

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18 《深海法》第 12~14 条。
19 《深海法》第 15~18 条。
20 《深海法》第 23~26 条。

继承财产作为基本原则，规定了国际合作、和平利用、保护人权等方面的内容，反映了《联合国宪章》的基本要求；在适用范围上与《公约》和《执行协定》以及管理局制定的相关规章等国际法律法规进行了对应衔接——《深海法》规定的“深海海底区域，是指中华人民共和国和其他国家管辖范围以外的海床、洋底及其底土”，是《公约》第十一部分规定的“区域”，即各沿海国管辖范围以外的“海床、洋底及其底土”。

《深海法》充分体现了中国的海洋法律制度与国际规则的衔接和融合，在制度设计上充分顾及了中国管理者（中国政府、国务院海洋主管部门等）、深海活动主体（中国的公民、法人或者其他组织）和管理局之间的关系。在深海资源调查、勘探和开采各阶段，这三者之间的法律关系在不停地变化：在调查研究阶段基本是自由的，不受政府干预；在结束调查申请矿区时，主要是申请者和管理局之间签订勘探合同，国家的角色是担保国；在开发阶段，这三方的权利义务关系与第二阶段类似。因此，中国政府无权径自批准中国企业直接进入“区域”从事资源勘探开发，必须先由勘探开发主体在国家担保下，与管理局签订勘探开发合同，按照合同和中国法律开展相关活动。这种形式的管理是相关部门面临的新问题，需要在职权范围和程序等方面充分考虑相关国际规则。

《深海法》的立法工作是在《公约》及相关国际法文件规定的制度框架内进行的，充分反映了国际社会关于保护深海环境、共同受益于深海科技发展和资源开发的愿望，具体体现在《深海法》的立法宗旨、基本原则和具体制度上。该法还反映出中国政府维护国际海底秩序、推进国际深海科技发展、和平利用深海资源的决心、努力和负责任大国的担当。

附：

“区域”资源矿区申请及批准情况表

序号	承包者	合同有效期限	担保国	合同区
多金属结核				
1	国际海洋金属联合组织	2001.3.29 – 2016.3.28	保加利亚、古巴、捷克共和国、波兰、俄罗斯和斯洛伐克	太平洋克拉利昂—克利珀顿断裂区
2	海洋地质南方联合体	2001.3.29 – 2016.3.28	俄罗斯联邦	太平洋克拉利昂—克利珀顿断裂区
3	大韩民国政府	2001.4.27 – 2016.4.26	—	太平洋克拉利昂—克利珀顿断裂区
4	中国大洋矿产资源研究开发协会	2001.5.22 – 2016.5.21	中国	太平洋克拉利昂—克利珀顿断裂区

5	深海资源开发有限公司	2001.6.20 – 2016.6.19	日本	太平洋克拉利昂—克利珀顿断裂区
6	法国海洋开发研究所	2001.6.20 – 2016.6.19	法国	太平洋克拉利昂—克利珀顿断裂区
7	印度政府	2002.3.25 – 2017.3.24	—	印度洋
8	德国联邦地球科学及自然资源研究所	2006.7.19 – 2021.7.18	德国	太平洋克拉利昂—克利珀顿断裂区
9	瑙鲁海洋资源公司	2011.7.22 – 2026.7.21	瑙鲁	太平洋克拉利昂—克利珀顿断裂区（保留区）
10	汤加近海开采有限公司	2012.1.11 – 2027.1.10	汤加	太平洋克拉利昂—克利珀顿断裂区（保留区）
11	马拉瓦公司研究与勘探有限公司	2015.1.19 – 2030.1.18	基里巴斯	太平洋克拉利昂—克利珀顿断裂区（保留区）
12	英国海底资源有限公司	2013.2.8 – 2028.2.7	英国	太平洋克拉利昂—克利珀顿断裂区
13	G-TEC 海洋矿物资源公司	2013.1.14 – 2028.1.13	比利时	太平洋克拉利昂—克利珀顿断裂区
14	新加坡海洋矿产有限公司	2015.1.22 – 2030.1.21	新加坡	太平洋克拉利昂—克利珀顿断裂区（保留区）
15	英国海底资源有限公司	2016.3.29 – 2021.3.28	英国	太平洋克拉利昂—克利珀顿断裂区
16	库克群岛投资公司	待签	库克群岛	太平洋克拉利昂—克利珀顿断裂区
17	中国五矿集团公司	待签	中国	太平洋克拉利昂—克利珀顿断裂区（保留区）
多金属硫化物				
1	中国大洋矿产资源研究开发协会	2011.11.18 – 2026.11.17	中国	西南印度洋脊

2	俄罗斯联邦政府	2012.10.29 – 2027.10.28	—	中大西洋洋脊
3	大韩民国政府	2014.6.24 – 2029.6.23	—	中印度洋洋脊
4	法国海洋开发研究所	2014.11.18 – 2029.11.17	法国	中大西洋洋脊
5	印度政府	待签	—	印度洋洋脊
6	德国联邦地球科学及自然资源研究所	2015.5.6 – 2030.5.5	—	中印度洋
富钴结壳				
1	中国大洋矿产资源研究开发协会	2014.4.29 – 2029.4.28	中国	西北太平洋
2	日本国家石油天然气金属矿物公司	2014.1.27 – 2029.1.26	日本	西太平洋
3	俄罗斯联邦自然资源和环境部	2015.3.10 – 2030.3.9	俄罗斯	太平洋中的麦哲伦山区
4	海洋资源研究公司	2015.11.9 – 2030.11.8	巴西	南大西洋

数据来源：http://www.isa.oarg.jm/deep-seabed-minerals-conrtractors?page=2

Exploitation of Resources in the Area and the Sponsoring State Responsibility: New Developments in China's Legislative Work Concerning the Deep Sea

JIA Yu*

Abstract: The international legal regimes designed to regulate the exploration and exploitation of resources in the Area have undergone a rapid development. Apart from the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI thereof, regulations have been adopted on prospecting and exploration for polymetallic nodules, cobalt-rich crusts and polymetallic sulphides. The "Advisory Opinion", which was rendered by the International Tribunal for the Law of the Sea with respect to Case No. 17, has prompted some States, especially developing States, to promulgate national laws concerning sponsoring State responsibility. Against this backdrop, China enacted the Law of the People's Republic of China on the Exploration and Exploitation of Resources in Deep Seabed Area, which can be listed as the first special law that China has made to regulate the exploration and exploitation of resources in the Area. This law contains provisions in respect of the following areas: the application scope of the law; exploration and exploitation of resources in the Area; environmental protection; marine scientific research and resources investigation; inspection and supervision; and legal liability. It has strongly underpinned the Chinese enterprises' participation in the exploration and exploitation activities in the international seabed area.

Key Words: Area; Resources exploitation; Sponsoring State responsibility; Deep seabed law

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The Law of the People's Republic of China on the Exploration and Exploitation of Resources in Deep Seabed Area (hereinafter referred to as the "Deep Seabed Law"), as adopted at the 19th Session of the Standing Committee of the Twelfth National People's Congress of the People's Republic of China on 26 February 2016, came into force on 1 May 2016.[1] With the enactment of the Deep Seabed Law, China will have a law to follow when carrying out exploitation activities with respect to the resources in the Area. Additionally, its promulgation also bears great practical significance, both for protecting China's maritime rights and interests, and also for China's participation in pertinent international affairs. This paper will present an analysis and examination of the law from its legislative origin and background, as well as its regime design, main contents and features.

I. Development of the Legal Regime of the Area

The International Seabed Area, hereinafter referred to as the "Area", means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.[2] In accordance with the relevant regimes envisaged in the United Nations Convention on the Law of the Sea (UNCLOS), if each coastal State has 200 nautical miles of waters under its jurisdiction, then the Area would approximately cover an area of 251.7 million km^2, which accounts for 65% of the total area of the ocean and 49% of the surface area of the earth. The Area, specifically, comprises the seabed, ocean floor and subsoil beyond the continental shelves (including the continental shelves extending beyond 200 nautical miles) of coastal States, but excluding the superjacent waters or the air space above those waters. "Resources of the Area" refers to all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed.[3] The Area is rich in mineral resources, mainly including polymetallic nodules, cobalt-rich crusts and hydrothermal polymetallic

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1 The Law of the People's Republic of China on the Exploration and Exploitation of Resources in Deep Seabed Area (hereinafter referred to as the "Deep Seabed Law") was submitted to the 17th Session of the Standing Committee of the Twelfth National People's Congress of the People's Republic of China for initial consideration on 31 October 2015. And the draft law was published to solicit opinions from the public from 6 November to 5 December 2015. This law, as adopted at the 19th Session of the Standing Committee of the Twelfth National People's Congress of the People's Republic of China on 26 February 2016, was issued in accordance with PRC Presidential Order No. 42 executed by President Xi Jinping, and came into force on 1 May 2016.

2 UNCLOS Article 1(1).

3 UNCLOS Article 133(a).

sulphides.[4] In addition, creatures inhabiting deep sea hydrothermal vents, due to the special value of their genes, have garnered great attention from the international community; and some developed States have established organizations specializing in the research and exploitation of these creatures. Natural gas hydrate (NGH) in the oceans, including the Area and the waters under national jurisdiction, is a potential unconventional resource that can be exploited in the 21st century.

The UNCLOS and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter referred to as the "Implementation Agreement"),[5] established a legal regime of the Area featured by the principle of common heritage of mankind and "parallel system" of exploitation. The Area and its resources are the common heritage of mankind.[6] No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof.[7] All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the International Seabed Authority (hereinafter referred to as the "Authority") shall act.[8] On the one hand, in accordance with the principle of common heritage of mankind, activities in

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4 Polymetallic nodules are rock concretions formed of concentric layers of iron and manganese oxides as well as silt minerals around a core. These nodules, lying in water depths of approximately 4000~5000 meters, has been found to contain over 60 kinds of minerals, including manganese, ferruginous, silicon and carbon nodules. The total amount of polymetallic nodules is estimated to be 500 billion tons. Cobalt-rich crusts contain certain metals, including cobalt, manganese and nickel. They can be found on the flanks and summits of seamounts, ridges and plateaus. According to one estimate, about 6.35 million km^2 of the ocean floor is covered by cobalt-rich crusts, translating to some 1 billion tons of cobalt. Located at water depths up to 3,700 meters, hydrothermal polymetallic sulphides, which is rich in zinc, lead, gold, silver and other metals, is a kind of deep sea mineral. Most sites of polymetallic sulphides have been located in mid-ocean at the East Pacific Rise, the Southeast Pacific Rise and the Northeast Pacific Rise. Several deposits are also known at the Mid-Atlantic Ridge and the ridge system of the Indian Ocean. See the Research Team of China Institute for Marine Affairs, State Oceanic Administration, *China Ocean Development Report 2010*, Beijing: China Ocean Press, 2010, pp. 347~348. (in Chinese)

5 The Implementation Agreement contains 9 sections, including "Costs to States Parties and Institutional Arrangements", "The Enterprise", "Decision-Making", "Review Conference", "Transfer of Technology", "Production Policy" and "Economic Assistance". Through these sections, this Agreement made a substantial amendment and supplement to UNCLOS Part XI. In accordance with the Implementation Agreement, the provisions of this Agreement and the UNCLOS shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and UNCLOS Part XI, the provisions of this Agreement shall prevail.

6 UNCLOS Article 136.

7 UNCLOS Article 137 (1).

8 UNCLOS Article 137(2).

the Area may be carried out by the Enterprise of the Authority on behalf of the mankind as a whole; on the other hand, such activities may be carried out, in association with the Authority, by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the given requirements.[9]

With the joint efforts from the international community, and pushed by the Authority, the Council of the Authority adopted the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-Rich Crusts in the Area in 2000, 2010 and 2012, respectively. These three sets of regulations further define the rights, obligations and functions of the contractors and the Authority, and specify some issues, such as the applications for approval of plans of work for prospecting and exploration, the contracts for exploration, and the protection and preservation of marine environment. Moreover, the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-Rich Crusts in the Area further developed the parallel system of exploration, stating that each applicant may elect either to contribute a reserved area, or offer an equity interest in a joint venture arrangement. The regime of the Area, primarily envisaged in the UNCLOS, the Implementation Agreement and the foregoing Regulations, provides the legal basis for the international community to regulate, exploit and utilize the Area and its resources.

II. Issues Relating to Sponsoring State Responsibility

Up to 1 May 2016, the Authority has approved 27 plans of work for exploration, and entered into 22 contracts for exploration with contractors. Fourteen of these contracts are for exploration for polymetallic nodules, with five contracts for exploration for polymetallic sulphides and three for cobalt-rich crusts. Some of these contracts are sponsored by small developing States like Nauru and Tonga. In reality, Nauru, like many other developing States, has not yet possessed the technical and financial capacity to prospect and explore resources in the Area. In order to participate in activities in the Area, these States must engage the

9 UNCLOS Article 153.

global private sector or entities. However, potential liabilities resulting from their sponsorship of contractors could, in some cases, exceed their capacities.[10]

In 2008, Nauru Ocean Resources Inc. and Tonga Offshore Mining Limited, under the sponsorship of Nauru and Tonga, submitted to the Authority their applications for approval of plans of work for the exploration for polymetallic nodules in the Clarion-Clipperton Fracture Zone of the Central Pacific (Reserved Area).[11] On 5 May 2009, the two companies decided to request the Authority to postpone the consideration of their applications above.[12]

The Proposal to Seek an Advisory Opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on Matters Regarding Sponsoring State Responsibility and Liability was submitted by the delegation of Nauru to the Authority in 2010. The Proposal states that: Nauru, like many other developing States, has not yet possessed the technical and financial capacity to undertake seafloor mining in the Area. To participate effectively in activities in the Area, these States must engage entities in the global private sector. Some of these developing States cannot afford exposure to the legal risks potentially associated with activities in the Area. Potential liabilities or costs arising from their sponsorship could, in some circumstances, far exceed the financial capacities of Nauru as well as those of many other developing States.[13] Although provisions concerning sponsoring State responsibility and obligations can be found in the UNCLOS, such responsibility and liability still needs further clarification.

On 6 May 2010, the Council of the Authority adopted decision ISBA/16/C/13, by which it decided to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) to render an advisory opinion on the following questions:

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10 Proposal to Seek an Advisory Opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on Matters Regarding Sponsoring State Responsibility and Liability, 5 March 2010, ISBA/16/C/6.

11 Executive Summary of the Application for Approval of a Plan of Work for Exploration by Nauru Ocean Resources Inc. (ISBA/14/LTC/L.2) and Executive Summary of the Application for Approval of a Plan of Work for Exploration by Tonga Offshore Mining Limited (ISBA/14/LTC/L.3).

12 Summary Report of the Chairman of the Legal and Technical Commission on the work of the Commission during the Sixteenth Session (ISBA/16/C/7).

13 Proposal to Seek an Advisory Opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on Matters regarding Sponsoring State Responsibility and Liability (ISBA/16/C/6).

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?

3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

The Authority's request for an advisory opinion on the foregoing questions was accepted by the ITLOS, and entered in the list of cases as No. 17.

Pursuant to the UNCLOS, States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by natural or juridical persons which possess the nationality of States Parties, shall be carried out in conformity with the UNCLOS, and to sponsor such activities. States Parties shall ensure that the contractors sponsored by them comply with the terms of contracts for exploration and their obligations specified in the UNCLOS and other relevant legal instruments. This is a kind of "due diligence" obligations. A sponsoring State shall be liable for damage caused by any failure to perform the obligations under the UNCLOS by a person whom it has sponsored. A sponsoring State shall not, however, be liable for such damage, if that State has adopted laws and regulations and taken administrative measures to secure effective compliance by contractors with their obligations in respect of activities in the Area.

The advisory opinion concerning the responsibilities and obligations of sponsoring States with respect to activities in the Area, issued by the ITLOS on 1 February 2011, further states that, the sponsoring State is absolved from legal liability and liability for damage, if it has taken "all necessary and appropriate measures", including adopting domestic laws, regulations and administrative measures, to secure effective compliance by the sponsored contractor with its contractual obligations, and to secure effective protection of the marine environment from harmful effects resulting from activities in the Area. In case a sponsoring State fails to perform its obligations to secure effective control over

its sponsored contractors through its domestic laws, regulations or administrative measures, that sponsoring State shall be legally liable for the damage caused by the contractors' violation of their obligations.[14] Additionally, the most important direct obligations of the sponsoring States also include: the obligation to assist the Authority under Article 153(4) of the UNCLOS; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and the obligation to ensure the availability of recourse for compensation.

As one of the principal international judicial organs in the world, the advisory opinions issued by the ITLOS concerning responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, undoubtedly, will be used as a most powerful "soft law". Previous international judicial practices indicate that, advisory opinions rendered by international tribunals are usually regarded as the leading authoritative statements on general international law. The advisory opinion, issued by the ITLOS with respect to the Case No. 17, partly motivated many States to adopt or amend their relevant national laws.[15]

III. The Background Against Which China Enacted the Deep Seabed Law

On 5 March 1991, China Ocean Mineral Resources Research and Development Association (COMRA) was accorded an exploration area for polymetallic nodules covering 150,000 km^2 in the Northeastern Pacific Ocean. On 5 March 1999, China relinquished half of this exploration area to the Authority. Then on 22 May 2001, COMRA signed a contract for exploration for polymetallic nodules with the Authority. Under the contract, China has the exclusive right to explore and the preferential right to exploit polymetallic nodules over 75,000 km^2 of the seabed. On

14 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Disputes Chamber of the International Tribunal of the law of the Sea, Case No. 17, 1 February 2011.

15 For instance, Tonga enacted the Seabed Minerals Act in 2014; Fiji adopted the International Seabed Mineral Management Decree in 2013; Cook Islands passed the Seabed Minerals Act in 2009; the Czech Republic formulated the Prospecting, Exploration for and Exploitation of Mineral Resources from the Seabed beyond Limits of National Jurisdiction (Act No. 1582000 of 18 May 2000) in 2000; UK revised its Deep Sea Mining Act in 2014; and the Germany amended the Seabed Mining Act of 6 June 1995 in 2010.

19 July 2011, the Seabed Council, at its 17th session, approved the plan of work for exploration for polymetallic sulphides submitted by COMRA. On 18 November of the same year, COMRA concluded a contract for exploration for polymetallic sulphides with the Authority in Beijing. Under the contract, China enjoys the exclusive right to explore and the preferential right to exploit polymetallic sulphides over 10,000 km^2 of the seabed located in the Southwestern Indian Ocean.

On 19 July 2013, the Seabed Council, at its 18th session, approved the plan of work for exploration for cobalt-rich crusts submitted by COMRA. On 29 April 2014, COMRA entered into a contract for exploration for cobalt-rich crusts with the Authority in Beijing. Under the contract, China has the exclusive right to explore and the preferential right to exploit cobalt-rich crusts over 3,000 km^2 of the seabed located in the Northwestern Pacific Ocean.

On 20 July 2015, the Seabed Council, at its 21st session, approved the plan of work for exploration for polymetallic nodules submitted by China Minmetals Corporation. The region under application is located within the reserved areas in the Northeastern Pacific Ocean. To date, contractors sponsored by China have obtained four seabed mining areas.

Activities in the Area face great difficulties and risks, *inter alia*, they may bring unpredictable impact to the deep sea environment. When any illegal operation of a contractor causes damage to the environment, the fact that its sponsoring State has or does not have any relevant domestic law in place would become a key factor to decide whether that sponsoring State is liable for the damage. Although China has enacted relevant laws and regulations, these laws and regulations, including the Mineral Resources Law of the People's Republic of China, the Rules for the Implementation of the Mineral Resources Law of the People's Republic of China, the Marine Environment Protection Law of the People's Republic of China, the Administrative Regulations concerning the Prevention and Treatment of Pollution and Damage Caused by Marine Engineering Construction Projects to the Marine Environment, have a limited application scope: the waters under Chinese jurisdiction. Prior to the adoption of the Deep Seabed Law, China has no special law dealing with the exploration and exploitation of deep seabed resources.[16] As the State sponsoring four contracts for exploration, China is obliged to take all the necessary and appropriate measures to ensure compliance with the UNCLOS and other instruments by the sponsored contractors when they carry out activities in

16 At https://www.isa.org.jm/national-legislation-database, 1 April 2016.

the Area. In this sense, formulating domestic law concerning the exploration and exploitation of oceanic resources, is not only a legal obligation that China should fulfill as a sponsoring State, but also an indispensible condition that China must satisfy if it intends to be exempt from liability for damage.

IV. The Main Contents of the Deep Seabed Law

The Deep Seabed Law contains 7 chapters and 29 articles. Chapter I (General Provisions) prescribes the legislative purpose and application scope of the law, as well as the principles that should be observed while conducting exploration and exploitation activities with respect to the resources in the deep seabed area. Chapters II~VI lay down a number of provisions concerning the following matters: the exploration and exploitation of resources; marine environmental protection; scientific and technological research and resources investigation; inspection and supervision; and legal liability. The last chapter (Supplementary Provisions) first defines the relevant terms, and then provides for the tax matters related to exploitation activities, as well as the time when the law shall come into force.

A. Application Scope

Geographically, the Deep Seabed Law applies to and regulate marine activities mainly within the Area. The Area has a special legal status. It is located beyond the waters under the jurisdiction of both China and other States, including their internal waters, territorial seas, exclusive economic zones and continental shelves. In terms of time, the contract for exploration for each mining area is effective for 15 years; and the time for commercial exploitation shall be specified in the contract for exploitation otherwise signed by China (Chinese enterprises) and the Authority.

B. Exploration and Exploitation

The regulations and controls, imposed by the Deep Seabed Law, over the exploration and exploitation of the resources in the Area, is an initiative China took to meet the basic requirements for States Parties as stipulated in the UNCLOS and the Implementation Agreement, as well as the regulations of the Authority and advisory opinions issued by the ITLOS. In order to ensure that the exploration and exploitation activities in the deep seabed would be carried out by

the contractors in an orderly, safe and reasonable manner, Chapter II of the Deep Seabed Law details the primary issues relating to exploration and exploitation: (a) Contractors shall, before applying to the Authority, file an application with the oceanic administration of the State Council, and submit the materials as required; (b) The oceanic administration of the State Council shall examine the materials submitted by the applicant, and issue a permit to the qualified contractor; (c) The contractor has exclusive rights to explore and exploit certain resources in the contract area; while exploring and exploiting the deep see resources, the contractor has the obligation to ensure the personal safety of the operation personnel, and protect the marine environment, as well as the cultural relics and the objects laying within the operation area, and also to abide by the laws and regulations of the People's Republic of China on work safety and labor protection; (d) Issues relating to the transfer, alteration and termination of the contract for exploration and exploitation are specified; (e) Where an emergency occurs during the exploration and exploitation, the contractor should initiate the emergency response plan in accordance with this Chapter, and take the corresponding measures.[17]

C. Environmental Protection

Activities relating to deep sea resources exploration and exploitation, if controlled improperly, may cause damage to the marine environment in the Area and other pertinent areas, especially the marine ecosystem. Chapter III of the Deep Seabed Law contains provisions dedicated to environmental protection, touching upon the topics like the use of the advanced technology available to protect marine environment, environmental impact assessment report, environmental monitoring plan, protection and preservation of marine environment and resources.[18]

D. Scientific and Technological Research and Resources Investigation

Aiming to promote China's deep sea scientific and technological research and raise its capability to explore and exploit deep sea resources, Chapter IV of the Deep Seabed Law, entitled "Scientific and Technological Research and Resources Investigation", sets out some provisions dealing with deep sea scientific

17 The Deep Seabed Law, Articles 7~11.
18 The Deep Seabed Law, Articles 12~14.

and technological research, as well as the building of resources exploration and exploitation capabilities: The State (China) supports deep sea scientific and technological research and the cultivation of professional talents, as well as the construction of a public platform for deep sea scientific and technological research, and also encourages entities and individuals to conduct activities to popularize deep sea science; this chapter also highlights the submission and sharing of materials obtained from the exploration and exploitation of deep seabed resources and resources investigation.[19]

E. Supervision, Inspection and Legal Liability

The Deep Seabed Law has devised two chapters, entitled "Supervision and Inspection" and "Legal Liability". The Chapter "Supervision and Inspection" prescribes the subject of supervision and the scope of supervision and inspection, and establishes a contractor reporting system. In order to ensure the effective implementation of the multiple regimes under the Deep Seabed Law, and further enhance effective control on the activities in the Area, the Chapter "Legal Liability" specifies the legal liability for any act which causes damage to the marine environment, or to the cultural relics or the objects laying within the operation area, as well as the legal liability for other violations.[20]

The UNCLOS and the Implementation Agreement, as well as the regulations of the Authority and advisory opinions issued by the ITLOS, all pay high attention to marine environment protection. Following this spirit, the Deep Seabed Law specially designs a chapter to regulate acts associated with marine environment protection. This law encourages marine scientific research and resources investigation, and highlights the gathering and sharing of materials, as well as the protection of underwater cultural relics. Such provisions fully indicate that this law is consistent with, both the contents and the requirements, of the UNCLOS and the Implementation Agreement, as well as the regulations issued by the Authority. The Deep Seabed Law basically covers the provisions concerning "direct obligations" as stipulated in the advisory opinions above. It also satisfies, to some extent, the "obligation of ensuring compliance" through some compulsory measures, such as arranging supervision and imposing legal liability.

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19 The Deep Seabed Law, Articles 15~18.
20 The Deep Seabed Law, Articles 23~26.

V. The Significances and Features of the Deep Seabed Law

The Deep Seabed Law is the first domestic law involving foreign interests that China enacted to regulate activities in the Area carried out by citizens, juridical persons or other organizations. Based on the basic principle of the Area and its resources being the common heritage of mankind, the law lays down some provisions regarding international cooperation, peaceful exploitation and human rights protection, which meet the basic requirements under the Charter of the United Nations. With respect to the application scope, the Deep Seabed Law has referred to many relevant international laws and regulations, including the UNCLOS, the Implementation Agreement, and the regulations issued by the Authority. For example, under the Deep Seabed Law, "deep seabed areas" means "the seabed and ocean floor and subsoil thereof, beyond the jurisdiction of the People's Republic of China and other States." This definition is identical to the one for the term "Area" under UNCLOS Part XI, which provides that the Area refers to "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

The Deep Seabed Law fully presents the link between China's system of the law of the sea with the relevant international rules, as well as the incorporation of the latter into the former. When designing the associated regimes, this law paid due regard to relationship among the Chinese administrators (such as the Chinese government and the oceanic administration of the State Council), subject of deep sea activities (Chinese citizens, juridical persons or other organizations) and the Authority. The legal relationship among the three mentioned above changes in different stages, including the stages of deep sea resources investigation, exploration and exploitation: in the investigation and research stage, the subject of deep sea activities is free from government intervention; when an application for mining areas is filed with the Authority after the investigation stage, a contract for exploration would be signed between the applicant and the Authority, and the State should act as the sponsoring State; during the exploitation stage, the relationship of rights and obligations between the three parties is similar to the one in the second stage. Therefore, the Chinese government is not entitled to directly approve the application for exploration and exploitation for the resources of the Area submitted by Chinese enterprises. Instead, the subject conducting exploration and exploitation activities, shall first be sponsored by the State, and then conclude a contract for exploration and exploitation with the Authority. Such activities shall be carried

out in accordance with the contract and Chinese laws. This kind of management is new to the competent authorities of China, who need to fully consider the relevant international rules when understanding the limits of their functions and powers and the pertinent procedures.

The legislative work concerning the Deep Seabed Law was completed under the institutional framework established by the UNCLOS and other relevant documents of international law. This law fully reflects the wish of the international community to protect the deep sea environment and to share the benefits arising from the development of deep sea technology and the exploitation of deep sea resources, which could be seen from its legislative purpose, basic principles and concrete regimes. It also shows the commitment and efforts that China, a responsible great power, made to maintain the international seabed order, to promote the development of international deep sea technology, and peacefully exploit deep sea resources.

Annex:

Applications for Deep Seabed Mining Areas and the Status of Approval

No.	Contractors	Term of Contract	Sponsoring State	Location
Polymetallic Nodules				
1	Interoceanmetal Joint Organization	March 29, 2001 – March 28, 2016	Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia	Clarion-Clipperton Fracture Zone
2	Yuzhmorgeologiya	March 29, 2001 – March 28, 2016	Russian Federation	Clarion-Clipperton Fracture Zone
3	Government of the Republic of Korea	April 27, 2001 – April 26, 2016	–	Clarion-Clipperton Fracture Zone
4	China Ocean Mineral Resources Research and Development Association	May 22, 2001 – May 21, 2016	China	Clarion-Clipperton Fracture Zone
5	Deep Ocean Resources Development Co. Ltd.	June 20, 2001 – June 19, 2016	Japan	Clarion-Clipperton Fracture Zone

6	Institut Français de Recherche pour l'Exploitation de la Mer	June 20, 2001 – June 19, 2016	France	Clarion-Clipperton Fracture Zone
7	Government of India	March 25, 2002 – March 24, 2017	–	Indian Ocean
8	Federal Institute for Geosciences and Natural Resources of Germany	July 19, 2006 – July 18, 2021	Germany	Clarion-Clipperton Fracture Zone
9	Nauru Ocean Resources Inc.	July 22, 2011 – July 21, 2026	Nauru	Clarion-Clipperton Fracture Zone (Reserved Area)
10	Tonga Offshore Mining Limited	January 11, 2012 – January 10, 2027	Tonga	Clarion-Clipperton Fracture Zone (Reserved Area)
11	Marawa Research and Exploration Ltd.	January 19, 2015 – January 18, 2030	Kiribati	Clarion-Clipperton Fracture Zone (Reserved Area)
12	UK Seabed Resources Ltd.	February 8, 2013 – February 7, 2028	UK	Clarion-Clipperton Fracture Zone
13	G-TEC Sea Mineral Resources NV	January 14, 2013 – January 13, 2028	Belgium	Clarion-Clipperton Fracture Zone
14	Ocean Mineral Singapore Pte Ltd.	January 22, 2015 – January 21, 2030	Singapore	Clarion-Clipperton Fracture Zone (Reserved Area)
15	UK Seabed Resources Ltd	March 29, 2016 – March 28, 2021	UK	Clarion-Clipperton Fracture Zone
16	Cook Islands Investment Corporation	To be concluded	Cook Islands	Clarion-Clipperton Fracture Zone

17	China Minmetals Corporation	To be concluded	China	Clarion-Clipperton Fracture Zone (Reserved Area)
Polymetallic Sulphides				
1	China Ocean Mineral Resources Research and Development Association	November 18, 2011 – November 17, 2026	China	Southwest Indian Ridge
2	Government of the Russian Federation	October 29, 2012 – October 28, 2027	–	Mid-Atlantic Ridge
3	Government of the Republic of Korea	June 24, 2014 – June 23, 2029	–	Central Indian Ridge
4	Institut Français de Recherche pour l'Exploitation de la Mer	November 18, 2014 – November 17, 2029	France	Mid-Atlantic Ridge
5	Government of India	To be concluded	–	Indian Ridge
6	Federal Institute for Geosciences and Natural Resources of Federal Republic of Germany	May 6, 2015 – May 5, 2030	–	Central Indian Ridge
Cobalt-Rich Crusts				
1	China Ocean Mineral Resources Research and Development Association	April 29, 2014 – April 28, 2029	China	Western Pacific Ocean
2	Japan Oil, Gas and Metals National Corporation	January 27, 2014 – January 26, 2029	Japan	Western Pacific Ocean
3	Ministry of Natural Resources and Environment of the Russian Federation	March 10, 2015 – March 9, 2030	Russian Federation	Magellan Mountains, Pacific Ocean

4	Companhia de Pesquisa de Recursos Minerais	November 9, 2015 – November 8, 2030	Brazil	South Atlantic Ocean

Source: http://www.isa.oarg.jm/deep-seabed-minerals-conrtractors?page=2

Translator: XIE Hongyue

中国拥有钓鱼岛主权的历史地图新证据

费　杰 *　　赖忠平 **

内容摘要: 本文报道了新发现的欧美历史地图中有关钓鱼岛及其附属岛屿（简称“钓鱼岛”）的资料。本研究共发现 14 幅记录有钓鱼岛的 18—19 世纪（1895 年以前）的英文和法文地图。在这些地图中，钓鱼岛的名称都以中文地名的音译标注。这些新发现的第三方历史地图和地名证据表明，在 1895 年《马关条约》签订以前，钓鱼岛已被中国人发现和命名，并且这一事实得到欧美社会的广泛认可。因此，本文认为钓鱼岛在历史上应为中国领土。

关键词: 钓鱼岛　历史地图资料　地名音译　《马关条约》

一、概　述

钓鱼岛及其附属岛屿（日本称“尖阁列岛”，以下简称“钓鱼岛”）分布在东经 123º20'—124º40'，北纬 25º40'—26º00' 之间的海域，由钓鱼岛本岛、黄尾屿、赤尾屿及其附属岛礁组成，位于中国东海大陆架上，台湾岛东北方向。中国政府主张钓鱼岛是中国领土不可分割的一部分。[1] 但是，中日两国围绕钓鱼岛一直存在领土主权争议。

*　费杰，复旦大学中国历史地理研究所副教授，德国汉堡大学历史系访问学者，电子邮箱：jiefei@fudan.edu.cn。本研究得到下列项目支持：国家海洋局项目（编号：CHINARE2014-04-05-03）、德国汉堡大学 DAAD 基金和中国国民党革命委员会上海市委员会调研课题。特别感谢葛剑雄教授、董波教授、孙立广教授与章典教授的指导。

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1　State Council Information Office, The People's Republic of China, Diaoyu Dao, an Inherent Territory of China, at http://english.gov.cn/archive/white_paper/2014/08/23/content_281474983043212.htm, 22 February 2016.

学术界从历史、[2] 政治 [3] 和国际法 [4] 等角度对钓鱼岛主权问题进行了很多研究。

钓鱼岛问题有深刻的历史背景。在中日甲午战争（1894—1895 年）中，中国战败，被迫于 1895 年与日本签订不平等的《马关条约》，其中规定钓鱼岛作为台湾的附属岛屿一并被割让给日本。在 1939—1945 年第二次世界大战中，日本战败，钓鱼岛本应依据《开罗宣言》、《波茨坦公告》和《日本投降书》归还中国，但是却

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2 刘江永：《古贺辰四郎最早开发钓鱼岛伪证之研究——兼论日本政府购买钓鱼岛的非法性》，载于《清华大学学报（哲学社会科学版）》2014 年第 4 期，第 26~41 页；[日] 村田忠禧著，韦平和等译：《日中领土争端的起源——从历史档案看钓鱼岛问题》，北京：社会科学文献出版社 2013 年版；韩昭庆：《从甲午战争前欧洲人所绘中国地图看钓鱼岛列岛的历史》，载于《复旦学报（社会科学版）》2013 年第 1 期，第 88~98 页；郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社 2011 年版，第 1~455 页；鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页；Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., “R.O.C.”, and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; [日] 井上清：《钓鱼列岛的历史和主权问题》，香港：七十年代杂志社 1973 年版， 第 1~144 页；丘宏达：《日本对于钓鱼台列屿的主权问题的论据分析》，载于《明报月刊》1972 年第 75 期，第 2~16 页；丘宏达：《中国对于钓鱼台列屿的主权问题的论据分析》，载于《明报月刊》1972 年第 78 期，第 53~63 页；吴天颖：《甲午战前钓鱼列屿归属考——兼质日本奥原敏雄诸教授》，北京：中国民主法制出版社 2013 年版。

3 Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., “R.O.C.”, and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; Sheila A. Smith, Japan and the East China Sea Dispute, at http://www.sciencedirect.com/science/article/pii/S0030438712000324, 22 February 2016; Carlos Ramos-Mrosovsky, International Law’s Unhelpful Role in the Senkaku Islands, *University of Pennsylvania Journal of International Law*, Vol. 29, Issue 4, 2008, pp. 903~946; Zhongqi Pan, Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective, *Journal of Chinese Political Science*, Vol. 12, No. 1, 2007, pp. 71~92; Peter Kien-hong Yu, Sino-Japanese Contention Over the Diaoyu Islands/Senkakus: A Hypothetical Analysis, *Pacific Focus*, Vol. 20, No. 1, 2005, pp. 285~314.

4 郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社 2011 年版，第 1~455 页；Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., “R.O.C.”, and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; Sheila A. Smith, Japan and the East China Sea Dispute, at http://www.sciencedirect.com/science/article/pii/S0030438712000324, 22 February 2016; Carlos Ramos-Mrosovsky, International Law’s Unhelpful Role in the Senkaku Islands, *University of Pennsylvania Journal of International Law*, Vol. 29, Issue 4, 2008, pp. 903~946; Zhongqi Pan, Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective, *Journal of Chinese Political Science*, Vol. 12, No. 1, 2007, pp. 71~92; Steven Wei Su, The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update, *Ocean Development & International Law*, Vol. 36, Issue 1, 2005, pp. 45~61; Jonathan I. Charney, Central East Asian Maritime Boundaries and the Law of the Sea, *American Journal of International Law*, Vol. 89, No. 4, 1995, pp. 724~749.

被美国非法托管，其后美国又非法将“行政管辖权”转交给日本。[5]

历史是钓鱼岛研究的重要方面，对厘清当今中日两国主权主张的问题具有启发意义。日本政府主张，1895 年前钓鱼岛是无主地。[6] 然而，大量中国和日本历史文献表明，中国最早发现、命名和开发钓鱼岛，并对钓鱼岛进行了长期管辖。

14—19 世纪，琉球（现称为冲绳）定期向中国政府朝贡。同时，中国政府也定期向琉球派遣使团。钓鱼岛恰好位于中国至琉球的航线上，常被用作航标和中继站。关于钓鱼岛的最早记录出现在 1403 年前后成书的《顺风相送》。[7] 有关钓鱼岛的记录还大量出现在中国使臣撰写的报告和其它相关文献中。这些记录均显示“黑水沟（冲绳海槽）”是中国和琉球的分界，钓鱼岛是中国领土。[8] 此外，自 16 世纪起，中国还将钓鱼岛纳入海防体系，并在清代（1644—1912 年）将其纳入台

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5 State Council Information Office, The People's Republic of China, Diaoyu Dao, an Inherent Territory of China, at http://english.gov.cn/archive/white_paper/2014/08/23/content_281474983043212.htm, 22 February 2016; 郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社 2011 年版，第 1~455 页。Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., “R.O.C.”, and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; Sheila A. Smith, Japan and the East China Sea Dispute, at http://www.sciencedirect.com/science/article/pii/S0030438712000324, 22 February 2016; Carlos Ramos-Mrosovsky, International Law's Unhelpful Role in the Senkaku Islands, *University of Pennsylvania Journal of International Law*, Vol. 29, Issue 4, 2008, pp. 903~946; Zhongqi Pan, Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective, *Journal of Chinese Political Science*, Vol. 12, No. 1, 2007, pp. 71~92; Steven Wei Su, The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update, *Ocean Development & International Law*, Vol. 36, Issue 1, 2005, pp. 45~61; Jonathan I. Charney, Central East Asian Maritime Boundaries and the Law of the Sea, *American Journal of International Law*, Vol. 89, No. 4, 1995, pp. 724~749.

6 Ministry of Foreign Affairs of Japan, The Basic View on the Sovereignty over the Senkaku Islands, at http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html, 22 February 2016; Tatsuo Urano et al. eds., *The Question of the Diaoyu Islands (Senkaku Islands), Research Materials Compilation*, Hong Kong: Lizhi Press, 2001; 日本外务省：《关于尖阁诸岛的基本见解》，下载于 http://www.mofa.go.jp/region/asia-paci/china/pdfs/r-relations_cn.pdf，2016 年 2 月 22 日。

7 《顺风相送》（1403？年），华盛顿：国会图书馆 1975 年重印版。

8 郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社 2011 年版，第 1~455 页；鞠德源：《钓鱼岛正名 —— 钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页；Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., “R.O.C.”, and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; [日]井上清：《钓鱼列岛的历史和主权问题》，香港：七十年代杂志社 1973 年版，第 1~144 页；丘宏达：《日本对于钓鱼台列屿的主权问题的论据分析》，载于《明报月刊》1972 年第 75 期，第 2~16 页；丘宏达：《中国对于钓鱼台列屿的主权问题的论据分析》，载于《明报月刊》1972 年第 78 期，第 53~63 页。

湾地方政府管辖。[9]

历史地图常常比文字记录更具信息量。众多中文和日文历史地图都显示，钓鱼岛由中国最早发现并实施管辖。[10]此外，第三方的西文地图更客观、更具信息量，可以确证这一点。前人已发现了约16幅此类地图（附件1）。[11]总而言之，1895年前，钓鱼岛不应被视为无主地。

本文报道了新发现的14幅记录有钓鱼岛的历史地图。这些地图由欧美地图学者绘制，地图语言为英文和法文，均绘制于《马关条约》（1895年）以前，其中最早的绘制于1797年，最晚的绘制于1872年。

二、历史地图资料

下文将简要介绍这些新发现的地图（附件1），并讨论图中涉及的钓鱼岛名称问题。

1. 让 - 弗朗索瓦•德拉彼鲁兹：《1787年中华与鞑靼海域图》1797年版[12]

该图是一幅法文地图。它将钓鱼岛本岛、黄尾屿和赤尾屿分别记作“I. Houpinsu”、“I. Tiaoyu-su”和“I. Tche-oey sou”（图1）。在此处，“su”和“sou”是“屿”的音译，指较小的岛屿。“I. Houpinsu”实际上是一个误称，因为它本应指钓鱼岛西南方向的花瓶屿。“I. Tiaoyu-su”也是一个误称，因为它本应是钓鱼屿（钓

9 郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社2011年版，第1~455页；鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社2006年版，第1~455页；Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., “R.O.C.”, and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; [日]井上清：《钓鱼列岛的历史和主权问题》，香港：七十年代杂志社1973年版，第1~144页；丘宏达：《日本对于钓鱼台列屿的主权问题的论据分析》，载于《明报月刊》1972年第75期，第2~16页；丘宏达：《中国对于钓鱼台列屿的主权问题的论据分析》，载于《明报月刊》1972年第78期，第53~63页。

10 郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社2011年版，第1~455页。鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社2006年版，第1~455页；[日]井上清：《钓鱼列岛的历史和主权问题》，香港：七十年代杂志社1973年版，第1~144页；丘宏达：《中国对于钓鱼台列屿的主权问题的论据分析》，载于《明报月刊》1972年第78期，第53~63页。

11 韩昭庆：《从甲午战争前欧洲人所绘中国地图看钓鱼岛列岛的历史》，载于《复旦学报（社会科学版）》2013年第1期，第88~98页；郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社2011年版，第1~455页；鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社2006年版，第1~455页；丘宏达：《中国对于钓鱼台列屿的主权问题的论据分析》，载于《明报月刊》1972年第78期，第53~63页。

12 Jean-Francois de Galaup La Perouse, Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie, par les Fregates Francaises la Boussole et l’Astrolabe, depuis leur Depart de Manille jusqu’a leur Arrivee au Kamtschatka (1 ere. Feuille), Paris: L’Imprimerie de la Republique, 1797, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~20222~550043:Mers,-Chine,-Tartarie--1-, 22 February 2016.

鱼岛本岛的别称）的音译。所以，该图作者将钓鱼岛本岛误认为是花瓶屿，又将黄尾屿误认为是钓鱼岛本岛。而“I. Tche-oey sou”则是中文地名“赤尾屿”的音译。

2. 约翰•卡里：《最新中国地图》1801 年版[13]

该图是一幅英文地图。它将钓鱼岛本岛、黄尾屿和赤尾屿分别记作“Hao-yu-su”、“Hoan-oey-su”和“Tshe-oey-su”（图 2），这些都是中文地名的音译。

前人研究报道过约翰 1806 版的中国地图，不过 1801 年版和 1806 年版对钓鱼岛的记录差异很大。后者将钓鱼岛本岛、黄尾屿和赤尾屿分别记作“Houpin su”、“Tiaoyu su”和“Tsheoey su”。[14]

3. 马修•凯里：《中国分省图》1811 年版和 1814 年版[15]

该图是一幅英文地图。前人研究报道过凯里 1796 年版的中国地图，[16] 该版地图和 1811 年版非常相似，而 1814 年版和 1811 年版也非常相似。这些地图都将钓鱼岛本岛、黄尾屿和赤尾屿分别记作“Haoyusu”、“Hoanoeysu”和“Tsheoeysu”（图 3）。

4. 约翰•汤姆逊：《鞑靼地图》1814 年版[17]

该图是一幅英文地图。它将钓鱼岛本岛、黄尾屿和赤尾屿分别记作“Houpin su”、“Tiaou su”和“Tche oey sou”（图 4）。

5. 阿德里安•休伯特•布鲁：《亚洲地图》1814 年版[18]

该图是一幅法文地图。它将钓鱼岛本岛、黄尾屿和赤尾屿分别记作“I. Houpin-su”、“I. Tiaoyu-su”和“I. Tsheouyeso”。另外，该图还将台湾北方三屿错误地标注为“I. Hao-yu-su”（图 5）。事实上，“Hao-yu-su”和“Tiaoyu-su”都是中文地名钓鱼屿（钓鱼岛本岛别称）的音译。台湾北方三屿位于台湾岛和钓鱼岛之间，从北向南依次是彭佳屿、棉花屿和花瓶屿。

6. 菲尔丁•卢卡斯：《中国地图》1823 年版[19]

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13 John Cary, A New Map of China, from the Latest Authorities, 1801, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~21541~640033:A-new-map-of-China,-from-the-latest, 22 February 2016.

14 John Cary, A New Map of Chinese & Independent Tartary, from the Latest Authorities, 1806, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~21542~640034:Tartary,-Chinese-&-independent-, 22 February 2016.

15 Mathew Carey, China, Divided into Its Great Provinces, 1811 and 1814, at http://www.davidrumsey.com/maps890071-24382.html and http://www.davidrumsey.com/maps3286.html, 22 February 2016.

16 Mathew Carey, China Divided into [Its] Great Provinces, 1796, at http://www.davidrumsey.com/maps860070-23904.html, 22 February 2016.

17 John Thomson, Tartary, N.R. Hewitt sc., 10 Broad Str., Bloomsbry., London. Drawn and engraved for Thomson’s New General Atlas, Sepr. 1st., 1814.

18 Adrien Hubert Brue, L’Asie 4, 1814, at http://www.davidrumsey.com/maps1030047-25565.html, 22 February 2016.

19 Fielding Lucas Jr., China, 1823, at http://www.davidrumsey.com/maps6286.html, 22 February 2016.

该图是一幅英文地图。它将钓鱼岛和赤尾屿分别记作“Haoyusu”和“Tsheceyou”，但忽略了黄尾屿（图 6）。

7. 西德尼•豪尔：《中国地图》 1828 年版[20]

该图是一幅英文地图。它将钓鱼岛和黄尾屿分别记作“Houpin su”和“Tyaoisu”，但忽略了赤尾屿（图 7）。

8. 约翰•阿罗史密斯：《中国地图》 1844 年版[21]

该图是一幅英文地图。它将钓鱼岛、黄尾屿和赤尾屿分别记作“Hoapin-su”、“Tiaoyu-su”和“Rock”（图 8）。

9. 安德里沃•古戎：《中华帝国与日本地图》 1847 年版[22]

该图是一幅法文地图。它将整个钓鱼岛记作“I. Tiaoyu-su”，但将黄尾屿和赤尾屿都忽略了。另外，该地图将台湾北方三屿之一的彭佳屿误记作“Haoyusu”。“Haoyusu”其实是钓鱼屿（钓鱼岛本岛）的音译（图 9）。

10. 乔治•弗雷德里克•克拉奇利：《中国地图》1850 年版[23]

该图是一幅英文地图。它将钓鱼岛整体记作“Tia-yu-su”（图 10）。

11. 阿尔文•朱厄特•约翰逊：《约翰逊之中国、东印度、澳大利亚及大洋洲地图》1860 年版[24]

该图是一幅英文地图。它将钓鱼岛整体记作“Tiaoyu su”（图 11）。

12. 亚历山大•基思•约翰斯顿：《中国与日本地图》1861 年版[25]

该图是一幅英文地图。它将钓鱼岛本岛和黄尾屿分别记作“Hoa-pin-sin”和“Tia-yu-su”，但忽略了赤尾屿（图 12）。

13. 阿尔文•朱厄特•约翰逊：《约翰逊之中国地图》1864 年版[26]

该图是一幅英文地图。它将钓鱼岛本岛和黄尾屿分别记作“Hawaping san”和“Tiayu su”，但忽略了赤尾屿（图 13）。

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20 Sidney Hall, China, 1828, at http://www.davidrumsey.com/maps3989.html, 22 February 2016.

21 John Arrowsmith, China, 1844, at http://www.davidrumsey.com/maps872.html, 22 February 2016.

22 J. Andriveau-Goujon, Carte de l’Empire Chinois et du Japon, 1847, at http://www.davidrumsey.com/maps1100406-26346.html, 22 February 2016.

23 George Frederick Cruchley, China, *Selection of Maps from Cruchley’s General Atlas, for the Use of Schools and Private Tuition*, London, 1850, at http://www.geographicus.com, 22 February 2016.

24 Alvin Jewett Johnson, Johnson’s China East Indies Australia and Oceanica, 1860, at http://www.davidrumsey.com/maps1751.html, 22 February 2016.

25 Alexander Keith Johnston, China and Japan, 1861, at http://www.davidrumsey.com/maps335.html, 22 February 2016.

26 Alvin Jewett Johnson, Johnson’s China, in A. J. Johnson, *Johnson’s New Illustrated Family Atlas*, New York: Johnson and Ward, 1862, at http://www.geographicus.com/P/AntiqueMap/China2-johnson-1862, 22 February 2016.

14. G•H• 斯旺斯顿、J• 巴塞洛缪：《中国地图》1872 年版[27]

该图是一幅英文地图。它将钓鱼岛和黄尾屿分别记作“Hawaping san”和“Tiayu su”，但忽略了赤尾屿（图 14）。

三、钓鱼岛地名学讨论

基于新发现的上述地图和前人发现的第三方地图，本部分将从地名学角度对钓鱼岛的岛屿名称进行初步分析。这些地图都是西文地图，由欧美地图学者绘制。

在这些第三方地图中，钓鱼岛的名称可以大致分为 3 类（附件 1）。

第 1 类使用“Tiaoyusu”、“Hoangoueysu”和“Tchehoeyou”等地名，分别指钓鱼岛本岛、黄尾屿和赤尾屿（附件 1）。这些名称实际上都是中文地名的音译，[28]在 18—19 世纪被许多地图广泛采纳。这些名称在不同地图中略有不同，其中，“Tiaoyusu”有时被拼作“Haoyusu”。

此类岛屿名称源自法国传教士宋君荣 1751 年绘制的法文地图《琉球诸岛图》，这是欧洲最早记录钓鱼岛的地图。[29]宋君荣的地图将钓鱼岛记作“Tiaoyusu”、“Hoangoueysu”和“Tchehoeyou”，分别指钓鱼岛本岛、黄尾屿和赤尾屿。这一法文地图实际上译自清代中国官员徐葆光的相关地图。[30]

第 2 类使用“Houpinsu”、“Tiaoyu-su”和“Tche-oey sou”等地名，也源自中文地名音译（附件 1）。这些地名最早出现于《1787 年中华与鞑靼海域图》。[31]

第 2 类岛屿名称在 19 世纪后期比第 1 类更具影响力。一个很有意思的个案是卡里的《最新中国地图》。卡里 1801 年版的地图采用第 1 类的岛屿名称，1806 年版则改为第 2 类名称。19 世纪 40 年代，英国海军对钓鱼岛进行勘察、制图，也采用了第 2 类岛屿名称。

然而，第 2 类岛屿名称包含 2 处错误。黄尾屿被错误地命名为“Tiaoyu-su”，

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27 G.H. Swanston and J. Bartholomew, China, 1872, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~3456~400026:China-, 22 February 2016.

28 吴天颖：《甲午战前钓鱼列屿归属考——兼质日本奥原敏雄诸教授》，北京：中国民主法制出版社 2013 年版。

29 R.P. Gaubil, *Carte Des Isles de Lieou-Kieou*, 1751；方豪：《方豪六十自定稿》，台北：学生书局 1969 年版。

30 徐葆光：《中山传信录》，收录于《四库全书存目丛书史部》第 256 册，济南：齐鲁书社 1996 年版。1718 年（清康熙五十七年），徐葆光任册封琉球王国副使，奉命出使琉球。明清两代，琉球为中国藩属。

31 Jean-Francois de Galaup La Perouse, Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie, par les Fregates Francaises la Boussole et l’Astrolabe, depuis leur Depart de Manille jusqu’a leur Arrivee au Kamtschatka (1 ere. Feuille), Paris: L’Imprimerie de la Republique, 1797, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~20222~550043:Mers,-Chine,-Tartarie--1-, 22 February 2016.

而钓鱼岛本岛被错误地命名为“Houpinsu”。“Tiaoyu-su” 是钓鱼屿的音译，钓鱼屿是钓鱼岛本岛的别称。“Houpinsu”实际上是花瓶屿的音译，花瓶屿位于钓鱼岛西南方向，台湾岛东北方向。钓鱼岛本岛位于黄尾屿西南方向。另外，赤尾屿在早期地图中被记作“Tche-oey sou”，后期改称为“Rock”或“Raleigh Rock”。

第 3 类岛屿名称则将钓鱼岛整体记作“I. Tiaoyu-su”或“Tiaoyu su”。

日本主张钓鱼岛是无主地，日本依据先占原则取得主权。但是，如前所述，日本这一主张得不到历史文献证据的支持。

本研究新发现的地图和地名证据进一步表明，钓鱼岛在被日本占据以前的几个世纪，就已经被中国发现和命名，而且这一事实已得到欧美国家的广泛认同。这些历史资料证明，在甲午战争（1894—1895 年）以前钓鱼岛不是无主地。

四、关于使用“Pinnacle Islands”、“Pinnacle Group”和“Pinnacle Island”的讨论

“Pinnacle Islands”、“Pinnacle Group”和“Pinnacle Island”是另一组重要的地名。《1861 年中国领航员》这一著作在“Hoa-pin-su, Pinnacle, and Ti-a-usu Islands”这一章记录了其中 2 个地名。

> 这一群岛构成一个三角形，其中三角形的斜边，即“Hoa-pin-su”与“Ti-a-usu”之间距离约为 15 海里，“Hoa-pin-su”与“Pinnacle Island”南部之间距离约为 2 海里……“Hoa-pin-su”最高处是 1181 英尺……该岛的北面坐标为北纬 25º47′7″，东经 123º30½′……“Pinnacle group”与“Hoa-pin-su”中间由一块礁石和浅滩连接……“Ti-a-usu”位于“Hoa-pin-su”东北方向 15 海里，看似由巨大的绿色斑岩组成。该岛最高处海拔约 600 英尺，从海拔约 60英尺处到最高处的岛屿表面覆盖着稀疏的草丛，但无任何树木。[32]

这一资料实际上还存在更早的版本，[33] 另外，它也见于后来的一些文献（附件 1）中。“Pinnacle Islands”与“Pinnacle group”在 19 世纪中叶的文献中指南小岛

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32 John W. King, *The China Pilot 1861: The Coasts of China, Korea, and Tartary; The Sea of Japan, Gulfs of Tartary and Amúr, and Sea of Okhotsk; and the Babuyan, Bashí, Formosa, Meiaco-Sima, Lu-chu, Ladrones, Bonin, Japan, Saghalin, and Kuril Islands*, third edition, published by order of the Lords Commissioners of the Admiralty, London: printed for Hydrographic office, Admiralty, 1861.

33 Robert Loney ed., *The China Pilot: Part I, East Coast from Hong Kong to Shanghai*, *Chiefly from the Surveys of Captain Collinson*, published by order of the Lords Commissioners of the Admiralty, London: printed for the Hydrographic Office, Admiralty, 1855.

和北小岛。南小岛和北小岛位于钓鱼岛本岛的东南侧，是钓鱼岛的一部分。钓鱼岛的日文名称尖阁列岛是“Pinnacle Islands”与“Pinnacle group”的翻译。不过，日本用尖阁列岛指整个钓鱼岛，而不是南小岛和北小岛。因此，日本所称“尖阁列岛”，其实是一个错误的名称。它是“Pinnacle Islands”的翻译，但后者是欧洲人对南小岛和北小岛的命名，而不是整个钓鱼岛。

“Pinnacle Island”这一地名所指非常不同，它不对应于钓鱼岛中的任何一个岛屿。它可能最早见于约翰斯顿1861年版的《中国与日本地图》与《中国领航员》，也见于G•H•斯旺斯顿与J•巴塞洛缪1872年版的《中国地图》（附件1）。根据其在这些地图中的位置，并结合《中国领航员》中给出的坐标，可知其是指花瓶屿，即台湾岛和钓鱼岛之间的一个岛屿。

五、结　论

本研究共发现14幅记录有钓鱼岛的地图。这些地图都由18—19世纪欧美地图学者绘制。这些地图记录的钓鱼岛名称可以分为3类：第1类使用“Tiaoyusu”、“Hoangoueysu”和“Tchehoeyou”分别指称钓鱼岛本岛、黄尾屿和赤尾屿；第2类使用“Houpinsu”、“Tiaoyu-su”和“Tche-oey sou”分别指称钓鱼岛本岛、黄尾屿和赤尾屿；第3类使用“Tiaoyu su”指称整个钓鱼岛。所有这些岛屿名称都是中文地名的音译。总体而言，本研究证明，从历史的角度看，在1895年《马关条约》以前，钓鱼岛不是无主地，而是中国领土的一部分。

附件1　西文地图记录的3类钓鱼岛名称

第1类：用“Tiaoyusu”、“Hoangoueysu”和“Tchehoeyou”分别指称钓鱼岛本岛、黄尾屿和赤尾屿

序号	钓鱼岛本岛	黄尾屿	赤尾屿
1-1 [34]	Hao-yu-su	Hoan-oey-su	Tshe-oey-su
1-2 [35]	Haoyusu	Hoanoeysu	Tcheoeysu

34　John Cary, A New Map of China, from the Latest Authorities, 1801, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~21541~640033:A-new-map-of-China,-from-the-latest, 22 February 2016.

35　Mathew Carey, China, Divided into Its Great Provinces, 1811 and 1814, at http://www.davidrumsey.com/maps890071-24382.html and http://www.davidrumsey.com/maps3286.html, 22 February 2016.

1-3 [36]	Haoyusu	N/A	Tsheceyou
R1-1*[37]	Tiaoyusu	Hoangoueysu	Tchehoeyou
R1-2 [38]	Hao-yu-su	Hoan-oey-su	Tche-oey-su
R1-3 [39]	Hao-yu-su	Hoan-oey-su	Tche-oey-su
R1-4 [40]	Hao-yu-su	Hoan-oey-su	Tshe-oey-su
R1-5 [41]	Hao-yu-su	Hoanoey-su	Tshe-oey-su
R1-6 [42]	Haoyusu?	Hoan-oey-su	Tche-oey-su
R1-7 [43]	Haoyusu	Hoanoeysu	Tcheoeysu
R1-8 [44]	Hao-yu-su	Hoan-oey-su	Tche-oey-su

“R”指前人发现的地图。

36 Fielding Lucas Jr., China, 1823, at http://www.davidrumsey.com/maps6286.html, 22 February 2016.

37 R.P. Gaubil, *Carte Des Isles de Lieou-Kieou*, 1751；方豪：《方豪六十自定稿》，台北：学生书局 1969 年版；鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页。

38 Jean Baptiste Bourguignon D’Anville, Second Part of Asia, being China, Part of India and Tartary, the Islands of Sonda, Molucka, Philippin, Japan etc., in Postlethwayt, *The Universal Dictionary of Trade and Commerce*, London: Printed for J. and P. Knapton, 1751-1755；韩昭庆：《从甲午战争前欧洲人所绘中国地图看钓鱼岛列岛的历史》，载于《复旦学报（社会科学版）》2013 年第 1 期，第 88~98 页。

39 Samuel Dunn, China, Divided into Its Great Provinces, and the Isles of Japan, London: printed for Rob. Sayer, 1774；鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页。

40 Jo. Roberts, The Empire of China, with Its Principal Divisions: Drawn from the Surveys Made by the Jesuits, London: printed for Robt. Sayer and John Bennett, No. 53, in Fleet Street, as the Act directs, 1775；郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社 2011 年版，第 1~455 页。

41 Aaron Arrowsmith, Arrowsmith’s Map of the World on a Globular Projection, Exhibiting Particularly the Nautical Researches of Captain James Cook, with All the Recent Discoveries to the Present Time, 1794；鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页。

42 J. Russell, China with the Tributary States, printed on 18 July 1795；韩昭庆：《从甲午战争前欧洲人所绘中国地图看钓鱼岛列岛的历史》，载于《复旦学报（社会科学版）》2013 年第 1 期，第 88~98 页。

43 Mathew Carey, China Divided into [Its] Great Provinces, 1796, at http://www.davidrumsey.com/maps860070-23904.html, 22 February 2016；韩昭庆：《从甲午战争前欧洲人所绘中国地图看钓鱼岛列岛的历史》，载于《复旦学报（社会科学版）》2013 年第 1 期，第 88~98 页。

44 John Cary, A New Map of China, from the Latest Authorities, 1811；韩昭庆：《从甲午战争前欧洲人所绘中国地图看钓鱼岛列岛的历史》，载于《复旦学报（社会科学版）》2013 年第 1 期，第 88~98 页；鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页。

第 2 类：用“Houpinsu”、“Tiaoyu-su”和“Tche-oey sou”分别指称钓鱼岛本岛、黄尾屿和赤尾屿

序号	钓鱼岛本岛	黄尾屿	赤尾屿
2-1 [45]	I. Houpinsu	I. Tiaoyu-su	I. Tche-oey sou
2-2 [46]	Houpin su	Tiaou su	Tche oey su
2-3 [47]	I. Hao-pin-su	I. Tiaoyu-su	I. Tsheouyesou
2-4 [48]	Hoapinsu	Tyaoisu	N/A
2-5 [49]	Hoapin-su	Tiaoyu-su	Rock
2-6 [50]	Hoa-pin-sin	Tia-yu-su	N/A
2-7 [51]	Hawapin-san	Taiyusu	N/A
2-8 [52]	Hoa-pin-sin	Tia-yu-su	N/A
R2-1 [53]	Houpin su	Tiaoyu su	Tcheoey su

45 Jean-Francois de Galaup La Perouse, Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie, par les Fregates Francaises la Boussole et l’Astrolabe, depuis leur Depart de Manille jusqu’a leur Arrivee au Kamtschatka (1 ere. Feuille), Paris: L’Imprimerie de la Republique, 1797, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~20222~550043:Mers,-Chine,-Tartarie--1-, 22 February 2016; John Thomson, Tartary, N.R. Hewitt sc., 10 Broad Str., Bloomsbry., London. Drawn and engraved for Thomson’s New General Atlas, 1 September 1814.

46 John Thomson, Tartary, N.R. Hewitt sc., 10 Broad Str., Bloomsbry., London. Drawn and engraved for Thomson’s New General Atlas, 1 September 1814.

47 Adrien Hubert Brue, L’Asie 4, 1814, at http://www.davidrumsey.com/maps1030047-25565.html, 22 February 2016.

48 Sidney Hall, China, 1828, at http://www.davidrumsey.com/maps3989.html, 22 February 2016.

49 John Arrowsmith, China, 1844, at http://www.davidrumsey.com/maps872.html, 22 February 2016.

50 Alexander Keith Johnston, China and Japan, 1861, at http://www.davidrumsey.com/maps335.html, 22 February 2016.

51 Alvin Jewett Johnson, Johnson’s China, in A. J. Johnson, *Johnson’s New Illustrated Family Atlas*, Johnson and Ward, 1862, at http://www.geographicus.com/P/AntiqueMap/China2-johnson-1862, 22 February 2016.

52 G.H. Swanston and J. Bartholomew, China, 1872, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~3456~400026:China-, 22 February 2016.

53 John Cary, A New Map of Chinese & Independent Tartary, from the Latest Authorities, 1806, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~21542~640034:Tartary,-Chinese-&-independent-, 22 February 2016; Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

R2-2[54]	Hawapin-san	Taiyusu	
R2-3[55]	Hoa-pin-su	Ti-a-usu	Raleigh Rock
R2-4[56]	Hoapinsu	Ti-a-usu	Raleigh Rock
R2-5[57]	Hoa-pin-su	Ti-a-usu	Raleigh Rock
R2-6[58]	Hoapinsu	Tiausu	Raleigh Rock

注：R2-3、R2-4、R2-5 和 R2-6 将南小岛和北小岛一并记作“Pinnacle Islands”或“Pinnacle group”。南小岛和北小岛位于钓鱼岛本岛的东南侧，是钓鱼岛的一部分。

第 3 类：用“Tiaoyu su”指称整个钓鱼岛

序号	钓鱼岛	黄尾屿	赤尾屿
3-1[59]	I. Tiaoyu-su	N/A	N/A
3-2[60]	Tia-yu-su	N/A	N/A

54 G.W. Colton, China (with) Two Insets: Harbor & Island of Amoy and Map of Canton and Adjacent Islands, Published by J.H. Colton & Co. No. 172 William St. New York, 1856, at http://www.davidrumsey.com/maps3483.html, 22 February 2016; 郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社 2011 年版，第 1~455 页。

55 John W. King, *The China Pilot 1861: The Coasts of China, Korea, and Tartary; The Sea of Japan, Gulfs of Tartary and Amúr, and Sea of Okhotsk; and the Babuyan, Bashí, Formosa, Meiaco-Sima, Lu-chu, Ladrones, Bonin, Japan, Saghalin, and Kuril Islands*, third edition, published by order of the Lords Commissioners of the Admiralty, London: printed for Hydrographic office, Admiralty, 1861; 鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页。

56 China, East Coast Hong Kong to Gulf of Liautung, Compiled from Various Authorities in the Hydrographic Office, London: published at the Admiralty, 1877; 鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页。

57 Frederick W. Jarrad, *The China Sea Directory, Vol. 4. Comprising the Coasts of Korea, Russian Tartary, Japan Islands, Gulfs of Tartary and Amúr, and the Sea of Okhotsk, also the Meiaco, Liu-kiu, Linschoten, Mariana, Bonin, Saghalin, and Kuril Islands*, second edition, compiled from various sources, published by order of the Lords Commissioners of the Admiralty, London: printed for Hydrographic office, Admiralty, 1884; 郑海麟：《论钓鱼台列屿主权归属》，台北：海峡学术出版社 2011 年版，第 1~455 页；鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页。

58 China Sea, Compiled from the Latest Government Surveys, 1886, at http://acms.sl.nsw.gov.au/album/ItemViewer.aspx?itemid=915216&suppress=N&imgindex=1, 22 February 2016; 鞠德源：《钓鱼岛正名——钓鱼岛列屿的历史主权及国际法渊源》，北京：昆仑出版社 2006 年版，第 1~455 页。

59 J. Andriveau-Goujon, Carte de l’Empire Chinois et du Japon, 1847, at http://www.davidrumsey.com/maps1100406-26346.html, 22 February 2016.

60 George Frederick Cruchley, China, *Selection of Maps from Cruchley’s General Atlas, for the Use of Schools and Private Tuition*, London, 1850, at http://www.geographicus.com, 22 February 2016.

3-3 [61]	Tiaoyu su	N/A	N/A
R3-1 [62]	Tiayu-Su	N/A	N/A
R3-2 [63]	Tia-yu-su	N/A	N/A

附件 2 新发现历史地图中有关钓鱼岛的记录

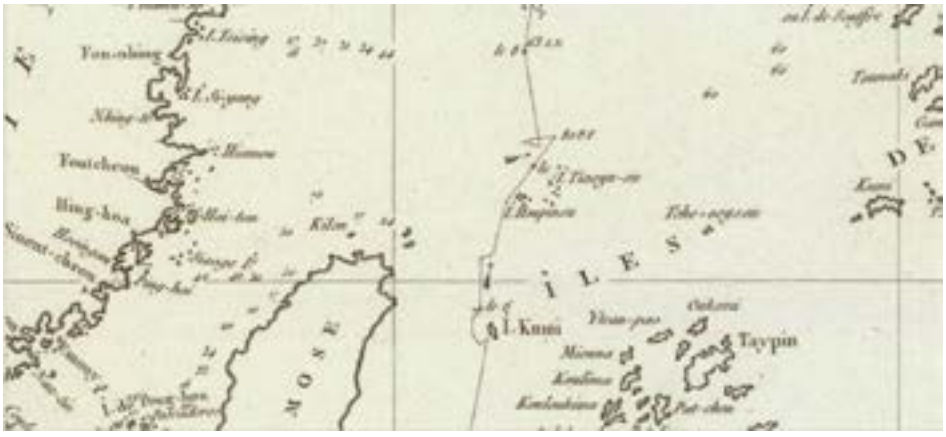

图 1 让 - 弗朗索瓦•德拉彼鲁兹：《1787 年中华与鞑靼海域图》1797 年版

图 2 约翰•卡里：《最新中国地图》1801 年版

61 Alvin Jewett Johnson, Johnson's China East Indies Australia and Oceanica, 1860, at http://www.davidrumsey.com/maps1751.html, 22 February 2016.

62 China and the Adjacent Countries, 1842; 韩昭庆：《从甲午战争前欧洲人所绘中国地图看钓鱼岛列岛的历史》，载于《复旦学报（社会科学版）》2013 年第 1 期，第 88~98 页。

63 George Frederick Cruchley, Cruchley's China (Educational series), printed in London, 1861; Hungdah Chiu, Chinese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 78, 1972, pp. 53~63 (in Chinese).

图 3 马修•凯里：《中国分省图》1811 年版

图 4 约翰•汤姆逊：《鞑靼地图》1814 年版

图 5 阿德里安•休伯特•布鲁：《亚洲地图》1814 年版

图 6　菲尔丁•卢卡斯：《中国地图》1823 年版

图 7 西德尼•豪尔：《中国地图》1828 年版

图 8 约翰•阿罗史密斯：《中国地图》1843 年版

图 9 安德里沃•古戎：《中华帝国与日本地图》1847 年版

图 10 乔治•弗雷德里克•克拉奇利：《中国地图》1850 年版

图 11 阿尔文•朱厄特•约翰逊：《约翰逊之中国、东印度、澳大利亚及大洋洲地图》1860 年版

图 12 亚历山大•基思•约翰斯顿：《中国与日本地图》1861 年版

图 13 阿尔文•朱厄特•约翰逊：《约翰逊之中国地图》1864 年版

图 14 G•H• 斯旺斯顿、J• 巴塞洛缪：《中国地图》1872 年版

New Historical Cartographic Records Supporting Chinese Sovereignty over the Diaoyu/Senkaku Islands

FEI Jie* LAI Zhongping**

Abstract: This article reports the discovery of new historical cartographic records concerning Diaoyu/Senkaku Island and its affiliated islands (hereinafter referred to as "the Diaoyu Islands") by European and American cartographers. In total, 14 maps from the 18-19th centuries (prior to 1895) that recorded the Diaoyu Islands in English and French were discovered. Each of these maps refers to the Diaoyu Islands by using transliterations of their Chinese place names. This newly discovered, third party historical cartographic and toponymic evidence supports the claim that the Diaoyu Islands were discovered and named by the Chinese prior to the 1895 Treaty of Shimonoseki, and that this was widely known in Europe and America. Thus, this article lends support to the claim that these islands are, in historical terms, within Chinese territory.

Key Words: Diaoyu/Senkaku Islands; Historical cartographic record; Transliteration of place name; Treaty of Shimonoseki

I. Introduction

The Diaoyu Island and its affiliated islands, also known as the Senkaku Islands in Japan, hereinafter referred to as "the Diaoyu Islands", consist of Diaoyu Island,

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Huangwei-yu Island, Chiwei-yu Island, and their affiliated islands and reefs. The Diaoyu Islands are located to the northeast of Taiwan, in the waters between 123º20'–124º40' E and 25º40'–26º00' N on the continental shelf of the East China Sea. The Chinese government claims that the Diaoyu Islands are an inseparable part of the Chinese territory,[1] however, territorial disputes over the islands between the Chinese and Japanese governments have persisted. Previous studies have discussed issues of sovereignty concerning the Diaoyu Islands in terms of history,[2] politics,[3]

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1 State Council Information Office, The People's Republic of China, Diaoyu Dao, an Inherent Territory of China, at http://english.gov.cn/archive/white_paper/2014/08/23/content_281474983043212.htm, 22 February 2016.

2 Liu Jiangyong, The Research on the Perjury of the Initial Exploration of the Diaoyu Dao Islands by Koga Tatushiro – Discussion on the Illegality of Japanese Government's Purchase of the Diaoyu Dao Islands, *Journal of Tsinghua University (Philosophy and Social Sciences)*, No. 4, 2014, pp. 26~41 (in Chinese); Tadayoshi Murata, translated by Wei Pinghe et al., *On the Origin of Japan-China Territorial Issues: An Examination of Historical Evidence on the Diaoyu Islands Dispute*, Beijing: Social Sciences Academic Press (China), 2013 (in Chinese); Han Zhaoqing, Diaoyu Islands on Maps of China Drawn by Western Cartographers before the Sino-Japanese War of 1894-1895, *Fudan Journal (Social Sciences)*, No. 1, 2013, pp. 88~98 (in Chinese); Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese); Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese); Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., "R.O.C.", and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; Kiyoshi Inoue, *History and Sovereignty over the Diaoyu Islands*, Hong Kong: 1970s Magazine Publishing House, 1973, pp. 1~144 (in Chinese); Hungdah Chiu, Japanese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 75, 1972, pp. 2~16 (in Chinese); Hungdah Chiu, Chinese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 78, 1972, pp. 53~63 (in Chinese); Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands Prior to the Sino-Japanese War of 1894-95: Also a Query to Professor Toshio Okuhara and Others*, Beijing: China Democracy and Law Press, 2013 (in Chinese).

3 Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., "R.O.C.", and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; Sheila A. Smith, Japan and the East China Sea Dispute, at http://www.sciencedirect.com/science/article/pii/S0030438712000324, 22 February 2016; Carlos Ramos-Mrosovsky, International Law's Unhelpful Role in the Senkaku Islands, *University of Pennsylvania Journal of International Law*, Vol. 29, Issue 4, 2008, pp. 903~946; Zhongqi Pan, Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective, *Journal of Chinese Political Science*, Vol. 12, No. 1, 2007, pp. 71~92; Peter Kien-hong Yu, Sino-Japanese Contention Over the Diaoyu Islands/Senkakus: A Hypothetical Analysis, *Pacific Focus*, Vol. 20, No. 1, 2005, pp. 285~314.

and international law.[4]

After their defeat in the first Sino-Japanese War (1894-1895), the Chinese were forced to sign the unequal Treaty of Shimonoseki. As a result, the Diaoyu Islands were occupied by the Japanese and ceded to Japan. After World War II (1939-1945), the Diaoyu Islands were to be returned to China in accordance with the Cairo Declaration, the Potsdam Proclamation and the Japanese Instrument of Surrender, however, the United States illegally administered the islands and illegally transferred the administration rights over the islands to Japan.[5]

History is an important dimension in the study of the Diaoyu Islands, and it may have implications for today's Sino-Japanese sovereignty claims in this regard. The Japanese government claims that Diaoyu Islands were *terra nullius*

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4 Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese); Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., "R.O.C.", and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; Sheila A. Smith, Japan and the East China Sea Dispute, at http://www.sciencedirect.com/science/article/pii/S0030438712000324, 22 February 2016; Carlos Ramos-Mrosovsky, International Law's Unhelpful Role in the Senkaku Islands, *University of Pennsylvania Journal of International Law*, Vol. 29, Issue 4, 2008, pp. 903~946; Zhongqi Pan, Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective, *Journal of Chinese Political Science*, Vol. 12, No. 1, 2007, pp. 71~92; Steven Wei Su, The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update, *Ocean Development & International Law*, Vol. 36, Issue 1, 2005, pp. 45~61; Jonathan I. Charney, Central East Asian Maritime Boundaries and the Law of the Sea, *American Journal of International Law*, Vol. 89, No. 4, 1995, pp. 724~749.

5 State Council Information Office, The People's Republic of China, Diaoyu Dao, an Inherent Territory of China, at http://english.gov.cn/archive/white_paper/2014/08/23/content_281474983043212.htm, 22 February 2016; Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese); Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., "R.O.C.", and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148; Sheila A. Smith, Japan and the East China Sea Dispute, at http://www.sciencedirect.com/science/article/pii/S0030438712000324, 22 February 2016; Carlos Ramos-Mrosovsky, International Law's Unhelpful Role in the Senkaku Islands, *University of Pennsylvania Journal of International Law*, Vol. 29, Issue 4, 2008, pp. 903~946; Zhongqi Pan, Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective, *Journal of Chinese Political Science*, Vol. 12, No. 1, 2007, pp. 71~92; Steven Wei Su, The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update, *Ocean Development & International Law*, Vol. 36, Issue 1, 2005, pp. 45~61; Jonathan I. Charney, Central East Asian Maritime Boundaries and the Law of the Sea, *American Journal of International Law*, Vol. 89, No. 4, 1995, pp. 724~749.

prior to 1895,[6] however, Chinese and Japanese historical documents demonstrate that, at that time, the Chinese had already discovered, named, developed, and had jurisdiction over the Diaoyu Islands.

During the 14th-19th centuries, Ryukyu (currently known as Okinawa) regularly paid tribute to the imperial court of China. In return, the Chinese imperial court routinely sent imperial envoys to Ryukyu. The Diaoyu Islands were located on the route between China and Ryukyu, and were utilized for navigation aids and relay stations. The earliest record of the Diaoyu Islands can be found in the book titled *Voyage with a Tail Wind* (*Shun Feng Xiang Song*) published circa 1403.[7] Records of the Diaoyu Islands can be found in official reports and other relevant literature written by Chinese imperial envoys, which indicated that the boundary between China and Ryukyu was the Black Water Trough (also known as the Okinawa Trough), and that the Diaoyu Islands were a part of Chinese territory.[8] As of the 16th Century, China placed the Diaoyu Islands under its coastal defense system, and under the jurisdiction of the local government of Taiwan during the

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6 Ministry of Foreign Affairs of Japan, The Basic View on the Sovereignty over the Senkaku Islands, at http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html, 22 February 2016. Tatsuo Urano et al. eds., *The Question of the Diaoyu Islands (Senkaku Islands), Research Materials Compilation*, Hong Kong: Lizhi Press, 2001; Ministry of Foreign Affairs of Japan, The Basic View on the Senkaku Islands, at http://www.mofa.go.jp/region/asia-paci/china/pdfs/r-relations_cn.pdf, 22 February 2016 (in Chinese).

7 *Voyage with a Tail Wind (Shun Feng Xiang Song)*, 1403?, reprint Washington D.C.: Library of Congress, 1975 (in Chinese).

8 Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese); Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese); Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., "R.O.C.", and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148. Kiyoshi Inoue, *History and Sovereignty over the Diaoyu Islands*, Hong Kong: 1970s Magazine Publishing House, 1973, pp. 1~144 (in Chinese); Hungdah Chiu, Japanese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 75, 1972, pp. 2~16 (in Chinese); Hungdah Chiu, Chinese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 78, 1972, pp. 53~63 (in Chinese).

Qing Dynasty (1644-1912).[9]

Historical maps are often more informative than textual records. Many Chinese and Japanese historical maps indicate that the Diaoyu Islands were first named and administered by the Chinese.[10] In addition, third party maps in European languages are objective and informative, and can be used to confirm this. Within previous studies, approximately 16 such maps have been identified (Annex 1).[11] All in all, the Diaoyu Islands should not be considered *terra nullius* prior to 1895.

This study reports the discovery of 14 historical maps that recorded the Diaoyu Islands. Each of these maps, written in English or French, was charted by European and American cartographers prior to the 1895 Treaty of Shimonoseki. The earliest map was charted in 1797, and the latest was charted in 1872.

II. Historical Cartographic Records

In this section we will briefly introduce the newly discovered maps (Annex 1), and further discuss the names and references of the Diaoyu Islands found within.

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9 Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese); Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese); Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of P.R.C., "R.O.C.", and Japan, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, No. 3, 1999, pp. 1~148. Kiyoshi Inoue, *History and Sovereignty over the Diaoyu Islands*, Hong Kong: 1970s Magazine Publishing House, 1973, pp. 1~144 (in Chinese); Hungdah Chiu, Japanese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 75, 1972, pp. 2~16 (in Chinese); Hungdah Chiu, Chinese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 78, 1972, pp. 53~63 (in Chinese).

10 Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese); Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese); Kiyoshi Inoue, *History and Sovereignty over the Diaoyu Islands*, Hong Kong: 1970s Magazine Publishing House, 1973, pp. 1~144 (in Chinese); Hungdah Chiu, Chinese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 78, 1972, pp. 53~63 (in Chinese).

11 Han Zhaoqing, Diaoyu Islands on Maps of China Drawn by Western Cartographers before the Sino-Japanese War of 1894-1895, *Fudan Journal (Social Sciences)*, No. 1, 2013, pp. 88~98 (in Chinese); Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese); Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese); Hungdah Chiu, Chinese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 78, 1972, pp. 53~63 (in Chinese).

1) Jean-Francois de Galaup La Perouse, Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie, 1797 [12]

This map, written in French, recorded the Diaoyu, Huangwei-yu, and Chiwei-yu Islands as "I. Houpinsu", "I. Tiaoyu-su", and "I. Tche-oey sou" respectively (Fig. 1). Here, "su" and "sou" are transliterations of "yu", meaning islet. The use of "I. Houpinsu" is actually a misnomer, since Houpinsu should be used to refer to the Huaping-yu Island, which lies to the southwest of Diaoyu Islands. "I. Tiaoyu-su", which is a transliteration of Diaoyu-yu (Diaoyu Island), is also a misnomer. Therefore the author of the map mistook the Diaoyu Island for Huaping-yu Island, and further mistook the Huangwei-yu Island for the Diaoyu Island. "I. Tche-oey sou" is a transliteration of the Chinese place name "Chiwei-yu".

2) John Cary, A New Map of China, from the Latest Authorities, 1801 [13]

This map, written in English, recorded the Diaoyu, Huangwei-yu, and Chiwei-yu Islands as "Hao-yu-su", "Hoan-oey-su", and "Tshe-oey-su" respectively (Fig. 2). Each of these names are transliterations of the Chinese place names. Previous studies reported John's map of China (1806), however the 1801 and 1806 versions differ significantly in terms of recording the Diaoyu Islands. The latter recorded the Diaoyu, Huangwei-yu, and Chiwei-yu Islands as "Houpin su", "Tiaoyu su", and "Tsheoey su".[14]

3) Mathew Carey, China, Divided into Its Great Provinces, 1811 and 1814 [15]

These maps are written in English. A previous study reported Carey's 1796 version[16] which is similar to the 1811 version. The 1814 version is also similar to the 1811 version. These maps recorded the Diaoyu, Huangwei-yu, and Chiwei-yu Islands as "Haoyusu", "Hoanoeysu", and "Tsheoeysu" respectively (Fig. 3).

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12 Jean-Francois de Galaup La Perouse, Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie, par les Fregates Francaises la Boussole et l'Astrolabe, depuis leur Depart de Manille jusqu'a leur Arrivee au Kamtschatka (1 ere. Feuille), Paris: L'Imprimerie de la Republique, 1797, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~20222~550043:Mers,-Chine,-Tartarie--1-, 22 February 2016.

13 John Cary, A New Map of China, from the Latest Authorities, 1801, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~21541~640033:A-new-map-of-China,-from-the-latest, 22 February 2016.

14 John Cary, A New Map of Chinese & Independent Tartary, from the Latest Authorities, 1806, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~21542~640034:Tartary,-Chinese-&-independent-, 22 February 2016.

15 Mathew Carey, China, Divided into Its Great Provinces, 1811 and 1814, at http://www.davidrumsey.com/maps890071-24382.html and http://www.davidrumsey.com/maps3286.html, 22 February 2016.

16 Mathew Carey, China Divided into [Its] Great Provinces, 1796, at http://www.davidrumsey.com/maps860070-23904.html, 22 February 2016.

4) John Thomson, Tartary, 1814 [17]

This map, written in English, recorded the Diaoyu, Huangwei-yu, and Chiwei-yu Islands as "Houpin su", "Tiaou su", and "Tche oey sou" respectively (Fig. 4).

5) Adrien Hubert Brue, L'Asie 4, 1814 [18]

This map, written in French, recorded the Diaoyu, Huangwei-yu, and Chiwei-yu Islands as "I. Hou-pin-su", "I. Tiaoyu-su", and "I. Tsheouyesou" respectively. In addition, this map incorrectly recorded the Northern Three Islands of Taiwan (*Bei Fang San Yu*) as "I. Hao-yu-su" (Fig. 5). "Hao-yu-su" and "Tiaoyu-su" are both transliterations of the Chinese place name "Diaoyu-yu", meaning Diaoyu Island. The Northern Three Islands of Taiwan are composed of the Pengchia-yu, Mianhua-yu, and Huaping-yu Islands from north to south, which lie between the Diaoyu Islands and Taiwan Island.

6) Fielding Lucas Jr., China, 1823 [19]

This map, written in English, recorded the Diaoyu and Chiwei-yu Islands as "Haoyusu" and "Tsheceyou" respectively, but omitted the Huangwei-yu Island (Fig. 6).

7) Sidney Hall, China, 1828 [20]

This map, written in English, recorded the Diaoyu and Huangwei-yu Islands as "Houpin su", "Tyaoisu", but omitted the Chiwei-yu Island (Fig. 7).

8) John Arrowsmith, China, 1844 [21]

This map, written in English, recorded the Diaoyu, Huangwei-yu, and Chiwei-yu Islands as "Hoapin-su", "Tiaoyu-su", and "Rock" respectively (Fig. 8).

9) J. Andriveau-Goujon, Carte de l'Empire Chinois et du Japon, 1847 [22]

This map, written in French, recorded the entire Diaoyu Islands as "I. Tiaoyu-su", but omitted the Huangwei-yu and Chiwei-yu Islands. In addition, it recorded the Pengchia-yu Island as "Haoyusu", which is actually a transliteration of Diaoyu-

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17 John Thomson, Tartary, N.R. Hewitt sc., 10 Broad Str., Bloomsbry., London. Drawn and engraved for Thomson's New General Atlas, Sepr. 1st., 1814.

18 Adrien Hubert Brue, L'Asie 4, 1814, at http://www.davidrumsey.com/maps1030047-25565.html, 22 February 2016.

19 Fielding Lucas Jr., China, 1823, at http://www.davidrumsey.com/maps6286.html, 22 February 2016.

20 Sidney Hall, China, 1828, at http://www.davidrumsey.com/maps3989.html, 22 February 2016.

21 John Arrowsmith, China, 1844, at http://www.davidrumsey.com/maps872.html, 22 February 2016.

22 J. Andriveau-Goujon, Carte de l'Empire Chinois et du Japon, 1847, at http://www.davidrumsey.com/maps1100406-26346.html, 22 February 2016.

yu (Diaoyu Island) (Fig. 9). Pengchia-yu Island is one of the Northern Three Islands of Taiwan.

10) George Frederick Cruchley, China, 1850 [23]

This map, written in English, recorded the entire Diaoyu Islands (including the Diaoyu, Huangwei-yu and Chiwei-yu Islands) as "Tia-yu-su" (Fig. 10).

11) Alvin Jewett Johnson, Johnson's China East Indies Australia and Oceanica, 1860 [24]

This map, written in English, recorded the entire Diaoyu Islands (including the Diaoyu, Huangwei-yu and Chiwei-yu Islands) as the "Tiaoyu su" (Fig. 11).

12) Alexander Keith Johnston, China and Japan, 1861 [25]

This map, written in English, recorded the Diaoyu and Huangwei-yu Islands as "Hoa-pin-sin" and "Tia-yu-su" respectively, but omitted the Chiwei-yu Island (Fig. 12).

13) Alvin Jewett Johnson, Johnson's China, 1864 [26]

This map, written in English, recorded the Diaoyu and Huangwei-yu Islands as "Hawaping san" and "Tiayu su" respectively, but omitted Chiwei-yu Island (Fig. 13).

14) G.H. Swanston and J. Bartholomew, China, 1872 [27]

This map, written in English, recorded the Diaoyu and Huangwei-yu Islands as "Hawaping san" and "Tiayu su" respectively, but omitted Chiwei-yu Island (Fig. 14).

III. Discussion on the Toponymy of the Diaoyu Islands

In this section we conduct a preliminary toponymic analysis of the Diaoyu Islands based on these newly discovered maps and previously discovered third

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23 George Frederick Cruchley, China, *Selection of Maps from Cruchley's General Atlas, for the Use of Schools and Private Tuition*, London, 1850, at http://www.geographicus.com, 22 February 2016.

24 Alvin Jewett Johnson, Johnson's China East Indies Australia and Oceanica, 1860, at http://www.davidrumsey.com/maps1751.html, 22 February 2016.

25 Alexander Keith Johnston, China and Japan, 1861, at http://www.davidrumsey.com/maps335.html, 22 February 2016.

26 Alvin Jewett Johnson, Johnson's China, in A. J. Johnson, *Johnson's New Illustrated Family Atlas*, New York: Johnson and Ward, 1862, at http://www.geographicus.com/P/AntiqueMap/China2-johnson-1862, 22 February 2016.

27 G.H. Swanston and J. Bartholomew, China, 1872, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~3456~400026:China-, 22 February 2016.

party maps. Each of these maps were in European languages and were charted by European and American cartographers.

The names of the Diaoyu Islands in third party maps may be categorized into three types (Annex 1) based on the names used within.

Type 1 maps use "Tiaoyusu", "Hoangoueysu" and "Tchehoeyou", which refer to Diaoyu Island, Huangwei-yu Island, and Chiwei-yu Island respectively (Annex 1). These are transliterations of Chinese place names,[28] and were widely adopted by many maps in the 18th and 19th century. The spelling of the island names in some maps changed slightly, in particular, some maps spelled "Tiaoyusu" as "Haoyusu".

This type of island names originated from Antoine Gaubil's French map *Carte Des Isles de Lieou-Kieou* (1751), which is the earliest record of the Diaoyu Islands in European maps.[29] Gaubil's map recorded the Diaoyu Islands as "Tiaoyusu", "Hoangoueysu" and "Tchehoeyou", referring to Diaoyu Island, Huangwei-yu Island, and Chiwei-yu Island, respectively. This map is actually a translation of the relevant map by Xu Baoguang, a Chinese official.[30]

The island names of Type 2 include "Houpinsu", "Tiaoyu-su", and "Tche-oey sou" originated from the transliterations of Chinese place names (Annex 1). The island names first appeared in *Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie*.[31]

The island names of Type 2 are more influential than those of Type 1 in the late 19th century. An interesting example is Cary's *A New Map of China*. In Cary's 1801 version, the island names of Type 1 were adopted, whereas his 1806 version used those of Type 2. During the 1840s, the British navy surveyed and mapped the Diaoyu Islands, and also adopted the island names of Type 2.

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28 Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands Prior to the Sino-Japanese War of 1894-95: Also a Query to Professor Toshio Okuhara and Others*, Beijing: China Democracy and Law Press, 2013 (in Chinese).

29 R.P. Gaubil, *Carte Des Isles de Lieou-Kieou*, 1751; Maurus Fang Hau, *The Collected Works of Maurus Fang Hau, Revised and Edited by the Author on Sixtieth Birthday*, Taipei, Student Book Company, 1969 (in Chinese).

30 Xu Baoguang, Records of Messages from Chong-shan (Zhong Shan Chuan Xin Lu), in *Series of Index to SI-KU-QUAN-SHU – Histories*, Vol. 256, Jinan: Qilu Press, 1996. Xu, a deputy title-conferring envoy, was sent to Ryukyu by the Qing Dynasty in 1718. The historical background is that, the Ryukyu Kingdom was a tributary State of the Chinese Ming (1368-1644 AD) and Qing Dynasties (1644-1911 AD).

31 Jean-Francois de Galaup La Perouse, Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie, par les Fregates Francaises la Boussole et l'Astrolabe, depuis leur Depart de Manille jusqu'a leur Arrivee au Kamtschatka (1 ere. Feuille), Paris: L'Imprimerie de la Republique, 1797, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~20222~550043:Mers,-Chine,-Tartarie--1-, 22 February 2016.

The island names of Type 2, however, contain two misnomers. The Huangwei-yu Island was incorrectly labeled as "Tiaoyu-su", and the Diaoyu Island misnamed as "Houpinsu". "Tiaoyu-su" is the transliteration of Diaoyu-yu, where the latter "yu" means islet. "Diaoyu-yu" is another name of Diaoyu Island, whereas "Houpinsu" is actually a transliteration of Huaping-yu Island. Huaping-yu Island lies to the northeast of Taiwan Island, and to the southwest of Diaoyu Island. Diaoyu Island lies to the southwest of Huangwei-yu Island. In addition, the Chiwei-yu Island was recorded as "Tche-oey sou" in earlier maps, but was later labeled as "Rock" and "Raleigh Rock" in later maps.

Type 3 simply records the Diaoyu Islands as "I. Tiaoyu-su" or "Tiaoyu su".

The Japanese government claims that the Diaoyu Islands were *terra nullius,* and were acquired by virtue of "discovery-occupation". As was stated above, previous studies suggested that the claim was not supported by historical documents. Our discovery of cartographic and toponymic evidence further indicates that the Diaoyu Islands had already been discovered and named by the Chinese centuries before they were occupied by the Japanese, and that this fact was widely known in Europe and America. These historical records support that these islands were not *terra nullius* prior to the First Sino-Japanese War (1894-1895).

IV. Discussions on the Use of "Pinnacle Islands", "Pinnacle Group" and "Pinnacle Island"

"Pinnacle Islands", "Pinnacle group" and "Pinnacle Island" are another group of important place names. The book *The China Pilot 1861* recorded the two place names in the section "Hoa-pin-su, Pinnacle, and Ti-a-usu Islands".

> *This group forms a triangle, of which the hypotenuse, or distance between Hoa-pin-su and Ti-a-usu, extends about 15 miles, and that between Hoa-pin-su and the southern Pinnacle Island about 2 miles ... The extreme height of Hoa-pin-su is 1,181 feet ... the north face of the island is in lat. 25°47′7″ N., long. 123°30½′ E. ... The Pinnacle group, which is connected by a reef and bank of soundings with Hoa-pin-su ... Ti-a-usu, bearing N.E. northerly 15 miles from Hoa-pin-su, appears to be composed of huge boulders of a greenish porphyritic stone. The capping of this island, from about 60 feet, to its summit, which is about 600 feet from the level of the sea, is covered with a loose*

brushwood, but no trees of any size.[32]

This record is an updated version of an earlier record,[33] whereas similar records are also available in some later sources (Annex 1). "Pinnacle Islands" and "Pinnacle group" referred to the Nanxiao Dao and Beixiao Dao Islets in mid-19th century literature. It is noteworthy that the Nanxiao Dao and Beixiao Dao Islands are two islets of the Diaoyu Islands, and lie to the southeast of the Diaoyu Island. The Japanese name of the Diaoyu Islands "Senkaku Islands" is a translation of the "Pinnacle Islands" or "Pinnacle group", however, the Japanese use this word to name the entire group of Diaoyu Islands, not the islets of Nanxiao Dao and Beixiao Dao. Thus, the Japanese name of the Diaoyu Islands, "Senkaku Islands", is a misnomer. It is a translation of "Pinnacle Islands", however, the latter is the European name of the Nanxiao Dao and Beixiao Dao Islets, not the entire set of Diaoyu Islands.

The meaning of the term "Pinnacle Island" is different, and it does not correspond to any part of the Diaoyu Islands. It may have first appeared in Johnston's *China and Japan* (1861) and the *China Sea Pilot*, and was used in G.H. Swanston and J. Bartholomew's *China* (1872) (Annex 1). According to its location shown in the above mentioned maps and the coordinates described in the *China Sea Pilot*, we can know that it refers to the Huaping-yu Island, an island lying between Taiwan and the Diaoyu Islands.

V. Conclusions

We report the discovery of 14 maps that recorded the Diaoyu Islands. Each of these maps were charted by European and American cartographers during the 18th and 19th centuries. The names of the Diaoyu Islands in these maps may be categorized into three types: Type 1, which uses "Tiaoyusu", "Hoangoueysu" and "Tchehoeyou" to refer to Diaoyu Island, Huangwei-yu Island, and Chiwei-

32 John W. King, *The China Pilot 1861: The Coasts of China, Korea, and Tartary; The Sea of Japan, Gulfs of Tartary and Amúr, and Sea of Okhotsk; and the Babuyan, Bashí, Formosa, Meiaco-Sima, Lu-chu, Ladrones, Bonin, Japan, Saghalin, and Kuril Islands*, third edition, published by order of the Lords Commissioners of the Admiralty, London: printed for Hydrographic office, Admiralty, 1861.

33 Robert Loney ed., *The China Pilot: Part I, East Coast from Hong Kong to Shanghai*, *Chiefly from the Surveys of Captain Collinson*, published by order of the Lords Commissioners of the Admiralty, London: printed for the Hydrographic Office, Admiralty, 1855.

yu Island, respectively; Type 2, which uses "Houpinsu", "Tiaoyu-su", and "Tcheoey sou" to refer to Diaoyu Island, Huangwei-yu Island, and Chiwei-yu Island, respectively; and, Type 3, where "Tiaoyu su" refers to the entire Diaoyu Islands. All the names of the islands are transliterations of the pronunciation of Chinese place names. As a whole, our study supports the idea that the Diaoyu Islands are, in historical terms, Chinese territory, and should not be considered as *terra nullius* prior to the Treaty of Shimonoseki (1895).

Annex 1 Three Types of Historical Names for the Diaoyu Islands as Recorded in Maps in European Languages

Type 1: Usage of "Tiaoyusu", "Hoangoueysu" and "Tchehoeyou" to Respectively Refer to Diaoyu Island, Huangwei-yu Island, and Chiwei-yu Island

No.	Diaoyu Island	Huangwei-yu Island	Chiwei-yu Island
1-1 [34]	Hao-yu-su	Hoan-oey-su	Tshe-oey-su
1-2 [35]	Haoyusu	Hoanoeysu	Tcheoeysu
1-3 [36]	Haoyusu	N/A	Tsheceyou
R1-1* [37]	Tiaoyusu	Hoangoueysu	Tchehoeyou
R1-2 [38]	Hao-yu-su	Hoan-oey-su	Tche-oey-su

34 John Cary, A New Map of China, from the Latest Authorities, 1801, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~21541~640033:A-new-map-of-China,-from-the-latest, 22 February 2016.

35 Mathew Carey, China, Divided into Its Great Provinces, 1811 and 1814, at http://www.davidrumsey.com/maps890071-24382.html and http://www.davidrumsey.com/maps3286.html, 22 February 2016.

36 Fielding Lucas Jr., China, 1823, at http://www.davidrumsey.com/maps6286.html, 22 February 2016.

37 R.P. Gaubil, *Carte Des Isles de Lieou-Kieou*, 1751; Maurus Fang Hau, *The Collected Works of Maurus Fang Hau, Revised and Edited by the Author on Sixtieth Birthday*, Taipei: Student Book Company, 1969 (in Chinese); Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

38 Jean Baptiste Bourguignon D'Anville, Second Part of Asia, being China, Part of India and Tartary, the Islands of Sonda, Molucka, Philippin, Japan etc., in Postlethwayt, *The Universal Dictionary of Trade and Commerce*, London: Printed for J. and P. Knapton, 1751-1755; Han Zhaoqing, Diaoyu Islands on Maps of China Drawn by Western Cartographers before the Sino-Japanese War of 1894-1895, *Fudan Journal (Social Sciences)*, No. 1, 2013, pp. 88~98 (in Chinese).

R1-3 [39]	Hao-yu-su	Hoan-oey-su	Tche-oey-su
R1-4 [40]	Hao-yu-su	Hoan-oey-su	Tshe-oey-su
R1-5 [41]	Hao-yu-su	Hoanoey-su	Tshe-oey-su
R1-6 [42]	Haoyusu?	Hoan-oey-su	Tche-oey-su
R1-7 [43]	Haoyusu	Hoanoeysu	Tcheoeysu
R1-8 [44]	Hao-yu-su	Hoan-oey-su	Tche-oey-su

"R" refers to previously discovered maps.

39 Samuel Dunn, China, Divided into Its Great Provinces, and the Isles of Japan, London: printed for Rob. Sayer, 1774; Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

40 Jo. Roberts, The Empire of China, with Its Principal Divisions: Drawn from the Surveys Made by the Jesuits, London: printed for Robt. Sayer and John Bennett, No. 53, in Fleet Street, as the Act directs, 1775; Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese).

41 Aaron Arrowsmith, Arrowsmith's Map of the World on a Globular Projection, Exhibiting Particularly the Nautical Researches of Captain James Cook, with All the Recent Discoveries to the Present Time, 1794; Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

42 J. Russell, China with the Tributary States, printed on 18 July 1795; Han Zhaoqing, Diaoyu Islands on Maps of China Drawn by Western Cartographers before the Sino-Japanese War of 1894-1895, *Fudan Journal (Social Sciences)*, No. 1, 2013, pp. 88~98 (in Chinese).

43 Mathew Carey, China Divided into [Its] Great Provinces, 1796, at http://www.davidrumsey.com/maps860070-23904.html, 22 February 2016; Han Zhaoqing, Diaoyu Islands on Maps of China Drawn by Western Cartographers before the Sino-Japanese War of 1894-1895, *Fudan Journal (Social Sciences)*, No. 1, 2013, pp. 88~98, pp. 88~98 (in Chinese).

44 John Cary, A New Map of China, from the Latest Authorities, 1811; Han Zhaoqing, Diaoyu Islands on Maps of China Drawn by Western Cartographers before the Sino-Japanese War of 1894-1895, *Fudan Journal (Social Sciences)*, No. 1, 2013, pp. 88~98 (in Chinese); Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

Type 2: Usage of "Houpinsu", "Tiaoyu-su", and "Tche-oey sou", to Respectively Refer to Diaoyu Island, Huangwei-yu Island, and Chiwei-yu Island

No.	Diaoyu Island	Huangwei-yu Island	Chiwei-yu Island
2-1 [45]	I. Houpinsu	I. Tiaoyu-su	I. Tche-oey sou
2-2 [46]	Houpin su	Tiaou su	Tche oey su
2-3 [47]	I. Hao-pin-su	I. Tiaoyu-su	I. Tsheouyesou
2-4 [48]	Hoapinsu	Tyaoisu	N/A
2-5 [49]	Hoapin-su	Tiaoyu-su	Rock
2-6 [50]	Hoa-pin-sin	Tia-yu-su	N/A
2-7 [51]	Hawapin-san	Taiyusu	N/A
2-8 [52]	Hoa-pin-sin	Tia-yu-su	N/A
R2-1 [53]	Houpin su	Tiaoyu su	Tcheoey su

45 Jean-Francois de Galaup La Perouse, Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie, par les Fregates Francaises la Boussole et l'Astrolabe, depuis leur Depart de Manille jusqu'a leur Arrivee au Kamtschatka (1 ere. Feuille), Paris: L'Imprimerie de la Republique, 1797, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~20222~550043:Mers,-Chine,-Tartarie--1-, 22 February 2016; John Thomson, Tartary, N.R. Hewitt sc., 10 Broad Str., Bloomsbry., London. Drawn and engraved for Thomson's New General Atlas, 1 September 1814.

46 John Thomson, Tartary, N.R. Hewitt sc., 10 Broad Str., Bloomsbry., London. Drawn and engraved for Thomson's New General Atlas, 1 September 1814.

47 Adrien Hubert Brue, L'Asie 4, 1814, at http://www.davidrumsey.com/maps1030047-25565.html, 22 February 2016.

48 Sidney Hall, China, 1828, at http://www.davidrumsey.com/maps3989.html, 22 February 2016.

49 John Arrowsmith, China, 1844, at http://www.davidrumsey.com/maps872.html, 22 February 2016.

50 Alexander Keith Johnston, China and Japan, 1861, at http://www.davidrumsey.com/maps335.html, 22 February 2016.

51 Alvin Jewett Johnson, Johnson's China, in A. J. Johnson, *Johnson's New Illustrated Family Atlas*, Johnson and Ward, 1862, at http://www.geographicus.com/P/AntiqueMap/China2-johnson-1862, 22 February 2016.

52 G.H. Swanston and J. Bartholomew, China, 1872, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~3456~400026:China-, 22 February 2016.

53 John Cary, A New Map of Chinese & Independent Tartary, from the Latest Authorities, 1806, at http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~21542~640034:Tartary,-Chinese-&-independent-, 22 February 2016; Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

R2-2[54]	Hawapin-san	Taiyusu	
R2-3[55]	Hoa-pin-su	Ti-a-usu	Raleigh Rock
R2-4[56]	Hoapinsu	Ti-a-usu	Raleigh Rock
R2-5[57]	Hoa-pin-su	Ti-a-usu	Raleigh Rock
R2-6[58]	Hoapinsu	Tiausu	Raleigh Rock

Note: R2-3, R2-4, R2-5, and R2-6 recorded the Nanxiao Dao and Beixiao Dao Islands as "Pinnacle Islands" or "Pinnacle Group". The Nanxiao Dao and Beixiao Dao Islands, lying to the southeast of the Diaoyu Island, are two islets of the Diaoyu Islands.

54 G.W. Colton, China (with) Two Insets: Harbor & Island of Amoy and Map of Canton and Adjacent Islands. Published by J.H. Colton & Co. No. 172 William St. New York, 1856, at http://www.davidrumsey.com/maps3483.html, 22 February 2016; Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese).

55 John W. King, *The China Pilot 1861: The Coasts of China, Korea, and Tartary; The Sea of Japan, Gulfs of Tartary and Amúr, and Sea of Okhotsk; and the Babuyan, Bashí, Formosa, Meiaco-Sima, Lu-chu, Ladrones, Bonin, Japan, Saghalin, and Kuril Islands*, third edition, published by order of the Lords Commissioners of the Admiralty, London: printed for Hydrographic office, Admiralty, 1861; Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

56 China, East Coast Hong Kong to Gulf of Liautung, Compiled from Various Authorities in the Hydrographic Office, London: published at the Admiralty, 1877; Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

57 Frederick W. Jarrad, *The China Sea Directory, Vol. 4. Comprising the Coasts of Korea, Russian Tartary, Japan Islands, Gulfs of Tartary and Amúr, and the Sea of Okhotsk, also the Meiaco, Liu-kiu, Linschoten, Mariana, Bonin, Saghalin, and Kuril Islands*, second edition, compiled from various sources, published by order of the Lords Commissioners of the Admiralty, London: printed for Hydrographic office, Admiralty, 1884; Zheng Hailin, *Sovereignty Issue of the Diaoyu Islands*, Taipei: Strait Academic Press, 2011, pp. 1~455 (in Chinese); Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

58 China Sea, Compiled from the Latest Government Surveys, 1886, at http://acms.sl.nsw.gov.au/album/ItemViewer.aspx?itemid=915216&suppress=N&imgindex=1, 22 February 2016; Ju Deyuan, *Rectification of the Name of the Diaoyu Islands – Historical Sovereignty over the Diaoyu Islands and the Sources of International Law*, Beijing: Kunlun Press, 2006, pp. 1~455 (in Chinese).

Type 3: Usage of "Tiaoyu su" Refers to the Entire Diaoyu Islands

No.	Diaoyu Island	Huangwei-yu Island	Chiwei-yu Island
3-1 [59]	I. Tiaoyu-su	N/A	N/A
3-2 [60]	Tia-yu-su	N/A	N/A
3-3 [61]	Tiaoyu su	N/A	N/A
R3-1 [62]	Tiayu-Su	N/A	N/A
R3-2 [63]	Tia-yu-su	N/A	N/A

Annex 2 Records of the Diaoyu Islands in Newly Discovered Historic Maps

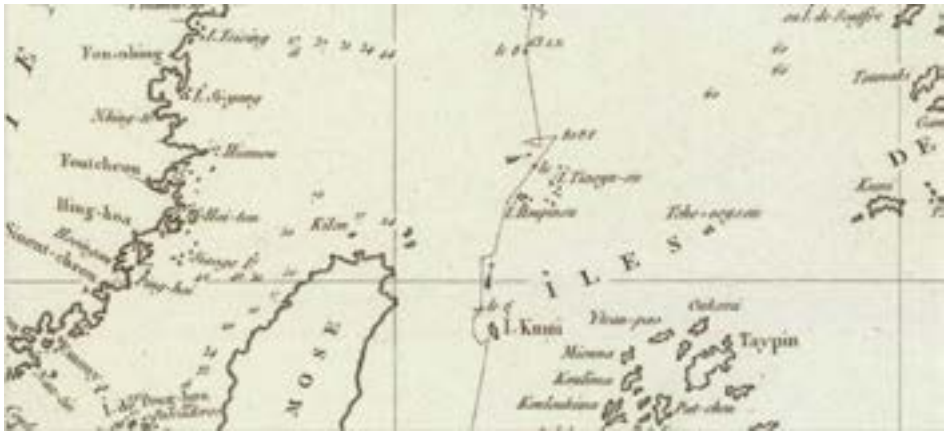

Fig. 1 Jean-Francois de Galaup La Perouse, Carte des Decouvertes, Faites en 1787 dans les Mers de Chine et de Tartarie, 1797

59 J. Andriveau-Goujon, Carte de l'Empire Chinois et du Japon, 1847, at http://www.davidrumsey.com/maps1100406-26346.html, 22 February 2016.

60 George Frederick Cruchley, China, *Selection of Maps from Cruchley's General Atlas, for the Use of Schools and Private Tuition*, London, 1850, at http://www.geographicus.com, 22 February 2016.

61 Alvin Jewett Johnson, Johnson's China East Indies Australia and Oceanica, 1860, at http://www.davidrumsey.com/maps1751.html, 22 February 2016.

62 China and the Adjacent Countries, 1842; Han Zhaoqing, Diaoyu Islands on Maps of China Drawn by Western Cartographers before the Sino-Japanese War of 1894-1895, *Fudan Journal (Social Sciences)*, No. 1, 2013, pp. 88~98 (in Chinese).

63 George Frederick Cruchley, Cruchley's China (Educational series), printed in London, 1861; Hungdah Chiu, Chinese Analysis of Evidences on the Sovereignty over the Diaoyu Islands, *Ming Pao Monthly*, Vol. 78, 1972, pp. 53~63 (in Chinese).

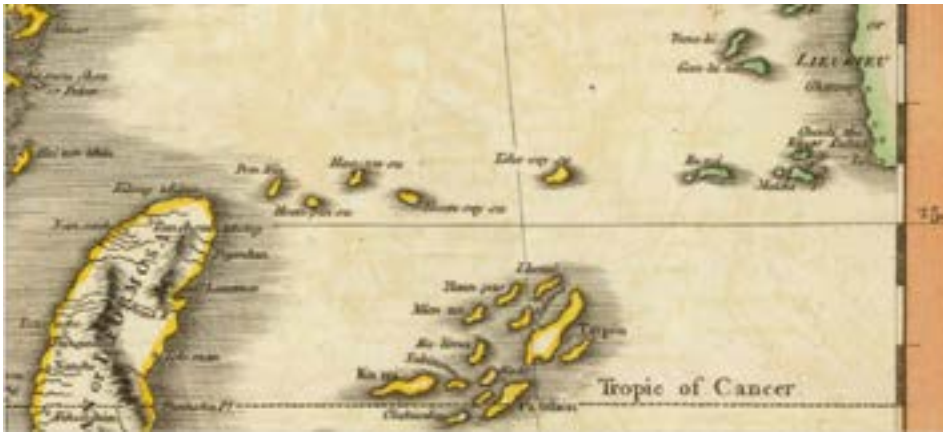

Fig. 2 John Cary, A New Map of China, from the Latest Authorities, 1801

Fig. 3 Mathew Carey, China, Divided into Its Great Provinces, 1811

Fig. 4 John Thomson, Tartary, 1814

Fig. 5 Adrien Hubert Brue, L'Asie 4, 1814

Fig. 6 Fielding Lucas Jr., China, 1823

Fig. 7 Sidney Hall, China, 1828

Fig. 8 John Arrowsmith, China, 1844

Fig. 9 J. Andriveau-Goujon, Carte de l'Empire Chinois et du Japon, 1847

Fig. 10 G.F. Cruchley, China, 1850

Fig. 11 Alvin Jewett, Johnson's China East Indies Australia and Oceanica, 1860

Fig. 12 Alexander Keith Johnston, China and Japan, 1861

Fig. 13 Alvin Jewett Johnson, Johnson's China, 1864

Fig. 14 G.H. Swanston and J. Bartholomew, China, 1872

Editor (English): David Devlaeminck

南海岛礁建设中船舶超航区航行情况下的保险责任

李荣存* 李 澜**

内容摘要: 针对近两年出现的船舶超航区航行情况下产生的保险理赔争议（尤其是涉及在三沙市下辖的诸岛附近航行的问题），本文明确了船舶超航区航行的含义，指出船舶超航区航行属于一种行政违法行为，依法应承担相应的行政责任；同时，船舶超航区航行也有可能面临保险人拒赔的风险。我国现行海事司法实践中倾向于认定船舶超航区航行构成船舶不适航，若保险人意图以船舶超航区航行为由拒赔，则应举证证明承保船舶存在超航区航行的事实、以及与保险事故之间存在因果关系。

关键词: 船舶超航区航行 南海岛礁 保险责任

一、引 言

近两年因船舶超航区航行导致保险理赔争议的案件时有发生，尤其是自三沙市设立之后，核定航区为沿海航区或近海航区的船舶在三沙市下辖的岛礁附近航行或作业发生事故引起保险合同纠纷的案件更是屡见不鲜。保险人与被保险人之间在船舶是否存在超航区航行的事实，超航区航行是否构成不适航，以及超航区航行与保险事故之间是否存在因果关系等问题上存在较大争议。本文结合作者的实务经验和调研，对这些问题进行一一探讨。

二、船舶超航区航行之界定

航区，即航行区域，我国海事管理中主要涉及以下 2 种航区：

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1. 船舶航区

船舶航区，是指船舶证书（如适航 / 适拖证书、船舶入级证书等）上所注明的经船舶检验部门、船级社核定的船舶的航区，其主要是根据船舶的构造、设施设备、吨位来限定的。一般而言，一艘船舶往往在其设计、建造时就已经确定了它的航区，航区不同，则其航行性能，船体的强度、结构及各种设备配备的要求，以及船员配备的要求等均不相同。[1] 根据中华人民共和国海事局颁行的《船舶与海上设施法定检验规则——国内航行海船法定检验技术规则》，海船的航区分为远海航区、近海航区、沿海航区和遮蔽航区 4 类。

2. 船员适任航区

船员适任航区，则是指船员适任证书中标明的该适任证书所能够适用的船舶的航区，根据现行 2004 年《中华人民共和国海船船员适任证书考试、评估和发证规则》，海船船员适任航区分为无限航区、近洋航区、沿海航区、近岸航区 4 类，其划分的航区名称及含义与船舶航区均不尽相同。

由上可知，船舶航区与船员适任航区存在实质的区别，[2] 但二者也存在一定的联系，如船舶超航区航行也有可能同时构成船员超适任航区航行，本文对此问题不做赘述，而主要探讨船舶超航区航行所涉的保险责任相关问题。本文以下所指的船舶超航区航行，是指船舶航行或作业超过了其船舶证书上载明的、由船舶检验部门、船级社核定的准予航行的航区。

三、船舶超航区航行属于一种行政违法行为

《中华人民共和国海上交通安全法》（以下简称“《海安法》”）第 10 条规定，“船舶、设施航行、停泊和作业，必须遵守中华人民共和国的有关法律、行政法规和规章”，《中华人民共和国海上海事行政处罚规定》（以下简称“《海事行政处罚规定》”）第 37 条第 2 款明确列举了“船舶、设施不遵守有关法律、行政法规和规章，影响其他船舶、设施航行、停泊和作业的安全”的具体情形，其中第（十一）项情形即为“超过核定航区航行”，由此可见，船舶超航区航行被法律明文规定为一种行政违法行为；而且，根据《海事行政处罚规定》第 37 条第 1 款规定，按照船舶超航区航行是否属于经营活动、是否有违法所得，应对船舶所有人、经营人及船长和其他直接责任人员处以相应金额的罚款。

尽管船舶超航区航行被《海事行政处罚规定》明文界定为一种影响其他船舶、

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1 陈文刚、田志宏：《浅析沿海航区船舶不能超航区航行的原因》，载于《中国水运》2010 年第 7 期，第 51~52 页。

2 金跃波：《船舶航区含义及名称问题探讨》，载于《中国水运》（学术版）2006 年第 7 期，第 14~16 页。

设施航行、停泊和作业安全的违法行为，实践中却多有发生船舶罔顾安全隐患、为了经济效益、节省航行时间选择更便捷的航线等原因而超过了核定的航区航行，在此情况下，一旦船舶出险，则往往会面临保险人以船舶超航区航行拒赔的局面。

四、保险人能否以船舶超航区航行为由拒赔

在我国海事司法实践中，保险人与被保险人之间就船舶超航区航行下的保险责任存在较大争议，如承保船舶是否存在超航区航行的事实？船舶超航区航行是否构成船舶不适航？船舶超航区航行与保险事故之间是否能够构建起因果关系？尤其是，在保单中约定的船舶保险的承保范围（如经营航线）已经远远超出该核定航区的情况下，船舶超航区航行引致的保险事故是否需要承担保险责任？在实务中，保险人通常主张船舶超航区航行构成船舶不适航，并进而主张免除赔偿责任，但保险人能否以船舶超航区航行为由拒赔，主要取决于对以下 4 个争议问题的认定。

（一）承保船舶是否超航区航行

船舶是否超过了核定的航区航行本质上属于一个事实问题，尤其是，当船舶险保单中明确以经纬度范围约定了船舶的航行范围的情况下，这一问题并不存在争议。然而，自三沙市设立以来，[3] 时有发生我国沿海航区及近海航区船舶在三沙市下辖的岛礁附近航行或作业过程中遇险的事故，而由于我国相关海事法律法规、规范性文件中对船舶航区的界定不甚明确，保险人与被保险人之间就出险船舶是否超航区航行这一事实问题往往存在极大争议。

根据中华人民共和国海事局《国内航行海船法定检验技术规则（2011 年版）》总则第 13 条关于“航区划分及营运限制”的界定，近海航区系指“中国渤海、黄海及东海距岸不超过 200n mile 的海域；台湾海峡；南海距岸不超过 120n mile（台湾岛东海岸、海南岛东海岸及南海岸距岸不超过 50n mile）的海域”；沿海航区指“台湾岛东海岸、台湾海峡东西海岸、海南岛东海岸及南海岸距岸不超过 20n mile 的海域和除上述海域外距岸不超过 20n mile 的海域；距有避风条件且有施救能力的沿海岛屿不超过 20n mile 的海域。但对距海岸超过 20n mile 的上述岛屿，本局将按实际情况缩小该岛屿周围海域的距岸范围”。

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3 经国务院批准，三沙市作为海南省四个地级市之一，于 2012 年 7 月 24 日正式设立，下辖西沙群岛、中沙群岛、南沙群岛的岛礁及其海域，政府驻地位于西沙永兴岛，参见文中图示。

图 1　三沙市辖区地图 [4]

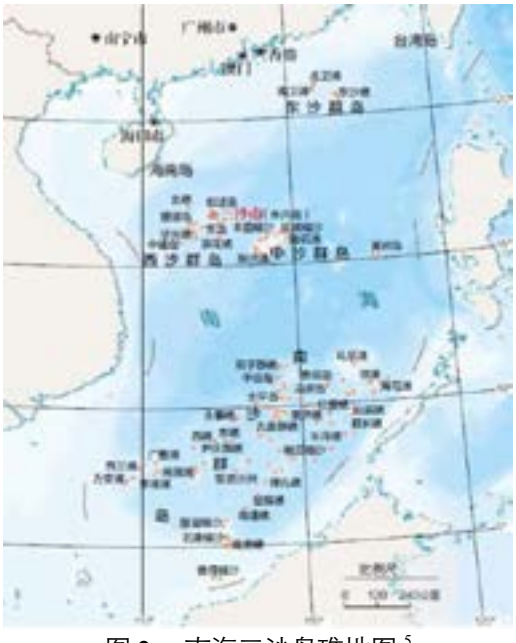

图 2　南海三沙岛礁地图 [5]

4　下载于 http://www.360doc.com/content/12/0726/12/3008216_226552860.shtml，2016 年 6 月 15 日。

5　下载于 http://www.360doc.com/content/12/0726/12/3008216_226552860.shtml，2016 年 6 月 15 日。

经咨询我国交通运输部海事局政策法规处，以上“距岸”的含义原则上是指距海岸线，包括大陆及岛屿（如上述台湾岛、海南岛）岸线；而鉴于《国内航行海船法定检验技术规则（2011 年版）》规定航区应具备“避风条件”和“施救能力”2 个条件，考虑到三沙下辖的绝大多数岛礁并不具备这 2 个条件，故这里的“距岸”并不包括距岛礁岸线的含义。

在三沙市下辖的南海诸岛中，离海南岛最近的西沙群岛距海南岛东南岸也大约有 180 海里，可见三沙市辖区显然不属于上述界定的近海航区或沿海航区的范围；然而，具体案件中船舶是否超航区航行仍需根据个案情况予以确定。

（二）船舶超航区航行是否构成不适航

我国《海商法》第 244 条规定，“除合同另有约定外，因下列原因之一造成保险船舶损失的，保险人不负赔偿责任：（一）船舶开航时不适航，但是在船舶定期保险中被保险人不知道的除外；……”，故在船舶超航区航行发生保险事故时，保险人通常以船舶超航区航行构成船舶不适航为由拒赔。但由于我国《海商法》第十二章“海上保险合同”对何为船舶适航并未予以明确定义，因此，尤其是在船舶保单或保险条款未就船舶适航的标准进行约定的情况下，保险人与被保险人之间在此问题上也存在争议。

1. 保险条款明确约定船舶超航区航行构成不适航

在保险条款中明确将船舶超航区航行列为不适航情形之一的典型当属《中国人民财产保险股份有限公司沿海船舶保险条款（2009 版）》及《中国人民财产保险股份有限公司内河船舶保险条款（2009 版）》第 6 条第 1 款之规定，即“船舶不适航（不适拖），包括保险船舶的人员配备不当、技术状态、航行区域、用途不符合航行（拖航）规定或货物装载不妥”。

2. 中国人民银行《沿海内河船舶保险条款解释》（银发〔1996〕459 号）

央行于 1996 年 12 月 27 日印发的《沿海内河船舶保险条款解释》，对船舶保险下的船舶适航进行了详细诠释，并认为船舶超航区航行的情况构成船舶不适航，属于保险除外责任：

> 一、适航是船舶能经受所驶航区通常所遇到的各种危险，它与保障等方面的适宜程度有关。船舶适航在有关法律、国际贸易法和保险条款中都有明确要求。我国《海上交通安全法》、《海商法》对船舶本身的适航均有明确定义，同时也对船舶保险中的船舶适航作了范围扩大的定义，并作为被保险人及其代表的一项重要义务。因此在保险条款中，船舶必须适航均作为被保险人（包括租赁经营人）的默示保证条款。
>
> 二、保险合同中的船舶适航包括 3 个方面的内容：一是船舶在设计、构造

和设备上应符合船舶建造和检验规范的要求，并经过检验获得相应的合格证书；二是船员资格、配备燃料和供给应符合有关法规的规定并满足航区的需要；三是配载货物应符合有关规定的要求。

三、凡有下列情况之一者，均构成了船舶不适航，本保险不负赔偿责任。

（一）船舶未持有法定的技术证书，或伪造、涂改证书，或船舶实际状况与证书所载不符。

（二）不遵守船舶性能限定的航行区域，擅自扩大航行区域，或未经过船检部门检验批准改变船舶原定的用途……

应当指出的是，尽管央行上述《沿海内河船舶保险条款解释》自 2010 年 9 月 29 日起已被废止，[6] 但其对我国海事司法实践中关于船舶保险中船舶适航的判定仍产生了一定影响。

3. 我国海事司法实践中的立场

案例一：

在阳光保险股份有限公司柳州中心支公司等诉柳州远龙航运有限公司通海水域保险合同纠纷案 [7] 中，法院认为

船舶是否适航，应从船舶技术状态、配员、装载等方面认定。船舶不适航主要指：

1. 人员配备不当。船上未能配备合格职务船员和按规定数量配置的人员。

2. 船舶适航证书失效。船舶国籍证书、船舶登记证书、船舶检验证书、捕捞许可证等过期失效。

3. 超航区、超抗风等级。超过适航证书记载的安全航行区域或抗风力等级。

4. 装备不妥。船舶技术性能不符合船舶的船级规范要求和不具备其航程所需的装备以及燃料、物料、淡水和给养物品不足。

5. 配载不当。装载货物没有按船型要求或进行合理配载。

案例二：

在朱某甲与华安财产保险股份有限公司上海分公司海上保险合同纠纷上诉案 [8] 中，唐山海事局出具的事故调查报告对该案事故原因进行了分析，认为

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6 该条款解释被《中国人民银行、中国保险监督管理委员会公告 (2010) 第 12 号——废止〈关于恢复国内保险业务和加强保险机构的通知〉等 38 件规范性文件的公告》废止。

7 （2014）桂民四终字第 48 号，（2013）海商初字第 68 号。

8 （2014）沪高民四（海）终字第 117 号，（2013）沪海法商初字第 1591 号。

事故的直接原因是“鸣某某”轮航行至京唐港附近水域时，正值台风“达维”过境，“鸣某某”轮遭遇大风浪，货舱进水导致船舶沉没。事故的间接原因是：1.“鸣某某”轮不适航，船舶超航区航行。“鸣某某”轮属内河船舶，船舶结构、强度、稳性和船上设备均不能满足海上安全航行需要，亦不具备抵御海上风浪的能力；2.“鸣某某”轮船上人员不适任。船上人员均未持有船员证书，也未经过相关的培训，违反了海上交通运输法律法规；3. 船舶管理混乱、安全意识不强。

两审法院也一致认定船舶构成不适航。

综上，即便船舶已取得适航 / 适拖证书，根据我国现行司法实践，其超航区航行仍应被认定为是不适航。

（三）船舶超航区航行与保险事故之间有无因果关系

根据我国《海商法》第 244 条规定，“除合同另有约定外，因下列原因之一造成保险船舶损失的，保险人不负赔偿责任：（一）船舶开航时不适航，但是在船舶定期保险中被保险人不知道的除外；……”，可见，即便船舶超航区航行构成不适航，作为保险人若想主张免除保险责任，则仍须证明船舶不适航与保险事故之间存在因果关系，这一点在我国现行海事司法实践中也得到普遍认同。

案例一：在刘和峰与中国太平洋财产保险股份有限公司舟山市普陀支公司海上保险合同纠纷上诉案[9]中，浙江省高级人民法院认为，

刘和峰经营的“国良 108”轮未配置适任船员只构成船舶不适航，并未明确约定为保险人免责事项，即便可以认定为被保险人及其代表的故意行为、重大过失行为，太保公司仍需证明本案事故损失与该行为的因果联系。

案例二：在乐清市江南海运有限公司与中国太平洋财产保险股份有限公司等海上、通海水域保险合同纠纷上诉案[10]中，上海市高级人民法院认为，

对于沉船事故引起的船舶保险合同案件，被保险人只需对损失与承保危险之间的因果关系进行初步证明；在被保险人已经初步证明损失是由于承保危险造成的情况下，保险人如以船舶不适航拒赔，应提供证据证明损失系因船舶不适航造成，而不能仅证明存在这种可能性。

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9 （2012）浙海终字第 29 号，（2011）甬海法舟商初字第 72 号。

10 （2008）沪高民四（海）终字第 1 号，（2006）沪海法商初字第 612 号。

案例三：在巴拿马永跃船务发展有限公司与中国人民财产保险股份有限公司青岛市分公司船舶保险合同保险赔偿金纠纷上诉案[11]中，山东省高级人民法院认为，

> 青岛人保向永跃公司出具的船舶保险单中记载按中国人保船舶保险条款（1986 年 1 月 1 日）承保一切险。上述保险条款关于责任范围的规定为，本保险承保船长、船员和引水员、修船人员及租船人的疏忽行为所造成的被保险船舶的损失。该条款关于除外责任的规定为，本保险不负责下列原因所致的损失、责任或费用：不适航，包括人员配备不当、装备或装载不妥，但以被保险人在船舶开航时，知道或应该知道此种不适航为限；被保险人及其代表的疏忽或故意行为；被保险人克尽职责应予发现的正常磨损、锈蚀、腐烂、保养不周，或材料缺陷包括不良状态部件的更换或修理。青岛人保以本案所涉事故损失是由于船东永跃公司未克尽职责所致为由主张免除其保险赔偿责任，应提交证据证实船舶不适航，或永跃公司有疏忽或未克尽职责的行为，且船舶不适航或永跃公司疏忽或未克尽职责的行为导致了本案所涉机损事故的发生。《船舶技术鉴定报告》的鉴定结论表明，本案所涉机损事故是船员的疏忽行为所造成的，属于中国人保船舶保险条款（1986 年 1 月 1 日）一切险的责任范围，青岛人保应予赔付。青岛人保提供的证据尚不足以证明“海丰大阪”轮存在双诚咨询公司《检验报告》所称的在沥港船厂修理后存在滑油分油机不能正常工作的问题和悦之公估公司《分析报告》所称的问题，亦不足以证明《检验报告》所称的该轮存在的五项问题和悦之公估公司《分析报告》所称的问题与机损事故之间存在因果关系，不能证明本案所涉机损事故是因为该轮不适航，或永跃公司疏忽或未克尽职责造成的，其免除赔付责任的主张没有事实和法律依据，本院不予支持。

然而，在有些船舶保险条款中，保险人关于船舶不适航与保险事故之间的因果关系这一举证责任因保险条款的设计而“化繁为无”，典型如《中国人民财产保险股份有限公司沿海船舶保险条款（2009 版）》及《中国人民财产保险股份有限公司内河船舶保险条款（2009 版）》除外责任条款的设计：

> 第六条 在保险期间内存在下述情况的，自该情况发生之日起保险人对任何原因产生的责任、损失和费用不负责赔偿：
>
> （一）船舶不适航（不适拖），包括保险船舶的人员配备不当、技术状态、航行区域、用途不符合航行（拖航）规定或货物装载不妥……

11 （2007）鲁民四终字第 65 号，（2004）青海法海商初字第 32 号。

根据上述保险条款的约定，一旦船舶超航区航行，即构成船舶不适航，且一旦构成不适航，则不论是何原因导致的责任、损失和费用，保险人均可以免除赔偿责任。但是，应当注意的是，鉴于此条款属于明显减轻、免除保险人责任的格式条款，保险人在与被保险人签订保险合同时应当作出明确说明，否则该条款将不产生效力。如在崔继好与民安财产保险有限公司蚌埠中心支公司海上保险合同纠纷案[12]中，法院即认定，因保险人民安公司未能举证证明其已经履行了明确告知的义务，保险合同的免责条款不发生效力，进而判决民安公司作为保险人仍应予以赔偿。

（四）船舶保险承保范围是否超出船舶核定航区

实践中，保单中载明的船舶航行区域一般与船舶证书上核定的航区一致，但也存在为减少风险而对承保船舶的航行区域进行特别约定，如具体到某些特定的航线或以经纬度确定承保船舶准予航行的范围（通常均在船舶证书核定航区的范围内），但也存在一些例外的情况，比如承保船舶的核定航区仅为沿海航区或近海航区，保单中约定的船舶保险的承保范围（如经营航线）却远远超出该核定航区，在这种情况下，若船舶超出核定的航区航行，但仍在约定的船舶保险的承保范围内，则保险人能否以船舶超航区构成船舶不适航为由拒赔呢？

我国《海商法》第 244 条规定，“除合同另有约定外，因下列原因之一造成保险船舶损失的，保险人不负赔偿责任：（一）船舶开航时不适航，但是在船舶定期保险中被保险人不知道的除外；……”，可见《海商法》赋予了海上保险合同缔约双方极大的合同自由，双方完全有权约定保险人对船舶超航区 / 不适航造成的责任、损失或费用承担赔偿责任，

五、结　语

综上所述，根据我国现行法律及海事司法实践，尽管船舶超航区航行属于一种行政违法行为，且在船舶超航区航行的情况下，法院极有可能认定船舶构成不适航；即便如此，保险人若想以船舶超航区航行为由拒赔，其仍面临繁重的举证责任：（1）在船舶保险单或保险条款中明确约定因船舶超航区航行构成不适航从而免除保险人赔偿责任的情况下，保险人须证明其妥善尽到对此类格式条款的说明、告知义务；（2）在不存在此种明确约定的情况下，保险人须证明船舶不适航与保险事故之间存在因果关系。

除此之外，如上所分析，若船舶保险合同中约定的承保范围超出了船舶核定

12　（2013）浙海终字第 77 号，（2012）甬海法商初字第 450 号。

的航区，则意味着保险人应当就其承保范围内的所有风险承担赔偿责任，因此，若船舶在承保范围内超航区行驶，则保险人可能丧失针对被保险人的免责抗辩。

Insurance Liability for Ships Sailing Beyond Their Designated Navigation Zones During Construction Activities on Islands in the South China Sea

LI Rongcun* LI Lan**

Abstract: This paper attempts to clarify the definition of ships sailing beyond their designated navigation zones in respect to insurance claims disputes (especially the disputes concerning navigating in the waters adjacent to islands under the jurisdiction of Sansha City) over the past two years. Considered as an illegal act under administrative law, sailing beyond navigation zones will give rise to a corresponding administrative liability; meanwhile, such sailing would likely risk the insurer repudiating any claims made by the insured ship and its owners. In China's maritime judicial practices, ships sailing beyond navigation zones are often identified as unseaworthy. If the insurer intends to refuse claims on these grounds, it should provide evidence to prove that the ship has sailed beyond its navigation zone and should causally link such sailing and the accident under investigation.

Key Words: Ships sailing beyond navigation zones; South China Sea Islands; Insurance liability

I. Introduction

Over the past two years, a series of disputes have occurred concerning insurance claims caused by ships which were sailing beyond their designated navigation zones. After the establishment of Sansha City, such insurance contract disputes have become more common since these ships are navigating or operating near

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the maritime features within the city's jurisdiction, however they are only registered for operation in coastal or offshore navigation zones. These disputes often riddled with controversy between the insurer and the insured concerning issues such as whether the ship has sailed beyond the navigation zone, whether the sailing beyond the navigation zone constitutes a condition unsuitable for navigation, and whether sailing beyond the navigation zone can be causally linked to the incident in question. This paper discusses these issues based on the practical and research experience of the authors.

II. Definition of a Ship Which Has Sailed Beyond Its Navigation Zone

China's maritime management primarily revolves around two categories of navigation zones: navigation zones for ships and navigation zones for seafarers.

1. Navigation Zones for Ships

Navigation zone for ships refers to the area where a ship may sail upon the approval of a ship inspection department and classification society, as indicated on the certificate of the ship, such as a seaworthiness/tow-worthiness certificate or ship classification certificate. It is primarily defined according to the structure, equipment and tonnage of the ship. Generally speaking, a ship's navigation zone is determined during its design and construction since different navigation zones require varied levels of navigational performance, strength, structure, equipment configuration, and staffing of ships.[1] According to the Regulations on Statutory Inspection of Vessels and Marine Installations – Technical Rules on Statutory Inspection of Seagoing Vessels in Domestic Navigation, the navigation zones for seagoing vessels can be classified into four categories: far sea, offshore, coastal and sheltered areas.

2. Navigation Zones for Seafarers

Navigation zone for seafarers refers to the area applicable to the navigation of ships identified in the certificate of competency for seafarers. In accordance with the 2004 Rules for Examination, Assessment and Issuance of a Certificate of Competency for Seafarers of the People's Republic of China, the navigation zones

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1 Chen Wengang and Tian Zhihong, A Brief Analysis of the Reasons for Ships' Sailing within Navigation Zones in Coastal Areas, *China Water Transport*, No. 7, 2010, pp. 51~52. (in Chinese)

for seafarers fall into four categories, whose designations and meanings are not the same with those for seagoing vessels, including: unlimited, offshore, coastal and near-shore areas.

The discussion above shows there are essential differences between navigation zones for seafarers and those for ships,[2] however these two categories are also connected. For example, while a ship sails beyond its navigation zone, its seafarers may also navigate beyond the area applicable to their eligibility. This question will not be elaborated here, since the paper only focuses on issues concerning insurance responsibility with respect to ships' sailing beyond their designated navigation zones. And a ship's sailing beyond its navigation zone hereinafter refers to the ship's sailing or operation beyond the area indicated on the certificate of the vessel upon the approval of the ship inspection department and the classification society.

III. Sailing Beyond Its Navigation Zone: An Illegal Act Under Administrative Law

Article 10 of the Maritime Traffic Safety Law of the People's Republic of China states that, "while navigating, berthing or carrying out operations, vessels and installations must abide by the relevant laws, administrative statutes and rules and regulations of the People's Republic of China." Article 37(2) of the Provisions of the People's Republic of China on Marine and Maritime Administrative Punishment, hereinafter referred to as "Provisions on Punishment", lists the circumstances when "a vessel or installation fails to observe the relevant laws, administrative regulations, and rules, and affects the safety of other vessels and installations in navigation, berthing, and operation," and the 11th circumstance refers to "navigating beyond its ratified navigation zone." Therefore, if a ship is navigating beyond its ratified navigation zone then such an act would be considered illegal under administrative law. Furthermore, Article 37(1) of the Provisions on Punishment stipulates, corresponding fines shall be imposed on the owner, operator or captain of the vessel or any other persons who are directly liable, depending on whether navigating beyond the ratified navigation zone was conducted for the purpose of business or non-business activities and whether or not there are any illegal proceeds.

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2 Jin Yuebo, Discussion on the Meaning and Designation of Navigation Zones for Ships, *China Water Transport*, No. 7, 2006, pp. 14~16. (in Chinese)

Sailing beyond the ratified navigation zone is defined in the Provisions on Punishment as an illegal act that affects the safety of other vessels and installations in navigation, berthing, and operation. In practice, quite a few ships have ignored the hidden dangers and navigated beyond their designated navigation areas to seek economic benefits or shorter sailing routes. Since these ships have sailed beyond their designated navigational areas, the insurer would refuse insurance claims if the ships were to be involved in an accident.

IV. Can Insurers Refuse Claims if a Ship Has Sailed Beyond Its Designated Navigation Zone?

In China's judicial practices concerning maritime affairs there is controversy between the insurer and the insured concerning insurance liability for ships which have sailed beyond their designated navigation zones, such as whether or not the insured ship has navigated beyond such zones, whether this constitutes its unseaworthiness, and whether there is any causality between the ship's navigating beyond its designated zone and its insurance claims. Particularly, when the insurance coverage agreed upon in the policy (including operation routes) is far beyond the designated navigation zone, is the insurer required to shoulder the insurance responsibility for accidents caused by the ship while in these areas? In practice, insurers often claim exemption from the compensation responsibility on the ground that navigation beyond the designated area constitutes unseaworthiness. Such an exemption depends on the following four issues.: 1) whether the ship has sailed beyond its designated navigation zone, 2) whether this navigation constitutes unseaworthiness, 3) whether this navigation and any incident can be causally linked, and 4) whether the ship's insurance coverage is applicable when the ship is beyond its navigable zone.

A. Has the Insured Ship Navigated Beyond Its Designated Zone?

In essence, whether or not the ship has sailed beyond its navigable zone is a factual question. As such, this issue is non-controversial especially when the insurance policy clearly defines the scope of navigation with longitudes and

latitudes. However, since the establishment of Sansha City,[3] multiple accidents have occurred near the maritime features under the city's jurisdiction involving vessels which are designated to navigate within coastal and offshore zones. Because of unclear definitions on the navigation areas for vessels in China's laws, regulations and normative documents pertinent to maritime affairs, there is much controversy between the insurer and the insured over whether the ship that has an accident has navigated beyond the designated navigation zone.

Fig. 1 Jurisdiction Map of Sansha City[4]

3 With the approval of China's State Council, Sansha City was officially inaugurated on July 24, 2012 as one of the prefecture-level cities of Hainan Province. Its government is situated in Yongxing Island of the Xisha Islands and it has jurisdiction over the maritime features of and the waters surrounding the Xisha Islands, Nansha Islands and Zhongsha Islands. Please refer to the maps for more details.

4 At http://www.360doc.com/content/12/0726/12/3008216_226552860.shtml, 15 June 2016. (in Chinese)

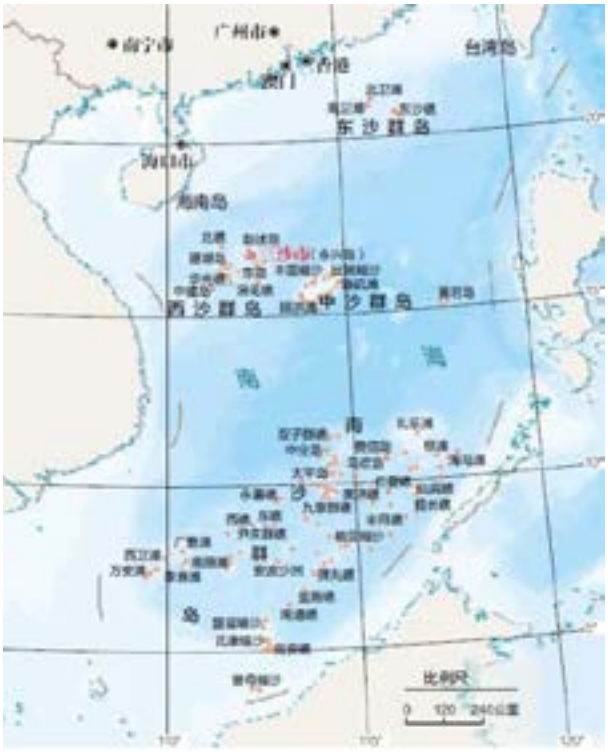

Fig. 2 Maritime Features under the Jurisdiction of Sansha City in the South China Sea[5]

According to the 2011 Technical Rules on Statutory Inspection of Seagoing Vessels in Domestic Navigation of the Maritime Safety Administration of the P.R.C., General Rules, Article 13 (Demarcation of navigation zones and limitations on operation and navigation), "offshore navigation zone" refers to "the waters in Bohai Sea, Yellow Sea and East China Sea less than 200 nautical miles from the coasts; Taiwan Strait; the waters in the South China Sea less than 120 nautical miles from the coasts (less than 50 nautical miles from the east coast of Taiwan Island, east and south coasts of Hainan Island)"; "coastal navigation zone" refers to "the waters less than 20 nautical miles from the east coast of Taiwan Island, east and west coasts of Taiwan Strait, east and south coasts of Hainan Island, as well as the waters less than 20 nautical miles from the coasts other than those mentioned above; the waters less than 20 nautical miles from the coastal islands capable of

5 At http://www.360doc.com/content/12/0726/12/3008216_226552860.shtml, 15 June 2016. (in Chinese)

providing shelter from the weather as well as rescue and relief. But as to the islands over 20 nautical miles from the coasts, the Administration will narrow the scope of their surrounding waters from the coasts."

According to the Policies and Regulations Department of Maritime Safety Administration of the P.R.C., the distance from the coasts in principle refers to the distance from the coastline, including mainland and island coastlines (such as Taiwan Island and Hainan Island). In view that the navigation zones should be capable of providing shelter from weather as well as rescue and relief in accordance with the 2011 Technical Rules on Statutory Inspection of Seagoing Vessels in Domestic Navigation, most maritime features under the jurisdiction of Sansha City do not enjoy such conditions; therefore the distance from the coastlines of these features is not included.

Among the South China Sea islands under the jurisdiction of Sansha City, the Xisha Islands, which is the nearest to Hainan Island, is approximately 180 nautical miles from the east and south Coasts of Hainan Island. It is clear that the areas within the jurisdiction of Sansha City do not fall within the scope of offshore or coastal navigation zones as defined above. As such, whether a ship has navigated beyond the designated navigation zone needs to be determined on a case-by-case basis.

B. Does the Ship's Navigation Beyond Its Designated Navigation Zone Constitute Unseaworthiness?

Article 244 of the Maritime Code of the People's Republic of China provides that, "[u]nless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from any of the following causes: (1) unseaworthiness of the ship at the time of the commencement of the voyage, unless where under a time policy the insured has no knowledge thereof; …" As such, the insurer often refuses such claims on the ground that the ship's navigation beyond its designated navigation area constitutes unseaworthiness. Since Chapter XII "Contract of Marine Insurance" of the Maritime Code contains no clear definition of "seaworthiness", controversy between the insurer and the insured arises, especially when the standards for a ship's seaworthiness are not fixed in the policy or insurance clauses.

1. Insurance Clauses Make It Clear That a Ship Sailing Beyond Its Designated Navigation Area Should Be Deemed Unseaworthy

Typical examples in this case include Article 6(1) of the Clauses of Insurance for Coastal Ships of PICC Property and Casualty Company Limited (2009) and Article 6(1) of the Clauses of Insurance for Inland Vessels of PICC Property and Casualty Company Limited (2009), which provide that "[w]here the insured ship is unseaworthy or untowworthy, including improper manning of the ship, the inconsistency of the ship's technical conditions, navigation zone and purpose with provisions relating to navigation (towing), and inappropriate loading of goods."

2. The Interpretations of Insurance Clauses for Coastal and Inland Ships Issued by the People's Bank of China (Y.F. [1996] No. 459)

The Interpretations of Insurance Clauses for Coastal and Inland Ships (Y.F. [1996] No.459) issued by the People's Bank of China on December 27, 1996, provides a detailed interpretation on the seaworthiness of insured ships, holding that navigation beyond the designated navigation zone constitutes unseaworthiness and is categorized as excluded liability in insurance. It states that:

I. Seaworthiness refers to all kinds of risks that the ships can withstand during its navigation through the navigation zone and is relevant to the suitability of guarantee and etc. There are clear-cut requirements on seaworthiness in relevant laws, international trade law and insurance articles. As for China, its Maritime Traffic Safety Law and Maritime Code have explicitly provided that ships should be seaworthy, and also extended the scope of seaworthiness under ship insurance and made it an important obligation for the insured and its representative. Therefore, among the insurance clauses, the one concerning the ship's seaworthiness is considered as an implied warranty by the insured, including leasing operator.

II. Seaworthiness in insurance contracts involves three aspects: 1) a vessel's design, structure and equipment should comply with the construction and inspection criteria, and it should obtain the corresponding certificate of conformity upon inspection; 2) seafarers' eligibility, fueling and supplies should conform to relevant laws and meet the requirements relating to the navigation zone; 3) stowage should fulfill relevant requirements.

III. Any of the following circumstances constitutes seaworthiness and the insured ship shall not be indemnified under this insurance, if:

(I) The vessel does not hold a statutory certificate of technical qualifications, the certificate is falsified or altered, or the vessel's actual conditions are inconsistent with those specified in the certificate.

(II) The vessel does not sail in the navigation zone defined according to its performance and arbitrarily navigates beyond its navigation zone, or changes its scheduled purpose without the approval from the inspection department…

It is worth noting that, although the Interpretations was abolished on September 29, 2010,[6] it still has some legal impacts on the determination of seaworthiness of insured vessels in China's maritime judicial practices.

3. China's Stance in Maritime Judicial Practices

Case 1:

In *Sunshine Insurance (Liuzhou City) Company et al. vs. Liuzhou City Yuanlong Shipping Co., Ltd.*[7] concerning an insurance contract for waters connecting to the sea, the Court held that,

Whether a vessel is seaworthy should be decided based on factors such as its technical conditions, manning and loading. Unseaworthiness mainly refers to:

1. Improper manning. The vessel is not well-equipped with eligible seafarers and other crew members in the prescribed quantity.

2. Invalidity of seaworthiness certificate. The certificates of nationality, registration or inspection, or fishing license have expired.

3. Sailing beyond navigation zone or when the wind is higher than the prescribed anti-wind grade. The vessel sails beyond the navigation zone as indicated in seaworthiness certificate or sails when the wind is higher than the prescribed anti-wind grade.

4. Improper equipment. The vessel's technical performance does not comply with the standardized requirements corresponding to its class and it has inadequate equipment, fuel, supplies, fresh water and provisions needed for the navigation.

5. Improper stowage. The goods are not stowed in accordance with the requirements for that type of vessel or not stowed properly.

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6 The Interpretations was, on September 29, 2010, abolished upon passing the No. 12 Notice (2010) of the People's Bank of China and China Insurance Regulatory Commission on Annulling Thirty-eight Pieces of Normative Documents with Respect to Recovering Domestic Insurance Businesses and Improving Insurance Agencies.

7 (2014) Gui Min Si Zhong Zi No. 48, (2013) Hai Shang Chu Zi No. 68.

Case 2:

In *ZHU vs. Sinosafe Property Insurance Co., Ltd. Shanghai Branch*[8] concerning a maritime insurance contract dispute, the cause for the dispute was analyzed in the investigation report by Maritime Safety Administration of Tangshan City. It was found that,

> *The accident has been directly caused by the typhoon. When the "Ming [Xuan]" vessel encountered heavy waves, a large amount of water got into its cargo hold, after which the vessel sank as it approached the waters surrounding Jingtang Port. The accident had three indirect causes. First, the "Ming [Xuan]" vessel, which navigated beyond its navigation zone, was considered unseaworthy. The vessel was made for inland waters, and its structure, strength, stability and equipment were unable to satisfy the needs for safe navigation at sea, nor guard against the waves at sea. Second, the crew members onboard were considered ineligible since they did not hold seafarer certificates. Nor did they receive relevant training, which is against the laws and regulations concerning maritime traffic and transport. Third, the vessel was improperly managed and those aboard were unaware of the security situation.*

The courts of first and second instances also ruled that the vessel was unsuitable for navigation.

In conclusion, even if a vessel has a seaworthiness/tow-worthiness certificate, it would still be deemed unseaworthy in China's judicial practices, when it sails beyond its designated zone.

C. Is There a Causal Link Between Navigation Beyond the Navigation Zone and the Insurance Accident?

According to Article 244 of the Maritime Code of the People's Republic of China, "[u]nless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from any of the following causes: (1) unseaworthiness of the ship at the time of the commencement of the voyage, unless where under a time policy the insured has no knowledge thereof;

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8 (2014) Hu Gao Min Si (Hai) Zhong Zi No. 117, (2013) Hu Hai Fa Shang Chu Zi No. 1591.

..." Thus, if the insurer intends to claim exemption from insurance liability where a ship sailing beyond its designated navigation zone constitutes unseaworthiness, it still must prove that there is a causal link between such navigation and the insurance accident. This has been widely identified in China's maritime judicial practices, particularly in the following three cases.

Case 1: *LIU Hefeng vs. CPIC Putuo Branch Company*

In the case of appeal concerning a maritime insurance contract dispute between LIU Hefeng and CPIC Putuo Branch Company (Zhoushan City),[9] the Higher People's Court of Zhejiang Province held that,

> *Since the "Guoliang 108" Vessel was not properly manned, it could be deemed unseaworthy. However, it has not been clearly agreed that the insurer would be exempted from liability for loss attributable to unseaworthiness. Even if it can be identified as an intentional act or gross negligence of the insured and its representative, CPIC Putuo Branch should still provide proof on the causal link between the losses caused by the accident and this act.*

Case 2: *Jiangnan Shipping Co., Ltd vs. CPIC*

In *Jiangnan Shipping Co., Ltd (Leqing City) vs. CPIC* concerning an insurance contract for the sea and the waters connecting the sea,[10] the Higher People's Court of Shanghai Municipality held that,

> *In insurance contract cases arising from the sinking of ships, the insured only needs to provide preliminary proof on the causal link between the loss and the insured perils; when the insured has already preliminarily proved that the loss is caused by the insured peril, the insurer should present evidence that the loss is brought about by the ship's unseaworthiness, instead of merely proving the existence of such possibility, if it intends to refuse compensation on the ground of the ship's unseaworthiness.*

Case 3: *Panama Yongyue Shipping Co., Ltd vs. PICC Qingdao Branch Company*

In the case concerning an appeal over compensation under the insurance

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9 (2012) Zhe Hai Zhong Zi No. 29, (2011) Yong Hai Fa Zhou Shang Chu Zi No. 72.

10 (2008) Hu Gao Min Si (Hai) Zhong Zi No.1, (2006) Hu Hai Fa Shang Chu Zi No. 612.

contract between Panama Yongyue Shipping Co., Ltd and the PICC Qingdao Branch Company,[11] the Higher People's Court of Shandong Province held that,

> *As indicated in the policy issued by PICC Qingdao Branch Company to Yongyue Company, all the risks have been covered according to PICC Hull Insurance Clauses (January 1, 1986). The scope of liability is defined in the Clauses as the losses of the insured ship caused by negligent acts of the captain, crew, pilot, ship repairer and charterer. It also provides exclusions, stating that the losses, liabilities, or expenses arising from the following causes are not covered in the insurance: unseaworthiness, including improper manning, equipment or stowing, to the extent the insured knows or should know the unseaworthiness when the ship sails; negligent or intentional acts by the insured and its representatives; normal wear, corrosion, decay, poor maintenance, or material defects (including change or repair of parts in bad condition), which should be discovered by the insured with due diligence. In this case, the PICC claimed exemption from insurance compensation liability on the grounds that the loss in the accident was caused by Yongyue Shipping Company breaching its responsibilities. As such, it should submit evidence to prove the unseaworthiness of the ship or to prove that the Yongyue Shipping Company had acted negligently or that it had breached its responsibilities, and further to prove that the ship's unseaworthiness or Yongyue's negligent acts had led to the accident. As indicated by the technical assessment report on the ship, the accident was caused by the negligent acts of the seafarers which was within the coverage of all risks insurance according to the PICC Hull Insurance Clauses (January 1, 1986). As a result, the PICC Qingdao Branch Company should compensate for the loss. The evidence provided by the PICC Qingdao Branch Company was insufficient to prove that the lubricant oil purifier on the "Haifengdaban" vessel malfunctioned after the vessel's repair in the Ligang Shipyard, as claimed in the Inspection Report by Shuangcheng Consultant Company, and that the vessel also had other problems, as claimed in the Analysis Report by Yuezhi Loss Assessment Company. The evidence is also inadequate to prove that there is any causality between the five problems claimed in the Inspection Report and the problems claimed in the Analysis Report and the accident, or that the accident was due to unseaworthiness of*

11 (2007) Lu Min Si Zhong Zi No. 65, (2004) Qing Hai Fa Hai Shang Chu Zi No. 32.

the ship or caused by negligent acts/breach of responsibilities by the Yongyue Company. The claims for exemption from compensation responsibility by PICC Qingdao Branch Company are not well-grounded in fact and law. Therefore, the Court ruled against its claims.

The burden of proof, however, shouldered by the insurer to establish the cause-and-effect relationship between the unseaworthiness of a ship and an insurance incident in some ship insurance clauses, vanished due to the design of these clauses. Perfect examples in this case include the design of certain exemption clauses in the Clauses of Insurance for Coastal Ships of PICC Property and Casualty Company Limited (2009) and the Clauses of Insurance for Inland Vessels of PICC Property and Casualty Company Limited (2009). Article 6 of both Clauses indicates that:

Under any of the following circumstances within the period of insurance, the insurer shall not be liable to any responsibility, damage or costs caused by any reasons in circumstances:

(1) Where the insured ship is unseaworthy or untowworthy, including improper manning of the ship, the inconsistency of the ship's technical conditions, navigation zone and purpose with provisions relating to navigation (towing), and inappropriate loading of goods.

In accordance with the insurance clause above, a ship will become unseaworthy if it navigates beyond the zone prescribed in the relevant document. When a ship becomes unseaworthy, the insurer would be absolved from liability for any damages or associated costs. Nevertheless, given that such clauses are standard terms which obviously reduce the insurer's obligation or absolve the insurer of its liability, such clauses shall have no effect if the insurer fails to explicitly state such clauses to the insurer when signing the insurance contract. For example, in the *Marine Insurance Contract Dispute Case (Cui Jihao vs. Bengbu Center Branch of Minan Property and Casualty Insurance Company Limited)*,[12] the court held that since Minan Company, the insurer, failed to present evidence which proved it had fulfilled its obligation to clearly inform the insured, the exemption clause of the insurance contract had no effect. Thus, the court decided that the insurer should pay

12 (2013) Zhe Hai Zhong Zi No. 77, (2012) Yong Hai Fa Shang Chu Zi No. 450.

the relevant compensation.

D. Does a Ship's Insurance Coverage Apply Beyond Its Approved Navigation Zone?

In practice, a ship's navigation zone as stated in its insurance policy is normally consistent with the navigation zone indicated on its certificate. In order to reduce risks, however, in some cases the insurer reaches agreement with the insured concerning the navigation zone of the insured ship. For example, a ship's navigation zone is limited to specific, agreed upon routes, or is clearly defined by a series of coordinates which often lie within the scope of the navigation zone approved on the ship's certificate. Yet there are also exceptions. For instance, if the approved navigation zone of an insured ship is comprised of the coastal or offshore navigation areas then the coverage under the insurance policy, such as the operating routes, often far exceeds the approved zone. In this case, if a ship navigates beyond its approved zone but within the coverage agreed upon in the ship's insurance policy, may the insurer refuse to pay the relevant compensation on the ground that the ship has navigated beyond its approved zone and has become unseaworthy?

Article 244 of Maritime Code of the People's Republic of China provides that, "[u]nless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from any of the following causes: (1) unseaworthiness of the ship at the time of the commencement of the voyage, unless where under a time policy the insured has no knowledge thereof;…" This provision indicates that the Maritime Code grants the parties to a marine insurance contract with much freedom of contract. As such, the parties are fully entitled to agree on the insurer's liability for any responsibility, damage or costs caused by the ship's unseaworthiness or navigation beyond its approved navigation zone.

V. Conclusion

In conclusion, China's current laws and maritime judicial practice indicate the following facts: A ship's navigation beyond its approved zone constitutes a breach of administrative laws. In this case, courts tend to assert that the ship becomes unseaworthy. In spite of this, the insurer still bears the burden of proof if it intends to refuse compensation for the insured on the grounds that the insured

ship has navigated beyond its approved navigation zone. Such proof must be provided primarily in two instances: First, in cases where the insurance policy or clauses explicitly state that the insurer shall be exempt from liability when the insured ship becomes unseaworthy due to navigation beyond its approved zone. In such instances the insurer shall prove that it has properly fulfilled its obligation to explain such standard terms or inform the insured of the same. Second, in the absence of specific provisions, the insurer must establish the cause-and-effect relationship between the unseaworthiness of a ship and an insurance incident.

Additionally, as described above, if the coverage specified in the insurance contract exceeds the approved navigation zone of the insured ship, the insurer should bear the liability arising out of all risks covered by the insurance. Therefore, if a ship navigates beyond its approved zone, but within the coverage as agreed in the ship's insurance policy, the insurer may lose the right to raise an exemption defense against the insured.

Translators: XIE Hongyue and YE Lin
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国际反海盗行动与我国相关刑事立法分析

林 蓁 *

内容摘要：面对索马里海域猖獗的海盗和海上武装抢劫活动，安理会呼吁各国在国内法中将此种行为定罪入刑，并起诉海盗嫌疑人，打击此种有罪不罚的现象。中国作为打击索马里海域海盗的主要力量之一，理应在起诉和制裁海盗罪犯方面承担更多的责任。然而，中国目前的国内法却无法完全满足这一需求。首先，中国刑法尚未将海盗行为定罪，这是需要解决的首要障碍。此外，中国刑事诉讼法中的相关规定，使得法院难以起诉在公海或国家管辖范围以外区域抓获的海盗罪犯。鉴于这些问题，本文认为中国的刑法和刑事诉讼法都需要作出修订，以期更好地遏制海盗和海上武装抢劫这一全球性“痼疾”。

关键词：索马里 海盗行为 中国刑法 中国刑事诉讼法 海洋法

海盗和海上武装抢劫已对全球海上安全构成越来越严重的威胁，特别是在红海、印度洋、索马里海域和南海。在大多数国家，海盗嫌疑人一旦交由法庭审判，就会受到严厉的制裁。尽管如此，仍存在未能将海盗嫌疑人绳之以法的情况，这是国际社会面临的一项巨大挑战。在国际层面的海盗打击活动中，各国合作在相关海域进行巡逻只是暂时性的解决方案，而旨在制止海盗的国际条约能否起到有力打击海盗行为的作用，还取决于每个缔约国能否在其国内法体系中有效执行国际条约的相关规定，因为有效的国内法体系对打击海盗和海上武装抢劫行为起决定性作用。

在国际社会打击海盗和海上武装抢劫的行动中，中国已经发挥了非常重要的作用。截至 2014 年 8 月，中国政府已派遣了 18 支护航编队赴亚丁湾和索马里海域执行护航任务。[1] 此外，中国的石油和天然气进口在很大程度上依赖于海上运输，从这个意义上来说，抑制危及海上安全的非法行为，确保重要海上通道的安全，也属于中国的核心利益。因此，出于中国自身的利益，也有必要对我国的反海盗立法及其对国际反海盗行动的影响进行研究。

本文首先将简要介绍反海盗和海上武装抢劫行为的相关国际规则，然后审视

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1 At http://baike.baidu.com/view/10908826.htm?fr=aladdin#2, 12 September 2014.

我国国内立法中的有关实体法。本文第三部分将探讨涉及到的程序性问题，特别是目前国内法中存在的管辖权问题。在最后的结语部分，本文将讨论我国刑法和刑事诉讼法的具体修订方式。

一、相关国际规则

本部分将探讨与海盗和海上武装抢劫行为有关的国际规则，特别是国际法中海盗和海上武装抢劫活动的定义。《联合国海洋法公约》（以下简称“《海洋法公约》”）第 101 条对海盗行为的定义如下：

> 下列行为中的任何行为构成海盗行为：
>
> （a）私人船舶或私人飞机的船员、机组成员或乘客为私人目的，对下列对象所从事的任何非法的暴力或扣留行为，或任何掠夺行为；
>
> （1）在公海上对另一船舶或飞机，或对另一船舶或飞机上的人或财物；
>
> （2）在任何国家管辖范围以外的地方对船舶、飞机、人或财物；
>
> （b）明知船舶或飞机成为海盗船舶或飞机的事实，而自愿参加其活动的任何行为；
>
> （c）教唆或故意便利（a）或（b）项所述行为的任何行为。[2]

然而，这一定义并非没有缺陷。许多学者都对第 101 条进行了评论，部分学者认为其对实践没有指导意义。[3] 认定某一犯罪行为属于海盗行为必须满足 3 个条件，即海盗罪有 3 个构成要件。首先，必须满足“公海”这一要件。这意味着，海盗行为必须发生在公海范围内，而发生在国家领海范围内的类似犯罪行为则不受第 101 条规制。其次，“私人目的”这一要件排除了出于政治目的的犯罪，因此，明确区分了海盗罪和恐怖袭击罪。最后，还必须满足“双船”要件，因此就排除了船员叛乱行为。

《海洋法公约》第 101 条定义的海盗罪本质上是一种国际法上的罪行，因此所有国家都可对此类犯罪活动行使管辖权，而发生在领海内的类似行为则不受第 101 条规制。为解决这一问题，国际海事组织在采用第 101 条下海盗行为定义的

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2 《海洋法公约》第 101 条。

3 Diana Chang, Piracy Laws and the Effective Prosecution of Pirates, *Boston College International and Comparative Law Review*, Vol. 33, Issue 2, 2010, pp. 281~284, at http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, 12 September 2014; John Kavanagh, The Law of Contemporary Piracy, *Australia International Law Journal*, 1999, pp. 137~138; Niclas Dahlvang, Thieves, Robbers and Terrorists: Piracy in the 21st Century, *Regent Journal International Law*, Vol. 4, 2006, p. 28.

同时，在其第 26 届大会上通过了第 A.1025(26) 号决议，规定在国家领海内发生的类似行为为武装抢劫。[4]

1988 年通过的《制止危及海上航行安全非法行为公约》是试图补充《海洋法公约》有关规定的另一项重要努力。该公约将其适用范围扩大至包括故意夺取或毁坏船舶或从事上述任何罪行未遂在内的所有罪行，但未将犯罪动机、犯罪地点规定为这类犯罪的构成要件。[5] 自然，这类犯罪行为并不属于第 101 条规定的海盗行为。

国际海事局为“海盗和海上武装抢劫行为”提供了一个更具包容性的定义：海盗和海上武装抢劫是指“有明显的实施偷盗或其他犯罪活动的意图，并在完成该活动中有明显意图或能力使用武力，进行登船或企图登船的行为”。[6]

有学者认为，打击海盗和海上武装抢劫的国际法框架目前尚不完善，因为至今未能对此形成一种国际社会普遍接受的定义。[7] 此外，国际条约只给出了海盗和海上武装抢劫行为的定义，却没有规定对这些犯罪该施以何种处罚。因此，国际条约能否有效执行还取决于各国的国内法。然而，各国在起诉和制裁这些罪行方面的立法却大相径庭。[8]

二、中国大陆立法中的实体规范以及海盗罪的定罪问题

下文将主要探讨我国实体法中的相关条款。本文采取比较法，试图揭示国际条约和我国国内立法之间的差异，以及我国国内立法对国际层面打击海盗活动可能造成的影响。

中国大陆尚未将海盗和海上武装抢劫行为定罪入刑，但这些行为可以根据刑

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4 IMO, Resolution A. 1025(26), adopted on 2 December 2009.

5 Art. 3, Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, adopted on 10 March 1988, at http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf, 12 September 2014; Diana Chang, Piracy Laws and the Effective Prosecution of Pirates, *Boston College International and Comparative Law Review*, Vol. 33, Issue 2, 2010, p. 275, at http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, 12 September 2014.

6 International Maritime Bureau, *Piracy and Armed Robbery against Ships, Report for the Period 1 Jan.-30 Jan. 2009*, p. 4.

7 Diana Chang, Piracy Laws and the Effective Prosecution of Pirates, *Boston College International and Comparative Law Review*, Vol. 33, Issue 2, 2010, p. 281, at http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, 12 September 2014.

8 Diana Chang, Piracy Laws and the Effective Prosecution of Pirates, *Boston College International and Comparative Law Review*, Vol. 33, Issue 2, 2010, p. 281, at http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, 12 September 2014.

法予以处罚。海盗和海上武装抢劫罪通常被归入危害公共安全罪的范畴予以惩治，如劫持船只罪（《刑法》第 122 条）、破坏交通工具罪（第 116 条）、故意伤害罪（第 234 条）、故意杀人罪（第 232 条）、绑架罪（第 239 条）和抢劫罪（第 263 条）。[9]

由于上面列举的罪行在我国刑法下都属于重罪，所以法院通常对海盗嫌疑人处以严厉的惩罚，从长期监禁到死刑不等。与其他一些国家的立法相比，大陆的法律相当严厉，确实可以有力地阻止中国管辖海域内的海盗行为。[10] 中国在打击海盗和海上武装抢劫方面的努力也得到了国际海事局的高度赞扬。[11]

然而，令人遗憾的是，海盗和其他危及海上航行安全的犯罪行为还未被我国国内法定罪，这无疑是大陆刑法的一大缺陷。

中国已经批准了《海洋法公约》和《制止危及海上航行安全非法行为公约》，所以承担了使其国内立法符合这些公约规定的条约义务。由于大陆尚未将海盗和海上武装抢劫行为定罪入刑，所以通常以劫持船只罪、破坏交通工具罪、故意伤害罪、故意杀人罪、绑架罪和抢劫罪等罪名起诉海盗嫌疑人。否则，会违背“法无明文不为罪”和“法无明文者不罚”的基本原则，即“法律没有明文规定为犯罪行为的，不得定罪处刑”（《刑法》第 3 条）。[12]

虽然海盗和海上武装抢劫可能涉及破坏船舶、绑架、抢劫等要件，但这些要件并不能构成海盗和海上武装抢劫罪。例如，谋杀罪和抢劫罪分别是针对人和财产，而海盗罪则主要是威胁航行安全。[13]

此外，海盗袭击不一定包括上述这些要件。一些研究表明，海盗嫌疑人通常在追击船舶和试图登船时被逮捕，[14] 在这种情况下，嫌疑人实际上并没有实施抢劫和谋杀等行为。然而，根据《海洋法公约》第 103 条和《制止危及海上航行安全

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9 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 10, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

10 与我国国内法形成鲜明对比的是，印尼法院在同一年只判处了一群劫持船舶的海盗监禁 2~3 年。Pirate Attacks Have Tripled in a Decade, IMB Report Finds, at http://www.iccwbo.org/policy/ip/icccbig/index.html, 12 September 2014.

11 2003 年，国际海事局局长波顿戈尔•穆昆丹高度评价了中国中央政府所做出的努力：今年年初，中国当局起诉了劫持“暹罗差猜号”油轮的海盗，中国法院判处海盗有期徒刑 10~15 年……中国当局对这些疑难案件进行起诉，这种做法才能制止更多人今后从事海盗行业。Pirate Attacks Have Tripled in a Decade, IMB Report Finds, at http://www.iccwbo.org/policy/ip/icccbig/index.html, 12 September 2014.

12 马呈元：《论中国刑法中的普遍管辖权》，载于《政法论坛》2013 年第 3 期，第 88~101 页。

13 童伟华：《海盗罪名设置研究》，载于《海峡法学》2010 年第 4 期，第 74~81 页。

14 于阜民、齐麟：《惩治当代海盗的法律对策研究——以中国刑法与国际刑法为视角》，载于《山东警察学院学报》2011 年第 5 期，第 86 页。

非法行为公约》，登船时意图夺取船舶或从事其他犯罪行为就足以构成海盗罪。[15] 丹麦和吉布提等国家的国内法中已经吸收了这些条款。因此，按照这些国家的国内法体系，意图犯海盗罪也可能被处刑。[16]

相反，我们国内法还未吸收国际条约中的有关条款，因此，对于未涉及可以依照我国法律处刑的重罪而仅仅是追击或登临船舶的海盗嫌疑人，将难以得到法律制裁。

在全球打击海盗和海上武装抢劫的行动中，众多国家的国内法未将此种行为定罪入刑是有些海盗嫌疑人被“无罪”开释的主要原因。因此，安理会重申，所有国家都需将《海洋法公约》中的海盗条款纳入国内法。[17] 为响应安理会的号召，不少国家已经开始进行法律改革，使国内刑法适应国际社会打击海盗活动的需求，尤其是索马里海域的海盗活动。[18] 这些国家不仅包括法国、西班牙、日本、俄罗斯等已派遣海军在亚丁湾巡逻的海上强国，还包括塞舌尔、坦桑尼亚、马尔代夫等负责审判大部分海盗嫌疑人的国家。[19] 这是全球打击海盗活动的一个积极征兆，也

15 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 59, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

16 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, pp. 12, 17, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

17 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 46, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

18 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 47, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

19 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 47, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014; United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 10, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

符合起诉和惩罚海盗嫌疑人应当由所有国家共同承担的精神。[20]

中国向危险海域派遣海军执行巡逻任务，为途经亚丁湾的中国商船队护航，也因此为全球打击海盗和海上武装抢劫行动作出了巨大贡献。在此背景下，中国很有必要改革其国内法，吸收国际公约中的有关规定。

三、我国法院对海盗活动的管辖权

在讨论了关于制止海盗和海上武装抢劫的实体规范之后，笔者还将讨论有关的程序性规则，尤其是管辖权问题，并特别注意这些规则对索马里海盗的适用情况。虽然国际社会联合反海盗行动取得了重大成果，但索马里海域仍是海盗和海上武装抢劫肆虐的危险区域。许多海盗在被护航海军抓获后未经审判即予以释放，[21] 这肯定是造成目前这种情况的因素之一。安理会第 2125 号决议敦促所有国家以立法的方式促进对索马里海域海盗嫌疑人的起诉。[22]

对于起诉被抓获的索马里海盗这一问题，参与索马里海域军事行动的国家和组织态度不一。一些巡逻国倾向于将海盗移送巡逻国自身的司法机构进行起诉，荷兰正在进行的审判就属于这种情况。[23] 另一方面，出于种种原因，其他一些国家则往往将本国海军抓获的海盗移交该区域内相关国家的主管当局。例如，中国已与索马里及肯尼亚签订一系列关于移交中国海军所抓获海盗的协定。[24]

截至目前，我国法院还未制定任何针对索马里海盗的刑事程序。事实上，我国刑法所规定的法院确立相关管辖权的条件很难成就，因此，在我国审判索马里海盗嫌犯相当困难。

我国刑法承认 4 种管辖权：属地管辖权、主动属人管辖权、被动属人管辖权和

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20 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 75, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

21 At http://www.un.org/News/Press/docs/2010/sc10014.doc.htm, 12 September 2014.

22 At http://www.un.org/News/Press/docs/2013/sc11177.doc.htm, 12 September 2014.

23 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, pp. 67~68, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

24 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 11, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

普遍管辖权。[25] 我国法院可以对在我国领土范围内发生的犯罪行为行使属地管辖权，对我国公民在我国领土范围以外的犯罪行为行使主动属人管辖权。理论上，基于上述这 2 项管辖权，我国法院无法确立对索马里海域海盗活动的管辖权。

此外，中国法院对外国人在中国领域外对中华人民共和国国家或者公民的犯罪行为也拥有管辖权。我国《刑法》第 8 条规定：“外国人在中华人民共和国领域外对中华人民共和国国家或者公民犯罪……可以适用本法”，但第 8 条的适用也有限制，“而按本法规定的最低刑为 3 年以上有期徒刑……但是按照犯罪地的法律不受处罚的除外”。[26]

确立被动属人管辖权是为了确保由外国人在中国境外对中国公民或国家本身实施的犯罪行为会受到制裁。但是，管辖权的确立必须达成 2 个要件：该犯罪行为按我国《刑法》规定的最低刑为3年以上有期徒刑，且按照犯罪地的法律应该定罪。[27] 从这个角度来说，我国《刑法》第 8 条详细规定了如何处理在其他国家领土内发生的犯罪行为，而不是在公海或国家管辖范围以外地区的犯罪行为，如海盗行为。

根据杰克•兰的报告，受海盗行为侵害船只的船旗国，对海盗行为进行的起诉微不足道。如果受害船舶的船旗国可以采取更有效的措施，促进对海盗嫌疑人的起诉，那么全球范围内对打击海盗行为负担的分担就会更合理。[28]

除了以上 3 种管辖权，中国法院还可以确立对海盗活动的普遍管辖权。根据我国《刑法》第 9 条，“对于中华人民共和国缔结或者参加的国际条约所规定的罪行，中华人民共和国在所承担条约义务的范围内行使刑事管辖权的，适用本法。”

几十年来，在是否接受普遍管辖权的问题上，中国一直踌躇不决，主要是担忧普遍管辖权的滥用问题。然而，中国政府认为海盗是少数几种国际法上应适用普遍管辖权的罪行之一。[29] 在认知方面，应该不存在需要克服的障碍，因为学者之间存在一定共识，认为中国法院应对海盗和海上武装抢劫行为确立普遍管辖权。

但是，根据我国现行刑法，必须满足 3 个条件：（1）中国加入的国际条约必须规定了这种罪行；（2）根据该公约，中国具有对这种罪行行使管辖权的条约义务；

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25 《刑法》第 6~9 条，下载于 http://www.chinalawedu.com/new/23223a23228a2010/20101222shangf111042.shtml，2014 年 9 月 12 日。

26 《刑法》第 8 条。

27 《刑法》第 8 条。

28 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 75, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

29 Statement by Ms. Guo Xiaomei, the Counselor and Legal Adviser of the Chinese Mission to the UN on Scope and Application of the Principle of Universal Jurisdiction at Sixth Committee of the 66th Session of the General Assembly, at http://www.china-un.org/eng/hyyfy/t867268.htm, 26 September 2014.

（3）国内法必须规定这种罪行为犯罪行为。[30] 因此，我们有必要探讨一下中国加入的有关国际条约。值得注意的是，一些影响力巨大的有关打击海盗活动的公约都载有关于管辖权问题的类似规定。

《海洋法公约》第 105 条规定：

> 在公海上，或在任何国家管辖范围以外的任何其他地方，每个国家均可扣押海盗船舶或飞机或为海盗所夺取并在海盗控制下的船舶或飞机，和逮捕船上或机上人员并扣押船上或机上财物。扣押国的法院可判定应处的刑罚，并可决定对船舶、飞机或财产所应采取的行动，但受善意第三者的权力的限制。

严格地说，《海洋法公约》并未规定缔约国有义务确立自身对海盗行为的普遍管辖权。相反，该公约规定，如果缔约国无法确立其他类型的管辖权，可以选择据此起诉海盗嫌疑人。

1988 年《制止危及海上航行安全非法行为公约》第 10 条第 1 款规定：

> 在其领土内发现罪犯或被指称的罪犯的缔约国，在第 6 条适用的情况下，如不将罪犯引渡，则无论罪行是否在其领土内发生，应有义务毫无例外地立即将案件送交其主管当局，以便通过其国内法律规定的程序起诉。主管当局应以与处理本国法中其他严重犯罪案件相同的方式作出决定。

同样于 1988 年通过的《制止危及海上航行安全非法行为公约议定书》也反映了相同的精神，“如被指称的罪犯出现在某缔约国领土内，而该缔约国又不将他引渡给根据本条第 1 款和第 2 款确定了管辖权的任何国家，该缔约国应采取必要措施，确定其对第 2 条所述罪行的管辖权。”[31]

国家无法对《制止危及海上航行安全非法行为公约》及其议定书规定的罪行确立普遍管辖权，因为这些罪行并不是国际法上可以适用普遍管辖权的犯罪行为。因此，《制止危及海上航行安全非法行为公约》及其议定书引入了“或起诉或引渡”义务。如抓获罪犯的国家无法确立管辖权，应当将罪犯引渡到有管辖权的其他国

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30 Chi Manjiao, A Note on China's Legal and Operational Responses to International Piracy, *Ocean Development & International Law*, Vol. 44, No. 1, 2013, p. 118; Zhu Lijiang, The Chinese Universal Jurisdiction Clause: How Far Can It Go?, *Netherlands International Law Review*, Vol. 52, Issue 1, 2005, p. 106.

31 Art. 3(4), Protocol for the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Fixed Platforms Located on the Continental Shelf, adopted on 10 March 1988, entered into force on 1 March 1992, at http://www.un.org/en/sc/ctc/docs/conventions/Conv9.pdf, 12 September 2014.

家。

一般情况下，有关国际条约都是鼓励国家对海盗提起司法程序，以应对罪犯逍遥法外的棘手问题。但是，这些公约并未真正要求各国履行对这些罪行确立管辖权的义务。相反，公约只是规定各国可以选择起诉这些罪犯，各国也因此可以行使管辖权。若由另一个更直接相关的国家来审理罪犯更为适合，一国还可决定引渡罪犯。“谢贝利案”[32] 就可以很好地说明这一点。

由于海盗行为在国内法中尚未被定罪入刑，法官可能难以依据我国《刑法》第 9 条对此种罪行确立管辖权。然而，海盗是“人类之敌”，谋杀罪和抢劫罪的性质与海盗罪不同。当海盗罪表现出国际性时，海盗罪的定罪问题就成了法院确立管辖权时面临的第一个障碍。

实际上，尽管中国法律未将海盗定罪入刑，但这并没有妨碍法官确立对海盗和海上武装抢劫行为的普遍管辖权。

在“暹罗差猜号”案中，中国法院援引《刑法》第 9 条和《制止危及海上航行安全非法行为公约》第 3 条第 1 款有效地确立了管辖权。涉案者是印尼人，其在马来西亚海域对悬挂泰国船旗的船舶实施罪行，并没有中国公民涉入该案。[33] 因此，中国法院无法确立对罪犯的属地管辖权、主动属人管辖权和被动属人管辖权。相反，因为中国已经批准了《制止危及海上航行安全非法行为公约》，所以中国法院可以根据该公约第 10 条确立管辖权。因我国刑法没有将威胁航行安全的犯罪行为定罪入刑，因此最终以抢劫罪起诉和制裁罪犯。

然而，司法实践表明，如果案件与中国没有关联，中国法院可能无法确立对该案的管辖权。在上述案件中，罪犯是在中国境内被捕，这属于中国国内法规定的最低关联度。《最高人民法院关于适用〈中华人民共和国刑事诉讼法〉的解释》明确指出：根据中国缔结的国际条约起诉嫌疑人，相关罪行由被告人被抓获地的人民法院管辖。[34] 因此，中国不可能起诉在公海上或其他国家管辖海域内抓获的海盗。

虽然我国国内立法符合《制止危及海上航行安全非法行为公约》及其议定书的规定，但并没有体现《海洋法公约》的精神。海盗行为属于国际法上的犯罪，适用普遍管辖权。根据定义，海盗行为属于在公海上或国家管辖范围以外的区域实施的犯罪。中国的国内立法使中国法院无法根据《海洋法公约》第 105 条确立对

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32 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 67, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

33 马呈元：《论中国刑法中的普遍管辖权》，载于《政法论坛》2013 年第 3 期，第 88~101 页。

34 Chi Manjiao, A Note on China’s Legal and Operational Responses to International Piracy, *Ocean Development & International Law*, Vol. 44, No. 1, 2013, p. 118.

海盗行为的管辖权。虽然第 105 条并没有为缔约国创建起诉海盗的义务，但笔者认为，第 105 条为中国法院提供了另一种选择，即可以起诉和制裁海盗嫌疑人，因此中国应该修订其国内立法，使第 105 条能够适用。最终还是由中国来决定是否行使这种管辖权。如果由另一国家审理案件更为合理，中国通常可以引渡罪犯。

四、我国《刑法》和《刑事诉讼法》修订建议

最新的《中华人民共和国刑法修正案（九）》于 2015 年 11 月 1 日生效，但没有涉及海盗问题的条款。[35] 如上所述，联合国敦促各国将海盗和海上武装抢劫行为定罪入刑。目前我国刑法还无法履行这一义务，只能继续以绑架罪和抢劫罪等其他罪名制裁海盗和海上武装抢劫行为。此外，我国刑事诉讼法的相关规定，使得中国法院无法审理在公海上抓获的海盗嫌疑人。

中国作为打击索马里海域海盗的主要力量之一，理应在起诉和制裁海盗罪犯方面承担更多的责任。然而，我国目前的国内立法可能无法完全满足这一需求。在国际范围内，越来越多的国家已经或正在修订国内法，以适应国际合作打击海盗的需求。从这种国际趋势来看，我国国内立法相对滞后。

有些学者可能认为，中国已经与肯尼亚和索马里等国就移交中国海军所抓获的索马里海盗达成协议，所以中国不再面临法院无法审理海军在公海上抓获的海盗嫌疑人问题，也因此，目前国内立法中的漏洞对当前打击海盗和海上武装抢劫活动的影响不大。这一观点有其合理之处，但必须强调的是，在我国国内立法中将海盗行为定罪入刑符合国家自身的利益。我国国际贸易和能源进口对海上运输的依赖程度很大，而中国规模巨大的商船队已成为海盗袭击的目标，因此海上安全对中国具有战略意义。中国负有保护中国公民和悬挂中国国旗的船舶的义务。除了中国籍船舶，中国公司也会租用悬挂外国国旗的船舶。[36] 值得怀疑的是，这样的船舶在受到海盗攻击且船上没有中国公民时，中国法院是否可以行使管辖权？中国的立法足以保护这些悬挂他国国旗的船舶吗？

海盗有罪不罚是世界各国面临的一项共同挑战，包括中国在内。中国与肯尼亚、索马里等国签订的协议只能暂时解决索马里海盗这一特定问题，但无法一劳永逸地解决海盗问题。

如前文所述，如果海盗行为发生在公海上或尚未将海盗行为定罪入刑的其他国家，我国《刑法》第 8 条无法充分保护我国公民或悬挂中国国旗的船舶。因此，有必要充分利用第 9 条的普遍管辖权，让其发挥应有的作用。我国《刑事诉讼法》规定的中国法院行使普遍管辖权的先决条件是一种自我设限。

35　下载于 http://news.xinhuanet.com/2015-08/30/c_1116414724.htm，2016 年 1 月 12 日。
36　下载于 http://www.gongqiu.com.cn/nsdetail-73084.shtml，2016 年 1 月 12 日。

在全球打击海盗的背景下，许多国家已经或正在修订国内刑法，而我国在这一波立法改革中可能已经有些落后。在考察其他国家的立法之前，我们可以简单地回顾一下台湾的“《刑法典》”。台湾是中国不可分割的一部分，台湾与大陆有很多共同点，因此，台湾“《刑法典》”对大陆立法的修订具有启发意义。

台湾“《刑法典》”为海盗罪和其他威胁海上航行安全的犯罪提供了详细的定义，其第 333 条规定：

> 未受交战国之允准或不属于各国之海军，而驾驶船舰，意图施强暴、胁迫于他船或他船之人或物者，为海盗罪，处死刑、无期徒刑或七年以上有期徒刑。
>
> 船员或乘客意图掠夺财物，施强暴、胁迫于其他船员或乘客，而驾驶或指挥船舰者，以海盗论。[37]

与《海洋法公约》中的定义类似，台湾“《刑法典》”第 333 条第 1 款规定犯罪行为应由船员或乘客对他船或他船之人或物实施。但是，《海洋法公约》规定海盗行为必须是“为私人目的”的犯罪行为，而台湾“《刑法典》”并未强制规定需要满足这一要件。因此，第 333 条的适用范围也会扩大到海上恐怖活动。第 333 条前 2 款的唯一区别在于，第 2 款不包含《海洋法公约》规定的“双船要件”。因此，第 333 条下的犯罪行为通常被称作准海盗罪。[38]

台湾“《刑法典》”第 333 条包含在“第三〇章：抢夺强盗及海盗罪”中，该章主要旨在遏制危及财产权的犯罪，但很显然，海盗罪并非仅仅针对财产。[39] 大陆的立法者可能不想采取这种分类方式。

杰克•兰的报告高度赞扬了各国努力调整自身立法，以适应当前环境下打击海盗的需求。[40] 各国修订自身国内法的方式可以对中国大陆今后的法律修订工作产生启发作用。

（一）法国

鉴于法国积极参与了欧洲在亚丁湾开展的联合军事行动，因此法国认为有必要更新国内打击海盗的法律框架。1994 年 7 月 15 日关于在海上行使国家警察权

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37 Text available at http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT01.asp?lsid=FL001424, 12 January 2016.

38 童伟华：《海盗罪名设置研究》，载于《海峡法学》2010 年第 4 期，第 74~81 页。

39 童伟华：《海盗罪名设置研究》，载于《海峡法学》2010 年第 4 期，第 74~81 页。

40 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the coast of Somalia, S/2011/30, adopted on 25 January 2011, paras. 47~58, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

力的模式的法案已于 2011 年修订，该修订案在原来的基础上增加了一章，具体涉及海盗行为。虽然也提到了列入刑法的几项相关罪行，但新增加的这一章将所有的相关罪行并入一份文书。[41]

法国法院已根据新法案扩大其管辖范围，法国之前只对受害者是法国公民的案件拥有管辖权，但现在可以对此类犯罪行使“准普遍”管辖权，法国法院可以审理法国海军逮捕的罪犯。当然，法国法院始终有权选择引渡嫌疑人而不进行审判。[42]

需要注意的一点是，新法案直接引用了《海洋法公约》中的相关规定，吸纳了《海洋法公约》及其他国际条约所设立的原则。该法修正案第 1 条规定，“本编适用于 1982 年 12 月 10 日在蒙特哥湾缔结的《联合国海洋法公约》中所定义的海盗行为，这些行为的实施具有如下特点：1. 在海上；2. 在不属于任何国家主管权范围的海区；3. 在国际法有规定的情形下，位于某国的领海。”[43]

上述修正案还调整了司法程序，便利法国法院审判犯罪嫌疑人。例如，修正案增加了拘留海上罪犯的具体程序，这是因为在一般适用于法国领土内被逮捕的嫌疑犯的有限时间内，很难把海上嫌疑犯送至法官面前接受审理。[44]

（二）俄罗斯

41 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 24, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

42 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 24, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

43 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 25, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

44 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, pp. 24~25, 28~29, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

俄罗斯政府认为其国内法完全符合《海洋法公约》。[45]《俄罗斯联邦刑法典》第 227 条规定：

> 海盗行为 1. 为了夺取他人的财产，使用暴力或以使用暴力相威胁袭击海洋船舶或内河船舶的，处 5 年以上 10 年以下的有期徒刑。2. 使用武器或使用其他物品作为武器实施上述行为的，处 8 年以上 12 年以下的有期徒刑，并处或不并处 50 万卢布以下或被判刑人 3 年以下的工资或其他收入的罚金。（本款由 2003 年 12 月 8 日第 162-FZ 号联邦法律修订）3. 本条第 1 款或第 2 款规定的行为，如果是有组织的集团实施的或过失致人死亡或造成其他严重后果的，处 10 年以上 15 年以下的有期徒刑由，并处或不并处 50 万卢布以下或被判刑人 3 年以下的工资或其他收入的罚金。（本款由 2003 年 12 月 8 日第 162-FZ 号联邦法律修订）。[46]

至于程序性问题，可以适用“准普遍”管辖权。俄罗斯法院可以对在公海上有海盗行径的外国罪犯行使管辖权，不论受害船舶的船旗国为何。为解决公海犯罪取证困难的问题，俄罗斯军舰上的军事检察人员会协助主管机构进行初步调查。[47]

（三）日本

《日本刑法典》未涉及海盗罪。过去，日本和中国使用同样的方法来制裁海盗和海上武装抢劫行为，即以抢劫罪和绑架罪等罪名来惩治这些行为。[48] 但是，2009 年，日本政府决定派日本海上自卫队参加多国部队打击海盗，接着便通过了

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45 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 76, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

46 Russian Federation Criminal Code, Adopted by the State Duma on 24 May 1996, (Federal Act No. 162-FZ of 8 December 2003), at http://www.russian-criminal-code.com/PartII/SectionIX/Chapter24.html, 12 January 2016.

47 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 77, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

48 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 85.

《处罚与应对海盗行为法》（2009 年第 55 号法案）。该法将海盗行为定罪，并引入普遍管辖权，填补了日本国内法的空白，解决了有关悬挂他国国旗船舶的特定问题。日本企业租用大型船队开展国际贸易，但租用的船舶中只有小部分是日本籍船舶。他国国籍的船舶与日本利益有关，但根据日本早先的国内法，其只有有限的管辖权。[49]

根据《处罚与应对海盗行为法》，海盗行为的定义是：

> 船舶（军舰及各国政府所有或运营的船舶除外）上的船员或乘客为私人目的在公海（包含《联合国海洋法公约》规定的专属经济区）或我国领海、内水实施的以下各项任一行为：
>
> （1）采取暴力、胁迫方式或其他方法，使人处于不能抵抗的状态，强行劫持航行中的其他船舶或任意支配其航行的行为。
>
> （2）采取暴力、胁迫方式或其他方法，使人陷于不能抵抗的状态，强行取得航行中其他船舶内的财物，获得或让他人获得财产上不法利益的行为。
>
> （3）为了要求第三人交付财物、实施其他无义务的行为或放弃权利，而劫持航行中其他船舶内的某些人员作为人质的行为。
>
> （4）强行劫持或恣意将其所控制的船舶内的某些人员或航行中其他船舶内被劫持者作为人质，要求第三者交付财物及实施其他无义务的行为或放弃权利的行为。
>
> （5）以实施上述各项中的任一海盗行为为目的，侵入或损坏航行中其他船舶的行为。
>
> （6）以实施第（1）项至第（4）项中的任一海盗行为为目的，使船舶航行、显著接近航行中其他船舶、纠缠或其他妨碍其航行的行为。
>
> （7）以实施第（1）项至第（4）项中的任一海盗行为为目的，准备凶器使船舶航行的行为。[50]

同时，《日本刑法典》仍对海盗行为适用，因为其第 8 条规定，《刑法典》适用于“其他法律和规则规定需要惩治的犯罪”。[51]

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49 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 83.

50 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 90. Art. 2, Law on Punishment of and Measures against Acts of Piracy (Act No. 55 of 2009), at http://www.sof.or.jp/en/topics/pdf/09_01.pdf, 12 January 2016.

51 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 94.

为方便起诉日本自卫队抓捕的亚丁湾海盗，日本军舰上配有日本海上保安厅官员，负责诉前调查取证。[52]

在《处罚与应对海盗行为法》生效后，日本法院审理的第一起案件是“瓜纳巴拉号”案，该船未在日本登记，悬挂的是他国的国旗，但对日本企业具有利益。[53]

总之，法国和日本的相关立法是在亚丁湾多国军事行动开始之后颁布的，直接引用《海洋法公约》中的相关规定，便利两国根据各自的国内法来起诉海盗。日法两国没有直接修正各自的刑法，而是修订有关制止海上犯罪的现行法案或通过新的法案来应对新情况。同时，两国刑法典的有关规定仍继续适用。此外，两国还专门制定了相关的拘留和取证制度，以解决审理在公海上抓获的犯罪嫌疑人时遇到的具体困难。

相比之下，俄罗斯的相关立法是在索马里海盗问题凸显之前通过的，并不完全符合《海洋法公约》的规定，当然，国内法中的海盗定义与国际法不一致也很自然。

各国将海盗行为定罪入刑、促进对海盗嫌疑人的起诉是一个全球趋势，这也符合中国自身的利益。因此，中国应顺应这一趋势，扩大本国法院的管辖权，为中国公民和中国企业租用的船舶提供更好的保护。

可以通过 2 种方式将海盗和海上武装抢劫行为定罪入刑。其中一种是将 2 种罪行都归于海盗罪之下，不加以区分，俄罗斯国内法就是此例。另一种是，各国在国内法中直接引用《海洋法公约》中有关海盗行为的定义，并将在国家管辖范围内海域发生的类似行为定为海上武装抢劫罪，2008 年之后有几个国家在修订国内法时选择了这种方式，如法国和日本。

笔者认为，海盗罪应当归入中国《刑法》第二编第二章危害公共安全罪，因此，可以在第 122 条（劫持船只、汽车罪）和第 123 条（暴力危及飞行安全罪）之间插入一条有关海盗罪的条款。但是，海盗和海上武装抢劫罪不需要分开定义。

一方面，我国国内法很少会规制在国家管辖范围以外区域发生的活动。另一方面，国内法中的海盗行为定义并不一定要与《海洋法公约》中的定义相同。更重要的是，在国内法背景下，没有必要区分海盗和海上武装抢劫行为。因此，我国国

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52 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 96.

53 “瓜纳巴拉号”油轮悬挂巴哈马国旗，由一家日本企业补贴运营。该油轮在距阿曼 300 英里的海域受到袭击，当时船上并无日本籍船员。美国海军抓获了犯罪嫌疑人。事实上，受害船舶船旗国（巴哈马）、船上船员国籍国和抓获嫌疑人的国家（美国）都可以行使管辖权。然而，在本案中，巴哈马和美国等国无意审理此案。嫌疑人最后被移送至东京接受审判。日本军舰上的日本海上保安厅官员可以从美国海军处取证。See Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, pp. 98, 100.

内法如试图为海盗行为定罪入刑，可以采用以下措辞：

海盗行为包含以下任何为私人目的的行为：

1. 针对船舶或飞机或其上人或财物的任何非法暴力或扣留行为，或任何掠夺行为；

2. 明知船舶或飞机从事第 1 款所涉行为，而自愿参加其活动的任何行为；

3. 教唆或故意便利第 1 款和第 2 款所述行为的任何行为。

从事第 1 款所述行为，处（ ）年以上有期徒刑、无期徒刑或死刑；从事第 2 款所述行为，处（ ）年以上有期徒刑……

我国《刑事诉讼法》也需要修订，或者需要最高法院颁布新的解释，允许中国法院对在公海上抓获的嫌犯行使管辖权。例如，《最高人民法院关于适用〈中华人民共和国刑事诉讼法〉的解释》第 10 条可作如下修订：对中华人民共和国缔结或者参加的国际条约所规定的罪行，中华人民共和国在所承担条约义务的范围内，行使刑事管辖权的，由被告人被抓获地或嫌疑人被移送的港口所在地的人民法院管辖。

五、结　语

面对索马里海域日益猖獗的海盗和海上武装抢劫活动，安理会呼吁各国在国内法中将此种行为定为犯罪，并起诉海盗嫌疑人，打击海盗有罪不罚的现象。

中国刑法尚未将海盗行为定罪入刑，这是需要解决的首要障碍。此外，中国刑事诉讼法中的相关规定，使得法院难以起诉在公海或国家管辖范围以外区域抓获的海盗罪犯。鉴于这些问题，需要对我国刑法和刑事诉讼法作出一些修订，以期更好地遏制海盗和海上武装抢劫这一全球性“痼疾”。

为此，应该在我国《刑法》第二编第二章第 122 条和第 123 条之间插入一条有关海盗罪定义的条款。此外，由于我国目前的刑事诉讼法无法让中国法院对在公海上抓获的嫌疑人行使普遍管辖权，所以必须对其做出修订。最简单的方法是最高法院颁布新的解释，对一些例外情况作出说明，而常见的例外情况包括海盗行为，以及嫌疑犯常在中国境外被抓获的其他海上犯罪行为。

（中译：赵菊芬）

An Analysis of the Chinese Criminal Legislation in the Context of the International Combat against Piracy and Armed Robbery at Sea

LIN Zhen *

Abstract: Facing the rampant piracy and armed robbery at sea off the coast of Somalia, the Security Council has called on all States to criminalize such offenses in their domestic laws and prosecute the presumed pirates, so as to combat impunity of the crimes. China, one of the major forces in the combat against piracy off the coast of Somalia, is expected to assume more responsibilities in the prosecution and sanctions against the offenders. However, the current domestic legislation of China might not be sufficient to meet this need. The non-criminalization of piracy is the first obstacle to overcome. Additionally, the criminal procedural law of China makes it difficult to prosecute offenders caught on the high seas or in a place beyond national jurisdiction. Due to these problems, some revisions are needed to be made to the criminal law and criminal procedural law of China, in order to better combat the global plague of piracy and armed robbery at sea.

Key Words: Piracy; Somalia; Criminal law of China; Criminal procedural law of China; Law of the sea

The piracy and armed robbery at sea have become an increasingly serious threat to the maritime security worldwide, particularly in the Red Sea, Indian Ocean, the waters off the coast of Somalia and the South China Sea. In most countries, if not all, the activities of piracy are subject to severe sanctions when the suspects are put to trial. However, there are still failures to bring the alleged pirates to justice, which is a great challenge to the international community. In the combat

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against piracy at the international level, the effort by the international community to patrol the relevant maritime areas is only a temporary solution to the problem, and whether the international treaties on the suppression of piracy can play a definitive role in combating piracy depends on the States Parties' enforcement of these treaties within their domestic legal systems, since an effective domestic legal system could be decisive in the combat against piracy and armed robbery at sea.

China has played a very important role in the combat against piracy and armed robbery at international level. Up to August 2014 the Chinese government has deployed 18 flotillas in the Gulf of Aden and the waters off the coast of Somalia.[1] China has also a vital interest in suppressing unlawful acts against maritime security and ensuring the safety of important sea lanes, because it depends heavily on maritime transport for its import of oil and gas. Thus, for the sake of China's own interests, it is necessary and meaningful to launch a study on China's domestic legislation on piracy and its effect on the combat against piracy at the international level.

The present paper will first briefly examine the relevant international rules concerning the suppression of piracy and armed robbery at sea and then review the substantive laws of the Chinese domestic legislation in this regard. The third part will explore the procedural issues involved, particularly the jurisdictional problems that exist in the current domestic law. The paper concludes with a discussion about the future amendments to the Chinese criminal law and criminal procedural law.

I. Relevant International Rules

This part will examine the international rules regarding piracy and armed robbery at sea, with special attention to the definition of piracy and armed robbery under the framework of international law. Piracy is defined in Art. 101 of the United Nations Convention on the Law of the Sea (UNCLOS) as follows:

> *Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or*

1 At http://baike.baidu.com/view/10908826.htm?fr=aladdin#2, 12 September 2014. (in Chinese)

property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft. (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[2]

However, this definition is not without defect. Numerous scholars have commented on Art. 101 and some consider that it provides little guidance in practice.[3] Three criteria have to be satisfied before an offense could be considered an act of piracy: first of all, the "high seas" requirement has to be met. It means that an act of piracy has to take place on the high seas. Similar offenses taking place in a State's territorial waters are not regulated by Art. 101. Secondly, the "private ends" requirement excludes crimes committed for a political reason. Consequently, there is a clear-cut distinction between the crimes of piracy and terrorist attacks. Thirdly, the so-called "two ship requirement" has to be met, thus excluding the rebellion of crew members.

The crime of piracy as defined by Art. 101 of the UNCLOS is by nature a crime *jure gentium,* so that all States could exercise jurisdiction over such criminal activities. However, similar activities taking place in the territorial sea are not regulated by Art. 101. In order to address this problem, the International Maritime Organization (IMO) follows the definition of piracy as laid down in Art. 101 and at the same time, adopted the Resolution A.1025 (26) on 2 December 2009 at its 26th Assembly Session, which defines such similar crimes taking place in a State's territorial waters as armed robbery.[4]

Another important attempt to complement relevant provisions of the UNCLOS is the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (hereinafter "SUA Convention") adopted in 1988. The SUA Convention has expanded its application scope to all offenses including intentionally seizing or damaging a ship or attempting to do so. It does not contain

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2 Art. 101 of UNCLOS.

3 Diana Chang, Piracy Laws and the Effective Prosecution of Pirates, *Boston College International and Comparative Law Review*, Vol. 33, Issue 2, 2010, pp. 281~284, at http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, 12 September 2014; John Kavanagh, The Law of Contemporary Piracy, *Australia International Law Journal*, 1999, pp. 137~138; Niclas Dahlvang, Thieves, Robbers and Terrorists: Piracy in the 21st Century, *Regent Journal International Law*, Vol. 4, 2006, p. 28.

4 IMO, Resolution A. 1025(26), adopted on 2 December 2009.

any requirement concerning the motive of such a crime or the place where the offense takes place.[5] Naturally, these offenses do not fall into the category of piracy as defined by Art. 101 of the UNCLOS.

The International Maritime Bureau has provided an even more inclusive definition. It defines "piracy and armed robbery at sea" as "an act of boarding or attempting to board any vessel with the apparent intent to commit theft or any other crime, and with the apparent intent or capacity to use force in furtherance of that act."[6]

Some scholars consider the current international legal framework on piracy and armed robbery at sea to be flawed because of its failure to provide a universally acceptable definition for such crimes.[7] Furthermore, the international treaties provide only a definition of piracy and armed robbery at sea, but no sanctions for the crimes. Therefore, such treaties depend on the domestic legislation of each State for their effective implementation. However, State legislations differ tremendously with regard to the prosecution and sanction of those crimes.[8]

II. The Substantive Rules of the Legislation of Mainland China and the Non-criminalization of the Crime of Piracy

This part will review the relevant provisions of Chinese substantive laws. By adopting a comparative approach, an attempt will be made to reveal the existing differences between the international treaties and the legislation of mainland China and the possible effect of the latter on the combat against piracy at the international

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5 Art. 3, Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, adopted on 10 March 1988, at http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf, 12 September 2014; Diana Chang, Piracy Laws and the Effective Prosecution of Pirates, *Boston College International and Comparative Law Review*, Vol. 33, Issue 2, 2010, p. 275, at http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, 12 September 2014.

6 International Maritime Bureau, *Piracy and Armed Robbery against Ships, Report for the Period 1 Jan.-30 Jan. 2009*, p. 4.

7 Diana Chang, Piracy Laws and the Effective Prosecution of Pirates, *Boston College International and Comparative Law Review*, Vol. 33, Issue 2, 2010, p. 281, at http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, 12 September 2014.

8 Diana Chang, Piracy Laws and the Effective Prosecution of Pirates, *Boston College International and Comparative Law Review*, Vol. 33, Issue 2, 2010, p. 281, at http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, 12 September 2014.

level.

Piracy and armed robbery at sea has not been criminalized in mainland China. Such activities are nevertheless punishable in accordance with the criminal law of mainland China, usually under the category of crimes against public security, like hijacking of vessels (Art. 122 of the Criminal Law of China), destruction of means of transport (Art. 116), malicious injury (Art. 234), willful homicide (Art. 232), kidnapping (Art. 239) and robbery (Art. 263).[9]

Since the crimes mentioned above are all felonies under the criminal law of mainland China, courts often impose severe sanctions upon the presumed pirates, ranging from long-term imprisonment to death penalty. Compared with legislation of some other countries, the Chinese law is quite harsh and can be really discouraging to the practice of piracy in Chinese jurisdictional waters.[10] China's efforts to combat piracy and armed robbery at sea have been highly praised by the International Maritime Bureau.[11]

However, the fact that piracy and other offenses against the safety of maritime navigation have not been criminalized by the domestic law, undoubtedly, is a regrettable shortcoming in the criminal law of mainland China.

China has ratified both UNCLOS and the SUA Convention, therefore China bears a treaty duty to bring its domestic legislation in line with the provisions of these conventions. Since piracy and armed robbery at sea have not been criminalized in mainland China, the presumed pirates are often prosecuted for committing the crimes of hijacking of vessels, destruction of means of transport,

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9 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 10, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

10 In sharp contrast with the domestic law of China, an Indonesian court sentenced in the same year a group of pirates to only two years or three years in prison for hijacking a ship. Pirate Attacks Have Tripled in a Decade, IMB Report Finds, at http://www.iccwbo.org/policy/ip/icccbig/index.html, 12 September 2014.

11 In 2003, Captain Pottengal Mukundan, director of International Maritime Bureau, spoke highly of the effort by the central government: Early this year, Chinese authorities prosecuted pirates who had hijacked the tanker *Siam Xanxai*. The Chinese courts sentenced the pirates to between 10 and 15 years in prison ... Chinese authorities should be congratulated for having taken these difficult cases through to prosecution. It is this kind of response which will deter future pirates from this trade. Pirate Attacks Have Tripled in a Decade, IMB Report Finds, at http://www.iccwbo.org/policy/ip/icccbig/index.html, 12 September 2014.

malicious injury, willful homicide, kidnapping and robbery. Otherwise, it will be against the very basic principle of "*nullum crimen sine lege*" and "*nulla poena sine lege*", which denote that "if an act is not expressly defined by law as a criminal act, it may not be convicted and sentenced" (Art. 3 of the Criminal Law of China).[12]

Although piracy and armed robbery may involve such elements like sabotage of ships, kidnapping, robbery and so forth, these elements do not amount to the crime of piracy and armed robbery at sea. For example, the crimes of murder and robbery are directed respectively at the person and the property while the crime of piracy poses primarily threat to the security of navigation.[13]

Furthermore, a pirate attack does not necessarily always include these elements mentioned above. As some studies have revealed, presumed pirates are often caught while chasing and trying to board a ship.[14] In that case, no offenses like robbery or murder are actually committed. However, according to the UNCLOS (Art. 103) and the SUA Convention, boarding a ship with the intent to seize it or commit other offenses may suffice to constitute the crime of piracy.[15] States like Denmark and Djibouti have already incorporated these provisions into their domestic law. Thus the attempts to commit the crime of piracy could also be sanctioned under the domestic legal system of these States.[16]

By contrast, if no felonies punishable under Chinese law are involved, it will be difficult to sanction the presumed pirates for simply chasing or boarding a ship, since the relevant provisions of the international treaties have not yet been incorporated into the domestic law.

In the global combat against piracy and armed robbery at sea, the non-criminalization of such offenses in the domestic law of States could be the major

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12 Ma Chengyuan, Studies on the Universal Jurisdiction in Criminal Law of China, *Tribune of Political Science and Law*, No. 3, 2013, pp. 88~101. (in Chinese)

13 Tong Weihua, Studies on the Criminalization of Piracy at Sea, *Cross-Strait Legal Science*, No. 4, 2010, pp. 74~81. (in Chinese)

14 Yu Fumin and Qi Lin, A Study on the Legal Measures of Punishing Contemporary Piracy, *Journal of Shandong Police College*, No. 5, 2011, p. 86. (in Chinese)

15 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 59, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

16 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, pp. 12, 17, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

reason for the impunity of the presumed pirates. In this context, the Security Council has reiterated the need for all States to incorporate into domestic law the provisions on piracy contained in the UNCLOS.[17] In answer to the call of the Security Council, quite a few States have already started the legal reform to adapt their criminal laws to the need of combating piracy on an international level, especially the piratical activities taking place off the coast of Somalia.[18] These States not only include maritime powers whose navies are patrolling the Gulf of Aden, such as France, Spain, Japan and Russia, but also States in the region where most of the presumed pirates are being tried, like Seychelles, Tanzania and Maldives.[19] It is a positive sign for the global combat against piracy and consistent with the spirit that the burden of prosecuting and punishing the presumed pirates should be shared among all States.[20]

China, with its navy patrolling the troubled waters and its immense merchant fleet transiting the Gulf of Aden, plays an important role in the global combat against piracy and armed robbery at sea. In this context, China needs to reform its domestic law to incorporate the relevant provisions of the international conventions into its domestic law.

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17 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 46, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

18 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 47, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

19 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 47, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014; United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 10, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

20 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 75, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014

III. The Jurisdiction of Chinese Courts over Piratical Activities

Having discussed about the substantive rules concerning the suppression of piracy and armed robbery at sea, the author will discuss about the procedural rules in this domain, in particular the jurisdictional issue with special attention paid to its application to the Somali pirates. Despite all the efforts by the international community, the waters off the coast of Somalia continue to be a dangerous area plagued by piracy and armed robbery at sea. Many pirates were released without trial after being caught by the escort naval forces,[21] which is certainly one of the factors contributing to the current situation. In the resolution 2125 of the Security Council, all States were urged to adopt legislation to facilitate the prosecution of suspected pirates off the coast of Somalia.[22]

States and organizations engaged in the military operation off the coast of Somalia have adopted different attitudes towards the prosecution of captured Somali pirates. Some of the patrolling States prefer to bring the pirates back to their own judicial authorities for prosecution. The ongoing trials in the Netherlands are of this kind.[23] Whereas, some other States, for various reasons, tend to transfer the pirates captured by their naval forces to the competent authorities of States within the region. For example, China has entered into a series of arrangements with Somalia and Kenya with regard to the transfer of the pirates captured by the Chinese navy.[24]

Up to now, Chinese courts have not yet introduced any criminal procedure against Somali pirates. In fact, it is quite difficult to put on trial an alleged Somali pirate in China because of the conditions imposed by the criminal law to establish

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21 At http://www.un.org/News/Press/docs/2010/sc10014.doc.htm, 12 September 2014.

22 At http://www.un.org/News/Press/docs/2013/sc11177.doc.htm, 12 September 2014.

23 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, pp. 67~68, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

24 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 11, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

the jurisdiction of a Chinese court.

The criminal law of China recognizes four types of jurisdiction: the territorial jurisdiction, the active personal jurisdiction, the passive personal jurisdiction and the universal jurisdiction.[25] A Chinese court could establish the territorial jurisdiction over offenses committed in the territory of China and the active personal jurisdiction over the criminal acts committed by Chinese citizens outside the territory of China. In theory, a Chinese court could not establish its jurisdiction over the piratical activities off the coast of Somalia on the basis of the first two options.

A Chinese court may also have jurisdiction when a crime committed by an alien outside the territory of China is directed at a Chinese citizen or the People's Republic of China. Art. 8 of the Criminal Law of China stipulates that "this Law may apply where a crime against China or a citizen of the People's Republic of China is committed by an alien outside the territory of the People's Republic of China". There are also limits on the application of Art. 8: "The minimum punishment of fixed-term imprisonment for such a crime is not less than three years in accordance with the provisions of this Law, except where a crime is not punishable in accordance with the law of the place where it is committed". [26]

The passive personal jurisdiction is established for the purpose of ensuring that the criminal acts committed by an alien outside the territory of China against its citizens or the State itself will be sanctioned. However, two conditions have to be satisfied: The minimum punishment for such an offense should be no less than three years of imprisonment according to the Chinese criminal law and such an offense has to be criminalized by the domestic law of the State where the offense is committed.[27] From this point of view, Art. 8 is so elaborated to deal with offenses committed in the territory of another State instead of those committed on the high seas or in a place outside the jurisdiction of any State, like piracy.

In accordance with the report of Jack Lang, prosecution by flag States of ships that have fallen victim to piracy has been marginal. Global sharing of the burden would be more rationally distributed if the flag States of the victim ships could take

25 Arts. 6~9, Criminal Law of China, at http://www.chinalawedu.com/new/23223a23228a2010/20101222shangf111042.shtml, 12 September 2014.

26 Art. 8, Criminal Law of China.

27 Art. 8, Criminal Law of China.

more effective measures to facilitate the prosecution of presumed pirates.[28]

Apart from the above three options, the Chinese court may establish universal jurisdiction over piratical activities. According to Art. 9 of the Criminal Law of China, "[t]his Law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction within the scope of obligations, prescribed in these treaties, it agrees to perform".

For decades, China showed great hesitation to accept the idea of universal jurisdiction primarily due to the concerns over the abuse of its application. However, piracy is considered by Chinese government as one of the few crimes *jure gentium* to which the universal jurisdiction should apply.[29] At the cognitive level, there should be no obstacle to overcome since there exists a certain consensus among the scholars that Chinese courts should establish universal jurisdiction over piracy and armed robbery at sea.

However, according to the present criminal law of China, three conditions have to be met: 1. Such a crime must be prescribed by an international convention to which China is a State Party; 2. China has a treaty obligation under the convention to exercise such jurisdiction over the crime; 3. Such a crime has to be criminalized by the domestic law.[30] Therefore, we need to take a look at the relevant international treaties to which China is State Party. It is interesting to note that some of the most influential conventions on the combat against piratical activities contain similar provisions on the question of jurisdiction.

Art. 105 of the UNCLOS reads as follows:

> *On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by*

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28 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the Coast of Somalia, S/2011/30, adopted on 25 January 2011, para. 75, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

29 Statement by Ms. Guo Xiaomei, the Counselor and Legal Adviser of the Chinese Mission to the UN on Scope and Application of the Principle of Universal Jurisdiction at Sixth Committee of the 66th Session of the General Assembly, at http://www.china-un.org/eng/hyyfy/t867268.htm, 26 September 2014.

30 Chi Manjiao, A Note on China's Legal and Operational Responses to International Piracy, *Ocean Development & International Law*, Vol. 44, No. 1, 2013, p. 118; Zhu Lijiang, The Chinese Universal Jurisdiction Clause: How Far Can It Go?, *Netherlands International Law Review*, Vol. 52, Issue 1, 2005, p. 106.

> *piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.*

Strictly speaking, the UNCLOS does not impose an obligation upon States to establish universal jurisdiction over piracy. Instead, it provides an option for States to prosecute the presumed pirates if they are unable to establish other types of jurisdiction.

Art. 10(1) of the SUA Convention 1988 stipulates:

> *The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.*

Its protocol adopted in the same year reflects the same spirit: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses set forth in Article 2 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this Article."[31]

States are unable to establish universal jurisdiction over offenses stipulated in SUA Convention and its protocol since such offenses are not crimes *jure gentium* to which universal jurisdiction could apply. Therefore, the SUA Convention and its protocol have introduced the so-called "prosecute or extradite" obligation. If the State that has captured the offenders is unable to establish its jurisdiction, it should extradite them to another State that has jurisdiction.

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31 Art. 3(4), Protocol for the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Fixed Platforms Located on the Continental Shelf, adopted on 10 March 1988, entered into force on 1 March 1992, at http://www.un.org/en/sc/ctc/docs/conventions/Conv9.pdf, 12 September 2014.

In general, the relevant international treaties encourage States to initiate procedures against pirates to cope with the thorny problem of impunity of the offenders. Nevertheless, the conventions have not really imposed an obligation upon States to establish jurisdiction over these offenses. They give States instead an option to prosecute these offenders, so that they could exercise their jurisdiction accordingly. A State could also decide to extradite the offenders if it is more appropriate for another State more directly concerned to try them. The *Shebelle Case*[32] could well illustrate this point.

Since piracy has not been criminalized by the domestic law, a judge may find it difficult to establish the jurisdiction over such an offense on the basis of Art. 9. While piracy is a crime *hostis humani generis*, the crimes of murder and robbery are not of this nature. When the international nature of the crime comes into play, the non-criminalization of the crime of piracy becomes the first obstacle to overcome to establish the jurisdiction of the court.

In reality, the fact that piracy is not criminalized by the Chinese law has not prevented the judges from establishing universal jurisdiction over piracy and armed robbery at sea.

In the *Case of Siam Chatchai*, the Chinese court effectively established its jurisdiction by invoking Art. 9 of its Criminal Law and Art. 3(1) of the SUA Convention. The alleged offenders were Indonesians and the offense was committed in the waters of Malaysia against a vessel flying the flag of Thailand. No Chinese citizen was engaged in this case.[33] As a result, the Chinese court was unable to establish the territorial, personal or protective jurisdiction over the alleged offenders. Instead, as China had ratified the SUA Convention, the Chinese court established its jurisdiction by following Art. 10 of this convention. The offenders were finally prosecuted and sanctioned for committing robbery because the unlawful acts against safety of navigation are not criminalized by the criminal law of China.

However, the judicial practice shows that the Chinese court will probably

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32 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 67, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

33 Ma Chengyuan, Studies on the Universal Jurisdiction in Criminal Law of China, *Tribune of Political Science and Law*, No. 3, 2013, pp. 88~101. (in Chinese)

not establish its jurisdiction if the case is not in the least connected to China. In the above case, the offenders had been arrested in the territory of China and that is the minimum connection required. The Supreme Court Explanation Relating to the Implementation of the Criminal Procedural Law of the People's Republic of China makes it clear that to prosecute suspects in accordance with the international treaties to which China is a party, the jurisdiction is to be exercised by the People's Court of the place where the suspect is apprehended.[34] As a result, it will be impossible for China to prosecute pirates arrested on the high seas or in the waters under the jurisdiction of another State.

While China's domestic legislation is consistent with the SUA Convention and its protocol, it does not reflect the spirit of the UNCLOS. Piracy, as a crime *jure gentium*, subject to universal jurisdiction, is by definition an offense taking place on the high seas or in a place beyond national jurisdiction. China's legislation makes it impossible for Chinese courts to establish jurisdiction over piracy under Art. 105 of the UNCLOS. Although Art. 105 does not create any obligation upon States Parties to prosecute the pirates, the author holds the view that China should have its domestic legislation amended to allow Art. 105 to apply, since it provides an additional option for Chinese courts to prosecute and sanction the presumed pirates. Finally, it depends on China to decide whether to exercise such jurisdiction or not. It could always extradite the offenders if it deems that it is more rational for another State to try a particular case.

IV. Suggestions on the Amendment of the Criminal Law and Criminal Procedural Law of China

The recent amendment IX to the Criminal Law of China came into force on 1 November 2015, but this latest revision to the criminal law still contains no article dealing with the question of piracy.[35] As we have mentioned above, the UN urges States to criminalize piracy and armed robbery at sea. The current Chinese criminal law cannot fulfill this obligation and continues to sanction the above criminal activities under the name of other crimes like kidnapping and robbery.

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34 Chi Manjiao, A Note on China's Legal and Operational Responses to International Piracy, *Ocean Development & International Law*, Vol. 44, No. 1, 2013, p. 118.

35 At http://news.xinhuanet.com/2015-08/30/c_1116414724.htm, 12 January 2016. (in Chinese)

Furthermore, the criminal procedural law makes it impossible for Chinese tribunals to try suspects caught on the high seas.

China, as one of the major forces in the combat against piracy off the coast of Somalia, is expected to assume more responsibility in the prosecution and sanction against the offenders. However, the current domestic legislation of China might not be sufficient to meet this need. More and more States have revised or are revising their domestic law to adapt to the need of combating piracy at international level, which has become an international trend. In this trend, China's domestic legislation is lagging behind.

Some scholars might argue that, since China has already entered into agreements with Kenya and Somalia on the transfer of the Somali pirates captured by the Chinese navy, China is no longer faced with any problem causing by the failure for Chinese courts to try any suspects caught on the high seas by the navy. Therefore, the loopholes in the current Chinese laws will have little effect on the ongoing combat against piracy and armed robbery at sea. This argument is reasonable in some aspects. But we have to emphasize that the criminalization of piracy in the domestic law of China is consistent with its own interests. China depends heavily on maritime transport for its international trade and energy import, and the large merchant fleet of China has become a target of pirates. Maritime security is hence of strategic importance to China. China bears an obligation to protect its nationals and vessels flying its flag. Apart from Chinese vessels, ships flying foreign States' flags are also hired by Chinese companies.[36] It is doubtful if Chinese courts can exercise jurisdiction when they are attacked and do not have Chinese nationals on board. Is the Chinese legislation sufficient to protect these foreign-flagged vessels?

Impunity of pirates poses a common challenge for all countries, including China. The agreements between China and Kenya or between China and Somalia deal only with this particular situation of Somali pirates and cannot solve the piracy problem once and for all.

As we have already mentioned, Art. 8 of China's Criminal Law is not sufficient to protect Chinese nationals or vessels flying Chinese flag if the offense takes place on the high seas or in any other country where piracy has not been criminalized. Therefore, it is necessary to make full use of Art. 9 on universal jurisdiction and let it function as it should. The condition posed by the Criminal Procedural Law of

36 At http://www.gongqiu.com.cn/nsdetail-73084.shtml, 12 January 2016. (in Chinese)

China is a self restraint in the exercise of universal jurisdiction by Chinese courts.

China might have lagged behind in the wave of legislative reforms where some other countries' criminal laws have undergone or are undergoing revisions in the context of global combat against piracy. Before taking a look at other States' legislation, we may briefly review the "Criminal Code" of Taiwan. Taiwan is an integral part of China and shares a lot in common with mainland China. Therefore, its "Criminal Code" could be thought-provoking for the amendment of the legislation of mainland China.

The "Criminal Code" of Taiwan contains a very detailed definition of piracy and other offenses against the safety of maritime navigation. Art. 333 of the "Criminal Code" of Taiwan defines piracy as follows:

> *A person who without the permission of a belligerent State or who does not belong to the naval force of such a State navigates a vessel for purpose to use violence or employ threats against another vessel or against a person or thing on board that vessel commits the offense of piracy and shall be sentenced to death or life imprisonment or imprisonment for not less than seven years.*
>
> *A member of the crew or a passenger on board a vessel who has purpose to plunder or rob property, and who uses violence or employs threats against another member of the crew or a passenger, and who operates or takes command of the vessel commits the offense of piracy.*[37]

Similar to the definition provided by the UNCLOS, Art. 333(1) of the "Criminal Code" requires that the crime should be committed by the crew or the passengers of a ship against another ship or persons or property on board the ship. However, the requirement set forth by the UNCLOS that the offender acts for private ends does not have to be met in the Taiwanese "Criminal Code". As a result, the maritime terrorist activities might as well be included to enlarge the application scope of Art. 333. The sole difference between the first two paragraphs of the article is that the second one does not contain the so-called "two-ship requirement" stated by the UNCLOS. For this reason, criminal acts subject to Art. 333 are often called the quasi-piracy.[38]

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37 Text available at http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT01.asp?lsid=FL001424, 12 January 2016.

38 Tong Weihua, Studies on the Criminalization of Piracy at Sea, *Cross-Strait Legal Science*, No. 4, 2010, pp. 74~81. (in Chinese)

Art. 333 is included in "Chapter 30. Offences of Abrupt Taking, Robbery and Piracy", which mainly aims at the suppression of crimes against property rights, however, it is clear that piracy is a crime more than an offense solely directed at property.[39] The legislators of mainland China might not want to follow this categorization.

The report of Jack Lang has highly praised the efforts of States that adapt their legislation to the need of combating piracy in the current context.[40] The way the States revise their existing domestic laws could be inspiring to the future amendments to the laws of mainland China.

A. France

France, with its active participation in European military operation in the Gulf of Aden, finds it necessary to update its national legal framework against piracy. The Act of 15 July 1994 concerning modalities for the exercise of national police powers at sea has been amended in 2011 and a new chapter was added. The new chapter dealing with piracy also makes reference to several relevant offenses contained in the criminal code. Nevertheless, the new chapter brings together all the relevant offenses in one instrument.[41]

French courts have enlarged their jurisdiction according to the new act. They had previously only jurisdiction over cases where the victim was a French national. They can now exercise "quasi universal" jurisdiction over such offenses. French courts now can try offenders captured by the French navy. Of course, the French

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39 Tong Weihua, Studies on the Criminalization of Piracy at Sea, *Cross-Strait Legal Science*, No. 4, 2010, pp. 74~81. (in Chinese)

40 United Nations Security Council, Report of the Special Advisor to the Secretary General on Legal Issues Relating to Piracy off the coast of Somalia, S/2011/30, adopted on 25 January 2011, paras. 47~58, at http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/30, 26 September 2014.

41 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 24, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

courts always have the option to extradite suspects instead of trying them.[42]

One thing to note about the new act is that it makes direct reference to the UNCLOS. By doing so, the French law incorporates principles set up by the UNCLOS and other international treaties. Art. 1 of the revised act reads: "This title applies to acts of piracy as defined in the United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982, where they are committed 1. At sea; 2. In maritime areas that do not fall under the jurisdiction of any State; 3. Where provided for under international law, in the territorial waters of a State."[43]

The revised French act also adjusts the judicial proceedings to make it easier for French courts to put the suspects on trial. For example, a specific procedure of detention of offenders of crimes at sea is added, because it is difficult to put such a suspect in front of a French judge within the limited time normally applicable for suspects caught in French territory.[44]

B. Russia

The Russian government believes that its domestic law is fully in conformity

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42 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 24, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

43 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 25, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

44 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, pp. 24~25, 28~29, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

with UNCLOS.[45] Art. 227 of Russian Federation Criminal Code reads as follows:

> *Piracy 1. Assault against a maritime or other vessel with intent to capture the property of others and with the use of force or the threat of force. Punishable by imprisonment from five to ten years. 2. The same act, but involving firearms or objects used in the capacity of firearms (Federal Act No. 162-FZ of 8 December 2003). Punishable by imprisonment from eight to twelve years, with or without a fine consisting of either 500,000 roubles or loss of salary or other income for a period of not more than three years (Federal Act No. 162-FZ of 8 December 2003). 3. The acts covered by parts 1 and 2 above, if they have been committed by an organized group and have resulted in either the inadvertent death of a person or other serious consequences. Punishable by imprisonment from ten to 15 years, with or without a fine consisting of either 500,000 roubles or loss of salary or other income for a period of not more than three years (Federal Act No. 162-FZ of 8 December 2003).*[46]

As to the procedural issue, the "quasi universal" jurisdiction is applicable. Russian courts can exercise jurisdiction over foreign offenders of piratical acts on the high seas, regardless of the nationality of the victim ship. To counter the difficulty to collect evidence in the case of crimes on the high seas, the military prosecution officers on board the Russian warships help the competent body with the initial investigations.[47]

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45 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 76, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

46 Russian Federation Criminal Code, Adopted by the State Duma on 24 May 1996, (Federal Act No. 162-FZ of 8 December 2003), at http://www.russian-criminal-code.com/PartII/SectionIX/Chapter24.html, 12 January 2016.

47 United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, S/2012/177, 26 March 2012, p. 77, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177&referer=http://www.un.org/depts/los/piracy/piracy_documents.htm&Lang=E, 26 February 2016.

C. Japan

The Penal Code of Japan does not contain the crime of piracy. Japan used the same method as China to sanction piracy and armed robbery at sea, which was punished under the name of robbery and kidnapping, among others.[48] However, in 2009, Japanese government decided to send the Japan Maritime Self-Defense Forces to join the multi-national military operation against piracy, thereupon the Law on Punishment of and Measures against Acts of Piracy (Act No. 55 of 2009) was adopted. The Act has criminalized piracy and introduced universal jurisdiction. And it could fill the gap in the Japanese domestic law and solve the particular problem of the foreign-flagged vessels. Japanese companies hire large fleet for their international trade, but only a small percentage of the ships hired fly the flag of Japan. The non-Japanese flagged ships are related to the interest of Japan which only had limited jurisdiction under the former domestic law of Japan. [49]

Under this Act, the acts of piracy are defined as acts falling under:

> *any of the following items committed for private ends on the high seas (including exclusive economic zone (EEZ) prescribed in the United Nations Convention on the Law of the Sea) or territorial sea as well as internal waters of Japan by crew or passengers of a ship (except for warships and other government ships): (i) seizing another ship in navigation or taking control of the operation of another ship by rendering persons irresistible by assault, intimidation or any other means; (ii) robbing property on board another ship in navigation or obtaining or causing others to obtain an unlawful profit by rendering persons irresistible by assault, intimidation or any other means; (iii) kidnapping a person on board another ship in navigation for the purpose of taking the person hostage to demand a third person to deliver any property or to take any other unobligated action or to waive that person's right;(iv) demanding a third person to deliver any property or to take any other unobligated action or to waive that person's right by taking a person, on board*

48 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 85.

49 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 83.

a robbed ship or a ship whose control is taken or kidnapped on board another ship in navigation, hostage; (v) breaking into or damaging another ship in navigation for the purpose of committing the acts of piracy as referred to in each preceding items; (vi) operating a ship and approaching in close proximity of, beleaguering, or obstructing the passage of another ship in navigation for the purpose of committing the acts of piracy as referred to in items (i) to (iv) above; and (vii) preparing weapons and operating a ship for the purpose of committing the acts of piracy as referred to in items (i) to (iv) above. [50]

At the same time, the Criminal Code of Japan continues to apply to such acts since its Art. 8 stipulates that it applies "to crimes for which punishments are provided by other laws and regulations." [51]

To facilitate the prosecution of pirates caught by the Japanese Self-Defense Forces in the Gulf of Aden, the Japanese warships have Japanese Coast Guard officials on board to collect evidence and carry out investigation for later prosecution. [52]

After the Act No. 55 of 2009 took effect, the first case tried by the Japanese court is the case of the *M/V Guanabara*, which was such a foreign-flagged ship that was not registered in Japan but carried the interests of Japanese enterprises.[53]

To sum up, the relevant legislation of France and Japan, promulgated after the

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50 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 90. Art. 2, Law on Punishment of and Measures against Acts of Piracy (Act No. 55 of 2009), at http://www.sof.or.jp/en/topics/pdf/09_01.pdf, 12 January 2016.

51 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 94.

52 Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, p. 96.

53 The oil tanker, *Guanabara* flying the flag of Bahamas was operated by a Japanese company's subsidy. It was attacked 300 miles away from Oman. The oil tanker has no Japanese crew member on board. It was the U.S. navy which captured the suspects. In fact, the flag State of the victim ship (Bahamas), States of nationalities of the crew members on board and the State that captured the suspects (the U.S.) could exercise their jurisdiction. However, in the current case, States like Bahamas and U.S. have shown no intent to try the case. The suspects were finally transferred to Tokyo for trial. The Japanese Coast Guard officials on board the Japanese warships were able to collect sufficient evidence from the U.S. navy. See Kentaro Furuya, Japanese Anti-Piracy Law: Protection of Flagged-out Ships, in Jr. Maximo Q. Mejia, Chie Kojima and Mark Sawyer eds., *Piracy at Sea*, Heidelberg: Springer, 2013, pp. 98, 100.

start of the multi-national military operations in the Gulf of Aden, makes direct reference to UNCLOS to facilitate prosecution of pirates under their domestic law. The two States did not directly revise their respective criminal code. Instead, they either amended an existing act devoted to the suppression of maritime crimes or adopted a new act to deal with the new situation. At the same time, the relevant provisions in each State's criminal code continue to apply. Special regime for detention and evidence collection has been designed to counter the specific difficulties in the trial of suspects caught on the high seas.

By contrast, the Russian legislation adopted before the emergence of the Somali piracy problem is not totally consistent with the UNCLOS. However, it is natural that the definition of piracy in Russian domestic law is different from the one given by international law.

It is a global trend for States to criminalize piracy and facilitate the prosecution of suspected pirates. And it is consistent with China's own interests to do so by expanding its courts' jurisdiction in order to provide better protection for its nationals and vessels hired by its own enterprises.

Piracy and armed robbery at sea may be criminalized through two methods. One is to put the two crimes under the same name of crime of piracy without distinguishing the two. Russian domestic law is such an example. The other one is that States introduce directly the definition of piracy given by UNCLOS into their domestic law and criminalize similar acts committed in waters under a State's jurisdiction under the name of armed robbery. Several States amending their domestic laws after 2008 have chosen to follow this method, like France and Japan.

The author holds that the crime of piracy should be incorporated into the Crimes Endangering Public Security in Part II, Chapter II of the Criminal Law of China. An article concerning piracy may be inserted between Art. 122 (hijacking of ships and motor vehicles) and Art. 123 (crimes endangering safety of aviation). But piracy and armed robbery do not need to be separately defined.

On the one hand, Chinese domestic law rarely regulates any activity happening in a place beyond the jurisdiction of China. On the other hand, piracy under domestic law does not have to be the same as the one defined by the UNCLOS. More importantly, it is not necessary to distinguish piracy and armed robbery in the context of domestic law. Therefore, in an attempt to criminalize piracy in Chinese domestic law, the following wording might be adopted:

Piracy consists of any of the following acts committed for private ends:

1. Any illegal acts of violence or detention, or any act of depredation directed

against a ship or aircraft, or against persons or property on board such a ship or aircraft;

2. Any act of voluntary participation in the operation of any ship or aircraft engaged in acts mentioned in para. 1, with knowledge of its involvement; and

3. Any act of inciting or intentionally facilitating an act described in paras. 1 and 2.

Whoever commits acts described in para. 1 shall be sentenced to a fixed-term of imprisonment of no less than ( ) years, life imprisonment or death.

Whoever commits acts described in para. 2 shall be sentenced to a fixed-term of imprisonment of no less than ( ) years …

The criminal procedural law of China also needs to be revised. Or a new Supreme Court Explanation is needed to allow Chinese courts to exercise jurisdiction over suspects caught on the high seas. For example, Art. 10 of The Supreme Court Explanation Relating to the Implementation of the Criminal Procedural Law of the People's Republic of China might be revised as follows: to prosecute suspects in accordance with the international treaties to which China is a party, the jurisdiction is to be exercised by the People's Court of the place where the suspect is apprehended or where the port to which the suspects are transferred is located.

V. Conclusion

Facing the rampant piracy and armed robbery at sea off the coast of Somalia, the Security Council has called on all States to criminalize such offenses in their domestic law and prosecute the presumed pirates to combat impunity of the crimes.

The still existing non-criminalization of piracy is the first obstacle to overcome. Additionally, the criminal procedural law of China makes it difficult to prosecute offenders caught on the high seas or in a place beyond national jurisdiction. Due to these problems, some revisions are needed to be made to the criminal law and criminal procedural law of China, in order to better combat the global plague of piracy and armed robbery at sea.

To this end, an article to define the crime of piracy can be inserted between Art. 122 and Art. 123, Part II, Chapter II of the Criminal Law of China. In addition, since the current criminal procedural law of China has made it impossible for Chinese courts to exercise universal jurisdiction over suspects captured on high seas, some changes have to be made to this law. To tackle this problem, the simplest

way is to issue a new Supreme Court Explanation to illustrate some exceptional situations, such as incidents of piracy and any other maritime offenses where the suspects are often caught outside the territory of China.

Editor (English): Judith Schöne

海底电缆和海洋环境:增强两者之间和谐的可持续性相互作用

Kingsley Ekwere*

内容摘要:海底电缆网络已成为现代生活的主要推动者,特别是在这个信息高速公路时代,应尤其强调高效、高速的国际通信的重要性。全球信息基础设施的主干网现在主要是由光纤海底电缆组成。为满足人们更好、更快的通信需求,已经构建了长距离、复杂的海底光纤电缆网络,这些电缆横跨各大洋、覆盖各大洲。但是,通信革命已经给脆弱的海洋生态系统和生物多样性带来了巨大压力,尽管目前尚不明显。本文旨在探究海底电缆和海底生态系统之间的相互作用。在保全、保护、可持续管理或利用沿海水域和深海海域方面,我们面临的主要挑战是使通信革命所带来的惠益与潜在的环境影响之间保持平衡。本文认为电缆作业对海洋环境的影响是相对良性的,并指出通信电缆运营商和其他海底使用者之间和谐的相互作用,对实现环境的可持续性发展、海洋环境的保全和保护至关重要。

关键词:海底电缆　生态可持续性　海洋治理

一、引　言

海底电缆诞生于 19 世纪早期。1850 年,全世界首条海底电报电缆在英国多佛到法国加来之间的英吉利海峡开始铺设,该条电缆主要由铜线和杜仲橡胶制成。[1] 1866 年,第一条跨大西洋海底电缆在加拿大的纽芬兰和英国的爱尔兰之间敷设成功。1902 年至 1903 年,第一条横跨太平洋的电缆铺设完成,1902 年从美国大陆连接到夏威夷,1903 年从关岛连接到菲律宾。[2]早期取得的这些突破性进展极大

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1 Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, p. 20.

2 Submarine Communications Cable, at https://en.Wikipedia.org/wiki/Submarine_communication_cable, 7 May 2016.

地增强了远距离通信和信息传播。[3]虽然当时电缆的传输信息量少，但这一发展标志着海底电缆行业迎来了新曙光。[4] 海底电报电缆铺设及设计中使用的新方法和新技术，以及电缆材料的不断改进，延长了电缆的使用寿命。因此，到 20 世纪，世界上多数地方已通过全球性网络连接起来，为政府、商贸业和普通民众提供高速通信。[5] 2 大事件影响了海底电报电缆业的命运，其一为第一次世界大战期间无线电报技术的重要性得到了提升，其二为 20 世纪 30 年代的经济大萧条。[6]

随着海底电报电缆的逐渐衰落，20 世纪 30 年代中期诞生了海底电话电缆。[7]“由铜线导体构成的同轴电缆研发成功，整个电缆由聚乙烯材料包住，可以进行多个语音通道的复用。”[8] 1955 年到 1956 年间，苏格兰和纽芬兰通过 2 条电缆（TAT 1）连接了起来，这一发展开创了海底同轴电缆的时代。[9] 到 1960 年，随着设计和铺设技术的发展，已可以在更深的海底铺设更长的电缆。[10]

随着 20 世纪 70、80 年代出现的重大技术飞跃，卫星作为主要的通信手段得到了快速发展，卫星的通信容量大，但成本更低。[11] 虽然卫星给海底电缆技术造成了很大挑战，但是，1966 年，高锟博士和霍克汉姆博士发现了一种“包芯结构玻璃纤维材料”，这种材料具有更大的信息容量以及低成本优势。[12] 这一前所未有的突破带来了 20 世纪 70 年代末光缆系统的发展。20 世纪 80 年代建成了第一个海

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3 Submarine Communications Cable, at https://en.Wikipedia.org/wiki/Submarine_communication_cable, 7 May 2016.

4 Lionel Carter, Douglas Burnett, Stephen Drew, Graham Marle, Lonnie Hagadorn, Deborah Barlette-McNeil and Nigel Irvine, Submarine Cables and the Oceans: Connecting the World (UNEP-WCMC Biodiversity Series No. 31), ICPC/UNEP/UNEP-WCMC, 2009, pp. 12~13, at http://www.unep-wcmc.org/resources/publications/UNEP_WCMC_bio_series/31.aspx [hereinafter “UNEP/ICPC Report”].

5 UNEP/ICPC Report, p. 13.

6 Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, pp. 27~28.

7 1986 年，印度和阿联酋之间铺设了最后一条海底电话电缆，海底电话电缆时代到此结 束。See Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, p. 32.

8 UNEP/ICPC Report, p. 14.

9 UNEP/ICPC Report, p. 14.

10 UNEP/ICPC Report, p. 14.

11 Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, p. 32.

12 George Hockham and Charles Kao, Dialectric-Fibre Surface Waveguides for Optical Frequencies, *Proceedings of the Institute of Electrical Engineers*, Vol. 113, Issue 7, 1966, pp. 1151~1158.

底光纤系统,到1986年,海底光缆系统开始取代其他通讯系统。[13] 1988年,连接美、英、法三国的第一条跨洋光缆铺设完成。随着时间的推移,海底电缆"在信息容量、通信速度、数据传输和语音通信的经济性等方面开始超越卫星"。[14]

到20世纪80年代中期,信息和通信产业的发展得到了另一股力量——互联网流量——的推动。海底电缆和互联网这2种技术的结合,支撑和变革了整个产业。如今,电缆提供了大量快速、安全的语音和数据流量传输,与此同时,互联网使得人们可以出于商务、贸易、教育和娱乐目的,访问和使用数据和信息。[15] "据估计,全球网络由约213个独立的电缆系统构成,涉及的光缆总长将近877122公里。"[16] 大多数国家现在都依靠海底电缆来满足通信需求。统计数据表明,截至2012年中期,只有21个国家和地区仍未连接光纤网络。[17] 因此,联合国将海底光纤电缆称为对所有国家的经济和安全都"至关重要的通信基础设施"也不足为奇。[18] 虽然光纤革命仍不断地给人们带来众多好处,但其对海洋环境的潜在和实际影响已成为各国政府和国际组织所关切的问题,这促使全球都在努力确保沿海和深海水域能得到养护、保护和可持续管理或利用。

面对海洋环境中越来越多的人类活动,在和谐发展和保护最后的待开发疆域时,所有各方和利益相关者均应沟通、协作,这一点至关重要。

国际通信活动受国际法和国际条约规制。这些如今被称为国际习惯法的法律框架,规定了签署方在国际水域铺设、维修、拥有和运营海底电缆的权利。

二、电缆和生态可持续发展的海洋:概念理解

可持续发展的概念源于布伦特兰委员会的一份报告《我们共同的未来》。根据《我们共同的未来》,可持续发展指的是:

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13 Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, pp. 33~34.

14 UNEP/ICPC Report, p. 16.

15 UNEP/ICPC Report, p. 16.

16 Douglas R. Burnett, Tara M. Davenport and Robert C. Beckman, Introduction: Why Submarine Cables?, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport eds., *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, p. 2.

17 Douglas R. Burnett, Tara M. Davenport and Robert C. Beckman, Introduction: Why Submarine Cables?, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport eds., *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, pp. 1~2. 应当指出的是,这些国家和地区的光纤网络项目已经启动,项目正如期进行。

18 General Assembly Resolution 65/37A, 7 December 2010.

> 既满足当代人的需要，又不对后代人满足其需要的能力构成危害的发展。它包括 2 个重要的概念：（1）“需要”的概念，尤其是世界上贫困人民的基本需求，应将此放在特别优先的地位来考虑；（2）“限制”的概念，技术状况和社会组织对环境满足眼前和将来需要的能力施加的限制。因此，世界各国——发达国家或发展中国家，市场经济国家或计划经济国家，其经济和社会发展的目标必须根据可持续性的原则加以确定，解释可以不一，但必须有一些共同的特点，必须从可持续发展的基本概念上和实现可持续发展的大战略上的共同认识出发。[19]

这一定义（又称“布伦特兰定义”）指出了此后有关可持续发展争论的焦点之一。本文不打算回顾可持续发展概念的历史演变过程，但将讨论这一概念的核心理念，并强调其对确保海底电缆和海洋环境之间和谐发展的重要性。

虽然对可持续发展概念的讨论和批评有很多，但目前还缺乏足够强大的理论和分析框架，以用于评价旨在实现更可持续的发展的决策。[20]“可持续发展”这一术语存在一些自相矛盾之处，或许第一步就要从此处下手。“可持续性”一词源自生态学，指的是一种永远持续的过程或状态。另一方面，“发展”则需要持续利用自然资源以及改变环境。将这 2 个词放在一起就构成“可持续发展”一词，这个词存在惊人的自相矛盾之处，尽管有时这种矛盾并不明显。虽然这 2 个词的含义南辕北辙，但当发展和环境保护并行不悖时，是可以放在一起的。[21]

可持续发展的支持者所面临的一个主要挑战是，人们是从不同学科领域来看待和解释可持续发展的，包括生态学、经济学、法学、贸易学，甚至是政治学等。理查德•诺加德承认这些分歧，并指出“环保人士想要环境系统持久不变，消费者想要持续消费，而工人则想要持久的工作岗位。”[22] 贾布林将有关可持续发展的不同文献结合起来加以研究，在学术上取得了突破性的进展。[23]贾布林设置了一组

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19 World Commission on Environment and Development (WCED), *Our Common Future*, Oxford: Oxford University Press, 1987, p. 43.

20 John S. Dryzek, *The Politics of the Earth: Environmental Discourses*, New York: Oxford University Press, 1997; Michael Redclift, The Multiple Dimensions of Sustainable Development, *Geography*, Vol. 76, No. 1, 1991, pp. 36~42.

21 Yosef Jabreen, A Knowledge Map for Describing Variegated and Conflict Domains of Sustainable Development, *Journal of Environmental Planning and Management*, Vol. 47, Issue 4, 2004, pp. 626~627.

22 Richard B. Norgaad, Sustainable Development: A Co-Evolutionary View, *Futures*, Vol. 20, Issue 6, 1988, p. 607.

23 Yosef Jabreen, A Knowledge Map for Describing Variegated and Conflict Domains of Sustainable Development, *Journal of Environmental Planning and Management*, Vol. 47, Issue 4, 2004, p. 628.

镜头，并透过这些镜头来描述可持续发展。[24] 然而，对可持续发展进行启发性论述的却是德雷泽克，[25] 他认为可持续性应被视为一个广泛的研究领域，涉及文化完整性、司法、治理问题，以及经济活动的生态极限、个体安全生活的权利等问题。[26] 卡塞塞法官将可持续发展归为软法文件以及条约和宣言中的一般准则。卡塞塞基于上述布伦特兰委员会报告中提出的可持续发展的定义，将可持续发展定义为“满足当代人的需要，又不对后代人满足其需要的能力构成危害的发展”。[27] 伯尼和波伊尔则认为可持续发展包含以下要素：（1）环境保护和经济发展相结合。这一要素反映了《里约宣言》原则四的内容，该项原则规定“环境保护应成为发展进程中的一个组成部分，不能同发展进程孤立开看待。”（2）发展的权利。《里约宣言》原则三规定，“必须履行发展的权利，以便公正合理地满足当代和世世代代的发展与环境需要。”（3）可持续利用和自然资源保护。（4）代际公平。（5）现有经济体系中的不平等。[28] 1991 年，贾斯蒂斯•布莱恩•普雷斯顿普及了生态可持续发展这一新概念，该概念强调经济与环境相结合，并涉及一系列原则，如可持续利用原则、整合原则、预警原则、代际和代内公平、生物多样性和生态完整性保护，以及外部环境成本的内部化。这些原则如得以实施，人们会从开发环境时不考虑环境后果，转变到注重可持续性发展，并将这种文化渗透到政府、私营开发的利益团体，以及社会和个人。这种发展方式能够维持生命所仰赖的生态过程，并提高现在和未来的总体生活质量。[29] 经济学家罗伯特•索罗将可持续发展解释为“一种正确行事的义务，以便让后人有权选择或有能力像我们一样富足。”从索罗的定义可以看出，我们具有不以牺牲后代人的利益为代价，不过分放任行事的道德责任。

综上所述，显而易见，可持续发展的定义需要扩展，以包容这一概念所涉及的方方面面。因此，有必要先找出可持续发展应当解决的核心问题。虽然我们无法列出一个详尽无遗的清单，但可以列举可持续发展的部分指标（见下文）。可持续发展的目标应该是满足人类基本需求，并减少环境成本分担和环境收益分配的不平等。为实现上述目标，有必要平衡各方之间的责任，即政府、社会和产业之间的责任。

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24 Yosef Jabreen, A Knowledge Map for Describing Variegated and Conflict Domains of Sustainable Development, *Journal of Environmental Planning and Management*, Vol. 47, Issue 4, 2004, p. 628.

25 John S. Dryzek, *The Politics of the Earth: Environmental Discourses*, New York: Oxford University Press, 1997.

26 John S. Dryzek, *The Politics of the Earth: Environmental Discourses*, New York: Oxford University Press, 1997.

27 Ian Brownlie, *Principles of Public International Law*, 7th edition, New York: Oxford University Press, 2008, p. 278.

28 Patricia Birnie and Alan Boyle, *International Law and the Environment*, 2nd edition, Oxford: Oxford University Press, 2002, pp. 86~87.

29 At http://www.lec.lawlink.nsw.gov.au, 2 May 2016.

（一）对海洋适用可持续发展原则

人们曾认为海洋是一个巨大的水库，能吸收无限的废弃物，也能承受人类造成的日益增加的压力，但海洋正变得越来越脆弱。作为地球的组成部分，海洋对人类生命、生活以及维系人类的环境至关重要。如上所述，可持续发展的概念可以通过很多方式来加强和丰富人类对海洋的利用和保护。

各国均具有可持续利用、养护和保护海洋和海岸环境的义务和权利，这些权利和义务在一系列具有法律约束力的全球和区域协定中均有规定。其中，最全面的条约就是 1982 年的《联合国海洋法公约》（以下简称“《公约》”）。[30] 除传统的公海权利外，《公约》还规定了保护和保全海洋环境的义务，包括稀有和脆弱的生态系统，以及衰竭、受威胁或有灭绝危险的物种和其他形式的海洋生物的生存环境。《公约》中多次提到可持续利用、养护、保护和保全海洋环境，以及促进全世界人民的经济和社会发展。[31] 例如，《公约》第十二部分指出，各国均负有保护和保全海洋环境的义务。[32]

1995 年《联合国鱼类种群协定》（以下简称“《协定》”）[33] 也多次提及可持续发展的原则。依据所发现的过度捕捞迹象，《协定》通过详细阐述和明确说明《公约》的某些规定来执行《公约》。为解决这些问题，《协定》还规定了沿海国和捕捞国具有管理高度洄游鱼类种群和跨界鱼类种群的严格义务。《协定》明确吸收了渔业管理和保护，以及促进鱼类种群长期可持续利用的现代方法，包括预防性方法和基于生态系统的方法。

1992 年的《生物多样性公约》[34] 也多次提及可持续发展概念。《生物多样性公约》的一项基本原则为：保护生物多样性是全人类共同关切的问题。该公约旨在保护生物多样性，可持续利用其组成部分，以及公正、公平地分享基因资源利用所产生的惠益。

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30 United Nations Convention on the Law of the Sea, opened for signature on December 10, 1982, in force on November 16, 1994, *United Nations Treaty Series*, Vol. 1833, p. 396. 截至 2016 年 4 月 29 日，《公约》共有 167 个缔约国。

31 Preamble, UNCLOS.

32 Article 192, UNCLOS.

33 The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001). At http://www.un.org/Deptslos/convention_agreement, 7 May 2016.

34 1992 United Nations Convention on Biological Diversity (in force from 29 December 1993). See *United Nations Treaty Series*, Vol. 1760, p. 79.

在区域层面，联合国环境署设立了“区域海洋方案”[35]，旨在通过可持续管理和利用海洋和沿海环境（包括资源在内），应对这些地区加速退化的问题。

上述这些全球和区域协定一起形成了一个各国在生物多样性和生态系统方面的义务框架，包括保护和保全海洋环境的义务。这些协定还强调，发展与生态可持续性必须并存不悖。综上分析可知，健康的海洋是实现全球可持续发展的根本，同时也重申了可持续发展的三大支柱——环境保护、社会发展和经济发展之间的内在联系，以及平衡这三大支柱的需要。这同样表明，国家在保护环境时，可以从健康的海洋中获得最佳经济和社会效益。因此，当务之急是保护全球海洋和海洋物种。在利用海洋时，使用者首先必须履行保全和保护生态完整性的义务。

（二）对海底电缆适用可持续发展原则

卡特和伯内特等人共同提出了一种整体评估海底光纤电缆对海洋可持续利用的影响的理论方法。[36] 他们并没有通过可持续发展的三大支柱来为海底电缆建构一个可持续发展框架，而是依据调查所获证据，概括海洋环境和海底电缆之间的相互影响。他们认为，海底电缆对海洋环境的影响是相对良性的。在经历将近半个世纪的光通信之后，在光纤电缆的整个生命周期中，标准化、安全和环境可持续性都非常重要。从生产、使用、报废到拆卸，都应尽量减少对环境可能造成的影响。[37] 下文将详细论述海底电缆和海洋环境之间的相互作用。

三、海底电缆国际法框架简析

海底电缆通常被视作公共物品，因此，人们才会产生规范和保护海底电缆的想法。这有助于人们将海底电缆的法律保护提上 1863 年至 1913 年间召开的 7 个国际会议的日程。[38] 第一份处理各国有关海底电缆的权利和义务的国际文书是

35 UNEP, *UNEP-Sponsored Programme for the Protection of Oceans and Coastal Areas, UNEP Regional Seas Reports and Studies No. 135*, Nairobi: Oceans and Coastal Areas Programme Activity Centre, UNEP, 1991.

36 See UNEP/ICPC Report.

37 Malcolm Johnson, *Optical Fibres, Cables and Systems, International Telecommunication Union Manual*, Geneva: International Telecommunication Union, 2009.

38 United National Documents on the Development and Codification of International Law, *Supplement to American Journal of International Law*, Vol. 41, No. 4, October 1947, at http://legal.un.org/ilc/documentation/english/ASIL_1947_study.pdf, 18 May 2016.

《保护海底电缆公约》（以下简称“《1884 年公约》”），[39] 接着是 1958 年的日内瓦《公海公约》和《大陆架公约》（以下简称“《1958 年日内瓦公约》”），最后，通过了《公约》，其被认为是可适用于海底电缆的法律框架。通常情况下，除了就保护海底电缆免受损坏作出规定外，这些公约还就海底电缆的铺设、维修和维护作出了规定。仔细阅读一下这些公约，我们会发现《1884 年公约》是仅涉及海底电报电缆保护的独立公约，而《1958 年日内瓦公约》和《公约》则不同，它们除了涉及电缆保护外，还处理了与海洋法相关的大量其他事务。整体而言，这些公约既涵盖海底电缆的保护问题（《1884 年公约》中有相关规定），[40] 又涉及电缆铺设、维修和维护的自由问题。

四、海域和海底电缆的铺设、修理和维护

（一）领海

应确保在铺设、修理和维护电缆时不会给电缆造成损害或将损害降到最低，这与所有利益相关者 [41] 均息息相关。[42] 根据《公约》，各国都有权确定其领海宽度，具体为按照本公约确定的基线量起不超过 12 海里。[43] 按照该规定，管控领海内所有活动的权利都属于沿海国，包括在领海铺设、修理和维护海底电缆的权利。然而，这一权利并不是不受约束的，其行使必须“受本公约和其他国际法规则的限制”。[44] 此外，各国船舶均享有无害通过领海的权利。[45] 在不违反《公约》规定和其他国际法规则的情况下，沿海国可针对海底电缆保护制定关于无害通过领海的法

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39 Convention for the Protection of Submarine Telegraph Cables 14 March 1884 (entered into force 1 May 1888) [hereinafter “1884 Convention”]. 在经过 2 年的协商之后，《1884 年公约》于 1884 年 3 月在巴黎通过，海底电报电缆是海底光纤通信电缆的前身。截至 2013 年 4 月 2 日，该公约共有 40 个缔约国。

40 值得注意的是，《1884 年公约》第 2、4、5条被并入到《公海公约》第 27、28、29 条和《公约》第 113、114、115 条中。

41 具体包括沿海国、其他国家以及海底电缆行业的权益。

42 对电缆造成损害可能会妨碍多个国家的电讯系统，“东非海事系统”在 2012 年 2 月 25 日遭受破坏时的情况便是典型的例子。“东非海事系统”是肯尼亚政府牵头的一个项目，旨在通过海底光缆将肯尼亚和世界其他地方连接起来。东非海事系统光钎电缆被停靠在蒙巴萨海岸的船舶意外割断。肯尼亚和乌干达超过一半的网络因此受到影响。At http://en.wikipedia.org/wiki/TEAMS_syst, 2 May 2016. 损坏海底电缆还可能承担相关责任，参见 Submarine Cable Company v. Dixon, *The Law Times Reports*, Vol. X, 1864, p. 32 and The Clara Kilam, *Law Reports, Admiralty and Ecclesiastical Cases*, Vol. III, 1870, p. 161.

43 Article 3, UNCLOS.

44 Article 2(3), UNCLOS.

45 Article 17, UNCLOS.

律法规。[46]

（二）群岛水域

群岛国[47]对群岛基线内的水域（群岛水域）享有主权，但各国船舶在群岛水域均享有无害通过权。[48]为保护海底电缆，群岛国也可制定有关无害通过的法律和规章。[49]尽管群岛国有权管控其群岛水域内的海底电缆，但必须尊重其他国家所铺设的通过其水域的海底电缆。群岛国于接到关于这种电缆的位置和修理或更换这种电缆的意图的适当通知后，应准许对其进行维修和更换。[50]

（三）专属经济区[51]

国家可以主张从测算领海宽度的基线量起不超过200海里的专属经济区。[52]沿海国在专属经济区内有“以勘探和开发、养护和管理海床上覆水域和海床及其底土的自然资源（不论为生物或非生物资源）为目的的主权权利，以及关于在该区内从事经济性开发和勘探，如利用海水、海流和风力生产能等其他活动的主权权利。”[53]沿海国对下列事项同样享有管辖权：（1）人工岛屿、设施和结构的建造和使用，（2）海洋科学研究，（3）海洋环境的保护和保全。[54]但沿海国对专属经济区的权利也存在一些限制，首先，在专属经济区内行使其权利和履行其义务时，沿海国应适当顾及其他国家的权利和义务。此外，所有国家都享有在专属经济区内铺设电缆的自由，以及与这一自由有关的海洋其他国际合法用途，诸如海底电缆的使用。[55]

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46 Article 21(1)(c), UNCLOS.
47 群岛国是指全部由一个或多个群岛构成的国家。See Article 46(a), UNCLOS.
48 Article 52, UNCLOS.
49 Article 21(1)(c), UNCLOS.
50 Article 51(2), UNCLOS.
51 《公约》第55条规定，专属经济区是“领海以外并邻接领海的一个区域，受本部分规定的特定法律制度的限制，在这个制度下，沿海国的权利和管辖权以及其他国家的权利和自由均受本公约有关规定的支配。”
52 Article 57, UNCLOS.
53 Article 56(1)(a), UNCLOS.
54 Article 56(1)(b), UNCLOS.
55 Article 58(1), UNCLOS.

（四）大陆架[56]

沿海国可以主张 200 海里的大陆架，如从测算领海宽度的基线量起到大陆边外缘的距离超过 200 海里，[57] 则可以主张从测算领海宽度的基线量起不超过 350 海里或 2500 公尺等深线 100 海里的大陆架。[58] 沿海国可以“为勘探大陆架和开发其自然资源的目的，对大陆架行使主权权利”，这些自然资源包括“海床和底土的矿物和其他非生物资源”。[59] 沿海国行使大陆架权利，绝不得对航行和《公约》规定的其他国家的其他权利和自由有所侵害，或造成“不当的干扰”。[60] 所有国家都有在大陆架上铺设海底电缆的权利，[61] 且沿海国对于铺设或维持这种海底电缆不得加以阻碍。[62] 铺设海底电缆时，《公约》要求沿海国进一步确保修理现有电缆的可能性不应受妨害。[63] 在大陆架上铺设管道（不包括海底电缆），其路线的划定须经沿海国同意，这意味着虽然沿海国可以控制管道路线的划定，但在海底电缆方面却没有类似的权利。[64]

（五）外大陆架

在专属经济区以外的外大陆架上，适用公海自由制度，[65] 包括铺设海底电缆的自由，但须适当顾及其他国家行使公海自由的利益。[66]

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56 大陆架是指“领海以外依其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。”

57 《公约》第 76(4) 条规定了划定大陆边外缘的复杂公式。

58 Article 76(5), UNCLOS.

59 Article 77(1) and (4), UNCLOS.

60 Article 78(2), UNCLOS.

61 Article 79(1), UNCLOS.

62 Article 79(2), UNCLOS.

63 Article 79(5), UNCLOS.

64 Article 79(3), UNCLOS. See also Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 174; Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. II*, The Netherlands: Martinus Nijhoff Publishers, 1993, p. 915, para. 79.8(c). 第 79 条第 3 款与管道线路有关，涉及现有的和新铺设的管道。该款规定各国在大陆架上铺设管道（不包括电缆），其路线的划定应得到沿海国的同意，从而对所有国家在大陆架铺设管道的自由进行了限制。这一规定与第 2 款允许沿海国对防止、减轻和控制管道造成的污染采取合理措施达成了一致。

65 Ian Brownlie, *Principles of Public International Law*, 7th edition, New York: Oxford University Press, p. 242.

66 Article 87(2), UNCLOS.

（六）公海[67]

公海对所有国家开放，[68]《公约》第 87 条规定，公海自由包括铺设海底电缆的自由，但受第六部分的限制。[69] 这些自由应由所有国家行使，但须适当顾及其他国家行使公海自由的利益，并适当顾及与“区域”内活动有关的权利。[70]

（七）“区域”[71]

国际海底管理局（以下简称“管理局”）负责管理“区域”矿产资源的勘探和开发。[72]管理局已和国际电缆保护委员会（以下简称“委员会”）签署了促进“区域”利用的合作谅解备忘录。该备忘录涵盖有关电缆线路和勘探、开发区域的信息交流。[73] 根据《公约》，“区域”是公海的一部分，第 87 条所规定的公海自由，包括铺设海底电缆的权利，也适用于“区域”。第 112(1) 条还进一步阐述了这种自由，该条款规定所有国家均“有权在大陆架以外的公海海底上铺设海底电缆……”，但铺设海底电缆时，各国应适当顾及已经铺设的电缆和管道，特别是，修理现有电缆或管道的可能性不应受妨害。[74]

《公约》将“区域”及其资源认定为“人类的共同继承财产”。任何国家都不能主张“区域”的任一部分或其资源。对“区域”内资源的一切权利，都属于全人类。因此，欲开采“区域”矿产资源的公司，必须与相关方达成收益分享协议，与发展中国家分享开采“区域”矿产资源所获得的收益。

（八）相关产业

参与海上作业的主要机构是电缆公司。虽然《公约》赋予“所有国家”铺设电

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67 公海是指“不包括在国家的专属经济区、领海或内水或群岛国的群岛水域内的全部海域。” See Article 86, UNCLOS.

68 Article 86, UNCLOS.

69 公海自由的大部分内容均适用于专属经济区（《公约》第 58 条）和大陆架（《公约》第 77 条）。《公约》第 56(3) 条规定，沿海国在专属经济区内关于海床和底土的权利，应按照第六部分有关大陆架的规定行使，因此，将专属经济区和大陆架的定位于同一地理区域内。

70 Article 87(2), UNCLOS.

71 “区域”是指“国家管辖范围以外的海床和洋底及其底土。” See Article 1(1), UNCLOS.

72 Article 1(3), UNCLOS.

73 Memorandum of Understanding between the International Cable Protection Committee and the International Seabed Authority signed on 15 December 2009, Annex to Note by the Secretariat at the 16th Session, 26 April to 7 May 2010, International Seabed Authority, at http://www.isa.org.jm/files/documents/EN/Regs/MOU-ICPC.pdf, 19 May 2016.

74 Article 112(2), UNCLOS.

缆的自由，但实际上，海底电缆通常由私营企业而非政府所有，且由私营企业运营和维修。根据《1982 年〈联合国海洋法公约〉评注》中的解释，“所有国家”这个词不应太严格地理解，因为许多海底电缆和管道实际上都归私人所有，并由公司或其他私人实体铺设。因此，这个词考虑到了国家及其国民的权利。[75] 海底电缆的所有者和运营者通常也是海底电缆的制造商和供应商，以及电缆检验员和安装人员，因此，确保电缆的铺设、修理和维护符合全球公认标准，提炼最佳实践的基本做法，关系到上述所有群体的利益。

总之，《公约》确立了所有利益相关者的权利和义务，以期平衡沿海国在近海水域的利益与所有国家 / 其他使用者在利用海洋方面的利益。《公约》借此明确区分了对内水、群岛水域和领海的主权行使，以及对专属经济区和大陆架的主权权利的行使。主权权利与职能管辖权相关，特别是对资源和环境保护的权利，主权权利是在性质上不及主权的权利。

五、国际海洋环境

海洋不是深不见底的垃圾场，也不具有无限的纳污能力和不断供给资源的能力，在这些事实得以证明之后的 20 世纪后叶，全球开始日益关注海洋环境的状态。越来越多的人类足迹，加上不可持续、不环保的矿产资源开采活动，以及海洋生物多样性的破坏，使得人们的环保意识日益提高，而海洋则成为人们关注的焦点之一。

海洋生态系统是地球上最大的水体系统。地球上的生命依赖于海洋，财富、机会和富裕源于海洋。地球约 71% 的表面都被海水覆盖，水深平均 3.8 千米，总水量为 13.7 亿立方千米。海洋生态系统的价值巨大，为我们提供粮食、能源和水，维持着数以百万计的人类生活。海洋同时也是国际贸易运输的高速公路，全球气候的主要“稳定器”。海洋渔业的渔获量占全球总渔获量的 85%。而且全球商品贸易货运量的 80% 以上都是通过海运完成的。[76]

除过度捕捞之外，陆上活动的累积效应已经对海洋造成了巨大压力，并破坏

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75 Myron H. Nordquist, Neil Grandy, Satya N. Nandan and Shabtai Rosenne eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. II*, Leiden: Martinus Nijhoff Publishers, 1995, p. 264. 然而，蕾纳•拉古尼教授却认为，根据条约的一般原则，如果国内立法认可，那么铺设电缆的自由只能由私人电缆所有者行使。据他所说，这是因为只有国际协定中的自动执行条款才可以为私人实体设置权利和义务。《公约》第 112 条针对的是国家而不是私人实体，该条款并不是一条自动执行条款，不能直接适用于电缆所有者。See Rainer Lagoni, *Legal Aspects of Submarine High Voltage Direct Current (HVDC) Cables*, New Jersey: Transaction Publishers, 1998, pp. 12~13.

76 A. N. Subramanian, Introduction: Marine Environment, at http://saltwaterstudies.com/wp-content/uploads/2015/07/Introduction-Marine-Environment.pdf, 19 May 2016.

了湿地、红树林和珊瑚礁。海洋最终还变成了被河流和风带来的各种陆上废弃物的污水池，包括沿海大城市的废弃物。有害废物运输、操作性溢油和事故性溢油、向海中排放放射性物质、核试验和船舶压舱水中的外来物种所造成的其他威胁，正变得越来越普遍，对海洋及其资源产生了不利影响。[77]

海洋环境是一个脆弱的生态系统，对环境进行管理应当是所有利益相关者的共同愿景。除了努力创造各利益群体利益均衡的环境外，还有必要确保和加强一个健康、可持续的深海海洋环境。

六、有关海洋环境保护和保全的法律和政策制度

《公约》为海洋环境的保护和保全提供了相关的法律和政策制度，尤其是全球层面主要的海洋治理制度。《公约》确立了各国保护和保全海洋环境的法律义务，[78] 其中许多规定都涉及海洋环境和海洋野生动物的保护。

《公约》第十二部分题为“海洋环境的保护和保全”，该部分载明了各缔约国防止、减少和控制污染的一般义务和特定义务。《公约》还规定沿海国有保护海洋的责任，因此《公约》下的海洋制度对海洋保护至关重要。毫无争议，沿海国处于适用和执行《公约》的最佳位置。在这一点上，沿海国可以采取其认为对保护海洋环境而言必要的任何措施。然而，由于沿海国的权力范围不及公海，所以《公约》制定了适用于所有国家的规定，即规定所有国家都有保护环境、减少污染的义务。

《公约》第 193 条 [79] 确认，各国“有依据其环境政策和按照其保护和保全海洋环境的职责开发其自然资源”的主权权利。第 194 条要求各国个别或联合地采取一切符合《公约》的必要措施，按照其能力使用其所掌握的最切实可行的方法，防止、减少和控制任何来源的海洋环境污染。第 194 条还进一步列举了 4 种污染源：（1）放出的有毒、有害或有碍健康的物质；（2）来自船只的污染；（3）来自用于勘探或开发海床和底土的自然资源的设施和装置的污染；（4）来自在海洋环境内操作的其他设施和装置的污染。最后，第 204 条规定，各国应在符合其他国家权利的情况下，在实际可行范围内，尽力用公认的科学方法观察、测算、估计和分析海洋环境污染的危险或影响。

在《公约》框架基础上建立的另一项条约是 1992 年《生物多样性公约》，该公约详细阐述了为加强海洋生物多样性的保护和可持续利用，各国应当如何保护和保全环境。

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77 A. N. Subramanian, Introduction: Marine Environment, p. 30, at http://saltwaterstudies.com/wp-content/uploads/2015/07/Introduction-Marine-Environment.pdf, 19 May 2016.

78 Part XII, Article 192, UNCLOS.

79 该规定与 1972 年《斯德哥尔摩宣言》第 21 条原则类似。

在很大程度上，《公约》和国家实践不仅提供了海洋生态系统保护的法律框架，同时也为此提供了适当的治理方式。由于海底不仅是脆弱的，而且也是铺设电缆的地方，所以有必要努力创造一个各利益群体利益均衡的不受干扰的环境。下文将对电缆和海洋之间的相互影响进行考察。

七、海底电缆网络和海洋环境的相互影响

认识到有维持海洋安宁的需求，《公约》在序言中祈望“为海洋建立一种法律秩序，以便利国际交通和促进海洋的和平用途，海洋资源的公平而有效的利用，海洋生物资源的养护以及研究、保护和保全海洋环境。”[80]

各种技术施工给海洋带来的压力越来越大，但是，除了促进国际交流外，海底电缆也属于对海洋的合理利用，这一点是毫无争议的。[81] 研究指出，电缆对海洋环境的影响是相对良性的。此外，并没有报告显示，生物的丰度和多样性会随距离电缆的远近而不同。[82]

（一）海底电缆的基本结构

在设计海底电缆时，需要考虑其抵御水、海浪、海流和其他影响海底的自然力量的能力。由于上述力量大部分都会随海水深度而改变，所以在过去 160 多年里，人们都在努力寻求如何克服这些问题。[83] 20 世纪 70 年代后期和 80 年代初，光纤海底电缆的发展被认为是电讯行业革命性的突破。光缆一般由缆心、加强钢丝、铜导线、护套、外护层等几个部分组成，其中，缆心由一定数量的光纤（细如头发的玻璃丝）按照一定方式组成，铜导线给传输光信号的中继器或放大器提供动力，护套一般采用聚乙烯绝缘体材料，外护层为钢铠。[84]

与管道和拖网等其他海底结构相比，通信电缆与环境保护更不容易产生冲突，因为电缆体积更小，而且由在海水里能长期稳定存在的无毒材料构成。

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80 Preamble, UNCLOS.

81 在使用海底电缆的 159 年时间中，铺设和维护通信电缆没有出现不可逆的环境影响。See UNEP/ICPC Report, p. 28.

82 John Komuc and Catherine Creese, Studying the Impact of Seafloor Cables on the Marine Environment, *Currents*, Spring 2014, pp. 8~21.

83 UNEP/ICPC Report, p. 17.

84 UNEP/ICPC Report, p. 18.

（二）环境影响评估程序

尽管光纤电缆对海底没有多大的危害，但其仍可能对海底环境产生影响。我们可以通过评定和监测电缆安装前后的生物群来评估这种影响。[85]

环境影响评估是指“针对一个项目对自然环境造成的影响的分析，其目的是为了确保在批准海底电缆铺设项目之前，将铺设和维护电缆可能对环境造成的任何影响都考虑在内。”[86]

就海底电缆而言，许多国家都规定，执行环境影响评估是获得铺设和修复电缆许可的条件之一。[87] 环境影响评估的范围包括：“提供有关技术资料和环保认证符合性声明，进行简单的环境审查，以及经过正式公开咨询和 / 或政府咨询的综合分析”。[88]

在评估领海内活动可能造成的影响时，各国在批准海底电缆铺设之前有义务执行环境影响评估。《公约》第 206 条规定，

> 各国如有合理根据认为在其管辖或控制下的计划中的活动可能对海洋环境造成重大污染或重大和有害的变化，应在实际可行范围内，就这种活动对海洋环境的可能影响作出评价，并应依照第 205 条规定的方式提送这些评价结果的报告。

海底电缆的铺设和修理不会对海床构成危害，因此不会对海洋环境造成污染[89]或有害变化。联合国环境规划署和委员会[90]的联合报告也支持海底电缆对环境的影响是良性的，认为“各国很少会对电缆作业进行环境影响评估，此种评估通常仅

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85 UNEP/ICPC Report, p. 31.

86 UNEP/ICPC Report, p. 29.

87 在领海内铺设电缆的，各国可能要求进行环境影响评估。例如，欧盟环境影响评估第 85/337/EEC 号指令（经第 97/11/EC 号指令修订）虽然没有要求对海底电缆的铺设进行环境影响评估，但个别缔约国的许可制度可能有这样的要求。在德国，申请程序框架中就必须提供环境影响评估。See OSPAR Commission, Assessment of the Environmental Impacts of Cables-Biodiversity Series, 2009, p. 13.

88 OSPAR Commission, Assessment of the Environmental Impacts of Cables-Biodiversity Series, 2009, p. 13.

89 在联合国教科文组织政府间海洋学委员会和联合国海洋污染科学问题专家联合组给出的定义的基础上，《公约》第 1 条将污染定义为，“人类直接或间接把物质或能量引入海洋环境，其中包括河口湾，以致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。”

90 国际电缆保护委员会是由国家电讯主管部门和电缆行业的代表所组成的非政府组织，其主要宗旨是促进海底电缆的保护，使其免受人为灾害和自然灾害的破坏，并促进有利于电缆保护的项目和计划的融资。

限于沿海国领海内的电缆作业”。[91]

（三）电缆路线勘测

路线选择的关键部分是识别和了解拟议路线的海洋地缘政治界限，这一初期阶段被称为桌面研究。在确定电缆可能埋设的位置后，需要收集所有可获得的水文和地质资料、授权渔业活动、批复报告，并考察附近已有的电缆和其他障碍物的位置和历史，接着再勘测高效、安全的路线。[92] 桌面研究有助于实施有效调查，避免危险，避开重大环保区。桌面研究的内容涵盖“水深和海洋地形、沉积物类型和厚度、海洋动物 / 植物群落，以及潜在的自然和人为灾害”。[93] 在勘测电缆路线时，一般使用基于声学的回声探测系统、声呐系统和地震系统。[94] 这些系统主要探测的是海底地表，如需要埋设电缆，还将探测海底表层沉积物。虽然研究仍在进行中，但“电缆勘测设备仍被视为仅对环境构成轻微的风险”。[95]

（四）电缆的铺设和埋藏

目前的做法是将电缆埋进海底，以保护电缆不发生故障。然而，在岩质和沙质海底，可以直接将电缆放置在海床上。评估电缆和海底生物之间相互影响的科学方法是，“监测电缆安装前后的生物群，或在已安装电缆的情况下，比较电缆附近和远处的生物群”。[96] 研究表明“电缆对当地的生物群没有或只有很小的影响”，[97] 且“电缆为海葵的锚靠提供了坚硬的基底”。[98] 此外，电缆渗漏的可能性也很低，因为电缆是由惰性材料制成，没有使用防污剂。[99] 最新的研究成果还显示，在电报电缆时代，鲸经常被海底电缆缠住，但如今进入光纤系统后，这一现象已经彻底结束。[100]

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91 UNEP/ICPC Report, p. 30.
92 UNEP/ICPC Report, p. 21.
93 UNEP/ICPC Report, p. 21.
94 UNEP/ICPC Report, p. 30.
95 UNEP/ICPC Report, p. 30.
96 UNEP/ICPC Report, p. 31.
97 UNEP/ICPC Report, p. 31. 保护东北大西洋海洋环境委员会也承认，与电缆铺设有关的海底干扰存在地方性和临时性，“电缆的铺设会对海底造成干扰并产生相关的损害，会引起动植物的位移或对其造成干扰，同时也会增加海水浊度，引起污染物的释放和沉积物的改变。加上噪声和视觉干扰，这些影响主要限于安装、修理工作和 / 或拆除阶段，并通常是临时性的。” See OSPAR Commission, Assessment of the Environmental Impacts of Cables-Biodiversity Series, 2009, p. 8.
98 UNEP/ICPC Report, p. 31.
99 UNEP/ICPC Report, pp. 32~33.
100 UNEP/ICPC Report, p. 31.

（五）电缆修理

随着电缆系统设计的改进，海底开发者电缆保护意识的增强，以及日积月累的电缆埋设实践和经验，电缆发生故障的次数也大大减少。尽管如此，电缆故障仍时有发生，受损电缆也需要进行修理。回收受损电缆的步骤一般如下，沿着电缆路径使用抓钩捞出电缆，在估计的故障点切断电缆，回收缆端。之后，受损电缆会放回维修船，然后用备用电缆接续到原来的电缆上。最后使用遥控潜水器重新埋设修复好的电缆。由于这个过程很少使用抓钩，所以降低了对海底的干扰。[101]

（六）电缆拆除

除了电缆的使用寿命[102]结束外，新技术的发展也可能导致电缆被废弃。在这种情况下，可以考虑拆除海底电缆。“电信泡沫”导致报废或不再使用的海底电缆系统数量急剧增长。为给这些电缆系统的所有者提供指导，委员会发布了相关建议，而这些建议代表了国际海底电缆系统的所有者和运营商的一致立场。[103]拆除海底电缆可能会造成干扰，且研究已经表明，“干扰程度与海底基质类型密切相关”。[104]从沙质和泥质沉积物中取出电缆会对海底产生很小的影响，或几乎没有影响，但从海泥中挖出电缆则会对海底地形造成一定影响。铺设在岩质海底表层的电缆如可以维系底生动物，则不需要拆除。[105]

总的来说，“电缆铺设和修理活动引发的干扰和影响，必须视活动的频率和程度而定”。[106]就海底电缆而言，在清楚了埋设电缆的拟议路线并按路线埋设好以后，“在电缆系统的计划使用期限内，海底将不会再受到干扰”。[107]此外，这种一次性干扰仅“限于宽度不足 5~8 米的海底地带”。[108]这与反复的底拖网和拖网捕鱼作业造成的干扰不同，因为这种捕鱼作业覆盖了更广泛的区域，影响大面积的海底区域。[109]

研究还表明，海床因电缆作业和底拖网、拖网捕鱼造成的干扰，需要时间进行修复，而前者自我修复所需的时间更短。在德国、澳大利亚和普吉特海湾，一般使用低冲击振动开沟犁在海岸湿地和潮间带地区埋设电缆，这里的植被会在 2 到 3

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101 UNEP/ICPC Report, p. 34.
102 光纤电缆的设计寿命一般为 20~25 年。
103 For a detailed discussion of the ICPC recommendation, see ICPC Recommendation No. 1, Management of Redundant and Out-of-Service Cables, Issue 12B, 6 May 2011.
104 UNEP/ICPC Report, p. 34.
105 UNEP/ICPC Report, p. 34.
106 UNEP/ICPC Report, p. 34.
107 UNEP/ICPC Report, p. 34.
108 UNEP/ICPC Report, p. 34.
109 UNEP/ICPC Report, p. 34.

年内重新生长，并在 5 年内完全恢复。[110] 电缆相关作业对北海、墨西拿海峡、巴斯海峡和库克海峡内大陆架造成的干扰，其海床的自我恢复速度最快。“内大陆架的沙质基底有利于海床在数天到数月之内得到恢复”。[111] 同一区域的底栖生物群落也会因为有利的环境条件而得到恢复。[112] 由电缆铺设所造成的中大陆架海底物理断层，可以由强流带动沉积物来填补，进而恢复平衡，研究人员在波罗的海就发现了这样的情况。对于埋在外大陆架和上陆坡的电缆对动物群落所造成的干扰，由于沉积物上方水流较强，其恢复速度会更快。[113]

八、电缆保护和海洋环境

虽然现代海底电缆设计先进、适应力强，但海底电缆网络仍然受到各种威胁。大部分电缆发生故障都是因为受到“外来攻击”，其中最常见的是渔业活动，接下来依次是抛锚、自然灾害、盗窃和海盗活动。

（一）电缆和渔业的相互作用

最常见的一种商业渔具是底拖网，其与电缆相互作用的历史很长。在全球范围内，底拖网捕鱼被公认是导致海底电缆出现故障的主要原因。[114]底拖网是“一个圆锥形的大网，由渔船沿海床拖曳进行作业”。[115]网板通常由钢板和木板制成，重达 100 公斤左右。拖网底部通常还装有链条、滚轴和钢质套环。底拖网与海床接触时，可能会对电缆造成损害。[116]

想要在捕鱼作业与电缆之间找到平衡，应该选择几乎不会导致电缆故障 [117] 的捕鱼技术，并避免或减少对脆弱的深海生态系统产生影响。一些最新的研究表明，

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110 UNEP/ICPC Report, p. 35.
111 UNEP/ICPC Report, p. 35.
112 UNEP/ICPC Report, p. 35.
113 UNEP/ICPC Report, p. 36.
114 Mick Green, Stephen Drew, Lionel Carter and Douglas Burnett, Submarine Cable Network Security, Presentation to APEC Submarine Cable Workshop Group, April 2009, at http://74.125.113.132/search?q=cache9yxrwo21PBIJ:www.iscpc.org/information/Openly%2520Published%2520Members%Area%2520Items/SubmarineCableNetworkSecurity’pptthengchuntearthquake+eleven+ships+cable&cd=3&hl=en%ct=clnk%gl=us, 2 May 2016.
115 UNEP/ICPC Report, p. 45.
116 Stephen C. Drew and Alan G. Hopper, *Fishing and Submarine Working Together*, 2nd edition, Lymington: ICPC, 2009, p. 27.
117 不太可能损坏电缆的捕鱼方式包括中层拖网、围网、中层延绳钓和定置渔具捕捞。See Stephen C. Drew and Alan G. Hopper, *Fishing and Submarine Working Together*, 2nd edition, Lymington: ICPC, 2009, pp. 33~34.

底拖网作业不会对海底电缆产生很大的威胁。这些研究指出,“当拖网拖过铺设在海底的通信电缆时,90% 以上并不会导致电缆损坏”。[118] 因为在拖网可能触及的深度,大部分电缆是装有护套的,所以,两者“可能根本没有明显可辨的接触”。[119] 此外,还可以通过勘测确定最安全的电缆线路,进一步保护电缆。除了实施电缆保护意识计划,还必须针对电缆路径上的每段电缆,选择最好的电缆类型。

(二)船锚

除了上述的捕鱼活动,导致电缆故障第二种常见的原因就是船锚。5000 吨的大型船舶“锚重 4 吨,可以穿透深达 5 米的松软沉积物”。[120] 如果这种锚落在电缆上,特别是靠近繁忙港口的地方,那么很有可能出现电缆故障。但是,如果电缆路径不设在指定锚地和港口巷道之内,就可以避免这类故障的发生。最近的研究表明,总吨位超过 10 亿载重吨的大型船队显著增加。[121] 商船不仅更重,而且数量众多,因此增加了海底电缆网络遭到破坏的风险。例如,在中国,钢铁产业革命“带来了散货船队的增长,这些船队负责从澳大利亚、印度和巴西运输铁矿石”。[122]铺设在陆架上的电缆,如配备重锚的大型船舶也会从这块陆架上经过,则容易遭受更大的风险。因此,此处的平衡在于正确识别和评估“相关船舶交通已经发生改变的贸易路线,以及这些路线和电缆位置的关系”。[123]

(三)自然灾害

从沿海到深海,辽阔的海洋时常会受到自然灾害的影响。自然灾害是“一种自然发生的物理现象,其由突发事件或慢发事件所致,并在大气、海洋和地质力量从几小时到上千年不等的时间作用下发生”。[124] 自然灾害的范围从与天气有关的干扰、地震、火山爆发,到长期的气候变化。[125] 因此,“沿海地区可能会被汹涌的海水和海浪淹没和侵蚀,海床则受到水流和波浪的冲刷,大陆架则被大河的沉积物所填充”。[126] 这些沉积物有时被深海洋流带到至少 6000 米深的地方,这样就有可能影响大陆架上的电缆。[127] 例如,台湾 2009 年遭受强台风“莫拉克”袭击,

118 UNEP/ICPC Report, p. 46.
119 UNEP/ICPC Report, p. 46.
120 UNEP/ICPC Report, p. 47.
121 UNEP/ICPC Report, p. 50.
122 UNEP/ICPC Report, p. 50.
123 UNEP/ICPC Report, p. 50.
124 UNEP/ICPC Report, p. 38.
125 UNEP/ICPC Report, p. 38.
126 UNEP/ICPC Report, p. 38.
127 UNEP/ICPC Report, p. 39.

过多的降雨造成河流发生洪水，携带大量沉积物入海。[128]沉积物的量如此庞大，引发了严重的山体滑坡，破坏了台湾东部和西部以及菲律宾附近的一系列电缆。[129]在巴布亚新几内亚和阿尔及利亚等国，地震引发的山体滑坡也导致电缆遭到严重损坏，海底网络瘫痪。[130]

海平面上升可能也确实对海底电缆造成了严重影响，因为“上升的海平面可能会增加遭受飓风和其他猛烈暴风雨的地区海岸设施遭到侵蚀和淹没的风险”。[131]海底电缆会受到具有侵蚀能力的水流和海浪的磨损。

虽然由自然因素造成的电缆故障不少，但近来由于“电缆设计的改良、安装技术的提高和保护措施的改善”，这类故障数量已经显著降低。

（四）盗窃

随着金属价格的上升，电缆盗窃事件已成为世界上许多国家或地区的一个严重问题。海底电缆被盗直接影响一个国家的社会经济发展和国家安全。正如许多报告指出的，这一问题波及范围广泛，发达国家和发展中国家都会受到牵连。在英国和美国，减少电缆被盗是安全机构的首要任务之一。在中国，电讯设施被盗事件从 2005 年的 5.3 万起上升到了 2006 年的 19 万起。2006 年，南非国家电力公司损失的电缆价值 2 千万兰特。2007 年，越南渔民在南海海底偷取的光纤电缆总长约 43 千米（26 英里），其中 11 千米为泰国—越南—香港光缆的部分线路，32 公里为亚太光缆网络，这造成了越南国际通信大面积中断。[132]

（五）海盗和恐怖主义

除了船锚和渔具造成的故障，海盗和恐怖分子针对海底电缆的恶意和敌对行动也在增长。2007 年，越南海盗在公海破坏海底电缆系统，2010 年，恐怖分子在菲律宾海域破坏海底电缆，这些事件都有据可查。[133] 电缆一般都安装在公共海域，

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128 UNEP/ICPC Report, p. 40.
129 UNEP/ICPC Report, p. 40.
130 UNEP/ICPC Report, p. 40.
131 UNEP/ICPC Report, p. 41.
132 Vietnam Makes More Arrests over Submarine Cables Thefts, *Brunei Press*, 25 June 2007, at http://www.brusearch.com/news/11336, 2 May 2016.
133 Douglas R. Burnett, Note to Navy: It’s Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 69, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

甚至连无政府主义者都清楚电缆的位置。[134] 在安全方面，海底电缆，特别是铺设在领海以外的海底电缆，就像是“国际孤儿”，[135] 容易受到海盗和恐怖分子的袭击。由于海底电缆具有独特的战略重要性，因此需要保护电缆，使其免受海盗和恐怖分子的恶意攻击。

第一份涉及规制海上恐怖行动的法律制度的国际文书是国际海事组织制定的《制止危及海上航行安全非法行为公约》。[136] 然而，海底电缆的保护却遭到了忽视，因为《制止危及海上航行安全非法行为公约》制度主要处理的是有关“船舶安全、导航辅助设备和海上设施”的问题。[137] 也可能是由于这样一个事实，“恐怖分子和海盗对领海以外海底电缆的攻击，不太可能根据国际法和大部分国家的国内法，被判定为有罪。”[138]

一些国际条约，如《1884 年公约》、《公海公约》和《公约》，都要求各国制定法律，对故意或因重大疏忽而损害国际海底电缆的个人和船舶进行制裁。例如，《公约》制定了公海海底电缆保护的详细规定。第 113 条要求各国均应制定必要的法律和规章，规定悬挂该国旗帜的船舶或受其管辖的人故意或因重大疏忽而破坏或损害公海（或专属经济区）海底电缆，致使通信中断的行为，均为应予处罚的罪行。

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134 Douglas R. Burnett, Note to Navy: It’s Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 69, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

135 Douglas R. Burnett, Note to Navy: It’s Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 68, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

136 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (10 March 1988) and 2005 Protocol for the Suppression of Unlawful Acts of Violence Against the Safety Fixed Platforms on the Continental Shelf.

137 Douglas R. Burnett, Note to Navy: It’s Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 68, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

138 Douglas R. Burnett, Note to Navy: It’s Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 68, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

此项规定也适用于故意或可能造成这种破坏或损害的行为。[139] 但对于仅为了保全自己的生命或船舶的正当目的而行事的人，在采取避免破坏或损害的一切必要预防措施后，仍然发生的任何破坏或损害，此项规定不应适用。[140] 还有观点认为，根据《公约》，针对公海海底电缆的偷盗和恐怖主义行为可以被认定为海盗行为。[141] 对于海盗行为，任何国家均享有普遍管辖权，可以登船、搜查、扣留船舶和货物，以及在本国的法院系统内逮捕、起诉并惩罚罪犯。然而，海底电缆却没有类似的法律框架。对海盗行为行使普遍管辖权的做法已经流行了几个世纪，本文建议针对电缆的恶意攻击行为也适用普遍管辖权。海盗和恐怖分子袭击将世界各国连接在一起的电缆，从而成为所有国家的敌人（“人类之敌”）。海底电缆对社会经济发展和国家安全所起到的关键作用不言而喻。海底电缆“将世界联结在一起，让数字数据、视频和电讯流可以 7×24 小时全天候在世界各地传输。”[142] 对这些重要全球网络的破坏行为，应适用普遍管辖权，所有国家都有权起诉或引渡相关罪犯。

海洋环境非常脆弱，铺设与保留在海底的电缆网络却日益增多。海盗和恐怖袭击带来的威胁不仅会损害海底电缆，还肯定会扰乱敏感的生态系统和海洋生物。

鉴于没有一个政府或机构可以独自有效地应对海盗和恐怖主义针对海底电缆的行动，故所有利益相关者都有必要“在以下方面展开合作：信息交流，参与演习，并在制止或惩罚从事或威胁从事针对电缆和电缆船舶的敌对行动的个人或团体的行动上相互支持”。[143] 此外，全球合作所采取的应对措施必须有效、可靠、及时、迅速。

面对恐怖分子和海盗给海底电缆带来的新威胁，政府和私营部门之间需要进行有效的国际合作。[144] 在此，我们希望作出一个兼具前瞻性与战略性的全方位安

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139 迄今为止，只有澳大利亚和新西兰出台了非常有效的法律制度，用于制止可能导致电缆故障的行为。See Douglas R. Burnett, Note to Navy: It’s Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 68, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

140 其他规定有《公约》第 114 和 115 条。

141 《公约》第 101 条规定：下列行为中的任何行为构成海盗行为：（a）私人船舶或私人飞机的船员、机组成员或乘客为私人目的，对下列对象所从事的任何非法的暴力或扣留行为，或任何掠夺行为：（1）在公海上对另一船舶或飞机，或对另一船舶或飞机上的人或财物；（2）在任何国家管辖范围以外的地方对船舶、飞机、人或财物。

142 Douglas R. Burnett, Note to Navy: It’s Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 67, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

143 Article 10 of the ICPC Draft Convention for the Protection and Repair of Submarine Cable 2008.

144 Michael Sechrist, Cyberspace in Deep Water: Protecting Undersea Communication Cables by Creating an International Public-Private Partnership, 23 March 2010, at http://belfercenter.ksg.harvard.edu/files/PAE_final_draft_-_043010.pdf, 26 May 2016.

全安排，参与者包含政府、国际非政府组织、民间社会团体、海事管理机构和相关行业。[145]

（六）电缆保护区和海上禁捕区

人类和自然给海洋环境和电缆作业带来的压力不断增长，推动各沿海国设立电缆保护区、[146]海洋保护区[147]和海上禁捕区。[148]第一批建立保护区的国家包括“澳大利亚，其在 1975 年设立了大堡礁海洋公园，为珊瑚礁的生态环境提供保护，保护区内允许捕鱼、航运和旅游等活动，但须受到规制。”[149] 2007 年，通过澳大利亚通信和媒体管理局，澳大利亚做出了 2 项有关电缆保护的声明。连接澳大利亚、新西兰、斐济和美国通信网络的南十字星电缆，以及经由关岛将澳大利亚与日本连接起来的澳日光缆，被誉为澳大利亚国家重大项目，为保护这些电缆，澳大利亚设立了专门的保护区。保护区内禁止“会给海底电缆带来严重损坏风险的海洋活动”，如禁止“在海床及其附近作业的渔船拖网渔具或中层拖网在保护区内拖曳、操作或暂停”。[150]同时，为减少电缆的受损风险，保护区内还会限制某些活动，限制程度依据活动的离岸距离和 / 或水深情况而定。例如，电缆保护区内允许的锚定范围为低潮线向海 0~500 米，但不得在水深超过 100 米的海域内抛锚。[151]因此，如套有金属软管的电缆埋藏在海床以下数米，而相关活动是在海岸附近开展的，则可以继续。[152]电缆保护区内不受影响的活动是不与“海床接触的活动，以及离岸距离在 500 米以内的娱乐活动”。[153]在澳大利亚，海底电缆就如国防一样重要，

145 David H. Capie and Paul M. Evans, *The Asia-Pacific Security Lexicon*, Singapore: Institute of Southern Asian Studies, 2002, pp. 98~107.

146 电缆保护区是一大块海底区域，其内禁止捕鱼和抛锚。See N. T. Shears and N. R. Usmar, The Role of the Hauraki Gulf Cable Protection Zone in Protecting Exploited Fish Species: *de facto* Marine Reserve?, *Dco Research & Development Series*, No. 253, 2006, p. 27, at http://www.doc.govt.nz/Documents/science-and-technical/drds253.pdf, 26 May 2016.

147 海洋保护区是特别指定的可能会影响海洋环境的地方。海洋保护区都被指定采取某种形式的保护，在区域内捕鱼可能会受到法规以及“事实上”的法规的影响。有些海洋保护区是沿海区域，有些是潮下带或潮间带。See Al J. Didier ed., Marine Protected Areas of Washington, Oregon and California, December 1998, at http://wdfw.wa.gov/publications/01136/wdfw01136.pdf, 26 May 2016.

148 海上禁捕区是相关部门在沿海和远洋水域中划定的独立区域，用以促进这些区域专项养护、休闲娱乐、生态、历史、研究、教育和美学资源的综合管理。See Al J. Didier ed., Marine Protected Areas of Washington, Oregon and California, December 1998, at http://wdfw.wa.gov/publications/01136/wdfw01136.pdf, 26 May 2016.

149 UNEP/ICPC Report, p. 53.

150 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.

151 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.

152 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.

153 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.

被当作保护工作的要务。在海底电缆保护区与国防实训基地的重叠区，国防部要求“设定弹药射击方向，训练时采用惰性装药弹和枪靶”。[154] 确立电缆保护区的法律确定了众多与保护区有关的刑事制裁，“旨在阻止对海底电缆造成损害风险的行为”。[155] “从事这些活动可能导致长达 10 年的监禁和 / 或 33 万的罚款”。[156]

为确保海洋生物多样性和生态系统得到可持续利用、保护和保全，欧洲采取的方法是建立海洋保护区。1992 年的《保护东北大西洋海洋环境公约》（以下简称“《奥斯陆巴黎公约》”）就对该公约所规定区域的海洋环境保护作出了规定。《奥斯陆巴黎公约》确立了一项生物多样性战略，其关键部分便是建立海洋环境保护区网络。[157] 英国的海洋政策侧重设立海洋保护区和电缆保护区，以确保可持续发展等。[158] 美国也为海洋保护区、禁捕区和海底电缆制定了保护制度。[159]

九、结　论

以上分析表明，电缆和海洋环境之间的相互作用主要发生在海洋底栖带，即电缆铺设的主要地点。电缆对海洋环境中的生物所产生的影响非常小。如果各国都致力于履行《公约》和国际法下的义务，颁布和实施国内法保护电缆，同时在安全事务上与业界合作，电缆与海洋环境之间的平衡将得到进一步加强。此外，海底使用者 / 开发者应当坚定地致力于可持续发展。电缆所有者和深海海底活动主体，在开展活动时应适当顾及对方。这可以通过优先对待彼此之间的对话和信息交换来完成。[160] 与此同时，还有必要将海洋提供的经济机会与保护和改善其独特的环境结合起来。公私合作对实现可持续发展的海洋至关重要，可持续发展的海洋是健康的，具有生物多样性的特征，而且能够提供重要的社会经济利益。尽管已经通过科技取得了实质性的进展，但还是有必要在研究和新科学技术上投入更

154 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.

155 在区域内从事以下行为视为犯罪：损坏或切断海底电缆；导致电缆损坏的疏忽行为；或从事保护区内禁止或限制的活动。At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.

156 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.

157 At http://jncc.defra.gov.uk/page-3370, 6 May 2016.

158 UK Marine Policy Statement, March 2011, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69322/pb3654-marine-policy-statement-110316.pdf, 26 May 2016.

159 Al J. Didier ed., Marine Protected Areas of Washington, Oregon and California, December 1998, at http://wdfw.wa.gov/publications/01136/wdfw01136.pdf, 26 May 2016.

160 Douglas Burnett, Michael W. Lodge, Gwenaëlle Le Gurun and Alice Leonard De Juvigny, Submarine Cables and Deep Seabed Mining, Advancing Common Interests and Addressing UNCLOS “Due Regard” Obligation, *Technical Study*, No. 14, 10-11 March 2015.

多的人力和物力，并分享有关海底电缆与海洋环境相互作用的知识。[161] 有时被看作相互冲突的利益或活动，也越来越可能找到可持续性的双赢解决方案，清楚这一点以后，所有利益相关者都有可能为更好的海洋环境作出积极贡献。

（中译:谢红月、赵菊芬）

161 首次联合国世界海洋评估对海洋的所有方面进行了评估，其鼓励进一步研究在世界人口的增加给海洋造成越来越大的压力的情况下，如何界定和提出负责任的对策。See the First World Ocean Assessment, Chapter 19 [Submarine Cables and Pipelines], at http://www.un.org/depts/los/global_reporting/WOA_RPROC/Chapter_19.pdf, 2 May 2016.

Submarine Cables and the Marine Environment: Enhancing Sustainable and Harmonious Interactions

Kingsley Ekwere*

Abstract: Submarine cable network has become key facilitators of modern life. The importance of efficient and high-speed international telecommunications cannot be over emphasized, especially in this era of information superhighway. The backbone of global information infrastructure is now preponderantly composed of fibre-optic submarine cables. To meet the ever increasing need for better and faster telecommunications, extended and highly sophisticated fibre-optic submarine cable networks have been constructed across the oceans and around the continents. However, the communications revolution has resulted in great pressure on vulnerable marine ecosystems and biodiversity, although not apparent currently. This paper aims to explore the interactions of submarine cables with seabed ecosystems. The key challenge for conservation, protection and sustainable management/use of coastal seas and deep offshore waters is to balance the benefits of the communications revolution against any potential environmental impacts. Demonstrating that cable operations are benign to the marine environment, this paper argues that the harmonious interactions between operators of telecommunication cables and other seabed users are critical in advancing the goals to reach environmental sustainability, and protect and conserve the marine environment.

Key Words: Submarine cables; Ecological sustainability; Ocean governance

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I. Introduction

Submarine cables were born around early nineteenth century. The first submarine telegraph cable, constructed from copper wire and gutta percha, was laid across the English channel from Dover to Calais in 1850.[1] The first long-term successful transatlantic submarine cable was laid between Newfoundland, Canada and Ireland in 1866; and the first trans-pacific cables were completed in 1902-03 linking the United States mainland to Hawaii in 1902 and Guam to Philippines in 1903.[2] This initial breakthrough greatly enhanced the communication and dissemination of information over a long distance.[3] Although only a few messages could be transmitted at that time, the development marked a new dawn in the submarine cable industry.[4] New methods and techniques in laying and design and improvement in materials increased the durability of the telegraph cables. The result was that by the twentieth century, much of the world was connected by a globalised network that enabled rapid communication of information for government, trade and the general public.[5] Two major events, namely, the rise in the prominence of radio telegraph technology during World War I and the economic depression of the 1930s, affected the fortune of the submarine telegraph industry.[6]

The gradual decline of the submarine telegraph cable witnessed the birth of the submarine telephone cable in the mid 1930s.[7] "A polyethylene encased cable

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1 Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, p. 20.

2 Submarine Communications Cable, at https://en.Wikipedia.org/wiki/Submarine_communication_cable, 7 May 2016.

3 Submarine Communications Cable, at https://en.Wikipedia.org/wiki/Submarine_communication_cable, 7 May 2016.

4 Lionel Carter, Douglas Burnett, Stephen Drew, Graham Marle, Lonnie Hagadorn, Deborah Barlette-McNeil and Nigel Irvine, Submarine Cables and the Oceans: Connecting the World (UNEP-WCMC Biodiversity Series No. 31), ICPC/UNEP/UNEP-WCMC, 2009, pp. 12~13, at http://www.unep-wcmc.org/resources/publications/UNEP_WCMC_bio_series/31.aspx [hereinafter "UNEP/ICPC Report"].

5 UNEP/ICPC Report, p. 13.

6 Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, pp. 27~28.

7 The last submarine telephone cable was laid between India and the United Arab Emirates in 1986, bringing an end to the era of submarine telephone cable. See Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, p. 32.

with copper coaxial core was developed that allowed multiple voice channels to be released."[8] Between 1955 and 1956, Scotland and Newfoundland was connected with two cables known as TAT 1. This development ushered in the submarine coaxial telephone era.[9] By 1960, with technological development in design and laying technique, longer cables were laid in deeper oceans.[10]

A great technological leap in the 1970s and 1980s saw the development of satellite as a primary means of communication with greater capacity and lower cost.[11] Although the submarine cable technology was greatly challenged by satellite, "a fibre of glassy material constructed in a cladded structure", discovered in 1966 by Dr. Charles Kao and Dr. George Hockham, was found to have a larger information capacity and advantages in material cost.[12] This unprecedented breakthrough led to the development of the fibre optic systems in the late 1970s. The first submarine fibre optic system was laid on the ocean floor in 1980s and by 1986 the submarine fibre optic system had taken over.[13] In 1988, the first trans-oceanic fibre optic cable linking the United States, United Kingdom and France was installed. As the year progressed, submarine cables "started to outperform satellites in terms of the volume, speed and economics of data and voice communications."[14]

By the mid-1980s, the information and communication sector received yet another boost – the Internet traffic. A combination of these two technologies, i.e. submarine cables and the Internet, has sustained and revolutionized the sector. Today, while the cables carry large volumes of voice and data traffic with speed and security, the Internet makes the data and information accessible and usable for business, commerce, education and entertainment.[15] "It is estimated that about 213 independent cable systems amounting to approximately 877,122 kilometers

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8 UNEP/ICPC Report, p. 14.
9 UNEP/ICPC Report, p. 14.
10 UNEP/ICPC Report, p. 14.
11 Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, p. 32.
12 George Hockham and Charles Kao, Dialectric-Fibre Surface Waveguides for Optical Frequencies, *Proceedings of the Institute of Electrical Engineers*, Vol. 113, Issue 7, 1966, pp. 1151~1158.
13 Stewart Ash, The Development of Submarine Cables, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, pp. 33~34.
14 UNEP/ICPC Report, p. 16.
15 UNEP/ICPC Report, p. 16.

(km) of fibre optic cables form the global network."[16] Most countries now depend on submarine cables to meet their communications needs. Statistics indicate that as of mid-2012, as few as 21 nations and territories remained unconnected to the fibre optic network.[17] Little wonder then that the United Nations has described these cables as "critical communications infrastructure" extremely important to the economy and security of all nations.[18] While significant gains have continued to trail the fibre-optic revolution, its potential and actual impacts on the marine environment have become a source of concern for governments and international organizations, prompting global efforts aimed at ensuring conservation, protection and sustainable management/use of coastal seas and deep offshore waters.

In the face of increasing human activities in the marine environment, it has become vital for all parties and stakeholders to communicate and cooperate in the harmonious development and conservation of our last frontier.

International communications are regulated by international law and treaties. These legal frameworks, now considered to be customary international law, set forth the rights of signatory parties to lay, repair, own and operate submarine cables in international waters.

II. Cables and Ecologically Sustainable Oceans: A Conceptual Understanding

The original concept of sustainable development is articulated in the report of the Brundtland Commission, "Our Common Future", which states that sustainable development is:

> *development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two*

16 Douglas R. Burnett, Tara M. Davenport and Robert C. Beckman, Introduction: Why Submarine Cables?, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport eds., *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, p. 2.

17 Douglas R. Burnett, Tara M. Davenport and Robert C. Beckman, Introduction: Why Submarine Cables?, in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport eds., *Submarine Cables: The Handbook of Law and Policy*, The Netherlands: Martinus Nijhoff Publishers, 2014, pp. 1~2. It should be pointed out that these nations and territories already have ongoing projects to get connected.

18 General Assembly Resolution 65/37A, 7 December 2010.

> *key concepts: (a) the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and (b) the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs. Thus the goals of economic and social development must be defined in terms of sustainability in all countries – developed or developing, market-oriented or centrally planned. Interpretations will vary but must share certain general features and must flow from a consensus on the basic concept of sustainable development and on a broad strategic framework for achieving it.*[19]

This definition, commonly known as the Brundtland definition, highlights what has since become one of the major issues of contention with sustainable development. This work will not trace the historical evolution of sustainable development but will highlight the central ideas and emphasize its importance in ensuring harmony between submarine cables and the marine environment.

The concept of sustainable development has received wide ranges of debates or critiques, however, there is as yet no sufficiently robust theoretical and analytical framework against which decisions aimed at achieving a more sustainable form of development could be assessed.[20] It might be useful from the onset to highlight the paradox inherent in the term of sustainable development. The term 'sustainability', derived from ecology, describes a process or state that continues forever. On the other hand, 'development' implied continued use of natural resources and the modification of the environment. When combined together, the term sustainable development reveals an amazing contradiction which may not be apparent sometimes. Although they are worlds apart, the two could be brought together when development and environmental protection go hand in hand.[21]

A major challenge facing advocates of sustainable development is that people view and interpret sustainable development from different disciplinary realms. Some of these realms include ecology, economics, law, trade and even politics.

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19 World Commission on Environment and Development (WCED), *Our Common Future*, Oxford: Oxford University Press, 1987, p. 43.

20 John S. Dryzek, *The Politics of the Earth: Environmental Discourses*, New York: Oxford University Press, 1997; Michael Redclift, The Multiple Dimensions of Sustainable Development, *Geography*, Vol. 76, No. 1, 1991, pp. 36~42.

21 Yosef Jabreen, A Knowledge Map for Describing Variegated and Conflict Domains of Sustainable Development, *Journal of Environmental Planning and Management*, Vol. 47, Issue 4, 2004, pp. 626~627.

Acknowledging these divisions, Richard Norgaard said "environmentalists want environmental systems sustained, consumers want consumption sustained, while workers want jobs sustained".[22] A groundbreaking scholarly effort in piecing together the different literature of sustainable development is the work of Jabreen.[23] Jabreen developed a set of lenses through which he described sustainable development.[24] However, an illuminating discourse of sustainable development is given by Dryzek.[25] For Dryzek, sustainability should be seen as a broad field of inquiry, encompassing issues of cultural integrity, justice, and governance as well as questions of ecological limits to economic activities, and the individual right to safe and secure livelihood.[26] Judge Cassese classifies sustainable development as a general guideline laid down in soft law documents and propounded in treaties and declarations. Cassese relies upon the definition of sustainable development in the Report of the Brundtland Commission and defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[27] Birnie and Boyle on their part see sustainable development as composing the following elements: (a) the integration of environmental protection and economic development. This element reflects Principle 4 of the Rio Declaration which provides that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it"; (b) the right to development. Principle 3 of the Rio Declaration provides that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"; (c) sustainable utilization and conservation of natural resources; (d) inter-generational equity; (e) inequity within the existing economic system.[28]

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22 Richard B. Norgaad, Sustainable Development: A Co-Evolutionary View, *Futures*, Vol. 20, Issue 6, 1988, p. 607.

23 Yosef Jabreen, A Knowledge Map for Describing Variegated and Conflict Domains of Sustainable Development, *Journal of Environmental Planning and Management*, Vol. 47, Issue 4, 2004, p. 628.

24 Yosef Jabreen, A Knowledge Map for Describing Variegated and Conflict Domains of Sustainable Development, *Journal of Environmental Planning and Management*, Vol. 47, Issue 4, 2004, p. 628.

25 John S. Dryzek, *The Politics of the Earth: Environmental Discourses*, New York: Oxford University Press, 1997.

26 John S. Dryzek, *The Politics of the Earth: Environmental Discourses*, New York: Oxford University Press, 1997.

27 Ian Brownlie, *Principles of Public International Law*, 7th edition, New York: Oxford University Press, 2008, p. 278.

28 Patricia Birnie and Alan Boyle, *International Law and the Environment*, 2nd edition, Oxford: Oxford University Press, 2002, pp. 86~87.

In 1991, Justice Brian Preston popularized the concept of ecological sustainable development (ESD) as a new paradigm which emphasizes the integration of economy and environment and involves a cluster of principles, such as the principle of sustainable use, principle of integration, precautionary principle, inter-generational and intra-generational equity, conservation of biological diversity and ecological integrity and internalization of external environmental costs. These principles, if implemented, will lead to a shift from a world in which development of the environment occurs without regard to environmental consequences to one where a culture of sustainability extends to government, private development interests, communities and individuals. It is a development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[29] The economist Robert Solow interprets sustainable development as "an obligation to conduct ourselves that we leave to the future the option or the capacity to be as well off as we are". What may be gleaned from Solow's definition is that there exists a moral obligation not to overindulge at the expense of future generations.

What may be apparent from the totality of the above is that the definitions of sustainable development need to become broader to accommodate all aspects of the concept. A useful guide therefore lies in identifying the core issues that sustainable development should address. Although the list may not be exhaustive, below are some of the indicators of sustainable development. Sustainable development should aim at the satisfaction of basic human needs and the reduction of inequality in the distribution of environmental costs and benefits. To achieve the above, there is a need for a balance of responsibility between all the parties, i.e., the government, the society and the industry.

A. Applying Sustainable Development Principles to Oceans

The ocean, once thought to be a vast reservoir capable of absorbing limitless waste and able to withstand increasing human pressure, is increasingly vulnerable. Being an integral part of our planet, the ocean is an absolutely essential component of human lives, livelihoods and the environment that sustains us. As demonstrated in the foregoing analysis, there are many ways in which the concept of sustainable development underpins and enriches ocean use and conservation.

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29 At http://www.lec.lawlink.nsw.gov.au, 2 May 2016.

Duties and rights of States with respect to the sustainable use, conservation and protection of the marine and coastal environment are contained in an array of legally binding global and regional agreements. The most comprehensive treaty on the oceans is the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[30] Apart from outlining traditional high seas rights, UNCLOS sets out the obligation to protect and preserve the marine environment, including rare and fragile ecosystems and the habitats of depleted, threatened or endangered species and other forms of marine life. There are frequent reference to sustainable use, conservation, protection and preservation of the marine environment and promotion of the economic and social advancement of all people in UNCLOS.[31] For instance, Part XII of UNCLOS notes that States have the obligation to protect and preserve the marine environment.[32]

The 1995 United Nations Fish Stocks Agreement (UNFSA)[33] also contains several references to sustainable development principles. UNFSA implements UNCLOS by elaborating on and specifying certain UNCLOS provisions in the light of evidence of overfishing. To address these concerns, it imposes stringent obligations on both coastal States and fishing States with respect to their management of highly migratory fish stocks and straddling fish stocks. UNFSA explicitly incorporates modern precautionary and ecosystem-based approaches to fisheries management, conservation and long-term sustainability of fish stocks.

The concept of sustainable development is often referred to in the 1992 Convention on Biological Diversity (CBD)[34] as well. CBD is based on the principle that conservation of biological diversity is a common concern of humankind. Its objectives are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

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30 United Nations Convention on the Law of the Sea, opened for signature on December 10, 1982, in force on November 16, 1994, *United Nations Treaty Series*, Vol. 1833, p. 396. As of 29 April 2016, there were 167 State Parties to the Convention.

31 Preamble, UNCLOS.

32 Article 192, UNCLOS.

33 The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001). At http://www.un.org/Deptslos/convention_agreement, 7 May 2016.

34 1992 United Nations Convention on Biological Diversity (in force from 29 December 1993). See *United Nations Treaty Series*, Vol. 1760, p. 79.

At the regional level, the United Nations Environment Programme's Regional Seas Programme (RSP)[35] was established to address the accelerating degradation of the world's oceans and coastal areas through the sustainable management and use of marine and coastal environment, including resources.

In total, the global and regional agreements form a web of obligations for States regarding biodiversity and ecosystems, including the duty to conserve and preserve the marine environment. They also underscore the need for development to proceed hand in hand with ecological sustainability. What comes out rather clear from the above is that a healthy ocean is fundamental for achieving global sustainability. It reaffirms the linkage among social, economic and environmental pillars of sustainable development and the need for a balance among them. It equally indicates that States can derive optimal economic and social benefits from a healthy ocean whilst protecting the environment. Thus, the highest priority must be given to conserving the world's oceans and marine species. The conservation and protection of ecological integrity should be a fundamental constraint on all ocean users.

B. Applying Sustainable Development Principles to Cables

A theoretical and holistic approach to assessing the impact of fibre optic cables on the sustainable use of the oceans is presented by Carter, Burnett, *et al*.[36] Rather than trying to develop a sustainable framework for submarine cables through the three pillars, they provide in their survey an evidenced-based synopsis of the interactions between the marine environment and cables. These authors argue that submarine cables are benign to the marine environment. Following almost half a century of optical communications, standardization, safety and environmental sustainability are of great importance throughout the life cycle of fibre optic cables. From manufacturing, usage, scrapping to disassembling, potential impacts on the environment should be lowered to the maximum possible extent.[37] Below is an extensive discourse on the interactions between cables and the marine environment.

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35 UNEP, *UNEP-Sponsored Programme for the Protection of Oceans and Coastal Areas, UNEP Regional Seas Reports and Studies No. 135*, Nairobi: Oceans and Coastal Areas Programme Activity Centre, UNEP, 1991.

36 See UNEP/ICPC Report.

37 Malcolm Johnson, *Optical Fibres, Cables and Systems, International Telecommunication Union Manual*, Geneva: International Telecommunication Union, 2009.

III. A Brief Analysis of International Legal Framework on Submarine Cables

The desire to regulate and protect submarine cables stems from the fact that they were recognized as public good. This awareness helped to inscribe the legal protection of submarine cables on the agenda of seven international conferences from 1863 to 1913.[38] The first international instrument that addressed the rights and obligations of States in relation to submarine cables was the International Convention for the Protection of Submarine Telegraph Cables (hereinafter "1884 Convention").[39] This was followed by the 1958 Geneva Conventions on the High Seas and the Continental Shelf (hereinafter "The 1958 Geneva Conventions"). Lastly, the UNCLOS was adopted and being later in time, is recognized as the applicable legal framework regulating submarine cables. Generally, these Conventions, apart from making provisions for the protection of submarine cables from damage, also regulate the laying, repair and maintenance of submarine cables. Looked at very closely, the 1884 Convention is an independent convention dealing only with the protection of submarine telegraph cables. The 1958 Geneva Conventions and the 1982 UNCLOS are however different, because in addition to cable protection, they deal extensively with other aspects of the law of the sea. Standing together, these conventions cover both the protection of submarine cables (as provided for in the 1884 Cable Convention)[40] and the freedom to lay, repair and maintain these cables.

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38 United National Documents on the Development and Codification of International Law, *Supplement to American Journal of International Law*, Vol. 41, No. 4, October 1947, at http://legal.un.org/ilc/documentation/english/ASIL_1947_study.pdf, 18 May 2016.

39 Convention for the Protection of Submarine Telegraph Cables 14 March 1884 (entered into force 1 May 1888) [hereinafter "1884 Convention"]. The 1884 Convention was adopted in Paris in March 1884 after a two year conference. Submarine telegraph cables were the predecessor to submarine fibre optic telecommunications cables. As of 2 April 2013, there were 40 State Parties to the Convention.

40 It is important to note that Articles II, IV and V of the 1884 Convention were incorporated into Articles 27, 28 and 29 of the 1958 High Seas Convention and Articles 113, 114 and 115 of UNCLOS.

IV. Maritime Zones and the Right to Lay, Repair and Maintain Submarine Cables

A. Territorial Seas

All stakeholders[41] have interest in ensuring that cable laying, repair, and maintenance are carried out with minimum or no damage.[42] Under UNCLOS, every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baseline determined in accordance with this Convention.[43] In accordance with this provision, the right to regulate all activities, including the laying, repair and maintenance of submarine cables within the territorial sea, belongs to the coastal State. However, this right is not at large. It must be exercised "subject to this Convention and other rules of international law".[44] Moreover, ships of all States must be allowed to have the right of innocent passage.[45] Coastal States may also adopt laws and regulations which are in conformity with this Convention and other rules of international law in relation to innocent passage through the territorial sea in respect of the protection of submarine cables.[46]

B. Archipelagic Waters

An archipelagic State[47] has sovereignty over the waters enclosed by its archipelagic baselines known as archipelagic waters. This right is to be exercised

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41 These include the rights and interests of coastal States, other States and the submarine cable industry.

42 Damage could interfere with telecommunications of several States as was the case when the East African Marine System (TEAMS) was damaged on 25 February 2012. TEAMS is an initiative spearheaded by the Government of Kenya to link the country to the rest of the world through a submarine fibre optic cable. The TEAMS cable was accidentally cut by a ship anchored off the coast of Mombasa. More than half of networks in Kenya and Uganda were affected. At http://en.wikipedia.org/wiki/TEAMS_syst, 2 May 2016. Damage to submarine cable may also incur liability, see Submarine Cable Company v. Dixon, *The Law Times Reports*, Vol. X, 1864, p. 32 and The Clara Kilam, *Law Reports, Admiralty and Ecclesiastical Cases*, Vol. III, 1870, p. 161.

43 Article 3, UNCLOS.

44 Article 2(3), UNCLOS.

45 Article 17, UNCLOS.

46 Article 21(1)(c), UNCLOS.

47 Archipelagic State means a State constituted wholly by one or more archipelagos. See Article 46(a), UNCLOS.

subject to the right of innocent passage for ships of all States.[48] They may also regulate ships exercising innocent passage in order to protect submarine cables.[49] While archipelagic States have the right to regulate submarine cables in their archipelagic waters, they must respect submarine cables laid by other States and passing through their waters. They should permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.[50]

C. Exclusive Economic Zone[51]

States may claim an Exclusive Economic Zone (EEZ) not extending beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[52] In the EZZ, the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and the winds".[53] It equally has jurisdiction with regards to: (i) the establishment and use of artificial islands, installations and structures, (ii) marine scientific research, and (iii) the protection and preservation of the marine environment.[54] There are however certain limits on the coastal State's rights over its EEZ. In exercising their rights and performing their duties in the EEZ, coastal States shall have due regard to the rights and duties of other States. Moreover, all States enjoy the freedom of laying submarine cables in the EEZ, and other internationally lawful uses of the seas related to this freedom, such as the operation of submarine cables.[55]

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48 Article 52, UNCLOS.
49 Article 21(1)(c), UNCLOS.
50 Article 51(2), UNCLOS.
51 Under Article 55, the EEZ "is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."
52 Article 57, UNCLOS.
53 Article 56(1)(a), UNCLOS.
54 Article 56(1)(b), UNCLOS.
55 Article 58(1), UNCLOS.

D. Continental Shelf[56]

A coastal State may claim a continental shelf up to a distance of 200 nm or if the outer edge of its continental margin extends beyond 200 nm,[57] it can claim an extended continental shelf up to 350 nm from the baseline from which the territorial sea is measured or 100 nm from the 2,500 metres isobaths.[58] On the continental shelf, a coastal State exercises "sovereign rights for the purpose of exploring it and exploiting its natural resources", such as "mineral and other non-living resources of the seabed and subsoil".[59] These rights must not be exercised in a manner which will infringe or result in any "unjustifiable interference" with navigation and other rights and freedoms of other States as provided in UNCLOS.[60] On the continental shelf, all States are entitled to lay submarine cables[61] and coastal States have an obligation not to impede the laying and maintenance of such cables.[62] When laying submarine cables, UNCLOS requires coastal States to further ensure that the possibilities of repairing cables are not prejudiced.[63] The right to delineate the course for the laying of pipelines (but not cables) is subject to the consent of the coastal State. This provision implies that a coastal State may control the delineation of pipelines, however, no similar right exists in the case of submarine cables.[64]

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56 The continental shelf is defined as "the seabed and subsoil of the submarine areas that extends beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin."

57 The complex formula to determine the outer edge of the continental margin is set out under Article 76(4) of UNCLOS.

58 Article 76(5), UNCLOS.

59 Article 77(1) and (4), UNCLOS.

60 Article 78(2), UNCLOS.

61 Article 79(1), UNCLOS.

62 Article 79(2), UNCLOS.

63 Article 79(5), UNCLOS.

64 Article 79(3), UNCLOS. See also Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 174; Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. II*, The Netherlands: Martinus Nijhoff Publishers, 1993, p. 915, para. 79.8(c). UNCLOS, Article 79, paragraph 3 deals with the course of pipelines, and covers both new and existing pipelines. It places a limitation on the freedom of all States to lay pipelines (but not cables) on the continental shelf by making the delineation of the course for those pipelines subject to the consent of the coastal State. This is consistent with paragraph 2, which allows a coastal State to take reasonable measures for the prevention, reduction, and control of pollution from pipelines.

E. Extended Continental Shelf

On the extended continental shelf beyond the EEZ, the regime of the freedom of the high seas applies.[65] It includes the freedom to lay submarine cables with due regard for the interests of other States exercising their high sea freedoms.[66]

F. High Seas[67]

The high seas are open to all States.[68] UNCLOS Article 87 provides that the freedom of the high seas includes freedom to lay submarine cables, subject to Part VI.[69] These freedom shall be exercised by all States with due regard firstly for the interests of other States in their exercise of the freedom of the high seas and secondly to activities in the area.[70]

G. The Area[71]

The exploration and exploitation of mineral resources of the Area is governed by the International Seabed Authority (ISA).[72] The ISA and the International Cable Protection Committee (ICPC) have signed a memorandum of understanding to advance cooperation on the use of the Area. The memorandum includes exchange of information on cable routing and prospecting and exploration areas.[73] The Area

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65 Ian Brownlie, *Principles of Public International Law*, 7th edition, New York: Oxford University Press, p. 242.

66 Article 87(2), UNCLOS.

67 The term high seas covers "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic State". See Article 86, UNCLOS.

68 Article 86, UNCLOS.

69 A significant proportion of the freedoms of the high seas are applicable in the EEZ (see Article 58), and the continental shelf (see Article 77). Article 56(3) locates both the EEZ and continental shelf in the same geographical area by providing that the rights of the coastal States in the EEZ with respect to the seabed and the subsoil shall be exercised in accordance with Part VI on the continental shelf.

70 Article 87(2), UNCLOS.

71 The Area means "the seabed and the ocean floor and subsoil thereof, beyond the limits of national jurisdiction". See Article 1(1), UNCLOS.

72 Article 1(3), UNCLOS.

73 Memorandum of Understanding between the International Cable Protection Committee and the International Seabed Authority signed on 15 December 2009, Annex to Note by the Secretariat at the 16th Session, 26 April to 7 May 2010, International Seabed Authority, at http://www.isa.org.jm/files/documents/EN/Regs/MOU-ICPC.pdf, 19 May 2016.

is considered part of the high seas under UNCLOS. The freedoms provided under Article 87, which include the right to lay submarine cables will apply to the Area. This freedom is further amplified under Article 112(1), which provides that all States are "entitled to lay submarine cables … on the bed of the high seas beyond the continental shelf", provided that when laying submarine cables, States shall have due regard to cables already in position. Moreover, the possibility of repairing existing cables should not be prejudiced.[74]

UNCLOS defines the Area and its resources as "the common heritage of mankind". No nation is allowed to lay claim to any part of the Area or its resources. Regarding the resources, all rights to the resources are vested in mankind as a whole. Consequently, companies wishing to exploit the mineral resources of the Area will have to enter into a profit sharing agreement, which stipulates that the profits derived from mineral resources of the Area will be shared with developing countries.

H. The Industry

Major players in marine operations are cable companies. Although UNCLOS affords the freedom to lay cables to "all States", in reality, private companies rather than governments generally own, operate and repair cables. It is noted by the Virginia Commentary on UNCLOS that the term "all States" should not be read too restrictively as in practice many submarine cables and pipelines are privately owned and are laid by corporations and other private entities. The term therefore contemplates the rights of States and their nationals.[75] These cable owners and operators, who are usually submarine cable manufacturers and suppliers and cable surveyors and installers, all have an interest in ensuring that cable laying, repair and maintenance comply with globally acceptable criteria in order to distil elements of

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74 Article 112(2), UNCLOS.

75 Myron Nordquist, Neil Grandy, Satya N. Nandan and Shabtai Rosenne eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume III*, Leiden: Martinus Nijhoff, 1995, p. 264. Professor Rainer Lagoni has however, argued that under the general principles of treaties, the freedom to lay is only exercisable by private cable owners if it is recognized in national legislation. This, according to him, is because only a self-executing provision of an international agreement can create a right or obligation for a private entity. Article 112 of UNCLOS addressing States and not private entities is not a self-executing provision and does not apply to cable owners directly. See Rainer Lagoni, *Legal Aspects of Submarine High Voltage Direct Current (HVDC) Cables*, New Jersey: Transaction Publishers, 1998, pp. 12~13.

best practice.

In summary, UNCLOS establishes the rights and duties of all stakeholders, aiming to balance the interests of coastal States in offshore zones with the interests of all States/other users in using the oceans. In doing so, UNCLOS makes a clear distinction between the exercise of sovereignty within internal waters, archipelagic waters and the territorial sea, and the exercise of sovereign rights in the EEZ and on the continental shelf. Sovereign rights pertain to a functional jurisdiction, notably over resources and environmental protection, which are more limited in character than sovereignty.

V. The International Marine Environment

After finding proofs that the oceans were not bottomless dumping grounds with limitless assimilative capacity and ceaseless ability to surrender their resources, global concern for the status of the marine environment heightened during the latter part of the twentieth century. Increasing footprint coupled with unsustainable and environmentally unfriendly exploitation of mineral resources as well as the destruction of marine biodiversity has made the oceans a focal point of growing environmental consciousness.

The marine ecosystem is the largest aquatic system on our planet. Life on our planet is dependent upon the oceans, which are the sources of wealth, opportunity and abundance. About 71 percent of the surface of this planet is covered with water. The water depth averages 3.8 km, a volume of 1370 x 10^6 km^3. The value of marine ecosystem is enormous. They provide us with food, energy and water and sustain the livelihoods of hundreds of millions of people. They are the highways for international trade as well as the main stabilizer of global climate. Marine fisheries account for 85 percent of global fish catch. Maritime shipping is involved in the transport of over 80 percent of world's merchandise trade.[76]

Apart from over-harvesting, the cumulative impact of land-based activities has occasioned great pressure on the oceans. This has resulted in the destruction of wetlands, mangroves and coral reefs. Oceans have also become ultimate sinks for discharges of waste of all sorts carried by rivers and wind from land based sources, including coastal mega cities. Other threats, which come from the transport

76 A. N. Subramanian, Introduction: Marine Environment, at http://saltwaterstudies.com/wp-content/uploads/2015/07/Introduction-Marine-Environment.pdf, 19 May 2016.

of hazardous waste, operational and accidental discharge of oil, discharge of radioactive materials at sea, nuclear testing and the transport of alien species in the ballast water of ships, are becoming increasingly common, adversely affecting the ocean and its resources.[77]

Since the marine environment is a fragile ecosystem, environmental stewardship should be the vision for all stakeholders. Apart from seeking an environment of balanced interest, there is a need to ensure and enhance a viable and healthy marine environment in the deep oceans.

VI. Legal and Policy Regime for the Protection and Preservation of the Marine Environment

The legal and policy regime for the protection and preservation of the marine environment is established in the UNCLOS. It provides the central regime for ocean governance at the global level. UNCLOS establishes the legal duty of all States to protect and preserve the marine environment.[78] Numerous provisions address the conservation of the marine environment and the protection of marine wildlife.

Part XII of UNCLOS, entitled "Protection and Preservation of the Environment", includes both general and specific obligations of State Parties to prevent, reduce and control pollution. The regimes of the sea designated by UNCLOS are very crucial for marine conservation, since it places the burden of marine conservation on coastal States. Undisputedly, coastal States are in the best position to apply and enforce the Convention. In this regard, they can adopt whatever measures they feel necessary to protect the marine environment. However, since the power of the coastal State ends where the high seas begin, the UNCLOS contains provisions applicable to all States, which require all States to protect the environment and reduce pollution.

Article 193 of UNCLOS[79] recognizes the sovereign right of States to "exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". Article 194

77 A. N. Subramanian, Introduction: Marine Environment, p. 30, at http://saltwaterstudies.com/wp-content/uploads/2015/07/Introduction-Marine-Environment.pdf, 19 May 2016.
78 Part XII, Article 192, UNCLOS.
79 This provision is similar to Principle 21 of the 1972 Stockholm Declaration.

requires States, individually and jointly, to take all measures consistent with UNCLOS that are necessary to prevent, reduce and control pollution of the marine environment from any source, using the best practicable means at their disposal and in accordance with their capabilities. Article 194 further enumerates four sources of pollution: (a) the release of toxic, harmful and noxious substances; (b) pollution from vessels; (c) pollutions from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil; and (d) pollution from other installations and devices operating in the marine environment. Finally, Article 204 provides that States shall, consistent with the rights of other States, endeavour to observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution of the marine environment.

Another treaty that builds on the UNCLOS framework is the 1992 CBD. This convention elaborates on what States should generally do to protect and preserve the environment in order to enhance the conservation and sustainable utilization of marine biodiversity.

UNCLOS and State practices, to a large extent, have provided not only the legal framework, but also adequate governance to protect marine ecosystem. Considering that the seafloor is not only fragile but also home to cables, there is a need to seek an undisturbed environment of balanced interests. Below is an examination of the interaction between cables and the oceans.

VII. Interactions between Submarine Cable Network and the Marine Environment

Recognizing the desirability of maintaining the tranquility of seas and oceans, UNCLOS in its preamble prays for "a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment".[80]

Notwithstanding the fact that the seas and oceans are being subjected to increasing pressure from varying technical construction, it is not moot that submarine cables, apart from facilitating international communications, represent

80 Preamble, UNCLOS.

reasonable use of the sea.[81] Researches have indicated that cables have relatively benign effects on the marine environment. Moreover, there is no report indicating difference in abundance and diversity for organisms living close or away from a cable.[82]

A. Composition of Submarine Cables

When designing a submarine cable, consideration is given to its ability to withstand pressure from water, waves, currents and other natural forces that affect the seabed. Since most of these forces change with depth, designing cables to meet these challenges has been a quest for over 160 years.[83] The development of fiber-optic submarine cables during the late 1970s and early 1980s was considered revolutionary in the telecommunications industry. A fiber-optic cable is, generally, composed of a core supporting pair of hair-like optical fibres surrounded by a layer of wire to provide strength, wrapped with a copper conductor to power the repeaters or amplifiers that process the light signals. A case of polyethylene dielectric and wire armour is added for protection.[84]

Compared to other submarine structures, such as pipelines and fishing trawls, telecommunication cables are more compatible with environmental protection because they are smaller and composed of non-toxic materials that are stable in sea waters.

B. Environmental Impact Assessment (EIA) Process

Despite its being benign to the seabed, fibre-optic cables may still interact with benthic environment. Such interactions may be evaluated by assessing and monitoring the biota before and after cable installation.[85]

EIA is "an analysis of a project's effects on the natural environment and its purpose is to ensure that any environmental effects of cable laying and maintenance are taken into account before authorization is provided to lay a cable on the

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81 In its 159 years of use, there has been no irreversible environmental impact in the laying and maintenance of telecommunications cables. See UNEP/ICPC Report, p. 28.

82 John Komuc and Catherine Creese, Studying the Impact of Seafloor Cables on the Marine Environment, *Currents*, Spring 2014, pp. 8~21.

83 UNEP/ICPC Report, p. 17.

84 UNEP/ICPC Report, p. 18.

85 UNEP/ICPC Report, p. 31.

seabed".[86]

In relation to submarine cables, many countries require an EIA to be carried out as part of the permit requirements for laying and repairing cables.[87] EIAs range from "provision of relevant technical information and a statement of compliance with environmental accreditation, to a brief environmental review, to a comprehensive analysis that includes formal public and/or governmental consultations."[88]

In assessing the potential effects of activities within the territorial sea, States are obligated to carry out EIAs before they permit the laying of submarine cables. Article 206 of UNCLOS provides that

> *When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as is practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.*

Being benign to the seabed, the laying and repairing of submarine cables do not cause pollution[89] or harmful changes to the marine environment. The

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86 UNEP/ICPC Report, p. 29.

87 Within its territorial sea, States may require an EIA. For instance, within the European Union, the EIA Directive 85/337/EEC (as amended by Directive 97/11/EC) does not require an EIA for the placement of submarine cables, though this may be required by the permitting system of individual Contracting Parties. In Germany, an EIA has to be provided in the framework of the application procedure. See OSPAR Commission, Assessment of the Environmental Impacts of Cables-Biodiversity Series, 2009, p. 13.

88 OSPAR Commission, Assessment of the Environmental Impacts of Cables-Biodiversity Series, 2009, p. 13.

89 Based on a definition produced by UNSECO's Inter-governmental Oceanographic Commission and the UN's Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP), Article 1 of UNCLOS defines pollution as "[t]he introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities".

joint report by United Nations Environment Programme (UNEP) and the ICPC[90] supports the benign disposition of submarine cables, concluding that "EIAs for cable operations are rare and are generally limited to a coastal State's territorial sea".[91]

C. Cable Route Survey

A crucial part of route selection is to identify and understand the marine geopolitical boundaries of the proposed route. This preliminary phase is called desktop study (DTS). Once potential cable landings have been identified, an efficient and secured route will be surveyed after assembling all available hydrographic and geological information, commission fisheries, permitting reports, and considering the location and history of existing nearby cables and other obstructions.[92] The use of DTS makes for efficient survey that avoids hazard and/or environmentally significant zones. It covers "water depth and sea topography, sediment type and thickness, marine fauna/flora communities, and potential natural or man-made hazards".[93] Acoustic-based echo-sounding, sonar and seismic systems are used in surveying cables routes.[94] These systems focus mostly on the seabed surface and the few meters of sediment below the seabed, where cable burial is required. While research is still ongoing, "cable survey equipment is regarded as posing only a minor risk to the environment".[95]

D. Laying and Burial of Cables

The current practice is to bury cables into the seabed to protect them against faults. However, in rocky and sandy areas, cables may be placed on the seabed. The scientific method to assess the interaction between cables and seabed life is by "monitoring the biota before and after cable installation or in the case of installed

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90 The ICPC is a non-governmental organization consisting of national telecommunications authorities and representatives from the cable industry. Its principal goal is to promote the safeguarding of undersea cables from human and natural hazards, as well as the funding of projects and programmes beneficial for the protection of cables.

91 UNEP/ICPC Report, p. 30.

92 UNEP/ICPC Report, p. 21.

93 UNEP/ICPC Report, p. 21.

94 UNEP/ICPC Report, p. 30.

95 UNEP/ICPC Report, p. 30.

cables, by comparing the biota at sites near and distant from a cable".[96] Apart from indicating that "cables have no or minimal impact on resident biota",[97] studies also showed that "cables provided a hard substrate for the attachment of anemones".[98] Furthermore, the possibility of leaching from the cables was found to be very remote since cables are composed of inert materials with no anti-fouling agents.[99] Recent findings have also shown that whale entanglements with submarine cables, a common phenomenon during the telegraphic era, have nowadays ceased completely following a transition to the fibre-optic systems.[100]

E. Cable Repairs

Improved cable system design, increased awareness of cables by seabed users and the practice of burying cables, have greatly reduced the number of faults in cables. Nevertheless, faults still occur and damaged cables require repairing. Damaged cables are retrieved from the seabed by towing a grapnel across the path of the cable, cutting the cables and retrieving both ends. The damaged cable is thereafter placed on the repair ship where a new section is then inserted to replace the damaged cable. The repaired cable is re-buried with the aid of a jet-equipped remote vehicle (ROV). Since few grapnel runs are required for this process, seabed disturbance is reduced.[101]

F. Cable Removal

Apart from the life span[102] of a cable coming to an end, advance in new technologies could result in cables being discarded. Once this happens, their

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96 UNEP/ICPC Report, p. 31.

97 UNEP/ICPC Report, p. 31. The localized and temporary nature of seabed disturbance associated with cable laying is also acknowledged by OSPAR Commission in the following words: "The laying of cables leads to seabed disturbance and associated impacts of damage, displacement or disturbance of flora and fauna, increased turbidity, release of contaminants and alteration of sediments. Along with noise and visual disturbance, these effects are mainly restricted to the installation, repair works and/or removal phase and are generally temporary". See OSPAR Commission, Assessment of the Environmental Impacts of Cables-Biodiversity Series, 2009, p. 8.

98 UNEP/ICPC Report, p. 31.

99 UNEP/ICPC Report, pp. 32~33.

100 UNEP/ICPC Report, p. 31.

101 UNEP/ICPC Report, p. 34.

102 Fibre optic cables have a design life of 20~25 years.

removal from the seabed may be considered. One of the remarkable effects of the "telecom bubble" was the extraordinary rise in the number of submarine cable systems either retired or taken out of service ("OOS Cables"). To provide a guideline for the owners of these cable systems, the ICPC issued its recommendations representing an agreed position by international owners and operators of submarine cable systems.[103] Removal may result in disturbances, and studies have shown that the "degree of disturbance is closely related to the type of substrate".[104] Cables extracted from sandy and muddy sediments will have little or no impact on the seabed. In contrast, those extracted from clay may leave some impacts on the seabed topography. Additionally, those laid on the rocky surface that could support epifauna need not be removed.[105]

By and large, "disturbances and impacts caused by cable laying and repairs must be viewed in the context of the frequency and extent of these activities".[106] For submarine cables, after the path proposed for its burial is cleared and the burial is done, the "seabed may not be disturbed again within the system's design life".[107] Moreover, the one-time disturbance, is only "restricted mainly to a strip of seabed less than 5~8 metres wide".[108] The same could not be said of bottom trawl and dredge fishing operations, which are repetitive and more extensive and affect substantial areas of the seabed.[109]

Studies have also shown that the time taken for the seabed to recover from cable related operations is less than that from trawl and dredge fishing operations. In Germany, Australia and Puget Sound, where low-impact vibrating ploughs were used in cable burial within the coastal wetlands and inter-tidal zones, re-establishment of vegetation took place within two to three years and full recovery happened within five years.[110] Physical restoration of the seabed from cable related disturbance on the inner continental shelves in the North Sea, Straits of Messina, Bass Strait and Cook Strait is most rapid. The presence "of sandy substrates on the inner shelf facilitates recovery within days to months".[111] Benthic communities

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103 For a detailed discussion of the ICPC recommendation, see ICPC Recommendation No. 1, Management of Redundant and Out-of-Service Cables, Issue 12B, 6 May 2011.
104 UNEP/ICPC Report, p. 34.
105 UNEP/ICPC Report, p. 34.
106 UNEP/ICPC Report, p. 34.
107 UNEP/ICPC Report, p. 34.
108 UNEP/ICPC Report, p. 34.
109 UNEP/ICPC Report, p. 34.
110 UNEP/ICPC Report, p. 35.
111 UNEP/ICPC Report, p. 35.

within the same zone also recovered due to favourable environmental conditions.[112] On the middle shelf, as observed in the Baltic Sea, physical dislocation of the seabed due to cable laying was erased by strong currents moving sediments to restore equilibrium. Recovery of fauna from burial disturbance in outer shelf and upper slope is more rapid due to the intensity of currents on sediments.[113]

VIII. Cable Protection and the Marine Environment

Despite its improved design and resilience, modern submarine cable networks are still susceptible to threats. The majority of cable faults are traced to "external aggression" with high incidence from fishing, followed by anchoring, natural hazards, theft and piracy in order.

A. Cables/Fishing Interactions

One of the most common types of commercial fishing gear with a long history of cable interaction is the bottom trawl. Globally, bottom trawl fishing is acknowledged as the main cause of submarine cable faults.[114] Bottom trawl is a "cone-shaped assembly of lines and nettings that is dragged along the seabed behind a vessel".[115] Trawl doors are usually made of steel and wooden panels, each of which weighs approximately 100 kg. The line along the bottom of the net is often rigged with chains, rollers and steel bobbins. Damage to cables may occur when trawls come in contact with the seabed.[116]

Finding a balance entails choosing fishing techniques causing few faults

112 UNEP/ICPC Report, p. 35.
113 UNEP/ICPC Report, p. 36.
114 Mick Green, Stephen Drew, Lionel Carter and Douglas Burnett, Submarine Cable Network Security, Presentation to APEC Submarine Cable Workshop Group, April 2009, at http://74.125.113.132/search?q=cache9yxrwo21PBIJ:www.iscpc.org/information/Openly%2520Published%2520Members%Area%2520Items/SubmarineCableNetworkSecurity'pptthengchuntearthquake+eleven+ships+cable&cd=3&hl=en%ct=clnk%gl=us, 2 May 2016.
115 UNEP/ICPC Report, p. 45.
116 Stephen C. Drew and Alan G. Hopper, *Fishing and Submarine Working Together*, 2nd edition, Lymington: ICPC, 2009, p. 27.

of cables[117] and avoiding or reducing impacts on vulnerable deep-water ecosystems. Some of the recent studies indicate that bottom trawling poses few threats to submarine cables. These findings reveal that "when a trawl crosses a communications cable lying on the seabed, more than 90 percent of such crossings do not result in cable damage".[118] Since most cables in trawling depths are armoured with protective covers, "there may be no apparent and discernible contacts at all".[119] Cables may further be protected by conducting surveys to identify the safest cable routes. Apart from maintaining cable awareness programmes, the best cable types must be selected for each part of the route.

B. Ship Anchors

Besides fishing, the next most common cause of cable faults is vessel anchors. A large vessel of about "5,000-tonne with a 4-tonne anchor could penetrate soft sediment to a depth of 5 metres".[120] Cable fault is likely to happen if such anchor lands on cables, especially those near busy ports. This can be avoided if cables are routed outside designated anchorage areas and port approaches. Recent studies indicate a remarkable increase in larger fleets with total tonnage exceeding 1 billion dwt (dead-weight tones).[121] Merchant ships are not only heavier but more numerous, heightening the risk to submarine network. In China, for instance, the revolution in the steel industry "has been accompanied by growth in the bulk carrier fleet required to transport iron ore, from Australia, India and Brazil''.[122] Cables on the continental shelves that are traversed by vast ships with heavier anchors are susceptible to more risks. The balance here lies in proper identification and assessment of "trade routes where vessel traffic has changed and the relationship of those routes to cable location".[123]

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117 Fishing methods less likely to damage cables include midwater trawling, boat seining, midwater long lines and stationary gears fixed on stakes. See Stephen C. Drew and Alan G. Hopper, *Fishing and Submarine Working Together*, 2nd edition, Lymington: ICPC, 2009, pp. 33~34.

118 UNEP/ICPC Report, p. 46.

119 UNEP/ICPC Report, p. 46.

120 UNEP/ICPC Report, p. 47.

121 UNEP/ICPC Report, p. 50.

122 UNEP/ICPC Report, p. 50.

123 UNEP/ICPC Report, p. 50.

C. Natural Hazards

A vast expanse of seas and oceans, from the coast to the abyss, is constantly exposed to natural hazards. A natural hazard is a "naturally occurring physical phenomenon caused by rapid or slow onset events, influenced by atmospheric, oceanic and geological forces that operate on timeless scales of hours to millennia".[124] Such hazards range from weather-related disturbances, earthquakes, volcanic eruptions to climate change.[125] As a consequence, the "coastal areas are exposed to flooding and erosion by surging seas and waves, while the seabed are scoured by currents and waves and the shelves inundated by sediments from major rivers".[126] These sediments which are sometimes transported by abyssal ocean currents to at least 6,000 metres depth have the potential to affect cables on the continental shelf.[127] A case in point is Typhoon Morakot, which struck Taiwan in 2009, resulting in excessive rain fall which caused rivers to flood and carry large volumes of sediments to the ocean.[128] The sediments were so massive that they triggered severe landslides that broke a succession of cables off eastern and western Taiwan as well as the nearby Philippines.[129] Earthquake-triggered landslides in countries like Papua New Guinea and Algeria have also led to severe damage to cables and serious disruption in submarine networks.[130]

Sea level rise can and do have serious impacts on submarine cables, because "rising sea level may heighten the risk of erosion and flooding of coastal facilities in regions subject to hurricanes and other intense storms".[131] Cables laid on the seabed are exposed to abrasion from eroding currents and waves.

In recent times, cable failures caused by natural processes are not minor, but have reduced considerably due to "improved cable design, installation technique and protection measures".

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124 UNEP/ICPC Report, p. 38.
125 UNEP/ICPC Report, p. 38.
126 UNEP/ICPC Report, p. 38.
127 UNEP/ICPC Report, p. 39.
128 UNEP/ICPC Report, p. 40.
129 UNEP/ICPC Report, p. 40.
130 UNEP/ICPC Report, p. 40.
131 UNEP/ICPC Report, p. 41.

D. Theft

Incidences of cable theft have become a serious problem in many parts of the world following the rise in metal prices. Thefts of submarine cables have direct effects on a country's socio-economic development and national security. As indicated in many reports, the problem is wide spread as both developed and developing countries are implicated. In the UK and the US, reducing cable theft is one of the highest priorities of security agents. In China, there were 190,000 recorded incidents of theft of telecommunication facilities in 2006, up from 53,000 in 2005. In South Africa, the Power Utility Eskom lost cables valued at R20 million in 2006. In 2007, Vietnamese fishermen stole about 43 km (26 miles) of fibre optic cables from the South China Sea floor – 11 km of TVH (Thailand-Vietnam-Hong Kong) line and 32 APCN (Asian Pacific Cable Network). This resulted in a serious disruption of Vietnamese international communication.[132]

E. Piracy and Terrorism

Apart from faults from anchors and fishing gears, vicious and hostile actions directed at submarine cables by pirates and terrorists are on the increase. The 2007 high seas depredations on submarine cable systems by Vietnamese pirates and the 2010 destruction of submarine cables by the terrorists in the Philippines are well documented.[133] Cable locations are in public domain, even anarchists are aware of them.[134] When it comes to security, submarine cables, especially those lying

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132 Vietnam Makes More Arrests over Submarine Cables Thefts, *Brunei Press*, 25 June 2007, at http://www.brusearch.com/news/11336, 2 May 2016.

133 Douglas R. Burnett, Note to Navy: It's Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 69, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

134 Douglas R. Burnett, Note to Navy: It's Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 69, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

on the seabed outside territorial waters, are "international orphans"[135], which are thus susceptible to attacks from pirates and terrorists. The unique and strategic importance of submarine cables calls for its protection from hostile actions of pirates and terrorists.

The first international legal instrument on the legal regime covering sea terrorist acts is the IMO Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter "SUA").[136] The protections of submarine cables are however omitted, since the SUA regime primarily addresses matters pertaining to the "security of vessels, navigational aids, and offshore facilities".[137] Probably due to this fact, "terrorist and pirate attacks on cables lying outside territorial seas are unlikely to be considered crimes under international law and most national laws".[138]

Several international treaties, such as the 1884 Convention, the High Seas Convention and the UNCLOS, require States to make laws imposing sanctions against individuals and vessels that injure international submarine cables willfully or by culpable negligence. UNCLOS, for instance, contains elaborate provisions for the protection of submarine cables beneath the high seas. Article 113 obligates States to adopt laws and regulations necessary to provide that it is punishable offence for a ship flying its flag or a person subject to its jurisdiction to willfully or through culpable negligence break or injure a submarine cable beneath the high seas (or EEZ) in such a manner as to be liable to disrupt communications. This provision shall also apply to conduct calculated or likely to result in such breaking

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135 Douglas R. Burnett, Note to Navy: It's Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 68, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

136 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (10 March 1988) and 2005 Protocol for the Suppression of Unlawful Acts of Violence Against the Safety Fixed Platforms on the Continental Shelf.

137 Douglas R. Burnett, Note to Navy: It's Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 68, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

138 Douglas R. Burnett, Note to Navy: It's Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 68, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

or injury.[139] It shall however not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid suck break or injury.[140] There is the argument that theft and terrorist acts directed against submarine cables in the high seas could be considered piracy under UNCLOS.[141] Piracy confers on any State a common jurisdiction to board, search, seize ship and cargo and arrest, prosecute in its own court system and punish offenders. However, there is no comparable legal framework for submarine cables. It is suggested here that similar jurisdiction treatment recognized for centuries to piracy should be extended to vicious attacks against cables. Pirates and terrorists attack cables linking every nation, and thus become the enemy of all States (*hostis humani generis*). The critical role played by submarine cables to socio-economic development and national security can not be overstated. It has been described as "the physical tie that binds the world together, allowing torrents of digital data, video, and telecommunications to course throughout the world uninterrupted on a 24/7 basis".[142] Depredation committed against these vital global networks should come under universal jurisdiction, and each State has the prerogative to prosecute or extradite the offenders.

Given the fragile nature of the marine environment where the extensive and growing networks are laid and maintained, threats posed by pirates and terrorist attacks will not only harm submarine cables but will definitely dislocate sensitive ecosystems and marine life.

Since no single government or agency can respond effectively on its own

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139 To date, only Australia and New Zealand have very effective legal regimes to deter acts that might result in cable faults. See Douglas R. Burnett, Note to Navy: It's Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 68, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

140 Other provisions are Articles 114 and 115 of UNCLOS.

141 Article 101 of UNCLOS provides: Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in place outside the jurisdiction of any State.

142 Douglas R. Burnett, Note to Navy: It's Time to Pay Attention to Security for Undersea Cables-crucial to Global Communications and Commerce, and Vital to Our National Interests, *Proceedings*, August 2011, p. 67, at http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/08/cable-vision/files/cablevisionburnettaug11/fileattachment/cablevisionburnettaug11.pdf, 25 May 2016.

to acts of piracy and terrorism against submarine cables, all stakeholders need to "cooperate in the exchange of information, participation in exercises and mutual support of actions to deter, or punish individuals or groups of individuals who engage in or threaten to engage in hostile actions against cables or cable ships".[143] Moreover, the global collaborative counter-measures suggested above must be effective, dependable, timely and rapid.

The emerging threats posed to submarine cables by terrorist and pirates also call for an effective international partnership between the government and the private-sector.[144] What is envisaged here is a proactive, strategic and all-inclusive security arrangement, involving the government, international non-governmental organizations, civil society groups, maritime communities and the industry.[145]

F. Cable Protection Zone and Marine Sanctuary

The increasing human and natural stresses on the marine environment and cable operations have promoted coastal States to establish cable protection zones (CPZs),[146] marine protected areas (MPAs)[147] and sanctuaries.[148] One of the first countries to establish a protected zone was "Australia which set up the Great Barrier Reef Marine Park in 1975 to provide environmental protection for the reef while

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143 Article 10 of the ICPC Draft Convention for the Protection and Repair of Submarine Cable 2008.

144 Michael Sechrist, Cyberspace in Deep Water: Protecting Undersea Communication Cables by Creating an International Public-Private Partnership, 23 March 2010, at http://belfercenter.ksg.harvard.edu/files/PAE_final_draft_-_043010.pdf, 26 May 2016.

145 David H. Capie and Paul M. Evans, *The Asia-Pacific Security Lexicon*, Singapore: Institute of Southern Asian Studies, 2002, pp. 98~107.

146 A cable protection zone is a large area of the seabed protected from fishing and anchorage. See N. T. Shears and N. R. Usmar, The Role of the Hauraki Gulf Cable Protection Zone in Protecting Exploited Fish Species: *de facto* Marine Reserve?, *Dco Research & Development Series*, No. 253, 2006, p. 27, at http://www.doc.govt.nz/Documents/science-and-technical/drds253.pdf, 26 May 2016.

147 A marine protected area is a site of special designation that could affect the marine environment. They are areas designated for some form of protection where fishing access could be affected by regulations as well as those which might be considered "*de facto*". Some of these sites may be coastal, sub tidal or intertidal. See Al J. Didier ed., Marine Protected Areas of Washington, Oregon and California, December 1998, at http://wdfw.wa.gov/publications/01136/wdfw01136.pdf, 26 May 2016.

148 Sanctuaries are designated discrete areas in coastal and ocean waters to promote comprehensive management of their special conservation, recreation, ecological, historical, research, educational, or aesthetic resources. See Al J. Didier ed., Marine Protected Areas of Washington, Oregon and California, December 1998, at http://wdfw.wa.gov/publications/01136/wdfw01136.pdf, 26 May 2016.

allowing but regulating activities such as fishing, shipping and tourism".[149] In 2007, Australia, through the Australian Communication and Media Authority (ACMA), made two declarations for submarine cable protection. Described as nationally significant, the Southern Cross Cable, linking Australia's communications network with those in New Zealand, Fiji and the United States, and the Australia-Japan cable, connecting Australia with Japan via Guam, are protected by establishing protection zones. Activities prohibited within the zones are "marine activities that pose a serious risk of damage to submarine cables", such as "towing, operating, or suspending from ship trawl gear designed to work on or near the seabed or a mid-water trawl".[150] Certain activities are restricted in the zones to reduce the risk of damage to cables. Such restrictions vary with either distance from shore, water depth or both. For instance, anchoring is permitted within the CPZ between 0~500 metres from low-water mark but not permitted in waters greater than 100 meters depth.[151] Under this category, activities near shore where cables are buried several metres below the seabed and housed in metal conduit may continue.[152] Activities not affected within the CPZ are those that do not have "contact with the seabed as well as certain recreational activities that occur within 500 metres of the shore".[153] As crucial as defence is, submarine cables are accorded protective priority in Australia. Where submarine CPZs overlap with defence practice areas, the Defence Department sets requirements on the "direction for firing ammunition, the use of inert practice rounds and the use of targets".[154] The law establishing the CPZ sets out numerous penal sanctions in relation to the zone, which are "aimed at deterring behavior that poses a risk of damage to submarine cables".[155] "Engaging in these activities may result in imprisonment for a period of up to 10 years and/or a fine of $330,000".[156]

One of the tools that are used to ensure the sustainable use and protection and conservation of marine biological diversity and ecosystems in Europe is

149 UNEP/ICPC Report, p. 53.
150 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.
151 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.
152 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.
153 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.
154 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.
155 It is an offence within the zone: to cause damage to, or to sever a submarine cable; engage in negligent conduct that results in damage to a cable; or engage in activity that is prohibited or restricted in a protection zone. At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.
156 At http://www.acma.gov.au/WEB/STANDARD/pc=, 2 May 2016.

the establishment of MPAs. The Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter "OSPAR Convention") 1992, provides for the protection of the marine environment of the Convention area. A key part of OSPAR's biodiversity strategy is to establish a network of MPAs.[157] In the United Kingdom, its marine policy seeks among other things to ensure sustainable development by establishing MPAs and CPZs.[158] The United States also created regimes to protect MPAs, sanctuaries and undersea cables.[159]

IX. Conclusion

As demonstrated from the above analysis, the main point of interaction of cables with the marine environment is the benthic zone of the oceans where the majority of the cables lie. Cables pose minimal impacts on life in the marine environment. And the equilibrium between the two can be enhanced if States are committed to meeting their obligations under UNCLOS and international law, enacting and enforcing domestic law to protect cables, and partnering the industry on security matters. Moreover, seabed users/developers should be firmly committed to sustainable development. Cable owners and those engaging in deep seabed activities should exercise due regard to each other. This could be done by privileging dialogue and exchange of information between them.[160] The economic opportunities that the sea offers need to be aligned with the protection and enhancement of its unique environment. Public-private partnership is crucial to the achievement of sustainable oceans that are healthy, biologically diverse and capable of delivering important socio-economic benefits. Although substantial progress has been made through science and technology, there is a need to invest more on research and new science and to share the knowledge that is emerging

157 At http://jncc.defra.gov.uk/page-3370, 6 May 2016.

158 UK Marine Policy Statement, March 2011, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69322/pb3654-marine-policy-statement-110316.pdf, 26 May 2016.

159 Al J. Didier ed., Marine Protected Areas of Washington, Oregon and California, December 1998, at http://wdfw.wa.gov/publications/01136/wdfw01136.pdf, 26 May 2016.

160 Douglas Burnett, Michael W. Lodge, Gwenaëlle Le Gurun and Alice Leonard De Juvigny, Submarine Cables and Deep Seabed Mining, Advancing Common Interests and Addressing UNCLOS "Due Regard" Obligation, *Technical Study*, No. 14, 10-11 March 2015.

on the interactions of submarine cables with the marine environment.[161] When knowing that sustainable win-win solutions are increasingly possible for what might sometimes be seen as competing interests or activities, all stakeholders have the potential to make positive contribution to a better marine environment.

161 The first UN World Ocean Assessment on all aspects of the ocean encourages further research to define and recommend responsible strategies in the light of increased pressure on the oceans as the world population increases. See the First World Ocean Assessment, Chapter 19 [Submarine Cables and Pipelines], at http://www.un.org/depts/los/global_reporting/WOA_RPROC/Chapter_19.pdf, 2 May 2016.

港口国应对船舶污染的责任:执行与保障机制

江家栋 * 蒋 围 **

内容摘要:在应对船舶污染方面,港口国相对于船旗国和沿海国而言,具有一些无可比拟的优势。1982 年《联合国海洋法公约》制定之前,国际上保护海洋环境公约对港口国责任的规定,通常限于对在港外国船舶的调查权,而对违章事件提起司法程序的权力则由船旗国拥有。《联合国海洋法公约》扩大了港口国的责任,规定港口国可对停靠其港口的外国船舶在公海或其他国家管辖水域内的污染行为执行可适用的国际法。而且港口国监督制度也在实践中发挥了防止和处置船舶污染的积极作用。但是港口国在监督船舶污染方面仍存在不足之处,亟需予以完善。

关键词:港口国监督 船舶污染 海洋环境保护

一、港口国应对船舶污染的必要性及历史沿革

海洋环境因其脆弱性和整体性需要世界各国共同保护。在海洋环境污染中,船舶污染约占 12%,是第二大污染源,[1] 具有直接污染海洋的特点,并会引起复杂的管辖权问题。半个多世纪以来,国际上发生了一系列严重的船舶污染海洋环境事件,引发了各国对船舶污染的关注,并促使国际社会出台了一系列遏制船舶污染的机制。

(一)港口国应对船舶污染的必要性

一直以来,根据船旗国管辖原则,船旗国有义务制定法律和规则,以阻止本国船舶对海洋环境造成污染。可见,船旗国在保护海洋环境中负有主要责任,而且过去还曾是唯一的责任者。但是多年来,很多船旗国无法或不愿采取必要的行动

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1 Liu Nengye, Frank Maes, The European Union and the International Maritime Organization: EU's External Influence on the Prevention of Vessel-Source Pollution, *Journal of Maritime Law and Commerce*, Vol. 41, No. 4, 2010, p. 581.

来履行义务，[2] 其主要原因在于方便旗问题。目前，世界上大概有 49% 的船舶属于方便旗船。[3] 一方面，为了减低运营成本，这些方便旗船的设计、排放以及装备并不十分严格，存在污染和安全隐患；另一方面，由于本国船舶遍布世界各地，船旗国很难对这些船舶都实行有效监管。而且还有批评者认为，因为在公海或其他国家沿海水域的污染并不会影响船旗国，所以船旗国没有动机去制定环境标准或采取适当的执行措施。[4]

虽然 1982 年《联合国海洋法公约》（以下简称“《海洋法公约》”）标志着沿海国在船舶污染管辖权方面取得了突破性进展，开启了沿海国对船舶污染进行管辖的新篇章，[5] 但是沿海国管辖权仍然存在局限之处。首先，《海洋法公约》确立了 200 海里专属经济区制度，在如此广泛的海域内，除非航行船舶造成了重大海洋污染，否则沿海国难以有效查明船舶的不法排放行为；其次，相较于船旗国，沿海国更直接面对海洋污染，在防止船舶污染时有更大的利害关系，因而其更倾向于制定严格的环境标准以及在沿海水域行使更大的权限，然而这又与海洋大国所主张的保护军事和商业利益的航行自由相冲突。[6]

相对于船旗国和沿海国在船舶污染管辖方面的不足，港口国在此方面具有重要作用。港口国行使管辖权时船舶位于其港口，能确保针对违法行为快速展开调查、提起司法程序，以及阻止不适航船舶带来的污染。[7] 从政策的角度而言，港口国对船舶污染的管辖权体现了船旗国管辖权和沿海国管辖权之间的折衷。一方面，港口国比船旗国更倾向于严格执行环境法规，因为港口国本身也是沿海国，因此可能承受不合标准船或违法船舶所带来的污染危险，港口国执行是对船旗国未履行义务或履行义务不当的矫正；另一方面，港口国执行比沿海国执行更有利，因为前者对航行自由的干预程度更少，而且通常能更安全地开展。[8] 因此，本文拟从执行与保障机制的角度，研究港口国应对船舶污染的有关国际规则，厘清其基本内容以及存在的不足，并提出完善建议。

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2 Ho-Sam Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea, *Journal of Maritime Law & Commerce*, Vol. 40, No. 2, April 2009, p. 291.

3 Virginie Terrie, Are “Black Tides” Inevitable?, *Coventry Law Journal*, Vol. 6, No. 2, 2001, p. 35.

4 Daniel Bodansky, Protecting the Marine Environment from Vessel-source Pollution: UNCLOS III and Beyond, *Ecology Law Quarterly*, Vol. 18, 1991, p. 737.

5 张湘兰、叶泉：《论沿海国对其专属经济区内船舶污染的立法管辖权》，载于《当代法学》2013 年第 3 期，第 145 页。

6 Daniel Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, *Ecology Law Quarterly*, Vol. 18, 1991, p. 725.

7 I. A. Shearer, Problems of Jurisdiction and Law Enforcement against Delinquent Vessels, *International and Comparative Law Quarterly*, Vol. 35, No. 2, 1986, p. 341.

8 Daniel Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, *Ecology Law Quarterly*, Vol. 18, 1991, pp. 739~740.

（二）港口国船舶污染管辖权的历史沿革

受格劳秀斯之《海洋自由论》的影响，传统国际法认为，船舶是“合法悬挂其国旗的那个国家领土的浮动部分”。[9] 因此，船舶的管辖权由船旗国专有，这一理论在很长一段时间内影响了绝大部分国家的实践及国际公约的制定。例如，1952年在布鲁塞尔通过的《统一船舶碰撞或其他航行事故中刑事管辖权方面某些规定的国际公约》，其第1条便明确了船旗国对船舶碰撞或其他航行事故的专属管辖权。然而，如前所述，船旗国管辖在船舶污染管理方面存在不足，诸多国际法学者和部分国家实践对这一原则提出了强烈的质疑和挑战，并体现在一些国际公约的条款中。

1954 年《国际防止海洋石油污染公约》规定了港口国对外国船舶进行检查的权利。根据该公约第 9(5) 条和第 10 条的规定，[10] 港口国可以检查靠港船舶并复制船上的油类记录簿，对于船舶的违法行为可向船旗国提交书面证明，由船旗国对船舶的违法行为进行调查以及提起相应的诉讼。

《经 1978 年议定书修正的〈1973 年国际防止船舶造成污染公约〉》（以下简称“《防污公约》”）对港口国就位于其港口或近海装卸站的船舶的检查、检查的具体程序以及威胁海洋环境船舶的处理方法作出了规定。该公约第 5(2) 条 [11] 明确规定了港口国对船舶有权进行检查，但这种检查应以核实证书为限。在船舶没有有效证书或者船舶情况或船舶设备与证书登记情况不符的情况下，港口国可以采取必要措施，包括允许其驶往最近的修船厂进行修理。此外，根据该公约第 6(2)、(4)

9 劳特派特修订，王铁崖等译：《奥本海国际法（上卷第二分册）》，北京：商务印书馆 1972 年版，第 9 页。

10 1954 年《国际防止海洋石油污染公约》第 9(5) 条规定：“缔约国任何领土的主管当局对于在港船舶，可检查按本条规定要求在船上携带的油类记录簿，也可复制记录簿中填写的任何内容并可要求船长证实该复制件是所述内容的真实复制件。”第 10 条规定：“违反本公约的事件无论在何处发生，任何缔约国政府可书面向符合本公约第 2 条第 1 款规定的船舶有关政府提出有关该船违反本公约任何规定的证明……被通知的政府收到详细材料后应进行调查，并可要求其他政府提供进一步的违章详细情报。如被通知的政府认为按其法律证据已足够起诉违章船东或船长时，则诉讼应尽早进行。”

11 《1973/78 年国际防止船舶造成污染公约》第 5(2) 条规定：“凡需要持有证书的船舶，当其在一缔约国所管辖的港口或近海装卸站时，应接受该缔约国正式授权的官员的检查。任何这种检查，应以核实船上是否备有有效的证书为限，除非有明显的理由认为该船或其设备的状况实质上不符合证书所载的情况。在这种情况下，或者船舶没有有效的证书时，则执行检查的缔约国应采取步骤，直至该船的出海对海上环境不致产生不当的危害威胁时，才准其开航。但是，该缔约国可允许这种船离开港口或近海装卸站而驶往可供使用的最近的适当修船厂以进行处理。”

条[12]的规定，港口国有权检查船舶是否排放了有害物质。但是，如果船舶存在违法事件，对违法事件的追责仍然由“主管机关”[13]负责，就有权悬挂某一国家国旗的船舶而言，其主管机关即为该国政府，即船旗国政府。

上述 2 个公约均规定了港口国的执行管辖权，港口国对于在检查过程中发现的船舶违章事件，应及时报请船旗国，由船旗国对此进行调查及提起诉讼。然而这些规定并未从根本上撼动船旗国管辖权的主导地位，港口国管辖尚未发挥出应有的作用。

真正意义上瓦解船旗国对船舶污染管辖权主体地位的是《海洋法公约》。作为全面规范海洋事务的“海洋宪章”，《海洋法公约》是迄今为止国际社会对船舶污染管辖权规定得最全面的重要公约。有关应对船舶污染的法律体制规定位于该公约第十二部分“保护和保存海洋环境”，这些规定确立了船旗国、沿海国和港口国并行的管辖制度，标志着港口国在船舶污染管辖权方面取得了突破性进展，开启了港口国对船舶污染进行管辖的新篇章。

几乎与此同时，另一套应对船舶污染的法律机制也得到了蓬勃发展。1978 年 3 月 16 日，阿摩科•卡迪兹号邮轮在法国海岸搁浅，造成船上装载的 22.3 万吨石油泄入海中，导致了灾难性的海洋环境污染。该事件直接导致了《巴黎港口国监督谅解备忘录》的产生，并使得港口国监督制度在全球实质性地开展起来。

二、《海洋法公约》有关港口国应对船舶污染的规定

《海洋法公约》第十二部分为海洋环境的保护提供了较为完善的框架性条款，同时也为船旗国、沿海国和港口国检查船舶，对船舶污染行使管辖权提供了基本法律框架。

一般认为，管辖权分为立法管辖权、执行管辖权和司法管辖权 3 种。不过，就船舶污染的国家管辖权而言，大部分学者都将其分为 2 类，即立法管辖权和执行管辖权，而将司法管辖权纳入执行管辖权的范畴。[14]《海洋法公约》第十二部分规定了船旗国、沿海国和港口国应对船舶污染的立法管辖权和执行管辖权。但正如

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12 《1973/78 年国际防止船舶造成污染公约》第 6(2) 条规定：“凡适用本公约的船舶，在一缔约国的任何港口或近海装卸站，可以受到该缔约国委派或授权的官员的检查，以核实该船是否违反规则的规定而排放了任何有害物质。如检查表明是违反了本公约的事件，则应将一份报告送请主管机关采取适当行动。”第 6(4) 条规定：“在收到这种证据后，被通知的主管机关应对此事进行调查，并可要求其他缔约国对所声称的违章事件提供进一步的或更完善的证据。如果该主管机关确信有充分的证据可对所声称的违章事件起诉，则应使这种起诉按其法律尽速进行。”

13 《1973/78 年国际防止船舶造成污染公约》第 2(5) 条。

14 张湘兰、叶泉：《论沿海国对其专属经济区内船舶污染的立法管辖权》，载于《当代法学》2013 年第 3 期，第 144 页。

笔者在文章开始所论述的，在应对船舶污染方面，更能体现港口国作用的是它对船舶污染执行管辖权的有效实施。[15] 因此，有必要从执行管辖权的角度对《海洋法公约》的相关条款进行分析。

（一）有关港口国应对船舶污染的执行制度

《海洋法公约》第 218 条规定了港口国应对船舶污染的执行制度。概括而言，港口国的执行权有以下 5 点：

（1）对自愿在港或岸外设施的外国船舶发生在其内水、领海或专属经济区外（结合下一款来看，指的是公海海域）的违法排放行为进行调查并在有充分证据的情形下，提起司法程序；

（2）对自愿在港或岸外设施的外国船舶发生在他国内水、领海或专属经济区内的违章排放行为，经该国、船旗国或受违章排放行为损害或威胁的国家请求，提起司法程序；

（3）对自愿在港或岸外设施的外国船舶发生在他国内水、领海、或专属经济区内的违章排放行为，已对或可能对港口国管辖海域造成污染的，进行调查并提起司法程序；

（4）对自愿在港或岸外设施的外国船舶，应违章行为发生地国、受损害或影响国以及船旗国的要求进行调查，并将调查记录转交给船旗国或沿海国；

（5）对外国船舶发生在沿海国内水、领海或专属经济区内的违反行为，在已经提起司法程序的情况下，应在沿海国的请求下暂停，并将案件的证据和记录、任何保证书或其他财政担保转交给沿海国。

上述 5 点中，前 3 点提到了港口国调查并提起司法程序的权力，后 2 点涉及港口国对他国的司法协助。因而港口国的执行管辖权可细分为调查权、提起司法程序的权力和提供司法协助的责任等 3 个方面。

1. 港口国的调查权

港口国的调查权主要是检查停泊在港口或岸外设施的外国船舶是否存在违反可适用国际规则和标准的排放行为。

根据《海洋法公约》第 226 条规定，港口国的调查权一般情况下仅限于查阅该船按照一般接受的国际规则和标准所须持有的证书、记录或其他文件或其所持有的任何类似文件。然而，在 (1) 有明显根据认为该船的情况或其装备与这些文件所载各节有重大不符；(2) 这类文件的内容不足以证实或证明涉嫌的违反行为；

15 港口国的立法管辖权是依据《海洋法公约》第 211 条第 3 款，该款规定，“各国如制订关于防止、减少和控制海洋环境污染的特别规定作为外国船只进入其港口或内水或在其岸外设施停靠的条件，应将这种规定妥为公布，并通知主管国际组织”。

或 (3) 该船未持有有效的证件和记录这 3 种情况下，可以进一步对船舶进行实际检查。这里的进一步实际检查是指对船舶空间及货物等的实际检查。

调查结果可分成 2 种情况进行处理：第 1 种是发现船舶存在违反可适用的法律和规章或国际规则和标准的行为，港口国可对船舶进行扣留，并在符合规定的情况下提起司法程序，但在船舶提供保证书或者财政担保等合理程序后，港口国应迅速予以释放；第 2 种是船舶处于对海洋环境有损害威胁的不适航状态时，港口国可拒绝释放或以驶往最近的适当修船厂为条件予以释放。

2. 港口国提起司法程序的权力

《海洋法公约》规定了港口国提起司法程序的 3 种情况。一般情况下，司法程序有广义与狭义之分。广义的司法程序是指国家专门机关以及诉讼参与人进行诉讼所应遵循的步骤、方式，以及原则、规则、制度等，比如刑事司法程序包括从立案、侦查、起诉、审判到刑事执行活动中所采用的具体步骤、方式、方法以及原则、规则、制度等。从这个意义上而言，司法程序实际上就是通常所说的诉讼程序。狭义的司法程序则是指法院审理各类案件的程序，即审判程序。[16] 根据《海洋法公约》的条文，第 218(1) 条提及港口国在调查后有充分证据的，可以提起司法程序。第 220(6) 条规定，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。因此，港口国可提起的司法程序具体包括船舶扣留、起诉、审判和执行。

司法程序可能因为一些原因而暂停或终止。第 1 种情形是，港口国对外国船舶提起加以处罚的司法程序，当船旗国在港口国提起程序之日起 6 个月内就同样控告提出加以处罚的司法程序时，港口国应即暂停进行。船旗国提起的司法程序结束时，暂停的司法程序应予终止。[17] 第 2 种情形是，如果违反行为发生在沿海国的内水、领海或专属经济区内，港口国根据相关调查提起的任何司法程序，经该沿海国请求可暂停进行。案件的证据和记录，连同缴交港口国当局的任何保证书或其他财政担保，应转交给该沿海国。转交后，港口国不再继续进行司法程序。[18]

在司法程序的惩罚手段方面，根据《海洋法公约》第 230 条的规定，港口国对于外国船舶违反可适用的国际规则和标准的行为，一般仅可处以罚款。

3. 港口国的司法协助责任

司法协助包括刑事司法协助和民事司法协助。刑事司法协助是协助或代为履行一定的刑事司法职能，为请求方进行刑事侦查、起诉、审判和执行刑罚进行协助，因而刑事司法协助的任何作为均具有诉讼性，从属或辅助于请求方的刑事诉讼活

16 江必新、程琥：《司法程序的基本范畴研究》，载于《司法适用》2011 年第 5 期，第 23 页。
17 《海洋法公约》第 228 条。
18 《海洋法公约》第 218 条第 4 款。

动。[19] 民事司法协助是一国法院应另一国法院的请求，代为履行某些诉讼行为，如送达诉讼文件、传询证人、提取证据以及执行外国法院判决和外国仲裁裁决等。[20] 港口国保护海洋环境的司法协助责任表现为：(1) 对在港或岸外设施的外国船舶发生在他国内水、领海或专属经济区内的违章排放行为，在相关国家的请求下，进行调查并提起司法程序；(2) 对在港或岸外设施的外国船舶，应违章行为发生地国、受损害或影响国以及船旗国的要求进行调查，并将调查记录转交给船旗国或沿海国；(3) 港口国对外国船舶发生在沿海国内水、领海或专属经济区内的违反行为，在已经提起司法程序的情况下，应在沿海国的请求下暂停，并将案件的证据和记录、任何保证书或其他财政担保，转交给沿海国。

（二）有关港口国应对船舶污染的保障制度

《海洋法公约》第十二部分第七节规定的保障办法是为防止国家滥用执行权力。该节致力于保护外国及其船舶尤其是外国船舶的船长和船员的权利。保障办法主要针对对外国船舶的执行权（只有第 227、229 和 232 条具有更宽泛的范围），并反映了下述 2 种需求之间的平衡:其中一种需求是指需要更有效的执行措施，尤其是针对执行权属于船旗国之外国家的船舶污染执行措施;另一种需求是指需要维持航行自由和全球航运系统的完整性。[21]

保障方法大致可以分为 2 类，一类针对执行措施，一类针对司法程序。

1. 针对执行措施的保障办法

这类办法包括对执行主体的限制、执行时避免不利后果、执行时不歧视外国船舶、通知船旗国和其他有关国家，以及赔偿不当执行产生的责任。这些内容具体如下：

（1）执行主体的保障规定。执行主体必须是官员或军舰、军用飞机或其他有清楚标志可以识别为政府服务并经授权的船舶或飞机；

（2）执行时避免不利后果的保障规定。港口国执行时不应危害航行安全或造成对船只的任何危险，或将船只带至不安全的港口或停泊地，或使海洋环境面临不合理的危险；

（3）不歧视外国船舶的保障规定。港口国不得在形式或事实上对任何其他国家的船只有所歧视；

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19 成良文：《刑事司法协助研究》（博士学位论文），重庆：西南政法大学 2002 年版，第 23 页。

20 韩德培主编：《国际私法》，北京：高等教育出版社、北京大学出版社 2000 年版，第 471 页。

21 Shabtai Rosenne and Alexander Yankov, *United Nations Convention on the Law of the Sea 1982: A Commentary (Volume IV)*, Dordrecht/Boston/London: Marinus Nijhoff Publishers, 1991, p. 321.

（4）通知船旗国和其他有关国家的保障规定。港口国对外国船只采取的措施，应立即通知船旗国和任何其他有关国家；

（5）关于赔偿责任的保障规定。港口国执行所采取的措施如属非法或根据可得到的情报超出合理的要求，其应对这种措施所引起的并可以归因于该国的损害或损失负责，并制定向本国法院申诉的办法。

2. 针对司法程序的保障办法

这类办法包括便利司法程序、对提起司法程序的暂停和限制、不影响民事诉讼程序的提起、对司法程序惩罚手段的限制、通知和赔偿责任。通知和赔偿责任前面已有论及，不再赘述。其他规定具体如下：

（1）便利司法程序。港口国应便利对证人的听询以及接受证据，便利相关代表参与程序，并保障其享有国内法律和规章或国际法规定的权利与义务；

（2）对司法程序的暂停和限制。船旗国在港口国提起司法程序之内的 6 个月中，有权提起同样的司法程序。然而自违反行为发生之日起 3 年后，任何国家对外国船只不应再提起加以处罚的司法程序。如另一国家已在《海洋法公约》第 228(1) 条所载规定的限制下提起司法程序，其他国家均不得再提起这一程序。

（3）对司法程序惩罚手段的限制。执行国对外国船只在领海以外所犯行为，仅可处以罚款；对在领海内所犯行为，仅可处以罚款，但在领海内故意和严重造成污染的行为除外。对于外国船只所犯这种违反行为进行可能对其加以处罚的司法程序时，执法国应尊重被告的公认权利。

（三）小结

从以上论述中，我们可以看到《海洋法公约》授予了港口国更大的权力，对停靠其港口的外国船舶在公海或其他国家管辖水域内的污染行为执行可适用的国际法。在《海洋法公约》之前，港口国执行管辖权只能针对在港口国管辖海域内发生的污染行为。根据习惯国际法，一国可对位于其港口内的外国船舶适用防污染法律，并可将这种法律或特定国际公约作为外国船舶进入其港口的条件。[22] 当然，港口国不能对船舶进入其领海之前实施的违反行为采取行动，除非特定协议中允许采取行动或者违反行为对该国海洋环境造成有害结果。

根据《海洋法公约》的规定，港口国执行管辖权针对的只是外国船舶违反通过主管国际组织或一般外交会议制订的可适用的国际规则和标准在沿海国管辖海域外的排放，而不是违反船舶构造、设计、装备和人员配备标准。这里的“可适用的国际规则和标准”与《海洋法公约》第 211 条中规定的作为各国立法管辖权依据

22 Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd Edition, Manchester: Manchester University Press, 1999, pp. 344~355.

的“一般接受的国际规则和标准”并不等同，后者是前者的一部分。“可适用的国际规则和标准”涉及由习惯国际法形成的或海事公约中规定的与相关事项有关的规则和标准，例如，《防污公约》规定的防污染规则。因此，“可适用的国际规则和标准”不包括尚未被视为“一般接受的国际规则和标准”的决议、指南和守则。[23]

总而言之，《海洋法公约》中的相关规定为港口国发挥自身在海洋环境保护中的积极作用提供了法律基础，是对船旗国管辖的有效补充。但《海洋法公约》的相关规定相对比较原则，只是框架性规定，在实践中，港口国发挥防止和处置船舶污染的作用，依据的是另一套国际机制——港口国监督制度。

三、应对船舶污染的港口国监督制度分析

可以说，港口国监督就是港口国管辖的主要表现形式。[24] 国际海事组织将港口国监督定义为港口国对进入本国港口的外国籍船舶所实施的为确保其船况及设备符合国际公约的规定，以及人员配备和操作符合国际公约和法规规定的检查。[25]

（一）港口国监督制度的发展

港口国的检查最初只是为了支持船旗国的执行权，然而，经验表明这是非常有效的，特别是在区域合作的基础上。驶往他国的船舶，返航前通常会在区域内其他国家的港口停泊，因此，港口国之间如能就船舶检查紧密合作，将会符合大家的利益。这样能确保尽可能多的船舶接受检查，同时又能避免船舶因不必要的检查而被延误。规定船舶标准的主要责任在于船旗国，然而港口国监督为查扣不符合标准的船舶又提供了一道安全网。[26] 除此之外，对于区域性港口国之间的合作，有学者认为港口之间的关系主要是竞争性的，[27] 对船舶施加严格的环境要求以及安全标准，将会增加运输成本并减弱港口的竞争力。而且，港口国之间适用不同的当地标准将会不合理地增加船舶的合规成本并阻碍海洋贸易。[28] 因此，非常有

23 Ho-Sam Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea, *Journal of Maritime Law and Commerce,* Vol. 40, 2009, p. 299.

24 赵在理：《船舶安全管理体系与港口国监督检查》，载于《交通企业管理》2005 年第 3 期，第 30 页。

25 At http://www.imo.org/TCD/mainframe.asp?topic_id=159, 11 June 2015.

26 Port State control, at http://www.imo.org/en/OurWork/MSAS/Pages/PortStateControl.aspx, 11 June 2015.

27 Ted L. McDorman, Regional Port State Control Agreements: Some Issues of International Law, *Ocean and Coastal Law Journal*, Vol. 5, 2000, p. 207.

28 Ted L. McDorman, Regional Port State Control Agreements: Some Issues of International Law, *Ocean and Coastal Law Journal*, Vol. 5, 2000, p. 207.

必要签订区域性港口国监督协议。[29]

1982 年《巴黎备忘录》生效后，国际海事组织在通过一系列相关决议，形成一套完整有关港口国监督检查程序的文件的同时，还修正了有关国际公约，对有关监督条款作了补充和完善。在管理组织方面，继巴黎港口国监督谅解备忘录组织于 1982 年成立以后，南美地区和亚太地区分别于 1993 年和 1994 年成立了港口国监督谅解备忘录组织。此后，加勒比海地区、地中海地区、印度洋地区、波斯湾和西非等地区也纷纷效仿。目前，港口国监督区域合作组织已基本覆盖全球，地区备忘录也成为港口国监督存在的主要形式，在应对船舶污染方面取得了显著的成果。

（二）港口国监督应对船舶污染的法律依据

《海洋法公约》是实施港口国监督的法律依据之一。《海洋法公约》第 219 条是开展港口国监督的直接依据，该条规定赋予港口国在外国船舶违反适航条件的可适用国际规则和标准从而有损害海洋环境的威胁时可采取行政措施的权利；第 226 条规定的是本文第二部分提及的港口国的调查权，这也是实践中开展港口国监督的具体程序和步骤；第 227 条规定了实施港口国监督时不应在形式上或事实上对任何其他国家的船只有所歧视，保证了港口国监督的公正性和有效性；第 232 条则明确了港口国因执行措施而产生的赔偿责任，保障了船舶在港口国监督中的救济权。

总体而言，在港口国应对船舶污染的执行和保障机制方面，《海洋法公约》对港口国监督的规定是比较宽泛的，没有详细条款的规定和指导，只是起到一个提纲挈领的框架作用。更多更具体的法律依据则是体现在由国际海事组织和国际劳工组织制定的一些海事公约之中。

国际海事组织某些重要的技术性公约对港口国检查外国船舶作出了规定，以确保这些船只符合国际海事组织的要求。这些国际海事组织制定的海事公约主要包括：

1.《1966 年国际载重线公约》及 1988 年议定书（以下简称“《载重线公约》”）；

2.《1974 年国际海上人命安全公约》及其修正案，1978 年和 1988 年议定书（以下简称“《安全公约》”）；

3.《防污公约》；

4.《1978 年海员培训、发证和值班标准国际公约》及 1995 年修正案（以下简称“《海员培训公约》”）；

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29 Ted L. McDorman, Regional Port State Control Agreements: Some Issues of International Law, *Ocean and Coastal Law Journal*, Vol. 5, 2000, p. 208.

5.《1969 年国际船舶吨位丈量公约》(以下简称“《吨位公约》”);

6.《1972 年国际海上避碰规则公约》及其修正案。

此外,国际劳工组织针对海员也制定了许多国际公约,其中在港口国监督方面最重要的是 2006 年的《海事劳工公约》。

这些海事公约的相关条款规定了港口国监督官员实施港口国监督检查的内容,主要包括船舶的技术状况、操作性要求、船舶配员以及船员生活和工作条件 4 个方面。[30] 这些技术性的条款构成了港口国在应对船舶污染时的执行和保障机制。但这里需要注意的是,港口国监督的执行机制是对船舶实施滞留,而不像《海洋法公约》中规定的港口国拥有调查权以及提起司法程序的权力。

《安全公约》第一章第 19 条“监督”条款规定,如果船舶证书过期或失效,港口国可以采取执行措施,对船舶进行滞留;第十一章第 4 条“港口国对作业要求的控制”条款也规定了对船舶实施滞留的执行措施。该公约在规定执行措施的同时,也规定了保障方法:第一章第 19 条第 6 项提到,“执行……监督时,应尽一切努力避免对船舶作不适当的扣留或延误。如船舶被不适当的扣留或延误,应有权对所受的任何损失或损害要求赔偿”。

《防污公约》是海洋环境保护方面非常重要的公约,该公约规定的港口国监督检查项目比较多。可以说,许多项目的检查都可以导致对船舶的滞留,例如证书无效、主要船员不熟悉主要的防止油污染程序等。同时,该公约还强调检查时应尽力避免使船舶受到不当的滞留或延误,如果船舶因此受到损失或损害,有权要求补偿。

《海员培训公约》和《海事劳工公约》中也有类似的执行和保障规定。[31]

然而,《载重线公约》和《吨位公约》中规定的执行规定则有所不同。前者强调港口国监督只限于审查证书的形式,不会直接导致对船舶的滞留;[32] 后者则规定在任何情况下都不因施行这种检查而滞留船舶。[33]

国际海事组织、国际劳工组织海事公约中的这些条款形成了港口国监督应对船舶污染执行和保障机制的法律依据,各国港口国监督检查官员据此实施严格检查,监督船旗国切实履行有关海洋环境保护和航行安全的国际公约,弥补船旗国安全管理的不足,使得港口国真正成为监督制度中的“最后一张安全网”。[34]

随着时代的发展,国际海事组织和国际劳工组织已制定了与时俱进的新国际公约,并修订了原有的国际公约,所以有关港口国监督检查的内容不断得到更新。

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30 钱闵:《ISM 规则与港口国监督实务》,大连:大连海事大学出版社 2001 年版,第 45 页。
31 《海员培训公约》第 X 条,及《海事劳工公约》标准 A5.1.4。
32 《载重线公约》第 21 条。
33 《吨位公约》第 12 条。
34 Dr. Z. Oya Özçcayir, The Use of Port State Control in Maritime Industry and Application of the Paris Mou, *Ocean and Coastal Law Journal*, Vol. 14, Issue 2, p. 201.

这类海事公约主要包括：

1.1990 年《国际油污防备、响应和合作公约》。该公约要求所有船舶、港口和近海装置都应具备油污应急计划，并且港口国当局有权对此进行监督检查。根据该公约第 3 条的规定，港口国正式授权的官员，有权根据现行国际协定或国内立法所规定的做法，对位于港口或近海装卸站的应备有油污应急计划的船舶进行检查。

2.2001 年《国际控制船舶有害防污底系统公约》。该公约规定了港口国应对船舶污染的责任。根据该公约第 11 条，授权的港口国官员有权对任何港口、船厂或近海码头的船舶进行检查。这一检查先限于船舶所携带的相关文件，在有明确根据认为船舶违反该公约时，港口国官员可对船舶进行彻底检查。如果查到船舶违反该公约，港口国可采取步骤警告、扣留、遣走或驱逐该船出港。根据第 13 条的规定，当船舶在检查时受到不适当的扣留或延误时，有权对所蒙受的任何损失或损害要求索赔。

3.2004 年《控制和管理船舶压载水和沉积物国际公约》。该公约同样规定了港口国对船舶的检查权，以及在船舶的状况或设备实质上不符合证书资料，或船长或船员不熟悉船上压载水管理的基本程序或未执行该程序的情况下，采取措施保证船舶不排放压载水。该公约第 10 条和第 12 条分别规定了港口国应对船舶污染的执行和保障机制。

4.2009 年《香港国际安全和无害环境拆船公约》。该公约对港口国的检查权、港口国针对违法船舶采取的措施以及执行过程中的不当扣留和延误承担责任作出了规定。根据该公约第 8、9、10、11 条的规定，港口国正式授权的官员有权对船舶进行检查，如果发现某一船舶违反了该公约，则执行检查的当事国可以对该船采取警告、滞留、驱逐或拒绝该船进港的措施，并对因不当扣留或延误给船舶带来的任何损失或损害给予赔偿。

（三）小结

在应对船舶污染方面，有必要区分港口国监督与《海洋法公约》中的港口国执行管辖权。港口国执行管辖权涉及港口国起诉船舶及对其违反国际规则和标准的行为处以罚金的权力，而港口国监督中，港口国只限于采取行政措施用以管控，例如在港口滞留船舶直至采取多方面的改正措施，或者命令其前往最近的船坞维修，港口国并不因声称船舶违反了其法律而起诉该船。[35]

35 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, *The International Journal of Marine and Coastal Law*, Vol. 23, 2008, p. 717.

在执行管辖权方面，虽然《海洋法公约》授权港口国可对自愿位于其港口的外国船舶在公海或另一国管辖海域的违章排放行使执行管辖权，但是在实践中，迄今为止，还没有港口国根据《海洋法公约》第 218 条对在其管辖海域外发生的非法排放行为提起诉讼的案例，《海洋法公报》和联合国网站都没有关于执行第 218 条的国内立法实际适用的详细情况，联合国秘书长关于海洋和海洋法的年度报告也没有提到相关内容。[36] 这主要是因为港口国对发生在其管辖海域之外的污染事件没有利益，港口国执行是选择性的，而不是强制性的。

然而，港口国监督作为应对船舶污染的一种方法，是通过区域层面而不是全球层面上的港口国监督谅解备忘录来组织实施的。尽管以目前各区域港口国监督谅解备忘录的数据为依据，要准确评价愈发协调的港口国监督所起的实际效果还为时尚早，但是很明显的是，许多港口国，特别是《巴黎备忘录》和《东京备忘录》的成员国已采取积极措施应对不合标准船舶，并通过确保符合国际防污染标准的方式来应对操作造成的船舶污染。[37] 因此，不可否认的是，港口国监督已经并且将继续在应对船舶污染方面扮演重要的角色。

四、港口国应对船舶污染的不足与完善

港口国对船舶污染的管辖权体现了沿海国管辖权和船旗国管辖权之间的折衷，其不仅能便利快速调查和提起司法程序，而且能尽量减少对船舶航行自由的损害。港口国在应对船舶污染方面的作用非常大。港口越多，港口国承当的责任就会更大，但港口国监督存在的不足之处也会愈发突显。

第一，港口国执行法律的成本是昂贵的，而《海洋法公约》并没有就船旗国和沿海国应为港口国分担执法成本作出规定。首先，尽管《海洋法公约》第 228(1) 条规定，在船旗国提起的司法程序结束之后，沿海国对于领海外所犯任何违法行为提起的司法程序应予终止。在程序中应收的费用经缴纳后，沿海国应发还与暂停的司法程序有关的任何保证书或其他财政担保。然而这仅仅是指司法程序所应收取的费用，没有涉及港口国在执法过程所付出的费用。其次，《海洋法公约》第 236 条规定了主权豁免规则。该条规定，关于保护和保全海洋环境的规定，不适用于任何军舰、海军辅助船、为国家所拥有或经营并在当时只供政府非商业性服务之用的其他船只或飞机，此类军舰或飞机由船旗国专属管辖。因此，就此类性质军舰或飞机造成的环境损害，受损害国无法直接依据《海洋法公约》提起司法程

36 Ho-Sam Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea, *Journal of Maritime Law and Commerce*, Vol. 40, 2009, p. 312.

37 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, *The International Journal of Marine and Coastal Law*, Vol. 23, 2008, p. 759.

序。

因此，当外国船舶违反了可适用的国际规则和标准时，船旗国和（或）沿海国有责任向港口国支付因执行上述规则和标准而合理产生的成本。为了达成这一目的，应该建立新的国际机制，确保港口国可以就法律执行成本对船旗国、沿海国提起司法程序并获得补偿。但是由于平等主权等制造的障碍，这样的制度并不容易建立。

第二，为迅速充分地赔偿海洋环境污染损害，各国应加强合作。合作层面包括执行现有国际法规则，制定有关损害评估和赔偿责任的国际规则以及相关争端的解决程序，并且在适当的时候，制定充分的补偿标准及程序，如强制保险或补偿基金。

第三，避免过度执行。船舶可能在多国的港口停泊，应避免港口国对船舶进行不必要的检查，港口国应相互合作，制定相应规则，避免过度执行、带来损害和引发争端。《海洋法公约》第 226(2) 款规定各国应合作制定程序，以避免在海上对船只作不必要的实际检查。在港口国监督制度下，同一个区域备忘录下的各港口国应切实遵守安排，加强港口国间的合作。区域备忘录之间也应秉承这一理念，加强沟通与合作，在保障跨区域船舶安全，防止海洋污染的同时，尽量避免对船舶的过度执行。

第四，港口国应将执行和保障机制转化为国内法律和规则，以确保全球应对海洋环境危机的努力可以成功。《海洋法公约》第 218 条规定，港口国可以对发生在公海上的违反“可适用国际规则和标准”的排放行为，进行调查并提起司法程序；可对发生在他国沿海水域的违法排放行为进行调查，并在该沿海国、船旗国或受损害国的请求下提起司法程序。第 218 条将港口国的执行管辖权仅限于“可适用”的标准。其中“可适用的国际规则和标准”能否在港口国适用，取决于该国国内法中有关国际法在国内适用的规定。国际法在国内的适用通常分成并入和转化 2 种。并入是指国际法能在国内直接适用，而转化则需要先将国际法转化成国内法后再适用。对于采用转化方式的港口国，需要在国内法律和规则中落实可适用的国际规则和标准。因此，港口国应将执行和保障机制转化为国内法律和规则。

五、结　语

在应对船舶污染方面，港口国相对于船旗国和沿海国而言，具有一些无可比拟的优势。国际社会意识到了这一点。因此，《海洋法公约》授予了港口国更大的权力，规定港口国可对停靠其港口的外国船舶在公海或其他国家管辖水域内的污染行为进行管辖，并为此制定了详细的执行和保障机制。几乎与此同时，港口国监督作为港口国管辖的主要表现形式也得到了蓬勃发展，形成了一整套有效的执

行和保障机制，在应对船舶污染方面取得了显著的成果。

我国的海岸线上港口众多，随着我国国际贸易和航运的发展，近年来船舶污染日趋严重，不仅破坏了沿海地区的海洋生态环境，还制约了我国海洋经济的可持续发展。因此，如何应对船舶污染，保护好海洋生态环境，是我国实现海洋强国战略目标必须面对的一个重要问题。我国作为《海洋法公约》的缔约国和东京备忘录的成员方，在近 10 年里切实履行了港口国的责任与义务。2014 年，在港口国监督检查中全面实施了新检查机制，港口国监督检查工作也随之发生了一些变化，主要体现在我国 2014 年港口国监督检查中滞留率、缺陷数量、安全管理体系缺陷等指标均较前 3 年有所下降。[38] 2014 年，全国 52 个港口国监督检查单位共实施港口国监督初次检查 7356 艘次，发现缺陷 35606 项，单船缺陷数量为 4.84 项，滞留外国籍船舶 484 艘次，滞留率为 6.56%。[39] 在取得这些成效的同时，我们仍要意识到我国作为港口国在应对船舶污染方面存在的不足之处，尤其是要将各国际公约中的执行和保障机制转化为国内法律和规则，在国内法律法规中明确港口国海洋环境执法人员及其分工，并争取制定就港口国执法成本向船旗国、沿海国的求偿程序。

38 《2014 年中国 PSC 数据年报出炉》，下载于 http://www.zgjtb.com/2015-04/07/content_24067.htm，2015 年 7 月 22 日。

39 此数据为 2014 年 4 个季度汇总数据。参见《中国海事》2014 年第 5、8、11 期，2015 年第 2 期。

Port State Responsibility for Combating Vessel-Source Pollution: Enforcement and Safeguard Mechanisms

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Abstract: Port States have unparalleled advantages over flag and coastal States in vessel-source pollution prevention, reduction and control. Prior to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), international conventions concerning marine environment protection, when addressing the issue of port State responsibilities, only granted a port State the power to investigate a foreign vessel within one of its ports, while the flag State had the right to institute proceedings against the vessel. UNCLOS expanded the responsibilities of port States in this regard, saying that port States could enforce applicable international law against visiting foreign vessels for pollution offences committed on the high seas or in the waters under the jurisdiction of other States. Moreover, the port State control regime has played a positive role in preventing and controlling vessel-source pollution. However, there are still deficiencies in port State control of vessel-source pollution; and these deficiencies desperately need to be improved.

Key Words: Port State control; Vessel-source pollution; Marine environment protection

I. The Necessity for Port States to Prevent and Control Vessel-Source Pollution and a Short History of Port State Jurisdiction over Such Pollution

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The marine environment, due to its vulnerability and integrity, needs protection from all world States. It is reported that vessel-source pollution accounts for approximately 12% of the total marine pollution, ranking as the second largest source of pollution.[1] Vessel-source pollution, which causes devastating effects on the marine environment, involves complicated jurisdiction problems. A host of serious vessel-source marine pollution incidents occurring over the past half century have evoked the international community's concerns over pollution from ships and pushed the establishment of a number of mechanisms for the prevention of such pollution.

A. The Necessity for Port States to Prevent Vessel-Source Pollution

In accordance with the principle of flag State jurisdiction, flag States have traditionally been obliged to enact laws and rules in order to prevent their vessels from polluting the marine environment. That is to say, the primary responsibility for protecting the marine environment rests with flag States. Flag States previously held sole responsibility in this regard, but for many years a number of flag States were either unable or reluctant to take necessary action to perform their duties.[2] This is mainly caused by reasons associated with "flags of convenience". Currently, about 49% of ships in the world fly flags of convenience.[3] On one hand, in order to reduce operating costs, the design, discharge and equipment of these ships are not made in strict compliance with the applicable standards. Such ships, therefore, are likely to generate marine pollution and safety hazards. On the other hand, it is difficult for a flag State to impose effective control on these ships, since its own number of national ships plying the oceans are enormous. Moreover, some critics assert that since pollution on the high seas or in another State's coastal waters normally does not affect the flag State, the flag State lacks incentive to set out environmental standards or take appropriate enforcement measures.[4]

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1 Liu Nengye, Frank Maes, The European Union and the International Maritime Organization: EU's External Influence on the Prevention of Vessel-Source Pollution, *Journal of Maritime Law and Commerce*, Vol. 41, No. 4, 2010, p. 581.

2 Ho-Sam Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea, *Journal of Maritime Law & Commerce*, Vol. 40, No. 2, April 2009, p. 291.

3 Virginie Terrie, Are "Black Tides" Inevitable?, *Coventry Law Journal*, Vol. 6, No. 2, 2001, p. 35.

4 Daniel Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, *Ecology Law Quarterly*, Vol. 18, 1991, p. 737.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) represents a profound breakthrough for coastal State jurisdiction over vessel-source pollution, thus starting a new chapter in this regard.[5] However, coastal State jurisdiction still has its limitations and weaknesses. First, UNCLOS established the 200 nautical miles exclusive economic zone (EEZ) regime, yet it is challenging for coastal States to effectively detect discharge violations in such vast waters, unless a ship causes significant pollution to the marine environment; additionally, in comparison with flag States, coastal States suffer more directly from marine pollution and have greater interests in preventing vessel-source pollution. Coastal States therefore have pushed for stricter environmental standards and greater authority over vessels in their coastal waters. However, such interests conflict with the interests of maritime States, which aim to protect their military and commercial interests in free navigation.[6]

In contrast with the limitations of flag and coastal State jurisdiction over pollution from ships, port States may play a greater role in this aspect. When a port State exercises jurisdiction over a delinquent vessel, the vessel stays within its port, ensuring that offences are expeditiously investigated, subsequent prosecutions are facilitated, and pollution from unseaworthy vessels are prevented.[7] From a policy perspective, port State enforcement of jurisdiction over vessel-source pollution represents a compromise between coastal and flag State enforcement. On the one hand, port States may be more inclined than flag States to enforce stringent environmental regulations, since port States are themselves coastal States and, as such, are at risk from substandard and delinquent vessels. Port State jurisdiction therefore serves as a corrective to inadequate flag State enforcement or non-enforcement. On the other hand, port State enforcement is preferable to coastal State enforcement because it interferes much less with freedom of navigation and can generally be performed more safely.[8] Against this backdrop, this paper, from the perspective of enforcement and safeguard mechanisms, attempts to examine the

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5 Zhang Xianglan and Ye Quan, Coastal State Prescriptive Jurisdiction over Pollution from Ships within Its Exclusive Economic Zone, *Contemporary Law Review*, No. 3, 2013, p. 145. (in Chinese)

6 Daniel Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, *Ecology Law Quarterly*, Vol. 18, 1991, p. 725.

7 I. A. Shearer, Problems of Jurisdiction and Law Enforcement against Delinquent Vessels, International and Comparative Law Quarterly, Vol. 35, No. 2, 1986, p. 341.

8 Daniel Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, *Ecology Law Quarterly*, Vol. 18, 1991, pp. 739~740.

international rules concerning port State control (hereinafter referred to as "PSC") over vessel-source pollution, *inter alia*, the basic contents and the drawbacks of such rules, and offers proposals to improve them.

B. A Short History of Port State Jurisdiction over Vessel-Source Pollution

Under the influence of Hugo Grotius' *Mare Liberum (The Free Sea)*, traditional international law asserts that a ship is "a floating part of the territory of its flag State".[9] This assertion leads to the argument that flag States own the jurisdiction over ships, which for a considerable period of time has affected the practice of the overwhelming majority of States and the formulation of international conventions. For instance, the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, adopted in Brussels in 1952, articulates in Article 1 that flag States' exclusive jurisdiction over vessels in the event of a collision or any other incident of navigation. However, as mentioned above, flag State jurisdiction is not sufficient in vessel-source pollution prevention and control under some circumstances. Therefore, this jurisdiction has been strongly questioned and challenged by many scholars of international law and certain national practices, as reflected in the provisions of some international conventions.

International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), 1954, sets out the port State's rights to inspect foreign vessels. As per

9 Lauterpacht revised, Wang Tieya et al. translated, *Oppenheim's International Law, Vol. I-2*, Beijing: The Commercial Press, 1972, p. 9. (in Chinese)

Articles 9(5) and 10 of this convention,[10] the port State may inspect any ship within its port, make a copy of the oil record book which is required to be carried in the ship, and furnish to the flag State particulars in writing of evidence proving that ship's violation. The flag State so informed shall investigate the matter, and bring proceedings in respect to the alleged violation.

International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), provides for the port State's inspection of ships within its ports or offshore terminals, outlines a detailed inspection procedure and defines ways of dealing with any ship presenting a threat of harm to the marine environment. Article 5(2) of MARPOL 73/78 [11] explicitly stipulates that port States are entitled to inspect ships, but any such inspection shall be limited to verifying that there is a valid certificate on board. If the ship does not carry a valid certificate or the condition of the ship or its equipment does not correspond with the particulars of that certificate, the port State may take necessary steps, including granting such a ship permission to proceed to the nearest appropriate repair yard available. Additionally, in accordance

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10 International Convention for the Prevention of Pollution of the Sea by Oil, 1954, paragraph (5) of Article IX states: "The competent authorities of any of the territories of a Contracting Government may inspect on board any ship to which the present Convention applies, while within a port in that territory, the oil record book required to be carried in the ship in compliance with the provisions of this Article, and may make a true copy of an entry in that book and may require the master of the ship to certify that the copy is a true copy of such entry." And its Article X reads: "Any Contracting Government may furnish to the Government of the relevant territory in respect of the ship in accordance with paragraph (1) of Article II particulars in writing of evidence that any provision of the present Convention has been contravened in respect of that ship, wheresoever the alleged contravention may have taken place … Upon receiving such particulars, the Government so informed shall investigate the matter, and may request the other Government to furnish further or better particulars of the alleged contravention. If the Government so informed is satisfied that sufficient evidence is available in the form required by its law to enable proceedings against the owner or master of the ship to be taken in respect of the alleged contravention, it shall cause such proceedings to be taken as soon as possible."

11 MARPOL 73/78, Article 5(2) stipulates: "A ship required to hold a certificate in accordance with the provisions of the regulations is subject, while in the ports or offshore terminals under the jurisdiction of a Party, to inspection by officers duly authorized by that Party. Any such inspection shall be limited to verifying that there is on board a valid certificate, unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate. In that case, or if the ship does not carry a valid certificate, the Party carrying out the inspection shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. That Party may, however, grant such a ship permission to leave the port or offshore terminal for the purpose of proceeding to the nearest appropriate repair yard available."

with Article 6(2) and (4),[12] port States have the right to inspect a ship for the purpose of verifying whether the ship has discharged any harmful substances. In the event of any alleged contravention, the "administration"[13] shall investigate the matter to find out who should be held responsible. With respect to a ship entitled to fly the flag of any State, the investigating administration would be the government of that State.

As described above, both OILPOL and MARPOL 73/78 provide for port State enforcement jurisdiction, requiring the port State to forward any detected vessel violations to the flag State in a timely manner. Thereupon, the flag State should investigate the matter and enable proceedings to be brought in respect to the alleged violation. Nevertheless, these provisions have not fundamentally changed the primary role of the flag State, and port State jurisdiction has failed to play its intended role.

However, UNCLOS substantially changed the primary role of the flag State in respect to the jurisdiction over vessel-source pollution. UNCLOS, as the "ocean charter" governing marine affairs, is the most important and comprehensive attempt by the international community at creating a convention regulating jurisdiction over vessel-source pollution. The provisions concerning the legal regime for vessel-source pollution prevention are contained in UNCLOS, Part XII (The Protection and Preservation of the Marine Environment). These provisions established the concurrent jurisdiction of flag, coastal and port States, signifying a breakthrough in port State jurisdiction over vessel-source pollution, and thus starting a new chapter in this regard.

Another legal regime for preventing vessel-source pollution developed quickly and at about the same time. This process began when a supertanker, *Amoco Cadiz*, ran aground off the coast of France on 16 March 1978. Resultantly, 223,000 tons of

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12 MARPOL 73/78, Article 6(2) prescribes: "A ship to which the present Convention applies may, in any port or offshore terminal of a Party, be subject to inspection by officers appointed or authorized by that Party for the purpose of verifying whether the ship has discharged any harmful substances in violation of the provisions of the regulations. If an inspection indicates a violation of the Convention, a report shall be forwarded to the Administration for any appropriate action." And its Article 6(4) states: "Upon receiving such evidence, the Administration so informed shall investigate the matter, and may request the other Party to furnish further or better evidence of the alleged contravention. If the Administration is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken in accordance with its law as soon as possible."

13 MARPOL 73/78, Article 2(5).

oil on board spilled into the sea, causing disastrous marine pollution. This accident directly lead to the creation of the 1982 Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, also known as the Paris PSC MOU of 1982. And the PSC system was really implemented at the global level following the model of the Paris MOU.

II. The Provisions concerning Port State Prevention and Control of Vessel-Source Pollution under UNCLOS

Part XII of UNCLOS lays down the framework provisions for the protection of marine environment; it also provides the basic legal framework for the inspection of ships by flag, coastal and port States, and their exercise of jurisdiction over vessel-source pollution.

Jurisdiction is generally divided into prescriptive, enforcement and judicial jurisdiction. The national jurisdiction over vessel-source pollution, however, is normally categorized into two types, namely, prescriptive and enforcement jurisdiction, since judicial jurisdiction can be included in enforcement jurisdiction.[14] Part XII of UNCLOS articulates flag, coastal and port State prescriptive and enforcement jurisdiction over vessel-source pollution. However, as discussed above, in order to address vessel-source pollution, a port State can play a greater role in its effective exercise of enforcement jurisdiction over vessel-source pollution.[15] Therefore, it calls for an analysis of the provisions under UNCLOS relating to enforcement jurisdiction.

A. Port State Enforcement Regime for Preventing Vessel-Source Pollution

Article 218 of UNCLOS establishes the port State enforcement regime for

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14 Zhang Xianglan and Ye Quan, Coastal State Prescriptive Jurisdiction over Pollution from Ships within Its Exclusive Economic Zone, *Contemporary Law Review*, No. 3, 2013, p. 144. (in Chinese)

15 Port State prescriptive jurisdiction is legally based on UNCLOS Article 211(3), which reads: "States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization."

preventing vessel-source pollution. The enforcement powers of port States can be summarized into the following five aspects:

(1) When a vessel is voluntarily within a port or at an off-shore terminal of a port State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect to any illegal discharge from that vessel beyond the internal waters, territorial sea or EEZ of that State, all of which refer to the high seas, as indicated by the next paragraph;

(2) When a vessel is voluntarily within a port or at an off-shore terminal of a port State, that State shall institute proceedings in respect to a discharge violation occurred in the internal waters, territorial sea or EEZ of another State, if requested by that State, the flag State, or a State damaged or threatened by the discharge violation;

(3) When a vessel is voluntarily within a port or at an off-shore terminal of a port State, that State shall investigate and institute proceedings in respect of a discharge violation occurred in the internal waters, territorial sea or EEZ of another State, if the violation has caused or is likely to cause pollution in the waters under the jurisdiction of the port State;

(4) When a vessel is voluntarily within a port or at an off-shore terminal of a port State, that State shall comply with requests for the investigation of a discharge violation from the State where a violation occurred, the State damaged or threatened by the violation and the flag State. The records of the investigation shall be transmitted upon request to the flag State or to the coastal State;

(5) Any proceedings instituted by the port State may be suspended at the request of the coastal State when the violation has occurred within the internal waters, territorial sea or EEZ of the coastal State. The evidence and records of the case, together with any bond or other financial security, shall be transmitted to the coastal State.

Among the five aspects above, the first three mention the port State's power to investigate and institute proceedings against violations, and the last two articulate the judicial assistance from port States to other States. Port State enforcement jurisdiction can, therefore, be subdivided into powers to investigate and initiate proceedings and the responsibility to offer judicial assistance.

1. Investigatory Powers of the Port State

The port State's investigatory powers mainly refer to its power to inspect foreign vessels within its port or at its off-shore terminals to determine whether any discharge violation of applicable international rules and standards exists.

In accordance with Article 226 of UNCLOS, port State inspection of a foreign vessel shall normally be limited to an examination of such certificates, records or other documents that the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken after such an examination and when: (1) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents; (2) the contents of such documents are not sufficient to confirm or verify a suspected violation; or (3) the vessel is not carrying valid certificates and records. Such "further physical inspection" includes the inspection of the space of the vessel and cargo on board.

The results of the investigation can be addressed under two circumstances: (1) If the investigation indicates a violation of applicable laws and regulations or international rules and standards, the port State may detain the vessel and institute proceedings when the required conditions are met; however, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security; (2) when the vessel is unseaworthy and would present a threat of damage to the marine environment, the port State may refuse to release the vessel or make the release conditional upon the vessel's proceeding to the nearest appropriate repair yard.

2. Port State Power to Initiate Proceedings

UNCLOS provides that port States may institute proceedings under three circumstances. Proceedings are normally divided into two categories: broad sense and narrow sense. Broad sense proceedings refer to the procedures, ways, principles, rules and regimes that the competent State authorities and any participant in proceedings should follow when engaging in a lawsuit. For example, criminal proceedings include the procedures, manners, ways, principles, rules and regimes which are adopted or observed during the filing and investigation of cases, as well as the initiation of lawsuits, trial of cases and the execution of criminal decisions and orders. In this sense, proceedings actually pertain to all litigation procedures. Narrow sense proceedings refer to the procedures that courts follow when entertaining all types of cases, commonly known as the trial procedures.[16] Under UNCLOS, Article 218(1) prescribes that a port State may undertake investigations

16 Jiang Bixin and Chen Hu, The Basic Scope of Legal Proceedings, *Journal of Law Application*, No. 5, 2011, p. 23. (in Chinese)

and, where the evidence so warrants, institute proceedings. Article 220(6) stipulates that a port State may, subject to Section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws. Therefore, to be specific, proceedings that may be instituted by a port State include the detention of vessels, the bringing of actions against vessels, the trial of violations, and the enforcement of court orders or decisions.

Proceedings may be suspended or terminated in certain cases. First, proceedings to impose penalties, in respect to any violation committed by a foreign vessel, shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State within six months of the date on which proceedings were first instituted by the port State. When proceedings instituted by the flag State have been brought to a conclusion, the suspended proceedings shall be terminated.[17] Second, any proceedings instituted by the port State on the basis of any relevant investigation may be suspended at the request of the coastal State when the violation has occurred within its internal waters, territorial sea or EEZ. The evidence and records of the case, together with any bond or other financial security posted with the authorities of the port State, shall in that event be transmitted to the coastal State. Such transmittal shall preclude the continuation of proceedings in the port State.[18]

Regarding penalties in proceedings, port States may, as per Article 230 of UNCLOS, only impose monetary penalties upon foreign vessels with respect to their violations of applicable international rules and standards under normal circumstances.

3. Port State Responsibility to Offer Judicial Assistance

Judicial assistance consists of criminal and civil judicial assistance. Criminal judicial assistance is the aid offered in performing some criminal judicial functions, or the performance of such functions on behalf of any other judicial organs, to help the party requesting such assistance to investigate, prosecute and try crimes, and enforce criminal penalties. Consequently, any actions to assist criminal proceedings are litigatory in nature and are, therefore, subordinate or auxiliary to criminal litigation activities of the requesting party.[19] Civil judicial assistance is the taking of some judicial action, such as the service of a document of action, the summoning

17 UNCLOS, Article 228.
18 UNCLOS, Article 218(4).
19 Cheng Liangwen, *Researches on Criminal Judicial Assistance* (Doctoral Dissertation), Chongqing: Southwest University of Political Science & Law, 2002, p. 23. (in Chinese)

of a witness, the taking of evidence, and the enforcement of a judgment rendered by a foreign court or an arbitral award of a foreign State, by a court from one State for and on behalf of a court in another State when requested.[20] The port State is responsible for providing judicial assistance to protect the marine environment in the following aspects: (1) When a vessel is within one of its ports or at one of its off-shore terminals, the port State shall institute proceedings in respect to a discharge violation occurred in the internal waters, territorial sea or EEZ of another State, if requested by that State; (2) When a vessel is within one of its ports or at one of its off-shore terminals, the port State shall comply with requests for investigation of a discharge violation from the State where a violation occurred, the State damaged or threatened by the violation and the flag State. The records of the investigation shall be transmitted upon request to the flag State or to the coastal State; (3) Any proceedings instituted by the port State may be suspended at the request of the coastal State when the violation has occurred within the coastal State's internal waters, territorial sea or EEZ. The evidence and records of the case, together with any bond or other financial security, shall be transmitted to the coastal State.

B. The Safeguard System for Port State to Control Vessel-Source Pollution

The safeguards under UNCLOS Part XII, Section 7 are made to avoid abuses in the exercise of the enforcement powers by States. This section is designed to protect the rights of foreign States and their vessels, especially the masters and crew. These safeguards relate mainly to the exercise of enforcement powers against foreign vessels (only Articles 227, 229 and 232 are of broader scope), reflecting a balancing of the need for more effective enforcement measures, especially with regard to vessel-source pollution, where enforcement powers are granted to States other than the flag State, and the need to maintain freedom of navigation and the integrity of the global navigation system.[21]

Safeguards may be roughly divided into two categories: one relates to

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20 Han Depei ed., *Private International Law*, Beijing: China Higher Education Press & Peking University Press, 2000, p. 471. (in Chinese)

21 Shabtai Rosenne and Alexander Yankov, *United Nations Convention on the Law of the Sea 1982: A Commentary (Volume IV)*, Dordrecht/Boston/London: Marinus Nijhoff Publishers, 1991, p. 321.

enforcement measures and the other relates to proceedings.

1. The Safeguards Relating to Enforcement Measures

This kind of safeguards includes setting restrictions on the body which may exercise enforcement powers, avoiding adverse consequences and making no discrimination against foreign vessels in the exercise of such powers, notifying the flag State and other States concerned, and requiring the States to be liable for damage or losses arising from their improper enforcement of powers. Specifically, these safeguard provisions include:

(1) Safeguard provisions concerning the body which may exercise enforcement powers: such powers may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

(2) Safeguard provisions relating to the avoidance of adverse consequences in the exercise of enforcement powers: in the exercise of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk;

(3) Safeguard provisions with regards to non-discrimination against foreign vessels: a port State shall not discriminate in form or in fact against vessels of any other State;

(4) Safeguard provisions regarding notification to the flag State and other States concerned: port States shall promptly notify the flag State and any other State concerned of any measures taken against foreign vessels; and

(5) Safeguard provisions with respect to liability to damages: a port State shall be liable for damage or loss attributable to it arising from measures it has taken when such measures are unlawful or exceed those reasonably required in the light of available information. That State shall provide for recourse in its courts for actions in respect to such damage or loss.

2. Safeguards Relating to Proceedings

This kind of safeguards includes facilitating proceedings, suspending and restricting the institution of proceedings, never affecting the institution of civil proceedings, limiting the penalties which may be imposed in the conduct of proceedings, and setting liability for notification and damages. As the provisions concerning the liability for notification and damages have been discussed above, we will skip it and focus on other provisions:

(1) Facilitating proceedings: port States shall take measures to facilitate the

hearing of witnesses and the admission of evidence, shall facilitate the attendance at such proceedings of the official representatives concerned, and shall ensure that these representatives have such rights and duties as may be provided under national laws and regulations or international law;

(2) Suspending and restricting the institution of proceedings: the flag State is entitled to take proceedings in respect to corresponding charges within six months of the date on which proceedings were first instituted by the port State. Proceedings to impose penalties on foreign vessels shall not be instituted after the expiry of three years from the date on which the violation was committed and shall not be taken by any State in the event of proceedings having been instituted by another State subject to the provisions set out in Article 228(1) of UNCLOS.

(3) Limiting the penalties that may be imposed in the conduct of proceedings: monetary penalties may only be imposed with respect to violations committed by foreign vessels beyond the territorial sea; monetary penalties may only be imposed with respect to violations committed by foreign vessels in the territorial sea, except in the case of a willful and serious act of pollution in the territorial sea. In the conduct of proceedings in respect to such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.

C. Summary

The discussion above shows that UNCLOS provides a port State with greater powers to enforce applicable international law against visiting foreign vessels for pollution offences committed on the high seas or in other States' waters. Prior to UNCLOS, port States could only enforce jurisdiction over pollution offences committed within their national waters. Under customary international law, a State may adopt anti-pollution laws for foreign vessels lying in its ports and may apply such laws or particular international conventions to such vessels as a condition for entry into its ports.[22] Certainly, a port State cannot take actions against a vessel for violations occurred before its entry into the territorial sea of that State, unless the enforcement is permitted under a particular agreement or the violation caused harmful effects on the marine environment of that State.

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22 Robin Rolf Churchill and Alan Vaughan Lowe, The Law of the Sea, 3rd Edition, Manchester: Manchester University Press, 1999, pp. 344~355.

Under UNCLOS, port States may merely exercise jurisdiction over a foreign vessel in respect to its discharge in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference, but not standards concerning the construction, design, equipment and manning of vessels. "Applicable international rules and standards" differ from "generally accepted international rules and standards" under Article 211 of UNCLOS, which serve as the legal basis for the prescriptive jurisdiction of each State and are included in the former. "Applicable international rules and standards" relates to those rules which are formed by customary international law or laid down in maritime conventions on the related issue, for example, MARPOL 73/78 anti-pollution rules. That is to say, the term "applicable international rules and standards" excludes resolutions, guidelines and codes that are not yet considered "generally accepted international rules and standards".[23]

To sum up, the relevant provisions of UNCLOS provides the legal basis for port States to play a positive role in the protection of the marine environment, which are recognized as complementary to flag State jurisdiction. However, these UNCLOS provisions are framework provisions and are principles in nature. In practice, port States play their roles in preventing and combating vessel-source pollution in accordance with another international mechanism – the PSC regime.

III. An Examination of the PSC Regime for Vessel-Source Pollution

It is fair to say that PSC is the core form of port State jurisdiction.[24] The term "PSC", is defined by the International Maritime Organization (IMO), as port States' inspection of foreign ships within their national ports to verify that the condition of the ships and their equipment complies with the requirements of international conventions and that the ships are manned and operated in compliance with these conventions and rules.[25]

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23 Ho-Sam Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea, *Journal of Maritime Law and Commerce*, Vol. 40, 2009, p. 299.

24 Zhao Zaili, Ship Safety Management Systems and PSC Inspection, *Transportation Enterprise Management*, No. 3, 2005, p. 30. (in Chinese)

25 At http://www.imo.org/TCD/mainframe.asp?topic_id=159, 11 June 2015.

A. The Development of the PSC Regime

Port State inspections of foreign ships were originally intended to be a back up to flag State implementation. However, experience has shown that these inspections can be highly effective, especially when inspections are closely coordinated among regions. A ship going to a port in one State will normally visit other States in the region, and it could, therefore, benefit all stakeholders if port States could closely coordinate their inspections. This ensures that as many ships as possible are inspected but at the same time prevents ships from being delayed by unnecessary inspections. The primary responsibility for setting ship standards rests with the flag State. Nevertheless, PSC provides a "safety net" to catch substandard ships.[26] Additionally, as far as regional cooperation between port States is concerned, some assert that the primary characterization of the relationship of ports is that of competition.[27] Strict environmental requirements and safety standards applied to visiting vessels could raise the cost of transportation and make a port less competitive. Moreover, port States applying differing local standards could unreasonably increase compliance costs and inhibit ocean trade.[28] This situation demands the adoption of regional arrangements for the PSC.[29]

Upon entry into force of the Paris PSC MOU in 1982, the IMO has adopted a series of resolutions relating to PSC. These resolutions have constituted a full set of documents respecting PSC inspection procedures. The IMO also revised relevant international conventions by adding and improving some control provisions. In addition, the establishment of the Paris PSC MOU in 1982 was followed by PSC MOUs for South American and Asian-Pacific regions in 1993 and 1994 respectively; then came PSC MOUs for the Caribbean, Mediterranean, Indian Ocean, the Persian Gulf, the West African and other regions. Until now, such PSC MOUs have covered nearly all of the world's oceans. Being the primary form of PSC, regional MOUs are fairly effective in combating marine environmental pollution.

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26 Port State control, at http://www.imo.org/en/OurWork/MSAS/Pages/PortStateControl.aspx, 11 June 2015.

27 Ted L. McDorman, Regional Port State Control Agreements: Some Issues of International Law, *Ocean and Coastal Law Journal*, Vol. 5, 2000, p. 207.

28 Ted L. McDorman, Regional Port State Control Agreements: Some Issues of International Law, *Ocean and Coastal Law Journal*, Vol. 5, 2000, p. 207.

29 Ted L. McDorman, Regional Port State Control Agreements: Some Issues of International Law, *Ocean and Coastal Law Journal*, Vol. 5, 2000, p. 208.

B. The Legal Basis for PSC over Vessel-Source Pollution

UNCLOS provides the legal basis for the implementation of PSC. Article 219 of UNCLOS grants port States the rights to take administrative measures to prevent a foreign vessel from sailing when they have ascertained that the vessel is in violation of applicable international rules and standards relating to the seaworthiness of vessels and thereby threatens damage to the marine environment. This article is the direct legal basis for the implementation of PSC in each port. Article 226 concerns the investigatory powers of port States, as mentioned in Part II of this paper. It provides the concrete procedures and steps needed to implement PSC. Article 227 stipulates that States shall not discriminate in form or in fact against vessels of any other State when implementing PSC, which ensures PSC will be carried out fairly and effectively. Article 232 specifies the liability of port States arising from enforcement measures, which guarantees the vessels' rights to remedy in the implementation of PSC.

In a nutshell, with respect to the enforcement and safeguards mechanisms for port States prevention and control of vessel-source pollution, the provisions of UNCLOS concerning PSC is relatively general and broad, without detailed provisions and guidelines, which therefore can only serve as a sketchy framework. In contrast, maritime conventions developed by the IMO and the International Labour Organization (ILO) offer more specific legal basis for PSC.

Some of the IMO's important technical conventions contain articles with regards to port State inspection of foreign vessels, for the purpose of ensuring these vessels' compliance with IMO requirements. Such IMO maritime conventions mainly include:

1. International Convention on Load Lines, 1966, as Modified by the 1988 Protocol Relating thereto (hereinafter "ICLL 66");

2. International Convention for the Safety of Life at Sea (SOLAS), 1974, its amendments, and the 1978 and 1988 SOLAS Protocols;

3. MARPOL 73/78;

4. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as Amended in 1995 (hereinafter "STCW Convention");

5. International Convention on Tonnage Measurement of Ships, 1969 (hereinafter "Tonnage Convention"); and

6. 1972 Convention on the International Regulations for Preventing Collisions

at Sea and Amendments thereto.

In addition, the ILO has formulated many international conventions regarding seafarers, among which the most important one dealing with PSC is the Maritime Labour Convention, 2006 (hereinafter "MLC").

The relevant provisions of these maritime conventions set out the items subject to PSC inspection by PSC officers, including the technical conditions of ships, operational requirements, manning of ships, and the living and working conditions for seafarers.[30] These technical provisions constitute the enforcement and safeguard mechanisms for port State prevention and control of vessel-source pollution. However, it is important to note that the enforcement mechanism for PSC is to detain or delay vessels, unlike port States' powers to investigate and institute proceedings against any violations as stipulated in UNCLOS.

SOLAS Regulation I/19 (entitled "Control") prescribes that in the circumstances where a certificate has expired or ceased to be valid, port States may take enforcement measures to detain vessels; Regulation XI/4 ("Port State Control on Operational Requirements") also has a provision concerning enforcement measures to detain vessels. In addition to enforcement measures, this convention also lays out safeguard provisions, as shown in Regulation I/19, paragraph (f), which reads: "When exercising control … all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is thereby unduly detained or delayed it shall be entitled to compensation for any loss or damage suffered."

MARPOL 73/78 is a significant convention respecting marine environment protection. This convention covers many items subject to PSC inspection. The inspection of many items may lead to the delay of vessels, for example, when a certificate ceased to be valid or the chief crew members of a vessel are unfamiliar with the essential procedures for oil pollution prevention. Additionally, this convention also emphasizes that all possible efforts should be made to avoid a ship being unduly detained or delayed, and when a ship is unduly detained or delayed, it is entitled to compensation for any loss or damage suffered.

The STCW Convention and MLC also have similar enforcement and safeguard provisions.[31]

However, the enforcement provisions under ICLL 66 and the Tonnage

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30 Qian Min, *ISM Rules and PSC Practice*, Dalian: Dalian Maritime University Press, 2001, p. 45. (in Chinese)

31 STCW Convention, Article X and MLC, Standard A5.1.1

Convention are somewhat different from those described above. ICLL 66 stresses that PSC shall be limited to the examination of certificates, which would not result in the delay of any ships;[32] and the Tonnage Convention provides that in no case shall the exercise of such inspection cause any delay to the ship.[33]

These provisions, under the maritime conventions developed by IMO and ILO, constitute the legal basis for PSC enforcement and safeguard mechanisms for vessel-source pollution. PSC officers of each State conduct strict inspections in accordance with these provisions and urge flag States to follow international conventions concerning marine environmental protection and navigation safety. When flag States fail to adhere to their commitments to marine safety, port States act as the "last safety net" in the control system.[34]

In an effort to adapt to the changing needs of time, IMO and ILO have developed new international conventions and modified the existing international conventions. Therefore, provisions with respect to PSC inspections have also been updated. These maritime conventions mainly include:

1. The International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990. This convention requires that ships, ports and offshore units have oil pollution emergency plans, which are subject to inspection by port State authorities. As per Article 3, when a ship is in a port or at an offshore terminal under the jurisdiction of a port State, officers duly authorized by that State shall have the right to inspect the ship required to have an oil pollution emergency plan on board, in accordance with the practices provided for in existing international agreements or its national legislation.

2. The International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001. This convention sets out the port State's responsibilities for preventing and controlling pollution from ships. Article 11 allows officers authorized by a port State to inspect a ship in any port, shipyard, or offshore terminal of that State. Any such inspection shall first be limited to verifying the relevant documents carried by the ship; if there are clear grounds to believe that the ship is in violation of this convention, a thorough inspection may be carried out by officers of the port State, and if the ship is detected to be in violation of this convention, the port State may take steps to warn, detain, dismiss, or exclude the

32 ICLL 66, Article 21.
33 Tonnage Convention, Article 12.
34 Dr. Z. Oya Özçcayir, The Use of Port State Control in Maritime Industry and Application of the Paris Mou, *Ocean and Coastal Law Journal*, Vol. 14, Issue 2, 2009, p. 201.

ship from its ports. In accordance with Article 13, if a ship is unduly detained or delayed while undergoing inspection, it shall be entitled to compensation for any loss or damage suffered.

3. The International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004. This convention also provides for the port State's power to inspect vessels. Where the condition of a ship or its equipment does not correspond substantially with the particulars of the certificate on board, or where the master or the crew are not familiar with essential shipboard procedures relating to ballast water management or have not implemented such procedures, the port State shall take steps to ensure that the ship shall not discharge ballast water. Articles 10 and 12 establish the enforcement and safeguard mechanisms for port States to combat pollution from ships.

4. The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009. This convention contains provisions about the port State's power to inspect ships, measures taken by the port State against illegal ships, and liability for damages arising from undue detainment or delay of ships while enforcing the convention. In accordance with Articles 8, 9, 10 and 11, the officers duly authorized by a port State shall have right to inspect ships. If a ship is detected to be in violation of this convention, the State carrying out the inspection may take steps to warn, detain, dismiss, or exclude the ship from its ports. When a ship is unduly detained or delayed, it shall be entitled to compensation for any loss or damage suffered.

C. Summary

In the context of dealing with vessel-source pollution, it is helpful to distinguish PSC from port State enforcement jurisdiction under UNCLOS. PSJ concerns the port State's power to prosecute ships and to impose fines on them for violations of international rules and standards; in the case of PSC, the port State limits itself to taking an administrative measure 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, but the port State does not prosecute the vessel

for an alleged breach of its legislation.[35]

In regards to enforcement jurisdiction, UNCLOS empowers a port State to exercise enforcement jurisdiction over foreign vessels that are voluntarily lying in one of its ports in respect to violations committed either on the high seas or in the national waters of another State, yet, to date, there have been no court cases, in practice, where port States have prosecuted foreign vessels for illegal discharges occurred outside their maritime zones under Article 218 of UNCLOS. Neither the Law of the Sea Bulletin nor the UN website gives any details of the practical application of national legislation implementing Article 218 of UNCLOS. This is also the case with the annual reports on Oceans and Law of the Sea of the UN Secretary-General.[36] This phenomenon is mainly caused by a lack of interest by port States to involve themselves in pollution incidents occurring outside their maritime zones, given that port State enforcement is optional, rather than mandatory.

PSC as a means to combat vessel-source pollution is implemented through regional (but not global) PSC MOUs. Although from the data concerning regional PSC MOUs currently available it is premature to assess the practical effects of the more concerted exercise of PSC, it is clear that many port States, in particular the parties to the Paris and Tokyo MOUs, have been vigorously pursuing action against substandard ships and combating operational vessel-source pollution by ensuring that international anti-pollution standards are met.[37] Therefore, it is undeniable that PSC has played, and will continue to play, an important role in combating vessel-source pollution.

IV. Drawbacks of Port State Prevention, Reduction and Control of Vessel-Source Pollution and the Ways to Improve Them

Port State jurisdiction over vessel-source pollution represents a compromise between coastal and flag State jurisdiction. Port State jurisdiction can facilitate the

35 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, *The International Journal of Marine and Coastal Law*, Vol. 23, 2008, p. 717.

36 Ho-Sam Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea, *Journal of Maritime Law and Commerce*, Vol. 40, 2009, p. 312.

37 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, *The International Journal of Marine and Coastal Law*, Vol. 23, 2008, p. 759.

investigation and the institution of proceedings against substandard vessels, and it interferes much less with freedom of navigation. For these reasons, it is fair to say that port States play a major role in combating pollution from ships. However, States with more ports will shoulder more responsibility, which clearly exposes the inherent limitations of PSC.

First, it is costly for port States to enforce laws, but UNCLOS lacks provisions requiring flag and coastal States to share the costs arising from law enforcement with port States. In the first place, UNCLOS Article 228(1) prescribes that when proceedings instituted by the flag State have been concluded, the proceedings initiated by the coastal State, in respect to any violation committed by a foreign vessel beyond the territorial sea of the State, shall be terminated. Additionally, it states that upon payment of costs incurred with respect to such proceedings, any bond posted or other financial security provided in connection with the suspended proceedings shall be released by the coastal State. Nevertheless, UNCLOS merely mentions the costs incurred in respect to such proceedings, but not the costs incurred to the port State as a result of its law enforcement activities. In addition, UNCLOS Article 236 lays down the principle on sovereign immunity. This article stipulates that the provisions of UNCLOS regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. Such vessels or aircraft are subject to the exclusive jurisdiction of the flag State. In this case, the States affected by any environmental damage caused by such vessels or aircraft will find it impossible to institute proceedings directly on the basis of UNCLOS.

Therefore, when a foreign vessel violates the applicable international rules and standards, the flag State and/or the coastal State bear the responsibility of paying the port State for the costs reasonably incurred in implementing such rules and standards. For this purpose, a new international mechanism should be established to ensure that the port State may, with respect to the costs of law enforcement, institute proceedings against the flag State and/or coastal State to get compensation for the damage suffered. However, it is difficult to establish such a mechanism due to obstacles caused by the principle of equal sovereignty.

Second, States should cooperate further to ensure adequate and prompt compensation for the damage to the marine environment. Specifically, States may cooperate to implement the existing rules of international law and to develop international rules regarding assessment of damage and liability for compensation

and the procedures to settle relevant disputes. Furthermore, where appropriate, States may work together to create an adequate compensation standard and procedure, such as establishing compulsory insurance programs or compensation funds.

Third, excessive enforcement should be avoided. A vessel may call at ports of many different States, so unnecessary inspection of vessels by port States should be avoided. Rather, port States should cooperate to develop corresponding rules to avoid excessive enforcement against vessels and causing damages and disputes. Article 226(2) of UNCLOS stipulates that States shall cooperate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea. Under the PSC regime, States within the same regional MOU should act in a manner consistent, so far as is practicable, with the arrangement in order to strengthen their cooperation. Moreover, different regional MOUs should follow this model to better communicate and coordinate with each other to ensure the safety of ships in different regions, to prevent marine pollution and to avoid the excessive enforcement against vessels.

Fourth, port States should transform the enforcement and safeguard mechanisms into their national laws and rules to ensure the success of global efforts to handle the marine environment crises. UNCLOS Article 218 states that a port State may undertake investigations and institute proceedings in respect to any discharge from a vessel on the high seas in violation of "applicable international rules and standards". Also, it may undertake investigations in respect of a discharge violation committed in the marine waters of another State and, when requested by that coastal State, the flag State, or a State damaged or threatened by the discharge violation, institute proceedings against such violation. Article 218 limits the enforcement jurisdiction of the port State into implementation of "applicable" standards. The question whether "applicable international rules and standards" can be applied to a port State depends on the provisions of the national laws of that State with respect to the application of international law to that State. International law normally applies to a State in two ways: incorporation and transformation. Incorporation means that international law may be directly applied to a State, and transformation means that international law should first be transformed into the national law of a State before being applied within the State. With respect to port States that apply international law through transformation, they should implement the applicable rules and standards under their national laws and rules. Therefore, port States should transform the enforcement and safeguard mechanisms into their

national laws and rules.

V. Concluding Remarks

Port States have unparalleled advantages over flag and coastal States in vessel-source pollution prevention, reduction and control, which has drawn the attention of the international community. Therefore, UNCLOS grants port States greater authority by providing that a port State has jurisdiction over pollution offences committed by visiting foreign vessels when the offences have either occurred on the high seas or in the national waters of another State. Additionally, UNCLOS also establishes detailed enforcement and safeguard mechanisms with respect to vessel-source pollution. PSC, the primary form of port State jurisdiction, was developed quickly and at almost at the same time. A full set of effective enforcement and safeguard mechanisms in respect to PSC has been established and achieved remarkable results in combating pollution from ships.

China has an abundance of sea ports along its coast line. However, the international trade and shipping boom of China has brought ever-increasing pollution from vessels. It damages the marine ecological environment of Chinese coastal areas and hinders the sustainable development of China's marine economy. Hence, how to deal with vessel-source pollution and protect marine ecological environment is an important issue that China should address in order to attain the strategic goal of building China into a maritime power. China, being a State party to UNCLOS and a member State of the Tokyo MOU, has performed the responsibilities and duties of a port State. In 2014, China implemented a new mechanism for PSC inspection, resulting in some changes to China's PSC inspection efforts. Specifically, compared with figures from the previous three years, the retention rate, the defect quantity, the defects of safety management systems and other indicators for PSC inspection in China dropped throughout 2014.[38] That year, 52 offices in charge of PSC inspection in China conducted initial PSC inspection on 7,356 foreign ships and detected 35,606 deficiencies, an average of 4.84 deficiencies per ship. Among them, 484 ships were detained, giving a

38 Release of the 2014 Annual Report on PSC Data of China, at http://www.zgjtb.com/2015-04/07/content_24067.htm, 22 July 2015. (in Chinese)

detention rate of 6.56%.[39] Notwithstanding these achievements, we should keep in mind the deficiencies found in China's efforts in combating pollution from ships. China should, *inter alia*, transform the enforcement and safeguard mechanisms under international conventions into its national laws and rules, specifying the officers in charge of marine environmental law enforcement and the division of their work. Additionally, China should endeavor to develop the procedures for port States to claim compensation from flag States and coastal States with respect to the costs of law enforcement.

Translator: XIE Hongyue
Editor (English): Ashley Hewitt

39 This data is the sum of the four quarterly figures in 2014. See *China Maritime Safety*, Nos. 5, 8 & 11, 2014, No. 2, 2015. (in Chinese)

最高人民法院关于海事诉讼管辖问题的规定

（最高人民法院审判委员会第 1674 次会议，2015 年 12 月 28 日）

为推进“一带一路”建设、海洋强国战略、京津冀一体化、长江经济带发展规划的实施，促进海洋经济发展，及时化解海事纠纷，保证海事法院正确行使海事诉讼管辖权，依法审理海事案件，根据《中华人民共和国民事诉讼法》《中华人民共和国海事诉讼特别程序法》《中华人民共和国行政诉讼法》以及全国人民代表大会常务委员会《关于在沿海港口城市设立海事法院的决定》等法律规定，现将海事诉讼管辖的几个问题规定如下：

一、关于管辖区域调整

1. 根据航运经济发展和海事审判工作的需要，对大连、武汉海事法院的管辖区域作出如下调整：

（1）大连海事法院管辖下列区域：南自辽宁省与河北省的交界处、东至鸭绿江口的延伸海域和鸭绿江水域，其中包括黄海一部分、渤海一部分、海上岛屿；吉林省的松花江、图们江等通海可航水域及港口；黑龙江省的黑龙江、松花江、乌苏里江等通海可航水域及港口。

（2）武汉海事法院管辖下列区域：自四川省宜宾市合江门至江苏省浏河口之间长江干线及支线水域，包括宜宾、泸州、重庆、涪陵、万州、宜昌、荆州、城陵矶、武汉、九江、安庆、芜湖、马鞍山、南京、扬州、镇江、江阴、张家港、南通等主要港口。

2. 其他各海事法院依据此前最高人民法院发布的决定或通知确定的管辖区域对海事案件行使管辖权。

二、关于海事行政案件管辖

1. 海事法院审理第一审海事行政案件。海事法院所在地的高级人民法院审理海事行政上诉案件，由行政审判庭负责审理。

2. 海事行政案件由最初作出行政行为的行政机关所在地海事法院管辖。经复议的案件，由复议机关所在地海事法院管辖。

对限制人身自由的行政强制措施不服提起的诉讼，由被告所在地或者原告所在地海事法院管辖。

前述行政机关所在地或者原告所在地不在海事法院管辖区域内的，由行政执法行为实施地海事法院管辖。

三、关于海事海商纠纷管辖权异议案件的审理

1. 当事人不服管辖权异议裁定的上诉案件由海事法院所在地的高级人民法院负责海事海商案件的审判庭审理。

2. 发生法律效力的管辖权异议裁定违反海事案件专门管辖确需纠正的，人民法院可依照《中华人民共和国民事诉讼法》第一百九十八条规定再审。

四、其他规定

本规定自 2016 年 3 月 1 日起施行。最高人民法院以前作出的有关规定与本规定不一致的，以本规定为准。

中华人民共和国深海海底区域资源勘探开发法

（第十二届全国人民代表大会常务委员会第十九次会议，2016 年 2 月 26 日）

第一章 总 则

第一条 为了规范深海海底区域资源勘探、开发活动，推进深海科学技术研究、资源调查，保护海洋环境，促进深海海底区域资源可持续利用，维护人类共同利益，制定本法。

第二条 中华人民共和国的公民、法人或者其他组织从事深海海底区域资源勘探、开发和相关环境保护、科学技术研究、资源调查活动，适用本法。

本法所称深海海底区域，是指中华人民共和国和其他国家管辖范围以外的海床、洋底及其底土。

第三条 深海海底区域资源勘探、开发活动应当坚持和平利用、合作共享、保护环境、维护人类共同利益的原则。

国家保护从事深海海底区域资源勘探、开发和资源调查活动的中华人民共和国公民、法人或者其他组织的正当权益。

第四条 国家制定有关深海海底区域资源勘探、开发规划，并采取经济、技术政策和措施，鼓励深海科学技术研究和资源调查，提升资源勘探、开发和海洋环境保护的能力。

第五条 国务院海洋主管部门负责对深海海底区域资源勘探、开发和资源调查活动的监督管理。国务院其他有关部门按照国务院规定的职责负责相关管理工作。

第六条 国家鼓励和支持在深海海底区域资源勘探、开发和相关环境保护、资源调查、科学技术研究和教育培训等方面，开展国际合作。

第二章 勘探、开发

第七条 中华人民共和国的公民、法人或者其他组织在向国际海底管理局申

请从事深海海底区域资源勘探、开发活动前，应当向国务院海洋主管部门提出申请，并提交下列材料：

（一）申请者基本情况；

（二）拟勘探、开发区域位置、面积、矿产种类等说明；

（三）财务状况、投资能力证明和技术能力说明；

（四）勘探、开发工作计划，包括勘探、开发活动可能对海洋环境造成影响的相关资料，海洋环境严重损害等的应急预案；

（五）国务院海洋主管部门规定的其他材料。

第八条　国务院海洋主管部门应当对申请者提交的材料进行审查，对于符合国家利益并具备资金、技术、装备等能力条件的，应当在六十个工作日内予以许可，并出具相关文件。

获得许可的申请者在与国际海底管理局签订勘探、开发合同成为承包者后，方可从事勘探、开发活动。

承包者应当自勘探、开发合同签订之日起三十日内，将合同副本报国务院海洋主管部门备案。

国务院海洋主管部门应当将承包者及其勘探、开发的区域位置、面积等信息通报有关机关。

第九条　承包者对勘探、开发合同区域内特定资源享有相应的专属勘探、开发权。

承包者应当履行勘探、开发合同义务，保障从事勘探、开发作业人员的人身安全，保护海洋环境。

承包者从事勘探、开发作业应当保护作业区域内的文物、铺设物等。

承包者从事勘探、开发作业还应当遵守中华人民共和国有关安全生产、劳动保护方面的法律、行政法规。

第十条　承包者在转让勘探、开发合同的权利、义务前，或者在对勘探、开发合同作出重大变更前，应当报经国务院海洋主管部门同意。

承包者应当自勘探、开发合同转让、变更或者终止之日起三十日内，报国务院海洋主管部门备案。

国务院海洋主管部门应当及时将勘探、开发合同转让、变更或者终止的信息通报有关机关。

第十一条　发生或者可能发生严重损害海洋环境等事故，承包者应当立即启动应急预案，并采取下列措施：

（一）立即发出警报；

（二）立即报告国务院海洋主管部门，国务院海洋主管部门应当及时通报有关机关；

（三）采取一切实际可行与合理的措施，防止、减少、控制对人身、财产、海

洋环境的损害。

第三章 环境保护

第十二条 承包者应当在合理、可行的范围内，利用可获得的先进技术，采取必要措施，防止、减少、控制勘探、开发区域内的活动对海洋环境造成的污染和其他危害。

第十三条 承包者应当按照勘探、开发合同的约定和要求、国务院海洋主管部门规定，调查研究勘探、开发区域的海洋状况，确定环境基线，评估勘探、开发活动可能对海洋环境的影响;制定和执行环境监测方案，监测勘探、开发活动对勘探、开发区域海洋环境的影响，并保证监测设备正常运行，保存原始监测记录。

第十四条 承包者从事勘探、开发活动应当采取必要措施，保护和保全稀有或者脆弱的生态系统，以及衰竭、受威胁或者有灭绝危险的物种和其他海洋生物的生存环境，保护海洋生物多样性，维护海洋资源的可持续利用。

第四章 科学技术研究与资源调查

第十五条 国家支持深海科学技术研究和专业人才培养，将深海科学技术列入科学技术发展的优先领域，鼓励与相关产业的合作研究。

国家支持企业进行深海科学技术研究与技术装备研发。

第十六条 国家支持深海公共平台的建设和运行，建立深海公共平台共享合作机制，为深海科学技术研究、资源调查活动提供专业服务，促进深海科学技术交流、合作及成果共享。

第十七条 国家鼓励单位和个人通过开放科学考察船舶、实验室、陈列室和其他场地、设施，举办讲座或者提供咨询等多种方式，开展深海科学普及活动。

第十八条 从事深海海底区域资源调查活动的公民、法人或者其他组织，应当按照有关规定将有关资料副本、实物样本或者目录汇交国务院海洋主管部门和其他相关部门。负责接受汇交的部门应当对汇交的资料和实物样本进行登记、保管，并按照有关规定向社会提供利用。

承包者从事深海海底区域资源勘探、开发活动取得的有关资料、实物样本等的汇交，适用前款规定。

第五章 监督检查

第十九条　国务院海洋主管部门应当对承包者勘探、开发活动进行监督检查。

第二十条　承包者应当定期向国务院海洋主管部门报告下列履行勘探、开发合同的事项：

（一）勘探、开发活动情况；

（二）环境监测情况；

（三）年度投资情况；

（四）国务院海洋主管部门要求的其他事项。

第二十一条　国务院海洋主管部门可以检查承包者用于勘探、开发活动的船舶、设施、设备以及航海日志、记录、数据等。

第二十二条　承包者应当对国务院海洋主管部门的监督检查予以协助、配合。

第六章　法律责任

第二十三条　违反本法第七条、第九条第二款、第十条第一款规定，有下列行为之一的，国务院海洋主管部门可以撤销许可并撤回相关文件：

（一）提交虚假材料取得许可的；

（二）不履行勘探、开发合同义务或者履行合同义务不符合约定的；

（三）未经同意，转让勘探、开发合同的权利、义务或者对勘探、开发合同作出重大变更的。

承包者有前款第二项行为的，还应当承担相应的赔偿责任。

第二十四条　违反本法第八条第三款、第十条第二款、第十八条、第二十条、第二十二条规定，有下列行为之一的，由国务院海洋主管部门责令改正，处二万元以上十万元以下的罚款：

（一）未按规定将勘探、开发合同副本报备案的；

（二）转让、变更或者终止勘探、开发合同，未按规定报备案的；

（三）未按规定汇交有关资料副本、实物样本或者目录的；

（四）未按规定报告履行勘探、开发合同事项的；

（五）不协助、配合监督检查的。

第二十五条　违反本法第八条第二款规定，未经许可或者未签订勘探、开发合同从事深海海底区域资源勘探、开发活动的，由国务院海洋主管部门责令停止违法行为，处十万元以上五十万元以下的罚款；有违法所得的，并处没收违法所得。

第二十六条　违反本法第九条第三款、第十一条、第十二条规定，造成海洋环境污染损害或者作业区域内文物、铺设物等损害的，由国务院海洋主管部门责令停止违法行为，处五十万元以上一百万元以下的罚款；构成犯罪的，依法追究刑事责任。

第七章 附则

第二十七条 本法下列用语的含义：

（一）勘探，是指在深海海底区域探寻资源，分析资源，使用和测试资源采集系统和设备、加工设施及运输系统，以及对开发时应当考虑的环境、技术、经济、商业和其他有关因素的研究。

（二）开发，是指在深海海底区域为商业目的收回并选取资源，包括建造和操作为生产和销售资源服务的采集、加工和运输系统。

（三）资源调查，是指在深海海底区域搜寻资源，包括估计资源成分、多少和分布情况及经济价值。

第二十八条 深海海底区域资源开发活动涉税事项，依照中华人民共和国税收法律、行政法规的规定执行。

第二十九条 本法自 2016 年 5 月 1 日起施行。

全国人民代表大会常务委员会关于批准《关于汞的水俣公约》的决定

（第十二届全国人民代表大会常务委员会第二十次会议，2016 年 4 月 28 日）

第十二届全国人民代表大会常务委员会第二十次会议决定：批准 2013 年 10 月 10 日由中华人民共和国政府代表在熊本签署的《关于汞的水俣公约》。

关于汞的水俣公约

本公约缔约方，

认识到 鉴于汞可在大气中作远距离迁移、亦可在人为排入环境后持久存在、同时有能力在各种生态系统中进行生物累积、而且还可对人体健康和环境产生重大不利影响，此种化学品已成为全球性关注问题，

回顾 联合国环境规划署理事会在其 2009 年 2 月 20 日第 25/5 号决定中要求各方着手采取国际行动，对汞实行高效率的、有成效的和连贯一致的管理，

回顾 标题为《我们希望的未来》的联合国可持续发展大会成果文件第二百二十一段，其中呼吁各方成功地完成为拟定一项具有法律约束力的全球性汞文书进行的谈判工作，以期应对汞对人体健康和环境构成的风险，

回顾 联合国可持续发展大会重申了《里约环境与发展宣言》中所阐明的各项原则，其中除其他外包括共同但有区别的责任的原则，并确认各国各自的国情和能力彼此不同，同时亦确认需要在全球范围内采取应对行动，

意识到 特别是在发展中国家，因人口中的脆弱群体接触汞而引发的各种健康问题，尤其是对妇女和儿童以及通过她们给子孙后代造成的健康问题，

注意到 北极地区的生态系统和当地土著社区因汞的生物放大作用及其传统食物被污染而尤其处于特别脆弱的境地，并对这些土著社区普遍更易受到汞的影响表示关注，

认识到 在水俣病方面所汲取的各种重大教训，特别是因汞污染而对健康和环境产生的严重影响，并认识到需要确保对汞实行妥善的管理，防止此类事件未来再度发生，

强调 提供财政、工艺和技术、以及能力建设诸方面的支持十分重要，特别是

应向发展中国家和经济转型国家提供此种支持，以便增强对汞实行管理的国家能力并促进有效地执行本公约，

还认识到 世界卫生组织为保护人体健康免受汞相关影响而开展的各项活动、以及各项相关的多边环境协定在此方面发挥的作用，特别是其中的《控制危险废物越境转移及其处置巴塞尔公约》和《关于在国际贸易中对某些危险化学品和农药采用事先知情同意程序的鹿特丹公约》，

认识到 本公约同环境与贸易领域内的其他国际公约彼此相辅相成，

强调 本公约的任何条文均非意在妨碍任何缔约方依照任何现行国际协定享受其权利和承担其义务，

理解 以上所列举的内容并非意在在本公约与其他国际文书之间建立一种等级制度，

注意到 本公约不得阻止缔约方根据其在适用的国际法下所承担的其他义务，采取符合本公约条文的额外国内措施，以努力保护人体健康和环境免受汞接触影响，

兹协议如下：

第一条 目标

本公约的目标是保护人体健康和环境免受汞和汞化合物人为排放和释放的危害。

第二条 定义

就本公约而言：

（一）“手工和小规模采金业”系指由个体采金工人或资本投资和产量有限的小型企业进行的金矿开采；

（二）“最佳可得技术”系指在考虑到某一特定缔约方或该缔约方领土范围内某一特定设施的经济和技术因素的情况下，在防止并在无法防止的情况下减少汞向空气、水和土地的排放与释放以及此类排放与释放给整个环境造成的影响方面最为有效的技术。在这一语境下：

1.“最佳”系指在实现对整个环境的高水平全面保护方面最为有效；

2.“可得”技术，就某一特定缔约方和该缔约方领土范围内某一特定设施而言，系指其开发规模使之可以在经济上和技术上切实可行的条件下，在考虑到成本与惠益的情况下，应用于相关工业部门的技术——无论上述技术是否应用或开发于该缔约方领土范围内，只要该缔约方所确定的设施运营商可以获得上述技术；以及

3.“技术”系指所采用的技术、操作实践，以及设备装置的设计、建造、维护、

运行和退役方式。

（三）“最佳环境实践”系指采用最适宜的环境控制措施与战略的组合；

（四）“汞”系指元素汞（Hg(0)，化学文摘社编号：7439-97-6）；

（五）“汞化合物”系指由汞原子和其他化学元素的一个或多个原子构成、且只有通过化学反应才能分解为不同成分的任何物质；

（六）“添汞产品”系指含有有意添加的汞或某种汞化合物的产品或产品组件；

（七）“缔约方”系指同意受本公约约束，且本公约已对其生效的国家或区域经济一体化组织；

（八）“出席会议并参加表决的缔约方”系指出席缔约方会议并投出赞成票或反对票的缔约方；

（九）“原生汞矿开采”系指以汞为主要获取材料的开采活动；

（十）“区域经济一体化组织”系指由某一特定区域的主权国家组成的组织，其成员国已将本公约所辖事项的处理权限让渡于它，且它已按照其内部程序正式获得签署、批准、接受、核准或加入本公约的授权；以及

（十一）“允许用途”系指缔约方任何符合本公约规定的汞或汞化合物用途，其中包括但不限于那些符合第三、四、五、六和七条规定的用途。

第三条 汞的供应来源和贸易

一、就本条文而言：

（一）“汞”包含汞含量按重量计至少占 95% 的汞与其他物质的混合物，其中包括汞的合金；以及

（二）“汞化合物”系指氯化亚汞 (I)（亦称甘汞）、氧化汞 (II)、硫酸汞 (II)、硝酸汞 (II)、朱砂矿石和硫化汞。

二、本条文之规定不得适用于：

（一）拟用于实验室规模的研究活动或用作参考标准的汞或汞化合物用量；或

（二）在诸如非汞金属、非汞矿石、或包括煤炭在内的非汞矿产品、或从此类材料中衍生出来的产品中存在的、属于自然生成的痕量汞或汞化合物、以及在化学产品中无意生成的痕量汞；或

（三）添汞产品。

三、每一缔约方均不得允许进行本公约对其生效之际未在其领土范围内进行的原生汞矿开采活动。

四、每一缔约方应只允许本公约对其生效之际业已在其领土范围内进行的原生汞矿开采活动自本公约对其生效之日后继续进行最多 15 年。在此期间，源自此种开采活动的汞应当仅用于依照第四条生产添汞产品、依照第五条采用的生产工艺、或依照第十一条对汞进行的处置，而且所采用的作业方式不得导致汞的回收、

再循环、再生、直接再使用或用于其他替代用途；

五、各缔约方均应当：

（一）努力逐个查明位于其领土范围内的 50 公吨以上的汞或汞化合物库存、以及那些每年出产 10 公吨以上库存的汞供应来源；

（二）采取各种措施，确保只要缔约方查明氯碱设施的退役过程中出现过量的汞，便应当依照第十一条第三款第一项中所阐明的环境无害化管理准则对之加以处置，而且所采用的处置方式不得导致汞的回收、再循环、再生、直接再使用或用于其他替代用途；

六、任何缔约方均不得允许汞的出口，除非：

（一）出口至某一业已向出口缔约方出具书面同意的缔约方，而且仅应用于以下目的：

1. 进口缔约方在本公约下获准的某种允许用途；或

2. 依照第十条的规定进行环境无害化临时储存；或

（二）出口至某一业已向出口缔约方出具书面同意、包括以下情况证明的非缔约方：

1. 该非缔约方已采取了确保人体健康和环境得到保护、而且确保第十条和第十一条的规定得到遵守的措施；以及

2. 此种汞将仅用于本公约允许缔约方使用的用途，或用于依照第十条的规定进行环境无害化的临时储存。

七、出口缔约方可凭借进口缔约方或非缔约方向秘书处发出的一般性通知作为第六款所规定的书面同意。此种一般性通知中应当列明进口缔约方或非缔约方表明其同意进口的任何条款和条件。该缔约方或非缔约方可随时撤消这一通知。秘书处应当保存一份记录此种通知书的公共登记簿。

八、任何缔约方均不得允许从它将提供书面同意的非缔约方进口汞，除非该非缔约方已提供了证书，表明所涉及的汞并非来自第三款或第五款第二项规定不允许使用的来源。

九、依照第七款发出一般性同意通知的缔约方可决定不适用第八款的规定，但条件是该缔约方对汞的出口实行一系列综合限制措施、而且亦在其本国内采取措施，确保对所进口的汞实行环境无害化的管理。所涉缔约方应当向秘书处提供一份此种决定的通知，其中列出介绍说明其所实行的出口限制措施和国内管制措施的信息、以及它从非缔约方进口的汞的数量及来源国的信息。秘书处应当保存一份记录此种通知书的公共登记簿。履行和遵约委员会应当依照第十五条审查和评价此种通知书及其证明资料，并可酌情就此向缔约方大会提出建议。

十、第九款中所列相关程序应当在缔约方大会第二次会议结束之前提供各缔约方使用。其后，这一程序将不再可用，除非缔约方大会以出席会议并参加表决的缔约方用简单多数方式另外作出决定。缔约方在缔约方大会第二次会议结束之

前依照第九款提供了一份说明者不在此列。

十一、每一缔约方均应在其依照第二十一条提交的报告中提供表明其已遵守本条文的各项规定的信息。

十二、缔约方大会应当在其第一次会议上就本条文、特别是其中第五条第一款、第六和第八款提供进一步指导，并应确定并通过第六条第二款和第八款所述证明书应列明的相关内容。

十三、缔约方大会应当对贸易中的具体汞化合物是否已损及本公约目标进行评价，并应当审议应否把相关汞化合物列入依照第二十七条所通过的补充附件，从而将之纳入第六和第八款规定的适用范围。

第四条 添汞产品

一、每一缔约方均应采取适当措施，不允许在针对附件 A 第一部分所列添汞产品明确规定的淘汰日期过后生产、进口或出口此类产品，除非已在附件 A 中具体规定了例外情况，或所涉缔约方已依照第六条登记了某项豁免。

二、作为第一款的替代办法，缔约方可在批准附件 A 的某一修正案，或其对之生效时表明它将采取不同的措施或战略来处理附件 A 第一部分中所列产品。缔约方只有在能够证明它业已把附件 A 第一部分所列绝大多数产品的生产、进口和出口数量降到最低限度的情况下，方可选择采用这一替代办法，而且还需能够在它向秘书处通知其决定使用这一替代办法时证明它已采取措施或战略来减少未列入附件 A 第一部分的其他产品中的汞的数量。此外，选择采用这一替代办法的缔约方还应当：

（一）在第一时间向缔约方大会汇报和说明其所采用的措施或战略的情况，包括所减少的具体数量；

（二）采取措施或战略，减少附件 A 第一部分中所列、尚未达到最低限值的任何产品中的汞的使用数量；

（三）考虑采取补充措施来实现进一步的减少；以及

（四）对于那些业已选择这一替代办法的任何产品类别而言，不具备依照第六条申请豁免的资格。

自本公约开始生效之日起 5 年之内，缔约方大会应当作为第八款所规定的审查程序的一部分，审查依照本款采取的措施的进展情况及其成效。

三、各缔约方均应按照附件 A 第二部分中所列规定针对该附件中所列添汞产品采取相关措施。

四、秘书处应根据缔约方所提供的信息，收集和保存有关添汞产品及其替代品的信息，并应向公众提供此种信息。秘书处还应将缔约方提交的任何其他相关信息公之于众。

五、各缔约方均应采取措施，防止将本条所规定的不得生产、进口和出口的添汞产品纳入组装产品。

六、各缔约方均应不鼓励在本公约对其生效之前为用于任何已知用途之外的用途而生产和商业分销添汞产品，除非所涉产品的风险和效益评估结果表明其对环境或人体健康有益。缔约方应当酌情向秘书处提供关于任何此种产品的信息，其中包括所涉产品的环境和人体健康风险及惠益方面的信息。秘书处应当把此种信息公之于众。

七、任何缔约方均可向秘书处提交关于将某种添汞产品列入附件 A 的提议，其中应列有与该产品无汞替代品的可得性、技术和经济可行性以及环境与健康风险和惠益相关的信息，同时亦应考虑到依照第四款应提供的信息。

八、自本公约生效之日起 5 年之内，缔约方大会应对附件 A 进行审查并可考虑根据第二十七条对该附件进行修正。

九、在依照本条第八款对附件 A 进行的任何审查过程中，缔约方大会至少应考虑到以下事项：

（一）依照第七款提交的任何提议；

（二）依照第四款中提供的信息；以及

（三）缔约方获得在经济上和技术上均为可行的无汞替代品的情况，同时亦考虑到其所涉环境和人体健康风险和惠益。

第五条 使用汞或汞化合物的生产工艺

一、就本条文和附件 B 而言，“使用汞或汞化合物的生产工艺”不得包括使用添汞产品的工艺、添汞产品的生产工艺、以及处理含汞废物的工艺。

二、各缔约方均应采取适当措施，不得允许在附件 B 第一部分中针对所列各种生产工艺明确规定的淘汰日期过后，在上述工艺中使用汞或汞化合物，除非该缔约方依照第六条登记了某项豁免。

三、各缔约方均应按照附件 B 第二部分的规定，采取措施限制在其中所列生产工艺中使用汞或汞化合物。

四、秘书处应当在缔约方所提供的信息的基础上收集并保存关于使用汞或汞化合物及其替代品的工艺方面的信息，缔约方亦可提供其他相关的信息，并应由秘书处将这些信息公之于众。

五、 拥有一处或多处在附件 B 所列生产工艺中使用汞或汞化合物的设施的各缔约方均应：

（一）采取措施解决源自上述设施的汞或汞化合物的排放和释放问题；

（二）在其依照第二十一条提交的报告当中，纳入依照本款规定所采取措施的相关信息；且

（三）努力查明其领土范围内将汞或汞化合物用于附件 B 所列工艺的设施，并自本公约对其生效之日起 3 年之内向秘书处提交此类设施数量和类型的相关信息，以及上述设施内汞或汞化合物的估计年用量。秘书处应将上述信息公布于众。

六、每一缔约方均不得在本公约生效之日前不存在的使用附件 B 所列生产工艺的设施中使用汞或汞化合物。此种设施不得适用任何豁免。

七、每一缔约方均不鼓励本公约对其生效之前尚不存在的设施采用任何其他有意添加汞或汞化合物的生产工艺，除非缔约方能够以缔约方大会满意的方式表明所涉生产工艺能够提供重大环境和健康惠益，而且没有任何在技术上和经济上均为可行的无汞替代工艺能够提供此种惠益。

八、鼓励缔约方相互交流以下诸方面的信息：相关的新技术的开发、经济上和技术上可行的无汞替代工艺、以及旨在减少并在可行情况下消除附件 B 所列生产工艺中汞和汞化合物的使用以及源自上述工艺的汞和汞化合物的排放和释放的可能性措施和技术。

九、任何缔约方均可对附件 B 提出修正提案，以期把使用汞或汞化合物的生产工艺列入其中。修正提案中应当包括关于无汞替代工艺的可得情况、技术和经济上的可行性、以及环境与健康风险与惠益诸方面的信息。

十、自本公约生效之日起 5 年之内，缔约方大会应对附件 B 进行审查，并可考虑根据第二十七条中所规定的程序对该附件进行修正。

十一、在依照第十款审查附件 B 时，缔约方大会至少应考虑到以下事项：

（一）依照第九款提交的任何提案；

（二）根据第四款提供的信息；以及

（三）相关缔约方在技术上和经济上均为可行的无汞替代工艺的可获得情况，同时亦考虑到所涉环境与健康风险和惠益。

第六条 缔约方提出要求后可以享受的豁免

一、任何国家或区域经济一体化组织均可采用书面通知秘书处的方式，登记一项或多项针对附件 A 或附件 B 所列淘汰日期的豁免，以下称为“豁免”：

（一）成为本公约缔约方之际；或者

（二）若有任何添汞产品以修正形式增列入附件 A，或有任何使用汞的生产工艺以修正形式增列入附件B，则应当在不迟于相关修正对缔约方生效之日提出。

任何此种登记均应随附一份解释所涉缔约方为何需要享受该项豁免的说明。

二、可针对附件 A 或附件 B 所列某一类别登记一项豁免、或可针对由任何国家或区域经济一体化组织所确定的其中某一分类别登记一项豁免。

三、应当在一份登记簿中列明享有一项或多项豁免的每一缔约方。秘书处应负责建立和保管登记簿并向公众开放。

四、登记簿应包括下列内容：

（一）享有一项或多项豁免的缔约方清单；

（二）每一缔约方所登记的一项或多项豁免；以及

（三）每项豁免的失效日期。

五、除非缔约方在登记簿中注明了一个更短的有效期，否则依照第一款确定的豁免应当于附件 A 或附件 B 中所规定的相关淘汰日期 5 年后失效。

六、缔约方大会可应缔约方的要求，决定将某项豁免的有效期延长 5 年，除非所涉缔约方要求的是一个较此更短的豁免时期。在作出决定时，缔约方大会应充分考虑到以下情形：

（一）缔约方阐述延长豁免有效期的必要性，并概述已经开展和计划开展的、旨在可行情况下尽快消除实行该项豁免之必要性的各项活动的报告；

（二）可得信息，包括不含汞或汞用量低于豁免用途的替代产品和工艺的可得性方面的信息；以及

（三）计划开展的或正在开展的旨在对汞进行环境无害化储存、并对汞废物进行环境无害化处置的各项活动。

某项豁免按产品和淘汰日期计算只可延期一次。

七、缔约方可随时书面通知秘书处，撤消某项豁免。豁免的撤消应自相关通知内注明的日期开始生效。

八、尽管有第一款的规定，任何国家或区域经济一体化组织均不得在附件 A 或附件 B 中所列相关产品或工艺的淘汰日期到期后 5 年之后登记注册任何豁免，除非一个或多个缔约方就该产品或工艺一直享有业经登记的豁免，而且业已依照第六款的规定获准延期。在此种情形中，一国或一经济一体化组织可按第一条第一款和第二款中所给出的时间段就该产品或工艺登记某项豁免。此种豁免应当自相关的淘汰日期起 10 年后失效。

九、任何缔约方均不得自附件 A 或附件 B 中所列产品或工艺的淘汰日期起 10 年后的任何时候针对这些产品或工艺享有任何豁免。

第七条 手工和小规模采金业

一、本条文以及附件 C 中所规定的措施适用于采用汞齐法从矿石当中提取黄金的手工和小规模采金与加工活动。

二、其领土范围内存在适用本条文的手工和小规模采金与加工活动的每一缔约方均应采取措施，减少并在可行情况下消除此类开采与加工活动中汞和汞化合物的使用及其汞向环境中的排放和释放。

三、每一缔约方若在任何时候确定其领土范围内的手工和小规模采金与加工活动已超过微不足道的水平，均应就此通知秘书处。若缔约方已作出此种确认，

则应：

（一）根据附件 C 制订并实施一项国家行动计划；

（二）在本公约对其生效后 3 年之内，或在通知秘书处后 3 年之内——二者之间以较迟者为准，将其国家行动计划提交秘书处；且

（三）其后，每 3 年对其在履行本条文规定的各项义务方面所取得的进展进行一次审查，并将上述审查结果纳入依照第二十一条提交的报告。

四、缔约方可酌情开展彼此之间以及与相关政府间组织及其他实体之间的合作，以实现本条文之目标。上述合作可包括：

（一）制定战略，以防止将汞或汞化合物挪用于手工和小规模采金与加工活动；

（二）教育、推广以及能力建设举措；

（三）推动研究可持续的无汞替代方法；

（四）提供技术援助和财政援助；

（五）旨在协助履行其在本条文下的各项承诺的合作伙伴关系；以及

（六）利用现行的信息交流机制推广知识、最佳环境实践以及在环境上、技术上、社会上和经济上切实可行的替代技术。

第八条 排放

一、本条文适用于通过对属于附件 D 中所列来源类别的范围的点源的排放采取措施，以控制、并于可行时减少通常表述为“总汞”的汞和汞化合物向大气中的排放问题。

二、对于本条文而言：

（一）“排放”系指汞或汞化合物向大气中的排放；

（二）“相关来源”是指属于附件 D 中所列来源类别范围的某种来源。缔约方可选择确立相关标准，用以确定附件 D 中所列某一来源类别内所涵盖的相关来源，只要关于其中任何来源的标准中包括来自所涉类别的排放量至少为 75% 即可；

（三）“新来源”是指属于附件 D 中所列类别的、且其建造或重大改造工程始于自以下日期起至少 1 年以后的任何相关来源：

1. 本公约对所涉缔约方开始生效之日；或

2. 对附件 D 的某一修正案对所涉缔约方开始生效之日——该来源系完全因为上述修正案才开始适用本公约之各项规定；

（四）“重大改造”是指对可导致排放量大幅增加的相关来源的重大改造工程，其中不包括因对副产品的回收而导致的排放量的任何变化。应当由所涉缔约方决定某一改造是否属于重大改造；

（五）“现有来源”系指不属于新来源的任何相关来源；

（六）“排放限值”系指对源自排放点源的汞或汞化合物的浓度、质量或排放率实行的限值，通常表述为某种来自某一点源的“总汞”；

三、拥有相关来源的缔约方应当采取措施，控制汞的排放，并可制订一项国家计划，设定为控制排放而采取的各项措施及其预计指标、目标和成果。任何计划均应自本公约开始对所涉缔约方生效之日起 4 年内提交缔约方大会。如果缔约方选择依照第二十条制订一项国家实施计划，则该缔约方可把本款所规定的计划纳入其中。

四、对于新来源而言，每一缔约方均应要求在实际情况允许时尽快、但最迟应自本公约开始对其生效之日起 5 年内使用最佳可得技术和最佳环境实践，以控制并于可行时减少排放。缔约方可采用符合最佳可得技术的排放限值。

五、对于现有来源而言，每一缔约方均应在在实际情况允许时尽快、但不迟于自本公约开始对其生效之日起 10 年内，在其国家计划中列入并实施下列一种或多种措施，同时考虑到其国家的具体国情、以及这些措施在经济和技术上的可行性及其可负担性；

（一）控制并于可行时减少源自相关来源的排放的量化目标；

（二）采用控制并于可行时减少来自相关来源的排放限值；

（三）采用最佳可得技术和最佳环境实践来控制源自相关来源的排放；

（四）采用针对多种污染物的控制战略，从而取得控制汞排放的协同效益；

（五）减少源自相关来源的排放的替代性措施。

六、缔约方既可对所有相关的现有来源采取同样的措施，亦可针对不同来源类别采取不同的措施。目标是使其所采取的措施得以随着时间的推移在减少排放方面取得合理的进展。

七、每一缔约方均应在实际情况允许时尽快，且自本公约开始对之生效之日起 5 年内建立、并于嗣后保存一份关于相关来源的排放情况的清单。

八、缔约方大会应当在其第一次会议上针对下列事项通过指导意见：

（一）最佳可得技术和最佳环境实践，同时亦考虑到新来源与现有来源之间的任何差异，并就尽最大限度减少跨介质影响的必要性提供指导意见；以及

（二）为缔约方实施本条第五款中所规定的措施提供支持，特别是在确立国家目标和订立排放限值方面提供支持。

九、缔约方大会应当在实际情况允许时尽快就下列事项通过指导意见：

（一）缔约方可依照第二条第二款制定的标准；

（二）用于拟定排放清单的方法学。

十、缔约方大会应当定期审查并酌情更新依照第八和第九款提出的指导意见。缔约方应当在执行本条各相关条款时考虑到这些指导意见。

十一、每一缔约方均应在其依照第二十一条提交的报告中列入关于其实施本

条条款情况的信息，特别是关于其依照第四至第七款所采取的措施、以及关于这些措施的实际成效的信息。

第九条 释放

一、本条文适用于控制，以及于可行时，减少来自那些未在本公约的其他条款中涉及的相关点源向土地和水中释放通常表述为“总汞”的汞和汞化合物。

二、就本条文而言：

（一）“释放”是指汞或汞化合物向土地或水中的释放；

（二）“相关来源”是指那些由缔约方所确定的、未在公约其他条款中涉及的任何重大人为释放点源；

（三）“新来源”是指任何相关的来源，此种来源的建造或重大改造系自本公约开始对所涉缔约方生效之日起至少 1 年之后启动；

（四）“重大改造”是指对某一相关来源进行的、导致其排放量大幅增加的改造，其中不包括因对其副产品进行的回收而导致的释放量的任何改变。应当由所涉缔约方认定所涉改造是否属于重大改造；

（五）“现有来源”是指任何不属于新的来源的相关来源；

（六）“释放限值”是指针对源自某一点源所释放的、通常表述为“总汞”的汞或汞化合物的浓度或质量确定的一种限值。

三、每一缔约方均应不迟于本公约对其开始生效之日起 3 年内、并于其后定期查明相关的点源类别。

四、那些拥有相关来源的缔约方应采取各种措施控制其释放，并可制定一项国家计划，列明为控制释放而采取的各种措施及其预计指标、目标和成果。任何计划均应自本公约对所涉缔约方开始生效之日起 4 年内提交缔约方大会。如果缔约方依照第二十条制定了一项实施计划，则所涉缔约方可把依照本款制定的计划列入这一执行计划之中。

五、相关措施应当酌情包括下列一种或多种措施：

（一）采用释放限值，以控制并于可行时减少来自相关来源的释放；

（二）采用各种最佳可得技术和最佳环境实践，以控制来自各类相关来源的释放；

（三）订立一项同时对多种污染物实行控制的战略，以期在控制释放方面取得协同效益；

（四）采取旨在减少来自相关来源的释放的其他措施。

六、在实际情况允许时尽快、且不迟于自本公约对其开始生效之日起 5 年内建立、并于嗣后保持一份关于各相关来源的释放情况的清单。

七、缔约方大会应在实际情况允许时尽快通过关于下列事项的指导意见：

（一）最佳可得技术和最佳环境实践，同时亦考虑到新的来源与现有来源之间的任何区别、以及尽最大限度减少跨媒介影响的必要性；

（二）用于拟定释放清单的方法学。

八、每一缔约方均应在其依照第二十一条提交的报告中提供关于本条执行情况的信息，特别是关于其依照第三至第六款所采取的措施及其成效方面的信息。

第十条 汞废物以外的汞环境无害化临时储存

一、本条文适用于第三条中所界定的、不属于第十一条中所列汞废物定义涵盖范围之内的汞和汞化合物的临时储存问题。

二、每一缔约方均应采取措施，顾及本条第三款通过的任何指导准则，遵照依本条第三款通过的任何要求，确保使拟用于缔约方在本公约下获准的允许用途的此类汞和汞化合物的临时储存以环境无害化的方式进行。

三、缔约方大会应在顾及《控制危险废物越境转移及其处置巴塞尔公约》下制定的任何相关指导准则、以及其他相关指导意见的情况下，针对此类汞和汞化合物的环境无害化临时储存问题制定指导准则。缔约方大会可依照第二十七条以本公约增列附件的形式通过关于临时储存问题的各项规定。

四、缔约方应酌情相互合作，并与相关政府间组织及其他实体合作，以加强各方在此类汞和汞化合物的环境无害化临时储存问题上的能力建设。

第十一条 汞废物

一、 就《控制危险废物越境转移及其处置巴塞尔公约》缔约方而言，《巴塞尔公约》的相关定义适用于本公约所涵盖的废物。对于那些不属于《巴塞尔公约》缔约方的本公约缔约方而言，则应以这些定义为指导，用于本公约所涵盖的废物。

二、就本公约而言，汞废物系指汞含量超过缔约方大会经与《巴塞尔公约》各相关机构协调后统一规定的阈值，按照国家法律或本公约之规定予以处置或准备予以处置或必须加以处置的下列物质或物品：

（一）由汞或汞化合物构成；

（二）含有汞或汞化合物；或者

（三）受到汞或汞化合物污染。

这一定义不涵盖源自除原生汞矿开采以外的采矿作业中的表层土、废岩石和尾矿石，除非其中含有超出缔约方大会所界定的阈值量的汞或汞化合物。

三、每一缔约方均应采取适当措施，以使汞废物：

（一）得以在虑及在《控制危险废物越境转移及其处置巴塞尔公约》下制定的指导准则、并遵照缔约方大会将依照第二十七条以增列附件的形式通过的各项要

求的情况下，以环境无害化的方式得到管理。缔约方大会在拟订这些要求时应虑及缔约方的废物管理规定和方案；

（二）仅为缔约方在本公约下获准的某种允许用途、或为依照第三条第一款进行环境无害化处置而得到回收、再循环、再生或直接再使用；

（三）《巴塞尔公约》缔约方不得进行跨越国际边境的运输，除非以遵照本条以及《巴塞尔公约》的条款进行环境无害化处置为目的。在《巴塞尔公约》对跨越国际边境的运输不适用情况下，缔约方只有在虑及相关国际规则、标准和准则后，才得允许进行此类运输。

四、在酌情审查和更新第三条第一款 所述及的指导准则时，缔约方大会应寻求与《巴塞尔公约》的相关机构密切合作。

五、鼓励缔约方酌情相互合作，并与相关政府间组织及其他实体合作，开发并保持全球、区域和国家对汞废物实行环境无害化管理的能力。

第十二条 污染场地

一、各缔约方均应努力制定适宜战略，用以识别和评估受到汞或汞化合物污染的场地。

二、任何旨在降低此类场地所造成的风险的行动，均应以环境无害化的方式进行，并酌情囊括一项针对其中所含汞或汞化合物对人体健康和环境所构成风险的评估。

三、缔约方大会应针对污染场地的管理问题通过指导意见，其中可附有针对以下问题的解决方法和办法：

（一）场地识别与特征鉴别；

（二）公众参与；

（三）人体健康与环境风险评估；

（四）污染场地风险管理的选择方案；

（五）惠益与成本评估；以及

（六）成果验证。

四、鼓励缔约方针对污染场地的识别、评估、确定优先次序、管理和视情修复问题合作制定战略并开展活动。

第十三条 财政资源和财务机制

一、每一缔约方均承诺在其能力范围内根据其国家政策、优先重点、计划和方案为旨在执行本公约而开展的国家活动提供资源。此种资源可包括通过相关政策、发展战略和国家预算、以及双边和多边供资和私营部门参与获得的国内供资。

二、发展中国家缔约方执行本公约的总体成效与本条的有效执行具有相关性。

三、迫切鼓励各方通过多边、区域和双边来源提供技术、财政和技术援助、以及能力建设和技术转让，用以增强和增加针对汞采取的行动，以期从财政资源、技术援助和技术转让诸方面为协助发展中国家缔约方执行本公约提供支持。

四、缔约方在其供资行动中，应当充分考虑到那些小岛屿发展中国家或最不发达国家缔约方的具体需要和特殊国情。

五、兹此确立一提供充足的、可预测的和及时的财政资源的机制。这一机制旨在支持发展中国家缔约方和经济转型缔约方履行其依照本公约承担的各项义务。

六、这一机制应当包括：

（一）全球环境基金信托基金；以及

（二）一项旨在支持能力建设和技术援助的专门国际方案。

七、全球环境基金信托基金应当提供新的、可预测的、充足的和及时的财政资源，用于支付为执行缔约方大会所商定的、旨在支持本公约的执行工作而涉及的费用。为了本公约之目的，全球环境基金信托基金应当在缔约方大会的指导下运作并对缔约方大会负责。缔约方大会应当对此种财政资源的获得和使用所涉及的总体战略、政策、方案优先重点和资格提供指导。此外，缔约方大会还应当对能够从全球环境基金信托基金获得资助的活动类别的指示清单提供指导。全球环境基金信托基金应当提供资源，用于支付所商定的全球环境惠益所涉及的增量成本、以及所商定的某些基础活动的全部费用。

八、在为一项活动提供资源过程中，全球环境基金信托基金应当考虑到这一拟议活动在减少汞方面所具有的潜力及其所涉及的费用。

九、为了本公约之目的，第六条第二款中所提及的国际方案应当在缔约方大会的指导下运作并对缔约方大会负责。缔约方大会应当在其首次会议上就这一方案的东道机构作出决定——这一东道机构应是一个现有的实体单位，并负责向该机构提供指导，包括该方案的期限。邀请所有缔约方和其他利益攸关方在自愿基础上向这一方案提供财政资源。

十、缔约方大会以及构成这一财务机制的各实体应当在缔约方大会的首次会议上商定实行上述各款的相关安排。

十一、缔约方大会应当最迟在其第三次会议上、并于嗣后定期审查供资水平、缔约方大会向那些受托运行依照本条设立的财务机制的实体所提供的指导及它们的成效、它们满足发展中国家缔约方和经济转型缔约方不断变化的需要的能力。缔约方大会应当根据此种审查结果为改进财务机制的成效采取适当的行动。

十二、邀请所有缔约方在其能力范围内向这一财务机制提供捐助。财务机制应当鼓励由其他来源提供资源，包括私营部门，并应寻求为它所支持的各种活动撬动此种资源。

第十四条 能力建设、技术援助和技术转让

一、 缔约方应协同合作，在其各自的能力范围内，向发展中国家缔约方、尤其是最不发达国家或小岛屿发展中国家缔约方，以及经济转型缔约方提供及时和适宜的能力建设和技术援助，以协助它们履行本公约所规定的各项义务。

二、依照本条第一款以及第十三条开展的能力建设和技术援助可通过区域、次区域以及国家一级的安排，包括现有的区域和次区域中心，通过其他多边和双边手段，以及通过伙伴关系，包括涉及私营部门的伙伴关系，予以提供。应寻求与化学品和废物领域内其他多边环境协定之间开展合作与协调，以提高技术援助及其结果的成效。

三、发达国家缔约方和其他缔约方在其能力范围内，酌情在私营部门及其他相关利益攸关方的支持下，应向发展中国家缔约方、尤其是最不发达国家和小岛屿发展中国家、以及经济转型缔约方推动和促进最新的环境无害化替代技术的开发、转让、普及和获取，以增强它们有效执行本公约的能力。

四、缔约方大会应虑及缔约方提交的呈文和报告，包括按照第二十一条的规定提交的呈文和报告，以及其他利益攸关方提供的信息，在其第二次会议前并于嗣后定期：

（一）考虑关于替代技术现行举措及所取得进展的相关信息；

（二）考虑缔约方、尤其是发展中国家缔约方对替代技术的需求；以及

（三）查明缔约方、尤其是发展中国家缔约方在技术转让方面遇到的各种挑战；

五、缔约方大会应就如何依照本条的规定进一步加强能力建设、技术援助和技术转让工作提出建议。

第十五条 履行与遵约委员会

一、兹此设立一项机制，其中包括一个作为缔约方大会附属机构的委员会，负责推动本公约各项条款的履行并审查本公约各项条款的遵约情况。这一机制，包括上述委员会，在本质上应具促进性，并应特别注重缔约方各自的国家能力和具体国情。

二、委员会应促进本公约所有条款的履行，并审议所有条款的遵守。委员会应审查履行和遵约方面的个体性问题和系统性问题，并酌情向缔约方大会提出建议。

三、委员会应当在充分考虑以联合国五大区域为基础的公平地域代表性原则的情况下，由缔约方提名并由缔约方大会选出的 15 名成员组成；其首批成员应在缔约方大会第一次会议上选举产生，并于嗣后依照缔约方大会根据第五款批准的

议事规则选举产生；委员会各成员应当在与本公约相关的某一领域内具有专业能力，而且委员会的成员构成应能反映出专业知识间的适当平衡。

四、委员会可在如下基础上考虑问题：

（一）任何缔约方提交的有关其自身遵约事项的书面呈文；

（二）依照第二十一条提交的国家报告；以及

（三）缔约方大会提出的要求；

五、委员会应当详细制订其议事规则，供缔约方大会在其第二次会议上批准；缔约方大会可通过委员会的进一步的工作大纲。

六、委员会应尽一切努力以协商一致的方式通过其建议。如已竭尽一切努力仍无法达成一致意见，则应作为最后手段，根据其成员的三分之二法定人数，以出席会议并参加表决的成员的四分之三多数票通过此类建议。

第十六条 健康方面

一、鼓励各缔约方：

（一）推动制定并落实战略和方案，以查明和保护处于风险之中的群体、尤其是那些脆弱群体，其中可包括在公共卫生部门及其他相关部门的参与下：针对接触汞和汞化合物的问题，制定以科学为依据的健康导则；在适用情况下确立减少汞接触的目标；以及开展公共教育；

（二）针对职业接触汞和汞化合物的问题，推动制定并落实以科学为依据的教育和防范方案；

（三）推动因接触汞和汞化合物而受到影响的群体的预防、治疗和护理提供适当的医疗保健服务；以及

（四）酌情建立和加强机构和医务人员在因接触汞和汞化合物而导致的健康风险方面的预防、诊断、治疗和监测能力。

二、在考虑与健康有关的议题或活动时，缔约方大会应：

（一）酌情与世界卫生组织、国际劳工组织及其他相关政府间组织开展咨询与协作；

（二）酌情促进与世界卫生组织、国际劳工组织、以及其他相关国际组织的合作与信息交流。

第十七条 信息交流

一、各缔约方应促进以下信息的交流：

（一）有关汞和汞化合物的科学、技术、经济和法律信息，包括毒理学、生态毒理学和安全信息；

（二）有关减少或消除汞和汞化合物的生产、使用、贸易、排放和释放的信息；

（三）在技术和经济上可行的对下列产品和工艺的替代信息：

1. 添汞产品；

2. 使用汞或汞化合物的生产工艺；以及

3. 排放或释放汞或汞化合物的活动和工艺；

包括此类替代产品和工艺的健康与环境风险以及经济和社会成本与惠益方面的信息；以及

（四）接触汞和汞化合物的健康影响方面的流行病学信息，可酌情与世界卫生组织和其他相关组织密切合作。

二、缔约方可直接、或通过秘书处、或酌情与其他相关组织，包括化学品和废物公约的秘书处合作，交流第一款所述及的信息 。

三、秘书处应促进本条所述信息交流方面的合作，同时促进与相关组织之间的合作，包括多边环境协定以及其他国际倡议的秘书处。除缔约方提供的信息外，上述信息还应包括在汞问题领域拥有专长的政府间组织和非政府组织以及拥有上述专长的国家机构和国际机构提供的信息。

四、各缔约方均应指定一个国家联络点，负责在本公约下交流信息，包括有关第三条所规定的进口缔约方同意问题的信息。

五、就本公约而言，人体健康与安全以及环境方面的相关信息不得视为机密信息。依照本公约交流其他信息的缔约方应按照双方约定保护任何机密信息。

第十八条 公共信息、认识和教育

一、各缔约方均应在其能力范围内推动和促进：

（一）向公众提供以下方面的现有信息：

1. 汞和汞化合物对健康和环境的影响；

2. 汞和汞化合物的替代品；

3. 第十七条第一款所确定的各项主题；

4. 第十九条所要求的研究、开发和监测活动的结果；以及

5. 为履行本公约各项义务而开展的活动；

（二）酌情与相关政府间组织和非政府组织以及脆弱群体协作，针对接触汞和汞化合物对人体健康和环境的影响问题所开展的教育、培训以及提高公众认识的活动。

二、每一缔约方均应利用现行机制或考虑建立相关机制，如在适用情况下建立污染物释放和转移登记簿等，以收集和传播其通过人为活动排放、释放或处置的汞和汞化合物的年度估计数量方面的相关信息。

第十九条 研究、开发和监测

一、缔约方应考虑到其各自的国情和能力，努力合作开发并改进：

（一）汞和汞化合物的使用、消费以及向空气中的人为排放和向水和土地中的人为释放方面的清单；

（二）针对脆弱群体以及包括诸如鱼类、海洋哺乳动物、海龟和鸟类等生物媒介在内的环境介质当中的汞和汞化合物含量建立的模型和进行的具有地域代表性的监测活动，以及在收集和交换适当的相关样本方面所开展的协作；

（三）除汞和汞化合物对社会、经济和文化影响评估外，其对人体健康与环境的影响评估，尤其是对脆弱群体而言；

（四）用于本款第一、二、三项下所开展活动的协调统一的方法学；

（五）汞和汞化合物在一系列生态系统中的环境周期、迁移（包括远程迁移和沉降）、转化与归宿方面的信息，其中适当考虑到人为的与自然的汞排放和释放之间的区别，以及历史性沉降中的汞的再活化问题；

（六）汞和汞化合物以及添汞产品的商业及贸易信息；以及

（七）无汞产品和工艺技术经济可得性方面的信息与研究，以及减少和监测汞和汞化合物释放的最佳可得技术和最佳环境实践方面的信息与研究。

二、缔约方在开展本条第一款所确定的行动时，应酌情依托现有的监测网络和研究项目。

第二十条 实施计划

一、每一缔约方在进行初步评估后，考虑到其本国国情，可制定并执行一项实施计划，用以履行本公约下的义务。任何此类计划均应在制定完毕后尽快递交秘书处。

二、每一缔约方，虑及其国内情况并参考缔约方大会的指导意见及其他相关指导意见，可审查和更新其实施计划 。

三、在开展本条第一款和第二款所述工作时，缔约方应咨询本国利益攸关方，以促进其实施计划的制定、实施、审查和更新工作。

四、缔约方亦可围绕区域计划协调配合，以促进本公约的实施。

第二十一条 报告

一、各缔约方均应通过秘书处向缔约方大会报告其为实施本公约各条款而采取的措施，并报告上述措施在实现本公约目标方面的成效以及可能遇到的挑战。

二、各缔约方均应在其报告中纳入本公约第三、五、七、八和九条所要求的信

息。

三、缔约方大会应考虑与其他相关的化学品和废物公约协同报告是否可取，在其第一次会议上决定缔约方应遵守的报告时间与格式。

第二十二条 成效评估

一、缔约方大会应在本公约生效后 6 年内开始，并于嗣后按照它所确定的时间间隔定期对本公约的成效进行评估。

二、为便于开展评估工作，缔约方大会应在其第一次会议上着手做出安排，以为其提供以下方面的可比监测数据：环境中汞和汞化合物的存在和迁移情况，以及生物媒介和脆弱群体当中观察到的汞和汞化合物的含量趋势。

三、评估工作应在现有的科学、环境、技术、财政和经济信息基础上进行，包括：

（一）依照本条第二款向缔约方大会提供的报告及其他监测信息；

（二）依照第二十一条提交的报告；

（三）依照第十五条提供的信息和建议；以及

（四）依照本公约的规定编制的财政援助、技术转让和能力建设安排的运作情况诸方面的报告及其他相关信息。

第二十三条 缔约方大会

一、兹此设立缔约方大会。

二、缔约方大会第一次会议应当自本公约生效日期起 1 年内由联合国环境规划署执行主任召集举行。嗣后，缔约方大会的常会应当按照缔约方大会所确定的时间间隔定期举行。

三、缔约方大会的特别会议应当在缔约方大会认为必要的其他时间举行，或应任何缔约方的书面请求，在秘书处将该请求通报所有缔约方后的 6 个月内，并在该请求得到至少三分之一缔约方支持的情况下举行。

四、缔约方大会应当在其第一次会议上以协商一致的方式商定并通过缔约方大会及其任何附属机构的议事规则和财务细则，以及有关秘书处运作的财务条例。

五、缔约方大会应不断审查和评价本公约的实施情况和履行本公约为其规定的各项职责，并应为此目的：

（一）为实施本公约设立它认为必要的附属机构；

（二）酌情与相关的国际组织、政府间组织和非政府组织开展合作；

（三）定期审查大会及秘书处依照第二十一条获得的所有信息；

（四）考虑履行与遵约委员会提交的任何建议；

（五）考虑并采取为实现本公约各项目标可能需要采取的任何额外行动；

（六）依照第四条和第五条审查附件 A 和附件 B。

六、联合国及其专门机构、国际原子能机构以及任何非本公约缔约方的国家均可作为观察员出席缔约方大会的会议。任何组织或机构，无论是国家或国际性质、政府或非政府性质，只要在本公约所涉事项方面具有资格，并已通知秘书处愿意以观察员身份出席缔约方大会的会议，均可被接纳参加会议，除非有至少三分之一的出席缔约方对此表示反对。观察员的接纳和出席应遵守缔约方大会所通过的议事规则。

第二十四条 秘书处

一、兹此设立秘书处。

二、秘书处的职能应当包括：

（一）为缔约方大会及其附属机构的会议做出安排，并为之提供所需的服务；

（二）根据要求，为协助缔约方、特别是发展中国家缔约方和经济转型缔约方实施本公约提供便利；

（三）酌情与相关国际组织的秘书处、特别是其他化学品和废物公约的秘书处进行协调；

（四）协助缔约方相互交流与实施本公约有关的信息；

（五）基于根据第十五条和第二十一条收到的信息以及其他现有信息，定期编制并向缔约方提交报告；

（六）在缔约方大会的总体指导下，做出为切实履行其职能所需的行政和合同安排；以及

（七）履行本公约明文规定的其他秘书处职能以及缔约方大会可能为之规定的其他职能。

三、本公约的秘书处职能应当由联合国环境规划署执行主任负责履行，除非缔约方大会以出席会议并参加表决的缔约方的四分之三多数票决定委托另一个或几个国际组织履行上述职能。

四、缔约方大会，经与适当国际机构磋商，可加强秘书处与其他化学品和废物公约秘书处之间的合作与协调。缔约方大会，经与适当国际机构磋商，可就此提供进一步的指导。

第二十五条 争端解决

一、缔约方应争取通过谈判或其自行选择的其他和平方式解决彼此之间因本公约的解释或适用问题而产生的任何争端。

二、非区域经济一体化组织的缔约方在批准、接受、核准或加入本公约时，或

在其后任何时候，可在交给保存人的一份书面文书中声明，对于因本公约的解释或适用问题而产生的任何争端，该缔约方承认在涉及接受同样义务的任何其他缔约方时，下列一种或两种争端解决方式具有强制性：

（一）按照载于附件 E 第一部分中的程序进行仲裁；

（二）将争端提交国际法院审理。

三、区域经济一体化组织缔约方可针对第二款所述裁决方式，发表类似的声明。

四、依照第二款或第三款所发表的声明，在其中所规定的有效期内或自其撤销声明的书面通知交存于保存人后 3 个月内，应一直有效。

五、除非争端各方另有协议，否则声明的失效、撤销声明的通知或作出新的声明均不得在任何方面影响仲裁庭或国际法院正在进行的审理。

六、如果争端各方尚未依照第二款或第三款接受同样的争端解决方法，且它们未能在一方通知另一方它们之间存在争端后的 12 个月内根据第一款规定的方式解决争端，则该争端应在争端任何一方的要求之下提交调解委员会。载于附件 E 第二部分的程序应适用于在本条文下进行的调解。

第二十六条 公约的修正

一、任何缔约方均可针对本公约提出修正案。

二、本公约的修正案应在缔约方大会的会议上通过。对本公约提出的任何修正案文均应由秘书处在建议通过该项修正案的会议举行之前至少提前 6 个月通报各缔约方。秘书处还应将该拟议修正案通报本公约所有签署方，并呈交保存人阅存。

三、缔约方应尽一切努力以协商一致的方式就针对本公约提出的任何修正案达成协议。如已竭尽一切努力仍无法达成一致意见，则应作为最后手段，以出席会议并参加表决的缔约方的四分之三多数票通过所涉修正案。

四、已获通过的修正案应由保存人通报所有缔约方，供其批准、接受或核准。

五、对修正案的批准、接受或核准应以书面形式通知保存人。按照第三款通过的修正案，应自该修正案通过之时缔约方的至少四分之三多数交存批准、接受或核准文书之日起第 90 天对同意接受该修正案约束的各缔约方生效。其后，任何其他缔约方自交存批准、接受或核准该修正案的文书之日起第 90 天，该修正案即开始对其生效。

第二十七条 附件的通过和修正

一、本公约各项附件构成本公约不可分割的组成部分。除非另有明文规定，

凡提及本公约时，亦包括其所有附件在内。

二、在本公约生效之后通过的任何增补附件均应仅限于程序、科学、技术或行政事项。

三、下列程序应适用于本公约增补附件的提出、通过和生效：

（一）增补附件应按照第二十六条第一至第三款规定的程序提出和通过；

（二）何缔约方如无法接受某一增补附件，则应在保存人就通过该增补附件发出通知之日起一年内将此种情况书面通知保存人。保存人应在接获任何此类通知后立即通知所有缔约方。缔约方可随时书面通知保存人撤销先前对某一增补附件提出的不予接受通知，据此该附件即应根据第三项的规定对该缔约方生效；且

（三）保存人就通过某一增补附件发出通知之日起 1 年后，该附件便应对尚未按照第二项的规定提交不予接受通知的本公约所有缔约方生效。

四、本公约各附件修正案的提出、通过和生效均应与本公约增补附件的提出、通过和生效遵循相同的程序，但如果任何缔约方已按照第三十条第五款的规定就附件修正案作出声明，则该附件修正案不得对该缔约方生效。此种情况下，任何此类修正案均将自该缔约方向保存人交存该修正案的批准、接受、核准或加入文书之日起的第 90 天起对该缔约方生效。

五、若某新增附件或某附件的修正案与本公约某个修正案有关，则在本公约上述修正案生效以前，该新增附件或附件修正案不得生效。

第二十八条 表决权

一、除第二款规定者外，本公约各缔约方均拥有一票表决权。

二、区域经济一体化组织在就其权限范围内的事项行使表决权时，其票数应与其作为本公约缔约方的成员国数目相同。如果此类组织的任何成员国行使表决权，则该组织便不得行使表决权，反之亦然。

第二十九条 签署

本公约应自 2013 年 10 月 10 日至 11 日在日本熊本、嗣后直至 2014 年 10 月 9 日在纽约联合国总部开放供所有国家和区域经济一体化组织签署。

第三十条 批准、接受、核准或加入

一、本公约须经各国和各区域经济一体化组织批准、接受或核准。本公约应自签署截止之日的次日起开放供各国和各区域经济一体化组织加入。批准、接受、核准或加入文书应当交存于保存人。

二、任何已成为本公约缔约方、但其成员国却均未成为缔约方的区域经济一体化组织，均应受本公约所规定的一切义务约束。若此类组织的一个或多个成员国是本公约缔约方，则该组织及其成员国应决定其各自为履行本公约规定的义务而承担的责任。在此种情形中，该组织及其成员国无权共同行使本公约所规定的权利。

三、区域经济一体化组织应当在其批准、接受、核准或加入文书中声明其在本公约所规定事项上的权限范围。任何此类组织亦应将其权限范围的任何相关变更通知保存人，再由保存人通知各缔约方。

四、鼓励每一国家或区域经济一体化组织在其批准、接受、核准或加入本公约时向秘书处转交其关于为执行本公约而采取的措施的信息。

五、任何缔约方均可在其批准、接受、核准或加入文书中声明，就该缔约方而言，对某一附件的任何修正只有在其交存了批准、接受、核准或加入文书之后方能对其生效。

第三十一条 生效

一、本公约应自第 50 份批准、接受、核准或加入文书交存之日起第 90 天开始生效。

二、对于在第 50 份批准、接受、核准或加入文书交存之后批准、接受、核准本公约或加入本公约的各国家或区域经济一体化组织，本公约应自该国或该区域经济一体化组织交存其批准、接受、核准或加入文书之日起第 90 天开始生效。

三、就第一款和第二款而言，区域经济一体化组织所交存的任何文书均不得视为该组织成员国所交存文书之外的额外文书。

第三十二条 保留

不得对本公约提出任何保留。

第三十三条 退出

一、自本公约对某一缔约方生效之日起 3 年后，该缔约方可随时向保存人发出书面通知，退出本公约。

二、任何此种退出均应在保存人收到退出通知之日起 1 年后开始生效，或在退出通知中可能指定的一个更晚日期开始生效。

第三十四条 保存人

应当由联合国秘书长担任本公约的保存人。

第三十五条 作准文本

本公约的正本应当交存于保存人，其阿拉伯文、中文、英文、法文、俄文和西班牙文文本均同为作准文本。

下列签署人，经正式授权，在本公约上签字，以昭信守。

公历两千零一十三年十月十日订于日本熊本。

落实中国—东盟面向和平与繁荣的战略伙伴关系联合宣言的行动计划（2016—2020）

（外交部，2016 年 3 月 3 日）

本《行动计划》旨在落实于 2003 年 10 月 8 日在印度尼西亚巴厘岛签署的《中国—东盟面向和平与繁荣的战略伙伴关系联合宣言》，以加强和提升 2016 年至 2020 年间中国和东盟战略伙伴关系、睦邻友好和互利合作。本《行动计划》同样旨在应对未来 5 年将出现的地区和全球挑战。

本《行动计划》以中国和东盟 1991 年建立关系以来取得的重要成就及《行动计划（2011-2015）》的成功落实为基础，推动建设一个和平、稳定、融合、繁荣和充满关爱的东盟共同体，并为东盟共同体后 2015 年愿景作出贡献。

本《行动计划》还确认中国支持东盟在不断演变的地区架构和所有东盟主导的机制和论坛中的中心地位。

中国和东盟将根据各自承担的国际法义务和国内法律、法规和政策，努力开展合作。

1. 政治与安全

1.1 经常性高层接触、访问和互动

1.1.1 加强经常性高层接触，充分利用各种机会就中国—东盟关系和共同关心和关切的国际和地区问题交换意见。

1.2 政治对话和合作

1.2.1 通过中国—东盟领导人会、中国—东盟外长会、中国—东盟高官磋商和中国—东盟联合合作委员会以及东亚峰会、东盟与中日韩、东盟地区论坛和东盟防长扩大会等其他以东盟为主导的平台，深化中国—东盟磋商与合作；

1.2.2 深化现有中国—东盟合作，进一步探讨东盟领导人关注的各项倡议中的合作领域，如中方提出的中国—东盟“2+7 合作框架”、建设中国—东盟命运共同体等。

1.3 《东南亚友好合作条约》

1.3.1 坚持《东南亚友好合作条约》的宗旨和原则，以促进地区和平、安全和繁荣，增进相互之间的信心和信任，包括支持东盟举办评估该条约落实进展的研修班和研讨会等。

1.4 《东南亚无核武器区条约议定书》

1.4.1 支持东盟根据《东南亚无核武器区条约》保持东南亚无核武器区的努力，包括通过落实《加强东南亚无核武器区条约的行动计划（2013—2017）》；

1.4.2 加强《东南亚无核武器区条约》（《曼谷条约》）缔约国和拥核国就解决签署和核准条约议定书未决问题的努力。

1.5 《南海各方行为宣言》和制订“南海行为准则”

1.5.1 通过定期举行落实《南海各方行为宣言》高官会和工作组会等，推进全面有效完整落实《南海各方行为宣言》，维护地区和平稳定，增进在南海的互信、对话与合作；

1.5.2 共同加强实质性讨论，以在协商一致基础上早日达成“南海行为准则”；

1.5.3 根据落实《南海各方行为宣言》指针，开展经同意的合作项目和活动以及早期收获项目，以促进相互信任和信心；

1.5.4 包括 1982 年《联合国海洋法公约》在内的普遍认可的国际法原则，继续共同合作，促进海上安全，维护南海和平稳定，包括确保南海航行和飞越的安全和自由；

1.5.5 自我克制，不采取使争议复杂化、扩大化和影响和平与稳定的行动。由相关方根据包括 1982 年《联合国海洋法公约》在内的公认的国际法原则，通过直接相关主权国家友好磋商和谈判，以和平方式解决领土和管辖权争议，不诉诸武力或以武力相威胁；

1.5.6 提升互信，加强信任建设，鼓励各方依据《南海各方行为宣言》的精神避免海上不测事件；

1.5.7 遵守包括《联合国海洋法公约》在内的公认的国际法原则和国际海事组织的其他相关法律文书；

1.5.8 在海洋科研、海洋环保、航行和交通安全、搜救行动、海上遇险人员的人道待遇、打击跨国犯罪等领域推进合作与对话，推进军队官员合作。

1.6 人权

1.6.1 支持东盟落实《东盟人权宣言》、《关于通过东盟人权宣言的金边声明》、《世界人权宣言》、《维也纳宣言和行动纲领》及其他全体东盟成员国加入的相关人权宣言和文书；

1.6.2 通过地区对话、研讨会、研修班、教育宣传活动、最佳实践交流和其他能力建设倡议等共同促进和保护人权和基本自由。其中包括支持东盟政府间人权委员会和东盟妇女儿童权益促进与保护委员会的工作。

1.7 非传统安全

1.7.1 在 10+1、10+3 打击跨国犯罪部长会、高官会及《中国与东盟非传统安全领域合作谅解备忘录》等其他关于加强非传统安全领域合作的框架下增加互访与合作，加强执法和安全对话；

1.7.2 尽可能通过互访、培训、研修班、研讨会、视频会议等，促进中国和东盟有关部门在应对自然灾害、反恐、打击网络和跨国犯罪等非传统安全领域促进信息共享、经验和最佳实践交流和能力建设；

1.7.3 加强东盟和中国在打击人口贩运方面的能力建设，加强中国和东盟成员国相关部门之间的信息交流合作，有效预防和打击人口贩运，起诉犯罪分子，保护受害者，包括开展受害者支持项目，协助并遣返受害者回国；

1.7.4 在应对偷渡、贩运人口及相关跨国犯罪巴厘进程（“巴厘进程”）等涵盖人口贩运来源国、中转国和目的地国的地区论坛框架下，推进地区合作，参与相关活动；

1.7.5 探讨适当整合本《行动计划》和“巴厘进程”中的活动的可能性，如能力建设和有关部门间信息交换等，确保有关活动相互补充，互不重复；

1.7.6 通过交流最佳实践和经验及能力建设等途径，在禁毒、刑事法医技术、边境管理、反洗钱、包括反恐怖融资在内的反恐、国际经济犯罪和网络犯罪侦查等领域合作提升能力，探讨进一步推进合作。包括根据各自法律，在取证、调查犯罪所得去向、资产追缴、缉捕调查逃犯等领域推进合作，鼓励相互间达成有关双边法律安排；

1.7.7 通过适当利用现有地区和国际设施和机制等途径，加强中国和东盟执法部门之间的合作和协调，包括海上执法机构根据各自法律法规在打击海上跨国犯罪方面的合作；

1.7.8 依据国内法和政策，加强刑事侦查和起诉方面的合作；

1.7.9 加强中国和东盟警察院校和执法部门及院校之间的互访交流；

1.7.10 促进具体领域专家及学者间的联系和互访，支持在非传统安全领域开展共同研究，分享研究成果；

1.7.11 通过中国—东盟总检察长会议，在包括相关司法和检察机构在内的部门间适当加强法律事务合作；

1.7.12 通过东盟地区地雷行动中心加强合作，应对本地区地雷和其他战争遗留爆炸物带来的人道主义问题，包括适当对中心给予资金和技术支持；

1.7.13 加强打击极端主义合作。

1.8 军事交流和合作

1.8.1 在东盟防长扩大会框架下，包括通过中国—东盟防长非正式会晤，在人道主义援助与救灾、海上安全、反恐、维和、军事医学及人道主义扫雷等领域增进对话，加强务实合作，以增进相互信任和信心，维护地区和平稳定；

1.8.2 继续加强高层军事人员及专业团组、院校交流，大力开展联合训练和适当层次人员交流。

2. 经济合作

2.1 中国—东盟自贸区

2.1.1 执行中国—东盟自贸区各项协议及中国—东盟自贸区升级版协议成果，以进一步加强中国—东盟关系，促进中国和东盟成员国间贸易平衡，力争实现领导人提出的到2020 年双方贸易额达 1 万亿美元、双向投资达 1500 亿美元的目标；

2.1.2 积极落实贸易促进措施，应对非关税壁垒；

2.1.3 监测中国—东盟自贸区协议执行中出现的问题，通过磋商，友好、建设性地加以解决；

2.1.4 通过优化中国—东盟中心的作用和鼓励有效利用中国—东盟自贸区商务门户网站，协助双方企业用好中国—东盟自贸区各项协议带来的有利条件，促进中国与东盟间贸易、投资和旅游；

2.1.5 通过加强专门技能交流和经济技术合作，积极开展贸易投资便利化、交通基础设施互联互通建设和人力资源开发合作；

2.1.6 探讨在中国和感兴趣的东盟国家间建立经贸合作区的可能性，发挥好中国—东盟博览会、中国—东盟商务与投资峰会、中国西部国际博览会、中国昆明进出口商品交易会等中国与东盟间各类贸易投资促进活动的平台作用，通过用好中国—东盟投资合作基金等，促进相互了解合作，扩大双向贸易投资；

2.1.7 同中国—东盟商务理事会和东盟商务咨询理事会相协调，通过研讨会及其他双方同意的活动，促进中国和东盟商会及行业协会间的交流与合作；

2.1.8 考虑采取具体措施，对食品和农产品进行安全检查。

2.2 金融

2.2.1 通过开展防火演练完善操作指南，开发经济评估与政策对话框架等，进一步加强清迈倡议多边化的操作性和有效性，深化各方在清迈倡议多边化机制下的合作；

2.2.2 支持 10+3 宏观经济研究办公室发展壮大，增强其经济监测和地区宏观经济和金融形势分析质量，加强其机构能力建设，保障清迈倡议多边化机制有效决策和运行，积极支持 10+3 各方开展经济评估和政策对话；

2.2.3 支持亚洲基础设施投资银行根据《亚投行章程》成立和运营，支持亚投行同世界银行、亚洲开发银行等多边金融机构开展合作，促进地区互联互通建设；

2.2.4 支持亚洲债券市场倡议对培育本地区本币债券市场作出贡献，允许域内大量储蓄用于满足本地区投资需求，促进本币债券的发行，扩大对本币债券的需求，改善债券市场监管框架和相关基础设施，继续探讨从双边层面做起，最终发展并转型形成一个综合性方案，以推进地区结算基础设施建设，促进地区跨境证券交易；

2.2.5 继续在 10+3 框架下就如何加强本地区金融合作进行研究，探讨加强金融合作的未来重点领域；

2.2.6 探讨开展贸易本币结算；

2.2.7 通过适当发挥中国—东盟银行联合体作用等促进银行和金融领域的人力

资源开发和能力建设；

2.2.8 通过金融素养能力建设和技术支持、有效的中介和分配渠道、各种金融工具、消费者权益保护、适用的国家及其他现有信用担保机制以及加强监管机构和利益相关者对话等途径，促进个人和中小企业更方便地获取金融服务和产品，提升金融包容性，实现可持续发展；

2.2.9 加强合作改善地区金融基础设施建设。

2.3 粮食、农业和林业

2.3.1 通过磋商、培训和最佳实践共享，继续在 10+3 框架下加强农业方面的对话和信息交流；

2.3.2 进一步落实《中国和东盟关于食品和农业合作的谅解备忘录》以及《中国和东盟关于加强卫生和植物卫生合作的谅解备忘录》；

2.3.3 继续落实《10+3 大米紧急储备协议》，定期举办 10+3 粮食安全合作战略圆桌会议，探讨加强粮食安全战略合作的途径和机制，提升区域粮食安全水平；

2.3.4 通过包括实施“中国—东盟粮食综合生产能力提升行动计划”等途径，加强在农作物、畜牧业、林业及渔业领域的合作，加强先进适用技术交流和能力建设；

2.3.5 通过开设农业科技和食品安全培训课程，加强研发合作；

2.3.6 推动负责任的捕鱼活动，打击非法、未经申报和不受管制的捕鱼，重点旨在维护渔业资源的可持续性，确保粮食安全，推动减贫，提升本地区人民和经济体的福祉；

2.3.7 在早期预警、疫情监测与疫苗研发等方面进行信息与技术经验交流，完善动植物疫病防控系统和疫情通报制度，加强跨境动植物疫病防控合作；

2.3.8 在林区管理领域，包括野生动植物保护、落实《濒危野生动植物种国际贸易公约》（CITES）等野生动植物相关的多边协议方面，探讨提出可能的合作倡议。

2.4 海上合作

2.4.1 继续在包容互利的原则基础上，通过相关平台加强关于海上合作的对话和交流，包括进一步探讨中方提出的建设 21 世纪海上丝绸之路等倡议；

2.4.2 使用现有中国—东盟合作资源，在海洋经济、海上互联互通、海洋科技推广应用、海洋环保、海上安全、海洋人文交流等领域开展合作项目。

2.5 信息通信技术

2.5.1 通过中国—东盟信息通信部长会议等机制，继续加强政策对话与交流；

2.5.2 进一步落实《中国—东盟信息通信技术合作的谅解备忘录》及《落实中国—东盟面向共同发展的信息通信领域伙伴关系北京宣言的行动计划》；

2.5.3 落实中国—东盟国家计算机应急响应组织合作机制，优化网络安全事件响应流程，推进信息和数据共享，开展能力建设和项目合作等；

2.5.4 共同完善中国和东盟信息和通信基础设施互联互通；

2.5.5 在发展农村通信、推广网络和电子商务应用等领域加强合作；

2.5.6 支持落实《东盟信息通信技术总体方案 2020》。

2.6 科技与创新

2.6.1 通过中国—东盟科技部长会、中国—东盟科技联委会及东盟—中日韩科技高官会等机制，构建更紧密的科技创新合作关系；

2.6.2 大力实施中国—东盟科技伙伴计划，包括通过建设联合实验室等开展联合研发；通过中国—东盟技术转移中心和卓越中心网络进行技术示范、推广和转移；通过东盟国家杰出青年科学家来华工作计划等，开展能力建设和人员交流；

2.6.3 加强中国—东盟农业合作、学术交流和科研；

2.6.4 加强新能源与可再生能源技术交流与合作，探讨制订一份新能源与可再生能源行动计划。

2.7 航天合作

2.7.1 鼓励和平利用外空，并根据国际法和参与国国内法规在空间技术及其应用方面进行技术转移、联合技术研发和能力建设等合作。

2.8 交通

2.8.1 通过中国—东盟交通部长会议及其他相关机制，进一步加强政策对话与交流；

2.8.2 继续落实《中国与东盟交通合作谅解备忘录》和《中国—东盟海运协定》，发挥亚洲基础设施投资银行等机构的作用，并考虑适当使用中国发起的中国—东盟基础设施专项贷款，开展交通基础设施互联互通合作；

2.8.3 继续支持落实《东盟交通战略计划（2011—2015）》及其后续战略计划；

2.8.4 加强海上运输和海港开发合作，推进港口城市间的合作，完善中国和所有东盟成员国的互联互通；

2.8.5 加强航空和海上搜救合作；

2.8.6 支持《中国—东盟航空运输协定》及其议定书早日顺利实施，加强中国和东盟全面民航合作；

2.8.7 继续开展中国—东盟航空合作，以最终建立一个自由和稳固的航空服务框架，支持中国—东盟自贸协议升级；

2.8.8 继续推动改善昆曼公路使用，加快完成泛亚铁路缺失段建设，尽早实现中国—东盟铁路基础设施互联互通；

2.8.9 进一步加强交通领域人力资源开发合作。

2.9 旅游

2.9.1 通过东盟与中日韩旅游部长会议加强政策对话和合作，就落实《东盟与中日韩 2013—2017 旅游合作工作计划》和《东盟成员国政府与中日韩政府关于加强旅游合作的备忘录》加强合作；

2.9.2 加强中国和东盟各级旅游主管部门和旅游企业之间的联系和合作，鼓励交流旅游相关数据和信息，鼓励联合开发旅游产品，并开展相关合作项目；

2.9.3 鼓励相互派员参加年度东盟旅游论坛、中国国际旅游交易会等旅游相关活动；

2.9.4 根据《东盟旅游战略计划（2016-2020》促进包容性旅游发展；

2.9.5 鼓励合作，探讨在紧急情况和危机下如何加强协调，减少意外情况对旅游业的影响；

2.9.6 加强中国—东盟中心在支持地区旅游中的作用；

2.9.7 为东盟各国培训旅游管理专业人才。

2.10 能源、矿产合作

2.10.1 通过地区论坛和研讨会等途径，加强关于能源，特别是水电、矿产和地质科学方面的政策交流与对话，共享清洁能源开发，特别是水文学、水电、煤炭和清洁煤技术、天然气发电、最新矿物勘探和保护技术及地热能等方面的信息和经验；

2.10.2 加强能源合作，鼓励投资于资源和勘探、发电、在中国和感兴趣的东盟国家间进行电力贸易和联通、石油和天然气下游工业、可再生和替代能源、和平利用民用核能等领域的基础设施建设，在尊重各国国内强制性标准的同时，对安全、环境、健康和国际公认的能源资源安全标准给予认真和应有的关注，实现互利；

2.10.3 在开发诸如生物能、水电、风能、太阳能、清洁煤技术、天然气发电、氢和燃料电池等新能源和可再生能源资源和技术方面加强信息共享、联合研发和技术交流；

2.10.4 促进节能合作，在提高能效和能源保护方面分享最佳实践，开展能力建设，尽可能探讨进行节能政策联合研究；

2.10.5 鼓励双方企业积极参与并投资矿产资源勘探与开发，实现互利，同时确保环境保护和可持续发展；

2.10.6 通过开展联合研究、实施能力建设项目、建设数据库、进行信息交流及共享经验，加强地质和矿业合作，实现互利；

2.10.7 加强可持续矿业领域的研发、经验分享和能力建设合作。

2.11 质检

2.11.1 落实《中国—东盟关于加强卫生与植物卫生合作的谅解备忘录》；

2.11.2 定期举行中国—东盟质量监督检验检疫部长会议，增强各层级相关部门间的交流与合作；

2.11.3 继续开展中国国家质量监督检验检疫总局和东盟标准和质量咨询委员会之间的定期对话，加强质检合作网站建设，促进信息共享，探索并开展联合研究和能力建设项目。

2.12 海关

2.12.1 通过中国—东盟海关署长磋商会及协调委员会会议等，深化海关领域的交流与合作；

2.12.2 继续落实《中国—东盟海关合作谅解备忘录》指定领域中的合作项目和活动；

2.12.3 通过海关技术开发及信息通信技术在海关中的应用，推进中国—东盟贸易便利化合作；

2.12.4 支持推进《世界贸易组织贸易便利化协定》生效的努力及其实施，推进贸易便利化合作，加快货物通关速度；

2.12.5 推进实施《世界海关组织全球贸易安全与便利标准框架》，包括考虑分享最佳实践和经验，适时开展“经认证的经营者”互认项目。

2.13 知识产权

2.13.1 通过中国—东盟知识产权局局长会议等加强政策对话与交流；

2.13.2 继续落实《中国—东盟知识产权合作谅解备忘录》；

2.13.3 加强知识产权领域合作，在知识产权的创造、取得、运用、商业化、保护、管理和执行方面加强能力建设、技术支持和知识产权专业人才培训。

2.13.4 加强在遗传资源和传统知识保护领域的信息和最佳实践共享。

2.14 中小企业合作

2.14.1 支持落实《东盟中小企业发展战略行动计划（2016—2025）》，包括分享最佳实践和经验，在中小企业发展领域开展能力建设，举办研讨会、研修班、专题报告会等；

2.14.2 加强中小企业主管部门包括相关利益攸关方之间的政策磋商和专业交流，务实推进中小企业合作；

2.14.3 支持中国和东盟国家中小企业支持机构加强联系，开展中小企业贸易投资、人员培训、工业园区建设等方面合作；

2.14.4 加强在贸易、农业、旅游等传统领域的中小企业合作，探讨相关合作新领域；

2.14.5 鼓励东盟成员国积极参与“中国国际中小企业博览会”，鼓励双方参与其他相关贸易展会和活动，促进双方中小企业拓展市场。

2.15 产业合作

2.15.1 适当加强生产设备升级合作，特别是先进技术、绿色和创意产业等领域的合作，提高生产力；

2.15.2 加强双方互利产业部门供应链联系，鼓励形成产业集群；

2.15.3 鼓励就关键技术及其在商业创新中的应用进行交流，推进创新合作；

2.15.4 鼓励必要时就中国和东盟间贸易问题进一步加强合作磋商。

3. 社会人文合作

3.1 公共卫生

3.1.1 通过中国—东盟卫生部长会议、中国—东盟卫生发展高官会及其他相关机制加强政策对话与交流；

3.1.2 落实《中国—东盟关于卫生合作的谅解备忘录》，通过中国—东盟公共卫生合作基金等支持有关合作项目；

3.1.3 在新发、再发传染病防控领域，特别是早期发现、报告、防控、治疗等方面深化合作，开展技术、人员和经验交流，增强应对能力；

3.1.4 在准备应对流行性感冒和新发传染病方面开展合作；

3.1.5 加强在慢病防控领域的交流与合作，降低慢病负担，提高本地区人民的健康状况和生活水平；

3.1.6 促进非传染性疾病，包括精神健康方面的信息及专业知识交流与合作；

3.1.7 推进职业病医疗领域的交流，包括职业病的诊断、治疗和预防；

3.1.8 根据各国的优先领域和国内规定，加强传统医学、补充 / 替代医学合作，重点加强其保护、发展及与医疗保健制度的结合；

3.1.9 加强卫生保健领域合作，包括通过使用信息通信技术持续促进公共卫生发展、健康城市建设和可持续卫生管理；

3.1.10 继续在培训卫生行政和专业人员方面开展合作。

3.2 教育

3.2.1 加强合作，增加高层教育部门互访。充分利用“中国—东盟教育交流周”和中国—东盟中心开展全方位、多层次和宽领域的交流与合作，推动双方人文交流；

3.2.2 继续促进双方学生交流和对东盟国家提供中国政府奖学金工作，包括实施“双十万学生流动计划”，鼓励适当建立机制，便利学位互认；

3.2.3 继续深化高等教育机构间的务实合作，重点是适当在人才培养、学生交流、联合研究、语言教学等方面加强合作；

3.2.4 推进学校和职业教育机构间的合作和交流；

3.2.5 继续促进在语言、文化、艺术和文化遗产领域的青年交流，以增进了解，加深友谊；

3.2.6 继续利用相关教育机构举办各层次、各领域的专业人才培训课程；

3.2.7 通过中国—东盟思想库网络促进和鼓励学术交流及共办学术会议；

3.2.8 探讨通过增加汉语教师人数，在包括技术和职业学院的各院校中推进汉语教学。

3.3 文化

3.3.1 继续加强文化主管部门间的政策沟通与交流，鼓励中国—东盟中心为促进文化交流进一步发挥作用；

3.3.2 落实《中国与东盟文化合作谅解备忘录》和《中国—东盟文化合作行动计划（2014—2018）》；

3.3.3 在文学、图书馆、档案材料、博物馆、表演艺术、视觉艺术、艺术教育和其他相关公共文化设施及文化 / 创意产业方面积极开展交流与合作；

3.3.4 鼓励和支持历史遗迹、考古和文化遗产保护部门、博物馆、档案馆、图书馆及文化机构之间开展合作；

3.3.5 合作开发文化产品市场，大力发展文化 / 创意产业；

3.3.6 努力相互支持对方主办高水平的传统 / 现代文化艺术活动；

3.3.7 联合保护并推广民族和传统节日，鼓励和支持传统体育运动方面的交流与合作；

3.3.8 继续举办中国—东盟文化论坛，探讨共同主办该论坛的方式；

3.3.9 通过交流举办大型活动经验等方式，加强文化领域人力资源开发和培训合作；

3.3.10 推动文化、传统及现代艺术、文化遗产和新兴文化产业（如数字媒体和网络游戏）领域的专家和专业技能交流；

3.3.11 鼓励东盟成员国已有的中国文化中心促进常态化文化交流合作。

3.4 人力资源和社会保障

3.4.1 落实人力资源开发计划，开展公务员培训，鼓励在人力资源市场建设、劳动力市场信息、职业技能开发、劳动法律法规及社会保障政策等方面交流经验并开展合作；

3.4.2 继续通过 10+3 劳工部长会议和 10+3 公务员负责人会议加强政策交流、对话和技术合作；

3.4.3 鼓励公共和私营部门参与人力资源开发和交流；

3.4.4 探讨建立中国和东盟间社会福利和社会保障合作机制，可包括在上述领域开展政策、信息和经验交流；

3.4.5 加强社会福利合作，特别是通过支持分享社会福利和保障政策方面的经验和研究，在老年人、残疾人、妇女儿童福利方面加强合作；

3.4.6 推进政府机构和残疾人组织间关于残疾人事务的信息交流、经验共享和培训合作，包括加强残疾人士家庭和社区扶助措施等；

3.4.7 通过 10+3 社会福利和发展部长级会议，继续加强政策交流、对话和技术合作；

3.4.8 推进合作，消除针对妇女儿童的暴力活动。

3.5 减贫合作

3.5.1 推进有关部门之间的交流与合作，落实相关减贫倡议，包括中国—东盟社会发展与减贫论坛和中国提出的“东亚减贫合作倡议”；

3.5.2 加强 10+3 村官能力建设合作，进一步加强 10+3 国家农村社区发展；

3.5.3 继续为东盟国家举办一系列减贫政策与实践研讨会，提供减贫与农村发展专业学位，加强减贫领域人力资源开发合作；

3.5.4 通过 10+3 农村发展和消除贫困高官会，继续加强政策交流对话和技术合作；

3.5.5 推动减贫主管部门通过人员互访、知识共享、信息交流及联合研究建立合作关系；

3.5.6 根据东盟国家需求，提供减贫政策咨询和技术支持，参与减贫项目设计和国家减贫战略制定；

3.5.7 通过鼓励中国和东盟成员国相关机构探索土地利用、规划、开发和管理方面的信息和技术交流，支持农村和社区发展。

3.6 环境合作

3.6.1 通过完成制订和有效落实《中国—东盟环境合作战略（2016—2020）》，继续推进环境合作，通过中国—东盟环境合作论坛等加强环境领域高层政策对话，通过中国—东盟环保合作中心推进环境合作；

3.6.2 支持落实中国—东盟环境保护技术与产业合作框架，加强环境友好技术交流与合作，探讨依托中国—东盟环保技术和产业合作示范基地开展示范项目的可能性，支持中国和东盟实现绿色和环境可持续发展；

3.6.3 在城市和农村环保管理领域加强对话和经验交流，落实城乡环境合作示范项目，提高地区生活环境质量，探讨建立生态友好城市发展伙伴关系；

3.6.4 探讨开展环境数据和信息共享合作，包括适时探讨建立环境信息共享联合平台的可能性；

3.6.5 加强环境能力建设和宣传教育合作，实施联合培训课程、联合研究、人员交流等项目，提升地区环境管理能力与水平，提高地区公众环境意识；

3.6.6 开展协同效应领域合作，如在大气和水质管理、健康和环境保护及管理等方面开展联合研究、能力建设及经验分享；

3.6.7 推进合作，使东盟人民享有清洁用水、清洁空气、基本医疗和其他社会服务，过上健康有益的生活，造福东盟乃至国际社会；

3.6.8 以实现环境可持续性为目标推进环境保护合作；

3.6.9 探讨可能的合作倡议，支持东盟生物多样性中心；

3.6.10 推进合作，作为东盟气候变化工作组《东盟联合应对气候变化行动计划》下的补充活动；

3.6.11 在东盟遗产公园等生物多样性优先保护区管理、落实《生物多样性公约》等生物多样性相关多边环境协议等方面探讨可能的合作倡议。

3.7 媒体合作

3.7.1 通过中国—东盟新闻部长会议，继续加强政策沟通与对话；

3.7.2 加强中国和东盟国家主流媒体间交流和讨论，促进双方记者交流互访，加强新闻报道合作，拓展新闻报道领域，增加内容深度；

3.7.3 加强新闻网络合作；

3.7.4 推进电影出品合作，为电影和电视节目联合制作和交流以及电视节目市场营销提供便利；

3.7.5 鼓励互办并积极参与对方举办的影视节展及相关贸易活动；

3.7.6 促进电视、电影和广播技术人员和专业人员之间的交流与合作；

3.7.7 联系并鼓励主流媒体为中国—东盟关系树立积极的国际形象。

3.8 灾害管理合作

3.8.1 有效落实《中国—东盟灾害管理合作谅解备忘录》；

3.8.2 在灾害管理、防灾减灾、灾害风险监测和预警、救灾和恢复方面加强技术合作，开展应急响应和救援技术培训，交流实践、经验和信息；

3.8.3 加强地震海啸预警合作；

3.8.4 通过项目和专家交流，完善灾害管理软硬件设施；

3.8.5 继续支持落实《东盟灾害管理和紧急响应协议》第二阶段工作计划（2013—2015）及后续工作计划，继续与东盟灾害管理人道主义救援协调中心开展合作，推进灾害管理能力建设；

3.8.6 通过信息共享、经验知识交流、举办紧急医疗服务管理和支持研修班和培训课程等，促进紧急医疗服务能力建设。

3.9 地方政府合作和民间交流

3.9.1 促进双方地方政府，包括省市长之间的对话、互访和经验交流；

3.9.2 通过妇女、青年等不同人群间的交流项目，老年人事务和积极老龄化等领域的合作以及民间友好组织继续推进民间交流；

3.9.3 通过东盟—中日韩青年事务部长会议、中国—东盟青年营、大湄公河次区域青年交流项目（澜沧江—湄公河青年交流项目）等平台和项目促进民间交流，鼓励双方用好中国—东盟青少年交流活动中心、中国—东盟青年联谊会、中国—东盟妇女培训中心等其他平台和项目；

3.9.4 鼓励中国和东盟地方政府在改善欠发达地区人民生活水平方面开展合作；

3.9.5 探讨在中国和东盟成员国间建立姐妹城市 / 省区网络。

4. 互联互通

4.1 加强东盟互联互通合作，包括开展能力建设，为《东盟互联互通总体规划》和东盟后 2015 互联互通议程提供资源；

4.2 继续加强东盟互联互通协调委员会和中国—东盟互联互通合作委员会中方工作组之间机制建设，以促进合作，开展旗舰项目，加强东盟互联互通；

4.3 加强合作，适当通过公私合营和其他方式调动私营资本，鼓励为建设基础设施提供可持续和高效的投资，促进地区基础设施发展；

4.1.4 通过对接《东盟互联互通总体规划》、东盟后 2015 互联互通议程和中国“一带一路”倡议中的共同优先领域，探讨完善中国和东盟间的互联互通的途径。

5. 东盟一体化倡议及缩小发展差距

5.1 通过加强基础设施建设、人力资源开发、信息与通信技术和区域及次区域发展，落实“东盟一体化倡议”第二份工作计划及其后续文件，为东盟缩小各成员国发展差距和一体化的努力加强资金和技术支持与援助。

6. 湄公河流域和次区域发展合作

6.1 继续加强澜沧江—湄公河合作、大湄公河次区域合作、东盟—湄公河流域开发合作框架下以及湄公河委员会机制下各领域合作，包括执法安全、交通、可持续发展、环保和气候变化、信息通信、水质、水资源的可持续使用和管理、健康、旅游、粮食和农业等领域，支持东盟共同体建设；

6.2 通过加强农业、交通、基础设施、信息通信技术、自然资源、旅游及中小企业等东盟东部增长区重点发展领域的合作，以及向东盟东部增长区方案和项目提供技术和资金支持，落实《中国—东盟东部增长区经济合作框架》。

7. 国际和地区事务合作

7.1 东亚合作

7.1.1 继续就包容、基于规则的地区架构开展讨论协调，支持东盟推行《东盟宪章》和《东南亚友好合作条约》、《东亚峰会互利关系原则宣言》（“巴厘原则”）等其他东盟相关法律文书中规定的准则和原则，推动建立更加基于规则的区域架构；

7.1.2 通过包括有效落实《2013—2017 年 10+3 合作工作计划》等，继续支持以东盟—中日韩合作作为主渠道，以东盟作为主要驱动力，实现建立东亚共同体的长远目标；

7.1.3 密切合作，以东盟为驱动力，加强东亚峰会“领导人引领的战略论坛”地位，就共同关心的战略、政治和经济等广泛议题开展对话合作，以促进地区和平、稳定和经济繁荣；

7.1.4 通过东亚论坛、东亚思想库网络、中国—东盟思想库网络、东盟东亚经济研究中心及其他机制，推进东亚共同利益，应对共同挑战。

7.2 推进温和运动

7.2.1 支持《关于全球温和运动的兰卡威宣言》的原则，促进和平与安全，坚持法治，推动可持续、包容性发展、均衡增长和社会和谐；

7.2.2 鼓励不同信仰、不同文明之间的对话，通过“全球温和运动”及将温和主义作为全面抗击极端主义和暴力行为的一项核心价值等倡议，进一步在全球和地区层面促进包容和理解。

7.3 跨区域合作

7.3.1 继续在亚太经合组织及亚欧会议中保持合作；

7.3.2 积极推动亚洲合作对话进程；

7.3.3 加强在二十国集团相关事务中的合作；

7.3.4 进一步促进在 77 国集团加中国等南南合作框架下，以及东亚—拉美论坛、亚非会议和亚非新型战略伙伴关系等其他跨区域框架下的对话及机制建设。

7.4 在联合国的合作

7.4.1 继续就联合国改革、影响国际和平与安全的事务、反恐、气候变化和发展议程等共同感兴趣和关心的问题在联合国加强合作；

7.4.2 加强中国和东盟国家各自常驻联合国代表之间的密切沟通和协调。

7.5 在其他国际组织中的合作

7.5.1 推进世界贸易组织事务合作，包括但不限于确保全面平衡落实“巴厘一揽子协定”的所有内容，制订“后巴厘工作计划”，以全面完成多哈发展议程，使多边贸易体系更加符合发展中和最不发达国家的优先需求。

8. 东盟机制建设

8.1 支持东盟落实好东盟秘书处和其他东盟机构及部门的能力建设措施，特别是在组织发展和项目管理方面，以加强对所有以东盟为中心的机构的支持。

9. 落实安排

9.1 本《行动计划》的落实将由中国和东盟成员国通过中国—东盟合作基金和其他资金等提供适当资金支持；

9.2 中国和东盟有关部门和机构将共同制定具体的工作方案和项目，落实本《行动计划》提出的各项行动和措施；

9.3 《行动计划》的评估将由相关中国—东盟各领域部长级会议、中国—东盟高官磋商、中国—东盟联合合作委员会等合适机制执行。该《行动计划》落实进展报告每年将由中国—东盟外长会向中国—东盟领导人会议提交。

大陆架界限委员会的工作进展主席的说明

（大陆架界限委员会，CLCS/93，2016 年 2 月 1 日至 3 月 18 日）

摘要: 本说明介绍了大陆架界限委员会及其各小组委员会在第四十届会议期间开展的工作，其中特别概述了在审议下列划界案方面取得的进展：俄罗斯联邦提交的关于北冰洋的划界案（部分修订的划界案）；巴西提交的关于巴西南部区域的划界案（部分修订的划界案）；乌拉圭提交的划界案；库克群岛提交的关于马尼希基海台的划界案；阿根廷提交的划界案；冰岛提交的关于埃吉尔海盆区和雷克雅内斯海脊西部和南部的划界案；挪威提交的关于布韦岛和毛德皇后地的划界案；南非提交的关于南非共和国领土大陆的划界案；密克罗尼西亚联邦、巴布亚新几内亚和所罗门群岛联合提交的关于翁通爪哇海台的划界案；法国和南非联合提交的关于克罗泽群岛和爱德华王子群岛地区的划界案；肯尼亚提交的划界案；毛里求斯提交的关于罗德里格斯岛区域的划界案；尼日利亚提交的划界案；以及塞舌尔提交的关于北部海台区的划界案。此外，本说明还介绍了委员会在届会期间处理的其他问题。

1. 大陆架界限委员会根据其第三十八届会议通过（见 CLCS/90，第 100 段）并经大会第 70/235 号决议（第 94 段）核可的决定，于 2016 年 2 月 1 日至 3 月 18 日在联合国总部举行了第四十届会议。本届会议的全体会议部分于 2 月 8 日至 12 日和 3 月 7 日至 11 日举行。本届会议的其他部分用于在秘书处法律事务厅海洋事务和海洋法司（海法司）地理信息系统实验室对划界案进行技术审查。

2. 委员会下列成员出席了会议：默罕默德•阿尔沙德、劳伦斯•福拉吉米•阿沃西卡、加洛•卡雷拉、弗朗西斯•查尔斯、伊万•格卢莫夫、理查德•托马斯•霍沃斯、马丁•旺•海尼森、埃马纽埃尔•卡尔恩吉、吕文正、马兹兰•本•马东、埃斯特瓦奥•斯特凡•马含加、海尔•阿尔伯托•里瓦斯•马克斯、西蒙•恩朱古纳、伊萨克•奥乌苏•奥杜罗、朴永安、卡洛斯•马塞洛•帕泰利尼、拉席克•拉温德拉、沃尔特•雷斯特、浦边彻郎和希蒙•乌兹诺维茨。由于健康原因，阿沃西卡先生、格卢莫夫先生和马克斯先生只出席了部分会议。浦边先生出席了 2 月 1 日至 3 月 11 日的会议，马含加先生出席了 2 月 1 日至 3 月 15 日的会议，雷斯特先生没有出席 2016 年 2 月 22 日的会议。

3. 委员会收到了下列文件和来文：

(a) 临时议程 (CLCS/L.40)；

(b) 主席关于委员会第三十九届会议工作进展的说明 (CLCS/91)；

(c) 沿海国根据《联合国海洋法公约》第七十六条第 8 款提交的划界案；[1]

(d)《联合国海洋法公约》第二十五次缔约国会议续会的报告 (SPLOS/293)；

(e) 题为“海洋和海洋法”的大会第 70/235 号决议；

(f)《公约》缔约国和联合国会员国的有关来文，包括阿根廷 (2016 年 2 月 2 日)、孟加拉国 (2015 年 10 月 22 日)、加拿大 (2015 年 12 月 16 日)、刚果民主共和国 (2015 年 10 月 7 日)、丹麦 (2015 年 10 月 7 日)、印度 (2015 年 10 月 30 日)、肯尼亚 (2015 年 10 月 21 日)、毛里求斯 (2015 年 10 月 8 日和 12 月 24 日)、俄罗斯联邦 (2016 年 1 月 27 日和 2 月 1 日)、美利坚合众国 (2015 年 10 月 30 日，两份) 和乌拉圭 (2015 年 8 月 20 日) 的来文。

(g) 内纳德莱德尔先生给委员会主席的信 (2015 年 9 月 22 日)。

项目 1 第四十届会议开幕

4. 委员会主席阿沃西卡先生宣布委员会第四十届会议全体会议开幕。

主管法律事务副秘书长的发言

5. 主管法律事务副秘书长兼法律顾问发言。他特别提请委员会成员注意大会最近通过的第 70/235 号决议的有关方面，该决议内容涉及委员会成员的服务条件，其中大会请秘书长作出具有成本效益、可移动、非结构性的改进，解决委员会当下对工作空间的一些需求。他还回顾，2016 年 1 月 15 日举行的《联合国海洋法公约》第二十五次缔约国会议续会由于缺乏提名，未能填补委员会的一个空缺。[2] 因此，补选将列入 2016 年 6 月举行的第二十六次缔约国会议的临时议程。他注意到各国非常重视委员会的工作，并鼓励委员会及其各小组委员会作出一切努力，完成过去四年进行的划界案审查，并核准委员会目前已收到的建议草稿。

项目 2 通过议程

6. 委员会审议了临时议程 (CLCS/L.40) 并通过了经修正的议程 (CLCS/92/Rev.1)。[3]

项目 3 工作安排

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1 向委员会提交的划界案的完整清单，见 www.un.org/Depts/los/clcs_new/commission_submissions.htm。

2 见 CLCS/90，脚注 1。

3 主席邀请提交国在第四十届会议上介绍其向委员会提交的划界案，下列国家对此表示，它们更希望在今后届会上作出介绍，其理解是推迟介绍不会影响其划界案的排序：巴哈马、加拿大、丹麦、法国、索马里和斯里兰卡。

7. 委员会核准了主席概述的工作方案和审议时间表。

项目 4 委员会的工作量

委员会成员的服务条件

8. 海洋事务和海洋法司司长向委员会详细通报了大会对于有关委员会的问题的审议结果。委员会表示注意到这一信息，并特别赞赏地注意到大会在第 70/235 号决议第 91-93 段中通过的措施，这些措施旨在解决委员会成员服务条件的某些方面的问题。委员会还重申了其在以前各届会议期间表达的有关工作量问题的意见 (见 CLCS/83，第 8-12 段；CLCS/85，第 9-13 段；CLCS/88，第 8-13 段；以及 CLSC/90，第 8-11 段)。

项目 5 审议巴西提交的关于巴西南部区域的划界案 [4]

小组委员会的报告

9. 小组委员会主席卡雷拉先生报告了小组委员会在第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 22 日至 26 日举行了会议。在此期间，小组委员会开始对该划界案进行主要的科学和技术审查。[5]

10. 他告诉委员会说，小组委员会已向巴西代表团发出一项澄清请求。他还指出，由于巴西按照委员会《议事规则》附件二的规定将划界案的第二和第三部分归类为机密材料，小组委员会成员将无法在闭会期间继续审查该划界案。

11. 他还说，小组委员会决定在第四十一届会议期间继续审议该划界案。

12. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 8 月 22 日至 26 日举行。

项目 6 审议乌拉圭提交的划界案 [6]

审议建议草稿

13. 2016 年 2 月 8 日，小组委员会主席查尔斯先生与小组委员会其他成员一道，向委员会介绍了关于乌拉圭于 2009 年 4 月 7 日提交的划界案的建议草稿。

14. 2016 年 2 月 9 日，乌拉圭代表团参加了委员会的审议，按照委员会《议事规则》附件三第六节第 15.1 段之二的规定作了介绍。作介绍的是乌拉圭外交部国际法司司长卡洛斯马塔普拉特斯。乌拉圭代表团成员中还有多名科学、法律和技术顾问。

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4 划界案于 2015 年 4 月 10 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_bra_rev.htm。

5 见《议事规则》附件三第四节 (CLCS/40/Rev.1)。

6 划界案于 2009 年 4 月 7 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_ury_21_2009.htm。

15. 乌拉圭代表团在介绍中对小组委员会成员所做的工作表示赞赏。乌拉圭代表团除了阐述划界案的实质性要点之外，还表示赞同小组委员会审查划界案后得出的意见和一般性结论。

16. 委员会随后转入非公开审议。委员会考虑到乌拉圭代表团和小组委员会所作的介绍，开始审议建议草稿。为了让其成员有充足的时间审议划界案和建议草稿，委员会依照《议事规则》第 53 条第 1 款，决定将对建议草稿的进一步审议推迟到第四十一届会议。

项目 7 审议库克群岛提交的关于马尼希基海台的划界案[7]

审议建议草稿

17. 委员会继续审议小组委员会拟订的建议草稿 (见 CLCS/90，第 31-34 段)。委员会决定在第四十一届会议上继续进一步审议该建议草稿。

项目 8 审议阿根廷提交的划界案[8]

审议建议草稿

18. 委员会继续审议小组委员会在第三十八届会议上向委员会介绍的建议草稿 (见 CLCS/90，第 38-41 段)。

核准建议

19. 2016 年 3 月 11 日，委员会未经表决通过了经修正的“大陆架界限委员会关于阿根廷于 2009 年 4 月 21 日提交的划界案的建议”。委员会的一名成员并不反对未经表决核准此项建议，不过也表示，该沿海国虽然在确定大陆坡脚时可以使用与一般规则相反的证据，但它也有义务表明，在这种情况下，无法或不能根据一般规则可靠地确定大陆坡脚的位置。他认为，这一点并未得到充分证明。[9]

20. 根据《公约》附件二第六条第 3 款，已于 2016 年 3 月 28 日以书面形式将建议 (包括其摘要) 递交该沿海国和秘书长。

项目 9 审议冰岛提交的关于埃吉尔海盆区和雷克雅内斯海脊西部和南部的划界案[10]

审议建议草稿

21. 委员会继续审议小组委员会在第三十四届会议上向委员会介绍的建议草

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7 划界案于 2009 年 4 月 16 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_cok_23_2009.htm。

8 划界案于 2009 年 4 月 21 日提交；见 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm。

9 其他两名成员随后表示赞同这一意见。

10 划界案于 2009 年 4 月 29 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_isl_27_2009.htm。

稿 (见 CLCS/83，第 64-66 段)。委员会广泛审议之后，委员会主席提出一项提议，这项提议为审议取得协商一致的结果提供了基础。

核准建议

22. 2016 年 3 月 10 日，委员会未经表决核准了经修正的“大陆架界限委员会关于冰岛于 2009 年 4 月 29 日提交的关于埃吉尔海盆区和雷克雅内斯海脊西部和南部的划界案的建议”。

23. 所有成员都对主席的建设性提议表示赞赏，这一提议推动建议获核准。然而，在这一过程中，委员会的某些成员也表示，鉴于小组委员会在拟定上述建议时花费了大量时间，这些建议原本不能按小组委员会提出的样式获得核准，令人遗憾。

24. 根据《公约》附件二第六条第 3 款，已于 2016 年 3 月 21 日以书面形式将建议 (包括其摘要) 递交该沿海国和秘书长。

项目 10 审议挪威提交的关于布韦岛和毛德皇后地的划界案 [11]

小组委员会的报告

25. 小组委员会主席霍沃斯先生报告了小组委员会在闭会期间和第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 1 日至 5 日举行了会议。在此期间，小组委员会继续对该划界案进行主要的科学和技术审查。[12]

26. 他告诉委员会说，挪威代表团已应小组委员会在届会期间提出的澄清请求，向小组委员会递交了数据和资料。

27. 小组委员会已决定由其成员在闭会期间继续研究该划界案，而小组委员会也会在第四十一届会议期间继续审议该划界案，包括与挪威代表团举行会议。

28. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 7 月 11 日至 15 日和 8 月 8 日至 12 日举行。

项目 11 审议南非提交的关于南非共和国领土大陆的划界案 [13]

小组委员会的报告

29. 小组委员会主席霍沃斯先生报告了小组委员会在闭会期间和第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 29 日至 3 月 4 日和 3 月 14 日至 18 日举行了会议。在此期间，小组委员会继续对该划界案进行主要的科学和技术审查。[12]

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11 划界案于 2009 年 5 月 4 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_nor_30_2009.htm。

12 见脚注 5。

13 划界案于 2009 年 5 月 5 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_zaf_31_2009.htm。

30. 他告诉委员会说，小组委员会与南非代表团举行了三次会议，在此期间，小组委员会就若干实质性问题表明了看法。南非代表团还对小组委员会在届会期间提出的问题和澄清请求作了回复。

31. 他还说，小组委员会已决定由其成员在闭会期间继续研究该划界案，而小组委员会也会在第四十一届会议期间继续审议该划界案，包括与南非代表团举行会议。

32. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 7 月 25 日至 8 月 5 日举行。

项目 12 审议密克罗尼西亚联邦、巴布亚新几内亚和所罗门群岛提交的关于翁通爪哇海台的联合划界案[14]

小组委员会的报告

33. 小组委员会主席雷斯特先生报告了小组委员会在第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 29 日至 3 月 4 日和 3 月 14 日至 18 日举行了会议。在此期间，小组委员会继续对联合划界案进行主要的科学和技术审查。[12] 小组委员会没有与联合代表团举行会议。

34. 他告诉委员会说，小组委员会遗憾地注意到，联合代表团没有按照之前商定的那样递交小组委员会在第三十九届会议上要求提供的材料。小组委员会回顾，联合代表团曾宣布它还会在第四十一届会议前提交新的测深数据，以进一步支持该联合划界案的某些方面。小组委员会主席还说，小组委员会表示关切的是，进一步拖延提供小组委员会要求的材料以及拖延提供新的测深数据，可能会对委员会成员任期在 2017 年 6 月届满前完成对该联合划界案的审议造成负面影响。

35. 他指出，小组委员会已以书面形式向联合代表团说明了其审议该联合划界案的状况和预期进展。

36. 他还说，小组委员会决定由其成员在闭会期间继续研究该联合划界案，并将在第四十一届会议期间继续审议该划界案，以便根据《议事规则》附件三第四节第 10.3 段向联合代表团介绍审查该划界案之后形成的意见和一般性结论。联合代表团将有机会按照《议事规则》附件三第四节第 10.4 段作出答复。另外，他还说，小组委员会打算在同届会议上最后拟定完成建议草稿，以提交委员会审议。

37. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 7 月 11 日至 15 日和 7 月 25 日至 29 日举行。

项目 13 审议法国和南非提交的关于克罗泽群岛和爱德华王子群岛地区

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14 划界案于 2009 年 5 月 5 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_fmpgsb_32_2009.htm。

的联合划界案[15]

小组委员会的报告

38. 小组委员会主席恩朱古纳先生报告了小组委员会在闭会期间和第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 15 日至 26 日举行了会议。在此期间，小组委员会继续对该划界案进行主要的科学和技术审查。[12] 小组委员会没有和联合代表团举行会议。

39. 他告诉委员会说，小组委员会审查了联合代表团应小组委员会在第三十九届会议期间提出的请求提交的数据和资料。经过全面审查后，小组委员会已经以书面形式向联合代表团说明了其对收到的数据和资料的意见以及对审议联合划界案的状况和预期进展的一般意见，并提出了有关进一步澄清的请求。

40. 他还说，小组委员会已决定由其成员在闭会期间继续研究该划界案，而小组委员会也会在第四十一届会议期间继续审议该划界案，包括与联合代表团举行会议。

41. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 8 月 1 日至 5 日和 8 月 22 日至 26 日举行。

项目 14 审议肯尼亚提交的划界案[16]

小组委员会的报告

42. 小组委员会主席朴先生报告了小组委员会在闭会期间和第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 29 日至 3 月 4 日和 3 月 14 日至 18 日举行了会议。在此期间，小组委员会开始对该划界案进行主要的科学和技术审查。[12]

43. 他告诉委员会说，小组委员会向肯尼亚代表团递送了一份文函，其中提出了若干项请求，请其澄清对所有已提交地震数据和资料的分析。小组委员会审查了对该请求所作的答复以及第四十届会议期间收到的对第三十九届会议上所提进一步澄清请求的答复。

44. 他指出，小组委员会还递送了一份文函，表明了其对代表团就进一步澄清请求所作答复的意见，以及对《谅解声明》某些方面的适用的意见。

45. 他还说，小组委员会已决定由其成员在闭会期间继续审议划界案中未被提交国根据《议事规则》附件二第 2 段归类为机密的部分，而小组委员会也会在第四十一届会议期间继续审议该划界案，包括与代表团举行会议。

46. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 7

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15 划界案于 2009 年 5 月 6 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_frazaf_34_2009.htm。

16 划界案于 2009 年 5 月 6 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_ken_35_2009.htm。

月 25 日至 8 月 5 日举行。

项目 15 审议毛里求斯提交的关于罗德里格斯岛区域的划界案 [17]

小组委员会的报告

47. 小组委员会主席马东先生报告了小组委员会在第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 1 日至 5 日和 2 月 15 日至 19 日举行了会议。在此期间，小组委员会继续对该划界案进行主要的科学和技术审查。[12] 小组委员会没有与毛里求斯代表团举行会议。

48. 他回顾，委员会第三十九届会议期间，小组委员会根据《议事规则》附件三第四节第 10.3 段向毛里求斯代表团说明了审查该划界案之后形成的意见和一般性结论。小组委员会于闭会期间收到了毛里求斯代表团就小组委员会所作说明递交的来文。小组委员会审议了来文的内容并拟定了相应的答复，答复已递交该代表团。

49. 他告诉委员会说，按照在第三十九届会议期间与毛里求斯代表团商定的那样，[18] 小组委员会根据《议事规则》附件三第四节第 10.4 段正在等待对其说明所作的全面答复，答复将由毛里求斯代表团在 2016 年 5 月 31 日前以书面形式提供。根据毛里求斯代表团的请求，将在第四十一届会议期间举行一次会议，由其向小组委员会介绍答复。

50. 他表示，在审议这一答复后，小组委员将按商定的那样着手根据《议事规则》附件三第四节第 10.5 段拟定建议。

51. 他还说，小组委员会已决定在第四十一届会议期间继续审议该划界案，以便在同届会议上向委员会提出建议。

52. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 7 月 11 日至 15 日举行。

项目 16 审议尼日利亚提交的划界案 [19]

小组委员会的报告

53. 小组委员会主席马含加先生报告了小组委员会在闭会期间和第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 1 日至 5 日举行了会议。在此期间，小组委员会继续对该划界案进行主要的科学和技术审查。[12] 小组委员会没有与尼日利亚代表团举行会议。

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17 划界案于 2009 年 5 月 6 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_mus_36_2009.htm。

18 见 CLCS/91，第 35 段。

19 划界案于 2009 年 5 月 7 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_nga_38_2009.htm。

54. 他告诉委员会说，小组委员会着重审查了尼日利亚代表团对于第三十九届会议之后小组委员会提出的初步意见和请求的答复。小组委员会还拟定并向尼日利亚代表团递交了第二次澄清请求。

55. 他还说，小组委员会已决定由其成员在闭会期间继续研究该划界案，而小组委员会也会在第四十一届会议期间继续审议该划界案，包括与尼日利亚代表团举行会议。

56. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 8 月 8 日至 12 日举行。

项目 17 审议塞舌尔提交的关于北部海台区的划界案[20]

小组委员会的报告

57. 小组委员会主席雷斯特先生报告了小组委员会在第四十届会议期间的工作进展，他指出，小组委员会于 2016 年 2 月 15 日至 26 日举行了会议。在此期间，小组委员会根据《议事规则》附件三第三节对该划界案进行了初步审查。

58. 他告诉委员会说，小组委员会核实了划界案的格式和完整性，并进行了预备性分析，小组委员会的结论是基于现有数据不能确定是否已通过从属权利检验。因此，小组委员会向提交国发出了一份书面来文，请提交国作出澄清。

59. 小组委员会还认定，没有必要建议依照《议事规则》第 57 条征求专家意见，或依照《议事规则》第 56 条寻求相关国际组织的合作。小组委员会进一步认定，需要更多时间审查数据并拟定递交给委员会的建议。

60. 他还说，小组委员会已决定由其成员在闭会期间继续研究该划界案，而小组委员会也会在第四十一届会议期间继续审议该划界案，包括与代表团举行会议。

61. 委员会随后决定，小组委员会在第四十一届会议期间的会议于 2016 年 8 月 22 日至 26 日举行。

项目 18 审议根据《公约》第七十六条第 8 款提交的其他划界案：介绍俄罗斯联邦提交的部分经修订的北冰洋划界案[21]

62. 2016 年 2 月 9 日，俄罗斯联邦代表团团长、自然资源和环境部长谢尔盖东斯科伊介绍了俄罗斯联邦向委员会提交的部分经修订的划界案。俄罗斯代表团中有多名顾问。

63. 除了阐述该划界案的实质性要点之外，东斯科伊先生还告诉委员会说，委员会现任成员之一格卢莫夫先生提供了科学和技术咨询意见，向俄罗斯联邦提供

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20 划界案于 2009 年 5 月 7 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_syc_39_2009.htm。另见本报告第 78 至 79 段。

21 划界案于 2015 年 8 月 3 日提交；见 www.un.org/Depts/los/clcs_new/submissions_files/submission_rus_rev1.htm。

了帮助。

64. 东斯科伊先生详细阐述了划界案所涉区域内的海洋划界问题。他特别回顾了丹麦 2015 年 10 月 7 日的普通照会、美利坚合众国 2015 年 10 月 30 日的普通照会和加拿大 2015 年 11 月 30 日的普通照会，并指出，这三个国家并不反对委员会审议该划界案。

65. 东斯科伊先生再次提出了他在 2016 年 2 月 1 日的信中所提的请求，也就是可否在第四十届会议工作方案中列入俄罗斯联邦代表团与小组委员会的会议，以初步介绍该划界案。

66. 委员会随后转入非公开会议。委员会回顾了其在第二十六届会议上所作的决定，据此，经修订的划界案将优先予以审议而不考虑排列顺序 (CLCS/68，第 57 段)，委员会将该划界案的审查工作分派给为审议俄罗斯联邦 2001 年 12 月 20 日提交的划界案而设立的小组委员会。委员会指出，根据委员会《议事规则》第 42 条第 2 款，该小组委员会现任成员为劳伦斯福拉吉米阿沃西卡、加洛卡雷拉 (主席)、马兹兰•本•马东、海尔•阿尔伯托•里瓦斯•马克斯、朴永安（副主席）、沃尔特•雷斯特（副主席）、希蒙 •乌兹诺维奇 (见 CLCS/80，第 33 和 34 段)。

67. 委员会随后处理了俄罗斯联邦要求其代表团与小组委员会举行会议以介绍划界案的请求。委员会的结论是，俄罗斯代表团晚一些时候进行介绍会更有成效，届时小组委员会将对该划界案进行实质性审查。

68. 委员会决定，小组委员会于第四十一届会议期间开始工作，时间是 2016 年 8 月 8 日至 12 日。

项目 19 保密问题委员会主席的报告

69. 保密问题委员会主席朴先生报告说，未出现属于该委员会职权范围的问题，因此在第四十届会议期间不需要该委员会举行会议。

项目 20 编辑委员会主席的报告

70. 编辑委员会主席霍沃斯先生报告说，第四十届会议期间不需要该委员会举行会议。他还告诉委员会说，编辑委员会收到了对委员会的建议所用模板提出的补充意见，并将根据这些意见制作新版本的模板。主席鼓励委员会成员结合正在拟定的进一步建议，继续审查该模板，并向编辑委员会主席提交任何补充意见或改进建议。

项目 21 科学和技术咨询委员会主席的报告

71. 科学和技术咨询委员会主席浦边先生报告说，由于时间有限，第四十届会议期间该委员会未举行会议，而且未出现属于该委员会职权范围的问题。

项目 22 培训委员会主席的报告和其他培训问题

72. 培训委员会主席卡雷拉先生报告说，在报告所述期间，不需要培训委员会举行会议。

73. 他还回顾，2015 年 9 月 21 日至 25 日在美利坚合众国科罗拉多州布雷肯里奇举办了为期五天的培训课程，培训内容涉及拟定提交给大陆架界限委员会的划界案，课程组织者邀请了沿海发展中国家的一些专家参加培训 (CLCS/90，第 84 段)。这项培训是与海法司合作进行的，讲授者中有委员会的一些现任和前任成员。

74. 在这方面，委员会提到，培训手册[22] 编写于多年以前，手册的某些部分应当更新。秘书处表示随时准备在这方面协助委员会，但也指出海法司目前的工作量导致其时间有限。

项目 23 其他事项

设立小组委员会

75. 委员会根据其工作进展，决定着手新设一个小组委员会。

76. 依照惯例，委员会审查了按收件顺序排列的下一批划界案，即缅甸提交的划界案、也门提交的关于索科垂岛东南的划界案、大不列颠及北爱尔兰联合王国提交的关于哈顿 - 罗科尔区的划界案、爱尔兰提交的关于哈顿 - 罗科尔区的划界案、斐济提交的划界案、马来西亚和越南联合提交的关于南海南部的划界案、以及越南提交的关于北部区域的划界案。

77. 委员会注意到各国没有递交新的来文，这表明不存在可以令这些划界案得到审议的事态发展。委员会决定进一步推迟为审查上述任何划界案而设立小组委员会。委员会还决定，由于这些划界案按收件顺序在审议工作方面仍排在下一个，委员会将在设立下一个小组委员会时再审查相关情况 (见 CLCS/76，第 22 至 24 段)。

78. 委员会随后根据其《议事规则》(特别是第 42 条第 1 和第 2 款) 及其惯例，着手设立一个小组委员会，以审议塞舌尔提交的关于北部海台区的部分划界案。

79. 委员会任命查尔斯先生、格卢莫夫先生、卡尔恩吉先生、吕先生、拉温德拉先生、雷斯特先生和乌兹诺维奇先生为小组委员会成员。小组委员会举行会议并选举雷斯特先生为主席，吕先生和拉温德拉先生为副主席 (另见第 57-61 段)。

出席情况

80. 委员会讨论了成员出席会议的问题，并再次强调委员会全体成员按时全程出席委员会所有会议非常重要。主席重申，他将视需要提请各常驻代表团注意其政府提名的委员会成员缺席会议的问题，以及缺席会议对委员会工作造成的影响。

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22 《划定 200 海里以外大陆架外部界限和编写提交大陆架界限委员会的划界案的培训手册》(联合国出版物，出售品编号 E.06.V.4)。

科学和技术性问题

81. 委员会再次审议了可否在今后一届会议上划定时间在内部讨论科学和技术性质的议题。考虑到第四十届的巨大工作量，委员会决定可在工作量允许时于今后的届会上进行此类内部讨论。

小组委员会向委员会全体会议移交在审查划界案过程中遇到的一般性问题

82. 艾尔沙德先生和阿沃西卡先生向委员会提交了一项提议，经过修正的提议现在将作为关于这一事项的内部导则。

小组委员会的程序和做法

83. 第三十七届会议上设立的不限成员名额工作组 (见 CLCS/88，第 68 段) 主席卡雷拉先生编写了一份描述各小组委员会在审查划界案时遵循的程序和做法的标准介绍。委员会表示注意到供小组委员会在与提交国的代表团举行初步会议期间使用的该介绍。

供划界案使用的地理信息管理软件

84. 委员会再次强调各提交国必须确保其划界案中使用地理信息管理软件的部分与委员会使用的软件版本保持兼容。

85. 委员会一名成员指出，地理信息系统实验室中使用的硬件和软件不再符合最新的标准，不足以处理某些划界案中所载的大量数据。委员会秘书告诉委员会说，硬件和软件升级定期进行，计划周期之外的任何升级可能会对所涉方案预算造成相当大的影响。因此，委员会如果希望在这方面提出任何要求，则需要予以充分证明。

委员会今后的届会

86. 委员会回顾了其作出的于 2016 年 7 月 11 日至 8 月 26 日举行第四十一届会议的决定 (见 CLCS/90，第 100(b) 段)。该届会议的全体会议经大会第 70/235 号决议第 94 段核可，将于 2016 年 7 月 18 日至 22 日和 2016 年 8 月 15 日至 19 日举行。

87. 第四十二届会议将于 2016 年 10 月 17 日至 12 月 2 日举行，但不会举行全体会议。

88. 委员会指出，委员会在 2017 年举行的第四十三届会议期间将需要更多的全体会议时间，以便在 2017 年 6 月委员会现任成员任期届满前审议并核准建议草稿。因此，委员会决定，第四十三届会议期间，即 2017 年 2 月 13 日至 17 日和 3 月 6 日至 17 日期间，将举行三周的全体会议，但须经大会核准。有鉴于此，为了不超过分配的全体会议周数，2017 年 7 月至 8 月的委员会第四十四届会议期间只会举行一周全体会议。

信托基金

89. 秘书处向委员会介绍了为来自发展中国家的委员会成员支付参加委员会

会议的费用而设立的自愿信托基金的状况。第四十届会议有八名委员会成员获得资助，金额估计为 170000 美元。截至 2016 年 3 月 18 日，信托基金约有余额 350000 美元。据估计，同样将于 2016 年举行的第四十一届和第四十二届会议的所需资金分别为 150000 美元至 170000 美元。因此，秘书处表示的关切是，没有进一步捐款，信托基金将在 2016 年枯竭。委员会还对信托基金余额偏低表示关切，因为这会很快对委员会的整体工作产生不利影响。因此，委员会强调亟需向信托基金捐款，以使委员会能够在 2016 年以后继续运作。

90. 秘书处还概述了为帮助发展中国家、特别是最不发达国家和小岛屿发展中国家编写提交给委员会的划界案和遵守《公约》第七十六条的规定而设立的自愿信托基金的情况。委员会获悉，截至 2016 年 2 月 10 日，信托基金的余额为 1263400 美元，目前海法司尚未收到援助申请。

91. 秘书处提请委员会注意大会第 70/235 号决议第 37 和 38 段，以及针对为协助编写划界案而设立的信托基金的职权范围、导则和规则所作的有关修订 (见第 70/235 号决议，附件)。在这方面，秘书处指出，现在可以向信托基金请求援助，以协助发展中国家支付在委员会审核其划界案时应委员会邀请与委员会举行会议的有关差旅和每日生活津贴费用。秘书处特别回顾，根据经修订的信托基金职权范围，在委员会或相关小组委员会已邀请某一代表团出席其会议或届会时，可为该代表团至多三名成员提供航空旅费和每日生活津贴资助，但正在审议三个或更多国家提交的联合划界案的情况除外，此种情况下联合代表团中至多可有总共六名成员获得资助。

92. 鉴于来自发展中国家的代表团现在可以请求该信托基金提供资助，秘书处强调必须详细而及时地规划发展中国家代表团与委员会或其小组委员会之间的任何必要会议，以便为申请和办理申请留出足够的时间，并对信托基金进行负责任的管理。

鸣谢

93. 委员会注意到海法司为其提供的高水准秘书处服务，并为此表示赞赏和感谢。

94. 委员会感谢秘书处其他成员为委员会提供协助，并特别鸣谢联合国正式语文口译工作的高度专业水准以及会议干事提供的协助。

《中国海洋法学评论》稿约

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《中国海洋法学评论》编辑部

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