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中国海洋法学评论

2008 年卷第 2 期　总第 8 期

CHINA OCEANS LAW REVIEW

Volume 2008 Number 2

卷首语

本期《中国海洋法学评论》刊发了海洋安全、海洋划界、海洋环境和海商法等 4 个领域的专论和述评。

为应对大规模杀伤性武器扩散对当今世界和平与安全的威胁，美国倡导成立了“防扩散安全倡议”这一独特的国际机制，但其赖以存在的相关法律文件却对现代国际法提出了挑战。杨泽伟教授在《防扩散安全倡议：国际法的挑战与影响》一文中回顾了该倡议的缘起和实践，着重缕析了其对无害通过权、公海航行自由等国际海洋法制度的影响，并就中国加入该倡议的利弊进行了分析。

海盗和海上武装劫持猖獗是一个由来已久的国际问题，而晚近兴起的恐怖行为则成为影响全球海上安全的又一因素。近年来，关于海上通道安全问题的研究日渐成为众多学科的前沿领域。杨帆先生对全球海盗和武装劫船犯罪这一传统安全问题展开深入探讨，并认为航运、执法方面的举措难以从根本上消除海盗和武装劫船犯罪，提高发展中国家沿海居民的生活水平和改善沿海地区的治理状况才是治本之道。史克功先生从海上保安角度出发，论述了美国、日本等国家为遏制恐怖主义而推行的海上安全战略，以及以联合国为首的国际社会在加强海上安全方面的多边合作机制。吴春庆先生从整个亚太地区探讨了构建亚太地区海上通道安全合作的法律框架，并展望了该法律框架的前景和中国在其中的角色。

2008 年 6 月 18 日，中日两国政府通过平等协商，就东海问题达成原则共识，并就共同开发问题达成谅解。结合谅解的具体内容，龚迎春女士探讨了在尚未划界的专属经济区和大陆架主张重叠海域内，当事国在最终解决海域划界之前，在临时设定的共同开发区域内的主权权利和管辖权之间的冲突及其解决模式。就在中日两国政府就东海问题展开密切磋商之际，日本于 2007 年 4 月通过了《海洋构筑物安全水域设定法》。作为日本海洋战略的一部分，这部法律将“确保海洋构筑物的安全及船舶在周边海域的航行安全”，并对中日东海问题产生影响。王泽林先生对该部法律的适用问题作出了评析。

世界能源危机凸显，催生了以风力为代表的绿色能源革命的兴起，并对海洋法提出了新的研究课题。在《从国际海洋法的视角看海上风力发电的环境影响》一文中，王泽林先生详细论述了海上风力发电对海洋环境、海洋航行自由、海洋渔业和海洋生物资源养护等方面法律制度的影响。

针对海商法领域的热点和焦点问题，本期评论刊发了 3 篇专论。引航是一项重要的航运业务，令人遗憾的是，因引航员过失而发生引航事故的责任认定和归责却一直存在分歧。针对我国法律和实践在该问题上的空白，刘孜文考察了英、美等国的法律规定，并结合民法基本原理对引航的民事责任制度展开了深度阐述。此外，考虑到正在起草和审议中的《UNCITRAL 运输法草案》可能对海商法乃至整个运输法带来重大制度变革，对其相关规定展开系统研究尤为重要。有鉴于此，徐英结合《海牙规则》、《海牙—维斯比规则》和《汉堡规则》的相关规定，对《UNCITRAL 运输法草案》下发货人的法律地位进行了比较研究。针对《UNCITRAL 运输法草案》创设的纸面运输单证和电子运输单证相互平行的独特提单体系，周虹女士分析了 UNITRAL 草案模式下电子提单的特点与不足，并提出了完善的建议。相信 3 位的研究心得会给读者提供新的视角和信息。

最后，本期评论还刊载了 2 篇关于海洋法方面的动态和信息的文章。张相君博士比较分析了国际海洋法法庭处理的关于《联合国海洋法公约》第 292 条的 2 个案件，充分阐释了《联合国海洋法公约》平衡沿海国和渔业国利益的机制。此外，作为前述《日本〈海洋构筑物安全水域设定法〉评析》一文的背景，金永明博士将《海洋构筑物安全水域设定法》翻译为中文，为我国的海洋法学人提供了一份宝贵的研究资料，也有利于我们更好地把握日本在海洋方面的立法动态。

《中国海洋法学评论》第八期的顺利出刊，已经将原本延迟半年的出刊时间调整过来。希望今后在广大读者与作者们的支持之下，我们能够每一期都准时出刊，为中国海洋法学的研究稍尽绵薄之力！

编辑部　谨识

EDITOR'S NOTE

This Issue of *China Oceans Law Review* includes treatises and commentaries on marine security, maritime delimitation, marine environment and maritime law.

In response to the threat imposed by proliferation of weapons of mass destruction to world peace and security, the US advocates the establishment of a unique international mechanism called "Proliferation Security Initiative" (PSI). However, the PSI's legal basis as reflected in the relevant legal instruments has posed challenges to contemporary international law. Prof. YANG Zewei, in his paper entitled "Proliferation Security Initiative: Challenges to and Implications on International Laws", reviews the origins and practice of PSI with a focus on PSI's influence on many regimes under international oceans law such as the right of innocent passage and freedom of navigation on the high seas, and finally analyzes the benefits and adverse effects of China's participation in the PSI.

Piracy and armed robbery against ships have long been a problem in the international community. And the recent terrorism has added a factor adversely affecting the global security at sea. In recent years, the research on the sea lane security has become an issue at the forefront of various research disciplines. Hence, Mr. YANG Fan offers an in-depth discussion on the traditional security issue of global piracy and armed robbery against ships, and contends that measures in navigation and law enforcement are unlikely to completely eliminate piracy and armed robbery, and that the more permanent solution lies in improving the living standards of coastal residents in developing countries and enhancing governance in those coastal regions. From the perspective of marine security, Mr. SHI Kegong explores the maritime security strategies adopted by US, Japan and other countries to combat terrorism, and the multilateral cooperation mechanism established by the UN-led international community to strengthen maritime security. Mr. WU Chunqing analyzes the construction of a legal framework for cooperation on sea lane security in the Asia Pacific region from the region as a whole, and outlines the prospects for such a framework and China's roles to play therein.

On June 18, 2008, the Chinese and Japanese governments, through equitable

negotiations, reached a principled consensus regarding the East China Sea (ECS) issue and issued a memorandum of understanding on the joint development of the ECS. Based on the details of the memorandum, Ms. GONG Yingchun explores the disputes over sovereign rights and jurisdiction in joint development zones established in overlapping waters where exclusive economic zones and continental shelves have not been delimited as provisional arrangement spending agreements on final delimitations, and solutions to such disputes. In April 2007, when the Chinese and Japanese governments were conducting close negotiations in respect of the ECS issue, the Act on the Establishment of Safety Zones around Marine Structures was adopted by Japan. This Act, constituting a part of Japanese ocean strategies, will "ensure the safety of marine structures as well as of the navigation in the waters surrounding these structures" and exert impacts on the Sino-Japanese ECS issue. Thus Mr. WANG Zelin offers an analysis of the application of this Act.

The world energy crisis leads to a green energy revolution represented by wind power, which provides new research topics for practitioners in the field of the law of the sea. In the article "A Study of the Impact of Offshore Wind Power Generation on the Environment from the Perspective of the International Law of the Sea", Mr. WANG Zelin elaborates the impact of offshore wind power generation on the marine environment, freedom of navigation, fisheries, marine living resources conservation and other legal regimes.

This Issue selected three treatises on some hot and key issues in the maritime law. Pilotage is an important part of the shipping industry. Unfortunately, inconsistencies abound in the identification and attribution of civil liability after the occurrence of pilotage accidents resulting from the pilot's negligence. As Chinese laws contain no provisions on this matter and there is no actual settlement of such matter in practice in China, LIU Ziwen offers an in-depth description of the civil liability system in pilotage by analyzing the laws and regulations of UK, US, and other countries together with the basic principles of civil law. In addition, considering that the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] (hereinafter "the UNCITRAL Draft"), which is being drafted and reviewed, has the potential to bring significant changes to the regimes under the maritime law and even the transport law, it become especially important to study the relevant provisions of the UNCITRAL Draft in a systematic way. As such, XU Ying makes a comparative study of the legal status of the consignor under the UNCITRAL Draft, taking into account the relevant provisions in the Hague Rules, Hague-Visby Rules and Hamburg Rules. The UNCITRAL Draft has

created a unique bill of lading (B/L) system featuring a parallelism between paper and electronic transport documents. With regards to this system, Ms. ZHOU Hong presents an analysis of the characteristics and defects of electronic B/Ls under the Draft as well as some suggestions for further improvement. It is believed that the views of the three authors above will bring new perspective and information to the readers.

This Issue ends with two articles regarding recent development and information of the law of the sea. Ph.D. ZHANG Xiangjun compares and analyzes two cases entertained by the International Tribunal for the Law of the Sea in connection with Article 292 of the United Nations Convention on the Law of the Sea (UNCLOS), and elucidates the mechanism for the balance of interests between coastal and fishing States under the UNCLOS. Additionally, Ph.D. JIN Yongming translated the Act on the Establishment of Safety Zones around Marine Structures into Chinese, which provides background for the aforementioned article entitled "The Japanese Act on the Establishment of Safety Zones around Marine Structures: A Commentary". Being a valuable research material for Chinese scholars in the field of the law of the sea, this translation facilitates our understanding of the Japanese legislative moves towards the ocean.

The publication of the 8th issue of *China Oceans Law Review* has made the originally delayed publication (which is delayed for half a year) back into order. With the support of our readers and authors, we hope that we can publish each issue in time, and make our contribution to Chinese research on the law of the sea.

COLR Editorial

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防扩散安全倡议:国际法的挑战与影响

杨泽伟 *

内容摘要: 防扩散安全倡议是由美国倡导的、旨在阻止大规模杀伤性武器通过海陆空渠道出入有扩散嫌疑国家的一种松散的国家联盟。《〈制止危害海上航行安全非法行为公约〉2005 年议定书》、安理会第 1540 (2004) 号决议和《不扩散核武器条约》等构成了防扩散安全倡议的法律依据。防扩散安全倡议对现代国际法、特别是海洋法提出了挑战。防扩散安全倡议在某种程度上体现了国际社会在防扩散方面的共识。中国加入防扩散安全倡议,有助于树立负责任大国的形象,并能参与有关规则的制定。

关键词: 防扩散安全倡议　国际法　大规模杀伤性武器　《联合国海洋法公约》　《联合国宪章》

2003 年 5 月,美国总统布什访问波兰克拉科夫时宣称:“和平最大的威胁是核武器、化学武器和生物武器的扩散,因此我们必须携手阻止这种扩散……当大规模杀伤性武器或其部件正在进出时,我们必须有权力和办法截获它。因此,今天我把这一新的防扩散的努力称之为《防扩散安全倡议》(以下简称“《倡议》”)”。[1] 时至今日,虽然《倡议》取得了一定的进展,但是国际社会对其法律依据及其对国际法发展的影响仍然存在较大分歧。此外,《倡议》的发展前景以及中国的态度更是令人关注。

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1 Daniel H. Joyner, The Proliferation Security Initiative: Nonproliferation, Counter-proliferation, and International Law, *Yale Journal of International Law*, Vol. 30, 2005, pp. 507~508.

一、什么是《倡议》

（一）《倡议》的缘起

2002 年 12 月，西班牙海军在距也门海岸 600 海里的公海上，截获了一艘运往也门的朝鲜“苏圣”号货船。在装有水泥的货物下，他们发现了 15 枚“飞毛腿”战术弹道导弹。由于当代国际法并没有禁止也门从朝鲜购买导弹的规定，也门也声称是为了自卫的需要而购买这些导弹，因此西班牙和美国最终释放了该船，尽管该船在航行时没有悬挂国旗并试图逃避检查。[2] 这一事件加深了美国政府对朝鲜可能扩散大规模杀伤性武器及其相关技术的忧虑，从而在某种意义上直接推动了《倡议》的出台。

（二）《倡议》的宗旨与原则

2003 年，美国副国务卿博尔顿在众议院国际关系委员会作证时称，美国希望“同其他相关国家一道运用新的手段来阻止海陆空的扩散贸易活动；《倡议》反映了需要一种更加积极的、主动的方法来应对全球扩散问题；《倡议》希望参加国结成伙伴关系，步调一致，利用各自的能力发展广泛的法律、外交、经济、军事等手段，阻截大规模杀伤性武器和导弹的相关设备和技术的危险性运输。”[3]

1.《倡议》的宗旨

《倡议》的宗旨是：通过创立一个松散的致力于防止大规模杀伤性武器扩散的国家联盟，以更好地应对大规模杀伤性武器及其运载工具和相关材料在全球扩散所构成的日益严重的问题，并进一步完善现有的国际武器控制方面的条约和安排。[4] 因此，《倡议》是“一个行动而不是一个组织，是由国家组成的一个临时性联

2 Michael Byers, Policing the High Seas: the Proliferation Security Initiative, *American Journal of International Law*, Vol. 98, 2004, p. 526.

3 John R. Bolton (Under Secretary of State for Arms Control and International Security), U.S. Efforts to Stop the Spread of Weapons of Mass Destruction: Testimony before the House Committee on International Relations, 108th Congress, 2003; Daniel H. Joyner, The Proliferation Security Initiative: Nonproliferation, Counter-proliferation, and International Law, *Yale Journal of International Law*, Vol. 30, 2005, p. 510.

4 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy,* Vol. 14, 2004–2005, p. 255.

盟而非正式的组织”。[5]

2.《倡议》的原则

按照2003年9月美国白宫新闻秘书办公室公布的“拦截原则声明”,《倡议》所提出的拦截原则主要包括以下内容:“(1) 单独或与其他国家共同采取有效措施,禁止大规模杀伤性武器及其运载系统和相关材料向 / 从与扩散活动有关联的国家或非国家实体转移或运输。‘与扩散活动有关联的国家或非国家实体’一般是指那些应受制于拦截行动的国家或《倡议》有关参与者建立的实体,因为这些国家或实体通过努力发展或获取化学武器、生物武器或核武器以及相关的运载系统,或者转移(出售、接受或促进)大规模杀伤性武器及其运载系统和相关材料等方式进行扩散活动。(2)采取简化程序,以便迅速交换可疑扩散活动的有关信息,保护其他国家按照《倡议》要求而提供的机密情报的保密性;为开展拦截行动及提高相关能力,投入适当资源和努力;最大限度地在参加拦截行动的国家之间进行协调。(3)审查并努力加强为实现上述目标所必需的相关的国家法定权力;必要时,以适当的方式努力加强相关的国际法及国际框架,以支持履行这些承诺。(4) 在国家法定权力许可的范围内,按照国际法和国际框架所规定的义务,采取具体行动,支持阻禁大规模杀伤性武器及其运载系统或相关材料的货物。”[6]

(三)《倡议》的实践

自美国提出《倡议》后,最初参加国只有澳大利亚、法国、德国、意大利、日本、荷兰、波兰、葡萄牙、西班牙、英国和美国等11个国家。2003年12月,加拿大、丹麦、挪威和新加坡加入了该《倡议》;2004年上半年,捷克、俄罗斯也加入了《倡议》;而新西兰、希腊和泰国则于2005年加入。此外,伯利兹、克罗地亚、塞浦路斯、利比里亚、马绍尔群岛、巴拿马分别在2004年、2005年与美国签署了相互登船检查货运船只的协定,从而成为了《倡议》的合作伙伴国。[7]目前,已有近80个国家表示支持《倡议》活动。《倡议》的参加国还在马德里、布里斯班、巴黎、伦敦、里斯本和克拉科夫等地,举行了多次圆桌会议;会议重申了防止大规模杀伤性武器及其技术扩散的决心,相关国家同意交换有关防扩散的信息,审议并进一步完善

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5 Andreas Persbo and Ian Davis, Sailing into Uncharted Waters? The Proliferation Security Initiative and the Law of the Sea, at http://www.basicint.org/pubs/research/04psi.htm, 4 June 2008.

6 U.S. Department of State, Proliferation Security Initiative: Statement of Interdiction Principles, at http://www.state.gov/t/np/rls/fs/23764pf.htm, 4 June 2008.

7 Richard Bond, The Proliferation Security Initiative: Three Years on, at http://www.basicint.org/nuclear/counterproliferation/psi.htm, 13 June 2008.

其国内法律制度，承诺采取多种拦截措施。[8] 值得注意的是，2006 年 6 月在波兰华沙举行的《倡议》高级别政治会议上，与会国同意努力增强对大规模杀伤性武器供应国和接受国的金融交易活动的拦截，集中打击涉及全球大规模杀伤性武器扩散的黑市交易网络和非法交易等。[9]

从 2003 年 9 月开始，《倡议》的参加国在西太平洋和地中海分别举行了一系列的海上拦截军事演习，内容涉及运用军事、情报、执法等综合手段，对被怀疑载有大规模杀伤性武器及其相关部件的海上、空中和陆地运载工具，进行模拟拦截、登临和检查。例如，2003 年 9 月 10 日—13 日，美国、澳大利亚、法国和日本在澳大利亚的珊瑚海举行了名为“太平洋保护者”的演习，这也是《倡议》的首次演习。特别值得一提的是，2003 年 9 月底，根据美、英两国的情报，一艘德国货轮“the BBC China”号在驶往利比亚的途中被拦截至意大利港口，结果检查发现该船载有用于生产高浓缩铀的离心加速器。[10] 这一成功的拦截行动，促使了利比亚领导人宣布放弃大规模杀伤性武器计划并同意接受国际核查。

二、《倡议》的法律依据

目前《倡议》的参加国主要从以下几个方面寻求《倡议》的法律依据：

（一）《〈制止危害海上航行安全非法行为公约〉2005 年议定书》

“911”事件后，出于对海上恐怖主义的担心，在国际社会的共同努力下，国际海事组织于 2005 年 10 月通过了《〈制止危害海上航行安全非法行为公约〉2005 年议定书》（以下简称“《2005 年议定书》”），对 1988 年《制止危害海上航行安全非法行为公约》进行了修改。修改后的《2005 年议定书》第 3 条规定，任何人如果非法并故意从事下述行为，则构成犯罪：把船只作为武器或作为执行恐怖袭击的手段，利用船只运输恐怖分子或旨在支持大规模杀伤性武器计划的相关材料。另外，《2005 年议定书》第 11 条还规定了缔约国在控制危害海上航行安全犯罪方面，应遵循“或起诉或引渡”的原则，即缔约国如果不将罪犯引渡，则有义务

8 Proliferation Security Initiative, Chairman’s Statement at the Fifth Meeting, at http://www.state.gov/t/np/rls/other/30960pf.htm, 12 June 2008.

9 Richard Bond, The Proliferation Security Initiative: Three Years on, at http://www.basicint.org/nuclear/counterproliferation/psi.htm, 13 June 2008.

10 Michael Byers, Policing the High Seas: the Proliferation Security Initiative, *American Journal of International Law*, Vol. 98, 2004, p. 529.

毫无例外地立即将案件提交其主管当局，以便通过其国内法律规定的程序起诉。[11] 可见，《2005 年议定书》进一步拓展了阻止、惩治参与大规模杀伤性武器相关事项的个人或实体的国际法基础。

（二）安理会第 1540 (2004) 号决议、第 1673 (2006) 号决议和第 1810 (2008) 号决议

2004 年 4 月，联合国安理会通过了第 1540 (2004) 号决议。决议要求各国不向企图开发、获取、制造、拥有、运输、转移或使用核生化武器及其运载工具的非国家行为者提供任何形式的支持;各国应制定和实施适当、有效的法律，禁止任何非国家行为者，尤其是为恐怖主义目的而制造、获取、拥有、开发、运输、转移或使用核生化武器及其运载工具;各国应采取合作行动，禁止非法贩运核生化武器及其运载工具和相关材料、设备和技术。此外，决议还决定在安理会之下设立一个委员会，监督未来 2 年内决议的执行情况，并要求各国在 6 个月内向该委员会提交执行决议的情况。[12] 此外，2006 年 4 月联合国安理会第 5429 次会议通过了第 1673 (2006) 号决议。决议重申核武器、化学武器和生物武器及其运载工具的扩散对国际和平与安全构成威胁，并强调安理会第 1540 (2004) 号决议的各项决定和要求，以及所有国家全面执行这项决议的重要性。[13]

值得注意的是，2008 年 4 月联合国安理会第 5877 次会议通过了第 1810 (2008) 号决议。安理会在该决议中，重申其 2004 年第 1540 (2004) 号决议和 2006 年第 1673 (2006) 号决议的各项决定和要求;申明决心根据《联合国宪章》对其规定的首要职责，采取适当、有效的行动，应对核生化武器及其运载工具的扩散给国际和平与安全带来的任何威胁;指出在打击非国家行为者非法贩运核生化武器、其运载工具和相关材料的活动方面，各国间需按照国际法开展国际合作;确认需要酌情强化协调国家、区域、次区域和国际各级的努力，以加强全球应对这一严峻挑战和国际安全所受威胁的行动。[14]

由于上述安理会的 3 项决议一再重申，大规模杀伤性武器及其相关事项的扩散是“对国际和平与安全的威胁”;安理会也要求各国“采取合作行动”防止大规模

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11 Protocol of 2005 to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, at http://www.imo.org/, 13 June 2008.

12 参见 2004 年 4 月 28 日联合国安理会第 1540 (2004) 号决议，下载于 http: //daccessdds.un.org/doc/UNDOC/GEN/N04/328/42/PDF/N0432842.pdf?OpenElement，2008 年 6 月 13。

13 参见 2006 年 4 月 27 日联合国安理会第 1673 (2006) 号决议，下载于 http://www.un.org/chi-nese/aboutun/prinorgs/se/sres/06/sl673.htm，2008 年 6 月 16 日。

14 参见 2008 年 4 月 25 日联合国安理会第 1810 (2008) 号决议，下载于 http://www.un.org/chi-nese/aboutun/prinorgs/sc/sres/08/s1810.htm，2008 年 6 月 16 日。

杀伤性武器扩散；因而《倡议》参加国认为，《倡议》正好就是这类“合作行动”的一个例子。[15] 不过，安理会的上述决议，都没有明确授权一国可以根据《倡议》而进行拦截活动。[16]

（三）1992 年安理会主席声明

1992 年 1 月，联合国安理会“国家元首和政府首脑会议”通过的主席声明指出：“联合国所有会员国必须履行与军控和裁军有关的义务……大规模杀伤性武器的扩散构成对国际和平与安全的威胁；安理会成员国有义务阻止这类武器及其相关技术的研究、生产和扩散，或采取适当步骤终止这种武器”。[17]

虽然 2003 年美国白宫新闻秘书办公室公布的“拦截原则声明”宣称：“《倡议》符合 1992 年 1 月联合国安理会的主席声明，并且是执行这一声明的一个步骤”；[18] 但实际上安理会的主席声明也未具体授权某一会员国可以针对别国进行海陆空拦截活动。

（四）集体自卫权

《倡议》参加国认为，《倡议》是对国际恐怖主义威胁的集体反应，它符合《联合国宪章》第 51 条规定的集体自卫权。《倡议》参加国提出，诸如“911”事件的恐怖袭击和马德里火车爆炸案，可以引发集体自卫权；而恐怖主义行为的不确定性，激起《倡议》参加国希望建立一个能够成功阻拦恐怖主义活动的网络，《倡议》正是为了防止进一步攻击而采取的预防性行动。此外，根据 1985 年联合国秘书长的一份报告，《联合国海洋法公约》（以下简称“《公约》”）并未禁止“符合《联合国宪章》规定的、特别是第 2 条第 4 项和第 51 条规定的国际法基本原则的军事行动”；更为重要的是，“在行使集体自卫权时，安全协定各方为保护其武装力量、公用船舶或国家航空器，在国际法规定的范围内，可以在公海上使用武力”。[19]

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15 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy*, Vol. 14, 2004–2005, p. 270.

16 Natalie Klein, Legal Limitations on Ensuring Australia’s Maritime Security, *Melbourne Journal of International Law*, Vol. 7, 2006, p. 333.

17 UN Security Council, Note by the President of the Security Council, S/23500, January 1992, at http://www.sipri.org/contents/expcon/cbwarfare/cbw_research_doc/cbw_ historical/cbw-unsc23500.html, 16 June 2008.

18 U.S. Department of State, Proliferation Security Initiative: Statement of Interdiction Principles, at http://www.state.gov/t/np/rls/fs/23764pf.htm, 4 June 2008.

19 United Nations Disarmament Study Series – The Naval Arms Race, Report of the Secretary-General, U.N. GAOR, 40th Session, Annexes, Agenda Item 68(b), para. 188, U.N. Doc. A/40/535(1985).

然而,《联合国宪章》第 51 条规定的行使集体自卫权的前提条件是,已经发生了针对联合国任何会员国的武力攻击。《倡议》参加国认为《倡议》符合《联合国宪章》中自卫权的规定,无疑是对宪章第 51 条的一种扩大解释,以此作为《倡议》的法律依据显得有些勉强。国际社会对此也有很大的分歧。

(五)《不扩散核武器条约》

1970 年生效的《不扩散核武器条约》奠定了现代多边核不扩散体系的基石。[20]《不扩散核武器条约》第 3 条规定:"每个无核武器的缔约国承诺,接受按照国际原子能机构规约及该机构的保障制度与该机构谈判缔结的协定中所规定的各项保障措施,其目的专为核查本国根据本条约所承担的义务的履行情况,以防止将核能从和平用途转为核武器或其他核爆炸装置;每个缔约国承诺为和平目的,不将原料或特殊裂变物质,或特别为处理、使用或生产特殊裂变物质而设计或配备的设备或材料,提供给任何无核武器国家,除非这种原料或特殊裂变物质受本条所要求的各种保障措施的约束。"因此,《倡议》参加国认为《不扩散核武器条约》也是《倡议》的法律依据之一。

综上所述,无论是《不扩散核武器条约》、《2005 年议定书》,还是 1992 年安理会主席声明或安理会第 1540 (2004) 号决议和第 1673 (2006) 号决议以及第 1810 (2008) 号决议,都没有明确授权《倡议》参加国可以针对大规模杀伤性武器及其相关事项的扩散而进行拦截。换言之,《倡议》既没有得到联合国安理会的授权,也不是某一国际公约的义务。《倡议》出台后在国际社会备受争议,一些国家心存疑虑、持观望态度的根本原因就在于此。不过,可以肯定的是,《倡议》与《不扩散核武器条约》,《2005 年议定书》、1992 年安理会主席声明、以及安理会第 1540 (2004) 号决议等法律文件所体现的防止大规模杀伤性武器扩散的宗旨是一致的。

三、《倡议》对国际法发展的影响

由于国际社会对《倡议》的法律依据存在争议,因此《倡议》的实践活动对现代国际法的发展产生了重要影响。

(一)《倡议》侵犯了无害通过权

20 Daniel H. Joyner, The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law, *Yale Journal of International Law*, Vol. 30, 2005, p. 512.

无害通过权是指外国船舶在不损害沿海国的和平、安全和良好秩序的情况下，享有无害通过一国领海的自由。《公约》第 17 条规定："所有国家，不论为沿海国或内陆国，其船舶均享有无害通过领海的权利"。《公约》第 19 条进一步指出：船舶的"通过只要不损害沿海国的和平、良好秩序或安全，就是无害的"。该条还具体列举了外国船舶损害沿海国的和平、良好秩序或安全的 12 种情形。

一些沿海国认为，运载大规模杀伤性武器的船舶事实上已损害沿海国的安全，因而并不是无害通过。[21] 然而，这种观点是站不住脚的。首先，外国船舶装载大规模杀伤性武器，不属于《公约》第 19 条所列举的损害沿海国和平、良好秩序或安全的 12 种情形之一。其次，沿海国很难证明运载大规模杀伤性武器构成对沿海国主权、领土完整或政治独立进行武力威胁或使用武力的行为。最后，沿海国也不能从大规模杀伤性武器在将来可能使用而得出运载大规模杀伤性武器是以违反《联合国宪章》所体现的国际法原则的方式进行武力威胁或使用武力。[22] 因此，某一外国船舶即使载有大规模杀伤性武器，只要在领海内不从事《公约》规定的损害沿海国和平、良好秩序或安全的 12 种非法活动，仍然享有无害通过权。

此外，《公约》第 23 条还规定："外国核动力船舶和载运核物质或其他本质上危险或有毒物质的船舶，在行驶无害通过领海的权利时，应持有国际协议为这种船舶所规定的证书并遵守国际协议所规定的特别预防措施。"因此，运输核物质的船舶，只要遵守国际协议的规定，同样享有在他国领海内的无害通过权。

由上可见，《倡议》参加国在领海上对运输大规模杀伤性武器的船舶实施拦截，侵犯了他国的无害通过权。

（二）《倡议》破坏了公海航行自由原则

公海自由原则是较古老的海洋法规则。其中，公海航行自由是公海自由原则的重要内容之一，它主要体现在《公约》第 90 条和第 96 条中。《公约》第 90 条规定："每个国家，不论是沿海国或内陆国，均有权在公海上行驶悬挂其旗帜的船舶"；第 96 条指出："由一国所有或经营并专用于政府非商业性服务的船舶，在公海上应有不受船旗国以外任何其他国家管辖的完全豁免权"。

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21 Andreas Persbo and Ian Davis, Sailing into Uncharted Waters? The Proliferation Security Initiative and the Law of the Sea, at http://www.basicint.org/pubs/research/04psi.htm, 18 June 2008.

22 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy*, Vol. 14, 2004–2005, pp. 259~260.

而对公海航行自由原则的限制,主要体现在《公约》第108条和第110条中。《公约》第108条规定:“所有国家应进行合作,以制止船舶违反国际公约在海上从事非法贩运麻醉品和精神调理物质”;第110条明确指出,军舰不得登临外国船舶,除非有合理根据认为该外国船舶有下列嫌疑:“从事海盗行为”,“从事奴隶贩卖”,“从事未经许可的广播”,“没有国籍”,“虽悬挂外国旗帜或拒不展示其旗帜,而事实上却与该军舰属同一国籍”。可见,运载大规模杀伤性武器的船舶不在《公约》规定的外国军舰可以登临、检查的范围内。因此,《倡议》参加国在公海上实施拦截行动,破坏了公海航行自由原则。

此外,《公约》第58条规定,在专属经济区内,所有国家,不论是沿海国或内陆国,都享有航行和飞越的自由。因此,《倡议》参加国在专属经济区内实施拦截行动,也侵犯了其他国家的航行自由。

(三)《倡议》违背了国际法基本原则

1.《倡议》违背了禁止以武力相威胁或使用武力原则

禁止以武力相威胁或使用武力原则是指各国在其国际关系上不得为侵害任何国家领土完整或政治独立的目的,或以任何其他与联合国宗旨不符的方式以武力相威胁或使用武力;以武力相威胁或使用武力的行为,永远不应作为解决国际争端的方法。《联合国宪章》第2条第4项明确规定:“各会员国在其国际关系上不得使用威胁或武力,或以与联合国宗旨不符之任何其他方法,侵害任何会员国或国家之领土完整或政治独立。”因此,《倡议》运用军事手段对怀疑装载大规模杀伤性武器的运输工具实施拦截行动,显然违背了禁止以武力相威胁或使用武力原则。

2.《倡议》违背了国家主权平等原则

国家主权平等原则是指各个国家不论大小、强弱,或政治、经济、社会制度和发展程度如何不同,它们在国际社会中都是独立地和平等地进行交往,在交往中产生的法律关系上也处于平等地位。国家主权平等原则既是传统国际法上的重要原则之一,也是一项现代国际法的基本原则。无论是联合国,还是其他区域性国际组织,在它们通过的有关国家间关系的基本原则的文件中,均无一例外地列有国家主权平等原则,甚至将它列为各项原则之首。《倡议》成立之初,虽然声称不是针对特定国家,但实际上就是专门针对朝鲜、伊朗等国。[23]《倡议》将某些国家宣布为与扩散活动有关联的国家,并对其运载工具实施拦截,违背了国家主权平等原则,是对有关国家的歧视。[24]

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23 Richard Bond, The Proliferation Security Initiative: Targeting Iran and North Korea?, at http://www.basicint.org/pubs/Papers/BP53.htm, 23 June 2008.

24 赵青海:《“防扩散安全倡议”评析》,载于《国际问题研究》2004年第6期,第62页。

四、《倡议》的前景及中国的对策

（一）《倡议》的前景

1.《倡议》在某种程度上体现了国际社会在防扩散方面的共识

《倡议》作为一种松散的非条约机制，是防扩散的工具。目前，防扩散已成为国际社会的共识。首先，无论是安理会的主席声明，还是安理会的相关决议，都断定“大规模杀伤性武器的扩散，构成对国际和平与安全的威胁”；防止大规模杀伤性武器及其运载工具的扩散，有利于维护国际和地区的和平与安全，符合国际社会的共同利益。其次，不管哪个国家都不敢公开坦言要进行扩散活动，甚至诸如伊朗、朝鲜等国都承诺不扩散大规模杀伤性武器。最后，《倡议》由最初的 11 个国家发展到现在的近 80 个国家，甚至包括俄罗斯也成为了《倡议》的参加国，表明越来越多的国家相信并期待《倡议》在防扩散方面能发挥更大的作用。特别是，在 2006 年俄罗斯圣彼得堡召开的八国峰会上，俄、美两国还共同提出了与《倡议》类似的《反核恐怖主义的全球倡议》，以进一步监控参加国国内核材料的流转活动。[25]

2.《倡议》的法律依据有待进一步完善

如前所述，由于有关的国际法律文件并没有明确授权《倡议》参加国可以进行拦截活动，因而国际社会对《倡议》的法律依据还存在较大的争议。《倡议》的实施对现代国际法的发展产生了重要影响，特别是对海洋法提出了挑战。诚如有学者所言：“《公约》是《倡议》实施的一个潜在法律障碍。”[26] 因此，今后几年，如何推动防扩散法律机制的发展、进一步完善《倡议》的法律依据，是《倡议》获得更多国家支持和参与的关键。

（二）中国的对策

1. 中国加入《倡议》的好处

首先，中国与其他国家在防扩散安全方面有着共同的利益，《倡议》与中国的防扩散政策是一致的。2003 年 12 月，中国国务院新闻办公室公布了《中国的防扩散政策和措施》。中国一贯主张全面禁止和彻底销毁核武器、生物武器和化学

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25 Richard Bond, The Proliferation Security Initiative: Three Years on, at http://www.basicint.org/nuclear/counterproliferation/ psi.htm, 23 June 2008.

26 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy*, Vol. 14, 2004–2005, p. 256.

武器等各类大规模杀伤性武器，坚决反对此类武器及其运载工具的扩散;多年来中国广泛参与了多边防扩散机制建设，积极推动这一机制的不断完善和发展，签署了与防扩散相关的所有国际条约，并参加了大多数相关国际组织;中国政府无论在敏感物项和技术的国内管理，还是出口控制方面，都采取了严格的管制措施，并根据形势变化不断加以完善。[27]

其次，中国加入《倡议》，有助于树立负责任大国的形象。由于《倡议》反映了国际社会对防止大规模杀伤性武器扩散的共同关切和努力，因而世界上大多数国家也都赞同《倡议》的目标和原则。2004 年 2 月，在中美第三轮副外长级战略安全、多边军控和防扩散磋商上，中方表示理解《倡议》参与国对大规模杀伤性武器及其运载工具扩散的关切，赞成《倡议》的防扩散原则和目标，中国对于在国际法范围内的信息交流和执法合作没有异议。[28] 2004 年 5 月，中国正式成为“核供应国集团”成员。中国的地理位置、国际地位和政治影响，决定了中国的参与关系到《倡议》的成效。[29] 因此，中国以负责任的大国身份加入《倡议》，有助于缓解国际社会对中国的压力，进一步树立核大国的全球责任的形象。

最后，中国加入《倡议》，有助于参与有关规则的制定。如果中国有条件地加入《倡议》，就能在这一多边合作机制内发挥作用。一方面，中国政府可以推动扩展《倡议》的范围，包括一些中国政府非常关切的非传统安全问题，如打击非法移民、非法走私、海盗、跨国有组织犯罪、洗钱和贩运伪钞等;另一方面，可以建议进一步增强联合国安理会和国际海事组织在防扩散方面的作用，制订尽可能为多数国家接受的拦截原则，制约任何违背国际法的行为。

2. 中国加入《倡议》的不利影响

自《倡议》出台后，朝鲜一直持坚决反对的立场。朝鲜多次强调，对正常航行的朝鲜船舶和飞机进行拦截将被视为战争行为，并重申对于任何诉诸武力的敌对行为都拥有立即报复的权利，宣布废除朝鲜停战协定。[30]韩国至今尚未加入《倡议》，也是出于韩朝关系的考虑。因此，如果中国加入《倡议》，将给解决朝核问题的“六方会谈”带来直接的冲击，并可能会对中朝关系产生消极影响，尽管中国也可以像俄罗斯一样，事先向朝方作出解释。不过，最近美朝关系缓和，朝鲜提交核计划申报，美国决定将其从支持恐怖主义国家名单中删除。这些有助于减轻中国加入《倡议》所导致的不利影响。

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27 中国国务院新闻办公室：《中国的防扩散政策和措施》，下载于 http://news.xinhuanet.com/zhengfu/2003-12/03/content_1211988.htm，2008 年 6 月 24。

28 顾国良：《美国“防扩散安全倡议”评析》，载于《美国研究》2004 年第 3 期，第 43 页。

29 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy*, Vol. 14, 2004–2005, p. 273.

30 Natalie Klein, Legal Limitations on Ensuring Australia's Maritime Security, *Melbourne Journal of International Law*, Vol. 7, 2006, p. 325.

全球海盗和武装劫船犯罪问题及其应对

杨 帆 *

内容摘要：近年来，世界范围内的海盗和武装劫船犯罪形势严峻，其给中国也造成了很大的不利影响。面对此情况，在国际法的框架下，国际社会已经采取了很多措施来防治海盗和武装劫船问题。但不可否认，这些航运、执法方面的举措难以从根本上消除海盗和武装劫船犯罪。提高发展中国家沿海居民的生活水平和改善沿海地区的治理状况才是治本之道。就中国而言，应当积极支持相关国际组织和大国打击海盗和武装劫船犯罪的努力；整合自身执法力量，运用海军舰艇维护南中国海的安全；同时还应该尽力援助东南亚国家以改变其沿海地区的贫困面貌。

关键词：海盗 武装劫船 海上执法 石油运输

今年以来，频频发生的索马里海盗劫船事件使得海盗这一古老的犯罪再一次成为人们关注的焦点。海盗自古有之，但是现代意义上的海盗和武装劫船犯罪主要是从上世纪七八十年代以来开始泛滥，并且逐渐成为了世界航运的一个巨大威胁。至今，全球范围内的海盗和武装劫船行为并没有得到有效遏制。特别是今年以来，海盗和武装劫船犯罪的形式和手段发生了巨大的变化。2008 年 9 月底，索马里的海盗劫持了乌克兰货轮“法伊尼”号，船上载有 33 辆 T—72 型主战坦克和枪榴弹发射器等武器装备。同年 11 月 15 日索马里的海盗更是劫持了世界上最大的油轮之一“天狼星”号，而在 11 月 18 日，一天之中竟然有三艘船舶被劫。上述事件无疑表明海盗犯罪分子，特别是索马里的海盗犯罪分子已经积聚起了比较强大的力量，他们不再满足于攻击临近海岸的普通船舶，而是把目标逐渐转移到了远海的大型船舶上，油轮也包括在内。今天，海盗和武装劫船犯罪问题已经成为了影响全球海上安全的一个战略性问题，受到人们的普遍关注。本文拟先对当前全球海盗和武装劫船犯罪的形势作一个描绘，而后对关于海盗和武装劫船的国际法框架以及国际社会应对海盗和武装劫船犯罪的措施加以探讨，最后是作者就中国政府对待海盗和武装劫船犯罪的态度所提的若干建议。

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一、全球海盗和武装劫船犯罪问题概述

（一）海盗和武装劫船的定义

在讨论海盗和武装劫船犯罪问题之前，我们首先要明确什么是海盗和武装劫船。对于海盗和武装劫船，国际海事局将二者合并起来定义为：“登临或试图登临任何船舶，并明显具有从事盗窃或其他犯罪意图的行为，而且在从事该行为时明显有使用武力的意图或能力。”上述定义包含了实际发生的或试图对船舶进行的攻击，不论该船舶是处于停泊抛锚状态，还是在海上航行。未使用武装的微小盗窃被排除在这个定义之外。

而国际海事组织在《调查海盗和武装劫船犯罪的实践规则》中则将海盗和武装劫船分开来加以定义。在该定义中海盗是指 1982 年《联合国海洋法公约》第 101 条所定义的非法行为，即：

（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。

而武装劫船是指在国家管辖范围内，针对船舶或船舶上的人或财产的任何非法的暴力、扣留、掠夺行为以及威胁采取上述行为的行动。

上述《规则》尊重了 1982 年《联合国海洋法公约》中对于“海盗”的定义，将海盗定义为在公海或国家管辖范围以外对船舶或飞机及其上的人员、财产的暴力、扣留、掠夺行为。同时把武装劫船定义为在国家管辖范围以内，对船舶或船上人员、财产的暴力、扣留、掠夺行为。

尽管上述两个定义的表述方式差别较大，但是它们所试图要涵盖的核心内容都是针对船舶或船上人员、财产的暴力行为。

（二）全球海盗和武装劫船犯罪现状

根据国际海事局提供的报告，2004 年以前全球发生的海盗和武装劫船犯罪案件数量较多，形势比较严峻。而 2005 年之后，情况有所好转，犯罪案件的数量有所下降且保持一定程度的稳定性。其中 2005 年共发生海盗和武装劫船案件 276

起，2006 年 239 起，2007 年 263 起。但是到了 2008 年，全球海盗和武装劫船犯罪的形势又发生了变化，特别是在索马里海域，今年到目前为止已经发生了 95 起船舶遭袭击的事件。[1]

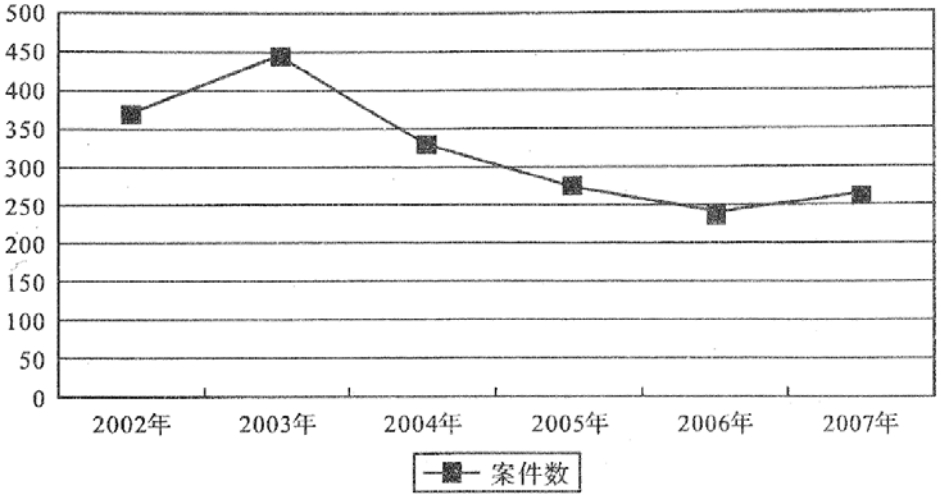

图 1　2002—2007 年全球发生海盗和武装劫船案件数量

（数据来源于 IMB 网站，下载于 http://www.icc-scc.org，2008 年 12 月 8 日。）

海盗和武装劫船案件发生的地点不均衡。东南亚、南亚和非洲的沿海地区为海盗和武装劫船多发区。就 2007 年而言，案件发生最频繁的地方是印度尼西亚和尼日利亚，分别发生了 43 起和 42 起案件，其次是索马里，发生了 31 起案件。而图 2 的 7 个国家和地区所发生的海盗和武装劫船案件的数量就占到了全世界案

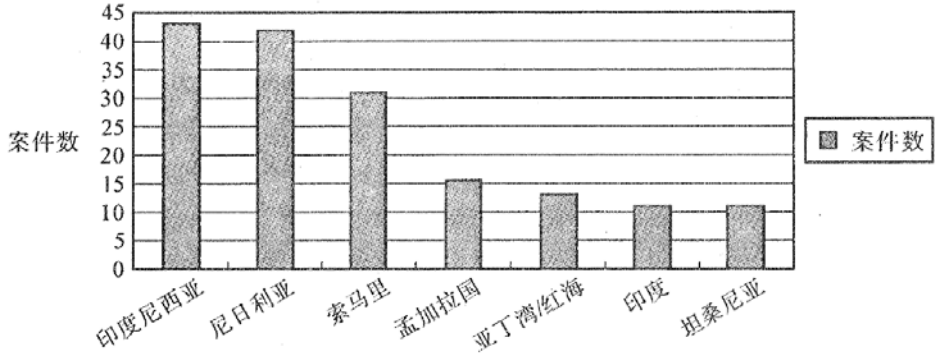

图 2　2007 年发生案件最多的 7 个地点

（数据来源于 IMB 网站，下载于 http://www.icc-scc.org，2008 年 12 月 8 日。）

1　党建军：《索马里缘何沦为“海盗天堂”》，下载于 http://gzdaily.dayoo.com/html/2008-11/21/content_383723.htm，2008 年 12 月 1 日。

件总数的 2/3（161/263）。就目前的情况看，索马里海域很有可能成为今年发生海盗和武装劫船案件最多的区域。

图 3　2007 年全球发生海盗和武装劫船发生的位置

（数据来源于 IMB 网站，下载于 http://www.icc-scc.org，2008 年 12 月 8 日。）

不同的海盗和武装劫船犯罪分子使用暴力的程度也不一样。就 2007 年的数据而言，在 72 起案件中，海盗和武装劫船犯罪分子使用了枪，在 67 起案件中使用了刀。全年共有 292 名船员被劫为人质，35 名船员受到伤害，5 人被杀死，3 人失踪。而今年，仅就索马里海域而言，至今已经有 38 艘船舶遭劫持，超过 740 人沦为人质。[2]

总体而言，现今全球的海盗和武装劫船犯罪形势还相当严峻，并且情况随着年份的不同有所起伏。犯罪发生的地点多集中在一些特定区域。海盗和武装劫船犯罪分子主要是以谋财为主，偷盗财物或者通过劫持人质以换取赎金。国际社会一直以来担心的海盗和武装劫船犯罪分子与恐怖分子勾结或者大规模杀伤船员的事件还较少发生。

（三）海盗和武装劫船犯罪发生的原因

造成海盗和武装劫船犯罪猖獗的原因是多方面的，但是通过对海盗和武装劫船犯罪多发地区和国家的比较，我们不难发现，地理、经济和政府管制力度等因素对于海盗和武装劫船犯罪的产生有着很大的影响。

2　党建军：《索马里缘何沦为“海盗天堂”》，下载于 http://gzdaily.dayoo.com/html/2008-11/21/content_383723.htm，2008 年 12 月 1 日。

第一，地理因素。海盗和武装劫船犯罪案件多发地段多临近于重要的国际海道，如索马里和亚丁湾处于由苏伊士运河进入印度洋和太平洋的重要位置，而马六甲海峡和印度尼西亚则位于印度洋进入太平洋的咽喉要道。在这些关键的海区，船舶往来频繁，数量众多，需要减速慢行，[3] 同时船上携带大量的贵重物品，因此，这些地区对犯罪分子来说有很大的诱惑力，而且犯罪分子也比较容易在这些地区攻击过往船只。而有些地区地形复杂，比如印度尼西亚，沿岸岛屿林立，犯罪分子得手后极易隐藏，难以寻找。在东南亚地区还存在着领土和领海纠纷，这更为犯罪分子的逃逸和躲避提供了方便。

第二，经济因素。经济因素可以说是海盗和武装劫船犯罪发生的一个根本性的因素。海盗和武装劫船犯罪需要在海上登临船舶进行盗窃、抢劫等活动，本身就存在着很大的危险性。如果沿海居民能够维持比较高的生活水准，就不会有很多人愿意在海上冒如此大的风险从事海盗和武装劫船犯罪。相反，一旦渔民和沿海居民难以生存，铤而走险的可能性就会加大。而当前海盗和武装劫船犯罪案件大多正是发生在那些政局不稳、经济凋敝、失业和贫困等问题比较严重的地区和国家。比如索马里，战争持续多年，局势不断恶化，“在摩加迪沙，伤亡惨重、财物被毁、劫掠以及侵犯人身安全现象普遍”。[4] 而印度尼西亚、菲律宾、马来西亚等地在金融危机和海啸之后经济发展也不稳定，贫困人口增加。[5] 因此，这些地区的某些渔民和沿海居民很有可能通过从事一些海盗和武装劫船的犯罪活动取得一定的经济来源。

而在尼日利亚则是另外一种情况，由于当地盛产石油，海盗和武装劫船犯罪分子的主要目标就是油轮。国际海事局官员穆昆丹曾表示：“对尼日利亚来说，海盗主要是冲着运送石油的船只去的，有些海盗集团甚至是由企图掌控石油公司大额股份的团体组织的。”[6]

第三，政府管制力度。政府重视和打击海盗和武装劫船犯罪的力度对于案件的发生有着很大的关系。最为明显的一个例子就是以前海盗和武装劫船犯罪极为严重的马六甲海峡，由于沿岸各国采取了各种有效措施，加强信息交流，进行联合巡逻，现今已经相对安静了。2007 年全年仅发生犯罪案件 7 起。[7] 而与此相反的是，由于索马里几乎处于无政府状态，海盗和武装劫船犯罪分子无法无天，“索马里的

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3 王良生：《东南亚海盗问题：合作与前景》，载于《江南社会学院学报》2007 年第 1 期，第 14 页。

4 丹尼尔•加尼翁：《索马里：局势日益动荡，坚持发放物资》，下载于 http://www.icrc.org/WEB/CHI/sitechi0.nsf/htrnlall/somalia-interview-230408，2008 年 5 月 5 日。

5 李凤宁：《当前海盗犯罪的特点、成因及对策研究》，载于《经济与社会发展》2007 年第 3 期，第 129 页。

6 《海盗袭击次数飙升索马里尼日利亚成重灾区》，下载于 http://news.sohu.com/20071017/n252689493.shtml，2008 年 5 月 5 日。

7 Piracy and Armed Robbery against Ships, at http://www.icc-scc.org, 12 December 2008.

海盗在远海搜索船只，连人带船一起劫持，然后进行敲诈勒索，丝毫没有隐藏所作所为的意思。”[8] 而在尼日利亚，尽管有一支强大的海防和警察部队，但是仍然无法控制海盗针对石油船只的攻击。

（四）海盗和武装劫船犯罪对中国海上石油运输的影响

全球性的海盗和武装劫船犯罪问题对中国也将产生巨大的影响，而受影响最大的领域之一就是中国的海上石油运输。中国现在超过 90% 的石油进口是通过海上运输的。2006 年，中国从海外进口的石油中，45％来自中东地区，31.5％来自非洲地区，[9] 其他的则来自东南亚、俄罗斯、哈萨克斯坦等地区和国家。这样的分布决定了中国石油进口的三条路线图：产自中东的石油从波斯湾经霍尔木兹海峡、马六甲海峡，穿越台湾海峡运到达国内；产自非洲的石油则分为两线，向北从北非绕过直布罗陀海峡、进入地中海，通过苏伊士运河，从红海进入印度洋，而后经马六甲海峡运回国内；向南则经过好望角，最后经马六甲海峡运回国内；产自东南亚的石油直接经过马六甲海峡运回国内。

对照上文所述的海盗和武装劫船多发地区，我们会发现，中国海上石油运输线路多经过海盗和武装劫船案件多发区，很大程度上可能会受到海盗和武装劫船犯罪的影响。首先，问题最严重的是从非洲进口石油的线路。非洲现在是中国的第二大石油进口地区，2006 年，在我国石油进口量前十位的来源国家中非洲占了四位，分别是：安哥拉、刚果、赤道几内亚、苏丹。利比亚、毛里求斯、加蓬、乍得、尼日利亚、南非、阿尔及利亚等国出口给中国的石油数量也很大。[10] 在上述国家中，尼日利亚本身就是当今世界海盗和武装劫船犯罪最为严重的国家之一，且当地犯罪分子的主要攻击目标就是油轮。而从苏丹、乍得等国进口的石油要经过亚丁湾和索马里沿海进行运输，这也是世界上海盗和武装劫船犯罪最为严重的地区之一。其次，无论从非洲还是中东驶出的油轮，在穿过印度洋时，往往会靠近印度沿海航行，而印度沿海的海盗和武装劫船犯罪也是相当的严重。最后，无论从非洲、中东还是东南亚进口的石油，其运输都要经过马六甲海峡和印度尼西亚沿海。这一地区虽然近年来形势有所好转，但是仍时有海盗和武装劫船事件发生，特别是印度尼西亚沿海，2007 年在印度尼西亚沿海发生的海盗和武装劫船犯罪案件数量仍然居世界之首。

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8 《海盗袭击次数飙升索马里尼日利亚成重灾区》，下载于 http://news.sohu.com/20071017/n252689493.shtml，2008 年 5 月 5 日。

9 美国合众国际社：中国原油进口面临油轮短缺，下载于 http://intl.ce.cn/zgysj/200805/13/t20080513_15440960.shtml，2008 年 5 月 13 日。

10 《中国与非洲的石油贸易与合作》，下载于 http://www.cepit.org/Contents/Channel-1089/2008/0213/88068/content88068.htm，2008 年 5 月 13 日。

海盗和武装劫船犯罪对于中国海上石油运输造成的影响是多方面的。第一，海盗和武装劫船犯罪活动会使石油运输船舶上的船员受到人身伤害和财产损失。如果海盗和武装劫船犯罪分子破坏或者攻击船舶，还很有可能造成原油大量泄漏，污染环境。而如果海盗和武装劫船犯罪分子劫持我国油轮，还会迫使我国航运企业向犯罪分子支付大笔赎金。据报道，2008 年 11 月 15 日劫持“天狼星”号油轮的海盗犯罪分子提出了支付 2500 万美元赎金的要求。[11] 第二，即使没有遇到现实的犯罪分子攻击，运油船舶在海盗和武装劫船多发区域航行或停泊时，船员也会处于恐惧和紧张的心理和情绪中，这也会对船员的身心健康造成影响。第三，船务公司为了应对海盗和武装劫船的威胁，遵守有关国际组织的标准，必须要安装更先进的安全设备，雇用专门的安全人员，这样就大大增加了船舶的运营成本。据国际海事局估计，仅仅在印度洋和太平洋之间，海盗和武装劫船就使得运输船舶每年损失 130~150 亿美元。有些船舶为了绕离索马里沿海，要多航行 200 多海里。[12] 同时船舶的保险费也会上升，这些费用在一定程度上都会造成中国石油运输价格和石油进口价格的上涨，以及石油供给量和运输量的减少；此外中国政府以及各国际组织为了应对海盗和武装劫船的威胁，也都会采取多种措施，而这些措施也会花费相应的成本，增加了财政上的负担。

这里值得注意的一点是，并不是只有海盗和武装劫船犯罪分子对中国籍油轮的攻击才会对中国的石油运输产生影响。事实上，中国石油进口总量中只有 10% 是由中国公司的船队运输的，而其他部分则多由日、韩等国际运输公司运输。[13] 因此，海盗和武装劫船犯罪分子对中国以外的其他国家国籍的油轮进行攻击也会影响到中国的海上石油运输。而在 2007 年有统计的海盗和武装劫船攻击案件中，虽然只有两起是针对中国船舶的，但是总共有 31 起是针对装载原油、液化石油气或液化天然气的油轮的。[14] 另外还有 52 起海盗和武装劫船攻击是针对装载化学品的油轮。这些也有可能会对中国的海上石油运输产生影响。考虑到全球有 7000 艘左右的油轮，[15] 那么油轮在世界范围内受到海盗和武装劫船攻击的机率大约在 1%左右，相比于其他犯罪来说，这个比率已经不低。因此，海盗和武装劫船犯罪对于中国海上石油运输的威胁不可小视。

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11 马晶：《索马里海盗狮子大张口提出 2500 万美元赎金》，下载于 http://military.people.corn.cn/GB/1077/57991/8387401.html，2008 年 12 月 1 日。

12 Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, *Vanderbilt Journal of Transnational Law*, January, 2007, p. 5.

13 《中远承运 3000 万吨进口石油》，载于《大公报》2006 年 2 月 9 日。

14 Piracy and Armed Robbery against Ships, at http://www.ice-scc.org, 18 May 2008.

15 苏德勤、张永欣：《世界油运市场与中国能源安全》，下载于 http://www.dalian-ship-ping.com/news/sp/hyzx/1216_9.htm，2008 年 5 月 18 日。

二、关于海盗和武装劫船犯罪的基本国际法框架

海盗犯罪给人类造成了很大的困扰，经过多年的实践，国际法中已经形成了一个比较成熟的法律框架对此行为加以应对。主要的规定见诸于《联合国海洋法公约》第 100 条至 107 条。

而武装劫船犯罪是发生在国家管辖范围之内的犯罪，一般由各国的国内法来加以调整。因此，针对这一犯罪的国际法规则比较少。

此外，某些针对其他海上犯罪的国际法规则，如主要是针对海上恐怖袭击的《制止危及海上航行安全非法行为公约》，尽管最初其目的并不是解决海盗和武装劫船犯罪的问题，但是其对这两类犯罪却可能产生一定的影响。

（一）《联合国海洋法公约》中有关海盗犯罪的规定

就海盗犯罪而言，《联合国海洋法公约》第 100 条首先课以各国合作制止海盗行为的国际义务，该条规定："所有国家应尽最大可能进行合作，以制止在公海上或在任何国家管辖范围以外的任何其他地方的海盗行为。"

接下来，《联合国海洋法公约》第 101 条对海盗犯罪的犯罪构成进行了详细的规定。《联合国海洋法公约》第 101 条承袭了 1958 年《公海公约》第 15 条的规定。在该条项下，第一，海盗犯罪的主体必须是私人船舶或私人飞机的船员、机组成员或乘客。如果从事暴力行为的是一个国家的军舰或其他公有船舶，那么其从事的行为就不是海盗行为。在这种情形下，如果被害者想寻求救济，应当向其船旗国申诉，而船旗国必须惩罚其船长。但是，如果一个国家的军舰或其他公有船舶叛变了，并且为了它自己的目的而在海上游弋，它就不是一只公有船舶，而这时他所作的暴力行为也就是海盗行为。[16]

第二，海盗犯罪的主观方面是故意，但是这里的故意是指从事非法暴力行为的故意，而不是指有抢劫或者获取财物的故意，如果是出于仇恨或者复仇而进行的海上非法暴力行为，也被看作是海盗。[17]

海盗犯罪的目的是为了私人目的。一般认为，如果是出于政治目的而进行的海上暴力行为就不能算作是海盗。但是政治目的和私人目的如何认定却没有统一

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16 劳特派特修订，王铁崖、陈体强译：《奥本海国际法》上卷第二分册，北京：商务印书馆 1972 年版，第 117 页。

17 Articles Concerning the Law of the Sea with Commentaries, text adopted bythe International Law Commission at its eighth session in 1956 and submitted to the General Assembly as a part of the Commission's report covering the work of that session (para.33).The report, which also contains commentaries on the draft articles, appears in *Year-book of the International Law Commission*, 1956, Vol. II.

的认识，1986 年，一家比利时法院就曾经判决从事反海上倾倒抗议的绿色和平组成成员犯有海盗罪。[18] 在 9•11 事件发生之后，不少美国学者更是担心如果机械地理解“私人目的”会放纵恐怖分子，因为恐怖分子在海上进行的抢劫、杀人、破坏活动往往有政治目的，如果恪守海盗犯罪关于“私人目的”的规定，那么对于海上恐怖分子的打击就难以援用《联合国海洋法公约》第 101 条，国际社会对于此类活动也就没有“普遍管辖权”。因此，有些美国学者提出，应当扩大对“私人目的”要件的解释，有的学者认为只要不是国际社会承认的国家或交战团体所进行的战争行为，其他的海上暴力行为都是为了“私人目的”。[19] 而有些学者则认为“私人目的”包括在那些团体或国家进行的伤害活动所引发的个人动机。[20] 总之，美国学者通过各种方式的解释，就是想把政治目的引入海盗犯罪的构成中来，使得《联合国海洋法公约》101 条可以用于对海上恐怖分子的打击。

第三，海盗犯罪的客观方面表现为非法的暴力、扣留或掠夺行为。但是此类非法行为必须是发生在公海或者任何国家管辖范围以外的地方。海盗行为不包括国家领土或领海范围内的海上暴力犯罪，发生在上述范围的海上暴力行为也就是本文中的所指的“武装劫船”犯罪应当由各个国家颁布法律、采取措施来进行相应的防范、打击和惩罚，而毋需在国际法中加以规定。

关于公海的范围，《联合国海洋法公约》第 86 条规定，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。但是《联合国海洋法公约》第 58 条第 2 款规定：“第 88 至第 115 条以及其他国际法有关规则，只要与本部分不相抵触，均适用于专属经济区”，因此 , 即使是在专属经济区中发生的海上暴力行为也是海盗犯罪。

对于“任何国家管辖范围以外的地方”的含义，联合国国际法委员会在起草该条时主要是指构成无主地的海岛和未被占领的领土的海岸，在这些地方由船舶或飞机实施的暴力行为也构成海盗犯罪。[21] 虽然这类区域现在已经比较少了，但是在南极洲和北冰洋区域仍然存在或者可能存在无主领土和无主岛屿。

此外，海盗犯罪必须是一条船上的船员 、乘客针对另一条船上的船员、乘客所进行的暴力、扣留或掠夺行为。也就是说发生海盗犯罪，至少要有两条船存在，

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18 Samuel Pyeatt Menefee, Anti-piracy Law in the Year of the Ocean: Problems and Opportunity, *ILSA Journal of International & Comparative Law*, Spring, 1999, p. 312.

19 Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory forNaval Anti-Piracy Operations, *Vanderbilt Journal of Transnational Law*, January 2007, p. 32.

20 Tina Garmon, International Law of the Sea: Reconciling the Law of Piracy and Terrorismin the Wake of September 11th, *Tulane Maritime Law Journal*, Winter, 2002, p. 257.

21 Articles Concerning the Law of the Sea with Commentaries, text adopted by the International Law Commission at its eighth session in 1956 and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (para.33).The report, which also contains commentaries on the draft articles, appears in Year-book of the International Law Commission, 1956, Vol. II.

有的学者称其为“两条船”要件。船上的船员或乘客针对自己所在的船舶或者是针对自己所在船舶上的其他船员、乘客的暴力行为不能算作是海盗犯罪。即使是在海上船员或乘客叛变也不能算作是海盗。[22]

海盗犯罪在国际法上所引起的法律后果就是各国都拥有对海盗犯罪的“普遍管辖权”，按照习惯国际法，一切国家的船舶，不论是军舰还是其他公有船舶，都可以在公海上追逐、攻击和拿捕海盗，并且把它带回本国，由本国的法院审理和惩罚。[23]《联合国海洋法公约》的规定与上述习惯国际法的规则也是一致的，其第105 条和 110 条的规定，任何国家的军舰或政府授权的公有船舶在公海上都可以对怀疑从事海盗行为的船舶进行登临，“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。”当然，对于海盗犯罪的普遍管辖并不是各国的义务。它是一项容许性规定，各国可以基于自身的国内法、能力等因素来决定是否对海盗犯罪进行管辖。

（二）《联合国海洋法公约》中与武装劫船犯罪有关的规定

武装劫船犯罪一般是在领海中发生的。对于一国的领海，沿海国拥有主权，其对领海中的犯罪拥有管辖权，因此，在一国领海中发生的武装劫船犯罪，其适用的具体罪名、构成要件、采取的强制措施和相应的刑罚等由沿海国在国内法中加以规定并由沿海国的执法部门加以实施。

《联合国海洋法公约》为了维护海上航行的秩序，对沿海国在通过其领海的外国船舶上行使刑事管辖权施加了限制，其第 27 条规定：“沿海国不应在通过领海的外国船舶上行使刑事管辖权，以逮捕与在该船舶通过期间船上所犯任何罪行有关的任何人或进行与该罪行有关的任何调查。”但是，该条接下来又列举了若干除外情形，而武装劫船犯罪显然属于其中的“扰乱当地安宁或领海的良好秩序的性质”或“罪行的后果及于沿海国”的情形。因此，即使是外国船舶上的人员在一国领海内从事武装劫船犯罪，沿海国也毫无疑问拥有管辖权。

此外，《联合国海洋法公约》第 27 条第 5 款还规定，“如果来自外国港口的外国船舶仅通过领海而不驶入内水，沿海国不得在通过领海的该船舶上采取任何

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22 Articles Concerning the Law of the Sea with Commentaries, text adopted by the International Law Commission at its eighth session in 1956 and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (para.33).The report, which also contains commentaries on the draft articles, appears in Year-book of the International Law Commission, 1956, Vol. II.

23 劳特派特修订，王铁崖、陈体强译：《奥本海国际法》上卷第二分册，北京：商务印书馆 1972 年版，第 122 页。

步骤，以逮捕与该船舶驶进领海前所犯任何罪行有关的任何人或进行与该罪行有关的调查。”也就是说，如果一艘外国船舶上的人员在别国领海从事了武装劫船犯罪，而后驶入该国领海，则该国并没有权力对进入其领海之前的武装劫船犯罪进行管辖，除非对武装劫船犯罪拥有管辖权的国家授权或提出请求。

（三）《制止危及海上航行安全非法行为公约》的相关规定

1985 年 10 月 7 日，4 名巴勒斯坦武装人员在埃及亚历山大港附近劫持了一艘意大利客轮，要求释放被以色列关押的 50 余名巴勒斯坦战士。这一事件过后，在意大利和奥地利的共同提议下，联合国大会通过了 40/61 号决议，要求国际海事组织“研究在船上发生或针对船舶的恐怖主义行为的问题”，以便就适当措施提出建议。1988 年 3 月，应联合国的此项要求，国际海事组织在罗马主持通过了《制止危及海上航行安全非法行为公约》（以下简称“《SUA 公约》”）。

《SUA 公约》将以下行为规定为犯罪：

(a) 以武力或武力威胁或任何其他恐吓形式夺取或控制船舶；或

(b) 对船上人员施用暴力，而该行为有可能危及船舶航行安全；或

(e) 毁坏船舶或对船舶或其货物造成有可能危及船舶航行安全的损坏；或

(d) 以任何手段把某种装置或物质放置或使之放置于船上，而该装置或物质有可能毁坏船舶或对船舶或其货物造成损坏而危及或有可能危及船舶航行安全；或

(e) 毁坏或严重损坏海上导航设施或严重干扰其运行，而此种行为有可能危及船舶的航行安全。

(f) 传递其明知是虚假的情报，从而危及船舶的航行安全；或

(g) 因从事（a）至（f）项所述的任何罪行或从事该类罪行未遂而伤害或杀害任何人。

从上述规定可以看出，《SUA 公约》虽然不是针对海盗和武装劫船犯罪而是针对危及海上航行安全特别是海上恐怖主义的行为，但是在很多情况下，其所规定的犯罪行为很有可能和海盗和武装劫船犯罪产生竞合。事实上，很多严重的海盗和武装劫船犯罪行为都可能被认定为危及海上航行安全的犯罪。比如海盗和武装劫船犯罪分子夺取或控制船舶，对驾驶人员使用暴力，劫持船员进行勒索，用火箭筒、机关枪等武器攻击船舶等等。2008 年 4 月就发生了一艘法国豪华游艇连同其上的 36 名船员在索马里沿海被海盗劫持的案件。

《SUA 公约》要求对于所规定的犯罪行为，各缔约国应当使这些罪行受到与其严重程度相适应的刑罚。[24] 为此，公约确定了多种不同的管辖体系。对于“(a) 罪行发生时是针对悬挂其国旗的船舶或发生在该船上；或 (b) 罪行发生在其领土内，

24 《SUA 公约》第 5 条。

包括其领海；或（c）罪犯是其国民”的罪行，各国应采取必要措施，确定管辖权；而对于“（a）罪行系由惯常居所在其国内的无国籍人所犯；或 (b）在案发过程中，其国民被扣押、威胁、伤害或杀害；或（c）犯罪的意图是迫使该国从事或不从事某种行为”的罪行，各国可以采取措施，确定管辖权，但不是必须的。此外，《SUA 公约》为了确保罪犯受到惩罚还规定了复杂和严格的引渡制度，并且确立了在危及航行安全犯罪上的“或起诉或引渡”的原则，该公约第 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。”

总体来看，《SUA 公约》给各国政府在对危及航行安全犯罪的管辖、调查、临时措施、引渡等方面课加了严格的义务。这对于保持国际社会对严重的海盗和武装劫船犯罪行为的高压态势有着很大的意义。中华人民共和国全国人民代表大会常务委员会于 1991 年 6 月批准中国加入了该公约。截至 2005 年底，公约共有 115 个缔约国。

三、国际社会应对海盗和武装劫船犯罪所采取的主要措施

面对上世纪以来全球范围内一度极为猖獗的海盗和武装劫船犯罪，国际社会在国际法的框架之下采取了很多措施，也取得了显著的效果。本节将对国际组织和地区、国家层面的主要反海盗和武装劫船举措做一个简单的考察。

（一）国际海事组织

国际海事组织是联合国负责海上航行安全和防止船舶造成海洋污染的一个专门机构，总部设在伦敦。为了应对海盗和武装劫船犯罪对国际海上航行安全的威胁，国际海事组织从 1998 年开始了一个长期的反海盗和武装劫船计划。该计划的第一阶段是召开由海盗和武装劫船现象比较严重的各国政府代表参加的区域性的研讨会和工作小组。而计划的第二阶段则是对一些主要的区域进行评估，目的是促进区域性的反海盗和武装劫船措施协定的达成。[25] 之后，国际海事组织又采取了一系列其他的行动。

1. 系列指南和规则

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25 关于该计划的成果将在下节详述。

为了支持反海盗和武装劫船行动的开展，国际海事组织起草和通过了一系列的指南和建议性的文件。1999 年通过了《关于防止和打击海盗和武装劫船给各国政府的建议》。该建议向各国政府提出了若干可以用于打击海盗和武装劫船犯罪的建议，如建立一个统一的指挥系统，协调相互之间的沟通，形成及时和完整的事件报告程序等等。2002 年，国际海事组织又通过了《关于防止和打击海盗和武装劫船给船东、船舶经营者、船长和船员的指南》，该指南包括了一系列详细的为避免遭到海盗和武装劫船犯罪分子攻击，或者一旦遭到攻击，为了将损失最小化所应当采取的措施。[26] 2001 年 11 月，国际海事组织大会还通过了《调查海盗和武装劫船犯罪的实践规则》，该规则由一些发达国家的著名执法机构参与起草，包括了调查方面的训练、调查策略、步骤、技巧等等。这些指南和规则为成员国特别是发展中国家成员提供了打击海盗和武装劫船犯罪的经验和策略。

2.《SOLAS 公约》的修改和《ISPS 规则》

2002 年 10 月 6 日法国油轮“林堡”在也门海域遭到恐怖分子的袭击。由于油轮的特殊性，一旦成为恐怖分子的袭击目标，将会对海洋环境造成极其严重的后果。为了应对日益严峻的海上安全形势，国际海事组织于 2002 年 12 月 9—13 日在伦敦召开国际海事保安外交大会，会议通过了《SOLAS 公约》第 XI 章有关海上保安的一系列修正案，并通过了《国际船舶和港口设施保安规则》。[27]

《SOLAS 公约》海上保安修正案要求除客船和液货船以外 300 总吨以上但小于 5 万总吨的船舶都要安装船舶自动识别系统，新增了关于船舶识别号和船舶连续概要记录两项要求。修正案新制订了第 XI-2 章“加强海上保安的特别措施”，全部为新内容，包括定义、适用范围、缔约国政府关于保安的责任、对公司和船舶的要求、公司的具体责任、船舶保安警报系统、对船舶的威胁、船长对船舶保安的决定权、监督和合规措施、港口设施要求、替代保安协议、等效保安安排、信息交流等。同时，在这一章中引入了强制性的“保安规则”。[28]

保安规则由 A、B 两部分组成。A 部分是对履行《SOLAS 公约》第 XI-2 章的具体要求，为强制性要求，B 部分则是对第 XI-2 章和 A 部分要求的实施指导，为建议性要求。保安规则规定了缔约国政府的职责和船公司的义务，要求船舶须遵从缔约国政府规定的保安等级，并根据所处的保安等级采取防范措施。须对船

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26 IMO: Piracy and armed robbery against ships, at http://www.imo.org/Facilitation/mainframe.asp?topic_id=362, 29 May 2008.

27 张逸欣：《海上保安事件与 ISPS 规则》，载于《中国水运》2007 年第 9 期，第 33 页。

28 李壮志：《浅谈 SOLAS 公约海上保安修正案和 ISPS 规则》，载于《船舶》2004 年第 3 期，第 65 页。

舶和港口设施进行保安评估，确定可能受到的威胁和其发生的可能性，根据风险评估制订船舶、港口设施保安计划，并将经批准的保安计划保存在船上。要求船公司任命一名公司保安员，在每条船上也要任命一各船舶保安员，公司保安员、船舶保安员、船上具体保安责任人和适当的岸上人员应按要求接受保安培训，定期组织演习和训练等等。[29]

《SOLAS 公约》海上保安修正案和保安规则的实施，协调和强化了各缔约国政府、船公司和船舶在海上保安方面的义务，使得相关的措施得以标准化和统一化，并有效地提高了各方主体应对海盗和武装劫船等海上安全威胁的能力。有分析指出，保安规则实施两年多来，已取得明显效果。船只在主要洋区被海盗和武装劫船袭击的概率大大减低了，确保了世界航运业的平稳发展。[30]但是与此同时，修正案和保安规则的实施给世界航运业所增加的巨额成本也是不可小视的。[31]

3. 对索马里海盗

近年来，由于索马里局势的恶化，索马里沿海的海盗和武装劫船活动愈发猖獗，发生多起船只和船员被劫持并借此索要赎金的案件。为了应对索马里沿海严峻的安全形势，国际海事组织第 25 届会议于 2007 年 11 月通过了预防和打击索马里海盗袭击的决议。该决议呼吁索马里过渡联邦政府采取一切必要措施打击索马里沿海的海盗和武装劫船犯罪，确保其海岸不会成为海盗和武装劫船分子的安全基地。所有被海盗劫持并被带入索马里领海的船只都应当被迅速释放，沿索马里海岸航行船只不应当成为海盗和武装劫船行为的受害者。决议还要求索马里过渡政府应当和联合国安理会合作，向打击海盗和武装劫船犯罪的外国军舰开放领海，而且还要求过渡政府缔结相关协定，同意外国军舰护送世界粮食计划署运送人道主义救援物资的船舶驶进或驶出索马里领海。[32]

（二）联合国安理会

由于世界上某些地区，特别是索马里地区的海盗和武装劫船犯罪已经相当严重，在一定程度上对世界的和平与安全产生了威胁，也引起了联合国安理会的关注，安理会在通过的多项决议中表达了对海盗问题的担忧。

2008 年 4 月 29 日，美法两国应索马里临时政府的请求共同向联合国安理会提交了议案，提议在事先通知索马里临时政府和联合国秘书长的前提下，授权外

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29 孙毅：《浅谈 SOLAS 公约海上保安修正案和 ISPS 规则对我国航运业的影响及应对》，载于《中国海事》2005 年第 3 期，第 30 页。

30 张逸欣：《海上保安事件与 ISPS 规则》，载于《中国水运》2007 年第 9 期，第 33 页。

31 孙毅：《浅谈 SOLAS 公约海上保安修正案和 ISPS 规则对我国航运业的影响及应对》，载于《中国海事》2005 年第 3 期，第 30 页。

32 《国际海事组织第 25 届会议重新制定了预防和打击索马里海盗袭击的方案》，下载于 http://www.simic.net.en/news/detail.jsp?id=16251，2008 年 5 月 29 日。

国军舰可以进入索马里领海追捕和取缔海盗，必要时可以动用武力。安理会在 2008 年 5 月 15 日通过了 1814 号决议，决议“重申支持一些国家为保护世界粮食计划署海运船队作出的贡献，呼吁各国和各区域组织彼此密切协调，在过渡联邦政府提出要求时，并在事先知会秘书长的情况下，采取行动保护向索马里运送人道主义援助的航运和联合国授权的活动”。

安理会在 2008 年 6 月 2 日又通过了 1816 号决议，决议再次表达了对索马里沿海海盗和武装劫船犯罪的关注，并且授权同过渡联邦政府合作打击索马里沿海海盗和武装抢劫行为的国家可：(a) 进入索马里领海，以制止海盗及海上武装抢劫行为，但做法上应同相关国际法允许的在公海打击海盗行为的此类行动相一致；(b) 以同相关国际法允许的在公海打击海盗行为的行动相一致的方式，在索马里领海内采用一切必要手段，制止海盗及武装抢劫行为。

而在 2008 年 10 月 7 日通过的 1838 号决议中，安理会呼吁各国部署军舰和飞机，按照《联合国海洋法公约》中所体现出来的国际法，积极参与打击索马里沿海的海盗行为。2008 年 11 月 20 日，安理会又进一步通过 1844 号决议，决定对包括海盗和武器走私人员在内的所有破坏索马里和平与稳定的个人和实体进行制裁，制裁措施包括资产冻结和禁止出国旅行等。

（三）区域合作

在国际海事组织的倡导下，世界上有一些区域就打击海盗和武装劫船进行了合作，其中最成功的就是亚洲地区。2001 年“亚洲合作打击海盗会议”在东京举行，[33] 会后日本提出了有关《亚洲地区打击海盗和武装劫船合作协定》的倡议，该协定的主要目标是加强亚洲国家之间在反海盗和武装劫船问题上的多边合作。经过三年的谈判，协定于 2004 年 11 月在东京最终起草完成，并于 2006 年 9 月 4 日正式生效。[34] 中国也在 10 月份成为其缔约国，并且声明协定适用于中国的香港和澳门地区。[35] 目前，协定总共有 14 个缔约国，分别是新加坡、印度、文莱、老挝、缅甸、柬埔寨、菲律宾、斯里兰卡、泰国、越南、孟加拉国、中国、日本和韩国。[36]

根据上述协定，亚洲将建立一个信息共享中心，地点设在新加坡。该中心的主要职能是：

1. 从事和保持有关海盗及武装劫船事件的信息在缔约方之间的迅速传播。

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33 《亚洲合作打击海盗会议在东京召开》，载于《中国经贸》2001 年 11 月，第 3 页。

34 More about Recaap, at http://www.recaap.org, 12 June 2007.

35 《中国签署〈亚洲地区反海盗及武装劫船合作协定〉》（新华网新加坡 2006 年 10 月 27 日电），下载于 http://international.big5.northeast.cn/system/2006/10/27/050588896.shtml，2007 年 6 月 12 日。

36 《亚洲地区打击海盗和武装劫船合作协定所属数据共享中心理事会第一次会议在新加坡召开》，载于《中国海事》2007 年第 1 期，第 79 页。

2. 收集、整理和分析缔约方发布的有关海盗和武装劫船的信息，包括涉及从事海盗和武装劫船的个人和跨国有组织犯罪集团的其他有关信息。

3. 准备数据和报告，并将其散发缔约方。

4. 在任何可能的情况下，如有合理理由相信存在发生海盗和武装劫船事件的紧迫威胁，向缔约方发出适当警报。

5. 在缔约方之间转交合作请求和所采取措施的信息。

6. 在收集和分析的信息基础上，准备非保密 , 数据和报告并将其散发航运界和国际海事组织。

同时，各国应当通过信息共享中心进行合作，每一个缔约国均要指定一个相应的与中心进行联络的联络点，遇有海盗或武装劫船，每一缔约方都应尽力要求其船舶、船舶所有者或经营者尽速将海盗或武装劫船事件通知包括联络点在内的有关国内机关，并在适当时通报中心。在任一缔约方收到或获取海盗或武装劫船的紧迫威胁或事件的信息后，应将相关信息通过其指定的联络点尽速通知中心。缔约方收到中心关于海盗或武装劫船紧迫威胁的警报时，应尽速将警报转发给位于该紧迫威胁所涉区域内的船舶。一个缔约方还可以通过中心或直接要求另一缔约方合作侦查海盗、从事武装劫船的人员及其相关的船舶、受害者等，并且要求另一方采取包括逮捕和扣押在内的适当措施，而被请求的缔约方则应当尽力予以合作。

该协定生效之后，信息共享中心已经开始运作，原日本驻联合国常驻使团的公使伊藤嘉章先生为该中心首任总干事。各国也选派本国熟悉海事防务的人员到新加坡为信息共享中心服务。来自中国公安部边防管理局海警处的许亮少校，于2007 年 5 月 24 日起担任信息共享中心的调研部主任。[37]

除了上述协定之外，马来西亚、新加坡、印度尼西亚等国也签署协定，对马六甲海峡进行联合巡逻，这一举措对于遏制马六甲地区海盗和武装劫船犯罪的发生起到了极其重要的作用。

（四）国家层面的反海盗和武装劫船努力

世界上受到海盗和武装劫船犯罪影响的国家很多，各国也采取了很多措施来应对此威胁。本节将对在反海盗和武装劫船中比较活跃的两个大国——法国和美国近期所采取的措施做一个简单的考察。

1. 法国

法国在 2008 年遭遇了一起较为严重的海盗事件，并造成了广泛的国际影响。

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37 《亚洲联手打击海盗各国派专员参加情报分享中心》（中新社香港 2007 年 6 月 6 日电），下载于 http://news.sohu.com/20070606/n25043034.1.shtml，2008 年 5 月 29 日。

2008 年 4 月 4 日 10 名海盗在索马里外海的印度洋劫持了一艘法国豪华游艇。游艇当时正在返航，未搭载乘客，船上有 30 名法国和乌克兰船员，其中有包括 6 名妇女在内的 22 名法国公民。海盗们在劫持游艇后使游艇沿索马里东海岸航行，后来抵达索马里北部城镇埃伊尔，海盗分子希望用这些人质换取巨额赎金。4 月 11 日，法国军队战舰和直升机发起突袭，抓捕 6 名海盗。索马里方面说，法军直升机在突袭行动中发射火箭弹，致使至少 5 名当地人死亡、8 人受伤。但法国方面否认造成人员伤亡。法国武装部队总参谋长让 – 路易斯•若热兰 11 日在首都巴黎举行的新闻发布会上说，海盗释放人质后上岸，法国军队追踪发现，海盗打算乘车离去。这时，一架法军“小羚羊”直升机上的狙击手开火击中汽车引擎。与此同时，3 名突击队员跳下一架“黑豹”直升机，抓获 6 名海盗。这些海盗分子将受到法国司法部门的审判。

这一事件展现了法国政府对海盗犯罪不妥协的态度，即使动用武力也在所不惜。有评论说法国政府这次在索马里使用武力违反了国际法，但是法国政府表示，法国武装力量进入索马里已经得到了索马里过渡政府的同意。

事实上，在此事件发生之前，法国政府就为解决索马里附近的海盗问题做出过努力。2007 年 11 月，法国政府和海军就派出军舰和飞机为世界粮食计划署向索马里运送人道主义救援物资的船舶提供护航，这一行动持续了 2 个月之久。[38] 而在此次劫持事件发生后，在法国的倡议下，丹麦、荷兰等欧盟国家继而响应并将共同派出海军舰船采取行动保护联合国世界粮食计划署向索马里运送人道主义援助物资的船只。

2. 美国

美国是世界上唯一的超级大国，其在全球都享有利益。而世界范围内的海盗和武装劫船犯罪对其利益产生了很大的影响，因而美国也采取了一系列措施应对此威胁。

多年前，美国联邦调查局和海岸警卫队就与世界上 44 个国家开展了合作计划，以共同应对包括海盗在内的跨国犯罪。这些计划包括一些很重要的培训方面的内容。美国的执法机构将他们与海上跨国犯罪作斗争的经验与其他国家进行了分享。[39]

2007 年下半年美国海军发布了一份题为《21 世纪海上战略》的报告，提出了著名的“千舰海军”计划。该报告认为在 21 世纪，海盗、团伙犯罪、走私贩卖人口、毒品交易已经成了对世界海洋秩序和所有沿海国家利益最大的威胁。而世界上任何一个国家都无法单枪匹马地肩负起维护公海安全的职责。因而需要紧密的国际

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38 《粮食署欢迎法国海军为索马里运粮船护航》，下载于 http://www.un.org/chinese/News/fullstorynews.asp?newsID=8823，2008 年 5 月 29 日。

39 Maureen O’C. Walker, Piracy and Armed Robbery at Sea, at http://www.state.gov/g/oes/rls/rm/4994.htm, 29 May 2008.

合作，各国海军应当联合起来，组成一支“千舰海军”，相互交流情报，协调执法行动，联合分配资源，以共同加强执行海洋法的能力。[40] 但是“千舰海军”这样一个看似很美妙的计划却没有得到很多国家政府的支持。原因是多方面的，一方面各国海军的防务目标、战略、计划不相一致，很难让各国海军放弃原有任务，优先进行联合海上执法；另一方面则是由于很多国家对美国的不信任，认为美国会利用这个计划扩张其霸权势力。

此外，面对索马里日益严峻的海盗和武装劫船犯罪形势，美国也没有等闲视之。在此处执行确保这一重要海道安全和反恐任务的美国海军第五舰队和其盟国舰队也扩展了任务范围，将打击海盗和武装劫船犯罪作为其任务目标之一。2007 年 10 月 28 日美国海军导弹驱逐舰“波特”号在索马里海域击沉 2 只海盗船只，这伙海盗劫持了运送化学品的日本船只“金程”（音译）号，被劫日本船只上载有有毒易燃化学品。船上 20 多名船员中包括韩国人、菲律宾人和缅甸人，遭劫地点位于索马里北部海域。2008 年 2 月 12 日，美国海军又向一只劫持丹麦船只的海盗船开火。在此前，美国海军自 2 月 4 日以来一直在监视那艘被劫持的丹麦船只，并通过电台与海盗们进行了联系，要求他们离开被劫船只。

此外，除了美国和欧盟，在索马里海域安全形势恶化之际，包括俄罗斯、印度在内的很多国家都从自己不同的目的出发向相关海域派出军舰、飞机以执行反海盗和武装劫船任务。印度的一艘军舰甚至击沉了一艘海盗母船，尽管后来证实该船是一艘被海盗劫持的泰国渔船。总体而言，世界各国海军舰队的存在对于索马里的海盗起到了一定的威慑作用。但是，目前来看，效果还不是很明显。数量有限的军舰并不能完全确保面积广大的亚丁湾的安全，而且海盗船只具有一定的隐蔽性，海盗劫持的人质也使得军舰不敢轻易开火。

（五）非政府组织国际商会—国际海事局

世界范围内的打击海盗和武装劫船犯罪的活动除了政府间国际组织和国家参加之外，一些特定的非政府组织也积极参与。国际海事局是国际商会下属的一个特殊部门。其是一个非营利性组织，于 1981 年成立，目标就是与各种海事犯罪作斗争。为应对海盗和武装劫船犯罪，国际海事局于 1992 年在马来西亚的吉隆坡成立了国际海事局海盗报告中心。该中心通过广播向船舶播送每天的海盗与武装劫船犯罪的发生情况；将发生的海盗和武装劫船犯罪案件报告给相关执法机构和国际海事组织；帮助经验不足的执法机构和其船舶遭到劫持或攻击的船东解决问题；中心还通过因特网发布每周海盗和武装劫船情况报告并且撰写、发布全面的季度和年度海盗和武装劫船问题报告。

40　约翰•摩根：《打造全球联合舰队》，载于《国际展望》2007 年第 4 期，第 35~41 页。

（六）小结

通过上文简单的考察，我们不难发现解决全球性的海盗和武装劫船犯罪问题的努力是一幅经典的“全球治理”的图景，国际组织、区域组织、国家、非政府组织、船东、船长、船员都参与其中，各方主体为了解决这个问题而采取了多样的措施，付出了巨大的努力。相关措施主要集中在信息沟通，经验、技能共享，联合打击，预警系统和设备的安装等方面。除索马里等特定区域之外，全球海盗和武装劫船犯罪形势相比于 20 世纪 90 年代末已经有所好转，这说明这些举措收到了一定的成效。然而现在国际社会所采取的应对海盗和武装劫船措施不能不说还存在一些问题。我们再审视一下 2007 年全球海盗和武装劫船案件发生的位置图，就会看到几乎所有的海盗和武装劫船案件都发生在发展中国家，特别是非洲、亚洲和南美洲国家的沿海，而在发达国家沿海，几乎没有发生任何的海盗和武装劫船案件。海盗和武装劫船犯罪实际上是全球矛盾所表现出来的表象，其发生与全球的贫困问题、发展中国家内部不稳定和南北差距问题有着深刻的关联。因此，虽然通过上文我们看到很多打击海盗和武装劫船的措施，特别是航运方面的措施已经被采用以防止海盗和武装劫船犯罪形势恶化，但是这些措施总体来说都是一些治标的手段，这些措施是必要的，但是难以从根本上消除问题。要从根本上消除海盗和武装劫船犯罪，确保航运安全，还是要从提高发展中国家沿海居民的生活水平入手，在发展中国家沿海地区建立良好的治理结构。应当由国际组织或者发达国家通过资金、技术和经验上的支援，帮助发展中国家提高沿海居民的就业率，增加他们的收入，帮助他们发展现代渔业、现代航运业或者其他现代工业。

之所以现在难以采取这些措施，一个原因就在于关注海盗和武装劫船犯罪问题的多是执法部门和航运部门或组织，这些部门和组织难以提出全面的社会经济政策，只能从他们熟悉的方向入手。所以要彻底解决全球性的海盗和武装劫船犯罪问题，还应当有更多的国际组织、政府部门加入进来，特别是经济、社会、民事部门。只有多部门、多组织共同协调，实施完整和全面的社会政策，逐步提高发展中国家沿海居民的生活水平，建立沿海地区良好的治理结构，才能使得海盗和武装劫船犯罪在这个地球上销声匿迹。

四、中国的对策

虽然中国沿海近年来已经少有海盗和武装劫船犯罪发生，但是全球海盗和武装劫船犯罪对中国的航运、渔业，特别是上文所分析的海上石油运输还是产生了很大的影响。为了保护中国船舶的安全，为了确保中国海上石油运输通道的安全，作为一个负责任的大国，中国应当采取措施，做出自己的努力，和全世界一道共同

应对海盗和武装劫船犯罪。中国政府可以从以下几个方面来着力：

（一）积极参与国际合作，支持全球反海盗和武装劫船行动

虽然中国不是反海盗行动的主战场，但是国际组织和世界上各主要大国所进行的反海盗和武装劫船努力事实上对中国有很大的益处。这些行动和措施可以确保世界航运的安全，增强人们的信心，从而起到稳定全球油价的作用。所以中国在一定程度上可以看作是“搭便车”者，从反海盗和武装劫船行动中获益，但是支付的成本相对比较少。可以试想，如果有一天，红海、亚丁湾或者马六甲海峡安全形势失控，海盗横行，中国的石油运输难以从这些重要海道通过，国内油价飞涨，出口商品也难以正常运输，那么中国国内繁荣稳定的局面必然会受到巨大的影响。因此，有些国家也提出，中国应当派出武装力量参与索马里打击海盗和武装劫船的行动。[41]

虽然中国现在可能还不会派出海军力量到离中国本土如此之远的海域参加剿灭海盗的行动，但是中国应当积极参加、支持有关国际组织为反海盗和武装劫船而采取的措施，对于大国所进行的反海盗和武装劫船军事巡逻和行动也应当表示支持。在这一方面，中国应当摒弃冷战思维，不能习惯性地认为所有大国在本土以外的军事行动，尤其是美国的军事行动都是在谋取全球霸权，充当“世界警察”而加以反对。事实上，有的时候，世界上多一个“世界警察”对全球利益以及中国的利益未尝不是一件好事，正如美国当前在红海、亚丁湾所进行的反海盗和武装劫船的巡逻一样。这些行动确实扩张了美国的势力范围，但同时也保持了这一重要海道的安全，使得世界各国都能够使用。对于这样的行动，中国应当坚决地支持。

在此基础上，中国的海上执法力量乃至武装力量应该更主动、更积极地参与到全球海上执法合作中去，一方面为维护世界海上安全贡献力量，另一方面也可以学习别国在海上执法方面的经验和技术。在这里中国同样不能警惕心理过强，不能总认为别国尤其是大国的合作请求，都是为了刺探中国的情报和实力，中国的海上执法力量和武装力量应当充满信心地走向世界。在这一方面，已经有一些良好的开端。2007 年美国海岸警卫队的“鲍特韦尔”号执法船访问上海；中国渔业巡逻船每年也与美国海岸警卫队的巡逻艇和巡逻机在北太平洋开展联合执法行动，打击非法捕鱼；中国渔业执法人员暂用美国海岸警卫队的舰艇，在北太平洋海域展开执法行动，打击中国非法渔船。与此同时，中方人员也在美国科迪亚克和阿拉斯加的渔业执法学校学习。[42] 这些都为中国海上执法力量参与构建全球海上

41 《西班牙首相提议中国海军参与打击索马里海盗》，下载于 http://war.news.163.com/08/0430/10/4AP5E5TV00011MTO.html，2008 年 5 月 30 日。

42 付征南：《中国：美国海上合作新伙伴？》，载于《国际展望》2007 年第 21 期，第 31 页。

安全的行动奠定了良好的基础。

（二）整合国内执法力量，维护南海安全

虽然中国近海最近并发生没有海盗和武装劫船犯罪，但是南海却不太平。2007 年总共发生多达 70 件有报告的海盗和武装劫船犯罪（包括印度尼西亚、泰国、马来西亚、菲律宾、越南和新加坡沿海）。作为该区域的一支重要力量，并且一直宣称南海是其历史性水域的中国理应在维护这一片海域的安全方面发挥更为重要的作用。

然而南海面积广阔，达到了 356 万平方公里，中国控制的最南端岛屿曾母暗沙离大陆的距离在 2000 公里以上。在如此广阔并远离本土的海域进行打击海盗和武装劫船犯罪、维护海上安全的行动并不是一件轻松的任务。中国要做的第一件事情就是整合国内的海上执法力量。中国国内目前海上执法力量高度分散，中国海监、中国海事、渔政渔港监督、公安边防海警部队、海关缉私等多个部门都拥有自己的舰艇、直升飞机等执法装备，执法内容各不相同，之间协调互动也相对缺乏。打击海盗和武装劫船等犯罪主要是属于公安边防海警部队的任务，但是海警部队普遍缺乏大型的巡逻舰艇和直升飞机，大多只能在近海执行任务。而海事部门拥有的大型巡逻舰艇较多，交通部也成立了海上搜救中心，采购了大量的直升飞机，但是这些大型舰艇和直升飞机大多只是用于搜救和海事执法，没有装备相应的武器，难以应对严重的海上犯罪。因此要在南海广大区域打击海盗和武装劫船犯罪分子，中国政府应当发挥装备多方面的功能，以节约资源。在采购和装备大型舰艇和直升飞机的时候，就应当考虑到在海事执法、渔业执法、打击犯罪等多方面的用途，装备各种设施和武器;而在使用的时候应建立统一的协调机制，一次巡逻完成尽可能多的任务。只有这样，中国才有可能运用有限的财政资源获得足够多的舰艇和飞机，进行南海区域打击海盗和武装劫船犯罪的行动并开展其他执法活动。

其次，中国海军应当更积极地参与打击海盗和武装劫船犯罪。中国的海上执法力量还比较弱小，而且资源分散，现阶段还难以在南海展开大面积的巡逻。但是中国海军南海舰队的力量则比较强大，拥有大量的大型舰艇和各种型号的飞机。而海军力量参与打击海盗和武装劫船犯罪也是世界各国的惯例，美国、法国、西班牙、巴基斯坦等国的海军都参与了打击索马里海盗和武装劫船的行动。因此，中国海军的舰艇和飞机应当在南海海域开展更多的巡航行动，在维护祖国主权和领土完整的同时，密切注视海域的安全情况，遇见海盗和武装劫船犯罪应当积极地予以打击，对于受害船舶也应该努力进行救援。这样才能在和平时期发挥海军的最大效用，也可以为中国海军赢得世界声誉。

（三）与东南亚国家建立更紧密关系，帮助提高沿海居民生活水平

上文已经提到，海盗和武装劫船犯罪的出现实际上与沿海居民的生活水平，沿海地区的治理程度有着相当大的关系。因此，为了确保中国海上石油运输航线的安全，仅仅开展武装力量的巡逻、打击还是不够的。中国应当努力与东南亚国家建立更紧密的关系，在力所能及的范围内帮助东南亚国家提高沿海地区居民的生活水平，改善沿海地区的治理。

中国经过 30 年的改革开放，已经改变了过去“一穷二白”面貌，有了一定的财富积累，并且在经济建设、法制建设等方面有了一定的经验。中国应当更多地与东南亚国家分享发展的成果，在自己的能力范围内，给印度尼西亚、菲律宾、马来西亚、泰国等海盗和武装劫船犯罪比较严重的国家以适当的经济援助，鼓励国内的企业在这些国家的沿海地区投资，帮助他们在沿海地区发展现代渔业、航运业和其他工业，提高沿海居民的就业率和生活水平。同时中国也可以与上述国家分享执法、法制建设方面的经验，向他们的执法力量提供培训或者舰艇等设备，提高其执法能力。这些措施除了能减少海盗和武装劫船犯罪，保障南海航运安全外，也能极大的提高中国在东南亚的影响力。当然，中国自身作为一个发展中国家在这方面的能力有限，改变发展中国家的面貌需要全世界的共同努力，但是中国应当做一些力所能及的事情。

五、结　论

当前，世界范围内的海盗和武装劫船犯罪形势依然相当严峻，其给中国的海上石油运输以及其他方面的航运和渔业利益都造成了很大的影响。虽然国际社会已经采取了很多措施来防治海盗和武装劫船问题，但是多集中于航运、执法方面，难以从根本上消除海盗和武装劫船犯罪。国际社会应当更多的从提高发展中国家沿海居民的生活水平和改善这些地区的治理状况入手，彻底地改变海盗和武装劫船所产生的土壤。就中国而言，中国应当积极地融入到打击海盗和武装劫船犯罪的国际合作中去，支持相关国际组织和大国的努力。对于海盗和武装劫船多发区南海，中国应当发挥更大的作用，积极整合执法力量，派出海军舰艇进行巡逻。更为关键的，还是应该为东南亚国家改变其沿海地区的贫困面貌尽自己的一份力量。

海上安全形势变化对海洋法秩序的影响

史克功 *

内容摘要: “911”恐怖袭击发生后，美国积极通过国内立法、加强国际协作等途径推行其海上安全战略，巩固其海洋霸主地位。日本也不遗余力地积极联合美国开展多边海上安全机制，保障自己的海洋利益，扩充自己海洋势力。面对新的海上安全形势，我国应积极应对，通过多种途径维护我国海洋权益，全面参与国际海洋事务，争取我国在海洋上的话语权。

关键词: 海洋　安全[1]　战略　行动　部署

2001 年 9 月 11 日“911”恐怖袭击事件发生后，美国政府迅速采取行动，出台了一系列的安全政策，国会也先后出台了许多有关安全的法律法案。同时，美国积极通过联合国大会、安理会、国际海关组织、国际海事组织等国际组织，在国际社会上推行其安全战略，全方位地开展安全工作。而实际上，早在“911”恐怖袭击发生之前，以美国为首的海洋强国，就一直在探索建立新的海上安全模式，针对海盗、海上武装抢劫、海上恐怖活动、大规模杀伤性武器扩散等威胁。“911”恐怖袭击的发生，为美国等海洋强国提供了一个良好的契机，使其海洋安全战略在全球的实施、海洋霸主地位的巩固成为可能。国际海事组织在“911”恐怖袭击发生后，在美国的推动下，以罕见的速度通过了 1974 年《国际海上人命安全公约》2002 修正案，对第 XI 章进行了修正，原来的第 XI 章修正为第 XI-1 章，并增加了第 XI-2 章“加强海上保安的特别措施”。同时《国际船舶和港口设施保安规则》也与第 XI-2 章同时生效，其中 A 部分作为强制要求，B 部分作为建议性要求。我国作为《国际海上人命安全公约》的缔约国，也于 2004 年 7 月 1 日开始正式实施《国际船舶和港口设施保安规则》。

我国作为航运大国，2007 年沿海运输完成货运量 9.24 亿吨，远洋运输完成货运量 5.89 亿吨，远洋运输集装箱 1711.93 万 TEU，[2] 连续多年海上货物运输量居全球第一。航运业的发展为国民经济的发展提供了有利保障。然而在新的海洋

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1 本文所谈的安全，不是传统意义上的安全 (safety)，而是保安角度的安全 (security)。
2 交通部《2007 年公路水路交通行业发展统计公报》。

安全形势下，面对海上恐怖活动、海盗、海上武装抢劫、毒品走私、武器走私和大规模杀伤性武器的扩散等海上保安威胁，我国应该进一步积极采取措施，保证航运安全，维护国家海洋权益。

一、与海上安全有关的概念

海上安全威胁的范畴是什么，各国根据不同的国情可能有不同的结论，列举所有的安全威胁内容也是比较困难的。《国际海上人命安全公约》 2002 年修正案对保安事件进行了定义，或许可以作为对海上安全威胁的理解。保安事件系指威胁船舶（包括海上移动式钻井平台和高速船）或港口设施或任何船 / 港界面活动或任何船到船活动保安的任何可疑行为或情况。[3]

《国际船舶和港口设施保安规则》B 部分第 8.9 条规定，开展船舶保安评估时，应考虑所有可能的威胁，可能包括下列保安事件类型：1. 对船舶或港口设施的损坏或破坏，例如实施爆炸、纵火、破坏或恶意行为；2. 劫持或扣留船舶或船上人员；3. 损坏货物、船舶基础设备或系统、或船舶物料；4. 未经授权使用或进入，包括藏于船上的偷渡人员；5. 武器或设备的走私，包括大规模杀伤性武器；6. 使用船舶载运企图制造保安事件的人员和 / 或其设备；7. 使用船舶本身作为损坏或破坏的武器或手段；8. 在港或锚泊时从海上发动的攻击；9. 海上攻击。

此条可以理解为是对保安事件定义的详细解释，即海上保安事件不仅包括海盗行为，还应包括所有针对船舶、港口的暴力破坏行为或威胁，如恐怖袭击、武器走私等。

虽然国际海事组织对海上保安事件以列举的形式进行了定义，但是在国际法的框架下，对海盗等行为进行明确定义仍很困难。

为了便于撰写工作报告，国际海事局将海盗定义为：为了实施盗窃或其他犯罪而登临船舶的行为，并有意或能够使用武力完成这一行为。[4] 国际海事局的定义包括了在一国领海或群岛水域针对船舶的袭击行为。

而国际海事组织在其文件中使用了“海盗和武装抢劫船舶”，其中，将海盗定义为《1982 年联合国海洋法公约》第 101 条定义的非法行为。[5] 即下列行为中的任何行为构成海盗行为：

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3 《国际海上人命安全公约》2004 年综合文本第 XI- 2 章“加强海上保安的特别措施”第 1 条。

4 International Maritime Bureau, Piracy and Armed Robbery against Ships, Annual Report, 1 January – 31 December 2000 (January 2001).

5 International Maritime Organization, Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, MSC/Circ. 984 (20 December 2000).

（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。

“武装抢劫船舶”是指在一国管辖范围内直接针对船舶或船上人员或财产实施除“海盗”定义之外的暴力、拘禁、掠夺等非法行为。[6]

国际海事组织的海盗定义仅适用于《1982 年联合国海洋法公约》第 101 条定义的情形，即发生在沿岸国主权管辖范围之外的海域（包括公海和专属经济区）的事件；武装抢劫船舶是指发生在沿岸国主权管辖范围内（包括内水、领海和群岛水域）的事件。大部分发生在用于国际航行海峡内的事件被定义为武装抢劫船舶，主要是考虑了这些海峡通常是在沿岸国的领海内。而国际海事局的海盗定义容易使各国政府和法律人士对事件的性质产生混淆；当然，武装抢劫船舶的定义也不是非常清晰，它也包括了未携带武器的犯罪。在目前的国际社会中，联合国文件及各国间的宣言均采用了国际海事组织的定义。如联合国安理会的第1816决议及《中国与东盟关于非传统安全领域合作联合宣言》等。

而恐怖主义的定义更是扑朔迷离。经统计，目前世界上对恐怖主义的定义超过 100 余个，其中一学院派定义得到了广泛的认可：

恐怖主义是通过反复采取暴力行为而引起民众焦虑的一种方式，由（半）秘密的个人、团体或国家行动者出于犯罪、政治或特殊原因而实施，恐怖主义与暗杀不同，恐怖分子直接攻击的对象并非其主要攻击对象。[7]

虽然如此，但是从国际法的角度统一恐怖主义的定义，仍是困难重重，各国之间分歧严重。

二、海上安全形势

多年来海上安全形势不容乐观，2007 年国际海事组织发表的年度报告显示当年发生的海盗事件达 263 起，比 2006 年增加了 24 起，增长率为 10%。报告指出，

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6 International Maritime Organization, Draft Code of Practice for the Investigation of theCrimes of Piracy and Armed Robbery against Ships, MSC/Circ. 984 (20 December 2000).

7 Lord Carlile of Berriew Q. C. and Home Office, The Definition of Terrorism: A Report by Lord Carlile of Berriew Q. C. – Independent Review of Terrorism Legislation, TSO (The Stationery Office), Cm. 7052 edition.

海盗的手法更加凶残，用枪支武装起来的海盗增加了 35%，遭海盗袭击后被杀害或者致伤的船员剧增到前年的 3 倍以上，达到 64 人。[8]

历年来，在全球范围内发生的海上保安事件如下：

1998 年 9 月，巴拿马籍货船“藤屿”号在马六甲海峡被劫持，16 名船员全部失踪。

2000 年 2 月的一天，日本籍油轮“战神”号在马来西亚海域被武装劫持，17 名韩国和缅甸船员被丢上一艘救生艇，3 天后才被渔民发现获救。

2001 年 8 月 23 日，中国福建省远洋渔业集团公司的“福远渔 226 号”在索马里海域被劫持，18 名船员被押到了舱底。后来，他们一举反击成功，这次事件中最可怕的是雇用的 2 名当地“保安”其实就是劫持人员的卧底。

2002 年 10 月，日本货轮“彩虹”号刚驶出印度尼西亚港口就被武装劫持。17 名船员被袭击者扔在救生筏上一星期后才获救。

2003 年 3 月 20 日凌晨，永丰远洋渔业有限公司“福远渔 225 号”渔轮在斯里兰卡海域进行拖网作业时，遭 8 艘海盗船的围劫和炮击，最终沉没，17 名船员死亡。

2004 年 12 月 12 日，一艘载有甲烷的印尼油轮在马六甲海峡被海上武装劫持。该油轮后来被释放，但船长和轮机长被绑架。

2004 年 12 月 14 日傍晚，日本籍拖船“韦驮天”号在马六甲海峡被劫持。马来西亚海上警察在收到遇袭船只发出的求救信号后紧急出动，并成功拦截了该船，但袭击者已经劫持 3 名船员乘坐另一艘船逃离。

2005 年 2 月 28 日，马六甲海峡北部水域发生海盗袭击拖船事件，马来西亚红土坎海军基地巡逻艇当晚 9 时在槟城以西约 50 海里的水域协助救起 6 名船员，但被掳走的拖船船长和 1 名船员至今下落不明。

2005 年 3 月 12 日，满载可燃化学品的“特里—苏木都剌”号运输船在马六甲海峡被海上武装劫持。该船后来被释放，但船长和轮机长被挟持为人质。

2005 年 3 月 14 日，日本拖船“伊达藤”号在马来西亚领海被海上武装劫持，导致 3 名船员失踪。

2005 年 6 月 28 日，在索马里首都摩加迪沙东北部约 400 公里的海域，联合国世界粮食计划署租用的一艘运送救助印度洋海啸灾民的粮食船遭海盗劫持。幸运的是，经过长达 3 个多月的谈判，船上的 10 名工作人员最终被释放，船上的 850 吨救援粮食也物归原主。

2005 年 10 月 18 日，一艘满载铁矿石的马耳他籍货轮在索马海域被海盗劫持，海盗胁迫 22 名乌克兰船员向乌克兰当局索要 70 万美元赎金。

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8 《年度报告显示 2007 年发生的海盗事件总数达 263 起》，下载于 http://news.china.com/zh-cn/international/1000/20080110/14606769.html，2008 年 6 月 16 日。

2005 年 11 月 5 日清晨，载有 300 多人的美国豪华游轮“精灵”号在印度洋遭到 2 艘海盗充气船的突然袭击，他们用火箭弹助推榴弹和机枪发起袭击，并企图攻上游轮抢劫。船长下令引爆安装在船舷一侧的非致命武器“声弹”，震退了众海盗并趁机加速逃离。最终“精灵”号成功脱险。[9]

2007 年，索马里海域一共发生了 31 起海盗及海上武装劫持事件；而从 2008 年上半年的情况看，绝对会刷新 2007 年的记录。2008 年 4 月 4 日，一艘法国豪华远洋游轮在索马里附近海域被海盗劫持，海盗方面索要 200 万美元的赎金；4 月 20 日，一艘西班牙渔船在索马里海域被海盗劫持；4 月 21，一艘在阿联酋迪拜注册的“海湾”号货船在索马里海域被海盗劫持；4 月 22 日，一艘悬挂意大利旗帜的油轮差点遭到索马里海盗破坏……在索马里的海盗行为日益猖獗。索马里海域已经成了世界上最危险的海域，索马里海盗也因为劫持联合国的运粮船只而引起国际社会的关注。[10]

全球范围内海盗和海上武装劫持猖獗已经是一个由来已久的国际问题，国际社会一直在国际法的框架内探讨开展打击海盗行为。然而，随着近年来国际形势的发展，海上安全形势已悄然发生了变化。恐怖行为和大规模的武器走私已经成为可能，使得恐怖主义开始威胁全球的安全。

2000 年 10 月 12 日，美国“库勒”号驱逐舰在也门南部亚丁港补充燃料时遭到一艘装满烈性炸药的小船的袭击，致使 17 名美国海军陆战队队员死亡，28 人受伤。[11]

2002 年 10 月 6 日，法国油轮“兰堡”号在也门谢哈尔港附近突然起火发生爆炸，造成 1 名船员死亡。船上装载了近 40 万桶原油。经也门、法国和美国三国调查人员以及反恐专家经过数天的联合调查和取证，确认法国“兰堡”号油轮是遭受一艘装满炸药的小船自杀性袭击后发生爆炸的，确认这是有预谋的恐怖主义行动。[12]

三、国际社会在海上安全领域内的行动

（一）联合国的行动

9 《近年来全球发生的海盗袭击大案》，下载于 http://www.chinadaily.com.cn/gb/doc/2005-12/03/content_500163.htm，2008 年 6 月 16 日。

10 《索马里海盗惹恼联合国，安理会通过首个打击决议案》，下载于 http://news.xinhuanet.corn/world/2008-06/07/content_8324068.htrn，2008 年 6 月 16 日。

11 《也门悬赏捉拿袭击美国“库勒”号驱逐舰的逃犯》，下载于 http://www.chinacourt.org/html/article/200304/24/53066.shtml，2008 年 6 月 16 日。

12 《也门宣布法“兰堡”油轮爆炸系恐怖行为所致》，下载于 http://www.people.com.cn/GB/guoji/22/83/20021017/843999.html，2008 年 8 月 10 日。

为了打击恐怖行为，国际社会开展了积极有效的工作，前联合国秘书长安南先生在“全球安全的新展望”中呼吁国际和地区性组织在反恐工作中树立“相互协作”的新观念。现任联合国秘书长潘基文发表讲话，认为“恐怖主义会伤害所有的国家，无论其领土大小、富裕或贫穷；会对不同年龄、收入、文化和宗教的人造成伤害。恐怖主义与联合国坚持的一切宗旨背道而驰。打击恐怖主义是我们共同的使命。”随着针对平民的暴力攻击不断增加和各成员国对此类威胁的密切关注，这些年来，恐怖主义已成为秘书长日程上和平与安全的主要挑战之一。秘书长呼吁各国联合起来打击此类暴行，并指定联合国系统协助各成员国的反恐努力，向各成员国发布了《联合国在线反恐手册》。[13]

联合国大会在 2002 年 12 月的有关决议中赞赏国际海事组织关于海上保安的行动，并要求相关国家给予积极的支持。联大第 61 届会议主席阿勒哈利法于 2006 年 9 月 19 日启动《联合国全球反恐战略》时指出：“联合国全球反恐战略决议及其所附《行动计划》的通过，表达了 192 个成员国的共同意愿，即我们联合国将正视恐怖主义，无论恐怖主义以何种形式和表现，由何人所为，在何处发生，为何目的而为，都必须受到谴责且不能容忍。”[14]《联合国全球反恐战略》采用了决议并附以《行动计划》的方式，是一项旨在增强各国、区域和国际反恐努力的全球性文书。这是所有成员国第一次就打击恐怖主义达成一致的战略方案。《行动计划》积极鼓励会员国考虑为联合国的反恐合作和技术援助项目提供自愿捐款，鼓励联合国考虑争取私营部门为各种能力建设方案提供捐款，特别是在港口、海事和民用航空安全等领域；同时也鼓励国际海事组织、世界海关组织和国际民用航空组织加强合作，协助各国找出其本国在运输安全领域的任何不足之处，并应请求提供援助加以解决。

为确保在联合国系统内采用协调一致的方式反恐，秘书长于 2005 年 7 月建立了反恐执行工作队。工作队的规划和协调工作可超越联合国系统，包括其它实体，如国际刑事警察组织。全球反恐战略为该工作队的实际工作提供支持，包括资源、信息、技术、管理以及应对恐怖主义威胁的措施等。[15] 同时，安理会自 20 世纪 90 年代起就一直致力于处理恐怖主义问题，对与某些恐怖活动有关联的国家采取制裁，如利比亚（1992 年）、苏丹（1996 年）和塔利班（1999 年至 2000 年根据第 1333 号决议扩展到“基地”组织）。在 1999 年的第 1269 号决议中，安理会呼吁各国进行合作以防止和制止所有恐怖活动，这是自 2001 年 9 月 11 日之后加强反恐工作的预演。2001 年“911”恐怖袭击事件之后，安理会根据第 1373 号决

13 《联合国秘书长的反恐努力》，下载于 http://www.un.org./chinese/terrorism/sg.shtml，2008 年 6 月 15 日。
14 《联合国全球反恐战略》，下载于 http://www.un.org/chinese/terrorism/，2008 年 8 月 12 日。
15 《联合国大会的反恐行动》，下载于 http://www.un.org/chinese/terrorism/ga.shtml，2008 年 6 月 15 日。

议设立反恐委员会。第 1373 号决议要求各成员国采取多项措施防止恐怖主义活动，并将各种形式的恐怖主义行动视为犯罪，同时采取措施协助和促进国家间合作。

为协助反恐委员会的工作，安理会于 2004 年通过了第 1535 号决议，决议要求建立反恐委员会执行局（反恐执行局），监测第 1373 号决议执行情况并推动各成员国提供技术援助。同年，安理会根据第 1540 号决议设立了另一反恐机构：即根据第 1540 号决议所设的委员会，负责监测各成员国对第 1540 号决议的遵守情况，要求各国阻止非国家行为者（包括恐怖主义团伙）获取大规模杀伤性武器。

安理会还在 2004 年通过了第 1566 号决议，并设立了由所有安理会成员组成的第 1566 号决议工作组，以提供针对此类个人和团体的切实措施建议，并探讨建立恐怖主义受害者补偿基金的可能性。2005 年 9 月 14 日通过了第 1624 号决议，谴责所有恐怖行为和煽动行为。安理会还呼吁各成员国依法制止恐怖行为和煽动恐怖行为，并拒绝向这类犯罪分子提供庇护。[16] 2008 年 6 月 2 日，联合国安理会通过了第 1816 号决议，授权外国军队在索马里政府同意的情况下，进入索马里领海打击海盗和海上武装抢劫行为。在决议通过后的 6 个月内，有关国家可以在经过索马里政府同意的情况下，进入索马里领海并采用一切必要手段，制止海盗及海上武装抢劫的行为。[17] 这是安理会有史以来第一个打击海盗的决议。

（二）其他国际组织的行动

1. 世界海关组织

2002 年 7 月，世界海关组织与国际海事组织就多式联运以及相关船 / 港界面活动中集装箱的检验问题签署备忘录。

2002 年 6 月 27—29 日，世界海关组织召开的理事会年会通过了《海关合作理事会关于国际贸易供应链安全与便利的决议》，并开始制定实施该决议的具体行动计划。《海关合作理事会关于国际贸易供应链安全与便利的决议》是国际海关组织框架下的多边安排，是在国际海关组织框架下建立的保证国际贸易供应链安全与便利的多边合作机制。国际海关组织在 2003 年 6 月制定的导则中，确认了有效的集装箱反恐举措要从进口国延伸到出口国装船之前，进口货物在进口国口岸或海域进行监督的传统已被突破。

2005 年世界海关组织年会上通过了关于制定《全球贸易安全与便利标准框架》的决议，大多数成员国都签署了实施意向书。该框架确定了一些原则和标准，

16 《安全理事会的反恐行动》，下载于 http://www.un.org/chinese/terrorism/security-council.shtml，2008 年 6 月 15 日。

17 《联合国安全理事会第 1816 (2008) 号决议》，下载于 http://www.un.org/chinese/about un/prinorgs/sc/sres/08/sl 816.htm，2008 年 8 月 11 日。

作为国际海关组织成员必须实现的最低标准。该决议的宗旨是制定全球范围供应链安全与便利的标准，促进稳定性和预见性；形成对所有运输方式适用的一体化供应链管理；增强海关应对 21 世纪挑战和机遇的作用、职能和能力；加强成员国海关之间的合作，提高甄别高风险货物的能力；加强海关与商界的合作以及通过保护国际贸易供应链安全促进货物畅通无阻的流动。

《全球贸易安全与便利标准框架》的内容主要包括：要求提前递交进出口及转运货物的电子信息；采用一致的风险管理手段；应进口国的合理要求，出口国海关对出口的高风险集装箱和货物进行查验；以及要求海关要向满足该标准的供应商提供相应的便利。基于上述要求，框架提出了海关与海关之间的合作安排和海关与商界之间的伙伴关系等内容。《全球贸易安全与便利标准框架》为全球供应链安全管理提供了统一标准，要求其成员国和地区海关致力于多边而不是双边的反恐统一行动，这可以从根本上铲除恐怖分子对供应链管理的威胁。

2. 国际劳工织

2003 年 6 月，第 91 届国际劳工组织会议用《2003 年海员身份证件公约》（185 号公约）替代了《1958 年海员身份证件公约》（108 号公约），该公约内容包括：海员身份认证制度，制定了全球统一的证件格式和具体技术参数；防伪技术的新成果将应用到海员身份证件中，使海员身份证件的防伪措施能够随着技术的进步而得以改进；引入了海员指纹的生物测定信息，这种生物测定技术在海运界是个新事物。同时，国际劳工组织还积极与国际海事组织沟通，推动海员身份公约的实施。

3. 国际海事组织

《1988 年制止危及海上航行安全非法行为公约》及其议定书已于 1992 年 3 月 1 日生效，但公约及议定书 2005 年修正案尚未生效。修正前的《1988 年制止危及海上航行安全非法行为公约》只规定了缔约国对于实施危及海上航行安全罪行的嫌疑人具有诉讼管辖权和不起诉即引渡的义务，但对于船舶本身的管辖仍限于船旗国管辖。但 2005 年修正案规定了缔约国可对其他缔约国船舶实施停船、登临检查、搜查、询问等执行管辖权。

“911”恐怖袭击后，国际海事组织反应迅速，在美国的大力推动下，于 2001 年 11 月第 22 届大会上通过了决议，呼吁增加反恐内容；2002 年 2 月召开第 1 次海上安全会间工作组会议；2002 年 5 月海上安全委员会第 75 届会议审议了工作报告；2002 年 9 月召开第 2 次海上安全会间工作组会议；2002 年 12 月海上安全委员会第 76 届会议商定提交外交大会审议的草案终稿；2002 年 12 月海上保安外交大会通过《国际海上人命安全公约》修正案和《国际船舶和港口设施保安规则》。

《国际海上人命安全公约》2002 年修正案对缔约国政府的保安义务、公司和船舶的要求、公司的具体责任、船舶保安警报系统、船舶的威胁、船长对船舶安全和保安的决定权、控制和符合措施、港口设施的要求、替代保安协议、等效保安安排、资料的送交、自动识别系统、船舶识别号、连续概要记录等进行了详细的规

定。

《国际船舶和港口设施保安规则》包括 A、B 两个部分，其中 A 部分是强制性要求，B 部分是对 A 部分要求的实施提供指导，两者相互对应。《国际船舶和港口设施保安规则》对港口安全进行了规定，其主要内容是对港口设施提出了保安要求，包括人员进入船舶或港口设施、船上或港口设施内的限制区域、货物装卸、船舶物料交付、非随身携带行李的装卸以及监控船舶和港口设施的保安等措施。

国际海事组织宗旨已由“航运更安全、海洋更清洁”改为“清洁海洋上安全、保安和高效的航运”，体现了船舶保安在国际海事组织工作中的地位。

另外，国际海事组织于 2005 年对《1965 年便利运输公约》进行了修正，从保安的角度对船东、船长、船员、旅客等提出了新的要求。

四、美国和日本的海上安全战略

（一）美国的海上安全战略行动

美国在“911”恐怖袭击发生后，迅速调整其海上安全战略。2001 年 12 月通过了《2001 年港口和海上保安法》；2002 年 4 月通过了《2002 年海上运输反恐法》；2002 年 11 月通过了《2002 年海上运输保安法》。这 3 部法律规定了美国海上保安制度的框架和原则，是美国海上（包括港口）保安制度的核心和基础。其中主要包括：要求对美国港口存在的薄弱环节进行评估；对船舶拟驶往美国或对美国具有保安威胁的外国港口实施保安评估；要求到达美国的旅客和船员提供身份文件，包括每个旅客和船员的出生日期、国籍、护照和签证号码及原籍；修改了《港口航道安全法》的规定，要求所有进入美国 12 海里领海的船舶在进入该领域前 96 小时通知海岸警卫队，扩大了海岸警卫队的管辖权；允许派遣海岸警卫人员在某些设施和船舶上进行侦察并对保安事件予以回击；要求进入美国的集装箱在抵港 24 小时前提供详细的集装箱货物信息；以及船舶配备自动识别系统、远距离跟踪系统等技术要求。同时对 33CFR（航行和可供航行水域规章）和 46CFR（航运规章）进行了大量修正，对海上保安的要求进行了详细的描述。

同时，美国修正了海关规章 19CFR 第四部分，即制定了在外国港口装船前 24 小时申报进口货物信息的规则，进口舱单必须在货物出口港装船前 24 小时申报。通过国际协作推行其集装箱倡议，在向其出口货物的国家的港口对集装箱进行监测，即通过国际协商，使美国海关官员能会同出口国海关人员共同监测在外国集箱海运枢纽港口的将要出口到美国的集装箱货物。

美国相关保安法律的出台，为美国构建了复杂而庞大的海上保安体系，涉及到了海上保安的每一个环节。大而化简，可以分为 3 类制度，分别是港口保安制度、船舶保安制度和集装箱保安制度。为了保证 3 个保安制度真正发挥作用，法律对保安设备的配备、保安事件的预防、保安威胁、保安事件的识别、保安事件的应急反应等环节进行了详尽和严谨地描述，对与保安有关的各部门进行了明确的分工，并建立了沟通机制。

同时，美国积极在全球范围内推行其新的海上安全战略，加强与相关国际组织合作，积极签订双边和多边协定。如美国与利比里亚、巴拿马等方便旗国家签订的船舶登临检查双边协定。目前全球海上安全新秩序已逐步形成，然而新的安全制度处处都留下了美国的影子。

（二）日本的海上安全战略行动

长期以来，日本对美国的海上安全政策是亦步亦趋，并结合自身的利益，不遗余力地推行海洋安全秩序。1996 年日本防卫厅研究所首次提出海上安全机制的新概念——海上维和。1999 年 10 月，日本船东所属的货船（“彩虹”号，船籍国为巴拿马）在马六甲海峡遭遇海盗，日本以此为契机，从 2000 年起通过与东南亚国家在政府和海上警备机关等层面上加强合作，初步建立起了以日本为主导的亚洲反海盗合作机制，日本海上保安厅开始协助东南亚国家创建海岸警备队以及提供人员、技术和设备支援。2004 年 12 月 10 日，日本内阁会议通过了日本防卫政策的《新防卫大纲》，首次明确提出了“应警惕中国的军事现代化和不断扩大的海洋活动范围的举动”，并提出了“台湾不应被置于多边海上安全机制之外”，“应活用多边海上安全机制，使之成为日美军事同盟的补充”等观点，说明了日本构建多边海上安全机制的真实意图。[18] 在世界范围内正在形成以美国和日本为核心的新的海上安全机制。

五、我国的海上安全措施

针对猖獗的恐怖行为，我国政府一贯反对任何形式的恐怖主义，主张加强国际合作，实行标本兼治，防范和打击恐怖活动，努力消除产生恐怖主义的根源。各级政府以及有关部门也都充分认识到做好反恐工作的重要性和紧迫性，居安思危、未雨绸缪，把反恐工作放在重要位置。

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18 龚迎春：《海洋领域非传统安全因素对海洋法律秩序的影响》，载于《中国海洋法学评论》2006 年第 1 期。

原交通部在《国际海上人命安全公约》2002 修正案生效前即出台了我国的《港口设施保安规则》和《船舶保安规则》，并于 2007 年进行了修正，出台了《中华人民共和国国际船舶保安规则》和《中华人民共和国港口设施保安规则》，分别于 2007 年 7 月 1 日和 2008 年 3 月 1 日施行。两部规则分别由海事机构和港口管理行政管理部门负责实施。

《中华人民共和国国际船舶保安规则》适用范围为从事国际航行的中国籍船舶和从事国际航运业务的中国公司以及进入中国管辖海域的外国籍船舶，包括客船、500 总吨及以上的货船；500 总吨及以上的特种用途船；移动式海上钻井装置。本规则不适用于军用船舶和仅用于政府公务用途的船舶。[19]

《中华人民共和国港口设施保安规则》适用于为航行国际航线的客船、500 总吨及以上的货船、500 总吨及以上的特种用途船和移动式海上钻井平台服务的港口设施。[20]

公安部于 2007 年 5 月 30 日通过了《公安机关海上执法工作规定》，该规定于 2007 年 12 月 1 日起施行。适用于发生在我国内水、领海、毗连区、专属经济区和大陆架违反公安行政管理法律、法规、规章的违法行为或者涉嫌犯罪的行为。[21]

同时与海上保安有关的规定也散见于海关等部门的规章中。

2007 年 8 月 30 日，《中华人民共和国突发事件应对法》由中华人民共和国第十届全国人民代表大会常务委员会第 29 次会议通过，自 2007 年 11 月 1 日起施行。《突发事件应对法》第 3 条规定本法所称的突发事件是指，突然发生，造成或者可能造成严重社会危害，需要采取应急处置措施予以应对的自然灾害、事故灾难、公共卫生事件和社会安全事件。根据此定义，海上保安事件可以理解为属于其管辖的范畴。同时，《突发事件应对法》确定了突发事件应急管理原则为属地管理。

然而综观我国海上安全机制，在战略规划、法律保障、技术支持、机制管理等诸多方面仍存在明显不足，很难保障我国在海洋上的权益。

2003 年 7 月 29 日，中美两国签署了中美海关《集装箱安全倡议》合作原则声明。美国将在中国上海和深圳派驻海关人员，由两国共同制定工作计划。[22] 美国海岸警卫队也派员于 2005 年 12 月 6 日至 8 日对宁波港保安履约情况进行评

19 《中华人民共和国国际船舶保安规则》第 2 条。
20 《中华人民共和国港口设施保安规则》第 2 条。
21 《公安机关海上执法工作规定》第 4 条。
22 《中美签集装箱安全倡议，美方将在沪深驻海关人员》，下载于 http://www.peoplecom.cn/GB/shizheng/1027/1990288.html，2008 年 6 月 18 日。

估；[23] 2008 年 4 月 1 日至 2 日对青岛港保安履约情况进行了评估。[24] 这说明了美国海上安全秩序新战略已经开始对我国海上安全产生影响。

六、海上安全因素对海洋秩序的影响

海上安全因素的变化为美国等海洋强国提供了扩大势力的机会。美国在《联合国海洋法公约》框架下，积极推行自己海洋战略思维。建立新的海洋安全秩序，主要表现在 3 个方面：一是积极推动现有国际公约的修正，推销其安全理念，同时尝试对现有国际法原则进行突破。如 2005 年《制止危及海上航行安全非法行为公约》修正案，对缔约国领海之外的船舶有权进行停航、登临、搜查和询问等，突破了《联合国海洋法公约》中领海之外船旗国管辖原则。而 2002 年《国际海上人命安全公约》修正案及《国际船舶和港口设施保安规则》等国际法的出台也是美国推销其安全战略的结果。二是在国际法未明确的部分，海洋强国通过推销其海洋安全思维，建立双边或多边合作，促进形成有利于该国的新秩序。如以日本为主导的亚洲反海盗合作机制。三是通过国内立法，利用强权地位，在国际法空白处，推销其海洋安全战略。如美国对外国港口的安全评估机制。

以美国为首的海洋强国，积极通过各种手段在全球范围内推行其海洋安全新战略，这将对全球的海洋安全格局产生深远的影响。而日本在东南亚推行的海上安全机制，也将对我国周边海上秩序产生重大影响。

七、完善我国的海上安全战略部署

由于海洋的特殊性，各国都将海洋放在特殊的战略地位。特别是美国和日本从国家安全战略角度出发，在国际法的框架下，积极扩展各自在海洋上的影响力，实现国家势力在海洋上的渗透。我国在海洋安全战略体系中明显处于滞后的不利局面。因此如何加强我国海洋安全战略规划，维护我国海洋权益，实现我们海洋强国之梦，是一个现实而紧迫的任务。

（一）对海洋安全进行全面而详尽的评估

构建海上安全管理体系，首要的问题是要对海上安全的所有环节进行全面而

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23 《美国海岸警卫队在宁波交流海上保安工作》，下载于 http://www.cnzjmsa.gov.cn/scripts/print.asp?docurnentid=2252，2008 年 6 月 18 日。

24 《美国海岸警卫队就港口保安履约工作访问青岛港》，下载于 http://www.zgsyb.com/Article/ArticleShow.asp?ArticleID=40953，2008 年 6 月 18 日。

详尽的评估，查找其中的薄弱环节。评估应该包括法规建设、机构设置、机构授权、机构能力、人员训练与配备、保安威胁预测与监控、保安威胁的来源、保安计划项目与覆盖范围、保安技术支持、薄弱环节的控制、保安事件反应机制、保安事件处置、机构的联合行动等。

一个良好的海上安全体系应该覆盖全面、反应快捷、行动高效。

（二）完善海上安全法律的框架，奠定法律基础

目前我国没有专门的海上安全方面的法律，《中华人民共和国突发事件应对法》虽然对突发事件有了明确规定，但是其能否对海上特殊环境下的突发事件进行有效管辖，尚需讨论。如中国籍船舶在公海上发生保安事件，能否得到有效的处置，如何处置？中国船东的船舶、运送中国公民所有货物的船舶或中国公民服务的船舶发生保安事件，如何处置？《中华人民共和国突发事件应对法》的属地管辖原则，能否保证海上保安事件的高效处置？另外，交通运输部和公安部虽然也制定了相应的部门规章，其适用范围也涉及水域，却不能覆盖与海上安全有关的各环节，而且相互之间缺少系统和全面的部署，各部门画地为囿，相互间缺少有机的联系。这能否真正实现国家在海洋安全方面的需求，保护国家在海洋上的权益，值得商榷。

因此，我国应该从海洋战略角度出发，在国际法的框架下，制定我国海洋方面的安全法律，在法律层面上建立、健全我国的海洋安全机制。

（三）完善海上安全机构的整合，统一海上安全执法权

目前我国海洋安全的管理是多部门执法，权力分散、力量薄弱，涉及到海军、海警、海事、海监、海关、渔政、水上公安等，部门分割，条块管理。多年来，虽经多方呼吁，但仍未改善。而随着美国和日本海洋战略的逐步渗透，以美国海岸警卫队和日本海上保安厅为蓝本的准军事组织，正悄然影响着全球的海上安全秩序。

海军，作为军事力量永远是国家在海洋战略上的坚强后盾。然而，在国际法的框架下，仅仅依靠军事力量容易引起别的国家警觉。因此，我国应该建立一支统一的海上执法力量——一支准军事组织，整合目前的海上执法力量，提高海上执法的效率，加大海上执法的力度，维护我国的海洋权益，保护我国公民、船舶、航空器、海洋资源及各类海上活动的安全。

（四）积极参与国际海洋事务，争得我国在海洋上的话语权

2008 年 6 月 2 联合国安理会通过第 1816 号决议，授权外国军队在索马里政

府同意的情况下，进入索马里领海打击海盗和武装抢劫船舶行为。作为联合国安理会有史以来第一个打击海盗的决议，且将外国军队“合理地”派遣到别国领海，这在联合国历史上尚属首次。[25] 索马里海域连接亚洲和欧洲，为亚欧海上通道之咽喉。因此以美国为首的海洋强国，其意在何方，不言而喻。虽然决议的出炉经过了一番博弈，决议也规定其适用范围仅限于索马里，而不应被视为确立了国际习惯法，但实际上决议的出台已经对《联合国海洋法公约》提出了挑战，势必会对现行国际法产生冲击。同时，决议的出台也反映了美国的强权地位。

我国作为航运大国，如何维护我国的航运利益、保障海上通道的安全、保证国民经济的健康发展、维护国家的安全，应该借鉴美日等国的海洋战略思路，积极通过外交、军事、准军事、政府间组织、民间组织等各种渠道，推行有利于我国的全球海洋战略，全面参与国际海洋事务，争取我国在海洋上的话语权。

25 《索马里海盗惹恼联合国，安理会通过首个打击决议案》，下载于 http://news.xinhuanet.com/world/2008-06/07/content 8324068.htm，2008 年 6 月 16 日。

构建亚太地区海上通道安全合作的法律框架

吴春庆 *

内容摘要：近年来，海上通道安全问题日渐成为众多学科研究的前沿领域。但至目前为止，仍鲜有从整个亚太地区探讨区域合作和构建合作的法律框架等问题的研究。本文从对亚太地区海上通道相关问题的界定入手，并在此基础上论及关于安全与合作的现状与出路，继而从理论和现实层面指出构建安全合作法律框架的必要性，并对法律框架的特征、原则、内容、组织等方面提出一些设想，最后总结影响法律框架构建的积极和消极因素，展望亚太地区海上通道安全合作法律框架的前景及中国的选择和应当发挥的作用。

关键词：亚太　海上通道　能源安全　国际合作　国际法

一、引　言

对现代国家来说，海洋的重要性是不言而喻的。除了从一般意义上所理解的海洋中蕴藏着丰富的生物和非生物资源外，更为重要的是，在经济日益全球化的今天，国际经贸的繁荣促使着海上交通的发达，海洋已经成为了一个世界“高速公路”。[1] 同时，关乎各国国家安全的机动兵力、战略物资的运输也需要海上通道的畅通无阻，海上通道已俨然成为各国的生命线，也是一国综合国力在海上的延伸。但从另一方面讲，如车辆增多交通事故亦相应增长的道理一样，随着各国对海外资源、能源及商品市场的依赖程度不断提高，海运负荷的剧增及海上交通流量的快速增加，走私、恐怖、海盗、污染、武器扩散等违法行为亦层出不穷，海上通道的安全问题正日渐凸显。

亚太地区海上通道是世界上最为繁忙的海上通道之一，特别是分布于西太平洋海域、接东北亚和东南亚以及中东的重要航线，其海运量仅次于欧洲的地中海，

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1 中国现代国际关系研究院海上通道安全课题组：《海上通道安全与国际合作》，北京：时事出版社 2005 年版，第 4 页。

居全球第二。[2] 以马六甲海峡为例，作为连接太平洋和印度洋的咽喉，全球一半以上的大型油轮及货轮均航经该水域，每年来来往往的船只总计在 5 万艘左右；马六甲海峡同时也是中东油田与东亚港口之间的油轮必经要道，[3] 目前，亚太国家进口原油占整个原油消费的 60%。[4] 经马六甲海峡进入南（中国）海的油轮是经过苏伊士运河的 3 倍，巴拿马运河的 5 倍。多年来，日本进口石油的 80％以上都经过这条航线运输。经过南（中国）海运输的液化天然气相当于全球液化天然气总贸易量的三分之二。这些海上通道对中日韩三国尤为重要，可以说是东亚各国的“海上生命线”，同时也是东南亚各国对外贸易的主航道。亚太地区所有海上通道均具有重要的战略意义，美国全球安全战略中包括的几大战略要点多集中在该地区。但是，亚太海上通道也是世界公认的安全“软肋”，马六甲海峡等水域就是公认的海盗及恐怖袭击的高发区，被称为“世界上最危险的海域”。[5] 此外，设在华盛顿的史汀生中心发表的一份研究报告显示，发生在日本海的事故多于世界其他任何海域。[6] 这片海域中还存在众多国家的领海纠纷，使得海道管理愈加困难。这些问题是任何一个国家都难以单方面解决的。亚太地区海上通道的重要性和脆弱性决定了通过国际合作增进安全的必行之路，而合作的前提和保障的最佳方式必然是构建一个关于亚太地区海上通道安全合作的专门性的、多边的、全方位的法律框架。鉴于此，本文首先就亚太海上通道作一界定，在此基础上对本地区为何需要安全合作、如何实现合作加以概述，然后对合作为何需要法律框架，法律框架的主要内容和前景是什么这些问题作相关探讨。

二、亚太海上通道的界定

（一）何谓“亚太”

“亚太”的概念并不是亚洲和太平洋在地理上的简单相加，它包含着历史、政治、经济、安全等诸多内涵，是一个伸缩性很强的概念。因此，虽然“亚太”一词现在已经耳熟能详，但确定“亚太”的概念和范围却并非易事。“亚太”概念不是一成不变的，而是在东西方文明碰撞交流和太平洋两岸相互联系的发展过程中逐步形成和演化的。殖民时代，以欧洲为中心的西方世界把西亚称为“近东”、“中东”，

2 International Herald Tribune, 3 May 1999.
3 江永欣主编：《世界地图册》，北京：星球地图出版社 2001 年版，第 58 页。
4 预计 2010 年，该百分比将上升至 75％。参见 Ji Guoxin, SLOC Security in the Asia Pacific, *Occasional Paper, Asia-Pacific Center For Security Studies*, February 2000.
5 古漠：《马六甲海盗牵动地缘政治》，载于《侨园》2005 年第 4 期，第 15 页。
6 Barry M. Blechman, Henry L. Stimson Center, William J. Durch, W. Philip Ellis, Cathleen S. Fischer andMary C. Fitzgerald, *The US Stake in Naval Arms Control*, Washington, D.C.: Henry L. Stimson Center, 1990.

把东亚称为“远东”，把南太平洋称为“远南”。二战期间，欧洲和亚太是两大主战场，当时将亚太战场分称为“太平洋战场”、“中国战场”等。战后至冷战初期国际上流行的仍是“东亚”、“远东”以及“太平洋地区”等概念，“亚太”的概念尚未完全形成。20 世纪 70 年代后，由于东亚地区经济的迅速增长和中国国际地位的日益提高，大洋洲国家的“脱欧入亚”政策，以及美国同东亚经济关系的进一步密切，国际上开始使用亚太这一概念。1974 年，联合国经社理事会把 1947 年成立的“亚洲和远东经济委员会”改名为“亚洲和太平洋经济社会委员会”。1989 年亚太经合组织成立以后，“亚太”这一概念得到了普遍认同和使用。

关于当代亚太的地域范围，往往需要结合各种政治经济力量的对比和国家间错综复杂的关系才能界定，而且针对不同的领域也会指定不同的范围。一般将亚太分为“大亚太”、“中亚太”、“小亚太”。“大亚太”可以包括西亚以外的整个亚洲部分、大洋洲、北美洲和中南美洲西部地区，甚至包括西亚地区。这种“大亚太”的概念更多运用于亚太国际关系领域，特别是“9•11”以后，中美俄等大国的战略外延空间逐步拓展后所指的亚太安全问题上。“中亚太”可以包括东北亚（含俄罗斯远东地区）、东南亚、大洋洲（主要指澳大利亚和新西兰）和北美洲（美国、加拿大、墨西哥）西部。这种“中亚太”更多使用于经济合作领域，特别是在亚太经合组织意义上使用。“小亚太”往往与“东亚”同时使用，一般指东北亚和东南亚两部分区域，即大、中亚太的核心部分。这种“小亚太”一般在论及地区发展道路和模式时使用。朱阳明在《亚太安全战略论》一书中也概括了如下不同的观点：1、亚太包括亚洲和太平洋的所有国家和地区，以及北美、中美、南美的太平洋沿岸国家；2、亚太是指亚洲东部和大洋洲诸国，一般不包括美洲各国和西亚各国；3、亚太是指东经 100°到 180°之间的广大区域；4、亚太主要涵盖了亚太经合组织所有成员国的地域范围，及东北亚、东南亚、大洋洲、北美和南美太平洋沿岸的国家，但不含南亚、中亚和西亚；5、亚太仅限于亚洲和太平洋的结合部，可称之为“太平洋亚洲”、“小亚太”或“大东亚”。[7] 此外其他学者的分类也是大同小异。

通过对“亚太”概念的历史追溯、地理范围考察，考虑到联合国亚太经社委员会和亚太经合组织的成员情况，[8] 结合本文的研究重点和中国的关切程度，本文将“亚太地区”限定为：东北亚、东南亚、大洋洲和北美洲太平洋沿岸国家，即东经

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7 陈鲁直：《亚太地区概念探源和海洋意识》，载于《太平洋学报》1993 年第 10 期；陈峰君：《亚太概念辨析》，载于《当代亚太》1997 年第 7 期；杜攻：《转换中的世界格局》，北京：世界知识出版社 1992 年版，第 136~137 页；亚太经济研究所编：《亚太经贸事典》，北京：中国对外经济贸易出版社 1992 年版，第 1~2 页；朱明阳：《亚太安全战略论》，北京：军事科学出版社 2000 年版；苏浩：《从哑铃到橄榄球：亚太合作安全模式研究》，北京：世界知识出版社 2003 年版；陈峰君：《亚太安全析论》，北京：中国国际广播出版社 2004 年版，第 2 页。

8 截至 2007 年 9 月，亚太经合组织共有 21 个成员：澳大利亚、文莱、加拿大、智利、中国、中国香港、印度尼西亚、日本、韩国、马来西亚、墨西哥、新西兰、巴布亚新几内亚、秘鲁、菲律宾、俄罗斯、新加坡、中国台湾、泰国、美国和越南。

120°到西经 90°之间的广大区域。当然，“亚太”概念仍在变化，随着世界政治经济格局的变化、经济全球化的发展及“亚洲意识”和东亚地区主义的增强，“亚太”概念还将会有新的含义和不同的范围。

（二）海上通道地理分布

一般来说，海上通道即海上船舶通行的航线。但海上通道安全的涉及面必然要超过纯粹的“航线”这一概念，它与一国的能源、军事、战略、贸易、海洋开发与保护等领域紧密相关。从运输角度考虑，其概念的内涵延伸到海上石油运输船队、出海口、能够停靠大型油轮的码头等配套设施方面；从航线安全讲，诸如军事冲突、恐怖活动、海盗、能源燃料走私及其他跨国经济犯罪是各国面临的共同威胁，海上通道安全必然涉及海上军事威慑力量、反恐、反海盗的问题；从能源安全看，能源在任何国家从来都不是一个纯粹的经济问题，资源的争夺很大程度上也反映在海上通道的争夺上。在和平时期，海上通道是能源贸易的通道。在战时，这些通道被视为战略通道，地理因素对海上通道的影响是各方战略考虑的重要问题。[9] 亚太地区海上通道众多而且非常重要，大致呈“仨”字形分布，如下表所示：[10]

航线	起点	途经	终点	走向	区位	航程
北太平洋航线	美国和加拿大西海岸	太平洋北部	中、日等国	东西走向	北纬 40° 以北至阿留申群岛附近	4200~4500 海里
中太平洋航线	美国西海岸	夏威夷群岛和关岛	中、日和东南亚各地	东西走向	北纬 20° 至 25° 之间	6000~8000 海里
南太平洋航线	南美洲西岸	新西兰和澳大利亚	东南亚各地	东西走向	北纬 10° 以南	约 1000 海里
北冰洋航线	北冰洋	自令海峡	亚洲东部海域	南北走向	//	//
欧亚航线	欧洲各国	苏伊士运河、北印度洋、马六甲海峡、太平洋	东亚与南亚各国	沿亚洲东部至南部呈“弧形”走向	//	//

9 Vijay Sakhuja, Indian Ocean and the Safety of Sea Lines of Communication, *Strategic Analysis*, Vol. XXV, No. 5, August 2001.

10 江永欣主编：《世界地图册》，北京：星球地图出版社 2001 年版；朱阳明著：《亚太安全战略论》，北京：军事科学出版社 2000 年版。

上述这些航线中，最重要且受地理环境影响最大的航线当属欧亚航线，这一“弧形”的海上通道可分为 3 段：一是东北亚段，自鄂霍次克海经日本海、东海至台湾海峡；二是东南亚段，包括南海海域和东南亚地区海域及众多海峡；三是北印度洋段，包括安达曼海、印度近海、孟加拉湾和斯里兰卡水域等。这条航线是亚太地区通往中东的重要途径，而且途经海域的人文地理环境及其复杂。之所以如此说，一方面是因为该航线涉及到众多不同经济发展程度、不同历史文化、不同社会制度的国家，其中有世界经济强国（美国和日本），有人口最多并迅速崛起的发展中大国（中国和印度），有世界两大军事强国（美国和俄罗斯）。另一方面，这一地区存在众多的领土、领海争端及其他历史遗留问题，如日俄北方四岛问题、日韩竹（独）岛争端、中日钓鱼岛争端以及中越菲马南海问题，以及朝鲜半岛、台湾、克什米尔等历史遗留问题，再加上一些国家继续推行遏制战略，导致地区矛盾呈复杂化发展，利益与矛盾交织、竞争与合作并存，影响地区局势的发展，威胁海上通道的安全。并且，该地区占据宗谷海峡、朝鲜海峡、台湾海峡、巴士海峡、马六甲海峡等众多重要海峡，[11] 海上通道的安全问题十分突出。

（三）海上通道的重要性及各国战略

早在 1967 年，世界著名政治家、新加坡总理李光耀就提出了一个具有远见卓识的见解，即“世界重心将转移到亚洲太平洋地区”。他的预见正在逐步成为现实。现在国际舆论普遍认为，21 世纪是亚太世纪。[12] 随着世界经济重心向亚太地区转移，该地区的贸易量和对能源的需求将增大。自然，对海上运输的依赖性也会增强，这就意味着海上通道安全将会变得更加重要。目前，90% 以上的世界贸易运输是通过海运实现的，尽管陆地运输和空运也在快速增长，但是，据预测，到 2010 年国际海运集装箱的吨数还将翻一番。石油等战略资源的贸易运输更是依赖海运。有数据表明，2001 年，世界石油贸易总量就接近 22 亿吨或 4357 万桶 / 天。海运总吨位中油轮占 40% 以上，载重 10~40 万吨的油轮更是在海洋中穿梭不息。对于能源供应国来说，只有具备出海口且出得去，才能保障能源卖得出去；对于能源进口国而言，只有在确认航线安全，能源进得来时才会下定单。对于亚太地区这样的进口石油地区而言，风险要大得多，特别是如果一国的石油储备有限，万一本国所依赖的相关海上通道被切断，能源供应势将陷入危机。同时，由于全球石油

11 该地区主要的海峡还包括：津轻海峡、巴林塘海峡、望加锡海峡等。关于这些海峡的具体介绍可参见江永欣主编：《世界地图册》，北京：星球地图出版社 2001 年版。

12 《二十一世纪是亚太世纪》，下载于 http：//www.dygbzy.com/html/hgss/2007-3/26/17_09_36_590.html，2008 年 3 月 14 日。

出口和进口地区过分区域性集中，[13] 再加上新的海上通道一时难以开辟，造成全球主要航线过于集中，热点航区、航线压力增大，对海上通道安全问题带来更大的挑战。这些海上通道对大多数亚太国家的石油运输至关重要。在今后的 20 年，亚太地区发展中国家的石油消耗预计平均以每年 4% 的速度增长。如果这种增长率持续下去，这些国家的石油需求到 2020 年将达到每天 2500 万桶，超过目前消耗水平的 2 倍。而这些增长的石油需求几乎都要依靠从中东和非洲进口。现在通过霍尔木兹海峡、马六甲海峡运出的原油每天相当于中东地区出口石油的 65％和全球石油贸易量的 40% 左右。[14] 未来 15 年内，中东向东亚地区的石油出口量将明显增加，通过霍尔木兹海峡和马六甲海峡的船只密度也将比目前明显提高，各种突发性事件很容易导致这些海峡出现短期的运输中断，进而导致全球或局部的短期供应中断。正由于此，亚太各国的安全战略或考虑议题无不把上述海上通道放在极其重要的位置。

美国与亚太地区的贸易总额自 20 世纪 90 年代中期已远远超过与欧洲共同体的贸易总额。1999 年美国与亚太地区的贸易占美国贸易总额的 38％，而与欧洲共同体和拉丁美洲的贸易则分别为 18% 和 15%。[15] 美国对亚太地区贸易的货物绝大多数是通过亚太海上航道运输，而且美国作为世界第一大石油消费国和原油进口国，石油需求的一半以上依靠进口，年进口原油近 5 亿吨，占世界原油贸易的近三分之一。据美国能源部预测，到 2010 年，美国石油进口依赖程度将达 70％。经过半个世纪的发展，美国已在亚太地区的众多战略岛屿上建立了星罗棋布的军事基地，东起阿留申群岛，西到印度尼西亚群岛。这些岛屿是美国战略物资的中转站、海陆空军的军事要塞，甚至建有美国核试验基地和反导弹基地。在美国宣布的受其控制的 16 个海上咽喉要道中，马六甲海峡、望加锡海峡、巽他海峡、朝鲜海峡等与亚太海上通道安全密切相关。马六甲海峡是美海军太平洋舰队舰只往返于波斯湾、夏威夷和美国西海岸最近航线的必经之路。巽他海峡是美海军第七舰队舰只从西太平洋赴印度洋或从印度洋返西太平洋的重要通道。1992 年美国海军将从菲律宾苏比克撤出的第七舰队后勤供应司令部迁至新加坡，以强化对东南亚航道的控制。对于没有完全控制的岛屿和要道，美国则通过“岛链”来建立据

13 中东地区是世界上最大的石油出口地区，石油年出口量 9.4 亿吨，占总量的 44%。其他石油主要出口区如非洲 3 亿吨，占 13.9％；中南美洲 1.55 亿吨，占 7.2％；墨西哥 0.94 亿吨；加拿大 0.88 亿吨。进口地区多集中在亚太地区，如美国净进口量 5.244 亿吨，占美国石油消费量（8.97 亿吨）的 58.4%；日本 2.57 亿吨，占世界贸易总量 11.9%；中国 8830 万吨。参见中国现代国际关系研究院海上通道安全课题组：《海上通道安全与国际合作》，北京：时事出版社 2005 年版，第 105 页。

14 David Rosenberg, Environmental Pollution around the South China Sea: Developing a Regional Response, *Contemporary Southeast Asia*, Vol. 21, No. 1, April 1999, pp. 120~121.

15 Lee Jae-Hyung, China’s Expanding Maritime Ambitions in the Western Pacific and the Indian Ocean, *Contemporary Southeast Asia*, Vol. 24, No. 3, December 2002, p. 563.

点、中转站并对附近区域施加控制。[16] 南海方面，美国主张维持南海航道的自由通行。[17] 1995 年 5 月 10 日，美国国务院代理发言人谢利宣布了美国的“南海声明”，声称“维持航行自由是美国的基本利益。南海地区所有船只与飞机的自由通行，对整个亚太地区，包括美国在内的和平与繁荣至关重要。”总之，海外军事基地和“海上航行自由”，是美国海上通道安全战略的一条根本性原则。

日本国土面积狭小、资源匮乏、经济对外依存度较高，战略资源和产品市场均过度依赖海外。日本的战略物资主要来源在东南亚和中东，长期以来形成的海上运输通道有 3 条：一是从波斯湾出发，经马六甲海峡或巽他海峡、龙目海峡，进入南海、东海，最后抵达日本；二是日本与美国、澳大利亚连接的东南航线；三是东北航线。其中第一条航线占日本海上运输量的 80%，对日本的战略意义不言而喻。除此之外，这些海上通道对日本将高附加值产品出口到欧洲、澳大利亚、中东和非洲也很重要，因此，其能否畅通无阻关系到日本的生死存亡。[18] 日本始终把保卫海上运输线安全作为日本自卫队和海军战略的首要任务。一方面，日本与美国合作，积极发展海空军，并努力“确保 1000 海里航线的安全”。在 1983 年出版的日本《防务白皮书》中第一次明文写到“日本周围数百海里、海上航线 1000 海里左右的海域为日本防御的地理范围”，日本将保护在该海域内执行任务的美国作战舰艇和向日本运送物资的外国船舶安全。[19] 2003 年出版的日本《防务白皮书》也“将防止外敌的范围从日本的陆地转换到日本列岛外的海上和空中”。这说明日本已改变了以本土为终点的防卫政策，将防卫前线推进到海上通道，采取弹道导弹防御等手段“御敌于国门之外”。另一方面，由于“大而富”的日本油轮经常成为海盗光顾的对象，故日本借反恐、人道主义救援、反海盗为名染指马六甲，大肆扩张

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16 从日本、韩国起，以关岛为中轴，一直延伸到东南亚的菲律宾群岛、印度尼西亚和新加坡，这条“太平洋岛链”上共有 7 个美海空军基地，这一西太平洋到印度洋的“弧形地带”与夹在地中海和波斯湾中间的中东石油能源供应带相连接。东南亚基地群由菲律宾、新加坡和泰国等国的 10 余个海空军基地组成，是“太平洋岛链”的南翼，该基地群扼守从西太平洋通往印度洋和波斯湾的主要海上通道。

17 美国分析认为，如果南沙群岛海域被声明为战争区，那么货物的保险费就可能上涨，即使经济费用不上涨，航道也失去了使用价值。故只有排除使用武力，才能保证南海航道的畅通。参见 Liselotte Odgaard, *Maritime Security between China and Southeast Asia*, England: Ashgate Publishing Limited, 2002, p. 133.

18 日本在二战时教训颇深。太平洋战争爆发后，日本固守所谓“舰艇决战”理论，对交通运输线保护不够，而美国针对日本过度依赖海外资源的特点，避实就虚，袭击日本的运输船队，使日本急需的战略物资得不到及时补充而屡获成功。特别是二战后期，美军发动“饥饿战役”，给了日本致命的一击。美国对日本海的环形封锁，使日本耗尽了本土的战略储备，日本经济在很短时间内就开始崩溃，几百万民众饱受饥饿煎熬，以致彻底丧失抵抗的意志。

19 主要是日本以南 1000 海里的东南、西南两条航线。东南航线指横滨海面—塞班岛—关岛一线；西南航线指九州以东—台湾海域。在日本看来，只要能确保这 2 条海上运输线的安全，就能保证战时国民生活和作战物资的最低需要。而 1000 海里以外至美国、中东、澳大利亚的航线安全由美国海军负责，这样整个太平洋海域的主体航线在总体上就得到了保护。

军力并将军事触角伸进东南亚。[20]

俄罗斯的地理和地缘政治环境对资源出口不利，打通更多的出海口对俄罗斯来说是具有战略意义的一环，因为出海口多就可以巩固自己能源供应国的地位，就有油价的决定权。前苏联的解体使俄罗斯失去了一些重要的石油出海口，北约东扩也增加了俄罗斯石油运往欧洲或通过欧洲人运往世界各地的难度，再加上俄罗斯西面新兴产油国的兴起，除海参崴的港口外，俄罗斯北部和东部漫长的海岸线再也找不到不冻港，通过中国与太平洋连接成了俄罗斯出海口的最好选择。1999 年俄国防部出台的《俄罗斯联邦海军战略》特别强调海上交通线的地位与作用，认为俄罗斯对外贸易和经济发展离不开交通线的畅通，把维护交通线的安全作为俄海军的重要战略任务。[21] 近年来，俄太平洋舰队多次派遣作战舰艇编队出航南（中国）海至马六甲海峡，还派遣侦察船到西太平洋各海域侦察美军的活动。

印度把控制印度洋、扼守连接亚太地区和印度洋的海上通道作为追求大国地位的必要环节和步骤，其海军战略也从近海防御向远洋作战转变。印度第一任总理尼赫鲁要求印度具有控制从苏伊士运河到霍尔木兹海峡再到马六甲海峡等海上咽喉要道的能力。拉吉夫•甘地也曾指出，“印度的防务要求我们牢牢控制通往印度洋的海上通道。”2001 年，印度外长辛格访美时宣称，印度在从波斯湾到南（中国）海的地区拥有广泛的战略利益。从实践上看，印度通过与印尼和马来西亚的“协助防务”频频涉足马六甲海峡，并借与美国海上合作之际欲当马六甲海峡的“国际水警”。2002 年 4 月，印度海军的海岸巡逻队从组建不久的安达曼—尼科巴三军联合司令部出发，成功护送一艘美国商船通过马六甲海峡到达新加坡。[22] 安达曼—尼科巴群岛位于马六甲海峡西部入口处，是印度海军经马六甲海峡进入太平洋的桥梁。印度在安达曼群岛以北扼守从马六甲海峡进入印度洋的“北纬 10°航道”，在尼科巴群岛以南控制着“古瑞特航道”。而东南亚是印度重要的石油进口基地，每年约有 114 艘特大油轮，总计 95 亿桶原油从东南亚运往南亚。一旦“北纬 10°航道”、马六甲海峡发生变故，必然会对印度经济造成影响。此地进可攻、退可守，既可使海军前推 1000 多公里，又易从太平洋进入南（中国）海，还可通过对专属经济区进行监控进而对亚太地区施加军事影响。所以印度在该地区建立海上通道安全屏障可谓“用心良苦”。

澳大利亚奉行纵深防御的战略思想，重点保卫澳通向北方的海上和空中通道、港口和运输线，以机动能力强的先进海空兵力弥补兵源较少的弱势。澳认为，从印度尼西亚到南太平洋的岛屿是战略上最重要的地区。

韩国海军遵循攻势防御和全方位防御战略，由海岸防御战略向远洋防御战略

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20 李兵：《日本海上战略通道思想与政策探析》，载于《日本学刊》2006 年第 1 期。

21 John LewisGaddis, Grand Strategy in the Second Term, *Foreign Affairs*, Vol. 84, Issue 1, 2005.

22 李兵：《印度海上战略通道思想与政策》，载于《南亚研究》2006 年第 2 期。

转变。

东南亚地区地处太平洋与印度洋、亚洲与澳洲的结合部，水域辽阔，岛屿众多，扼守东亚地区重要的海上石油航线，本身就具有重要的战略位置。但该地区也存在恐怖主义威胁、海盗袭击、领土争端、经济资源争夺、各国扩军等不稳定因素。东盟各国首先将维护海上安全作为保卫本国安全的任务之一，并高度重视。其次，东盟各国均十分重视加强海军力量建设，将其看作应对未来海上冲突的根本依托。越南在 20 世纪 90 年代初提出了“逐步将海军建设成为兵种齐全、有现代化装备、有足够力量保卫领海、海岛主权的军种”的发展目标，加快武器装备更新，逐步改善武器装备现状，并奉行陆守海进、以岛制海的海上安全战略。印尼自 20 世纪 80 年代起，相继实施了 3 个五年发展计划，加速建设具有高速机动能力和威慑能力的强大海上武装力量。菲律宾的战略重点由冷战时期的维护国内安全转变为冷战后的抵御外部侵略，重点加强西部海防建设，提出“抢先占领和开发”的海洋新战略，将海军巡逻和作战场所由近海向远岸的卡拉延群岛（即中国的南沙群岛）推进。马来西亚早在 80 年代初就提出要建设一支令人畏惧的现代化海军，进入 90 年代后制定了《20 年海军发展计划》，并采取了一系列措施，如：扩充海军编制、建立海空一体的立体防御体系；加紧基地、港口和机场建设，完善军事设施；四处采购军火，加快武器装备更新；关注地区合作，加强海上协同演练。泰国在 20 世纪 80 年代末确立了建设“蓝水”海军向远洋发展的战略目标，为此该国不惜在 1997 年国内经济遭受金融危机打击的关头耗巨资购买航母，从而成为亚洲第二、东南亚唯一一个拥有航母的国家。近年来，泰国大量采购新舰艇，实现了海军在装备上的超前跳跃，其花巨资打造的新编航母护卫舰队代表了东南亚地区的最高水平。新加坡自 1965 年独立以来就一直贯彻国家“总体安全思想”，重视加强与东盟国家及美、英、澳等国家的合作，以实现区域共同防御。最后，东盟国家积极倡导区域内和跨地区的海上安全合作，共同打击海盗和加强军事合作，对内推动相互信任措施，消除相互间的猜疑，增加互信，大大拓展了东盟国家在大国间的回旋余地，有利于东盟国家主动参与亚太地区事务，也在一定程度上巩固了其自身安全，对提升东盟的国际地位、限制大国在东南亚安全事务中的影响也起到了一定作用。与此同时，东盟国家对外以一个声音说话，与美、日加强海上安全合作，维持大国均势平衡。

2003 年中国对外贸易总额达到 8512 亿美元，其中很大一部分是通过海运来实现的。随着中国海运事业的迅速发展，中国远洋运输船队往来于世界 150 多个国家和地区的 600 多个港口。而且中国对国际石油的严重依赖已成一个基本事实

和趋势。[23] 因此海上通道安全对保护中国的能源运输，促进中国经济持续稳定发展关系重大。中国面临着油轮队伍、港口建设、航线安全等海上能源通道战略的全方位规划，最终目标是建立安全、有效和长期的石油运输“海上走廊”。[24] 一方面，中国政府一再声明：“希望有关国家不要因存在争议而影响各国船只通过南海的正常航行。”[25] 另一方面，中国已经有了一套视野比较开阔的海洋战略，建设了一支比较强大的海军，海洋科技和海洋工业也比较发达。中国为了应对“马六甲困局”，也建立了自己的石油战略储备。[26] 中国遵循防御性的海洋安全战略，并积极开展军队外交，推动和参与亚太地区特别是与东盟的安全合作。2003 年 11 月 14 日，中、印海军在东海海域实施了海上联合搜救演习，演习的目的是确保海上贸易安全，并提高海上搜索与救援行动的相互配合。2004 年 4 月 26 日，中国参加了共有 18 个国家的 20 艘军舰和 1600 人参加的在新加坡举行的大型海军演习，重点在于通过研讨与演习，推动各国建立多边合作和协调机制，加强安全措施，保护亚太海上通道畅通。2004 年 5 月 25 日，中国海事巡视船首访日本，并参加了随后在东京湾举行的联合演习，主要内容包括：打击海盗和反恐，追击走私、可疑船只，搜查运送大规模杀伤性武器的船只。[27] 中国海军的首次环球航行也体现了中国希望在世界大洋上确立自己的地位，确保自己海上能源通道的战略意义。

三、关于安全与合作的问题

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23 据中国发改委能源所周大地研究员所说，2008 年中国石油的进口与生产比例已达到约 1:1，今后主要还是依靠进口。有国际机构预计，到 2020 年，中国的石油进口有可能达到 3~4 亿吨，而 2030 年可能达到 4~5 亿吨，甚至更多。

24 中国的海洋航线主要是 4 条：一是东行航线，也就是从太平洋西岸到太平洋东岸的航线，包括中国至日本，至北美东、西海岸，至中美洲，至南美洲东海岸以及至南美洲西海岸的航线。二是南行航线，包括中国至新、马、菲、印尼等东南亚国家的航线，至大洋洲的航线以及至西南太平洋岛国的航线等。三是西行航线，也就是从中国东部经马六甲海峡进入印度洋、红海，经苏伊士运河入地中海，进入大西洋的航线，包括中国至中南半岛、孟加拉、阿拉伯湾、红海的航线，至东非和西非的航线，至地中海、黑海的航线以及至西欧、北欧和波罗的海的航线。四是北行航线，也就是由中国向北至朝鲜各港口以及俄罗斯海参崴等港口的航线。这 4 条航线中，西行航线对中国来说尤具战略价值。

25 1995 年 5 月 18，中国外交部发言人在记者招待会上说，关于南海航行权问题，中国政府的立场是明确的，即中国维护对南沙群岛的主权及相关海洋权益，不影响外国船舶和飞机按照国际法通过南海国际航道的航行、飞行自由和安全。见《中国外交部发言人谈论各国船只通过南海的正常航行》，载于《人民日报》1995 年 5 月 19 日第 4 版。

26 首期的 4 个战略石油储备基地已在 2008 年建成。目前，中国战略石油储备量在 200 万至 300 万吨之间，2010 年前将增至 1200 万吨。《发改委：中国计划 3 年内将石油储备增加 3 倍》，下载于 http://gb.cri.cn/14714/2007/09/13/106@1760635.htm，2008 年 3 月 14 日。

27 中国现代国际关系研究院海上通道安全课题组：《海上道安全与国际合作》，北京：时事出版社 2005 年版，第 9 页。

（一）海上通道安全与国家安全

当代世界，海上安全已经扩大了国家安全的外延，而海上通道安全是国家海上安全的重要组成部分。对一国来说，安全的本质就是维持生存（国家主权的维护、维系领土统一及避免外部因素的破坏以及战争行为）和发展（持续的社会稳定和国力增长）的能力。与此对应的是，海上通道安全畅通是一国维持生存与发展及化解外来入侵、干扰、破坏的能力在海上的延伸，是确保一国经济、贸易活动在海上的延伸空间及拥有运输便利的方式，也是化解海上安全威胁后确立的海上和平空间。从另一方面讲，随着现代国家战略空间的向外延伸和国内工业化、市场化进程的加速，各国生存和发展所需的能源均离不开海上通道的畅通。海上通道安全很大程度上体现了一国的海洋权益，海上的主导地位是国家的发展命脉，也是一国国力发展的重要依托。所以一个国家要真正维护国家安全，绝不能仅仅着眼于主权管辖范围内的领土、领海或领空，而应放眼于海上通道、能源供应线和公海航行的安全。海上通道的安全与国家利益紧密联系在一起，应成为国家安全及发展战略的重要组成部分。在这方面有史为鉴，欧洲因最早认识和实践海上通道安全理论而迅速繁荣和强大，海权论的创始人马汉曾说："荷兰的商业成就并不仅仅取决于它在海上的航运，也取决于众多一帆风顺的水道，使其进入自身与德国的腹地既便宜又方便。"[28] 美国也是在 1890 年放弃大陆政策和孤立主义并摆脱近海作战思想，全面发展可在深海作战的现代化海军后才走上海上霸权道路，最终成为世界"一超"。日本也是走同样的道路。而中国和印度虽然曾是陆上强国，但正是因为在这方面的认识和实践不足而在近代世界中衰落了。[29] 就当代中国来说，海上通道安全会直接影响到中国的大国地位。虽然目前中国的大国地位和大国作用越来越受到国际社会的关注，但中国在维护海外利益的手段方面以及参与国际社会所公认的国际秩序方面还较弱。显然促进海上通道安全，将会带动上述能力的提高，通过这个途径可以间接提升我国的军事、经济实力，增强我国的综合国力，又不会引起他国对"中国威胁论"的"严重关切"。[30] 中国不称霸，但不能忘记：1820 年中国的经济水平及国内生产总值曾居世界第一，但 20 年后却在东海惨败于英国的坚船利炮；1890 年中国国民生产总值是日本的 5.28 倍，但 5 年后中国被日本在海上打败并为此遭受险些被彻底肢解的厄运。[31]

同时我们也应该认识到，不能仅仅从国内层面认识海上通道安全与国家安全的关系，还要抓住当今国际安全关系的连动性、依存性等特征，善于从地区乃至全

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28 马汉著，萧伟中、梅然译：《海权论》，北京：中国言实出版社 1997 年版，第 25 页。
29 张文木：《制海权与大国兴衰的启示》，载于《学习月刊》2005 年第 3 期。
30 冯梁、张春：《中国海上通道安全及其面临的挑战》，载于《国际问题论坛》2007 年秋季号。
31 张文木：《制海权与大国兴衰的启示》，载于《学习月刊》2005 年第 3 期。

球安全合作角度审视需要保护的海上安全利益，确定选择合适的策略、手段。立足中国，这方面我们要学习毛泽东在处理与资产阶级建立统一战线时“又联合又斗争”的艺术。[32] 在一定的时期、一定的条件下，且在有共同利益的情况下可以同别国合作维护海上安全，但在另一些情况下我们应该以竞争者的姿态与别国进行斗争。中国就应在这种又合作又竞争的环境下发展起来。不知道国际合作，犯左倾关门主义错误，中国就不能发展，不能前进；不知道竞争，犯右倾机会主义错误，中国就会落后乃至丧失独立性。

（二）亚太海上通道安全所面临的问题

前述海上通道经过的东北亚、东南亚地区局势复杂多变，是一条存在诸多安全隐患的“动荡弧”。结合亚太地区的情况来看，影响前述海上通道安全的不利因素大概有以下几个方面。

首先是传统安全观下的海军军备竞赛和国家领土纠纷导致的潜在军事冲突。马汉在 19 世纪抛出他的海权论，极力强调海洋的重要性和控制海洋的意义，鼓吹以强大的海军确保在平时和战时掌握海权，特别是控制海上交通线，阻止敌方获取海上交通运输。亚太许多国家的战略家及政策决策者均深受“海权论”的影响并将其付诸实践，纷纷加强海军军备竞赛，意图“控制海洋”。至 2000 年美国海军仍保持有 12 艘航母、11 个海空兵联队、12 个两栖作战群、73 艘攻击潜艇、128 艘水面作战舰只，其中相当一部分部署在西太平洋、印度洋地区。美国太平洋舰队由第七舰队和第三舰队组成，共有 3 艘航母、近 40 艘核动力潜艇（包括 10 艘战略潜艇)、50 多艘巡洋舰和其他大型水面舰艇。其中，第七舰队拥有 58 艘主要水面舰船（不包括登陆舰)、38 艘潜艇及 350 架作战飞机，主要常规攻击力量包括“小鹰”号航母、3 艘配备有“战斧”式巡航导弹的巡洋舰及 5 艘核动力攻击潜艇。至 1996 年 8 月，俄罗斯在远东地区的太平洋舰队（俄第二大舰队）有海军舰艇 660 艘，其中包括主要水面作战舰只 55 艘、潜艇 60 艘、核动力潜艇 45 艘。根据 1999 年《俄罗斯联邦海军战略》的规定，该舰队的主要构成应当是：多用途导弹核潜艇、带舰载飞机的舰船、登陆舰艇、多用途监听船只和装载导弹的海军飞机等。日本海上自卫队的实力当前仅次于美俄两国，居世界第三位，并准备把行之多年的“八•八舰队”（由 8 艘驱逐舰和 8 架反潜直升机组成）改为“十•九舰队”，比原先“八•八舰队”编制多加 1 艘“宙斯盾”级驱逐舰、1 艘多用途驱逐舰和 1 架反潜直升机。日本是除美国以外惟一拥有世界上最先进的“宙斯盾”级驱逐舰的国家，其自卫队将配备 4 艘“宙斯盾”级驱逐舰，驱逐舰数量将达 42 艘，是美国太平洋

32 毛泽东同志在这方面的论述尤其精辟，今天仍然值得我们深思。详见《毛泽东选集》，第二卷，第 607~609 页。

舰队驱逐舰数量的一倍多。它还拥有适合远洋作战的高性能潜艇 15 艘。日本海上自卫队的扫雷能力超过美国，居世界第一位，海上自卫队的航空反潜能力居世界第二位。韩国海军正加速舰艇的大型高速化、导弹化设，提高海军的早期预警、海上监视及航空作战能力。韩国拥有 6 艘潜艇、7 艘驱逐舰和 33 艘护卫舰，计划购买至少 3 艘第二代柴油电动潜艇。它已自行建造 4000 吨级驱逐舰以及护卫舰、新式潜艇、新型登陆舰、导弹巡逻艇等。印度在 2000—2001 年度国防预算中为海军拨款 9.4 亿美元，60% 用来采购武器和实现海军现代化的计划。印度海军已拥有 28 艘水面作战舰只（包括 1 艘航母）和 19 艘潜艇，并将从俄罗斯引进轻型航母、导弹驱逐舰和导弹护卫舰。中国台湾拥有 3 艘潜艇、22 艘驱逐舰和 16 艘护卫舰。近年来中国台湾先后向法国购买了 6 艘“拉斐特”级护卫舰，并向美国租借了 6 艘“诺克斯”级护卫舰。1998 年初中国台湾就向美国购买了 3 艘“诺克斯”级舰。自行研制的 7 艘佩里级导弹护卫舰已全部交货。台湾海军从 1999 年起展开“十年兵力整建计划”，准备购买或自行建造 4 艘“宙斯盾”级导弹驱逐舰、建造 30 艘隐形快艇和换装新型飞弹快艇。台湾海军还拥有休斯 500MD、570(M) 等型号的反潜直升机约 20 架。冷战结束后，东盟国家重点加强海空军力量以适应其防卫重点由陆向海的转变和满足保卫 200 海里专属经济区的需要。泰国向西班牙购买的一艘 11500 吨级的轻型航母已编入现役，使其成为亚洲继印度之后第二个拥有航母的国家，它还准备购买至少 3 艘 R 级或更先进的潜艇。印尼已有 2 艘潜艇和 13 艘护卫舰，并计划向德国定购几艘二手的 U-206 型潜艇。马来西亚已有 4 艘护卫舰，并向英国定购了 2 艘“莱基马”级导弹护卫舰，向意大利定购了 2 艘“拉克萨马纳”级军舰。新加坡已拥有 6 艘轻型护卫舰，它与瑞典合作制造 1000 吨级轻型导弹护卫舰，并从瑞典购买了 4 艘潜艇，于 1999 年正式建立潜艇部队。文莱向英国定购了 3 艘导弹舰艇，向澳大利亚定购了 2 艘登陆艇。这些军舰大都装备有“鱼叉”或“飞鱼”式反舰导弹。菲律宾从英国购买了 3 艘巡逻艇，并于 1997 年 5 月进行了购买 8 艘巡逻艇和 24 架军用飞机的招标。越南也在加强海军力量，1999 年从国外进口了 2 艘“桑戈”级二手潜艇，并已向俄罗斯定购了 6 架苏—27 战斗机，还计划从俄追加购买 24 架飞机。澳大利亚近年来购买了 6 艘潜艇、8 艘护卫舰、16 架“海鹰”直升机，并向美国定购了 11 架 SH-2G 舰载直升机，以装备新的“安扎克”级护卫舰。新西兰海军 1997 年定购了 4 架 SH-2G 舰载直升机，用来装备两艘“安扎克”级护卫舰。[33]

这些愈演愈烈的军备竞赛相当程度上增加了亚太地区相关国家的危机感，亚

33 夏立平：《当前亚太地区海军发展的特点和海军军控的前景》，下载于 http://iaps.cass.cn/Bak/ddyt/0104-2.htm，2008 年 3 月 14 日。

太安全形势日益复杂。此外，本地区海域还存在日俄“北方四岛”之争，[34] 中日钓鱼岛之争，[35] 韩日独（竹）岛之争，[36] 南（中国）海纠纷，[37] 东南亚国家的诸多领土、领海争议，[38] 以及台湾问题 [39] 等历史遗留问题未得解决，这增加了相关国家爆发海上冲突的可能性，严重威胁地区海上通道安全乃至整体安全。

其次是海盗、恐怖主义等新安全问题。海盗古已有之，近年来在东南亚死灰复燃，且愈演愈烈。其多发地区包括：马六甲和巽他海峡、越南和柬埔寨沿海地区、香港—吕宋—海南三角地带以及台湾以北地区和黄海。统计数字表明，东南亚地区的海盗事件占世界海盗事件的比例高达 60％多，特别是马六甲海峡被称为“海盗滋生地”，“最恐怖的海峡”。仅 2000 年一年，发生在马六甲海峡和南（中国）

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34 “北方四岛”即位于日本北海道和俄罗斯千岛之间的择捉、国后、齿舞、色丹 4 个岛屿。二战以前，这些岛屿一直处于日本的管辖之下，属于日本领土。二战后，根据《雅尔塔协定》，北方四岛于 1945 年 9 月 3 日被苏联占领，从此埋下领土争端的种子。目前双方在该问题上采取不同战略，日方要求俄方尽快归还北方四岛，而俄方的焦点在于与日方联合开发四岛。从目前的情况看，由于双方缺乏坚实的合作基础，“北方四岛”之争在短期内很难得到解决。

35 钓鱼岛及其附属岛屿位于中国东海大陆架上，从历史、地理、国际法来看，钓鱼岛都属于中国，日本却以“发现”原则主张其主权。1972 年美国不顾中国的强烈反对，根据日美《归还冲绳协定》把琉球群岛和钓鱼岛一并“归还”日本。1972 年中日双方曾达成共识，“搁置争议，共同开发”。但日本右翼分子近来不断兴风作浪，有可能激化这个问题。另外，中日在东海权益问题上与钓鱼岛相关的分歧还有：关于大陆架的定义和分歧、关于岛屿海洋权益的分歧、大陆架划界原则上的分歧。由于存在着一系列国际法、自然地理、资源开发等因素，这些问题的解决都有相当难度。

36 独（竹）岛位于日本海西南部，包括东西 2 个小岛及周围的低潮高地，总面积仅为 0.186 平方千米，散落分布在 1.3 万平方千米的海面上。西北距韩国的郁陵岛 46 海里，东南距日本的隐岐群岛 79.5 海里。日本称之为“竹岛”，韩国称之为“独岛”，日韩两国都声称对该岛拥有主权。现在该岛处于韩国实际控制之下。由于该岛争端还涉及到渔业资源和专属经济区的划分，而且两国政府都需通过外交上的强硬来赢得国内政权的稳固，也担心在该问题上处理不当会带来其他领土之争的“连锁反应”，因此双方互不退让，给争端的解决带来了一定困难。但由于双方存在广泛的共同利益，不太有激化的可能。

37 如前所述，南（中国）海及其周围的海域是世界上最为重要的海上通道，而且目前的油气储量已超过 630 亿吨，被称为“第二个中东”。中国对南沙群岛拥有无可争辩的主权，南海海域也是中国的“历史性水域”。但目前共有六国七方（中国大陆、越南、菲律宾、马来西亚、文莱、印度尼西亚和中国台湾）声称对其拥有主权，并引发了一些武装冲突。南海问题的核心有 2 个：一是岛礁的主权归属，二是领海、大陆架和专属经济区的划分。虽然中国政府提出“平等协商、求同存异”和“搁置争议、共同开发”的主张，但由于南海地区发生的任何妨碍海上通道的行为都将对地区和全球经济产生不可低估的影响，而且一些大国也乘机染指这一重要战略海域，使得这一问题成为国际关系中最棘手的问题。

38 如新加坡与马来西亚对白礁岛的主权之争，马来西亚与印尼对加里曼丹东北的锡帕丹岛及其附近水域的归属之争，泰国与越南的捕鱼纠纷及大陆架重叠争议，以及马来西亚与新加坡围绕德光岛填海工程引发的领海争端。

39 台湾问题完全属于中国的内政，台湾是中国不可分割的一部分。但由于长期以来西方反华势力及日本右翼分子的插手，再加上“台独”势力的存在，使得这一问题变得错综复杂。台湾海峡位于东北亚和东南亚的结合部，为中国和国际上的海上交通要道，是中国进入太平洋的门户，也是日本南下的必经之途，更是美国在亚太地区的重要战略地带，台海问题成为中国对外交往最敏感、最核心的问题。

海的海盗事件就达 252 起，72 名船员被杀，129 人受伤或失踪。据估计，海盗袭击及其他海上诈骗活动造成的损失每年高达 16 亿美元。[40] 更为严重的是，现在海盗已经变成了有组织的活动，装备有先进的自动化武器和高科技设备，并走向“国际化”，甚至形成“海盗托拉斯”或具有黑社会背景的“海盗辛迪加”。一些分离组织如泰米尔虎也经常进行海盗袭击。海盗和恐怖组织的勾结会对海上通道安全产生更大的影响。恐怖组织善于寻找力量薄弱的地区实施不对称性袭击，随着国际反恐的全面展开，恐怖分子将“阵地”转向了海上。目前，与“基地”组织有关的恐怖主义网络已经开始劫取运送放射性物质的船只用于制造致命的化学武器。[41] 美国联邦调查局称：恐怖分子对海上目标的攻击已成为美国反恐的“软肋”。2003 年国际海事局官员警告，继 2002 年巴厘岛发生恐怖主义爆炸后，海上恐怖袭击将是下一个目标。2002 年卡塔尔半岛电视台播放本•拉丹讲话称，伊斯兰力量“正准备让你们心中充满恐惧，目标对准你们的经济生命线”。目前看来，恐怖组织袭击海上通道有以下几种方式，一是拦截或抢劫运载核生化及相关危险材料的油轮，偷取铀、钚氧化物等各种可用于制造“脏弹”的原材料；[42] 二是驾驶危险船只冲向港口、油轮或石油设施，取得轰动性效应；[43] 三是针对海上军事目标的自杀性袭击；[44] 四是让装满炸药的船只悬挂“方便旗”漂浮于海上。

再次是有组织的海上跨国犯罪问题。跨国海上犯罪主要是武器走私、贩毒、贩卖人口。缅甸的海洛因通常通过海运到达泰国、越南、中国和印度等地或者运往西方的海上枢纽。通过海道非法运输移民是最为廉价、最为容易的方式，而移民主要运往美国、西欧和澳大利亚。上述这些活动目前在亚太地区已经呈上升趋势，而且往往是武装走私，容易发生冲突，给海道过往船只带来一定威胁。走私活动导致的武器扩散与恐怖主义结合使海上通道安全雪上加霜。

最后是海上事故油轮污染问题。亚太地区许多海上通道都是狭窄的水路或海峡。[45] 一旦发生原油轮泄露污染或放射性物质污染，会对大片海域的航道安全造成影响。

（三）合作的可能性及意义

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40 Pirates Flourish on Asian Seas, *Washington Post*, 18 June 2001.

41 Mark Bruyneel, Reports in 2002, at http://home.wanadoo.nl/rn.bruyneel/ar-chive/modern/2k2repc.htm, 14 March 2008.

42 例如：2003 年 2 月，3 艘满载化学品的船只从印尼兰沙港出发，在马六甲海峡遭遇袭击，其中 2 艘被击起火，余下一艘则被劫持长达 1 小时。

43 例如：2002 年 10 月法国油轮“林堡号”在亚丁湾遭到恐怖分子装满炸药的小船袭击，造成了巨大的经济损失，引发了灾难性的生态后果。

44 例如：2000 年 10 月 12 日，停泊在也门亚丁湾的美军舰“科尔”号遭遇也门激进的伊斯兰武装组织“穆罕默德军队”的自杀性袭击，导致美军 17 人死亡，“科尔”号受重创。

45 例如：马六甲海峡全长 1000 千米，平均深度 25~27 米，北部海域宽达 350 千米，南部最窄的地方不足 40 千米，像一个漏斗。

从理论上讲，安全是一个动态的概念。传统安全下国家主要以军事为后盾，经济为保障，维持自己的安全保障能力。如果说这种能力主要通过自己得以实现的话，那么在非传统安全的影响下，各国间的相互依赖性加强，通过国际合作确保安全更为有效。“9•11”表明了美国这样的“超强”国家在面对非传统安全威胁时仍存在巨大的安全漏洞，其无与伦比的军事实力并没有确保其免受恐怖分子的不对称性攻击。当一方追求单边安全时，其他方或其他国家自然会因此觉得不安全，这种不安全感实际上反示对方国家并不安全，该国所追求的单边安全只是一种虚幻，因此，从这个意义上说，安全应是互相的、合作性的、共享的。“9•11”恐怖袭击导致空前广泛的国际反恐阵线，这是基于各国的共同立场，对共享安全、相互安全的期望，所以没有建立一种新的合作安全秩序，安全始终会遇到挑战。在非传统安全威胁的影响下，各国间的相互依赖性加强，通过国际合作确保安全更为有效。

从现实情况来看，上述影响海上通道安全的种种不利因素，都不是任何一个国家凭一己之力能解决的。一方面，这些不利因素会给一国带来不对称的安全威胁。另一方面，这些问题具有跨国、跨地区性，牵涉到亚太地区本来就存在的诸多领海纠纷问题。对于同样一片有争议的海域，有战略利益时，争端当事国就争夺其管辖权及管理权，而面临安全问题时，该片海域则成为“三不管地带”，这对各方都不利，而且国家的权利和义务也不能得到平衡。很明显，在不合作的情况下“一加一”是小于二的。比如，虽然东南亚地区海盗问题与地理环境和经济波动问题相关，但也与多数东盟国家海上安全力量较薄弱有关，在这种情况下，相关国家又以主权问题为由限制其他国家的跨境追踪、调查和管理，造成了“能力小的管不了，有能力的不让管”的局面。目前国际法对海盗的规定过于狭隘，有的国家没有或不愿意认识到海盗问题的严重性，也不愿意承认一些海域为危险海域。由于对区域海盗行为管辖权仍存在争议，各国均“各扫门前雪”，这对国际海道安全和国际社会的利益造成很大影响。这种局面只能通过合作解决，因为恐怖主义并非针对某个国家，而是针对整个世界，特别是涉及到公海时。而跨境犯罪和海上油污事故本来就具有跨国性质。在这些问题上，国家的利益已经和整个国际社会的利益紧紧联系在一起了，因此国际合作是必要的也是可能的。另外，未来 10 到 15 年内，中东地区向东亚地区的石油出口量将明显增加，通过霍尔木兹海峡和马六甲海峡的船只密度也将比目前明显提高，海上通道承受了越来越大的压力，海运竞争态势更加突出，未来航道成本、通行权之争将更趋复杂。各国也出台了相应的管制措施，比如 1971 年马来西亚、印度尼西亚和新加坡提出确保无害通航原则后，只有 20 万吨以上的油轮才可以从马六甲海峡和新加坡海峡通过。这些措施和通行

权之争也使得航运成本不断提升，只有加强合作，通过“议题互换”，[46] 整合法律资源，才能减少这方面的成本，达到地区共赢。

在海上通道安全方面进行合作具有重大意义。海上能源通道的安全问题是亚太各国共同面临的问题，而且亚太各国能源局势都很紧张，都对海上通道有着强烈的依赖，比如中日韩三国对马六甲海峡的依赖度分别为 85.7％、90.6％、87.30%。[47] 长期以来，各国都加大了在世界能源产地的外交和投资力度，而互相之间采取竞争性排挤，陷入竞相加价的恶性循环，[48] 使能源市场呈现“卖方独大，买方竞标”的局面。亚太国家只有联合起来，形成能源消费联盟，才能掌握能源控价权，形成强大的购买力和协商力，才有利于多方共赢，实现亚太地区的共同繁荣。总之，亚太海上通道安全合作第一会平衡亚太各国的权利与义务；第二可以实现“一加一”大于二的局面，增加亚太地区国际社会的福利；第三可以在合作中达成默契，合作范围由小及大，为以后海域边界的友好解决奠定政治和法律基础。因为只有在共同推进和维护这一通道安全的过程中，才会与别国产生共同的利益观，并借此增进各国在安全领域的相互信任，为区域与国际安全提供更多的安全服务。[49]

（四）合作的初步现状及领域

目前亚太地区关于海上通道安全合作主要集中在加强对话、建立相互信任措施、科技合作、信息分享、军事合作等方面，并且大多是双边或区域性的合作。这一方面是因为亚太地区各国家之间都存在利益交汇点，[50] 另一方面是因为这些利益交汇点目前只是存在于狭窄的领域和双边或区域之间，更广泛的利益共同点和合作领域并没有被发掘出来。

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46 在一个完整的海运体系中，与海上通道连成一体的还有出海口、港口、运输船队等配套设施，这均是海上通道安全所必须依赖的关键环节。“非航线枢纽国”可以通过承诺帮助“航线枢纽国”在这些方面进行建设并相应开放本国航线和港口等方式，来换取海上通行权，航运成本的降低和在反恐、打击海盗方面等方面的适当管辖权和跨境追踪、调查、管理权。

47 杨泽伟：《“东北亚能源共同体”法律框架初探》，载于《法学》2006 年第 4 期。

48 彭云：《东亚，从资源消费联盟做起》，载于《世界知识》2005 年第 15 期。

49 中国现代国际关系研究院海上通道安全课题组：《海上通道安全与国际合作》，北京：时事出版社 2005 年版，第 8 页。

50 最明显的例子是：日本一方面要借助美国力量平衡中、俄两大国的影响，并强烈依赖美国对太平洋海上通道安全的维护，日本国内近年来反美民族主义情绪有所升温，但日本政府却加强了与美国海上安全战略合作，因为两国的共同利益远远超过二者的分歧。另一方面，考虑到需要规避战略要地，分散能源进口的运输风险，改变能源进口过分集中在中东和东南亚国家的格局，日本越来越关注与俄罗斯的能源合作项目。一个最明显的例子就是日本积极参与“萨哈林—I”和“萨哈林—II”这 2 个石油天然气开发项目，还一直在探讨修建从萨哈林大陆架油气开发地往南穿过海底直接通往日本首都东京的输送天然气管道问题。

就双边和多边合作先例而言，新加坡和印度尼西亚两国制定了马六甲海峡联合海上行动计划，国际海事局于 1992 年在马来西亚首都吉隆坡成立了地区海盗中心，其管辖的海域包括从东斯里兰卡到东南亚以及远东地区的海域。近年来，本地区围绕该合作的双边合作正步入实质性阶段。印美在马六甲海峡开展联合巡逻；印日及中印等相继进行海上联合军事演习；中国与东盟加强合作，并于 2002 年与东盟签署南海行为准则。但总体而言，尚缺乏成型的多边机制。

目前，除从属于亚太安全合作理事会的海事合作工作组等组织以外，亚太地区尚无专门负责海上安全合作的组织。亚太安全合作理事会成立于 1993 年 6 月，是迄今为止亚太地区组织最为严格、全面、积极的“第二轨道”多边对话渠道。其下设 5 个工作组：建立信心及安全措施工作组、合作与综合安全工作组、北太平洋工作组、跨国界犯罪研究小组、海事合作工作组等。设立海事合作工作组的目的有 6 个：一、培养亚太地区国家海事合作及对话，以求有效地管理和利用海洋资源；二、加强对区域海洋议题的了解，扩大合作、对话的范围；三、寻求建立一个稳定的海洋机制，以降低区域冲突的危险性；四、针对特定区域的海洋安全问题从事政策研究；五、促进制定有关海洋的特定信心和安全建立措施；六、促使各国遵守 1982 年《联合国海洋法公约》。[51] 另外还有“西太平洋海军论坛”。该组织成立于 1988 年，成员包括俄罗斯、美国、日本、澳大利亚等 17 个国家，法国和加拿大为观察员。该组织每 2 年举行一次代表会，第一次座谈会在澳大利亚举行，主要任务是为本国政府提供制定协调地区海军合作的建议。[52]

在具体合作领域方面，地区性合作已经从务虚走向了务实，采取了各种行动。部分国家之间进行了一定程度的海军交流与合作。韩、日认为未来两国虽然存在对立的因素，但着维护安全的共同战略方向和战略目标，两国海军可能将担负共同作战任务。这个共同战略方向就是西部的海洋方向，共同战略目标就是对付来自西部的可能威胁，两国海军可能担负的共同作战任务就是反潜和保障海上航道的安全。[53] 另外，韩俄、日俄、中韩、中俄的海军交流与合作也非常频繁。中日韩三国由于地理位置的邻近和渔业上的相互依存，互相签署了渔业协定。[54] 关于打击海盗，中国力主加强地区合作，现在已经与越南、日本、新加坡、印度等国家在打击海盗方面达成了相关协定或采取了相关措施。此外，中国与东盟已于 2002

51 下载于 http://www.oycf.org/Perspective/Chinese/Chinese-4-11302001/LiHu.htm，2008 年 3 月 14 日。

52 《俄罗斯海军走向国际舞台》，下载于 http://www.cnread.net/cnreadl/jszl/y/yiming/sjjsl/062.htm，2008 年 3 月 14 日。

53 1994 年韩国海军舰队访日，1996 年日本自卫队军舰访韩，1997 年两国达成进一步加强两国军事交流的协定，1999 年韩日海军举行了旨在对付来自韩日两国西部“威胁”的搜索与救援联合军事演习，2002 年又举行第二次海上搜救与救援军事演习。

54 关于中日渔业协定、韩日渔业协定、中韩渔业协定、韩俄渔业协定、日俄渔业协定内容，下载于 http://www.lfg.com.cn/，2008 年 3 月 22 日。

年发表了《关于非传统安全领域合作联合宣言》，表示将联手打击贩毒、非法移民、海盗、恐怖主义、武器走私、洗钱、国际经济犯罪和网络犯罪等跨国犯罪。

四、构建“法律框架”的必要性

（一）理论层面的分析

在国际社会这样一个没有权威的“无政府社会”，在缺乏强有力的执行机制的情况下，国家为什么要遵守国际法？国际社会需要国际法吗？理论上对这些质疑了几百年，传统的看法就极力否定国际法的存在和价值。这种看法起源于霍布斯的观点：“缺少共同权威的地方就没有法律。”[55] 普芬道夫认为，独立主权国家不受条约的约束，可以随时解除协议，所以国际法没有约束力。奥斯汀也认为：“法律是主权者的命令，由于国际社会中并不存在一个主权者，所以把国际法视为法律是不正确的。”[56] 但另一方面我们又看到，几百年来国际社会的立法活动层出不穷，上至外层空间、下至海床洋底，从政治军事到金融贸易，国际法的规则无处不在。而且国家大多都是遵循国际法行动的，特别是在和平时期。如果国际法真的没有价值，为什么国家会遵守呢？传统观点最致命的缺陷就在于片面强调国际法的约束力，把法律局限在强制性这一特征之下。像奥斯汀那样先给法律下一个并不完全的定义，然后再用这个定义去验证国际法法律性的做法更是画地为牢，自我设限。

片面依赖外部强制性的法律不会有持久的生命力，合法性才是法律存在的主要原因。小约瑟夫•奈说：法律作为规则的 2 个特征——“可预见性”和“合法性”是国家需要国际法和国际组织的 2 个理由。[57] 国际法在国际社会中的作用有力地证明了国际社会对国际法的需要：

1. 维护和协调国家共同利益。国际社会的共同利益和各国自我利益两者之间并非是相互对立的。国际关系现实主义把这两者截然分开，并片面强调后者，这种做法很难让人信服。[58]

2. 国际法的基本原则和规则以及体现的价值取向为国际社会提供了秩序。在无政府的国际社会里，秩序更显得弥足珍贵。肆无忌惮地违反国际法带来的秩序崩溃也是大国不愿意看到的。熊玠说得好：假如秩序的维持是因为各国明智地出于各自利益而自愿遵循可被接受的行为的共同标准，那么各国诉诸自助以捍卫自

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55 Hobbes, *Leviathan*, London: Blackwell, 1946, p. 83.
56 John Austin, *The Province of Jurisprudence Determined*, London: Weidenfeld & Nicolson, 1954, lecture VI.
57 小约瑟夫•奈：《理解国际冲突》，上海：上海人民出版社 2002 年版，第 24 页。
58 熊玠：《无政府状态与世界秩序》，杭州：浙江人民出版社 2001 版，第 11 页。

我利益的做法就不必要了。[59]

3. 国际法为国家行为提供正当性和合法性依据。在实践中，国家总是尽可能地为自己的行为寻找合法性依据，并谴责违反国际法的国家行为。

我们换一个角度去思考，其实正是国际社会的“无政府状态”，即每个国家都是平等的主权者而且不存在高于它们的任何权威，使得国际社会加强了对秩序的需求。有政府权威的国内社会中个人并不需要自己创造秩序。与此相对的是，国际社会中的国家必须努力创造国际社会的秩序，摆脱这种无政府状态。各国之间有足够的联系，以保证规约其相互关系的共同标准具有存在的必要性。[60] 无政府主义是与秩序相伴相生的，尽管国际法不能对秩序提供万全的保障，但民族国家在无政府状态中对秩序的迫切需求，将不可避免地导向国际法的创立。[61] 也就是说，对秩序的需求必然产生对法制的需求。[62] 这就如奥地利国际法学家菲德罗斯所指出的：“哪里有来往，哪里就有法。”[63]

（二）现实层面的分析

从现实情况来看，亚太地区海上通道安全合作需要多边法律机制的规制与协调。一方面，亚太地区内部各国家都对本地区的海上通道存在普遍的关切，但各自之间又由于价值观念和国家利益不同而存在分歧。在这种情况下，法律框架的存在能有效消除负面影响，增加积极影响。既然法律框架是主权国家间为协调彼此之间的关系而达成的国际协议，那么一经确立，甚至在确立过程中，就对亚太国家之间的关系包括国际政治关系起着重要影响，促使其向好的方向发展。具体来说，法律框架首先具有约束作用，它能促使亚太各国在作出决策时，把它的限制作为次要因素来考虑。法律是由国家创造的，但它一旦被创造出来就有相对独立性，会对国家产生反作用力，并形成政治制衡中的一个独立因素发生其作用，国家反过来也会在某种程度上依赖国际法进行活动。国际法既是平等相处的各国家之间相互协调关系的产物，同时又对这种关系起引导作用。其次，法律框架也会促使亚太地区的海上通道安全合作方式更文明，促使争端能得到和平解决。再次，法律框架可以确定亚太地区各国权利义务和海上管辖权，从而极大减少争端的可能性。这种海上通道安全合作体制的确立，使各国的权利与义务得到了清楚的界定，使亚太各国能够更好地利用海洋为人类造福。最后，法律框架的存在会缓解亚太

59 熊玠：《无政府状态与世界秩序》，杭州：浙江人民出版社 2001 版，第 11 页。
60 熊玠：《无政府状态与世界秩序》，杭州：浙江人民出版社 2001 版，第 12 页。
61 熊玠：《无政府状态与世界秩序》，杭州：浙江人民出版社 2001 版，第 243 页。
62 熊玠：《无政府状态与世界秩序》，杭州：浙江人民出版社 2001 版，第 12 页。
63 [奥]菲德罗斯著，李浩培译：《国际法》（上册），北京，商务印书馆 1981 年出版，第 16 页。

地区目前正愈演愈烈的“安全困境”。[64] 因为它促进了各国的交流和信任，并且会在统一的规定中作出对称性的安排，减少合作中的不确定因素和对“相对获益”[65]问题的担忧。

另一方面，对亚太地区外部环境来说，由于法律机制的自足性和相对独立性，可以排除外来势力在本地区的影响。美国在亚太地区享有重要的战略和经济利益。但从美国的全球战略利益来讲，它希望亚太地区保持现状，而不愿看到本地区的力量发生变化，更不愿看到亚太成为一个整体。在这个问题上，马来西亚副总理兼国防部长拉扎克说得很明白：“美国的能源安全跟马六甲海峡没什么关系。但是以一个小小的海盗问题为理由，美国就轻易地介入了马六甲海峡……如果我们不能有效解决海盗问题，国际社会就会更有理由给我们压力……”。[66] 马来西亚《新海峡时报》上的一句话或许值得注意：“海盗问题越来越不像一个国际法的问题，而更多地成为了一个地缘政治的问题。”美国始终声称关心在有“争议”的南（中国）海区域维持航行自由，美国前国务卿克里斯托弗称，南沙争端是美国在亚太驻军的原因。[67] 单纯从政治层面并不能解决这些问题，因为政治是交易的艺术，而法律机制是自给自足的体系，其在确立后不需要依靠交易。国际法中，“自给自足的体系”一般具有以下特点：(1) 该制度的建立是基于特定国家之间的协议；(2) 它是和平解决国家之间争端以及执行国际法的一种制度；(3) 它拥有自己的一套执行体系，违反协议方按协议规定的程序和规则承担责任，从而排除使用一般国际法的救济；(4) 其目的是反对国家在制度外采取单边（报复）措施；(5) 其作用是促进国家履行条约义务，和平解决国际争端。该制度对保持国际关系的稳定具有不可低估的作用。[68] 亚太地区按照上述标准构建海上通道安全合作的法律框架，就会向实现“亚太是亚太人自己的亚太”这一目标更进一步。

（三）现有的合作机制及其局限

目前，有关亚太地区维护海上通道安全的国际合作机制，主要有以下几个方

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64 “安全困境”，又叫“安全两难”，在国际政治的现实主义理论中，它是指一个国家为了保障自身安全而采取的措施反而会降低其他国家的安全感，从而导致该国自身更加不安全的现象。一个国家即使是出于防御目的增强军备，也会被其他国家视为需要作出反应的威胁，这样一种相互作用的过程是国家难以摆脱的一种困境。

65 “相对获益”是国际关系理论中的用语，与它相对的是“绝对获益”。“绝对获益”指国家在国际合作中关注的是自己是否获益。“相对获益”指国家在国际合作中不光关注自己是否获益，而且关注他国的获益情况，如果他国获得了更多的利益，则认为自己的“相对获益”减少了。

66 《海盗牵动马六甲格局》，载于《南方周末》2005 年 7 月 28 日。

67 《国际石油的战略影响》，载于《现代国际关系》2003 年第 2 期。

68 王传丽：《WTO：一个自给自足的法律体系》，载于陈安主编：《国际经济法学刊》，第 11 卷，北京：北京大学出版社 2004 年版。

面：

1.《联合国海洋法公约》

1982 年《联合国海洋法公约》（以下简称“《公约》”）已经有 130 多个缔约国，是海洋法方面最重要的多边公约，它涵盖了与海洋相关的一切问题。比如，《公约》对海盗作出了明确规定，[69] 也赋予了各国相应的权利义务 [70] 和普遍管辖权。它也规定了领海的无害通过权、[71] 用于国际航行的海峡、[72] 海洋环境的保护与保全 [73] 等与海上通道安全密切相关的问题。但由于《公约》是各国政治博弈的产物，必然会有很多问题规定得过于原则化，有些条款比较模糊，容易引起争议，对于一些敏感问题甚至都保持沉默，这就降低了它在实践中的可操作性。亚太地区的海上通道安全合作所遇到的主要问题是海域的划分、海峡的通行等问题，但公约对这些问题的规定模棱两可，客观上造成了海洋争议的扩大，加大了合作的难度。特别是对于海盗的定义，《公约》的规定过于狭隘，造成了对海盗责任的认定、追究不利，妨碍了海道安全的维护。因此，可以加强对话与交流，形成对海洋法的区域性共识。对《公约》中模糊的条款，在区域层面执行时更应该将其统一化，以免产生不必要的争议。比如对海盗、无害通过权形成统一解释，以及统一与专属经济区相关认识的分歧等。

2.《制止危及海上航行安全非法行为公约》

1988 年《制止危及海上航行安全非法行为公约》是有关海上通道安全最重要的国际公约。它规定了危害海上航行安全是国际社会公认的严重国际罪行，也是危害国际和平与安全的恐怖主义犯罪。[74] 该公约还要求各国：(1) 应通过国内法将危害海上航行安全的行为定为刑事犯罪并予以惩治；(2) 应在国内法中确立对危害海上航行安全罪的管辖权；(3) 在控制危害海上航行安全罪方面，应遵循“或引渡或起诉”原则；(4) 应在对危害海上航行安全罪提起刑事诉讼、引渡等方面依法提供协助与合作。[75]

3.《海上人命安全国际公约》（《SOLAS 公约》，1980 年生效）

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69 《联合国海洋法公约》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；(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。

70 《联合国海洋法公约》第 100 条规定：所有国家应尽最大可能进行合作，以制止在公海上或在任何国家管辖范围以外的任何其他地方的海盗行为。

71 《联合国海洋法公约》第 17、18、19 条。

72 《联合国海洋法公约》第 34、35、36 条。

73 《联合国海洋法公约》第十二部分。

74 《制止危机海上航行安全非法行为公约》第 3 条。

75 邵沙平：《国际刑法学——经济全球化与国际犯罪的法律控制》，武汉：武汉大学出版社 2005 年版，第 322~324 页。

《SOLAS 公约》是最重要的有关商船安全的国际公约，该公约由 12 部分组成，还包括众多修正案。2002 年 12 月的《SOLAS 公约》修正案和《船舶和港口设施保安国际规则》还建立了海上保安的国际法律制度，其内容不仅适用于船舶和船员，同时也适用于港口设施，对港口保安系统的硬件和软件 2 方面均提出了十分详尽的要求。[76]

4. 亚太合作安全理事会

亚太合作安全理事会是一个民间机构，也是一个重要的协商机构。它成立于 1993 年，成员包括美、日、韩、中、俄等多数地区国家，欧盟也参加其活动，有些对于官方来说过于敏感的话题可以在此讨论。

5. 东盟地区论坛

东盟地区论坛的主要功能是保障东盟的外部安全，即通过与东亚各国及世界主要大国的安全对话，建立信任和开展预防性外交，维护东南亚地区的和平与稳定，使东盟免受外部势力的干预。它是亚太地区最主要的官方多边安全对话和合作渠道，对提升东盟的国际地位，限制美国在东南亚安全事务中的影响起到了一定作用。[77]

此外，还有 1997 年《制止恐怖主义爆炸的国际公约》、1999 年《制止向恐怖主义提供资助的国际公约》、1969 年《国际油污损害民事责任公约》、1969 年《国际干预公海油污事故公约》、1971 年《设立国际油污损害赔偿基金公约》、2001 年《国际燃油损害民事责任公约》等。还有一些区域性公约和不计其数的亚太地区各国之间的双边和三边安排。

总的来说，现有的国际法框架对维护亚太地区海上通道安全起到了一定的作用。但实际情况并非如苏纳尔迪所说的，“由于现有的大部分成员国之间的双边防务合作机制及个别的三边防务合作机制运作灵活，并且已经形成了一个有效的安全合作网络，能够应付各种威胁和挑战，因此没有必要再搞多边或集体安全合作机制。”[78] 这些法律框架由于其固有的缺陷，大多只能起到一些间接的和部分的积极效果。其缺陷主要有：

1. 没有一个专门针对海上通道安全合作的多边公约。比如上述有关反恐的一系列公约都是针对一切形式的恐怖主义，而不是专门针对海上恐怖活动，这无疑会影响海上打击恐怖主义的力度。《公约》规定了“关于海洋的一切事务”，更是失之过宽。

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76 杨泽伟：《反恐与海上能源通道安全的维护》，载于《华东政法学院学报》2007 年第 1 期。

77 中国现代国际关系研究院海上通道安全课题组：《海上通道安全与国际合作》，北京：时事出版社 2005 年版，第 271 页。

78 R. M. Sunardi, Regional Security Cooperation and the Future of the ASEAN Regional Forum, in Haidi Soesastro et al ed., *The Role of Security and Economic Cooperation Structures in the Asia Pacific Region*, Washington D.C.: Centre for Strategic and International Studies, 1996, p. 108.

2. 缺乏有效的实施监督机制。比如亚太合作安全理事会和东盟地区论坛很大程度上只是一个对话协商的民间机构，没有形成相应的约束力。

3. 参与国具有任意性。有关公约规则作用的发挥完全有赖各国对公约的签署、加入和实施。

4. 一些涉及海上通道安全的现有公约也没有顾及到海上通道安全的各个方面。比如《SOLAS 公约》、1969 年《国际油污损害民事责任公约》等等。

五、关于法律框架的设想

（一）法律框架应具备的特征

针对上述当前亚太地区海上通道安全合作机制的局限性，新的法律框架应具有以下特征：

1. 前瞻性

鉴于“9•11”以后反恐思路以及当今国际形势发生了很大变化，并且亚太地区的国家有其特殊性，过去的国际法律制度不一定符合当代要求和亚太国家的具体情况。所以新法律框架的相关定义及规定要具有前瞻性并且具体情况具体对待，不拘泥于以往的国际法规范，以求用最合适的方式进行合作，并取得最佳的效果。比如有关海盗的定义就可以比《公约》的更为宽泛。

2. 专门性

汲取过去有关公约中海上通道安全合作的条款加上新内容整合为蓝本，设计出一个专门针对亚太地区海上通道安全合作的法律框架公约。

3. 多边性

针对上述参与国具有任意性，谈判、签署新的法律框架公约时可以尽量采用协商一致的办法，并且规定较多的参与国数量为法律框架的生效条件。甚至可以充分利用亚太经合组织等政治资源，以取得新法律框架公约的多边性和普遍性。

4. 全面性

新法律框架应是一部全方位规定有关亚太地区海上通道安全合作所有事项的综合性公约。将合作的宗旨和基本原则、各国权利和义务、合作的全部内容、监督实施机制包括在内，使之成为亚太地区海上通道安全合作的普遍行为准则。

5. 强制性

建立公约的实施监督机制，强化国家的履约意识。加强国际组织的作用，积极与联合国联系，发挥联合国的协调作用。并将有关公约解释和适用的争端及有关海上通道安全犯罪纳入国际司法机构的管辖范围，接受其调整。

6. 开放性

世界上只有一个海洋。各大洋的海上通道安全问题其实是紧密联系的。所以法律框架在成员资格上应是开放的，可以吸引其他国家参与，并通过亚太海上通道安全合作法律框架的示范作用推动世界海洋通道的安全合作。

（二）法律框架宗旨与基本原则

亚太地区海上通道安全合作的“法律框架”应具有如下宗旨：

根据一般国际法和《联合国宪章》的宗旨和原则，基于亚太国家对本地区海上安全的共同认识，积极促进亚太国家共同维护本地区海上交通安全及相关方面的合作，为地区政治稳定、经济繁荣和各成员国的协同发展作出贡献，最终推动亚太地区一体化进程。

根据海上通道安全的性质，为实现法律框架的以上宗旨，法律框架内的各成员国在公认的国际法准则以外还应恪守以下原则：

1. 平等合作原则

即在国际法“主权平等”的基础上，亚太地区各国在公平、自愿的基础上进行最广泛的合作。排除亚太地区出现不稳定因素的可能性，使合作的轨道沿着良好的方向发展。

2. 公平互利原则

从整个亚太地区的海上通道安全出发，各国发挥各自优势，取长补短，协调国内政策，并认识到国家在地理位置和环境资源方面的优劣，适当采取“差别待遇”，力争事实上的平等，寻求多方共赢。

3. 非歧视原则

即在海上通道安全合作的各个方面，各种手段不应作为实施差别待遇的依据。

4. 比例原则

也就是相称性原则。[79] 在涉及亚太地区海上安全的公共利益和各国自身利益的问题上，应该牢记法律框架的宗旨，权衡利弊。在追求公共利益时，应将公共利益限于必要的范围内，将对个体的损害降到最低，从而协调公共利益和个体利益 2 种价值的冲突。

5. 发展性原则

应将共同发展作为实施一切合作手段和解释一切事项的价值取向。

6. 不妨碍原则

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79 “比例原则”最早出现于国内公法，是指如果某种价值的实现必然会以其他价值的损害为代价，也应当将对其他价值的损害减小到最低限度。拉伦兹指出，为保护某种较为优越的法价值须侵及另一种法益时，不得逾越此目的所必要的程度。在国际法层面，欧共体法院经常援引类似于比例原则或相称性原则的理论来判断共同体行为是否合法有效。

不得因外部因素或成员国对合作问题有争议而擅自中断或破坏合作。

7. 开放性原则

如前开放性特征所述。

（三）法律框架的基本内容

亚太海上通道安全所涵盖的内容极其广泛，基本上涉及了亚太安全的各个领域。鉴于亚太安全的特殊性和复杂性，合作内容不同，合作的层次与级别也不同。安全合作的成效很大程度上有赖于其从易到难、循序渐进、稳步发展的进程，关键是找到各方的利益契合点。先从最紧迫的非传统安全问题入手，然后不断扩大合作范围，如海洋开发技术、联合实施海洋工程等。海洋科技合作是各国争议最小的领域，而且也方便扩大合作，不但有利于地区经济发展，而且有利于互相增信释疑。具体而言，亚太地区国家就保护海上通道进行合作而制定的法律框架的具体内容应包括：设定公共管理航区、界定和开展联合搜救、进行反海盗巡逻和行动、召开有关海洋生态研讨会等基本海上通道安全合作；成立联合保护海上通道部队、开展联合多边救灾行动、开展环境保护和监测活动等高级海上通道安全合作；以及联合开发海洋技术、指定保护港口、制定码头安全统一战略、确立地区海洋科学项目等广义海上通道安全合作等方面。[80]

此外，技术合作不仅能够逾越国家间政治、意识形态障碍，而且还能提高透明度，并为互利的合作创造中立氛围。因此，还可以成立讨论亚太海上通道安全问题的技术工组小组；展开双边技术援助，特别是加强海峡两岸和朝韩双方的技术援助将有利于缓解台湾海峡和朝鲜半岛的紧张局势；利用现代技术手段，如商业卫星成像和跟踪、网络通讯以及污染监测系统等手段解决诸如海盗、走私、搜救和污染控制等问题。

另外，可以在相互信任的基础上建立海军合作，创造新的国际公共产品，建立新的国际合作制度。由于全球化和非传统安全威胁的存在，地区国家的相互依存及共同利益亦随之增长，合作应特别集中在探讨处理非传统威胁的具体办法，内容可以包括：海军友好交往、防止海上事故的安排、海上安全的磋商、人道主义援助、海上搜救、签署避免海上事故协议、反海盗合作、打击海上恐怖主义、联合海上监测以及制定反开采措施等。[81] 对于传统安全问题，可以“搁置争议，共同管理”，即在一些敏感的领土主权纠纷问题上先搁置争议，而面对共同的安全问题可以按照法律框架的要求共同管理。

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80 中国现代国际关系研究院海上通道安全课题组：《海上通道安全与国际合作》，北京：时事出版社 2005 年版，第 78 页。

81 中国现代国际关系研究院海上通道安全课题组：《海上通道安全与国际合作》，北京：时事出版社 2005 年版，第 79 页。

最后，还可以建立亚太海事信息共享数据库，加强海事科学教育与研发。比如设置海洋学、环境科学、国防经济、社会研究、法律与政策等短期国际课程。

（四）关于新的专门性国际组织

从法学的角度来解释，国际组织是国家间合作的一种法律形式。[82] 国际组织往往由各国基于特定目的，依附于特定条约而设立。一般来说，国际组织在其组织内部的法律机制中的作用无非有三：一是协调，二是解决争端，三是处理日常行政事务。由此，亚太地区海上通道安全合作应建立的组织机构主要可以有：

1. 大会

大会是最高协商机关，也是最高权力机关，由各国代表组成，对有关亚太海上通道安全合作的所有事项进行讨论、磋商、评议、审查，并形成有约束力的报告。

2. 理事会

理事会是核心的执行机关，可以由各国政府派遣一名交通部门或海洋部门的部长级代表组成。理事会的主要任务在于协调各国政府之间的海上通道安全工作，独立地执行职务，不接受任何政府和非政府组织的指示。其可以按照法律框架规定的条件作出有约束力的决定或意见。

3. 秘书处

秘书处处理日常行政事务。可以设立专门性办公室，如合作发展战略办公室、反恐及打击海盗办公室、能源应急办公室、信息及宣传办公室等。

4. 关于司法机构

可以单独设立一个法庭，用来解释和适用法律框架，并裁决有关合作问题的纠纷。不过，更明智的做法是将有关国际争端和海上国际犯罪的管辖权赋予国际上已有的国际司法机构，如国际法院、国际海洋法法庭、国际刑事法院等，让亚太各国统一接受它们的管辖。

六、结语及展望

在探索建立亚太地区海上通道安全合作法律框架的可行性时，我们要清醒地认识到影响其建立的积极因素和消极因素，只有这样才能为构建这一法律框架打好坚实的基础。

（一）构建法律框架的主要阻碍因素

82 梁西：《国际组织法》，武汉：武汉大学出版社 1998 年版，第 3 页。

这些负面因素主要是一些历史遗留问题、传统安全问题、亚太各国的领土争端、亚太地区冷战残余的战略结构，以及区域意识薄弱等。具体而言，二战后，美国并没有从日、韩、菲等国撤出驻军，环太平洋岛链依然存在，[83] 旧有的军事同盟关系冷战后还一度加强，这是影响亚太地区安全合作的重大负面因素。朝核问题、台海问题，甚至日本右翼势力的兴起，都与这种残余的冷战安全结构有关。另外，有关日本对亚洲各国侵略战争的历史旧账，再加上其参拜靖国神社、篡改教科书等行为，常常给中韩等受害国造成感情伤害，引起政治摩擦，阻碍政治互信的建立。还有亚太地区国家的大量领土及海域争端，[84] 如得不到妥善解决，势必影响合作。并且，按照区域合作的一般理论，区域合作组织的成员国，往往在民族、历史、语言、文化或宗教上具有密切联系，培育了某种共同意识；或者在现实国际生活中具有彼此关心的政治、军事、经济或社会问题，形成了某种相互依赖关系。[85] 但亚太地区由于宗教林立，冷战时期的长期隔绝和各国政治经济制度的差异，各国民族意识上升、缺乏地区意识，与欧共体毕竟不能同日而语。最后，合作中的竞争因素也不可忽视，各大国若在合作中争夺领导权或主导地位则会互相牵扯，影响海上通道安全多边合作。

（二）构建法律框架的积极因素及前景

当然，我们还应该认识到，构建亚太地区海上通道安全合作的法律框架也存在一定的积极因素。亚太国家基本上都有相同的政治经济背景，再加上对本地区海上通道安全的共同需求，和排除外来势力干涉的共同意愿，而且实践中已经有了东盟和亚太合作安全理事会这样的合作先例，并有中国这一个负责任的大国在积极倡导“新安全观”，所以合作的前景依然是光明的。

因此，有关国家应转变观念，本着相互尊重、循序渐进、开放包容的精神，增进相互信任，扩大共同利益。在此基础上，逐步形成体现地区多样性特征，与多层次的区域合作相协调，并为各方都能接受的地区海上通道安全合作的法律框架。首先，中国近年提倡的“新安全观”应成为推动合作的最积极因素。新安全观提倡在互信、互利、平等、合作的基础上，消除合作的消极因素，促进合作的积极因素。[86]

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83 美国分析认为，如果南沙群岛海域被声明为战争区，那么货物的保险费就可能上涨，即使经济费用不上涨，航道也失去了使用价值。故只有排除使用武力，才能保证南海航道的畅通。参见 Liselotte Odgaard, *Maritime Security between China and Southeast Asia*, England: Ashgate Publishing Limited, 2002, p. 133.

84 参见脚注 35~40。

85 梁西著：《国际组织法》，武汉：武汉大学出版社 1998 年版，第 278 页。

86 1999 年 3 月 26 日，江泽民以中国国家主席身份在日内瓦裁军谈判会议上发表了题为《推动裁军进程，维护国际安全》的讲话，全面阐述了中国的新安全观。

2002 年，参加东盟地区论坛外长会议的中国代表团向大会提交的《中方关于新安全观的立场文件》，全面系统地阐述了中方在新形势下的安全观念和政策主张。[87] 新安全观不仅具有极强的理论性，而且建立在成功实践的基础上，反映了亚太地区的现实特点，符合各国的普遍要求，定将为合作奠定良好的基础。美国倡导的“合作安全”也是以国家之间的相互依存而非对抗作为政策的基点，其实质是建立在互信互利基础上的国家间相互合作的安全关系。其次，应从加强各国教育、科学、文化、技术等领域的交流入手，逐步扩大合作范围，推进“亚太意识”，在亚太的多元文化中寻找共同性，建立亚太文化圈，树立地区内共同的价值观，推进地区经济合作和安全合作向前发展。最后，应坚持从易到难、循序渐进、稳步发展的原则。鉴于亚太地区形势的复杂性，合作可以分阶段、分领域进行，从最易合作的领域入手，如从非传统安全到传统安全领域，从打击海盗到反恐，从环保合作到能源合作，遵循开放性的原则，并不断发起定期谈判和制定谈判计划，逐步推进合作，最终达到上述“全面性”特征。

（三）中国的选择和应当发挥的作用

如前所述，亚太海上通道对中国来说具有重要的海洋经济利益，但中国的海洋地理相对不利，面临的海上问题亦十分突出，一方面，中国海上通道安全脆弱，另一方面，中国与周边一些国家仍存在海疆纠纷。同时，中国海洋力量的发展也存在一定的制约因素。一是因为周边美、日海洋强国基本控制了太平洋上的主要海上通道，造成中国海洋力量的相对弱势；二是从中国进入太平洋必须穿过岛链间的一些易被控制的战略要地，如冲绳与宫古列岛之间 350 公里的海峡或菲律宾和台湾之间 85 公里的巴士海峡；三是中国海洋力量的发展还会引起“中国威胁论”，形成安全困境。

我们必须认识到，中国是一个海陆国家而不是海洋国家。马汉在《海权论》中将“地理位置”列为海权（国）[88] 六要素之首。由此，若是海洋地理上占据优势的海洋国家，则固然可以专注海权，采取海主陆从的战略，而海洋地理不利内陆国家当然不可能采取海洋战略，而应坚持陆主海从。这再一次印证了“真理都是具体的，都有其特定的适用范围和条件，超出这特定的适用范围和条件，就会使真理转化为谬误”这一哲理。[89] 内陆国家不能重海轻陆，恰如海洋国家不能舍海趋陆，国家

87 《中国关于新安全观的立场文件》，下载于 http://www.fmprc.gov.cn/chn/wjb/zxjg/gjs/gjzzyhy/1136/1138/t4549.htm，2008 年 3 月 22 日。

88 中国学者广泛地将英文“sea power”的概念转译为汉语“海权”。然笔者认为在这个地方翻译为“海洋强国”更为合适，马汉在论述地理要素时明显是指“海洋强国”应具备的地理要素，而所谓的“海权”并无所谓什么地理要素。

89 列宁著：《列宁选集》第 4 卷，北京：人民出版社 1995 年版，第 172 页。

若不考虑自己的地理因素，企图舍其所长、用其所短，则未有不败者。[90] 这对那些对马汉的理论食而不化、盲目鼓吹所谓中国海权的人无疑是一剂清醒剂。

从实际情况出发，中国在战略上应该陆海并重、陆海兼顾，不应在海洋上采取进攻性战略，更不应劳师远征而忽视内陆，特别是西部边疆的建设和防卫。这并不是说中国应该舍海趋陆，我们应该认识到中国的海洋力量一定要强大，海防必须稳固。有海岸线的国家没有制海权，就好像陆地国家没有边境线。但我们的目标不是去争夺海洋权力，而是要捍卫海洋权利。坚持防御性的海洋安全战略，把“海权”建立在“权利”而非“权力”的基础上，我国海洋力量的发展才能获得正当性和合理性，才更有利于与亚太各国的海上安全合作。未来中国对海上安全问题的选择只能是发展与合作。发展，即通过发展我国的海洋力量、海洋经济、海洋科技来维护海洋安全以及周边环境的和平与稳定，并奠定平等合作的基础。合作，即积极推动和参与亚太地区海上通道安全各个领域的合作，只有合作才是解决中国海洋问题的最佳途径。中国远洋战略能力有限，缺乏海上安全的有力保障。以印度洋为例，中国并不是印度洋国家，但经济却日益依赖印度洋，“马六甲海峡是中国的核心利益。中国介入包括海盗问题在内的马六甲海峡事务，战略上的合法性远远大于美国……”，[91] 这意味着中国在这方面受制于人，增加了中国能源物资海上运输的风险与政治成本。所以，中国必须借助与印度洋国家或地区的协助和合作来保障海上通道的顺畅与安全。对中国而言，美国、印度、东盟、俄罗斯、日本、韩国是亚太海上通道安全合作的重要伙伴，而东北亚则是亚太地区战略中的重中之重。[92]

在发展与合作，构建合作机制与法律框架的过程中，中国所起的作用简而言之应为：提倡、促进、协调和维护。首先，在亚太地区以“新安全观”为基础倡导多边安全合作，国家安全的威胁并非仅来自外部，许多威胁是来自内部的因素，需关注国家在不同发展阶段的安全需求，应以更包容和宽广的思维来考虑问题。其次，中国尚不具备化解亚太海上安全威胁的国际影响力。中国只能扮演一个促和的角色，而且其作用也是很有限的。对于那些非传统安全威胁，更需要综合治理，需要相关大国协同作战。积极发展中国在构架合作机制与法律框架过程中的斡旋、促进作用，树立一个负责任的大国形象，发挥国际影响力。再次，在法律框架的构建和执行过程中，中国应努力协调各方利益冲突，从大局出发，维护亚太地区海上安全合作机制的统一性。最后，维护法律框架的稳定性和统一性也应成为中国所发挥的作用之一。

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90 钮先钟著：《战略研究》，桂林：广西师范大学出版社 2003 年版，第 120 页。
91 《海盗牵动马六甲格局》，载于《南方周末》2005 年 7 月 28 日。
92 朱阳明著：《亚太安全战略论》，北京：军事科学出版社 2000 年版，第 47 页。

争议海域的权利冲突及其解决途径

龚迎春 *

内容摘要: 争议海域可能因岛屿的主权归属、划界主张重叠、条约解释等不同性质的争议而产生。在不同性质的争议水域内，当事国之间发生冲突所涉及的权利内容和发生冲突的方式也是不同的。在尚未划界的专属经济区和大陆架主张重叠海域，争端当事国之间存在对于资源的主权权利和相关事项的管辖权的潜在冲突。当事国间避免冲突的方法之一是采取共同开发模式对资源进行开发，但是，共同开发模式并不当然解决共同开发区内的所有主权权利和管辖权冲突。在本质上仍然属于争议海域的共同开发区内，当事国间需要就主权权利和管辖权的行使做出安排。中日东海共同开发区内也存在同样的问题。

关键词: 争议海域　主张重叠海域　共同开发模式　共同开发区　主权权利管辖权　安全水域

一、争议海域的范畴

争议海域可能因岛屿的主权归属、划界主张重叠、条约解释等不同性质的争议所产生。因此，广义上的“争议海域”除了国家间尚未划界的专属经济区和大陆架主张重叠水域之外，还应包括存在领土主权归属争议的岛屿的周边水域和因条约解释的不同而对相关海域的法律地位产生争议的水域，如中国和日本就日本的冲之鸟礁周边海域到底应是公海还是日本的专属经济区而产生的争议。

在不同性质的争议水域内，当事国之间发生冲突所涉及的权利内容和发生冲突的方式也是不同的。具体来说，可以作出以下几种分类：

第一，在存在岛屿主权归属争端的争议海域，当事国间发生冲突的对象为领土主权，此种性质的冲突有时可能以军舰和政府船舶的海上对峙乃至武装冲突等激烈的方式出现。此时，一方执法船舶以管辖的名义对另一方民用船舶采取的海上执法行动，从后者的角度来看则属于对悬挂本国旗帜的船舶在本国领海或管辖

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海域的非法管辖，是对船旗国主权或司法管辖权的一种侵犯。如果在一方针对另一方的所谓的执法行动中涉及武器使用，则此种情形下的武器使用可能被判断为违反《联合国海洋法公约》（以下简称“《公约》”）、《联合国宪章》以及一般国际法的“非法使用武力或武力威胁”。虽然相关国际判例对于在领土争端地区对另一争端当事国使用武力到底是属于联合国宪章和一般国际法禁止的“非法使用武力或武力威胁”，还是属于行使自卫权维护国家领土完整的问题通常都采取回避判断的谨慎态度，如国际法院在 2002 年喀麦隆 / 尼日利亚陆地与海洋疆界划界案的判决中，对于领土争端中的武力冲突的国家责任未作判断；但是，2007 年 12 月 17 日常设仲裁法院在圭亚那 / 苏里南海域划界仲裁案中裁定苏里南在争议海域对圭亚那的武器使用属于非法使用武力和武力威胁。[1] 此外，常设仲裁法院 2005 年 12 月 19 日在厄利特里亚和埃塞俄比亚武力使用合法性事件的裁决中，也否认了国家可以在领土争端地区以自卫的名义对另一争端当事国使用武力。上述裁定似乎意味着在此种情形下，遭到武力使用或武力威胁的国家所采取的武力对抗应属于自卫的范畴。[2]

第二，在尚未划界的专属经济区和大陆架主张重叠海域，争端当事国之间在争议水域内仅就资源的主权权利和相关事项的管辖权发生冲突。此种冲突的性质不同于领土主权的冲突。根据《联合国宪章》第 2 条第 3 款的规定，各国负有和平解决国际争端的义务，这意味着相关国家不得以武力方式解决此类争议。在此种性质的争议海域，海上执法过程中的武器使用只能在国际法允许的范围内实施。国际习惯法和国际判例都承认紧追国在紧追过程中的武器使用，[3] 但是，该权利的行使必须严格符合紧追的各项要件，否则，不管是否涉及武器使用，该紧追本身也会给紧追国带来国家责任。

在尚未划界的专属经济区和大陆架主张重叠水域，相关国家虽然主张拥有《公约》规定的主权权利和管辖权，但是主张重叠水域的存在，使得相关国家在上述水域的管辖权行使不可避免地要面临冲突，该冲突通常还可能伴随相关国家海上执法部门的直接对峙。但如果相关国家不积极主动地在争议海域行使管辖权，那么在最终解决海域划界的过程中，不能提供管辖权行使证据的当事国将会处于不利的境地。

此外，在大陆架和专属经济区的主张重叠海域，当事国间作为最终解决海域划界之前的临时安排而设定的共同开发区域（包括石油、天然气等非生物资源的

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1 Award in the Arbitration between Guyana and Suriname, Permanent Court of Arbitration, para. 445, at http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf, 8 December 2008.

2 Christine Gray, The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?, *European Journal of International Law*, Vol. 17, No. 4, 2006, p. 711.

3 常设仲裁法院在圭亚那 / 苏里南海域划界案中指出，“法院承认在国际法上，一国可以在执法行动中使用武力，前提是该武力使用必须是不可避免的、合理的和必要的。”

共同开发区域，以及以生物资源开发养护为目的的共同渔区、暂定水域等）本质上也属于争议海域的范畴。

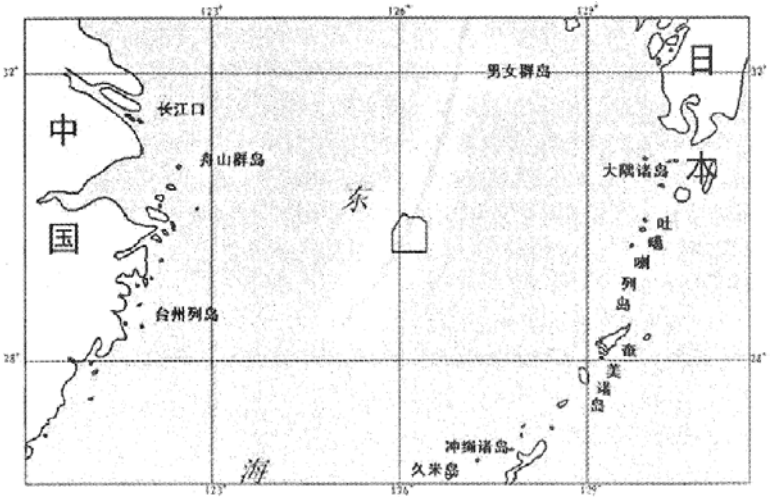
第三类争议是相关当事国因对《公约》相关条款的不同解释而产生的争议，如中日两国就冲之鸟礁本身的法律地位及其周边海域的法律地位的分歧即来自两国对《公约》第 121 条的不同解释，即“冲之鸟”到底应属于《公约》第 121 条第 1 款规定的岛屿，还是同条第 3 款所指的岩礁。关于对岛屿定义的解释和适用问题不属于《公约》第 297 条规定的不适用强制性争端解决程序的争端或《公约》第 298 条规定的强制性争端解决程序任择性例外事项，因此，该争端可适用《公约》第十五部分规定的强制性争端解决程序加以解决。

本文将重点就第二类争议水域，即在尚未划界的专属经济区和大陆架主张重叠海域内，当事国间作为最终解决海域划界之前的临时安排而设定的共同开发区域内的主权权利和管辖权冲突及其解决模式进行探讨。

二、主张重叠海域内的共同开发区：主权权利和管辖权的冲突

2008 年 6 月 18 日，中日双方通过平等协商，就东海问题达成原则共识，并就中日关于东海共同开发达成以下 4 项谅解：

1. 在东海设定一块共同开发区块（见示意图）：



2. 双方经过联合勘探，本着互惠原则，在上述区块中选择双方一致同意的地点进行共同开发。具体事宜双方通过协商确定。

3. 双方将努力为实施上述开发履行各自的国内手续，尽快达成必要的双边协议。

4. 双方同意，为尽早实现在东海其他海域的共同开发继续磋商。

鉴于中日两国政府就东海共同开发尚未达成具体的协议，事实上，两国就东海争议海域的范围也未能达成共识。因此，中日东海共同开发的前景目前还处于不明朗的状态，正因为如此，就共同开发区的性质、共同开发区内可能存在的权利冲突、中日东海争议水域的范围、解决争议水域内的权利冲突的途径等问题进行研究才更加具有现实意义。

（一）共同开发模式的性质

《公约》第 74 条第 3 款和第 83 条第 3 款规定，在达成有关专属经济区和大陆架的协议之前，“有关各国应基于谅解和合作精神，尽一切努力作出实际性的临时安排，并在此过渡期间内，不危害或阻碍最后协议的达成，这种安排应不妨害最后界限的划定”。

在尚未划界的专属经济区或大陆架争议水域内设定的资源类共同开发区，是作为争端当事国“谋求”最终解决争端的一种过渡性措施而仅就资源的开发、管理和分配做出的临时性安排，而大陆架和专属经济区划界问题本身并不仅仅是资源的分配问题，更大程度上是管辖范围划分的问题。[4] 因此，共同开发资源的过渡性安排对于争端当事国在主张重叠的专属经济区和大陆架争议水域的其他主权权利和管辖权并不必然产生任何影响，除非相关协议中有特别规定。

（二）共同开发模式的可适用范围及其法律效果

共同开发模式通常作为过渡性措施，适用于争议水域内的资源利用和分配，但有时共同开发模式也适用于已经划定了领海、专属经济区和大陆架的非争议水域，如 2000 年 12 月 25 日签订的《中越北部湾渔业合作协定》中规定的共同渔区和过渡性安排水域即位于中越两国已经划界的专属经济区内。此外，该协定还在两国的领海内设定了小型渔船缓冲区。

和尚未划界的争议水域内的共同开发区不同，在《中越北部湾渔业合作协定》设定的不同性质的渔业合作水域内，中国和越南在各自的领海、专属经济区和大陆架内的主权、主权权利和管辖权不受影响。由于两国已经划定了领海、专属经济区和大陆架的范围，两国各自行使主权、主权权利和管辖权（包括立法、海上执

4 [日] 山本草二：《未划定边界海域内的执法措施的背景与界限》，载于海上保安体制调查研究委员会编：《有关海洋法执行与适用的国际纠纷案例研究》，东京：财团法人海上保安协会，第 108 页。

法和司法管辖权）的空间范围理论上并不存在模糊或重叠不清的问题。[5] 例如，关于在共同渔区内的执法问题，协定第 9 条规定：“缔约一方授权机关发现另一方国民和渔船在共同渔区内己方一侧水域违反中越北部湾渔业联合委员会的规定时，有权按中越北部湾渔业联合委员会的规定对该违规行为进行处理，并应通过中越北部湾渔业联合委员会商定的途径，将有关情况和处理结果迅速通知缔约另一方。被扣留的渔船和船员，在提出适当的保证书或其他担保后，应迅速获得释放”。显然，两国共同渔区的管辖权属于沿岸国。

协定虽未对共同渔区内针对第三国的管辖权问题作出规定，但因为两国各自管辖海域的范围已经划定，因此，中越两国在本国管辖海域内对第三国的管辖权不受该渔业协定的影响。

另一方面，在尚未划界的专属经济区和大陆架主张重叠水域，共同开发模式的运用并不能解决共同开发区内当事国在立法权、海上执法权和国内司法管辖权方面的冲突问题，除非在相关协议中就管辖权问题做出特别的规定和安排。此种管辖权的冲突包括：争端当事国相互间的管辖权冲突；争端当事国同时对共同开发区内的第三国行使管辖权而产生的重叠管辖问题，即积极的管辖冲突；争端当事国都避免对共同开发区第三国行使管辖权而产生的消极的管辖冲突。

《公约》赋予了沿海国在位于争议海域的共同开发区内行使主权权利和管辖权，同时，此种权利的行使也将产生相应的法律效果。虽然共同开发作为争端解决之前的过渡性临时安排，“不妨害最后界限的划定”，但是，如果争端当事一方长期放弃在争议水域内行使主权权利和管辖权，则意味着该国默认对方当事国在争议水域内行使权利，此种默认，在国际法上可能导致本国权利的丧失，并对该国最后界限的划定产生不利影响。有学者认为，在划定最后界限时，当事国此前在争议水域的行为将受到重视，特别是与石油勘探开发活动、渔业活动的许可证发放有关的权限行使，将作为“相关因素”加以考虑。[6] 值得注意的是，国际法院在 2002 年喀麦隆 / 尼日利亚陆地与海洋疆界划界案的判决中，否认了两国石油公司在争议区域的活动是划界中应加以考虑的“相关因素”，[7] 但是，却认定两国在争端前达成的几个相关协议“事实上已经划定了界限”。因此，最后界限划定之前的临时性措施中如果存在大量的管辖权行使事例以及相关当事国对管辖权行使范围的默认，则形成了事实上的分界线，此种情形有可能作为相关因素对最后界限的划定产生影响。

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5 关于在共同渔区、过渡性安排水域以及小型渔船缓冲区内的管辖权，详见《中越北部湾划界协定情况介绍》，下载于 http://www.mfa.gov.cn/chn/zxxx/t145558.htm，2008 年 12 月 8 日.

6 Rodman R. Bundy, Preparing for a Delimitation Case: The Practitioner’s View, in Rainer Lagoni and Daniel Vignes eds., *Maritime Delimitation*, Leiden: Nijhoff, pp. 100~101, 108.

7 Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), *ICJ Reports*, 2002, pp. 140~141, paras. 302~304.

（三）主张重叠水域内的共同开发区的性质和中日东海争议水域的范围

如果共同开发区内的水体、海床和底土全部属于相关当事国的专属经济区和大陆架主张重叠部分，共同开发区的性质则属于争议水域。

在争议水域内实施的共同开发协议，通常仅就相关资源的开发和分配做出临时性安排，协议并不当然影响当事国在其主张海域内行使其作为专属经济区或大陆架沿海国而拥有的其他主权权利和管辖权，除非协议中另有规定。

目前，日本有学者主张“整个东海都是争议之海”。[8] 此种提法不但没有依据，同时也不利于未来两国在东海的共同开发。中日东海专属经济区和大陆架的界限目前虽没有通过协议划定，但是这并不意味着两国在东海需要通过划界来确定专属经济区和大陆架界限的海域都是争议海域，如春晓油气田所在海域显然就不是争议海域。[9]

在未确定两国争议海域范围的情况下设定共同开发区，有可能使本来不存在争议或不可能存在争议的海域的法律地位复杂化。因此，中日两国有必要就争议海域的大致范围达成基本的谅解。

为此，有必要重新审视日本近年来在东海划界问题上提出的200海里权原论。近年来，日本学界在已有的大陆架200海里内自然延伸否定论、大陆架和专属经济区一元论等主张之外，又提出了200海里权原论，即“在离岸200海里内的情形下，地质学的要素作为权原的基础不再有意义”。也就是说自然延伸论在大陆架的“权原”问题上大幅后退，相反，距离标准具有决定性的意义。国际法发展的结果是：在200海里之内，大陆架和专属经济区在法律上结合了，自然延伸在此范围内也失去作为权原的意义。[10]

关于中日东海争议海域的范围，日本学者提出争议海域是“权原主张”冲突的范围，而不是“请求主张”冲突的范围，中日在东海相距不到400海里，双方根据距离标准都具有主张200海里大陆架的权原，因此争议海域应是双方各自200海里线之间的区域，而不是日方实际主张的“中间线”和中方实际主张的冲绳海槽之间的海域。[11]

在2005年9月中日第三轮东海问题磋商时，日方首次提出在所谓“中间线”

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8 Sakamoto Shigeki, Agreement of the Joint Development of the Natural Resources in the East China Sea between China and Japan: Evaluation from the Japanese Perspective, 3rd Sino-Japanese Workshop on the Development in the Law of the Sea: Practice and Prospects, 1 November 2008, Hangzhou, China.

9 《中日东海协议，无损中国主权权利》，载于《新华每日电讯》2008年6月25日第5版。

10 张新军：《日本国际法学界大陆架划界问题的文献和观点初探》，载于《中国海洋法学评论》2005年第2期，第36页。

11 [日]村濑信也：《日中大陆架划界问题》，载于日本国际问题研究所编：《国际问题》2007年10月第365期，第2页。

两侧进行共同开发的方案。而在此之前，日本无论是在其国内法，即 1996 年 6 月颁布的《专属经济区和大陆架法》中，还是在与中国的相关交涉中，都主张以中间线作为其在东海的专属经济区和大陆架界限。

日本提出的 200 海里“权原”主张显然违反了禁止反言的原则；另一方面，在不足 400 海里的东海海域，200 海里距离标准只是《公约》中规定的一项虚拟权利，而非现实可主张的权利。而相对于日本的 200 海里“权原”主张，中国主张的大陆架自然延伸则不仅是《公约》中规定的权原，同时也是在东海海底现实存在的，因而也是可主张的权利。

中日东海共同开发区是否属于两国间的争议水域，对此中日两国政府虽没有作出明确定位，但是，根据《中日关于东海共同开发的谅解》中的相关规定和中国政府对于该谅解的说明：春晓油气田和共同开发区适用不同的法律，前者适用中国法律，而后者则既不适用中国法也不适用日本法。上述适用法律的不同，意味着两者在法律地位上的不同。前者是非争议水域，在该合作开发区内适用我国相关国内立法，而后者的法律地位则应属于既包括争议海域也包括非争议海域在内的共同开发区。如果把中日东海共同开发区定位为两国的专属经济区和大陆架主张重叠海域，即争议海域，将意味着对日本提出的 200 海里权原主张的承认，即中日两国的争议海域越过日本单方面主张的中间线，进入本无争议的中间线西侧部分。这样的主张显然是不能被中方接受的，因为《中日关于东海共同开发的谅解》中明确规定，“双方一致同意在实现划界前的过渡期间，在不损害双方法律立场的情况下进行合作”。而在东海划界问题上，中国从未承认过日本单方面主张的中间线，更没有承认过所谓的 200 海里权原主张。

（四）专属经济区和大陆架主张重叠海域内的共同开发：主权权利和管辖权的潜在冲突

根据《公约》第 56 条的规定，沿海国在其主张的专属经济区内的主权权利包括：所有生物和非生物资源的勘探、开发、养护和管理；关于在该区内从事诸如利用海水、海流和风力生产能等经济性开发和勘探活动。除了主权权利外，沿海国在其主张的专属经济区内还享有建造并授权和管理建造、操作和使用人工岛屿、为第 56 条所规定的目的和其他经济目的的设施和结构、可能干扰沿海国在区内行使权利的设施和结构的专属权利并对海洋科学研究和海洋环境的保护和保全享有管辖权。

《公约》第 77 条规定，沿海国为勘探本国大陆架和开发其自然资源的目的行使专属的主权权利。大陆架上的自然资源包括海床和底土的矿物和其他非生物资源，以及属于定居种的生物 。除了上述主权权利之外，沿海国在其主张的大陆架上的权利和管辖权还包括：他国在大陆架上铺设海底电缆和管道时，其路线的划定

须经沿海国同意；沿海国为了勘探大陆架、开发自然资源和防止、减少和控制管道造成的污染有权采取合理措施（第 79 条）；沿海国有建造并授权和管理建造、操作和使用人工岛屿、设施和结构的专属权利（第 80 条）；沿海国有授权和管理为一切目的在大陆架上进行钻探的专属权利（第 81 条）；沿海国有在其大陆架开凿隧道以开发底土的权利，不论底土上水域的深度如何（第 85 条）；沿海国有权按照本公约的有关条款，规定、准许和进行大陆架上的海洋科学研究；其他国家和国际组织在大陆架上进行海洋科学研究，应经沿海国同意（第 246 条）。

如果相关国家在各自主张的专属经济区和大陆架重叠海域内设定共同开发石油、天然气的共同开发区，为此目的签订的相关开发协定通常只涉及非生物资源中的石油和天然气资源的勘探、开发和分配，双方作为专属经济区和大陆架的沿海国在本国主张的管辖海域内，对石油、天然气之外的其他非生物资源以及生物资源的勘探、开发、养护和管理的主权权利并不因共同开发协议的签订而受到影响，除非协议中有特别规定。

当事国在主张重叠海域内的权利冲突主要体现在：立法权的冲突、国内司法管辖的冲突和海上执法管辖权的冲突；除协议中另有特别规定的事项外，沿海国依据《公约》应享有的主权权利和管辖权都可能发生冲突。

在此种性质的共同开发区内，不但在争端当事国之间存在主权权利和管辖权冲突的可能性，在对第三国的管辖权问题上，还存在积极的和消极的管辖冲突问题。当事一方单方面授权第三国船舶在本质上属于争议水域的共同开发区内进行海洋科学研究，或允许第三国在区内建造人工岛屿、设施和结构、或从事与资源的勘探、开发有关的其他活动，则另一方当事国的主权权利和管辖权即受到挑战。关于在争议水域单方面行使管辖权的范围及其可能产生的法律效果，日本前国际海洋法法庭法官山本草二教授认为，“在未划定界限的争议水域，作为过渡阶段的措施，立法管辖权的行使及其适用（包括试掘许可的发放、试采掘、实际的采掘作业等行为）的范围至少应到中间线为止”。他还指出，“应注意不要为了回避在争议水域的争端而抑制本国在争议水域行使立法管辖权，因为这将导致在争议水域形成对现状的默认，并对本国在暂定协议乃至最终界限划定时产生权利放弃的不利影响”。[12]

（五）中日东海共同开发区的法律适用问题

如上文所述，目前中日两国对于东海争议海域的范围还存在分歧。双方对于东海共同开发区本身法律地位的不同认知，将会影响该区域内的法律适用。在共

12 [日] 山本草二：《未划定边界海域内的执法措施的背景与界限》，载于海上保安体制调查研究委员会编：《有关海洋法执行与适用的国际纠纷案例研究》，东京：财团法人海上保安协会，第 115 页。

同开发区内既不适用中国法也不适用日本法的含义应该是指两国不在共同开发区内单方面适用本国法律，而是应适用双方共同同意的规则。所以，两国必须就以下相关事项作出具体的规定，如共同开发区内石油开采平台的建造 、管理、和使用，石油开采平台等设施和结构以及周边安全地带的法律地位、法律适用、管辖权以及争端解决机制等。

1. 人工岛屿、设施和结构在国际法上的法律地位

根据《公约》第 60 条和第 80 条的规定，沿海国对于本国专属经济区和大陆架上的人工岛屿、设施和结构的建造、管理和使用有专属的权利;沿海国对这种人工岛屿、设施和结构应有专属管辖权，包括有关海关、财政、卫生、安全和移民的法律和规章方面的管辖权。

上述规定表明，沿海国不但对于建造、管理和使用本国专属经济区和大陆架上的人工岛屿、设施和结构享有专属的权利，同时，对于人工岛屿、设施和结构本身也有专属的管辖权。沿海国的管辖事项中还包括在海关、财政、卫生、安全和移民方面享有专属的立法、执法和司法管辖权。正是由于《公约》赋予专属经济区和大陆架沿海国对于人工岛屿、设施和结构的广泛管辖权，一些国家才在国内法上赋予人工岛屿、设施和结构类似于本国领土的法律地位，即一种“拟制领土”的地位。

至于人工岛屿、设施和结构在国际法上的地位，《公约》第 60 条第 8 款明确规定，人工岛屿、设施和结构不具有岛屿地位。它们没有自己的领海，其存在也不影响领海、专属经济区或大陆架界限的划定。

关于安全地带的设置，《公约》第 60 条第 4 款规定，“沿海国可于必要时在这种人工岛屿、设施和结构的周围设置合理的安全地带，并可在该地带中采取适当措施以确保航行以及人工岛屿、设施和结构的安全”。同条第 6 款规定，“一切船舶都必须尊重这些安全地带，并应遵守关于在人工岛屿、设施、结构和安全地带附近航行的一般接受的国际标准”。关于安全地带的设置国在该地带内的执行权，《公约》第 111 条第 2 款还规定，“对于在专属经济区内或在大陆架上，包括大陆架上设施周围的安全地带内，违反沿海国按照本公约适用于专属经济区或大陆架包括这种安全地带的法律和规章的行为，应比照适用紧追权”。

上述条款规定了安全地带的设置国在安全地带内可行使的执行权包括:第一，为确保航行以及人工岛屿、设施和结构的安全可采取适当措施;第二，对于违反安全地带法律规章的行为行使紧追权。但是，《公约》并未规定沿海国可采取的适当措施具体包括哪些措施，也未规定沿海国可就安全地带制定哪些内容的法律规章。

从《公约》第 60 条、第 80 条的相关规定来看，允许沿海国在人工岛屿、设施和结构周围设置安全地带的目的，一方面是为了确保人工岛屿、设施和结构的安全，另一方面也是为了确保船舶的航行安全。为了前者的安全而限制船舶的航行

权或对船舶航行实施许可制，是对船舶在专属经济区内的航行权的限制。这种限制似乎并没有相关的国际法依据。因为在《公约》第 60 条和第 80 条中，船舶在安全地带航行时的义务为，“尊重这些安全地带，并应遵守关于在人工岛屿、设施、结构和安全地带附近航行的一般接受的国际标准”。

安全地带的性质可能因人工岛屿、设施和结构所处的位置而异。在公海上的人工岛屿、设施和结构，其周边的安全地带属于公海的一部分，而位于沿海国专属经济区内的人工岛屿、设施和结构周边的安全地带则为沿海国的专属经济区。在本质上属于公海或沿海国专属经济区的安全地带内对外国船舶的航行权进行限制，应有相应的国际法依据，即《公约》第 60 条和第 80 条中提及的“一般承认的国际标准”，否则，一国国内法上的限制航行措施可能构成对他国的航行权的侵害。

另一方面，由于《公约》规定“人工岛屿、设施和结构及其周围的安全地带，不得设在对使用国际航行必经的公认海道可能有干扰的地方”，因此，沿海国在安全地带内依据国内法对外国船舶实施的航行限制，对于外国船舶的航行利益并不会造成大的影响。但是，问题的关键在于安全地带的性质以及沿海国是否有权对外国船舶的航行权实施此类限制。对此，日本有学者认为，“安全水域”[13] 只能设定 500 米这样一个极其狭窄的范围，因此把安全水域和海洋构筑物作为一个整体看待，使之作为海洋构筑物的附属港湾而具有类似于内水的性质，沿海国在确保构筑物安全的必要限度内将其国内法令广泛适用于安全水域也是可能的。[14] 2007 年 7 月开始生效的日本《海洋构筑物安全水域设置法》中关于安全地带的相关规定即反映了上述观点。

2. 日本关于人工岛屿、设施和结构及其周边安全地带的国内立法

目前，我国还没有涉及人工岛屿、设施和结构及其周边安全地带的专门的国内立法。而日本国会则于 2007 年 4 月 27 日通过了《海洋构筑物安全水域设置法》，该法案于 2007 年 7 月 20 日开始生效。该法规定了海洋构筑物的定义、海洋构筑物在日本国内法上的法律地位、安全地带内的船舶航行制度等。

(1) 日本《海洋构筑物安全水域设置法》中“海洋构筑物”的定义

日本《海洋构筑物安全水域设置法》第 2 条规定，“本法律中所指的‘海洋构筑物’指在专属经济区和大陆架法（1996 年法律第 74 号）第 1 条第 1 款规定的专属经济区或该法第 2 条规定的大陆架范围内进行该法第 3 条第 1 款第 1 项至第 3 项规定的行为的作业物体（包括新建的或正在拆除的），以及进行大陆架开采的船舶（限于为开采目的而停止前进的船舶）”。

据此，日本国内法把为开采大陆架的目的而停止前进的船舶也包括在海洋构筑物的范畴中。这一定义也反映在 1974 年《日韩共同开发大陆架南部协定》第

13 日文中的安全水域即指“安全地带”。

14 奥脇直也：《安全水域与执行措施》，载于海上保安体制调查研究委员会编：《有关海洋法执行与适用的国际纠纷案例研究》，东京：财团法人海上保安协会，第 54 页。

19 条，该条也把为开采目的而停止前进的大陆架开采船舶规定为“海上构筑物”。

(2) 人工岛屿、设施和结构在日本国内法上的地位

日本 1996 年《专属经济区和大陆架法》第 3 条规定，“人工岛屿、设施和结构应被看作位于日本国内，适用日本的法律法规。这一规定同样也适用于在日本的专属经济区和大陆架上的、由外国建造的人工岛屿、设施和结构（包括为开采目的而停止前进的外国船舶）”。

根据上述国内法的规定，日本可对其主张的专属经济区和大陆架上的人工岛屿、设施和结构本身以及在人工岛屿、设施和结构之上的一切人、事、物行使广泛的管辖权。

(3) 对船舶在安全地带航行的规定

日本在《海洋构筑物安全水域设置法》第 5 条中规定，“未经国土交通大臣的许可，任何人不得进入安全水域”。日本对于安全地带的船舶航行实施许可制，意味着在日本国内法中安全地带被赋予类似于内水的法律地位。据此，在国内法层面上，日本可对安全地带行使广泛的立法、执法和司法管辖权。

四、共同开发区内的主权权利、管辖权冲突的解决途径

综上所述，共同开发区内的资源开发，不仅仅涉及资源本身，还不可避免地涉及共同开发区内主权权利和管辖权的分配。未来的东海共同开发协定将对石油、天然气资源的主权权利和管辖权的行使和分配作出安排。鉴于中日两国搁置争议、共同开发的政治意愿，两国对于对方国家的人员、船舶等在共同开发区内从事与石油、天然气的勘探、开发直接有关的活动适用两国共同制定的规则；在执行权方面，不对对方国家的船舶和人员行使管辖权、而只对悬挂本国旗帜的船舶行使管辖权的做法可以有效避免两国在管辖权问题上的冲突，也符合中日两国以往的实践。如 2000 年缔结的《中日渔业协定》第 7 条规定，在未划定界限的专属经济区主张重叠水域不对对方渔船行使管辖权，而由各自国家对本国船舶行使船旗国管辖。[15]

从国家实践来看，解决共同开发区内的管辖权冲突问题通常采用的方式包括：划定专属经济区和大陆架界限。即当事国分别在共同开发区内的本国专属经济区和大陆架上实施沿岸国管辖。该模式要求首先进行海域划界，当事国在各自

15 《中日渔业协定》第 7 条第 3 款规定：缔约各方应对在暂定措施水域从事渔业活动的本国国民及渔船采取管理及其他必要措施。缔约各方在该水域中，不对从事渔业活动的缔约另一方国民及渔船采取管理和其他措施。缔约一方发现缔约另一方国民及渔船违反第 11 条规定设置的中日渔业联合委员会决定的作业限制时，可就事实提醒该国民及渔船注意，并将事实及有关情况通报缔约另一方。缔约另一方应在尊重该方的通报并采取必要措施后将结果通报该方。

的专属经济区和大陆架内行使《公约》规定的主权权利和管辖权，因而不发生管辖权的冲突问题。当事国在未划定专属经济区和大陆架界限的共同开发区内实施共同管理或共同管辖。该模式要求当事国之间有良好的互信关系，并就法律适用、立法、司法管辖权等具体事项达成协议，同时对第三国管辖问题做出安排。

当事国在未划定专属经济区和大陆架界限的共同开发区内仅就资源的开发进行合作，在管辖权方面，采取不对对方国家的船舶、人员及其活动行使管辖权的船旗国管辖方式，此种方式的缺陷在于共同开发区内的资源养护、环境保护和海洋科学研究等事项可能得不到有效的管理和管辖。对于获得许可的第三国船舶，由给予许可的一方当事国实施管辖，对于未获得任何一方许可的第三国船舶，双方当事国都有权行使管辖权，但此种情形会产生重叠管辖的问题。

共同开发区中既包括争议水域也包括部分非争议水域，如挪威和前苏联于1978年签订的《暂定渔业协定》中在巴伦支海设定的被称为灰色地带的广阔海域。[16]该协议第10条第b项规定，在该灰色地带内，两国不对对方国家的船舶以及经对方国家许可的第三国船舶行使海上执法权，但是对于未获得任何一方许可的第三国船舶，两国都有权行使执法权。但该协议未能解决当事国在本不属于本国管辖的海域是否有权对第三国船舶行使管辖权以及第三国是否有义务接受此种管辖的问题。

我国在处理与海上邻国的海域划界问题时，应考虑到所采取的临时性措施或安排是否可能对最终界限的划定产生不利的影响。在本国主张的管辖海域内，如果我们对他国在争议海域内行使管辖权的行为长期采取容忍、默认的立场，或缺乏可与之抗衡的管辖权的积累，最终可能导致权利的放弃，从而对最后界限的划定产生影响。

16 Robin Rolf Churchill and Geir Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea*, Oxford: Routledge, 1992, pp. 91~98; Alex G. Oude Elferink, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation*, The Hague: Martinus Nijhoff Publishers, 1994, pp. 246~247.

从国际海洋法的视角看海上风力发电的环境影响

王泽林 *

内容摘要: 世界能源危机使得海上风力发电成为沿海国重点考虑的项目，但是其对环境造成的已知或潜在的影响应引起重视，本文主要讨论海上风力发电对环境的影响以及现有国际海洋法对它的规范问题。

关键词: 海上风力发电　环境　《联合国海洋法公约》

世界能源出现危机，如果说世界上曾经有两次伟大工业革命，即蒸汽机和电气革命的话，那么现在面临的就可能是第三次工业革命即能源革命。由于世界出现能源危机，风力无疑是具有可再生特点的新的绿色能源。海上风力发电的主要特点是:海上风力资源丰富，比陆地风力发电产能大;环境影响小;电力传输和接入电网的技术难度大;建设和维护的技术难度大、费用高。[1]

一、海上风力发电的方式及现状

一般而言，海上风力发电场建在具有丰富风力资源的海域，这些海域是在沿海国的近海即领海范围内，但是目前有向深海发展的趋势，有的风力发电场已经建设在沿海国的专属经济区之中，相对而言，在深海建设电场的技术要求更高。

通常海上风力发电系统由以下几部分组成。首先是将风力涡轮机安装在机塔之上，而机塔固定在海底基础的一个平台上，海底基础可以是三角架、重力沉降或单桩钢管等。[2] 此后将风力涡轮机用电缆连接到安装有电气开关和变压装置的平台，以便它将电力再通过海底电缆传送到岸上的配电站，接着再传输到沿海国的电网之中。现在一些国家正在研究并实施漂浮式的海上风力发电装置，这样会使

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1 任杰:《海上风力发电——风力发电的新趋势》，载于《全球科技经济瞭望》2006 年第 6 期，第 59 ～ 61 页。

2 基础结构依其结构形式可分为单桩、重力式混凝土沉箱、多桩基础（一般为三角桩）和吸力式基础。

得风机向具有更大风力资源的深海延伸。

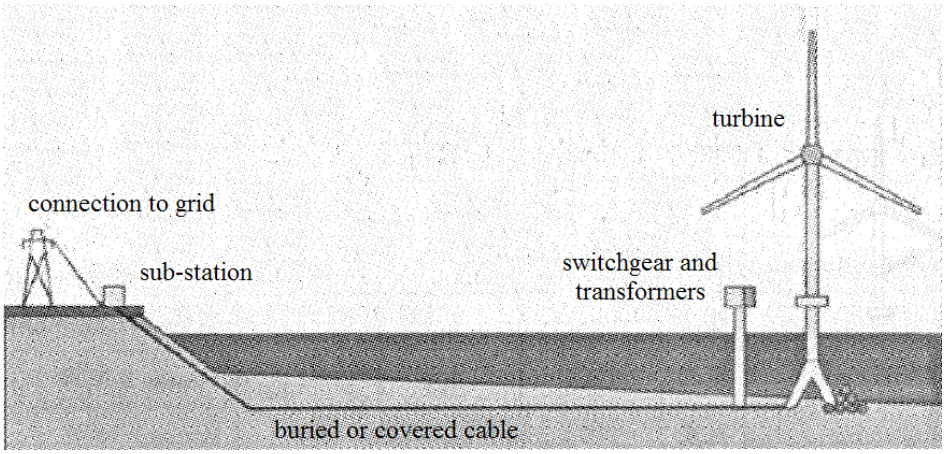

图 1 海上风力发电原理 [3]

根据世界风能委员会 2007 年的报告，2007 年世界风能工业装机容量增长 27%，风力发电总能力已经达到 94000 MW。一些国家也开始重视海上风力发电，已经建设或计划建设海上风力发电场。根据中国 2007 年 9 月 4 日颁布的《国家可再生能源中长期发展规划》，中国到 2010 年前将建设 1 个或 2 个 100 MW 的海上风力发电试验项目；法国尽管受到法律制度的影响，海上风力发电速度缓慢，但是政府计划在 2015 年前建成 4000 MW 的海上风力发电项目；德国预测到 2010 年时海上风力发电装机容量约 500 MW，2015 年达到约 3000 MW，2020 年达到约 10000 MW；日本的海上风力发电项目进展很慢，目前装机量只有 11 MW，因为海上风力发电在日本是一个社会问题，主要涉及公众谅解和渔业赔偿问题，但是日本日前已经启动向深海发展的计划；波兰目前无海上风力发电装置，但计划到 2020 年时使装机容量达到约 1500 MW；西班牙也计划在 2020 年前装机 5000 MW；英国的目标更宏伟，2007 年 6 月 29 日英国新成立的商业、企业和改革部大臣约翰•赫顿在同年 12 月宣布到 2020 年计划建设达 30 GW 装机量的海上风力发电项目，从而超越丹麦成为海上风力发电领域的领袖，依目前的计划其装机量几乎占据世界总量的一半。[4]

3 A Typical Wind Form, at http://www.offshore-sea.org.uk/site/scripts/documents_info.php?categorylD=21&documentlD=6, 15 May 2008.

4 GWEC Global Wind 2007 Report, at http://www.gwec.net/index.php?id=90, 22 May 2008.

表 1 海上风力发电场统计 [5]

名称	国家	建成时间	机组容量 MW	风机台数	风机类型
Vindeby	丹麦	1991	4.95	11	Bonus 450 kW
Lely (Ijsselmeer)	荷兰	1994	2.0	4	NedWind 500 kW
Tunø Knob	丹麦	1995	5.0	10	Vestas 500 kW
Dronten (Ijsselmeer)	荷兰	1996	11.4	19	Nordtank 600 kW
Gotland (Bockstigen)	瑞典	1997	2.5	5	Wind World 500 kW
Blyth Offshore	英国	2000	3.8	2	Vestas 2 MW
Middelgrunden	丹麦	2001	40	20	Bonus 2 MW
Uttgrunden	瑞典	2001	10.5	7	GE Wind 1.5 MW
Yttre Stengrund	瑞典	2001	10	5	NEG Micon NM72
Horns Rev	丹麦	2002	160	80	Vestas 2 MW
Frederikshaven	丹麦	2003	10.6	4	2 Vestas 3 MW, 1 Bonus 2.3 MW and 1 Nordex 2.3 MW
Samsø	丹麦	2003	23	10	Bonus 2.3 MW
North Hoyle	英国	2003	60	30	Vestas 2 MW
Nysted	丹麦	2004	158	72	Bonus 2.3 MW
Arklow Bank	爱尔兰	2004	25.2	7	GE 3.6 MW
Scroby Sands	英国	2004	60	30	Vestas 2 MW
Totals			587	316	

二、海上风力发电对环境等事项的影响

尽管海上风力发电是沿海国发展新能源的趋势，但是其对环境的影响依然不容忽视。综合实践而言，影响主要体现在以下几个方面。

（一）对渔业的影响

5 Worldwide Offshore Wind, at http://www.bwea.corn/offshore/worldwide.html, 28 May 2008.

如果海上风力发电场风机之间的间距过小，会影响渔船的捕鱼活动，以及影响近海的渔业养殖空间。这是风力发电工业与渔业之间的利益博弈，也是各国在决定兴建海上风力发电场的时候不得不面对的问题。例如美国在楠塔基特海湾修建海上风力发电场时，反对者就认为这样会影响传统且历史悠久的当地捕鱼业。[6] 日本也因为渔业权的问题制约其海上风力发电的发展，成为亟需解决的问题。[7] 台湾的台电已宣布投资新台币 478 亿元于四湖设置全台第一座海上风力发电场，对养殖渔业的负面影响正在进行研究。[8]

从渔业角度来讲，可能对渔民的影响最大，因为海上存在的风机群会影响渔民的拖网作业，直接影响他们的权益。

（二）对鸟类的影响

由于风机随着容量的增加，其扫掠面积和高度都跟着增加和增高，当风机安装在鸟类飞行的通道上，鸟类则有可能撞击到风机上而死亡。这是引起一些鸟类保护者抗议的主要原因。除了引起鸟类死亡之外，这种影响还体现在 2 个方面：首先是对候鸟的影响，风机可能会让候鸟不敢降落觅食休息；其次是影响生活在风机所在地和附近的海鸟生活，引起这些海鸟离开原来的生活地，影响当地的生态环境。

最近有研究认为鸟类撞上风机而死亡的事件从总体上来说是很少的，因为鸟类是有智力的动物，当事件发生后，其他鸟类会得到警告，避开运行中的风机。

（三）对景观的影响

一些反对者认为海上风力发电设备会破坏原本优美的海景，影响传统的旅游度假滨海风光，但是距离海岸较远的海上风力发电场则不会存在这个问题。风机的运行需要一定的高度，因此风机总能吸引人的目光，如果在建立海上风力发电场的时候没有考虑到审美的因素，则会影响人们对优美景观的欣赏。所以风机的建立要考虑到风机的颜色与大小，与周边景观的谐调，否则容易引起环境保护者的反对。

（四）对船舶通行的影响

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6 《美国加强海上风力管理》，下载于 http://www.library.coi.gov.cn/qbyj/hyzc/200712/p020071203552481195 77.pdf，2008 年 8 月 1 日。

7 荒川中一：《日本的海上发电》，载于《上海电力》2007 年第 1 期，第 161 页。

8 《爱地球拼环保，政府积极推进风力发电》，下载于 http://www.investintaiwsn.nat.gov.tw/zh-tw/news/200705/2007053001.html，2007 年 5 月 30 日。

这种影响有两个方面。一是如果风机间距过小，天气不好，例如出现大雾的情况，则对航行在风力发电区域的船舶航行安全造成隐患，船舶可能会撞到风机或者船舶之间相互发生碰撞。二是风机噪声干扰雷达影响船舶通讯，进而影响航行安全。

英国通过研究在 Kentish Flats 海上风力发电区域内或附近通行的船舶的雷达受影响程度，得出一系列有关影响的不同数据。[9] 这种对雷达的影响也引起英国军方的关注，英国军方在经过详细论证后，认为这些风力发电场的建立，风力发电机的叶片将危及到英国防空雷达的工作，不停旋转的涡轮将使得空雷的波束受阻，进而出现严重的防空漏洞。[10]

（五）噪声对海洋动物的影响

风机转动时会对光线造成影响，也会产生噪声。风机的噪声主要来源于发电机、齿轮箱和浆叶切割空气产生的噪声。这些噪声会通过塔基结构而传入海洋，因为声音在水中的传输性能良好，这些噪声特别是低频噪声可能会影响海洋生物。[11] 丹麦最近的一项研究显示，声音在深水中能传播很远，可能会影响海洋中利用低频来进行回声定位的较大型动物，例如鲸鱼。最近研究表明，如果现有海域的低频环境噪声小于 400 赫兹，而海上风力发电场增加 80—110 分贝的情况下，就会影响须鲸类的沟通和可能的猎物分布。[12]

三、海上风力发电与国际海洋法的关系

海上风力发电装置大多位于沿海国的领海中，并向专属经济区延伸。国际海洋法特别是 1982 年《联合国海洋法公约》（以下简称“《公约》”）在制定的时候并没有过多考虑到海上风力发电对各国行使海洋权利的影响，所以结合海洋风力发

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9 Marico Marine, Investigation of Technical and Operational Effects on Marine Radar Close to Kentish Flats Offshore Wind Farm, at http://www.bwea.com/pdf/AWG_Reference/0704_Marico%20BWEA_Radar.pdf, 22 May 2008.

10 毕远：《英国防部称风力发电严重影响空军雷达正常工作》，下载于 http://www.chinanews.com.cn/gj/oz/news/2008/02-04/1157242.shtml，2008 年 5 月 8 日。

11 Jens Kjerulf Petersen and Torleif Malm, Offshore Windmill Farms: Threats to or Possibilities for the Marine Environment, *AMBIO*, Vol. 35, March 2006, pp. 75~80. 但是作者认为该文未有详尽的描述，特别是有关海上风力发电场产生的噪声如何与其他声源互相作用方面，此外，声音影响海洋动物有多种方式，故而目前很难预测海上风力发电场造成的噪声所造成的任何环境影响。

12 Jim Cummings, Ocean Noise: What We Learned in 2006, at http://www.acousticecology.org/, 20 May 2008.

电的特点讨论其对海洋法的影响，以及目前海洋法对海洋风力发电的规范显得更有意义。

（一）海上风力发电与海洋航行

航行自由是国际习惯法所确立的一项各国均享有的权利，尽管近代沿海国的主权权利和管辖权向海洋深处扩张，但是保证各国在海洋中的航行自由权利依然是海洋法公约所追求的目标之一。1958 年《领海及毗连区公约》第 14 条第 1 款规定:“无论是否沿海国之各国船舶依本条款之规定享有无害通过领海之权。”1958 年《公海公约》第 2 条规定公海四项自由，而航行自由排在第一位。1958 年《大陆架公约》第 5 条第 6 款规定：“此项设置或位于其周围之安全区不得建于对国际航行所必经之公认海道可能妨害其使用之地点。”

1982 年《公约》是国际海洋法的“宪法性”规定，其中对航行自由之规定更为详尽，以确保各国在海洋航行之顺利。《公约》第 17 条规定领海的无害通过权“在本公约的限制下，所有国家，不论为沿海国或内陆国，其船舶均享有无害通过领海的权利”，第 38 条和第 45 条规定各国在用于国际航行的海峡拥有过境通行权和无害通过权，第 52 条和第 53 条规定各国在群岛水域的无害通过权和群岛海道通过权，第 58 条规定各国在专属经济区内的航行自由，第 87 条规定公海自由，其第一项自由就是航行自由。

上文已经提及，海上风力发电场会对海上航行权利存在影响，而这种航行权利又是国际海洋法所确立的各国拥有的一项基本权利。沿海国的主权及于领海的上空及其海床和底土，[13] 沿海国有权对本国专属经济区中人工岛屿、设施和结构的建造和使用享有管辖权，[14] 所以沿海国可以在本国的领海和专属经济区内建立海上风力发电装置，但是这种海上风力发电装置的存在，可能会使本国船舶与外国船舶不得不绕行以避开电场的风机，从而加大航行的成本或风险，这与海洋航行自由的观念相冲突。

领海是沿海国的领土，沿海国在领海内建立风力发电场是领海国行使主权的表现。如果电场建立地点对航行不利，则船舶与风机碰撞的风险几率增加。如果是油轮发生这样的碰撞事故，则会对海洋造成更严重的环境污染。领海内的风力发电场可能对本国的船舶航行影响最大，而不是外国船舶，因为本国船舶在领海内活动更多，所以在领海内建立风力发电场需更多地考虑本国船舶行使的方便，考虑到各方的利益，电场不能建立在重要航线之中或者过于靠近重要航线，或者更改重要航线。1982 年《公约》规定沿海国有权依《公约》规定和其他国际法规则，

13 《联合国海洋法公约》第 2 条第 2 款。
14 《联合国海洋法公约》第 56 条第 1(b)(1) 款。

对航行安全及海上交通管理制定关于无害通过领海的法律和规章，考虑到航行安全认为必要时，可要求行使无害通过其领海权利的外国船舶使用其为管制船舶通过而指定或规定的海道和分道通航制。[15] 因此，沿海国在本国领海内建立风力发电场是其自由或权利，但是并非完全无相应的义务，根据《公约》，沿海国如果建立了无害通过领海的法律和规章，应将这种法律和规章妥为公布，[16] 如果实行海道和分道通航制，应在海图上清楚地标出这种海道和分道通航制，并应将该海图妥为公布。[17] 实践中，各国为航行安全，一般均会要求本国的海上风力发电场在风机叶片上安装警示灯或雾灯，以及涂上醒目颜色，防止船舶相撞或者直升飞机相撞。

沿海国有权利在本国的专属经济区内建立风力发电场，但这种权利受到限制。1982 年《公约》第 60 条第 7 款规定沿海国专属经济区内的“人工岛屿、设施和结构及其周围的安全地带，不得设在对使用国际航行必经的公认海道可能有干扰的地方”。因此，沿海国无权在对使用国际航行必经的公认海道可能有干扰的地方建立风力发电场。

上文中提及风机的叶片运行会对雷达产生影响，尽管这种影响还在研究阶段，但是毫无疑问会对船舶的雷达正常通讯产生影响，又可能影响到航行安全，如何解决这一问题还有待于国际社会的实践。但是为了航行的安全，沿海国应有必要将建立的海上风力发电场（无论是在领海内还是在专属经济区内）予以公开，特别是在海图中标示，这对航行安全是必需的。

对用于国际航行的海峡，因为其国际航行通道的重要性，沿海国在海峡建立风力发电场时，必须要考虑到外国船舶享有的过境通行权和无害通过权，因此 1982 年《公约》特别规定海峡沿岸国对海峡的主权或管辖权的行使受到《公约》和其他国际法规则的限制，[18] 所有船舶和飞机均享有在用于国际航行的海峡过境通行的权利，过境通行不应受阻碍。[19]《公约》又规定了海峡沿岸国的义务：“海峡沿岸国不应妨碍过境通行，并应将其所知的海峡内或海峡上空对航行或飞越有危险的任何情况妥为公布。过境通行不应予以停止。”[20] 从《公约》中可以得出结论，沿岸国不能妨碍、阻碍外国船舶和飞机的过境通行，如果建立的海上风力发电场构成了对过境通行的妨碍或阻碍，沿岸国则违反了《公约》，需要承担国际责任，保证过境通行得以实现。

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15 《联合国海洋法公约》第 21 条和第 22 条。
16 《联合国海洋法公约》第 21 条第 3 款。
17 《联合国海洋法公约》第 22 条第 4 款。
18 《联合国海洋法公约》第 34 条第 2 款。
19 《联合国海洋法公约》第 38 条第 1 款。
20 《联合国海洋法公约》第 44 条。

（二）海上风力发电与渔业

海上风力发电场会对渔业产生影响，但是这种已知的影响是对渔民的影响，影响到渔民的拖网作业或者是定点养鱼，又因为目前海上风力发电场大多位于本国的领海或专属经济区内，所以对渔业影响的体现也主要是针对本国的渔业。从这个角度而言，这是一个沿海国之内部渔业与电场部门的利益之争，而基本不涉及到其他国家的利益，其他国家得到授权在该国专属经济区内毗邻海上风力发电场的地方进行渔业作业时会受到影响，但这种影响也可通过与该国进行谈判而得到解决，例如沿海国减少其他国家的上缴费用。

至于海上风力发电场是否会对该海域的鱼类产生影响，例如是否会影响鱼群的数量、洄游、产卵、生长等，目前的研究还缺乏足够的结论，但一般倾向于对鱼类的生存和数量无关键性的影响。一项对瓦登海的风力发电场的研究表明，其对周边的海洋沉淀物构成没有影响，只对鱼类的数量有短暂的微弱影响，但受影响的区域和其他参考区域并没有明显的区别。[21] 目前对鱼类影响的最大因素是过度捕捞，如果换个角度思考问题，则海上风力发电场会给鱼类提供一个“避难所”，反而有利于鱼类产卵与生长。

实践中，各国在建立海上风力发电场的时候，风力发电企业会与渔业组织进行谈判，对所建海域渔业作业和渔业资源的影响进行评估，以达到一个平衡各方利益的结果。

进行海上风力发电场项目评估时通常要考虑以下因素，所建电场区域是否属于捕鱼重要水域，渔业利益是否会因此受到影响，项目是否会引起捕鱼机会与捕鱼收入的减少，该区域的捕鱼活动是否得到政府的许可，捕鱼活动是否在允许的时间之内，项目的建设是否会引起渔业作业增加成本等。经过对上述问题进行评估之后，风力发电企业与渔业组织会进行赔偿方面的谈判，这样的谈判或者通过利益关系当事人直接进行，或者通过渔业联合组织进行，或者通过公共团体进行等。[22] 英国商业、企业和改革部已经设立渔业与海上风力集团联络员，以促进渔业部门与风力企业进行公开对话，加强他们之间的密切联系。[23]

（三）海上风力发电与海洋生物资源养护

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21 Julia Koller, Johann Koppel and Wolfgang Peters eds., *Offshore Wind Energy Research on Environmental Impacts*, Berlin/Heidelberg: Springer, 2006, p. 176.

22 Framework for Dialogue between the Fishing and the Wind Farm Industries, at http://www.bwea.corn/pdf/offshore/fisheries_framework.pdf, 18 May 2008.

23 Offshore Wind: Fishing, at http://www.berr.gov.uk/whatwedo/energy/sources/renew-ables/planning/offshore-wind/fishing/pagel8850.html, 21 May 2008.

海洋生物资源保护日益受到人们的重视，1982 年《公约》中的生物资源养护规定对海上风力发电设置的建设存在影响。

降河产卵鱼种在其水域内度过大部分生命周期的沿海国，应有责任管理这些鱼种，并应确保洄游鱼类的出入。[24]《公约》的这款规定，意味着沿海国在建立海上风力发电场时，必须要考虑到电场建立的水域是否会影响到洄游鱼类的出入，如果影响到洄游鱼类的出入，则这种建立海上风力发电场的行为直接违反《公约》。但是如何确定是否存在这种影响，则需要科学研究，研究的内容需要公开透明，接受国际组织的监督与认可。

1982 年《公约》第 65 条规定，“本部分的任何规定并不限制沿海国的权利或国际组织的职权，对捕捉海洋哺乳动物执行较本部分规定更为严格的禁止、限制或管制。各国应进行合作，以期养护海洋哺乳动物，在有关鲸目动物方面，尤应通过适当的国际组织，致力于这种动物的养护、管理和研究。”

《养护波罗的海和北海小鲸类协定》[25] 第五次缔约方会议通过了第 4 号决议，内容涉及噪音、船舶和其他形式的干扰可能给小鲸类动物造成的负面影响。决议要求缔约方和非缔约分布区国家与军事当局和其他有关当局一起，制定有效缓解措施，包括环境影响评估，以减少对小鲸类动物的干扰和可能的身体伤害，进一步研究风力发电场对小鲸类动物造成的影响。[26]

因此，各国都有养护海洋哺乳动物，特别是鲸目动物的义务。海上风力发电场风机所产生的噪声是否会影响鲸鱼的生活以及生存？虽然这一问题还存在争议，但鲸鱼及海豚保护协会 2004 年已经提出存在的影响可能是间接的，[27] 丹麦最新的研究结果也证明是存在影响的。各国在建立电场时应对鲸目动物给予重视，有义务甚至有必要与一些国际组织合作展开研究。

四、结语

综上所述，海上风力发电场对海洋环境具有影响，其中已经得到确认的是对航行、捕鱼的影响，而对于海洋生物资源，特别是对海洋哺乳动物的影响，目前尚没有特别准确的结论。

海上风力发电场对航行的影响，主要体现是对海洋航行自由的影响。各国在

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24 《联合国海洋法公约》第 67 条第 1 款。

25 目前该协定有 10 个成员，分别是比利时、丹麦、芬兰、法国、德国、荷兰、波兰、瑞典、英国和立陶宛。下载于 http://www.ascobans.org/index0101.html，2008 年 6 月 9 日。

26 联合国大会 2007 年 8 月 31 日第 62 届会议临时议程项目 79(a)，秘书长报告《海洋和海洋法》第 46 页。

27 Mark Simmonds, Sarah Dolman and Lindy Weilgart, Oceans of Noise 2004 A WDCS Science report, at http://www.wdcs.org/publications.php, 19 May 2008.

建立海上风力发电场的时候，需要依据国际海洋法的规定，在不同的海域考虑到国际航行的自由与便利，不能建立在公认的国际通行航道之中。各国有义务在风力发电装置上设置安全警示信号，以及在海图上标示电场位置。

海上风力发电场对渔业的影响主要体现在风力发电企业与渔业部门之间的利益冲突，对鱼类的影响还尚在研究之中。这种利益冲突大多是一国之内部门之间的冲突，因此解决的方法主要是通过国内部门之间协商，以达到平衡冲突各方的利益。

海上风力发电场对于海洋生物资源养护的影响，目前的研究缺乏确定的结论，研究还在继续之中。海上风力发电场对优美风景的影响，这种影响主要是对近海风景的审美影响，如果海上风力发电场在设计的时候考虑到周边的风景，则可以减少这种负面的影响，甚至以可能会形成一种新的优美风景。

论引航的民事责任

刘孜文 *

内容摘要：在我国，因引航员过失而引起的民事责任是一个令人困惑的问题，不仅没有法律、行政法规和部门规章的规定，也没有相关的法院判例，学术界也鲜有探讨。本文主要采用制度法学和比较法学的方法，对引航的民事责任问题加以阐述。

关键词：引航　引航员　引航机构

引航是航运业的一项重要业务，对于保证船舶安全航行，提高港口作业效率，维护港口安全秩序，保护港口水域环境，具有积极的意义。然而，自引航业诞生以来，特别是随着中国改革开放的不断推进和航运业的快速发展，引航事故也频频发生。引航事故发生的原因是多样的，如气候条件多变、航道复杂、设备失控以及人为因素，而人为因素就包括了引航员自身的过失。鉴于引航员的特殊地位，因其过失而引起的事故危害尤为巨大，不但会造成人员伤亡和重大财产损失，而且还会因涉及大量外国籍船舶而有损国家声誉。

令人遗憾的是，实践中因引航员过失而发生引航事故后，对其相应民事责任的认定和归责却一直存在分歧。我国法律、行政法规和部门规章均无明确规定，也没有相关的法院判例，而在海商法学界，虽也有一定的研究，[1] 但主要是对外国法的介绍，并未结合我国法律进行深入的分析。在本文中，笔者将对中、英、美等国法律进行比较分析，在此基础上结合民法基本原理，对引航的民事责任制度进行阐述。

一、引航各民事主体的法律地位

（一）引航机构与引航员的法律性质

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1 邓瑞平著：《船舶侵权行为法基础理论问题研究》，北京：法律出版社 1999 年版，第 268~273 页；司玉琢、吴兆麟著：《船舶碰撞法》，大连：大连海事大学出版社 1995 年版，第 49~51 页。

引航机构是专业提供引航服务的法人。[2] 根据交通部《关于我国港口引航管理体制改革实施意见的通知》和《关于加强港口引航管理工作的若干意见》，我国引航机构为事业单位法人。[3]

引航员是从事船舶引航工作的专门人员。在我国，引航员是引航机构的工作人员，与引航机构之间存在劳动关系。[4]

（二）引航员与被引船舶所有人之间的关系

引航员与被引船舶所有人之间的关系较为复杂。在英国，无论是在普通法下还是成文法下，引航员都被视为被引船舶所有人的受雇人。[5] 我国法律没有明确的规定，在宁波海事法院审理的俞小洪诉巴拿马古德吉尔航运股份有限公司海上人身伤害赔偿纠纷案[6] 中，虽涉及引航员与被引船舶所有人的关系，但法院却予以回避。[7] 下面，笔者拟结合民法基本理论和我国法律规定，对这个问题加以阐述。

首先，引航员受聘于引航机构，与引航机构之间存在劳动关系，与被引船舶所有人之间没有劳动关系。

其次，引航员与被引船舶所有人之间没有雇佣关系。第一，两者之间不存在书面或口头雇佣合同；第二，不存在事实雇佣关系。因为事实雇佣关系必须满足“受雇人给付劳务，雇主给付报酬”的条件，但引航员并不从船东处取得报酬，而是根据他和引航机构的聘用合同从引航机构获得劳动报酬，船东虽可能通过引航员交纳引航费，但引航费是以引航机构的名义收取的，且引航费与引航员报酬之间并无直接关系。有学者认为，引航员的地位与外派船员十分相似，船东或其管理公司与外派单位签订协议，而与船员之间没有协议，由船东按协议将船员的工资支付给外派单位，外派单位再将工资支付给船员，这些丝毫不影响其与船东之间雇

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2 《船舶引航管理规定》第 3 条。

3 交通部于 2005 年和 2006 年分别下发了《关于我国港口引航管理体制改革实施意见的通知》和《关于加强港口引航管理工作的若干意见》，要求各引航机构从港口企业分离出来，成立具有独立法人资格的事业单位，目前我国引航机构均已完成这一改革。

4 根据《公务员法》、《国务院办公厅转发人事部关于在事业单位试行人员聘用制度意见的通知》的规定，事业单位实行人员聘用制度，但法律、法规授权的具有公共事务管理职能的事业单位中除工勤人员以外的工作人员，经批准，参照《公务员法》进行管理。引航机构作为事业单位法人，虽然确实具有一定的公共事务管理职能，但并未经批准适用《公务员法》，因此引航机构应当在平等自愿、协商一致的基础上，依法与引航员签订聘用合同，明确引航机构和引航员与工作有关的权利和义务。

5 Francis D. Rose, The Modern Law of Pilotage, London: Sweet & Maxwell, 1984, p. 33.

6 俞小洪诉巴拿马古德吉尔航运股份有限公司海上人身伤害赔偿纠纷案，下载于 http://www.ccmt.org.cn/，2007 年 8 月 10 日。

7 该案中，原告俞小洪是宁波引航站的引航员，在登上古德航运公司所有的“春天商人”轮实施强制引航时，因引航软梯的绳索突然断裂而导致原告重伤，后被宁波市劳动鉴定委员会鉴定为二级伤残。法院认定船东作为共同侵权人之一，应承担原告医疗费、精神损失费等经济损失。

佣关系的成立。[8] 对此观点，笔者不敢苟同。船东一般是按照协议承担船员的工资、奖金等报酬，虽不一定将工资直接支付给船员，而可能通过外派单位支付，但一定是以船员工资的名义支付的，而非支付给外派单位的中介费、劳务费或其他费用，协议上也往往约定由船东承担外派船员的工资；但对于引航员来说，船东支付的是实施引航的服务费用，无论在名义上还是实质上都与引航员劳动报酬无关。因此，船东实际上并不承担给付引航员报酬的义务。综上所述，引航员与船舶所有人之间不存在雇佣关系。

回到笔者前面提到的俞小洪涉外海上人身伤害索赔案中，法院虽在判决中回避了引航员与被引船舶所有人的关系，但从上述的分析来看，引航员与被引船舶所有人之间事实上也确实不存在劳动关系或雇佣关系。

（三）引航机构与被引船舶所有人之间的关系

上文已经论及船东向引航机构提出引航申请构成要约，引航机构接受其申请并派遣引航员前往构成承诺。因此，引航机构与被引船舶所有人之间存在合同关系。但关于其所属的合同种类是有争议的，其首先不是雇佣关系，因为雇佣关系中的雇主可为自然人或法人，而受雇人以自然人为限，[9] 因此，引航机构与船东之间无雇佣关系。

有学者认为，引航机构与船东之间的关系为承揽合同关系。[10] 从表面上看，如果我们把完成引航视为承揽人交付的工作成果，把收取的引航费看作报酬的话，这一观点似乎可以成立。但该观点只关注了承揽合同的形式，而没有注重其实质：第一，承揽合同以完成一定工作为目的，但引航服务注重的是引航的过程，并非完成引航的结果；第二，承揽合同中承揽人具有独立性，但引航过程中引航员的行为并非完全独立，他虽然掌握了船舶的驾驶，但船长仍掌握最高的指挥权，有权改变引航员的指令。[11] 因此，引航机构与船东之间存在的并非承揽合同关系，而只是一种我国《合同法》分则并未规定的无名合同（非典型合同）关系。

值得注意的是，即使在强制引航中，引航机构与被引船舶所有人之间仍然是合同关系，而非行政关系。虽然强制引航制度是我国法律所明确规定的，并由交通部负责实施，但实施强制引航与引航机构的职能无关。《船舶引航管理规定》第 3 条把引航机构定义为“专业提供引航服务的法人”，第 12 条又规定，“引航机构的主要职责之一是接受引航申请，提供引航服务”。可见，引航机构的职责是提供

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8 赵劲松：《俞小洪涉外海上人身伤害索赔案引发的思考》，载于《海商法研究》2002 年第 1 辑。

9 易军、宁红丽著：《合同法分则制度研究》，北京：人民法院出版社 2003 年版，第 373 页。

10 乔归民：《船长与引航员关系的法律分析》，载于《中国航海》2007 年第 1 期。

11 《船舶引航管理规定》第 36 条。

引航服务，并没有得到法律的授权具备行政职能。因此，在我国，无论是否为强制引航，引航机构与被引船舶所有人之间只存在合同关系。

二、引航员、引航机构对被引船舶的责任

引航员因其过失造成了被引船舶的损失，引航员与引航机构是否应当承担责任，应当承担什么责任？笔者将在下文就这一问题作详细阐述。

英国法律明文规定引航员是被引船舶所有人的受雇人，因此船东既可以根据他们之间的雇佣合同提起违约之诉，也可以对引航员提起侵权之诉。但在实践中鲜见对引航员提起的违约或侵权之诉，原因在于：一是引航员个人的财力有限，难以承担数额巨大的赔偿责任，正如英国学者萝丝所说，“由于引航员无法支付判决规定的赔偿金额，因此他不值得被起诉”；[12] 二是英国《1987 年引航法》第 22 条规定了引航员的责任限制，即任何持有执照的引航员，因其本身的过失所造成的损失，对于超过 1000 英镑加上其为该船舶所提供的引航服务而收取的引航费之和的部分，不负赔偿责任。而在由引航员过失引起的事故中，所造成的损失可能远远大于法律规定的限额。因此，被引船舶所有人似乎很难从引航员那里获得令人满意的赔偿。

在英国，被引船舶所有人无法从引航员那里获得完全的赔偿，也没有真正意义上的引航机构，被引船舶所有人甚至不能向引航员的管理机关索赔。在 1916 年的 Fowles v. Eastern and Australian Steamship Company, Ltd. 案中，法院驳回了被引船舶所有人要求引航管理机关承担责任的诉讼请求，洛雷本大法官说，“法律并没有改变引航员的法律地位，引航员仍被视为独立的自由职业者，如果要改变引航员传统且为人熟悉的法律地位，法律就必须用更加明确的方式。政府要做的事情很有限，即选择合适的引航员，进行适当的监督，提供合理的报酬……政府管理机关要做的是为合格的引航员授权，而不是控制、管理或驾驶船舶”。[13] 在 The Cavendish 案中，克拉克大法官又从另外一个角度否定了引航管理机关的责任，他认为，《1987 年引航法》创造了强制引航员与船东之间的雇佣关系……而一个受雇人不能有 2 个雇主，一旦引航员成为船东的受雇人，他就不可能再成为适格港口管理机关的受雇人。[14]

在我国，引航机构是事业单位法人，引航员是事业单位工作人员，与引航机构有劳动关系，且引航员实施引航为职务行为。因此，引航机构理应为引航员的过

12 Francis D. Rose, *The Modern Law of Pilotage*, London: Sweet & Maxwell, 1984, p. 33.
13 Fowles v. Eastern and Australian Steamship Company, Ltd. (1916) 2 A. C. 556, pp. 562~563.
14 The Cavendish, *Lloyd's Law Report*, Vol. 2,1993, p. 292.

失承担民事责任。又鉴于引航机构与被引船舶所有人之间存在合同关系，船舶所有人既可以对引航机构提起侵权之诉，也可以提起违约之诉。因而，与英国由引航员个人承担责任相比，我国法律对被引船舶所有人的保护力度更大。

三、引航员、引航机构对第三人的责任

引航员因其过失导致船舶发生侵权行为，造成了第三人的损失，引航员或引航机构是否应当承担责任？针对这个问题，在立法与司法实践中都存在 2 种对立的做法：否定主义与肯定主义。否定主义认为引航员或引航机构不承担责任，相关责任应由被引船舶所有人承担；肯定主义则认为，因引航员过失引起的民事责任应由引航员或其所在的引航机构承担。[15]

（一）否定主义

现行英国法是否定主义的典范。《1987 年引航法》第 16 条规定，船舶接受强制引航，不影响船舶所有人承担由该船造成的损害的责任。该规定为什么要强调“强制引航”呢？这要从英国引航员责任制度的历史说起。

在英国历史上，法律曾规定，在强制引航中由引航员的过失而导致船舶发生侵权行为，船舶所有人不承担法律责任，这一规则被称为“强制引航抗辩”。该规则源于普通法，后来又得到了早期成文法的认可。[16] 船东若想凭借“强制引航抗辩”规则获得免责，必须具备 4 个条件：一是船长必须接受强制引航；二是事故发生在强制引航的区域内；三是引航员必须控制船舶的航行，而不仅仅是向船长提供建议；四是事故必须完全是由引航员的过失引起的。[17]

英国法曾经允许船东依据“强制引航抗辩”规则获得免责，这种做法有其普通法上的根据，即引航员被视为被引船舶所有人的受雇人。乔安西勋爵就曾在 The Esso Bernicia 案中说过，“普通法下，船东要对所雇引航员的过失负责，就像他要对船长的过失负责一样，因为引航员被视为船东的受雇人，然而船东不必对强制引航员的过失负责，因为他不是船东的受雇人”。[18] 加拿大的杜布大法官也认为，船东或是船长雇佣的引航员是船东的受雇人，船东要对由引航员的过失所引起的

15 邓瑞平著：《船舶侵权行为法基础理论问题研究》，北京：法律出版社 1999 年版，第 269~271 页。

16 Francis D. Rose, *The Modern Law of Pilotage*, London: Sweet & Maxwell, 1984, p. 37.

17 David J. Bederman, Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts, *Tulane Law Revie*w, Vol. 64, No. 5, 1990, pp. 1050~1061.

18 The Esso Bernicia, *Lloyd's Law Report*, Vol. 1, 1989, p. 24.

碰撞负责。[19]

然而，从英国《1913 年引航法》开始，“强制引航抗辩”的规则就被废除了，该法规定，“船舶即使接受强制引航，船舶所有人仍要承担由该船造成的损害的责任。”[20] 自此以后，船东就无法依据“强制引航抗辩”规则获得免责了。在前面提到的 Fowles v. Eastern and Australian Steamship Company 案中，法院通过分析引航员与引航管理机关的关系，认为引航管理机关无须对引航员的过失承担责任，该等责任应由船东负责。[21] 在 The Esso Bernicia 案中，乔安西勋爵也确认了船东负责的规定，并给出了法律依据，他指出：引航管理机关对引航员的过失引起的责任不承担雇主责任，这是一条公认的规则，所有的权威资料都证实了这一点，没有不同的意见。该规则的依据有 2 点：一是引航员是独立的工作人员，其独立实施引航，并不是引航管理机关的受雇人；二是《1913 年引航法》的第 15 条规定引航员是船东的受雇人。[22] 在最近的 The Cavendish 案中，克拉克大法官完全赞同 The Esso Bernicia 案的判决，他说，“《1987 年引航法》第 16 条把对第三人的责任施加给了船东，这一规定与《1913 年引航法》意思相同，但语言更加现代化，创造了强制引航员与船东之间的雇佣关系”。[23]

多数国家和地区都参照英国法，采用否定主义。[24] 例如，根据《香港海事条例和附属法例》第 84 章（领港条例）第 24 条，在领港属强制性的情况下航行的船只的船东或船长，须对该船只或该船只在航行上的任何错误所引致的损失或损坏负责，方式与假若领港非属强制性时他所须负责的方式相同。这一规定几乎与英国《1987 年引航法》第 16 条相同。埃及《苏伊士运河航行规则》更加明确地规定，“无论任何形式的船舶……应对……第三者所造成的损害和重大损失，无论是直接的或间接的，都负有责任……船舶不论由于什么原因对第三者造成了直接或间接的任何损失，应保证在索赔上，免除运河局的赔偿责任”。[25]

美国的情况较为特殊，它采纳的实际上是不完全否定主义。在 1868 年的 The China 案中，美国联邦最高法院在参考了英国的众多先例之后，针对英国当时盛行的“强制引航抗辩”规则提出了不同的看法。克利福德大法官说，“巡回法院判

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19 The Irish Stardust, *Lloyd's Law Report*, Vol. 1,1977, p. 205.

20 英国《1913 年引航法》第 15 条、《1983 年引航法》第 35 条以及现行《1987 年引航法》第 15 条均有此规定。参见 Francis D. Rose, *The Modern Law of Pilotage*, London: Sweet & Maxwell, 1984, p. 38；英国《1987 年引航法》第 16 条。

21 Fowles v. Eastern and Australian Steamship Company (1916) 2 A. C. 556.

22 The Esso Bernicia, *Lloyd's Law Report*, Vol. 1, 1989, p. 30.

23 The Cavendish, *Lloyd's Law Report*, Vol. 2, 1993, p. 292.

24 邓瑞平著：《船舶侵权行为法基础理论问题研究》，北京：法律出版社 1999 年版，第 269~271 页。

25 埃及苏伊士运河局：《苏伊士运河航行规则》，北京：人民交通出版社 1990 年版，第 2、22 页。转引自邓瑞平著：《船舶侵权行为法基础理论问题研究》，北京：法律出版社 1999 年版，第 269~270 页。

决碰撞船要承担责任，尽管船上有引航员在，原审判决应当得以维持。许多英国先例有不同的判决，但我对这些判决的依据不甚满意，于是我毫不犹豫地作出了以下判决，法庭的大多数法官也与我意见相同。有观点认为，州法律要求船东无论是否雇佣引航员，都要支付全额或半额引航费，这样他们可以此抗辩，拒绝承担引航员引起的责任……我不同意这一点。船东是否要负责，取决于他是否是侵权人。如果侵权行为是他实施的，或是由于他的过失引起的，他就要负责。如果船东是雇佣引航员的雇主，他就要负责，一旦雇主地位没有了，责任也随之终止。因此，除非雇主地位不复存在，否则船东就要承担对人责任”。[26] 即在雇佣引航的情况下，船东要承担对人责任和对物责任，而在强制引航的情况下，船东仅承担对物责任，不承担对人责任。

（二）肯定主义

采用肯定主义立法的国家不多。俄罗斯就是其中一例，如《俄罗斯联邦航运商法典》规定，“雇佣引航员的组织对引航员的过失不当引航导致船舶发生的损失负责”，[27] 波兰、比利时、巴拿马等国海商法也有类似的规定。[28] 1977 年我国广州远洋公司的“大德轮”在引航员在船的情况下与一艘外国船舶发生碰撞，经查，碰撞完全是由于引航员的过失造成的，巴拿马运河当局后来承担了 95% 的责任。[29]

在英国，虽然“强制引航抗辩”的规则已被废除，但法院在审理涉及外国水域强制引航的案件时依然承认该规则。例如，在 1953 年的 The Waziristan 案中，威尔默大法官说，“事故发生在伊拉克的领水范围内，根据伊拉克法律，该水域是实施强制引航的。但在伊拉克的法律中没有类似英国《1913 年引航法》第 15 条的规定，要求船东要对强制引航员的过失负责”，[30] 因而最终法院判决船东对强制引航员的过失不承担责任。

（三）中国法下引航员、引航机构对第三人的责任

在我国法律下，究竟采取的是否定主义还是肯定主义并不明确。我国《海商法》第 39 条规定，船长管理船舶和驾驶船舶的责任，不因引航员引领船舶而解除。《船

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26 The China (1868) 74 U. S. 53, pp. 69~70.

27 韩立新、王秀芬主编：《各国（地区）海商法汇编》（中英文对照）下卷，大连：大连海事大学出版社 2003 年版，第 1382 页。转引自司玉琢著：《海商法专论》，北京：中国人民大学出版社 2007 年版，第 411 页。

28 司玉琢、吴兆麟著：《船舶碰撞法》，大连：大连海事大学出版社 1995 年版，第 50 页。

29 邓瑞平著：《船舶侵权行为法基础理论问题研究》，北京：法律出版社 1999 年版，第 271~272 页。

30 The Waziristan, *Lloyd's Law Report*, Vol. 2, 1953, p. 370.

舶引航管理规定》第 23 条与《海商法》的规定一致，即船舶接受引航服务，不解除被引船舶的船长驾驶和管理船舶的责任。这是否意味着船舶所有人要对引航员的过失负责？笔者认为不是。《海商法》第 39 条和《船舶引航管理规定》第 23 条只是说明了引航员和船长的职责和权限划分，即引航员代替船长掌管船舶的操纵和航行，船长仍对船舶有最高指挥权，[31] 这 2 条并非针对民事责任而设置。我们可以用系统解释[32] 的方法理解这一点。《海商法》第 39 条出现在该法第三章第二节“船员”中，该节重点是讲船长的职责，因而第 39 条也应与整节的内容相同，若仅该条规定引航员在船时是承担民事责任的主体，则与整节结构不符。《船舶引航管理规定》有所不同，第 23 条出现在该规定第三章“引航员”中，这样看来，在该章的最后出现一则条文规定引航员的民事责任似乎是合理的。但令人疑惑的是，如果要明确排除引航员对第三人的责任，为什么不采用英国《1987 年引航法》第 16 条的模式，使用更加明白无误的措辞，而是采用这种模棱两可的方式呢？因此，在笔者看来，《船舶引航管理规定》第 23 条不过是对《海商法》第 39 条的重复和强调，并没有规定引航员的民事责任。

法律无明文规定，在我国司法实践中也很少有判决涉及引航员的民事责任，唯一的判决是关于 1985 年上海供电局与波罗的斯船务公司海事损害赔偿纠纷案的。[33] 该案中，被告巴拿马波罗的斯船务公司所有的“阿加米能”轮在黄浦江中拖锚航行，因引航员的过失，钩断了 2 个浮筒之间的过江电缆，造成原告上海供电局的设备及供电损失。上海海事法院经审理认为，被告所有的“阿加米能”轮在黄浦江中拖锚航行，损坏原告铺设的过江电缆，其行为违反了《中华人民共和国海上交通安全法》第 10 条和《上海港港章》第 37 条的规定，应对造成的经济损失作出全部赔偿，最终判决被告船东负赔偿责任。1986 年 3 月 3 日，最高人民法院审判委员会第 246 次会议在总结审判经验时，认为上海海事法院在审理该案中，对于发生纠纷的事实及时核查、分清责任，对赔偿金额的处理实事求是、公平合理，可供各级人民法院借鉴。法院虽在判决中没有明确提到引航员的责任该由谁承担的问

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31 根据相关法律法规，引航员登船后，应当向被引船舶的船长介绍引航方案，被引船舶的船长应当向引航员介绍本船的操纵性能以及其他与引航业务有关的情况，应当为引航员提供工作便利，并配合引航员实施引航，回答引航员有关引航的疑问，除有危及船舶安全的情况外，应当采纳引航员的引航指令。但船舶接受引航服务，不解除被引船舶的船长驾驶和管理船舶的责任，船长发现引航员的引航指令可能对船舶安全构成威胁时，可以要求引航员更改引航指令，必要时还可要求引航机构更换引航员，并及时向海事管理机构报告。参见《船舶引航管理规定》第 23 条、29 条、36 条。

32 系统解释是指将需要解释的法律条文与其它法律条文联系起来，从该法律条文与其它法律条文的关系、该法律条文在所属法律文件中的地位、有关法律规范与法律制度的联系等方面人手，系统全面地分析该法律条文的含义和内容，以免孤立、片面地理解法律条文。参见张文显著：《法理学》，北京：北京大学出版社 / 高等教育出版社 1999 年版，第 331 页。

33 上海供电局与波罗的斯船务公司海事损害赔偿纠纷案，下载于 http://www.com-law.net/anli/haishisunhai.html，2007 年 10 月 26 日。

题，但判决结果已清晰地表明了法院的观点，即被引船舶所有人应对引航员的过失承担责任。

笔者认为法院做出此判决主要有 2 个原因。首先是法院受到“引航员是船东受雇人”这一英国法规则的影响。其次则是历史的原因，我国交通部曾在 1959 年颁布了《关于海损赔偿的几项规定》，其第 1 条就明确指出，“由于船长、船员、引水员或者船舶所有人任用在船上服务的人员职务上的过失所造成的海损，船舶所有人应当负责赔偿”；1976 年交通部《海港引航工作规定》第 8 条也规定，船舶在被引过程中，由于引航员的过失所发生的海损事故，引航员当受应得的处分，但不负经济赔偿责任。虽然该案发生时这 2 个部门规章已失效，但法院受其影响也是不可避免的。当时，我国《海商法》尚未颁布，甚至连《民法通则》也未制定，在此情况下，法院做出这样的判决可以说是合理的，但该案对当前的司法实践恐怕就没有多少指导意义了。

从民法原理看，由于引航员及引航机构与被引船舶所有人之间没有雇佣关系，因此被引船舶所有人也不可能为引航员的过失承担责任。

综上所述，我国法律虽然没有明确规定引航员的过失由谁承担，但基于侵权法的一般原则，我们不难看出，我国法律采纳的应当是肯定主义，即由引航机构承担引航员因其职务过失引起的责任。

由引航机构承担引航员的过失责任具有重要的意义。首先，从法理上说，法律责任的认定和归结应当遵循责任自负的原则，每个人应当对自己的行为负责。我们承认，或许与被引船舶的所有人相比，引航机构的经济赔偿能力稍显不足，由船东承担赔偿责任确实能够更好地保护受害方的利益，但我认为，并不能为了保护第三人利益而牺牲无辜者的权益，在没有法律依据的情况下，由被引船舶所有人承担责任显然是不合理的，也与责任自负的原则相悖。其次，由引航机构为引航员的过失承担责任也有利于促使引航机构加强引航员的任用与管理，提高引航员的业务水平。英国纽卡斯尔保赔协会也曾发出呼吁，“要求改变引航员造成碰撞不承担经济责任的做法，强调除此之外不可能有更好的手段来保证引航员的服务质量”。[34]

但是，也有人担心，由于引航机构的经济赔偿能力有限，一旦让其承担过多的赔偿责任，可能会导致其无法面对风险而退出航运业。事实上，这种担心是不必要的。从航运业上千年的发展历程来看，作为风险最大的船舶所有人，不仅没有退出航运业，反而在不断地壮大自己的力量。原因主要有二，一是船舶所有人可以通过保险分担其风险，二是他们可以受到责任限制制度的保护。我认为，保险和责任限制同样可以适用于引航机构，笔者接下来将介绍引航机构的责任限制制度。

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34 司玉琢、吴兆麟著：《船舶碰撞法》，大连：大连海事大学出版社 1995 年版，第 50~51 页。

四、引航责任限制制度

责任限制是指责任人根据法律的规定，将自己的赔偿责任限制在一定范围内的法律制度。在海商法领域，责任限制制度的历史非常悠久，[35] 我国《海商法》也在第四章和第十一章分别规定了单位责任限制和海事赔偿责任限制 2 种不同的责任限制制度，目的是保护船舶所有人利益，促进航运业发展。

引航业的发展与航运业类似。在早期尚未产生经政府许可的引航员时，一部分熟悉航道、港口情况的人就开始为来往船只提供引航服务，他们以自己的经验和技术避免了很多由于对当地航道、气候不熟悉而导致的水上事故，客观上也促进了水运的繁荣和对外贸易的发展。时至今日，虽船上已配备了各种先进的设备，但引航员丰富的经验和对当地情况的了解仍对维护来往船舶和港口的安全发挥着不可忽视的作用。然而，引航毕竟面临着较大的风险，由于航道的复杂、天气的多变以及港口过于拥挤，引航事故的发生是不可避免的，如果我们对引航员和引航机构过于苛求，给他们施加过高的赔偿责任，必然会导致更多引航员的流失，从而阻碍引航业的健康发展，也进而会加大航运的风险。因此，我认为，一方面我们应当加强对引航员和引航机构的管理，提高引航员的素质，改善引航质量，但另一方面，我们也应将天平略微向引航员和引航机构倾斜，激励他们对引航工作的热情，其中最有效的办法就是实行引航责任限制制度。

有些国家已经建立了引航员和引航机构的责任限制制度。《俄罗斯联邦航运商法典》规定，雇佣引航员的组织的赔偿责任限额为应支付的引航费的 10 倍，波兰《海商法》则把责任限额固定为引航费的 20 倍。[36] 在英国，法律对引航员与引航机构的责任限额作出了不同的规定：引航员的责任限额为 1000 英镑加上其为该船舶所提供的引航服务而收取的引航费之和，而引航员的管理机关，即适格港口管理机关的责任限额则是事故发生时，该管理机关所许可的引航员的人数乘以 1000 英镑之积。[37]

我国没有规定引航机构的责任限额。我认为，中国已是一个航运大国，很多港口正处于高速发展时期，引航任务繁重，因此，为鼓励引航业发展，防止引航员的流失，我国应当建立引航责任限制制度。关于责任限额，我建议参照英国的模式，以某引航机构中引航员的人数乘以一个固定基数组成，固定基数的数值则可以根据收取的引航费和当地的经济发展水平等因素酌情确定。

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35 据说，早在 17 世纪，一艘装运黄金的荷兰船被盗（损失的金额远远大于船价），法院判船舶所有人的赔偿责任仅以船价为限，此事为著名的荷兰法学家格劳秀斯得知，他曾赞许这完全符合正义的要求。参见司玉琢著：《海商法专论》，北京：中国人民大学出版社 2007 年版，第 522 页。

36 司玉琢著：《海商法专论》，北京：中国人民大学出版社 2007 年版，第 411 页。

37 Pilotage Act 1987, Sec. 22.

五、结语

通过上面的阐述，我们发现我国法律没有明确规定引航员的民事责任，但通过对现行法的分析以及对民法原理的理解，我认为引航机构应当为引航员的过失承担民事责任，这里的民事责任包括因引航员的过失而引起的对被引船舶所有人的责任和对第三人的责任。由引航机构为引航员的过失承担责任有利于促使引航机构加强引航员的任用与管理，提高引航员的业务水平，改善引航质量。与此同时，鉴于引航的特殊风险，应当通过保险以及引航责任限制制度，防止引航员的流失，促进引航业的发展。综上，笔者认为，一方面要求引航机构承担责任，另一方面又对引航机构的责任加以限制并通过保险分担其责任，这才是根据法律基本原则和行业的实际情况所需要的制度。

《UNCITRAL 运输法草案》下发货人法律地位之研究

徐 英*

内容摘要: 发货人虽然是一个运输法上的概念，但由于有权交付货物的人往往是对该货物拥有货权的人，通常为货物买卖中的卖方，因而发货人实质上又是贸易法下卖方在运输法中的延伸。运输法中发货人的权利义务规定会直接影响到贸易法下卖方利益的实现。本文详细介绍了《UNCITRAL 运输法草案》下的发货人制度，着重分析了发货人主体地位和权利义务变化，并对此作出了评价。

关键词: 发货人　法律地位

一、引 言

长期以来，运输合同的订立尤其是海上货物运输合同的订立，都是为了履行国际贸易合同，通过提供位移完成卖方的交货义务并使货物所有权在买卖双方之间发生转移。在一般国际贸易术语下往往都由卖方向承运人租船订舱来安排运输，也往往由卖方将货物交付承运人运输，因而一般情形下运输合同中的托运人和发货人都为同一人，都是贸易合同中的卖方或其代理人、分包人。但 FOB 价格条件下是由买方租船订舱，这就意味着与承运人签订运输合同的是买方，买方成了运输合同中的托运人，其也通常为运输合同下的收货人，而向承运人交付运输货物的却是卖方，而且实践中，FOB 下承运人在实际签发提单时都将交货的卖方填写在提单中“托运人”栏中，这样提单中记载的“托运人”就和托运人定义发生了矛盾。因为虽然《海牙规则》和《海牙—维斯比规则》[1] 作为调整提单的统一规则，

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1 在本文中，《海牙规则》系指 1924 年《统一提单若干法律规则国际公约》；《海牙—维斯比规则》系指经 1968 年 2 月 23 日关于修正 1924 年 8 月 25 日《统一提单若干法律规则公约》的议定书修正的《海牙规则》；《汉堡规则》系指《1978 年联合国海上货物运输公约》。

并没有对“托运人”这一概念进行定义，但后者第 1(a) 条规定“承运人包括与托运人订有运输合同的船舶所有人或租船人”。于是人们从承运人定义的反向来界定托运人，认为托运人就是与承运人订立运输合同的人。针对上述矛盾，《汉堡规则》在第 1(3) 条中规定：“托运人”指其本人或以其名义或代其与承运人订立海上货物运输合同的任何人或指其本人或以其名义或代其将货物实际交付给海上货物运输合同有关的承运人的任何人。至此，托运人概念中加入交货托运人（收货人）这一类型，以解决上述提单上记载托运人与订约托运人不一致的情形。从此，托运人包括了契约托运人和交货托运人 2 种，但《汉堡规则》本身却并未对契约托运人和交货托运人的权利义务加以区分，而是将其留待实践中视具体情况而定，这就导致了司法实践中的混乱。我国《海商法》照搬了《汉堡规则》中托运人的定义条款，并将“或”改成了“和”，使得 FOB 术语下 2 种托运人同时存在，但对二者各自的权利义务划分却鲜有涉及，实践中谁有权从承运人处取得提单，谁承担货物包装和申报义务并对承运人因此而遭受的损失承担责任，承运人在目的港该听谁的指示放货，各法院的认定不一。

在这种背景下，正在审议的《UNCITRAL 运输法草案》（以下简称“《草案》”）[2] 将“交货托运人”从托运人概念中剥离出来，单独定义为“发货人”，这从立法上彻底改变了发货人的法律地位，也彻底改变了运输法上货方主体（相对于船方主体而言）的既存框架，从此“发货人”与托运人成为并列的 2 个概念，而不再是包容与被包容的关系。而且草案还通过对运输单证功能的分离单独赋予了发货人相应的权利和义务，即第 37 条规定“发货人仅有权获得不可转让运输单证或不可转让电子运输记录，且只能以此证明承运人或履约方收到了货物”。《草案》关于发

2 《UNCITRAL 运输法草案》系指联合国贸易法律委员会成立的第三工作小组（有时也称运输法工作小组）目前正在审议制定的《〔全程或部分〕〔海上〕货物运输公约草案》。在该草案的最初编拟中，联合国贸易法律委员会邀请国际海事委员会参与了调查，国际海事委员会在该调查基础上起草了《〔全程或部分〕〔海上〕货物运输公约草案》的最初案文（即 UNCITRAL. A/CN. 9/WG. III/WP. 21), 所以国内有些学者也将该草案称为《CMI 运输法草案》。到本文截稿时止，联合国贸易法律委员会已经完成了对草案案文的三读，并形成了最新案文（A/CN. 9/WG. III/WIP. 101）。而且第三工作组在每次完成一读即一次审议修改后都会针对当前修订结果编写草案案文，其中在对初稿 UNCITRAL. A/CN. 9/WG. III/WP. 21 一读后形成 UNCITRAL. A/CN. 9/WG. III/WP. 56，二读后形成 UNCITRAL. A/CN. 9/WG. III/WP. 81 无特殊说明时，本文以联合国贸易法律委员会第三运输法工作小组最新审议的该草案案文即 A/CN. 9/WG. III/WP. 101 号文件中所载草案案文为准。本文采用的草案案文取自联合国贸易法律委员会的官方网站，并以其公布的中文和英文版本为准，其中中文版本下载于 http://www.uncitral.org/uncitral/zh/commission/working_groups/3Transport.html，2008 年 4 月 10 日；英文版本下载于 http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html，2008 年 4 月 10 日。

货人权利义务的规定影响最大的就是 F 组离岸价贸易术语中卖方的权利。以 FOB 为例，因为 FOB 卖方并不安排运输，一般他并不能成为运输法上托运人，无法享有草案为托运人设置的权利义务，相反其只能成为发货人，或只能在托运人同意和指示下成为单证托运人。如果 FOB 中卖方只能成为草案中发货人，那么其将只能获得一张货物收据，这将严重影响到其对运输中货物的控制能力和收回货款的能力。可见，草案的发货人制度将对 FOB 下卖方的权利产生深远影响。因而，本文对《草案》的发货人制度，尤其是其法律地位变化的研究将具有极其重大的理论意义。

本文中使用的“发货人”概念可以从 2 个层面来理解：从学理上来说，发货人的实质就是“将货物交付于承运人运输”，它其实是一个通过实际从事的行为来加以界定的概念。具体到实践中，一般有权将货物交付运输的人通常为贸易合同中的卖方，但因贸易合同下运输的安排不同，发货人也可能是卖方的分合同人、代理人，有时甚至会是买方在装运港的代理人；而且发货人也可能在运输法上因从事其他一些行为而具有其他的身份，如签订运输合同成为托运人，或被记载于运输单证上成为单证托运人。可见，无论在运输法上还是在贸易法上，发货人在从事交货行为的同时还可能从事其他行为，从而具有其他主体身份，极易与其他主体重叠，而本文在使用“发货人”这个词时一般都会在前面加上前缀以特定化，有时甚至直接用它的另一种身份来指称。

二、发货人概述

（一）现行立法和司法实践中与发货人相关的主体概念

理论上，发货人是通过“向承运人或履约方交货”的事实行为加以界定的，而实践中发货行为将因贸易合同的安排不同、运输方式不同而由不同主体来完成。正如引言中所述，发货人是一个极易与其他主体相重合的主体。从另一个角度而言，与发货人相重叠的其他主体可以被看成是发货人在实践中的不同类型，与发货人具有极其重要的联系。下面我们将根据在贸易法下或运输法下与发货人相重叠的其他主体身份来对实践中的发货人进行分类。

1. 运输法中

(1) 运输合同之托运人

在到岸价贸易术语中，货物成交价格一般包含了成本、运费和保险费等，因而货物的运输一般由卖方安排。卖方除了向承运人或履约方交付货物而成为发货人之外，还向承运人租船订舱而成为托运人，此时发货人与托运人一致。

(2) 托运人之代理人、分合同人

在 C 组贸易术语下，发货人与托运人一致，其除了让雇员去交货外，还可委托代理人、分合同人去履行其交货义务。此时代理人、分合同人将因交货行为而成为发货人，享有《草案》中关于发货人的权利义务规定。

(3) 单证托运人

如前所述，实践中 FOB 下签发的提单等单证中往往将 FOB 卖方记载于单证的托运人栏中，《草案》为了保护 FOB 术语下卖方而特设了“单证托运人”这一概念。在草案框架下，仅仅交付货物只能让其成为运输法上发货人，仅能享有取得货物收据的权利。但这对于 FOB 下的卖方（其此时只能是发货人，而不能成为托运人）而言是极其不够的。草案为了保护这种 FOB 卖方，便创设了“单证托运人”概念，即此时只要托运人（即 FOB 买方）同意并向承运人发出指示将卖方（发货人）记载于运输单证的托运人栏中，发货人（FOB 卖方）即可成为单证托运人，享有与托运人相同的权利义务。

(4) 承运人或履约方

承运人或履约方成为发货人多存在于多式联运或转运中，前一程的承运人或全程承运人在完成部分运输后，委托后一程的承运人继续将货物运至目的地。这时，在后一程运输的运输单证上，前一承运人就会被记载为托运人，鉴于该承运人实际交付货物的情况，他很自然地被视为发货人。[3]

2. 贸易法上

前面我们谈到过，一般有权将货物交付运输的人通常为贸易合同中的卖方，这在 C 组到岸价贸易术语下和 F 组离岸价贸易术语下都是如此。但因为 C 组中卖方除了交付货物之外还要安排运输，此时的发货人与托运人一致，已于前面类型中提及，便不再赘述。此处我们主要谈论 F 组中的卖方。

(1) F 组中的卖方

在 F 组离岸价贸易术语下，买方因安排运输而成为托运人，但货物仍处于卖方控制之下，卖方一般需按照买方指示来履行其贸易合同下的交货义务。有时买方会指示卖方向买方的货代交货（如下所述），但多数情况下买方会指示卖方直接向承运人或履约方交付货物，此时卖方因向承运人交货而成为运输法中的发货人。而且，FOB 下卖方为实现其对运输中对货物的控制，可在贸易合同中要求买方在安排运输时向承运人指示将卖方记载在运输单证上，从而成为单证托运人。

(2) F 组中卖方之代理人、分合同人

在 FOB 下，卖方也可能不亲自交货，而是委托代理人或分合同人代为履行其贸易合同下的交货义务，此时卖方之代理人、分合同人因向承运人交货这一事实行为而成为发货人，其应享有《草案》中所规定的发货人的权利义务。

但各国外贸出口实践中还存在另外一种内销和外销相结合的情形，即货物由

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3 蒋正雄：《论发货人的法律地位》，载于《集装箱化》2003 年第 17 期，第 17 页。

当地的生产商销售给另一国内经销商，而后者随即将货物转卖给国外另一买方。当内销和外销均采用 FOB 时，经销商出于方便往往将前后 2 个合同的交货地点定为同一个，这样实际上是由生产商直接向国外买方所指定的承运人或履约方交货，此时生产商当然成为外销运输合同中发货人。但其要想成为单证托运人还必须获得国外买方的同意，而在这种情形下，生产商与国外买方之间并无直接联系，可能根本不知道国外买方，因此只能通过经销商来约束国外买方。

(3) F 组中买方之代理人、分合同人

在 F 组贸易术语（以 FOB 为例）下，有时买方（即托运人）会在卖方交货港地区委托货代，由其从卖方处接收货物并由其代理买方将货物交付于承运人运输。此时买方完全控制了货物运输，卖方因未向承运人交运货物而不能成为运输法下的交货人，此时的发货人是买方（托运人）的代理人或分合同人。有时此种代理人或分合同人在得到托运人（买方）明示或默示授权或经托运人向承运人指示后还可记载在运输单证上成为单证托运人，从而享有与托运人相同的权利和义务，而此时 FOB 下卖方在运输法上将不享有任何权利，其完全丧失了对货物的控制。[4]

(二) 《草案》下的发货人概念

《草案》于第 1(10) 条中明确规定：发货人是指将货物交给承运人或履约方运输的人。认定发货人的关键在于实际交付货物，而实践中一般有权交付货物的人通常需对所交付货物拥有物权，一般为贸易合同中卖方。正是在此意义上，我们说发货人概念本质上是贸易合同中的卖方在运输法中的延伸，但发货人毕竟是运输法上的概念，其必须与运输合同的另一方当事人即承运人发生联系，于是交货行为的对象为承运人或履约方。可见，判断发货人时有 2 个要点，即实际交运货物和交运对象为承运人或履约方。

《草案》将“向承运人或履约方交付货物的行为”作为认定发货人的关键，这同《汉堡规则》中的交货托运人的内涵实际上是一致的，后者指“其本人或以其名义或代其将货物实际交付给海上货物运输合同有关的承运人的任何人”。相对于该定义，草案关于发货人的定义显得有点简单，其有意回避了代理问题。这是因为各国关于代理的认定和法律规定并不相同，甚至相去甚远，所以草案将其留待各国国内法解决。但就“交货”这一事实行为而言，草案关于发货人定义的外延基本上与汉堡规则的交货托运人一致，可从 UNCITRAL 秘书处对《草案》初稿的说明得到证实，后者指出“发货人可包括托运人、第 7.7 条所指人员或作为其代表或

4 参见 UNCITRAL. A/CN.9/WG. Ⅲ /WP. 21，第 122 段。

应其请求实际将货物交给承运人或参与履约方的其他人。”[5] 其中“第 7.7 条所指人员”是指单证托运人，主要为船上交货型卖方；而“作为其代表或应其请求实际将货物交给承运人或参与履约方的其他人”则主要是指托运人或单证托运人的雇员、代理人、分合同人等，他们因实际交货行为而成为发货人。从秘书处的这一解释我们看到草案下的发货人与《汉堡规则》下的交货托运人实际上具有相同的内涵和外延，都可涵盖贸易法中的买卖双方及他们所委托的分合同人、代理人。草案只不过是在照搬《汉堡规则》下交货托运人概念的同时将它单列出来，并置于与托运人同等的运输法主体地位。

在现代商业社会中，商事主体往往是法人等社会组织体，不可能亲自从事交货行为，而由其雇员来完成。虽然《草案》关于托运人、单证托运人的雇员可否因交货这一事实行为而成为发货人的态度模糊不清，我们仍可从草案关于承运人和履约方的受雇人的规定来判断草案对于现代商事主体之雇员的态度。UNCITRAL 第三工作组在其第 19 届会议工作报告中讨论到履约方的定义时确定了 3 项指导原则，即：1. 承运人和分合同人应当承担连带赔偿责任；2. 承运人和雇主应为其受雇人承担间接赔偿责任；3. 所谓的“喜玛拉雅条款”保护应当以对雇主适用的同样方式适用于受雇人，而且其适用不应受到契约关系不涉及第三方的原则的限制。而且在其对第 1(6) 条关于履约方定义的修订案文中明确规定履约方只包括代理人和分合同人，而不包括雇员。[6] 但在最终形成 UN-CITRAL. A/CN.9/WG. Ⅲ / WP.101 号草案文本时，有人担心该规定会影响到海运履约方对其受雇人的责任，从而放弃了该修改案文而在第 20(4) 条中加入新条款，即根据公约草案不得对承运人和履约方的雇员追究个人责任。[7] 可见草案关于雇员的态度是并没有将雇员作为一个独立的主体来单独承担运输法上的权利义务，而仅将其纳入“喜马拉雅条款”（《草案》第 4 条）中以保护承运人、海运履约方在承担雇主责任时仍享有抗辩权和责任限制的权利。因而在托运人、单证托运人方面也不宜将雇员作为一个独立主体，而应放在托运人背后。这种处理也符合我国合同法中关于“代理”和“代表”的区分。

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5 UNCITRAL.A/CN.9/WG. Ⅲ /WP. 21 附件，第 4 段。

6 《草案》修订案文第 1(6) 条规定：(a) “履约方”是指承运人以外的履行或承诺履行承运人在运输合同下有关接收、装载、操作、积载、运输、照料、卸载或交付货物的任何义务的人，以该人直接或间接在承运人的要求、监督或控制下行事为限；“履约方”包括履约方的代理人或分合同人，但以其同样履行或承诺履行运输合同下承运人义务为限。(b) “履约方”不包括 :1. 承运人或履约方的受雇人；或者 2. 托运人、单证托运人、发货人、控制方或收货人，而不是由承运人直接或间接所用的任何人。参见 UNCITRAL. A/CN. 9/621，第 128~153 段。

7 UNCITRAL.A/CN.9/WG. Ⅲ /WP. 101，秘书处的说明 2。

（三）《草案》中发货人与托运人、单证托运人之关系

《草案》将“发货人”从“托运人”概念下剥离出来之后，于第 1(8) 条规定，“托运人”是指与承运人订立运输合同的人。至此，发货人和托运人不再是包含与被包含的概念，而是运输法上 2 个独立且并列的运输法主体。

《草案》将《汉堡规则》下的交货托运人单列并单独定义为发货人的目的，主要是为了解决离岸价贸易术语（通常为 F 组，即 FCA/FAS/FOB，下面将以 FOB 为例）中托运人（指契约托运人，通常为贸易合同中买方）与发货人（贸易合同中卖方）不一致时二者各自在运输法下的权利。在 FOB 贸易术语下，因为货物的运输由买方安排，买方往往通过向承运人租船订舱而成为托运人，但此时货物仍处于卖方控制之下，当买方所指定的船舶到达装运港时，向承运人交付待运货物的是卖方，此时发货人与托运人不一致。在《汉堡规则》下，这 2 种人都可成为托运人，都可享有运输法上的托运人的权利义务，于是实践中出现了混乱。现在草案将发货人单列之后就能解决这种混乱了，FOB 下租船订舱的买方现在就是草案下的托运人，而实际交付货物的卖方就成了发货人。而且草案接着于第 37 条规定了发货人与托运人各自的权利，即发货人有权取得不可转让运输单证，但以此仅能证明承运人或履约方收到了货物；而托运人则有权取得证明或包含运输合同的运输单证，即我们通常所说的提单或海运单等。[8] 虽然二者的权利已明确，但草案起草人员也注意到了如果仅赋予 FOB 下卖方取得货物收据的权利，这样将无法保护 FOB 下卖方对货物的控制和收回货款的权利，于是草案专门创设了“单证托运人”概念。

《草案》第 1(9) 条规定：单证托运人是指“托运人以外的，同意在运输单证或电子运输记录中记名为‘托运人’的人”。其中，“同意”是指须经托运人的同意，并由托运人向承运人发出此种将发货人或其他人记载于运输单证上的指示。而且草案第 34 条规定单证托运人和托运人享有相同的权利和承担相同的义务，二者具有相同的法律地位。只要 FOB 下卖方一旦记载于运输单证上，其就可以成为

8 《草案》第 37 条：除非托运人和承运人约定不使用运输单证或者电子运输记录，或者不使用运输单证或者电子运输记录系行业习惯、做法或者惯例，否则，货物一经向承运人或者履约方交付运输：(a) 发货人即有权获得不可转让运输单证，或者根据第 8 条 (a) 项获得不可转让电子运输记录，但只能以此证明承运人或者履约方收到了货物；并且 (b) 托运人，或者经托运人同意的单证托运人，有权按照托运人的选择从承运人处获得适当的可转让运输单证或者不可转让运输单单证，或者根据第 8 条 (a) 项获得可转让电子运输记录或者不可转让电子运输记录，除非托运人和承运人已经约定不使用可转让运输单证或者可转让电子运输记录，或者不使用可转让运输单证或者可转让电子运输记录系行业习惯、做法或者惯例。

单证托运人，其就有权要求取得证明或包含运输合同的运输单证，从而实现对该货物的控制和收回货款的权利。可见，《草案》通过设置单证托运人的概念完成了FOB 下发货人（卖方）向托运人的转化。但是我们也应看到这种转化是有限制的，即需得到托运人的同意，并由托运人来向承运人指示。

综上所述，运输法上的发货人将因贸易合同中运输安排、交货安排的不同而不同，其并不局限于贸易合同中卖方，还包括卖方代理人、分合同人，在 FOB 下甚至还包括买方的货运代理人。但卖方代理人、分合同人因仍是为卖方行事，其利益与卖方利益一致，可看成是卖方的衍生，而且实践中 FOB 买方代理人成为发货人的情形比较少。因此，运输法中发货人概念基本上都是贸易合同中卖方在运输法下的延伸。当然在运输法上，这些由贸易法下卖方延伸而来的发货人也可以成为托运人或单证托运人，从而享有运输法上托运人的权利义务，如 C 组到岸价贸易术语下。但是有些发货人（如 FOB 下卖方）只能成为发货人，只能享有取得货物收据的权利。可见草案对贸易法中卖方的保护将因贸易术语不同而不同，尤其是因贸易术语下运输安排的不同而不同。

三、《草案》下发货人之权利义务

依发货人定义，向承运人或履约方交付货物是认定发货人的关键。而一般有权向承运人交付货物的通常都是贸易合同中的卖方。通常情况下，这些由贸易法下卖方延伸而来的发货人在运输合同中将可能因从事其他行为而具有多重身份，如与承运人签订运输合同而成为托运人（CAA 中），也可能因托运人指示而被记载于运输单证中而成为单证托运人，从而享有运输法所规定的托运人的权利义务，其也可能没有任何其他事实而仅为发货人。可见，发货人在运输法上所享有的权利将因其是否与托运人一致而完全不同。下面我们将根据发货人与托运人是否一致来分情况讨论《草案》下发货人的权利义务。

（一）发货人与托运人不一致时

在《草案》下，当一个人仅仅只从事了向承运人或履约方交付货物的行为时，其只能成为草案下的发货人，只能享有草案所规定的发货人的权利义务。实际上也只有这些才真正是《草案》所规定的发货人的权利义务。

1. 发货人的权利

实际上，草案仅于第 37(a) 条规定了发货人的权利，即“发货人有权获得不可转让运输单证，或者根据第 8 条 (a) 项获得不可转让电子运输记录，但只能以此证

明承运人或者履约方收到了货物”。草案对运输单证[9]作了与当前公约和各国法律都不相同的分类。根据草案第 1(15) 条的规定：“运输单证”是指由承运人或者履约方在运输合同下签发的单证，该单证满足下列一项或者两项条件：(a) 证明承运人或者履约方收到了运输合同下的货物；(b) 证明或者包含一项运输合同。该定义涵盖了运输单证的 2 个中心功能，即证明收到货物以及证明运输合同。但传统提单的第三个功能即物权凭证的功能，草案定义中并未涉及，而是通过对运输单证可转让和不可转让的分类体现出来。草案之所以这么做是希望通过扩大运输单证本身的内涵来涵盖海运单、大副收据等目前实践中广泛使用的各种单证。而且提单的物权凭证功能更多地来源于和体现在贸易中关于所载货物的买卖活动中。UNCITRAL 第三工作组在第 9 届会议工作报告中指出，该定义 (a) 段意在包括已向租船人出具并仍在其控制之下的提单，该提单并不证明或包含一项运输合同而仅作为收据，还包括在运输之前或转运期间出具的一些类型的收据，而（b）段意在包括起到其所规定作用的可转让提单和不可转让海运单等。[10] 从这个意义上看，发货人仅有权从承运人处取得到 (a) 类的货物收据意义上的运输单证，其并不具备证明或包含运输合同的功效。而只有托运人、单证托运人才有权从承运人处取得 (b) 段意义上的运输单证。可以说草案正是通过对运输单证功能上的划分完成了对发货人和托运人权利的本质区分。

运输法工作组指出，《草案》第 37 条的历史前身实际上是《海牙规则》和《海牙—维斯比规则》第 3(3) 条（承运人根据托运人的要求向托运人签发提单）和《汉堡规则》的第 14(1) 条（该条规定向托运人签发提单，而“托运人”的定义则是指发货人）。《草案》第 37 条草案的主要创新是认识到“发货人”并不一定与“托运人”为同一人，例如，离岸价卖方是“发货人”，离岸价买方则是“托运人”。虽然承认在大多数情况下托运人与发货人将根据买卖合同进行合作，但也可能产生纠纷，因此哪一方当事人收到哪种单证至关重要。[11] 在草案起草过程中，与会者对于是“托运人”还是“发货人”有权取得第 37(b) 条规定的运输单证表示了不同看法。持反对观点的人认为目前的第 37 条草案不能有效保护 FOB 下的卖方，因为其只能收到收据而不是可转让单证；而且发货人获得的收据无法律意义，因为买方获得的提单的功能之一是作为收到货物的证据。另外，在一些法域中，向承运人交付货物的人享有独立的权利，可以获得可转让运输单证，而在离岸价销售中的发货人在

9 草案针对现代电子商务在国际运输领域的广泛使用，特在传统纸制单证之外创设了“电子运输记录”制度，后者虽然在技术操作上具有自身的特性，但在其定义、功能、签发、转让等规则上都按照纸制单证（具体到草案中即为“运输单证”）来制定。出于行文上简洁的目的，本文提到“运输单证”时一般也包括了“电子运输记录”，除非有特殊说明。

10 UNCITRAL. A/CN. 9/510，第 108 段，A/CN. 9/WG. Ⅲ /WP. 21 附件，第 23 段。

11 UNCITRAL. A/CN. 9/594，第 218 段，A/CN. 9/WG. Ⅲ /WP. 21 附件，第 125 段。

将货物交付承运人时则应收到可转让单证作为货物的担保。[12] 但也有与会者赞成目前第 37 条草案，认为 34(b) 款提及单证托运人能对离岸价贸易术语中卖方或发货人给予充分的保护。虽然在离岸价销售下，离岸价卖方通常代表离岸价买方行事，但在运输合同下，离岸价卖方拥有获得运输单证的独立权利。承运人如何知道离岸价卖方（或发货人）而不是离岸价买方（或托运人）有权获得可转让运输单证，唯一方法就是由托运人指示承运人，指明第 34 条草案的单证托运人（即离岸价卖方）应收到可转让运输单证。另外，托运人（或离岸价买方）根据买卖合同条款的规定也将在这方面负有通知承运人的义务。按照这种机制，离岸价卖方（或发货人）将收到可转让运输单证，并且被认为受到充分的保护。他们认为这是一种适当的做法，买卖合同当事人应在该贸易合同中纳入对其利益的保护，而不应指望运输合同的当事人来提供这种保护。[13]

尽管存在上述的争议和分歧，工作组经过讨论之后仍决定第 37 条草案所采取的做法是可接受的。故在目前的草案体制下，发货人仅有权取得一份货物收据，因为其有可能需要一份这样的文件与其他人打交道，如未记载为单证托运人的 FOB 卖方可能需要一份收据来证明其履行了贸易合同下的交货义务，又如 CIF 或 FOB 下卖方的代理人或分合同人可能需要一份这样的收据来证明其履行了卖方所委托的交货义务。

2. 发货人之义务和责任

在《草案》框架下，因草案仅赋予发货人取得货物收据的权利，故其并不要求发货人对承运人直接承担任何义务和责任，而全部由托运人来向承运人承担。草案第 35 条关于“托运人为其他人负赔偿责任”的规定中指出：托运人委托发货人或者包括受雇人、代理人和分合同人在内的其他任何人履行托运人任何义务的，对于此等人的作为或者不作为造成违反本公约规定的托运人义务，托运人负赔偿责任；但是，托运人委托承运人或者代表承运人行事的履约方履行托运人义务的，对于此等人的作为或者不作为，托运人不负赔偿责任。从此条规定我们可以看到，当发货人履行托运人运输法下的义务时，托运人当然应对发货人的行为向承运人负赔偿责任。只有发货人履行其自身运输法上的义务时才应承担相应的责任。但在草案的整个案文中我们找不出一条关于发货人义务的规定，即使是与发货人联系最密切的交货行为也不例外。第 28 条关于“交付运输”的条文是放在第 7 章“托运人向承运人履行的义务”中的，其规定：1. 除非运输合同另有约定，否则托运人应当交付搁妥待的货物。任何情况下，托运人交付的货物应当处于能够承受住预定运输的状态，包括货物的装载、操作、积载、绑扎、加固和卸载，并且不会对人

12 UNCITRAL. A/CN. 9/594，第 220 段。
13 UNCITRAL. A/CN. 9/594，第 221 段。

身或者财产造成损害；2. 各方当事人订有第 14 条第 2 款[14] 述及的约定的，托运人应当妥善而谨慎地装载、操作或者积物；3. 托运人装载集装箱或者拖车的，托运人应当妥善而谨慎地积载、绑扎和加固集装箱或者拖车之内或者之上的货物，使之不会对人身或者财产造成损害。可见草案将“交付运输”的义务归到了托运人身上，托运人应使其交付的待运货物能承受预定的运输，否则将承担由此对承运人造成的损害，即使该交付行为实际上是由托运人以外的发货人来履行的，该发货人相对于承运人而言也只是托运人的代理人，其行为应由托运人负责。这主要是因为在草案框架下，托运人和承运人才是运输合同的当事人，而“交付运输”作为运输合同中最主要的环节和最重要的义务之一，应由托运人向承运人履行。就目前运输法草案关于发货人的权利义务规定来看，我们认为其达到了一个平衡，即在赋予发货人很少的权利时也免除其运输法上的义务。

（二）发货人与托运人（或单证托运人）为同一人时

当发货人与托运人或单证托运人一致时，则适用草案关于托运人的权利义务规定。

1. 托运人之权利

(1) 取得运输单证的权利

如前所述，草案别树一格的对运输单证从功能上加以分类，即 (a) 证明承运人或者履约方收到了运输合同下的货物；(b) 证明或者包含一项运输合同。通过从功能角度的界定，草案力求涵盖和适用于提单、海运单、大副收据等现今使用的所有与海上运输有关的各类单证。而第 37 条关于运输单证的签发规定，托运人或者经托运人同意的单证托运人有权按照托运人的选择，从承运人处获得适当的可转让运输单证或者不可转让运输单证。从工作组的报告中看，此处托运人和单证托运人可取得的运输单证应是指包含或证明运输合同的可转让单证（如提单）或不可转让运输单证（如海运单）。从理论上来说，托运人作为与承运人签订运输合同的当事人，当然有权取得包含或证明运输合同的运输单证，这在逻辑上也是符合的。而且经托运人同意，单证托运人也可取得上述单证，此处托运人的同意可视为托运人对其运输合同下权利的处分。单证托运人的权利来源于托运人的转

14 草案第 14 条是关于承运人于责任期间内的具体义务的规定：1. 在第 12 条规定的责任期间内，除第 27 条另有规定外，承运人应当妥善而谨慎地接收、装载、操作、积载、运输、保管、照料、卸载并且交付货物；2. 虽有本条第 1 款的规定，在不影响第 4 章其他规定以及第 5 章至第 7 章规定的情况下，各方当事人可以约定由托运人、单证托运人或者收货人装载、操作、积载或者卸载货物。此种约定应当在合同事项中述及。其中第 2 款是将承运人在运输法下的义务通过合同约定转移给托运人等履行。托运人在履行转移过来的义务时，如在装货港装载、积载货物时也需尽到合理注意义务，否则依第 28(2) 条规定仍需向承运人承担责任。

让，而托运人或单证托运人取得一份这样的运输单证，目的还在于成为控制方从而享有对运输期间货物的控制权。

2. 作为控制方的权利 [15]

秘书处在对《草案》初稿的说明中指出："控制权问题在当今海事公约中没有得到探讨，可能是因为提单制度所形成的各种惯例能有效解决这一问题。但当今海运情况已经不一样了，在许多行业中可转让运输单证的使用在迅速减少，甚至已经完全消失；而且一种明确的可转让的控制权也可以在发展电子商务时起到有益作用。"[16] 而且为了更好地衔接贸易法以保护贸易合同下货方（即拥有货权的人）的权利，草案新创设了控制权这一制度。《草案》第 1(13) 条规定货物控制权是指"根据第 11 章在运输合同下向承运人发出有关货物的指示的权利"，包括：(a) 发出或者修改不构成对运输合同变更的有关货物的指示的权利；(b) 在计划挂靠港，或者在内陆运输情况下在运输途中的任何地点提取货物的权利；和 (c) 由包括控制方在内的其他任何人取代收货人的权利（见《草案》第 53 条）。而且第 57(1) 条规定控制方是唯一可以与承运人约定对运输合同加以变更的人。从上述控制权的权能可以看出其是一项功能强大的权利，谁拥有控制权谁就拥有了对处于承运人运输下的货物的控制，这在一定程度上取代了现行提单制度的物权凭证功能。如果说在现行法律制度下，提单是"打开仓库的钥匙"，那么在草案框架下，控制权才是这把"打开仓库的钥匙"。[17]

根据《草案》第 54 条的规定，控制权主体将根据运输合同下所签发的运输单证的不同而不同，主要分 3 种情况：其一，在没有签发任何运输单证或只签发海运单等不可转让的运输单证时，托运人为唯一控制方，除非托运人与承运人在签订运输合同时指定收货人或单证托运人为控制方；其二，在签发记名提单 [18] 场合下，托运人为控制方；其三，当签发可转让运输单证时，单证持有人为控制方。而根据第 34(b) 条托运人有权要求承运人向其签发可转让运输单证而成为提单持有人。从上述 3 种情形看，不论所签发的运输单证为何种，托运人都可成为控制方，而且是控制权的原始享有人。其他人如收货人、单证托运人、托运人以外的持单人所享有的控制权都源自于托运人的转让。

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15 此处使用"控制方的权利"而不使用"控制权"主要是因为，前者除了包括《草案》第 53 条规定的控制权外，还包括第 57 条所规定的对运输合同的协议变更权利。而且由于托运人一般可成为最初的控制方，其应享有草案第 10 章所规定的所有控制方的权利，而非仅仅是控制权。本文中为了行文简洁，所称的控制权基本上都是指控制方的权利，即包括变更运输合同权利在内的控制权。

16 UNCITRAL. A/CN.9/WG.III/ WP. 21，第 185 段。

17 何丽新、张清姬：《警惕发货人法律地位的倒退——评 UNCITRAL 运输法草案对发货人的规定》，载于《法令月刊》2007 年第 9 期，第 93~99 页。

18 鉴于实践中，不同法域将记名提单又称为"直交提单"、"直接提单"，称谓不统一，所以《草案》条文中并未使用"记名提单"的说法，而是用"必须交单的不可转让运输单证或电子运输记录"来直接指代。

3. 无人提货或无单放货 [19]

针对目前航运实践中普遍存在的目的港无人提货问题以及因提单流转速度过慢所带来的无单放货问题，《草案》特设第 9 章“货物的交付”制度。根据第 47~50 条规定，草案依据所签发的运输单证的类型不同而区分 3 种情况对无人提货和无单放货的指示权做出规定：首先，未签发可转让运输单证时，承运人应先通知控制方，[20] 其无法确定时再通知托运人，仍无法确定时通知单证托运人，并凭其指示交货；其次，在签发记名提单时，因托运人就是控制人，故承运人应先通知托运人并凭其指示放货，仍无法确定时才凭单证托运人指示放货；最后当签发的是可转让运输单证时，指示权人的通知顺序与第一种相同。可见目的港无人提货或无单放货时托运人的指示权次于控制权人，因为托运人以外的控制方的控制权都来自于托运人的转让，而控制权权能中本身包含了指定和变更收货人的权利。但仍需注意到，当控制方无法确认时，承运人需通知托运人并凭其指示交货。

（三）托运人之义务和责任

《草案》为了平衡对承运人所采用的过失推定责任基础以及取消航海过失免责，于第 7 章专章规定了“托运人向承运人履行的义务”，弥补了《海牙规则》、《海牙—维斯比规则》对托运人义务规定的缺失，也扩大了《汉堡规则》第三部分托运人责任的范围。其中第 28 条规定的“托运人交付运输”的义务乃是出于平衡第 9 章中规定的承运人交付货物的义务，第 29 条规定了承运人和托运人所负有的在就货物运输方面提供对方所需的信息和指示的合作义务；对照承运人的推定过失责任基础，草案第 31 条规定了托运人的过失责任基础，但在“拟定合同事项所需信息的准确性上”以及危险货物方面托运人仍需对承运人承担严格责任；类比第 19 条“承运人为其他人负赔偿责任”的规定，草案规定托运人应对其所委托的发货人或包括受雇人、代理人、分合同人在内的其他履行其运输法下义务的人的行为承担赔偿责任（第 35 条）。可见随着货主地位的强大及现代航运危险的减小，运输法中承运人和托运人的权利义务划分在草案框架下将达到另一种平衡。

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19 此处的指示权严格的说来应为控制权的一项权能，即《草案》第 53 条关于控制权的行使和范围中第 1(c) 项规定，控制权包括由包括控制方在内的其他任何人取代收货人的权利。此处之所以称为权利规定主要是出于行文中称呼的方便，而单列出来则主要是因为该项指示权仅存在于无人提货或无单放货情形中，且该权利直接削弱了传统提单“凭单交货”的功能。

20 此处承运人应先通知控制方而非托运人的原因在于，依照《草案》第 54(1) 条的规定，在未签发可转让运输单证时的控制方除了托运人之外，还可能是托运人与承运人在签订运输合同时所指定的收货人或单证托运人。

（四）单证托运人的权利义务

FOB 下卖方（发货人）可通过贸易合同要求买方（托运人）向承运人指示将其记载于运输单证上从而成为单证托运人。《草案》第 34(b) 条规定单证托运人必须承担第 7 章和第 58 条对托运人规定的义务和赔偿责任，并且有权享有第 7 章和第 13 章为托运人提供的权利和抗辩。可见其享有与托运人相同权利义务，只是在无单放货或目的港无人提货时所享有的指示权在托运人之后。

此处单独介绍单证托运人的权利义务，关键在于分析单证托运人和托运人并存时，二者对承运人的义务划分问题。关于单证托运人的义务，《草案》的态度是单证托运人作为第一持单人享有托运人的所有权利和抗辩，他也当然应承担草案为托运人所规定的所有义务和赔偿责任。但这并不意味着在赋予单证托运人义务和责任的同时免除原托运人所应承担的义务和责任。这也正是草案第 34(2) 条所表明的观点，其规定“本条第 1 款规定不影响托运人的义务、赔偿责任、权利或者抗辩”。但当二者同时存在时其对承运人的赔偿责任该如何承担？二者是否也类比承运人与海运履约方那样承担连带责任？草案并未对此明确说明，对于这一问题，首先要明确托运人和单证托运人的责任来源。无疑，托运人的责任基础是运输合同，即使存在单证托运人，他仍是运输合同的最初当事人;而单证托运人之所以要向承运人承担义务和责任，在于他是包含或证明运输合同的运输单证上记载的托运人，其责任基础来源于该运输单证的记载和持有该单证的事实。单证托运人与承运人之间依法律规定创设了一种新的运输单证关系，其独立于托运人和承运人的原始运输合同关系。可见托运人和单证托运人应凭各自与承运人之间的法律关系向承运人承担不真正连带责任。

综上，当发货人与托运人或单证托运人为同一人时，其享有《草案》为托运人设定的权利义务，能受到较好的保护，尤其是对运输中货物的控制。但我们不能因此说这些权利是发货人的，其实际是草案为托运人设置的权利义务。

四、《草案》下发货人法律地位之演变及评价

前面我们谈到了“发货人”制度是《草案》下变化最大的制度之一，它的变化不仅来自于其从托运人概念下单列出来并成为与托运人相并列的概念，而且更来自于草案对发货人权利义务的规定与以往国际公约的不同，其中发货人权利变化最大之处在于发货人是否有权取得提单或海运单等能证明或包含运输合同的运输单证。接下来我们将详细地探讨发货人法律地位的变化。

（一）发货人法律地位之演变

1.《海牙—维斯比规则》体系下

《海牙规则》中并无发货人的概念，且对条文中出现的托运人也未加以明确界定。因为《海牙规则》和《海牙—维斯比规则》重点调整的是提单关系，其主要目的是对提单背面的承运人免责条款加以规范，而并不是从运输合同的角度来设计其整体框架，所以其并没有对“托运人”这一运输合同当事人进行定义，更没有提到发货人概念。而且《海牙规则》制定当时并未对托运人与发货人加以区分，二者是同一的。甚至托运人更倾向于指发货人，因为《海牙规则》第 3（3）条规定：“承运人或船长或承运人的代理人在收受货物归其照管后，经托运人的请求，应向托运人签发提单……”。实践中以及《海牙规则》所形成的判例都要求承运人向其交付货物的人签发提单，尤其是在 FOB 下承运人应向交货的卖方签发提单，而且卖方也有权要求承运人签发提单。由于海上运输和国际贸易的特殊性，提单逐渐具有了物权凭证的属性，在运输法上它是承运人据以交付货物的凭证，成为了“打开仓库的钥匙”;而在贸易法中它直接代表着它所记载的货物。正是由于提单的上述属性，所以人们都默示提单应签发给对其上记载的货物具有物权之人，通常为贸易合同中的卖方。而卖方也可通过持有提单继续保有对货物的权利和控制，并放心的将货物交付出去，从而使得国际贸易尤其是FOB 贸易得以顺利开展。可见《海牙规则》及其发展起来的判例所确定的“承运人向交付货物的人签发提单”的规则具有其内在的合理性和操作上的便捷性。在《海牙规则》下，发货人通常都会凭借交付货物从承运人处获得一份代表该货物的单证（通常为提单），通过控制该提单，发货人能实现对提单所记载的货物的控制，一般表现为转让提单收回货款。

2.《汉堡规则》体系下

由于《海牙规则》是关于提单的统一规则，它本身并没有对托运人这一概念加以界定，但在第 1(a) 条关于“承运人”定义中规定，承运人包括与托运人定有运输合同的船舶所有人或租船人。之后，有人开始从承运人的定义中反向推导出托运人的定义，并慢慢的赋予托运人以不同于发货人的内涵，即“与承运人订立运输合同的人”。这样就导致实践中，FOB 下的发货人（卖方）一般被记载在提单上托运人栏中并取得提单，但其并非现在的《海牙规则》第 3(3) 条中的托运人，因为此时的托运人已具有了特定的内涵从而区别和独立于发货人。《汉堡规则》作为调整海上货物运输关系的统一规则，其相比于《海牙规则》（主要调整提单）更注重对运输合同的规定，因而它从合同相对方的角度完成了对托运人的初步定义。其于第 1(3) 条将托运人规定为“指其本人或以其名义或代其与承运人订立海上货物运输合同的任何人”。而且在考虑到 FOB 下实践做法与公约中的矛盾时，其在托运人的定义后面又加了一句“或是指其本人或以其名义或代表其将关于海上货物

运输合同的货物实际上提交给承运人的任何人”。[21] 至此交货托运人的概念产生。但我们也要注意到在《汉堡规则》下，发货人是托运人的下位概念，其包含于托运人概念之中，是托运人的一个类型。

虽然《汉堡规则》在概念上区分了交货托运人（即《草案》下的发货人）和契约托运人，但却没有明确区分二者的权利义务。而且在涉及到二者权利义务规定时，都使用了“托运人”这一统称。这就导致了一些问题，即在实践中当交货托运人和契约托运人不为同一人时，二者中到底谁才是托运人？谁有权享有《汉堡规则》赋予托运人的权利？其中争议最大的是《汉堡规则》第 14(1) 条关于提单签发的规定，即“当承运人或实际承运人接管货物时，应托运人要求，承运人必须给托运人签发提单”。因为此时的提单仍具有着传统的 3 大功能，控制提单的人即意味着控制了处于运输中的货物，而且转让提单也就意味着货物的转让。那么此处的托运人到底指谁？《汉堡规则》本身并未给出明确的答案，而是将这个问题留待承运人根据实践中具体情形来判断。

3.《草案》下

针对上述司法和实践中的混乱，《草案》出于统一和澄清的目的，将“交货托运人”从托运人概念中剥离出来，单独定义为“发货人”，这从立法上彻底改变了发货人的法律地位，发货人再也不是托运人的下位概念，而是与托运人并列的概念，二者不再是包容与被包容的关系。

如前所述，《草案》通过对运输单证功能的分离单独赋予了发货人相应的权利和义务，即“发货人仅有权获得不可转让运输单证或不可转让电子运输记录，且只能以此证明承运人或履约方收到了货物”。除此之外，草案再没有赋予发货人任何权利，也没有课以其任何义务。草案单列“发货人”主要是为了在 FOB 下发货人与托运人不一致时区分二者各自的权利义务，但草案起草人员同时也注意到如果仅赋予 FOB 下卖方取得货物收据的权利，这样将无法保护 FOB 下卖方对货物的控制和收回货款的权利，于是草案专门创设了“单证托运人”概念，以使发货人有可能成为单证托运人从而享有托运人的权利义务。至此，在《草案》框架下，发货人、单证托运人和托运人都成了货方当事人（相对于船方而言），一改《海牙规则》下单一主体和《汉堡规则》下主体混乱的面貌。

从上述发展来看，《草案》关于发货人主体单列的规定相比于《海牙规则》、《汉堡规则》是一种上升，因为其从一个托运人的下属概念上升为与托运人相并列的概念。但是我们同时看到草案关于发货人权利的规定相对于《海牙规则》、《汉堡规则》而言减少了，尤其是相对于《海牙规则》。因为在后者体系下，发货人（通常为贸易合同下卖方）通常有权要求承运人将其记载在提单上的托运人栏中，并

21 樱井玲二著，张既义译校：《汉堡规则的成立及其条款的解释》，北京：对外贸易教育出版社 1985 年版，第 268 页。

有权取得该提单，而无需由托运人向承运人发出此种指示。而一旦发货人取得该提单，也就取得了对该提单项下货物的控制，其有权通过转让提单来转让该货物，并能保障其在转让提单时收回货款的能力。虽说《汉堡规则》下关于托运人和发货人谁有权取得提单存在争议，但至少从法律上而言发货人仍有权获得代表其所交付货物的提单，而且实践中发货人有很大可能性能从承运人处取得提单，因为提单一般在交付货物之时或之后签发，而且《海牙规则》延续下来的传统仍在影响承运人提单的签发。但是在《草案》下就完全不同了，草案明确规定发货人仅有权从承运人处取得一份货物收据，这就从法律上排除了发货人取得包含或证明运输合同的提单或海运单的可能性。而且其一旦生效，承运人按照传统向发货人签发上述单证的行为将被认定为违反运输法的规定，承运人也就不敢再将该单证签发给发货人。

（二）《草案》下发货人法律地位之评价

如前所述，《草案》下发货人法律地位的特点主要体现在 2 个方面，即单列为运输法上的独立主体以及其权利义务的减少，下面我们将从这 2 个方面分别来评价草案下发货人的法律地位。

1. 单列发货人主体之肯定

《草案》针对目前司法实践中存在的 FOB 下承运人签发提单的尴尬，将《汉堡规则》中“发货托运人”从托运人概念中单列出来规定为发货人，并单独赋予其相应的运输法下的权利，可谓创举。它首次明确了发货人与托运人权利义务的区分，对于统一各国法律规定和司法实践中的做法起到了重要作用。正是在此种意义上我们肯定草案将发货人单列的进步意义。

但是在工作组的讨论中，意大利、韩国和荷兰代表团提出了在草案中删除提及“发货人”的所有内容并简化“运输单证”定义的建议。他们认为在草案规定的运输合同中涉及到 3 种货方参与人：托运人、单证托运人和发货人。其中，托运人是承运人的合同对应方，单证托运人实际上是离岸价卖方，发货人是在出发地实际将货物交付承运人的人。实际上，发货人可能是托运人，也可能是单证托运人。此外，如果发货人不是这 2 种人，就是在按照托运人或单证托运人的指示行事或代表托运人或单证托运人行事的人，其作为和不作为根据代理原则应由托运人或单证托运人负责。此外草案也没有规定任何由发货人单独承担的义务。这意味着，除非发货人是托运人或单证托运人，否则根据草案发货人没有自己的义务。不过，发货人根据草案享有一项权利，即作为实际上向承运人交付货物的人，其有权按照草案第 37 条取得收据。这似乎是在草案中引入“发货人”概念的唯一目的。意大利、韩国和荷兰代表团认为，这一目的并没有重要到要在草案中保留“发货人”概念的地步。而且他们还认为从草案中删去“发货人”概念还有诸多好处，除可以

避免同其他运输公约和某些国内法相混淆[22]外，还可以简化草案关于运输单证的规定。因为规定“发货人取得收据的权利”是草案将“运输单证”中仅作为收据的运输单证同既有收据功能又有运输合同证据功能的运输单证区分的唯一原因。因此，如果从草案中删去发货人的概念，那么运输单证“仅作为收据”的功能便不再必要。此外，也许更为重要的是，这还会增进对草案第 8 章（运输单证和电子运输记录）若干条款的理解，因为这些条款是否完全适合仅有收据功能的运输单证是令人怀疑的。[23] 正是基于上述种种理由，这些国家代表团建议删除“发货人制度”。

我们注意到那些主张删除发货人概念的人们没有考虑到那些不能成为单证托运人的 FOB 卖方的权利问题，而这类人可能大量存在于草案框架下。如果删除了“发货人”概念，那么这些没能成为单证托运人的 FOB 卖方在运输法下将连获得货物收据的权利都没有，他们仅仅是托运人的代理人，代理托运人向承运人交付货物，代理托运人从承运人处取得货物收据。如此一来，卖方如何证明其履行了贸易合同下的交货义务。正是在这个意义上，草案仍应保留发货人概念和制度，至少它能为 FOB 卖方的权利保护在运输法上提供一个平台，尽管它可能不够大。

2. 发货人权利义务之回归

在肯定草案单列发货人概念的基础上，我们注意到《草案》对发货人权利义务的规定非常简单，这也是很多人反对草案第 37 条规定，甚至质疑发货人单独存在的必要性的最重要原因。但是单从运输法自身的角度而言，我们认为《草案》下的发货人权利义务的减少是一种理性的回归。

首先《草案》延续了《汉堡规则》的特点，将运输合同作为整个草案调整的中心和出发点，但是在合同主体的设置上，它突破了《汉堡规则》托运人制度的混乱，将运输合同当事人明确界定为托运人和承运人（这从草案对于二者的定义中可以看出，草案第 1(5) 条规定“承运人”是与托运人订立运输合同的人，而第 1(8) 条规定“托运人”是与承运人订立运输合同的人），而其他的单证托运人、单证持有人、发货人、控制方、履约方、海运履约方等都只是运输合同上的关系人。其中发货人、单证托运人、单证持有人、控制方、收货人与托运人是货方主体，而履约方、海运履约方与承运人一起是船方主体。但草案的核心毕竟是运输合同，其关于运输合同下权利义务的设置和分配必须以托运人和承运人这 2 大合同当事人为基点，这两方主体阵营里其他的关系人在运输合同下的权利义务都来自于托运人和承运人的让与（包括法定转让和约定转让）。这样草案就理顺了托运人和发货人在运输

22 如在《统一国际航空运输某些规则的公约》（《蒙特利尔公约》）和经修订的《国际铁路货物运输公约》附录《国际铁路货物运输合同统一规则》中，“发货人”这一术语系指承运人的合同对应方，而且一些国内法律也有相同的用法，或者他们用“发货人”指离岸价卖方。

23 参见 A/CN. 9/WG. Ⅲ /WP. 103，意大利、韩国和荷兰代表团提出的删除提及“发货人”的任何内容并简化“运输单证”定义的建议。

法上的关系，即发货人的交货行为实际上是为托运人利益，因为向承运人交付货物本是运输法草案赋予托运人的义务（如前所述见《草案》第 28 条）。因而相对于承运人而言，发货人就是托运人的代理人，其交货的义务及取得货物收据的权利都是源自于托运人，只不过发货人取得货物收据的权利在草案框架下是一种法定转让。

其次，依照《草案》第 37(2) 条的规定，发货人要想取得证明或包含运输合同的运输单证必须经托运人同意，并由托运人指示承运人将其记载于运输单证之上，这实际上是将判断决定提单或海运单签发对象的义务归还给托运人这一最有权判断的人。实际上，在《海牙规则》、《汉堡规则》体系下承运人承担了判断谁是贸易合同中卖方的义务，而这一义务的承担更多来自于其所签发的提单的物权凭证的特性。而在现在的草案框架下，承运人将这种判断义务推给了托运人这一贸易合同的当事人，而承运人仅凭托运人的指示来签发运输单证。因为托运人作为贸易合同下的一方当事人，其比承运人更有机会了解贸易合同中的货权归属情况，从而可以提高运输单证签发的效率和安全。

浅析《UNCITRAL 运输法草案》中的电子提单

周 虹 *

内容摘要:《UNCITRAL 运输法草案》创设了纸面运输单证和电子运输单证相互平行的独特提单体系，也反映了电子提单在国际货物运输中日益提升的地位。但是电子提单独特的流转模式使其相关体系的构建存在诸多困难，也导致出现了一些新的制度与风险。如何处理这些新生问题，使电子提单可以在国际货物运输中发挥其应有的作用与优势，值得我们反复探讨。本文从 UNCITRAL 草案中电子提单的含义入手，分析了 UNCITRAL 草案模式下电子提单的特点与不足，并提出了一些完善建议。

关键词: UNCITRAL 草案 电子运输记录 电子提单 承运人

随着计算机技术的迅猛发展，电子商务以其高效率、低成本、高收益的特点，在世界范围内得到了广泛推广。伴随其发展，各种电子单证亦应运而生。而在国际货物运输中，又以电子提单为其先锋。有关电子提单的流转体系有 SeaDocs 系统、Bolero 系统与 CMI 系统 3 种。而 CMI 系统作为联合国国际贸易法委员会根据《UNCITRAL 运输法草案》（以下简称“《草案》”）所确立的体系，具有其他二者所无法比拟的开放性与整体性。通过对电子提单地位的确认，草案模式下的电子提单制度以其独特的流转机制提高了货物运输的效率，也方便了当事人对电子提单的使用，但是这种系统也存在着一些不足之处。什么是草案模式下的电子提单制度，其具有哪些特点与不足，我们应当如何完善？本文将针对这些问题提出笔者的一些观点和看法。

一、对《草案》中电子提单的含义解析

（一）对《草案》中所指的电子提单定义的解析

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《草案》中将电子提单称为“电子运输记录”，指由承运人或履约方根据运输合同以电子通信方式发出的一条或多条电文中的信息，包括成为电子运输记录的一部分，作为附件与电子运输记录有着逻辑联系的或承运人或履约方在发出电子运输记录的同时或随后以其他方式相链接的信息。该信息满足下列 1 项或 2 项条件：(a) 证明承运人或履约方收到了运输合同项下的货物；或 (b) 证明或包含一项运输合同。[1] 在这 2 个条件中，第一个条件“证明承运人或履约方收到了运输合同项下的货物”并没有什么疑义，这一规定相当于纸面提单的收据功能。我们所需要注意的是第二个条件“证明或包含一项运输合同”，也就是说其包含双重的角色功能：第一，证明一个运输合同；第二，包含一个运输合同。

从中我们可以看出：首先，电子记录并不是一个电子运输合同。无论是什么提单，其必然是根据合同来签发的。但由于电子单证交易需要做到方便和迅捷，因此承托双方一般不会把规定当事人之间权利义务的特定条款作为电子提单的具体内容通过电子数据传送，这些具体条款往往在订立海上货物运输合同之时就已经达成了约定，也就是说在电子提单之前必然存在一个运输合同，且电子提单也不可能包含合同所需要的诸多繁琐而具体的条款。其次，电子提单所证明的到底是什么？传统的书面提单具有证明合同存在、合同内容与合同成立的作用。而《草案》第 8 条 (a) 规定：凡根据《草案》应载入或载于运输单证的内容均可在电子运输记录中加以记录。因此，尽管如我们前面所说到的，电子提单不会像传统的纸制提单那样传送诸多繁琐而具体的条款，但是只要是记载于其上的合同内容，就可以得到证明。那么电子提单是不是合同成立与存在的证明呢？就纸面提单而言，运输合同早在提单签发之前就已经生效，故其若要证明合同的成立就必须是合法签发的，且符合承托双方事前达成的订舱协议以及订舱单所表述的事项。[2] 如果发生预借或倒签提单的情况，那么提单就不符合这一要求，也就不能证明运输合同的成立。而在电子提单中，由于其迅捷的特点，往往不可能存在预借或倒签提单的情况，其可以算是承托双方根据事先达成的协议，以电子数据的交换来确认合同的方式，因此电子提单当然可以证明的合同成立。此外，虽然电子提单并不包含运输合同的全部内容，但是对于承托双方的基本情况、货物概况、船名、装卸港等提单记载的一般事项均会有所体现，这些规定也是承运人履行与托运人订立的合同中的义务的基础。这一系列的记载事项，足以证明合同的存在。

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1 《运输法 [全程或部分][海上] 货物运输公约草案》第 1 条第 20 款。本文引用的所有 UNCITRAL 草案条文，见 2008 年 1 月联合国国际贸易法委员会第三工作组（运输法）第 21 届会议：《运输法 [全程或部分][海上] 货物运输公约草案》A/CN.9/WG.III/WP.101，及《第三工作组（运输法）第 21 届会议工作报告草稿》A/CN.9/645，下载于 http://www.uncitral.org，2008 年 12 月 8 日。

2 刘洋：《电子提单若干法律问题之探讨》，载于《中国海商法年刊》1997 年卷，第 37 页。

（二）对《草案》中所指的可转让电子运输记录之可转让性的理解

根据《草案》规定，“可转让电子记录”是指通过使用“凭指示”、“可转让”或该记录所适用法律承认具有同等效力的其他适当措词，表明货物已经交运并应按照托运人或收货人的指示交付，或者交付给持单人，并且未明确表明其为“不可转让”或“不得转让”的电子记录。或者说，“可转让电子记录”是一种不符合不可转让电子记录特征的电子记录。

电子提单为什么是可转让的？在现实世界和电子世界中，“占有”一词的含义也存在差异。而占有这一事实在可转让单证法中很重要，这不仅是因为有形的象征物本身就具有价值，还因为在同一时间内只有一个人可以占有实质的客体，这也是转让的本质所在。如我们所知，纸面提单的转让基础在于其权利与单证的合一性，而唯一的“正本”提单的存在是实现“占有”的唯一前提，从而也就要求电子提单也具有唯一的“正本”。但由于电子提单涉及计算机系统的特殊性，这给区分电子提单的正本与副本产生了不可避免的困难。因此有人质疑，如果我们无法建立一个可以通过严密的安全程序只承认一个单证的抄本是唯一的“正本”，并使其与副本相区别的系统，电子提单还是可以转让的吗？[3] 在国际海事委员会成立 100 周年的庆祝大会上，乔治•F•钱德勒教授对此作出了回答。他认为可转让单证最本质的问题不在于单证的签名或者单证是否为原件，而在于双方通过单证产生信用关系的过程。他还指出，提单或者其他的权利凭证是实际货物的象征，就像纸币是它所记载的单位货币的象征符号一样。在上述 2 种情形下，纸张本身没有任何价值，它的价值仅在于它所记载的是一种信用 ，这种信用可以用来履行某种承诺。钱德勒提出，不管是纸制的还是电子信息单证，都仅仅是交易的媒介。在此基础上，只要交易双方同意，并且承认信息所包含的信用关系，任何媒介（包括电子数据交换）都可以使用。[4]

二、《草案》下电子提单制度的特点

（一）创建了电子提单制度的特殊原则

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3 Georgios I. Zekos, The Contractual Role of Documents Issued under the CMI Draft Instrument on Transport Law 2001, *Journal of Maritime Law & Commerce*, Vol. 35, 2004, p. 117.

4 George F. Chandle, Maritime Electronic Commerce for the Twenty-First Century, paper presented to CMI Panel on EDI on 10 June 1997, p. 12.

《草案》下的电子提单制度具有其独特的原则，主要体现在以下 3 点：

1. 开放性

《草案》下的电子提单系统以开放性为基本原则，运用仅由承托双方知晓的密钥技术，使托运人及以后的持有人能将草案所称的电子提单项下货物的支配和转让权让渡给后手持有人。就理论上而言，这一电子提单系统向任何用户开放，只要当事人备有计算机、调制解调器、电话、无线电或其他通信介质及相关技术就可以使用这一系统。从而使其区别于 SeaDocs 系统与 Bolero 系统对成员较为严格的要求。

2. 概括性

《草案》规定了电子提单的主要运转程序和规则，并系统、综合地对提单电子化的问题进行了说明。而对于其具体的步骤要求，比如具体的流转程序，往往可以援引《1990 年国际海事委员会电子提单规则》。

3. 整体性

注重电子提单与其他纸面提单的协调，使其比较完整地实现了纸面提单的几个主要功能。对整个提单系统整体性的注重突出体现在《草案》第 10 条“可转让运输单证或可转让电子运输记录的替换”上。

（二）确认了电子提单的独立地位

《草案》正式承认电子提单可以具有与普通纸面提单同等的内容与效力，其规定电子运输记录的使用与效力在不违反《草案》所述要求的情况下：(a) 凡应载入或载于运输单证的内容，均可在电子运输记录中加以记录，但电子运输记录的签发和随后的使用须得到承运人和托运人的同意；且 (b) 电子运输记录的签发、排他性控制或转让，与运输单证的签发、占有或转让具有同等效力。[5] 电子提单的独立地位借此得到了明确确认。为了进一步确认其地位，《草案》还规定了对可转让的这 2 种单证的替换规则，从而创设了纸面运输单证和电子运输单证相互平行的体系。[6]

电子提单应当具有和普通提单一样的效力。首先，二者都是根据一个在先的运输合同来签发的。而电子合同与普通合同并没有什么本质的不同。因为通过网络，主要有 2 个订约途径。第一，可以通过电子邮件进行要约和承诺。这实际上与我们通常所采用的合同订立方式并没有什么不同；另一个主要的网络订约途径则是在万维网上提供价目表和订货单。在此情况下是由电脑程序自动接受要约并

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5 《运输法 [全程或部分][海上] 货物运输公约草案》第 8 条。

6 郭玉军、向在胜：《电子提单的法律实施机制研究》，载于李双元主编：《国际法与比较法论丛（第一辑）》，北京：中国方正出版社 2004 年版，第 251 页。

控制交付进行交易，以此区别于普通合同的订立。但是计算机并不能作为合同的主体，它的参与并不会产生任何法律后果，因为计算机本身不可能具有意思表示，这些合同实际上是建立在个人的决定和行动之上的，只是在先的人类意图的延续结果。在此基础上自动宣布的要约与承诺应当有效，也是当事人双方合意的结果。从这个意义上说，网络订约方式与传统的订约方式也无本质的区别。其次，尽管电子提单与纸面提单在具体记载内容上有所区别，但是如我们前面所分析的，它同样具有作为收据与合同证明的功能。

（三）考虑了承运人的特殊地位

《草案》模式下电子提单的流转是这样进行的：首先由现持有人向承运人发出其意欲将支配和转让权转让给拟定的新持有人的通知；而后由承运人确认该通知电讯，并据此向拟定的新持有人发送《国际海事委员会电子提单规则》第 4 条所规定的所有信息（密钥除外）；之后由拟定的新持有人通知承运人其接受拟被转让的支配和转让权；据此承运人销毁现用密钥，并向新持有人发出新密钥。[7] 其以通知制度代替了背书方式，以掌握电子提单密钥的方式表示对电子提单的占有。

由此可以看出，在《草案》下的电子提单和普通提单之间有一点差异：即一份通常的提单在交易者间可流转，直到卸货时才会回到承运人手中；而《草案》下的电子提单在达成每次交易协议时均会回到承运人处，实际上，每次交易均会由船方签发运输单证的新密钥给每一次交易中的受让方。[8]

也就是说电子提单的转让需要提单持有人、受让人、承运人三方参与才能完成，且提单密钥始终处于承运人掌控之下。因此承运人既是提单转让的当事方，其权利义务受到转让提单行为的影响，同时也是托运人和持有人之间提单转让的第三方媒介，这一作用类似于 Bolero 体系中的公共登记中心，只不过它是私人的登记中心而已。这样的规定，一方面使承运人可以据此了解每笔提单的具体转让情况，避免了纸面提单可能出现的收货人不明或错误放货的情形，极大防止了欺诈。另一方面，这种以承运人为转让媒介的方式较之设立专门的公共登记中心，明显地降低了相关成本。

（四）实现了电子提单的质押功能

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7 《草案》并未详细地规定电子提单的流转模式，但是可以参考 CMI 之前制定的《国际海事委员会电子提单规则》。其中第 7 条（支配和转让）详细地介绍了如何发送与销毁密钥。

8 徐锦：《CMI 模式下的电子提单及其法律问题》，载于《世界海运》2000 年第 4 期，第 36 页。

从理论上讲，电子提单应该尽量与纸面提单保持一致，使之具有纸面提单的所有功能。而且既然电子提单可以转让，也就可以在承运人的配合下以电子密钥的方式转移占有，进行质押。如何将转让和质押中的转移占有相区别，并使得此种转移占有产生的质权能够取得对抗第三人的法律效力，且在需要时能保证质权顺利实现，是实际操作中需要解决的问题。[9]

前节已述，《草案》规定的运作方案主要基于一套较为复杂的新旧密钥转换方式：货交承运人时，承运人按照发货人的电子地址给予发货人一份收到货物的电讯通知，该通知包括纸面提单所包括的一切内容和一个密钥；发货人收到通知后向承运人发出一封确认信，一经确认，发货人便成为提单持有人。提单持有人欲将提单质押给银行的时候，应先向承运人发出通知，承运人据此向被建议的接受质押的银行发送提单内容，经银行确认后，承运人销毁原密钥，发出新密钥，提单的占有权由此发生了转移，质押关系也同时生效。

货物到港后由承运人核实密钥，货交最终的电子提单持有人。在整个过程中，承运人和提单持有人均需保持密钥的安全性。正是由于密钥的介入，电子提单持有人可以通过持有密钥掌握提单项下货物的控制权，并支配货物的转让，从而实现电子提单的质押。随着银行自身规则的补充和完善，银行可以像持有书面单证一样持有电子钥匙，从而保障其享有基于提单的各种权益。

三、《草案》中有关电子提单制度规定的不足与完善建议

（一）对电子提单前手持有人权利的保障

《草案》对接受支配、转让权的持有人不支付货物价款的情况未作明确规定。我们知道，前手持有人绝不能在权利让渡后仍保留用以对抗承运人的任何货物上的权利，这是权利转让的唯一性要求。否则，确已付款的后手持有人将无法获得有价值的货权保障。但问题在于转让了电子提单后，已经将所有的货物权利转让给后手的前手持有人即卖方，可能面临后手持有人即买方不支付价款的情况。电子提单的特殊性使其转让在承运人发出密钥之后就成立且无法撤回。而在此情况下，前手持有人若仅仅根据违约来对后手持有人进行请求是否显得过于无力与单薄？

当然，这一问题可以通过买卖双方对合同的自由处置权来解决，即在电子贸易合同中以明示条款作相应的规定，如：在买方付款前保留货物处置权，或主张在

9 林春雨：《电子提单法律问题研究》，载于《世界海运》2002 年第 4 期，第 37 页。

买方不付款时再将支配、转让权让渡回卖方等等，但是这样的规定似乎不大符合提单一直以来作为物权凭证的功能，而且似乎会极大地加重承运人的工作负担，同时也不具有有效的保障。因此，较为可行的方式似乎仍然是使银行作为支付中的第三方，通过使用信用证的电子替代物来满足支付要求，将对货物的支配、转让权让渡给信誉良好的付款银行，通过银行的付款保证，使银行来承担解决追索不便的责任。

（二）电子提单替代纸面提单的困难

在用电子记录取代原纸本运输单证时可能会出现困难，尤其是当持单人未能交出一套完整的最初签发的运输单证时会怎样。在此种情况下，是需要重新订立一份合同，还是根据已有的提单进行补充规定就可以？根据《草案》的规定，已签发可转让运输单证的，而且承运人和持有人均有意以可转让电子运输记录替换该单证的，持有人应向承运人提交该可转让运输单证，签发一份以上单证的，应提交所有单证。[10] 也就是说这里的持有人是无缺陷持有人，其具有全部的一式三份的提单。如果存在有缺陷的持有人，即在所有的原正本纸面提单确已经毁损又确实无法补足的情况下，承运人和持有人双方均同意以电子提单替换该纸面提单是否可行？

纸面提单的整个提货程序就是持有人上交所有的单证给承运人，而后承运人才履行下行的程序。在承运人签发了一式三份的提单的情况下，如果缺失了一份提单，承运人就可能不敢放货，因为这 3 份提单都是正本提单，仅在提单正面会有区分。即使提交了 2 份正本，他人仍旧可能凭剩下的 1 份正本提单来主张权利。而在进行纸面提单与电子提单的转换时也一样，如果仅仅根据 1 份纸面提单就进行了转换，那么他人拿出另 1 份正本要求转换时就会现问题。按照纸面提单与电子提单功能相当的理论，在持有人有缺陷时，两者就不能转换。而且依照《草案》的规定，提单一旦进行转换，原提单就失效，另 1 份正本提单的持有人的权利就将无法保障。而对于提单确已遗失却又迫切需要将纸面提单转换成电子提单的有缺陷持有人，公示催告程序的进行需要太多的时间。为了解决这个问题，是否可以

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10 《运输法 [全程或部分][海上] 货物运输公约草案》第 10 条——可转让运输单证或可转让电子运输记录的替换：1. 已签发可转让运输单证的，而且承运人和持有人均同意以可转让电子运输记录替换该单证的：(a) 持有人应向承运人提交该可转让运输单证，签发一份以上单证的，应提交所有单证；(b) 承运人应向持有人签发一份可转让电子运输纪录，其中应包括一项关于替换该可转让运输单证的声明；并且 (c) 该可转让运输单证随即失去效力。2. 已签发可转让电子运输记录的，而且承运人和持有人均同意以可转让运输单证替换该电子记录的：(a) 承运人应向持有人签发一份替换该电子运输记录的可转让运输单证，其中应包括一项关于替换该可转让电子运输记录的声明；并且 (b) 该电子运输记录随即失去效力。

考虑在承运人和持有人双方均同意的情况下，通过签定一个补充协议允许以电子提单替代不完整的纸面提单。此时双方的行为应当视为对其抗辩权利的放弃，如果提单替换后出现其他纸面提单持有人主张权利，承运人和持有人需对此承担连带责任。

（三）承运人责任过重与监督缺失

电子提单交付的单方性使其只能在二者之间存在。而电子提单流转方式的特殊性使承运人始终处于电子提单下货物所有权转让程序的中心地位，卖方、发货人、银行、买方和收货人均以承运人为中心，通过专有计算机密钥完成运输途中货物所有权的转让。通过发送包含用于鉴定的密钥通知来实现货物所有权转移的方式，只能是货物所有权从卖方向买方通过承运人这一中心进行的转移，而不包括买方向第三者的转移。这使得承运人必然成为此转让行为中的一方，同时密钥始终处于承运人的掌控之下，承运人在电子提单的转让中承担着决定是否发送信息与发送什么信息的义务。而在传统提单的流转机制中，承运人对于提单签发后的转让基本不用操心，因此与纸面提单相比，承运人承当了更大的责任，其不但要关心运输合同的履行情况，还要关心买卖合同以及信用担保合同、融资合同的情况，这大量增加的工作负担极不利于其工作的进行。而另一方面，对一个盈利性组织加之如此重大的责任，承运人本身的诚信就颇值得考量。作为合同的当事人，承运人自身的权利义务也会受到提单转让行为的影响。为了自身利益，承运人完全可能在此转让过程中采取各种行为规避风险，甚至采取包括某些欺诈行为。

面对此种情况，较好的解决方法是构建一个独立的第三方机构，如认证机构。[11] 通过其对承运人的信息处理能力及资格进行认证，证明电子签名人的身份及其信用状况，从而消除交易双方的疑虑，为交易的达成起到桥梁作用。同时创建一种信用等级认定制度，由认证机构进行定期评定，从而实现对承运人的监督，认证机构对其评定行为承当过错责任。另一方面，也必须明确纠纷出现后，提单所有人、受让人及承运人的责任分担机制。不确定的重大责任也可能导致承运人对作为电子提单转让中间方的排斥。对于具体的责任划分问题，在下文的网络风险责任中将论及。

（四）网络风险责任归责问题

电子提单系统，作为一项极度依赖于网络的制度，必然会引发由网络问题导

11 侯万龙：《电子信用证安全性的法律问题研究》，载于《廊坊师范学院学报》2004 年第 9 期，第 65 页。

致的新风险。这些风险主要包括：

1. 由不可抗力或意外事件所导致的电子提单客户的利益损害，例如突然停电、网络故障、遭受雷击、火灾等。运用目前的科技无法完全避免这些情况带来的损害，所以要求承运人承担由此而产生的客户损失是不公平的。除了雷击、火灾可以归入《草案》中规定的天灾这一类属外，草案似乎并没有对突然停电、网络故障等作出规定。[12]

2. 承运人过失，包括发送的电文有误或该电文使托运人与承运人之间的运输合同不能成立，以及防范、管理不严或故意欺诈导致用户数据被增加、修改、删除。《草案》规定的承运人对货物的责任期间是从承运人或履约方为运输而接收货物时开始，而在电子提单签发之前所进行的电子通信交流则不被纳入保护范围。那么在电子提单签发之前的此种承运人过失应当如何处理？同时，对于这种承运人过失所导致的损失，是否可以适用关于责任限制的规定呢？

3. 所用的软件出现传输错误而损害用户利益。由承运人使用的传送软件错误而引起的损害问题，如果问题是由系统提供商造成的，那么承运人作为该软件的使用者可以向系统提供商索赔，但不能以此作为对网络用户的抗辩。但是，承运人可能面临因为技术故障造成的损失而得不到赔偿却可能要对网络用户进行赔偿的问题，那样对承运人是非常不公平的。另一方面，对于系统提供商或者软硬件提供商，如果要其对所有因自己的过失而造成的损失进行赔偿，是非常困难的，也是不可能的。而对用户来说，由于别人的过失而引起的损害没法得到赔偿也是极为不公的。[13] 此时，简单地适用《草案》中的概括性赔偿原则似乎就不可行。

面对上述问题，如何公平合理地界定责任，树立正当的责任分配机制和风险分担机制，对于电子提单有关规则的实施是相当重要的。[14] 尽管有观点认为《草案》规定的是关于货物灭失、损害、迟延交付的责任问题，网络责任并不属于草案的调整范围。但是由于电子提单的独特性，使其产生的这些风险直接与草案中的一些规定相关，从而使其也有适用草案之原则性规定的可能。因此，通过对草案的适当完善来解决这些风险也就有了现实操作的可能性与意义。

对于第一类风险中的突然停电、网络故障，我们应该考虑将其并入《草案》中规定的免责范围，但是要注意排除某些可以被控制的情况。如事先已有通知停电，且备用电源可以解决电脑因意外停电而无法运行的难题，在此情况下，承运人就应该对此造成的损害承当过错责任。随着科技的发展，此类型的范围应当逐步缩小，减少承运人免责的情况。

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12 有观点认为尽管有些情况符合不可抗力条件，但为保护善意第三方的利益，应确定承担货物灭失责任的当事方。

13 吴淑娟：《电子提单与承运人的法律责任》，载于《天津航海》2006 年第 8 期，第 28 页。

14 张卫新、王前锋：《论电子提单在国际货物运输中的运作》，载于《对外经贸实务》2004 年第 2 期，第 22 页。

对第二类风险，因为其是承运人过失造成的，故应当适用较为严格的过错责任原则，由承运人承当责任，但应当区分合同成立与不成立的情况。如果是导致了合同的不成立，则追究承运人的缔约过失责任;如果合同成立，则我们需要分析是否属于违约责任，也就是要分析责任期间的问题。如我们前面已经论及，在电子提单签发之前，双方之间已经存在一个在先合同，因此承运人在电子提单签发之前的行为，仍然应该属于合同责任。所以我们可以考虑扩展《草案》所规定的承运人的责任期间，使其包括在电子提单签发之前所进行的电子通信交流。在赔偿范围问题上，笔者认为对承运人的过失行为可以采用责任限制。如前所述及，草案给承运人在电子提单的签发与转让上设定了较重的责任。为了平衡承运人与电子提单客户间的利益，也为了鼓励承运人积极地使用电子提单，对作为电子提单中转机构的承运人的过失行为，我们应当允许其享受责任限制制度的保护。但对于承运人的故意行为，则应当依据完全赔偿原则要求其进行赔偿，使受害方在经济上得到相当于合同正常履行的同等收益，这样也能使承运人尽其谨慎义务，避免欺诈行为。

对于第三类风险，出于利益平衡的考虑，我们只能采用公平责任原则解决，由三方平摊损害。但是在赔偿顺序上，不妨采用承运人先行承担其与系统提供商者的份额，再由承运人向系统提供商者求偿的顺序。因为网络用户相对于承运人和系统提供商者而言，是相对弱势的群体，而其与系统提供商者之间的联系与作为私人登记机构的承运人相比也较少，在求偿时存在更大的困难。

四、结　语

电子提单较之传统的纸面提单而言，具有安全、正确、高效、快速等无法比拟的优越性，在海上货物运输中的地位也在不断提升，成为我们不能忽视的一种新兴单证。《草案》中含有涉及电子提单的规定也反映了国际贸易法委员会对这一制度的重视态度。倘若这一草案能够通过与生效，将极大地扫清电子提单制度在现行运行中障碍。当然，我们也应该看到这一制度的构建上仍有许多不足之处。作为一个比较新的制度，其需要在实践中得到不断的检验。而想要彻底地用电子提单代替纸面提单，仍然是一条遥遥之路。尽管如此，我国立法中却迫切需要增加与电子提单制度相关的规定，这是当前实务中的需要，也是未来海运发展趋势的要求。关注草案下电子提单制度的构建，加强对国际海运公约的研究，才能巩固与发挥我国航运大国的地位与作用，真正维护我国航运主体的利益。

迅速释放案件中沿海国与渔业国之间的利益平衡

——国际海洋法法庭第 14 号和第 15 号案件评述

张相君 *

内容摘要：《联合国海洋法公约》第 292 条规定了渔船被扣留时渔业国和沿海国的权利义务，并在与公约其他相关条款的共同规范下，力图保持双方在海洋利用上的利益平衡。这种平衡的实现，有赖于双方适当地行使权利和履行义务，也有赖于国际海洋法法庭提供的司法保障。在 2007 年所受理的第 14 号和第 15 号案件中，法庭对 2 起案情相似案件的不同处理再次证实了这一点。法庭的这种处理结果，对中国这个渔业国而言，颇具启示意义。

关键词：迅速释放　沿海国　渔业国　利益平衡

《联合国海洋法公约》（以下简称“《公约》”）被誉为国际海洋宪章，是各方利益较量后相互做出妥协的结果。而反过来，在条文达成后，它又影响到现实中各方利益的具体状态。《公约》第 292 条[1]是有关迅速释放被扣留船只和船员的规定，这一规定的达成，旨在解决现实中沿海国和渔业国之间的矛盾。自 1996 年《公约》生效以来，这一条文对国际社会在海洋利用方面产生的影响，主要体现在 2 个方面：其一，缓和了沿海国与远洋渔业国之间在海洋利用上存在的矛盾；其二，通过缓和上述矛盾，平衡了它们之间的不同利益诉求。国际海洋法法庭（以下简称“法庭”）的实践也证明了这一点。截至目前，在法庭审理的 15 起案件中，因渔船被

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1 1982 年《联合国海洋法公约》第 292 条（船只和船员的迅速释放）：1. 如果缔约国当局扣留了一艘悬挂另一缔约国旗帜的船只，而且据指控，扣留国在合理的保证书或其他财政担保经提供后仍然没有遵从本公约的规定，将该船只或其船员迅速释放，释放问题可向争端各方协议的任何法院或法庭提出，如从扣留时起十日内不能达成这种协议，则除争端各方另有协议外，可向扣留国根据第二八七条接受的法院或法庭，或向国际海洋法法庭提出。2. 这种释放的申请，仅可由船旗国国或以该国名义提出。3. 法院或法庭应不迟延地处理关于释放的申请，并且应仅处理释放问题，而不影响在主管的国内法庭对该船只、其船主或船员的任何案件的是非曲直。扣留国当局应仍有权随时释放该船只或其船员。4. 在法院或法庭裁定的保证书或其他财政担任经提供后，扣留国当局应迅速遵从法院或法庭关于释放船只或其船员的裁定。

扣留而要求迅速释放的案件占了 10 起。法庭对这些案件的处理，缓和了沿海国和渔业国之间的矛盾和冲突。

2007 年 7 月 6 日，法庭收到了 2 份起诉申请。[2] 这 2 起案件，都是基于《公约》第 292 条的规定，由日本针对俄罗斯提起的迅速释放诉讼。这 2 起案件的案情虽然颇为类似，但由于起诉时，沿海国对被扣留船只的司法处理程序进行到了不同阶段，法庭的最终判决也截然不同。通过对这 2 起案件的分析，我们可以获得有益的启示。即对于中国这个渔业国而言，在本国渔船被扣留时，应如何采取行动，才能最大程度地保护己方的利益。

一、判决要旨

第 14 号案件是日本针对俄罗斯提起的迅速释放渔船的诉讼。双方对于渔船违法捕鱼的事实没有争议，但对于释放保证金的金额却无法达成一致。法庭经过审理认为，俄罗斯所要求的保证金数额的确过高，要求其将保证金数额确定为 1000 万卢布。并且，在涉案渔船缴纳保证金之后，俄罗斯应迅速释放所扣留的渔船，船长以及船员也可无条件自由离开俄罗斯。

第 15 号案件的诉讼请求和第 14 号案件一样，也是要求俄罗斯迅速释放所扣留的日本籍渔船。双方对于渔船违法捕鱼的事实也没有争议。但是，日本提出诉讼申请时，俄罗斯已经根据国内相关法规，没收了该渔船。对于被没收的渔船，所有权转移之后，其船旗国是否仍然可以依据《公约》第 292 条提出迅速释放的诉讼，双方存在争议。法庭经过审理认为，俄罗斯扣留渔船的行为是正当的，渔船所有权的转移，也并不当然剥夺船旗国依据《公约》第 292 条提出诉讼的权利。但是，由于《公约》第 292 条规定，法庭处理释放案件时“不影响主管的国内法庭对该船只、其船主或船员的任何案件的是非曲直”，在综合《公约》第 73 条[3] 的规定后，法庭认为，此案已经失去了诉讼标的物，故不支持日本方面提出的诉讼请求。

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2 国际海洋法法庭第 14 号案件和第 15 号案件，均为 2007 年 7 月 6 日日本诉俄罗斯的案件，案由也都是被扣留渔船的迅速释放问题。但这 2 个案件的审理结果截然不同。下文将会对 2 个案件的案情予以概括性介绍。有关案件的详细情况，下载于 http://www.itlos.org/start2_en.html，2008 年 7 月 15 日。

3 1982 年《联合国海洋法公约》第 73 条（沿海国法律和规章的执行）：1. 沿海国行使其勘探、开发、养护和管理在专属经济区内的生物资源的主权权利时，可采取为确保其依照本公约制定的法律和规章得到遵守所必要的措施，包括登临、检查、逮捕和进行司法程序。2. 被逮捕的船只及其船员，在提出适当的保证书或其他担保后，应迅速获得释放。3. 沿海国对于在专属经济区内违犯渔业法律和规章的处罚，如有关国家无相反的协议，不得包括监禁，或任何其他方式的体罚。4. 在逮捕或扣留外国船只的情形下，沿海国应通过适当途径将其所采取的行动及随后所施加的任何处罚迅速通知船旗国。

二、案件概要

（一）丰进丸号案

1. 案件事实

第 14 号案件，也称为丰进丸号案，是针对俄罗斯扣留日本籍第 88 号渔船丰进丸号及其 17 名船员所提起的。

丰进丸号渔船，于 2004 年 3 月 24 日在日本注册，获得船籍。2007 年 5 月 14 日，渔船从俄罗斯联邦获得了捕鱼许可证。根据该许可证，渔船可以在 2007 年 5 月 15 日至 2007 年 7 月 31 日期间，于俄罗斯专属经济区内的 3 处区域使用流网捕鱼。

2007 年 6 月 1 日，渔船在俄罗斯堪察加半岛东岸捕鱼时，被俄罗斯一艘巡逻艇拦下。随后，俄罗斯联邦安全局东北边境海岸警卫处国家海上监测部门的监察小组登船。登船之后，监察员发现在渔船上的捕捞物中，表层为马苏三文鱼的渔捞，之下其实是红色三文鱼。因此，该渔船涉嫌违法捕鱼：即，以红色三文鱼代替了马苏三文鱼的允许捕捞量，部分隐匿了其在 1 号捕捞区域的红色三文鱼捕捞量，捕鱼日志以及船舶每日报告中也都记录了错误的数据。

次日，渔船因违法捕鱼被扣留。就渔船被扣留一事，俄罗斯方面书面通知了日本驻符拉迪沃斯托克总领事。基于司法之目的，渔船被护送至堪察加彼得罗巴甫洛夫斯克市，并于 6 月 4 日，进入行政司法程序。6 月 26 日，根据《俄罗斯联邦刑法典》有关非法捕鱼造成重大损害的规定，丰进丸号船长被提起刑事诉讼。

日本方面在收到通知后，于 6 月 6 日致函俄罗斯外交部，要求依据《公约》第 73 条第 2 款，在缴纳合理数额的保证金之后，释放丰进丸号及其船员。6 月 8 日和 6 月 12 日，俄罗斯外交部以及俄罗斯联邦驻日本大使馆又收到了类似信函。

2007 年 6 月 29 日，俄罗斯方面开始评估渔船价值，并于 7 月 6 日致函渔船所有权人代表，要求对方提供有关渔船价值的相关信息，以便决定释放保证金的数额。据俄罗斯方面称，他们并未收到回复。同日，日本驻俄罗斯大使馆收到俄罗斯外交部递交的照会。照会通知，在缴纳保证金（数额正在确定）之后，俄罗斯方面就会迅速释放丰进丸号及其船员。

2007 年 7 月 13 日，俄罗斯确定了保证金数额：2500 万卢布，其中包括损害赔偿金 7927500 卢布。在此期间，日本于 7 月 6 日向法庭提出诉讼申请。法庭于 7 月 9 决定，在 7 月 19 听审此案。法庭听审此案期间，俄罗斯将保证金数额降至

2200 万卢布。[4]

2. 法庭对此案的管辖和受理权限

根据《公约》第 292 条的规定，法庭在审查之后认为，法庭对此案可以行使管辖权。

对于法庭是否应受理此案，俄罗斯提出了异议。俄罗斯的第一个理由是，日本的起诉要求是俄罗斯应确定保证金的数额并释放渔船，既然俄罗斯相关机构已经告知日本俄罗斯已确定的保证金数额，那么，法庭对此案的审理就失去了意义。而且，在日本起诉之后，俄罗斯已经确定了保证金的数额，这使得此案失去了标的。法庭认为，确定一个案件是否应该受理，决定性日期原则上应是提起诉讼申请的日期。同时，法庭也承认，起诉后发生的后续事实，可能导致案件失去标的。但是，法庭认为，就本案而言，被起诉一方确定保证金的事实，并未导致该案丧失标的。在之前审理的赛加号案[5]中，法庭最终判决，一国依据《公约》第 292 条起诉时，不仅可以在保证金数额未确定之时提起诉讼，而且在保证金数额确定之后，如其认为扣留国所确定的保证金数额不合理也可以提起诉讼。法庭确认了这一法理，并再次强调，只有法庭才有权决定根据《公约》第 292 条所确定的保证金数额是否合理。

在此案中，法庭认为，双方的争议性质并未改变，但争议的范围的确缩小了。双方的争议已经由原来的确定保证金数额并迅速释放的问题，缩小为所确定的保证金数额是否合理的问题。

俄罗斯提出异议的第二个理由是原告起诉书第 1 段 c 节的用语过于模糊。[6]而且，被告认为，根据《公约》第 292 条，法庭并没有权利确定被扣留船舶的释放条款与条件。

法庭认为，此处的争议没有任何意义。原告的诉讼请求很明确，是基于《条约》第 292 条以及第 73 条第 2 款的规定。而且，法庭并非要确定被扣留渔船的释放条款与条件。法庭只是根据第 292 条第 3 款赋予法庭的权力，审查保证金的金额或者其他财政担保是否合理，并且在确定此类释放条件合理的前提下，裁定释放渔船及其船员。

据此，法庭认为可以受理此案。

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4 该数额的计算依据是《俄罗斯刑法典》、《俄罗斯联邦行政违法法典》、《俄罗斯民法典》以及相关的联邦野生动植物法律。但在诸计算依据中，有 2 项分别使用了法律规定的最高限额。

5 该案件是法庭所审理的第 1 号和第 2 号案件，是圣文森特和格林纳丁斯诉几内亚的迅速释放渔船案件。案件详情，下载于 http://www.itlos.org/start2_en.html，2008 年 8 月 19 日。

6 俄罗斯宣称，原告起诉书第 1 段 c 节的用语太模糊、太概括，以至法庭无法予以适当的考量，己方也无法进行应诉。日本方面起诉书第 1 段 c 节内容如下：根据法庭认为合理的释放条件和要求，（法庭）应命令被告释放丰进丸号渔船及其船员。

3. 判决

双方虽然在诸如船员是否被扣留、保证金是否及时确定的问题上存在争议，但是，双方在原则上都同意，在考虑案件具体情况的基础上，应在合理期限内设定迅速释放船舶的保证金。

鉴于双方争议的范围已经缩小为保证金数额的合理性问题，法庭在其听审过程中，主要考虑了被告确定的保证金数额是否合理。

在之前的数个判决中，法庭都曾就保证金数额的合理性问题发表了自己的看法。在判断保证金数额或其他财政担保是否合理时，法庭非穷尽地列举了如下几个因素，包括（但不限于）：

（1）违法行为的严重性；

（2）根据扣留国法律应科收或可科收的罚金；

（3）被扣留船舶和被扣留货物的价值；

（4）扣留国所提出的保证金数额及其形式。[7]

此案中，丰进丸号渔船的违法捕鱼是在捕鱼许可证的许可期限内、许可区域内，过多地捕捞了某一种鱼类所造成的违法行为，迥异于一般的非法、未管制、未报告捕鱼行为。俄罗斯在确定保证金数额时，却将渔船的价值也包括在内，这其实是一种隐性征收。丰进丸号渔船违法行为的严重性，明显与这种征收的处罚力度不相当。而且，俄罗斯在确定罚金时，有 2 项计算依据都采用了浮动数额中的最高限额，这一做法也不尽正当。

据此，法庭认为，俄罗斯所确定的 2200 万卢布的保证金数额并不合理。即俄罗斯并未遵守《公约》第 73 条第 2 款的规定，[8] 日本的申请证据充分、事实确凿，俄罗斯联邦应立刻释放丰进丸号渔船（包括其船上的合法捕捞物）及其船员。

最终，法庭于 2007 年 8 月 6 日判定：

保证金数额应为 1000 万卢布；

在缴纳保证金之后，俄罗斯联邦应迅速释放丰进丸号渔船，船长以及其他船员也可无条件自由离开；

保证金可支付至被告所指定的银行账户。或者，如果原告愿意的话，也可以由位于俄罗斯联邦或者与一家俄罗斯银行有业务往来的银行提供担保。

（二）富丸号案

1. 案件事实

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7 The “Hoshinmaru” Case (Japan V. Russian Federation) Prompt Release Judgment, p. 28.

8 《联合国海洋法公约》第 73 条第 2 款规定：被逮捕的船只及其船员，在提出适当的保证书或其他担保后，应迅速获得释放。

第 15 号案件，又称富丸号案。这是日本在提起第 14 号案件时，同时向法庭提交的迅速释放渔船的另一起案件。

日本籍第 53 号渔船富丸号，是一艘日本公司所有并运营的拖捞渔船。根据俄罗斯当局签发的捕鱼许可证，富丸号得到授权，于 2006 年 10 月 1 日至同年 12 月 31 日，在俄罗斯专属经济区的西白令海峡捕鱼。捕鱼许可证上载明的捕捞量为青鳕 1163 吨、鲱鱼 18 吨。

2006 年 10 月 31 日，当渔船在指定区域进行捕鱼时，被巡逻艇的官员拦停登临，并由俄罗斯联邦安全局东北边境海岸警卫处国家海上监测部门的监察小组登船检查。此次检查，查出了 5.5 吨未上报的青鳕。之后，渔船被责令改航，并被护送至阿瓦恰湾接受进一步的调查。

进一步调查的结果表明，富丸号渔船上查出的青鳕，有至少 20 吨已清理内脏但并未列入记录。除此之外，还有其他禁止捕捞的鱼类产品。[9] 最终确认，该渔船的非法捕鱼总量为 62186.9 公斤，对俄罗斯生物资源所造成的损害达 880 万卢布。

2006 年 11 月 8 日，根据《俄罗斯联邦刑法典》，富丸号船长被提起刑事诉讼。渔船作为刑事审判的关键证据，也被扣留在阿瓦恰湾。

2006 年 11 月 14 日，根据《俄罗斯联邦行政违法行为法典》，船东被提起诉讼。

2006 年 12 月 12 日，地区间检察官办公室致函船东，就渔船的行政违法行为给俄罗斯造成的损害，告知对方所确定的保证金数额为 880 万卢布。

之后，船东向东北边境海岸警卫处和堪察加彼得罗巴甫洛夫斯克市法院提出请求，要求对方确定释放渔船的保证金数额，法院拒绝了船东的请求。其拒绝的理由是，《俄罗斯联邦行政违法行为法典》并没有明文规定，俄罗斯在收到保证金之后，可以释放被扣押的涉嫌违法的财产。此后，日本也曾多次提出请求，要求释放被扣留的渔船及其船长。

2006 年 12 月 28 日，市法院做出判决，判定没收渔船富丸号。

船东接着向堪察加地区法院提出上诉，地区法院维持了没收渔船的判决。此后，船东根据监督审查程序，对地区法院作出的判决提出再审申请。

日本向法庭提出诉讼申请时，俄罗斯联邦最高法院院尚未对上述案件进行审理。[10]

2007 年 4 月 9 日，根据联邦财产管理局联邦办公室第 158-r 号令，作为俄罗斯联邦的财产，富丸号渔船被联邦财产登记处登记注册。

2. 法庭对此案的管辖和受理权限

根据《公约》第 292 条，法庭对此案享有管辖权。

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9 这其中包括 19.5 吨的各种冰冻大比目鱼，3.2 吨鳐，4.9 吨鳕以及至少 3 吨其他种类的底栖鱼。

10 国际海洋法法庭听审之后，2007 年 7 月 26 日，罗斯联邦最高法院驳回了再诉申请。

对于法庭是否应受理此案，俄罗斯则提出了异议。俄罗斯认为，富丸号渔船已经是俄罗斯的国有财产。渔船所有权的改变，已经使得日本的起诉申请失去了依据。另外，俄罗斯也提出了和 14 号案件中一样的抗辩理由，即俄罗斯认为原告申请中的用语过于模糊，而且法庭也无权决定释放被扣留渔船的条款与条件。法庭仅有权决定释放渔船所需保证金的数目、性质和形式。

法庭认为，日本作为渔船的船旗国是不容置疑的。据此，日本仍然享有《公约》第 292 条所赋予的权利。而且，原告的申请是基于《公约》第 292 条和第 73 条第 2 款，即原告的诉讼请求很明确，就是要求法庭命令被告，在渔船提交合理数额的保证金或其他财政担保之后，迅速释放渔船及其船员。

根据《公约》的规定，法庭可以受理此案件。

3. 判决

就双方争议的渔船所有权移转是否影响船旗国根据《公约》第 292 条提起诉讼的权利，法庭认为，所有权和船籍是两个问题，所有权的转变，并不意味着船旗国的改变。日本仍然可以根据《公约》第 292 条，向法庭提出迅速释放的申请。

就船舶被没收是否使得诉讼失去标的物的问题，法庭认为，《公约》第 73 条并未规定没收的问题。对此问题的处理，既需要考虑迅速释放的立法目的，又应考虑《公约》第 292 条第 3 款的规定。

法庭认为，《公约》第 73 条的规定，仅限于沿海国所采取的临时性措施。当一国的国内措施不再是临时性、而是终局性的措施，那么迅速释放就失去了意义。《公约》第 292 条第 3 款的规定说明了法庭不会干涉国内法院行使司法管辖权的权力。而且，法庭也无意充当任何国内司法审判程序中的上诉机构。

与此同时，法庭强调，没收渔船是沿海国根据国内立法所做出的行为。这种行为，既不应当影响到《公约》所确定的沿海国和船旗国之间的利益平衡，也不应妨碍船东采取国内司法救济的权利，更不应妨碍船旗国根据《公约》规定提出迅速释放诉讼的权利，当然，也不应以不符合国际司法正当程序的手段来实现。

法庭认为，《公约》第 292 条的立法目的之一就是敦促船旗国及时采取行动。只有船东以及船旗国在合理期限内采取行动，以便在扣留国内采取国内司法手段，或者根据《公约》第 292 条提出迅速释放申请，这一立法目的才能实现。

当案件仍处于国内司法程序中时，国内法院没收渔船的判决，并不影响船旗国提出迅速释放的申请。但是，本案中，俄罗斯最高法院的判决，已经终结了涉及该渔船的国内司法程序，其判决是具有终局性的司法判决。而且，法庭并未发现、日本也没有提出，俄罗斯的司法程序违背了国际司法正当程序。

因此，法庭最终认为，日本的诉讼已经失去了标的物，法庭无需就此作出判决。

三、评　析

无论是从国际社会角度看，还是从沿海国或者渔业国角度看，法庭对这 2 起案件的审理以及最终迥然相异的结果，都颇具启示意义。

（一）法庭对《公约》实现的利益平衡的强调

在这 2 个案件的审理中，尤其是在第 15 号案件的审理中，法庭特别强调了扣留国在采取国内司法程序时，不得打破《公约》所欲实现的各方利益的平衡。

在国际海洋利用上，每个国家都有自己的利益诉求。这些利益诉求，有重叠的部分，也有冲突的部分。就沿海国和渔业国之间的利害关系而言，沿海国允许渔业国在本国的专属经济区捕鱼，既实现了沿海国的经济利益，又实现了渔业国的经济利益。但是，沿海国在本国专属经济区的经济利益，除了短期内的渔业利益以及允许他国渔捞所带来的利益之外，还有生态利益，或者说是长期的经济利益。而渔业国对于其他国家的专属经济区，则只具有渔业利益，且是短期的经济利益。

当渔业国合法捕鱼时，沿海国和渔业国的经济利益是一致的。渔业国如果过度捕捞，或者未按照沿海国颁发的许可证进行捕捞时，渔业国对自身经济利益的追求则必然妨害沿海国的生态利益或者长期经济利益。因此，《公约》规定，在渔船发生违法事实之后，沿海国可以扣留违法捕捞的船只。沿海国扣留位于本国管辖海域的违法船只，是其管理手段之一。这一手段的利用，有助于实现沿海国维护本国主权，尤其是政治和经济方面的重要主权权利。但是，船舶的航行或持续航行又是渔业国进行渔业活动的内在要求，从而实现本国在海洋中的经济利益目标。船舶一旦被扣留，船旗国的海洋渔业利益和经济利益也就失去了赖以实现的手段。因此，《公约》也承认，在缴纳合理数额的保证金或其他财政担保之后，违法捕捞的船只可以迅速离开。

《公约》第 73 条和第 292 条旨在协调双方的不同利益，并且在协调的基础上实现利益平衡。在第 14 号和第 15 号案件中，法庭尤为强调《公约》所实现的这种利益平衡。在第 15 号案件中，法庭更是明确指出，扣留国采取的国内措施不能打破这种平衡。正是基于这种考虑，法庭一再强调，基于《公约》第 292 条的规定，只有法庭才有权确定释放保证金是否合理。

（二）《公约》对沿海国利益的承认和约束

如前所述，沿海国对于本国的专属经济区，除了具有短期的渔业经济利益，还

有更为长远的生态利益。《公约》承认，为了养护专属经济区的生物资源，沿海国有权制定相应的法律法规，规范和管理专属经济区内的各种活动。对于进入本国专属经济区捕鱼的外国渔船，沿海国可以通过行政许可的手段控制渔船的准入。对准入后的渔船，沿海国也有权进行检查。并且，在发现渔船涉嫌违法行为时，沿海国有权扣留渔船，并通过国内的司法程序处理这种违法行为。除了科以罚金之外，必要时也可以没收渔船。

从法庭对第 14 号和第 15 号案件的审理也可以看出，法庭承认沿海国对本国专属经济区的规范和管理权力，也承认沿海国在生物资源养护上所具有的利益。但法庭也强调，行使这种国内司法权，不得违背国际司法中的正当程序标准，也不得借此剥夺船旗国使用国际司法程序的权利。概言之，法庭强调的是国际法中长期以来就存在的一个基本原则，即条约必须遵守，任何一国都不得以国内法作为其不履行自己在国际法下所应承担义务的理由。

（三）《公约》对渔业国利益的承认和约束

根据获得的许可，渔业国有权进入其他国家的专属经济区捕鱼。一旦发生渔船被扣留事件，渔业国在提交合理数额的保证金或其他财政担保后，有权要求沿海国迅速释放己方渔船。如果沿海国此时拒绝释放渔船，作为船旗国的渔业国则有权向国际司法机构提起诉讼。公约第 73 条第 2 款和第 292 条第 1 款和第 4 款都明确承认了船旗国的这种利益。

《公约》在承认渔业国利益的同时，也包含了相应的约束条件。其一是在纠纷之前，其二是在发生纠纷之后采取救济行动时。前者较为明确，即渔业国的渔船进入其他国家的专属经济区捕鱼时，应遵守该国有关专属经济区管理的法律法规。具体而言，则是严格按照授权范围捕鱼。后者更为隐晦，即在因渔船被扣留而向国际司法机构提起诉讼时，应注意到行动的及时性。渔船被扣留，会严重影响到渔业国的利益，渔业国不应怠于行使自己的权利。一旦沿海国在扣留渔船之后完成了有关渔船扣留的国内司法程序，其所作出的决定成为终局，法庭也就不可能再做出其他判决。毕竟，法庭要尊重国内司法程序的独立性，法庭没有意愿、也不可能充当国内司法程序中的最终上诉机构。

四、结　语

这 2 起渔船迅速释放案件，均肇始于沿海国和渔业国的利益冲突。两 2 案件的案情大致相同，都是渔船超出许可证授权范围捕鱼，进而被沿海国扣留，并进入了国内司法程序。但是，法庭对这 2 起案件的审理结果却是截然不同，其原因正

是因为船旗国申请迅速释放的时机不同。或者说，船旗国根据《公约》采取行动的及时与否决定了诉讼的成败胜负。这样的结果，对中国这个渔业国而言，颇具启示。在本国的渔船被扣留时，作为船旗国，中国必须及时行使自己的权利。前车之鉴，后事之师。日本起诉俄罗斯的这 2 起案件，提醒了船旗国行使权利时，必须注意时机和及时性。

在第 14 号案件中，当日本提出诉讼申请时，俄罗斯的国内司法程序正在进行，渔船被扣留仍然是临时性的。即便在听审过程中，俄罗斯确定了保证金，并声称此时此案已经失去了诉讼标的，法庭仍然可以对其确定的保证金数额是否合理进行审理。法庭在审理之后判定，俄罗斯确定的保证金数额不合理，于是更改了保证金数额，并要求俄罗斯在收到保证金之后，立刻释放所扣留的日本籍渔船。

在第 15 号案件中，当日本提出诉讼申请时，俄罗斯的国内司法程序已经完成，渔船已经被俄罗斯国内法院判决予以征收。这就使得法庭不得不承认其国内司法权，而此案的申请也由于失去标的物而失去了判决意义。

沿海国在其专属经济区内行使主权权利和 3 项专属管辖权。沿海国遵守《公约》且未违反国际司法程序时，其国内法院的判决应该得到国际海洋法法庭的尊重。渔业国在本国渔船被扣留之后，应当及时提出申请，不应怠于行使《公约》第 292 条所赋予的权利。毕竟，《公约》强调的是双方利益的平衡，法庭不可能超越《公约》规定的范围，干预沿海国的司法权，或者对渔业国的申请迅速释放的权利予以偏重。

日本《海洋构筑物安全水域设定法》评析

王泽林 *

内容摘要： 2007 年 4 月 20 日，日本参议院表决通过了《海洋构筑物安全水域设定法》，这必将对日本本国海洋权益的保护产生积极影响，但也为中日东海问题的谈判与解决增加了一些变数。结合《联合国海洋法公约》针对专属经济区内人工岛屿、设施和结构的相关条款，本文分析了日本《海洋构筑物安全水域设定法》的具体规定，重点对该法在东海地区的适用问题进行探讨，主张其不能适用于东海争议区域，并建议中国尽快完善该方面的立法。

关键词： 安全地带　东海　《联合国海洋法公约》　《日本海洋构筑物安全水域设定法》

日本参议院于 2007 年 4 月 20 日通过并于当年 7 月 20 日起实施了《海洋构筑物安全水域设定法》。该法设立的宗旨是“为确保海洋构筑物等的安全及船舶在周边海域的航行安全，根据《联合国海洋法公约》，对海洋构筑物周边安全水域的设定等方面内容规定必要的措施”。由此可见，该法的依据是《联合国海洋法公约》（以下简称“《公约》”）。因此，本文将首先缕析《公约》的相关规定，并对比其与《海洋构筑物安全水域设定法》的具体规定，重点探讨中日东海区域共同开发与日本适用该法的关系。

一、对《公约》相关规定的分析

根据《公约》第 60 条的规定，沿海国在专属经济区内有建造并授权和管理建造、操作和使用人工岛屿、设施和结构的专属权利，[1] 对这种人工岛屿、设施和结构应有专属管辖权，包括有关海关、财政、卫生、安全和移民的法律和规章方面的

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1 《联合国海洋法公约》第 60 条第 1 款。

管辖权，[2] 可以在这些人工岛屿、设施和结构的周围设置合理的安全地带，并可在该地带中采取适当措施以确保航行以及人工岛屿、设施和结构的安全，[3] 安全地带的宽度原则上不超过 500 米。[4]

虽然《公约》第 60 条规定了沿海国享有在专属经济区内建造并授权和管理建造、操作和使用人工岛屿的专属权利，但并没有对“人工岛屿”进行明确界定，因此可以认为非自然形成的岛屿即是人工岛屿，[5] 例如，美国在其领海之外建造的作为深水港的固定或浮动设施也属于人工岛屿。[6] 沿海国在其专属经济区内或大陆架上建造或授权建造人工岛屿并无特定目的的限制，可以为任何目的建造人工岛屿，[7] 但是建造设施和结构则要符合《公约》第 56 条所规定的目的和其他经济目的，即“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”。[8] 值得注意的是，《公约》并未提及沿海国在专属经济区内或大陆架上建造和使用“装置”的权利，而“装置”一词却在《公约》第 194 条第 3(c)、(d) 款中出现。[9]《公约》第 60 条之所以未规定“装置”，并未要求设施和结构的建造需要符合特定目的，是因为强国特别是美国和前苏联的顾虑：既然将沿海国的专属管辖权仅限于以经济为目的的设施和结构，那么对于强国在沿海国专属经济区内设置的用于军事用途的设施、结构或装置，沿海国就不能主张专属管辖权。[10] 因此，《公约》的规定未提及军事设施、结构或装置，实际上是对强国主张的一种妥协。

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2 《联合国海洋法公约》第 60 条第 2 款。

3 《联合国海洋法公约》第 60 条第 4 款。

4 《联合国海洋法公约》第 60 条第 5 款：安全地带的宽度应由沿海国参照可适用的国际标准加以确定。这种地带的设置应确保其与人工岛屿、设施或结构的性质和功能有合理的关联；这种地带从人工岛屿、设施或结构的外缘各点量起，不应超过这些人工岛屿、设施或结构周围 500 米的距离，但为一般接受的国际标准所许可或主管国际组织所建议者除外。安全地带的范围应妥为通知。

5 参见《联合国海洋法公约》第 121 条岛屿制度的规定。

6 参见美国于 1974 年制定、1984 年修正的《深水港法》。

7 《联合国海洋法公约》第 60 条和第 80 条。第 60 条第 1(a) 款在提到人工岛屿的时候，与第 2(b) 款提到的设施和结构相比，并没有规定人工岛屿为任何目的而建造。

8 《联合国海洋法公约》第 56 条第 1 款。

9 《联合国海洋法公约》第 194 条第 3(c) 款：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，特别是为了防止意外事件和处理紧急情况，保证海上操作安全，以及规定这些设施或装置的设计、建造、装备、操作和人员配备的措施。《联合国海洋法公约》第 194 条第 3(d) 款：来自在海洋环境内操作的其他设施和装置的污染，特别是为了防止意外事件和处理紧急情况，保证海上操作安全，以及规定这些设施或装置的设计、建造、装备、操作和人员配备的措施。

10 B. H. Oxman, Customary International Law in the Absence of Widespread Ratification ofthe U. N. Convention on the Law of the Sea, in LSI Conference 1983(1984), p. 676.

但笔者认为，如果就此便得出“其他国家可以在沿海国的专属经济区或大陆架上建造军事设施、结构或装置”这一结论，亦非正确。众所周知，人工岛屿可以区分为固定的人工岛屿和漂浮的人工岛屿。在第三次联合国海洋法会议期间，美国与比利时认为沿海国不应对漂浮的人工岛屿拥有管辖权，因为从理论上而言，它们是可以移动的，应被视为船舶。[11] 但考虑到漂浮的人工岛屿与船舶存在明显区别：尽管漂浮的人工岛屿能够移动，但它经常是在一个特定的海域进行作业，它的船员和工作环境与船舶也存在较大差异，有鉴于此，美国与比利时的上述建议并未被《公约》采纳。因此，《公约》的规定仍然未能完全达到强国的目的。也正是因为《公约》最终未对人工岛屿作出明确定义，对人工岛屿的建造并无任何目的的限制，所以，沿海国有权将外国在本国专属经济区内或大陆架之上的任何军事设施、结构或装置甚至船舶解释为人工岛屿，从而行使专属管辖权，或者以该行为违反《公约》第 301 条“海洋的和平使用”，侵害《公约》赋予沿海国的主权权利为由提出抗议或采取行动。可见，《公约》对经济目的和军事目的区分，实际上是各国妥协的结果。在实践中，各国在其国内立法中往往不作如此明确的区分，例如日本的《海洋构筑物安全水域设定法》便将两者统称为“海洋构筑物”。

根据《公约》第 60 条的规定，沿海国可于必要时在这些人工岛屿、设施和结构的周围设置合理的安全地带，并可在该地带中采取适当措施以确保航行以及人工岛屿、设施和结构的安全。一切船舶都必须尊重这些安全地带，并应遵守关于在人工岛屿、设施、结构和安全地带附近航行的一般接受的国际标准。[12] 因此，沿海国对其他与本部分不相符的活动进行适当管制，并不违反《公约》的规定。在欧洲北海地区的实践中，违反此等安全地带规定的船舶大部分是渔船。因而，为了确保安全地带内航行及人工岛屿、设施和结构的安全，渔船是重要的规范对象。[13] 此外，《公约》明确规定，违反沿海国按照《公约》适用于专属经济区或大陆架包括这种安全地带的法律和规章的行为，应比照适用紧追权。[14] 但遗憾的是，《公约》并未对一些细节问题作出进一步的具体规定，例如“合理的安全地带”中的合理标准如何界定；沿海国采取的适当措施是否可以禁止外国船舶进入安全地带，或在安全地带中抛锚或进行拖网作业；沿海国是否可以设定安全地带内的航线以及通过安全地带的船舶种类与大小等等。[15] 上述模糊的规定进一步导致了实践中各国立法内容的冲突。例如，1964 年英国《大陆架法令》就授权政府阻止船舶进入法令

11 The 1973 Belgian Working Paper Concerning Artificial Islands and Installations (Part B), 15. UN Doc. A/AC. 138/91, in Oda Vol. II p. 359; and the 1974 U.S. Draft Articles, UN Doc. A/CONF. 62/C. 2/L. 47, in Third UNCLOS, Vol. III, pp. 214~222.

12 《联合国海洋法公约》第 60 条第 4 款和第 6 款。

13 姜皇池著：《国际海洋法》（上册），台北：学林文化事业有限公司出版，第 416 页。

14 《联合国海洋法公约》第 111 条第 2 款。

15 这些细节问题在 1958 年《大陆架公约》中也无明确的规定。

规定的大陆架的指定区域。[16] 日本 2007 年的《海洋构筑物安全水域设定法》规定，除几种特殊情况外，任何人未经许可不得进入安全水域。此外，针对在领海之外建造的固定或浮动设施，即处于公海上的人工岛屿，理论上沿海国不能在深水港安全区内行使管辖权，但美国 1974 年《深水港法》却规定，外国船舶进入深水港需要与美国订立协定，授权美国在安全区内对外国油轮行使管辖权，[17] 否则不能进人该安全区。在实践中，美国在公海内设立安全地带并对其进行管辖的做法，也得到了一些国家的承认，这些国家还与美国签订了双边协定。同样，如果沿海国也在专属经济区内设立了安全地带，沿海国可行使哪些具体管辖权？《公约》中的“适当措施”这一模糊概念势必引发更多争议。

此外，除海平面外，“安全地带”是否还包括人工岛屿、设施和结构之下海水和之上的空气空间？虽然《公约》对此无明确规定，但是《公约》采取了“around”这一措辞。对此，可作如下分析：首先，从字面含义看，其意指“周围”，即应理解为一个立体空间，而不仅仅也不可能只限于海平面；其次，从立法目的看，《公约》设定安全地带的目的是为了确保航行以及人工岛屿、设施和结构的安全。如果不将“安全地带”理解为一个立体空间，很难想象会达到设定安全地带的目的。例如，其他国家的飞机在人工岛屿、设施和结构的上空，特别是在军事性质的人工岛屿的低空来回飞行，潜艇在其海面以下潜行，均会影响到航行以及人工岛屿、设施和结构的安全，这也是沿海国所无法容忍的。《公约》第 58 条第 1 款规定所有国家在专属经济区内“享有第 87 条所指的航行和飞越的自由”，亦即享有公海上的航行和飞越自由，当然也应受到国际民航组织航空规则的约束。根据国际民航组织 1985 年的报告，如果有可能的话，沿海国可以对飞越专属经济区中的人工岛屿、设施和结构制定特别规则。[18] 尽管可能存在质疑，认为安全地带不包括海平面上

16 参见 UK Continental Shelf Act 1964 Article 4(1), Part II of the Coast Protection Act 1949 (which requires the consent of [the Board of Trade] to the carrying out of certain works on the sea shore if obstruction or danger to navigation is likely to result) except section 34(1)(b) (which restricts the deposit of materials) shall apply in relation to any part of the sea bed in a designated area as it applies in relation to the sea shore; and section 46 of that Act (local inquiries) shall extend to any matter arising under this section。值得注意的是，英国该法中“指定区域”的概念引起其他国家的效仿。印度在 1976 年第三次联合国海洋法会议期间首次提出关于在专属经济区内设定指定区域的议案，但遭到否决。印度继而在其 1976 年制定的《领海、大陆架、专属经济区与其他海域法》中规定，中央政府可在“官方文告”中发布通知，宣布专属经济区的任何区域、大陆架的任何区域及其邻接海域为指定区域。此后，巴基斯坦、圭亚那、毛里求斯和塞舌尔等国也相继通过类似法律。

17 美国 1974 年制定、1984 年修正的《深水港法》第 11 条。

18 UN Doc. ICAO/C-WP/8077, p. 10.

的空间，但从《公约》文本、立法目的与意图分析，“安全地带”应被认为是一个立体空间。从国际民航组织的报告也可以看出，沿海国也存在这样的主张，只是因为在实践中难以操作且可能与飞越自由相冲突，因此尚未制定出具体的规则。但应当承认，沿海国的上述主张具备理论依据并得到了《公约》的支持。因此，沿海国在其本国国内立法中，可以依据《公约》的立法目的进一步制定适用于本国安全地带的适当措施。只要这一“适当措施”是为了合理地“确保航行以及人工岛屿、设施和结构的安全”，并且没有严重影响航行和飞越自由，应该都是《公约》所认可的。

二、对日本《海洋构筑物安全水域设定法》的具体评析

日本《海洋构筑物安全水域设定法》的立法宗旨是“确保海洋构筑物等的安全及船舶在其周边海域的航行安全”，以为海洋构筑物安全水域的设定等方面规定必要措施。该法第 2 条和第 3 条对海洋构筑物安全水域进行了具体界定。

根据日本《海洋构筑物安全水域设定法》第 2 条的规定，“海洋构筑物”是指符合日本《专属经济区和大陆架法》，在其专属经济区和大陆架进行特定行为的工作物以及从事大陆架开发的船舶。可见，该法中所指的“海洋构筑物”即对应《公约》所规定的“人工岛屿、设施和结构”，但是“工作物”的范围从字面理解要比《公约》的规定更为宽泛，而且该法还将从事大陆架开发的船舶也包含在“海洋构筑物”的范围之内。由于《公约》对于“人工岛屿、设施和结构”尚无具体定义，因此，可以认为，只要符合《公约》规定的设定设施和结构的目的，该法界定的“工作物”并无直接违反《公约》之处。

关于“安全水域”的含义，日本《海洋构筑物安全水域设定法》规定，“安全水域”是指符合《公约》第 60 条第 4 款（包括适用《公约》第 80 条的情形）规定的安全地带。依照该法第 3 条第 5 款的规定，“安全水域的宽度应为从海洋构筑物等外缘的任何点量起不超过 500 米”，这与《公约》第 60 条第 5 款的规定也相一致。

笔者认为，该法中比较关键的内容在于第 5 条第 1 款的规定，即除了几种例外情形外，“根据国土交通部令的规定，非经国土交通大臣的许可，任何人均不得进入安全水域。”1996 年 6 月 14 日，日本国会通过了《专属经济区和大陆架法》。该法第 1 条第 2 款规定，“日本的专属经济区是从其领海基线量起向外延伸到其每一点同领海基线的最近点的距离为 200 海里的线以内的区域，包括海床、底土和上覆水域（不包括领海）。如果专属经济区外部界线的任何部分超过了中间线（中间线是一条其每一点同日本领海基线的最近点和与日本海岸相向的其他国家的领海基线的最近点距离相等的线），中间线（或者是日本与其他国家协商同意的

其他线）将代替那条线。”第 2 条第 1 款进一步规定：“日本的大陆架包括从日本的领海基线向外延伸到其每一点同领海基线的最近点的距离等于 200 海里的线以内的海域的海底及其底土。如果大陆架的外部界线的任何一部分超过了中间线，中间线（或者日本与其他国家协商同意的其他线）将代替那条线。”[19] 结合日本《海洋构筑物安全水域设定法》的规定，可以看出日本方面的主张是，如果日本企业或团体在东海“中间线”日本一侧进行油气勘探或开发并设立有安全水域时，那么，未经其国土交通大臣的许可，任何人均不得进入该安全水域。假如日本本国人或外国人违反《海洋构筑物安全水域设定法》的规定，进入其设定的安全水域，或者中国的执法单位对其开发行为进行阻拦而使其开发受阻，日本的海上保安厅则可依据此法采取行动。[20]

《公约》规定沿海国可以在安全地带中采取适当措施以确保航行以及人工岛屿、设施和结构的安全。日本在《海洋构筑物安全水域设定法》中也规定了可采取的措施，即未经国土交通大臣的许可，任何人均不得进入安全水域，但是也规定了几种例外情形，即在“船舶驾驶失去自由时；从事营救人员生命或船舶危急时；国家或都道府县的机构在实施确保海上安全与治安业务时；在该安全水域从事海洋构筑物等的业务时”。[21] 对违反上述规定的行为者，可以处一年以下徒刑或 50 万日元以下的罚款；代理人、雇佣者及其他从业人员对法人或自然人的业务违反上述规定的，除处罚行为者外，还应对相应的法人或自然人进行罚款。[22]

根据《公约》的规定，一切船舶都必须尊重这些安全地带，并应遵守关于在人工岛屿、设施、结构和安全地带附近航行的一般接受的国际标准，[23] 同时，《公约》还授权沿海国在安全地带中采取适当措施。这意味着，除了遵守一般接受的国际标准外，一切船舶还需要遵守沿海国所采取的适当措施，如沿海国针对安全地带所颁布的法律法规等。这里的关键问题是，沿海国采取的适当措施具体应包含什么内容，《公约》并没有做出具体规定。如前文如述，各国相应的国内立法呈现出较大差异并可能造成冲突。日本《海洋构筑物安全水域设定法》规定，任何人未经其许可均不得进入安全水域，这种措施是否“适当”？结合国际社会的实践而言，

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19 参见日本《专属经济区和大陆架法》的条款，转引自朱凤岚：《中日东海争端及其解决的前景》，载于《当代亚太》2005 年第 7 期，第 8~9 页。

20 日本海上保安厅是以维持日本海上安全及治安为目的的行政机关，主要从事海难救助、交通安全、防灾及环境保全和治安维持的任务，它的一项重要职责就是维护日本的海洋利益。例如，其宣传册明确宣称：“近年，一些中国积极分子试图非法进入尖阁群岛领水或登陆……对于这些侵犯我们海洋权利的行为，我们的回应是，海上保安厅与其他相关部门合作，布置船舶和飞机对发生侵犯行为的场所进行监视，并采取严格和适当的措施去阻止这些问题。”参见 Pamphlet–Japan Coast Guard, at http://www.kaiho.mlit.go.jp/e/pamphlet.pdf, 29 November 2008.

21 日本《海洋构筑物安全水域设定法》第 5 条第 1 款。

22 日本《海洋构筑物安全水域设定法》第 7 条。

23 《联合国海洋法公约》第 60 条第 6 款。

应该说该措施并没有违反《公约》的规定，而且其他国家的立法也有类似内容。此外，从《公约》的规定来分析，一切船舶“应遵守关于在人工岛屿、设施、结构和安全地带附近航行的一般接受的国际标准”，这里强调的是安全地带附近航行时应遵守一般接受的国际标准，而在安全地带之内的航行标准似乎留待沿海国去制定。那么沿海国是否可以制定诸如“未经其许可，禁止航行或进入安全地带内”的标准呢？如前文述讲，《公约》亦无具体规定。半径为 500 米的安全地带在海洋中所占的面积也是微乎其微，一般而言，对船舶航行几乎不存在多大影响。如果这样理解的话，既然《公约》规定一切船舶都必须尊重这些安全地带，那么这些船舶也当然应该尊重沿海国为这些安全地带所颁布的法规，甚至是内容严苛的法规。

三、中日东海区域共同开发与日本《海洋构筑物安全水域设定法》适用的关系

2008 年 6 月 18 日，中国政府与日本政府就东海部分区域达成原则共识，并就共同开发第一步达成谅解。可以认为，这只是一种过渡性安排，关于东海划界的问题仍需要通过进一步谈判加以解决。而在谈判达成最终协议之前，日本《海洋构筑物安全水域设定法》无疑成为中日之间谈判的一个筹码，起到向中方施压的效果。中日共同开发的区域范围在中日谅解备忘录中已有明确的经纬度划定，可参考下图中间的标示部分。[24]

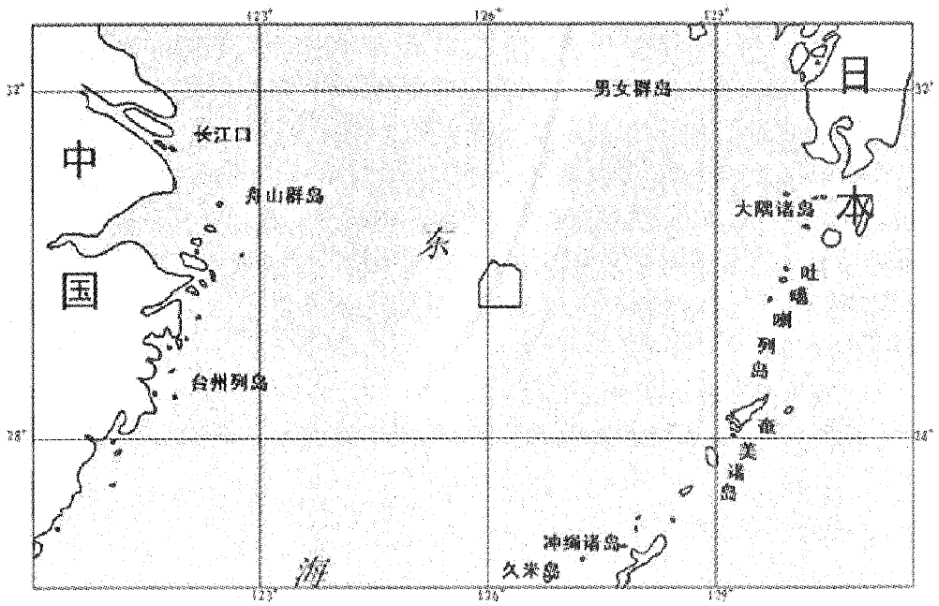
1982 年日本驻华使馆向中国交通部递交了一份地图，第一次明确提出中日之间海域应当依据“中间线”原则划分。[25] 根据中日两国政府于 2008 年 6 月达成的共同开发区域所处的位置，日本国内有人声称，中日在东海北部海域开展共同开发是以“中间线”为基础。但中国政府声明，中国从未承认日本所提出的中间线原则，[26] 共同开发区域与中间线没有任何关系。尽管确定的现状是共同开发的区域位于日本单方面提出的所谓“中间线”附近或跨越“中间线”，并位于中国的大陆

24 中华人民共和国外交部：《中日就东海问题达成原则共识》，下载于 http://www.fmprc.gov.cn/chn/xwfw/fyrth/1056/t448568.htm，2008 年 11 月 3 日。

25 于希：《警惕！日本人绘制的东海油田图》，下载于 http://gbl.chinabroadcast.cn/3821/2004/07/08/401@224385.htm，2008 年 11 月 4 日。

26 2008 年 6 月 24 日，中国外交部长杨洁篪在谈及东海问题时，重申春晓主权权利属于中国。记者问：“日本国内有人称，中日在东海北部海域搞共同开发是以‘中间线’为基础，你对此有何看法？”杨洁篪部长回答：“在东海划界问题上，中方过去从来没有承认过日方所谓‘中间线’的主张，今后也不会承认。中方主张按自然延伸原则实现东海大陆架公平划界。东海的最终划界问题，将由中日双方通过谈判加以解决。”参见《杨洁篪谈东海问题：重申“春晓”主权权利属中国》，下载于 http://www.chinadaily.com.cn/hqzg/2008—06/24/content_6791376.htm，2008 年 11 月 4 日。

架之上，[27] 但这不能不说是中国作出妥协与让步的结果，是双方在巨大争执之下达成的一种政治安排或战略选择，以维护中日友好关系及东亚稳定的局势，实现双赢的结果。



日本《海洋构筑物安全水域设定法》如何在东海适用？笔者认为，该法作为日本的国内法，只能适用于日本的专属经济区和大陆架。对于东海而言，可以区分为无争议区域和有争议区域二部分，对于无争议的东海区域，如果是日本的专属经济区和大陆架，则毫无疑问，该法可以适用。但是对于有争议的东海区域，即位于日本主张的“中间线”的日方一侧至中国主张的大陆架自然延伸线冲绳海槽之

27 中国主张东海按自然延伸原则实现东海大陆架的公平划界。虽然中国尚未明确主张东海大陆架的边界位置，但是根据中国的《专属经济区和大陆架法》第 2 条规定，“中国的大陆架为中华人民共和国领海以外依本国陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土”，因此中国的东海大陆架可以自然延伸到中国的大陆边外缘即冲绳海槽。

间的区域，能否适用该法？[28] 显然不能适用，因为这一部分是中国的大陆架，日本的法律特别是公法不能适用。根据日本《专属经济区和大陆架法》的规定，其采用的是“中间线”划界，而这一部分位于东海中间线的日本一侧。虽然日本法律规定有协议划定线时，以协议划定线为准，但是迄今为止中日双方无法就划界协议达成一致意见。在这种情况下，如果日本在争议区域实施《海洋构筑物安全水域设定法》，则是在中国的大陆架之上实施日本法律，不仅危及了中国的海洋权益，更重要的是，如本节最后一段所述，还侵犯了中国的国家主权。

此外，中日之间在东海部分区域达成原则共识，而日本《海洋构筑物安全水域设定法》能否适用共同开发区域？笔者的结论是，仍然不能适用。首先，共同开发区域是双方在划界前的一种过渡性安排区域，对于双方主张的划界原则并无任何影响。该区域适用的法律其实是双方在达成的原则共识之上进一步形成的双边协议，而这种协议作为国家之间的条约应优先于双方国内法的实施；其次，共同开发区域跨越日本主张的所谓“中间线”，在中间线中方一侧的共同开发区域毫无疑问地属于无争议的中国的专属经济区和大陆架，日本该法当然不能适用；而在中间线日方一侧的共同开发区域是尚存在争议的区域，如上文如述，日本该法亦不能在此区域适用。中日在达成原则共识时，在共识中提到应尽快达成必要的双边协议，履行各自的国内手续。因此，双方在今后达成必要的双边协议时，有必要对共同开发区域的法律适用问题作出清楚的规定。

日本《海洋构筑物安全水域设定法》显然有利于日本防止及处置东海“有事”状况，也为其在东海争议区域的实施埋下伏笔。该法第 4 条第 1 款规定：“一旦设定安全水域，国土交通大臣应立即公告其位置与范围。在废止安全水域时，也同样。”公开安全地带位置的做法也是《公约》第 60 条第 5 款所要求履行的程序。因此，如果日本开发东海有争议区域的资源，其设定的安全水域应立即公开，否则其他国家不会视其为《公约》所规定的安全地带。

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28 从中国外交部关于东海问题的谈话中可以看出，中日间的东海问题主要是划界问题，在划界暂时无法达成协议之前，东海的油气开发成为需要优先解决的问题。关于有争议的东海区域，均未见中日两国官方的解释。但是中国政府在东海大陆架的立场是根据自然延伸原则解决东海大陆架划界问题，而日本则主张“中间线”原则。虽然中国尚未说明中国东海大陆架自然延伸的外部界限，但从理论上而言应在是冲绳海槽处。此外，根据日本 1996 年《专属经济区和大陆架法》的规定，日本的专属经济区和大陆架是 200 海里，如果专属经济区和大陆架的 200 海里外部界限超过与日本海岸相向国家的中间线，则以中间线为界。从日本该法分析，日本依本国法律主张的中日东海边界应是“中间线”，它不能超越其本国的法律规定向中间线中国一侧主张专属经济区和大陆架。最后，日本第 161 届国会参议院经济产业委员会议事录 (2004 年 11 月 2 日) 也表明，日本目前主张中日东海划界应忽视冲绳海槽的法律效力，具体的划界方法应以等距离标准以“中间线”定界线（参见朱凤岚《“自然延伸”还是“中间线原则”——国际法框架下透视中日东海大陆架划界争端》，载于《国际问题研究》2006 年第 5 期，第 22 页）。综上所述，笔者认为中日之间有争议的东海区域是东海“中间线”与冲绳海槽之间的区域。

中国与日本在在东海共同开发区内存在主权权利和管辖权的冲突，“不但涉及到争端当事国相互间的管辖权冲突，还涉及因争端当事国同时对共同开发区内第三国行使管辖权而产生的重叠管辖问题”。[29] 笔者认为，由于中国与日本在东海区域的划界问题尚未解决，会产生主权权利的冲突，并相应引起两国在东海争议区域管辖权的冲突。《公约》对沿海国设立的安全地带管辖权没有明确规定，如上文所述，各国在实践中也各行其是。有的国家通过本国法律对安全地带进行立法，行使立法管辖权，继而对违法行为人追究责任，行使行政管辖权与司法管辖权。管辖是国家对个人、财产或事件拥有处理的权力，国家行使管辖权是以国家主权为依据，是国家主权的核心问题。在《公约》没有明确规定的情况下，一些沿海国对其设立的安全地带行使了不同程度的管辖权。如果日本依据《海洋构筑物安全水域设定法》，将安全水域设立在东海有争议区域，也就意味着日本单方面认为该区域是在本国的专属经济区内或大陆架上，毫无疑问这种行为（日本在中国的大陆架上设立安全水域）不但侵犯了中国在东海的主权权利，而且侵犯了中国的管辖权，最终侵犯的是中国的主权。从这个因素考虑，日本《海洋构筑物安全水域设定法》在东海有争议区域的实施并非简单易行，如果强制实施必然会损害中日两国的关系，为中日之间的东海划界谈判增加变数或困难，引起中日之间的外交纠纷。

四、日本《海洋构筑物安全水域设定法》的启示

从立法角度而言，《海洋构筑物安全水域设定法》作为日本的国内法，对其本国的海洋权益进行保护无可厚非。但关键在于，如果日本与中国在东海油气田开发方面存在争议并涉及安全地带时，该法将为日本企业或团体的东海油气（试）开发提供国内法上的保障。因此，日本的这部法律已经对中国海洋权益的保护产生了重大影响。考虑到中国与日本之间的东海大陆架与专属经济区之争，这部法律显得颇为重要。

《海洋构筑物安全水域设定法》是日本海洋战略行动的体现，是其整体海洋政策与立法的一部分。[30] 与该法同一天通过的日本《海洋基本法》，是日本为了实现其战略性的海洋政策而通过的一部重要法律。从日本的立法以及其外交行动可以看出，日本对于东海权益保护的态度非常强硬，其国内立法工作一直有条不紊。

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29 参见龚迎春：《共同开发区内的主权权利和管辖权冲突问题》。本文提交于 2008 年 11 月 15 日厦门大学海洋政策与法律中心与《中国海洋法学评论》编辑部联合举办的“海峡两岸海洋合作问题”学术研讨会，并发表于本期《中国海洋法学评论》。

30 关于日本海洋战略、政策与立法的内容，参见金永明：《日本在海洋问题上的动向及对我国的启示》，载于《中国海洋法学评论》2007 年第 1 期，第 15~28 页。

从中国目前的国内立法角度来分析这个问题，中国于 1998 年 6 月 26 通过并已生效的《中华人民共和国专属经济区和大陆架法》规定：

> 第 3 条 中华人民共和国对专属经济区的人工岛屿、设施和结构的建造、使用和海洋科学研究、海洋环境的保护和保全，行使管辖权。
>
> 第 4 条 中华人民共和国对大陆架的人工岛屿、设施和结构的建造、使用和海洋科学研究、海洋环境的保护和保全，行使管辖权。
>
> 第 8 条 中华人民共和国在专属经济区和大陆架有专属权利建造并授权和管理建造、操作和使用人工岛屿、设施和结构。中华人民共和国对专属经济区和大陆架的人工岛屿、设施和结构行使专属管辖权，包括有关海关、财政、卫生、安全和出境入境的法律和法规方面的管辖权。中华人民共和国主管机关有权在专属经济区和大陆架的人工岛屿、设施和结构周围设置安全地带，并可以在该地带采取适当措施，确保航行安全以及人工岛屿、设施和结构的安全。

可以看出，我国的上述立法仅是对《公约》相应规定的转述，而并未对《公约》中的细节问题结合我国国情作出进一步的明确规定。例如，有关安全地带概念的界定、安全地带宽度的界定、具体的主管机关名称以及适当措施的内容等等，我国《专属经济区和大陆架法》均无规定，这种原则性的立法需要进一步制定配套法规才可以更好地解决实践中产生或潜在的问题，从而为我国开发专属经济区和大陆架资源提供更强有力的法律保障。否则，如果实践中出现相关争议，只能依据《公约》或现有立法中的原则去处理，虽然可能具有一定的灵活性，但是毕竟缺乏具体的执法措施与直接的法律依据，进而影响中国海洋权益的法律保障效果。

日本《海洋构筑物安全水域设定法》（中译本）

金永明 译*

（2007 年 7 月 20 日生效）

【宗旨】

第一条 为确保海洋构筑物等的安全及在其周边海域航行的船舶安全，本法根据《联合国海洋法公约》，对海洋构筑物安全水域的设定等方面的内容规定必要的措施。

【定义】

第二条 1. 本法的“海洋构筑物”是指，在《专属经济区和大陆架法》（1996 年法律第 74 号）第一条第一款规定的专属经济区或其第二条规定的大陆架（以下称“大陆架”）中，进行该法第三条第一款至第三款规定的行为（以下称“特定行为”）的工作物（包括新建的或正在拆除的物件），以及开发大陆架的船舶（仅限于为开发目的而停止的船舶）。

2. 本法的“安全水域”是指，《联合国海洋法公约》第六十条第四款（包括适用第八十条的情形）规定的安全水域，根据本法第三条第一款的规定在海洋构筑物等周边设置的水域。

3. 本法的“特定行政机构首长”是指，主管从事与海洋构筑物等特定行为有关的企业业务的行政机构的首长。

【安全水域的设定等】

第三条 1. 为确保海洋构筑物等的安全及在其周边海域航行的船舶安全，国土交通大臣可根据《联合国海洋法公约》的规定设定安全水域。

2. 上款设置的安全水域，应根据特定行政机构首长提出的申请进行。

3. 欲设置安全水域时，国土交通大臣应与外务大臣、农林水产大臣、经济产业大臣、防卫大臣及其他相关行政首长协商；废除安全水域时，也应遵循同样程序。

4. 安全水域的设置必须遵循海洋构筑物等的性质及功能，合理进行。

5. 安全水域的宽度应为从海洋构筑物等外缘的任何点量起不超过 500 米。

6. 安全水域不得设置在可能对公认的不可或缺的国际航行的使用有干扰的海

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域。

第四条 1. 一旦设定安全水域，国土交通大臣应立即公告其位置与范围；如果废止安全水域时，也同样。

2. 安全水域设定后，国土交通大臣可对依第三条第二款规定的提出申请的特定行政机构首长，提出采取必要措施要求，旨在使在该安全水域航行的船舶知晓该安全水域的位置与范围。

【禁止进入安全水域等】

第五条 1. 根据国土交通部令的规定，非经国土交通大臣许可，任何人不得进入安全水域，除非符合下列情形之一：

（1）船舶驾驶失去自由时；

（2）从事营救人员生命或船舶危急时；

（3）国家或都道府县的机构在实施确保海上安全与治安业务时；

（4）在该安全水域从事海洋构筑物等的业务时。

2. 在存在上款规定的许可申请时，国土交通大臣除非认定对确保海洋构筑物等的安全没有障碍，或为灾后重建及其他公益事业不得已而采取的临时措施，否则不得予以批准。

3. 国土交通大臣欲批准第一款提出的申请时，应事先与依第三条第二款规定的与安全水域有关提出申请的特定行政机构首长协商。

4. 国土交通大臣可对第一款的批准附加必要条件。

5. 国家机关或地方公共团体欲进入安全水域时（除第一款但书的规定之外），应以在该国家机关或地方公共团体与国土交通大臣之间达成协议为前提，方可视为批准第一款。

6. 第三项的规定，适用于国土交通大臣接受根据上项规定达成的协议。

【诚实履行国际规则】

第六条 应注意的是，本法的实施不得妨碍诚实履行我国已缔结的条约及其他国际规则。

【罚则】

第七条 1. 符合下列情形之一者，处以一年以下徒刑或50万日元以下的罚款：

（1）违反第五条第一款规定者；

（2）违反国土交通大臣根据第五条第四款的规定所附条件者。

2. 法人代表、法人、或自然人的代理人、雇佣者及其他从业人员对法人或自然人的业务有违反前款规定的行为时，除处罚行为者外，还要对法人或自然人处以同款规定的罚款。

【附则】

本法自公布之日起三个月内由政令规定的日期开始实施。

【理由】

提出本法律的理由:为确保海洋构筑物等的安全及在其周边海域航行的船舶安全,根据《联合国海洋法公约》的规定,有必要完善与海洋构筑物等有关的安全水域的设定方面的规定。

太平洋深海海底结核矿带的生物多样性、物种分布和基因流动：预测和管理深海海底采矿的影响 (ISBA/14/C/2)

（2008 年 5 月 26 日至 6 月 6 日牙买加金斯敦，国际海底管理局理事会第十四届会议）

秘书长的报告

1. 本报告综述国际海底管理局与 J. M. Kaplan 基金研究太平洋深海海底结核矿带的生物多样性、物种分布和基因流动的联合项目的结果。该项目在 2002 至 2007 年期间开展。完整的项目最后报告已由管理局作为《管理局技术研究，第 3 号》(2008) 出版。编写本摘要是为提供资料作参考，并对管理局成员在第十四届会议期间有所助益。

一、背景

2. 国际海底管理局于 1998 年在三亚举行的科学研讨会建议管理局编制一个环境研究模型，以鼓励各国、各国家科学机构和先前的已登记先驱投资者（承包者）在环境研究领域开展合作。根据这项建议，管理局在 1999 年 3 月召集了一小组国际公认的科学专家，以找出适于进行国际协作的关键问题。这些专家指出，虽然里拉里昂一克利珀顿区的结核生态系统的一般性质已为人所知，但对实际的群落抵抗力、复原力和生物多样性型式却知之甚少。这种知识的缺乏使得人们难以预测和周全地管理采矿活动的影响。

3. 这些讨论导致管理局决定在 2002 年召开关于国际海洋科研协作前景的研讨会。该研讨会侧重于被视作适于开展国际协作的四个关键科学问题：

(a) 深海海底结核矿带的生物多样性程度、物种分布和基因流动；

(b) 采矿轨迹形成和羽流重新沉降后的海底扰动和移生过程；

(c) 采矿羽流对水体生态系统的影响（营养物添加、浑浊度增加、重金属毒性、

需氧量增加）；

(d) 结核矿带生态系统的自然变数。

4. 因此，在 2002 年的研讨会上启动了卡普兰项目。项目目的是评估深海海底结核矿带的生物多样性程度、物种分布和基因流动。项目主要由 J. M. Kaplan 基金供资，管理局提供额外捐助。

二、项目范围和目标

5. 克拉里昂一克利珀顿区的太平洋深海海底沉积物蕴含以多金属结核为形式的丰富矿物资源，这些资源具有越来越大的商业和战略意义，也可能是生物多样性的主要吸收库。但是，迄今为止已证明，在没有更好了解下列方面的情况下，难以量化结核开采对生物多样性的威胁（特别是物种消失的可能性）：

(a) 可能被单一采矿作业扰动的区域内的栖居物种数量；

(b) 一般结核矿带内物种的典型地域范围（和基因流动率）。

6. 对结核矿带内的生物多样性和物种分布仍知之甚少，这主要有三个原因。首先，对结核矿带的许多区域以及海底生物的主要群体（特别是线虫和有孔虫）的采样仍严重不足。其次，虽然许多考察活动已采集了结核矿带海底生物群系的样本，但每个采样方案一般均使用不同的专家来鉴定其采集样本中的生物。由于所采集的大多数物种是科学所未知的新物种，科学文献中尚未正式描述，因此无法将一项研究的物种清单与另一项研究的物种清单联系起来。因而，很难将整个结核矿带的物种清单进行比较。第三，结核矿带内的所有生物多样性研究均使用传统的形态学方法来鉴定物种。但是，最近发展起来的分子方法（例如，利用脱氧核糖核酸序列中的遗传信息）表明，形态学技术往往低估了海洋生境中的物种数量，并高估物种分布。

7. 在尚未更好了解太平洋结核矿带的生物多样性程度和物种分布之前，无法预测结核采矿（或者其他大规模的人为扰动）对深海生物多样性的影响。例如，如果采矿区内的生物多样性程度很低，或者大多数物种分布与采矿区和潜在采矿扰动的规模相比很大，则结核采矿引起的物种消失的速率可能较低。

8. 在卡普兰项目中，科学家[1]使用先进的分子和形态学方法评价太平洋深海海底结核矿带下列三个主要动物群的生物多样性和地域范围：多毛目环节虫、线虫和

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1 主要调查人员包括：Craig R. Smith 博士（夏威夷大学，美利坚合众国 Manoa）；Gordon Paterson 博士、John Lambshead 博士和 Adrian Glover 博士（伦敦自然历史博物馆，联合王国）；Alex Rogers 博士（伦敦动物学会，联合王国）；Andrew Gooday 博士（国家海洋学中心，联合王国南汉普顿）；Hiroshi Kitazato 博士（日本海洋研究开发机构，日本）；Myriam Sibuet 博士、Joelle Galeron 博士和 Lenaick Menot 博士（法国海洋所，法国）。

原生动物有孔虫。这些群体共同构成深海海底沉积物中动物丰度和物种丰富度的 50 % 以上，代表了范围广泛的生态和生命史类型。项目的主要目标如下：

(a) 使用现代分子和形态学方法估计太平洋结核矿带内相距约 1500 公里的两到三个站点的多毛目环节虫、线虫和有孔虫物种的数量；

(b) 使用先进的分子和形态学技术评价多毛目环节虫、线虫和有孔虫动物的主要构成部分范围在 1000 至 3000 公里的物种重叠水平，并在可能时评价基因流动率；

(c) 向科学界和采矿管理界广泛传播研究结果，并就尽可能减少采矿给生物多样性带来的风险向国际海底管理局提出具体建议。

9. 为实现这些项目目标，参与项目的科学家使用特别的“脱氧核糖核酸便利型”技术在准备进行结核采矿的太平洋区域内相距约 1000 至 2000 公里的三个场址采集大型水底生物和小型水底生物样本。采样方案使用三支科考船，项目人员（每船 8 至 20 人）在海上航行 83 天，采集总共 40 个盒式岩芯采样器采集的样本和 32 个多芯采样器采集的样本。采集的有孔虫、线虫和多毛目环节虫样本随后运到美国、联合王国、日本和法国的实验室进行分选和详细的形态学和分子分析。在国际科学会议和研讨会上的 16 份论文和经同行审查的科学文献内的 20 份出版物中报告了这些分析、结果和综合情况。今后计划发表更多的论文和出版物。

三、结果

10. 研究结果表明，每个研究地点的所有三类生活在沉积物中的动物（即有孔虫、线虫和多毛目环节虫），均有未预见的高度物种多样性，而对其进行的采样工作仍然十分欠缺。在多毛目环节虫和线虫中，隐藏式物种形成（即存在原被鉴定为单一物种的多个物种）看来十分普遍。生境不同质的程度看来也比先前所知的程度高。研究者猜测，克拉里昂一克利珀顿区内一个场址中生活在沉积物中的有孔虫、线虫和多毛目环节虫（动物总量的一部分）的物种丰富度总量可轻易超过 1000 个物种。来自所有动物构成部分的结果显示，深海海底动物有自己的特点，即深海海底生境存在持续的物种辐射，而不仅仅是来自海洋边缘的非生殖性个体的汇槽。此外，还有大量证据表明，在里拉里昂一克利珀顿区 1000 至 3000 公里范围内，有孔虫和多毛目环节虫的群落结构存在显著不同。

11. 研究者的发现表明，应建立保护区，保护克拉里昂一克利珀顿区的生物多样性不受预计进行的结核采矿的影响。他们建议，应按以下方式建立保护区（管理局规章中称为“保全参比区”）：

(a) 应在克拉里昂一克利珀顿区的多个地点设立海洋保护区，至少应在采矿区的东部、中部和西部建立保护区；

(b) 鉴于赤道太平洋区域内生产率和群落结构的纬度梯度较大，海洋保护区应设计为保护克拉里昂一克利珀顿区整个宽度范围，即北纬 7 度至 17 度范围内的生物多样性；

(c) 海洋保护区应足够大，以便涵盖已知的克拉里昂一克利珀顿区海底生境类型的主要区域，包括有结核和无结核的深海海底高地、岩态海脊和海床以上高层不同的多种海山；

(d) 每个海洋保护区必须足够大，以便其大部分区域能够免受结核采矿活动的直接和间接影响，包括免受水体中和海床上的沉积物羽流带来的影响；

(e) 由于克拉里昂一克利珀顿区的海底过程和群落结构受到其上水体中各种过程的强烈影响，因此海洋保护区的管理工作极宜包括对深海海床到大洋表面的大量人类活动 (采矿、能源开发、废物处置和商业捕捞) 进行控制。这一建议符合基于生态系统的管理方法的概念。

12. 必须认识到，卡普兰项目提出的建议是基于关于克拉里昂一克利珀顿区生物多样性和物种分布的有限数据库，虽然这种数据库正在迅速扩大。即便如此，依据注重预防的方法，该项研究的结果表明，在数据不足以排除特定人类活动 (在此是结核采矿) 可能造成的环境损害的情况下，应以保守的方式管理该活动，以便确保环境得到保护。

四、今后的行动

13. 2007 年 10 月，包括参与卡普兰项目的一些主要研究者在内的一组科学家举行会议，以便就克拉里昂一克利珀顿区内有代表性的保护区网络的大小和位置的确定标准拟订一组初步建议。建议草稿将提交法律和技术委员会以及理事会第十四届会议。

14. 根据卡普兰项目的结果，管理局正在与海山海洋生物全球普查进行讨论，以便对海山动植物的遗传构成进行类似研究。

关于大陆架界限委员会和国际海洋法法庭席位分配问题的决定 (SPLOS/182)

（2008 年 6 月 13 日至 20 日纽约，《联合国海洋法公约》缔约国会议第十八次会议）

缔约国会议，

满意地注意到《联合国海洋法公约》缔约国数目稳步增加，回顾所有缔约国有责任忠实履行其根据《公约》承担的义务，

还回顾所有缔约国就席位分配问题达成普遍一致意见的重要性和惯例，又回顾《公约》关于大陆架界限委员会和国际海洋法法庭席位构成的附件二第 2 条和附件六第 2 和第 3 条，

回顾 2007 年 6 月 14 日和 18 日至 22 日在纽约举行的联合国海洋法公约缔约国第十七次会议期间通过的 2007 年 7 月 10 日 SPLOS/163 号决定，

确认需要按照《公约》规定的公平地域代表性和公平地域分配，就委员会和法庭的席位分配问题达成最新的一致意见，

审议了为反映缔约国数目增加的情况而在 SPLOS/L.56 和 SPLOS/L.57 号文件中提出的有关委员会和法庭席位分配问题的两项联合提案（见 SPLOS/163，附件一和二），

1. 决定第十九次缔约国会议将穷尽一切努力就大陆架委员会和海洋法法庭席位分配问题达成普遍一致意见；

2. 还决定第十九次缔约国会议开幕期间除其他外，根据 SPLOS/L.56 号文件所载亚洲和非洲缔约国的建议，就委员会和法庭的席位分配问题通过一项决定如下：

“缔约国会议，

“回顾所有缔约国有责任忠实履行其根据《联合国海洋法公约》承担的义务，

“还回顾 2007 年 6 月 14 日和 18 日至 22 日在纽约举行的联合国海洋法公约缔约国第十七次会议期间通过的 2007 年 7 月 10 日 SPLOS/163 号决定，

“认识到缔约国数目，特别是非洲和亚洲缔约国的数目已经大幅度增加，因此作出本决定，以满足改变大陆架界限委员会和国际海洋法法庭席位构成方面的

公平地域代表情况并使其具有一定确定性的需要，

“审议了非洲和亚洲缔约国为反映缔约国数目增加的情况而提出的有关大陆架界限委员会和国际海洋法法庭席位分配问题的两项联合提案（见 SPLOS/163，附件一和二），

“决定，

(a) 按照《公约》相关条款的规定分配大陆架界限委员会的席位，同时必须使每个区域集团至少有三个席位；将按照以下安排选出委员会成员：

（一）从非洲国家集团选出 5 名成员；

（二）从亚洲国家集团选出 5 名成员；

（三）从东欧国家集团选出 3 名成员；

（四）从拉丁美洲和加勒比国家集团选出 4 名成员；

（五）从西欧和其他国家集团选出 3 名成员；

（六）增设的一个委员会席位将在非洲和亚洲国家集团间轮流占有。在委员会下次选举中，亚洲将占有 6 个席位；在接下来的选举中，非洲将占有 6 个席位，以此类推；

(b) 按照《公约》相关条款的规定分配国际海洋法法庭的席位，同时必须使每个区域集团至少有三个席位；将按照以下安排选出法庭的法官：

（一）从非洲国家集团选出 5 名法官；

（二）从亚洲国家集团选出 5 名法官；

（三）从东欧国家集团选出 3 名法官；

（四）从拉丁美洲和加勒比国家集团选出 4 名法官；

（五）从西欧和其他国家集团选出 3 名法官；

（六）增设的一个法院席位将由非洲和亚洲国家集团轮流占有。在法院下次选举中，非洲将占有 6 个席位；在接下来的选举中，亚洲将占有 6 个席位，以此类推

(c) 上述安排将适用于今后的选举，但不妨碍因任何区域集团缔约国数目大幅度增加而需要作出新的安排”。

中日就东海问题达成原则共识 *

外交部发言人姜瑜 2008 年 6 月 18 日宣布，中日双方通过平等协商，就东海问题达成原则共识。

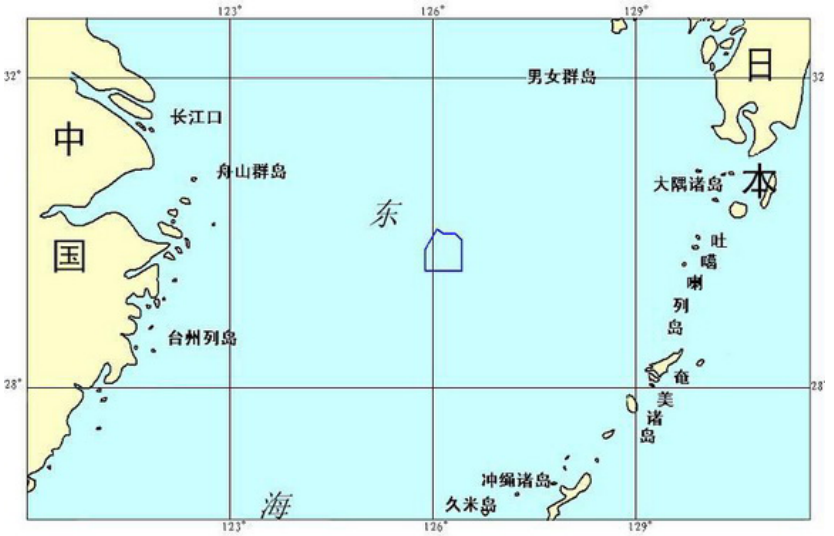
一、关于中日在东海的合作

为使中日之间尚未划界的东海成为和平、合作、友好之海，中日双方根据 2007 年 4 月中日两国领导人达成的共识以及 2007 年 12 月中日两国领导人达成的新共识，经过认真磋商，一致同意在实现划界前的过渡期间，在不损害双方法律立场的情况下进行合作。为此，双方迈出了第一步，今后将继续进行磋商。

二、中日关于东海共同开发的谅解

作为中日在东海共同开发的第一步，双方将推进以下步骤：

（一）由以下各坐标点顺序连线围成的区域为双方共同开发区块（附示意图）：



中日共同开发区块示意图

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* 中华人民共和国外交部网站 www.fmprc.gov.crl，访问于 2008 年 6 月 18 日。

1. 北纬 29°31'，东经 125°53'30"
2. 北纬 29°49'，东经 125°53'30"
3. 北纬 30°04'，东经 126°03'45"
4. 北纬 30°00'，东经 126°10'23"
5. 北纬 30°00'，东经 126°20'00"
6. 北纬 29°55'，东经 126°26'00"
7. 北纬 29°31'，东经 126°26'00"

（二）双方经过联合勘探，本着互惠原则，在上述区块中选择双方一致同意的地点进行共同开发。具体事宜双方通过协商确定。

（三）双方将努力为实施上述开发履行各自的国内手续，尽快达成必要的双边协议。

（四）双方同意，为尽早实现在东海其它海域的共同开发继续磋商。

三、关于日本法人依照中国法律参加春晓油气田开发的谅解

中国企业欢迎日本法人按照中国对外合作开采海洋石油资源的有关法律，参加对春晓现有油气田的开发。

中日两国政府对此予以确认，并努力就进行必要的换文达成一致，尽早缔结。双方为此履行必要的国内手续。

中华人民共和国船员服务管理规定

（2008 年 7 月 8 日交通运输部经第 8 次部务会议通过，自 2008 年 10 月 1 日起施行）

第一章 总则

第一条 为加强船员服务管理，规范船员服务行为，维护船员和船员服务机构的合法权益，根据《中华人民共和国劳动合同法》、《中华人民共和国船员条例》等法律、行政法规，制定本规定。

第二条 在中华人民共和国境内提供船员服务，适用本规定。

本规定所称船员服务，是指代理船员办理申请培训、考试、申领证书（包括外国船员证书）等有关手续，代理船员用人单位管理船员事务，为船舶提供配员等相关活动。

第三条 交通运输部主管船员服务工作。

中华人民共和国海事局负责统一实施船员服务管理工作。

海船船员服务管理工作由交通运输部直属海事管理机构具体负责；内河船舶船员服务管理工作由交通运输部直属海事管理机构、地方海事管理机构具体负责。

第四条 国家鼓励成立船员服务行业协会，规范行业行为，提高行业服务水平，增强行业自律能力。

第二章 船员服务机构资质

第五条 船员服务机构分为内河船舶船员服务机构和海船船员服务机构；海船船员服务机构分为甲级、乙级两类。

内河船舶船员服务机构，是指为内河船舶船员提供船员服务的机构。

甲级海船船员服务机构，是指为国际航行和国内航行海船船员提供各项船员服务的机构。

乙级海船船员服务机构，是指为国内航行海船船员提供船员服务的机构。

第六条 从事内河船舶船员服务业务的机构，应当符合下列条件：

（一）在中华人民共和国境内依法设立的法人；

（二）有不少于 100 平方米的固定办公场所；

（三）有 2 名以上具有内河一等、二等船舶高级船员任职资历的专职管理人员和 2 名以上专职业务人员；

（四）按照中华人民共和国海事局的规定，建立船员服务质量管理制度、人员和资源保障制度、教育培训制度、应急处理制度和服务业务报告制度等内河船舶船员服务管理制度。

第七条 从事甲级海船船员服务业务的机构，应当符合下列条件：

（一）在中华人民共和国境内依法设立的法人；

（二）有不少于 300 平方米的固定办公场所；

（三）有 2 名以上具有海船甲类一等高级船员任职资历的专职管理人员和 5 名以上专职业务人员；

（四）从事乙级海船船员服务业务 3 年以上，并且最近 3 年来为国内沿海船舶提供配员 500 人以上；

（五）按照中华人民共和国海事局的规定，建立船员服务质量管理制度、人员和资源保障制度、教育培训制度、应急处理制度和服务业务报告制度等海船船员服务管理制度。

第八条 从事乙级海船船员服务业务的机构，应当符合下列条件：

（一）在中华人民共和国境内依法设立的法人；

（二）有不少于 150 平方米的固定办公场所；

（三）有 2 名以上具有海船甲类、 乙类和丙类一等高级船员任职资历的专职管理人员和 2 名以上专职业务人员；

（四）按照中华人民共和国海事局的规定，建立船员服务质量管理制度、人员和资源保障制度、教育培训制度、应急处理制度和服务业务报告制度等海船船员服务管理制度。

第九条 申请从事船员服务业务的机构，应当提交下列材料：

（一）设立船员服务机构的申请文书；

（二）企业法人营业执照复印件；

（三）专职管理人员的船员适任证书复印件或者相关证明材料；

（四）拟设立机构的人员组成、职责等情况的说明材料；

（五）船员服务相关管理制度文件；

（六）为国内沿海船舶提供配员的证明材料（仅适用甲级海船船员服务机构申请人）；

（七）其他相关证明材料。

申请人在提供企业法人营业执照和专职管理人员的船员适任证书复印件时，应当向海事管理机构出示原件。

第十条 船员服务机构的申请和受理工作应当按照《交通行政许可实施程序

规定》的有关要求办理。

第十一条 申请甲级海船船员服务业务，应当向中华人民共和国海事局提出。

申请乙级海船船员服务业务，应当向该机构工商注册地的交通运输部直属海事管理机构提出，该机构工商注册地没有交通运输部直属海事管理机构的，应当向中华人民共和国海事局指定的交通运输部直属海事管理机构提出。

申请内河船舶船员服务业务，应当向该机构工商注册地的交通运输部直属海事管理机构或者地方海事管理机构提出。

海事管理机构应当自受理申请之日起30日内作出批准或者不予批准的决定。予以批准的，发给《船员服务机构许可证》;不予批准的，书面通知申请人并说明理由。

第十二条 《船员服务机构许可证》上应当载明船员服务机构编号、名称、法定代表人姓名、地址、服务范围、有效期以及其他有关事项。

《船员服务机构许可证》的有效期为 5 年。

第十三条 《船员服务机构许可证》记载的事项发生变更的，船员服务机构应当到发证机构办理变更手续。变更服务范围的，应当重新提出申请。

第十四条 《船员服务机构许可证》实施中期核查制度。

中期核查应当自《船员服务机构许可证》发证之日起第 2 周年至第 3 周年之间进行。

申请《船员服务机构许可证》中期核查，船员服务机构应当提交下列材料：

（一）中期核查申请文书；

（二）船员服务机构的资质符合情况说明材料；

（三）开展船员服务业务的情况说明

（四）其他证明材料。

中期核查合格的，海事管理机构应当在《船员服务机构许可证》上进行签注；中期核查不合格的，海事管理机构应当责令限期改正。

第十五条 船员服务机构应当在《船员服务机构许可证》届满之日 30 日以前申请办理《船员服务机构许可证》延续手续。

申请办理《船员服务机构许可证》延续手续，应当提交下列材料：

（一）《船员服务机构许可证》延续申请；

（二）本规定第九条第一款第（二）项至第（五）项、第二款规定的材料。

第十六条 有下列情形之一的，海事管理机构应当办理《船员服务机构许可证》注销手续：

（一）申请注销；

（二）法人依法终止；

（三）《船员服务机构许可证》被依法撤销或者吊销。

第三章　船员服务机构的权利与义务

第十七条　依法与船员签订劳动合同的单位，为船员用人单位。使用未与船员用人单位解除劳动合同船员的单位，为船员用工单位。

船员服务机构向船员用人单位或者船员用工单位提供船员服务，应当签订船舶配员服务协议或者劳务派遣协议。船舶配员服务协议应当明确船员的劳动报酬、工作时间和休息休假、遣返方式和费用、意外伤亡保险和社会保险、违反协议的责任等，并将船舶配员服务协议的内容告知有关船员。劳务派遣协议应当约定被派遣船员岗位和人员数量、派遣期限、劳动报酬、意外伤亡保险和社会保险费以及违反协议的责任等，并将船员劳务派遣协议的内容告知被派遣船员。

船员服务机构为已经与航运公司或者其他单位签订劳动合同的船员提供船舶配员服务的，应当事先经过船员用人单位同意。

船员服务机构提供船舶配员服务，应当督促船员用人单位与船员依法订立劳动合同。船员用人单位未与船员签订劳动合同的，船员服务机构应当终止向船员用人单位提供船员服务。

第十八条　船员服务机构向船员提供船员服务业务，应当与船员签订船员服务协议。

船员服务机构不得为未经船员注册的人员提供船舶配员服务。

船员服务机构不得克扣船员用人单位、船员用工单位按照船舶配员服务协议支付给船员的劳动报酬。

为与船员服务机构签订劳动合同的船员提供船舶配员服务的，船员服务机构为船员用人单位，船员服务机构应当同时履行船员用人单位的责任和义务。

第十九条　船员服务机构提供船员服务，应当遵守国家船员管理、劳动和社会保障的有关规定，履行诚实守信义务。

船员服务机构应当向社会公布服务内容和收费标准，不得重复或者超过标准收取费用。

船员服务机构在提供船舶配员服务时，应当向船员用人单位或者船员用工单位以及有关船员提供全面、真实的信息。不得提供虚假信息，不得损害船员的合法权益。

第二十条　船员服务机构应当为其服务的船员取得法定和约定的劳动和社会保障权利提供相应的支持。

船员发生失踪、死亡或者其他意外伤害的，船员服务机构应当配合船员用人单位做好相应的善后工作。

第二十一条　船员服务机构不得有下列行为：

（一）以欺骗、贿赂、提供虚假材料等非法手段取得《船员服务机构许可证》；

（二）伪造、变造、倒卖、出租、出借《船员服务机构许可证》，或者以其他形式非法转让《船员服务机构许可证》；

（三）超出《船员服务机构许可证》服务范围提供船员服务；

（四）以虚假资历、虚假证明等手段向海事管理机构申请办理船员培训、考试、申领证书等有关业务；

（五）为未取得船员服务机构资质而从事船员服务的机构代办各类船员服务业务；

（六）严重侵害船员的合法权益，或者当所服务船员的合法权益受到严重侵害时不履行法定义务。

第二十二条 境外船员用人单位不得在中华人民共和国境内直接招用中国籍船员，应当通过符合本规定资质条件的船员服务机构办理。

第二十三条 船员服务机构应当建立船员服务信息档案，记载服务船员在船员服务期间发生的下列事宜，并保持船员服务信息记载的真实、连续和完整：

（一）船上任职资历；

（二）基本安全培训、适任培训和特殊培训情况；

（三）适任状况、安全记录和违章记录；

（四）劳动合同、船员服务协议、船舶配员服务协议。

船员服务机构应当建立船员名册，记载服务船员的姓名、所服务的船公司和船舶的名称、船籍港、所属国家等情况，并定期以书面或者电子方式向海事管理机构备案。

第四章 监督检查

第二十四条 海事管理机构应当建立健全船员服务机构监督检查制度，加强对船员服务机构诚实守信以及保护船员合法权益等情况的监督检查。

第二十五条 海事管理机构应当建立船员服务机构管理档案，记载船员服务机构的名称、地址、法定代表人、服务范围、业务开展情况和遵纪守法情况等。

第二十六条 海事管理机构应当建立船员服务机构名单公布制度，对不依法履行相应职责和承担法律义务、侵害船员合法权益或者不诚实守信的船员服务机构，定期向社会公布。

第二十七条 船员服务机构不再具备规定条件的， 由海事管理机构责令限期改正；逾期不改正的，海事管理机构应当撤销相应的船员服务机构许可决定，并依法办理《船员服务机构许可证》的注销手续。

第五章　法律责任

第二十八条　违反本规定，未经批准擅自从事船员服务的，由海事管理机构责令改正，处5万元以上25万元以下罚款；有违法所得的，还应当没收违法所得。

本规定所称“未经批准擅自从事船员服务”，是指下列行为：

（一）未取得《船员服务机构许可证》擅自从事船员服务业务的；

（二）以欺骗、贿赂、提供虚假材料等非法手段取得《船员服务机构许可证》的；

（三）超出《船员服务机构许可证》服务范围提供船员服务的。

第二十九条　违反本规定，船员服务机构未将其招用或者管理的船员的姓名、所服务的船公司和船舶的名称、所属国家等情况定期向海事管理机构备案的，由海事管理机构责令改正，处5000元以上2万元以下罚款。

第三十条　违反本规定，船员服务机构在提供船员服务时，提供虚假信息，欺诈船员的，由海事管理机构责令改正，处3万元以上15万元以下罚款；情节严重的，并给予暂停《船员服务机构许可证》6个月以上2年以下直至吊销《船员服务机构许可证》的处罚。

本规定所称“提供虚假信息，欺诈船员”，是指船员服务机构的下列行为：

（一）未向社会公布服务内容、收费项目和标准的；

（二）重复或者超过标准收取费用，或者在公布的收费项目之外收取费用；

（三）未将船舶配员服务协议的相关内容告知有关船员的；

（四）克扣按照船舶配员服务协议应当支付给船员的劳动报酬的；

（五）有其他欺诈船员行为的。

第三十一条　违反本规定的规定，船员服务机构在船员用人单位未与船员订立劳动合同的情况下，向船员用人单位提供船员的， 由海事管理机构责令改正，处5万元以上25万元以下罚款；情节严重的，给予暂停《船员服务机构许可证》6个月以上2年以下直至吊销《船员服务机构许可证》的处罚。

第三十二条　违反本规定的规定，船员服务机构有下列行为之一的，由海事管理机构责令改正，处1万元以上3万元以下罚款：

（一）为未经船员注册的人员提供船舶配员服务，或者未经船员用人单位同意，为尚未解除劳动合同关系的船员提供船舶配员服务；

（二）伪造、变造、倒卖、出租、出借《船员服务机构许可证》，或者以其他形式非法转让《船员服务机构许可证》；

（三）以虚假资历、虚假证明等手段向海事管理机构申请办理船员培训、考试、申领证书等有关业务；

（四）严重侵害船员的合法权益，或者当所服务船员的合法权益受到严重侵

害时不履行法定义务。

第三十三条 海事管理机构工作人员有下列情形之一的，依法给予行政处分：

（一）违反规定给予船员服务机构许可；

（二）不依法履行监督检查职责；

（三）不依法实施行政强制或者行政处罚；

（四）滥用职权、玩忽职守的其他行为。

第六章 附则

第三十四条 为航行于香港特别行政区、澳门特别行政区和台湾地区的船舶提供船员服务的，按照为国际航行船舶提供船员服务管理，应当取得《甲级海船船员服务机构许可证》。

第三十五条 本规定施行前已开展船员服务的机构，符合本规定第七条第（一）至第（三）项、第（五）项规定，并且最近 3 年来为外国籍船舶提供配员 300 人以上的，可以按照本规定申请甲级海船船员服务机构资质。

第三十六条 本规定自 2008 年 10 月 1 日起施行。

游艇安全管理规定

（2008 年 7 月 8 日交通运输部经第 8 次部务会议通过，自 2009 年 1 月 1 日起施行）

第一章　总则

第一条　为了规范游艇安全管理，保障水上人命和财产安全，防治游艇污染水域环境，促进游艇业的健康发展，根据水上交通安全管理和防治船舶污染水域环境的法律、行政法规，制定本规定。

第二条　在中华人民共和国管辖水域内游艇航行、停泊等活动的安全和防治污染管理适用本规定。

本规定所称游艇，是指仅限于游艇所有人自身用于游览观光、休闲娱乐等活动的具备机械推进动力装置的船舶。

本规定所称游艇俱乐部，是指为加入游艇俱乐部的会员提供游艇保管及使用服务的依法成立的组织。

第三条　中华人民共和国海事局统一实施全国游艇水上交通安全和防治污染水域环境的监督管理。

各级海事管理机构依照职责，具体负责辖区内游艇水上交通安全和防治污染水域环境的监督管理。

第二章　检验、登记

第四条　游艇应当经船舶检验机构按照交通运输部批准或者认可的游艇检验规定和规范进行检验，并取得相应的船舶检验证书后方可使用。

第五条　游艇有下列情形之一的，应当向船舶检验机构申请附加检验：

（一）发生事故，影响游艇适航性能的；

（二）改变游艇检验证书所限定类别的；

（三）船舶检验机构签发的证书失效的；

（四）游艇所有人变更、船名变更或者船籍港变更的；

（五）游艇结构或者重要的安全、防污染设施、设备发生改变的。

第六条 在中华人民共和国管辖水域航行、停泊的游艇，应当取得船舶国籍证书。未持有船舶国籍证书的游艇，不得在中华人民共和国管辖水域航行、停泊。

申请办理船舶国籍登记，游艇所有人应当持有船舶检验证书和所有权证书，由海事管理机构审核后颁发《中华人民共和国船舶国籍证书》。

长度小于 5 米的游艇的国籍登记，参照前款的规定办理。

第三章 游艇操作人员培训、考试和发证

第七条 游艇操作人员应当经过专门的培训、考试，具备与驾驶的游艇、航行的水域相适应的专业知识和技能，掌握水上消防、救生和应急反应的基本要求，取得海事管理机构颁发的游艇操作人员适任证书。

未取得游艇操作人员适任证书的人员不得驾驶游艇。

第八条 申请游艇操作人员适任证书，应当符合下列条件：

（一）年满 18 周岁未满 60 周岁；

（二）视力、色觉、听力、口头表达、肢体健康等符合航行安全的要求；

（三）通过规定的游艇操作人员培训，并经考试合格。

第九条 申请游艇操作人员适任证书的，应当通过中华人民共和国海事局授权的海事管理机构组织的考试。

申请游艇操作人员适任证书的，应到培训或者考试所在地的海事管理机构办理，并提交申请书以及证明其符合发证条件的有关材料。

经过海事管理机构审核符合发证条件的，发给有效期为 5 年的相应类别的游艇操作人员适任证书。

第十条 游艇操作人员适任证书的类别分为海上游艇操作人员适任证书和内河游艇操作人员适任证书。

第十一条 持有海船、内河船舶的船长、驾驶员适任证书或者引航员适任证书的人员，按照游艇操作人员考试大纲的规定，通过相应的实际操作培训，可以分别取得海上游艇操作人员适任证书和内河游艇操作人员适任证书。

第十二条 游艇操作人员适任证书的有效期不足 6 个月时，持证人应当向原发证海事管理机构申请办理换证手续。符合换证条件中有关要求的，海事管理机构应当给予换发同类别的游艇操作人员适任证书。

游艇操作人员适任证书丢失或者损坏的，可以按照规定程序向海事管理机构申请补发。

第十三条 依法设立的从事游艇操作人员培训的机构，应当具备相应的条件，并按照国家有关船员培训管理规定的要求，经过中华人民共和国海事局批准。

第四章　航行、停泊

第十四条　游艇在开航之前，游艇操作人员应当做好安全检查，确保游艇适航。

第十五条　游艇应当随船携带有关船舶证书、文书及必备的航行资料，并做好航行等相关记录。

游艇应当随船携带可与当地海事管理机构、游艇俱乐部进行通信的无线电通信工具，并确保与岸基有效沟通。

游艇操作人员驾驶游艇时应当携带游艇操作人员适任证书。

第十六条　游艇应当按照《船舶签证管理规则》的规定，办理为期 12 个月的定期签证。

第十七条　游艇应当在其检验证书所确定的适航范围内航行。

游艇所有人或者游艇俱乐部在第一次出航前，应当将游艇的航行水域向当地海事管理机构备案。游艇每一次航行时，如果航行水域超出备案范围，游艇所有人或者游艇俱乐部应当在游艇出航前向海事管理机构报告船名、航行计划、游艇操作人员或者乘员的名单、应急联系方式。

第十八条　游艇航行时，除应当遵守避碰规则和当地海事管理机构发布的特别航行规定外，还应当遵守下列规定：

（一）游艇应当避免在恶劣天气以及其他危及航行安全的情况下航行；

（二）游艇应当避免在船舶定线制水域、主航道、锚地、养殖区、渡口附近水域以及交通密集区及其他交通管制水域航行，确需进入上述水域航行的，应当听从海事管理机构的指挥，并遵守限速规定；游艇不得在禁航区、安全作业区航行；

（三）不具备号灯及其他夜航条件的游艇不得夜航；

（四）游艇不得超过核定乘员航行。

第十九条　游艇操作人员不得酒后驾驶、疲劳驾驶。

第二十条　游艇应当在海事管理机构公布的专用停泊水域或者停泊点停泊。

游艇的专用停泊水域或者停泊点，应当符合游艇安全靠泊、避风以及便利人员安全登离的要求。

游艇停泊的专用水域属于港口水域的，应当符合有关港口规划。

第二十一条　游艇在航行中的临时性停泊，应当选择不妨碍其他船舶航行、停泊、作业的水域。不得在主航道、锚地、禁航区、安全作业区、渡口附近以及海事管理机构公布的禁止停泊的水域内停泊。

第二十二条　在港口水域内建设游艇停泊码头、防波堤、系泊设施的，应当按照《港口法》的规定申请办理相应许可手续。

第二十三条 航行国际航线的游艇进出中华人民共和国口岸，应当按照国家有关船舶进出口岸的规定办理进出口岸手续。

第二十四条 游艇不得违反有关防治船舶污染的法律、法规和规章的规定向水域排放油类物质、生活污水、垃圾和其他有毒有害物质。

游艇应当配备必要的污油水回收装置、垃圾储集容器，并正确使用。

游艇产生的废弃蓄电池等废弃物、油类物质、生活垃圾应当送交岸上接收处理，并做好记录。

第五章 安全保障

第二十五条 游艇的安全和防污染由游艇所有人负责。游艇所有人应当负责游艇的日常安全管理和维护保养，确保游艇处于良好的安全、技术状态，保证游艇航行、停泊以及游艇上人员的安全。

委托游艇俱乐部保管的游艇，游艇所有人应当与游艇俱乐部签订协议，明确双方在游艇航行、停泊安全以及游艇的日常维护、保养及安全与防污染管理方面的责任。

游艇俱乐部应当按照海事管理机构的规定及其与游艇所有人的约定，承担游艇的安全和防污染责任。

第二十六条 游艇俱乐部应当具备法人资格，并具备下列安全和防污染能力：

（一）建立游艇安全和防污染管理制度，配备相应的专职管理人员；

（二）具有相应的游艇安全停泊水域，配备保障游艇安全和防治污染的设施，配备水上安全通信设施、设备；

（三）具有为游艇进行日常检修、维护、保养的设施和能力；

（四）具有回收游艇废弃物、残油和垃圾的能力；

（五）具有安全和防污染的措施和应急预案，并具备相应的应急救助能力。

第二十七条 游艇俱乐部依法注册后，应当报所在地直属海事局或者省级地方海事局备案。

交通运输部直属海事局或者省级地方海事局对备案的游艇俱乐部的安全和防污染能力应当进行核查。具备第二十六条规定能力的，予以备案公布。

第二十八条 游艇俱乐部应当对其会员和管理的游艇承担下列安全义务：

（一）对游艇操作人员和乘员开展游艇安全、防治污染环境知识和应急反应的宣传、培训和教育；

（二）督促游艇操作人员和乘员遵守水上交通安全和防治污染管理规定，落实相应的措施；

（三）保障停泊水域或者停泊点的游艇的安全；

（四）核查游艇、游艇操作人员的持证情况，保证出航游艇、游艇操作人员持有相应有效证书；

（五）向游艇提供航行所需的气象、水文情况和海事管理机构发布的航行通（警）告等信息服务；遇有恶劣气候条件等不适合出航的情况或者海事管理机构禁止出航的警示时，应当制止游艇出航并通知已经出航的游艇返航；

（六）掌握游艇的每次出航、返航以及乘员情况，并做好记录备查；

（七）保持与游艇、海事管理机构之间的通信畅通；

（八）按照向海事管理机构备案的应急预案，定期组织内部管理的应急演练和游艇成员参加的应急演习。

第二十九条 游艇必须在明显位置标明水上搜救专用电话号码、当地海事管理机构公布的水上安全频道和使用须知等内容。

第三十条 游艇遇险或者发生水上交通事故、污染事故，游艇操作人员及其他乘员、游艇俱乐部以及发现险情或者事故的船舶、人员应当立即向海事管理机构报告。游艇俱乐部应当立即启动应急预案。在救援到达之前，游艇上的人员应当尽力自救。

游艇操作人员及其他乘员对在航行、停泊时发现的水上交通事故、污染事故、求救信息或者违法行为应当及时向海事管理机构报告。需要施救的，在不严重危及游艇自身安全的情况下，游艇应当尽力救助水上遇险的人员。

第六章 监督检查

第三十一条 海事管理机构应当依法对游艇、游艇俱乐部和游艇操作人员培训机构实施监督检查。游艇俱乐部和游艇所有人应当配合，对发现的安全缺陷和隐患，应当及时进行整改、消除。

第三十二条 海事管理机构发现游艇违反水上交通安全管理和防治船舶污染环境管理秩序的行为，应当责令游艇立即纠正；未按照要求纠正或者情节严重的，海事管理机构可以责令游艇临时停航、改航、驶向指定地点、强制拖离、禁止进出港。

第三十三条 海事管理机构发现游艇俱乐部不再具备安全和防治污染能力的，应当责令其限期整改；对未按照要求整改或者情节严重的，可以将其从备案公布的游艇俱乐部名录中删除。

第三十四条 海事管理机构的工作人员依法实施监督检查，应当出示执法证件，表明身份。

第七章 法律责任

第三十五条 违反本规定，未取得游艇操作人员培训许可擅自从事游艇操作人员培训的，由海事管理机构责令改正，处 5 万元以上 25 万元以下罚款；有违法所得的，还应当没收违法所得。

第三十六条 游艇操作人员培训机构有下列行为之一的，由海事管理机构责令改正，可以处 2 万元以上 10 万元以下罚款；情节严重的，给予暂扣培训许可证 6 个月以上 2 年以下直至吊销的处罚：

（一）不按照本规定要求和游艇操作人员培训纲要进行培训，或者擅自降低培训标准；

（二）培训质量低下，达不到规定要求。

第三十七条 违反本规定，在海上航行的游艇未持有合格的检验证书、登记证书和必备的航行资料的，海事管理机构责令改正，并可处以 1000 元以下罚款，情节严重的，海事管理机构有权责令其停止航行；对游艇操作人员，可以处以 1000 元以下罚款，并扣留游艇操作人员适任证书 3 至 12 个月。

违反本规定，在内河航行的游艇未持有合格的检验证书、登记证书的，由海事管理机构责令其停止航行，拒不停止的，暂扣游艇；情节严重的，予以没收。

第三十八条 违反本规定，游艇操作人员操作游艇时未携带合格的适任证书的，由海事管理机构责令改正，并可处以 2000 元以下罚款。

第三十九条 游艇操作人员持有的适任证书是以欺骗、贿赂等不正当手段取得的，海事管理机构应当吊销该适任证书，并处 2000 元以上 2 万元以下的罚款。

第四十条 违反本规定，游艇有下列行为之一的，由海事管理机构责令改正，并可处以 1000 元以下罚款：

（一）未在海事管理机构公布的专用停泊水域或者停泊点停泊，或者临时停泊的水域不符合本规定的要求；

（二）游艇的航行水域超出备案范围，而游艇所有人或者游艇俱乐部未在游艇出航前将船名、航行计划、游艇操作人员或者乘员的名单、应急联系方式等向海事管理机构备案。

第四十一条 其他违反本规定的行为，按照有关法律、行政法规、规章进行处罚。

第四十二条 海事管理机构工作人员玩忽职守、徇私舞弊、滥用职权的，应当依法给予行政处分。

第八章　附则

第四十三条　游艇从事营业性运输，应当按照国家有关营运船舶的管理规定，办理船舶检验、登记和船舶营运许可等手续。

第四十四条　游艇应当按照国家的规定，交纳相应的船舶税费和规费。

第四十五条　乘员定额 12 人以上的游艇，按照客船进行安全监督管理。

第四十六条　本规定自 2009 年 1 月 1 日起施行。

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*，以下简称《评论》) 是全国性的海洋法领域优秀学术著述的汇辑，着重研究与海洋相关的法律与政策，秉承“海纳百川，有容乃大”的精神，力求吸取国内外该领域的一切先进成果。同时在现有法学学科划分的基础上，打破学科藩篱，将视野拓展到一切关于海洋的法学理论、司法实践以及法律运作实务。本刊对于理论探索与实证究并重，以期推动海洋相关法律科学的发展，为各位专家学者提供学术研究和交流的平台。

《评论》由厦门大学法学院以及厦门大学海洋政策与法律中心（Xiamen University Center for Oceans Policy and Law, XMU-COPL）主办，由（香港）中国评论文化有限公司出版，每年两期。为此，热忱欢迎各位学界同仁及实务界人士不吝赐稿，并立稿约如下：

一、来稿形式不限，学术专论、评论、判解研究、译作等均可，篇幅长短不拘，语言限于中文或英文，且须同一语言下未曾在任何纸质和电子媒介上发表。

二、来稿请注明作者姓名、学位、工作单位及职务、职称、研究领域和通讯方式等。编辑部在收到来稿两个月内将安排匿名审稿。届时未接到用稿通知者，作者可自做他用。来稿一律不退，请作者自留底稿。

三、来稿须严格遵守学术规范，来稿格式参见后附《〈中国海洋法学评论〉书写技术规范》。若文中引征网上文献资料，应将该页面另存为独立文档，发送至编辑部邮箱或者打印后寄送《评论》编辑部，以备查阅。

四、译作请附寄原文，并附作者或出版者的翻译书面授权许可。译者需保证该译本未侵犯作者或出版者的任何权利，并在可能的损害产生时自行承担损害赔偿责任。《评论》编辑部及其任何成员不承担由此产生的任何责任。

五、来稿文责自负，除非作者特别声明，《评论》编辑部保留对来稿进行技术性加工处理的权利。

六、为适应我国信息化建设，扩大《评论》及作者知识信息交流渠道，本书被 CNKI《中国优秀法律学术论文集全文数据库》收录，其作者著作权使用费与本书稿酬一次性给付，并免费提供作者文章引用统计分析资料。除非作者特别声明，所有来稿均视为同意被同步编入该数据库。

七、《评论》实行双向匿名审稿制度。来稿一经刊用，即付稿酬，并提供样书两册，无需版面费。

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《中国海洋法学评论》书写技术规范

为了统一《中国海洋法学评论》来稿格式，特制定本规范：

一、书写格式

1. 来稿由题目（中英文）、作者姓名及简介、内容摘要、关键词和正文构成。
2. 来稿正文各层次标示顺序按一、（一）、1、（1）、①、A、a 等编排。

二、注释

1. 注释采用页下重新计码制：全文以页下脚注形式重新编排，注释码置于标点符号之后。

2. 引用中文著作、辞书、汇编等的注解格式为：

（1）傅崐成著：《国际海洋法——衡平划界论》，台北：三民书局 1992 年版，第 118 页。

（2）魏敏主编：《海洋法》（高等学校法学教材），法律出版社 1987 年版，第 24 页。——教材应列明为何种教材。

（3）国家海洋局政策法规办公室编：《中华人民共和国海洋法规选编》，海洋出版社 2001 年第 3 版，第 56 页。——不是初版的著作应注明“修订版”或“第 2 版”等。

3. 引用中文译著的注解格式为：

（1）巴里•布赞（Barry Buzan）著，时富鑫译：《海底政治》，三联书店 1981 年版，第 78 页。

（2）联合国新闻部编，高之国译：《〈联合国海洋法公约〉评介》，海洋出版社 1986 年版，第 67 页。

4. 引用中文论文的注解格式为：

（1）傅崐成：《中国周边大陆架的划界方法与问题》，载于《中国海洋大学学报（社会科学版）》2004 年第 3 期，第 5 页。

（2）司玉琢、朱曾杰：《有关海事国际公约与国内法关系的立法建议》，载于《海商法年刊》1999 年卷，大连海事大学出版社 2000 年版，第 5 页。

（3）傅崐成：《联合国教科文组织 2001 年〈水下文化遗产保护公约〉评析》，

载于厦门大学海洋法律研究中心编：《纪念〈联合国海洋法公约〉签署 20 周年学术研讨会论文集》（2002 年），第 58 页。——载于论文集中的论文。

（4）褚晓琳、傅崐成：《两岸合作开发南海渔业资源规划研究》，载于《中国海洋法学评论》2012 年第 2 期，第 7 页。

5．引用中译论文的注解格式为：

中川淳司：《生物多样性公约与国际法上的技术规限》（钱水苗译、林来梵校），载于《环球法律评论》2003 年第 2 期，第 248~249 页。

6．引用外文著作等注解格式为：

（1）Christopher Hill, *Maritime Law*, 3rd ed., London: Lloyd's of London Press Ltd, 1989, p. 69.

（2）Connie Peck and Yoy S. Lee ed., *Increasing the Effectiveness of the International Court of Justice*, Hague: Martinus Nijhoff Publishers, 1997, pp. 109~110. —— 编著应以 "ed." 标出。

7．引用外文论文的注解格式为：

Jonathan I. Charney, Compromise Clauses and the Jurisdiction of the ICJ, *American Journal of International Law*, Vol. 81, 1987, pp. 855~856.

8．引用网上资料的注解格式为：

（1）郭文路：《传统捕鱼权和专属经济区制度》，下载于 http://www.riel.whu.edu.cn/lunwenshow.asp?id=709，2004 年 5 月 11 日。（此处标明的日期为引用者上网查询的日期）

（2）John Hare, Maritime Law Update South Africa 2002, at http://www.ports.co.za/legalnews/article_0732.html, 14 May 2004.

9．引用报纸的注解格式为：

（1）王曙光：《海洋开发关乎民族复兴》，载于《人民日报》2003 年 4 月 28 日第 11 版。

（2）《中方重申钓鱼岛问题原则立场》（新华社北京 12 月 26 日电），载于《人民日报》2003 年 12 月 27 日第 3 版。

10．引用法条的注解格式为：

《中华人民共和国海洋环境保护法》第 11 条第 2 款。——条文用阿拉伯数字表示。

三、数字

1. 年、月、日、分数、百分数、比例、带计量单位的数字、年龄、年度、注码、图号、参考书目的版次、卷次、页码等，均用阿拉伯数字。万以下表示数量的数字，直接

用阿拉伯数字写出，如 1458 等；万以上的数字以万或亿为单位，如 9 万、10 亿等。

2. 年份一般不用简写，如：1996 年不应简作 96 年。

3. 表示数值范围的起讫用“～”表示，如第 10 ~15 页；表示时间的起讫用“－”表示，如 1980 年－ 1982 年，1990 年 7 月－ 8 月。

四、图表

1. 表格规范：表的顺序号用阿拉伯数字，表号与表题空一个汉字位置，表题末不加标点。表题置于表格正上方，表内数据用阿拉伯数字。

2. 图的规范：图的顺序号用阿拉伯数字，图号与图题空一个汉字位置，图题末不加标点。图题置于图的正下方。

《中国海洋法学评论》编辑部编订

Proliferation Security Initiative: Challenges to and Implications on International Laws

YANG Zewei*

Abstract: The Proliferation Security Initiative (PSI) is a loose association of countries led by the United States in an effort to prevent the trafficking of weapons of mass destruction (WMD) by land, sea and air to countries suspected of proliferation. The PSI's legal basis is provided in international instruments such as the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the United Nations Security Council Resolution 1540(2004), and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). However, the PSI as a reflection of the international community's consensus on nonproliferation, has posed challenges to contemporary international law, especially the law of the sea. China's entry into the PSI will enable it to enhance its image as a responsible great power and participate in the decision making process.

Key Words: Proliferation Security Initiative; International law; Weapons of mass destruction; United Nations Convention on the Law of the Sea; Charter of the United Nations

In May 2003, during his visit to Krakow, Poland, former United States President Bush claimed: "The greatest threat to peace is the spread of nuclear, chemical, and biological weapons. And we must work together to stop proliferation… When weapons of mass destruction (WMD) or their components are in transit, we

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must have the means and authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative (PSI)."[1] Although the PSI has made some progress, a great difference of opinion remains among the international community on the legal basis of the PSI and its implications for international law. In addition, the prospect of the PSI and China's attitude toward it are matters of particular concern.

I. What is the PSI?

A. The Establishment of the PSI

In December 2002, the Spanish navy interdicted a cargo ship *So San* sailing for Yemen on the high seas 600 nautical miles off the Yemenis coast. Underneath the sacks of cement they found fifteen Scud tactical ballistic missiles. Although the cargo ship failed to show a national flag, and attempted to avoid inspection, Spain and the US allowed the ship to continue because there were no stipulations on arms embargoes prohibiting Yemen from purchasing missiles from North Korea in contemporary international law. Furthermore, Yemen claimed its purchase of these missiles was an effort to meet its self-defense needs.[2] This incident intensified the American concern over the potential for North Korea to proliferate WMD and related technologies, and in some way directly promoted the establishment of the PSI.

B. The Purpose and Principles of the PSI

In 2003, John R. Bolton, then Under Secretary of State, said in his testimony before the House International Relations Committee that the US wishes to "work with other concerned States to develop new means to disrupt the proliferation trade at sea, in the air, and on land. The initiative reflects the need for a more dynamic, proactive approach to the global proliferation problem. It envisions partnerships of States working in concert, employing their national capabilities

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1 Daniel H. Joyner, The Proliferation Security Initiative: Nonproliferation, Counter-proliferation, and International Law, *Yale Journal of International Law*, Vol. 30, 2005, pp. 507~508.

2 Michael Byers, Policing the High Seas: the Proliferation Security Initiative, *American Journal of International Law*, Vol. 98, 2004, p. 526.

to develop a broad range of legal, diplomatic, economic, military and other tools to interdict threatening shipments of WMD – and missile-related equipment and technologies."[3]

1. The Purpose of the PSI

The PSI aims to complement existing international arms control treaties and arrangements by creating a loose partnership of countries which are committed to non-proliferation of WMD to better combat the increasingly serious problem of the proliferation of WMD and their delivery systems and related materials.[4] Therefore, the PSI is "an activity, not an organization, and as such consists of an ad hoc coalition of States rather than a formal membership."[5]

2. The Principles of the PSI

In accordance with the Statement of Interdiction Principles issued by the White House, Office of the Press Secretary in September 2003, the interdiction principles proposed by the PSI are listed as follows:

> *1. Undertake effective measures, either alone or in concert with other States, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from States and non-State actors of proliferation concern. "States or non-State actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (a) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (b) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials. 2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other States as*

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3 John R. Bolton (Under Secretary of State for Arms Control and International Security), U.S. Efforts to Stop the Spread of Weapons of Mass Destruction: Testimony before the House Committee on International Relations, 108th Congress, 2003; Daniel H. Joyner, The Proliferation Security Initiative: Nonproliferation, Counter-proliferation, and International Law, *Yale Journal of International Law*, Vol. 30, 2005, p. 510.

4 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy,* Vol. 14, 2004—2005, p. 255.

5 Andreas Persbo and Ian Davis, Sailing into Uncharted Waters? The Proliferation Security Initiative and the Law of the Sea, at http://www.basicint.org/pubs/research/04psi.htm, 4 June 2008.

part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts. 3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments. 4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks." [6]

C. The Practice of the PSI

The eleven original participating States of PSI are Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. Canada, Demark, Norway and Singapore joined the PSI in December 2003. The Czech Republic and Russia joined in the first half of 2004, with New Zealand, Greece, and Thailand joining in 2005. The US signed bilateral boarding agreements with flag-of-convenience States, namely, Belize (August 2005), Croatia (June 2005), Cyprus (July 2005), Liberia (February 2004), Marshall Islands (August 2004), and Panama (May 2004), all of which later became partners of the PSI.[7] The PSI has now won the support of nearly eighty States. PSI participants have held round-table conferences in Madrid, Brisbane, Paris, London, Lisbon, and Krakow, among others. In these conferences, participants restated their determination to prevent the proliferation of WMD and related technologies. PSI participants agreed to exchange information on nonproliferation, further improve their own legal systems as well as promised to take diverse measures for interdiction.[8] At the High Level Political Meeting (Warsaw, Poland June 2006), PSI participants agreed to intensify the interdiction of financial transactions between proliferators and suppliers, and concentrate on combating black market networks

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6 U.S. Department of State, Proliferation Security Initiative: Statement of Interdiction Principles, at http://www.state.gov/t/np/rls/fs/23764pf.htm, 4 June 2008.

7 Richard Bond, The Proliferation Security Initiative: Three Years on, at http://www.basicint.org/nuclear/counterproliferation/psi.htm, 13 June 2008.

8 Proliferation Security Initiative, Chairman's Statement at the Fifth Meeting, at http://www.state.gov/t/np/rls/other/30960pf.htm, 12 June 2008.

and illegitimate businesses enmeshed in the illicit trade in WMD.[9]

Since September 2003, PSI participants have organized a series of military exercises on the Western Pacific and the Mediterranean Sea to simulate the interdiction, boarding, and inspection of vessels, aircraft and vehicles suspected of carrying WMD or their components by combining military measures with measures in the area of intelligence and law enforcement. For example, from September 10 to 13 of 2003, a joint military exercise entitled "Pacific Guardian" between the US, Australia, France, and Japan was launched on the Coral Sea of Australia. "Pacific Guardian" was the first military exercise to launch under the banner of the PSI. Another example worth mentioning is that, in late September 2003, intelligence information provided by the UK and the US indicated that a German cargo ship called "the BBC China" was being used to provide Libya with nuclear technology. The vessel was subsequently interdicted and brought to an Italian port. After inspection, a centrifugal accelerator used to produce high-enriched uranium was found onboard.[10] This successful interdiction prompted Libyan leaders to announce the abandonment of Libya's WMD program and accept international inspection.

II. The Legal Basis for the PSI

PSI participants have been exploring the legal basis for the PSI through the following five aspects:

A. The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

Concern for maritime terrorism in the wake of 9/11 prompted the International Maritime Organization to adopt the Protocol of 2005 to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter "the Protocol of 2005"). This protocol represented an effort to make necessary modifications to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. As stipulated in Article 3 of the Protocol of 2005, any person commits an offence if that person unlawfully and intentionally:

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9 Richard Bond, The Proliferation Security Initiative: Three Years on, at http://www.basicint.org/nuclear/counterproliferation/psi.htm, 13 June 2008.

10 Michael Byers, Policing the High Seas: the Proliferation Security Initiative, *American Journal of International Law*, Vol. 98, 2004, p. 529

(a) uses a ship as a weapon or a means of terrorist attack; (b) uses a ship to transport terrorists or related materials aimed at supporting WMD. Article 11 of the Protocol of 2005 stipulates that State Parties shall comply with the principle of "prosecution or extradition" when curbing crimes against the safety of maritime navigation. In other words, if a State Party fails to extradite the criminal, it has the obligation to submit the case to its own competent authority for prosecution without delay, following the procedures stipulated in its domestic laws.[11] Therefore, the Protocol of 2005 has further expanded the legal basis in international law for the stop and punishment of a person or entity that is involved in activities related to WMD.

B. Resolutions 1540 (2004), 1673 (2006), and 1810 (2008) of the United Nations Security Council

In April 2004, the United Nations Security Council adopted Resolution 1540 (2004). The resolution imposes the following obligations: (a) All States ought to refrain from using any means to support non-State actors developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems; (b) All States ought to adopt and implement appropriate and effective legislation to prevent the non-State actors from manufacturing, acquiring, possessing, developing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems, especially for the purpose of terrorism; and (c) All States ought to take concerted efforts to establish controls over nuclear, chemical or biological weapons and their delivery systems as well as the related materials, equipment and technology to prevent illicit trafficking. In addition, the resolution calls for a committee to be established under the Security Council to supervise the implementation of the resolution in the next two years and that all States represent a first report on their implementation to the committee no later than six months.[12] In April of 2006, Resolution 1673 (2006) was adopted by the Security Council at its 5429th Meeting. The resolution restated that the proliferation of nuclear, chemical, and biological weapons as well as their delivery systems constituted a threat to international

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11 Protocol of 2005 to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, at http://www.imo.org/, 13 June 2008.

12 Resolution 1540 (2004) of 28 April 2004 of United Nations Security Council, at http://daccessdds.un.org/doc/UNDOC/GEN/N04/328/42/PDF/N0432842.pdf?OpenElement, 13 June 2008. (in Chinese)

peace and security, and stressed all decisions and requirements stipulated in Resolution 1540 (2004) of the Security Council as well as the importance of full implementation by each signatory to the Resolution.[13]

Resolution 1810 (2008) was adopted by the Security Council on 25 April 2008 at its 5877th Meeting. The Resolution: (a) reaffirms the decisions and requirements made in its Resolutions 1540 (2004) and 1673 (2006); (b) states the Security Council's determination to take appropriate and effective initiatives to, in compliance with its primary duty stipulated in the Charter of the United Nations, combat the threat to international peace and security posed by the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery; (c) points out that international cooperation between States, in accordance with international law, is required to counter the illicit trafficking by non-State actors in nuclear, chemical and biological weapons, their means of delivery, and related materials; and (d) recognizes the need to enhance coordination of efforts on national, regional, sub-regional and international levels, as appropriate, in order to strengthen a global response to this serious challenge and threat to international security.[14]

It has been restated in all three resolutions of the Security Council that the proliferation of WMD and related items has constituted a "threat to international peace and security". The Security Council also requires all States to "enhance coordination of efforts" to prevent the proliferation of WMD. Thus, PSI participants regard the PSI as one of the many examples of "coordination of efforts".[15] However, none of the three resolutions explicitly authorizes interdiction by a State in line with the PSI. [16]

C. The 1992 Security Council Presidential Statement

During a January 1992 Security Council meeting at the level of Heads of State and Government, the Council president issued a note which pointed out: "the

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13 Resolution 1673 (2006) of 27 April 2006 of United Nations Security Council, at http://www.un.org/chinese/aboutun/prinorgs/se/sres/06/sl673.htm, 13 June 2008. (in Chinese)

14 Resolution 1810 (2008) of 25 April 2008 of United Nations Security Council, at http://www.un.org/chinese/aboutun/prinorgs/sc/sres/08/s1810.htm, June 16, 2008. (in Chinese)

15 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy*, Vol. 14, 2004–2005, p. 270.

16 Natalie Klein, Legal Limitations on Ensuring Australia's Maritime Security, *Melbourne Journal of International Law*, Vol. 7, 2006, p. 333.

members of the Council underline the need for all Member States to fulfill their obligations in relation to arms control and disarmament … The proliferation of all weapons of mass destruction constitutes a threat to international peace and security. The members of the Council commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end. "[17]

Though the 2003 Statement of Interdiction Principles released by the White House claimed that: "It (the PSI) is consistent with and a step in the implementation of the UN Security Council Presidential Statement of January 1992",[18] the presidential statement did not authorize any specific member to conduct interdictions aimed at any other member by land, water, or air.

D. The Right to Collective Self-defense

The PSI participants deem the PSI as a collective response to international terrorism, which is consistent with the right to collective self-defense stipulated in Article 51 of the Charter of the United Nations. They point out that the right to collective self-defense can be exercised in the case of terrorist attacks such as the 9/11 incident and the 2004 Madrid train bombings. The uncertain nature of terrorist attacks creates an incentive for PSI participants to establish a wide network in the hopes of successfully preventing terrorism. And the PSI is designed to take pre-emptive action to prevent further attacks. According to a 1985 report of the UN Secretary-General, the United Nations Convention on the Law of the Sea (UNCLOS) does not prohibit "military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, Paragraph 4, and Article 51." The report goes on to state that "in the exercise of the right of collective self-defense it is clear that parties to these security arrangements may use force upon the high seas, within the limits prescribed by international law, to protect their armed forces, public vessels, or

17 UN Security Council, Note by the President of the Security Council, S/23500, January1992, at http://www.sipri.org/contents/expcon/cbwarfare/cbw_research_doc/cbw_ historical/cbw-unsc23500.html, 16 June 2008.

18 U.S. Department of State, Proliferation Security Initiative: Statement of Interdiction Principles, at http://www.state.gov/t/np/rls/fs/23764pf.htm, 4 June 2008.

aircraft."[19]

However, Article 51 of the Charter of the United Nations requires that an armed attack against a Member State to occur before action can be taken in collective self-defense. Therefore, PSI participants' view, that the PSI is an initiative consistent with the right to self-defense stipulated in Article 51 of the United Nations Charter, is too broad an interpretation of Article 51 to be a convincing legal basis for the PSI and remains a controversial issue among the international community.

E. Treaty on the Non-Proliferation of Nuclear Weapons (NPT)

The NPT, which entered into force in 1970, underpins the modern multilateral non-proliferation system.[20] According to Article 3 of the NPT, "each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices." It goes on to state that "[e]ach State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article." PSI participants consider the NPT as one of the legal basis of the PSI.

There are no explicit stipulations in either the NPT, the Protocol of 2005, the 1992 Presidential Statement of the Security Council, or the Resolutions 1540 (2004), 1673 (2006), and 1810 (2008) of the United Nations Security Council, which authorize the interdiction by PSI participants of WMD and other related

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19 United Nations Disarmament Study Series – The Naval Arms Race, Report of the Secretary-General, U.N. GAOR, 40th Session, Annexes, Agenda Item 68(b), para. 188, U.N. Doc. A/40/535(1985).

20 Daniel H. Joyner, The Proliferation Security Initiative: Nonproliferation, Counter-proliferation, and International Law, *Yale Journal of International Law*, Vol. 30, 2005, p. 512.

items. To put it another way, the PSI has not been authorized by the Security Council of United Nations, nor has been stipulated in any international convention as an obligation. This is the fundamental reason why there has been so much controversy regarding the PSI since its establishment and why some States harbor doubts towards its purpose. Nevertheless, preventing the proliferation of WMD is surely a goal shared by the NPT, the Protocol of 2005, the 1992 Presidential Statement of the Security Council, and the Resolution 1540 (2004) of the United Nations Security Council and other legal instruments.

III. Implications of the PSI on the Development of the International Law

Due to the controversial nature of the PSI's legal foundations in the international community, activities organized by the PSI have profound implications for the development of contemporary international law.

A. The PSI Violates the Right of Innocent Passage

The right of innocent passage allows freedom to a vessel to pass through the territorial waters of another State so long as it is not prejudicial to the peace, good order or security of the coastal State. Article 17 of the UNCLOS stipulates, "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." Article 19 of the UNCLOS further elaborates: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State", and specifies 12 situations where passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State.

Some coastal States maintain that the passage of the vessels carrying WMD is non-innocent because it jeopardizes the security of coastal States.[21] However, this point of view does not hold water. First, the transportation of WMD does not fit neatly within any of the 12 exceptions listed in Article 19 of the UNCLOS. Second, it is difficult for coastal States to prove that the shipment of WMD constitutes a use of force or even threat of force against their sovereignty, territorial integrity or

21 Andreas Persbo and Ian Davis, Sailing into Uncharted Waters? The Proliferation Security Initiative and the Law of the Sea, at http://www.basicint.org/pubs/research/04psi.htm, 18 June 2008.

political independence. Third, the coastal State cannot rely on the possibility that the WMD will be used at some time in the future to conclude that the transport constitutes the threat of force or the use of force by the means of violating the principles of international law reflected in the Charter of the United Nations.[22] Therefore, a ship transporting WMD has the right of innocent passage through the territorial sea as long as the transport of WMD does not fit within the 12 situations specified in the UNCLOS where passage of a foreign ship would be considered prejudicial to the peace, good order or security of the coastal State.

Furthermore, Article 23 of the UNCLOS stipulates that, "[f]oreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements." Thus, ships carrying nuclear materials enjoy the right of innocent passage through the territorial sea of any other State as long as they do not violate the stipulations of international agreements.

Thus, it can be seen that the interdiction by PSI participants of ships carrying WMD within their terrestrial sea violates the right of innocent passage of other States.

B. The PSI Violates the Principle of Free Navigation on the High Seas

Freedom of navigation is one of the most important parts of the principle of freedom of the high seas, which itself is a long established rule in international law. The former has been stipulated in Article 90 and Article 96 of the UNCLOS. Article 90 of the UNCLOS stipulates: "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas", and in Article 96, "[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."

Constraints on the freedom of navigation on the high seas are stipulated in Article 108 and Article 110 of the UNCLOS. As is stipulated in Article 108 of the UNCLOS, "[a]ll States shall cooperate in the suppression of illicit traffic in

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22 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy*, Vol. 14, 2004—2005, pp. 259~260.

narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions", and in Article 110, a warship is not justified in boarding a foreign ship unless there is reasonable ground for suspecting that "the ship is engaged in piracy", "the ship is engaged in the slave trade", "the ship is engaged in unauthorized broadcasting", "the ship is without nationality"; or "though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship". It can be observed that the vessels carrying WMD do not fall under the scope of ships that a foreign warship is justified in boarding and inspecting. Therefore, interception by the PSI participants on the high seas violates the principle of free navigation on the high seas.

In addition, Article 58 of the UNCLOS stipulates that all States, whether coastal or land-locked, enjoy the freedom of navigation and overflight in the exclusive economic zone. Therefore, the interdiction by PSI participants in the exclusive economic zone violates other States' freedom of navigation.

C. The PSI Violates Basic Principles of International Law

1. The PSI Violates the Principle that both the Threat and the Use of Force are Prohibited

The principle that both the threat and the use of force are prohibited means that all States in their international relations must not resort to the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The threat and use of force should never be the solution to international disputes. Article 2(4) of the Charter of the United Nations states that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Therefore, the PSI, which allows military interdiction of the delivery vehicles suspected of loading WMD, obviously violates the non-use or threat of force principle.

2. The PSI Violates the Principle of Sovereign Equality

The principle of sovereign equality means that all States, regardless of their size, strength, or their differences in politics, economy, social system and development level, are equal and independent members of the international community with equal legal status. It is both one of the key principles of traditional international law and a fundamental principle of contemporary international law.

The principle of sovereign equality has been listed as one of the top principles in documents issued by the United Nations and various other regional organizations in respect of basic principles on international relationships. During its early years, the PSI claimed that it did not target any particular nation, but in fact it was aimed specifically at certain States such as North Korea and Iran.[23] The PSI, which claims certain States as being involved in proliferation and allows interdiction of their delivery vehicles, is a violation of the principle of sovereign equality as well as a discrimination against these countries. [24]

IV. Prospects of the PSI and China's Solutions

A. Prospects of the PSI

1. The PSI Reflects to Some Extent the Consensus of the International Community on Nonproliferation

The PSI, as a loose non-treaty based mechanism, is a tool for nonproliferation. Nowadays, non-proliferation has become a consensus of the international community. First, both the presidential statement and related resolutions of the Security Council conclude that proliferation of WMD threatens international peace and security. Preventing the proliferation of WMD and their delivery systems will help maintain world peace and international security in the common interest of the international community. Second, no State dares to claim in public that it is going to be involved in proliferation activities, and even States such as North Korea and Iran have committed themselves to nonproliferation of WMD. Finally, the fact that the number of PSI participants has increased from eleven to roughly eighty and that even Russia has joined the PSI indicates that an increasing number of countries believe and expect that the PSI will play a greater role in nonproliferation. In fact, at the 2006 G8 Summit in St. Petersburg, the US and Russia announced the Global Initiative to Combat Nuclear Terrorism that is similar to the PSI to further detect and secure nuclear materials inside the borders of member States.[25]

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23 Richard Bond, The Proliferation Security Initiative: Targeting Iran and North Korea? at http://www.basicint.org/pubs/Papers/BP53.htm, 23 June 2008.

24 Zhao Qinghai, A Comment on the Proliferation Security Initiative, *International Studies*, No. 6, 2004, p. 62. (in Chinese)

25 Richard Bond, The Proliferation Security Initiative: Three Years on, at http://www.basicint.org/nuclear/counterproliferation/ psi.htm, 23 June 2008.

2. The Legal Basis of the PSI Needs to Be Improved

As mentioned above, much controversy remains in regard to the legal basis of the PSI because no relevant international legal document expressively authorizes PSI participants to conduct interdictions. The implementation of the PSI has huge implications for the development of contemporary international law, the most noteworthy of which is that it poses challenges to the law of the sea. As some scholars have said, "[t]he United Nations Convention on the Law of the Sea is an underlying legal barrier to the implementation of the PSI."[26] Over the next few years, the question of how to promote the development of the legal mechanism of nonproliferation and further improve the legal basis of the PSI will become the key to gaining support and participation from more States.

B. China's Solutions

1. The Benefits of China's Participation in the PSI

First, the PSI is consistent with China's nonproliferation policy, because China shares a common interest with other countries in proliferation security. In December 2003, the State Council Information Office of China released The Nonproliferation Policy and Measures of China. China has long supported and advocated complete prohibition and thorough destruction of WMD such as nuclear weapons, biological weapons, and chemical weapons, and has been firmly opposed to the proliferation of the aforesaid weapons and their delivery systems. Over the years, China has actively participated in the creation of the multilateral nonproliferation regime and has worked for its continued improvement and development. China has signed all nonproliferation related treaties and joined most of the relevant international organizations. The Chinese government has taken strict measures to enhance both the domestic supervision of sensitive items and technology and the control over the export of the same, which will keep improving as the circumstance changes.[27]

Second, participation in the PSI will help to establish an image of China as a responsible great power. As the PSI is a mirror of the common concern of and efforts by the international community in respect of WMD nonproliferation, its

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26 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy*, Vol. 14, 2004–2005, p. 256.

27 State Council Information Office of China, The Nonproliferation Policy and Measures of China, at http://news.xinhuanet.com/zhengfu/2003-12/03/content_1211988.htm, 24 June 2008. (in Chinese)

purposes and principles are embraced by most States. During the 3rd round of vice-minister level negotiation on strategic security, multilateral military control and nonproliferation in February 2004, China stated that it understood the concerns of PSI participants regarding proliferation of WMD and their delivery systems, and agreed with the principles and purposes of the PSI. China also stated that it had no objection to the practice of exchanging information and cooperating on law enforcement in compliance with international law.[28] In May 2004, China officially became a member of the Nuclear Suppliers Group. China's geographical location, international status and political influence would make its participation in the PSI a major boost to the initiative.[29] China's participation in the PSI as a responsible great power will also contribute to relieving pressure from the international community and further strengthen its image as a responsible nuclear power.

Finally, by participating China can contribute to the PSI's institutional development. China can play a role within the multilateral cooperation mechanism if it joins under certain conditions. On the one hand, the Chinese government can promote the expansion of the range of the PSI to include the non-traditional security matters such as illegal immigration, smuggling, piracy, transnational crime, money laundering and counterfeit money trafficking, among others. On the other hand, it can suggest to enhance the roles of the UN Security Council and the International Maritime Organization in nonproliferation, and to formulate acceptable interdiction rules to restrict any illegal acts.

2. The Adverse Effects of China's Participation in the PSI

North Korea has been firmly opposed to the PSI ever since it was proposed. It has repeatedly stressed that interdiction of its ships and aircraft shall be considered a declaration of war, and reaffirmed its right to retaliate immediately against any hostile act involving the use of force and withdraw from the Korean Armistice Agreement.[30] South Korea has not joined the PSI out of consideration for inter-Korean relations. Therefore, China's participation would have direct consequences on the six-party talks aimed at solving the North Korean nuclear issue. It would also have a negative influence on the Sino-North Korean relations, though China

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28 Gu Guoliang, An Analysis of the Proliferation Security Initiative, *American Studies Quarterly*, No. 3, 2004, p. 43. (in Chinese)

29 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law & Policy*, Vol. 14, 2004—2005, p. 273.

30 Natalie Klein, Legal Limitations on Ensuring Australia's Maritime Security, *Melbourne Journal of International Law*, Vol. 7, 2006, p. 325.

can explain to North Korea in advance following the Russian example. However, now that North Korea has submitted a nuclear declaration and the US has decided to remove it from the terrorism-support list, there has been easing of the tensions between the US and North Korea, which will help reduce the adverse effects resulted from China's participation in the PSI.

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Global Piracy and Armed Robbery against Ships: Problems and Strategies

YANG Fan *

Abstract: In recent years, worldwide crime in piracy and armed robbery against ships has run rampant, which has had remarkably adverse effects on China. Faced with this situation, the international community has worked within the framework of international law to make considerable efforts in combating these crimes. Admittedly, however, measures in navigation and law enforcement are unlikely to completely eliminate the acts of piracy and armed robbery. The more permanent solution lies in improving the living standards of coastal residents in developing countries and enhancing governance in those coastal regions. In terms of China, it should actively uphold the initiatives against piracy and armed robbery adopted by relevant international organizations and other world powers; integrate its own law enforcement forces and naval vessels to defend the security of the South China Sea; and assist Southeast Asian countries in improving conditions in their coastal regions.

Key Words: Piracy; Armed robbery against ships; Maritime law enforcement; Oil transport

In this year, frequent ship attacks by Somali pirates have made the ancient crime of piracy once again a focus of public attention. Piracy dates back to ancient times, but the crimes of piracy and armed robbery against ships in the modern sense originate mainly in the 1970s and 80s. They gradually evolved into a substantial threat to global shipping. To date, worldwide piracy has not been effectively suppressed. From the beginning of this year in particular, the forms and means of piracy have shifted dramatically. At the end of September 2008, Somali pirates hijacked the *Faina*, a Ukrainian freighter carrying thirty three T-72 main battle

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tanks as well as other weapons such as grenade launchers. On November 15 of the same year, Somali pirates seized the *Sirius Star*, one of the world's supertankers and then, on November 18, three vessels were captured in a single day. These events demonstrate that these pirates, especially Somali pirates, have amassed a raft of forces, and they are no longer content with attacking ordinary, near-shore vessels, but have shifted to target large vessels including tankers in distant waters. Now piracy has turned into a strategic issue impacting global maritime security and drawing widespread concerns. To begin with, this article articulates the current situation of piracy and armed robbery worldwide. It then analyzes the framework of international law relating to piracy and armed robbery against ships and existing approaches to addressing these crimes in the international community. It concludes by making suggestions in respect to attitudes the Chinese government should adopt towards piracy.

I. Overview of Global Piracy and Armed Robbery against Ships

A. Definitions of Piracy and Armed Robbery against Ships

Before discussing the problems of piracy and armed robbery against ships, it is necessary to first clarify what these crimes are. Piracy and armed robbery against ships are defined together by the International Maritime Bureau (IMB) as "any act of boarding or attempting to board any ship with the apparent intent to commit theft or other crime with intent or capability to use force in furtherance of that act." This definition encompasses actual or attempted attacks on ships, regardless of the ships being anchored or traveling at sea. An unarmed minor theft is excluded from the purview of this definition.

Under the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, drafted by the International Maritime Organization (IMO), piracy and armed robbery against ships are defined separately, of which piracy follows the definition as laid down by Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), namely:

(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 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).

With regard to armed robbery against ships under the Code, it refers to any illegal acts of violence, detention, or depredation directed against a ship, or against persons or property on board such ship, or threats to commit the above acts in a place within the jurisdiction of any State.

The Code, following the definition of piracy as provided for in 1982 UNCLOS, describes piracy as acts of violence, detention and depredation against ships or aircrafts or against persons or property on board such ship or aircraft on the high seas or in a place beyond national jurisdiction, whereas armed robbery means acts of violence, detention and depredation against ships or against persons or property on board in a place within national jurisdiction.

Despite the significant differences between the two definitions, they essentially intend to cover violent acts against ships or persons and property on board.

B. Worldwide Piracy and Armed Robbery against Ships in the Current Day

According to an IMB report, worldwide piracy and armed robbery against ships were severe before 2004 with a large number of piratical and armed robbery attacks each year. However, the situation began improving after 2005 with a slight decrease in the number of annual cases, and the number maintained a fairly stable level. In 2005, there were 276 cases; in 2006, 239 cases; and in 2007, 263 cases. Since 2008, however, the situation has changed, particularly in the areas around Somalia, with 95 vessel attacks worldwide to date.[1]

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1 Dang Jianjun, Why Somalia Becomes the "Paradise for Pirates", at http://gzdaily.dayoo.com/html/2008-11/21/content_383723.htm, 1 December 2008. (in Chinese)

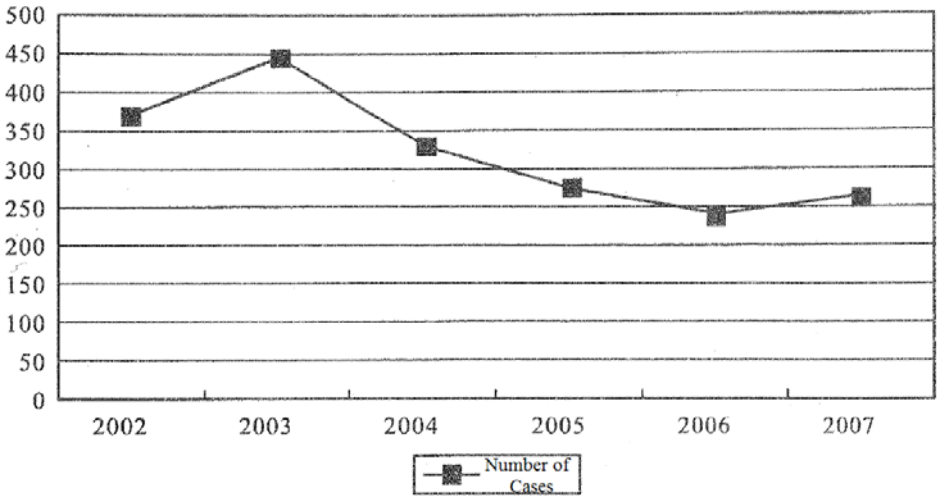

Fig. 1 The Number of Piracy and Armed Robbery against Ships Incidents from 2002 to 2007

(Source: IMB, at http://www.icc-scc.org, 8 December 2008.)

The frequency of piracy and armed robbery incidents varies over different areas. Coastal areas around Southeast Asia, South Asia and Africa suffer most. In 2007, the most frequently hit areas were Indonesia and Nigeria with 43 and 42 incidents respectively, followed by Somali with 31 cases. The number of cases of piracy and armed robbery in the 7 countries and regions in Fig. 2 accounts for 2/3 of the total number of cases worldwide (161/263). Based on the current situation, Somali waters are likely to be the place where piracy and armed robbery crimes most frequently occur in this year.

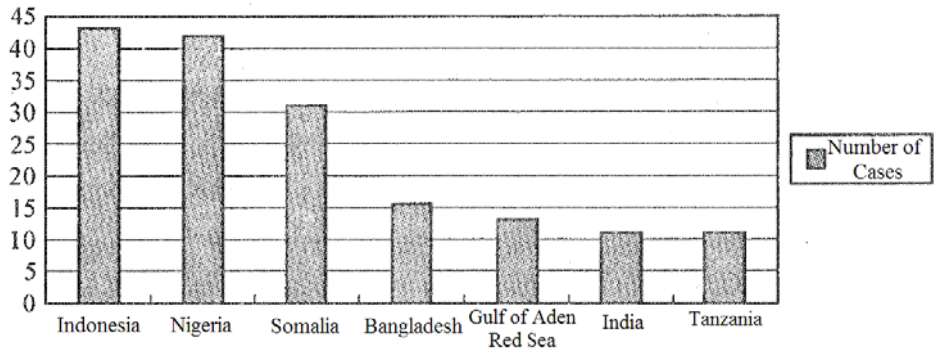

Fig. 2 Seven Countries Suffering the Most Piracy and Armed Robbery against Ships Incidents in 2007

(Source: IMB, at http://www.icc-scc.org, 8 December 2008.)

Fig. 3 Areas Suffering the Piracy and Armed Robbery against Ships Incidents in 2007

(Source: IMB, at http://www.icc-scc.org, 8 December 2008.)

The degree of violence also differs among pirates and armed robbery criminals. According to 2007 statistics, 72 attacks involved guns while 67 attacks employed knives. In 2007, 292 crew members were taken hostage, 35 injured, 5 killed and 3 reported missing. This year, in Somali waters alone, 38 vessels have been captured, and more than 740 people held hostage.[2]

The current worldwide piracy and armed robbery situation is quite severe, though it varies with years. Incidents are mostly concentrated in certain areas. Pirates and armed robbery criminals mainly focus on obtaining pecuniary wealth by means of theft or kidnapping persons in exchange for ransom. The fear in the international community that pirates and armed robbery criminals may slaughter people or collaborate with terrorists has yet to become a reality.

C. Factors Contributing to Piracy and Armed Robbery against Ships

A number of reasons account for the epidemic of piracy and armed robbery against ships. However, by examining the regions and countries where such crimes are concentrated, it becomes apparent that geography, economy and efficacy of

2 Dang Jianjun, Why Somalia Becomes the "Paradise for Pirates", at http://gzdaily.dayoo.com/html/2008-11/21/content_383723.htm, 1 December 2008. (in Chinese)

government regulation have a great influence on the occurrence of piracy and armed robbery.

Geography is one of the main factors. Piracy and armed robbery against ships are concentrated around important international sea lanes. Somalia and the Gulf of Aden, for instance, are located where the Suez Canal runs into the Indian Ocean and the Pacific Ocean, while the Straits of Malacca and Indonesia are located where the Indian Ocean connects with the Pacific Ocean. Due to the fact that there is a high amount of traffic in these important sea areas, ships must travel at a slower speed.[3] In addition, these ships often carry valuable goods in high quantities. Therefore vessels in these areas are easy to attack and attractive to pirates and armed robbers. Areas characterized by complex geographical conditions are also attractive to pirates, such as the waters around Indonesia that have numerous large islands near the coast, providing easy escapes for criminals. Furthermore, in Southeast Asia, many territorial and maritime disputes exist, which makes it more convenient for criminals to escape and hide.

Economic factors also play a fundamental part in causing piracy and armed robbery against ships. Since pirates and armed robbers need to board ships at sea to commit theft and robbery, great dangers are involved. Were coastal residents able to maintain relatively high standards of living, it would be unlikely that many people would be willing to take these considerable risks to commit piracy or armed robbery. Once fishermen and coastal residents are too poor to survive, however, they are much more likely to take these risks. It is in regions and countries subject to political instability, economic depression, serious unemployment and poverty that piracy and armed robbery incidents often occur. For instance, amid deteriorating conditions in Somalia, war has lasted for years, and "casualties, destruction of property, looting and widespread violations of personal safety are prevalent in Mogadishu."[4] Similarly, in Indonesia, the Philippines, and Malaysia, the economy is unstable, and impoverished populations have only increased since the financial crisis and the tsunami.[5] As a result, some fishermen and coastal residents in these areas are likely to make some income by comitting piracy and

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3 Wang Liangsheng, Piracy Issue in Southeast Asia: Cooperation and Prospect, *Journal of Jiangnan Social University*, No. 1, 2007, p. 14. (in Chinese)

4 Daniel Gagnon, Somalia: Increasingly Unstable and Striving to Distribute Aid, at http://www.icrc.org/WEB/CHI/sitechi0.nsf/htrnlall/somalia-interview-230408, 5 May 2008. (in Chinese)

5 Li Fengning, A Study on Piracy: the Current Features, Reasons and Strategies, *Economic and Social Development*, No. 3, 2007, p. 139. (in Chinese)

armed robbery against ships.

It is another case in Nigeria. As there is an abundance of oil, piracy and armed robbery are targeted at oil tankers. IMB official, Mukundan, stated, "For Nigeria, pirates mainly target ships transporting oil, and some pirate gangs are even organized by groups attempting to control a majority of shares of an oil company."[6]

The third factor is the efficacy of government regulation. Governmental efforts to combat piracy and armed robbery play a remarkable role in the suppression of the crimes. The most notable example is the Strait of Malacca where piracy and armed robbery were previously considerably rampant. However, effective measures of strengthening information exchange and exercising joint patrols to counter piracy were adopted by the surrounding coastal States, and the area has been become relatively safe now. In 2007, attacks totaled only 7 for the entire year.[7] By contrast, because of the nearly anarchic state of Somalia, pirates and armed robbers in this area are quite bold. "Somali pirates searched vessels far off the coast, captured the vessel and persons on board, and extorted large sums of money, all of which were conducted conspicuously without any intent to conceal."[8] In Nigeria, despite a strong coastal guard, attacks against oil tankers have yet to be taken under control.

D. The Impact of Piracy and Armed Robbery against Ships on China's Oil Transport

Global piracy and armed robbery crimes exert a dramatic influence on China, particularly China's oil transport at sea. At present, more than 90% of China's oil imports are transported by sea. In 2006, 45% of China's oil imports came from the Middle East, 31.5% from Africa,[9] and the rest from regions and countries such as Southeast Asia, Russia, and Kazakhstan. This geographical distribution results in three paths for oil imports: (1) Oil produced in the Middle East is transported through the Persian Gulf, the Strait of Hormuz, the Strait of Malacca, and the Taiwan Strait to reach domestic ports; (2) oil produced in Africa is transported via

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6 The Spike in Piracy Attacks: Somalia and Nigeria Becoming Heavily Affected Areas, at http://news.sohu.com/20071017/n252689493.shtml, 5 May 2008. (in Chinese)

7 Piracy and Armed Robbery against Ships, at http://www.icc-scc.org, 12 December 2008.

8 The Spike in Piracy Attacks: Somalia and Nigeria Becoming Heavily Affected Areas, at http://news.sohu.com/20071017/n252689493.shtml, 5 May 2008. (in Chinese)

9 UPI: China's Crude Oil Import is Facing a Shortage of Tankers, at http://intl.ce.cn/zgysj/200805/13/t20080513_15440960.shtml, 13 May 2008. (in Chinese)

two routes, the northern route running through North Africa, the Strait of Gibraltar, the Mediterranean Sea, the Suez Canal, the Red Sea, the Indian Ocean, and the Straits of Malacca to reach China; the southern route runs through the Cape of Good Hope and the Straits of Malacca back to China; (3) oil produced in Southeast Asia is transported through the Straits of Malacca directly to China.

In light of the frequently attacked areas discussed above, it can be seen that China's oil transport routes travel through these hard hit areas and thus are likely to suffer from piracy and armed robbery. Firstly, the most serious problems may arise from the oil transport routes starting in Africa. Africa is currently the second largest oil exporters to China. In 2006, four African countries are among the top ten suppliers of oil for China, namely: Angola, the Congo, Equatorial Guinea, and Sudan. Libya, Mauritius, Gabon, Chad, Nigeria, South Africa and Algeria export a great quantity of oil to China as well.[10] Among the aforementioned countries, Nigeria itself is one of the countries heavily attacked by piracy and armed robbery, and local pirates primarily target oil tankers. Oil produced in countries such as Sudan and Chad has to be shipped through the Gulf of Aden and Somali waters, where there are also high numbers of pirates and armed ship robbers. Secondly, tankers from Africa or the Middle East have to travel along the shores of India while passing through the Indian Ocean. Unfortunately, piracy and armed robbery are quite rampant near the Indian coast. Finally, oil imported from Africa, the Middle East or Southeast Asia has to go through the Straits of Malacca and the Indonesian coastal waters. In spite of improvement in these regions in recent years, piracy and armed robbery incidents still occur at a considerable amount, notably in the Indonesian coastal regions, where the number of attacks was the highest in the world in 2007.

Piracy and armed robbery could have a number of ramifications on China's oil transport by sea. Firstly, piracy and armed robbery would result in crew casualties and property loss for oil tankers. If vessels are attacked or destroyed, oil spills could very well occur and contaminate the environment. In the event of tankers being hijacked, Chinese shipping companies would be forced to pay high ransoms. It is reported that on November 15, 2008, pirates hijacking the *Sirius Star* oil tanker demanded a ransom of $25 million.[11] Additionally, even if no attacks occur, crews

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10 The Oil Trade and Cooperation between China and Africa, at http://www.cepit.org/Contents/Channel-1089/2008/0213/88068/content88068.htm, 13 May 2008. (in Chinese)

11 Ma Jing, Somali Pirates Demand a High Ransom of 25 Million Dollars, at http://military.people.corn.cn/GB/1077/57991/8387401.html, 1 December 2008. (in Chinese)

will be under fear and pressure when tankers sail or moor along the regions plagued by piracy and armed robbery, which would adversely affect the crew's physical and mental health. Another effect piracy and armed robbery could have on China's oil transport is extra security costs. In order to cope with the threat of piracy and armed robbery against ships, shipping companies, in compliance with standards of some international organizations, are required to install advanced safety equipment and hire professional security personnel, which greatly increase operating costs. According to IMB estimates, in the regions between the Indian Ocean and the Pacific Ocean, piracy and armed robbery cause shipping vessels losses of $13~15 billion annually. A number of ships travel an extra 200 nautical miles to avoid passing along Somali coasts.[12] Also, with an increase in ships' insurance premiums, oil transport costs and prices of imported oil increase while the supply and transport of petroleum shrink. In addition, given that the Chinese government and international organizations take various measures to deal with piracy and armed robbery against ships, financial burdens are added due to expenses arising from these measures.

It should be noted that not only attacks against tankers of Chinese nationality will affect China's oil transport. In fact, merely 10% of China's imported oil is transported by fleets owned by Chinese companies, while a large portion of the rest is shipped by international transport corporations such as Japanese or Korean companies.[13] As such, piracy and armed robbery against foreign tankers will likewise impact China's oil transport. In 2007 among the piracy and armed robbery incidents on record, only 2 cases were directly against Chinese ships. However, a total of 31 cases involved tankers carrying crude oil, liquefied petroleum gas or liquefied natural gas.[14] Another 52 attacks were launched against tankers loaded with chemicals, which also may influence China's oil transport. In light of the approximately 7000 tankers worldwide,[15] the possibility of a tanker being hijacked by pirates is approximately 1%. Compared to the rates of other crimes, this rate is not low. Thus, the threat of piracy and armed robbery to China's oil transport security is worth considerable attention.

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12 Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, *Vanderbilt Journal of Transnational Law*, January, 2007, p. 5.

13 COSCON Carries 30 Million Imported Oil, *Ta Kung Pao*, 9 February 2006. (in Chinese)

14 Piracy and Armed Robbery against Ships, at http://www.ice-scc.org, 18 May 2008.

15 Su Deqin, Zhang Yongxin, World Oil Shipping Market and China's Energy Security, at http://www.dalian-shipping.com/news/sp/hyzx/1216_9.htm, 18 May 2008. (in Chinese)

II. Basic International Legal Framework Relating to Piracy and Armed Robbery against Ships

Persecuted by piracy, the international community has developed a relatively mature legal framework to address this issue on the basis of many years of experience. The main provisions concerned are found in the UNCLOS Articles 100 to 107.

With regard to armed robbery against ships, since it is a crime occurring within the scope of State jurisdiction, it is generally regulated by the domestic laws of each country, so international law regarding this crime is relatively scarce.

In addition, international law relating to other maritime crimes, for instance the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which aims to combat terrorist attacks at sea, may influence the suppression of these two categories of crimes although those laws are not initially designed to resolve the problems of piracy and armed robbery.

A. UNCLOS Provisions Related to Piracy

As to piracy, Article 100 of the UNCLOS imposes on States the international obligation to cooperate in the repression of such crimes. It reads, "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

Article 101 of the UNCLOS then deals with the constituent elements of piracy in more detail. This article is inherited from Article 15 of the Convention on the High Seas 1958. Under Article 15, the subject of piracy must be the crew or the passengers of a private ship or a private aircraft. If the illegal acts are committed by a warship or a government ship, they are not considered acts of piracy. In such a case, where the victims intend to seek relief, they shall appeal to the flag State of the ship, and the said flag State shall punish the captain. However, if the crew of a warship or a government ship has mutinied and the ship voyages at sea for private ends, the ship shall no longer be considered a public ship, and the illegal acts shall be deemed as piracy.[16]

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16 *Oppenheim's International Law*, Volume 2, edited by Watts KCMG QC, translated by Wang Tieya and Chen Tiqiang, Beijing: The Commercial Press, 1972, p. 122. (in Chinese)

Secondly, in terms of *mens rea*, piracy must be committed intentionally. To establish piracy, it is required that the said pirates intend to commit the illegal acts of violence, regardless of intentions of robbery or acquiring property. It follows that violent acts of hatred or revenge are considered piracy as well.[17]

Piracy must be undertaken for private ends. Generally, acts of violence at sea carried out for political purposes shall not be counted as piracy. Nonetheless, views are divided on how to distinguish political purposes from private purposes. In 1986, a Belgian court ruled that members of Greenpeace engaged in protests against waste dumping at sea were guilty of piracy.[18] In the wake of September 11 attacks, many American scholars were concerned that a mechanical interpretation of private purposes would facilitate terrorists. Terrorists commit robbery, murder and sabotage at sea often with political purposes, and thus strict compliance with the requirement of private ends would prevent the application of Article 101 of the UNCLOS and preclude universal jurisdiction over these acts. As such, it is suggested by some American scholars that the interpretation of private purposes should be expanded. Some contend that violent acts at sea, unless recognized by the international community as acts of war carried out by States or belligerent groups, shall be deemed as being committed for private ends.[19] Others hold that private purposes include personal motives arising from violent acts of belligerent groups or States.[20] In short, many American scholars attempt to interpret "private ends" in various ways with a view to covering political purposes in the scope of piracy so that the Article of 101 is applicable to maritime terrorist attacks.

Thirdly, the *actus reus* of piracy consists of illegal acts of violence, detention or depredation. Such illegal acts must occur on the high seas or in a place outside the jurisdiction of any State. Maritime criminal violence within territories or territorial waters of any State is referred to as armed robbery against ships herein and shall be excluded from acts of piracy. These acts should be prevented,

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17 Articles Concerning the Law of the Sea with Commentaries, text adopted by the International Law Commission at its eighth session in 1956 and submitted to the General Assembly as a part of the Commission's report covering the work of that session (para. 33). The report, which also contains commentaries on the draft articles, appears in Year-book of the International Law Commission, 1956, Vol. II.

18 Samuel Pyeatt Menefee, Anti-piracy Law in the Year of the Ocean: Problems and Opportunity, *ILSA Journal of International & Comparative Law*, Spring, 1999, p. 312.

19 Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, *Vanderbilt Journal of Transnational Law*, January, 2007, p. 32.

20 Tina Garmon, International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th, *Tulane Maritime Law Journal*, Winter, 2002, p. 257.

suppressed and punished by States through enacting laws and taking counter-measures. It is unnecessary for them to be prescribed by international law.

In respect to the limits of the high seas, under Article 86 of the UNCLOS, high seas refer to all parts of the sea that are not included in the exclusive economic zone, territorial seas or internal waters of a State, or in the archipelagic waters of an archipelagic State. However, Article 58(2) provides that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." Hence, acts of violence committed in the exclusive economic zone also falls within the scope of piracy.

Regarding the definition of "a place outside jurisdiction of any State", in the draft of the Article by International Law Commission of the United Nations, such a term is intended to cover islands of *terra nullius* or unoccupied coasts. Therefore, acts of violence undertaken by a ship or an aircraft in such areas are also considered piracy.[21] Though such areas are now rare, *terra nullius* or unclaimed islands may still exist in Antarctica or the Arctic region.

In addition, as piracy must be acts of violence, detention or depredation committed by the crew or passengers of a vessel against those of another vessel, a minimum of two ships must be involved to establish the crime of piracy, which is referred to by some scholars as the constituent element of "two ships". In the event of violent acts undertaken by crew members or passengers against other crew members or passengers on board the same ship, including mutiny, such acts shall not be deemed as acts of piracy.[22]

One legal effect of piracy under international law is that any State can be conferred with universal jurisdiction over this crime. In accordance with customary international law, any State's ships, whether warships or other government ships, may pursue, attack and seize pirates on the high seas and take them back to the

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21 Articles Concerning the Law of the Sea with Commentaries, text adopted by the International Law Commission at its eighth session in 1956 and submitted to the General Assembly as a part of the Commission's report covering the work of that session (para. 33). The report, which also contains commentaries on the draft articles, appears in Year-book of the International Law Commission, 1956, Vol. II.

22 Articles Concerning the Law of the Sea with Commentaries, text adopted by the International Law Commission at its eighth session in 1956 and submitted to the General Assembly as a part of the Commission's report covering the work of that session (para. 33). The report, which also contains commentaries on the draft articles, appears in Year-book of the International Law Commission, 1956, Vol. II.

State, and the domestic courts thereof will adjudicate and punish them.[23] In line with customary international law, Articles 105 and 110 of the UNCLOS provide that any State's warships or government-authorized ships may on the high seas board a ship suspected of piracy, and "every State may seize a pirate ship or aircraft, or a ship or aircraft taken by 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". Admittedly, no State is obligated to exercise universal jurisdiction over piracy. In light of the optional nature of this article, a State may determine whether to exercise jurisdiction on account of such factors as its domestic laws and its capacities.

B. UNCLOS Provisions Related to Armed Robbery against Ships

Generally, armed robbery against ships occurs in territorial seas where coastal States have sovereignty, and thus, armed robbery committed in territorial sea is subject to a State's jurisdiction, of which the specific charges, constituent elements of the crime, suitable enforcement measures to be taken and penalties to be imposed shall be decided in accordance with domestic laws and carried out by domestic law enforcement agencies of the coastal State.

In order to maintain order at sea, the UNCLOS imposes restrictions on coastal States when they exercising criminal jurisdiction over foreign ships passing through their territorial seas. Article 27 of the UNCLOS provides, "the criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage." Despite this, a number of exceptions are enumerated in this article, including armed robbery, which can be classified as an exception when "the crime is of a kind to disturb the peace of the country or the good order of the territorial sea" or when "the consequences of the crime extend to the coastal State". In this connection, the coastal State has jurisdiction over armed robbery committed by persons on board a foreign ship within its territorial sea.

Moreover, Article 27(5) of the UNCLOS provides that, "except as provided in

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23 *Oppenheim's International Law*, Volume 2, edited by Watts KCMG QC, translated by Wang Tieya, Chen Tiqiang, Beijing: The Commercial Press, 1972, p. 122. (in Chinese)

Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters". As such, if persons on board a foreign ship commit armed robbery within the territorial sea of another State and then the ship enter the territorial sea of the coastal State, the coastal State cannot exercise jurisdiction over the crime committed before the ship entered the territorial sea of the coastal State, unless it is authorized or requested to do so by the State having jurisdiction.

C. Relevant Provisions of the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation

On October 7, 1985, near Alexandria Port, Egypt, four Palestinian militants hijacked an Italian ferry, demanding the release of more than 50 Palestinian fighters detained in Israel. This incident led to the adoption of the 40/61 resolution, jointly proposed by Italy and Austria, calling for the IMO to "study the problem of terrorism aboard or against ships" with a view to making recommendations on appropriate measures. In March 1988, upon this request, the IMO adopted the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation in Rome (hereinafter "the SUA Convention").

A crime is committed under the SUA Convention if a person:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in paragraphs (a) to (f).

Pursuant to these provisions, the SUA Convention may apply to offences of piracy and armed robbery against ships in that piracy and armed robbery, in many circumstances, can be recognized as offences that may jeopardize navigation, or even maritime terrorism, which the SUA Convention purports to combat. For instance, pirates or armed robbery criminals may seize or take control of the ship, use force against navigators, kidnap the crew, and attack the ship with weapons such as rocket-propelled grenades and machine guns. A case in point is that in April 2008, a French luxury yacht with 36 crew members aboard was hijacked by pirates off the Somali coast.

The SUA Convention requires each State Party to make the aforementioned offences punishable by appropriate penalties which take into account the gravity of the crimes.[24] Also, the SUA Convention separates different situations in which a State establishes jurisdiction. When an offence is committed (a) against or on board a ship flying the flag of the State at the time the offence is committed; or (b) in the territory of the State including its territorial sea; or (c) by a national of the State, that State Party shall take necessary measures to establish its jurisdiction over such an offence; whereas, when (a) an offence is committed by a stateless person whose habitual residence is in the State; or (b) during its commission a national of the State is seized, threatened, injured or killed; or (c) an offence is committed in an attempt to compel the State to do or abstain from doing any act, that State Party may establish its jurisdiction, but not necessarily. Besides, delicate and stringent provisions of extradition are provided for to ensure the perpetrators under punishment and the principle of "prosecute or extradite" is confirmed by the SUA Convention in Article 10, paragraph 1, "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 obligated, 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 purposes 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 cases of any other offence of a grave nature under the

24 The SUA Convention, Article 5.

law of that State."

Overall, the SUA Convention imposes strict obligations on States with respect to jurisdiction, investigation, provisional measures, and extradition of offences which may endanger the safety of maritime navigation. The imposing of such obligations plays a notable role in forcing the international community to take a strong position against piracy and armed robbery against ships. In June 1991, the Standing Committee of the National People's Congress of China ratified its accession to the SUA Convention. By the end of 2005, 115 States had joined the SUA Convention.

III. Measures Taken by the International Community to Combat Piracy and Armed Robbery against Ships

The international community has been faced with worldwide piracy and armed robbery against ships, which have run rampant since some time in the last century. They have used the framework of international law to take a variety of countermeasures, which have accomplished remarkable achievements. This section will present brief observations regarding those measures undertaken by international organizations, as well as measures undertaken at the regional and national levels.

A. International Maritime Organization

Headquartered in London, the IMO is the United Nations specialized agency responsible for the safety and security of navigation as well as the prevention of marine pollution caused by ships. In response to the threat of piracy and armed robbery against the safety of international maritime navigation, the IMO embarked on a long-term anti-piracy plan in 1988. The first phase of the program was to convene regional seminars and working groups participated in by government representatives of relevant States located in piracy hot spots. In the second phase, evaluation of the major regions was to be made with a view to reaching regional agreements on approaches against piracy and armed robbery.[25] Subsequently, the IMO has taken a series of other steps.

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25 The achievements of the program will be discussed in detail in the next section.

1. A Series of Guidelines and Rules

In order to support operations combating piracy and armed robbery against ships, the IMO drafted and adopted a number of guidelines and proposals. In 1999, it passed the Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships, which suggests an array of measures such as establishing a centralized command system to coordinate communications between States, as well as prompt and complete reporting procedures. In 2002, it adopted Guidance to Ship Owners and Ship Operators, Ship Masters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships, which covers a range of detailed measures to avoid attacks as well as measures to minimize losses if attacked.[26] In November 2001, the Code of Practice for the Investigation of Crimes and Armed Robbery against Ships was adopted by the IMO Assembly. The Code involved a number of renowned law enforcement agencies from developed countries in the drafting process, and brought in expertise and advanced techniques in training, strategies, procedures, and techniques for investigation. These guidelines and rules have provided State parties, especially developing State parties, with experience and strategies in the field of combating piracy and armed robbery against ships.

2. Modification of the SOLAS Convention and ISPS Code

On October 6, 2002, *Limburg*, a French oil tanker, was attacked by terrorists in Yemen waters. Due to the nature of oil tankers, terrorist attacks against them will result in serious damages to the marine environment. Taking into account the increasingly insecure environment at sea, the IMO convened a Diplomatic Conference on Maritime Security in London from December 9 to13, 2002. A series of amendments to Chapter XI of the SOLAS Convention relating to maritime security and the International Ships and Port Facilities Security Code (ISPS Code) were passed at the conference.[27]

The 2002 SOLAS amendments require non-passenger and non-tanker ships of gross tonnage between 300 and 50,000 to install Automatic Identification Systems (AIS). They also added two additional requirements concerning Ship Identification Numbers and Continuous Synopsis Records. The amendments supplement an entirely new Chapter XI-2 entitled "Special Measures to Strengthen

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26 IMO: Piracy and Armed Robbery against Ships, at http://www.imo.org/Facilitation/mainframe.asp?topic_id=362, 29 May 2008.

27 Zhang Yixin, Maritime Security Event and ISPS Rule, *China Water Transport*, No. 9, 2007, p. 33. (in Chinese)

Maritime Security," which encompasses definitions, applications, security obligations of contracting governments, requirements for companies and ships, specific responsibilities of companies, ship security alert systems, threats to ships, master's discretion over ship safety and security, control and compliance measures, requirements for port facilities, alternative security agreements, equivalent security arrangements, and communication of information. Further, Chapter XI introduces the mandatory "Security Code" (i.e., ISPS Code).[28]

The ISPS Code consists of two parts. Part A is mandatory, specific requirements to implement the provisions of Chapter XI-2 of the SOLAS Convention, whereas Part B is recommendatory guidelines envisaged to maintain compliance with the provisions of Chapter XI-2 and of Part A of the Code. The ISPS Code establishes the roles and obligations of contracting governments and shipping companies, requiring ships to act in accordance with the security levels set by contracting governments and to take preventive measures accordingly. Ship and port facility security assessments are required in order to identify possible threats and the likelihood of their occurrence. Security plans for ship and port facilities are to be drafted based on the security assessments and each ship shall carry on board a ship security plan approved by the Administration. A company security officer shall be appointed and a ship security officer shall be designated on each ship. The company security officer, the ship security officer, crew members responsible for specific security duties and suitable onshore personnel shall receive training and participate in regular drills and exercises.[29]

The enforcement of the SOLAS amendments and the ISPS Code coordinates and stresses the maritime security obligations of contracting governments, shipping companies and ships. It standardizes and unifies the measures concerned, greatly enhancing their effectiveness in fighting threats to maritime safety, including piracy and armed robbery against ships. Analysis indicates that after two years of implementation of the ISPS Code, the situation worldwide has improved significantly. For instance, the occurrence of piracy and armed robbery against ships in major oceans has been notably reduced, ensuring the smooth development

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28 Li Zhuangzhi, On SOLAS Amendments and ISPS Code, *Ship & Boat*, No. 3, 2004, p. 65. (in Chinese)

29 Sun Yi, Discussion on the Influence of the SOLAS Amendments and ISPS Code on China's Shipping Industry and Countermeasures thereof, *China Maritime Safety*, No. 3, 2005, p . 30. (in Chinese)

of the world's shipping industry.[30] However, the huge costs sustained by the shipping industry because of such implementation cannot be overlooked.[31]

3. Somali Pirates

In recent years, due to the deteriorating conditions in Somalia, piracy and armed robbery in waters off the Somali coast have been increasingly rampant, including a raft of hijacking incidents involving the demand of ransoms. In November 2007, a resolution regarding the prevention and suppression of Somali pirates was adopted at the 25th Assembly of the IMO, calling upon the Somali Transitional Federal Government (TFG) to take all necessary measures to combat piracy and armed robbery along its shores so as to ensure that Somali shores do not become a base for pirates and armed robbers. The resolution requests that all the ships that are hijacked and taken into Somali territorial sea be promptly released and that vessels sailing along the Somali coast not become victims of piracy or armed robbery. It also requests that the TFG cooperate with the UN Security Council in opening its territorial sea to foreign warships interdicting piracy or armed robbery, as well as to conclude relevant agreements allowing foreign warships to escort the World Food Programme to transport humanitarian relief supplies into or out of Somali waters.[32]

B. The United Nations Security Council

Because piracy and armed robbery against ships are considerably severe in certain regions of the world, including Somali areas, and to some extent pose threats to international peace and security, the UN Security Council expressed concerns about piracy in a series of its resolutions.

On April 29, 2008, at the request of the Somali transitional government, the United States and France jointly submitted a motion to the UN Security Council, proposing to authorize foreign warships to enter Somali territorial seas to seize and arrest pirates, as well as to use force if necessary, provided that a prior notice has been given to the Somali transitional government and the United Nations

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30 Zhang Yixin, Maritime Security Event and ISPS Rule, *China Water Transport*, No. 9, 2007, p. 33. (in Chinese)

31 Sun Yi, Discussion on the Influence of the SOLAS Amendments and ISPS Code on China's Shipping Industry and Countermeasures thereof, *China Maritime Safety*, No. 3, 2005, p . 30. (in Chinese)

32 The 25th Assembly of the IMO Formulated the New Plan on the Prevention and Suppression of Somali Piracy, at http://www.simic.net.en/news/detail.jsp?id=16251, 29 May 2008.

Secretary-General. On May 15, 2008, the Security Council adopted Resolution 1814, "reiterat[ing] its support for the contribution made by some States to protect the World Food Programme maritime convoys, call[ing] upon States and regional organizations, in close coordination with each other and as notified in advance to the Secretary-General, and at the request of the TFG, to take action to protect shipping involved with the transportation and delivery of humanitarian aid to Somalia and United Nations-authorized activities."

On June 2, 2008, the Security Council adopted Resolution 1816, reiterating its grave concerns regarding the acts of piracy and armed robbery against ships in the waters off the coast of Somalia and authorizing the States cooperating with the TFG in the fight against piracy and armed robbery to: (a) enter the territorial waters of Somalia for the purposes of repressing acts of piracy and armed robbery at sea, in a manner consistent with such actions permitted on the high seas with respect to piracy under relevant international law, and (b) use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.

In Resolution 1838, adopted on October 7, 2008, the Security Council calls upon individual States to take active part in the fight against piracy in the seas off the coast of Somalia. It specifies the deployment of naval vessels and military aircraft, in accordance with international law, as reflected in the UNCLOS. On November 20, 2008, the Security Council further adopted Resolution 1844, deciding to impose sanctions against individuals or entities whose actions undermine the peace and stability of Somalia, including pirates and arms smugglers by freezing financial assets and preventing such individuals' entry into or transit through contracting States' territories.

C. Intraregional Cooperation

Advocated by the IMO, regional cooperation to prevent and suppress piracy and armed robbery against ships has risen in certain areas of the world, of which the most successful has been the Asia region. In 2001, the Asian Cooperation Conference on Combating Piracy and Armed Robbery against Ships was held in

Tokyo.[33] After the conference, Japan proposed an initiative in connection with the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), for the purpose of promoting and enhancing multiple government-to-government cooperation against piracy and armed robbery in Asia. It was finalized in November 2004 in Tokyo after three years of negotiations and took effect on September 4, 2006.[34] China became a contracting party to ReCAAP in November 2006 and declared that the agreement also applies to China's territories of Hong Kong and Macau.[35] At present, there are fourteen contracting parties, namely Singapore, India, Brunei, Laos, Myanmar, Cambodia, the Philippines, Sri Lanka, Thailand, Vietnam, Bangladesh, China, Japan and South Korea.[36]

Pursuant to the ReCAAP, an Information Sharing Center (ISC) would be established in Singapore. The functions of the ReCAAP ISC are:

1. to manage and maintain the expeditious flow of information relating to incidents of piracy and armed robbery against ships among the contracting parties;

2. to collect, collate and analyze the information transmitted by the contracting parties concerning piracy and armed robbery against ships, including other relevant information, if any, relating to individuals and transnational organized criminal groups committing acts of piracy and armed robbery against ships;

3. to prepare statistics and reports and disseminate them to the contracting parties;

4. to provide an appropriate alert, whenever possible, to the contracting parties if there is reasonable ground to believe that there exists an imminent threat of piracy or armed robbery;

5. to circulate among the contracting parties cooperation requests and relevant information on measures taken; and

6. to prepare non-classified statistics and reports based on information gathered and analyzed and to disseminate them to the shipping community and the IMO.

To collaborate with each other via the ISC, each contracting party designates a focal point responsible for its communication with the Center. ReCAAP also

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33 Asian Cooperation Conference on Combating Piracy Held in Tokyo, *China Business Update*, November 2001, p. 3. (in Chinese)

34 More about ReCAAP, at http://www.recaap.org, 12 June 2007.

35 China Signed ReCAAP (Xinhua Net, Singapore, 27 October 2007), at http://international.big5.northeast.cn/system/2006/10/27/050588896.shtml, 12 June 2007. (in Chinese)

36 The First ISC Council Meeting Held in Singapore, *Maritime Safety*, No. 1, 2007, p. 79. (in Chinese)

stipulates that each contracting party should make every effort to require its ships, ship owners or operators to promptly notify relevant national authorities, including focal points, and the Center when appropriate, of incidents of piracy or armed robbery against ships. Any contracting party which receives or obtains information about an imminent threat or incident of piracy or armed robbery is required to promptly notify the Center of all relevant information through its designated focal point. In the event that a contracting party receives an alert from the Center of an imminent threat of piracy or armed robbery, that party will then promptly disseminate the alert to ships within the area of the threat. A contracting party may request any other contracting party, directly or through the Center, to cooperate in detecting pirates, victims, persons committing armed robbery and ships used for such purposes, as well as request any other contracting party to take appropriate measures, including arrest or seizure. The requested contracting party is required to make every effort to oblige the request.

The ISC began operations after the agreement took effect, and Mr. Yoshiaki Ito, the former Minister of the Permanent Mission of Japan to the United Nations, became the first Executive Director of the Center. The contracting parties appointed nationals with extensive knowledge of maritime defense to serve at the ISC in Singapore. Xu Liang, the rear admiral at the Marine Police Department of the Border Administration Bureau of the Chinese Ministry of Public Security, took office as the director of the Research Department of the ISC on May 24, 2007.[37]

In addition to the ReCAAP, countries including Malaysia, Singapore and Indonesia have signed agreements to conduct joint patrols in the Straits of Malacca, which has played an important role in the suppression of acts of piracy and armed robbery in this region.

D. National Efforts to Combat Piracy and Armed Robbery against Ships

Many countries have been subject to the threat of piracy and armed robbery against ships, and many countermeasures have been adopted to address the issue. This section will examine the measures carried out by France and the U.S., two powers that have been rather active in the fight against piracy and armed robbery.

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37 Asian Countries Cooperate to Combat Piracy and Appoint Officers to ISC, (China News Service, 6 June 2007), at http://news.sohu.com/20070606/n25043034.1.shtml, 29 May 2008.

1. France

In 2008, a serious incident of piracy committed against a French vessel drew broad international attention. On April 10, 2008, in the Indian Ocean off the coast of Somalia, pirates hijacked a French luxury yacht. At the time, the yacht was on its return voyage, carrying no passengers but 30 crew members from France and Ukraine, including 22 French nationals, six of whom were female. The pirates seized the vessel, sailed along the east coast of Somalia, and finally reached the northern Somali town of Egil. The persons on board the ship were taken hostage in order to extort large sums of ransom. On April 11, France launched raids against the pirates using warships and helicopters and arrested six of them. Somalia reported that French helicopters fired rockets in the raids, causing at least five Somali deaths and eight injured, though the French government denied it caused any casualties. Portland Jorge Luis, the chief of the general staff of the French Army, at the press conference in Paris on April 11, said that the pirates released the hostages before going ashore. He stated that the French army tracked the pirates and found them preparing to escape in a vehicle. At that time, snipers on the "Small Antelope", a French armed helicopter, opened fire and shot the vehicle's engine, while three commandos jumping from "Black Panther", another helicopter, captured the six pirates, who were to be tried by the French courts.

That event demonstrated the French government's adamant position against piracy, as well as its willingness to use any necessary force. Some contend that the use of force by the French government in this instance has violated international law, whereas the French government claims that the entry of French armed forces into Somalia occurred with advance consent from the TFG.

Indeed, prior to this incident, the French government had made efforts in the fight against piracy in the Somali region. In November 2007, the government of France and the French Navy provided naval escorts to ships carrying WFP humanitarian aid to Somalia, this action lasting two months.[38] Furthermore, after the hijacking incident, E.U. countries including Denmark and the Netherlands followed France's initiative and agreed to jointly send naval ships and take steps to protect the WFP ships delivering humanitarian aid to Somalia.

2. U.S.

The United States is the world's only superpower, and it therefore has vital

38 The WFP Welcomes French Navy to Protect the Shipping of Aids to Somalia, at http://www.un.org/chinese/News/fullstorynews.asp?newsID=8823, 29 May 2008. (in Chinese)

interests around the globe. Worldwide piracy and armed robbery against ships have major effects on these interests and cause the U.S. to take measures in response to these threats.

Many years ago, the United States FBI and the Coast Guard started cooperation programs with 44 countries around the world with a view to addressing transnational crimes, including piracy. The programs included some important training, and U.S. law enforcement authorities shared with other countries their experience in fighting transnational crimes at sea.[39]

During the second half of 2007, the U.S. Navy issued a report entitled "A Cooperative Strategy for 21st Century Seapower," putting forward the well-known "thousand-ship navy" concept. This report holds that in the 21st century, piracy, organized crimes, smuggling, human trafficking and drug trade have become the biggest threats to world maritime order and all littoral States' interests. Nonetheless, not a single State alone is able to take the responsibility of maintaining safety and security on the high seas. Close international cooperation is, hence, demanded, and the report proposes that navies of States should be integrated into a "thousand-ship navy" through exchange of information, coordination of enforcement actions and unified distribution of resources, in order to improve the international community's capacity to implement the law of the sea.[40] Notwithstanding the seemingly attractive concept, it has yet to be endorsed by many State governments, which can be attributed to a number of factors. On one hand, States' defense objectives, strategies, and plans are not consistent with each other, a fact which makes it difficult for States to give precedence to joint maritime actions over their own national naval duties. On the other hand, many countries do not trust the United States and hold that the U.S. may use this program to expand its hegemonic power.

Furthermore, faced with the surge of piracy and armed robbery incidents in Somali waters, the Fifth Fleet of the U.S. Navy and its ally fleets, which were originally deployed to deter terrorism and ensure the safety of this critical sea lane, broadened their objectives to include the suppression of piracy and armed robbery against ships. On October 28, 2007, the guided missile destroyer *USS Porter* sank two pirate ships off Somalia which had hijacked the Japanese chemical tanker *Golden Nori* (transliteration), containing flammable toxic chemicals. More than

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39 Maureen O'C. Walker, Piracy and Armed Robbery at Sea, at http://www.state.gov/g/oes/rls/rm/4994.htm, 29 May 2008.

40 Jone Morgan, Build up Globally Unified Fleets, *World Outlook*, No. 4, 2007, pp. 35~41. (in Chinese)

twenty crew members aboard, including crews from South Korea, the Philippines and Myanmar, were robbed in the waters to the north of Somalia. On February 12, 2008, the U.S. Navy fired on a pirate ship hijacking a Danish vessel. The U.S. Navy had been monitoring the hijacked Danish ship since February 4 and had contacted the pirates via radio asking them to leave the vessel.

Besides the United States and the European Union, numerous other States including Russia and India, for various purposes, have sent warships and aircrafts to sea areas around Somalia to interdict acts of piracy and armed robbery. An Indian warship sank a pirate "mother" ship, though it was later confirmed to be a hijacked Thai fishing boat. It is clear that the presence of navy fleets does act as deterrence to pirates in Somalia. Currently, the effect is not very obvious, however. A limited number of warships cannot safeguard the security of the Gulf of Aden sufficiently as it covers a vast area. Additionally, pirate ships may be disguised, and hostages aboard would deter warships from opening fire.

E. NGO ICC–IMB

In addition to States and inter-governmental organizations, a number of non-governmental organizations have also been actively engaged in the fight against worldwide piracy and armed robbery against ships. The International Maritime Bureau (IMB), a special department under the International Chamber of Commerce (ICC), is a non-profit organization founded in 1981, the goal of which is to combat various maritime crimes. In response to the rise of piracy and armed robbery against ships, the IMB established the Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia, in 1992. The center broadcasts to ships by radio daily incidents of piracy and armed robbery and reports these incidents to relevant law enforcement authorities and the IMO. It assists inexperienced enforcement authorities and ship owners whose ships have been hijacked or attacked in the resolution of the problem. The center also releases weekly reports on piracy and armed robbery incidents via the Internet and writes and publishes comprehensive quarterly and annual reports regarding the problem of piracy and armed robbery.

F. A Brief Summary

In light of the above discussion, the efforts to resolve the problem of global piracy and armed robbery against ships presents a classic panorama

of "global governance" in which diverse entities, encompassing international organizations, regional organizations, States, non-governmental organizations, ship owners, shipmasters and crews, are involved and take various approaches in an attempt to solve the issue. The relevant countermeasures focus on information communication, sharing of experience and skills, joint actions, as well as the installation of warning systems and equipment. Except for some specific areas like Somalia, the incidents of piracy and armed robbery against ships have been reduced worldwide compared to those in the late 1990s. These approaches are productive to a certain extent; however, there still exist deficiencies in those efforts taken by the international community. As far as the locations of the 2007 piracy incidents are concerned, nearly all piratical and armed robbery attacks occurred off the coasts of developing countries, including nations in Africa, Asia and South America, whereas no incidents have been reported in the seas of developed countries. Actually, the plague of piracy and armed robbery reflects a deep global conflict, as it is profoundly associated with poverty, the internal instability of developing countries and the North-South gap. It follows that despite a tremendous number of measures, in particular navigational means, which have been taken to prevent the situation worsening, those measures, though necessary, merely deal with the surface of the problem rather than eliminate the root of it. A more fundamental approach ought to focus on improving the living standards of the coastal residents of developing countries and establishing good governance in those coastal regions. International organizations and developed countries should provide capital, technological and experiential assistance to facilitate the growth of employment rates, increase household incomes and develop modern fisheries, modern shipping industry or other modern industries along the coasts of those developing countries.

One reason accounting for the difficulty of implementing such approaches lies in that, under most circumstances, only law enforcement agencies and navigational authorities and organizations are involved in handling problems of piracy and armed robbery against ships. These agencies and organizations tend to offer familiar solutions rather than suggest comprehensive social and economic policies. As such, more international organizations and governmental departments, including the departments responsible for economy, or social and civil affairs, should participate in the resolution of the problem. Problems of piracy and armed robbery could be eradicated, provided that multiple departments and organizations coordinate amongst themselves and carry out complete and integrated social policies. If this is done, the living conditions of coastal residents in the developing

countries could be gradually elevated, and good governance could be established in coastal areas.

IV. China's Countermeasures

Although piratical and armed robbery attacks have seldom occurred in the waters off the Chinese coast in recent years, global piracy and armed robbery have considerable implications on China's maritime transportation and fisheries, particularly the aforementioned oil transport at sea. In order to defend the safety of Chinese ships and maintain the security of China's oil transport lanes, China should, as a responsible country, work with the rest of the world to combat piracy and armed robbery. The Chinese government should concentrate on the following aspects:

A. To Actively Participate in International Cooperative Efforts to Support Global Actions against Piracy and Armed Robbery against Ships

China is not the main battlefield of anti-piracy operations, but the efforts taken by international organizations and the world's major powers against piracy and armed robbery are, in reality, of great benefit to China. These actions and measures work to safeguard global shipping, strengthen public confidence, and consequently, stabilize international oil prices. Thus, China can be regarded, to a certain extent, as a "free rider" that benefits from international anti-piracy operations while contributing relatively little. Suppose that one day, the Red Sea, the Gulf of Aden or the Straits of Malacca are out of control and piracy overruns these regions, then those crucial sea lanes would be blocked off from China's oil transport, giving rise to soaring domestic oil prices. China's goods export would also be hampered, and domestic prosperity and stability would undoubtedly be adversely impacted. Some countries have hence proposed that China should send armed forces to aid in the suppression of piracy and armed robbery against ships off the coast of Somalia.[41]

At the current time, China may not be likely to dispatch naval forces to a place so far from Chinese territories to participate in anti-piracy operations. Nonetheless,

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41 Spain Prime Minister Proposes China's Navy Participate in the Fight against Somali Pirates, at http://war.news.163.com/08/0430/10/4AP5E5TV00011MTO.html, 30 May 2008. (in Chinese)

China should take active part in and aid the actions against piracy and armed robbery against ships initiated by international organizations, as well as operations such as military patrols by world powers. In this regard, China should discard the Cold War mentality that military operations taken by world powers outside of their territories, in particular U.S. operations, should be opposed on the ground that the goal of such operations is to seek hegemony and to function as "world police". In fact, a "world police" may be of value to the international community and China sometimes. For instance, the U.S. patrols in the Red Sea and the Gulf of Aden for the purpose of combating piracy and armed robbery against ships maintain the security of these vital sea lanes, making them accessible to each country, notwithstanding the expansion of the American sphere of influence. China should firmly uphold the value of these operations.

Furthermore, China's maritime law enforcement forces and even the armed forces should be more proactively involved in global law enforcement at sea. On one hand, they could contribute to maintaining global maritime security and, on the other hand, they could learn from other countries' experience and technology concerning maritime law enforcement. In addition, China should not become distracted by the thinking that other countries, particularly world powers, request maritime cooperation in an attempt to spy on China's power and intelligence. On the contrary, China's maritime law enforcement and armed forces ought to embrace the world with confidence. In fact, a number of positive initiatives have been undertaken. The *Cutter Boutwell* of the U.S. Coast Guard visited Shanghai in 2007. Annual joint enforcement operations have been established between Chinese fishery administration ships and U.S. Coast Guard patrol vessels and aircrafts to take measures against illegal fishing in the North Pacific Ocean. Chinese fishery enforcement officers carried out operations with U.S. Coast Guard fleets against illegal Chinese fishing ships in the North Pacific Ocean. Meanwhile, Chinese officials studied at fishery enforcement schools in Kodiak and Alaska of the U.S.[42] These operations have laid a good foundation for China's law enforcement becoming further engaged in the strengthening of global maritime security.

B. To Aggregate Internal Law Enforcement to Maintain Security in the South China Sea

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42 Fu Zhengnan, China: American New Maritime Partner?, *World Outlook*, No. 21, 2007, p 31. (in Chinese)

Recently, no incidents of piracy or armed robbery against ships have occurred in Chinese coastal waters. However, the South China Sea (SCS) is not peaceful; there were more than seventy reported piracy and armed robbery attacks there in 2007 (covering the coastal areas of Indonesia, Thailand, Malaysia, the Philippines, Vietnam and Singapore). China is an important force in the region and claims the SCS as its historic waters and should therefore play a more vital role in protecting the safety of those waters.

The SCS covers a massive area of 3.56 million square kilometers while the farthest island in the southern part of the SCS is the Zengmu Reef controlled by China and located more than 2,000 km distant from the mainland. It is not an easy task to carry out operations against piracy and armed robbery and maintain maritime security over such vast and remote waters. To begin with, the first step should be the integration of domestic maritime law enforcement. Currently, Chinese enforcement forces are highly fragmented. A diversity of departments including Marine Surveillance, Maritime Safety Administration, Bureaus of Fishery and Fishing Port Management, Border Police and Coast Guard, and Bureaus of Anti-Smuggling under Customs, all have their own fleets and helicopters. They each perform distinct functions and lack coordination with each other. The duty of combating piracy and armed robbery against ships as well as other offences is mainly discharged by the Border Police and Coast Guard, though due to lack of large patrol fleets and helicopters they mostly conduct offshore operations. The Maritime Safety Administration, on the other hand, has a significant amount of large patrol vessels, and the Maritime Search and Rescue Center of the Transport Ministry has purchased a number of helicopters. These patrol vessels and helicopters are all not appropriately armed and are mainly used for searches and maritime law enforcement, thereby falling short of the capacity to deal with grave maritime crimes. If this connection was made, the Chinese government would be able to make use of manifold functions of equipment to reduce the wasting of resources. When procuring and assembling large fleets and helicopters, the government should take into consideration their multiple uses in terms of maritime law enforcement, fishery administration and combating crimes and install various facilities and weapons. When deploying these fleets and helicopters, China should establish a unified coordination mechanism and perform tasks to their maximum possible capacity. Only by taking this approach could China use its limited financial resources to acquire a sufficient number of ships and aircrafts to fight piracy and

armed robbery as well as undertake other enforcement activities.

The Chinese navy should also be more actively involved in the fight against piracy and armed robbery against ships. China's maritime law enforcement are relatively weak with scattered resources and at present are unable to patrol over immense sea areas in the SCS. By contrast, China's SCS Fleet is quite powerful and in possession of spectacular quantities of large fleets and various types of aircrafts. It is an established practice that naval forces join in the fight against piracy and armed robbery, for instance, the navies of the United States, France, Spain and Pakistan took part in the Somali anti-piracy operations. Thus, the fleets and aircrafts of the Chinese navy should conduct more patrols in the SCS. While maintaining national sovereignty and territorial integrity, they should diligently monitor the security of the SCS and actively combat piracy and armed robbery in the event of such attacks, as well as strive to rescue victim ships. If the Chinese government does these things, it could thereby harness the maximum utility of the Navy during pracetime and earn a worldwide reputation for it.

C. To Establish Closer Relations with Southeast Asian Countries to Help Improve the Living Standards of Coastal Residents

As stated above, the occurrence of piracy and armed robbery against ships is in close association with the living conditions of coastal residents and the level of governance in coastal areas. Therefore, merely conducting armed patrols and suppression operations is insufficient to ensurer the safety of China's oil transport by sea. China should make efforts to build closer relationships with Southeast Asian countries and work within its capacity to assist in improving the living standards of the coastal residents and enhance local governance in these countries.

After thirty years since Reform and Opening Up began, China has improved its past poor conditions, accumulated relative wealth and acquired some experience in economic and legal constructions. China should share its fruits of development more with Southeast Asian countries and work within its capacity to provide appropriate financial assistance to countries severely affected by piracy and armed robbery such as Indonesia, the Philippines, Malaysia, and Thailand. China could encourage domestic enterprises to invest in the coastal areas of such countries, help them develop modern fisheries, shipping industry and other industries, and improve the employment rate and living standards of the coastal residents. Moreover, China could share its experience in law enforcement and the promotion of rule of law,

as well as offer training and equipment such as fleets to their maritime forces, thereby enhancing their enforcement capacity. These measures would notably increase China's influence in the Southeast Asia region, in addition to the benefits of reducing the incidents of piracy and armed robbery against ships and defending navigational security in the region. Admittedly, China, as a developing country, has limited capacity in this sense and Southeast Asian countries should also work with other nations around the world to improve their situations, but China should take all necessary steps that fall within its capacity.

V. Conclusions

Currently, worldwide piracy and armed robbery against ships are still rampant, a fact which dramatically impacts China's maritime oil transport and the interests of shipping and fisheries. While the international community has taken numerous measures to prevent and suppress piratical and armed robbery attacks, such measures merely focus on navigation and law enforcement. They are therefore less likely to completely eradicate the problem of piracy and armed robbery against ships. The international community should focus more on improving the living standards of coastal residents and strengthening local governance in coastal developing countries to completely remove the root cause of piracy and armed robbery against ships. As far as China is concerned, it should be more proactively involved in international cooperative efforts in combating piracy and armed robbery against ships and uphold the efforts of international organizations and other world powers. Because the South China Sea is affected heavily by piracy and armed robbery against ships, China should play a greater role by integrating its law enforcement forces and dispatching naval fleets to conduct patrols. More essentially, China should contribute to the fight against poverty in the coastal regions of Southeast Asian countries.

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The Impact of the Changing Maritime Security World Order on the Admiralty Law Regime

SHI Kegong*

Abstract: In the aftermath of the September 11 terrorist attacks, the United States aggressively implemented its maritime security strategy through domestic legislation and international coordination, and sought to cement its dominance on the seas. In collaboration with the United States, Japan also made every effort to utilize multilateral maritime security mechanisms to protect its maritime interests and expand its influence on the seas. In the face of an altered maritime security situation, China should assert its maritime interests, fully participate in international maritime affairs, and secure a place at the table.

Key Words: Sea; Security;[1] Strategy; Action; Strategic plan

After the September 11, 2001 terrorist attacks, the United States government promptly introduced a series of security policies. Congress also proposed a number of security measures. Additionally, the United States pushed for its security strategy in a comprehensive manner in the international community through international organizations like the UN General Assembly, the Security Council, the World Customs Organization (WCO), and the International Maritime Organization (IMO). But in fact, even before September 11, maritime powers – with the United States the most prominent among them – had been searching for a new maritime security paradigm to combat threats such as piracy, armed robbery at sea, maritime terrorist activities, and the proliferation of weapons of mass destruction (WMD). The September 11 attacks provided a good opportunity for the United States and other maritime powers to make it possible for the United States to implement its maritime

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1 The term "security" in this article refers to public security, not safety in the traditional sense.

security strategy throughout the world and cement its hegemony on the seas. At the urging of the United States, the IMO adopted amendments to the 1974 International Convention for the Safety of Life at Sea (SOLAS) in 2002, shortly after the September 11 attacks, with uncommon dispatch. The amendments revised Chapter XI of the Convention: the original Chapter XI became Chapter XI-1, and Chapter XI-2, entitled "Special Measures to Enhance Maritime Security," was added. The International Ship and Port Facility Security Code (ISPS Code) went into effect at the same time as Chapter XI-2. Part A of the ISPS Code detailed the mandatory requirements, and Part B provided recommendations. China, a contracting party to the SOLAS, officially implemented the ISPS Code on July 1, 2004.

China is a major player in international shipping. In 2007, China handled 924 million tons of coastal freight and 589 million tons of ocean freight. The volume of containers in ocean shipping traffic reached 17,119,300 TEU.[2] For several years, China has been ranked No. 1 in the world in ocean freight volume. The development of the shipping industry provides a safety net for the national economy. However, in this new maritime security climate, China should step up its efforts to combat maritime security threats such as maritime terrorist activities, piracy, armed robbery at sea, the smuggling of drugs and weapons, and WMD proliferation to guarantee security in shipping and to safeguard China's maritime rights and interests.

I. Concepts Related to Maritime Security

Because the situation varies from one country to another, there is no universal conclusion as to the scope of threats to maritime security. It is also difficult to make an exhaustive list of all security threats. The 2002 amendment to the SOLAS defined a security incident as "any suspicious act or circumstance threatening the security of a ship, including a mobile offshore drilling unit and a high speed craft, or of a port facility or of any ship/port interface or any ship to ship activity." This may serve as the definition of maritime security threats.[3]

Paragraph 8.9, Part B of the ISPS Code establishes that the Ship Security

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2 Ministry of Transport, 2007 Statistical Bulletin of the Development of the Transportation Industry on Roads and Waterways. (in Chinese)

3 International Convention for the Safety of Life at Sea, Art. 1, Ch. XI-2 (Special Measures to Enhance Maritime Security) (2004 integrated text).

Assessment (SSA) should consider all possible threats, which may include the following types of security incidents: 1. damage to, or destruction of, the ship or of a port facility, *e.g.,* by explosive devices, arson, sabotage or vandalism; 2. hijacking or seizure of the ship or of persons on board; 3. tampering with cargo, essential ship equipment or systems or ship's stores; 4. unauthorized access or use, including presence of stowaways; 5. smuggling weapons or equipment, including weapons of mass destruction; 6. use of the ship to carry those intending to cause a security incident and/or their equipment; 7. use of the ship itself as a weapon or as a means to cause damage or destruction; 8. attacks from seaward whilst at berth or at anchor; and 9. attacks whilst at sea.

This paragraph can be understood as a detailed explanation of a security incident, *i.e.,* maritime security incidents encompass not only piracy, but also all acts of violence or threats against a ship or a port facility, such as terrorist attacks and the smuggling of weapons.

Although the IMO has defined a maritime security incident by way of examples, it is still challenging to come up with a clear definition of piracy and other acts in the framework of international law.

For the purpose of writing reports, the International Maritime Bureau (IMB) defines piracy as "any act of boarding any vessel to commit theft or any other crime with the intent or capability to use force in furtherance of that act."[4] This definition covers any attack against ships in the territorial waters of a country or in archipelagic waters.

The IMO has used "piracy and armed robbery against ships" in its documents, which define piracy as any illegal act specified in Article 101 of the 1982 United Nations Convention on the Law of the Sea.[5] 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:

(1) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(2) against a ship, aircraft, persons or property in a place outside the

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4 International Maritime Bureau, Piracy and Armed Robbery against Ships, Annual Report, 1 January – 31 December 2000 (January 2001).

5 International Maritime Organization, Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, MSC/Circ. 984 (20 December 2000).

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 inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).

"Armed robbery against ships" refers unlawful acts of violence, detention, or robbery directed against a ship or against persons or property on board a ship, outside the definition of "piracy," in territory where a State has jurisdiction over such offenses.[6]

The definition of piracy adopted by the IMO only applies to circumstances specified in Article 101 of the 1982 United Nations Convention on the Law of the Sea, which refers to incidents occurring in sea areas outside the jurisdiction of any coastal State, including the high seas and exclusive economic zones; armed robbery against ships refers to incidents occurring within the territorial jurisdiction of a coastal State, including internal waters, territorial waters, and archipelagic waters. Most incidents that take place in straits used for international navigation are considered armed robberies against ships, mainly because these straits are usually located within the territorial waters of a coastal State. The IMB's definition of piracy may confuse governments and legal practitioners as to the nature of a particular incident. Additionally, the definition of armed robbery against ships, which includes unarmed offenses, is not crystal clear either. Currently, all UN documents as well as international manifestos among countries adopt the IMO's definitions. Examples include the UN Security Council Resolution 1816 and the Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues.

A definition of terrorism is even more elusive. According to the statistics, there exist currently more than 100 definitions of terrorism in the world, among which the following academic definition has gained broad acceptance:

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-)clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of

6 International Maritime Organization, Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, MSC/Circ. 984 (20 December 2000).

violence are not the main targets.[7]

However, it remains difficult to settle on a uniform definition of terrorism in the framework of international law. Serious disagreements among countries on this issue remain.

II. The Maritime Security Situation

For many years, the maritime security situation has not inspired optimism. According to the IMO's 2007 annual report, there were 263 piracy incidents in 2007, an increase of 24 or 10% over the number for 2006. The report pointed out the pirates' increasing ruthlessness: pirates armed with guns increased by 35%, and 64 crew members were killed or injured after attacks by the pirates. The number of deaths or injuries was more than three times of that of 2005.[8]

Maritime security incidents that have occurred in the world over the years include the following:

In September 1998, the Panamanian-registered cargo ship *Tenyu* was hijacked in the Strait of Malacca, and all 16 crew members disappeared.

In February 2000, the Japanese-registered tanker *Global Mars* was hijacked by armed attackers in Malaysian waters. The 17 South Korean and Burmese crew members were forced onto a lifeboat and were only rescued by fishermen after three days.

On August 23, 2001, the *Fu Yuan Yu 226* belonging to the Fujian Pelagic Fishery Group Company, China was hijacked in Somali waters. Eighteen crew members were detained in the bilge. The crew later fought back successfully. The most terrifying part of the incident was that the two local "security guards" employed by the ship had been spies for the pirates.

In October 2002, the Japanese cargo ship *Alondra Rainbow* was hijacked by armed attackers as soon as it sailed out of port in Indonesia. The 17 crew members were thrown onto a life raft. Rescuers arrived a week later.

In the early morning of March 20, 2003, the fishing vessel *Fu Yuan Yu 225*, belonging to Yongfeng Ocean Fishery Co., Ltd., was surrounded and shelled by

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7 Lord Carlile of Berriew Q. C. and Home Office, The Definition of Terrorism: A Report by Lord Carlile of Berriew Q. C. – Independent Review of Terrorism Legislation, TSO (The Stationery Office), Cm. 7052 edition.

8 263 Piracy Incidents Worldwide by 2007, According to Annual Report, at http://news.china.com/zh-cn/international/1000/20080110/14606769.html, 16 June 2008. (in Chinese)

8 pirate ships when it was trawling in Sri Lankan waters. The vessel sank, and 17 crew members died.

On December 12, 2004, an Indonesian oil tanker carrying methane was hijacked by armed attackers in the Strait of Malacca. This tanker was later released, but its captain and chief engineer were kidnapped.

In the evening of December 14, 2004, the Japanese-registered tugboat, *Skanda*, was hijacked in the Strait of Malacca. Malaysian maritime police set off immediately upon receiving the distress signal from the attacked vessel and intercepted the vessel successfully. However, the attackers had escaped in another boat with 3 kidnapped crewmen in tow.

On February 28, 2005, a towboat was attacked by pirates in the northern part of the Strait of Malacca. The patrol boats from the Malaysian Lumut Naval Base helped rescue 6 crewmen in waters about 50 nautical miles west of Penang at 9:00 on the same night, but the captain and one other crewman, both abducted, still remain missing.

On March 12, 2005, the cargo ship *MT TriSamudra*, carrying a full load of combustible chemicals, was hijacked by armed attackers in the Strait of Malacca. The ship was later released, but its captain and chief engineer were held hostage.

On March 14, 2005, the Japanese towboat *Idaten* was hijacked by armed attackers in Malaysian territorial waters, resulting in three missing crewmen.

On June 28, 2005, a supply ship chartered by the UN World Food Programme to bring food to the victims of the Indian Ocean tsunami was hijacked by pirates in waters about 400 nautical miles northeast of Mogadishu, the capital of Somalia. Fortunately, after over three months' negotiations, the 10 staffers on board were eventually released, and 850 tons of food on board were returned to the UN.

On October 18, 2005, a Maltese-registered cargo ship that was fully loaded with iron ore was hijacked by pirates in Somali waters. The pirates forced the 22 Ukrainian crewmen on board to request a ransom of $700,000 from the Ukrainian authorities.

The *Seabourn Spirit*, a U.S. luxury liner with over 300 passengers on board sailing in the Indian Ocean, was attacked suddenly by pirates on two inflatable boats in the early morning of November 5, 2005. The pirates hurled rocket-propelled grenades and fired machine guns at the ship, and attempted to board the liner. The captain ordered the detonation of an "acoustic bomb," a non-lethal weapon installed on the side of one shipboard, and repelled the pirates. The *Seabourn Spirit* took the opportunity to flee as fast as possible and eventually sailed

out of danger.[9]

There was a total of 31 piracy and armed robbery incidents at sea in Somali waters in 2007. Based on statistics from the first half of the year, the record in 2008 will surely surpass that of 2007. A French luxury ocean liner was hijacked by pirates in Somali waters on April 4, 2008, and the pirates asked for a ransom of $2 million; a Spanish fishing vessel was hijacked by pirates in Somali waters on April 20; a cargo ship registered in Dubai of the UAE, the *Gulf,* was hijacked by pirates in Somali waters on April 21; an oil tanker flying the Italian flag was almost destroyed by pirates in the waters off Somalia … Pirates run increasingly unchecked in the waters off Somalia. Somali waters have become the most dangerous in the world, and Somali pirates have drawn the attention of the international community after they hijacked the UN supply ship.[10]

Rampant global piracy and armed robbery against ships have been a long-standing international issue, and the international community has been exploring ways to combat piracy within the framework of international law. However, maritime security conditions have been quietly realigning in recent years in pace with changes in the international situation. Terrorism and large-scale weapon smuggling have become possibilities, and terrorism a threat to global security.

On October 12, 2000, while refueling at a port in Aden, Yemen, the U.S. Navy destroyer *Cole* was attacked by a small motorboat full of explosives. Seventeen U.S. Marines were killed, and 28 people were wounded.[11]

The French oil tanker *Limburg*, carrying 400,000 barrels of crude oil, burst into fire and exploded off the coast of Sayhut, Yemen on October 6, 2002. One crew member was killed. After days of joint investigation and evidence collection by Yemeni, French, and American investigators and counter-terrorism experts, it was determined that the *Limburg* had exploded after being struck by an explosive-laden boat in a suicide attack. The incident was confirmed as a premeditated terrorist attack.[12]

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9 Significant Global Piracy Incidents in Recent Years, at http://www.chinadaily.com.cn/gb/doc/2005-12/03/content_500163.htm, 16 June 2008. (in Chinese)

10 Somali Pirates Irritate UN and Security Council Adopts First Resolution in Response, at http://news.xinhuanet.corn/world/2008-06/07/content_8324068.htrn, 16 June 2008. (in Chinese)

11 Yemen Offers Reward for Capture of Suspects in Attack on US Navy Destroyer *Cole*, at http://www.chinacourt.org/html/article/200304/24/53066.shtml, 16 June 2008. (in Chinese)

12 Oil Tanker *Limburg* Explosion due to Terrorist Attack, Says Yemen, at http://www.people.com.cn/GB/guoji/22/83/20021017/843999.html, 10 August 2008. (in Chinese)

III. Actions Taken by the International Community on Maritime Security

A. Actions of the UN

The international community has undertaken aggressive and effective efforts to combat terrorism. Mr. Kofi Annan, the former Secretary-General of the UN, called on international and regional organizations to adopt a new approach of mutual collaboration in counter-terrorism in his remarks on a "new vision of global security." Ban Ki-moon, the current Secretary-General, has said, "[t]errorism hurts all nations – large and small, rich and poor. It takes its toll on human beings of every age and income, culture and religion. It strikes against everything the United Nations stands for. The fight against terrorism is our common mission." As a result of the increase in violent attacks against civilians, along with the heightened focus of member States on this threat, terrorism has become one of the main items on the peace and security agenda of the Secretary-General in recent years. He has urged countries to take a united front against such violence, directed the United Nations to assist member States in their counter-terrorism efforts, and distributed the United Nations Counter-Terrorism Online Handbook to member States.[13]

The General Assembly acknowledged the IMO's actions on maritime security in a resolution adopted in December 2002, and requested that all involved countries actively support the efforts. When launching the United Nations Global Counter-Terrorism Strategy on September 19, 2006, the President of the 61st session of the General Assembly, Sheikha Haya Rashed Al-Khalifa, said, "[t]he passing of the resolution on the United Nations Global Counter-Terrorism Strategy with its annexed Plan of Action by 192 Member States represents a common testament that we, the United Nations, will face terrorism head on and that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, must be condemned and shall not be tolerated."[14] The United Nations Global Counter-Terrorism Strategy (A/RES/60/288), in the form of a resolution

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13 The Secretary-General's Counter-Terrorism Efforts, at http://www.un.org/chinese/terrorism/sg.shtml, 15 June 2008. (in Chinese)

14 The United Nations' Global Counter-Terrorism Strategy, at http://www.un.org/chinese/terrorism/, 12 August 2008. (in Chinese)

and an annexed Plan of Action, is a global document that aims to enhance national, regional, and international efforts to counter terrorism. It represents the first time that all member States have agreed on a common strategic approach to combat terrorism. The Plan of Action encourages member States to consider making voluntary contributions to United Nations counter-terrorism cooperation and technical assistance projects, and urges the United Nations to consider reaching out to the private sector for contributions to capacity-building programs, in particular in the areas of port, maritime, and civil aviation security. In addition, it encourages the IMO, the World Customs Organization, and the International Civil Aviation Organization to strengthen cooperation amongst themselves, help governments identify any shortfalls in transportation security in their own countries, and provide assistance as requested to address any issues.

To coordinate counter-terrorism efforts across the UN, the Secretary-General established the Counter-Terrorism Implementation Task Force (CTITF) in July 2005. The planning and coordination efforts of the CTITF may reach outside the UN and involve other entities such as the International Criminal Police Organization. The Global Counter-Terrorism Strategy provides practical support to the CTITF in the areas of resources, information, technology, management, and policy to respond to threats of terrorism.[15] In the meantime, the Security Council has taken action against terrorism since the 1990s. It enacted sanctions against countries with links to certain acts of terrorism: Libya (1992), Sudan (1996), and the Taliban (1999, and expanded to include Al-Qaeda in 2000 by Resolution 1333). In Resolution 1269 (1999), the Security Council urged countries to work together to prevent and crack down on all terrorist activities. This resolution was a prelude to the intensification of counter-terrorism efforts after September 11, 2001. After the September 11 attacks, the Security Council established a Counter-Terrorism Committee according to Resolution 1373. The resolution requests member States to take a number of measures to prevent terrorist activities, criminalize various forms of terrorist actions, assist each other, and promote cooperation amongst themselves.

To assist the work of the Counter-Terrorism Committee, the Security Council adopted Resolution 1535 in 2004. The resolution called for the establishment of a Counter-Terrorism Committee Executive Directorate (CTED) to monitor the implementation of Resolution 1373 and to press for the provision of technical

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15 The General Assembly's Actions to Combat Terrorism, at http://www.un.org/chinese/terrorism/ga.shtml, 15 June 2008. (in Chinese)

assistance from member States. In the same year, through Resolution 1540, the Council established an additional counter-terrorism body called the 1540 Committee. This committee is responsible for monitoring member States' compliance with Resolution 1540, which requested that they prevent non-State actors (including terrorist groups) from obtaining weapons of mass destruction.

Resolution 1566 (2004) established the 1566 Working Group, which is made up of all Council members. It was tasked with recommending practical measures against individuals and groups linked to terrorism and exploring the possibility of setting up a compensation fund for victims of terrorism. On September 14, 2005, the Security Council adopted Resolution 1624, which condemned all acts of terrorism and the incitement of such acts. It also called on member States to prohibit, by law, terrorist acts and the incitement to commit terrorist acts, and to deny protection to terrorists.[16] On June 2, 2008, the Security Council adopted Resolution 1816, authorizing foreign military forces – with the consent of the Somali government – to enter the territorial waters of Somalia to combat piracy and armed robbery at sea. For six months from the date of the resolution, the countries involved may enter the territorial waters of Somalia and take all necessary means to combat piracy and armed robbery at sea,[17] and again only with the consent of the Somali government. This was the Security Council's first resolution with regards to the fight against piracy.

B. Actions of Other International Organizations

1. WCO

In July 2002, the WCO and the IMO signed a Memorandum of Understanding on issues related to the examination of containers and cargo integrity in multimodal transport and matters relating to the ship/port interface.

On June 27–29, 2002, the annual WCO Council Session adopted the Resolution of the Customs Co-operation Council on Security and Facilitation of the International Trade Supply Chain, and began to prepare the specific plan of action to implement the resolution. This Resolution, a multilateral arrangement under the framework of the WCO, is a cooperative mechanism established to ensure the

16 The Security Council's Actions to Combat Terrorism, at http://www.un.org/chinese/terrorism/security-council.shtml, 15 June 2008. (in Chinese)

17 UN Security Council Resolution 1816 (2008), at http://www.un.org/chinese/aboutun/prinorgs/sc/sres/08/sl816.htm, 11 August 2008. (in Chinese)

security and efficiency of the international trade supply chain. WCO guidelines issued in June 2003 direct that, to effectively combat terrorist acts related to containers, protocols should be implemented before the containers are loaded on the ship in the exporting country. This guidelines parted with tradition, where goods were only monitored or inspected when they had arrived in the ports or waters of the importing country.

In 2005, the WCO adopted a resolution on the preparation of the SAFE Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework) at its annual Council session. Most member States executed the letter of intent for its implementation. The SAFE Framework sets out certain principles and standards that are presented as minimum standards for WCO members. The resolution aims to establish standards to ensure the global security and efficiency of supply chains and promote their certainty and predictability; enable the integrated and uniform management of supply chains that can be applied to all modes of transport; enhance the role, functions, and capabilities of customs authorities to meet the challenges and opportunities of the 21st century; strengthen cooperation among customs authorities and improve their ability to identify high-risk goods; strengthen cooperation between customs and businesses, and promote the seamless movement of goods through secure international trade supply chains.

The SAFE Framework includes the following core elements. It requires the advance delivery of electronic information on inbound, outbound, and transit shipments, the employment of consistent risk management policies, the inspection of high-risk containers and cargo by the customs authorities of the exporting nation at the reasonable request of the importing nation's customs authorities, and the provision of certain benefits by customs authorities to suppliers who meet the standards of the SAFE Framework. Based on these requirements, the SAFE Framework proposes ways for customs authorities to work with each other and for customs authorities to work with businesses. The SAFE Framework provides uniform standards for managing the security of the global supply chain, and requires the customs authorities of WCO's member States and regions to commit to multilateral (instead of simply bilateral) coordinated action against terrorism. The SAFE Framework may eliminate terrorist threats to supply chain management at their origin.

2. The International Labour Organization (ILO)

In June 2003, the 91st International Labour Conference adopted the 2003 Seafarers' Identity Document Convention (No. 185) to replace the 1958 Seafarers'

Identity Document Convention (No. 108). This new Convention established an identification system for sailors and a globally uniform format and technical specifications for sailors' identity documents. It also applied the latest anti-counterfeiting technology to the identity documents so that the documents could keep pace with technological developments. Biometric identity data for the sailors' fingerprints were introduced, which was an innovation in the shipping industry. At the same time, the ILO reached out to the IMO to promote the implementation of the Seafarers' Identity Document Convention.

3. IMO

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention 1988) and its protocol came into force on March 1, 1992, but the revised Convention and the 2005 protocol to the Convention have not become effective. The original SUA Convention 1988 provided that States parties had prosecuting jurisdiction over persons suspected of offenses against maritime safety, as well as the obligation to extradite the suspects once the decision not to prosecute had been made. However, jurisdiction over the ship in question remained with the flag State. The revised 2005 Convention specifies that a party State can exercise jurisdiction over a ship flying another party State's flag to stop the ship, go on board to investigate, search, and interrogate.

The IMO responded quickly to the September 11 attacks. Driven by the United States, the November 2001 22nd IMO Assembly adopted a resolution that called for the enhancement of the counter-terrorism agenda. The first meeting of the MSC Intersessional Working Group on Maritime Security was held in February 2002. The 75th Session of the Maritime Security Committee deliberated on the Working Group's report in May 2002. The second meeting of the MSC Intersessional Working Group was held in September 2002. The 76th Session of the Maritime Security Committee, held in December 2002, considered the final draft to be submitted to the Diplomatic Conference on Maritime Security. The Diplomatic Conference, in turn, also adopted amendments to the SOLAS and the ISPS Code in December 2002.

The 2002 Amendments to the SOLAS contain detailed provisions on the security obligations of party States, requirements for companies and ships, specific responsibilities of companies, the ship security alert system, threats against the ship, the master's authority to make decisions with regards to the security and safety of the ship, control and compliance measures, requirements for port facilities, alternative security arrangements, equalization security arrangements, the delivery

of information, automatic identification systems, ship identification numbers, and a ship's Continuous Synopsis Record.

The ISPS Code consists of Part A and Part B. Part A is mandatory, and Part B contains guidance on complying with the mandatory requirements. The two parts correspond to each other. The ISPS Code is a set of provisions for port security. It includes security requirements for port facilities, such as those related to the people boarding the ship or entering the port facilities or their entry into restricted areas on the ship or in the port facilities; the loading and unloading of cargo; the delivery of shipping supplies; the loading and unloading of checked luggage; and the monitoring of ships and port facilities.

The IMO has changed its slogan from "Safer Shipping, Cleaner Ocean" to "Safe, Secure and Efficient Shipping on Clean Oceans," which demonstrates the importance of ship security in the IMO's work.

Further, in 2005, the IMO amended the 1965 Convention on Facilitation of International Maritime Traffic to add new requirements for the ship owner, the master, the crew, and the passengers with regards to security.

IV. American and Japanese Strategies for Maritime Security

A. The United States' Strategic Actions on Maritime Security

The United States quickly adjusted its maritime security strategy after September 11. The Port and Maritime Security Act of 2001 was passed in December 2001, the Maritime Transportation Anti-Terrorism Act of 2002 in April 2002, and the Maritime Transportation Security Act of 2002 in November 2002. These three pieces of legislation provide the framework and principles for the maritime security system of the United States and form the core and basis of its maritime (including port) security system. Their main contents include the followings: requiring vulnerability assessments of U.S. ports; conducting security assessments of foreign ports whose ships are headed toward the United States or that pose a security threat to the United States; requiring passengers and crew members arriving in the United States to provide identification documents that contain the birth date, nationality, passport number, visa number, and the original nationality of each passenger and crew member; amending the Port and Waterways Safety Act to require all ships entering the 12-nautical-mile territorial sea of the

United States to notify to the Coast Guard 96 hours before entering those waters and thereby extending the jurisdiction of the Coast Guard; allowing the dispatch of the Coast Guard to certain facilities and on ships to conduct an inspection or to respond to acts of terrorism; requiring detailed information on containerized cargo on its way to the United States to be provided 24 hours prior to its arrival at port; and requiring all ships to be equipped with an automatic identification system and remote tracking system, as well as meet other technical requirements. The United States also made significant amendments to Title 33 of the Code of Federal Regulations (Navigation and Navigable Waters) and Title 46 (Shipping), which describe maritime security requirements in detail.

In addition, the United States revised the customs regulations at 19 CFR, Part 4, establishing the rule that cargo manifest data must be submitted 24 hours prior to loading in a foreign port, namely the import manifest must be submitted 24 hours prior to loading in the exporting port. To carry out its Container Security Initiative, the United States was to work with other countries and screen containers at the ports of countries exporting goods to the United States. International negotiation would allow U.S. customs officials to work with their counterparts in the exporting countries to screen U.S.-bound containers and containerized cargo at foreign container shipping hubs.

The introduction of these security laws by the Unites States established a complex and large maritime security system that covered every aspect of maritime security. U.S. maritime security systems may be divided into those concerning ports, ships, or containers. To ensure the effective implementation of the three security systems, the laws give detailed and precise explanations with regards to security equipment, the prevention of terrorist events, security threats, the identification of terrorist events, emergency responses to terrorist events, as well as other aspects of security. Roles and functions related to security are clearly divided among departments and agencies, and communication mechanisms are established.

Moreover, the United States has actively carried out its new maritime security strategy worldwide, strengthened its cooperation with relevant international organizations, and signed bilateral and multilateral agreements. For example, the United States has signed bilateral Mutual Shipboarding Agreements with Liberia, Panama, and other flag-of-convenience States. A new maritime security world order has gradually taken form, and the United States casts a long shadow on every aspect of this new order.

B. Japan's Maritime Security Strategic Actions

For a long time, Japan has followed the maritime security policies of the United States while defending its own interests, and has spared no effort in building the new maritime security world order. In 1996, the National Institute for Defense Studies at the Japanese Ministry of Defense proposed a new concept for maritime security structure called "Ocean Peace-Keeping" (OPK). In October 1999, the Panamanian-registered Japanese cargo ship, the *Alondra Rainbow*, was hijacked by pirates in the Strait of Malacca. Taking advantage of this incident, Japan has taken first steps toward establishing a Japanese-led anti-piracy cooperation structure in Asia since 2000 through strengthening its cooperation with the governments and maritime police authorities in Southeast Asia. Further, the Japan Coast Guard has begun to assist Southeast Asian countries with establishing their own coast guard forces and to offer support in the areas of personnel, technical expertise, and equipment. On December 10, 2004, the Japanese cabinet approved the new Bureau of Defense Policy's National Defense Program Guidelines. In the Guidelines, Japan expressly stated for the first time that it would "have to remain attentive" to China's military modernization and the expansion of its activities at sea; that Taiwan should not be excluded from the multilateral maritime security structure; and that Taiwan should be nurtured to supplement the Japan-U.S. military alliance through the flexible application of the multilateral maritime security system. These statements revealed the true intention behind Japan's building of a multilateral maritime security structure.[18] A new maritime security world order dominated by the United States and Japan is taking shape.

V. China's Maritime Security Actions

In the face of aggressive terrorism, the Chinese government has consistently taken a stand against terrorism in all forms, advocated for both temporary and permanent solutions against terrorism through strengthening international cooperation, and endeavored to eradicate terrorism at its roots. Fully recognizing the importance and urgency of counter-terrorism, the Chinese government and relevant agencies at all levels prepare for emergencies even in times of safety, take

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18 Gong Yingchun, The Influence of Nontraditional Security Factors on Maritime Law Structures, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

precautions against terrorism, and give the highest priority to counter-terrorism efforts.

Even before the 2002 Amendments to the SOLAS came into force, the former Ministry of Communications had enacted its own Port Facility Security Code and Ship Security Code. Both were amended in 2007. The International Ship Security Code of the People's Republic of China and the Port Facility Security Code of the People's Republic of China went into effect respectively on July 1, 2007 and March 1, 2008. The maritime and port administrative agencies are responsible for the implementation of these codes.

China's International Ship Security Code applies to Chinese ships serving international routes, Chinese companies involved in international shipping, and foreign ships in waters under Chinese jurisdiction. These include passenger ships, cargo ships of 500 gross tonnages or above, special-purpose ships of 500 gross tonnages or above, and mobile offshore drilling units. The code does not apply to military ships or ships used exclusively for official government business.[19]

China's Port Facility Security Code applies to port facilities that serve passenger ships on international routes, cargo ships of 500 gross tonnages or above, special-purpose ships of 500 gross tonnages or above, and mobile offshore drilling units.[20]

The Ministry of Public Security adopted the Rules on Public Security Agency Maritime Law Enforcement on May 30, 2007, and they became effective on December 1, 2007. These rules apply to acts that breach the public security administrative laws, regulations or rules, or any alleged crime in Chinese inland waters, territorial sea, contiguous zones, exclusive economic zones, and continental shelves.[21]

In addition, other regulations related to maritime security can be found in the rules and regulations of the customs authority and other authorities.

The Emergency Response Law of the People's Republic of China was adopted at the 29th session of the Standing Committee of the Tenth National People's Congress on August 30, 2007, and went into effect on November 1, 2007. According to Article 3 of the Emergency Response Law, an emergency incident refers to a natural disaster, accident rising to the level of a disaster, public health

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19 International Ship Security Code of the People's Republic of China, Art. 2.
20 Port Facility Security Code of the People's Republic of China, Art. 2.
21 Rules on Public Security Agency Maritime Law Enforcement, Art. 4.

incident, or social safety incident that occurs suddenly, has caused or may cause serious harm to society, and requires the deployment of emergency response measures. Based on this definition, maritime security incidents can be construed as falling within the scope of the Emergency Response Law. The Emergency Response Law also establishes that, on principle, emergency response management is mainly left to local governments.

However, China's maritime security system as a whole is still lacking with respect to strategic planning, legal protection, technical support, and systems management. These shortcomings prevent China from adequately protecting its maritime rights and interests.

On July 29, 2003, China signed a declaration of principles with the United States on the U.S.'s Container Security Initiative. The United States would deploy customs officers to China at Shanghai and Shenzhen, and the two countries together would prepare a plan of action.[22] The U.S. Coast Guard sent personnel to assess the security performance by the port of Ningbo on December 6–8, 2005,[23] and by the port of Qingdao on April 1–2, 2008.[24] All these demonstrate that the United States' new strategy for the maritime security world order has affected the maritime security of China.

VI. The Influence of the Maritime Security Situation on the World Order on the Seas

The changes in the maritime security situation have provided a good opportunity for the United States and other maritime powers to expand their influence. The United States has pushed aggressively to implement its maritime strategic agenda in the framework of the United Nations Convention on the Law of the Sea. The new maritime security world order that it has established can be assessed from the following three perspectives. First, it actively promoted the amendment of existing international conventions, advocated its ideas on security,

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22 China and U.S. Sign Container Security Initiative; U.S. Will Station Customs Officers at Shanghai and Shenzhen, at http://www.peoplecom.cn/GB/shizheng/1027/1990288.html, 18 June 2008. (in Chinese)

23 U.S. Coast Guard Discusses Maritime Security in Ningbo, at http://www.cnzjmsa.gov.cn/scripts/print.asp?docurnentid=2252, 18 June 2008. (in Chinese)

24 U.S. Coast Guard Assesses Security Performance of Qingdao Port, at http://www.zgsyb.com/Article/ArticleShow.asp?ArticleID=40953, 18 June 2008. (in Chinese)

and attempted to alter the existing principles of international law. For example, the 2005 amendments to the SUA Convention allow signatory States to stop, board, and search a ship outside its own territorial waters and to question persons on board. This provision broke the principle in the United Nations Convention on the Law of the Sea, which states that a ship outside the territorial waters of any country is subject only to the jurisdiction of its flag State. The 2002 Amendments to the SOLAS Convention, the ISPS Code, and other international laws also resulted from the United States' advocacy of its security strategy. Second, in places where international law had been unclear, maritime powers established bilateral or multilateral relationships by pushing their maritime security agenda and thereby shaped a new favorable regional order. An example is the Japan-led Asian anti-piracy cooperation system. Third, these maritime powers passed domestic legislation to fill in the blanks in international law which, due to these countries' international dominance, has had the effect of advancing their maritime security agenda. An example would be the United States' system for assessing the security of foreign ports.

The maritime powers – with the United States at the forefront – are driving their new global maritime security strategy by various means. These efforts will have a far-reaching effect on the maritime security world order. The maritime security mechanism that Japan is pursuing in Southeast Asia will have a significant influence on the regional maritime order in the waters surrounding China.

VII. Improving China's Maritime Security Strategic Plan

Because of its peculiarities, the ocean occupies a special strategic status for all countries. In particular, the United States and Japan are taking national security strategy as a point of departure and are aggressively expanding their respective influences on the seas in the framework of international law. Their power permeates the seas. China is obviously lagging behind in a disadvantaged strategic position in the maritime security system. Therefore, it is practical and urgent for China to enhance its maritime security strategic planning in order to protect its rights and interests on the seas and realize its dream of becoming a maritime power.

A. Conduct a Comprehensive and Detailed Assessment of Maritime Security

The first step in building a system for the management of maritime security is to conduct a comprehensive and detailed assessment of all aspects of maritime security and identify the vulnerabilities. The assessment should cover the legal framework; the establishment, authority, and capacity of the agencies; the training and equipment allocated to personnel; the prediction and monitoring of security threats; the source of security threats; security plans and their scope; relevant technical support; the control of vulnerabilities; security incident response mechanisms; the handling of security incidents; and coordination among agencies.

A good maritime security system should be comprehensive, efficient, and capable of delivering a rapid response.

B. Improve the Maritime Security Legal Framework and Lay the Legal Foundation

Currently, China does not have laws specifically directed to maritime security. Although the Emergency Response Law has specific provisions on emergencies, it remains unclear whether this law can be effective in emergencies occurring in the special circumstances of the seas. For instance, if a Chinese-flagged ship encounters a security incident on the high seas, would the incident be handled effectively, and how? How would security incidents encountered by a Chinese-owned ship, a ship with Chinese-owned cargo, or a ship with Chinese workers be handled? Would the principle of territorial jurisdiction, as set forth in the Emergency Response Law, guarantee the efficient handling of maritime security incidents? Additionally, although the Ministries of Transport and Public Security have developed regulations, which apply to the waters, for their agencies, they do not cover all the components associated with maritime security. A systematic and comprehensive approach is also absent from these regulations. Each department restricts its regulations to a limited sphere; they have no organic relationships amongst themselves. It is questionable whether such a framework can truly satisfy China's maritime security needs and protect its rights and interests on the seas.

Therefore, China should devise its maritime security laws in the framework of international law and from the perspective of furthering a maritime strategy, and build and improve its maritime security system on a legal foundation.

C. Improve Integration among Maritime Security Agencies and Centralize Maritime Security Enforcement Powers

Presently, the maritime security of China is managed through enforcement by many departments. Authority is decentralized and weak, and involves the Navy, the Coast Guard, the Maritime Safety Administration, Marine Surveillance, Customs, Fisheries, and the marine police. All these departments operate separately, without systematic management. Even though many have called for better coordination for years, the situation has not improved. With the gradual permeation of the American and Japanese maritime strategic agendas, a paramilitary organization modeled on the U.S. Coast Guard and the Japan Coast Guard is quietly changing the maritime security world order.

The navy, as a military force, is always the bedrock of a country's maritime strategy. However, the sole reliance on military force, in the framework of international law, will alarm other countries. Therefore, China should establish a unified maritime enforcement force, a paramilitary organization, to integrate the current maritime enforcement forces and increase the efficiency of enforcement, intensify enforcement efforts, protect the marine rights and interests of China, and ensure the safety of Chinese citizens, ships, aircraft, ocean resources, and all marine activities.

D. Actively Participate in International Maritime Affairs and Garner a Place at the Table

On June 2, 2008, the UN Security Council adopted Resolution 1816, authorizing foreign military forces to enter the territorial waters of Somalia to repress acts of piracy and armed robbery at sea with the consent of the Somali government. It was the first resolution to combat piracy in the history of the UN Security Council and the first to authorize foreign military forces to enter the territorial waters of another country "legitimately," which had not previously occurred in the history of the UN.[25] The Somali waters, connecting Asia and Europe, is a vital sea passage between the two continents; the intent of the maritime powers, led by the United

25 Somali Pirates Irritate UN and Security Council Adopts First Resolution in Response, at http://news.xinhuanet.com/world/2008-06/07/content 8324068.htm, 16 June 2008. (in Chinese)

States, was obvious. It is true that the adoption of the resolution only occurred after much debate and negotiation, and the resolution specified that it was only applicable to Somalia and should not be considered customary international law. However, the resolution has in fact challenged the United Nations Convention on the Law of the Sea and will certainly impact existing international law. In addition, the adoption of the resolution reflects the United States' hegemony.

As a major player on the seas, China should take a page from the maritime strategy playbook of the United States, Japan, and other countries to guarantee its shipping interests, the security of sea passages, the healthy development of its national economy, and its own security. It should actively pursue a favorable global maritime strategy through all diplomatic, military, paramilitary, and inter-governmental and non-governmental organizational channels, and fully participate in global maritime affairs to garner a place at the table.

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Establishment of a Legal Framework for Sea Lane Security Cooperation in the Asia Pacific Region

WU Chunqing*

Abstract: Sea lane security has become an issue at the forefront of various research disciplines. However, there has been a little analysis of regional cooperation and the potential for a legal framework for such cooperation in the Asia Pacific region. This paper begins with a discussion of relevant issues for the sea lanes in the Asia Pacific region. It then examines the status quo and the prospects for cooperation on security issues. It goes on to note the importance of establishing a legal framework for security cooperation from both theoretical and practical perspectives. The paper proposes the characteristics, principles, content, and organization of such a legal framework. It offers an examination of the positive and negative factors affecting such a legal framework and outlines the prospects for such a framework for sea lane security cooperation in the Asia Pacific region. The paper ends with a discussion of China's choices and roles to play.

Key Words: Asia Pacific; Sea lanes; Energy security; International cooperation; International law

I. Prelude

The sea is evidently one of the most crucial resources for a modern country. Beyond the rich aquatic life and natural resources within it, the sea has become a global "expressway."[1] Booming international trade has driven the development of marine transportation in a globalized economy. Transportation of mobile force

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1 Sea Lane Security Task Team, Research Institute of Modern International Relations of China, *Sea Lane Security and International Cooperation*, Beijing: Current Affairs Press, 2005, p. 4. (in Chinese)

and strategic materials critical to national security also demands safe passage. This makes sea lanes a lifeline for each State as well as an extension of a State's overall power. On the other hand, just as land transportation, where more accidents are likely to occur along with a growing number of cars: the value and number of goods that travel the sea increases, so do the illegal activities related to the shipping industry. Trafficking, terrorism, piracy, pollution, and weapons proliferation are spreading. As States become more and more dependent on overseas resource and energy and commodity markets, these issues are turning sea lane security into a pressing issue.

The sea lanes in the Asia Pacific region are among the busiest in the world. The Western Pacific lanes connecting Northeast and Southeast Asia with the Middle East carry the second largest freight traffic in the world, next only to the Mediterranean in Europe.[2] Roughly 50,000 or over half of the large oil tankers and freighters in the world pass through the Strait of Malacca connecting the Pacific and Indian Oceans each year. It is also a necessary thoroughfare for oil tankers travelling between the oil fields of the Middle East and East Asian sea ports.[3] Currently, oil imports by the Asia Pacific States account for 60% of the global crude oil consumption.[4] The number of oil tankers that enter the South China Sea via the Strait of Malacca is three times that of the Suez Canal and five times that of the Panama Canal. For many years, over 80% of Japan's oil import has been transported through this line, and liquefied natural gas transported via the South China Sea is two thirds of the total trade volume of global liquefied natural gas. These sea lanes are so crucial to the economic health of China, Japan and South Korea that they can be called the lifeline of the East Asian States. These sea lanes are also the major passageways for foreign trade to and from Southeast Asia. The sea lanes in the Asia Pacific region are so strategically important that the United States considers them key points in its global security. However, the sea lanes of the Asia Pacific are also a globally recognized "Achilles' heel" when it comes to global security. The waters around the Strait of Malacca are notoriously prone to pirate and terrorist attacks, hence it is known as "the world's most dangerous waters."[5] In

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2 International Herald Tribune, 3 May 1999.

3 Jiang Yongxin ed., *World Atlas*, Beijing: Star Map Press, 2001, p. 58. (in Chinese)

4 The ratio is expected to rise to 75% in 2010. See Ji Guoxin, SLOC Security in the Asia Pacific, *Occasional Paper*, *Asia-Pacific Centre for Security Studies*, February 2000.

5 Gu Mo, Malacca Pirates and the Geopolitics, *Overseas Chinese Garden*, No. 4, 2005, p. 15. (in Chinese)

addition, a research report published by the Washington D.C. based Stimson Center indicates that the Sea of Japan has the most incidents of all sea regions in the world.[6] Disputes over the territorial sea among various States make administration of these sea lanes even more challenging. None of these issues can be solved by a single State. The importance and vulnerability of sea lanes in the Asia Pacific region make it necessary to strengthen security through international cooperation. The best way to create a solid foundation and provide assurance for cooperation on this issue is through the establishment of a specific, multilateral and well-rounded legal framework for the sea lane security cooperation in the Asia Pacific Region. Therefore, this paper first defines the sea lanes of the Asia Pacific region and based on that, illustrates why security cooperation is needed and how it should be realized. Following this discussion, an examination of why a legal framework is necessary for cooperation and the main contents and prospects of such a framework will be conducted.

II. Definition of the Asia Pacific Sea Lanes

A. What Is the Asia Pacific?

The Asia Pacific is not a simple geographical agglomeration of Asia and the Pacific; rather, it is a flexible concept that covers many aspects of history, politics, economics, security, etc. That is why although the word Asia Pacific is well known, it is not easy to define its concept and scope. Instead of a fixed definition, Asia Pacific as a concept has formed and evolved through interchanges between Eastern and Western civilizations and the interrelations of both coasts of the Pacific. During colonial times, the western world centering on Europe called West Asia the Near East or the Middle East, East Asia the Far East, and the South Pacific the Far South. During World War II, Europe and the Asia Pacific were the two major battlefields, and the Asia Pacific battlefield was divided further into the Pacific battlefield, China battlefield, among others. Concepts such as "East Asia," the "Far East" and the "Pacific Region" were still in popular usage at the beginning of the Cold War. The concept of Asia Pacific was not yet fully formed. Due in large part to the booming

6 Barry M. Blechman, Henry L. Stimson Center, William J. Durch, W. Philip Ellis, Cathleen S. Fischer and Mary C. Fitzgerald, *The US Stake in Naval Arms Control*, Washington, D.C.: Henry L. Stimson Center, 1990.

economies of the East Asian region and the rising international status of China beginning in the 1970s, as well as the Oceanic countries' closer ties to Asia and the ever-growing closeness of the US and East Asia in terms of economy, the concept of Asia Pacific began to spread globally. In 1974, the UN Economic and Social Council changed the name of the Economic Commission for Asia and the Far East (founded in 1947) to the Economic and Social Commission for Asia and the Pacific. Since the establishment of the Asia-Pacific Economic Cooperation (APEC) in 1989, the term of Asia Pacific has become commonly recognized and used.

Currently, the Asia Pacific geographical scope can only be defined in light of the combination of the varying political economic powers and the complex relations among the States in the region. The definition can vary depending on the context. Generally speaking, the Asia Pacific can be divided into the large Asia Pacific, the medium Asia Pacific, and the small Asia Pacific. The large Asia Pacific may include all Asia except for West Asia, the Oceania, North America, and the west part of the Central and South America, or even the West Asia region. The concept of large Asia Pacific is often used in Asia-Pacific international relations, especially when discussing security issues of the Asia Pacific after the gradual expansion of the strategic extension space of big powers such as China, the US, and Russia after the 9/11 attack. The medium Asia Pacific may include Northeast Asia (including the far-east region of Russia), Southeast Asia, the Oceania (mainly Australia and New Zealand), and the western part of North America (the US, Canada, and Mexico). The concept of medium Asia Pacific is mostly used in economic cooperation, especially in terms of APEC. The small Asia Pacific is often used together with East Asia, which usually refers to the two regions of Northeast Asia and Southeast Asia, i.e. the core parts of the large Asia Pacific and the medium Asia Pacific. The concept of small Asia Pacific is generally used in discussing regional development approaches and models. Zhu Yangming summarizes the following points of view in his book *Asia Pacific Security Strategy*: (1) the Asia Pacific includes all countries and regions of Asia and the Pacific, and the coastal States around the Pacific in North, Central and South America; (2) the Asia Pacific refers to the countries of East Asia and those in the Oceania, while those from the Americas or West Asia are generally excluded; (3) the Asia Pacific refers to the broad areas located between 100°E and 180°E; (4) the Asia Pacific mainly covers the geographical scope of all member countries of the APEC, and also the countries along the coast of the Pacific in Northeast Asia, Southeast Asia, the Oceania, North America and South America, but not those of South Asia, Central Asia or West Asia; (5) the Asia Pacific is

only limited to the connection part of Asia and the Pacific, which can be referred to as the "Pacific Asia", the "small Asia Pacific", or the "large East Asia".[7] The definitions or classification by other scholars are roughly the same.

Having dug back into the history and geographic scope of the concept of the Asia Pacific, and considering the members of the UN Economic and Social Commission for Asia and the Pacific and APEC,[8] the research focus of this paper and its relevance to China, this paper defines the Asia Pacific region as Northeast Asia, Southeast Asia, the Oceania, and States of North America lying along the Pacific coast, i.e. the broad area between longitude 120°E and 90°W. With changes in global political and economic patterns, economic globalization, and the growing Asia awareness and East Asian regionalism, the concept of the Asia Pacific will continue to evolve to pick up new meanings and have new scopes.

B. Geographical Layout of Sea Lanes

A sea lane is a regularly used route for vessels on oceans. However, the security of sea lanes definitely exceeds a strict concept of route, as it is closely linked to fields such as a State's energy, military, strategy, trade, marine development and protection. In terms of transportation, the concept can be extended to petroleum transportation fleets, access to the sea, accompanying facilities such as ports to accommodate large oil tankers, etc. In terms of route security, all States are faced with the same threats exemplified by military conflicts, terrorist activities, piracy, energy and fuel smuggling and other transnational economic crimes; therefore the security of sea lanes necessarily involves issues such as maritime military detention

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7 Chen Luzhi, Origins of the Concept of the Asia Pacific Region and Sea Awareness, *Pacific Studies*, No. 10, 1993 (in Chinese); Chen Fengjun, Differentiation of the Concept of the Asia Pacific, *Modern Asia Pacific*, No. 7, 1997 (in Chinese); Du Gong, *The Evolving World Pattern*, Beijing: World Knowledge Press, 1992, pp. 136~137 (in Chinese); Asia Pacific Economy Research Institute ed., *Asia Pacific Economic and Trade Event Dictionary*, Beijing: China Foreign Economic and Trade Press, 1992, pp. 1~2 (in Chinese); Zhu Yangming, *Asia Pacific Security Strategy*, Beijing: Military Science Press, 2000 (in Chinese); Su Hao, *From Dumbbell to Soccer: Research on the Models for Asia Pacific Cooperation on Security*, Beijing: World Knowledge Press, 2003 (in Chinese); Chen Fengjun, *Asia Pacific Security*, Beijing: China Radio International Press, 2004, p. 2. (in Chinese)

8 As of September 2007, APEC consists of 21 members: Australia, Brunei, Canada, Chile, China, China Hong Kong, Indonesia, Japan, South Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, China Taiwan, Thailand, the US, and Vietnam.

power, anti-terrorism, and anti-piracy. In terms of energy security, energy is never a simple economic issue for any State, as scrambles for resources are also reflected in the struggle for sea lanes to a large extent. During peacetime, sea lanes are the passages for the energy trade. But during war, these lanes are considered strategic passages, and the impact of geographical factors on the sea lanes is a key strategic issue for all parties.[9] The Asia Pacific region boasts many strategically important sea lanes as shown below, whose layout is roughly like the Chinese character "仨":[10]

Route	Starting point	By way of	Ending point	Direction	Region	Passage
North Pacific route	West coast of the USA and Canada	North of the Pacific	China and Japan	East-west	From North of 40°N to the area adjacent to the Aleutian Islands	4200~4500 nautical miles
Central Pacific route	West coast of the USA	The Hawaii islands and Guam	China, Japan, and Southeast Asia	East-west	Between 20°Nand 25°N	6000~8000 nautical miles
South Pacific route	West coast of South America	New Zealand and Australia	Southeast Asia	East-west	South of 10°N	Around 1000 nautical miles
Arctic Ocean route	The Arctic Ocean	Bering Strait	East Asian waters	North-south	//	//
Europe-Asia route	All European countries	Suez Canal, Northern Indian Ocean, Strait of Malacca and the Pacific	States of East Asia and South Asia	Arcs along the southern and eastern parts of the Asian continent	//	//

Of these routes, the most important is the Europe-Asia route, which is also

9 Vijay Sakhuja, Indian Ocean and the Safety of Sea Lines of Communication, *Strategic Analysis*, Vol. XXV, No. 5, August 2001.

10 Jiang Yongxin ed., *World Atlas*, Beijing: Star Map Press, 2001 (in Chinese); Zhu Yangming, *Asia Pacific Security Strategy*, Beijing: Military Science Press, 2000. (in Chinese)

the most vulnerable to the geographical environment. This arc-shaped sea lane can be divided into three sections: (1) the Northeast Asian section, from the Sea of Okhotsk to the Taiwan Strait via the Sea of Japan and East China Sea; (2) the Southeast Asian section, including the waters of the South China Sea, the waters of the Southeast Asia and various straits; (3) the Northern Indian Ocean section, including Andaman Sea, coastal waters of India, the Bay of Bengal and Sri Lanka waters. It is a key sea route from the Asia Pacific region to the Middle East, and the cultural and geographic environments of the waters on the route are rather complicated. On the one hand, it involves countries of different economic developments, histories and cultures, and different social regimes. There are global economic powers (the US and Japan), the most populous emerging countries (China and India), and two global military powers (the US and Russia) in the region. On the other hand, the region is also faced with numerous conflicts over land territory, territorial seas and other historical issues, such as the "four northern islands" issue between Japan and Russia, Dokdo/Takeshima Island dispute between South Korea and Japan, the Senkaku/Diaoyu Islands dispute between Japan and China and the South China Sea issues among China, Vietnam, the Philippines and Malaysia. In addition, historical issues such as those regarding the Korean Peninsula, Taiwan, and Kashmir complicate the region. The development in regional situation and sea lane security are threatened by regional conflicts derived from the containment policy of some States, and the coexistence of interests and conflicts as well as competition and cooperation there. Meanwhile, the region boasts many important straits such as the Soya Strait, the Korean Strait, the Taiwan Strait, Bashi Channel, and the Strait of Malacca,[11] making sea lane security a prominent issue.

C. Importance of Sea Lanes and the Strategy of Each State

In 1967, Lee Kuan Yew, Prime Minister of Singapore, also a world famous politician, put forward a prophetic insight, i.e. the world focus would shift to the Asia Pacific region. His prophecy is materializing as it has become a common

11 Major straits and channels in this region also include the Tsugaru Strait, Balintang Channel, and the Makassar Strait. A more detailed introduction of these straits and channels may be found in Jiang Yongxin ed., *World Atlas*, Beijing: Star Map Press, 2001. (in Chinese)

global understanding that the 21st century will be the Century of the Asia Pacific.[12] As the global economic focus shifts to the Asia Pacific region, trade volume and demand for energy within the region will increase. Dependence on sea transportation will also increase, which will make sea lane security an even more important issue. As of writing, over 90% of global trade volume is transported by sea. While land transportation and air transportation are growing rapidly, it is estimated that the tonnage of international marine containers will double by 2010. The transportation of strategic resources such as petroleum is even more dependent on the sea. Statistics show that in 2001, global petroleum trade volume was close to 2.2 billion tons in total, or 43.57 million barrels per day. Over 40% of the gross tonnage of marine transportation was carried by oil tankers, and oil tankers with a carrying capacity between 100,000 and 400,000 tons could be seen travelling back and forth on the sea. For a country that supplies energy, sales are only assured when it has access to the sea. An energy importer will not place an order unless the route is confirmed to be secure and the energy resources can be transported to its country. The risks are much higher for the Asia Pacific region and other petroleum importing regions, especially for a State having a limited petroleum reserve. If the sea lanes it depends on are cut off, its energy supply will be in crisis. As the global petroleum exporting and importing regions are highly concentrated[13] and because new sea lanes are not being discovered and major global routes are highly concentrated, the increase in traffic through the existing main lanes in hot navigation area puts greater pressure on sea lane security. Such sea lanes are critical for the transportation of petroleum for the majority of Asia Pacific States. In the next 20 years, petroleum consumption of developing countries within Asia Pacific is expected to grow at an average rate of 4% per year. If the growth rate continues, these States will consume 25 million barrels a day by 2020, which is more than double the current level of

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12 21st Century is the Asia Pacific Century, at http://www.dygbzy.com/html/hgss/2007-3/26/17_09_36_590.html, 14 March 2008. (in Chinese)

13 The Middle East is the world's largest petroleum exporting region, with annual petroleum exports over 940 million tons, or 44% of the global total. Other major petroleum exporting regions are Africa with 300 million tons, or 13.9%; Central and South America with 155 million tons, or 7.2%; Mexico with 94 million tons, and Canada 88 million tons. Importing regions are concentrated in the Asia Pacific, e.g. the US has a net import volume of 524.4 million tons, accounting for 58.4% of the total petroleum consumption of 897 million tons in the US. Japan imports 257 million tons, 11.9% of the global total. China imports 88.3 million tons. See Sea Lane Security Task Team, Research Institute of Modern International Relations of China, *Sea Lane Security and International Cooperation*, Beijing: Current Affairs Press, 2005, p. 105. (in Chinese)

consumption. The growing demand for petroleum will largely depend on imports from the Middle East and Africa. Daily crude oil transported out of the Strait of Hormuz and the Strait of Malacca is around 65% of the petroleum exported from the Middle East region and 40% of the global petroleum trade volume.[14] In the next 15 years, the volume of petroleum exports from the Middle East to East Asia will experience notable growth, and the number of vessels passing through the Straits of Hormuz and Malacca will be obviously more numerous than before. Thus, a sudden incident may easily lead to short-term transportation disruptions, breaking the global or regional supply of oil. Fear of these disruptions is why the Asia Pacific States view sea lanes security as an important strategic security issue.

The total trade between the US and the Asia Pacific region has far surpassed total trade between the US and the EU since the mid-1990s. In 1999, the total trade between the US and the Asia Pacific region amounted to 38% of the US total trade, while that with the EU and with the Latin America were 18% and 15% respectively.[15] An overwhelming majority of the cargo transported between the US and the Asia Pacific was through Asia Pacific sea lanes. The US is the largest consumer and importer of petroleum and crude oil. It depends on imports for over half of its demand for petroleum, which is around 500 million tons a year, accounting for 1/3 of the global crude oil trade. As estimated by the US Ministry of Energy, the US dependence on petroleum imports would reach 70% by 2010. After a half century's development, the US has built up well deployed military bases throughout the strategic islands of the Asia Pacific. The location of these bases range from the Aleutian Islands in the east to the Indonesian Islands in the west. These islands serve as transfer stations for US strategic materials and military fortresses for naval, ground and air forces; some even host US nuclear and anti-missile bases. Of the 16 sea lane chokepoints that the US has claimed control of, the Strait of Malacca, the Makassar Strait, the Sunda Strait, and the Korean Strait are closely related to the sea lane security of the Asia Pacific. The Strait of Malacca is the fastest route for the US naval Pacific Fleet to travel between the Persian Gulf, Hawaii and the west coast of the US, while the Sunda Strait is an important passage for the US 7th Fleet to travel from the Western Pacific to the Indian Ocean. In 1992, the US moved its 7th Fleet Logistics Command to Singapore from Subic

14 David Rosenberg, Environmental Pollution around the South China Sea: Developing a Regional Response, *Contemporary Southeast Asia*, Vol. 21, No. 1, April 1999, pp. 120~121.

15 Lee Jae-Hyung, China's Expanding Maritime Ambitions in the Western Pacific and the Indian Ocean, *Contemporary Southeast Asia*, Vol. 24, No. 3, December 2002, p. 563.

of the Philippines in order to strengthen its control over the Southeast Asian sea lanes. For islands and critical sea routes that are not fully under its control, the US has set up strongholds and transfer stations through "island chains" to gain control over the neighboring regions.[16] In the South China Sea, the US advocates for free navigation.[17] On 10 May 1995, Christine Shelly, the acting spokesperson of the US State Department declared in a statement on the US policy on the South China Sea: "Maintaining freedom of navigation is a fundamental interest of the United States. Unhindered navigation by all ships and aircraft in the South China Sea is essential for the peace and prosperity of the entire Asia-Pacific region, including the United States." To summarize, maintaining overseas military bases and promoting "unhindered navigation" is a fundamental principle of the US sea lane security strategy.

With a small territory, limited natural resources, and an economy highly dependent on foreign countries, Japan is overly dependent on strategic resources and product markets overseas. Japan imports strategic resources mainly from Southeast Asia and the Middle East through three ancient sea lanes. The first begins in the Persian Gulf and enters the South China Sea and the East China Sea via the Strait of Malacca, the Sunda Strait, or the Lombok Strait ending in Japan. The second is the southeast route connecting Japan, the US and Australia. The third is the Northeast Route. Of the three, the first sea lane carries 80% of Japan's marine transportation volume, which speaks for itself how strategically important it is for Japan. In addition, these sea lanes are also an important way for Japan to export its highly value-added products to Europe, Australia, the Middle East and Africa, thus whether they are free and unhindered is a matter of famine

16 Starting from Japan and South Korea and taking Guam as the axis, the Pacific island chain has 7 US naval and air force bases, extending all the way to Philippine Islands, Indonesia and Singapore. The arc area from the Western Pacific to the Indian Ocean is connected with the petroleum supply in the Middle East sandwiched between the Mediterranean and the Persian Gulf. The Southeast Asian bases consist of over 10 naval and air force bases from the Philippines, Singapore, Thailand and other countries, making up a southern wing of the Pacific island chain, and the bases guard the major sea lanes from the Western Pacific to the Indian Ocean and the Persian Gulf.

17 The US analysis argues that if the waters surrounding the Nansha Islands are declared as a war zone, the insurance costs for cargo will go up. Even if the economic expenses do not rise, the route will lose its value. Therefore, military force has to be excluded to ensure the freedom of the South China Sea routes. See Liselotte Odgaard, *Maritime Security between China and Southeast Asia*, England: Ashgate Publishing Limited, 2002, p. 133.

or feast for Japan.[18] Japan has always put protection of sea lanes as a top priority for the Japanese Self-Defense Force and its naval strategy. On the one hand, it has cooperated with the US to develop its naval and air forces and striven to "ensure the safety of 1,000 nautical miles." In Defense of Japan 1983, a Japanese Defense Agency "White Paper", Japan first clearly expressed that "the sea waters extending to several hundred nautical miles or so from its shores in the event of establishing sea routes covering about 1,000 nautical miles in the surrounding waters of [Japan]" are considered as the geographical scope of Japan's defense, and that Japan will maintain the security of US combat ships in operation and foreign vessels transporting to Japan in these waters.[19] Defense of Japan 2003 white paper also "change the scope of defense against foreign enemies from Japan's land to the sea and the air outside the Japan islands," which indicates that Japan has changed its defense policy merely focusing on its land to pushing forward its defense line to the sea lanes, and will take defensive measures such as ballistic missiles to "drive out its enemies from Japanese territory." On the other hand, as the "big and magnificent" Japanese oil tankers are usually targets for pirates. Japan has poked its nose in Malacca in the name of anti-terrorism, humanitarian relief, and anti-piracy and aggressively extended its military presence to the Southeast Asia.[20]

The geographical and geopolitical environment is not advantageous for Russian resource export, therefore, it is a strategic step to have more accesses to the sea, as more accesses to the sea will further strengthen its position as an energy

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18 Japan learned the lesson the hard way during World War II. When the Pacific War broke out, Japan stuck to its so-called "battle by warship" theory and did not provide enough protection for transportation routes, while the US, taking advantage of Japan's over dependence on overseas sources and avoiding direct battles, succeeded in attacking the Japanese transportation fleets so that Japan's urgently needed strategic materials could not be refilled. Especially towards the end of World War II, the US army launched the "hunger war" and it was lethal for Japan. The circular blockade that the US army deployed around the Sea of Japan exhausted Japan's strategic reserve, and the Japanese economy began to collapse in a short period of time. Millions of Japanese were tortured with hunger so much that they simply lost the will to resist.

19 This mainly refers to the Southeast and Southwest routes 1,000 nautical miles to the south of Japan. The Southeast route travels from the surface of Yokohama to Saipan and Guam. The Southwest route is east of Kyushu / Taiwanese waters. Japan holds that the security of these two routes will ensure that minimum necessities for living and military purposes reach Japan even during wartime. Routes beyond 1,000 nautical miles connecting the US, Middle East, and Australia are the responsibility of the United States, hence the major routes in the Asia Pacific are protected as a whole.

20 Li Bing, Analysis of the Thoughts and Policies of Japan's Sea Lane Strategy, *Japan Studies*, No. 1, 2006. (in Chinese)

supply country and make it have more discretion in deciding its oil price. Russia lost some important accesses to the sea for petroleum because of the collapse of the former Soviet Union, and expansion of the NATO to the west of Russia made it even more difficult for Russian petroleum to reach Europe or the world through Europe. Furthermore, with the rise of the new oil countries to the west of Russia, there is no more ice-free access to the sea along the east or north coasts of Russia other than the port of Vladivostok, making the connection to the Pacific through China the best choice for access to the sea for Russia. The Russian Naval Strategy issued in 1999 attached special importance to the position and roles of sea lanes, holding that smooth navigation is indispensable for the foreign trade and economic development of Russia, and made it an important strategic task of the Russian Navy to maintain the security of routes.[21] During recent years, the Russian Pacific Fleet has deployed its Fleet formation to the Strait of Malacca through the South China Sea many times and deployed scout ships to various waters of the West Pacific to detect activities of the US Navy.

India considers the control of the Indian Ocean and the protection of the sea lanes connecting the Asia Pacific and the Indian Ocean as a necessary step on its way to becoming a great power, and its naval strategy has transformed from offshore defense to far-seas operations. Nehru, the first Prime Minister of India, required India to have the capability to control the critical sea lanes from the Suez Canal to the Strait of Hormuz and further to the Strait of Malacca. Rajiv Gandhi also pointed out that "defense of India requires us to firmly control the sea lanes to the Indian Ocean." Singh, the then Indian Foreign Minister, claimed during his visit to the US in 2001 that India has broad strategic interests in the region from the Persian Gulf to the South China Sea. In practice, by developing "mutually supportive defense policy" with Indonesia and Malaysia, India has frequently had its hand in the Strait of Malacca, and even intended to become the "international marine police" of the Strait of Malacca through marine cooperation with the US. In April 2002, the Coast Guard of the Indian Navy successfully escorted an American commercial vessel from the newly established Andaman and Nicobar three force headquarters to Singapore through the Strait of Malacca.[22] The Andaman and Nicobar Islands, located at the western inlet of the Strait of Malacca, is a bridge for

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21 John Lewis Gaddis, Grand Strategy in the Second Term, *Foreign Affairs*, Vol. 84, Issue 1, 2005.

22 Li Bing, Strategic Sea Lane Concept and Policy of India, *South Asia Studies*, No. 2, 2006. (in Chinese)

the Indian Navy to enter the Pacific through the Strait of Malacca. India maintains the Ten Degrees Channel to the north of the Andaman Islands, which is a sea lane connecting the Strait of Malacca to the Indian Ocean, and controls the Great Channel to the south of the Nicobar Islands. Southeast Asia is an important base for petroleum imports to India, as approximately 114 extra-large oil tankers carrying a total of 9.5 billion barrels of crude oil from Southeast Asia to South Asia each year. If any unforeseen event happens to the Ten Degrees Channel or the Strait of Malacca, the Indian economy will be affected. This is a place which can be used as a defensive as well as offensive base. It can push forward its naval forces by 1000 kilometers, and it makes it easier to enter the South China Sea from the Pacific and exert its military impact in the Asia Pacific region by monitoring exclusive economic zones (EEZ). It can be seen that India's establishment of a security defense of the sea lanes here is well planned.

Australia adopts a strategy of defense in depth to mainly protect its sea and air routes, ports and transportation lines to the north and compensate for the weakness of its insufficient forces with highly mobile and advanced naval and air forces. Australia holds that the islands lying between Indonesia and the Southern Pacific are the most strategically important regions.

The South Korea Navy follows the strategies of offensive defense and all-rounded defense, shifting from a coastal defense strategy to that of far-seas defense.

The Southeast Asian region, located at the conjunction of the Pacific and the Indian Ocean as well as Asia and Australia, is strategically critical. It boasts wide waters and numerous islands and guards the petroleum sea passages for the East Asian region. However, the region is troubled with unstable factors such as terrorist threats, piracy, territorial disputes, competition for economic resources, and a proliferation of military forces. The ASEAN States attach great importance to the maintenance of marine security as a means to safeguard their national security. Furthermore, each ASEAN State takes naval force buildup very seriously and considers it a fundamental basis to cope with future conflicts at sea. Vietnam proposed the development goal of "gradually building up the Navy into a force with complete arms and modern equipment that is powerful enough to protect sovereignty over the territorial seas and islands" in the early 1990s, stepping up its military equipment upgrade and gradually improving its arms and equipment status. It adopts a sea security strategy of defending the land and progressing at sea and controlling the sea based on the islands. Indonesia has executed three consecutive 5-year plans since the 1980s and has accelerated the buildup of a powerful marine

military force with high-speed mobile capability and deterrence capability. The Philippines strategic focus has shifted from safeguarding domestic security in the Cold War era to defending against foreign invasion, focusing on the construction of coastal defense in the west. To meet this new goal it has proposed a new marine strategy of "pre-emptive occupation and development," and pushed forward its naval patrol and operations sites from the offshore to the far coast of the Kalayaan Islands (known as the Spratly Islands in China). Malaysia proposed to establish a formidable modern Navy as early as the beginning of 1980s, and drafted a 20-year Navy Development Plan in the 1990s and has since taken a series of measures, such as expanding the naval organization to establish a tridimensional defense system of integrated naval and air forces, speeding up construction of bases, ports and airports, perfecting military facilities, purchasing weapons worldwide to accelerate weaponry upgrade, focusing on regional cooperation, and strengthening synergized exercises at sea. Thailand defined a strategic goal of establishing "blue water" navy for the far seas at the end of 1980s, and it even spent a huge amount of money to purchase an aircraft carrier in 1997 despite its domestic economy was heavily hit by the financial crisis, making it the second country in Asia and the only in Southeast Asia to be equipped with an aircraft carrier. In recent years, Thailand went on a shopping spree for new warships and its naval equipment has upgraded to unprecedented level. The new escort fleet of the aircraft carrier that it spent a lot of money to build represents the highest level in Southeast Asia. Singapore has implemented a national "holistic security concept" since its independence in 1965, stressing on strengthening cooperation with ASEAN countries and the US, the UK and Australia in order to move toward the policy of regional common defense. Finally, the ASEAN States proactively promote regional and cross-regional security cooperation at sea to jointly counter piracy, strengthen military cooperation, take measures to boost trust and eliminate suspect among the ASEAN States, which has greatly expanded the negotiation room of ASEAN States with big powers and helped the ASEAN States to be a part of the leadership team for Asia Pacific affairs. This cooperation has also strengthened its own security as well as facilitated it to improve the international status of ASEAN and limit the impact of big powers on Southeast Asian security affairs. In addition, the ASEAN States speak with one voice externally, strengthen maritime security cooperation with the US and Japan, and keep big powers balanced.

In 2003, the foreign trade volume of China reached USD 851.2 billion, the majority of which was made through sea transportation. China's sea transportation

industry has experienced rapid development, and now its oceanic transportation fleet travels between over 600 ports in over 150 countries and regions across the world. It is a given fact that China tends to be heavily dependent on international petroleum for continued growth.[23] Therefore, the security of sea lanes is critical to the protection of China's energy transportation and the stable development of the Chinese economy. China is faced with comprehensive planning for energy sea lane strategies covering oil tanker fleet, port buildup and route security, and the ultimate goal is to establish a safe, effective, and long-lasting "marine passage" for petroleum transportation.[24] On the one hand, the Chinese government has claimed over and over again that "we hope the States concerned will not affect the normal navigation of vessels owned by any State in the South China Sea because of disputes."[25] On the other hand, China has developed an open-minded marine strategy, built up a strong naval force and made progress in marine technology and industry. China has also created its petroleum strategic reserve

23 According to Zhou Dadi, researcher of the Energy Institute of NDRC of China, the approximate ratio of imported petroleum vs. local production reached 1:1 in China in 2008, and in the future imports will still be heavily counted on. Some international institutions estimated that by 2020, China's imported petroleum will reach 300~400 million tons, and 400~500 million tons, if not more, by 2030.

24 China mainly has four marine routes: (1) eastbound routes, i.e. from the west coast of the Pacific to the east coast of the Pacific, including those from China to Japan, to the east and west coasts of North America, to Central America, and to the east and west coasts of South America; (2) southbound routes, including the ones from China to Southeast Asian States such as Singapore, Malaysia, the Philippines, Indonesia, to the Oceanic and also to island States of Southwest Pacific; (3) westbound routes, i.e. from eastern China to the Indian Ocean and the Red Sea via the Strait of Malacca, to the Mediterranean via Suez Canal before it reaches the Atlantic, including those from China to the Indo-China Peninsula, Bangladesh, the Arabian Bay, and the Red Sea, those to East Africa and West Africa, those to the Mediterranean and the Black Sea and those to West Europe, North Europe, and the Baltic; (4) northbound routes, i.e. routes going north from China to the ports of North Korea and Russian ports such as the port of Vladivostok. Of all the four routes, the westbound route is of special strategic value to China.

25 At the press conference on 18 May 1995, the spokesperson of the Chinese Ministry of Foreign Affairs, said that China's position was clear regarding the navigation rights through the South China Sea. That is to say, China safeguards its sovereignty over and relevant maritime rights and interests in the Nansha Islands and will not affect the freedom and security of navigation of foreign vessels and flight of foreign aircrafts through the international passages of the South China Sea pursuant to international laws. See Spokesperson of Chinese Ministry of Foreign Affairs on Normal Navigation of Vessels through the South China Sea, *People's Daily*, 19 May 1995, p. 4. (in Chinese)

to cope with the "Malacca dilemma."[26] China adopts a defensive marine security strategy, proactively launches military diplomacy, drives and participates in security cooperation in the Asia Pacific, especially with ASEAN members. On 14 November 2003, the naval forces of China and India carried out a joint search and rescue exercise in the waters of the East China Sea, the purpose of which was to ensure security of marine trade and enhance mutual cooperation in marine search and rescue activities. On 26 April 2004, China participated in a large-scale naval exercise in Singapore. 20 warships with 1,600 people from 18 States participated in the event. The exercise was designed to drive for the establishment of a multilateral cooperation and coordination mechanism, enhance security measures, and protect the safety of sea lanes in the Asia Pacific through seminars and exercise. On 25 May 2004, a marine patrol ship of China made the first visit to Japan and participated in a joint exercise in Tokyo Bay. Major activities conducted in this exercise included fighting against piracy and terrorism, pursuing trafficking and suspect vessels, and inspecting vessels carrying mass destruction weapons.[27] The first global navigation of the Chinese Navy reflects China's hope to define its status in the world's oceans to ensure the strategic roles of its sea lanes for energy transportation.

III. Issues on Security and Cooperation

A. Sea Lane Security and National Security

In the modern world, sea security has broadened the extension of national security, and sea lane security constitutes an important part of national maritime security. For a State, the essence of being secure is the capability to survive (to safeguard national sovereignty, maintain territorial unity, and defend against external disturbances or war activities) and develop (maintain continuous social stability and national growth). Safe and smooth sea lanes are an extension of a State's capability to survive and develop as well as dispel foreign invasion,

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26 The first four strategic petroleum reserve bases were built in 2008. As of writing, the strategic petroleum reserve of China is between 2~3 million tons, and it will increase to 12 million tons before 2010. SDRC: China Plans to Add Its Petroleum Reserve Three Times in 3 Years, at http://gb.cri.cn/14714/2007/09/13/106@1760635.htm, 14 March 2008. (in Chinese)

27 Sea Lane Security Task Team, Research Institute of Modern International Relations of China, *Sea Lane Security and International Cooperation*, Beijing: Current Affairs Press, 2005, p. 9. (in Chinese)

interference, and disturbance to the sea. They are ways to ensure extended room at sea for the State's economic and trade activities and provide transportation convenience for such activities, and also offer a peaceful maritime room when marine threats have been addressed. On the other hand, with the outward extension of the strategic space of a modern State and an acceleration of domestic industrialization and marketization, smooth sea lanes have become indispensable for the energy needed by a State to survive and thrive. Sea lane security reflects a State's maritime rights and interests to a large extent, because a leading position at sea is the lifeblood for the development of a State as well as an important support for the development of its national power. Therefore, to ensure real national security, a nation cannot just focus on the land territory, territorial waters and air space under its jurisdiction, but also the security of sea lanes, energy supply routes and navigation on the high seas. Sea lane security is closely linked to a State's interests, and it should be an important constituent of national security and development strategy. History serves as a mirror in this regard. Europe was the first to have realized and practiced sea lane security theory, and it soon became prosperous and powerful. As Mahan, the founder of sea power theory, once said, "the commercial achievement of the Netherlands was not only thanks to its sea transportation, but also dependent on its smooth sea channels, as they made it cheap and convenient to enter its own land and Germany."[28] The US became the world's super power only when it had abandoned its continental policy and isolationism as well as the concept of offshore operations and started to develop an all-rounded modern navy that was capable of deep sea battle. All these helped the US establish its maritime supremacy. Japan also followed suit. While China and India were once land powers, they became weak in the modern world exactly because they did not have sufficient awareness or experience in this regard.[29] For modern China, sea lane security directly impacts its status as a great power. Although China is gaining more and more attention in international society due to its status and the role it has played as a great power, China is still rather weak in its approach to safeguard its overseas interests and participation in international norms acknowledged by the international society. Obviously, promotion of sea lane security will improve the above mentioned capabilities, and indirectly upgrade China's military and

28 Mahan, translated by Xiao Weizhong and Mei Ran, *Sea Power*, Beijing: China Yanshi Press, 1997, p. 25. (in Chinese)

29 Zhang Wenmu, Revelation of Sea Supremacy and Rise and Fall of Great Powers, *Learning Monthly*, No. 3, 2005. (in Chinese)

economic power and thus comprehensive power, without raising "severe concerns" over "China threat theory" from other States.[30] China will not seek hegemony, but it should not forget that in 1820 China's economy was the largest and its GDP was the strongest in the world, but 20 years thereafter it was defeated by the gunboats of the UK at the East China Sea. It should not be forgotten that China's GNP was 5.28 times that of Japan in 1890, but 5 years later China was defeated by Japan at sea and was almost divided.[31]

We should also realize that it is not enough to examine the relationship between sea lane security and national security from a domestic perspective. Also, we should identify the interlock and interdependence among the countries in the current international security pattern to consider which security interests at sea shall be protected from the perspective of regional or global security cooperation and determine the proper strategy and tactics. Based on China, we should learn the art of "unity and struggle" from Mao Zedong when forming a unified defense line with the bourgeois.[32] During certain periods and under certain circumstances, we can cooperate with other States to safeguard security at sea when we share common interests, while in other cases we also need to fight with other States as a rival. China should develop through such cooperation and fights. China cannot develop or make any progress if it does not know how to cooperate internationally and pursues an isolationist foreign policy, but it will also run the risk of being left behind or even losing its independence if it does not participate in competition and commits the right opportunism.

B. Issues Facing Sea Lane Security in the Asia Pacific

The above mentioned sea lanes pass through Northeast and Southeast Asia. The geopolitical situation in these regions are complex and evolving, making it an "unstable arc" susceptible to various security problems. Given the situation in the Asia Pacific region, the following negative factors impact the security of the sea lanes indicated above:

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30 Feng Liang and Zhang Chun, Sea Lane Security of China and Its Challenges, *International Issues Forum*, Fall Issue, 2007. (in Chinese)

31 Zhang Wenmu, Revelation of Sea Supremacy and Rise and Fall of Great Powers, *Learning Monthly*, No. 3, 2005. (in Chinese)

32 Mao Zedong's analysis in this regard is especially incisive and still worth considering. See *Selected Works of Mao Zedong*, Vol. II, pp. 607~609. (in Chinese)

A traditional realist perspective notes the danger of military conflicts arising from territorial disputes and naval arms races. Mahan's sea power theory was first popularized in the 19th century, which stressed the importance of the sea and the significance of controlling the sea. It advocated for control of the sea and especially sea routes both in peacetime and wartime, to disrupt the enemy's sea transportation. Many strategists and decision makers of the Asia Pacific States have been influenced by and observed his theory, and they all rushed to expand their naval power in order to "control the sea". In the year 2000 the US Navy maintained 12 aircraft carriers, 11 navy and air force fleets, 12 amphibious ready groups, 73 attack submarines, and 128 surface warships, of which quite a number are deployed in the Western Pacific and the Indian Ocean regions. The US Pacific Fleet consists of the 7th and 3rd Fleets equipped with three aircraft carriers, around 40 nuclear-powered submarines (including 10 strategic submarines), over 50 cruisers, and other large surface ships. Of these, the 7th Fleet possesses 58 main surface ships (excluding landing ships), 38 submarines and 350 fighter aircrafts. Traditional attack forces mainly include *Kitty Hawk* aircraft carriers, 3 cruisers equipped with Tomahawk cruise missiles, and 5 nuclear-powered submarines. By August 1996, the Russian Pacific Fleet stationed in the Far East region (Russian second largest fleet) had possessed 660 naval ships, of which there were 55 surface fighters, 60 submarines, and 45 nuclear-powered submarines. Pursuant to Russian Naval Strategy in 1999, the fleet should mainly consist of multi-purpose nuclear attack submarines, ships bearing aircrafts, landing ships, multi-purpose monitoring ships, and missile equipped naval aircraft. Japan Maritime Self-Defense Force is the third most powerful in the world, only second to the US and Russia, and it plans to change the "Eight-Eight Fleet" (consisting of 8 destroyers and 8 anti-submarine helicopters) which had been in place for years to a "Ten-Nine Fleet," one aegis-class destroyer, one multi-purpose destroyer, and one anti-submarine helicopter more than the "Eight-Eight Fleet". Japan is the only country other than the US that possesses the most advanced aegis-class destroyer. The Japan Self-Defense Force will be equipped with four aegis-class destroyers, bringing its total number of destroyers to 42, one time more than the number of destroyers of the US Pacific Fleet. It also possesses 15 high performance submarines suitable for far-seas operations. The Japan Maritime Self-Defense Force has the best mine clearance capability in the world, overtaking the US. Its airborne anti-submarine capability is ranked the second in the world. The South Korean Navy is accelerating its large-scale, high-speed missile buildup to improve its capabilities in early warning, marine

surveillance, and air operations. South Korea is equipped with 6 submarines, 7 destroyers and 33 frigates and plans to purchase at least 3 second-generation diesel electric submarines. It has independently built 4,000-ton-class destroyers as well as frigates, new class of submarines, new type of landing ships, missile patrol boats, etc. India allocated USD 940 million of its 2000–2001 defense budgets to its navy, 60% of which was to purchase arms and carry out the modernization plan of the navy. The Indian Navy already possesses 28 surface warships (including an aircraft carrier) and 19 submarines, and will import light aircraft carriers, missile destroyers and missile frigates from Russia. China Taiwan possesses 3 submarines, 22 destroyers and 16 frigates. In recent years, China Taiwan purchased 6 La Fayette-class frigates from France and rented 6 Knox-class frigates from the US, and in early 1998 China Taiwan bought 3 Knox-class frigates from the US. 7 Perry-class guided missile frigates independently developed by China Taiwan have been fully delivered. Since 1999 the Taiwanese Navy has started a "ten-year force buildup plan" and planned to purchase or independently build 4 aegis-class guided missile destroyers, construct 30 invisible speedboats and remodel new types of Fast Attack Boat Missile. The Taiwanese Navy further possesses approximately 20 Hughes 500MD and 570(M) anti-submarine helicopters. With the end of the Cold War, the ASEAN States strengthened their naval and air forces to adapt to the shift of defense focus from the land to the sea and address the need to protect their respective 200 nautical miles EEZ. Thailand purchased an 11,500 ton light aircraft carrier from Spain, which is now in service, making it the second country in Asia to possess an aircraft carrier following India. It also plans to purchase at least 3 R-class submarines, if not more advanced. Indonesia already has 2 submarines and 13 frigates and plans to purchase some secondhand U-206 submarines from Germany. Already equipped with 4 frigates, Malaysia has ordered two Lekima-class guided missile frigates from the UK and two Laksamana-class corvettes from Italy. With 6 light frigates, Singapore cooperated with Sweden to produce 1,000-ton light missile guided frigates and bought 4 submarines from Sweden and officially built a submarine army in 1999. Brunei ordered 3 guided missile ships from the UK and 2 landing crafts from Australia. Most of these warships are equipped with Harpoon or Flying-fish anti-ship missiles. The Philippines purchased 3 patrol boats from the UK and started the bidding process for 8 patrol boats and 24 military airplanes in May 1997. Vietnam is also strengthening its naval force. It imported 2 secondhand Sang-o submarines in 1999 and has already ordered 6 Soviet-27 fighters from Russia, and plans to buy another 24 planes from Russia. Australia has in recent

years bought 6 submarines, 8 frigates, and 16 Seahawk helicopters and ordered 11 SH-2G ship-based helicopters to equip its new Anzac-class frigates. New Zealand Navy ordered 4 SH-2G ship-based helicopters in 1997 to equip two Anzac-class frigates.[33]

Increasingly fierce arms race has worsened the sense of crisis within the Asia Pacific, further complicating the security situation in this region. In addition, historical disputes over the waters in this region continue to pose problems for cooperation. The dispute over the four northern islands between Japan and Russia,[34] the dispute over the Senkaku/Diaoyu Islands between Japan and China,[35] the

33 Xia Liping, Characteristics of Naval Developments in Current Asia Pacific Region and Prospects of the Naval Arms Control, at http://iaps.cass.cn/Bak/ddyt/0104-2.htm, 14 March 2008. (in Chinese)

34 The four northern islands are Etorofu Island, Kunashiri Island, Shikotan Island, and Habomai Island lying between Hokkaido of Japan and the Kuril islands of Russia. These islands were part of Japanese territory and subject to its jurisdiction prior to World War II. According to the Yalta treaty the four northern islands were occupied by the USSR beginning from 3 September 1945, and all the territorial disputes between the two States are caused thereby. Currently both parties take different strategies: Japan requests Russia to return the islands as soon as possible, while Russia's focus is to pursue joint development with Japan on the four islands. The dispute over the four northern islands is unlikely to be resolved any time soon as a solid cooperative basis has yet to be established.

35 Located on the continental shelf of the East China Sea, the Diaoyu Island and its affiliated islands and islets belong to China in view of history, geography, and international law, but Japan advocates for its sovereignty on the same based on the discovery principle. In 1972, the US returned the Ryukyu Islands and the Diaoyu Islands to Japan according to the Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands despite China's strong opposition. China and Japan once reached a common understanding of "shelving differences and seeking joint development" in 1972. However, Japanese rightists have been stirring up trouble during the past years, which will probably worsen the situation. In addition, China and Japan have disputes over the rights and interests in the East China Sea that are also related to the Diaoyu Islands: definition of and dispute over the continental shelf, dispute over the maritime rights and interests associated with islands, and dispute over the principles on continental shelf delimitation. As they involve factors such as international law, natural geography, and resource development, all these issues are challenging to solve.

dispute over Dokdo/Takeshima Island between South Korea and Japan,[36] disputes in the South China Sea,[37] disputes over the territorial land and sea among the Southeast Asian States,[38] and the Taiwan issue,[39] increase the likelihood of conflicts among the States concerned. This instability presents a severe threat to regional sea lane security and even security on the whole.

New security issues such as piracy and terrorism also pose a threat to sea lane security. Pirates have always been around, and they have made a resurgence

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36 Located in the Southwest of the Sea of Japan, Dokdo (Korean) or Takeshima (Japanese) Island includes two small islands, one on the east and one on the west, and also includes the surrounding low tide elevations. Scattered on a sea area occupying 13,000 square kilometers, it has an area of 0.186 square kilometers. It is 46 nautical miles away from the Ulleung-do of South Korea on the northwest, and 79.5 nautical miles away from the Oki Islands of Japan on the southeast. Although both States claim sovereignty over the island, it is actually under South Korea's control. Neither party will concede as the dispute over the island also involves disputes over fishery resources and the delimitation of EEZ. Both governments also need to secure domestic political stabilities through a tough diplomatic policy, and they fear that improper handling of these issues may result in further territorial disputes, which further challenges the resolution of disputes. Considering that both parties have broad common interests, the dispute is unlikely to intensify.

37 As mentioned above, the South China Sea and its surrounding waters have the most important sea lanes in the world. It is also estimated to have oil and gas reserves exceeding 63 billion tons, qualifying it as "the second Middle East". China claims that it has undisputable sovereignty over the Nansha Islands, arguing that the South China Sea waters are historic waters of China. However, currently, seven parties, including China Mainland, Vietnam, the Philippines, Malaysia, Brunei, Indonesia, and China Taiwan, all claim sovereignty over parts of the region. These disputes have led to armed conflict. There are two core issues concerning the South China Sea: one is the sovereignty over the islands and rocks, and the other is the delimitation of a State's territorial sea, continental shelf, and EEZ. While the Chinese government has proposed concepts of equal negotiation and seeking common interests while reserving difference, shelving differences and seeking joint development, it has become a major issue in international relations. Any disruption to the sea lanes in the South China Sea will have a regional or even global economic impact that should not be underestimated. And some big powers may also take the opportunity to get involved in these key strategic waters.

38 For example, the sovereignty dispute over the Pedra Branca/Pulau Batu Puteh between Singapore and Malaysia, dispute over the belonging of Mesopotamia Island and its surrounding waters to the northeast of Kalimantan between Malaysia and Indonesia, disputes over fishery and overlapping continental shelf between Thailand and Vietnam, and disputes over the territorial sea arising from the reclamation project of the Pulau Tekong between Malaysia and Singapore.

39 The Taiwan issue is completely an internal affair of China, and Taiwan is an indispensable part of China. However, due to the involvement of western anti-China powers and Japanese rightists as well as the existence of Taiwan separatists, the issue is rather complicated. Located between Northeast and Southwest Asia, the Taiwan Strait is a critical sea lane for China and the world, as it is the gate for China to enter the Pacific, the only way for Japan to reach the south, and a key strategic place for the US in the Asia Pacific region. The Taiwan issue has become the most sensitive and most critical issue for Chinese diplomacy.

and become more rampant in recent years in Southeast Asia. Pirate-stricken areas include the Strait of Malacca and the Sunda Strait, coastal areas of Vietnam and Cambodia, the triangular area of Hong Kong – Luzon – Hainan, north of Taiwan and the Yellow Sea. Statistics show that piracy incidents in the Southeast Asian regions account for as many as 60% of the world piracy incidents, and the Strait of Malacca especially is known as pirate-infested and "the most terrifying strait." In the year 2000 alone, 252 piracy incidents happened in the Strait of Malacca and the South China Sea, 72 crewmembers were killed, and 129 were injured or missing. Losses caused by piracy attacks and other fraud activities at sea are estimated to be USD 1.6 billion annually.[40] What is worse, piracy has become affiliated with organized crime and pirates are now equipped with advanced automatic weapons and high-tech equipment. Piracy is becoming "globalized" with the formation of "pirate trusts" or "pirate syndicates" with criminal background. Some separatist organizations such as the Tamil Tigers also conduct piracy, and collaboration of the pirates and terrorist organizations has an even worse impact on sea lane security. Terrorist organizations are adept at finding out where the weak points are and making asymmetrical attacks. With the rollout of international anti-terrorism campaigns, terrorists have shifted their foothold to the sea. Now terrorists related to the Al Qaeda organization are already involved in hijacking vessels carrying radioactive substances in order to create lethal chemical weapons.[41] The US Federal Bureau of Investigation (FBI) claimed that terrorists' attacks on objects at sea have become the Achilles' heel of anti-terrorism of the US. In 2003, officials from the International Maritime Bureau (IMB) warned that terrorist attacks at sea would become the next target for the terrorists following the terrorist explosion in Bali in 2002. In 2002, the Qatar Peninsula TV station broadcasted a talk of Bin Laden, who claimed that the Islam forces are "getting ready to fill you with horror, and our target is your lifeline." Terrorist organizations, currently, have the following approaches to attacking sea lanes: (1) intercept or rob tankers carrying nuclear, biological, chemical or other dangerous materials to steal raw materials including uranium and plutonium oxides to create "dirty bombs";[42] (2) drive a dangerous

40 Pirates Flourish on Asian Seas, *Washington Post*, 18 June 2001.

41 Mark Bruyneel, Reports in 2002, at http://home.wanadoo.nl/rn.bruyneel/ar-chive/modern/2k2repc.htm, 14 March 2008.

42 For example, in February 2003, three chemical-laden vessels departing from Langsa, Indonesia, were attacked in the Strait of Malacca, two caught fire after being shot, and the third one was detained for an hour.

vessel to attack a port, tanker or petroleum facilities to create sensational effects;[43] (3) conduct suicide attacks on maritime military targets;[44] (4) float vessels full of explosives that fly "flags of convenience."

A third issue is organized transnational maritime crime such as weapon trafficking, drug smuggling, and human trafficking over the high seas. Heroine from Burma is usually transported to Thailand, Vietnam, China, India and other countries via sea transportation or to sea hubs for distribution to the west. Illegal transportation of migrants by sea is the cheapest and easiest, and the main destinations of illegal migrants are the US, Western Europe, and Australia. Above activities are growing in the Asia Pacific region and smugglers are generally armed and prone to conflicts, presenting threats to passing vessels. A combination of weapons proliferation due to trafficking activities and terrorism makes the sea lane security situation go from bad to worse.

Finally, there is the issue of tanker pollution incidents at sea. Many sea lanes in the Asia Pacific region pass through narrow passages or straits.[45] Once a tanker of crude oil or radioactive substance leaks, it will affect the security of the lanes over a large area.

C. Prospects for and Significance of Cooperation

Theoretically, security is a dynamic concept. From a traditional security perspective, a State mainly maintains its safety control capabilities through its military backing and economic assurance. If such capabilities are acquired through their own efforts, then security will be more effective through international cooperation as States become more interdependent under the impact of non-traditional security. 9/11 attack indicates that even a State like the US with a powerful conventional military still has huge security vulnerability from non-traditional threats. US' incomparable military power failed to protect it from

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43 For example, a French tanker *Limberg* was attacked by terrorists with an explosive-laden dinghy in October 2002 while travelling through the Gulf of Aden. This incident caused huge economic losses and catastrophic ecological damage.

44 For example, a US warship *Cole* was hit by a suicide attack by radical Yemeni Islamic military "Mohamed's army" while berthing in the Gulf of Aden, Yemen, on 12 October 2000. 17 sailors were killed and the *Cole* was gravely damaged in the incident.

45 For example, the Strait of Malacca is 1,000 kilometers long, with an average depth of 25~27 meters. As wide as 350 kilometers on the northern waters, while the narrowest being less than 40 kilometers in the south, it is shaped like a funnel.

asymmetrical attacks from terrorism. When a party seeks unilateral security its neighbors may feel insecure because of its military buildup. The insecurity actually shows that the country seeking unilateral security is not safe, and such unilateral security is only an illusion. In this sense, security should be mutual, cooperative, and shared. The 9/11 attack led to an unprecedented international anti-terrorism defense line, which is based on the common positions and expectations for shared security and mutual security among States. International security will eventually be challenged without a new cooperative security order. Interdependence between States is growing in light of non-traditional security threats. National security can better be achieved through international cooperation than unilateral methods.

In reality, none of the above mentioned unfavorable factors can be solved by one State on its own. These factors pose an asymmetrical threat to a State's security. These issues are also transnational and trans-regional which further complicates the existing disputes over territorial sea in the Asia Pacific region. The States concerned may fight over jurisdiction and management of the disputed waters when strategic interests are involved, but these same waters may degenerate into a "no man's land" when States are faced with a security issue. This outcome is unfavorable to any party and to the keeping of balance between rights and liabilities among States. Obviously, in an uncooperative environment, synergy is not at play. For example, the piracy issue in Southeast Asia is related to the geographical environment and economic fluctuations as well as the weak sea security of the majority of ASEAN countries. Some States concerned limit other States' cross-border tracking, investigation, and management by using State sovereignty excuse, leading to a situation where the weak cannot manage, while the capable are not allowed to manage. Due to the current narrow definition of piracy in international law, some States have not realized or are unwilling to realize the severity of the piracy issue, nor are they willing to recognize certain waters as dangerous. As there are still disputes regarding the jurisdiction of regional piracy, each State protects its own interests, and this has a huge impact on international sea lane security and the interests of the international community. This problem can only be solved through cooperation, because terrorism is not a threat against one State, but instead it is a threat to the whole world, especially when it involves the high seas. Cross-border crimes and sea pollution incidents are transnational in nature. A State's interests are closely linked to the broader interests of international community in respect of these issues, making international cooperation both necessary and possible. Furthermore, in the next 10 to 15 years, oil exports from the Middle East region

to the East Asian region will substantially increase, and more vessels will pass through the Strait of Hormuz and the Strait of Malacca than before, adding more stress to the sea lanes. Competition for marine transportation will become even more severe, and conflicts for navigation rights and costs will become even more complicated. States have unveiled measures to manage these new challenges. For example, the principle of assurance of innocent passage was proposed by Malaysia, Indonesia, and Singapore in 1971. This principle would only allow oil tankers over 200,000 tons to pass through the Straits of Malacca and Singapore. These measures and disputes over the navigation rights also increase transportation costs. Only through cooperation and "topic exchange"[46] to synergize legal resources can costs in these regards be reduced to ensure regional win-win.

It is significant to cooperate in the field of sea lane security. The energy sea lane security is a common issue facing all Asia Pacific States, which are dependent on secure sea lanes for their energy supply. For example, China, Japan, and South Korea have a level of dependence of 85.7%, 90.6% and 87.30% on the Strait of Malacca respectively.[47] States have long used investment in energy sources and the relevant diplomacy measures to engage in competitive exclusion against each other. States enter into a malicious circle of bidding against one another,[48] creating "a sellers' monopoly where buyers have to bid" in the energy market. The Asia Pacific States can only take control of energy pricing by cooperating in an energy consumption alliance which gives them purchasing and negotiating power. This alliance will allow for a win-win situation among multiple parties and benefit the prosperity of the Asia Pacific region. To sum up, cooperation on sea lane security in the Asia Pacific region will (1) balance the rights and liabilities of the States in this region; (2) create synergy and improve wellbeing within the Asia Pacific region; (3) reach mutual understanding through cooperation, where the scope of cooperation may expand to lay down a good political and legal basis for friendly settlement of

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46 In a complete sea transportation system, there are accompanying facilities such as accesses to the sea, ports, and transportation fleets that are integrated parts of the sea lanes, all of which are key links that sea lane security is dependent on. The States that are not hubs on the routes may commit to helping the States that are hubs in building such facilities and may open the routes and ports of their States in exchange for passage rights, reduction of transportation costs, and appropriate jurisdiction and rights of cross-border tracking, investigation, and management in anti-terrorism and anti-piracy operations.

47 Yang Zewei, Preliminary Exploration in a Legal Framework for Northeast Energy Union, *Study of Law*, No. 4, 2006. (in Chinese)

48 Peng Yun, East Asia: A Start from Energy Consumption Alliance, *World Knowledge*, No. 15, 2005. (in Chinese)

sea borders. Only through a process of joint promotion and maintenance of sea lane security can States share common views of interests. This process will help to boost mutual trust in the security field and provide more security services for regional and international security.[49]

D. Preliminary Status of and Fields for Cooperation

Currently, cooperation for sea lane security in the Asia Pacific region is mainly focused on improving dialog, establishing mutual trust measures, technological cooperation, information sharing, and military cooperation. And most of these are bilateral or regional cooperation. This is partly because there are convergences of interest among States of the Asia Pacific region,[50] and partly because these convergences of interest currently only exist in a narrow field and bilateral or regional aspect, while the broader convergences of interest and cooperative fields are yet to be found out.

Regarding pioneers in bilateral and multilateral cooperation, Singapore and Indonesia formulated a joint maritime action plan for the Strait of Malacca. The IMB established a regional piracy reporting center in Kuala Lumpur, capital of Malaysia, in 1992. The regional piracy reporting center has jurisdiction over the seas of Southeast and East Asia. In recent years, bilateral cooperation within this region has entered a substantive stage. India and the US began joint patrols over the Strait of Malacca. India has conducted separate joint military exercises at sea with Japan and China. China has strengthened cooperation with the ASEAN States and in 2002 signed the Code of Conduct for the South China Sea. However, on the

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49 Sea Lane Security Task Team, Research Institute of Modern International Relations of China, *Sea Lane Security and International Cooperation*, Beijing: Current Affairs Press, 2005, p. 8. (in Chinese)

50 For example, Japan relies on the US to balance China and Russia, and it depends heavily on the US for maintenance of its sea lane security on the Pacific. While the anti-US nationalism has been rising in Japan in recent years, the Japanese government nonetheless enhanced sea security strategic cooperation with the US, as the common interests between the two States far outweigh their disputes. On the other hand, considering the need to circumvent strategic chokepoints, mitigate transportation risks of energy import, and change the pattern that its energy imports are overly dependent on the Middle East and Southeast Asia, Japan has been focusing on energy cooperation projects with Russia. A clear example is that Japan is actively engaged in the Sakhalin-I and Sakhalin-II petroleum and natural gas development projects, and has been discussing digging a natural gas tunnel that goes south from the oil and gas development base on the continental shelf of Sakhalin to Japan's capital Tokyo across the sea.

whole, a concrete multilateral mechanism is yet to be established.

One of the few special organizations for cooperation on sea lane security in the Asia Pacific region is the Working Group on Maritime Cooperation affiliated to the Council for Security Cooperation in the Asia Pacific. Established in June 1993, the Council for Security Cooperation in the Asia Pacific is so far the most rigorous, comprehensive, and active "second track" multilateral dialog channel. It has 5 working groups: the Confidence and Security Building Measures, Concepts of Cooperative and Comprehensive Security, the North Pacific, Transnational Crime, and Maritime Cooperation. The Working Group on Maritime Cooperation has 6 key purposes: (1) to cultivate maritime cooperation and dialog in the Asia Pacific region as a means to effectively manage and utilize marine resources; (2) to boost understanding on regional marine topics and increase the scope for cooperation and dialog; (3) to establish a stable maritime mechanism to mitigate the risk of regional conflicts; (4) to conduct policy research on marine security topics for specific regions; (5) to drive for special marine-related confidence and security building measures; (6) to push all States to observe the United Nations Convention on the Law of the Sea 1982.[51] In addition, the Western Pacific Naval Symposium, established in 1988, has 17 States as its members such as Russia, the US, Japan, and Australia, and France and Canada are its observers. The Symposium holds a conference once every two years, with the first held in Australia, where the main task was to propose to its own government a coordinated regional naval cooperation effort.[52]

In terms of concrete cooperation, the regional cooperation has evolved from guideline discussions to concrete measures and various actions have been taken. Naval exchange and cooperation is made among some States to a certain extent. South Korea and Japan, while holding that there are conflicting factors between the two States, believe they have common strategic directions and strategic goals in maintaining security, and the navies of both States may shoulder common operations. This common strategic direction is the westbound sea, and the common strategic goal is to counter possible threats from the west. The navies of both States

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51 At http://www.oycf.org/Perspective/Chinese/Chinese-4-11302001/LiHu.htm, 14 March 2008. (in Chinese)

52 Russian Navy Goes towards International Stage, at http://www.cnread.net/cnreadl/jszl/y/yiming/sjjsl/062.htm, 14 March 2008. (in Chinese)

may cooperate on anti-submarine efforts and sea lane security.[53] Naval exchanges and cooperation are frequent between South Korea and Russia, Japan and Russia, China and South Korea, as well as China and Russia. China, Japan and South Korea are adjacent to each other and share many fishery resources, and thus have signed mutual fishery agreements.[54] When it comes to piracy combating efforts, China advocates an improvement of regional cooperation. China has reached counter piracy agreements with Vietnam, Japan, Singapore, India and other countries or adopted relevant measures. Furthermore, China and ASEAN published the Joint Declaration on Cooperation in the Field of Non-traditional Security Issues in 2002, expressing that both will jointly crack down on transnational crimes such as drug trafficking, illegal immigration, piracy, terrorism, weapons trafficking, money laundering, international economic crime, and internet crime.

IV. The Necessity of a Legal Framework

A. Analysis from a Theoretical Perspective

In an anarchic international society with no higher authority and no powerful enforcement mechanism, why would a State abide by international law? Does international society need international law? Such questions have been asked for hundreds of years, and the traditional view belittles the existence and value of international law. This classical realist argument originated from Hobbes's statement that "where there is no common power, there is no law."[55] According to Pufendorf, independent States are not bound by any pacts and they can nullify agreements at will, thus international law is not binding. Austin also held that "law is the command of a sovereign; as international community has no sovereign, international law cannot be considered true law."[56] On the other hand, for hundreds

53 A South Korean Navy fleet visited Japan in 1994, a Japanese Self Defense Force fleet visited South Korea in 1996, and both States agreed to enhance their military exchange in 1997. In 1999 the navies of South Korea and Japan conducted a joint search and rescue military exercise against threats from the west of South Korea and Japan, and in 2002 both had a second search and rescue military exercise at sea.

54 The contents of China-Japan Fishery Agreement, South Korea-Japan Fishery Agreement, China-South Korea Fishery Agreement, South Korea-Russia Fishery Agreement, and Japan-Russia Fishery Agreement, at http://www.lfg.com.cn/, 22 March 2008. (in Chinese)

55 Hobbes, *Leviathan*, London: Blackwell, 1946, p. 83.

56 John Austin, *The Province of Jurisprudence Determined*, London: Weidenfeld & Nicolson, 1954, lecture VI.

of years, the international community has seen countless legislative acts enacted covering topics as diverse as from the outer space to the sea bed and floor, from politics and military to finance and trade. Examples of international legal rules can be seen throughout the international system. Furthermore, States act within the framework of international law, especially during peacetime. Why would States behave this way if international law was valueless? The fatal flaw of traditional perspectives is that they stress the binding power of international law unilaterally and only define law as coercive. First offering an incomplete definition of law and then using it to verify the legality of international law, as Austin did, is self-restraining.

A law dependent on external coercion will not have lasting power, because laws derive their existence from legitimacy. As Jr. Joseph Nye said, the two characteristics of law as a set of rules – predictability and legitimacy are the two reasons why States need international law and international organizations.[57] The effects of international law on international society powerfully evidence that the latter needs the former. International society relies on international law in three key areas:

1. To safeguard and coordinate the common interests of States. The common interests of the international community and each State's own interests are not contradictory. Realism offers an unconvincing separation of the two and over emphasizes State's interests. [58]

2. The basic principles and rules of international law as well as the values reflected provide direction for the international community. In an anarchic international system, order is especially valuable. Collapse of order due to rampant violation of international law is not an outcome desired by the relevant actors. As is well pointed out by Xiong Jie, if the maintenance of order is a common standard for behavior willingly accepted by each State due to a consideration of its own interests, then it will become unnecessary for States to resort to self-defense to safeguard their interests.[59]

3. International law provides a basis of justice and legitimacy for State

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57 Jr. Joseph Nye, *Understanding International Conflicts*, Shanghai: Shanghai People's Press, 2002, p. 24. (in Chinese)

58 Xiong Jie, *Anarchy Status and World Order*, Hangzhou: Zhejiang People's Publishing House, 2001, p. 11. (in Chinese)

59 Xiong Jie, *Anarchy Status and World Order*, Hangzhou: Zhejiang People's Publishing House, 2001, p. 11. (in Chinese)

behavior. In practice, States always seek a legitimate basis for their behavior and reprimand State behavior that violates international law.

If we examine the issues from a different perspective, it is precisely because of the anarchy that we have in an international system. Each State is an equal sovereign and there exists no power above itself. This fact has created the need for order in the international community. After all, an individual does not need to create an order for himself in a society with government authority. Instead, States in the international community must try to create an order for themselves to prevent anarchy. There are enough connections between States to ensure that a set of common standards that guide their relations is necessary.[60] Anarchism is concomitant with order. While international law cannot provide full assurance to order, the nations' and States' urgent need for order in an anarchic system will inevitably lead to the creation of international law.[61] That is to say, demand for order will necessarily create demand for a legal mechanism.[62] As pointed out by Verdross, an Austrian international law scholar, "where there is society, there is law."[63]

B. Analysis from a Practical Perspective

In reality, cooperation for sea lane security in the Asia Pacific region requires rules and the coordination of multilateral legal mechanisms. On the one hand, the States of the Asia Pacific region share a common concern for the sea lanes in the region, but they are also divided because of their different values and national interests. Under such circumstances, a legal framework, as an international agreement to be reached among sovereign States to coordinate their relations, can help to effectively remove negative factors and boost positive factors. Once the legal framework is established, or even during the establishment process, it will push the relations (including international political relations) between Asia Pacific States in a positive direction. To be specific, the legal framework must

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60 Xiong Jie, *Anarchy Status and World Order*, Hangzhou: Zhejiang People's Publishing House, 2001, p. 12. (in Chinese)

61 Xiong Jie, *Anarchy Status and World Order*, Hangzhou: Zhejiang People's Publishing House, 2001, p. 243. (in Chinese)

62 Xiong Jie, *Anarchy Status and World Order*, Hangzhou: Zhejiang People's Publishing House, 2001, p. 12. (in Chinese)

63 Verdross, translated by Li Haopei, *International Law*, Volume 1, Beijing: Commercial Press, 1981, p. 16. (in Chinese)

first be binding, whose limitations will be considered secondary when the Asia Pacific States make decisions. Laws are created by States, but they have relative independence once they are created and will exert counter-effects on those States. Laws become an independent factor in checking political power, and States will look to international law to a certain extent to guide their actions. International law occurs when States of equal status coordinate their relations, and it also has a guiding impact on the relations. Second, the legal framework will promote more civilized approaches to cooperation for sea lane security in the Asia Pacific region and drive for peaceful dispute resolutions. Third, the legal framework can define States rights and liabilities as well as the jurisdiction of States in the Asia Pacific region, greatly reducing the possibility of disputes. Establishment of a mechanism for cooperation on sea lane security will define the rights and liabilities of the States in the Asia Pacific. This will help States make better use of the sea for the well-being of the humanity. Finally, the existence of a legal framework will ease the increasingly disturbing "security dilemma"[64] in the Asia Pacific region, as it will promote communication and trust among States, make symmetrical arrangements under unified regulations, and reduce uncertainties for cooperation and ease concerns for "relative gains."[65]

On the other hand, in terms of external environment, the impact of external powers may be dispelled from the Asia Pacific region due to the self-sufficiency and the relative independence of a legal mechanism. The US has important strategic and economic interests in the Asia Pacific region. However, for its global strategic interests, the US hopes to maintain the status quo in the Asia Pacific region and does not want to see any power shifts in the region, nor to see an integrated Asia Pacific. As Razak, the Malaysian Vice Prime Minister and Minister of National Defense, once stated, "US energy security has little to do with the Strait of Malacca. However, under the excuse of minor issues such as piracy, the

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64 According to realist theory in the field of international politics, security dilemma refers to a situation in which actions by a State intending to heighten its security lead other States to feel less secure, making this State less secure as well. Even if a State strengthens its military for self-defense purposes, other States will still consider it a threat that demands a reaction, creating a dilemma that is challenging for States to solve.

65 Relative gain is a term used in contrast with absolute gain in international relations theory. Absolute gain refers to the case where a State only focus on whether it makes gains through international cooperation, while relative gain means that a State is not only concerned whether it makes gains from an international cooperation, but also concerned with the gains of other States. If other States have made more gains, it will consider that its relative gains are lost.

US became involved in the Strait of Malacca … if we cannot effectively solve the piracy issue, international community will have more than enough excuses to exert pressure on us …"[66] Maybe a sentence in the *New Strait Daily* of Malaysia is worthy of attention, "the piracy issue is becoming more and more a geopolitical issue than an issue of international law." The US has always claimed that it is concerned with maintaining the freedom of navigation in the "disputed" South China Sea waters, and Warren Christopher, former US Secretary of State, claimed that disputes over the Nansha Islands were the reasons why the US stationed troops in the Asia Pacific.[67] These issues cannot be resolved from the political level alone, as politics is an art of trade. However, a legal mechanism is a self-sufficient system that does not rely on tradeoffs after its establishment. In international law, a self-sufficient system generally has the following characteristics: (1) the system is based on agreements among specific States; (2) it is an instrument of peaceful dispute resolution among States and implementation of international law; (3) it has its own enforcement system, where the breaching party assumes the relevant liabilities pursuant to the procedures and rules provided by the agreement. This eliminates the need to resort to the use of remedies under the general international law; (4) it is designed to prevent unilateral (revenging) State measures taken beyond the mechanism; (5) it is designed to promote States in the execution of their responsibilities as per agreement and to offer peaceful international dispute resolution. The role that such a mechanism plays cannot be underestimated in maintaining stable international relations.[68] If the Asia Pacific region establishes a legal framework for sea lane security pursuant to the above criteria, it will be a step closer to the goal of "the Asia Pacific of the Asia Pacific people."

C. Current Cooperative Mechanisms and Their Limitations

The following is a list of international cooperative mechanisms regarding sea lane security in the Asia Pacific region:

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66 Piracy Affects the Pattern in the Strait of Malacca, *Southern Weekend*, 28 July 2005. (in Chinese)

67 Strategic Impacts of International Petroleum, *Modern International Relations*, No. 2, 2003. (in Chinese)

68 Wang Chuanli, WTO: A Self-Sufficient Legal System, in Chen An ed., *Journal of International Economic Law*, Vol. 11, Beijing: Peking University Press, 2004. (in Chinese)

1. United Nations Convention on the Law of the Sea

With over 130 contracting States, the United Nations Convention on the Law of the Sea (UNCLOS) of 1982 is the most important multilateral convention on maritime law and covers all topics of the sea. For example, the UNCLOS has express provisions regarding piracy,[69] and it has granted each State appropriate rights and liabilities[70] as well as universal jurisdiction. It also provides topics related to sea lane security such as the right of innocent passage through the territorial sea,[71] straits used for international navigation,[72] protection and preservation of the marine environment.[73] However, as the UNCLOS is a product of political games among States, certain issues are or only dealt with in principle. Some articles are vague and prone to disputes, and the UNCLOS even keeps silent on certain sensitive topics, which hurt its practical significance on these issues. The main issues facing the security cooperation on sea lanes in the Asian Pacific region are the delimitation of the sea areas and navigation through the straits, but the UNCLOS is ambiguous regarding these issues. The vagueness of the UNCLOS on these issues has arguably increased the possibilities for maritime disputes and created further obstacles for cooperation. Specifically, the definition of piracy in the UNCLOS is so narrow that it is not helpful in determining and affixing the responsibilities of pirates, which hinders the maintenance of sea lane security. Therefore, dialog and communication should be enhanced to reach a regional common understanding of the law of the sea. Ambiguous articles should be clarified in a unified manner in regional execution to avoid unnecessary disputes. For example, a unified interpretation of piracy and innocent passage should be formed, and different understandings of the EEZ should also be unified.

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69 Article 101 of the UNCLOS provides that 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 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).

70 Article 100 of the UNCLOS provides that all States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

71 UNCLOS, Articles 17, 18 & 19.

72 UNCLOS, Articles 34, 35 & 36.

73 UNCLOS, Part XII.

2. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation is the most important international convention regarding sea lane security. It provides that unlawful acts against the safety of maritime navigation are serious international crimes universally recognized in the international community, and it is also a terrorist act that endangers international peace and security.[74] The Convention also requires the States to: (1) use domestic laws to define acts against the safety of maritime navigation as criminal offences and impose penalty on the offenders; (2) determine jurisdiction over offences against maritime navigation safety in domestic laws; (3) adopt the principle of "either extradition or litigation" regarding how to control acts against maritime navigation; (4) provide legal support and cooperation for litigation in connection with offences against maritime navigation safety and the extradition of the offender.[75]

3. International Convention for the Safety of Life at Sea (SOLAS Convention, Effective from May 1980)

The SOLAS Convention is the most important international treaty concerning the safety of merchant ships. It consists of 12 sections and several amendments. The amendment to the SOLAS Convention of December 2002 and the International Ship and Port Facility Security Code further established the international legal mechanism of maritime security. It is not only applicable to ships and crew, but also to port facilities, as it proposes detailed requirements for both the hardware and software of harbor security system.[76]

4. Council for Security Cooperation in the Asia Pacific

The Council for Security Cooperation in the Asia Pacific (CSCCAP) is a non-governmental organization, and an important negotiation organization. Established in 1993, its members include many regions and countries like the US, Japan, South Korea, China, and Russia. The European Union also attends its activities, and topics that may be too sensitive for official channels may be discussed here.

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74 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Article 3.

75 Shao Shaping, *International Criminal Law – Economic Globalization and Legal Control over International Crimes*, Wuhan: Wuhan University Press, 2005, pp. 322~324. (in Chinese)

76 Yang Zewei, Anti-terrorism and Maintenance of Energy Sea Lane Security, *East China University of Political Science and Law Journal*, No. 1, 2007. (in Chinese)

5. ASEAN Regional Forum

The main purpose of the ASEAN Regional Forum (ARF) is to ensure the external security of ASEAN. It is designed to build up trust, launch preventive diplomacy, maintain peace and stability in Southeast Asia and protect ASEAN from external interference through security dialogs with East Asian States and major world powers. It is the primary official channel for multilateral security dialog and cooperation, and it has been effective in uplifting the international position of ASEAN and containing the US' impact on the security matters of Southeast Asia.[77]

In addition, there is also the International Convention for the Suppression of Terrorist Bombings 1997, the International Convention for the Suppression of the Financing of Terrorism 1999, the International Convention on Civil Liability for Oil Pollution Damage 1969, International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, as well as regional conventions and numerous bilateral and trilateral arrangements among the Asia Pacific States.

On the whole, the current international legal framework has played a role in maintaining sea lane security in the Asia Pacific. But the real situation is not as R.M. Sunardi said, "currently, most of the bilateral and trilateral defensive cooperation mechanisms are flexibly operated, forming an effective security cooperation network that is capable to handle all threats and challenges, thus it is unnecessary to establish a multilateral or collective security cooperation mechanism."[78] Due to their inherent defects, most of these legal frameworks can only have indirect and partial positive effects. The major defects are:

1. There is no multilateral convention addressing cooperation for sea lane security. For example, the above-mentioned series of anti-terrorism conventions are targeted at all forms of terrorism, but not at terrorist activities at sea. This dilutes the potency of counter terrorism efforts at sea. The UNCLOS provides a too general approach towards "all matters of the sea."

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77 Sea Lane Security Task Team, Research Institute of Modern International Relations of China, *Sea Lane Security and International Cooperation*, Beijing: Current Affairs Press, 2005, p. 271. (in Chinese)

78 R. M. Sunardi, Regional Security Cooperation and the Future of the ASEAN Regional Forum, in Haidi Soesastro et al ed., *The Role of Security and Economic Cooperation Structures in the Asia Pacific Region*, Washington D.C.: Centre for Strategic and International Studies, 1996, p. 108.

2. There is no effective execution monitoring mechanism. For instance, the Council for Security Cooperation in the Asia Pacific and the ASEAN Regional Forum are only non-governmental organizations for dialog and negotiation with no binding power.

3. Participation from States is arbitrary. Whether the relevant conventions will work or not solely depends on the signing of, accession to, and implementation of the conventions by all the States.

4. Existing Conventions involving sea lane security fail to cover all aspects of sea lane security, such as the SOLAS Convention and the International Convention on Civil Liability for Oil Pollution Damage 1969.

V. Concepts of the Legal Framework

A. Necessary Characteristics of the Proposed Legal Framework

To address the above mentioned limitations of the current cooperative mechanisms for sea lane security in the Asia Pacific, the new legal framework should have the following characteristics:

1. Future-Proof

Previous international legal regulations may not meet the current requirements and address the actual situation in the Asia Pacific due to its specialty. Anti-terrorism theory and for that matter the current international security situation have experienced dramatic changes since the 9/11 attack. Definitions and provisions of the new legal framework need to be future-proof and address specific topics instead of being restrained by previous international legal regulations in order to find the most appropriate way to conduct the most effective cooperation. For example, the definition of piracy may be broadened than the UNCLOS definition.

2. Being Specialized

A legal framework convention needs to specifically address cooperation for sea lane security. The framework may be designed through collecting previous relevant articles in respect of cooperation on sea lane security but should also include new material.

3. Being Multilateral

To address the arbitrariness of State members, the new legal framework convention shall be signed after reaching consensus, and participation by a majority of States should be a criterion for the legal framework to take effect. Even political

resources such as the APEC, may be utilized to achieve diverse and general participation in the new legal framework convention.

4. Being All-Rounded

The new legal framework should be a comprehensive convention that covers all matters related to the cooperation on sea lane security in the Asia Pacific region, including the purposes and principles of cooperation, States' rights and liabilities, details of cooperation, supervision and execution mechanisms. Such a well-rounded treaty will become a general code of conduct of cooperation on sea lane security in the Asia Pacific region.

5. Being Mandatory

An execution monitoring mechanism of the convention should be established to boost State responsibility for executing the convention. The role of the international organization needs to be enhanced and links with the UN should be proactively built to utilize the UN's capabilities for coordination. Disputes over the interpretation and applicability of the convention and offences against sea lane security may also be under the jurisdiction of the international judicial institutions and subject to their regulation.

6. Being Open

There is only one sea in the world, and the security of all sea lanes is connected. Therefore, the legal framework is open to membership of States from other regions. The legal framework for cooperation on sea lane security of the Asia Pacific may be an example to promote cooperation on sea lane security in the world.

B. Purposes and Basic Principles of the Legal Framework

The legal framework on cooperation for sea lane security in the Asia Pacific region should have the following purposes:

According to the purposes and principles of general international law and the UN Charter and based on the common understanding among States in the Asia Pacific regarding sea lane security, the legal framework is designed to promote the Asia Pacific States to jointly maintain the sea lane security in the region and cooperate on other relevant issues. It should also contribute to regional political stability, economic development, and concerted development of the member States, and eventually boost the integration of States in the Asia Pacific region.

In view of the nature of sea lane security, in addition to the recognized norms

of international law, member States under the legal framework also need to observe the following principles to fulfill the purposes of the legal framework.

1. Principle of Equality and Cooperation

On the basis of "equal sovereignty" in international law, States in the Asia Pacific region should cooperate in fields as broad as possible on the principle of fairness and voluntariness. The possibility of unstable factors should be eliminated in the Asia Pacific region to ensure that the cooperation goes on a smooth track.

2. Principle of Fairness and Mutual Benefit

Considering sea lane security in the Asia Pacific, States should use their advantages and overcome their disadvantages, coordinate their domestic policies and realize their strengths and weaknesses in geographical location and environmental resources, appropriately adopt "preferential treatment", and try their best for *de facto* equality to achieve win-win for multiple parties.

3. Non-Discriminatory Principle

For all aspects of cooperation on sea lane security, approaches should not be taken that may be used as the basis for differential treatments.

4. Principle of Proportionality

It is similar to the principle of subsidiarity.[79] When it involves common interests concerning sea lane security in the Asia Pacific region and each State's individual interests, the purposes of the legal framework should be borne in mind when weighing the pros and cons. Common interests should be limited to a necessary extent and damage to the individual interests should be minimized so that conflict between the common interests and the individual interests will be coordinated.

5. Principle of Development

Joint development should be taken as an orientation priority when taking all kinds of cooperative approaches and interpreting any issues.

6. Principle of Non-hindrance

Arbitrary interruption or disruption of cooperation should not be permitted for any external factors or any disputes over the cooperative issue arising between the

79 The principle of proportionality first appeared in public domestic law. In the principle of proportionality, if the realization of a certain value comes at the expense of some other value, such an expense should be minimized. As Larenz notes certain legal interests must be trespassed in order to protect a more advantageous legal value, such trespasses should not be more than necessary. In terms of international law, the EU court often cites what is similar to the principle of proportionality to judge whether an act of the EU is legal and effective.

member States.

7. Principle of Openness

It has been discussed earlier in the section in relation to the characteristic of being open.

C. Basic Contents of the Legal Framework

Sea lane security in the Asia Pacific covers numerous issues relating to Asia Pacific security. In light of the specialty and complexity of security in the Asia Pacific region, the level and quality of cooperation varies depending on the issue being considered for cooperation. Effectiveness of security cooperation depends to a large extent on a progressive and stable process of moving from simple issues to challenging ones, the key of which is finding the shared interests of involved parties. Cooperation can start from the most urgent non-traditional security issues, and then extend to include aspects such as marine development technology, or the joint execution of marine engineering projects. As cooperation in marine technology is not a controversial field, the scope of cooperation is open to expansion. This is not only helpful for regional economic development, but also a useful way to boost mutual trust and dispel doubts. The content of the legal framework for cooperation in protecting sea lane security in the region should include: basic cooperation on sea lane security such as establishing jointly administered navigation zones, defining and performing joint rescue, conducting anti-piracy patrolling and operations, and holding seminars regarding marine ecology; advanced cooperation on sea lane security such as establishing joint sea lane protection fleet, conducting joint multilateral disaster relief operations, launching environmental protection and surveillance; and extending cooperation on sea lane security in a broad sense such as joint development of marine technology, designing ports requiring protection, making a unified strategy for maintaining the security of wharfs, and launching regional marine scientific projects.[80]

In addition, technical cooperation not only overcomes political and ideological obstacles between States, but also improves transparency and creates a neutral atmosphere for mutually beneficial cooperation. Therefore, a technical task team

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80 Sea Lane Security Task Team, Research Institute of Modern International Relations of China, *Sea Lane Security and International Cooperation*, Beijing: Current Affairs Press, 2005, p. 78. (in Chinese)

may be formed to discuss issues of sea lane security in the Asia Pacific. Bilateral technical support may also be launched, and specifically, technical support across the Taiwan Strait and that between South Korea and North Korea may be enhanced to help ease the tension across the Taiwan Strait and on the Korean Peninsula. Modern technical approaches such as commercial satellite imaging and tracking, online communication and pollution monitoring system can also be used to solve issues like search and rescue, piracy, trafficking, and pollution control.

On top of that, naval cooperation may be established on the basis of mutual trust to create new international public goods and build new international cooperation regime. Interdependence among regional actors is growing along with globalization and the existence of non-traditional security threats, and they enjoy increasing common interests at the same time. Therefore, cooperation should prioritize concrete approaches to non-traditional threats. These approaches may include: friendly naval communications, arrangements to prevent marine incidents, negotiations for maritime security, humanitarian aid, marine search and rescue, signing agreements to avoid marine incidents, anti-piracy cooperation, fighting marine terrorism, joint marine surveillance and drafting anti-development measures.[81] For traditional security issues, "shelving differences and seeking joint management" may be adopted. In other words, sensitive disputes over territorial sovereignty should be put aside but common security issues may be jointly solved under the legal framework.

Finally, an Asia Pacific maritime information sharing database may be established to enhance education, research and development of marine science. This institution should offer short international courses such as oceanology, environmental science, economics of national security, social research, law and policy, etc.

D. New International Organizations for Special Purposes

From a legal perspective, an international organization is a legal form of

81 Sea Lane Security Task Team, Research Institute of Modern International Relations of China, *Sea Lane Security and International Cooperation*, Beijing: Current Affairs Press, 2005, p. 79. (in Chinese)

cooperation between States.[82] Dependent on a specific agreement, an international organization is usually set up for a particular purpose. An international organization generally has the following three functions in the legal mechanism within the organization: (1) to coordinate; (2) to resolve disputes; and (3) to deal with routine administrative affairs. Therefore, organizations set up for cooperation on sea lane security may include:

1. Congress

As the highest organization for negotiation and also the organization with the highest authority, a congress consists of delegates from all member States to discuss, negotiate, assess and review all matters regarding cooperation on sea lane security in the Asia Pacific and to prepare reports with binding force.

2. Council

The council is an important executive organization that may consist of a ministerial delegate from the transportation or maritime department of each State. The council's main task is the coordination of States on issues relating to sea lane security. As an independent body it must perform its tasks free of external influence from State and non-State actors. It can issue binding decisions or opinions pursuant to the terms provided in the legal framework.

3. Secretariat

The secretariat handles routine administrative affairs. Special offices may be set up, such as the cooperative development strategy office, anti-piracy and counter terrorism office, energy emergency office, information and communications office, etc.

4. Judicial Institutions

A court may be set up to construe and apply the legal framework as well as settle disputes related to cooperation. However, a wiser approach is to confer jurisdiction concerning international disputes and international maritime offences to the existing international judicial institutions, such as the International Court of Justice, International Tribunal for the Law of the Sea and the International Criminal Court and all the States in the region shall subject to their jurisdiction.

VI. Conclusions and Expectations

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82 Liang Xi, *Law of International Organization*, Wuhan: Wuhan University Press, 1998, p. 3. (in Chinese)

When exploring the feasibility of a legal framework for cooperation on sea lane security in the Asia Pacific region, we also must consider the positive and negative factors for its establishment. Only by examining these factors can we create a strong foundation for the establishment of the legal framework.

A. Major Obstacles to the Establishment of the Legal Framework

The major obstacles to the establishment of a legal framework are the historical legacies of relevant actors, traditional security issues, territorial disputes, strategic issues left unresolved after the Cold War, and weak regional awareness in the Asia Pacific. After World War II, the US did not withdraw troops stationed in Japan, South Korea, the Philippines, and the Pan Pacific island chains still remained.[83] These military alliances were even strengthened after the Cold War. The US troop presence is a major negative factor affecting cooperation on security issues in the Asia Pacific, as the nuclear issue on the Korean Peninsula, the Taiwan Strait issue, and even the rise of the right-wing forces in Japan are all related to the legacy of this Cold War security structure. In addition, the historical thorn of Japan's invasion of its neighbors, exacerbated by its leaders' visits to the Yasukuni Shrine and textbook whitewash, riles emotions in Korea, China and other victimized countries. These behaviors have created political skirmishes, and prevented the buildup of mutual trust in political arena. Furthermore, there are a number of territorial disputes between the Asia Pacific States that will stall cooperation unless they are settled.[84] General theory on regional cooperation is that member States of a regional cooperation organization usually share close links in ethnicity, history, language, culture, or religion and some form of a common identity. From these shared values interdependent relations are formed as there are shared political, military, economic or social concerns.[85] However, due to their different religions, long-term isolation during the Cold War, and different political and economic systems the potential for cooperation in Asia Pacific is much lower than in the European Union. In the Asia

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83 The US analysis argues that if the Nansha Islands become a war zone, the insurance costs for cargo will go up. Even if the economic expenses do not rise, the route will lose its value. Therefore, military force has to be excluded to ensure the freedom of the South China Sea routes. See Liselotte Odgaard, *Maritime Security between China and Southeast Asia*, England: Ashgate Publishing Limited, 2002, p. 133.

84 Please refer to notes 35~40.

85 Liang Xi, *Law of International Organization*, Wuhan: Wuhan University Press, 1998, p. 278. (in Chinese)

Pacific, national awareness is rising while regional awareness is missing. Finally, the competition for leadership in any potential regional framework should not be overlooked. If the powers fight over the leadership or a dominant position during the cooperation process, they will hold each other back and negatively impact multilateral cooperation on sea lane security.

B. Positive Factors for the Establishment of the Legal Framework and Its Prospect

We should also realize that there are certain positive factors influencing the establishment of a legal framework on cooperation for sea lane security in the Asia Pacific region. The Asia Pacific States share similar political and economic background, and there is a common demand for sea lane security in the region as well as a common willingness to eliminate interferences from external forces. Furthermore, in practice there are existing examples of regional cooperation such as ASEAN and the Council for Security Cooperation in the Asia Pacific, plus there is China, a responsible power that proactively promotes the New Security Concept, so the prospects for cooperation are promising after all.

Therefore, the States concerned need to change their mindset to be respectful and open-minded so as to boost mutual trust and expand common interests step by step. A legal framework for cooperation on sea lane security acceptable to all States that reflects the diversity of the region and is coordinated to the multi-track regional cooperation can be established gradually. First, the New Security Concept promoted by China should become the primary positive factor to promote cooperation. The New Security Concept targets at encouraging positive factors for cooperation and eliminating negative factors on the basis of mutual trust, mutual benefit, equality, and cooperation.[86] In 2002, the Chinese delegation to the foreign ministers' meeting of the ASEAN Regional Forum submitted China's Position Paper on the New Security Concept, which gave a comprehensive and systematic explanation on China's security concepts and policy goals in a new situation.[87] The New Security Concept is not only well founded in theory, but is also based

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86 On 26 March 1999, Jiang Zemin gave a talk entitled *P*romote Disarmament Process and Maintain International Security at the Geneva disarmament meeting as the President of China, which fully illustrated China's New Security Concept.

87 China's Position Paper on the New Security Concept, at http://www.fmprc.gov.cn/chn/wjb/zxjg/gjs/gjzzyhy/1136/1138/t4549.htm, 22 March 2008. (in Chinese)

on successful practices that reflects the reality of the Asia Pacific region and addresses the general requirements of the States in the region. It will surely lay a good foundation for cooperation. The "cooperative security" concept advocated by the US is a policy that is also based on interdependence instead of confrontation between States, and in essence it is a cooperative security relationship based on mutual trust and benefit. Second, we should start with the strengthened exchange of non-controversial fields such as education, science, culture, and technology, among States in the region to gradually expand the scope of cooperation and create a greater sense of regional awareness in the region. Actors need to look for common ground in the diversified cultures in the Asia Pacific to establish an Asia Pacific cultural circle and discover common values so that regional economic and security cooperation can be driven forward. Finally, we should adopt progressive and stable principles and move from easy issues to challenging ones. Considering the complex situation in the Asia Pacific, cooperation can be made in stages in different fields. Cooperation may begin with the easiest aspects, such as from the non-traditional security to the more difficult traditional security issues, from anti-piracy to anti-terrorism, and from cooperation in environmental protection to energy cooperation. Following the principle of openness, we should start regular negotiations and formulate on plans therefor and gradually promote cooperation until it becomes as all-rounded as discussed above.

C. China's Choice and Roles to Play

As indicated above, the sea lanes in the Asia Pacific are a significant part of China's maritime economic interests, but the marine geography of China is disadvantageous, and China is still faced with rather prominent issues at sea. On the one hand, China has poor sea lane security; on the other hand, China still has maritime border disputes with neighboring States. Plus there are certain factors limiting China's development of marine power: (1) the fact that the US and Japan are neighboring big powers who have almost controlled the major sea lanes in the Pacific puts China's marine power in a weak position; (2) China has to pass through strategic fortresses in the Asian island chains in order to enter the Pacific, e.g. the 350-km strait between Okinawa and Miyako Retto or the 85-km Bashi Channel between the Philippines and China Taiwan; (3) development of China's marine power actualizes the so-called "China threat theory" which will create future security dilemmas.

It is necessary to note that China is a State with both sea territory and land territory but it is not a sea State. In Mahan's *Sea Power*, he takes the geographic location as the first of the six critical factors of a sea power (State).[88] Therefore, just as a sea State that has advantageous marine geography can focus on the sea while treating the land as a supplementary concern, it is not possible for a landlocked State with disadvantageous marine geography to take an aggressive sea strategy. Such landlocked State should instead focus on its land and treat the sea as a secondary concern. This again proves the philosophy that all truths are concrete and have their own specific applicable scopes and conditions. Once they exceed these specific applicable scopes and conditions, the truths will become mistakes instead.[89] A landlocked State cannot attach significance to the sea while disregarding the land, just as a sea State cannot abandon the sea to go for the land. A State cannot succeed if it ignores its own geographic characteristics and underutilizes its strengths and overemphasizes its weaknesses instead.[90] This is a rude awakening to those who stubbornly hold to Mahan's theories and blindly advocate for Chinese sea power. In view of the facts, China should attach equal significance to the land and the sea and be concerned with both the land and the sea strategically instead of adopting an aggressive strategy at sea, not to mention launch offshore operations while ignoring inland China, especially the construction and defense of its western borders. This does not mean that China should abandon the sea while focusing on the land. We must realize that China must be strong at sea and its maritime defense must be firm. A State with coastal line but with no sea control power is like a landlocked State with no borders. However, our goal is not to fight for sea power, but to defend our marine rights. A defensive sea security strategy should be observed, and sea power should be established on the basis of rights instead of power. Then, the development of China's sea power will be justified and reasonable. This will be more conducive to the cooperation on sea lane security between China and other Asia Pacific States. In the future, China's only choice regarding security at sea is development and cooperation. Development is to safeguard maritime

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88 Chinese scholars generally translate the English term of sea power into " 海权 " (authority at sea) in Chinese. However, the author believes that it makes more sense to translate it into " 海洋强国 " (a powerful State at sea). Mahan clearly pointed out that a powerful State at sea needs to have geographical advantage, while the authority at sea does not involve any geographical element.

89 Lenin, *Selected Works of Lenin*, Vol. 4, Beijing: People's Press, 1995, p. 172. (in Chinese)

90 Niu Xianzhong, *Strategic Research*, Guilin: Guangxi Normal University Press, 2003, p. 120. (in Chinese)

security, peace and stability of the environment and lay down the foundation for equal cooperation through development of China's maritime power, economy, and technology. Cooperation is to proactively drive for and participate in cooperation in all aspects of sea lane security in the Asia Pacific region, as cooperation is the best channel to tackle China's maritime issues. China is rather limited in terms of far-sea strategic capabilities and does not have powerful assurance for security at sea. Take the Indian Ocean for example: China is not a State of the Indian Ocean, but its economy is growingly dependent on the Indian Ocean, "the Strait of Malacca is considered a core Chinese interest. China is strategically far more legitimate than the US to get involved in the Strait of Malacca affairs including the piracy problem…"[91] this means that China is rather restricted in this respect, which increases China's risks from marine transportation of energy supplies and the potential political costs associated therewith. Therefore, China has to ensure smoothness and security of its sea lanes through support and cooperation with States or regions of the Indian Ocean. The US, India, ASEAN, Russia, Japan, and South Korea are all important partners for China regarding cooperation for sea lane security in the Asia Pacific, and the Northeast Asia should be its top priority in terms of its strategy in the Asia Pacific region.[92]

China's role in the process of development and cooperation and the establishment of the cooperation mechanism and legal framework can be summarized as one of encouragement, promotion, coordination, and maintenance. First of all, multilateral security cooperation should be encouraged in the Asia Pacific region on the basis of the New Security Concept. Threats to a State's security come not only from outside, but from internal factors as well. Different national security demands in different stages need to be observed and a broad, inclusive perspective should be taken when considering an issue. Second, China does not have the international impact to remove marine security threats in the Asia Pacific. China can only play a peace-promoting role, with a limited impact. Comprehensive governance involving coordinated efforts from big powers is required to handle non-traditional security threats. China needs to proactively negotiate and facilitate the formation of the cooperation mechanism and the legal framework in order to establish China as a responsible State to exert its international impact. Third, in the construction and

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91 Piracy Affects the Pattern in the Strait of Malacca, *Southern Weekend*, 28 July 2005. (in Chinese)

92 Zhu Yangming, *Asia Pacific Security Strategy*, Beijing: Military Science Press, 2000, p. 47. (in Chinese)

execution processes of the legal framework, China should endeavor to coordinate conflict of interests among all parties and safeguard the unification of the cooperation mechanism of sea lane security in the Asia Pacific region with the big picture in mind. Finally, China should also maintain the stability and unification of the legal framework.

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Conflicts over Rights in Disputed Sea Areas and Their Solutions

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Abstract: Disputed sea areas can result from different types of controversies: for example, those over the sovereignty of islands, overlapping delimitation claims, or the interpretation of treaties. The substance of the rights involved in the conflicts, as well as the manner in which the conflicts arise among the States involved, vary with the nature of the particular disputed sea area. In overlapping waters where EEZs and continental shelves have not been delimited, potential conflicts exist among States with regards to the sovereign rights over resources and jurisdiction over relevant matters. The joint development of resources is one way to avoid conflict. However, joint development does not guarantee the resolution of all disputes over sovereign rights and jurisdiction in the joint development zones. In the joint development zones, which in essence remain disputed sea areas, the States involved should come to an agreement on the exercise of sovereign rights and jurisdiction. These problems also exist in the Sino-Japanese joint development zone in the East China Sea.

Key Words: Disputed sea areas; Sea areas with overlapping claims; Joint development model; Joint development zone; Sovereign rights and jurisdiction; Safe waters

I. The Scope of Disputed Sea Areas

Disputed sea areas can result from different types of controversies, such as those over the sovereignty of islands, overlapping delimitation claims, or the inter-

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pretation of treaties. Therefore, "disputed sea areas," in a broad sense, include not only overlapping waters where EEZs and continental shelves have not been delimited, but also the waters around islands involved in sovereignty disputes and waters whose legal statuses are contentious because there exist conflicting interpretations of relevant treaties. For instance, there is a controversy between China and Japan as to whether the waters surrounding Okinotorishima are a part of the high seas or of Japan's EEZ.

The substance of the rights involved in the conflicts, as well as the manner in which the conflicts arise among the States involved, vary with the nature of the particular disputed sea area. Specifically, the disputes fall into the following categories:

The first type of conflicts includes those over territorial sovereignty in the disputed sea areas around islands with overlapping claims. These conflicts may manifest themselves through violence, such as confrontation between naval and governmental vessels, and even armed conflict. In this case, if the law enforcement vessels of one State exercise jurisdiction over non-governmental vessels from another State and enforce the law with regards to these vessels, it is viewed by the other State as an unlawful exercise of jurisdiction over vessels flying its flag in its own territorial sea or waters over which it has jurisdiction and therefore a violation of its sovereignty or jurisdiction. If one State uses weapons against another State's vessels in its so-called law enforcement activities, the use of force may be considered a violation of the principle of refraining from the "threat or use of force" under the United Nations Convention on the Law of the Sea (UNCLOS), the Charter of the United Nations, and general international law. However, with respect to the use of force against another State in disputed territory, international precedent has steered clear of deciding whether it is a "threat or use of force" prohibited by the UN Charter and general international law or an exercise of the right to defend territorial integrity. For instance, in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), the International Court of Justice (ICJ) did not pass judgment on the States' responsibility in the armed conflict in the territorial dispute. However, in its December 17, 2007 award on the Guyana/Suriname maritime border dispute, the Permanent Court of Arbitration (PCA) ruled that Suriname's use of force against Guyana in the

disputed area was an illegal threat and use of force.[1] In addition, in its December 19, 2005 award on the legality of the use of force in the conflict between Eritrea and Ethiopia, the PCA rejected the position that a State could use force against another State in disputed territory in the name of self-defense. The above decisions seem to imply that, under these circumstances, a State's resistance by force against another State's threat or use of force constitutes self-defense.[2]

The second type of conflicts includes those over the sovereign rights over resources and the jurisdiction over relevant matters among States in overlapping waters where EEZs and continental shelves have not been delimited. The nature of these conflicts differs from that of territorial sovereignty conflicts. According to Article 2(3) of the UN Charter, all States have the obligation to settle international disputes by peaceful means; in other words, States should not use force to solve these disputes. In sea areas with disputes of this type, weapons should only be used in law enforcement activities within the scope defined under international law. Under customary international law and international judicial precedent, the use of force by a State in hot pursuit is recognized only if all the elements of hot pursuit are met.[3] Otherwise, regardless of whether weapons are used, the hot pursuit itself will create liability for the State.

In overlapping waters where EEZs and continental shelves have not been delimited, States maintain that they have sovereign rights and jurisdiction as defined in the UNCLOS. But the existence of overlapping claims on sea areas means that conflicts between the States concerned in the exercise of jurisdiction are inevitable. These conflicts may often be accompanied by confrontations between marine law enforcement agencies of the States involved. If a State does not actively exercise jurisdiction in disputed sea areas, it would be at a disadvantage in the final delimitation process because it would lack evidence of its exercise of jurisdiction.

Further, before an agreement on the delimitation of the EEZs and continental shelves with overlapping claims has been reached, the joint development zones

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1 Award in the Arbitration between Guyana and Suriname, Permanent Court of Arbitration, para. 445, at http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf, 8 December 2008.

2 Christine Gray, The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?, *European Journal of International Law*, Vol. 17, No. 4, 2006, p. 711.

3 The PCA stated in its award regarding the maritime delimitation between Guyana and Suriname, "the Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary."

(JDZs) (including JDZs for non-living resources such as oil and natural gas, as well as common fishery zones and provisional water areas aimed at the conservation of living resources) that are established as provisional arrangements are by their nature within the disputed areas.

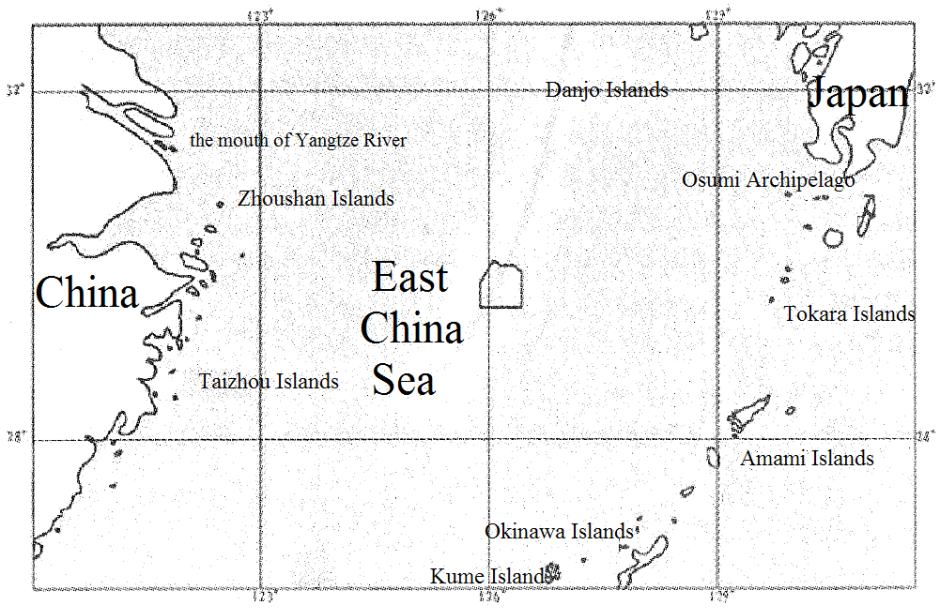
The third category of disputes includes those that trace their origins in the States' different interpretations of the UNCLOS. For instance, the different opinions of China and Japan about the legal status of Okinotorishima and its surrounding waters stem from different interpretations of Article 121 of the UNCLOS: *i.e.,* whether Okinotorishima is an "island" as defined in Article 121(1) or "rocks" as referenced in Article 121(3). Neither Article 297, "Limitations on Applicability of Section 2 [Compulsory Procedures Entailing Binding Decisions]" nor Article 298, "Optional Exceptions to Applicability of Section 2 [Compulsory Procedures Entailing Binding Decisions]" applies to the interpretation and application of the definition of "islands." Therefore, this category of disputes may be resolved as per Part XV, "Compulsory Procedures Entailing Binding Decisions," of the UNCLOS.

This article focuses on the second category of disputed sea areas: JDZs established in overlapping waters where EEZs and continental shelves have not been delimited as provisional arrangements pending agreements on final delimitations, disputes over sovereign rights and jurisdiction in these areas, and solutions to the disputes.

II. Conflicts over Sovereign Rights and Jurisdiction in JDZs in Sea Areas with Overlapping Claims

On June 18, 2008, China and Japan, on the basis of equal consultation, reached a consensus of principles on the East China Sea issue and the following four common understandings on Sino-Japanese joint development in the East China Sea:

a. Establishing a block for joint development in the East China Sea (see the figure below).



b. The two sides will, through joint exploration, select by mutual agreement areas for joint development in the above-mentioned block under the principle of mutual benefit. Specific matters will be decided by the two sides through consultations.

c. To carry out the above-mentioned joint development, the two sides will work to fulfill their respective domestic procedures and arrive at the necessary bilateral agreement at an early date.

d. The two sides have agreed to continue consultations for the early realization of joint development in other parts of the East China Sea.

China and Japan have not reached a detailed agreement on the joint development of the East China Sea; in fact, there is no consensus between the two on the scope of the disputed area. Thus, the future of Sino-Japanese joint development is still uncertain. For this reason, research on the nature of JDZs, potential conflicts of rights in JDZs, the scope of the disputed areas in the East China Sea, and ways to solve the conflicts over rights in disputed waters has more practical meaning.

A. The Joint Development Model

According to Arts. 74(3) and 83(3) of the UNCLOS, before reaching an agreement on EEZs and continental shelves, “the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional

arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

A resource-oriented JDZ in overlapping waters where EEZs and continental shelves have not been delimited, is a provisional arrangement for exploiting, managing, and allocating resources by States that are seeking a final solution. However, the delimitation of EEZs and continental shelves is not only an issue of resource allocation; to a greater extent, it is an issue of defining the scope of each State's jurisdiction.[4] Therefore, unless there are special provisions in the agreements, temporary arrangements on the joint development of resources do not necessarily dictate or guide the allocation of sovereign rights or jurisdiction among States in overlapping waters where EEZs and continental shelves have not been delimited.

B. The Scope of Application of the Joint Development Model and Its Legal Effects

In general, the joint development model is a transitional measure that can be applied to the utilization and allocation of resources in disputed waters. But it can also sometimes be used in undisputed waters where the territorial seas, EEZs and continental shelves have already been delimited. For example, the common fishery zone and waters under transitional arrangements provided for in the December 25, 2000 Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on Fishery Cooperation in Beibu Bay/Bac Bo Gulf (hereinafter "the Fishery Agreement") are located in an EEZ that had been delimited. In addition, the agreement set up small fishing boat buffer zones in the two States' respective territorial seas.

Unlike JDZs in undelimited, disputed waters, the various types of sea areas identified for fishery cooperation in the Fishery Agreement do not affect China's and Vietnam's respective sovereignty, sovereign rights and jurisdiction in their territorial seas, EEZs, or continental shelves. Since China and Vietnam have delimited the scope of their territorial seas, EEZs, and continental shelves, there

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4 Soji Yamamoto, Background and Limit of the Law Enforcement Measures in Undelimited Waters, in Maritime Security System Research Committe ed., Study on International Dispute Cases Regarding the Implementation and Application of Maritime Law, Tokyo: Maritime Security Association of Consortium Corporation, p. 108. (in Japanese)

is theoretically no confusion, uncertainty, or overlap with regards to the spatial scope of their sovereignty, sovereign rights, or jurisdiction (including right to legislation, maritime law enforcement, and judical jurisdiction) between them.[5] For example, on law enforcement in the common fishery zone, Article 9 of the Fishery Agreement states, "when one party to the Agreement discovers that Chinese or Vietnamese nationals and fishing boats have violated rules made by the Joint Fishery Committee in its own territorial waters within the common fishery zone, it has the right to handle the violation in accordance with the rules made by the Joint Fishery Committee. It shall also promptly apprise the other contracting party of the situation and the end result through ways agreed on by the Joint Fishery Committee. Detained vessels and crew shall be promptly released after the posting of an appropriate bona or other security." Obviously, jurisdiction over the two States' common fishery zone belongs to the State whose coast borders the zone.

Although the Fishery Agreement is silent on questions relating to the jurisdiction over a third State, the jurisdiction of both States over a third State in their respective waters will not be affected by this Fishery Agreement because these waters have been delimited.

On the other hand, the joint development model cannot resolve the conflicts on the right to legislation, maritime law enforcement, and domestic legal jurisdiction among States in overlapping waters where EEZs and continental shelves have not been delimited, unless there are special provisions and arrangements with regards to the issue of jurisdiction in specific agreements. These jurisdictional conflicts include: (1) jurisdictional conflicts between the States; (2) overlapping jurisdiction between the States over a third State in the JDZ, *i.e.*, active jurisdictional conflicts; and (3) abstention by both States from exercising jurisdiction over a third State in the JDZ, *i.e.*, passive jurisdictional conflicts.

A coastal State's exercise of sovereign rights and jurisdiction in the JDZ in the disputed sea areas is not only a right given by the UNCLOS; it will also have corresponding legal effects. Although joint development is a transitional and provisional arrangement that "does not prejudice the final delimitation," one party's long neglect in exercising its sovereign rights and jurisdiction in disputed waters will signify acquiescence to the other party's exercise of its rights in such

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5 With regards to jurisdiction in the common fishing areas, sea areas under transitional arrangements, and small boat buffer zones, please see "Information on the Agreement between China and Viet Nam on Delimitation in Beibu Bay/Bac Bo Gulf," at http://www.mfa.gov.cn/chn/zxxx/t145558.htm, 8 December 2008. (in Chinese)

waters. This acquiescence may lead to loss of the rights under international law and have an adverse impact on the final delimitation. Some scholars believe that States' past conduct in disputed waters, especially the exercise of authority in searching for oil deposits and issuing fishing licenses, will be taken into serious consideration as "relevant factors" in the final delimitation.[6] It is worth noting that in *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, the ICJ determined that the activities of the oil companies of neither State were "relevant factors" to be considered in the delimitation,[7] but held that "the two parties had in fact delineated their boundaries" in several prior agreements. Therefore, if there are a large number of incidents involving the exercise of jurisdiction during the existence of a provisional measure and acquiescence to the scope of the exercise by other States, a *de facto* boundary may have come into being and may be a relevant factor in the final delimitation.

C. The Nature of a JDZ in Areas with Overlapping Claims and the Extent of the Waters in Dispute between China and Japan in the East China Sea

If the water, seabed, and subsoil of a JDZ are all located in areas of EEZs or continental shelves with overlapping claims, then the JDZ is located in disputed waters.

A joint development agreement implemented in disputed waters is usually a provisional arrangement about the exploitation and allocation of resources. It does not necessarily affect a State's other sovereign rights or jurisdiction as a coastal State bordering an EEZ or a continental shelf, unless otherwise stipulated in the agreement.

Currently, some Japanese scholars assert that "the entire East China Sea is in dispute."[8] This claim is not only unfounded, but also impedes future joint development in the East China Sea. Although there has been no agreement to

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6 Rodman R. Bundy, Preparing for a Delimitation Case: The Practitioner's View, in Rainer Lagoni and Daniel Vignes eds., *Maritime Delimitation*, Leiden: Nijhoff, pp. 100~101, 108.

7 Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), *ICJ Reports*, 2002, pp. 140~141, paras. 302~304.

8 Sakamoto Shigeki, Agreement of the Joint Development of the Natural Resources in the East China Sea between China and Japan: Evaluation from the Japanese Perspective, 3rd Sino-Japanese Workshop on the Development in the Law of the Sea: Practice and Prospects, November 2008, Hangzhou, China.

delimit the boundaries of the EEZs and continental shelves in the East China Sea, it does not mean that all the sea areas that need to be delimited so as to define each State's EEZs and continental shelves are disputed seas. For example, the sea area where the Chunxiao oil and gas field is located is not a disputed area.[9]

Setting up a JDZ before defining the extent of the disputed sea areas between two States will possibly complicate the legal status of the sea areas that cannot be or may not have been under dispute. Hence, China and Japan must reach a common understanding on the approximate extent of the disputed sea areas.

For this reason, it is necessary to re-examine the theory of the "original right to the 200 nautical miles" asserted by Japan with regards to the delimitation of the East China Sea. In addition to existing theories like negating the natural prolongation of the continental shelf within 200 nautical miles and claiming that the continental shelf and the EEZ are one and the same, Japanese academics have come up with the theory of "original right to the 200 nautical miles" in recent years. Under this theory, geological factors are no longer meaningful as the foundation of rights within 200 nautical miles from the baseline. That is to say there is a massive reversal of the natural prolongation principle on the issue of the original right to a continental shelf. Instead, the distance standard acquires a determinative significance. As a result of the evolution of international law, the natural prolongation principle is no longer meaningful as the foundation for rights within 200 nautical miles from the baseline because the continental shelf is combined with the EEZ on a legal level.[10]

Regarding the extent of the disputed waters in the East China Sea, Japanese scholars contend that the disputed areas lie within the scope of "claims based on original rights" rather than "claims by request." China and Japan are less than 400 nautical miles apart in the East China Sea. According to the distance standard, both sides have a foundation for claiming the 200-nautical-mile continental shelf. Thus, the disputed sea area should be the area lying between the 200-nautical-mile lines from their respective baselines, and not the area between the Japan-supported "median line" and the China-supported Okinawa Trough.[11]

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9 The Sino-Japanese Agreement on the East China Sea Does Not Prejudice China's Sovereign Rights, *Xinhua Daily Electronic News*, 25 June 2008, p. 5. (in Chinese)

10 Zhang Xinjun, Japanese International Lawyers' Perspectives on Maritime Delimitation: Literatures and Arguments, *China Oceans Law Review*, No. 2, 2005, p. 36. (in Chinese)

11 Shinya Murase, The Delimitation Issues of the Continental Shelf between Japan and China, *Kokusai Mondai*, No. 365, Oct. 2007, p. 2. (in Japanese)

In the third round of negotiations on the East China Sea issue in September 2005, Japan came up with the proposal for conducting joint development on the two sides of the so-called "median line" for the first time. Before that time, Japan had used the "median line" as the outer limit of its EEZ and continental shelf in the East China Sea, both in its domestic Law on the Exclusive Economic Zone and the Continental Shelf enacted in June 1996 and negotiations with China.

On one hand, Japan's claim of an original right to 200 nautical miles obviously violates the principle of equitable estoppel. On the other hand, in the East China Sea that measures less than 400 nautical miles, the distance standard of 200 nautical miles is only a virtual right under the UNCLOS rather than a practical right that can be claimed. In contrast with Japan's claim of an original right to 200 nautical miles, China's claim of the natural prolongation of the continental shelf is not only supported by the UNCLOS, but also in keeping with actual conditions in the East China Sea. Thus, it is a right that may be claimed.

Although neither China nor Japan took a clear stance as to whether the Sino-Japanese JDZ in the East China Sea is within disputed waters, different laws should be applied in the Chunxiao oil and gas field and the JDZ according to the relevant provisions in the Sino-Japanese Understanding on Joint Development of the East China Sea and the interpretations to the Understanding by the Chinese government: Chinese law should be applied in the Chunxiao oil and gas field, while the law of neither State should be applied in the JDZ. The application of different laws indicates a difference in the legal statuses of the two sea areas. The former is not a disputed sea area, and the latter includes both disputed and non-disputed areas. Defining the East China Sea Sino-Japanese JDZ as EEZ and continental shelf with overlapping claims, *i.e.,* a disputed sea area, would be to acquiesce to Japan's claim of an original right to 200 nautical miles. In other words, the disputed sea area between China and Japan would extend to the west side of the "median line" unilaterally proposed by Japan, which was originally not under dispute. Such a claim is clearly not acceptable to China: the Sino-Japanese Understanding on Joint Development of the East China Sea clearly states that "China and Japan agree that the two sides will cooperate in the transitional period before delimitation without prejudicing each other's respective legal positions." On the question of the delimitation of the East China Sea, China has never recognized Japan's unilateral assertion of the median line and its claim of an original right to 200 nautical miles.

D. Joint Development in EEZs and on Continental Shelves with Overlapping Claims: Potential Conflicts over Sovereign Rights and Jurisdiction

According to UNCLOS Article 56, in the exclusive economic zone, the coastal State has (1) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, 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 winds; (2) the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures for the purpose provided for in Article 56 and other economic purposes, as well as installations and structures which may interfere with the exercise of the rights of the coastal State in the zone; and (3) jurisdiction with regard to marine scientific research and the protection and preservation of the marine environment.

According to UNCLOS Article 77, a coastal State exercises exclusive sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources. These natural resources consist of "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species." Besides the sovereign rights mentioned above, the coastal State also has the following rights and jurisdiction over its continental shelf: the right to give or withhold consent to other States' delineation of a course for the laying of submarine pipelines or cables on the continental shelf; the right to "take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources, and the prevention, reduction and control of pollution from pipelines" (Article 79); the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures (Article 80); the exclusive right to authorize and regulate drilling on the continental shelf for all purposes (Article 81); the right to exploit the subsoil by means of tunneling, irrespective of the depth of water above the subsoil (Article 85); the right to regulate, authorize and conduct marine scientific research on their continental shelf in accordance with the relevant provisions of the UNCLOS, and the right to give or withhold consent to other States' or organizations' conducting of marine scientific research on the continental shelf (Article 246).

If a State establishes a JDZ for the exploitation of oil and gas in the EEZ or on the continental shelf with overlapping claims, the agreements for these purposes

generally refer only to the exploration, exploitation, and allocation of – among the non-living resources – the oil and gas. Unless otherwise specially stipulated in the agreement, a coastal State's sovereign rights to explore, exploit, conserve, and manage other non-living resources (except oil and gas) as well as living resources in the EEZ and on the continental shelf under its claims are not affected by the joint development agreement.

Rights come into conflict in areas with overlapping claims mainly include conflicts over the right to legislation, judicial jurisdiction, and maritime law enforcement. Unless otherwise specially specified in the agreement, conflicts are likely to arise with regards to the sovereign rights and jurisdiction that coastal States enjoy under the UNCLOS.

In a JDZ of this nature, there exist not only possible conflicts of sovereign rights and jurisdiction between the States involved, but also positive and negative conflicts of jurisdiction related to third parties. When one State unilaterally authorizes or allows vessels from a third State to conduct marine scientific research, establish artificial islands, installations, and structures, or engage in other activities related to the exploitation and exploration of resources in a JDZ which is in nature a disputed area, the other State's sovereign rights and jurisdiction are challenged. With regards to the scope of the unilateral exercise of jurisdiction in disputed waters and its possible legal effects, Prof. Soji Yamamoto, a former judge of the International Tribunal for the Law of the Sea (ITLOS), believed that "the scope of the exercise and application of legislative jurisdiction (including the issuance of excavation permits, trial mining, and actual mining operations, etc.), as a measure in transitional period in disputed waters before delimitation, at least extends to the median line." He also noted that "the exercise of legislative jurisdiction in disputed waters should not be repressed for the purpose of avoiding disputes, because it would lead to acquiescence to the status quo, be construed as a waiver, and have an adverse effect in the operation of the provisional agreement or even during the final delimitation."[12]

E. Questions on the Application of Law in the East China Sea JDZ

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12 Soji Yamamoto, Background and Limit of the Law Enforcement Measures in Undelimited Waters, in Maritime Security System Research Committe ed., Study on International Dispute Cases Regarding the Implementation and Application of Maritime Law, Tokyo: Maritime Security Association of Consortium Corporation, p. 115. (in Japanese)

As discussed above, there is still disagreement between China and Japan over the extent of the disputed sea areas in the East China Sea. The two States' different understandings on the legal status of the East China Sea JDZ will affect the application of laws in the zone. To say that neither Chinese nor Japanese law should apply in the JDZ means that neither State should unilaterally apply domestic law, but should apply rules agreed on by both sides. Therefore, the two States must come up with detailed provisions on related matters, such as the establishment, management, and use of oil platforms in the JDZ; and the legal status, applications of law, jurisdiction, and dispute resolution with regards to the oil platforms, other facilities and structures, and surrounding safety zones.

1. The Legal Status of Artificial Islands, Installations, and Structures under International Law

According to Articles 60 and 80 of the UNCLOS, in its EEZ and on its continental shelf, a coastal State has (1) the exclusive right to the construction, operation and use of artificial islands, installations and structures, and (2) exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

The provisions above indicate that a coastal State not only has the exclusive right to construct, operate, and use artificial islands, installations, and structures in the EEZ and on the continental shelf, but also exclusive jurisdiction over the islands, installations and structures themselves. The coastal State may exercise rights to legislation, law enforcement and jurisdiction with regards to customs, fiscal, health, safety, and immigration. Because the UNCLOS gives broad jurisdiction over artificial islands, installations and structures to coastal States in their EEZs and on the continental shelves, some States confer a legal status on artificial islands, installations, and structures similar to that of a territory – in essence, creating a fiction – in domestic law.

Artificial islands, installations, and structures in international law, do not have the status of islands under UNCLOS Article 60(8). They have no territorial sea of their own, and their presence does not affect the delimitation of territorial seas, EEZs, or continental shelves.

On the establishment of safety zones, UNCLOS Article 60(4) states that "the coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands,

installations and structures." Paragraph 6 in the same article goes on to state, "all ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones." With regards to the enforcement rights of the State that established the safety zones in the zones, UNCLOS Article 111(2) states that "the right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones."

Under the above provisions, the State that set up the safety zones has the following enforcement rights: it may take appropriate measures to ensure the safety of navigation and of the artificial islands, installations, and structures, and they have the right of hot pursuit with respect to applicable violations of laws and regulations in the safety zones. However, the UNCLOS neither specifies the measures that are "appropriate" for a coastal State to take, nor the detailed content of laws and regulations that the coastal State may promulgate for the safety zones.

According to Articles 60 and 80 of the UNCLOS, safety zones are allowed to be established by coastal States around artificial islands, installations, and structures to ensure the safety of these islands, installations and structures as well as of the navigation. Restricting the right to navigate, or running a licensing system for navigation for the safety of the artificial islands, installations and structures are both restrictions on the right to navigate in the EEZ. These restrictions do not appear to have a basis in international law: under Articles 60 and 80, the obligation of ships sailing in the safety zones is to "respect these safety zones and comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones."

The nature of safety zones may vary with the location of the artificial islands, installations, and structures. If the artificial islands, installations and structures are on the high seas, their surrounding safety zones are part of the high seas; if the artificial islands, installations, structures are located in a coastal State's EEZ, their safety zones is part of the EEZ. Restrictions on foreign ships' right to navigate in safety zones that are part of the high seas or an EEZ should have corresponding basis in international law, namely the "generally accepted international standards" referred to in Articles 60 and 80 of the UNCLOS. Otherwise, these restrictions that are found in domestic law may infringe on other States' right to navigate.

On the other hand, under the UNCLOS, "artificial islands, installations and structures and the safety zones around them may not be established where they may cause interference to the use of recognized sea lanes essential to international navigation." Hence, restrictions in domestic law on navigation of foreign vessels in safety zones will have a small impact on the foreign vessels' navigational interests. The key to the question lies in the nature of the safety zones and whether the coastal State has the right to restrict the navigation of foreign vessels. A Japanese scholar claims that a safety zone cannot exceed the extremely narrow distance of 500 meters; therefore, it is reasonable to regard the safety zone and the marine structures as a whole and confer on the safety zone (as an appurtenant harbor) a status similar to internal waters. Consequently, it is possible to apply domestic laws to the safety zone, within the limits of necessity, to ensure the safety of the marine structures.[13] This view was reflected in Japan's Act on the Establishment of Safety Zones around Marine Structures, which went into effect in July 2007.

2. Japan's Domestic Legislation on Artificial Islands, Installations, and Structures, and Their Surrounding Safety Zones

So far, China has no domestic legislation that specifically involves artificial islands, installations, and structures and their safety zones. However, on April 27, 2007, the Japanese Diet adopted the Act on the Establishment of Safety Zones around Marine Structures, which went into effect on July 20, 2007. The Act defines marine structures as well as their legal status in Japanese domestic law, and also provides for a system for regulating navigation in the safety zones.

a. The Definition of Marine Structures in the Act on the Establishment of Safety Zones around Marine Structures

According to Article 2 of the Act on the Establishment of Safety Zones around Marine Structures, "'marine structures' in this Act are operational objects (including objects in the process of being built or removed) engaged in activities described in Article 3(1)(i) to (iii) in the Law on Exclusive Economic Zone and the Continental Shelf (Law No. 74, 1996) in an exclusive economic zone as defined in Article 1(1) in Law No. 74 or on a continental shelf as defined in Article 2 of Law No. 74, and vessels engaged in exploitation on the continental shelf (limited to vessels halted for the purpose of exploitation)."

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13 Okuwaki Naoya, Safe Zones and Enforcement Measures, in Maritime Security System Research Committe ed., Study on International Dispute Cases Regarding the Implementation and Application of Maritime Law, Tokyo: Maritime Security Association of Consortium Corporation, p. 54. (in Japanese)

As stated above, Japanese domestic law includes vessels halted for the purpose of exploitation on the continental shelf in its definition of marine structures. The same definition of "marine structures" also appears in Article 19 of the 1974 Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf adjacent to the Two States.

b. The Legal Status of Artificial Islands, Installations, and Structures in Japanese Domestic Law

According to Article 3 of the 1996 Law on Exclusive Economic Zone and Continental Shelf, "artificial islands, installations and structures shall be considered to be located in the territory of Japan, with respect to which the laws and regulations of Japan shall apply ... This article shall also apply to artificial islands, installations and structures (including foreign vessels halted for the purpose of exploitation) established by foreign States but located in Japan's EEZ and on continental shelf."

According to this law, Japan has broad jurisdiction over artificial islands, installations and structures in its EEZ and on its continental shelf, as well as all people, matters, and objects on them.

c. Regulations on Navigation in the Safety Zones

According to Article 5 of the Act on the Establishment of Safety Zones round Marine Structures, "without the permission of the Ministry of Land, Infrastructure, Transport and Tourism, no person could enter the safe zones." Japan applies a licensing system to navigation of vessels in its safety zones, which means the legal status of the safety zones is similar to internal waters under Japanese domestic law. Therefore, under Japanese domestic law, Japan may exercise broad right to legislation, law enforcement, and judicial jurisdiction over its safety zones.

IV. Solutions to the Conflicts over Sovereign Rights and Jurisdiction in the JDZ

In sum, the development of resources in a JDZ involves not only the resources, but also inevitably the allocation of sovereign rights and jurisdiction in the JDZ. The future joint development agreement for the East China Sea will provide for the exercise and allocation of sovereign rights and jurisdiction over oil and natural gas resources. Given China and Japan's political inclination to shelve

their differences and seek joint development, the two should apply rules that they agree on to matters directly related to the activities conducted by the other State's personnel and ships in the JDZ to explore and exploit oil and gas. In terms of enforcement rights, refraining from exercising jurisdiction over the other's ships and personnel and exercising jurisdiction only over ships flying their own flags can effectively prevent jurisdictional conflicts between the two States. This is also consistent with past practice of the States. For example, Article 7 of the 2000 Sino-Japanese Fishery Agreement states that, in EEZs with overlapping claims that have not been delimited, the two States will not exercise jurisdiction over fishing boats of the other, and will only exercise flag State jurisdiction over their own ships.[14]

From the perspective of practice, solutions to jurisdictional conflicts in a JDZ usually include the delimitation of the EEZ and continental shelf; that is, each State will exercise coastal State jurisdiction in their own EEZs and continental shelves in the JDZ. This model requires maritime delimitation to have first taken place. After delimitation, States can exercise the sovereign rights and jurisdiction as provided in the UNCLOS in their respective EEZs and on their continental shelves without jurisdictional conflicts. Before delimitation, the two States may exercise joint management or jurisdiction in the JDZ. This model requires a good relationship of mutual trust between the States involved and specific agreements on the application of law, legislation, and jurisdiction, including arrangements on jurisdiction over a third State.

When States merely cooperate in the development of resources in a JDZ located in an EEZ or on the continental shelf that has not been delimited and do not exercise jurisdiction on the other side's ships, persons or their activities, ineffective management may plague resource conservation, environmental protection, and marine scientific research. Ships from a third State with permission to navigate will be under the jurisdiction of the State giving the permission. Those ships without

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14 Agreement on Fisheries between the Government of the People's Republic of China and the Government of Japan, Article 7(3) states, "the contracting parties should implement management and other necessary measures with respect to their own respective citizens and fishing boats engaged in fishing activity in the area in which the temporary measures are in effect. The contracting parties will not take management or other measures with respect to the citizens and fishing boats of the other contracting party. If a contracting party discovers that the other contracting party's citizens and fishing boats are violating the operating limitations determined by the Sino-Japanese Joint Fishery Committee in Article 11, it may warn the citizens and fishing boats based on the facts and report the facts and the related situation to the other contracting party. The other contracting party should respect the report and, after taking the necessary measures, report the results to the party."

permission will be under the jurisdiction of both States. However, the problem of overlapping jurisdiction will arise in that circumstance.

A JDZ may include both disputed waters and undisputed waters, such as the broad sea area known as the gray zone in the Barents Sea defined by the Norwegian-Soviet Grey Zone Agreement of 1978.[15] According to Article 10(b) of this agreement, neither State would exercise rights to enforce maritime law against vessels of the other nor vessels licensed by the other, but would be able to exercise enforcement rights over vessels of a third State that had not been licensed by either party. But the agreement did not resolve the question of whether the party had jurisdiction over vessels of a third State in sea areas that was not under its own jurisdictions, or whether the third State was obligated to acquiesce to its jurisdiction.

When handling maritime delimitation issues with maritime neighbors, China should consider whether the provisional measures or arrangements would prejudice the final delimitation. If we tolerate and acquiesce to other States' exercise of jurisdiction and do not accumulate examples of our exercising jurisdiction in disputed sea areas that form part of our claims, the result will be a waiver that adversely impacts the final delimitation.

Translator: DENG Yuncheng
Editor (English): Sherrra Wong

15 Robin Rolf Churchill and Geir Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea*, Oxford: Routledge, 1992, pp. 91~98; Alex G. Oude Elferink, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation*, The Hague: Martinus Nijhoff Publishers, 1994, pp. 246~247.

A Study of the Impact of Offshore Wind Power Generation on the Environment from the Perspective of the International Law of the Sea

WANG Zelin*

Abstract: The global energy crisis has turned offshore wind power generation into a key energy project for coastal States. Greater adoption of wind generation technology will have a substantial impact on the environment. These externalities are either already known or need to be verified and should be accorded due importance. This paper presents a discussion on the impact of offshore wind power generation on the environment as well as its industrial standardization under the existing international law of the sea.

Key Words: Offshore wind power generation; Environment; United Nations Convention on the Law of the Sea

The world energy crisis will lead to an energy revolution, which may be called the third industrial revolution comparable to the impact of the world-shaking invention of steam engines and the electric revolution. It is in this context that wind power will undoubtedly become a new alternative form of renewable green energy. Offshore wind energy is characterized by its greater output (in comparison with onshore wind power), high costs and technical challenges in electricity transmission, grid access, construction and maintenance, as well as a reduced impact on the environment.[1]

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1 Ren Jie, Offshore Wind Power Generation Represents a New Trend in Wind Power, *Global Science, Technology and Economy Outlook*, No. 6, 2006, pp. 59~61. (in Chinese)

I. Current Status of Offshore Wind Power Generation

Offshore wind power plants are usually built in wind resource-rich offshore waters in coastal States' territorial seas. However, higher technical capabilities have allowed construction of plants in the deep sea, with some even built in the exclusive economic zone of the coastal State.

In a typical offshore wind-driven generator system, the wind turbine is mounted on a tower fixed to a platform on the seabed foundation. This may be anchored by gravity settling, a tripod or by a single steel pipe pile.[2] The wind turbine is then connected to the platform with electrical switches and transformers with cables, to ensure power distribution to onshore stations and then to the power grid of a coastal State. The growing body of knowledge and expertise on floating offshore wind-driven generators will make the cultivation of deep sea wind farms rich in wind resources more feasible.

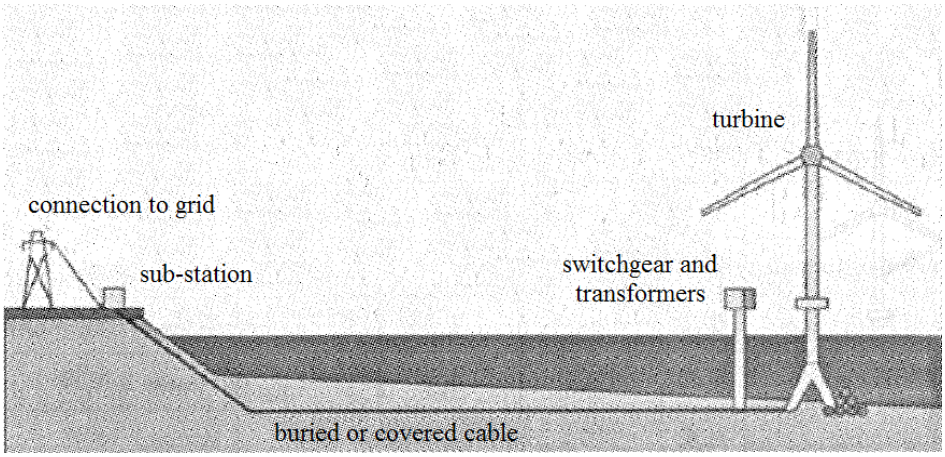

Fig. 1 Principles of Offshore Wind Power Generation[3]

According to a 2007 report by the Global Wind Energy Council (GWEC), the installed capacity of the global wind energy industry had increased by 27% year on year, and the total wind generating capacity had reached 94,000 MW in 2007. Some States have begun to attach importance to this industry and several

2 Infrastructure can be divided into four types, namely single-pile type, gravity-type concrete caisson, multi-pile (triple-pile in most cases) foundation and suction foundation.

3 A Typical Wind Farm, at http://www.offshore-sea.org.uk/site/scripts/documents_info.php?categorylD=21&documentlD=6, 15 May 2008.

offshore wind power plants are already under construction or in the planning stages. According to China's Mid-Long Term Development Plan for Renewable Energy promulgated on September 4, 2007, one or two offshore wind generation pilot projects with a capacity of 100 MW are scheduled to be completed by 2010. The French government has created a plan to expand that country's offshore wind generating capacity to 4000 MW by 2015 despite the impact of the legal system and slow initial industry development. Germany is forecasted to obtain an installed capacity of approximately 500 MW by 2010, growing to 3000 MW by 2015, and 10,000 MW by 2020. Japan has experienced very slow progress in this field. For example Japan's existing installed capacity is only 11 MW. This is because offshore wind farms are considered a social problem, involving public understanding and fisheries compensation. Japan has already launched a plan to develop wind power plants in the deep sea. Poland currently lacks any wind power plants but plans to catch up with an installed capacity of approximately 1500 MW by 2020. Spain plans on reaching a 5000 MW capacity by 2020. In December 2007, John Hutton, chancellor of the British Department for Business, Enterprises and Regulatory Reform set up on June 29, 2007, proposed in December of the same year that the U.K. surpass Denmark and leap to first globally in offshore wind generation with an installed capacity of 30 GW by 2020, accounting for nearly a half of the world's total capacity.[4]

Table 1 Statistics of Offshore Wind Power Plants[5]

Name	Country	Time of Completion	Capacity of Unit: MW	Qty. of Generators	Generator Type
Vindeby	Denmark	1991	4.95	11	Bonus 450 kW
Lely (Ijsselmeer)	Holland	1994	2.0	4	NedWind 500 kW
Tunø Knob	Denmark	1995	5.0	10	Vestas 500 kW
Dronten (Ijsselmeer)	The Netherlands	1996	11.4	19	Nordtank 600 kW

4 GWEC Global Wind 2007 Report, at http://www.gwec.net/index.php?id=90, 22 May 2008.
5 Worldwide Offshore Wind, at http://www.bwea.corn/offshore/worldwide.html, 28 May 2008.

(Continue from previous page)

Name	Country	Time of Completion	Capacity Unit: MW	Qty. of Generators	Generator Type
Gotland (Bockstigen)	Sweden	1997	2.5	5	Wind World 500 kW
Blyth Offshore	U.K.	2000	3.8	2	Vestas 2 MW
Middel-grunden	Denmark	2001	40	20	Bonus 2 MW
Uttgrunden	Sweden	2001	10.5	7	GE Wind 1.5 MW
Yttre Stengrund	Sweden	2001	10	5	NEG Micon NM72
Horns Rev	Denmark	2002	160	80	Vestas 2 MW
Frederik-shaven	Denmark	2003	10.6	4	2 Vestas 3 MW, 1 Bonus 2.3 MW and 1 Nordex 2.3 MW
Samsø	Denmark	2003	23	10	Bonus 2.3 MW
North Hoyle	U.K.	2003	60	30	Vestas 2 MW
Nysted	Denmark	2004	158	72	Bonus 2.3 MW
Arklow Bank	Ireland	2004	25.2	7	GE 3.6 MW
Scroby Sands	U.K.	2004	60	30	Vestas 2 MW
Totals			587	316	

II. Impact of Offshore Wind Power Generation (Especially on the Environment)

Although offshore wind power generation is experiencing an explosion in popularity, its potential impact on the environment cannot be neglected. The following explores some of those potential environmental consequences based on

practice.

A. Impact on Fisheries

An inadequate clearance among offshore wind power plants would affect the fishing activities of fishing vessels as well as offshore aquaculture. A cost-benefit analysis between wind generation and fisheries is conducted by all costal States when a decision has been made to build such plants. For instance, opponents to the U.S. offshore wind power plant in the Nantucket Gulf argued that the project would affect the traditional local fishing industry.[6] Japan's offshore wind generation is also constrained by its own fishery rights, which is considered an urgent issue need to be addressed.[7] While the Taiwan Power Company has announced an investment of NT $ 47.8 billion in the Sihu project, Taiwan's first offshore wind power plant, efforts are being made to study its negative impacts on the fishery industry.[8]

Fishermen face the largest threat from offshore wind power generators, because fishing trawlers are unable to access to waters where wind generators have been set up. This can directly violate their rights and interests.

B. Impacts on Birds

The increase in the quantity of wind-driven generators is accompanied by a rise in their swept area and height. There is a possibility that birds may be killed by colliding with a wind-driven generator. This danger to birds is among the major causes of objection by bird protectors. In addition, wind-driven generators may cause migratory birds to avoid foraging or resting in that area and force local seabirds to leave their existing nests, which has a serious impact on the local ecological environment.

Recent studies suggest that the risk of mortality for birds colliding with wind-driven generators is extraordinarily low. As an intelligent species, as long as a death incident occurs, other birds will be warned to avoid the running generators.

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6 U.S. Strengthens Offshore Wind Power Generation Management, at http://www.library.coi.gov.cn/qbyj/hyzc/200712/p020071203552481195 77.pdf, 1 August 2008. (in Chinese)

7 Chuichi Arakawa, Japan's Offshore Wind Power Generation, *Shanghai Electricity*, No. 1, 2007, p. 161. (in Chinese)

8 With a Love for the Earth and a Passion for Environmental Protection, the Government Will Vigorously Promote Wind Power Generation, at http://www.investintaiwsn.nat.gov.tw/zh-tw/news/200705/2007053001.html, 30 May 2007. (in Chinese)

C. Impacts on the Sea Landscape

Some opponents argue that offshore wind power plants will destroy the beautiful sea landscape and the views from traditional coastal resorts. This problem is absent for wind power plants installed far from the coast. As the high-rising wind-driven generators are unmistakable, the landscape would be affected if aesthetic factors are not taken into account during the construction process. Therefore, the color/size of wind-driven generators as well as whether there is a harmony with the surrounding landscape should be carefully considered, otherwise it will lead to opposition by environmentalists.

D. Impacts on Navigation of Vessels

The impacts on navigation of vessels are mainly attributed to inadequate clearance and noise caused by wind-driven generators, which could pose potential risks to the vessels travelling within the wind generation area in bad weather (e.g., fog) and could interfere with radar communication, impacting navigation safety. Such potential risks include that a vessel may collide with a wind-driven generator or another vessel.

The U.K. has conducted a study on the effects of the Kentish Flats on radar communication of vessels travelling within or near the offshore wind generation area, which has generated a series of diversified data.[9] The potential impact on radar has been given great importance by the U.K. Force which believes that the blades of the established wind power plants will limit the effectiveness of air-defense radar and the continuous rotating turbines will hinder the beams, causing serious air-defense vulnerabilities.[10]

E. Impacts of Noise on Marine Animals

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9 Marico Marine, Investigation of Technical and Operational Effects on Marine Radar Close to Kentish Flats Offshore Wind Farm, at http://www.bwea.com/pdf/AWG_Reference/0704_Marico%20BWEA_Radar.pdf, 22 May 2008.

10 Bi Yuan, U.K. DoD Claims that Wind Power Generation Has a Serious Influence on the Normal Radar Operations of the Air Force, at http://www.chinanews.com.cn/gj/oz/news/2008/02-04/1157242.shtml, 8 May 2008. (in Chinese)

The rotation of wind-driven generators will not only affect sunray, but also cause noises via air cutting by generators, gearboxes and blades. Such noises will pass through the tower structure and enter the sea. Since sound travels easily underwater, the noises from the wind generators, especially low-frequency noises, may have a negative influence on marine organisms.[11] A recent study conducted by researchers in Denmark reveals that sound can carry an extremely long distance underwater and this has a potential impact on large marine animals (e.g., whales) that echolocate by using low frequency sound. A new study found that wind farms add 80–110 dB to the existing low-frequency ambient noise (under 400 Hz); this could impact baleen whales communication and perhaps prey distribution.[12]

III. Relationship of Offshore Wind Power Generation and the International Law of the Sea

While most offshore wind power plants are installed in the territorial waters of coastal States, some States have established plants far into the EEZ. The international law of the sea, especially the United Nations Convention on the Law of the Sea (UNCLOS) of 1982 does not give adequate consideration to the impacts of offshore wind power generation on the maritime rights of various countries. Therefore, a discussion on its impact on the law of the sea based on the characteristics of offshore wind power generation as well as the regulation of the offshore wind generation imposed by the existing law of the sea will be a meaningful endeavor.

A. Offshore Wind Generation & Maritime Navigation

Freedom of navigation is a right conferred upon all States by customary international law. Although there has been a trend among the coastal States towards

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11 Jens Kjerulf Petersen and Torleif Malm, Offshore Windmill Farms: Threats to or Possibilities for the Marine Environment, *AMBIO*, Vol. 35, March 2006, pp. 75~80. However, the authors discovered the absence of a detailed description, especially that of how the noise generated by offshore wind power plants interact with other acoustic sources, and the marine animals are affected by the sounds in different ways, thus adding to the difficulties in predicting the impacts of the noises generated by offshore wind power plants on the environment.

12 Jim Cummings, Ocean Noise: What We Learned in 2006, at http://www.acousticecology.org/, 20 May 2008.

expanding sovereign rights and jurisdiction towards the deep sea over the past decades, a guarantee for all States to the freedom of navigation in the sea is still among the main objectives of the conventions on the law of the sea. Paragraph 1, Article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone states that "[s]ubject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea." Article 2 of the 1958 Convention on the High Seas confers four freedoms, where the freedom of navigation is given priority. According to Article 5(6) of the 1958 Convention on the Continental Shelf, "[n]either the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation."

In the international law of the sea, the "constitutional" UNCLOS of 1982 includes more detailed provisions on the freedom of navigation to provide all States a guarantee of free passage at sea. According to Article 17 of the UNCLOS, "[s] ubject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." Articles 38 and 45 confer the rights of transit and innocent passage through straits used for international navigation on all States. Articles 52 and 53 prescribe that all States enjoy the right of innocent passage through archipelagic waters as well as the right of archipelagic sea lanes passage. Articles 58 and 87 entitle all States to the freedom of navigation within exclusive economic zones and the freedom of high seas (the first of which is freedom of nevigation) respectively.

As mentioned above, offshore wind power plants have an impact on the maritime navigation rights – a fundamental right conferred upon all States by the international law of the sea. State sovereignty extends to the airspace above the territorial sea as well as its sea-bed and subsoil.[13] A coastal State enjoys jurisdiction over the construction and usage of artificial islands, installations and structures in its exclusive economic zones[14] and hence is entitled to establish offshore wind power plants in its territorial seas and exclusive economic zones. However, the existence of offshore wind power plants may require a detour by domestic and foreign ships, adding costs or risks to navigation, which may conflict with principles of freedom of navigation.

The territorial sea is a part of a coastal State's territory, and the establishment

13 Article 2(2) of the UNCLOS.
14 Article 56(1)(b)(i) of the UNCLOS.

of offshore wind power plants is an exercise of its sovereignty over that territory. Inappropriate wind farm site selection would increase the risks of maritime collisions. If an oil tanker was involved in a collision it could create an ecological disaster. Domestic rather than foreign ships are most inconvenienced by wind power plants in the territorial sea because domestic ships are frequently sailing within the territorial sea. Therefore, greater consideration should be given to the navigation of domestic ships during site selection so that the interests of all involved parties are balanced. Any interference with or alteration of key sailing courses is not allowed. According to the 1982 UNCLOS, a coastal State may adopt laws and regulations, in conformity with the provisions therein and other rules of international law, relating to innocent passage through the territorial sea, in respect of the safety of navigation and the regulation of maritime traffic. Furthermore, where necessary to protect the safety of navigation, the coastal State may require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.[15] Therefore, coastal States enjoy the freedom or right to establish offshore wind power plants within their territorial seas, as long as they do not prevent them from performing their due obligations under the UNCLOS. As provided by the UNCLOS, should laws and regulations relating to innocent passage through the territorial sea be adopted, the coastal States must give due publicity to all such laws and regulations,[16] and if sea lanes and traffic separation schemes are implemented, such sea lanes and traffic separation schemes should be clearly indicated on charts to which due publicity shall be given.[17] In practice, for the sake of navigation safety, States also require the offshore wind power plants to install warning or fog lights coated in bright colors on blades in order to increase their visibility to ships and helicopters so as to prevent collisions.

Coastal States are entitled to establish offshore wind power plants in their exclusive economic zones, provided that relevant requirements are satisfied. It is provided in Article 60(7) of the 1982 UNCLOS that "[a]rtificial islands, installations and structures and the safety zones" around such exclusive economic zones "may not be established where interference may be caused to the usage of recognized sea lanes essential to international navigation." Therefore, coastal States

15 Articles 21 and 22 of the UNCLOS.
16 Article 21(3) of the UNCLOS.
17 Article 22(4) of the UNCLOS.

shall not establish offshore wind power plants where interference may be caused to the usage of recognized sea lanes essential to international navigation.

As mentioned above, the operating blades of wind-driven generators have an influence on radar technology. Although this influence is still being studied, wind farms may interfere with radar communication and thus endanger navigating vessels. The solution must be developed based on the practice of the international society. In order to ensure safety of navigation, coastal States must ensure that the location and extent of offshore wind power plants are given publicity and included in sea charts, regardless of location in the territorial seas or exclusive economic zones.

If a coastal State plans to establish a wind power plant within straits used for international navigation it must give due consideration to foreign ships rights to transit and innocent passage. The 1982 UNCLOS prescribes that the sovereignty or jurisdiction of the States bordering the straits is exercised subject to the provisions therein and to other rules of the international law,[18] and all ships and aircraft enjoy the right of transit passage, which shall not be impeded.[19] It is also provided that "States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage."[20] Therefore, it can be concluded that coastal States must not hamper or impede transit passage of foreign ships or aircraft, and if an offshore wind plant does constitute an interference with or an impediment to transit passage, the plant would be held a breach of the provisions of the UNCLOS and the coastal States would bear international responsibilities and would be required to remove the obstacles against such transit passage.

B. Offshore Wind Power Generation & Fisheries

Offshore wind power plants have an influence on fisheries, specifically trawling or fixed aquaculture projects undertaken by fishermen. As such plants are mostly located within a coastal State's territorial sea or exclusive economic zones; a major carrier of influence is the domestic fisheries industry. Therefore, a conflict

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18 Article 34(2) of the UNCLOS.
19 Article 38(1) of the UNCLOS.
20 Article 44 of the UNCLOS.

of interest arises between domestic fisheries industry and power plants enterprises. This conflict of interest does not involve the interests of other States except those authorized by a coastal State to engage in fishery operations in its exclusive economic zone adjacent to an offshore wind power plant. This conflict can be eliminated through mutual negotiations, for example, by reducing the amount payable to the said coastal State.

Although decisive conclusions cannot be made on whether the fish within affected waters (including quantity, migration, spawning, growth, etc.) is influenced by offshore wind power plants, existing research shows that such plants do not have a critical influence on the survival or quantity of fish. A study of the wind power plants established in the Wadden Sea indicates that the plants have no influence on the composition of surrounding marine sediments but a slight temporary impact on the quantity of fish and that there is no clear distinction between the affected area and other reference areas in this regard.[21] Overfishing is still the biggest threat to the fish population. Considering from another perspective, offshore wind power plants might provide a "refuge" for fish which is conducive to spawning and population growth.

In practice, enterprises engaged in wind power generation and relevant fishery organizations will launch mutual negotiations as well as a joint assessment of the potential impact on fishery operations and resources to obtain a balance of interests among all the parties involved.

During the assessment of offshore wind power generation projects, due consideration must be given to issues such as: whether the waters where the site is located are important for fishing, whether the interests of fisheries industry would be affected, whether the opportunities and income of fishing would fall, whether permits for fishing activities have been obtained from the government, whether fishing activities occur during an allowed time span, whether target projects would add the costs of fishery operations, etc. Subsequent negotiations on appropriate compensation should be initiated among stakeholders directly or jointly by fishery organizations or public communities on behalf.[22] The Fishing Liaison with Offshore Wind Group, established by the Department of Business, Enterprise and Reform of the U.K., is aimed at encouraging open dialogue between the fishery industry and

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21 Julia Koller, Johann Koppel and Wolfgang Peters eds., *Offshore Wind Energy Research on Environmental Impacts*, Berlin/Heidelberg: Springer, 2006, p. 176.

22 Framework for Dialogue between the Fishing and the Wind Farm Industries, at http://www.bwea.corn/pdf/offshore/fisheries_framework.pdf, 18 May 2008.

the enterprises engaged in wind power generation and fostering closer relations between them.[23]

C. Offshore Wind Power Generation and Marine Biological Resources Conservation

Importance has been increasingly attached to the protection of marine biological resources, and the establishment of offshore wind power plants has been bound by the provisions of the 1982 UNCLOS in respect of the conservation of living resources.

It is provided by the UNCLOS that a coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish.[24] According to this provision, all coastal States are required to check whether there will be an influence on the ingress and egress of migrating fish before offshore wind power plants are established, and if any, such behavior would constitute a violation of the UNCLOS. However, this investigation requires open and transparent scientific research subject to the supervision and certification by international organizations.

According to Article 65 of the 1982 UNCLOS, "[n]othing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploration of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study."

The adverse effects of sound, vessels and other forms of disturbance on small cetaceans are covered by resolution 4 adopted at the 5th meeting of the parties to Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS).[25] The resolution required the invitation to parties and non-party

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23 Offshore Wind: Fishing, at http://www.berr.gov.uk/whatwedo/energy/sources/renew-ables/planning/offshore-wind/fishing/pagel8850.html, 21 May 2008.

24 Article 67(1) of the UNCLOS.

25 There are altogether 10 parties to the Agreement, including Belgium, Denmark, Finland, France, Germany, the Netherlands, Poland, Sweden, the United Kingdom and Lithuania, at http://www.ascobans.org/index0101.html, 9 June 2008.

range States to develop, with military and other relevant authorities, effective mitigation measures, including environmental impact assessments, to reduce disturbance of and potential physical damage to small cetaceans, and to further study the impacts of wind power plants on such creatures.[26]

Therefore, all States are responsible for the conservation of marine mammals, especially cetaceans. Although the claim that the noise generated by offshore wind power plants has an influence on the life and survival of whales is still open to dispute, affirmative acknowledgement of the potential impact was made by both the Whale and Dolphin Conservation Society (2004)[27] and a recent Danish study. During the establishment of offshore wind power plants, due importance must be given to the cetaceans, and all States are obligated to engage in cooperative study with international organizations.

VI. Conclusion

To sum up, offshore wind power plants have an influence on the marine environment, more specifically on the navigation of vessels and fishing activities which have been verified; their potential influence on marine living resources, especially marine mammals, however, lack accurate conclusion currently.

Freedom of maritime navigation is the major aspect of navigation as a carrier of the impact of offshore wind power plants. The establishment of offshore wind power plants must be in conformity with the provisions of the international law of the sea and forbidden in recognized international waterways. In this way appropriate consideration to the freedom and convenience of international navigation of stakeholders in various waters will be maintained. All States are obliged to provide offshore wind-driven generators with warning signals as well as clear indication on sea charts.

The impact of offshore wind power plants on the fisheries industry (while the impact on fish stocks is still in the study phase) is reflected by the conflict of interests between entities engaged in wind power and fisheries. Most conflicts arise among domestic actors, leading to the conclusion that the solution should be

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26 Item 79(a) of the provisional agenda of the 62nd Session United Nations General Assembly held on 31 August 2007, report of the Secretary-General: Oceans and the Law of the Sea, p. 46.

27 Mark Simmonds, Sarah Dolman and Lindy Weilgart, Oceans of Noise 2004 A WDCS Science report, at http://www.wdcs.org/publications.php, 19 May 2008.

developed through mutual consultation to achieve a balance of interests among involved parties.

The impact on the conservation of marine living resources is also being studied and deserves a definitive conclusion. Aesthetically, the major carrier of such impacts is the offshore landscape. Due consideration given to the surrounding scenery during the design phase would be helpful to reducing negative impacts and even possibly adding to the scenic beauty.

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On Civil Liability for Pilotage

LIU Ziwen*

Abstract: Civil liability for the pilot's negligence is a perplexing issue in China. No statute, administrative regulation, departmental rule, or legal precedent has addressed the topic, and Chinese scholars have rarely discussed it. This article examines the issue from the perspectives of the institutional theory of law and comparative jurisprudence.

Key Words: Pilotage; Pilot; Pilotage agency

Pilotage is an important part of the shipping industry. It is vital to guarantee the safety of navigation, improve the efficiency of port operations, maintain the safety and order of the harbor, and protect the marine environment around the harbor. But since the beginning of the pilotage industry, and especially with the continued acceleration of China's reform and opening-up and the rapid development of its shipping industry, pilotage accidents have become frequent occurrences. There are many causes of pilotage accidents, such as changing weather conditions, complicated navigational channels, flaws in the equipment, and human factors, the last of which includes the pilot's negligence. Given the pilot's special status, accidents caused by his or her negligence can be especially destructive: not only can they result in serious casualties and property loss, but they may also damage our country's reputation as these accidents often involve foreign vessels.

Unfortunately, in practice, inconsistencies abound in the identification and attribution of civil liability after the occurrence of pilotage accidents resulting from the pilot's negligence. Chinese statutes, administrative regulations, department rules, and legal precedents contain no explicit provisions or guidance. Although

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admiralty law scholars have studied the issue,[1] their work mainly introduces the reader to foreign law and has not analyzed the foreign law in depth in association with Chinese law. In this article, the author describes the civil liability system in pilotage by analyzing and comparing the laws of China, the United Kingdom, the United States, and other countries, together with the basic principles of civil law.

I. The Legal Statuses of Players in the Pilotage Industry

A. The Legal Character of the Pilotage Agency and the Pilot

A pilotage agency is a legal person who provides professional pilotage services.[2] According to the Notice on the Suggestions for Implementing Reforms of the Pilotage Management System in Chinese Ports and the Suggestions on Strengthening Harbor Pilotage Management, both from the Ministry of Transport, a pilotage agency in China is a public institution with the status of a legal person.[3]

A pilot is a professional who pilots ships. In China, a pilot is a staff person of a pilotage agency, and the two are in a labor relationship with each other.[4]

B. The Relationship between the Pilot and the Owner of the Piloted Ship

The relationship between the pilot and the owner of the piloted ship is rather

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1 Deng Ruiping, *A Study of the Fundamental Theoretical Issues in Tort Law Involving Ships*, Beijing: Law Press China, 1999, pp. 268~273 (in Chinese); Si Yuzhuo and Wu Zhaolin, *The Law of Ship Collisions*, Dalian: Dalian Maritime University Press, 1995, pp. 49~51. (in Chinese)

2 Pilotage Regulations of the People's Republic of China, Art. 3.

3 The Ministry of Transport issued the Notice on Suggestions for Implementing Reforms of the Pilotage Management System in Chinese Ports in 2005 and the Suggestions on Strengthening Harbor Pilotage Management in 2006, requiring pilotage agencies to separate from port enterprises as public service entities with an independent legal status. At present, Chinese pilotage agencies have completed this change.

4 According to the Civil Servant Law and the State Council General Office's Notice (Forwarding the Opinions of the Ministry of Personnel) on the Trial Implementation of the Employment System in Public Service Agencies, public service entities operate under the employment system. But staff (other than ground skilled staff) in public service agencies that are authorized by law and regulations and that have public administration functions are fall under the Civil Servant Law, if approved. Although pilotage agencies are public service entities with the status of legal person and participate in public administration at a certain level, they have not been approved to apply the Civil Servant Law. Therefore, pilotage agencies should sign employment contracts with pilots to specify their respective rights and obligations on the basis of equality, free will, and negotiation in compliance with law.

complicated. In the UK, the pilot is considered the servant of the owner of the piloted ship under common law and statutory law.[5] Chinese law has not decided this question. *Yu Xiaohong v. Goodhill Navigation, S.A., Panama*, a case that involved maritime personal injury claims in the Ningbo Maritime Court,[6] touched on the relationship between the pilot and the owner of the piloted ship; however, the court avoided speaking on the issue.[7] The author will explore it by taking into account of the basic theories of civil law and the provisions in Chinese law.

First, as an employee of the pilotage agency, the pilot is in a labor relationship with the pilotage agency, and not the owner of the piloted ship.

Second, the pilot is not an employee of the owner of the piloted ship. These two parties have not entered into a written or oral service contract. Neither are they in fact in an employer-employee relationship. An essential condition in an employer-employee relationship is the employer's compensation to the employee for the services he or she provides. The pilot is not paid by the shipowner, but by the pilotage agency based on the employment contract between the pilot and the pilotage agency. Although the shipowner may pay the pilotage fees through the pilot, the pilot collects the fees on behalf of the pilotage agency, and the fees have no direct relationship to the pilot's compensation. According to some scholars, the pilot's status is very similar to that of a contract sailor working on a foreign ship, who has an employment contract not with the shipowner or its management company, but with a contracting agency that has an agreement with the shipowner or its management company. The shipowner pays the contracting agency in accordance with the contract, and the agency pays the sailor. These relationships do not affect the establishment of an employment relationship between the sailor and the shipowner.[8] The author does not agree with this view. In general, the shipowner is responsible for the sailor's salary, bonuses, and other types of compensation in

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5 Francis D. Rose, *The Modern Law of Pilotage*, London: Sweet & Maxwell, 1984, p. 33.

6 Yu Xiaohong v. Goodhill Navigation, S.A., Panama (claim for personal injury at sea), at http://www.ccmt.org.cn, 10 August 2007. (in Chinese)

7 In this case, Yu Xiaohong, the plaintiff, was a pilot of a Ningbo pilotage station. When he was conducting compulsory pilotage on the *Spring Trader*, owned by Goodhill Navigation, S.A., Panama, he was seriously injured when the rope in the pilot's ladder suddenly snapped. He was later adjudged as a second-degree disabled person by the Ningbo Labor Appraisal Committee. The court decided that the shipowner was a joint tortfeasor and should be liable for the plaintiff's economic losses, including medical costs, emotional damages, etc.

8 Zhao Jingsong, Reflections on Yu Xiaohong's International Maritime Personal Injury Claim, *Admiralty Law Review*, No. 1, 2002. (in Chinese)

accordance with the relevant agreement. Although the shipowner does not always pay the sailor directly and sometimes pays the sailor through the contracting agency, the payment is always considered the sailor's salary and not commissions, service fees, or other fees paid to the agency. Agreements usually specify that the shipowner is responsible for compensation to the sailor. However, it is not the case in pilotage. In contrast, the shipowner pays a fee for the pilotage service, which has no relationship to the pilot's compensation in either form or substance. So the shipowner is in fact not responsible for paying the pilot, and there is no employment relationship between the pilot and the shipowner.

The court avoided defining the relationship between the pilot and the owner of the piloted ship in the *Yu Xiaohong* case mentioned above, which involved maritime personal injury claims. But according to the previous analysis, there is in fact no labor or employment relationship between the two parties.

C. The Relationship between the Pilotage Agency and the Shipowner

As discussed, the request for pilotage services from the shipowner to the pilotage agency is an offer, and the pilotage agency's agreement to the request and the dispatch of a pilot is an acceptance of such offer. Therefore, the pilotage agency has a contractual relationship with the owner of the piloted ship. However, opinions differ as to category into which the contract may fall. Above all, it is not an employment contract: while an employer can be either a natural person or a legal person, an employee can only be a natural person.[9] Therefore, there is no employment relationship between the pilotage agency and the shipowner.

Some scholars believe that the relationship between the pilotage agency and the shipowner is one of work-for-hire contracts.[10] On the surface, this point of view seems valid. The pilotage service is the product offered by the hired person, and the pilotage fee is the compensation. However, this view focuses only on the form and not the substance of a work-for-hire contract. First, the goal of a work-for-hire contract is the completion of certain work, while pilotage focuses not on the result, but the process, of the pilotage. Second, in a work-for-hire contract, the contractor is independent. But during pilotage, the pilot is not wholly independent

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9 Yi Jun and Ning Hongli, *A Systemic Study of Specific Provisions of Contract Law*, Beijing: People's Court Press, 2003, p. 373. (in Chinese)

10 Qiao Guimin, A Legal Analysis of the Relationship between the Master and the Pilot, *Chinese Navigation*, No. 1, 2007. (in Chinese)

in piloting the ship because the master remains the supreme commander of the ship and has the right to change the pilot's instructions, although the pilot is steering the ship.[11] Hence, the contract between the pilotage agency and the shipowner is not a work-for-hire contract, but a nameless contract (atypical contract) that has not been provided for in the Specific Provisions of Contract Law of China.

It is worth noting that, even in the case of compulsory pilotage, the pilotage agency and the owner of the piloted ship are still in a contractual relationship rather than an administrative relationship. Although the system of compulsory pilotage is explicit in Chinese law and is implemented by the Ministry of Transport of China, the implementation of compulsory pilotage has nothing to do with the functions of the pilotage agency. Article 3 of the Pilotage Regulations of the People's Republic of China defines "pilotage agency" as "a legal person that specializes in providing pilotage service," and Article 12 states that "one of the major responsibilities of a pilotage agency is to accept pilotage requests and provide pilotage services." It is evident that the function of the pilotage agency is to provide pilotage services, and it does not have administrative authority under the law. Therefore, regardless of whether the pilotage is compulsory, in China, the pilotage agency and the owner of the piloted ship are only in a contractual relationship.

II. The Liabilities of the Pilot and the Pilotage Agency for the Piloted Ship

When the pilot's negligence leads to losses to the piloted ship, should the pilot and the pilotage agency assume liability? If so, what types of liability should they assume? The author will explore the question in the following pages.

British law clearly states that the pilot is the servant of the owner of the piloted ship. Therefore, the owner can either sue the pilot for breach of contract based on the service contract, or in tort. But in practice, the pilot is rarely sued for breach of contract or in tort for two reasons. First, the pilot's own limited individual resources cannot satisfy large compensatory awards. In the words of British scholar Francis D. Rose, "the pilot is not worthy to be sued because he is unable to afford to pay the judgment."[12] Second, Article 22 of Britain's Pilotage Act 1987 limits the pilot's liability. Specifically, for losses caused by the negligence of a licensed pilot,

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11 Pilotage Regulations, Art. 36.

12 Francis D. Rose, *The Modern Law of Pilotage*, London: Sweet & Maxwell, 1984, p. 33.

the pilot's liability is limited to 1,000 pounds plus the pilotage fee for the particular ship. In accidents caused by the pilot's negligence, the losses may be far greater than the compensation limit set by the law. It seems unlikely for the shipowner to receive satisfactory compensation from the pilot.

In Britain, it is unlikely for an aggrieved party to receive full compensation from the pilot. Since there is no pilotage agency in any real sense, the ship owner cannot even claim compensation from the pilot's supervisory authority. In 1916 *Fowles v. Eastern and Australian Steamship Company, Ltd.*, the court rejected the vessel owner's request for the pilot's supervisory authority to assume liability. Justice Loreburn believed that, the traditional and familiar legal status of the pilot as an "independent professional man" has not been altered by law, unless more explicit stipulations are made. According to him, the government played a very limited role in pilotage: it chose qualified pilots, provided appropriate supervision, and paid reasonable compensation. The governmental regulatory authority licensed the pilots, and did not control, manage, or operate the ship.[13] In *The Cavendish*, Justice Clarke refused to impute liability to the pilotage regulatory authority for a different reason. In his opinion, the Pilotage Act 1987 created a compulsory employment relationship between the compulsory pilot and the shipowner. Since an employee can only have one employer and the pilot is employed by the shipowner, the pilot cannot be simultaneously employed by the particular port regulatory authority.[14]

In China, the pilotage agency is a public legal person. Being a staff person of the public agency, the pilot has an employment relationship with the agency, and pilotage is within the scope of the pilot's official duties. Therefore, the pilotage agency should assume civil liability for losses caused by the pilot's negligence. Because there is a contractual relationship between the pilotage agency and the shipowner, the shipowner can sue the pilotage agency in tort or for breach of contract. Compared with the pilot's assumption of all liability under British law, Chinese law provides greater protection for the shipowner.

III. The Pilot's and the Pilotage Agency's Liability toward a Third Person

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13 Fowles v. Eastern and Australian Steamship Company, Ltd. (1916) 2 A. C. 556, pp. 562~563.

14 The Cavendish, *Lloyd's Law Report*, Vol. 2, 1993, p. 292.

Should the pilot or the pilotage agency assume liability for a third person's losses caused by any infringing act of the piloted ship arising from the pilot's negligence? Two opposite approaches to this issue exist in legislative and judicial practice: the negative and the affirmative. Under the negative approach, the shipowner, but not the pilot or the pilotage agency, absorbs the losses. Under the affirmative approach, the pilot or his or her pilotage agency assumes the civil liability caused by the pilot's negligence.[15]

A. The Negative Approach

Current British law exemplifies the negative approach. Under Article 16 of the Pilotage Act 1987, even compulsory pilotage does not affect the shipowner's liability for losses caused by the ship. Why does the provision highlight "compulsory pilotage"? This comes from the history of the pilot's liability in the British system.

A "compulsory pilotage defense" used to exist in British law: a shipowner was not liable for losses caused by a tort committed by the piloted ship that resulted from the pilot's negligence during an instance of compulsory pilotage. This rule originated from the common law and was later recognized under early statutory law.[16] The shipowner must satisfy four elements to be shielded from liability under the compulsory pilotage defense: (a) the master accepted the compulsory pilotage; (b) the accident occurred in the area of the compulsory pilotage; (c) the pilot controlled the ship, and did not merely advise the master; and (d) the accident was caused completely by the pilot's negligence.[17]

The shipowner's erstwhile immunity with the compulsory pilotage defense under British law has its basis in the British common law, which considered the pilot a servant of the owner of the piloted ship. As Lord Jauncey wrote in *The Esso Bernicia*, "at common law a shipowner is liable for the negligence of a pilot voluntarily engaged just as it would be liable for the negligence of the master. Where, on the other hand, the pilotage is compulsory, the shipowner would not be

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15 Deng Ruiping, *A Study of the Fundamental Theoretical Issues in Tort Law Involving Ships*, Beijing: Law Press China, 1999, pp. 269~271. (in Chinese)

16 Francis D. Rose, *The Modern Law of Pilotage*, London: Sweet & Maxwell, 1984, p. 37.

17 David J. Bederman, Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts, *Tulane Law Review*, Vol. 64, No. 5, 1990, pp. 1050~1061.

liable for the negligence of the pilot."[18] The Canadian Justice L'Heureux-Dubé also believed that the pilot engaged by the shipowner or the master is the shipowner's employee, and so the shipowner should be liable for collisions caused by the pilot's negligence.[19]

However, the compulsory pilotage defense was abolished by the Pilotage Act 1913, which states that "the owner … of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel … in the same manner as he would if pilotage were not compulsory".[20] Since then, the shipowner has no longer been able to use the compulsory pilotage defense to avoid liability. In *Fowles v. Eastern and Australian Steamship Company, Ltd.*, discussed above, the court, after analyzing the relationship between the pilot and the pilotage supervisory agency, decided that the shipowner instead of the agency should assume the losses caused by the pilot's negligence.[21] In *The Esso Bernicia*, Lord Jauncey did not only affirm the rule imputing liability to the shipowner, but also gave the legal basis for the rule. He asserted that it was a universally-acknowledged rule, confirmed by all the authoritative sources, that the regulatory authority of the pilot was not liable for the losses caused by the pilot's negligence. There were two basis for this rule: on one hand, the pilot was an independent staff person who independently provided pilotage services, and was not an employee of the supervisory agency. On the other hand, Article 15 of the Pilotage Act 1913 stated that the pilot was an employee of the shipowner.[22] In *The Cavendish*, a recent case, Justice Clarke expressed complete agreement with *The Esso Bernicia* judgment. He wrote that Article 16 of the Pilotage Act 1987 imposed liabilities to the third person on the shipowner. This article expressed the same meaning as the Pilotage Act 1913 in a more modern manner, and created an employer-employee relationship between the compulsory pilot and the shipowner.[23]

Most countries and regions have adopted British law's negative approach.[24]

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18 The Esso Bernicia, *Lloyd's Law Report*, Vol. 1, 1989, p. 24.
19 The Irish Stardust, *Lloyd's Law Report*, Vol. 1, 1977, p. 205.
20 This provision appears in the Pilotage Act 1913, Art. 15; the Pilotage Act 1983, Art. 35; and the Pilotage Act 1987, Art. 15. See Francis D. Rose, *The Modern Law of Pilotage*, London: Sweet & Maxwell, 1984, p. 38; the Pilotage Act 1987, Art. 16.
21 Fowles v. Eastern and Australian Steamship Company, Ltd. (1916) 2 A. C. 556.
22 The Esso Bernicia, *Lloyd's Law Report*, Vol. 1, 1989, p. 30.
23 The Cavendish, *Lloyd's Law Report*, Vol. 2, 1993, p. 292.
24 Deng Ruiping, *A Study of the Fundamental Theoretical Issues in Tort Law Involving Ships,* Beijing: Law Press China, 1999, pp. 269~271. (in Chinese)

For example, according to Article 24, Chapter 84 (Pilotage Ordinance) of Hong Kong Shipping Ordinances and Their Subsidiary Legislation, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory. The language is almost identical to the Pilotage Act 1987, Article 16. The Rules of Navigation for the Suez Canal are even more explicit in this regard: "[A]ny vessel of any description is responsible for any damage and consequential loss she may cause directly or indirectly … to third party … [T]he vessel guarantees to indemnify [the Canal Authority] in respect of any claim against the latter by reason of any damage, whatsoever she may cause either directly or indirectly to third party."[25]

The situation in the United States is relatively unique. In practice, it has adopted an incomplete negative approach. In *The China*, after examining many British precedents, the U.S. Supreme Court diverged from the compulsory pilotage defense prevalent in Britain at the time. Justice Clifford wrote in his concurrence, "[T]he decree of the circuit court, determining that the colliding steamship was liable, notwithstanding she had a licensed pilot on board, ought to be affirmed. Many English cases decide otherwise, but I am not satisfied with the reasons given in their support, and have no hesitation in concurring in the conclusion to which the majority of the Court has come; but I do not concur in the proposition that the state laws which require inward or outward bound vessels to pay pilot fees or half pilot fees whether they employ a pilot or not would afford any such defense in a case of collision ... Whether the party charged is liable or not, aside from the merits, depends in all cases upon his relation to the wrongdoer. If the wrongful act was done by himself, or was occasioned by his negligence, of course he is liable, and he is equally so, if the act constituting the fault was done by one towards whom he bore the relation of principal, but the liability ceases where the relation of principal entirely ceases to exist, as in case of inevitable accident. Unless the relation of principal entirely ceases to exist, the party owning the vessel remains liable in a suit *in personam*."[26] In other words, the shipowner should be liable *in rem* and *in*

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25 Suez Canal Navigation, *Suez Canal Rules of Navigation*, Beijing: China Communications Press, 1990, pp. 2, 22, as quoted in Deng Ruiping, *A Study of the Fundamental Theoretical Issues in Tort Law Involving Ships*, Beijing: Law Press China, 1999, pp. 269~270. (in Chinese)

26 The China (1868) 74 U. S. 53, pp. 69~70.

personam if the pilotage is conducted under an employer-employee relationship, but only be liable *in rem* in case of compulsory pilotage.

B. The Affirmative Approach

Not many countries take the affirmative approach in their legislation. One example is Russia in its Merchant Shipping Code: "The organization employing the pilot shall be liable for losses caused by the pilot's negligence."[27] The admiralty law of Poland, Belgium, Panama, and some other countries have similar provisions.[28] In 1977, the Chinese ship *Dadelun* of the Guangzhou Ocean Shipping Company, with the pilot onboard, collided with a foreign ship. The subsequent investigation revealed that the collision was caused completely by the pilot's negligence, and the Panama Canal Authority assumed 95% of the liability.[29]

Although the compulsory pilotage defense has been abrogated in Britain, courts still recognize the doctrine in cases of compulsory pilotage in foreign waters. In *The Waziristan,* Justice Willmer wrote: "The accident occurred within territorial waters of Iraq. Though compulsory pilotage is enforced in this waters in line with Iraq's law, there is no provisions in Iraqi law similar to Article 15 of Pilotage Act 1913 which requires the vessel owner to assume liabilities for the negligence of the pilot during the compulsory pilotage."[30] Therefore, the court decided that the shipowner was not liable for the pilot's negligence during compulsory pilotage.

C. Liability of the Pilot and the Pilotage Agency toward Third Parties Under Chinese Law

It is unclear whether Chinese law uses the affirmative or the negative approach. According to Article 39 of the Maritime Code of the People's Republic of China, the master shall not be absolved of his duty to manage and operate the

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27 Han Lixin and Wang Xiufen ed., *International Admiralty Law (Countries and Regions) (Chinese-English Edition)*, Vol. II, Dalian: Dalian Maritime University Press, 2003, p. 1382, as quoted in Si Yuzhuo, *Maritime Law Monograph*, Beijing: China Renmin University Press, 2007, p. 411. (in Chinese)

28 Si Yuzhuo and Wu Zhaolin, *The Law of Ship Collisions*, Dalian: Dalian Maritime University Press, 1995, p. 50. (in Chinese)

29 Deng Ruiping, *A Study of the Fundamental Theoretical Issues in Tort Law Involving Ships*, Beijing: Law Press China, 1999, pp. 271~272. (in Chinese)

30 The Waziristan, *Lloyd's Law Report*, Vol. 2, 1953, p. 370.

ship even with the presence of a pilot piloting the ship. Article 23 of the Pilotage Regulations of the People's Republic of China is identical to the Maritime Code provision: the master is not absolved of the duty to manage and navigate the ship when the ship is being piloted. Does this mean that the shipowner is liable for the pilot's negligence? The author does not think so. Article 39 of the Maritime Code and Article 23 of the Pilotage Regulations only define the master's and the pilot's respective authority and duties: although the pilot stands in the master's place in managing and operating the ship, the master still has supreme command over the ship.[31] Neither provision addresses civil liability. This point can be understood through the systematic interpretation approach.[32] Article 39 of the Maritime Code appears in Chapter 3, Section 2, which is entitled "The Crew" and focuses on the master's duties. So the contents of Article 39 should be consistent with the rest of Section 2. If only Article 39 defines the pilot on board a ship as a party with civil liability, then the article would not be consistent with the structure of the rest of the section. The Pilotage Regulations are different: its Article 23 appears in Chapter 3, "The Pilot." It seems reasonable for a provision at the end of this chapter to provide for the pilot's civil liability. But here is the conundrum: if the provision aims to exempt the pilot from liability with respect to third parties, why does it use such ambiguous language, and not something more explicit and precise such as Article 16 of the British Pilotage Act 1987? Therefore, in my opinion, Article 23 of the Pilotage Regulations merely repeats and reinforces Article 39 of the Maritime Code, and neither article addresses the pilot's civil liability.

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31 According to the relevant laws and regulations, the pilot should describe his pilotage plan to the master of the piloted ship. The master should introduce the ship's operations to the pilot and give the pilot other information related to pilotage, help the pilot perform the pilotage duties, cooperate with the pilot during the pilotage, answer the pilot's questions related to the pilotage, and follow the pilot's instructions unless the safety of the ship would be compromised. However, the ship's acceptance of pilotage services does not absolve the master from the duties in managing and operating the ship. When the master discovers that the pilot's instructions may pose a threat to the safety of the ship, the master is entitled to ask the pilot to modify the instructions and, when necessary, ask the pilotage agency to change pilots and promptly report the issue to the maritime administrative agency. See Pilotage Regulations, Arts. 23, 29 and 36.

32 Systematic interpretation means to systematically and thoroughly analyze the meaning and content of a legal provision in association with other legal provisions. The interpretation considers the provision's relationship with other legal provisions, its status in the legal document where it is found, and the relationship between the related legal norms and systems to avoid an isolated and superficial interpretation. See Zhang Wenxian, *Jurisprudence*, Beijing: Peking University Press/Higher Education Press, 1999, p. 331. (in Chinese)

Echoing the absence of any explicit provision in Chinese law on the pilot's civil liability, there is also a dearth of judicial opinions on the subject. The only existing opinion is concerning *Shanghai Power Supply Bureau v. Proteus Shipping Co., S.A.* (1985), which involved a dispute over compensation for maritime damages.[33] In this case, the *M.V. Agamemnon*, owned by the defendant, Proteus Shipping Co. S.A. of Panama, was dragging anchor in the Huangpu River. Due to the pilot's negligence, the ship broke the estuary cable between two buoys, resulting in damage to the Shanghai Power Supply Bureau's equipment and losses related to its supply of electricity. After a trial, the Shanghai Maritime Court ruled that the defendant had violated Article 10 of the Maritime Traffic Safety Law of the People's Republic of China and Article 37 of the Regulations of Shanghai Municipality on Port Services by dragging anchor in the Huangpu River and damaging the estuary cable that the plaintiff had laid. The court further ruled that the resulting economic losses should be compensated, and assigned the liability to the defendant shipowner. On March 3, 1986, the Judicial Committee of the Supreme People's Court reviewed trial experience in its 246th meeting, and stated that the Shanghai Maritime Court's conduct of the trial should be a point of reference for courts at all levels for its timely investigation of the facts in the dispute, clear determination of responsibility for the accident, and reasonable, fair, and practical assessment of the amount of compensation. Although the court's opinion was not explicit on the question of who should be responsible for the pilot's negligence, the result made the court's position abundantly clear: the shipowner is liable for the pilot's negligence.

I believe there are two main reasons behind the court's judgment. First, the court was influenced by the British rule of considering the pilot an employee of the shipowner. The second reason is historical. In 1959, the Ministry of Transport of China issued the Certain Regulations on Compensating Maritime Losses, whose Article 1 clearly stated that "the shipowner should assume liability for losses caused by the negligence of the master, sailors, pilot, or any other employee of the shipowner who are serving on the ship and acting within the scope of their duties". According to the Ministry of Transport's 1976 Provisions on Pilotage in Seaports, in accidents caused by the pilot's negligence, the pilot should be appropriately

33 Shanghai Power Supply Bureau v. Proteus Shipping Co., S.A. (case for compensation for losses at sea), at http://www.com-law.net/anli/haishisunhai.html, 26 October 2007. (in Chinese)

disciplined, but is not liable for economic damages. Although both regulations were no longer valid by the time of the *Agamemnon* incident, the court inevitably fell under their influence. Considering that neither the Maritime Code nor the General Principles of the Civil Law were in effect at the time, the court's judgment was reasonable. However, the case has little instructive value for current judicial practice.

According to civil law principles, as there is no employment relationship between the pilot or the pilotage agency and the owner of the piloted ship, the shipowner should not be liable for the pilot's negligence.

In sum, although Chinese law has no explicit stipulation on who should assume liability for the pilot's negligence, it is not difficult to see – based on general principles of tort law – that Chinese law uses the affirmative approach. That is to say, the pilotage agency shall be liable for the pilot's negligence.

It is significant that the pilotage agency assumes liability for the pilot's negligence. First, from a jurisprudential perspective, the attribution and determination of legal responsibility should be in accord with each person's own actions. We recognize that the pilotage agency's ability to furnish economic compensation is somewhat less adequate than that of the shipowner, and the victim may receive better protection if the shipowner bears the responsibility. But in my opinion, the third party's interests should not supersede the rights and interests of the innocent. Without a legal basis, it is obviously unreasonable for the shipowner to assume liability for the pilot's negligence. It would also be contrary to the principle that each person should assume responsibility for his or her own actions. Further, the pilotage agency's assumption of liability for the pilot's negligence would also prompt it to improve its hiring and management of pilots, as well as the pilots' professional skills. The Newcastle Protection and Indemnity Association has also advocated for the position that the pilot should assume economic compensation for collisions that result from his or her own negligence; there is no better way to guarantee the quality of the pilot's service.[34]

Some worry that, because pilotage agencies have limited ability to compensate for economic losses, they may be forced out of the shipping industry by the risk of possibly significant liability. Nevertheless, these worries are unfounded. Over the last thousand years in the development of the shipping industry, shipowners –

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34 Si Yuzhuo and Wu Zhaolin, *The Law of Ship Collisions*, Dalian: Dalian Maritime University Press, 1995, pp. 50~51. (in Chinese)

who face the greatest risks – have not only stayed in the shipping industry, but have also grown in strength and numbers. There are two main reasons for this. On one hand, they can spread their risk through insurance. On the other hand, they have been protected by a limitation-of-liability system. I believe that insurance and the limitation of liability can also apply to pilotage agencies, which I will discuss in the following section.

IV. Limiting Liability for Pilotage

The limitation of liability refers to the practice where the law limits the scope of a responsible party's financial liability. The limitation of liability has a long history in admiralty law.[35] Chapter 4 and Chapter 11 of China's Maritime Code describe two different systems for limiting liability: the limitation of liability for entities and the limitation of liability for maritime claims. Both aim to protect the shipowner's interests and promote the development of the shipping industry.

The development of the pilotage industry is similar to that of the shipping industry. In the early days, before the appearance of government-licensed pilots, individuals familiar with the conditions of channels and ports began to provide pilotage services to passing ships. With their experience and expertise, they prevented many maritime accidents that could have been caused due to unfamiliarity with the local channels and climate. Broadly speaking, they also furthered the development of the shipping industry and international trade. Today, although ships are outfitted with advanced equipment, the pilot's rich experience and familiarity with local conditions are still indispensable to the safety of ports and ships. However, pilotage involves relatively high levels of risk: due to the complexity of the channels, changing weather, and overcrowded ports, pilotage accidents are inevitable. If we demand too much from pilots and pilotage agencies and place too much liability on them, more pilots will certainly leave the industry. The loss of pilots will hamper the healthy development of the pilotage industry and further increase the risks in shipping industry. Therefore, I believe that we should,

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35 It is said that, in the early 17th century, in a burglary on a Dutch ship carrying gold (the incurred loss was far greater than the value of the ship), the shipowner was liable for no more than the value of the ship as compensation. This decision won the approval of the celebrated Dutch jurist Hugo Grotius, who praised the ruling as to be in the interest of justice. See Si Yuzhuo, *Maritime Law Monograph*, Beijing: China Renmin University Press, 2007, p. 522. (in Chinese)

on one hand, improve the management of pilots and pilotage agencies and enhance the quality of pilots and pilotage services; and on the other hand, make the job more appealing to pilots by tipping the scales somewhat in their and the pilotage agencies' favor. The most effective way is to limit their liability.

Some countries have already established a system that limits the liability of pilots and pilotage agencies. According to the Merchant Shipping Code of the Russian Federation, the liability of an entity that employs pilots is limited to 10 times of the pilotage fee due. Poland's Admiralty Law fixes the liability limit at 20 times of the pilotage fee.[36] In Britain, the law has different liability limits for the pilot and the pilotage agency. The pilot's liability is limited to 1,000 pounds plus the pilotage fee for the ship in question, and the liability limit of the regulatory authority of the pilot – *i.e.*, the regulatory authority of the port in question – is 1,000 pounds times the number of pilots licensed by the regulatory authority at the time of the accident.[37]

Chinese law has not provided for the limitation of liability for pilotage agencies. Because China has a significant shipping industry, has many rapidly developing ports, and a heavy workload for pilots, I believe that China should establish a limitation of liability system for pilotage to encourage the development of the pilotage industry and prevent the loss of pilots. I suggest that the British model should be used as a reference, and the liability limits should be the product of the number of pilots in a pilotage agency times a fixed base number, which can be determined in accordance with the pilotage fees charged and local economic conditions.

V. Conclusion

Based on an analysis of the current law as applied and an interpretation of civil law theory, we can see that, although Chinese law has no clear provision on the pilot's civil liability, the pilotage agency should assume liability for the pilot's negligence. Such civil liability includes liability towards the owner of the piloted ship and liability towards a third party. Having the pilotage agency assume liability for the pilot's negligence will encourage the pilotage agency to improve the hiring

36 Si Yuzhuo, *Maritime Law Monograph*, Beijing: China Renmin University Press, 2007, p. 411. (in Chinese)

37 Pilotage Act 1987, Sec. 22.

and management of pilots, enhance the pilot's professional skills, and raise the quality of pilotage services. At the same time, taking into account the considerable risks involved in pilotage, insurance and a limitation-of-liability system should be used to prevent the loss of pilots and stimulate the development of the pilotage industry. In sum, I believe that a system that requires pilotage agencies to assume liability on one hand, and limits their liability to a fixed sum and apportions the liability through insurance on the other hand, is a system that conforms to basic legal principles and the actual needs in the shipping industry.

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The Legal Status of the Consignor under UNCITRAL Draft Convention on the Carriage of Goods

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Abstract: Although the consignor is a concept in transport law, it is substantially also an extension of the concept of seller in trade law to transport law, because the person being entitled to deliver goods is the same with the one possessing title to such goods, i.e. the seller in a trade. The provisions regarding the rights and duties of the consignor under the transport law will directly affect the interests of the seller under the trade law. On the basis of a detailed introduction of the provisions related to the consignor in UNCITRAL Draft Convention on the Carriage of Goods, this paper makes an analysis of and shares some views on the change of the status and the rights and obligations of the consignor.

Key Words: Consignor; Legal status

I. Introduction

A contract of carriage, especially the one of goods by sea, has always been concluded to perform an international trade contract, so as to ensure sellers' fulfillment of their duties to deliver goods through transportation and the transfer of ownership of goods from sellers to purchasers. Under common terms in international trade, it is usually the obligation of sellers to charter ships and book shipping spaces with carriers to have goods delivered. Therefore, it is quite common that the role of the consignor and that of the shipper are played by the same person under a contract of carriage, either the seller in a trade contract or its agent or subcontractor. However, in a contract of carriage under FOB terms, it is the obligation of purchasers to charter ships and book shipping spaces, making the purchasers

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also the shippers and the consignees under transport law, while it is the responsibility of the seller to deliver the goods to the carrier. What's more, in practice, under FOB terms, when a bill of lading is issued, the carrier fills the column marked "shipper" with the name of the seller who delivers the goods. Thus, the "shipper" in a bill of landing is not the "shipper" by definition. The term "shipper" has not been defined in either Hague Rules or Hague-Visby Rules,[1] two set of uniform rules for the regulation of bills of lading; however, according to Article 1(a) of Hague-Visby Rules, "carrier includes the owner or the charterer who enters into a contract of carriage with a shipper", so the shipper is defined as any person who enters into a contract of carriage with a carrier, i.e. the counterparty of the carrier. In an effort to resolve the confusion, the shipper is defined in Article 1(3) of Hamburg Rules as any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea. In this way, the category of the delivery shipper (the consignee) is added into the concept of shipper to resolve the inconsistency between the contracting shipper and the "shipper" marked in a bill of lading, and the shipper fall into two categories, namely, the delivery shipper and the contracting shipper. However, the rights and obligations between the two types of shippers have not been clarified in Hamburg Rules but are determined in line with different situations in practice, causing confusions in juridical practice. By changing "or" into "and" when borrowing the definition of "shipper" from the Hamburg Rules, the Maritime Code of the People's Republic of China makes it possible for the coexistence of the two types of shippers under FOB terms, yet makes few clarifications regarding the rights and obligations between the two, leading to a judicial inconsistency in respect of such issues as to who has the right to receive a bill of lading from the carrier, who is responsible for the packaging and declaration as well as assuming responsibilities for losses the carrier suffered therefrom, and whose instructions should the carrier follow when it is delivering goods at the port of destination.

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1 The Hague Rules herein refers to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and Protocol of Signature reached in 1924; the Hague-Visby Rules refers to the Hague Rules amended on 23 February 1968 by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924; and Hamburg Rules refers to United Nations Convention on the Carriage of Goods by Sea, 1978.

In this context, the concept of "the delivery shipper" becomes separated from the doctrine of "the shipper" and is defined separately as "the consignor" in UNCITRAL Draft Convention on the Carriage of Goods (hereinafter "the Draft Convention"),[2] which is being reviewed. Now, "the consignor" is a coordinate concept of "the shipper" rather than being included in the latter, bringing a thorough change in the legal status of "the consignor" at the level of legislation as well as the existing framework of cargo owners (as compared to ship owners) in transport laws. Besides, the Draft Convention provides for the consignor's rights and obligations by splitting the functions of transport documents, as is stipulated in Article 37, "[t] he consignor is entitled to obtain a non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record that evidences only the carrier's or performing party's receipt of the goods." What have been influenced most by the provisions of the Draft Convention on the rights and obligations of the consignor are the rights of the seller under offshore trade terms ("F"-terms). Take FOB terms as an example. As the seller is not responsible for arranging the transport under FOB, it can only serve as the consignor or the documentary shipper at the consent and direction of the shipper rather than the shipper under transport laws who is entitled to the rights and obligations of the

2 The UNCITRAL Draft Convention on the Carriage of Goods refers to the Draft Convention on the Carriage of Goods [wholly or partly] [by Sea] being reviewed and formulated by Working Group III (sometimes referred to as the "Working Group on Transport Law") of the United Nations Commission on International Trade Law. During the preparation of the initial version of the Draft Convention, the Comité Maritime International (CMI) was invited by the United Nations Commission on International Trade Law to participate in its investigation and, on the basis of the investigation, drafted the initial version of the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by Sea] (UNCITRAL. A/CN. 9/WG. III/WP. 21), which therefore is also referred to by some Chinese scholars as CMI Draft Convention on the Carriage of Goods. By the time this article is finalized, the Draft Convention has been reviewed and revised for three times by the United Nations Commission on International Trade Law and updated to the latest version (A/CN. 9/WG. III/WIP. 101). The previous version of the Draft Convention will be updated after each revision. Therefore, the initial version (UNCITRAL. A/CN. 9/WG. III/ WP. 21) was updated to the second version (UNCITRAL. A/CN. 9/WG. III/WP. 56) after the first revision, and after the second revision the third version (UNCITRAL. A/CN. 9/ WG. III/WP. 81). Unless otherwise stated, the Draft Convention mentioned herein refers to the latest version (A/CN. 9/WG. III/WP. 101) by Working Group III of the United Nations Commission on International Trade Law. The Draft Convention mentioned herein is quoted from the versions released by United Nations Commission on International Trade Law on its official website. The Chinese and the English Versions were downloaded respectively at http://www.uncitral.org/uncitral/zh/ commission/working_groups/3Transport.html and http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 10 April 2006.

shipper stipulated in the Draft Convention. Now that the FOB seller can only act as the consignor defined in the Draft Convention, it is entitled to obtain nothing but a goods receipt, greatly affecting its ability to exercise control over goods in transit as well as to collect due payment. It is obvious that the consignor system established in the Draft Convention will have a far-reaching impact on the rights of the FOB seller. Therefore, it is of great theoretical significance for studying the consignor system established by the Draft Convention, especially the changes in the legal status of the consignor, which is the objective of this article.

The concept of "the consignor" in this article can be understood at two levels. Theoretically speaking, it is a concept defined in terms of what it actually does – "deliver the goods to the carrier". From the perspective of practice, the person having the right to deliver the goods to the carrier is usually the seller in a trade contract, however, because arrangements on transport under trade contracts differ from one to another, the role of the consignor can also be performed by the seller's subcontractor or agent, or sometimes even the agent of the purchaser at the port of shipment. Furthermore, the consignor can serve several other roles by performing other legal acts under transport law. For example, it can serve as a shipper by concluding a carriage contract, or a documentary shipper by being named as the "shipper" in any transport document. Whether in transport law or trade law, the consignor may perform other acts than the delivery of goods and serve other roles, so its concept may usually overlap with those of other subjects. Therefore, when the concept of "the consignor" is used in this article, it is either usually specified by adding relevant prefixes or sometimes directly referred to as the names of other subjects.

II. A Summary of the Concept of the Consignor

A. The Concepts of Other Subjects Related to the Consignor in Current Legislative and Judicial Practice

While in theory, the concept of the consignor is defined by the factual act of delivering the goods to the carrier or the performing party, in practice, the act of delivery may vary with differences in trade contract arrangement as well as the mode of transportation and may be performed by different subjects. As mentioned in the introduction, the concept of the consignor may easily overlap with that of other subjects. From another perspective, other subjects whose concepts overlap

with that of the consignor can be viewed as different types of consignors in practice that are in important relation with the consignor. The consignor can be classified into the following categories in line with other subjects overlapping with the consignor in transport law or trade law.

1. Under Transport Laws

a. The Shipper under Carriage Contract

Under CIF terms, the transaction price of goods generally covers cost, freight, and insurance premium, so the transport of goods is arranged by the seller. In addition to acting as the consignor by delivering goods to the carrier or the performing party, the seller also serves as the shipper by chartering a ship and booking shipping space from the carrier. In this case, the concept of the consignor overlaps with that of the shipper.

b. The Agent or the Subcontractor of the Shipper

Under "C"-terms, the concept of the consignor overlaps with that of the shipper. The consignor, apart from asking its employees to deliver the goods, can entrust its agent or subcontractor with the obligation of the delivery of goods. In such case, the agent or the subcontractor acts as the consignor and is entitled to the rights and obligations of the consignor stipulated in the Draft Convention.

c. The Documentary Shipper

As is mentioned above, in practice under FOB terms, the name of the seller is usually filled in the column of the shipper in such documents as bills of lading. In order to protect the FOB seller, the concept of "documentary shipper" is specially put forward in the Draft Convention. Within the framework of the Draft Convention, the seller's delivery of goods entitles him only the right of obtaining the receipt of goods as a consignor under transport law, which is far from being enough for the seller (in such case, it can only act as the consignor but not the shipper) under FOB terms. Thus, the concept of "the documentary shipper" is devised to protect the FOB seller. In other words, as long as the carrier fills the name of the seller into the column of "the shipper" in transport documents as is consented and instructed by the shipper (the purchaser under FOB terms), the consignor (the FOB seller) can also serve as the documentary shipper and is entitled to the same rights and obligations as the shipper.

d. The Carrier or the Performing Party

The carrier or the performing party usually acts as the consignor in the case of multimodal transport or transshipment, where the pre-carrier or whole-course carrier entrusts its follow-up carrier to carry the goods to the destination after it

has fulfilled its transportation task. In such case, the name of the pre-carrier will be filled in the column of "the shipper" in the transport document for the follow-up transportation. As a result, the pre-carrier will, as a matter of course, be regarded as the consignor as a result of its actual delivery of the goods. [3]

2. Under Trade Law

As has been discussed above, the seller under a trade contract is generally the person being entitled to deliver goods to the carrier, which is the same under "C"-terms or "F"-terms. However, the seller under "C"-terms is responsible for not only the delivery of goods but also the arrangement of transport, in which case it acts as both the consignor and the shipper. As the category of the consignor in such case has been elaborated above, we may skip it but focus mainly on the seller under "F"-terms.

a. The Seller under "F"-Terms

Under "F"-terms, the purchaser acts as the shipper as it arranges the transport, yet the goods are in the control of the seller who will fulfill its obligation of delivery of the goods under a trade contract in compliance with the instructions of the purchaser. While the seller is sometimes instructed to deliver the goods to the forwarder of the purchaser, which will be mentioned below, in most cases he is instructed to deliver the goods directly to the carrier or the performing party. In such a case, the vender delivers the goods to the carrier and thus acts as the consignor. In addition, when concluding a trade contract, the FOB seller, for the purpose of exercising his control over the goods in transit, can request the purchaser to instruct the carrier to fill the seller's name in the column of the shipper in transport documents, thus making the seller a documentary shipper.

b. The Agent or Subcontractor of the Seller under "F"-Terms

Under FOB terms, the agent or the subcontractor of the seller may be entrusted by the vender to perform its obligation of delivery of goods under a trade contract and acts as a consignor due to de facto act of delivering the goods to the carrier. They shall be entitled to the rights and obligations of the consignor as stipulated in the Draft Convention.

However, domestic sales and exports may be combined in foreign trade export practice, in which case a domestic dealer may, upon the receipt of the goods purchased from a local manufacturer, resell them to a foreign purchaser. When

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3 Jiang Zhengxiong, A Discussion on the Legal Status of Consignors, *Containerization*, No. 17, 2003, p. 17. (in Chinese)

both domestic sales and export are made under FOB terms, the places of delivery under two contracts may be agreed as the same one for the dealer's convenience. In such a case, the manufacturer directly delivers the goods to the carrier or the performing party designated by the foreign purchaser and thus acts as the consignor under the contract of carriage for exported goods. If the manufacturer intends to be a documentary shipper, prior consent of the foreign purchaser shall be obtained. Under this circumstance, the manufacturer, who does not have direct contact with the foreign purchaser or even may not know him at all, can only have the foreign purchaser bounded by certain contract through the dealer.

c. The Agent or the Subcontractor of the Purchaser under "F"-Terms

Under "F"-terms (taking FOB as an example), the purchaser sometimes entrusts his forwarder to take delivery of the goods from the seller at the place of delivery and then deliver them to the carrier. In such case, the agent or the subcontractor of the purchaser, rather than the seller, acts as the consignor under transport laws, for the purchaser has complete control over the goods while the seller does not deliver the goods to the carrier. On some occasions, the aforesaid agent or the subcontractor may act as a documentary shipper by having his name filled in the column of "the shipper" in transport documents after obtaining explicit or implicit authorization from the shipper (the purchaser) or after the carrier receives instructions from the shipper, and hence is entitled to the same rights and obligations as the shipper. On such occasions, the FOB seller is not entitled to any right and has no control over the goods under transport laws.[4]

B. The Concept of the Consignor under the Draft Convention

As the Draft Convention, Article 1(10) stipulates explicitly that "consignor" means a person that delivers the goods to the carrier or to a performing party for carriage, the key to identify the consignor is the factual act of the delivery of goods, which is usually performed by the seller under a trade contract who possess title to the goods. It is in this sense that the nature of the concept of the consignor is the extension of the seller under a trade contract into the sphere of transport law. However, since the consignor is a concept in transport law, it has to be related to the carrier, the other party of a contract of carriage, and thus the party that receives the delivery of goods is the carrier or the performing party. Therefore, there are two

4 UNCITRAL. A/CN. 9/WG. ⅢⅠ /WP. 21, para. 122.

standards to judge whether a party is the consignor, namely, the actual delivery of goods, and the carrier or the performing party as the party receiving the delivery of goods.

The Draft Convention regards the act of "deliver[ing] the goods to the carrier or to a performing party" as the key to the identification of a consignor, which is in consistence with the connotation of the consignor (the delivery shipper) in Hamburg Rule, which refers to "any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea". Compared with the latter, the former seems to be simplified by intentionally circumventing the issue of the agent and leaving it to the domestic laws of each country, as the relevant laws in different countries vary from and even are quite at odds with, each other in respect of the definition of agents. Yet judging from the factual act of the delivery of goods, the extension of the definition of the consignor in the Draft Convention is basically consistent with that of the consignor (the delivery shipper) in Hamburg Rules. This can be confirmed through the Note by the Secretariat of Preliminary Draft Instrument on the Carriage of Goods by Sea, which points out "[a] consignor may include the shipper, the person referred to in article 7.7 or somebody else who on their behalf or on their request actually delivers the goods to the carrier or to the performing party."[5] Here, "the person referred to in article 7.7" refers to the documentary shipper, which is mainly served by the FOB seller, while "somebody else who on their behalf or on their request actually delivers the goods to the carrier or to the performing party" mainly refers to the shipper, or the documentary shipper's employee, agent, or subcontractor, etc., who acts as the consignor due to its actual delivery of the goods. According to the Note by the Secretariat, there is no difference between the connotation and the extension of the concept of consignor in the Draft Convention and those of the delivery shipper in the Hamburg Rules, both of which include the purchaser and the seller in trade law as well as their entrusted subcontractor and agent. Though the definition of the consignor in the Draft Convention simply copies the one of delivery shipper in Hamburg Rules, it is singled out and treated as an equal subject in transport law as the shipper.

In modern commercial society, commercial subjects are usually social organizations such as corporations. Since they cannot deliver the goods themselves, their employees perform this obligation. Though the Draft Convention is noncommittal

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5 Annex to UNCITRAL.A/CN. 9/WG. ⅢⅠ /WP. 21, para. 4.

about whether employees of the shipper or the documentary shipper can have the legal position of the consignor due to their factual act of delivering the goods, its attitude towards the employees of modern commercial subjects can be speculated from its stipulations on employees of the carrier and the performing party. Three guiding principles have been established when the performing party is defined in Report of Working Group III (Transport Law) on the Work of its Nineteenth Session: a) carriers and subcontractors should have joint and several liability; b) carriers and employers should be vicariously liable for their employees; and c) the protection of the so-called "Himalaya clause" should apply to the employees in the same way that it is applied to the employers and not be limited in operation by the principle of privity of contract. Besides, as is explicitly stipulated in Article 1(6) of the report, the definition of the performing party (as amended) includes only agents and subcontractors but not employees.[6] However, when the draft of UNCITRAL. A/CN. 9/WG. Ⅲ /WP.101 was being finalized, it was doubted that the regulation would affect the maritime performing party's obligations towards its employees, so the revised text was abandoned and a new provision was added into Article 20(4) that "nothing in this Convention imposes liability on an employee of the carrier or of a performing party".[7] Now, the attitude of the Draft Convention is clear: instead of treating employees as an independent subject which assumes rights and obligations in transport law on his own, it only makes employees bounded by the "Himalaya clause" (Article 4 of the Draft Convention) in order to ensure that the carrier and the maritime performing party are entitled to the right of defense and limitation of liability while performing their obligations as employers. Therefore, employees of the shipper and the documentary shipper should not be deemed as independent subjects but only agents of the former. Such practice conforms to the distinction of "agent" and "representative" in Chinese law of contract.

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6 The revised Article 1(6) of the Draft Convention stipulates: (a) "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, discharge or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. It includes agents or subcontractors of a performing party to the extent that they likewise perform or undertake to perform any of the carrier's obligations under a contract of carriage. (b) Performing party does not include: (i) an employee of the carrier or a performing party; or (ii) any person that is retained, either directly or indirectly, by the shipper, by the documentary shipper, by the consignor, by the controlling party or by the consignee instead of by the carrier. See UNCITRAL. A/CN. 9/621, paras. 128~153.

7 Note 2 by the Secretariat. UNCITRAL. A/CN. 9/WG. Ⅲ /WP. 101.

C. The Relationship between the Consignor, the Shipper, and the Documentary Shipper under the Draft Convention

Since the Draft Convention has singled out the definition of the consignor and that of the shipper, and defined the shipper in Article 1(8) thereof as "a person that enters into a contract of carriage with a carrier", the two definitions are no longer in a relationship of one being included in the other, but a pair of independent and parallel subjects in transport laws.

The main purpose of the Draft Convention's singling out the delivery shipper in Hamburg Rules and defining it separately as the consignor is to resolve the dispute of rights in transport law under terms related to FOB (usually the "F"-terms, including FCA, FAS, and FOB; FOB will be taken as an example in the following discussion) when the two roles are not played by the same person. Under FOB terms, the purchaser arranges the transport of the goods and acts as the shipper as he charters a ship and books shipping space with the carrier. However, since the goods remain in the control of the seller, the seller delivers the goods to the carrier when the ship designated by the purchaser arrives at the port of loading. In such case, the role of the consignor and that of the shipper are played by two different persons. What's more, both the persons can act as shippers and are entitled to the rights and obligations of the shipper in transport law subject to Hamburg Rules, thus causing confusion in practice. Now that the consignor is singled out in the Draft Convention, such confusions are resolved: under the FOB terms, the purchaser who charters a ship and books shipping space acts as the shipper while the seller who actually delivers the goods acts as the consignor. Furthermore, the respective rights of the consignor and the shipper are clarified in Article 37 of the Draft Convention: the consignor is entitled to obtain a non-negotiable transport document that evidences only the carrier's or performing party's receipt of the goods, while the shipper is entitled to obtain transport documents that evidence

or contain a contract of carriage, such as the bill of lading or the sea waybill, etc.[8] Apart from the clarification of the respective rights of the two, the concept of "the documentary shipper" is specially put forward in the Draft Convention to protect the rights of FOB seller to have control over the goods and receive payment, which cannot be secured by granting the seller only the right to obtain a goods receipt.

Article 1(9) of the Draft Convention stipulates, "'[d]ocumentary shipper' means a person, other than the shipper, that accepts to be named as 'shipper' in the transport document or electronic transport record". Here, "accept" means that the carrier names the consignor or other person as "shipper" in the transport document with the shipper's consent and under his instruction. Besides, Article 34 of the Draft Convention stipulates that the documentary shipper shall be entitled to the same rights and obligations as the shipper, and that the documentary shipper and the shipper shall have the same legal status. Once the FOB seller is named as "shipper" in the transport document, he shall act as the documentary shipper and is entitled to obtain the transport document that evidences or contains a contract of carriage, thus securing its right to have control over the goods and receive payment. Hence, the transformation of the role of the consignor (the seller) under FOB terms to the shipper is realized through introducing the concept of documentary shipper to the Draft Convention. However, such role transformation is subject to the shipper's consent and the instruction given by the shipper to the carrier.

To sum up, in transport law, the consignor varies with different arrangements of shipment and delivery under a trade contract and includes not only the seller under a trade contract but also its agent or subcontractor, and even the freight forwarder of the purchaser under FOB terms. However, the agent or subcontractor of the seller can be considered as the derivations of the seller because they act on behalf of and share common interests with the seller, and that, in practice,

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8 Article 37 of the Draft Convention: Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice in the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party: (a) The consignor is entitled to obtain a non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record that evidences only the carrier's or performing party's receipt of the goods; and (b) The shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option, an appropriate negotiable or non-negotiable transport document or, subject to article 8, subparagraph (a), a negotiable or non-negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage, or practice in the trade not to use one.

the freight forwarder of the purchaser under FOB rarely serves as the consignor. Therefore, the consignor in transport law is basically the extension of seller under a trade contract. Though in transport law, it is possible for the consignors, as the extension of the seller under the trade law, to act as the shipper or the documentary shipper and assume the shipper's rights and obligations under transport law as under "C"-terms, there are still some consignors (such as the seller under FOB) who can only play the role of the consignor and are only entitled to obtain the receipt of goods. It can be concluded that the Draft Convention's protection of the seller varies under different trade terms, especially with the different arrangements of transport under different trade terms.

III. Rights and Obligations of the Consignor under the Draft Convention

According to the definition of the consignor, the key to the identification of a consignor is the act of delivering goods to the carrier or to the performing party. And normally it is the seller under a trade contract who has the right to deliver the goods to the carrier. On most occasions, the consignor, as the extension of the seller under the trade law, may play different roles under the transport law for performing other acts. For example, he acts as the shipper when entering into a contract of carriage with a carrier (under CAA), or as the documentary shipper for being named in a transport document as is instructed by the shipper, and thus assuming the rights and obligations of the shipper under the transport law. It is also possible that he performs no other action and plays no other role but that of the consignor. As a result, the consignor may be entitled to completely different rights under the transport law subject to whether or not the shipper and the consignor are the same person. Next, the rights and obligations of the consignor under the Draft Convention will be discussed respectively in the case when the consignor and the shipper are not the same person and in the case when they are the same person.

A. When the Consignor and the Shipper Are Not the Same Person

Under the Draft Convention, if a person performs no other action than the delivery of goods to the carrier or to a performing party, he shall only act as the consignor and assume only consignor's rights and obligations under the Draft Convention. In fact, these are what the Draft Convention has provided for as the

rights and obligations of the consignor.

1. Rights of the Consignor

Article 37(a) of the Draft Convention has provided for the rights of the consignor: "the consignor is entitled to obtain a non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record that evidences only the carrier's or performing party's receipt of the goods." The classification of the transport document[9] made in the Draft Convention is different from that in the current convention or in the law of any country. According to Article 1(15) of the Draft Convention, "transport document" means a document issued under a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions: (a) evidences the carrier's or a performing party's receipt of goods under a contract of carriage; or (b) evidences or contains a contract of carriage. This definition covers the two central functions of transport documents, namely evidencing the receipt of goods and evidencing a contract of carriage, but fails to include the third function of traditional bill of lading − serving as a document of title, which is reflected indirectly through the classification of transport document as negotiable one and non-negotiable one. In this way, the Draft Convention intends to expand the connotation of transport document to include various kinds of documents frequently used in current practice, such as sea waybills and mate's receipts. Besides, the function of the bill of lading as a document of title is mainly derived from and reflected in the transactions of the carried goods in a trade. It is stated in the Report of Working Group Ⅲ on the work of its ninth session that paragraph (a) of the definition of transport document would include a bill of lading issued to, and still in the possession of, a charterer, which does not evidence or contain a contract of carriage but functions only as a receipt, and some types of receipt issued before carriage or during transshipment. Paragraph (b) would include a negotiable bill of lading when operating as such, and a non-negotiable sea waybill.[10] In this sense, the consignor is only entitled to obtain from the carrier a transport document mentioned in paragraph (a), which does not evidence or

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9 Considering the extensive use of e-commerce in international transportation, the Draft Convention specially creates the system of "electronic transport record" in addition to the traditional paper documents. Though the former has its special operational features, it is formulated by the same rule with paper documents (i.e. the transport document in the Draft Convention) in respect to the definition, function, issuance and transfer. For the sake of simplicity, "transport document" mentioned herein usually includes "electronic transport record", except otherwise stated.

10 UNCITRAL. A/CN. 9/510, Para. 108; Annex to A/CN. 9/WG. Ⅲ /WP. 21, para. 23.

contain a contract of carriage but functions only as a receipt. Only the shipper and the documentary shipper are entitled to obtain the transport document mentioned in paragraph (b). It is through the classification of the function of transport document that the Draft Convention, as it were, makes an essential distinction between the rights of the consignor and those of the shipper.

The Working Group on Transport Law points out that the precursor of Article 37 of the Draft Convention is Article 3(3) of the Hague and Hague-Visby Rules, where the carrier issues the bill of lading to the shipper on the shipper's demand, as well as Article 14(1) of the Hamburg Rules, which provides for the issue of the bill of lading to the shipper, who, by definition, refers to the consignor. It is noted that the principal innovation of draft Article 37 of the Draft Convention is the recognition that the "consignor" is not necessarily the same person as the "shipper". For instance, the seller acts as the "consignor" while the purchaser the "shipper" under FOB terms. Though it is acknowledged that in most cases the shipper and the consignor would cooperate in compliance with sales contracts, it is possible that a dispute would arise, and it would therefore be important to know which documents are to be received by each party.[11] During the preparation of the Draft Convention, contradicting views are expressed as to who, the shipper or the consignor, has the right to receive the transport document provided for in Article 37(b). Those who are against draft Article 37, think that it cannot provide effective protection to the FOB seller, for it cannot receive a negotiable document but only a receipt. What's more, the receipt obtained by the consignor has no legal effect, for one of the functions of a bill of lading is to serve as evidence of receipt of goods. In addition, it is said that in some jurisdictions, the person delivering the goods to the carrier has an independent right to obtain a negotiable transport document, and the consignor under FOB terms shall receive a negotiable document as a guarantee of goods when he delivers them to the carrier.[12] However, some attendees who are for Article 37, hold that the reference in Article 34(b) to the documentary shipper, can provide adequate protection to the seller or consignor under FOB terms. While under FOB terms, the seller will usually act on behalf of the purchaser, that is not the case under the contract of carriage, where the seller has an independent right to obtain the transport document. The only way for the carrier to know that the FOB seller, or the consignor, is entitled to the negotiable transport document rather than

11 UNCITRAL. A/CN. 9/594, para. 218; Annex to A/CN. 9/WG. Ⅲ /WP. 21, para. 125.
12 UNCITRAL. A/CN. 9/594, para. 220.

the FOB purchaser, or shipper, is that the shipper will instruct the carrier that the documentary shipper specified in draft Article 34, i.e. the FOB seller, shall receive the negotiable transport document. Furthermore, the shipper, or FOB purchaser, will be under an obligation to notify the carrier in this regard under the terms of a sales contract. Under this mechanism, the FOB seller, or the consignor, will receive the negotiable transport document and is thought to be adequately protected. It is believed that this is an appropriate approach, and that parties to a sales contract should incorporate provisions in connection with protection for their interests into such contract, and should not expect the parties to a contract of carriage to provide such protection. [13]

Though disputes and controversies exist as mentioned above, the Working Group, after discussion, still decides that the approach taken in the draft Article 37 of the Draft Convention is acceptable. So under the current system of the Draft Convention, the consignor is only entitled to obtain a receipt of goods, since it may need such a document to have dealings with others. For example, the FOB seller who is not named as the documentary shipper may need a receipt of goods to prove that it has performed its obligation to deliver the goods under a trade contract, or in a CIF or FOB sale, the agent or the subcontractor of the seller may need such a receipt to prove that it has performed its obligation to deliver goods entrusted by the seller.

2. Obligations and Liabilities of the Consignor

Within the framework of the Draft Convention, the consignor is only entitled to obtain a receipt of goods, but not required to be directly liable to the carrier. All the obligations and liabilities to the carrier are supposed to be assumed by the shipper. Article 35 of the Draft Convention, which is about the liability of the shipper to other persons, states that the shipper is liable for the breach of its obligations under the Draft Convention caused by the acts or omissions of the consignor or any other person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for the acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations. From this provision, we can see that the shipper is certainly liable to the carrier for the breaches caused by the consignor's acts when the consignor is performing the obligations of the shipper under the transport law. Only when the

13 UNCITRAL. A/CN. 9/594, para. 221.

consignor performs his own obligation under the transport law, should he assume the corresponding responsibility. However, in the whole Draft Convention, there is no provision about the consignor's obligation, even in respect of the act of delivery which is most related to the consignor. The provision on the "Delivery for carriage" in Article 28 is placed under Chapter 7 (Obligations of the Shipper to the Carrier). It provides that: 1) Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property. 2) When the parties have made an agreement referred to in Article 14(2),[14] the shipper shall properly and carefully load, handle or stow the goods. 3) When a container or a trailer is packed by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or trailer and in such a way that they will not cause harm to persons or property. It can be concluded from this provision, that, in the Draft Convention the obligation of delivery for carriage is imposed on the shipper, who shall deliver the goods in such condition that they will withstand the intended carriage, else he is liable for any loss incurred to the carrier as a result thereof, even if the act of delivery is actually performed by the consignor instead of the shipper, in which case the consignor is only considered to be an agent of the shipper and the latter should be liable for the former's behavior. The main reason for this is that only the shipper and the carrier are the parties to a contract of carriage within the framework of the Draft Convention, and that delivery for carriage, as one of the most important parts and obligations under the contract of carriage, is supposed to be performed by the shipper to the carrier. As far as the provisions for the consignor's rights and obligations in the Draft Convention are concerned, we

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14 Article 14 of the Draft Convention, on specific obligations of the carrier during the period of its responsibility, provides that: (1) The carrier shall during the period of its responsibility as defined in article 12, and subject to article 27, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods; (2) Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the parties may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars. The second provision thereof actually transfers the carrier's obligations to the shipper and other persons by contractual agreements. The shipper shall assume the duty of reasonable care when performing the transferred obligations such as loading and stowing of goods, otherwise he shall assume the responsibility to the carrier according to provisions of Article 28(2).

maintain that it has reached a balance between rights and obligations, where the consignor is entitled to few rights and meanwhile relieved from obligations under transport law.

B. When the Consignor and the Shipper (or the Documentary Shipper) Are the Same Person

When the consignor and the shipper or the documentary shipper are the same person, provisions on the rights and obligations of the shipper in the Draft Convention shall apply to the consignor.

1. Rights of the Shipper

a. The Right to Obtain Transport Document

As set forth, classification of the transport document is peculiarly made in the Draft Convention based on its functions, that is: (a) evidences the carrier's or a performing party's receipt of goods under a contract of carriage; or (b) evidences or contains a contract of carriage. Through functional classification, the Draft Convention endeavors to encompass and apply to all documents in use today related to sea carriage including bills of lading, sea waybills and mate's receipts. But Article 37 of the Draft Convention, the provision for the issuance of the transport document, states that the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option, an appropriate negotiable or non-negotiable transport document. According to the Report of the Working Group, the transport document herein which the shipper or the documentary shipper is entitled to obtain refers to a negotiable (as a bill of lading) or non-negotiable (as a sea waybill) transport document. Theoretically, the shipper, as the party who enters into a contract of carriage with the carrier, certainly has the right to obtain the transport document which evidences or contains a contract of carriage. This is also logically correct. And if the shipper consents, the documentary shipper is also entitled to obtain the aforesaid document. The shipper's consent therein can be considered as his disposition of his rights under the contract of carriage. The documentary shipper acquires his right when the shipper transfers such right to him, and the purpose for the shipper or the documentary shipper to obtain such a transport document is to become the controlling party so as to have the right to control the goods during transportation.

2. Rights of the Controlling Party[15]

The Secretariat, in a statement about the preliminary draft instrument, points out: "Unlike under other transport conventions, the subject of the right of control is not dealt with in maritime conventions. Practices that have developed under the bill of lading system may have been the reason that in the past no urgent need was felt. Today, the situation in maritime transport is different. In many trades, the use of negotiable transport documents is rapidly decreasing or has entirely disappeared. Furthermore, a well defined and transferable right of control may play a useful role in the development of e-commerce systems."[16] To better cooperate with the trade law to protect the rights of the cargo owner, the person who possesses the title to goods, the Draft Convention has innovatively created the system of right of control. The Draft Convention, Article 1(13), provides that "right of control" of the goods means "the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with Chapter 11," and such right to give the carrier instructions comprises: (a) the right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage; (b) the right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and (c) the right to replace the consignee by any other person including the controlling party (see Article 53). Article 57(1) also states that the controlling party is the only person that may agree with the carrier to modify a contract of carriage. It can be observed from the above illustrations that the right of control is a powerful right and whoever has the right of control can take control over goods in carriage by the carrier, thus the role of the bill of lading as document of title is replaced to some extent. If the bill of lading can be compared to the key to the storage under current legal system, then within the framework of the Draft Convention, it is the right of control that opens the door of the storage.[17]

According to Article 54 of the Draft Convention, the holder of the right of

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15 The reason why we use "right of the controlling party" instead of "right of control" is mainly that the former contains not only the right of control specified in Article 53, but also the right to make variations to the contract of carriage as provided in Article 57. Furthermore, the shipper can usually be the initial controlling party and is entitled to all the rights of the controlling party as provided in Chapter 10, but not restricted to right of control. The expression "right of control" herein is used to refer to the right of the controlling party for the sake of convenience.

16 UNCITRAL. A/CN. 9/WG. III/ WP. 21, para. 185

17 He Lixin and Zhang Qingji, Be Cautious of the Regression of Consignor's Legal Status − Review on the Provisions Related to Consignor in the Draft Convention, *Law Monthly*, No. 9, 2007, pp. 93~99. (in Chinese)

control varies according to the different types of transport documents issued under the contract of carriage, where three cases are involved: Firstly, when no transport document or only non-negotiable transport document such as sea waybill is issued, the shipper is the only controlling party unless the shipper, when concluding the contract of carriage, designates the consignee, the documentary shipper or another person, as the controlling party; secondly, when a named bill of lading[18] is issued, the shipper is the controlling party; thirdly, when a negotiable transport document is issued, its holder is the controlling party. And Article 34(b) provides that the shipper is entitled to obtain from the carrier a negotiable transport document, thus to become the holder of bill of lading. In the above three cases, no matter what kind of transport document is issued, it is possible for the shipper to be the controlling party, and even the initial holder of right of control. Right of control transferred from the shipper is the only way for other persons, such as the consignee, the documentary shipper, and other document bearers, to obtain the right of control.

3. Non-taking Delivery of Goods or Delivery of Goods without Original Bill of Lading [19]

To deal with the problem of non-taking delivery of goods at the port of destination or delivery of goods without the original bill of lading being surrendered due to the slow circulation of bills of lading, which is the ubiquitous case in current shipping practice, Chapter 9 – "Delivery of the goods", is specially set in the Draft Convention. Articles 47~50 provide that the right to give instructions in respect of the delivery of the goods, in the case of non-taking delivery of goods or delivery of goods without original bill of lading, varies with different types of transport documents issued. First, when no negotiable transport document is issued, the

18 Considering that different names, such as straight bill of lading and order bill of lading, are used in different laws to refer to the named bill of lading, the wording "a non-negotiable transport document or a non-negotiable electronic transport record has been issued that [provides] [indicates] that it shall be surrendered in order to obtain delivery of the goods" is used instead of named bill of lading in the Draft Convention.

19 Here the right to give instructions, strictly speaking, is an item of right under the right of control. According to Article 53 "Exercise and extent of right of control", paragraph 1(c), the right of control includes the right to replace the consignee by any other person including the controlling party. It is called a right herein for the sake of convenience, while it is listed out because the right to give instructions only exists in the case of non-taking delivery of goods or delivery of goods without original bill of lading, and it directly reduces the role of traditional bill of lading as proof of delivery.

carrier shall so advise the controlling party.[20] If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier shall so advise the shipper. If, after reasonable effort, the carrier is unable to locate the controlling party or the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods. Second, when a named bill of lading is issued, since the shipper is the controlling party, the carrier shall so advise the shipper first, and deliver goods according to the shipper's instructions. If, after reasonable efforts, the carrier is unable to locate the shipper, the carrier shall so advise the documentary shipper and request instructions in respect of the delivery of the goods. At last, when a negotiable transport document is issued, the order to advise is the same as in the first case. So it can be seen that in the case of non-taking delivery of goods or delivery of goods without original bill of lading, the shipper's right to give instructions is only second to the controlling party, because the controlling party other than the shipper can only get the right of control from the shipper's transfer, and the right to designate and change consignee is already included in the right of control itself. But it is important to note that when the carrier cannot locate the controlling party, he shall inform the shipper and deliver the goods according to the shipper's instructions.

C. Obligations and Liabilities of the Shipper

Chapter 7 of the Draft Convention entitled "Obligations of the shipper to the carrier" is specially set to balance the liability basis of presumed fault and elimination of nautical fault exemption against the carrier. It is not only a supplement to the Hague Rules and Hague-Visby Rules in respect of the provisions for the shipper's obligations, but also an enlargement to the scope of responsibility of the shipper which is stipulated in Part 3 of the Hamburg Rules. The shipper's obligation of delivery for carriage, which is provided in Article 28 of the Draft Convention, is aimed at balancing the carrier's obligation of delivery of the goods as set out in Chapter 9, and Article 29 specifies the carrier's and the shipper's obligations of cooperation in providing information and instructions in respect of carriage of the goods. In contrast to the liability basis of presumed fault of the

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20 The reason why the carrier shall first advise the controlling party instead of the shipper is that according to Article 54(1), when no negotiable transport document is issued, the controlling party, besides the shipper, may be the consignee or the documentary shipper designated by the shipper when the contract of carriage is concluded.

carrier, the Draft Convention, Article 31, makes provisions about the liability basis of fault of the shipper, but the shipper is still strictly liable to the carrier on the accuracy of information for compilation of the particulars of the contract and on dangerous goods. Paralleled to Article 19, "Liability of the carrier for other persons", the Draft Convention states that the shipper is liable for the breach of its obligations under this Convention caused by the acts of the consignor or any other person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations (Article 35). Thus, the conclusion comes that with the cargo owner's strengthening status and reducing risks in sea carriage, a balance will finally be reached within the framework of the Draft Convention as to the carrier's and the shipper's rights and obligations under transport law.

D. Rights and Obligations of the Documentary Shipper

Under FOB terms, the seller (the consignor) is entitled to demand, through the trade contract, the purchaser (the shipper) to give instructions to the carrier that the carrier shall note the consignor on the transport document to name him as the documentary shipper. Draft Convention states in its Article 34(b) that a documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to Chapter 7 and pursuant to Article 58, and is entitled to the shipper's rights and defenses provided by Chapter 7 and by Chapter 13. Hence, we can see that the documentary shipper assumes the same rights and obligations as the shipper does, except that his right to give instructions is placed after that of the latter in the case of non-taking delivery of goods or delivery of goods without original bill of lading.

The matter on the documentary shipper's rights and obligations is singled out to discuss the problem of the distribution of their obligations to the carrier when both the shipper and the documentary shipper exist. With regard to the documentary shipper's obligations, the Draft Convention holds that the documentary shipper, as the initial bill holder, is subject to all the obligations and liabilities imposed on the shipper, and is entitled to the shipper's rights and defenses. However, the imposition of obligations and liabilities on the documentary shipper does not mean the exemption of the obligations and liabilities from the shipper, which is the very point of view stated in Article 34(2). It provides that paragraph 1 of Article 34 does not affect the obligations, liabilities, rights or defenses of the shipper. But how to distribute their liabilities to the carrier, when both exist? Does

the provision of joint liability between the carrier and the maritime performing parties apply to this situation? The Draft Convention does not give clear answer to this question. To solve this problem, the source of the liabilities of the shipper and the documentary shipper should first be clarified. There is no doubt that the shipper's liability is based on the contract of carriage, and he is still the initial party of the contract of carriage even though there is a documentary shipper. While the documentary shipper is liable to the carrier because he is the shipper named on the transport document which evidences or contains a contract of carriage, and his liability is based on the statement on the transport document and the fact of holding the document. The relationship between the documentary shipper and the carrier is newly formulated on the basis of transport document in accordance with laws, which is different and independent from the initial relationship between the shipper and the carrier based on the contract of carriage. Therefore, the shipper and the documentary shipper are liable to the carrier independently according to their relationship with the carrier, and their liabilities are not joint.

In conclusion, when the consignor and the shipper or the documentary shipper are the same person, the consignor is entitled to the rights and obligations of the shipper and can get much protection, especially the control over goods in carriage, according to the Draft Convention. However, we cannot say that the consignor is entitled to these rights, which are actually set for the shipper by the Draft Convention.

IV. Evolution and Review of the Consignor's Legal Status under the Draft Convention

We have mentioned in the previous paragraphs that the system of consignor is one of the systems that have undergone most changes under the Draft Convention. The manifestation lies not only in the independence of consignor as a concept parallel to that of the shipper, but more in the change of provisions on the consignor's rights and obligations, which are different from those in the previous international conventions. The biggest change of the consignor's rights is about whether the consignor has the right to obtain the transport document, such as the bill of lading or the sea waybill, which evidences or contains a contract of carriage. Next, the evolution of the consignor's legal status will be elaborated.

A. Evolution of the Consignor's Legal Status

1. Under the System of Hague-Visby Rules

The concept of consignor does not exist in the Hague Rules, which does not even give a clear definition of the shipper, a frequent concept in its articles. Since the Hague Rules and the Hague-Visby Rules focus on the adjustment of certain rules related to the bill of lading and are aimed at regulating the immunities of the carrier as is stated on the back of a bill of lading, rather than establishing an integrated framework from the aspect of the contract of carriage, neither of them has offered a definition of the shipper, a party to the contract of carriage, not to mention the concept of the consignor. What's more, no distinction between the concept of the shipper and the consignor was made in the Hague Rules when it was first formulated and the two concepts actually refer to the same person. Sometimes the word "shipper" is used more to refer to the person who delivers goods to the carrier, as is provided in Hague Rules Article 3(3) that "after receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading..." In practice, and in cases involving the Hague Rules, the carrier is required to issue a bill of lading to the person who delivers goods to him, especially under FOB terms, where the carrier shall issue a bill of lading to the seller who delivers goods and the seller is entitled to require the bill of lading from the carrier. Due to the peculiarity of sea carriage and international trade, the bill of lading is eventually attributed with the function as a document of title. Under the transport law, it is the key to the storage and the document based on which the carrier shall deliver the goods; and under the trade law, it directly represents the goods recorded on it. Because of the above mentioned attributes of the bill of lading, relevant parties acquiesce in the rule that the bill of lading is supposed to be issued to the owner of the goods recorded on it, usually the seller under a trade contract. And the seller will feel guaranteed to deliver the goods since he still has the rights to and control over the goods by holding the bill of lading, thus ensuring the smooth progress of international trade, especially trade under FOB terms. So we can find intrinsic rationality and operational convenience in the rule that the carrier shall issue the person delivers goods to him a bill of lading, which is specified in the Hague Rules and formulated in the cases applicable thereto. Under the Hague Rules, the consignor, upon delivery of goods, shall obtain from the carrier a document (usually a bill of lading) which represents the goods he delivers. By holding the bill of lading, the consignor can take control over the

goods recorded on it, and he shall receive payment through the transfer of the bill of lading.

2. Under the System of Hamburg Rules

Since, the Hague Rules is a convention for the unification of rules relating to bills of lading, it does not give specific definition of the concept "shipper". But in the definition of carrier, set out in Article 1(a), it provides that "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper. Later, the definition of shipper is derived backward from that of the carrier, and eventually attributed with connotations different from the person who delivers goods. The shipper is thus defined as the person who enters into a contract of carriage with the carrier, which leads to the result that under FOB terms, the person who delivers goods (the seller) is usually stated on the bill of lading as the shipper and obtains the bill of lading, but in fact he is not the shipper referred to in Article 3(3) of the Hague Rules, which is different and independent from "consignor" with its own connotations. The Hamburg Rules, as a convention for unification of certain rules relating to the carriage of goods by sea, lays more emphasis on regulations about the contract of carriage than the Hague Rules does (focusing on the bill of lading), and it gives the preliminary definition of shipper from the perspective of the other party to a contract of carriage. It provides in its Article 1(3) that the shipper means "any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier". Considering the contradiction between the practice under FOB terms and the provisions in the convention, it adds, thereafter, that, "or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea".[21] So far the concept of the delivery shipper comes into being. But it should be noted that under the Hamburg Rules, the consignor is a hypogyny of and included in the concept of the shipper as one of its types.

Though the Hamburg Rules makes a distinction between the concept of the delivery shipper (consignor under the Draft Convention) and that of the contracting shipper, their rights and obligations are not clarified, and the general term "shipper" is used in provisions related to their rights and obligations. That's where the problem arises as to who is the real shipper in practice when the delivery shipper

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21 Sakurai Reiji, translated by Zhang Jiyi, *Formulation of Hamburg Rules and Explanation to Its Clauses*, Beijing: International Business and Education Publishing House, 1985, p. 268. (in Chinese)

and the contracting shipper are not the same person, and that who is entitled to the rights provided for under the Hamburg Rules to the shipper. The most controversial provision in Hamburg Rules is Article 14(1) about the "issuance of bill of lading", which provides that when the carrier or the actual carrier takes the goods in his charge, the carrier must, at the demand of the shipper, issue to the shipper a bill of lading. At this moment, the bill of lading still has the three traditional functions, and the bill holder has control over the goods in carriage which can be transfered by transferring the bill of lading. Then who does the "shipper" refer to in this provision? The Hamburg Rules itself does not give a clear answer to this question, but leaves it to the judgment of the carrier according to specific situations in practice.

3. Under the Draft Convention

In response to the confusion in judiciary and practice as set forth, the Draft Convention, for the purpose of unification and clarification of terms, separates the concept of delivery shipper from the concept of shipper and defines it as the consignor, which brings complete change to the consignor's legal status through legislation. Hence, consignor is no longer a hypogyny conception of shipper, but a parallel to it. The two are no longer in the relationship of one being included by the other.

As has been discussed above, the consignor is granted corresponding rights and obligations under the Draft Convention through the separation of the functions of the transport document, that is, "the consignor is entitled to obtain a non-negotiable transport document or a non-negotiable electronic transport record that evidences only the carrier's or performing party's receipt of the goods." Except this, no rights or obligations are granted to or imposed upon the consignor. The main purpose for the Draft Convention to single out the concept of consignor as an independent subject is to draw a distinction between the rights and obligations enjoyed by the consignor and the shipper respectively when they are not the same person. But the draft panel also notices that it would be impossible to protect the FOB seller's right to take control over the goods and to receive payment if he is only entitled to obtain the receipt of goods, so the concept of documentary shipper is created so that the consignor may act as a documentary shipper and have the same rights and obligations as the shipper. Hence, the consignor, the shipper and the documentary shipper are all parties on the cargo side (opposed to the ship side), thus changing the situation of single subject in the Hague Rules and ambiguous subjects in the Hamburg Rules.

From the evolution of the consignor's legal status, we can see that the separation of the consignor as an independent subject in the Draft Convention is an advanced step compared with the Hague Rules and the Hamburg Rules, since the concept of "consignor" rises from a hypogyny conception of "shipper" to its parallel concept. Also, there are less provisions on the consignor's rights under the Draft Convention than the Hague Rules and the Hamburg Rules, especially the Hague Rules. Because under the system of the latter, the consignor (usually the seller under the trade contract) normally has the right to demand the carrier to name the consignor as the shipper on the bill of lading and is entitled to obtain the bill of lading without such an instruction made by the shipper to the carrier. The consignor, upon obtaining the bill of lading, gets control over the goods recorded on it. He can transfer the goods by assigning the bill of lading, and his right to receive payment is guaranteed in such assignment. Though under the Hamburg Rules, there is a dispute over who, the consignor or the shipper, shall have the right to obtain the bill of lading, at least the consignor is still provided with the right to obtain the bill of lading which represents the goods he delivers on legal ground, and in practice it is also possible for the consignor to obtain from the carrier a bill of lading because the bill of lading is usually issued upon or after the delivery of goods and the tradition derived from the Hague Rules still affects the issuance of bill of lading by the carrier. However, it is not the case under the Draft Convention. It clearly states that the consignor is only entitled to obtain a receipt of goods from the carrier, which rules out the possibility by law for the consignor to obtain the bill of lading or the sea waybill which evidences or contains a contract of carriage. Once the Draft Convention comes into effect, the issuance of the above mentioned documents by the carrier to the consignor according to the tradition will be deemed to be illegal and no such a document will be issued to the consignor any more.

B. Evaluation on the Consignor's Legal Status under the Draft Convention

As previously mentioned, the consignor's legal status under the Draft Convention has two main features, one being the separation of the consignor as an independent subject and the other the decline of the rights and obligations of the consignor. In the following section, we will comment on the consignor's legal status respectively from these two aspects.

1. Affirmation of the Separation of the Consignor as an Independent Subject

To address the problem of the carrier's issuance of the bill of lading under FOB terms in current judicial practice, the Draft Convention innovatively separates the concept of "delivery shipper" from the concept "shipper" and defines it as the consignor to whom corresponding rights is granted under the transport law. Clear distinction between the consignor and the shipper in respect to their rights and obligations is made, which is of great importance to the unification of provisions in domestic laws of different countries and of their judicial practices. It is in this sense that we affirm the positive significance of the separation of the consignor as an independent subject.

However, during the discussion of the working group, the delegations of Italy, the Republic of Korea and the Netherlands put forward the proposal that all references to the "consignor" be deleted and the definition of "transport document" be simplified. They held that there are three parties on the cargo side which are involved in the contract of carriage under the Draft Convention, namely, the shipper, the documentary shipper and the consignor. Among the three parties, the shipper is the counter party of the carrier in a contract; the documentary shipper is actually the FOB seller; and the consignor is the person who actually delivers the goods to the carrier at the place of departure. In fact, the consignor may be the same person as the shipper or the documentary shipper. Besides, if a consignor does not fall into the two categories above, he may act under the instruction of, or on behalf of, the shipper or the documentary shipper, who is responsible for the consignor's acts and omissions in line with the principle of agent. Furthermore, the Draft Convention does not stipulate any obligation that shall be performed independently by the consignor. This means that unless the consignor acts as the shipper or the documentary shipper, he does not have to perform any obligation of his own under the Draft Convention. Nonetheless, the consignor has one right under the Draft Convention: as the person who actually delivers the goods to the carrier, he is, pursuant to Article 37, entitled to obtain a receipt upon its delivery of the goods to the carrier, which seems to be the sole purpose for the Draft Convention to introduce the concept of "consignor". According to the delegations of Italy, the Republic of Korea and the Netherlands, this purpose is of insufficient importance for retaining the concept of "consignor" in the Draft Convention. They also proposed the advantages of deleting the concept of "consignor" from the Draft Convention. On one hand, it can resolve the confusion of the Draft Convention

with other transport conventions and some domestic laws,[22] and on the other hand, the definition of the transport document can be simplified too, as the entitlement of the consignor to obtain a receipt is the only reason why the Draft Convention has distinguished transport documents that serve only as receipts from transport documents that not only serve as receipts but also evidence the contract of carriage. As a result, if the concept of consignor is deleted from the Draft Convention, the function of transport documents only as receipts is no longer necessary. What may be even more important is that such deletion may foster understanding of several articles of Chapter 8 (transport documents and electronic transport records), for it is doubtful whether those articles are wholly appropriate to a transport document that is receipt only.[23] It is for the above reasons that the delegations of these countries proposed to delete the system of consignor.

It is noted that the delegations who proposed to delete the concept of "consignor" have failed to take into consideration the rights of some FOB sellers who cannot act as the documentary shipper and who will constitute a large group under the framework of the Draft Convention. If the concept of "consignor" is omitted, FOB sellers who cannot act as the documentary shipper will be deprived of even the right to obtain the receipt of goods under the transport law. They are supposed to act as the shipper's agent, deliver goods to the carrier, and obtain from the carrier the receipt of goods under the instruction of, or on behalf of the shipper. If they are deprived of the right to obtain the receipt of goods, how can they prove that they have performed the obligation of delivering goods under the trade contract? It is in this sense that the concept and system of "consignor" should be retained, for it can at least provide a platform to protect the FOB seller's rights under the transport law, though the platform may not be big enough.

2. Return of the Consignor's Rights and Obligations

In addition to affirming the separation of consignor as an independent subject, we shall note that the provisions of the Draft Convention stipulating the consignor's

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22 In the Convention for the Unification of Certain Rules for the International Carriage by Air (Montreal Convention) and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended, the term "consignor" is used as meaning the contractual counterpart of the carrier. Some national laws do the same or use the term "consignor" when a reference to the FOB seller is meant.

23 A/CN. 9/WG. Ⅲ /WP. 103, Proposal by the delegations of Italy, the Republic of Korea and the Netherlands to delete any reference to "consignor" and to simplify the definition of "transport document".

rights and obligations are very simple. This is the most important reason why many people object to Article 37 of the Draft Convention, and even challenge the necessity of the concept "consignor". However, as far as the transport law itself is concerned, it is a return of rationality that the consignor's rights and obligations are reduced under the Draft Convention.

While the Draft Convention inherited the tradition of the Hamburg Rules by taking the contract of carriage as the focus and starting point of its adjustment. But in setting up the subjects to the contract, it has resolved the confusion of the shipper system under the Hamburg Rules by explicitly defining the two parties to the contract of carriage respectively as the shipper and the carrier (it is reflected in the definition of the shipper and the carrier made by the Draft Convention: Article 1(5) states that "carrier" means a person that enters into a contract of carriage with a shipper, and Article 1(8) provides that "shipper" means a person that enters into a contract of carriage with a carrier), while treating other persons only as relevant parties to the contract of carriage, including the documentary shipper, the document holder, the consignor, the controlling party, the performing party and the maritime performing party. Among them, the consignor, the documentary shipper, the document holder, the controlling party, the consignee and the shipper are parties on the cargo side, while the parties on the ship side include the performing party, the maritime performing party and the carrier. However, since the focus of the Draft Convention is after all the contract of carriage, the starting point for the setting and distributing of rights and obligations under the contract of carriage should be the two parties to the contract of carriage, namely the shipper and the carrier, so the rights and obligations of other relevant persons that belong to the camp of either party are obtained through the shipper's and the carrier's assignment (including legal assignment and contractual assignment). Hence, the relationship between the shipper and the consignor under the transport law is straightened out by the Draft Convention: the consignor's delivery of the goods is for the interest of the shipper because delivery of the goods to the carrier is the obligation imposed on the shipper by the Draft Convention (as has been mentioned above, see Article 28 of the Draft Convention). Therefore, as to the carrier, the consignor is the agent of the shipper, and it is from the shipper that the consignor gets the obligation to deliver goods and the right to obtain the receipt of goods, which is only a kind of legal assignment of right to obtain such receipt under the framework of the Draft Convention.

Secondly, in accordance with Article 37(2) of the Draft Convention, if the consignor intends to obtain a transport document that evidences or contains a

contract of carriage, the shipper's consent shall be obtained and the carrier shall record the consignor on such document under the instruction of the shipper. This provision actually returns the obligation to decide who will be granted a bill of lading or sea waybill to the shipper, the party who is in the best position to make such a decision. In fact, under the system of the Hague Rules and the Hamburg Rules, the carrier assumes the obligation to decide who is the seller of a trade contract, which in turn is derived from the function of bill of lading as a document of title. However, under the current framework of the Draft Convention, this obligation is imposed on the shipper, a party to the trade contract, and the carrier shall issue transport document only under the instruction of the shipper. In this way, the efficiency and security of the issuance of transport document can be improved, as the shipper, a party to the trade contract, knows more about the ownership of the goods in a trade contract than the carrier does.

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A Preliminary Analysis of Electronic Bills of Lading under the UNCITRAL Draft Convention on the Carriage of Goods

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Abstract: The UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] has created a unique bill of lading (B/L) system featuring a parallelism between paper and electronic transport documents, which mirrors the growing role of electronic B/Ls in the international goods carriage. However, the unique circulation pattern of electronic B/Ls has added difficulties to the construction of systems associated therewith and hastened the emergence of new systems and risks. How to solve such new-emerging problems and put the roles and advantages of electronic B/Ls in the international goods carriage into full play is a subject worth of repeated exploration. Based on the definition of electronic B/L under the UNCITRAL Draft, this paper presents an analysis of the characteristics and defects of electronic B/Ls thereunder as well as some suggestions for further improvement.

Key Words: UNCITRAL Draft; Electronic transport record; Electronic B/L; Carrier

Along with the rapid development of computer technology, the low-cost, high-efficiency and high-yield e-commerce has been widely promoted all over the world, expediting the emergence of a variety of electronic documents. As the most important electronic document in international goods carriage, electronic B/Ls usually involve three types of circulation systems, namely, SeaDocs, Bolero and CMI. The CMI system, established under the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] (hereinafter "the Draft") by the Uni-

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ted Nations Commission on International Trade Law (UNCITRAL), is distinguished by openness and integrity unmatched by the other two. By confirming the status of electronic B/Ls, the electronic B/L system under the Draft can obviously enhance the efficiency of goods transport and facilitate the use of electronic B/Ls with its unique circulation mechanism. However, we have found that it is otherwise disadvantageous in some aspects. What is an electronic B/L system under the Draft? What are the characteristics and defects of the system? And how can we improve it? This paper will make an attempt to answer such questions.

I. Understanding Electronic B/Ls under the Draft

A. Interpreting the Definition of Electronic B/Ls under the Draft

An electronic B/L, referred to as "electronic transport record" in the Draft, means information in one or more messages issued by electronic communication under a contract of carriage by a carrier or a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that satisfies one or both of the following conditions: (a) evidences the carrier's or a performing party's receipt of goods under a contract of carriage; or (b) evidences or contains a contract of carriage.[1] The condition described in item (a) is unquestionable and equivalent to paper B/L's function of serving as goods receipt, it shall be noted that two roles of electronic B/L are specified in the second condition described in item (b). Its first role is to evidence a contract of carriage and the second one is to contain a contract of carriage.

The following inference can be drawn from the information above. Firstly, an electronic B/L is not an electronic contract of carriage. Whatever it is, a B/L must be issued under a contract. Considering that electronic documents-based

1 Article 1(20) of the Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]. All the provisions of the Draft contained herein are quoted from the Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] (A/CN.9/WG.III/WP.101) formulated by UNCITRAL Working Group III (Transport Law) during its twenty-first session in January, 2008 and the Report of Working Group III (Transport Law) on the Work of Its Twenty-First Session (A/CN.9/645), at http://www.uncitral.org, 8 December 2008.

transactions need to be convenient and rapid, specific terms on the rights and obligations of the carrier and the shipper, which have generally been agreed on as of the conclusion of the contract of carriage of goods by sea, are not contained in an electronic B/L and transmitted as electronic data. It means that a contract of carriage has already been concluded prior to the issuance of a B/L, and such B/L may not contain any of the elaborate and specific terms as required by the contract. Secondly, what can actually be evidenced by an electronic B/L? A traditional paper B/L evidences the existence, contents and effectiveness of a contract. Article 8(a) of the Draft mentions that "anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record". Therefore, although as mentioned above, the elaborate and specific terms that may be contained in a traditional paper B/L are generally not included in an electronic B/L, any contractual provisions recorded in an electronic B/L can be evidenced by it. Then, can an electronic B/L prove the existence and effectiveness of a contract? In case of a paper B/L, a contract of carriage has come into force prior to its issuance, so the effectiveness of the contract can be evidenced by legitimate issuance of the B/L and its consistency with the provisions of the booking agreement entered by and between the carrier and the shipper as well as the matters stated in a booking note;[2] should it be advanced or ante-dated, the B/L shall be deemed non-conforming to such requirements and fail to evidence the effectiveness of the said contract. Nevertheless, an electronic B/L is impossible to be advanced or ante-dated due to its convenience and rapidness, and thus can be considered a way to confirm the contract through exchange of electronic data in line with the agreement entered by and between the carrier and the shipper in advance, which may thereby definitely evidence the effectiveness of a contract. Moreover, although it does not contain all the provisions specified in a contract of carriage, an electronic B/L usually includes the basic information of the carrier/shipper and goods, vessel name, loading and unloading ports, and other matters generally appeared in a B/L. The carrier performs its obligations under the relevant contract based on the said information recorded on an electronic B/L, and such information is sufficient to substantiate the existence of a contract.

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2 Liu Yang, A Probe into Several Legal Issues Related to Electronic Bills of Lading, *Annual of China Maritime Law*, 1997, p. 37. (in Chinese)

B. Comprehending "Negotiability" of a Negotiable Electronic Transport Record under the Draft

According to the provisions of the Draft, a "negotiable electronic record" means an electronic record that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non-negotiable" or "not negotiable". In other words, a negotiable electronic record is an electronic record that does not qualify as a non-negotiable electronic record.

Why is an electronic B/L negotiable? The meaning of word "possession" in the real world is greatly different from that in the electronic world. The fact of possession is essential in negotiable document law not merely because the tangible tokens are valuable of its own, but because only one person can possess a tangible object at one time, which is in fact the essence of transfer. As we know, the transfer of a paper B/L is based on the fact that the rights of the B/L are coexistent with the B/L, and "possession" is only realized provided that a sole "original" B/L is exist. For this reason, it is justified to require that an electronic B/L shall also have its sole original version. However, the computer systems' involvement in the electronic B/Ls has caused inevitable difficulties in distinguishing between the original and all other copies thereof. Therefore, it is questioned whether electronic B/Ls could maintain their negotiability when we cannot build a system that can recognize only one copy of the document/record as "original" by rigorous security procedures and distinguish it from all the other copies?[3] For this question, Professor George F. Chandle offered an answer at the centenary celebration of Comité Maritime International (CMI). According to his opinion, the substance of a negotiable document is not its signature or its original nature, but the process that inspires confidence in that piece of paper. A B/L or any document of title is an abstract representation of the material goods it describes, just as paper money is the abstract representation of the monetary unit it describes. In both cases, the paper has no real value of its own, and its value exists only as long as there is confidence that it can

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3 Georgios I. Zekos, The Contractual Role of Documents Issued under the CMI Draft Instrument on Transport Law 2001, *Journal of Maritime Law & Commerce*, Vol. 35, 2004, p. 117.

be redeemed for the material promised. Accordingly, the instrument, whether it is a paper document or electronic information, is merely the medium for transfer. On that basis, any medium, including Electronic Data Interchange, can be used if the parties agree and have confidence in it.[4]

II. Characteristics of the Electronic B/L System under the Draft

A. Having Established Particular Principles for the Electronic B/L System

The electronic B/L system under the Draft adheres to its unique principles, which may be manifested in the following three aspects:

1. Openness

Following the basic principle of openness, the B/L system under the Draft adopts the private key, only known by the carrier and the shipper, to ensure the shipper and the successive holders can transfer the right of control and transfer under the said electronic B/L to another party. In theory, the electronic B/L system is open to all users and ready for use as long as a computer, a modem, a telephone, a radio or other communication media and relevant technologies are available. As a result, the electronic B/L system is in sharp contrast different with Bolero and SeaDocs, which impose more stringent requirements on their members.

2. Generality

The Draft includes the main operation procedures and rules of the electronic B/L system, and explores the issue in relation to B/L electronization in a systematic and comprehensive manner. The requirements on specific procedures, including the circulation process, in most cases, may be found in CMI Rules for Electronic Bills of Lading 1990.

3. Integrality

Importance is attached to the coordination between electronic and paper B/Ls so that the former can achieve several major functions of the latter, and focus is put on the integrity of the entire B/L system, which is primarily reflected in Article 10 of the Draft – the replacement of negotiable transport document or negotiable

4 George F. Chandle, Maritime Electronic Commerce for the Twenty-First Century, paper presented to CMI Panel on EDI on 10 June 1997, p. 12.

electronic transport record.

B. Having Confirmed the Independence of Electronic B/Ls

The Draft officially recognizes that electronic B/Ls may include the same contents as ordinary paper B/Ls with equal effects and provides that, subject to the requirements set in the Draft, (a) anything that is to be in or on a transport document may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and (b) the issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.[5] This provision expressly confirms the independence of electronic B/Ls. In order to make a further confirmation, the Draft also prescribes the rules for replacement of the said two types of documents, thereby creating a system featuring a parallelism between paper and electronic transport documents.[6]

Electronic B/Ls shall have the same effect with ordinary paper B/Ls. Both are issued based on a prior contract of carriage, and there is no essential difference between electronic and ordinary paper contracts, because, in the cyberspace, there are two major ways for concluding a contract. Firstly, offer and acceptance can occur in e-mail, which in fact has no difference with the commonly adopted approach for concluding a contract; the other major way of contracting in cyberspace involves catalogs and order forms published to the World Wide Web. In the second case, computer programmed to automatically accept orders and control delivery can then carry out transactions. This makes the conclusion of an electronic contract distinct from that of an ordinary paper contract. Nevertheless, a computer is not capable of being a party to a contract. The involvement of a computer has no legal consequences because it cannot express its willingness. These contracts are based on decisions and actions of individuals and are only the result of prior human intention. On this basis, automated declarations of offer and acceptance are the intention of both parties and thus shall be valid. In this sense, the way of contracting in cyberspace is not different from the traditional way in nature.

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5 Article 8 of Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea].

6 Guo Yujun and Xiang Zaisheng, A Study of the Legal Enforcement Mechanism for Electronic Bills of Lading, in Li Shuangyuan ed., *Essays on the International Law and Comparative Law (Vol. 1)*, Beijing: China Founder Press, 2004, p. 251. (in Chinese)

Additionally, although its specific recordings are to some extent different from those on a paper B/L, an electronic B/L may also be deemed a receipt or evidence of a contract, as discussed earlier.

C. Having Considered the Special Status of the Carrier

According to the provisions of the Draft, an electronic B/L shall be circulated as follows: (a) the current holder shall notify the carrier of his intention to transfer its right of control and transfer to a proposed new holder, and (b) the carrier shall confirm the receipt of such notification message, whereupon (c) the carrier shall transmit all the information as referred to in Article 4 of the CMI Rules for Electronic Bills of Lading (except for the private key) to the proposed new holder, whereafter (d) the proposed new holder shall advise the carrier of its acceptance of the right of control and transfer, whereupon (e) the carrier shall cancel the current private key and issue a new private key to the new holder.[7] In such a way, the endorsement is replaced by the notification system, and the possession of an electronic B/L is marked by the control of its private key.

It can be seen that the electronic B/Ls under the Draft is different from ordinary paper B/Ls in the following aspect. The latter is negotiable between the traders and will not be received by carrier until goods are unloaded. In contrast, the former will be returned to the carrier as long as a transaction agreement is reached. In fact, the carrier will issue a new private key to transport document to the transferee upon each transaction.[8]

It indicates that the transfer of electronic B/Ls requires the participation of the B/L holder, transferee and the carrier, and the private key for the B/L shall always remain under the control of the carrier. Consequently, the carrier, whose rights and obligations will be affected by the B/L, is not only a party to the B/L transfer, but also serve as a third party (agent) between the shipper and the B/L holder. The role of the carrier in this process qualifies it as an entity resembling the public registration center under the Bolero system in every way except that the carrier is a

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7 The Draft does not include any detailed provisions on the circulation mode of electronic bills of lading; however, the CMI Rules for Electronic Bills of Lading developed by the Comité Maritime International may apply. Article 7 of the CMI Rules (Right of Control and Transfer) contains detailed provisions on the transmission and cancellation of the private key.

8 Xu Jin, Electronic Bills of Lading under the CMI Mode and the Relevant Legal Issues, *World Shipping*, No. 4, 2000, p. 36. (in Chinese)

private registration center. As such, the carrier may become informed of the details of each B/L transfer; furthermore, unknown consignee or incorrect delivery of goods that may occur in case of paper B/Ls will be avoided in case of electronic B/Ls, which will be conducive to fraud prevention. On the other hand, with the carrier acting as an agent, the relevant costs will be much less than that with a public registration center specially established for this purpose.

D. Having Achieved the Electronic B/L's Function of Serving as a Pledge

In theory, electronic B/Ls shall be consistent with paper B/Ls to the extent possible, so as to have all the functions of the latter. Since electronic B/Ls are negotiable, such B/Ls may be transferred and pledged by the use of an electronic private key under the coordination of the carrier. How to distinguish between the possession made through transfer and that made through pledge? How to ensure the pledge generated in such transfer is legally effective against a third party? And how to guarantee the materialization of such right of pledge when necessary? These are issues that we need to address when it comes to actual operation.[9]

As mentioned above, the operation scheme under the Draft is mainly based on a complex private key modification method: should it be free carrier (FCA), the carrier shall send the shipper an electronic notification of the receipt of the goods to the electronic address specified by the shipper, and the notification shall include all the contents of a paper B/L and a private key; the shipper must confirm the receipt of such notification to the carrier, whereupon the shipper shall become the B/L holder. If a B/L is to be pledged to the bank as security, the B/L holder shall firstly issue a notice to the carrier, who shall then inform the proposed bank of the particulars of the B/L. Upon confirmation by the said bank, the carrier shall cancel and replace the original private key with a new one. In this way, the right of possession of the said B/L shall be transferred and the pledge shall take effect.

Upon the arrival of the goods at the destination port, the carrier shall verify the private key and deliver the goods to the final holder of B/L. The carrier and the holder shall maintain the security of the private key during the entire process. Keeping the private key ensures that the holder of electronic B/L will be entitled to the right of control and transfer of goods, and further supports the

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9 Lin Chunyu, A Study of the Legal Issues Concerning Electronic Bills of Lading, *World Shipping*, No. 4, 2002, p. 37. (in Chinese)

pledge of electronic B/Ls. With the supplementation and improvement of banking regulations, a bank may hold an electronic key just like holding a paper document, which will protect its rights and interests in connection with B/L.

III. Limitations of the Provisions Concerning the Electronic B/L System under the Draft and Corresponding Suggestions

A. Guarantee of Rights of the Previous Holder of an Electronic B/L

The Draft fails to include any explicit provisions on the default of payment by the transferee over his right of control and transfer. As we may know, the previous holder shall not retain any right to goods effective against the carrier upon transfer, considering the requirement on the uniqueness in the transfer of rights; otherwise, despite the successive holder has paid the goods price, his valuable rights to the goods may not be secured. However, upon the transfer of an electronic B/L, the previous holder (the seller), having surrendered all his rights to goods, may suffer from a risk when the transferee (the buyer) fails to pay the goods price. As a result of the particularity of an electronic B/L, its transfer shall be irrevocable upon the transmission of the private key by the carrier. In such a context, wouldn't it be disadvantageous for the previous holder, if his request against the successive holder is only based on default?

This problem can be solved by virtue of the seller's and buyer's right to dispose the contract at their own discretion. An electronic trade contract may, among others, explicitly stipulate that the seller shall retain the right to dispose the goods prior to payment or that the buyer shall re-transfer the right of control and transfer to the seller in case of default of payment. However, such stipulations may contradict with the tradition that a B/L may function as a document of title and greatly increase the burden of the carrier, coupled with loss of effective guarantee. Therefore, a more feasible approach is procuring a bank as the third party and using electronic equivalents to letter credit to make payment. The right of control and transfer can be transferred to a bank with good credit standing, which may provide payment guarantee and bear the responsibility of lifting any barrier in recourse.

B. Difficulties in Replacing Paper B/Ls with Electronic B/Ls

Difficulties may arise in the course of replacing an original paper transport document with an electronic record, especially when the holder fails to surrender a complete set of the transport documents that have been initially issued. In such a case, shall we conclude a new contract or add supplementary provisions to the existing B/L? According to the provisions of the Draft, should a negotiable transport document have been issued and the carrier and the holder intend to replace the said document by a negotiable electronic transport record, the holder shall surrender the negotiable transport document, or all of them, if more than one have been issued, to the carrier.[10] Under this circumstance, the holder shall be considered non-defective and hold all of the B/Ls in triplicate. However, if the holder is defective, which means all the original paper B/Ls have been destroyed and cannot be made up completely, is it possible for the carrier and the holder to reach a mutual agreement on replacing them with electronic B/Ls?

Should it be paper B/Ls, the holder shall surrender all documents to the carrier, so as to support the latter to perform the subsequent procedures. That is to say, if the B/L is issued in triplicate, but one of them is missing, the carrier may not release the goods, for all of B/Ls are original, except that there is a tiny difference on the front of the B/Ls. Even if two of them have been surrendered, the missing one may come into possession of another party, who may thereby make a claim. It is the same case in the replacement of electronic and paper B/Ls. If replacement by merely surrendering an original paper B/L is allowed, difficulties may arise when a third party requests for replacement by surrendering any other originals. Therefore, in view of the equivalence between paper and electronic B/Ls, replacement shall not be allowed if the holder is defective. Moreover, according to the provisions of

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10 Article 10 of Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Replacement of negotiable transport document or negotiable electronic transport record: 1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record: (a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier; (b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and (c) The negotiable transport document ceases thereafter to have any effect or validity. 2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document: (a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and (b) The electronic transport record ceases thereafter to have any effect or validity.

the Draft, the original B/L shall be invalid upon replacement; as a result, the rights of the holder of a second original B/L will not be secured. In case that a paper B/L is missing but the defective holder is in dire need for substitution for an electronic B/L, it requires going through a time-consuming public notification process. As a countermeasure, we may conclude a supplementary agreement to allow the replacement of incomplete paper B/Ls by electronic B/Ls, provided consent has been obtained from both the carrier and the holder. As this shall be deemed a waiver of the right to defense, the carrier and the holder shall be jointly and severally liable for any claim lodged by any other holders of paper B/Ls upon such replacement.

C. Overloaded Responsibility Borne by the Carrier and Inadequate Supervision

Considering its unidirectional nature, the delivery of an electronic B/L may only occur between two parties. And due to the peculiar circulation manner of electronic B/L, the carrier shall always be placed in the center, via whom the ownership of goods in transit may be transferred among the seller, the consigner, the bank, the buyer and the consignee by using a proprietary computer private key. The said ownership can only be transferred, by issuing notice containing a private key for authentication, from the seller to the buyer with the help of the center (the carrier), excluding the transfer from the buyer to any third party. In such a way, the carrier is surely a party in this process and becomes the controller of the private key, responsible for deciding whether to send message or not and determining what message will be sent during the transfer of an electronic B/L. However, according to the traditional B/Ls transfer mechanism, the carrier is basically spared from the transfer process upon B/L issuance. Compared with a paper B/L, an electronic B/L implies greater responsibility to be borne by the carrier, because the carrier under an electronic B/L must see to the performance of not only any contract of carriage, but also any trade contract, credit assurance contract and financing contract, which might be a substantial and extremely detrimental adding to his workload. Moreover, as a for-profit organization carrying such a great responsibility, the carrier shall be subject to integrity investigation. As a party to the contract, the carrier's rights and obligations may be affected by the transfer of B/Ls. For his own good, it is possible that the carrier will make every effort to attempt risk aversion by taking acts including fraud.

In such a context, it is wiser to establish an independent third party, such as a

certification body.[11] Such a third party may attest the identity and credit standing of the electronic signatory through verifying the information processing capability and qualifications of the carrier, which will eliminate the concerns of both parties and facilitate the transaction. It is also suggested to create a credit rating system, including a certification body that may conduct regular credit assessment and impose supervision on the carrier, and shall be responsible for any fault arising from such assessment. In addition, in case of any disputes, the mechanism for responsibility division among the B/L holder, transferee and carrier shall be defined. Undefined major responsibility may cause the carrier to reject the role of the intermediary for the transfer of electronic B/Ls. The specific responsibility division will be discussed in the following section about network risk liability.

D. Division of Responsibility for Network-Related Risks

The electronic B/L system, heavily dependent on the network as it is, will bring about new network-related risks, which may mainly include the following:

1. Damages to the interests of the clients under an electronic B/L arising from force majeure or accidents, such as unexpected power failure, network failure, lightning strike and fire. As not all of these damages are avoidable by employing the current technology, it is unfair that all the losses arising therefrom are borne by the carrier. Saving that lightning strike and fire are included in the natural disasters under the Draft, the Draft fails to make any provisions regarding unexpected power failure, network failure and the like.[12]

2. Carrier's negligence, including transmitting incorrect messages or such messages causing any contract of carriage between the shipper and the carrier invalid, or inadequate prevention, improper management or intentional fraud that results in any increase, modification and deletion of user data. The responsibility of the carrier for goods under the Draft commences upon the receipt of goods by the carrier or performing party, while the electronic communications and exchanges prior to the issuance of an electronic B/L are not covered in the scope of protection. Then, how shall we deal with the carrier's negligence occurred prior to the

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11 Hou Wanlong, A Study of the Legal Issues on the Security of Electronic Letters of Credit, *Journal of Langfang Teachers College*, No. 9, 2004, p. 65. (in Chinese)

12 It is held that although some cases meet the conditions for force majeure, the party who shall be responsible for the loss of goods should be determined in order to protect the interests of any *bona fide* third party.

issuance of an electronic B/L? And is it applicable to the provision on limitation of responsibility in case of any loss arising from such negligence?

3. Damage to the interests of users arising from any software transmission error. Should such damage be caused by the system provider, the carrier may, as the software user, lodge a claim against the provider; yet the carrier should not use it to defend itself against the network user. However, the network user may still claim for indemnity against the carrier when the carrier fails to recover his damages caused by technical malfunctions. This is extremely unfair to the carrier. On one hand, it is unjustified for the user if his damages caused by negligence of others cannot get compensated;[13] on the other hand, it is also difficult or even impossible for the system/hardware/software provider to recover all the losses caused by his negligence. Therefore, it seems unfeasible to simply apply the general principle of compensation under the Draft.

In such a context, how to define the responsibilities fairly and reasonably and establish a proper responsibilities allocation mechanism and risk-sharing mechanism is of great importance for implementing rules related to electronic B/Ls.[14] It is taken that the Draft only lays out stipulations concerning the responsibilities arising from or related to cargo losses, damages, and delayed delivery, and that network-related liability is not subject to its regulation; nevertheless, electronic B/Ls, with special features, make their accompanying risks directly link to some provisions under the Draft. Hence, some principled provisions under the Draft may be applicable to electronic B/Ls. Therefore, the possibility and significance of risk elimination by appropriate amendment to the Draft in real operations can be inferred.

The risks of the first category, namely unexpected power failure and network failure, shall be covered in the scope of exemption under the Draft, except for some situations that are controllable. If an advance notice of power failure has been received, and any standby power is available for computer operation so that the problem caused by unexpected power failure can be solved, the carrier shall be responsible for compensating against any damages caused by his negligence. It is required to reduce this category of risks as well as the scope of exemption for the

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13 Wu Shujuan, Electronic Bills of Lading and Legal Responsibilities of the Carrier, *Navigation of Tianjin*, No. 8, 2006, p. 28. (in Chinese)

14 Zhang Weixin and Wang Qianfeng, A Discussion on the Operations of Electronic Bills of Lading in International Carriage of Goods, *Practice in Foreign Economic Relations and Trade*, No. 2, 2004, p. 22. (in Chinese)

carrier with the development of technologies.

To deal with the risks of the second category arising from negligence by the carrier, more stringent principle of liability for fault shall be applied. The relevant liabilities shall be borne by the carrier; nonetheless, the liabilities shall vary depending on the effectiveness or ineffectiveness of the contract. Should the carrier's negligence lead to the ineffectiveness of a contract, the carrier should be called to account for any contracting negligence; if the contract is effective, it shall be required to analyze whether the carrier's responsibility is a default responsibility or whether it occurs during the period of responsibility. As discussed earlier, for both parties have already entered into a contract prior to the issuance of electronic B/Ls, the behavior of the carrier before such issuance shall be covered by contractual obligations. Therefore, considerations shall be given to extending the period of responsibility of the carrier under the Draft to include the electronic communications and exchanges sent prior to the issuance of electronic B/Ls. Regarding the scope of compensation, the author believes that limited liability may be applied in the case of negligence by the carrier. As mentioned above, more responsibilities arising from or related to the issuance and transfer of electronic B/Ls are provided to be borne by the carrier under the Draft. In order to balance the interests of the carrier and those of the clients under an electronic B/L, and to encourage the active use of electronic B/Ls by the carrier, the negligence of the carrier, as an agent in the transfer, shall also be under the protection provided by the liability limitation regime. However, in case of any willful misconduct by the carrier, the injured party shall be fully indemnified by the carrier based on the principle of full compensation. As such, the injured party may obtain economic benefit equivalent to that gained from normal performance of the contract, the carrier may perform his duty of care, and fraud will be prevented.

For the risks of the third category, the sole solution is based on the principle of equitable responsibility that provides an equal sharing of damages among the three parties involved, so as to achieve a balance of interests. When it comes to the order of compensation, it is suggested that the carrier should first make compensations on behalf of the system provider and himself and then claim reimbursement from the system provider. That is because network users are relatively disadvantaged in comparison with the carrier and the system provider, and such users are not as closely connected to the system provider as the carrier (serving as a private registration agency), it involves greater difficulties for the network users to get compensated.

IV. Conclusion

High in security, accuracy, efficiency and speed as they are, electronic B/Ls have exhibited incomparable superiority over traditional paper B/Ls. Holding a rising position in carriage of goods by sea, electronic B/Ls have become a kind of new transport document that we cannot ignore. The importance that the UNCITRAL attaches to the electronic B/L system is also embodied by the relevant provisions under the Draft. If the Draft can be adopted and take effect, barriers to the implementation of the electronic B/L system would be lifted to a great extent. Nevertheless, it should be noted that this nascent system, inadequate in many aspects as it is, shall be constantly tested in practice. There is still a long way to go before paper B/Ls are completely replaced by electronic B/Ls. Notwithstanding all the above, China has witnessed an urgent need to make a supplement to the provisions on the electronic B/L system, which is a call to both current practices and future development trends. It is required to pay attention to the construction of the electronic B/L system under the Draft and further the study of any convention on the carriage of goods by sea. China's role as a major shipping State can be consolidated and put into full play, and its rights and interests can be truly protected only by doing so.

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Balance of Interests between Coastal and Fishing States in Prompt Release Cases: A Review of Cases No. 14 and 15 before the ITLOS

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Abstract: The rights and obligations of both the fishing States and the coastal States in case of vessel detention are defined in Article 292 of the United Nations Convention on the Law of the Sea (UNCLOS). In conjunction with other relevant articles of the UNCLOS, it attempts to maintain a balance of interests between both parties in terms of ocean utilization, which relies on the due exercise of rights and performance of obligations by both parties as well as the judicial guarantee provided by the International Tribunal for the Law of the Sea (ITLOS). Although similar in factual background, the Cases No. 14 and 15 accepted in 2007, have received different settlement by the ITLOS, which reconfirms that the said balance of interests relies on the judicial guarantee provided by the ITLOS. And the different approaches that the ITLOS adopted to entertain the two cases give some enlightenment to China as a fishing State.

Key Words: Prompt release; Coastal State; Fishing State; Balance of interests

The United Nations Convention on the Law of the Sea (UNCLOS), considered the international charter of the sea, is the outcome of making a compromise after giving full consideration to the interests of all parties, which in return has an actual

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impact on the interests of all parties. Article 292 of the UNCLOS[1] lays out some provisions regarding the prompt release of detained vessels and crew, aiming at eliminating the conflicts between coastal and fishing States. Ever since its entry into force in 1996, it has exerted significant impact on the international community in the field of ocean utilization by alleviating the contradiction between coastal States and pelagic fishing States in ocean utilization and thus achieving a balance between different interests and demands of such States. The fact has been proved by the practice of the International Tribunal for the Law of the Sea (hereinafter "the ITLOS" or "the Tribunal"). Of the 15 cases heard by the ITLOS up to now, 10 involve request for prompt release of detained vessels. The processing of such cases has effectively alleviated the contradictions and conflicts between the coastal and fishing States.

On July 6, 2007, the ITLOS received two applications for instituting legal proceedings,[2] both of which involved request for prompt release, made by Japan against Russia on the basis of the provisions in Article 292 of the UNCLOS. Notwithstanding the two cases were similar in the factual background, the progresses of judicial treatments of vessels detained by coastal States in the two cases were different when Japan filed the applications, which led to different decisions by the Tribunal. An analysis of these will be greatly beneficial to China by giving an insight into what kind of actions can be taken when its vessels are detained, so as to optimize the protection of China's interests.

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1 Article 292 (Prompt release of vessels and crews) of the UNCLOS 1982: 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree. 2. The application for release may be made only by or on behalf of the flag State of the vessel. 3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time. 4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

2 Cases No. 14 and 15 before the ITLOS were both filed by Japan against Russia on July 6, 2007 concerning the prompt release of detained vessels. However, the final decisions with respect of the two cases were sharply contrasting. A brief introduction to the two cases will be presented later. More details, at http://www.itlos.org/start2_en.html, 15 July 2008.

I. Highlights of the Decisions

Case No. 14 is a proceeding instituted by Japan against Russia concerning the prompt release of a fishing vessel. Both parties had no dispute over the fact of illegal fishing, but failed to reach an agreement on the amount of bonds. Upon trial, the Tribunal was of the view that Russia had indeed asked for an overtly high price, and ordered Russia to reduce it to 10 million roubles. Upon the posting of a bond, Russia shall promptly release the detained vessel, and the Master and the crew shall be free to leave Russia without any conditions.

Similar to Case No. 14, Case No. 15 also involved Japan's request of prompt release of its fishing vessel arrested by Russia, and both parties admitted the fact of illegal fishing. However, when Japan initiated the proceedings, Russia had already confiscated the vessel according to its relevant laws and regulations, which ushered a debate between both the parties whether the flag State was entitled to request prompt release in line with Article 292 of the UNCLOS after the transfer of the ownership of the said confiscated vessel. Upon trial, the Tribunal held that it was legitimate for Russia to detain the said vessel, and the change of ownership did not necessarily lead to the flag State's loss of right to initiate a procedure in accordance with Article 292 of the UNCLOS. Nevertheless, Article 292 of the UNCLOS provides that the Tribunal shall deal with the application for release "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew". After taking into account Article 73 of the UNCLOS,[3] the Tribunal maintained that the case was without object of procedure, and thus it did not support the claim lodged by Japan.

II. Case Summary

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3 Article 73 (Enforcement of laws and regulations of the coastal State) of the UNCLOS 1982: 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention. 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security. 3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment. 4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

A. Hoshinmaru Case

1. Factual Background

Case No. 14, also known as *Hoshinmaru* case, was filed by Japan concerning Russia's detainment of Japan's *88th Hoshinmaru* and its 17 crew members on board.

The vessel *Hoshinmaru* finished its registry in Japan on March 24, 2004. On May 14, 2007, the Russian Federation provided the *Hoshinmaru* with a fishing license. With this license, the *Hoshinmaru* was authorized to fish with drift net in three different areas of the exclusive economic zone of the Russian Federation from May 15, 2007 to July 31, 2007.

On June 1, 2007, when fishing off the eastern coast of Kamchatka Peninsula, the *Hoshinmaru* was ordered to stop by a Russian patrol boat. Subsequently, the vessel was boarded by an inspection team of the State Sea Inspection of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. After boarding the vessel, the coastguard inspector found that under the upper layer of chum salmon sockeye salmon was kept. As a result, the vessel was suspected of illegal fishing: substitution of output of one kind (chum salmon) with the other kind (sockeye salmon) and, thus, concealment of part of sockeye salmon catch in the Exploitation area No. 1; misrepresentation of data in a fishing log and daily vessel report.

The vessel was detained for illegal fishing the next day. And Russia informed the Consul-General of Japan in Vladivostok of detention of the *Hoshinmaru* in writing. For the purpose of judicial proceedings, the fishing vessel was escorted to the port of Petropavlovsk-Kamchatskii, and the administrative judicial procedures commenced on June 4. A criminal case against the master of *Hoshinmaru* was initiated on June 26 according to the provisions dealing with major damage caused by illegal fishing under the Criminal Code of Russian Federation.

Upon the receipt of the said notice, Japan sent a letter to the Ministry of Foreign Affairs of Russian Federation on June 6, 2007, requesting prompt release of the *Hoshinmaru* and its crew upon the posting of a reasonable bond in accordance with Article 73(2) of the UNCLOS. Similar letters were received by the Ministry of Foreign Affairs of Russian Federation and the Embassy of Russian Federation in Japan on June 8 and June 12 respectively.

On June 29, 2007, Russia began the examination procedures to evaluate the

detained vessel, and sent a letter to the representative of the owner of the vessel on July 6, requesting relevant information on the value of the vessel so as to determine the amount of the bond. However, as alleged by Russia, no reply was received. On the same day, the Embassy of Japan in Russia received a note verbale from the Ministry of Foreign Affairs of Russian Federation, which informed the Embassy of Japan that *Hoshinmaru* and its crew would be released promptly upon the posting of a reasonable bond, the amount of which was being determined.

On July 13, 2007, Russia determined that the bond should be 25 million roubles, including the amount of damages equivalent to 7,927,500 roubles. However, an application was filed by Japan on July 6 before the ITLOS, and on July 9, the Tribunal fixed July 19 as the date for hearing the case. The amount of the bond was reduced to 22 million roubles during the hearing.[4]

2. Jurisdiction and Admissibility of the Case

According to the provisions of Article 292 of the UNCLOS, the Tribunal found upon trials, that it had jurisdiction over the said case.

As to the question of the admissibility of the case, Russia opposed it on the basis of two reasons. First, what Japan had requested was that Russia should set the amount of bond and release the detained vessel. Since, the competent Russian authorities had informed Japan the amount of the bond, thus there was no ground for hearing the case. Also, the fact that Russia had determined the amount of bond subsequent to the initiation of proceedings by Japan may render the application without object. However, it was held by the Tribunal that, in principle, the decisive date for determining the issues of admissibility should be the date of the filing of an application. It acknowledged that the events subsequent to the filing of an application may render the application without object. However, in the present case, the Tribunal believed that the setting of the bond by the respondent did not render the application without object. In the *M/V SAIGA* case[5] heard previously, the Tribunal held that a State may make an application under Article 292 of the UNCLOS not only when no bond had been determined but also when it considered that the bond set by the detaining State is unreasonable. The Tribunal affirmed this

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4 The amount was calculated on the basis of the Criminal Code of Russian Federation, the Code of Administrative Offences of the Russian Federation, Civil Code of Russian Federation and relevant federal laws related to wildlife. Two of the penalties were calculated on the basis of the maximum ones provided by laws.

5 It refers to Cases No. 1 and 2 heard before the Tribunal. The two cases were filed by Saint Vincent and the Grenadines against Guinea for prompt release of fishing vessels. More details, at http://www.itlos.org/start2_en.html, 19 August 2008.

jurisprudence and reemphasized that it was for the Tribunal to decide whether a bond was reasonable under Article 292 of the UNCLOS.

The Tribunal held that in the present case, the dispute between both the parties remained unchanged in nature, but the scope of the dispute had narrowed. The dispute between the parties turned from the determination of the amount of the bond and the prompt release of the vessel to the reasonableness of the amount of bond so determined.

Secondly, Russia maintained that the applicant's submission in paragraph 1(c) was too vague.[6] Additionally, the respondent alleged that according to Article 292 of the UNCLOS, the Tribunal was not entitled to determine the terms and conditions upon which the detained vessels should be released.

The Tribunal held that there was no merit in these arguments. The application of the applicant was explicitly based on the provisions of Article 292 and Article 73(2) of the UNCLOS. Moreover, the Tribunal was not asked to determine the terms and conditions upon which the detained vessels should be released. The Tribunal was only asked to examine the reasonableness of the amount of a bond or other financial security by exercising its power under Article 292(3) of the UNCLOS, and to order the release of the vessel and its crew after confirming that such conditions were reasonable.

On the above grounds, the Tribunal held that the case in question should be admissible.

3. Decision

Despite of disputes on whether the crew members were detained and whether a bond had been set timely, both parties agreed in principle that the bond for prompt release should be set within a reasonable time limit, taking into account all the circumstances of the particular case.

Given that the scope of the dispute had narrowed to the issue of the reasonableness of the amount of bond, during the hearing, the Tribunal mainly examined the issue whether the amount determined by the respondent was reasonable.

In several previous judgments, the Tribunal expressed its views on the reasonableness of the bond. The Tribunal listed a number of factors (the list was not

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6 Russia maintained that the applicant's submission in paragraph 1(c) was too vague and too general, and that it was so unspecific that it neither allowed the Tribunal to consider it properly, nor Russia to reply to it. Japan's submission in paragraph 1(c) reads as follows: "to order the Respondent to release the vessel and the crew of the *Hoshinmaru*, upon such terms and conditions as the Tribunal shall consider reasonable."

complete) that it considered relevant when assessing the reasonableness of bonds or other financial security. Such factors included but without limitation to:

(1) Gravity of the alleged offences;

(2) The penalties imposed or imposable under the laws of the detaining State;

(3) The value of the detained vessels and of the cargo seized; and

(4) The amount of the bond imposed by the detaining State and its form.[7]

In this case, the fishing activities by *Hoshinmaru* were illegal in the sense that a certain fish stock had been overfished in the term and in the authorized area specified in the fishing license, which was obviously different from the common illegal, unregulated and unreported fishing. When fixing the amount of bond, Russia included the value of the fishing vessel, which was however in fact a covert levy. The penalty was not proportionate to the gravity of the offence made by *Hoshinmaru*. Moreover, when fixing the penalties, it was unjustified for Russia to calculate two penalties on the basis of the maximum ones which could be applicable.

For these reasons, the Tribunal held that the bond of 22 million roubles determined by Russia was unreasonable. It found that Russia failed to comply with the provisions of Article 73(2) of the UNCLOS,[8] that the application by Japan was well-founded, and that, consequently, Russia should promptly release the *Hoshinmaru* (including the legal catch on board) and its crew.

The final adjudication was made on August 6, 2007 as follows:

The bond should be 10 million roubles;

Upon the posting of a reasonable bond, the Russian Federation should promptly release the *Hoshinmaru* and ensure that the master and other crew members should be free to leave without any conditions; and

The bond may be in the form either of a payment to the bank account designated by the respondent, or if the applicant so preferred, of a bank guarantee from a bank present in the Russian Federation or having corresponding arrangements with a Russian bank.

B. Tomimaru Case

1. Factual Background

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7 The "Hoshinmaru" Case (Japan V. Russian Federation) Prompt Release Judgment, p. 28.

8 Article 73(2) of the UNCLOS provides that "arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security."

Case No. 15, also known as the *Tomimaru* case, was another case concerning the prompt release of a fishing vessel filed by Japan before the Tribunal along with Case No. 14.

53rd Tomimaru, a fishing vessel of Japan, is a trawler owned and operated by a Japanese company. According to the fishing license issued by the Russian authorities, the vessel was authorized to fish from October 1 to December 31, 2006, in an area of the western Bering Sea located in the exclusive economic zone of Russia. The quota allowances specified in the fishing license were 1,163 tons of walleye pollack and 18 tons of herring.

When fishing in the specified area on October 31, 2006, the *Tomimaru* was boarded by officers from the patrol boat *Vorovskii* and inspected by officials from the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. And 5.5 tons of unreported walleye pollack were found during the inspection. The vessel was then re-routed and escorted to Avachinskiy Bay for further investigation.

The result of the investigation indicated that at least 20 tons of gutted walleye pollack, which were not listed in the logbook, were found on board the vessel, and also some kinds of fish products which were forbidden to catch.[9] It was finally confirmed that the quantity of fish illegally caught was 62,186.9 kg and the damage to the living resources in the Russia was estimated at 8.8 million roubles.

On November 8, 2006, a criminal proceeding was initiated against the master of *Tomimaru* in accordance with the Criminal Code of Russian Federation, and the vessel was detained in the Avachinskiy Bay as a key evidence for criminal trial.

On November 14, 2006, a lawsuit against the owner was filed according to the Code of Administrative Offences of the Russian Federation.

A letter dated December 12, 2006 from the Inter-district Prosecutor's office to the owner informed that the amount of bond was fixed to be 8.8 million roubles for the damage caused to Russia by the administrative offense of the fishing vessel.

Subsequently, the owner sent petitions to the Northeast Border Coast Guard Directorate and the City Court of Petropavlovsk-Kamchatskii, requesting Russia to set the amount of a bond for prompt release of the vessel. The City Court rejected the petition filed by the owner for the following reason: the Code of Administrative Offences of the Russian Federation failed to provide the possibility of releasing

9 It included 19.5 tons of various sorts of frozen halibut, 3.2 tons of ray, 4.9 tons of cod and at least 3 tons of other species of bottom fish.

a property after Russia's receipt of a bond. However, repeated requests had been made by Japan for prompt release of the arrested vessel and the master thereafter.

On December 28, 2006, a decision was made by the City Court that the fishing vessel *Tomimaru* should be confiscated.

Subsequently, the owner of the vessel filed an appeal at the Kamchatka District Court. The District Court confirmed the decision concerning the confiscation of the *Tomimaru*. The owner then applied for retrial under the supervisory review procedure regarding the decision made by the District Court.

The said procedure was pending before the Supreme Court of the Russian Federation at the time when Japan filed the application.[10]

In accordance with the Order No. 158-r issued by the Federal Agency on Management of Federal Property, the *Tomimaru* was entered in the Federal Property Register as property of the Russian Federation on April 9, 2007.

2. Jurisdiction and Admissibility of the Case

According to the provisions of Article 292 of the UNCLOS, the Tribunal enjoys jurisdiction over the case in question.

As to the question whether the Tribunal should accept the said case, Russia opposed by arguing that *Tomimaru* had already become the property of Russia, and that as the ownership of the vessel had been transferred, there was no ground for Japan's application. In addition, counterarguments similar to the ones in Case No. 14 were raised by Russia. In other words, Russia believed that the wording of the application filed by the applicant was too vague, that the Tribunal had no competence to determine the terms and conditions upon which the arrested vessel should be released, and that the Tribunal only had power to determine the amount, nature and form of the bond to be posted for the release of the vessel.

The Tribunal held that it was undeniable that the flag State of the fishing vessel was Japan. Therefore, Japan should enjoy the rights conferred by Article 292 of the UNCLOS. The application filed by the applicant was based on the provisions of Article 292 and Article 73(2) of the UNCLOS. The applicant explicitly requested the Tribunal to order the respondent to promptly release the vessel and the crew upon the posting of reasonable bond or any other financial security.

According to the provisions of the UNCLOS, the Tribunal maintained that the case in question should be admissible.

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10 On July 26, 2007, the Supreme Court of Russian Federation dismissed the complaint after the ITLOS closed the hearing process.

3. Decision

As to the question whether the right of litigation provided in Article 292 of the UNCLOS should be affected by the changes of the ownership of a vessel, which was disputed by both parties, the Tribunal held that the ownership and the nationality of a vessel should be considered two separate issues. The transfer of the ownership of a vessel should not imply any change of the flag State. Therefore, Japan may apply to the Tribunal for prompt release according to Article 292 of the UNCLOS.

Concerning the question whether the confiscation of a vessel rendered an application for its prompt release without object, the Tribunal noted that Article 73 of the UNCLOS included no provisions on confiscation of vessels. In considering the question, the Tribunal must take into account the object and purpose of the prompt release procedure, in conjunction with Article 292(3) of the UNCLOS.

According to the opinion of the Tribunal, the provisions of Article 73 of the UNCLOS shall only apply to the temporary measures taken by the coastal States. When the domestic measures of a State become final, rather than temporary, prompt release would be meaningless. Article 292(3) provides that the Tribunal shall not interfere with the exercise of jurisdiction by an appropriate domestic forum. Moreover, the Tribunal has no intention of being the appellate body to domestic judicial proceedings.

The Tribunal also stressed that the confiscation of the fishing vessel was based on domestic legislation of a coastal State and should not upset the balance of interests between the coastal State and the flag State established in the UNCLOS. Such confiscation should not prevent the shipowner from having recourse to available domestic judicial remedies, or to prevent the flag State from resorting to the prompt release procedure set forth in the UNCLOS; nor should it be taken through proceedings inconsistent with international standards of due process of law.

According to the opinion of the Tribunal, one of the legislative objectives of Article 292 of the UNCLOS is to urge the flag State to act in a timely manner. This objective can only be achieved if the shipowner and the flag State take actions within reasonable time either to have recourse to the national judicial system of the detaining State or to initiate the prompt release procedure under Article 292 of the UNCLOS.

Any decision to confiscate a vessel made by a domestic court while proceedings are still before the domestic court shall not prevent the flag State from filing

an application for prompt release of the vessel. However, in the present case, the decision of the Supreme Court of Russian Federation, as the final judicial decision, had brought to an end the procedures in connection with the vessel before the domestic courts. Moreover, inconsistency with international standards of due process of law was neither found by the Tribunal nor raised by Japan.

For the reasons above, the Tribunal concluded that the application of Japan was without object and that it was not necessary to pronounce expressly upon the application.

III. Analysis

The decisions of the Tribunal and sharply contrasting results of the said two cases are extremely enlightening from the perspective of both the international community and the coastal and fishing States.

A. The Tribunal's Stress on the Balance of Interests Established in the UNCLOS

During the hearing of the two cases above, especially of Case No. 15, the Tribunal particularly emphasized that the detaining State should not break the balance of interests between the parties expected to be established in the UNCLOS while proceedings are still before the domestic courts of the detaining State.

In international arena, each State has its own interests and demands when utilizing the ocean. Some of the interests might be overlapping or conflicting. With regards to the relation between the coastal States and the fishing States, the coastal States, by giving permission to fishing States to fish in their exclusive economic zones, can bring economic benefits to both the fishing States and themselves. However, the economic interests of coastal States generated from their exclusive economic zones include not only the short-term interests arising from fishing in their exclusive economic zones and those from allowing other States to fish in such zones, but also long-term ecological interests. But as to interests given to the fishing States by the exclusive economic zones of other States, there are only short-term economic interests from fishing.

When the fishing States conduct fishing activities in a legal way, the economic interests of the coastal States between those of the fishing States will be consistent. The fishing States' overfishing or any other violation of the fishing license issued by

coastal States, which is driven by the pursuit of unilateral economic interests, would obviously jeopardize the ecological benefits or long-term economic interests of the coastal States. Therefore, the UNCLOS provides that coastal States may detain the vessels fishing illegally in case of any offence. The detention of illegal vessels by a coastal State in the waters under its jurisdiction shall be one of its administrative measures. This measure can help safeguard the sovereignty of the State concerned, in particular, the essential sovereign rights in relation to politics and economy. However, the navigation or continuous navigation of vessels is inherently required by the fishing activities engaged by a fishing State in order to achieve its economic interests from the sea. In case of vessel detention, the flag State may have no means to realize its marine fishery and economic interests. Consequently, the UNCLOS acknowledges that the vessels fishing illegally can be promptly released upon the posting of a reasonable bond or other financial security.

The purpose of Articles 73 and 292 of the UNCLOS is to coordinate the interests of both parties and to achieve a balance based on that. In Cases Nos. 14 and 15, the Tribunal particularly emphasized the said balance of interests established in the UNCLOS. In Case No. 15, the Tribunal explicitly stated that the domestic measures adopted by the detaining State should not break such balance of interests. Based on such considerations, the Tribunal reemphasized that only the Tribunal have the power to assess the reasonableness of a bond in accordance with the provisions of Article 292 of the UNCLOS.

B. Acknowledgement of and Constraints on the Interests of Coastal States under the UNCLOS

As set forth, a coastal State may not only gain short-term economic fishing interests but also long-term ecological benefits from its exclusive economic zone. The UNCLOS acknowledges that, in order to preserve the living resources in its exclusive economic zone, a coastal State shall be entitled to develop corresponding laws and regulations to regulate and manage the activities within its exclusive economic zone. A coastal State may impose control on the access of foreign vessels into its exclusive economic zone for fishing through administrative licensing, and shall be entitled to inspect any vessel that is allowed to enter into such zone. In addition, the coastal State may detain any vessel suspected of violating laws and may deal with such offence through domestic judicial proceedings. Penalties may be imposed on the vessel, and confiscation of the vessel is also possible when

necessary.

The decisions on Cases No. 14 and 15 indicate that the Tribunal acknowledged that a coastal State should be entitled to regulate and administrate its exclusive economic zone, and that the Tribunal also confirmed the coastal State's benefit from the preservation of living resources. However, the Tribunal also stressed that the exercise of such domestic jurisdiction should not violate the international standards of due process of law, or prevent the flag State from resorting to international judicial proceedings. In summary, the Tribunal laid emphasis on a longstanding basic principle in international law, namely, the principle of *pacta sunt servanda* (all agreements shall be followed in good faith), which means that no State shall be exempted from performing its obligations under the international law under the pretext of domestic laws.

C. Acknowledgement of and Constraints on the Interests of Fishing States under the UNCLOS

With a license issued to it, a fishing State should be authorized to enter the exclusive economic zone of other States to fish. In case of any vessel detention, the fishing State should be entitled to request the coastal State to promptly release the vessel upon the posting of a reasonable bond or other financial security. Should such request be denied by the coastal State, the fishing State should have the right to file a lawsuit at any international judicial institution in the name of the flag State. Such interest of the flag State has been explicitly recognized in Article 73(2) and Article 292(1) & (4) of the UNCLOS.

While acknowledging the interests of the fishing States, the UNCLOS also sets out two types of constraints on them. One is applicable before the occurrence of any dispute, and the other is applicable when taking remedial measures after the occurrence of the dispute. The first constraint explicitly requires that, when the vessels of a fishing State are fishing in the exclusive economic zones of other States, they shall observe other States' laws and regulations in association with the management of such exclusive economic zones, or specifically, the fishing activities shall be conducted in strict accordance with the scope of authorization. The second constraint, which is relatively less explicit, provides that the fishing State should act in a timely manner when it intends to lodge a lawsuit before any international judicial body concerning the detention of a fishing vessel. The detention would have a serious influence on the interests of the fishing State concerned, hence, the

fishing State should exercise its rights without delay. Once the domestic judicial procedures for vessel detention have been completed by a coastal State, its decision shall be deemed final, preventing the Tribunal from making other judgments. The Tribunal should honor the independence of domestic judicial proceedings, and it has neither the intent nor the possibilities to serve as the appellate body to domestic judicial proceedings.

IV. Conclusion

Both of the prompt release cases arose from the conflict of interests between a coastal State and a fishing State. And the factual backgrounds of the two cases were roughly the same: the fishing vessels were detained by the coastal State for fishing beyond the scope of authorization specified in the relevant fishing license, and relevant domestic judicial procedures were initiated in the detaining State. However, the Tribunal came to two totally different decisions, considering that the applications for prompt release were filed by the flag State at different times. That is to say, the final result of the proceedings depended upon whether proper actions were timely taken by the flag State in accordance with the provisions under the UNCLOS. This is extremely enlightening for China as a fishing State. Should any Chinese fishing vessel be detained, China, as the flag State, shall exercise its rights in a timely manner. We should learn from the experiences of others. The two lawsuits filed by Japan against Russia are actually a reminder that the flag State shall pay attention to the timing and the promptness when exercising its rights.

In Case No. 14, the procedure was pending before the domestic courts of the Russian Federation at the time when Japan filed the application, and the detention of the vessel was deemed to be temporary. Although during the hearing process, Russia finished fixing the bond and claimed that the case was without object of procedure, the Tribunal may still have the competence to assess whether the amount of the bond so fixed is reasonable. Since the amount of the bond set by Russia was held to be unreasonable by the Tribunal, the Tribunal modified such amount and ordered Russia to promptly release the detained vessel of Japan upon the posting of the bond so fixed.

In Case No. 15, Russia had finished the domestic judicial procedure when Japan filed the application, and the vessel was confiscated according to the decision of the domestic courts of Russia. Therefore, the Tribunal had to acknowledge the domestic jurisdiction of Russia and thus it was unnecessary for the Tribunal to

pronounce expressively on the application because this application was without object.

A coastal State shall enjoy sovereign rights and three exclusive jurisdictions over its exclusive economic zone. The ITLOS shall respect the judgments made by domestic courts of a coastal State if it observes the provisions of the UNCLOS and international judicial proceedings. In the event that any of its fishing vessels are detained, the fishing State shall file an application in a timely manner, and exercise its rights conferred by Article 292 of the UNCLOS without any delay. As, after all, the UNCLOS is aimed at achieving a balance of interests between both parties, the Tribunal may not go beyond the scope specified by the UNCLOS by interfering with the judicial power of the coastal States or putting more weight on the fishing States' right to apply for prompt release.

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The Japanese Act on the Establishment of Safety Zones around Marine Structures: A Commentary

WANG Zelin*

Abstract: On April 20, 2007, the House of Councilors of Japan adopted the Act on the Establishment of Safety Zones around Marine Structures, which is essentially intended to impact positively on Japan's protective designs over its maritime rights and interests, but concurrently inscribes uncertainty to the negotiations and settlement of the East China Sea (ECS) issues between China and Japan. Taking into account the relevant provisions of the United Nations Convention on the Law of the Sea on artificial islands, installation and structures in the exclusive economic zone, this article examines the specific provisions of the Act, particularly, the issues likely to arise from the application of the Act in the ECS. The author contends that this Act shall not be applied to the disputed areas in the ECS and suggests China to promptly fill the legislative gap in that regard.

Key Words: Safety zones; East China Sea; United Nations Convention on the Law of the Sea; Act on the Establishment of Safety Zones around Marine Structures

On April 20, 2007, the House of Councilors of Japan adopted the Act on the Establishment of Safety Zones around Marine Structures (hereinafter "the Act"), which took effect on July 20 of the same year. The purpose of this Act is "to ensure the safety of marine structures as well as of the navigation in the waters surrounding these structures and to set out the necessary measures, pursuant to the

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United Nations Convention on the Law of the Sea, for the establishment of safety zones around the marine structures". In essence, the legal basis for this Act is the United Nations Convention on the Law of the Sea (hereinafter "the UNCLOS" or "the Convention"). Thus, this article will first analyze the relevant provisions of the Convention, then compare the Convention with the specific provisions of the Act, and lastly, focus on the relations between the Sino-Japanese joint development of the East China Sea (ECS) and Japan's application of this Act.

I. An Analysis of the Relevant Provisions of the Convention

Article 60 of the Convention stipulates that, the coastal States shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures in exclusive economic zones;[1] they shall have an exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction in regard to customs, fiscal, health, safety and immigration laws and regulations;[2] they may establish reasonable safety zones around such artificial islands, installations and structures in which they may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures;[3] and the breadth of a safety zone, in principle, shall not exceed a distance of 500 meters.[4]

Although Article 60 of the Convention provides that the coastal State has the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands in the exclusive economic zone, it does not expressly define "artificial islands" and thereby it can be understood that an island that is not naturally formed is an artificial island.[5] For instance, the fixed or floating manmade structures constructed by the US beyond its territorial seas,

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1 Article 60(1) of the UNCLOS.
2 Article 60(2) of the UNCLOS.
3 Article 60(4) of the UNCLOS.
4 Article 60(5) of the UNCLOS: The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 meters around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.
5 See Article 121 of the UNCLOS, regime of islands.

which are used as deepwater ports, are considered as artificial islands.[6] The coastal State may construct or authorize the construction of artificial islands within its exclusive economic zone or on the continental shelf for any purpose,[7] whereas the construction of installations and structures shall comply with the purposes provided for in Article 56 of the Convention and other economic purposes, namely "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 sea-bed and of the sea-bed 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 winds".[8] It should be noted that the Convention fails to mention the coastal State's right to construct and use "devices" in the exclusive economic zone or on the continental shelf. Meanwhile the term "devices" is found in Article 194(3)(c) and (d) of the Convention.[9] The reason for the absence of provisions regarding "devices" in Article 60 and why the construction of installations and structures is required to satisfy specific purposes is that the great powers, particularly the US and the Soviet Union, so desire: as the exclusive jurisdiction of the coastal State is limited to the installations and structures for economic purposes, it cannot be applied to claim exclusive jurisdiction over installations, structures, and devices established by the great powers for military purposes in the exclusive economic zone of the coastal State.[10] In this connection, the absence of military installations, structures or devices in the Convention is, in fact, a compromise to the claims of great powers.

Nevertheless, the author deems it insufficient to draw the conclusion that

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6 See the US Deepwater Port Act of 1974, amended in 1984.

7 Articles 60 and 80 of the UNCLOS. Article 60(1)(a) does not require that artificial islands should be constructed for any purpose, unlike the requirement imposed on installations and structures in Article 60(2)(b).

8 Article 56(1) of the UNCLOS.

9 Article 194(3)(c) of the UNCLOS: pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices. Article 194(3)(d) of the UNCLOS: pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

10 B. H. Oxman, Customary International Law in the Absence of Widespread Ratification of the U. N. Convention on the Law of the Sea, in LSI Conference 1983 (1984), p. 676.

other States may construct military installations, structures or devices in the exclusive economic zone or on the continental shelf of the coastal State merely based on the point above. As we know, the artificial islands are divided into two categories: fixed artificial islands and floating artificial islands. During the Third United Nations Conference on the Law of the Sea, the US and Belgium argued that the coastal State should not exercise jurisdiction over floating artificial islands in that, theoretically, such islands are floating and therefore should be deemed as ships.[11] However, despite the fact that floating artificial islands are mobile, there exist significant differences between floating artificial islands and ships, in that the former normally operate in a specific area and the staff and working environment of the former are remarkably different from those of vessels. For this reason, the above suggestions of the US and Belgium were not adopted by the Convention. As such, the provisions of the Convention have not completely carried out the will of the great powers. Also, due to the lack of a clear definition of artificial islands in the Convention, no restrictions on the purposes of the construction of such islands exist. Therefore, the coastal State has the right to interpret any foreign military installation, structure or device, or even ships in its exclusive economic zone or on its continental shelf as artificial islands and thereby exercise exclusive jurisdiction over them, or protest or take actions on the grounds that such presence violates the proclamation of "peaceful uses of the seas" in Article 301 of the Convention and infringes on the sovereign rights of the coastal State. In this light, these paration of economic purposes from military purposes in the Convention is in fact a result of compromise and concession made by States. In practice, States seldom make such detailed distinctions between them. For example, the Act refers to both structures for economic and military purposes as "marine structures".

In accordance with Article 60 of the Convention, the coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures. All ships must respect these safety zones and comply with generally accepted international standards regarding navigation in the vicinity of artificial

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11 The 1973 Belgian Working Paper Concerning Artificial Islands and Installations (Part B), 15. UN Doc. A/AC. 138/91, in Oda Vol. II p. 359; and the 1974 U.S. Draft Articles, UN Doc. A/CONF. 62/C. 2/L. 47, in Third UNCLOS, Vol. III, pp. 214~222.

islands, installations, structures and safety zones.[12] Therefore, where coastal States regulate activities that are not in conformity with this section, they do not violate the Convention. In the case of the North Sea in Europe, vessels that flout the regulations concerning such safety zones are generally fishing ships. Thus, to ensure the safety of navigation and of artificial islands, installations and structures, fishing ships are the primary targets that need to be regulated.[13] In addition, the Convention explicitly states that, the right of hot pursuit shall apply *mutatis mutandis* to violations of the laws and regulations of the coastal States applicable in accordance with the Convention to the exclusive economic zone or the continental shelf, including such safety zones.[14] Regretfully, the Convention does not thoroughly address certain prevalent issues, for example, the criteria for the reasonableness of safety zones; whether the appropriate measures taken by the coastal State may prevent foreign vessels from entering the safety zones or from anchoring or trawling in such zones; and whether the coastal State may determine the routes in the safety zones and the varieties and sizes of vessels that may go through the safety zone.[15] The vague provisions above further lead to the conflict between the domestic laws and regulations of various countries. For instance, the 1964 UK Continental Shelf Act empowered the government to prevent vessels from entering into the designated area on the continental shelf provided for by the act.[16] The Japanese Act on the Establishment of Safety Zones around Marine Structures of 2007 prescribes that, except in some special circumstances, nobody may enter

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12 Article 60(4) and (6) of the UNCLOS.

13 Jiang Huangchi, *The Law of the Sea (Vol. I)*, Taipei: Sharing Cultural Enterprise Co., Ltd., p. 416. (in Chinese)

14 Article 111(2) of the UNCLOS.

15 These detailed issues have not been provided for in the 1958 Convention on the Continental Shelf, either.

16 See UK Continental Shelf Act 1964 Article 4(1), Part II of the Coast Protection Act 1949 (which requires the consent of [the Board of Trade] to the carrying out of certain works on the sea shore if obstruction or danger to navigation is likely to result) except section 34(1) (b) (which restricts the deposit of materials) shall apply in relation to any part of the sea bed in a designated area as it applies in relation to the sea shore; and section 46 of that Act (local inquiries) shall extend to any matter arising under this section. It should be noted that the phrase "a designated area" was borrowed by other States: In 1976, during the Third UN Conference on the Law of the Sea, India first submitted a proposal in connection to the establishment of "a designated area" in the exclusive economic zone, but this proposal was rejected. Afterwards, India enacted the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, under which the Central Government may, by issuing notification in the Official Gazette, declare any area of the exclusive economic zone and the continental shelf and their adjacent waters to be designated areas. Subsequently, Pakistan, Guyana, Mauritius, and the Seychelles passed similar acts.

the safety zones without consent. Moreover, as regards to the fixed or floating installations constructed in waters outside the territorial sea of a State, namely artificial islands constructed on the high seas, the coastal State in theory cannot exercise jurisdiction over safety zones in deepwater ports; whereas according to the US Deepwater Port Act, agreements must be concluded with the US to authorize it to exercise jurisdiction over foreign oil tankers in its safety zone if such foreign vessels intend to enter its deepwater ports.[17] Otherwise, foreign vessels are not permitted to enter such safety zones. In practice, a number of countries have recognized the safety zones established by the US on the high seas together with US' jurisdiction over such zones, and they accordingly conclude bilateral agreements with the US. Likewise, when a coastal State establishes safety zones in its exclusive economic zone, what specific matters are under the jurisdiction of the coastal State? The vague words "appropriate measures" envisaged in the Convention would inevitably spark more controversies.

Furthermore, apart from the surface of the sea, should "the safety zones" encompass the waters below and the airspace above artificial islands, installations and structures? Notwithstanding the lack of specific provisions on this, the Convention uses "around" to identify the reach of the zones. In effect, the following interpretation can be made from the situation discussed above: firstly, the word "around" can be literally construed to mean a three-dimensional space and thus, the safety zones cannot be limited to the surface of the sea; secondly, in terms of the purpose of the Convention, it aims to ensure the safety of navigation as well as of the artificial islands, installations and structures. It is hard to imagine the purpose can be met without interpreting "the safety zones" as a solid space. For instance, flights over artificial islands, installations and structures by foreign aircrafts, especially those that are low-flying over military artificial islands, and under-water passage in the waters by foreign submarines would affect the security of navigation and of the artificial islands, installations and structures, which is unlikely to be tolerated by coastal States. Article 58(1) of the Convention provides that, in the exclusive economic zone, all States enjoy the "freedoms referred to in article 87 of navigation and overflight", namely the freedoms of navigation and overflight on the high seas, subject to the regulations of the International Civil Aviation Organization (ICAO). According to the 1985 Report of the ICAO, whenever possible, coastal States may enact special provisions regarding flights over artificial

17 US Deepwater Port Act of 1974, ammended in 1984, Article 11.

islands, installations and structures in the exclusive economic zone.[18] Although it may be argued that the safety zones must not cover the airspace above the surface of the sea, the zones should be interpreted as a three-dimensional space in light of the texts, purpose and object of the Convention. As revealed by the reports of the ICAO, coastal States have such claims. However, due to the difficulty encountered in such endeavours and the potentiality of conflict with the exercise of freedom of overflight, they have yet to enact specific rules. Nonetheless, it is important to note that the claims above are grounded in theory and supported by the Convention. In light of this, a coastal State may further make domestic laws concerning the appropriate measures applicable to its safety zones pursuant to the purpose and object of the Convention. Such appropriate measures should be recognized under the Convention, provided that the "appropriate measures" reasonably "ensure the safety both of navigation and of the artificial islands, installations and structures," without critically affecting the freedom of navigation and overflight.

II. An Analysis of the Japanese Act on the Establishment of Safety Zones around Marine Structures

The objective of this Act is "to ensure the safety of marine structures as well as of the navigation in the waters surrounding these structures" and to set out the necessary measures for the establishment of safety zones around the marine structures. Articles 2 and 3 of the Act define the safety zones around marine structures as follows.

In accordance with Article 2 of the Act, "marine structures" refer to any operational devices undertaking specific activities in the exclusive economic zone and on the continental shelf, and the ships engaged in the exploration of the continental shelf in compliance with the Japanese Law on the Exclusive Economic Zone and the Continental Shelf. Apparently, the "marine structures" envisaged in the Act refer to "artificial islands, installations and structures" provided for in the Convention, but the literal meaning of "operational devices" are more inclusive than that of "artificial islands, installations and structures." Furthermore, the Act includes ships engaged in the exploration of the continental shelf into the scope of marine structures. Given the fact that no clear definitions of "artificial islands,

18 UN Doc. ICAO/C-WP/8077, p. 10.

installations and structures" are offered by the Convention, it can be agreed that "operational devices" as referred to in the Act, do not violate the Convention as long as the purpose for establishing such devices is in conformity with the purpose for establishing installations and structures as provided in the Convention.

As far as the definition of "safety zones" is concerned, the Act describes, "safety zones" refer to the zones that meet the provisions of Article 60(4) of the Convention (including the circumstances applicable to Article 80 of the Convention). Under Article 3(5) of the Act, the breadth of the safety zones shall not exceed a distance of 500 meters measured from the outer limits of the marine structures, which is also in line with Article 60(5) of the Convention.

The author contends that Article 5(1) of the Act is prominent for it declares, "pursuant to the regulations of the Ministry of Land, Infrastructure, Transport and Tourism (LITT), nobody may enter the safety zones without the consent of the Minister of the LITT," except under several special circumstances. On June 14, 1996, the National Diet of Japan adopted the Law on the Exclusive Economic Zone and the Continental Shelf, whose Article 1(2) stipulates that "the exclusive economic zone comprises the areas of the sea extending from the baseline of Japan to the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan (excluding therefrom the territorial sea) and its subjacent seabed and its subsoil. Provided that, where any part of that line lies beyond the median line ("the median line" here is the line every point of which is equidistant fromthe nearest point on the baseline of Japan and the nearest point on the baseline from which the breadth of theterritorial sea pertaining to the foreign coast which is opposite the coast of Japan is measure) as measured from the baseline of Japan, the median line (or the line which may be agreed upon between Japan and a foreign country as a substitute for the median line) shall be substituted for that part of the line." Further, Article 2(1) of the Japanese Law on the Exclusive Economic Zone and the Continental Shelf enounces that, the continental shelf of Japan comprises "the seabed and its subsoil subjacent to the areas of the sea extending from the baseline of Japan to the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan (excluding therefrom the territorial sea). Provided that, where any part of that line lies beyond the median line as measured from the baseline of Japan, the median line (or the line which may be agreed upon between Japan and a foreign country as a substitute for the median line, and the line to be drawn to connect with the said line, which shall be prescribed by Cabinet

Order) shall be substituted for that part of the line."[19] Taking into account also the provisions of the Act, one can conclude that, Japan asserts that if Japanese enterprises or entities conduct oil exploration or exploitation on the Japanese side of the "median line" in the ECS where a safety zone has been established, nobody may enter the safety zone without the consent of the Minister of LITT. Where Japanese nationals or foreigners enter the safety zones in violation of the provisions of the Act, or Chinese law enforcement agencies thwart the exploration and exploitation activities of Japanese enterprises or entities, the Japan Coast Guard can take the necessary actions against them in accordance with this Act.[20]

The Convention provides that the coastal States may take appropriate measures in the safety zones to ensure the safety both of navigation and of the artificial islands, installations and structures. The Act also specifies the measures that Japan may take. Such measures include that it may prevent the entry of vessels into the safety zones that have not acquired prior consent from the Minister of LITT. However, the following circumstances are excluded from this rule: "where vessels lose control; where vessels are rescuing lives or in distress; where the State or the prefectural or county government executes operations to ensure safety and order at sea; and where vessels are conducting operations pertaining to marine structures in the safety zone."[21]Anyone who violates the provisions above shall be sentenced to imprisonment of not more than one year or a fine of not more than 500,000 Yen; where the agent, employee or other workers employed by a legal person or a natural person violate the provisions above, such legal or natural person, in addition to the agent, employee or workers, shall also be fined.[22]

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19 See the provisions of the Japanese Law on the Exclusive Economic Zone and the Continental Shelf, quoted from Zhu Fenglan, Sino-Japanese Disputes Concerning the East China Sea and the Prospect for Resolution, *Contemporary Asia-Pacific Studies*, No. 7, 2005, pp. 8~9. (in Chinese)

20 The Japan Coast Guard (JCG) is an administrative agency with the goal of ensuring the security and good governance at sea in Japan. It takes the responsibilities of search and rescue, ensuring maritime traffic safety, preparing for disasters, protecting the marine environment and maintaining maritime order. One of its major functions is to guard Japan's maritime rights and interests. For instance, in its Pamphlet, it said, "[i]n recent years, there have been cases of Chinese activists ... through unlawful entry into the waters of and landings onto the Senkaku Islands ... In response to these encroachments on our maritime interests, JCG deploys patrol vessels and aircraft to these areas, carrying out strict & effective surveillance and security measures." See Pamphlet–Japan Coast Guard, at http://www.kaiho.mlit.go.jp/e/pamphlet.pdf, 29 November 2008. (in Japanese)

21 The Japanese Act on the Establishment ofSafety Zones around Marine Structures, Article 5(1).

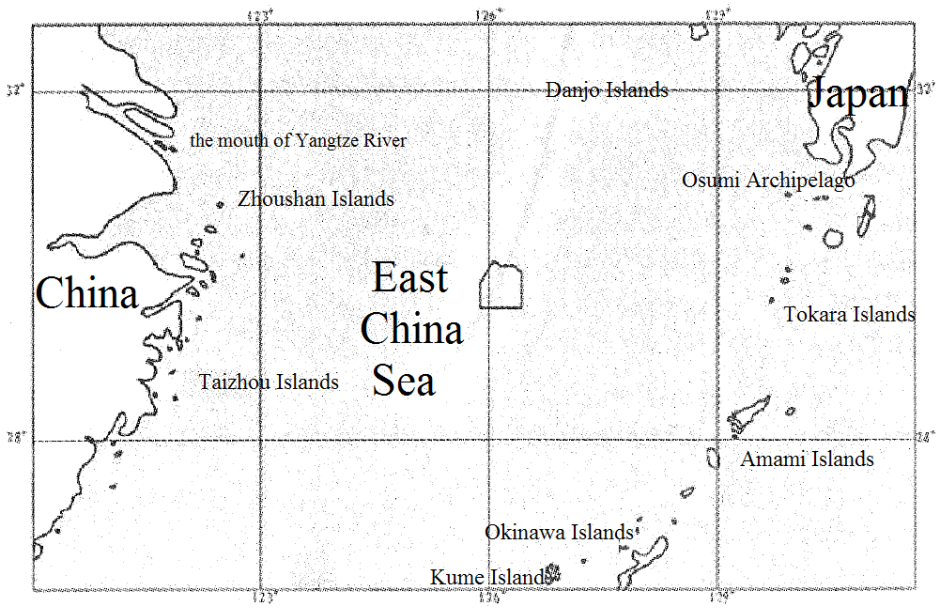
22 The Japanese Act on the Establishment ofSafety Zones around Marine Structures, Article 7.

Under the Convention, all ships must respect these safety zones and comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.[23] It propounds that, besides generally accepted international standards, all ships shall observe the appropriate measures taken by coastal States such as laws and regulations in relation to safety zones that have been enacted by those coastal States. The critical question here is what measures taken by coastal States qualify as appropriate? The Convention fails to offer an answer in this regard. As already mentioned above, domestic legislation of different States varies greatly on this matter, and is likely to give rise to conflicts. According to the Act, no one is allowed to enter the safety zones of Japan without consent. The question existing here is, is this measure appropriate? In light of international practice, such a measure does not contravene the Convention, as other countries have similar provisions in their domestic laws. Additionally, from the perspective of the language of the Convention, which reads, "all ships must comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones", it can be noted that the Convention emphasizes that ships navigating in the vicinity of safety zones must comply with generally accepted international standards. As such, the standards for navigation in the area within the safety zones seem to be left to the coastal States to decide at their own discretion. In this regard, can a coastal State prescribe that "without its approval, navigation in or other entries into safety zones are forbidden"? As discussed above, no pertaining provisions can be found in the Convention. The area of a safety zone with a radius of 500 meters is negligible compared to the ocean as a whole, and such a safety zone normally has little effect on navigation. With this understanding, as the Convention requires that all ships respect these safety zones, naturally all ships must respect regulations with regard to these safety zones issued by coastal States, albeit the strictness of such regulations.

III. The Relation between the Sino-Japanese Joint Development in the ECS and the Application of the Japanese Act on the Establishment of Safety Zones around Marine Structures

23 Article 60(6) of the UNCLOS.

On June 18, 2008, the Chinese and Japanese governments reached a principled consensus regarding some parts of the ECS and issued a memorandum of understanding on the first step of a joint development venture. It can be assumed that this is only a transitional arrangement and further negotiations are needed to resolve the dispute on delimitation in the ECS. However, prior to the conclusion of an ultimate agreement, the Japanese Act on the Establishment of Safety Zones around Marine Structures would serve as a bargaining chip in such negotiations to exert pressure on China. The regions for Sino-Japanese joint development are delineated explicitly through latitudinal and longitudinal lines in the deed of understanding between China and Japan, as referred to the marked area in the middle of the following map.[24]



In 1982, the Embassy of Japan in China submitted a map to the Ministry of Transport of China, proposing for the first time that the sea area between China and Japan should be delimitated in accordance with the principle of "the median

24 The Ministry of Foreign Affairs of China, China and Japan Reached a Principled Consensus on the ECS Issue, at http://www.fmprc.gov.cn/chn/xwfw/fyrth/1056/t448568.htm, 3 November 2008. (in Chinese)

line".[25] Judging from the location of the joint development area identified by the two governments in June 2008, some Japanese argued that the Sino-Japanese joint development in the north of the ECS was based on "the median line". Nevertheless, the Chinese government declared that it had never acknowledged the principle of "the median line" advocated by Japan,[26] and that there was no connection between the joint development area and the median line. Notwithstanding the fact that the joint development area is located in the vicinity of or across the "median line" unilaterally proposed by Japan and on the continental shelf of China,[27] it can be acknowledged that this is an outcome of China's compromise and is a political arrangement or a strategic choice in the context of prominent disputes between China and Japan in order to maintain a friendly relationship with Japan, and to promote stability in the East Asian region, and finally to achieve a win-win result for both parties.

How can the Japanese Act on the Establishment of Safety Zones around Marine Structures be applied in the ECS? The author holds that this Act, as a domestic law of Japan, can only be applied to Japan's exclusive economic zone and continental shelf. When it comes to the ECS, it can be divided into disputed areas and undisputed areas. For the undisputed areas which fall within the exclusive economic zone and continental shelf of Japan, this Act can be applied undoubtedly; but in respect of disputed areas, namely those between the Japanese side of the

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25 Yu Xi, Caution: Map of the Oil Fields in the ECS Drawn by Japanese, at http://gbl.chinabroadcast.cn/3821/2004/07/08/401@224385.htm, 4 November 2008. (in Chinese)

26 On June 24, 2008, Yang Jiechi, the Minister of Foreign Affairs of China, repeated that China had sovereign rights over the Chunxiao oil and gas field when talking about the ECS issues. A reporter asked, "how do you view some Japanese remarks that China and Japan would conduct joint development in the northern part of the ECS on the basis of the 'median line'?" Yang answered, "as to the delimitation of the ECS, China has never recognized and will not recognize Japan's so-called 'median line' in the future. China holds to delimitthe continental shelf of the ECS on the principle of natural prolongation. The final delimitation of the ECS will be settled through the negotiation between the two countries. See Foreign Minister Yang Jiechi Answered Questions Concerning the ECS Issues: the Sovereign Rights over Chunxiao Belongs to China, at http://www.chinadaily.com.cn/hqzg/2008—06/24/content_6791376.htm, 4 November 2008. (in Chinese)

27 China asserts that the continental shelf in the ECS should be delimited fairly based on the principle of the natural prolongation. Though China has yet to assert the definite outer limits of its continental shelf in the ECS, Article 2 of the China's Exclusive Economic Zone and Continental Shelf Act stipulates, "[t]he continental shelf of the People's Republic of China comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin...", thereby China's continental shelf in the ECS may extend to the outer edge of the continental margin, i.e. the Okinawa Trough.

"median line" claimed by Japan and the Okinawa Trough that is claimed by China to be the outer limits of its continental shelf based on the natural prolongation principle, can this Act be applied?[28] Obviously, it cannot be applied on the grounds that this part is China's continental shelf and the Japanese laws, *inter alia* the Japanese public law, cannot apply. Japanese Law on the Exclusive Economic Zone and Continental Shelf adopts the "median line" approach to the delimitation in the ECS, and the disputed part is located on the Japanese side of the median line. The Japanese laws provide that when there exists a line agreed by Japan and any other country, such line shall prevail, but China and Japan have not reached a consensus on the delimitation of the maritime boundary in the ECS until now. In this case, should Japan enforce its Act in the disputed areas, it would be enforcing its domestic laws on the territory of China, not only by infringing on China's maritime rights and interests but more importantly encroaching upon its sovereignty (which will be discussed in the last paragraph of this section).

Moreover, as China and Japan have reached principled consensus with respect

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28 It can be drawn from the statements of the China's Ministry of Foreign Affairs concerning the ECS issue that the ECS issue between China and Japan is mainly the issue of delimitation. Before an agreement is reached regarding the delimitation, the issue of oil and gas development in the ECS should be solved in priority. No official explanations from China or Japan with regard to the disputed areas in the ECS could be found. However, China's position is that the continental shelf of the ECS shall be delimited based on "the natural prolongation" principle; in contrast, Japan asserts that it should be delimited based on "the median line" principle. Though China has not expressly declared the precise outer limits of its continental shelf in the ECS, theoretically analyzing, such outer limits should extend to the Okinawa Trough. Further, under the 1996 Japan's Law on the Exclusive Economic Zone and the Continental Shelf, the Japanese exclusive economic zone and continental shelf extend to a distance of 200 nautical miles; nevertheless, if the line constituting the outer limit of its exclusive economic zone and continental shelf that is 200 nautical miles from its baseline lies beyond the median line between Japan and the State with opposite coast, the median line shall be adopted in delimitation. From the perspective of the Japanese Law on the Exclusive Economic Zone and the Continental Shelf, the outer limit of Japan's exclusive economic zone and continental shelf in the ECS claimed by Japan should be the median line and it cannot claim the exclusive economic zone and the continental shelf that fall within the Chinese side of the median line. Lastly, the minutes of the 161th Session of the Committee on Economy and Industry of the House of Councilors of Japan (November 2, 2004) also indicated that presently, Japan claimed that legal effect should not be given to the Okinawa Trough in the delimitation in the ECS. Rather, the equidistance principle or "the median line" principle should apply. (See Zhu Fenglan, The Natural Prolongation or the Median Line Principle: An Analysis of the Sino-Japanese Dispute on the Delimitation of the Continental Shelf in the ECS within the Framework of International Law, *International Studies*, No. 5, 2006, p. 22. (in Chinese)) To conclude, the author deems that the disputed areas between China and Japan in the ECS comprise areas between "the median line" and the Okinawa Trough.

to some areas in the ECS, the question still remains as to whether this Japanese Act can also apply to the joint development area. This paper's answer to this question remains dissentient. First, the joint development area is a transitional arrangement between the two parties before arriving at the decision of a final delimitation, thereby having no bearing on the delimitation principles asserted by both parties. The law applicable to this area is, in essence, a bilateral agreement reached by the parties on the basis of principled consent which, as an international treaty, shall preempt domestic laws of the parties. Second, this joint development area crosses the median line proposed by Japan, and the area on the Chinese side of the median line is unquestionably China's exclusive economic zone and continental shelf, hence the Japanese Act shall not apply there; the area on the Japanese side of the median line is under dispute, thus the Japanese law should not be applied either, as explained above. When the principled consensus was reached by China and Japan, such consensus prescribed that both sides should conclude a necessary bilateral agreement and complete domestic procedures as soon as possible. In view of this, when both sides conclude a necessary bilateral agreement, it is necessary to spell out the applicable laws to the joint development area in the agreement.

The Japanese Act apparently would assist Japan in the prevention of and response to "emergencies" in the ECS and at the same time, prepare Japan to implement the Act in the disputed areas in the ECS. Article 4(1) of the Act provides that, once the safety zone is set up, the Minister of LITT shall immediately give public notice of the location and extent of it. And it is the same when the safety zone is renounced. Such a public notice of the location of the safety zone is also required by the provisions of Article 60(5) of the Convention. As such, in case Japan undertakes development in the disputed areas in the ECS, due notice shall be given immediately of a safety zone so established. Otherwise, other States would not recognize it as a safety zone established in accordance with the Convention.

The conflict of sovereign rights and jurisdiction remains evident in China and Japan's endeavors in the joint development area in the ECS, and "the conflict would relate not only to competition over jurisdiction by the two parties concerned, but also overlapping jurisdiction arising from the exercise of jurisdiction by the

parties over a third State in the joint development area".[29] The author agrees that by virtue of the impending dispute between China and Japan concerning the maritime boundary in the ECS, there is a conflict of sovereign rights between the two States and consequently, a conflict of jurisdiction in the disputed areas of the ECS. Nevertheless, as discussed above, no specific provisions could be found in the Convention with regard to the exercise of jurisdiction in safety zones established by coastal States and State practice also varies in this regard. Some States execute legislative jurisdiction by enacting domestic legislation over safety zones, and exercise administrative and judicial jurisdiction by holding any party that has violated the laws liable for its conduct. Jurisdiction refers to the authority of a State to deal with persons, property and events. The exercise of jurisdiction is grounded on State sovereignty and is also the core of State sovereignty. In the absence of explicit provisions in the Convention, a few coastal States have exercised jurisdiction over safety zones established by themselves to a various extent. If Japan sets up safety zones in the disputed areas in the ECS based on the Act, it means that Japan unilaterally considers such areas are located in its exclusive economic zone or on its continental shelf. Undoubtedly, such an action (of establishing safety zones on China's continental shelf) would infringe on China's sovereign rights, jurisdiction and ultimately, sovereignty in the ECS. In this regard, the enforcement of the Japanese Act in those areas of the ECS under dispute will not be easy; and a compulsory enforcement would necessarily impair the Sino-Japanese relations, add uncertainty or difficulty to the negotiation in respect of delimitation in the ECS, and may eventually lead to diplomatic confrontation between China and Japan.

IV. Implications of the Japanese Act on the Establishment of Safety Zones around Marine Structures

From the legislative perspective, this Act as a domestic law of Japan with the aim of protecting its own maritime rights and interests should not have been criticized. Importantly, however, if Japan and China have conflicting interests over the development of oil and gas in the ECS and that relates to the safety zones

29 See Gong Yingchun, Sovereign Rights and Jurisdictional Conflict in the Joint Development Zone. It was submitted to the Symposium on Cross-Strait Cooperation in Maritime Affairs hold jointly by Xiamen University Center for Oceans Policy and Law and the Editorial of *China Oceans Law Review* on November 15, 2008, and was published in the current issue of the Journal.

established by Japan, this Act would provide protection for Japanese enterprises and entities which explore and exploit oil and gas in the ECS on the basis of its domestic law. In this connection, this Japanese Act has already had profound influence on the safeguarding of China's maritime rights and interests. Taking into consideration the pending dispute between China and Japan on the continental shelf and exclusive economic zone in the ECS, this Act is of particular significance.

The Act, an integral part of Japan's maritime policy and legislation, is one action Japan takes to carry out its maritime strategies.[30] The Basic Act on Ocean Policy, adopted by Japan on the same day as this Act, is a crucial act to implement its strategic ocean policy. It can be assumed from Japan's legislation and diplomatic moves that Japan takes a hard line on the protection of its maritime rights and interests in the ECS and its domestic legislation has proceeded steadily and gradually.

From the perspective of China's current domestic legislation, the Exclusive Economic Zone and Continental Shelf Act of the People's Republic of China, which was adopted on June 26, 1998 and has become effective, prescribes the following:

> *Article 3 The People's Republic of China shall have jurisdiction in the exclusive economic zone with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.*
>
> *Article 4 The People's Republic of China shall have jurisdiction over the continental shelf with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.*
>
> *Article 8 The People's Republic of China shall have exclusive rights in the exclusive economic zone and the continental shelf to establish and to authorize and regulate the establishment, operation and use of artificial islands, installations and structures. The People's Republic of China shall have exclusive jurisdiction over the artificial islands, installations andstructures in the exclusive economic zone and the continental shelf, including jurisdiction*

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30 As regards Japan's ocean strategy, policy and legislation, see Jin Yongming, Japan's Recent Moves in Maritime Affairs and Their Implications for China, *China Oceans Law Review*, No. 1, 2007, pp. 15~28. (in Chinese)

with regard to customs, fiscal, health, security and immigration laws and regulations. The competent authorities of the People's Republic of China shall have the right to establish safety zones around the artificial islands, installations and structures in the exclusive economic zone and continental shelf inwhich they may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

It is evident that China's domestic legislation is merely a reiteration of the relevant provisions of the Convention without giving further elucidation of the detailed issues unsettled in the Convention based on the particular situations of China. For instance, China's Exclusive Economic Zone and Continental Shelf Act is silent on the issues such as the definition and the breadth of safety zones, the name of the specific competent authority, the content of appropriate measures. Such a principled act shall be supplemented with concrete regulations to better resolve the existing or potential problems in practice and to furnish a powerful legal basis for China's development of the resources in the exclusive economic zone and on the continental shelf. Otherwise, where disputes of this kind arise in practice, only the principles specified in the Convention or the existing legislation can be relied on to handle them. This option may have the advantage of flexibility but is very likely to negatively impact the protection of China's maritime rights and interests due to lack of concrete law enforcement measures and direct legal basis.

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