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2009 年卷第 1 期　总第 9 期

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CHINA OCEANS LAW REVIEW

Volume 2009 Number 1

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卷首语

本期的《中国海洋法学评论》有一个当然的焦点:大陆架外部界限划定问题。联合国大陆架界限委员会已于2009年5月12日截止受理各国提出其大陆架外部界限的申报。总共有50个国家提出了申报。但是,真正的问题现在才要开始。大陆架界限委员会能不能有效处理所有这些申报案件?今后该委员会陆续做出的建议文,到底会发挥什么样的效力?对未来各国的大陆架权益会产生什么样的影响?这些问题都有待我们持续的关切与研究。

从中国的角度,本期刊登了《试论中日东海共同开发与中国200海里以外大陆架的关系》(贾宇)、《日本外大陆架划界申请案内涵与中国的立场》(金永明)、《中日东海问题原则共识述评》(余民才)、《钓鱼岛海域渔业资源与划界之争分析》(王泽林)等几篇深刻的专题文章。

在本期的综述专栏部分,也有很许多很可贵的资料。除了本刊课题组针对2008年全国有关海洋法学的研究重点,再度撰写的一份年度综述外;去年(2008)11月厦门大学海洋政策与法律中心主办的一场两岸产、官、学界专家研讨会,深入研讨了两岸目前在海洋上所共同面对的问题,以及未来各种可能的合作项目,这次会议的精彩内容也由王泽林、徐鹏、董琳三位详尽记述,并在本期的《中国海洋法学评论》中刊出。

另外,印度海洋法与海洋安全政策专家Vijay Sakhuja博士就印度海洋执法的机制与实践作出了说明。本刊前编辑季烨翻译了一份海外专家的演讲稿,深入介绍了美国迄今没有加入《联合国海洋法公约》的前因后果。

所有这些文字创作,加上刊末附载的国内外有关海洋发展的最新法令文献,都是编者们精心为各位读者提供的专业材料,敬请各位读友参阅、收藏。

我们愿在此再度感谢我们的作者们,他们的热心研究、撰文,提升了中国海洋法学的整体研究水平,对国家海洋法学研究,无论公法、私法,都产生了正面的效应,实在值得我们为他们喝彩。部分作者的部分佳作,

未能在本刊坚持的双盲审查制度中顺利过关，我们深感遗憾，并且期盼获得各位的谅解与继续支持。当然，您的阅读就是我们一切服务的目的。欢迎您继续对本刊提出任何建言，我们当尽力改善。

编辑部　谨识

EDITOR'S NOTE

The current issue naturally focuses on the delineation of the outer limits of the continental shelf beyond 200 nautical miles. The deadline for making submissions on such limits by States to the UN Commission on the Limits of the Continental Shelf (CLCS) is May 12, 2009 and 50 States submitted their applications by this deadline. However, real problems just begin: will the CLCS be able to address all these submissions effectively? What effects will the recommendations made by the CLCS bear? What will be the impacts on States' rights and interests over the continental shelf? These questions deserve our constant concern and research.

From the perspective of China, the current issue includes several articles thoroughly analyzing this topic: Sino-Japanese Joint Development in the East China Sea and the Outer Continental Shelf of China (JIA Yu), The Contents of Japan's Submission on the Extended Continental Shelf and China's Position (JIN Yongming), The Sino-Japanese Principled Consensus on the East China Sea Issues: A Commentary (YU Mincai), Disputes over Fishery Resources and Maritime Boundary Delimitation of the DiaoyuDao Islands: An Analysis (WANG Zelin).

In Notes of the current issue, a wealth of valuable information is presented to our readers. Apart from a Summary to the Research on China Oceans Law in the Year of 2008 conducted by COLR working group, a detailed summary of a symposium convening professionals and experts from industry, government and academia across the Taiwan Strait held by the Xiamen University Centre for Oceans Policy and Law in November 2008 is also covered here. This symposium took an in-depth look at the problems confronted by both sides of the Taiwan Strait on marine affairs and potential cooperation opportunities in the years to come. WANG Zelin, XU Peng and DONG Lin make this comprehensive summary on the highlights of the symposium.

Additionally, Dr. Vijay Sakhuja, an expert on Indian ocean law and maritime security policies makes an observation on the mechanisms and practices of maritime law enforcement in India. JI Ye, a former editor of our journal, translates a speech given by a foreign expert with respect to the cause and effect of the US

refusal to accede to the UN Convention on the Law of the Sea.

All these articles as well as the latest Chinese legislation and international instruments on marine affairs compiled at the end of this issue are the efforts of the editors for the purpose of providing professional materials for our readers' reference and enjoyment.

We would like to extend our genuine gratitude to the authors whose devoted research and writing contribute to the overall enhancement of China's legal research on the law of the sea. Their contributions to ocean law studies either in public law or private law sense deserve our applause. We are regretful that some well-written works of certain authors fail to pass the double-blind review adhered to by our journal and hope that you could understand and continue to support us. Of course, your reading of COLR is the ultimate goal of all our efforts. We welcome you to propose suggestions to our journal and will strive to live up to your expectations.

COLR Editorial

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海洋渔业执法的国际合作
——我国大陆的执法实践

黄硕琳 [*]　　刘艳红 [**]

内容摘要: 长期以来,海洋渔业制度中存在的主要问题之一就是缺乏有效的监测、管理、监督和执法机制。加强国家间海洋渔业的执法合作是国际渔业法律制度的一个明确发展方向。本文阐述了海洋渔业执法合作的法律基础,介绍了我国大陆与美国、日本、韩国、越南等国家开展海洋渔业执法国际合作的三种不同方式:一是派遣授权的执法人员参加合作方的海上执法巡航,对违法渔船进行联合登临检查,由船旗国进行处罚;二是双方的渔业执法船在海上联合编队巡航,或与对方的海上巡航飞机合作,发现可疑违法渔船后交由船旗国进行调查取证和查处;三是将海上观察到的对方可疑违法渔船的信息向对方主管机构通报,由船旗国进行调查取证和处罚。我国大陆海上渔业执法的国际合作呈现出以下几个特点:(1)在现行国际法的框架下开展执法合作,突出了船旗国管辖原则。不管是在公海水域或是在渔业协定规定的水域,渔业执法合作的实践都体现了对船旗国主权和管辖权的尊重,同时也体现了对执法合作方的尊重。(2) 海上渔业执法的合作极大地提高了海上执法的成效,有效地打击了违反国际法和国内法的捕鱼活动。

关键词: 海洋渔业　执法　国际合作

长期以来,公海渔业制度中存在的主要问题之一就是缺乏有效的监测、管理、监督和执法机制。公海上船旗国管辖原则是国际法的一个传统原则,但对公海渔业来说,仅靠船旗国的管辖已经很难确保渔船遵守公海渔业资源的养护和管理措施。为进行有效的监测、管理、监督和执法,公海渔业制度的一个明确发展方向就是加强公海渔业的执法合作。

我国是世界第一渔业大国,也是拥有最多海洋捕捞渔船的国家。据统计,截至2005 年 9 月底,中国大陆共有 19.47 万艘海洋渔船获得许可证,总吨位为 541.01

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万吨，总功率为1262.18 万千瓦。[1] 大陆的海洋渔业生产活动不仅涉及到公海水域，也涉及有关国家的专属经济区和双边渔业协定水域，海上渔业执法的任务既沉重又艰巨。

为进行有效的监测、管理、监督和执法，从上个世纪 90 年代开始，我国大陆的渔业管理与渔业执法机构就开始了与美国海岸警卫队在北太平洋公海上的渔业执法合作。从 2000 年开始，《中华人民共和国和日本国渔业协定》（以下简称"《中日渔业协定》"）、《中华人民共和国和大韩民国渔业协定》（以下简称"《中韩渔业协定》"）、《中华人民共和国政府和越南社会主义共和国政府北部湾渔业合作协定》（以下简称"《中越渔业合作协定》"）相继生效，我国大陆的渔业管理与渔业执法机构也开始了在协定水域与其他国家的海上渔业执法合作。

一、海上渔业执法国际合作的法律基础

国际渔业公约或协定的执行一直是困扰国际社会的一个难题。由于执行不到位，公海渔业资源的养护和管理措施未能发挥作用。因此，从上世纪 80 年代以来，国际渔业法律制度发展的一个趋势就是构建海上执法国际合作的法律框架。

1982 年的《联合国海洋法公约》（以下简称"《公约》"）只是规定了各国在养护和管理生物资源方面的合作。《公约》第 118 条规定："各国应互相合作以养护和管理公海区域内的生物资源。凡其国民开发相同生物资源，或在同一区域内开发不同生物资源的国家，应进行谈判，以期采取养护有关生物资源的必要措施……"[2]

1993 年的《促进公海渔船遵守国际养护和管理措施的协定》（以下简称"《公海渔船协定》"）对执法的国际合作提出了进一步的要求。《公海渔船协定》第 5 条规定："各缔约方均应酌情合作实施本协定，尤其应交流同渔船活动有关的资料，包括证据材料，以协助船旗国查明据报告悬挂其旗帜而从事损害国际养护和管理措施活动的那些渔船，从而履行第 3 条规定的义务……必要时各缔约方应酌情在全球、区域、分区域或双边基础上缔结合作协定或作出互助安排，以便促进实现本协定的目标。"[3]

1995 年的《执行 1982 年 12 月 10 日〈联合国海洋法公约〉有关养护和管理跨界鱼类种群和高度洄游鱼类种群之规定的协定》（以下简称"《执行协定》"）对执法合作作了更详细的规定，不仅对国际执法合作提出了较高的要求，也对分区域

1 唐建业、张建国、赵铁武、唐文生：《完善我国渔船管理的探讨》，载于《渔业政策理论研究论文集》（2006 年）。
2 《联合国海洋法公约》第 118 条。
3 《促进公海渔船遵守国际养护和管理措施的协定》第 5 条。

和区域的执法合作作了具体的规定。《执行协定》要求各国应直接地或通过分区域或区域渔业管理组织或安排进行合作，以确保养护和管理措施的遵守和执法工作的落实；规定船旗国对涉嫌违反养护和管理措施的行为进行调查时，可向提供合作可能有助于进行这种调查的任何国家请求协助。《执行协定》还要求各国应相互协助查明据报曾经从事破坏养护和管理措施效力的活动的船只。

除上述国际公约、协定规定了有关国家国际执法合作的责任和义务外，《中日渔业协定》、《中韩渔业协定》、《中越渔业合作协定》也都规定了执法合作的事项。《中越渔业合作协定》规定：缔约各方授权机关对进入共同渔区内己方一侧水域的缔约双方国民和渔船进行监督检查，并有权在己方一侧水域对另一方违反规定的国民和渔船进行处理并将结果通知另一方；必要时，缔约双方可联合监督检查。《中日渔业协定》规定：缔约一方发现对方国民和渔船违约时，可提醒该国民和渔船，并将事实通报对方；缔约另一方应将采取必要措施后的结果通报该方。

1993 年 12 月 3 日，中国政府和美国政府签订了一份《关于联合执行联合国大会关于大型流刺网决议的谅解备忘录》（以下简称“《谅解备忘录》”）。按照《谅解备忘录》的规定，两国的执法官员，在公海上发现任何违反联合国大会决议，使用或装备有大型流刺网的悬挂美国旗帜或中国旗帜的渔船，可以登临检查。该备忘录还规定一国的执法官员可随另一国的执法船舶在公海上执法。

所有这些法律文件构成了我国海上渔业执法国际合作的法律基础。从上世纪 90 年代以来，我国大陆的渔政渔港监督管理机构正是根据这些国际、国内法律规定，与多个国家开展了海上渔业执法的合作，提高了执法效力，增进了与有关国家的相互了解，树立了中国政府在海洋生物资源养护和管理方面负责任的大国形象。

二、中美北太平洋渔业执法合作

地处北纬 38 度以北、西经 167 度以西的北太平洋公海，鱿鱼资源非常丰富。因此，早在上世纪 80 年代以前，世界上不少国家就在这些水域进行鱿鱼钓和流网作业。我国西北太平洋鱿鱼钓作业始于 1990 年，1991 年以后东移至北太平洋。上世纪 90 年代后期，由于中日、中韩渔业协定的签定和实施，我国渔船的作业空间进一步缩小，原来从事近海渔业作业的民间渔船纷纷进入到北太平洋从事鱿鱼钓作业。鱿鱼钓产业成为涉及国内 30 多家渔业企业，400 多艘鱿钓渔船，上万渔民和数万加工、销售人员的重要产业，在我国的远洋渔业中占据着重要地位。据统计，2007 年，仅北太平洋鱿钓渔业的总产值就达 6.78 亿元，对扩大就业、发展地方经济等起到了积极的作用。[4]

由于到北太平洋作业的鱿鱼钓渔船作业方式主要是手钓和机钓，又是夜间作

4 参见中华人民共和国东海区渔政渔港监督管理局资料。

业，劳动强度大，而且产量有限。个别渔船受经济利益驱使，无视国际国内法律法规，从事流网捕捞鱿鱼的作业，不仅扰乱了渔场秩序，还严重威胁航运安全。

1989年12月22日，联合国第44届大会通过了《大型远洋漂网捕鱼及其对世界海洋生物资源的影响》的第44/225号决议，该决议建议国际社会所有成员从1992年6月30日起全面禁止大型流刺网作业，以防止此种捕鱼活动对任何区域的渔业资源产生不可接受的影响。1990年12月20日，联合国第45届大会通过了第45/197号决议，该决议重申了第44/225号决议的精神，号召国际社会全面执行第44/225号决议，再次强调国际社会所有成员应采取必要措施，保证遵守联合国大会决议。1991年12月20日，联合国第46届大会通过了《大型远洋漂网捕鱼及其对世界海洋生物资源的影响》的第46/215号决议。该决议进一步重申第44/225号和第45/197号决议，明确从1993年1月1日起，在各大洋公海海域，全面禁止大型流刺网作业。

为了督促第46/215号决议的执行，联合国先后于1994年的第49届大会、1996年的第51届大会、1997年的第52届大会和1998年的第53届大会通过决议，敦促各国适当采取制裁措施，打击违反第46/215号决议的行为。美国《1992年公海流网捕鱼执行法》明令禁止公海流网作业方式，并禁止从违反联合国决议的国家进口鱼、渔产品和运动用捕鱼用具。

中国政府大力支持联合国关于禁止在公海使用大型流网作业的决议，对联合国大会的第44/225号、第45/197、第46/215号决议都投了赞成票。1990年11月10日，农业部发布了《关于印发联合国大会通过禁止在公海使用大型流网决议的通知》，“决定停止审批发展公海流网渔业项目”。1991年和1993年，农业部两次发布《关于禁止在公海使用大型流网作业的通知》，禁止我国渔船在公海从事流网或兼流网作业，并对违规渔船制定了严厉的处罚措施。1993年12月，中美两国政府签署了《谅解备忘录》，根据该备忘录的规定，中国政府自1994年开始派遣中国渔政检查官搭乘美国海岸警卫队舰艇在北太平洋海域检查联合国大会第46/215号决议的执行情况。中国渔政检查官在执行《谅解备忘录》的过程中，代表中国政府对中国渔船进行管辖。在执行过程中，中美双方的执法人员对涉嫌违法的船只进行联合登临，调查取证，而后交由船旗国根据其国内法的规定进行处罚。

例如，2007年10月5日，执行中美联合执法任务的美国海岸警卫队“鲍特韦尔”号舰在北纬42度30分、东经152度22分的北太平洋公海海域发现“鲁荣渔2659”、“鲁荣渔2660”和“鲁荣渔6105”等渔船涉嫌非法流网作业。依据中美两国政府《谅解备忘录》的有关规定，中美执法人员联合登临检查了“鲁荣渔2659”、“鲁荣渔2660”和“鲁荣渔6105”等渔船。经现场检查确认，这3艘渔船涉嫌违反了联合国大会第46/215号决议，中美联合执法人员当场对上述3艘渔船实施了扣押。中华人民共和国东海区渔政渔港监督管理局（以下简称“东海区局”）

根据中国渔政指挥中心的要求，派遣“中国渔政201”船于2007年10月11日出发，前往北纬29度3分、东经131度11分海域，与负责押送此3艘违规渔船的美国海岸警卫队726舰会合，接收上述3艘违法渔船，连续押送4天4夜后于10月17日成功押送回上海港。东海区局负责对上述3艘渔船的违法事实进行调查取证，并根据法律作出了行政处罚决定：共计没收流网捕捞的非法渔获物约81.33吨（拍卖以后的所得上缴国库）；3艘渔船分别罚款人民币5万元，共计罚款人民币15万元；没收渔具（流网1909片、流网网具3件套）；没收“鲁荣渔2659”、“鲁荣渔2660”和“鲁荣渔6105”。[5] 东海区局将查处的情况通报美国海岸警卫队。

从2002年开始，中国渔业管理机构连续6年派遣渔政船赴北太平洋公海执行渔政巡航任务，监督检查在北太平洋公海作业的中国渔船。2005年和2006年，中国渔政船与美国海岸警卫队巡逻船在北太平洋进行了编队巡航和双边会晤，拓展了中美联合执法的新模式，促进了中美北太平洋联合执法机制的完善。2007年8月，美国海岸警卫队“鲍特韦尔”号舰成功访问上海，中国渔政代表团与美国海岸警卫队官员交流了中国渔政查处北太平洋非法流网案件的情况，就如何加强双方执法合作达成共识。[6]

在北太平洋，除了与美国合作外，中国渔政还与日本、加拿大等国家进行合作，打击公海上的非法流网作业。2006年，中国渔政根据日本和加拿大政府提供的照片资料，成功查获了公海非法流网渔船“浙远东601”、“浙远东607”、“浙远东801”和“舟顺渔2007”4艘违法渔船，涉案渔船和渔获物全部被依法没收。

通过海上执法的国际合作，仅东海区局就查处北太平洋违法捕捞案116起，没收非法流网渔船19艘，情节特别严重的当事人还因触犯刑法被追究了刑事责任。非法流网案件的查处有效打击了公海非法流网作业渔船，体现了中国渔政执法人员良好的执法水平和法律素养，体现了中华人民共和国政府认真履行国际公约、查禁北太平洋公海非法流网作业的决心。

三、区域渔业执法合作

（一）中越渔业执法合作

《中越渔业合作协定》是在确定了两国在北部湾的领海、专属经济区和大陆架分界线的基础上签订的，共包括7部分，22条及1个附件。该协定于2004年6月30日生效。协定规定了共同渔区水域的范围（图1），要求缔约双方本着互利的精神，在共同渔区内进行长期渔业合作。根据该区的自然环境条件、生物资源

5 资料来自东海区局张秋华副局长2008年1月10日流网专案通报会讲稿。
6 资料来自东海区局李富荣局长在“北太平洋公海非法流网渔具销毁仪式”上的讲话。

特点、可持续发展和环境保护的需要，以及对缔约各方渔业活动的影响，共同制定共同渔区生物资源的养护、管理和可持续利用措施。由中越北部湾渔业联合委员会（以下简称“渔委会”）每年确定缔约各方在此区的作业渔船数量。欲在该区作业的渔船须向本国政府授权机关提出申请，获得捕捞许可证并按规定进行标识。

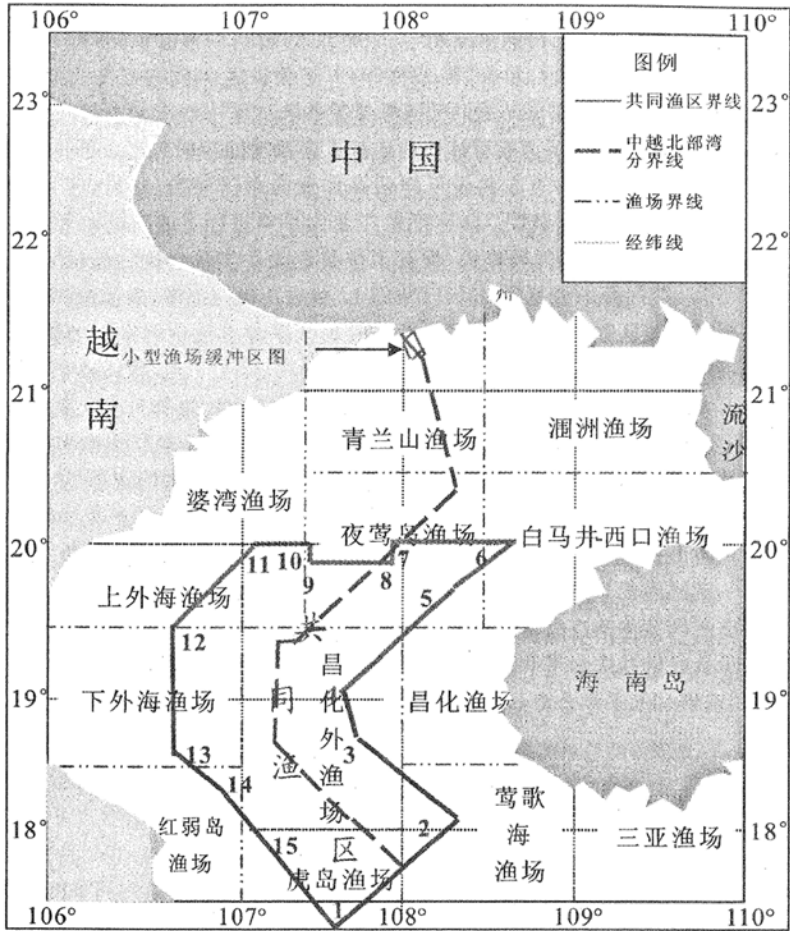

图 1　中越北部湾渔业合作协定水域示意图

缔约各方授权机关对进入共同渔区内己方一侧水域的缔约双方国民和渔船进行监督检查，有权在己方一侧水域对另一方违反规定的国民和渔船进行处理并将结果通知另一方。必要时，缔约双方可联合监督检查。

2004 年 2 月，中越双方共同制订了《北部湾共同渔区渔业资源养护和管理规定》，要求任何人和渔船进入共同渔区从事渔业活动，必须取得共同渔区渔业捕捞许可证。双方根据中越北部湾渔委会每年确定的共同渔区作业渔船数量，向本国渔船发放许可证。双方按已达成一致的渔船数量互相提供防伪标识，发放许可证

时，发放方应将对方提供的防伪标识粘贴在规定的栏目中。

双方监督机关对进入共同渔区己方一侧水域的双方渔船和人员进行监督检查，实施处罚；对另一方的渔船和人员的违规行为进行处理时，应在案件发生后 72 小时内将有关违规情况通报另一方实施机关，需暂扣渔船应在 48 小时内通报，处罚决定下达后 72 小时内应通报处罚决定；应尊重和不妨碍获得许可证的渔船和人员从事正常渔业活动，避免重复检查和处罚。双方监督机关可在共同渔区进行联合检查，可采取互派公务人员上对方公务船或双方公务船联合检查的方式。

协定实施 4 年来，中国渔政南海总队和广东、广西、海南三省（区）渔政部门采取渔政船定点执勤与编队巡航相结合的方式，在海况允许的情况下，坚持每天派 1 艘以上渔政船在海上巡航检查，对北部湾共同渔区、过渡性安排水域及小型渔船缓冲区等重点海域的渔业活动实施监管，防止渔船非法越界生产，对非法进入中方海域作业的越南渔船进行查处。4 年来共组织 208 艘次渔政船执行北部湾监管任务 2148 天，观察记录渔船 42782 艘，驱赶越南渔船 434 艘，查处未经许可进入我国管辖海域从事渔业活动的越南渔船 37 艘，救助遇险、遇难渔船 70 艘次，渔民 543 人。[7]

自 2006 年起，农业部南海区渔政渔港监督管理局与越南海警局每年组织一次中越北部湾共同渔区渔业海上联合检查，至今已开展了 3 次行动。联合检查的成功实施，增强了中越两国执法部门之间的互信，加深了双方的了解，促进了交流，增进了中越两国之间的传统友谊。

我国还建立了中国渔政、边防海警北部湾渔业海上联合监管机制。协定实施 4 年来，渔政与海警先后开展 8 次北部湾渔业海上联合监管行动，共出动渔政、海警船艇 50 多艘次。渔政和海警部门积极履行协定赋予的职责，在北部湾渔业海上联合监管机制框架下加强合作，共同查处外国侵渔渔船，打击盗抢渔民网具等针对渔民的犯罪行为，越南渔船进入我国管辖海域从事侵渔和盗抢网具等情况明显减少。渔政和海警部门不断巩固北部湾渔业海上联合监管机制，加强对外执法合作，在登临检查、抓扣、处罚、押送、监护、遣送外国渔船（渔民）中密切配合、分工协作，顺利完成数十宗涉外渔业案件的处理，为《中越渔业合作协定》的顺利实施奠定了基础。

（二）中韩渔业执法合作

《中韩渔业协定》于 2001 年 6 月 30 日正式生效。《中韩渔业协定》规定：缔约一方发现缔约另一方国民及渔船违反中韩渔业联合委员会的决定时，可就事实

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7 《中越北部湾渔业合作协定平稳实施 4 周年》，下载于 http://www.jsof.gov.cn/art/2008/7/9/art_37_27096.html，2008 年 7 月 9 日。

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；缔约另一方应尊重对方的通报，并在采取必要措施后，将结果通知对方；在过渡水域可采取共同的养护措施和适量的管理措施，也可采取联合监督检查措施，包括联合乘船、勒令停船、登临检查等。

在实际执行过程中，根据《中韩渔业协定》规定的入渔船数和捕捞额度限制制度，中韩渔业双方高层每年年底举行 1 次会议，通报一年来各自履行协定情况，研究确定下一年度入渔船数和捕捞配额。从 2001 年至 2006 年 6 月 30 日，我国共向韩国发送我国渔船入渔信息 20 余万条。此外，我国还组成专属经济区渔政巡航船队，不断加强《中韩渔业协定》相关水域（特别是韩国特定禁区附近海域的巡航管理和过渡水域）联合检查，规范了我国渔船的作业秩序，有效地减少了涉外违规事件的发生。[8]

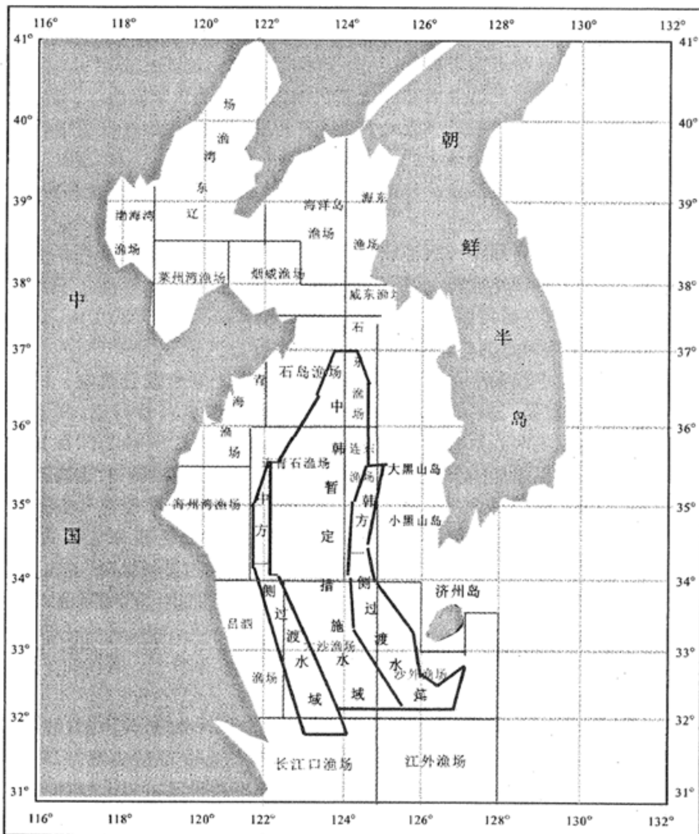

图 2　中韩渔业协定水域示意图

8　牛玉山：《现代渔业管理的成功实践——〈中韩渔业协定〉实施情况回顾与探讨》，载于《中国渔业报》2006 年 8 月 25 日。

中韩双方定期就维护《中韩渔业协定》水域作业秩序和两国渔业执法合作等内容进行交流，积极推进两国渔业执法交流事项。到 2006 年为止，我国渔政机构派出执法船与韩方执法机构进行了 14 次联合检查，查处违规渔船 50 艘次。2007 年 5 月两国渔业执法公务员互换乘船交流，10 月首次开展两国渔业执法公务船互访，对增进相互理解发挥了重要作用。双方还同意在两国渔业执法交流实施机关之间建立渔业执法联络机制，对双方的渔业执法和渔业违规作业情况及时交换意见。[9]

（三）中日渔业执法合作

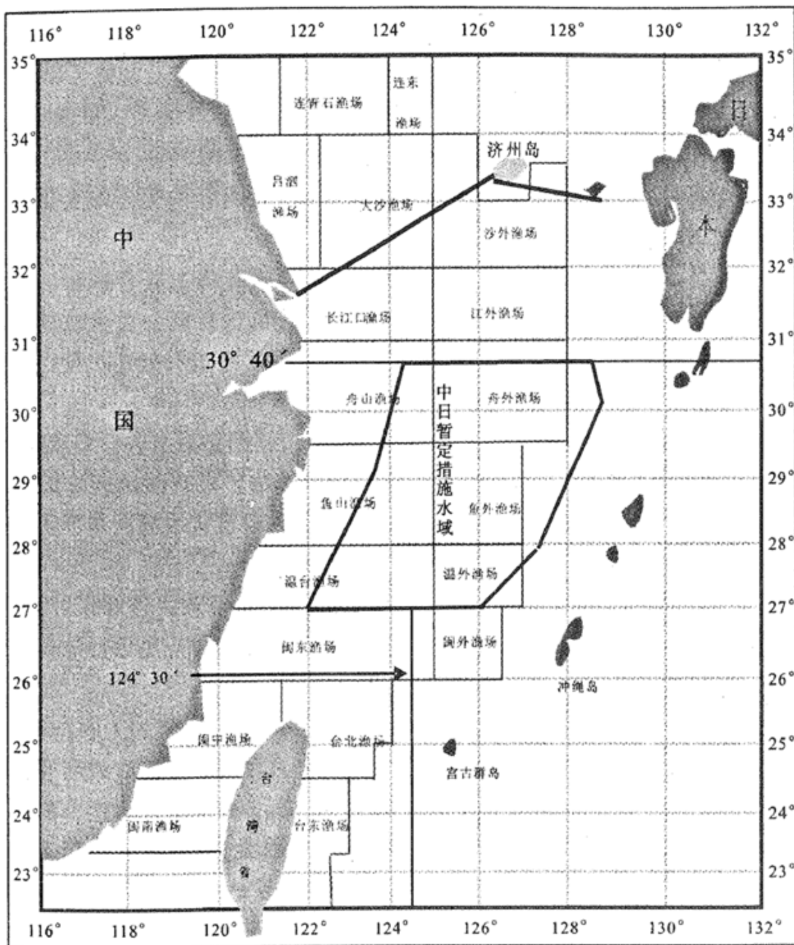

图 3　中日渔业协定水域示意图

9　吕威：《2006 年度中韩渔业执法工作会谈顺利举行》，载于《中国渔业报》2006 年 10 月 21 日。

《中日渔业协定》于 2000 年 6 月 1 日正式生效。该协定明确规定“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”。协定还规定缔约一方发现对方国民和渔船违约，可提醒该国民和渔船，并将事实通报对方；缔约另一方应将采取必要措施后的结果通报对方等。事实上，违约管辖权属船旗国，由中、日双方按各自国内法处理本国的渔船。

在实际的执行过程中，中日两国每年召开渔业联合委员会，决定双方的入渔船数和采取的管理措施，并将入渔的船名册通报对方。海上执法时，发现对方违法渔船应及时通报对方；另一方则根据本国的法律规定进行查处，并将查处结果通知对方。与其它两个渔业协定不同的是，在《中日渔业协定》的执行过程中，尚未建立联合执法的机制。

四、我国渔业执法国际合作的特点分析

十几年渔业执法合作的实践表明，我国的渔业国际执法合作主要以下述几种方式进行：

一是执法人员参加合作方执法船的海上巡航，进行海上联合执法。遇到任何一方涉嫌违法的渔船，由双方的执法人员进行联合登临检查。查获的违法证据连同违法渔船交由船旗国根据其本国法律规定进行处罚。处罚结果通报合作方。

二是海上编队巡航，进行联合执法。双方执法船舶在海上联合编队巡航，或大陆执法船舶与合作方空中巡航飞机合作，联合执法。发现任何一方涉嫌违法的渔船，由船旗国执法船实施登临检查，并根据其本国法律规定进行处罚。

三是双方将在海上观察到的对方涉嫌违法的渔船相关信息通报对方，由船旗国调查取证，对被证实违法的渔船，由船旗国按照其法律规定进行处罚。处罚结果向合作方通报。

这些执法合作虽然在形式上有所不同，但却具有共同的特点。其一，几种执法合作的方式都建立在国际、国内法律基础之上，且合作国家具有遵守海洋生物资源养护与管理法律措施的意识和强烈愿望。只有合作双方都有严格执法的意愿，执法的合作才能配合密切，合作的效率才能不断地提高。其二，执法合作的实践中，突出了船旗国管辖原则。无论是在公海上或是在渔业协定水域内，对涉嫌违法的渔船的惩处都是由船旗国依据其本国的法律规定实施，体现了对船旗国主权和管辖权的尊重，也体现了船旗国责任的强化。而且把查处的结果通报给执法合作方的做法，体现了对执法合作方的尊重，也体现了渔业执法国际合作的严肃性。其三，海上渔业执法合作有效打击了违法渔船在公海上和渔业协定水域的违法捕鱼活动，大大提高了海上渔业执法的效率。通过海上执法的国际合作，违规渔船的数量在迅速减少。以北太平洋公海的渔业执法合作为例：2006 年我国渔政

机构向有关国家通报了查处的 53 艘违法渔船；2007 年共通报了 6 艘违法渔船；2008 年至作者成文时尚未发现违法渔船。

当然，要进行海上渔业执法合作，执法机构也必须满足一些最基本的要求。首先，执法队伍的人员素质必须能满足国际执法合作的需要。执法人员不仅要了解和掌握国内的相关法律规定，也要了解国际和合作国家的法律规定；不仅要能和本国渔民沟通，还要能和合作方的执法人员进行沟通。我国渔业执法机构在这方面做了大量的工作：为了适应执法人员参加合作方海上巡航的需要，我国从 1993 年就开始渔政人员的执法培训，包括国际法律培训、执法技能培训和英语培训。所有派往国外参加联合执法的人员都参加了培训，保证了联合执法工作的顺利进行。其次，执法队伍的装备也必须能满足联合执法的需要。为了尽快适应海上渔业执法的需要，从 1998 年以来，我国大陆投入大量的资金建设 4 艘 1000 吨级、13 艘 500 吨级、12 艘 300 吨级渔政船；大部分渔政船配备了卫星 C 站、卫星 B 站、电子海图、多目标跟踪雷达系统等先进的通讯和执法设施。[10] 这些渔政船的投入使用为实施海上渔业执法的国际合作创造了基本条件。

五、结语

从上个世纪 90 年代开始，我国根据国际法的相关规定，开始了与相关国家在公海水域和渔业协定水域的执法合作。从派遣渔业执法人员参与他国的海上渔业执法巡航，到两国执法船舶（包括他国执法巡航飞机）在海上的联合执法巡航，实现了联合执法方式的不断创新，有效地打击了违法的海洋捕鱼活动，使海上的渔业生产秩序明显好转，既保护了海洋渔业生产者的合法利益，也维护了中国的海洋权益。我国同多个国家开展的海洋渔业执法国际合作既展示了中国政府认真履行国际多边公约和双边协定的良好形象，也顺应了国际渔业管理发展的新潮流。

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10 《“十五”渔业成就：200 海里专属经济区渔政巡航卓有成效》，下载于 http://www.wzsci.com，2005 年 12 月 27 日。

试论中日东海共同开发与中国 200 海里以外大陆架的关系

贾 宇*

内容摘要: 根据《联合国海洋法公约》, 200 海里以外的大陆架当然也是沿海国大陆架的组成部分。共同开发是缓解大陆架划界争端的有效方法, 其实施空间是在沿海国权利主张重叠的大陆架区域。就中日而言, 共同开发区的选划应在冲绳海槽最大水深线至日本所谓“中间线”之间的海域。“东海共识”是中日两国政府达成的政治意愿, 是进行国际法上的共同开发的基础。而日方企业参加春晓油气田的合作开发, 是依照中国法律作出的商业性安排, 既不是国际法意义上的共同开发, 与“中日关于东海共同开发的谅解”也没有关系。

关键词: 共同开发 200 海里以外大陆架

一、大陆架法律制度之基本要义

（一）大陆架的法律概念

大陆架原本是海洋地理和地质学上的一个概念，第二次世界大战以后出现了法律概念的大陆架。1945 年 9 月 28 日，美国总统杜鲁门发表了《关于大陆架底土和海床的自然资源政策的第 2667 号总统公告》（以下简称“《杜鲁门公告》”），宣布“处于公海下但毗连美国海岸的大陆架的底土和海床的自然资源属于美国，受美国的管辖和控制。”[1] 与此同时，美国政府发布新闻公告，称大陆架的范围不超过 100 㖊水深。此后不久，很多国家，特别是拉美国家纷纷对其邻接海域、海底及其资源主张权利，但所主张的内容和范围都不尽相同。

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1 北京大学法律系国际法教研室编：《海洋法资料汇编》，北京：人民出版社 1974 年版，第 386~387 页。

随着科学技术和国际法的发展，大陆架法律概念的内容也发生了深刻的变化。从 1958 年第一次联合国海洋法会议制定的《大陆架公约》和 1982 年第三次联合国海洋法会议制定的《联合国海洋法公约》（以下简称"《公约》"）的有关规定中，可以清晰地看出这一演进过程。根据 1958 年《大陆架公约》，大陆架包括两种情况："(1) 邻接海岸但在领海以外之海底区域之海床及底土，其上海水深度不逾 200 米，或虽逾此限度而其上海水深度仍使该区域天然资源有开发之可能性者；(2) 邻接岛屿海岸之类似海底区域之海床及底土。"[2] 根据这个概念，大陆架是一个动态的变量，它将随着人类科学技术的发展和对海洋资源的开发水平而不断变化，具有很大的不确定性。

随着海底资源勘探开发能力的迅速提高，一系列国际司法判决和仲裁裁决的出现以及国家实践的发展，《大陆架公约》的模糊性和不确定性已经不能满足时代的需要。第三次联合国海洋法会议对大陆架制度进行了艰难、高度技术性的讨论和谈判，对大陆架的法律概念进行了重大修改，作出了更为详细的规定，在科学和法律的基础上重新确定了大陆架的概念。[3]

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2 《大陆架公约》第 1 条。

3 《联合国海洋法公约》第 76 条规定："1. 沿海国的大陆架包括其领海以外依其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土，如果从测算领海宽度的基线量起到大陆边的外缘的距离不到 200 海里，则扩展到 200 海里的距离。2. 沿海国的大陆架不应扩展到第 4 至第 6 款所规定的界限以外。3. 大陆边包括沿海国陆块没入水中的延伸部分，由陆架、陆坡和陆基的海床和底土构成，它不包括深洋洋底及其洋脊，也不包括其底土。4. (a) 为本公约的目的，在大陆边从测算领海宽度的基线量起超过 200 海里的任何情形下，沿海国应以下列两种方式之一，划定大陆边的外缘：(1) 按照第 7 款，以最外各定点为准划定界线，每一定点上沉积岩厚度至少为从该点至大陆坡脚最短距离的 1%；或 (2) 按照第 7 款，以离大陆坡脚的距离不超过 60 海里的各定点为准划定界线。(b) 在没有相反证明的情形下，大陆坡脚应定为大陆坡坡底坡度变动最大之点。5. 组成按照第 4 款 (a) 项 (1) 和 (2) 目划定的大陆架在海床上的外部界线的各定点，不应超过从测算领海宽度的基线量起 350 海里，或不应超过连接 2500 公尺深度各点的 2500 公尺等深线 100 海里。6. 虽有第 5 款的规定，在海底洋脊上的大陆架外部界限不应超过从测算领海宽度的基线量起 350 海里。本款规定不适用于作为大陆边自然构成部分的海台、海隆、海峰、暗滩和坡尖等海底高地。7. 沿海国的大陆架如从测算领海宽度的基线量起超过 200 海里，应连接以经纬度座标标出的各定点划出长度各不超过 60 海里的若干直线，划定其大陆架的外部界限。8. 从测算领海宽度的基线量起 200 海里以外大陆架界限的情报应由沿海国提交根据附件二在公平地区代表制基础上成立的大陆架界限委员会。委员会应就有关划定大陆架外部界限的事项向沿海国提出建议，沿海国在这些建议的基础上划定的大陆架界限应有确定性和拘束力。9. 沿海国应将永久标明其大陆架外部界限的海图和有关情报，包括大地基准点，交存于联合国秘书长。秘书长应将这些情报妥为公布。10. 本条的规定不妨害海岸相向或相邻国家间大陆架界限划定的问题。"

根据《公约》，沿海国的大陆架包括其领海以外依其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土，如果从测算领海宽度的基线量起到大陆边的外缘的距离不到 200 海里，则扩展到 200 海里的距离。《公约》进一步解释大陆边包括沿海国陆块没入水中的延伸部分，由陆架、陆坡和陆基的海床和底土构成，但不包括深洋洋底及其洋脊，也不包括其底土。

对于那些拥有宽大陆架的沿海国而言，大陆架的外部界限可以通过《公约》第 76 条第 4~6 款规定的“两条公式线”和“两条限制线”来确定：

1. 两条公式线。《公约》第 76 条第 4 款为沿海国划定 200 海里外大陆架外部界限提供了可任意选择使用的两条公式线。(1)“1%沉积岩厚度线”。以最外各定点为准划定界限，每一定点上沉积岩的厚度至少为从该点至大陆坡脚最短距离的 1%。 (2)“坡脚＋ 60 海里线”。以离大陆坡脚的距离不超过 60 海里的各定点为准划定界线。在没有相反证据的情形下，大陆坡脚应定为大陆坡坡底坡度变动最大之点。

2. 两条限制线。按照上述公式线所划定的大陆架外部界线的各定点，不应超过从领海基线量起 350 海里，或不应超过 2500 米等深线外 100 海里。

沿海国可根据本国的情况，自主决定同时或交替采取哪种公式线或限制线来最大限度地划定其 200 海里外大陆架的外部界限。如果一个沿海国不具有自然延伸的 200 海里以内的大陆架，自然也就不具有 200 海里以外的大陆架。

（二）沿海国对大陆架的权利

1. 主权权利

根据《公约》第 77 条第 1 款的规定，沿海国为勘探大陆架和开发其自然资源的目的，对大陆架行使的主权权利，有以下几个特征：第一，该权利是与自然资源直接相关的，具有资源性。从大陆架制度的发展来看，《杜鲁门公告》即是以大陆架的海床和底土的自然资源为对象。在资源性的问题上，《大陆架公约》与《公约》也有着完全一致的规定。从大陆架制度本身的性质来看，大陆架是沿海国近海一定范围内的海床及底土。因此，大陆架制度中赋予沿海国的权利无疑应主要是与海床及其底土的自然资源有关的一种权利。第二，该权利是专属于沿海国的，具有专属性。如果沿海国不勘探大陆架或开发其自然资源，未经沿海国明示同意，任何人均不得从事这种活动。[4] 第三，该权利是沿海国固有的，具有固有性。沿海国对大陆架资源的固有权利，不取决于有效或象征的占领或任何明文公告。

2. 管辖权

沿海国对大陆架的管辖权有两项，一是根据《公约》第 79 条第 4 款，沿海国

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4 《联合国海洋法公约》第 77 条。

对勘探其大陆架或开发其自然资源拥有管辖权。二是根据《公约》第 80 条，第 60 条有关专属经济区的人工岛屿、设施和结构的规定比照适用于大陆架上的人工岛屿、设施和结构。第 60 条第 2 款规定，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。这样的规定同样适用于大陆架。

3. 专属权利

《公约》第 81 条规定，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。专属权利强调的是沿海国排他性的授权及管理的行为。

大陆架制度是以沿海国对海床及底土资源的勘探开发权利为基础，因此，沿海国行使对大陆架的权利是有限制的。《公约》规定沿海国对大陆架的权利不影响其上覆水域或水域上空的法律地位，即：其上覆水域继续维持毗连区、专属经济区或公海的地位，其上空继续维持原有的开放地位。由于大陆架的特殊地位，《公约》特别强调，沿海国对大陆架权利的行使，不得影响或干扰航行自由及其他国家的其他权利。同时，《公约》还保障所有国家在大陆架上铺设海底电缆和管道的权利。沿海国除为了勘探大陆架，开发其自然资源和防止、减少和控制管道造成的污染有权采取合理措施外，对于铺设和维持这种海底电缆或管道不得加以阻碍。沿海国对 200 海里以外大陆架上所获收益，应通过缴付费用或实物的方式与国际社会分享。

海岸相邻或相向国家之间对于大陆架的主张有重叠的，应根据《公约》第 83 条的规定，在国际法的基础上以协议划定，以便得到公平解决。在达成协议之前，有关各国应尽一切努力达成实际性的临时安排。

（三）200 海里以外大陆架

大陆架是一个统一、完整的法律概念。所谓“外大陆架”并不是一个严格的法律概念。“法律上只有一个单一的‘大陆架’，而不是一个内大陆架和一个分离的扩展大陆架或外大陆架。”[5] 尽管已有多个沿海国将其 200 海里以外大陆架的信息资料提交根据《公约》第 76 条第 8 款和附件二成立的大陆架界限委员会（以下简称“委员会”），但这并不表明沿海国的大陆架正在“延伸”或“扩展”，反而说明沿海国正在明晰其 200 海里以外的大陆架及其外部界限之所在。

对于拥有宽大陆架的沿海国来说，其大陆架 200 海里以内的部分和 200 海里以外的部分都是属于其主权权利的管辖海域。如果一定要论及 200 海里以内和以外大陆架的区别的话，则《公约》所建立的大陆架制度，就其范围而言，既是“内

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5 Barbados/Trinidad and Tobago, Award of the Arbitral Tribunal, para. 213 (11 April 2006), [PCA], at http://www.pca-cpa.org/upload/files/Final0%20Award.pdf, 1 May 2009.

外一致”，也是“内外有别”的。

一方面，根据《公约》第 76 条的规定，沿海国的大陆架是其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土。如果以距离划线，则包括 200 海里以内的部分和 200 海里以外的部分。就《公约》赋予沿海国对大陆架自然资源的权利而言，沿海国对其大陆架行使的主权权利、管辖权和专属权利是“内外一致”的，并不受大陆架之“内”或“外”的影响，不因 200 海里以内或以外而在法律性质上有所区别。

另一方面，宽大陆架沿海国对其大陆架的权利又是“内外有别”的——《公约》要求拥有宽大陆架的沿海国，对 200 海里以外大陆架上非生物资源的开发，应通过向国际海底管理局缴付费用或实物的方式与国际社会分享。[6] 需要强调的是，这种“分享”并不能将沿海国自然延伸的大陆架“一分为二”。换言之，这种“分享”既未改变大陆架作为沿海国陆地领土的全部自然延伸的法律性质，也不表明 200 海里以外大陆架的法律地位与 200 海里以内的大陆架有本质区别，抑或低于 200 海里以内的大陆架。[7]

与此同时，尽管沿海国对大陆架享有的主权权利具有专属性和固有性的特点，并且这种权利不取决于有效或象征的占领或任何明文公告。但是，沿海国应将其 200 海里以外大陆架外部界限的情报和数据提交委员会，并在委员会建议的基础上划定有确定性和拘束力的 200 海里以外大陆架的外部界限。[8]

200 海里以外大陆架外部界限的划定与海岸相邻或相向国家之间的大陆架划界有所不同。根据《公约》第 76 条确定的 200 海里以外大陆架的外部界限，明确了沿海国的大陆架与国际海底区域（《公约》称之为“区域”）之间的界限；而第 83 条则以 4 款的内容，清楚地规定了海岸相向或相邻国家间大陆架界限的划定原则、争端的解决机制、划界前的临时安排等问题。并且，根据第 76 条第 10 款确定 200 海里以外大陆架外部界限的有关规定，“不妨害海岸相向或相邻国家间大陆架界限划定的问题。”

综上所述，《公约》关于大陆架的规定，重申了大陆架的法律概念及其与自然延伸的自然事实之间的关系，建立了大陆架作为一个法律概念与大陆边缘作为一

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6 《联合国海洋法公约》第 82 条“对 200 海里以外的大陆架上的开发应缴的费用和实物”规定：1. 沿海国对从测算领海宽度的基线量起 200 海里以外的大陆架上的非生物资源的开发，应缴付费用或实物。2. 在某一矿址进行第 1 个 5 年生产以后，对该矿址的全部生产应每年缴付费用和实物。第 6 年缴付费用或实物的比率应为矿址产值或产量的 1%。此后该比率每年增加 1%，至第 12 年为止，其后比率应保持为 7%。产品不包括供开发用途的资源。3. 某一发展中国家如果是其大陆架上所生产的某种矿物资源的纯输入者，对该种矿物资源免缴这种费用或实物。4. 费用或实物应通过管理局缴纳。管理局应根据公平分享的标准将其分配给本公约各缔约国，同时考虑到发展中国家的利益和需要，特别是其中最不发达的国家和内陆国的利益和需要。

7 《联合国海洋法公约》第 76、82 条和 83 条。

8 《联合国海洋法公约》第 76 条第 8 款。

个地貌概念的联系，引入了200海里距离标准，使一个沿海国无论是否有自然意义上的自然延伸，都可以主张从领海基线量起远至200海里的大陆架。对于那些有宽大陆架的沿海国，《公约》规定了其对自然延伸的、超过200海里部分的大陆架的权利和义务。根据《公约》，如果一个沿海国的陆地领土没有向海洋自然延伸的客观事实，也可以主张不超过200海里的大陆架。对这两种完全不同的客观情况的兼顾，为解释和适用《公约》的有关规定造成了一定的混淆和困难。

（四）200海里以外大陆架信息资料的提交

根据《公约》附件二的规定，“按照第76条划定其200海里以外大陆架外部界限的沿海国，应将这种界限的详情连同支持这种界限的科学和技术资料，尽早提交委员会，而且无论如何应于本公约对该国生效后10年内提出。”[9] 显然，就《公约》第76条第4～6款有关确定大陆架外部界限的技术规则的高度复杂性而言，该条款的实施难度较大，相关信息资料的提交对各沿海国的科学技术能力来说不啻一次严峻的挑战。

鉴于200海里以外大陆架外部界限的重要性和很多发展中国家不具备提供这种信息资料的能力，2001年5月召开的《公约》第11次缔约国大会通过决议，将10年期限的起始时间定为1999年5月13日委员会发表《大陆架界限委员会科学和技术准则》（以下简称“《科学和技术准则》”）之日。[10] 这意味着1999年5月13日之前批准或加入《公约》的国家，最迟应于2009年5月13日之前完成200海里以外大陆架的划定和有关的法律程序工作。第11次缔约国大会通过的决议，实际上已经修改了划界案的提交时限要求。

尽管如此，多数发展中沿海国仍无力在截止日期之前将其200海里以外大陆架的有关信息资料提交委员会。到2008年12月，只有13个国家完成了这种提交，其中大部分只是部分提交。[11]

9 《联合国海洋法公约》附件二《大陆架界限委员会》第4条。

10 Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea, SPLOS/72, the 11th Meeting of States Parties to the United Nations Convention on the Law of the Sea (29 May 2001), at http://daccessdds.un.org/doc/UNDOC/GEN/N01/387/64/PDF/N0138764.pdf?OpenElement, l May 2009.

11 这13个国家及其提交时间分别是：俄罗斯（2001年12月20日）、巴西（2004年5月17日）、澳大利亚（2004年11月15日）、爱尔兰（2005年5月25日）、新西兰（2006年4月19日）、法国、爱尔兰、西班牙和英国（2006年5月19日联合提交）、挪威（2006年11月27日）、法属圭亚那和新喀里多尼亚（2007年5月22日）、墨西哥（2007年12月13日）、巴巴多斯（2008年5月8日）、英国和北爱尔兰（2008年5月9日）、印度尼西亚（2008年6月16日）和日本（2008年11月12日）。下载于http://www.un.org/Deps/los/clcs_ new/clcs_home.htm，2009年5月1日。

2008 年 6 月，《公约》第 18 次缔约国大会就 200 海里以外大陆架信息资料提交的截止日期通过了一项新决议：沿海国向联合国秘书长提交一份“初步信息”，其中载有该国 200 海里以外大陆架外部界限的指示性资料，并说明编制划界案的情况和拟提交正式划界案的日期，即可被视为遵守了《公约》关于划界案期限的规定，而无需即刻正式提交划界案。[12] 尽管该决议要求“初步信息”应包含沿海国拟提交划界案的日期，但这个日期是由沿海国根据具体情况自行决定，不再受到 2009 年 5 月 13 日截止期限的限制。显然，关于初步信息的决议又一次修改了提交划界案的截止期限。

“初步信息”不是划界案，委员会不对“初步信息”进行审议。沿海国提交“初步信息”，并不影响其根据《公约》第 76 条的要求、《大陆架界限委员会议事规则》以及《科学和技术准则》提交的划界案，也不影响委员会对划界案的审议。

二、政治和法律意涵下的共同开发

自 1958 年巴林与沙特阿拉伯签署关于共同开发波斯湾大陆架的协定以来，共同开发的理论和实践已经走过了近 50 年的发展历程，逐步形成了一套比较完整的法律制度。

（一）共同开发的法律概念

共同开发的产生和发展促进了国际法理论和国家实践的不断丰富和完善。法律上的共同开发包括多种情况，得到普遍承认的是作为划界前的临时安排的共同开发。

共同开发作为一个政治基础之上的法律概念，指的是有关国家在海域划界相持不下的情况下，搁置其划界主张的争议，对争议海域的油气资源进行共同开发。一些国家的划界条约中还定有“共同开发条款”，规定对已经发现或将来可能发现的跨越边界线的油气资源，设定跨界的共同开发区进行共同开发，这是一种广义上的共同开发。

就划界前的共同开发问题而言，笔者认为，共同开发作为国家间完成海洋划

12 Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfill the requirements of Article 4 of Annex II to the Convention, SPLOS/183, as well as the decision contained in SPLOS/72, paragraph (a), the l8th Meeting of States Parties to the United Nations Convention on the Law of the Sea, (20 June 2008), at http://daccessdds.un.org/doc/UNDOC/GEN/N08/398/76/PDF/N0839876.pdf?OpenElement, l May 2009.

界前的一种临时性安排，是主权国家在海上边界未定的情况下，在不影响各自划界立场的前提下，搁置争议，对争议区的自然资源合作进行勘探和开发的临时性安排。共同开发不影响最终界限的划定。

（二）共同开发的国际法依据

共同开发产生于国家实践之中，一些专家学者对此进行了研究和论述，《公约》也作出了一般性规定。凡此种种都构成共同开发的法律依据。

共同开发的国际法依据首先表现为国家间的实践和经验。海洋油气资源共同开发的国家实践已有 20 多例，成功地化解和缓和了争议地区的紧张和对立。共同开发的国家实践和经验促进了国际法理论的丰富和发展，为有关国家提供了可资借鉴的先例。

国际法学者的研究和著述也是国家间作出共同开发安排的重要参考。1968 年奥诺拉托发表的《国际共同石油储藏的分配》，对共同开发问题进行了较为全面的理论探索，[13] 对 1969 年国际法院关于北海大陆架案的判决产生了重要影响，促使国际法院在判决中首次引入了近海资源共同开发的概念，并建议有关当事国在争议海域设立一个“共同管辖、使用或开发的制度”。[14] 其后，英国国际法和比较法学院专门就共同开发问题进行了研究，起草了共同开发协定的范本，出版了《近海油气的共同开发》专著，为有关国家共同开发协定的达成提供了重要的参考。[15]

《公约》的有关条款是国家间进行共同开发的最直接的国际法依据。《公约》第 83 条要求有关国家在达成划界协议前，“应基于谅解和合作的精神，尽一切努力做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。”这是《公约》关于共同开发的框架性规定，也是指导有关国家作出共同开发安排的法律原则。

（三）共同开发的影响因素

相关国家实践表明，影响共同开发的因素很多。其中，有关国家的政治意愿对共同开发的有效开展起着决定性的作用。作为极具政治色彩的临时性安排，国家的政治意愿是决定共同开发能否实现的关键因素。

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13 William T. Onorato, Apportionment of an International Common Petroleum Deposit, *International and Comparative Law Quarterly*, Vol. 17, Issue 1, 1968, pp. 85~102.

14 国家海洋局政策研究室编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 81 页。

15 Hazel Fox and Paul McDade eds., *Joint Development of Offshore Oil and Gas (Vol.1)*, London: British Institute of International and Comparative Law, 1989 & 1990.

在挪威和冰岛的共同开发协议中，冰岛对扬马延岛的主权属于挪威没有异议。尽管双方都认为扬马延岛周围陆架不是冰岛大陆架的自然延伸，但是挪威还是同意冰岛将其大陆架扩展到距杨马延岛仅 92 海里的地方。双方所建立的共同开发区 70％的面积都位于挪威一侧，共同开发协议中关于经营和开发等内容也明显有利于冰岛。这个协议的达成显然深受冷战后期国际政治和国家安全政策等的影响——挪威作出较大让步，换取冰岛继续留在北约，使北约得以继续使用冰岛境内的军事基地，以抗衡苏联强大的北方舰队，从而使直接面对苏联而又严禁外国驻军的挪威得到北约的保护。[16]

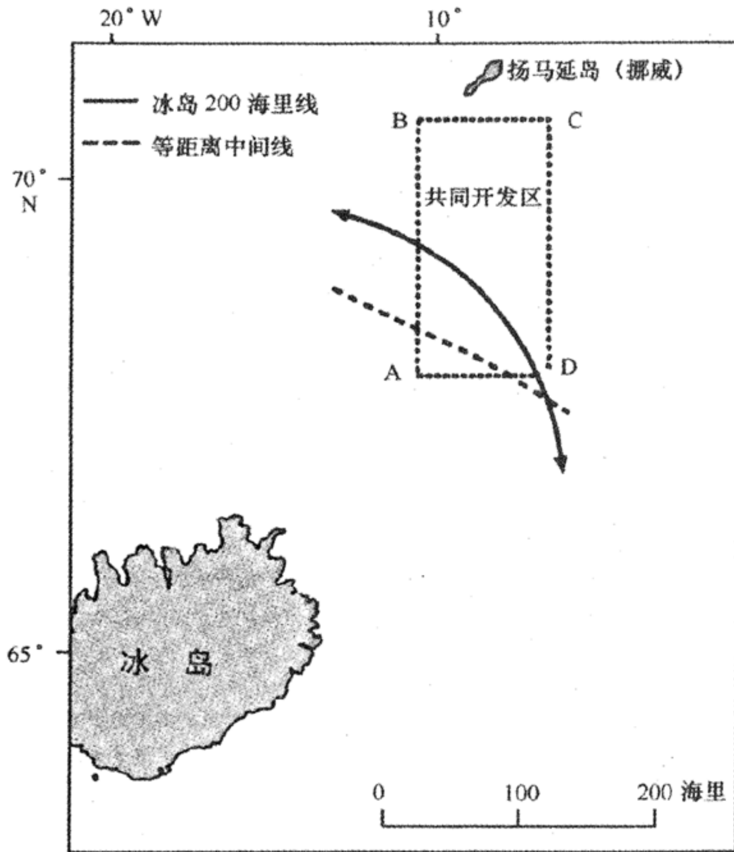

图 1　冰岛与挪威关于扬马延的共同开发示意图

共同开发区的确定是进行共同开发的关键问题之一。国际法的理论和国家实践一般把各方划界主张的重叠区设定为共同开发区，或在重叠区内选划共同开发

16　蔡鹏鸿著：《争议海域共同开发的管理模式：比较研究》，上海：上海社会科学出版社 1989 年版，第 96~108 页。

区。澳大利亚和印度尼西亚在帝汶海的共同开发实践，为共同开发区的确定提供了有意义的示范。澳、印尼两国隔海相望，两国关于大陆架划界主张的差异形成了约 6.1 万平方公里的重叠区。1989 年 12 月，澳、印尼签订《关于印度尼西亚东帝汶省和北澳大利亚之间区域的合作条约》，把双方权利主张的重叠区作为合作范围。[17] 其中，位于两国中间线和 1500 米等深线之间的区域是实质意义上的共同开发区。2001 年 7 月，独立后的东帝汶与澳大利亚签署《关于帝汶海油气资源开发的谅解备忘录》，对上述共同开发区予以确认和保留。

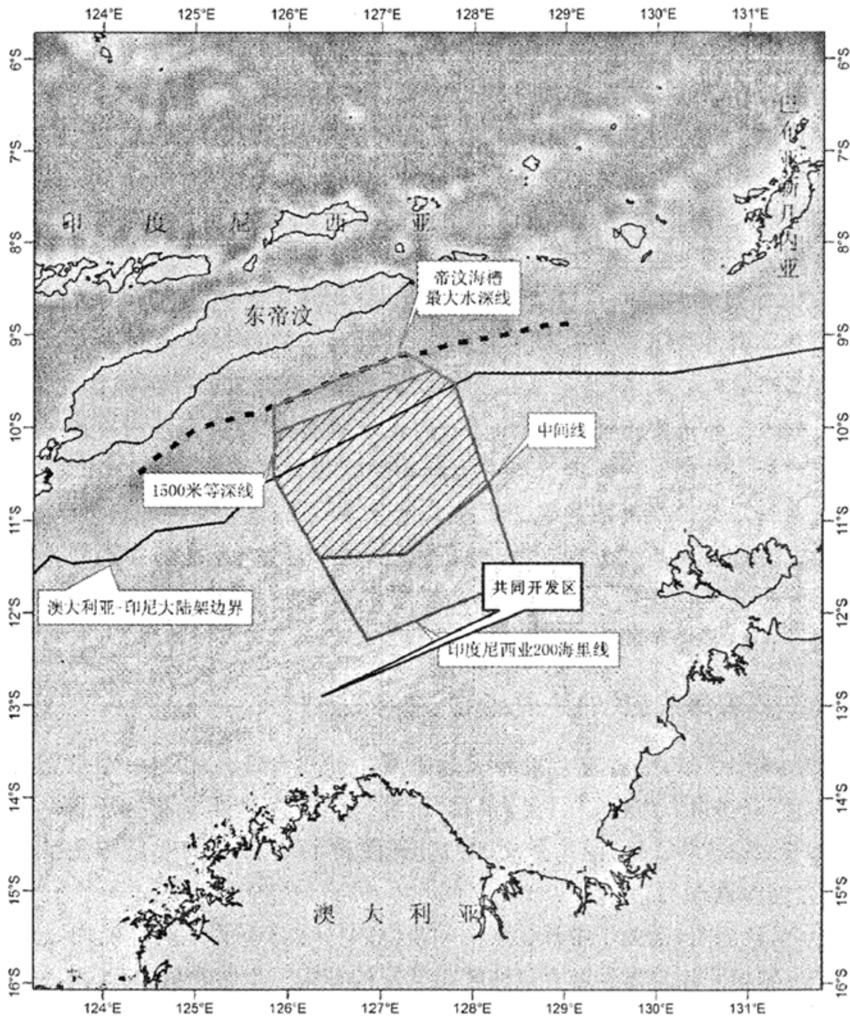

图 2 澳—印尼 / 澳—东帝汶共同开发区示意图

17 蔡鹏鸿著：《争议海域共同开发的管理模式：比较研究》，上海：上海社会科学出版社 1989 年版，第 95~103 页。

三、中日东海共同开发的有关问题

（一）历史发展

20 世纪 70 年代，中日曾就东海共同开发问题数次交换意见，双方关于共同开发的立场逐渐清晰。1979 年 6 月，中方正式向日本提出共同开发钓鱼岛附近海域油气资源的设想。这是中国首次公开表明愿以“搁置争议、共同开发”的方式解决同周边邻国间领土和海洋权益争端。此后，双方就东海共同开发问题数次交换意见。中方多次重申大陆架自然延伸原则，并提出了搁置领土主权争议、共同开发钓鱼岛附近海域的初步设想。但日本既不承认中日就钓鱼岛的主权归属存在争议，更不同意在其附近海域进行共同开发，反而极力主张在东海跨越其单方主张的所谓“中间线”进行开发。

1985 年双方石油界开始以民间形式探讨共同开发问题。中国海洋石油总公司与日本石油公团等先后进行了多轮会议，双方石油界对共同开发的具体问题和内容形成广泛共识，包括以民间形式为先导，取得共识并达成协议后，分别由双方向本国政府提出请求，经两国政府认可后实施，或两国政府在此基础上直接签订政府间共同开发协定。由于国际和地区形势的风云变换，民间的共识一直未能上升为政府层面的共识。从技术上说，东海的地质条件比较复杂，开发风险较大。一些日本石油公司在其近海进行的油气开发和“日韩共同开发”，都没有取得令人满意的成效。[18] 长期以来，日本对东海油气资源的共同开发问题，基本上处于观望状态。

（二）“东海共识”的主要内容

2004 年 10 月，中日重启东海问题磋商。2006 年 10 月以来，中日两国领导人接连进行“破冰”、“融冰”、“迎春”和“暖春”之旅，建立并全面推进战略互惠关系。终于，2008 年 6 月，两国外交部门分别发表了“中日东海问题原则共识”（以下简称“东海共识”）。

“东海共识”包括关于中日在东海的合作、中日关于东海共同开发的谅解、

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18 1974 年 1 月 30 日，日韩签订《关于共同开发邻接两国的大陆架南部的协定》。对此，中国政府于同年 2 月 4 日提出了强烈抗议。1977 年，当日本政府批准该协定时，中国政府于同年 6 月 13 日再次发表声明：“根据大陆架为大陆领土自然延伸的原则，中华人民共和国对东海大陆架拥有不容侵犯的主权。”“任何国家和私人未经中国政府同意不得在东海大陆架擅自进行开发活动，否则，必须对由此引起的一切后果承担全部责任。”

关于日本法人依照中国法律参加春晓油气田开发的谅解三部分内容，将双方在东海的合作与开发分成两个方面：一方面，两国政府达成在东海进行共同开发的共识，并选定了共同开发区块；另一方面，中方欢迎日方企业参加“春晓”的合作开发。

1．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，今后也将继续进行磋商。

2．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：

(1) 由 7 点坐标顺序连线围成的区域为双方共同开发区块。

(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它海域的共同开发继续磋商。

3．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，努力就进行必要的换文达成一致，并尽早完成换文。双方为此履行必要的国内手续。

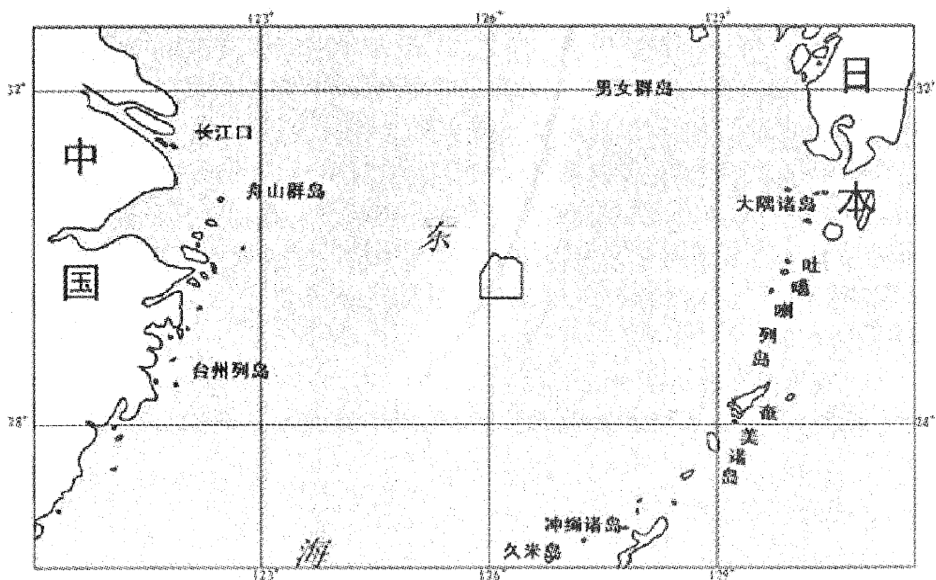

图 3　中日东海共同开发区块示意图（图片引自新华网）

（三）对“东海共识”的解读

1.“东海共识”与中日双方的政治意愿

共同开发在本质上是极具政治色彩的临时性安排，有关国家的政治意愿对共同开发的有效开展有着决定性的影响，是达成共同开发协议的关键因素。“中日关于东海共同开发的谅解”是两国政府达成的政治磋商文件，体现中日双方的政治意愿，表明两国愿意搁置海洋划界的争议，先就东海油气资源的开发进行合作的政治意愿，是一种政治意向或安排。

这一共识是政治概念上的共同开发，是进行实质意义上的共同开发的先决条件，但它毕竟不是国际法上的条约或协定。要实现国际法上的共同开发，还需要双方在此基础上，通过谈判协商，就共同开发的具体事项签订国际法上的条约或协定，经过两国最高权力机关的批准，赋予其法律效力，作为划界前的“临时安排”，方能构成法律意义上的共同开发。

2.“东海共识”与双方的划界立场

中日两国划界主张的巨大差异使东海划界问题久拖不决。日方一直回避大陆架划界问题，主张以“中间线”进行海域划界，并单方面提出了一条所谓的“中间线”。中方则认为，双方应当根据《公约》的有关规定，以衡平原则进行海域划界。其中，大陆架划界应适用自然延伸原则，中国陆地领土在东海的自然延伸可及冲绳海槽最大水深线。在东海划界问题上，中方不承认日方所谓的“中间线”，中日之间也不存在划定“中间线”的问题。

在“东海共识”中，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”。这表明“东海共识”不影响各自的划界立场。因此，“东海共识”不损害中方对东海大陆架及其自然资源的主权权利和管辖权，不影响中方在东海有关问题上的法律立场和主张。中方主张按自然延伸原则实现东海大陆架的公平划界，过去没有承认、今后也不会承认日方所谓的“中间线”。双方就共同开发问题达成的原则共识，不涉及各自既往的权利诉求，也不影响未来的海洋划界。东海划界问题的最终解决，应由中日双方通过谈判加以解决。

3．共同开发区块的性质和特点

“中日关于东海共同开发的谅解”规定了中日在东海的共同开发区块，使中日双方共同开发东海油气资源的政治意愿更加具体化，该区块为 7 点坐标连线组成的大体呈方形的海域，面积约 2700 平方千米，各点坐标如下表。

表 1　中日东海共同开发区块坐标

序号	北纬	东经
1	29°31'	125°53'30"
2	29°49'	125°53'30"
3	30°04'	126°03'45"
4	30°00'	126°10'23"
5	30°00'	126°20'00"
6	29°55'	126°26'00"
7	29°31'	126°26'00"

“中日关于东海共同开发的谅解”划定共同开发区块，是向现实的共同开发迈出的第一步。实现共同开发的具体事宜，包括上述区块内具体开发位置的选择和确定、合作的模式、开发的形式、作业者的确定、费用的分担和收益的分享、管理机构的设立和共同开发协议的执行等内容，还需双方协商确定，最终达成双边协议，才能实现法律意义上的共同开发。

4．日本企业参股“春晓”油气田与共同开发的关系

“春晓”是中国近海大陆架上的油气田，位于日本单方面主张的所谓“中间线”以西，与双方的海域划界争议无关。根据《公约》关于大陆架的有关规定，春晓油气田的主权权利完全属于中国。中国的海洋石油企业开发春晓油气田，是中方对没有争议的中国大陆架上的自然资源行使主权权利，是属于中国主权范围内的事，是《公约》赋予缔约国的权利。

“关于日本法人依照中国法律参加春晓油气田开发的谅解”表示，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。这里所说的中国法律，指的是 1982 年颁布、2001 年修订的《中华人民共和国对外合作开采海洋石油资源条例》。该条例第 1 条规定：“在维护国家主权和经济利益的前提条件下，允许外国企业参与合作开采中华人民共和国海洋石油资源。”中国内海、领海、大陆架以及其他管辖海域的石油资源，都属于中华人民共和国国家所有（第 2 条）。该条例还要求合作开采海洋石油资源的一切活动都应当遵守中国的法律、法令和有关规定；参与实施石油作业的企业和个人都应当受中国法律的约束，接受中国政府有关主管部门的检查和监督（第 3 条）。[19]

依据上述中国法律进行的中外合作，是中国企业依法吸收外资的合作。这种合作开发不是共同开发，其法律性质与共同开发完全不同。日方企业参加春晓油气田的合作开发，不是国际法意义上的共同开发，而是基于“关于日本法人依照中

19　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》，北京：海洋出版社 2001 年，第 95~101 页。

国法律参加春晓油气田开发的谅解”，依照中国法律作出的商业性安排，其性质是中国近海油气资源的合作开发，不是国际法意义上的共同开发，与“中日关于东海共同开发的谅解”没有关系。

日本企业参加春晓油气田的合作开发，应遵守《中华人民共和国对外合作开采海洋石油资源条例》等法律法规，接受中国政府有关主管部门的检查和监督。这一“共识”充分体现了中国对春晓油气田的主权权利，和日方对此一客观事实的确认。

日本企业应通过签订商业合同的方式，投资入股，获得参加春晓油气田合作开发的资格，这是中国企业依法吸收外资的一种合作方式，与其他吸引外资的中外合作无异。此前，包括美国尤尼科公司在内的外国石油公司也曾依照中国法律与中国的海洋石油企业进行过此类合作。此次日本企业依照中国法律参与春晓油气田的合作开发，其性质与上述中外合作并无不同。

四、中日东海共同开发与中国 200 海里以外大陆架的关系

大陆架是沿海国陆地领土的全部自然延伸。如果这种自然延伸超过了从测算领海宽度的基线量起 200 海里，则超过的部分为 200 海里以外大陆架，200 海里以外大陆架当然是沿海国大陆架的组成部分。《公约》赋予沿海国对其大陆架（包括 200 海里以外大陆架）自然资源的主权权利，这是沿海国开发其大陆架自然资源的法律基础。

鉴于大陆架及其自然资源对沿海国政治、经济等方面利益的重要性，海洋划界向来为相邻或相向的沿海国所重视，任何一方都不会轻言让步，许多国家也不愿将这类争端提交国际法院等第三方强制解决。因此，世界上约有 70％的海洋边界有待划定也就不足为奇。[20] 但是，海洋边界争端的长期僵持不利于国家关系的稳定和经济的发展。在各自坚持海洋权利主张的前提下，有关国家暂且搁置对海洋边界的争议，转而就共同关心的资源进行共同开发，不失为缓解争议的方式之一。作为成功化解和缓和争议地区的紧张和对立的方法，《公约》对共同开发做出了一般的框架性规定。《公约》第 83 条要求有关国家在达成划界协议前，“应基于谅解和合作的精神，尽一切努力做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。”这被认为是有关国家进行共同开发的最直接的国际法依据，也是指导有关国家作出共同开发安

20　据世界知名海洋法学家普雷斯科特在其 1975 年所著《The Political Geography of the Oceans》中的统计，全世界沿海国之间约有近 400 条各种性质的海洋边界需要划定，目前只划分了 1/3。

排的法律原则。显然，共同开发的实施空间是在沿海国权利主张争议重叠的大陆架区域，而共同开发的客体则是大陆架权利主张重叠区的油气资源。

东海大陆架无论从地形、地貌、地质上都与中国大陆有着连续性，是中国大陆在水下的自然延伸，冲绳海槽构成东海大陆架与琉球群岛岛架的自然分界线。因此，中国在东海大陆架的外部界限应该是冲绳海槽最大水深线。日本在东海只有狭窄的岛架，但坚持以中间线方法划定中日在东海的海域界限，并单方面提出了一条所谓的“中间线”。中日东海大陆架主张的重叠区，是中国主张的冲绳海槽最大水深线和日本主张的所谓“中间线”之间的海域。按照《公约》的有关规定，参考既有共同开发的国家实践，中日东海共同开发区应在此范围内确定。此外，钓鱼岛是中国的固有领土，现为日本所侵占，中日之间不仅存在着领土主权争端，也存在着由此带来的海域划界争端。因此，钓鱼岛周边海域也是双方主张的重叠区，也可在这个区域内选择共同开发区。

根据《公约》，沿海国对其 200 海里以外大陆架上的非生物资源的开发，应通过向国际海底管理局缴付费用或实物的方式与国际社会分享。如果中日之间法律意义上的共同开发在中日双方主张重叠区内中国的 200 海里以外大陆架上实现，中国也无需按照上述规定缴付费用或实物。因为这个区域尽管位于中国的 200 海里以外大陆架上，但同时也位于日本主张的“中间线”以东，并不是日本的 200 海里以外大陆架。因而，这种共同开发并不全然是对 200 海里以外大陆架上自然资源的开发。

日本外大陆架划界申请案内涵与中国的立场

金永明 *

内容摘要：日本经过连续五年的大陆架调查工作，终于向大陆架界限委员会提交了外大陆架划界申请案，其申请面积极其广袤，约为日本国土面积的 2 倍。为提交外大陆架申请案，日本在组织机构配置、调查任务分工、财政上均予以了大力协助和支持，提早完成了调查任务。应注意的是，在日本外大陆架划界申请案中，冲之鸟礁是作为日本申请外大陆架的基点。这种主张是不符合《联合国海洋法公约》关于岛屿的规定的，相关部分必不能通过审议。

关键词：日本外大陆架　相关措施与特点　我国的立场

众所周知，《联合国海洋法公约》（以下简称"《公约》"）的重大成果之一是创设了外大陆架制度，同时按照《公约》第 76 条，建立了审议外大陆架界限的机构——大陆架界限委员会。[1] 大陆架界限委员会自 1997 年成立以来，已举行了 22 届会议，并为推进外大陆架制度的实施做了一些基础性的工作，主要是制定和修订了《大陆架界限委员会议事规则》，制定了《大陆架界限委员会科学和技术准则》（以下简称"《科学和技术准则》"）、《大陆架界限委员会内部行为守则》、《审议提交大陆架界限委员会的划界案的工作方式》等文件，从而为国际社会提交外大陆架划界案提供了基础和保障。当然，该委员会最重要的工作是审议沿海国外大陆架划界案。自 2001 年 12 月 20 日俄罗斯向大陆架界限委员会提交首份外大陆架划界申请案以来，国际社会开始了外大陆架的申请进程，至 2009 年 2 月 11 日，已有 17 个外大陆架划界申请案提交至大陆架界限委员会。

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1 例如，《联合国海洋法公约》附件二（大陆架界限委员会）第 1 条规定，按照第 76 条的规定，应依本附件以下各条成立一个 200 海里以外大陆架界限委员会。附件二第 2 条第 1 款规定，本委员会应由 21 名委员组成，委员应是地质学、地球物理学或水文学方面的专家，由本公约缔约国从其国民中选出，选举时应妥为顾及确保公平地区代表制的必要，委员应以个人身份任职。

在此应指出的是，所谓的“外大陆架”（《公约》规定的200海里以外的大陆架部分），是指从测算领海宽度的基线量起超过200海里或200海里以外的部分，且其外部界限不应超过从测算领海宽度的基线量起350海里，或不应超过连接2500米深度各点的2500米等深线100海里。[2] 所谓的“外大陆架制度”，是指国家划定200海里以外大陆架外部界限应遵循的规范与程序方面的内容。

本文将阐述日本外大陆架划界申请案的主要内容和调查大陆架的相关政策措施，并指出其特点。

一、日本外大陆架划界申请案内涵概要

2008年11月12日，日本通过联合国秘书长向大陆架界限委员会提交了外大陆架申请案。日本外大陆架申请案主要包括以下内容：第一，申请范围。日本外大陆架申请案涉及本州南部和东南七个海域，即九州—帕劳国间的海岭南部海域、南硫黄岛海域、南鸟岛海域、茂木海山海域、小笠原海台海域、冲大东海岭南方海域、四国海盆海域。第二，与美国的争端问题。包含在该申请案中的大陆架与他国间不存在争端，但美国如申请外大陆架，则在以母岛和南鸟岛为基点的海域、以及以南硫黄岛为基点的海域，存在潜在的重叠区域，将是两国协商的对象；当然，日本向大陆架界限委员会提交申请，以及大陆架界限委员会对申请案的审查和建议，并不影响日美间200海里外大陆架的划界问题。因为，美国政府向日本政府作出了以下说明，即大陆架界限委员会对日本外大陆架划界申请案的审查和建议，美国不提出异议，也不影响两国间的划界。[3] 第三，与帕劳国的争端问题。在以冲之鸟礁为基点的海域，如果帕劳国申请外大陆架，则可能存在潜在的重叠区域，这将是两国协商的对象。但日本向大陆架界限委员会提交的申请，以及大陆架界限委员会对日本外大陆架申请案的审查和建议，并不影响两国之间200海里以外大陆架的划界问题。因为，帕劳政府已向日本政府表示，帕劳政府不会对大陆架界限委员会对日本外大陆架划界申请案进行的审查和建议提出异议，也不影响两国之间的划界问题。

日本为能在2009年前向大陆架界限委员会提交外大陆架划界申请案，主要采取了以下措施：第一，构筑组织机构与制定基本方针。日本为向大陆架界限委员会提交外大陆架划界申请案，在内阁设置了由政府主要部门参加的“与大陆架调

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2 《公约》第76条第4款、第5款和第8款。

3 针对日本的外大陆架划界申请案，美国于2008年12月22日向联合国秘书长提交了照会申明，即美国与日本关于大陆架的潜在冲突不影响大陆架界限委员会对其的审议和作出的相关建议。

查、海洋资源有关的相关省厅联络会议”，并于 2004 年 8 月 6 日制定了《大陆架界限基本方针》，以此基本方针为基础，在内阁官房的综合协调和相关省厅机构的合作下，实施了大陆架调查工作。第二，调查活动分工。由于大陆架的调查活动有多种，所以根据相关机构的职能作了分工。海上保安厅调查精密海底地形和勘探地壳构造；[4] 文部科学省勘探地壳构造，具体由“海洋研究开发机构”实施；[5] 经济产业省负责提取基底岩石，具体由“石油、天然气与金属矿物资源机构”[6] 和“产业技术综合研究所”实施。[7] 第三，决定提交外大陆架划界申请案。2007 年 7 月 20 日施行的日本《海洋基本法》第 19 条规定，为开发、利用和保全大陆架和专属

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4 日本海上保安厅根据《海上保安厅法》(1948 年 4 月 27 日制定，1948 年 5 月 1 日起施行，并于 2001 年 11 月 2 日进行了最后一次修改）第 1 条的规定，于 1948 年 5 月 1 日创设。例如，《海上保安厅法》第 1 条规定，为保护海上人员生命和财产，以及预防、搜查和镇压违法人员，设置国土交通大臣管理的外部机构——海上保安厅。关于海上保安厅的组织机构，《海上保安厅法》第 10 条规定，海上保安厅由海上保安厅的长官管辖，其接受国土交通大臣的指挥与监督，并统一管理海上保安厅业务，指挥监督其职员。根据《海上保安厅法》第 2 条的规定，海上保安厅的任务为：厉行海上法令，海难救助，防止海洋污染，搜查和逮捕海上犯人，规制海上船舶交通，管理水路、与航标有关的事务，以及其他确保海上安全的附属事务，以确保海上安全和治安。参见海上保安厅政策评价宣传室编：《海上保安厅》（内部资料），2006 年 4 月版。

5 关于“海洋研究开发机构”，其是以和平和福祉的理念为基础，通过综合合作实施与开发海洋基础研究、学术研究等业务，提升海洋科学技术水准、促进学术研究发展，并于 2004 年 4 月 1 日起由原来的“海洋科学技术中心”(1971 年 10 月设立）改称为“独立行政法人：海洋研究开发机构”。海洋研究开发机构，下载于 http://www.jamstec.jp/j/about/index.html 和 http://www.jamstec.jp/j/about/outline/index.html，2009 年 1 月 31 日。

6 “石油、天然气与金属矿物资源机构”，成立于 2004 年 2 月 29 日，为独立行政法人。其目的是为勘探石油、可燃性天然气及金属矿物提供必要资金，为促进和致力于提供稳定而低价的石油、可燃性天然气和金属矿物资源的开发所需必要业务予以支持，为预防因金属矿物等造成的矿害提供资金贷款和其他业务，为保护国民的健康和保全生活环境及健康发展金属矿物等做出贡献。“石油、天然气与金属矿物资源机构”的最新调查活动为：为调查基础海洋环境，受海洋研究开发机构委托，利用海洋研究开发机构的海洋调查船“Kairei”和无人调查机“Kaikou7000”，于 2009 年 1 月 7 日从横滨新港出发，对伊豆、小笠原及冲绳海域的海底热水矿床周边的海底环境进行调查，预计需要 20 天时间。石油、天然气与金属矿物资源机构，下载于 http://www.jogmec.go.jp/index. html，2009 年 1 月 31 日。

7 “产业技术综合研究所”负责的基盘岩石调查，是指从日本周边海域约 200 多个预定挖掘点中采取岩石试验材料，判定其是否为构成日本列岛的基底岩石种类及其边缘物，从而为扩展外大陆架的可能性提供地质学根据。产业技术综合研究所，下载于 http://www.unit.aist.go.jp/igg/csj-pj/index.html，2009 年 1 月 31 日。

经济区，政府需采取必要的措施。同时，根据《海洋基本法》，日本内阁于2008年3月18日通过的《海洋基本计划》，也要求政府对外大陆架的申请问题采取计划和综合的政策或措施，并作为海洋政策之一加以强调。另外，“与大陆架调查、海洋资源有关的省厅联络会议”机构职权也随着《海洋基本法》的施行转移至根据《海洋基本法》设立的综合海洋政策研究本部下属的由各省厅局长级人员组成的机构。[8] 为此，以麻生太郎内阁总理大臣为本部长的综合海洋政策本部于2008年10月31日召开会议，决定向大陆架界限委员会提交日本外大陆架划界申请案，主张的总面积约74万平方公里，大约相当于日本国土面积的2倍。[9] 日本政府接受了综合海洋政策本部的决定后，通过联合国秘书长向大陆架界限委员会提交了日本外大陆架划界申请案。

二、日本调查外大陆架的政策与措施特点

日本为提交外大陆架划界申请案，必须对大陆架进行调查活动。为此，日本采取了严密的措施和对策，其特点主要体现在以下几个方面：

（一）组织机构的严密性和涉及机构的全面性

为推进大陆架调查工作，提交外大陆架划界申请案，日本不仅设置了专司大陆架调查的联络会议，还在该联络会议下设立了“大陆架调查工作组”，并在其下设立了“海域调查委员会”、“向联合国提交申请案起草委员会”和“国际环境培育委员会”（2004年12月27日），层层推进、步步深入，组织体系可谓严密、细致和周全。

日本“与大陆架调查、海洋资源有关的相关省厅联络会议”于2004年8月4

8 例如，（日本）《海洋基本法》第29条规定，为集中而综合地推进海洋政策的实施，在内阁设置综合海洋政策本部。关于综合海洋政策本部的职责，《海洋基本法》第30条规定：推进《海洋基本计划》方案的制定和实施；根据《海洋基本计划》，统一调整相关行政机构实施的政策；此外，策划、起草和综合调整海洋方面的重要政策。另外，根据《海洋基本法》第31~34条的规定，综合海洋政策本部由本部部长（内阁总理大臣）、副部长（由内阁官房长官、海洋政策大臣担任）以及其他成员（由政府所有国务大臣担任）组成。参见金永明著：《东海问题解决路径研究》，北京：法律出版社2008年版，第223~231页。

9 综合海洋政策本部成立以来，已召开4次（2007年7月31日、2007年11月9日、2007年3月18日和2008年10月31日）会议，在第四次会议上，麻生太郎首相指出，鉴于大陆架的重要性，经过大家5年的努力，终于完成了向联合国提交庞大资料的任务，但最终获得联合国的通过，还需要数年时间，希望大家继续紧密合作，为取得好的结果而作出最大的努力。内阁官房，下载于 http://www.kantei.go.jp/kaiyou/kaisai.html，2009年1月31日。

日设立，2006 年 12 月 22 日对其中一部分作了修改。[10] 其主要内容为：第一，设立宗旨。根据《公约》，为确实推进大陆架调查、对 200 海里外大陆架和专属经济区的划定采取必要措施，以及制定海洋资源的政策措施，通过相关省厅机构的紧密合作，在内阁设置"与大陆架调查、海洋资源有关的相关省厅联络会议"。第二，联络会议构成与职权。上述联络会议由以下 12 个部门的人员组成，但议长认为必要时，可增加组员。议长为内阁官房副长官（负责事务）；副议长为内阁官房副长官辅助（负责外政）；成员为内阁官房副长官辅助（负责内政）、内阁官房内阁审议官、外务省综合外交政策局局长、文部科学省研究开发局局长、水产厅长官、资源能源厅长官、国土交通省综合政策局局长、海上保安厅长官、环境省地球环境局局长和防卫省运用企划局局长。联络会议设干事，干事是相关行政机构的职员，并应是议长指定的上述机构的官员；议长认为必要时，可要求有识之士、组员以外的相关行政机构的职员及其他相关者出席会议；为顺利运作联络会议，设置由相关府、省职员组成的工作组；联络会议的后勤工作由外务省、国土交通省、资源能源厅等相关行政机构协助，在内阁官房处理该工作；未定事项、与联络会议运作有关事项及其他必要事项由议长决定。第三，干事会。联络会议的干事会由以下 9 名干事组成：内阁官房内阁参事官、外务省综合外交政策局总务课长、文部科学省研究开发局海洋地球课长、水产厅资源管理部资源管理课课长、资源能源厅资源与燃料部政策课长、国土交通省综合政策局环境与海洋课长、海上保安厅总务政务课长、环境省地球环境局环境保全对策课长和防卫省防卫政策局调查课长。[11]

联络会议下的"大陆架调查工作组"由以下人员组成：议长由内阁官房副长官辅助担任（负责外政），组员为内阁官房副长官（负责内政）、内阁官房内阁审议官、外务省经济局局长、文部科学省研究开发局局长、水产厅次长、资源能源厅次长、国土交通省综合政策局局长、海上保安厅次长、环境省地球环境局局长和防卫省运用企划局局长。在工作组中设立干事，干事为相关行政机构的职员，并由议长指定的官员担任。工作组的后勤事务由国土交通省协助，在内阁官房处理。未定

10 "与大陆架调查、海洋资源有关的相关省厅联络会议"自成立以来已举行了 6 次会议和 1 次干事会会议。第一次是在 2004 年 8 月 6 日，讨论了日本水域的海洋法问题与管理现状，日本水域的资源分布和勘探现状，制定了《大陆架界限基本方针》。第二次是在 2004 年 12 月 27 日，讨论了日本海洋巡防问题与管理现状和东海海底物探问题，调整了大陆架调查体制和预算。第三次是在 2005 年 3 月 24 日，讨论了外大陆架申请的调查状况，再次讨论了日本海洋巡防问题和东海海底物探问题。第四次是在 2005 年 9 月 5 日，讨论了大陆架调查现状和 2006 年度预算概要，在海洋问题上与邻国的关系和现状，东海海底物探和试开采权许可问题。第五次是在 2006 年 3 月 23 日，再次讨论了外大陆架调查状况、与邻国在海洋问题上的关系和现状。第六次是在 2007 年 6 月 13 日，再次讨论了外大陆架调查状况，部分修改《大陆架界限基本方针》。干事会会议于 2004 年 9 月 27 日举行。下载于 http://www.cas.go.jp/sei-saku/tairikudana/kaisai.html，2009 年 1 月 31 日。

11 下载于 http://www.cas.go.jp/jp/seisaku/tairikudana/renrakukaigi.html，2009 年 1 月 31 日。

事项、工作组运作的相关事项和其他必要事项，由议长决定。如果联络会议废止，则在联络会议上决定的事项由工作组承担。另外，工作组干事会由以下人员组成：内阁官房内阁参事官、外务省经济局海洋室长、文部科学省研究开发局海洋地球课课长、水产厅资源管理部资源管理课课长、国土交通省综合政策局环境与海洋课课长、海上保安厅海洋情报部海洋调查课课长、环境省地球环境局环境保全对策课课长和防卫省防卫局调查课课长，共由9个部门的9名人员组成。[12]

大陆架调查工作组下的"海域调查委员会"负责制作调查实施计划、调整船舶调查日程。该委员会由以下机构人员组成：内阁官房大陆架调查对策室内阁参事官、文部科学省研究开发局海洋地球课课长、经济产业省资源能源厅资源与燃料部矿物资源课课长、国土交通省海上保安厅海洋情报部海洋调查课课长。海域调查委员会认为必要时，可指名让实施大陆架调查的机构的相关工作人员出席会议。同时，"海域调查委员会"可指名让评估、建言调查大陆架的委员担任顾问。"海域调查委员会"的后勤事务由海上保安厅、文部科学省和经济产业省协助，在内阁官房处理。[13]

大陆架调查工作组下的"向联合国提交申请案起草委员会"的任务主要是根据调查大陆架的成果，起草和汇总向大陆架界限委员会提交的有关大陆架地形和地质等方面的大陆架界限情报。该委员会由以下人员构成：内阁官房大陆架调查对策室内阁参事官、外务省经济局经济安全保障课课长、文部科学省研究开发局海洋地球课课长、经济产业省资源能源厅资源与燃料部矿物资源课课长和国土交通省海上保安厅海洋情报部海洋调查课课长。该委员会还下设了向联合国提交外大陆架界限案的起草小组，组员由委员会指名组成，起草小组组长应经常出席委员会会议，并向委员会报告起草小组的工作进程。具体实施大陆架调查活动的机构（独立行政法人海洋研究开发机构，独立行政法人石油、天然气和金属矿物资源机构，独立行政法人产业技术综合研究所及国土交通省海上保安厅）的工作人员应经常出席委员会会议。委员会可指名让评估、建言大陆架调查活动的委员担任顾问。委员会的后勤工作由外务省、文部科学省、经济产业省、海上保安厅协助，并在内阁官房处理。[14]

为收集联合国和其他申请外大陆架国家的情报、营造有利于日本划界案审查结果的国际环境，并进一步调整相关政策和措施，在大陆架调查工作组下还设立了"国际环境培育委员会"。该委员会由以下人员组成：内阁官房大陆架调查对策室内阁参事官、外务省经济局经济安全保障课课长、文部科学省研究开发局海洋地球课课长、经济产业省资源能源厅资源与燃料部矿物资源课课长、国土交通省

12 下载于 http://www.cas.go.jp/seisaku/tairikudana/wg.html，2009年1月31日。
13 下载于 http://www.cas.go.jp/seisaku/tairikutana/kaiiki.html，2009年1月31日。
14 下载于 http://www.cas.go.jp/seisaku/tairikutana/seisakuiinkai.html，2009年1月31日。

海上保安厅海洋情报部海洋调查课课长。该委员会可指名让对大陆架调查评估和建言的委员担任顾问。“国际环境培育委员会”的后勤事务由外务省协助，在内阁官房处理。

最后应补充指出的是，实际上在设立“与大陆架调查、海洋资源有关的相关省厅联络会议”前，日本已于 1980 年设立了“海洋开发相关省厅联络会议”，并对其进行了 6 次部分修改。[15] 同时，为确实而有效地推进大陆架调查工作，日本于 2002 年 6 月 7 日在内阁设置了“大陆架调查相关省厅联络会议”，以期相关省厅联合实施。[16] 2003 年 6 月在“大陆架调查相关省厅联络会议”下设置了从专业角度出发，以对大陆架调查内容予以评估与建言为目的，由海洋科学和国际法专家组成的“大陆架调查评估与建言会议”。2003 年 12 月在内阁官房设置了以对大陆架调查政策和措施进行必要调整以达到统一为目的的“大陆架调查对策室”。此后，于 2006 年 8 月将“大陆架调查相关省厅联络会议”改组为由内阁官房副长官任议长的“与大陆架调查、海洋资源有关的相关省厅联络会议”，并制定了《大陆架界限基本方针》。[17] 另外，随着《海洋基本法》的施行，“与大陆架调查、海洋资源有关的相关省厅联络会议”的职权由内阁总理大臣为本部长的综合海洋政策本部承担。

从上可以看出，为应对大陆架调查活动，日本设置了综合而全面的组织机构，并不断地加以补充扩展，通过全面协作以切实有效地为提交外大陆架划界申请案作准备。同时，由于谋划早，提前实现了提交划界申请案的预定计划。

（二）大陆架调查政策方针内容具体、各项任务分工明确

针对外大陆架界限问题，日本以《大陆架界限今后的基本观点》（2003 年 8 月制定）为基础，并由“与大陆架调查、海洋资源有关的相关省厅联络会议”于 2004 年 8 月 6 日制定了以今后大陆架调查的方针和日程等为内容的《大陆架界限

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15 关于“海洋开发相关省厅联络会议”的内容，即为推进综合实施海洋开发的政策和措施，寻求相关行政机构之间事务的紧密联络，在内阁设立“海洋开发相关省厅联络会议”。该联络会议由以下人员组成，但议长认为必要时，组员可增加。其构成为：内阁官房副长官（议长，负责事务），内阁官房副长官辅助（副议长）和文部科学省研究开发局局长（副议长），总务省情报通信政策局局长，外务省经济局局长，农林水产省水产厅次长，经济产业省资源能源厅次长，国土交通省综合政策局局长和环境省地球环境局局长。联络会议设置干事，干事为行政机构的职员，由议长指定的官员担任。联络会议的后勤工作由相关省厅协助，在内阁官房和文部科学省研究开发局处理。未定事项、联络会议运作事项和其他必要事项由议长决定。下载于 http://www.cas.go.jp/seisaku/kaiyou/konkyo.html，2009 年 1 月 31 日。

16 海上保安厅编：《海上保安厅年度报告》（2008 年），东京：茑有印刷株式会社 2008 年版，第 15 页。

17 海上保安厅编：《海上保安厅年度报告》（2006 年），东京：国立印刷局 2006 年版，第 42 页。

基本方针》（2007 年 6 月 17 日部分修改）。即自 2004 年 4 月起，在相关省厅的合作下，日本政府全力推进大陆架调查工作，并计划于 2009 年 5 月前向大陆架界限委员会提交外大陆架界限情报。

《大陆架界限基本方针》的内容，主要为：(1) 关于外大陆架划界申请的意义。如果日本的外大陆架划界申请案能获得大陆架界限委员会的认可，则日本可对该外大陆架进行勘探，并能确保对外大陆架自然资源的开发行使主权权利。(2) 日本调查外大陆架的动向和国际经验及相关措施。海上保安厅自 1983 年以来就把大陆架调查作为水路测量的一个环节予以实施，调查结果表明，日本可能存在的新大陆架海域面积约为国土面积的 1.7 倍。当然，文部科学省和经济产业省也在实施活用大陆架的调查活动。对于实际审查外大陆架情报的方针，大陆架界限委员会已于 1999 年 5 月制定了《科学和技术准则》。此后，2001 年 12 月俄罗斯首次向大陆架界限委员会提交了外大陆架划界申请案，审查结果是大陆架界限委员会提出了内容不认可的建议，其理由为不具备充足地让大陆架界限委员会进行审查所需的客观、高度科学的详细数据。因此，为有效推进日本外大陆架调查工作，日本政府于 2003 年 6 月决定设立由海洋科学、国际法学者组成的“大陆架调查评估与建言会议”，以对大陆架调查内容提出建议。另外，2003 年 12 月在内阁官房设立了统一政府相关政策和进行必要综合调整的“大陆架调查对策室”。具体的大陆架调查进程为：根据“大陆架调查评估与建言会议”的建议，自 2004 年 4 月起，在相关省厅的协助下，政府全力开始第一阶段的调查工作，同时，进一步探讨调查内容、有效的调查体制、缩减成本方面的对策措施。2004 年 7 月 15 日，“大陆架调查评估与建言会议”认为，大陆架调查活动的调查方式和调查量完全满足大陆架界限委员会的审查水准。2007 年 5 月 24 日，“大陆架调查评估与建言会议”根据最新科学认识提出了必须对第一阶段调查结果进行进一步调查的建议。(3) 大陆架界限具体实施方针。根据《公约》关于 200 海里外大陆架的相关规定，在内阁官房“大陆架调查对策室”的综合调整下，相关省厅按以下方针采取措施。第一，实施海域调查活动。根据“大陆架调查评估与建议会议”的建议、2004 年第一阶段的调查结果和联合国的相关情报，并根据调查计划，由以下机构分担实施 2005 年以后的第二阶段调查活动。具体为：海上保安厅实施精密海底地形调查和地壳构造勘探活动，文部科学省实施地壳构造勘探活动，经济产业省实施基底岩石采样活动，其他省厅尽可能合作提供情报及船舶等方面的设备。实际调查时，应最大限度地活用已实施的调查结果，必须共享海底地形方面的已存数据，相关省厅应与拥有该数据的海上保安厅进行紧密合作并实施调查活动。同时，在实务者会议上也应共享情报、调整调查日程。另外，为有效起草大陆架界限情报，应构筑统一收集、整理、保管及提供必要调查成果的体制。第二，起草和汇总大陆架界限情报。在内阁官房“大陆架调查对策室”的综合协调下，外务省、文部科学省、经济产业省和海上保安厅应合作，从 2004 年 4 月起应迅速开始起草大陆架界

限的情报，尽早探讨包括海洋科学和国际法专家学者参与的汇总大陆架界限情报的组织体制。第三，向大陆架界限委员会提交大陆架界限的情报和收集联合国等机构的情报。由外务省向大陆架界限委员会提交情报，以外务省为中心收集联合国等机构的情报，通过注意大陆架界限委员会有关审查标准等方面的审议讨论情况，通过强化与联合国和其他申请国的关联情报收集工作，努力让大陆架界限委员会对日本的审查取得好的结果。(4) 今后的调查日程。日本向大陆架界限委员会提交大陆架情报应以以下日程为目标：2005 年 4 月，开始第二阶段的调查工作；2007 年 6 月，选举大陆架界限委员会的委员；2008 年 6 月，完成海域调查工作；2008 年 12 月，结束大陆架界限情报的汇总工作；2009 年 1 月（2009 年 5 月为向大陆架界限委员会提交外大陆架划界申请案的截止期），履行国内相关程序和向大陆架界限委员会提交外大陆架申请案。[18]

上述政策的出台与实施，有力地支撑了日本大陆架调查活动的完成。

（三）强有力的经费保障

上已言及，日本由三大行政机构相关部门分工实施大陆架调查活动，下面以海上保安厅为例，予以说明。

众所周知，根据《科学和技术准则》的建议，沿海国向大陆架界限委员会提交的外大陆架划界申请案，应当包括深海测量与测地学资料、地球物理与地质学资料、数位与非数位资料、资料说明清单，且提出的资料应能说明沿海国采用之方法与结果数据，以证明其所提出之外部界限的定点确实合法。另外，沿海国还应及时答复大陆架界限委员会（包括审议外大陆架申请案成立的小组委员会）提出的有关划界的问题，以便大陆架界限委员会审议和作出建议。[19]

鉴于提交外大陆架划界申请案数据的重要性，以及调查大陆架活动的困难性，海上保安厅虽然自 1983 年以来就开始实施大陆架调查活动，存在许多前期成果和丰富的经验，但其在组织机构上的重视和国家在财政上的大力支持，确保了其调查工作的加速实施和完成。例如，海上保安厅为有效实施向联合国提交大陆架界限的情报，新设了大陆架情报管理官，以期对大陆架调查成果实施统一收集、管理、保管及提供情报的工作，构筑了完善的组织体制。[20] 在财政支持上，海上保安厅 2005 年度关于调查大陆架界限的经费为 66.86 亿日元，[21] 2006 年度关于调

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18 下载于 http://www.cas.go.jp/seisaku/tairikudana/kettei.html，2009 年 1 月 31 日。

19 大陆架界限委员会在第五届会议上，即 1999 年 5 月 13 日，协商一致通过了《大陆架界限委员会科学和技术准则》，为各沿海国提出外大陆架申请案提供了基础，也实质性地推进了外大陆架制度的申请工作。

20 海上保安厅编：《海上保安厅年度报告》（2005 年），东京：国立印刷局 2005 年版，第 40 页。

21 海上保安厅编：《海上保安厅年度报告》（2005 年），东京：国立印刷局 2005 年版，第 40 页。

查大陆架界限的经费为67.35亿日元，[22] 2007年关于调查大陆架界限的经费为66.87亿日元，[23] 2008年关于调查大陆架界限的经费为3.07亿日元。[24] 相关财政支持了海上保安厅2007年对南鸟岛周边海域和大东岛周边海域及离其陆岸很遥远的海域进行精密海底地形调查和地壳构造勘探的调查工作。另外，海上保安厅通过精密海底地形和地壳构造勘探方法，在利用测量船（例如，“昭洋”、“拓洋”号）调查大陆架的过程中，也发现了许多新的海山，即在父岛和南鸟岛之间海域发现了7个海山，并取得了相关科学数据，从而进一步扩张了日本主张的所谓的外大陆架申请面积。[25]

可见，日本通过构建完善的组织体制、制定政策方针、任务分工和合作，以及在财政上的大力支持，完成了大陆架调查工作，致使外大陆架划界申请案得以提前提交。日本的大陆架调查工作和其申请方案如果获得通过，尤其在冲之鸟礁附近海域将对我国在远海的航行和调查测量工作，及国家安全等带来不利的影响，值得关注。

三、日本外大陆架划界申请案问题与中国的立场

众所周知，外大陆架制度是《公约》的新制度，其主要内容规定在《公约》第76条、第83条和附件二（大陆架界限委员会）中。同时，《公约》设立了审议外大陆架划界案的专职机构——大陆架界限委员会，其职能主要为审查沿海国为200海里以外大陆架的界限所提出的各种资料，并按照《公约》第76条和1980年8月29日第三次联合国海洋法会议通过的最后文件附件二（《关于使用一种特定方法划定大陆边外缘的谅解声明》）提出建议；经相关沿海国之请求，在编制上述资料时，提供科学和技术咨询意见。沿海国在大陆架界限委员会所提出之建议基础上所划定的大陆架外部界限具有确定性和拘束力。上已言及，迄今，大陆架界限委员会已接收了17个外大陆架划界申请案，审议的工作量相当大。可以预见，沿海国将在以下方面关注大陆架界限委员会的审查工作：第一，审议划界案的效率问题；第二，国家划界案涉及的秘密保守问题；第三，资助发展中国家提交申请案的有关问题；第四，关注核可国家划界案的建议内容，包括标准等问题。

在日本的外大陆架划界申请案中突出的问题是，其将冲之鸟礁作为岛屿处理，并以此为基点主张大陆架。实际上，冲之鸟礁不是《公约》第121条规定的岛屿，

22 海上保安厅编:《海上保安厅年度报告》(2006年)，东京：国立印刷局2006年版，第56页。
23 海上保安厅编:《海上保安厅年度报告》(2007年)，东京：国立印刷局2007年版，第43页。
24 海上保安厅编:《海上保安厅年度报告》(2008年)，东京：蔦有印刷株式会社2008年版，第46、86页。
25 海上保安厅编:《海上保安厅年度报告》(2007年)，东京：国立印刷局2007年版，第32~33页。

只是岩礁，根本无法主张大陆架。

“冲之鸟”位于我国台湾岛以东、硫球群岛以南海域。它实际上是一块珊瑚岩礁，在退潮时东西长 4.5 千米，南北宽 7 千米，周长 11 千米，高潮时整个礁基本上都被淹没在海水中，只有“北小岛”和“东小岛”有两块小的礁石露出水面，其高 1 米多，宽约 4.6 米，总面积不超过 10 平方米。[26] 同时，由于冲之鸟礁周围水域拥有丰富的渔业资源，海底拥有丰富的锰结核资源，所以日本试图以“冲之鸟”为领海基点，扩大海洋范围。为此，日本出巨资加固，即在两块礁石四周构筑了一个直径为 50 米的圆形钢筋水泥防护设施，并建了一个离海面约 7 米的海上观测平台，以避免其消失于水下，[27] 可谓“用心良苦”。日本提交的外大陆架划界申请案就包含了以“冲之鸟”为基点的外大陆架范围。

冲之鸟礁虽远离我国海岸，但对我国的影响严重。由于日本的无理先占，造成其以此为基点主张 200 海里专属经济区和外大陆架，这不仅严重影响各国在该公海海域的航行自由和海洋科学研究，侵害周边国家的海洋利益；而且在军事上对我国进出太平洋海域构成严重威胁，必须引起高度重视。

鉴于上述考量，我国常驻联合国代表团于 2009 年 2 月 6 日向联合国秘书长提交了针对日本外大陆架划界申请案的立场声明。主要内容如下：“中国政府认真研究了日本划界案的执行摘要，尤其注意到该划界案以“冲之鸟岛”为基点划出的 200 海里大陆架范围，以及以“冲之鸟岛”为基点延伸的 SKB、MIT 和 KPR 三处 200 海里外大陆架。应当注意，所谓的“冲之鸟岛”实际上是《公约》第 121 条第 3 款所指的岩礁。因此中国政府提请大陆架界限委员会委员、《公约》缔约国和联合国会员国注意，日本将冲之鸟礁列入其划界案中是不符合《公约》规定的。”《公约》第 121 条第 3 款规定，“不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区和大陆架。”现有的科学资料充分表明，冲之鸟礁依其自然状况显然是不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区和大陆架，更不具备扩展 200 海里以外大陆架的权利。鉴于冲之鸟礁不具备拥有任何范围大陆架的权利基础，日本划界案中以冲之鸟礁为基点划出的 200 海里以内及以外的部分均超出了《公约》有关委员会作出建议的授权。中国政府谨要求委员会不对上述部分采取任何行动。中国常驻联合国代表团请秘书长将上述立场周知委员会全体委员、《公约》全体缔约国和联合国全体成员国。

另外，韩国常驻联合国代表团于 2009 年 2 月 27 日也向联合国秘书长提交了针对“冲之鸟岛”与中国政府内容相同的照会申明。

可见，日本外大陆架划界申请案中以“冲之鸟岛”为基点主张的大陆架和外

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26 高之国：《关于苏岩礁和“冲之鸟”礁的思虑和建议》，载于高之国、张海文、贾宇主编：《国际海洋法发展趋势研究》，北京：海洋出版社 2007 年版，第 3~4 页。

27 高之国：《关于苏岩礁和“冲之鸟”礁的思虑和建议》，载于高之国、张海文、贾宇主编：《国际海洋法发展趋势研究》，北京：海洋出版社 2007 年版，第 3~5 页。

大陆架是不符合《公约》关于岛屿的相关规定的，大陆架界限委员会也无权对此发表建议。[28]

总之，国际社会以《公约》为基础的外大陆架圈地运动已经产生，为此，我国应积极研究外大陆架制度，以维护我国海洋权益。

我国虽然是一个海洋大国，但我国的外大陆架范围极其有限。具体来说，在南海可能存在属于我国的200海里外大陆架。

同时，尽管我国为外大陆架划界申请工作实施了国家专项计划，并积极准备提出申请，但我国是否应于2009年5月13日之前向大陆架界限委员会提交外大陆架划界申请方案，仍需在进行综合研究后判定。但从《公约》规定引申出的沿海国义务来看，似乎应以提交为妥。例如，《公约》附件二第4条规定，拟按照《公约》第76条划定其200海里外大陆架外部界限的沿海国，应将这种界限的详情连同支持这种界限的科学和技术资料，尽早提交大陆架界限委员会，而且无论如何应于本《公约》对该国生效后10年内提出。但由于提交外部界限申请案的高度复杂性和高难度性，在《公约》的第11次缔约国会议（2001年）上通过了延长申请期限的决议，即决定：凡是在1999年5月13日以前正式批准或加入《公约》的国家，都可以从这一天开始起算法定的10年内提交期限。当然，国际社会现有再次延长申请期限的呼声，但在大陆架界限委员会或《公约》缔约国会议未作出新的决议之前，沿海国原则上应予以遵守，否则将承担不履行《公约》义务的责任。为此，我国必须积极应对。

28 例如，《公约》第121条第1款规定，岛屿是四面环水并在高潮时高于水面的自然形成的陆地区域。

中日东海问题原则共识述评

余民才 *

内容摘要:《中日东海问题原则共识》（以下简称"《原则共识》"）是中日解决东海油气田争端、推进两国战略互惠关系的产物，具有不同于其他开发合作安排的独特特征。中日落实《原则共识》的一项主要后续步骤是达成东海"区块"共同开发协定，进行共同开发活动。这一目标有望在麻生太郎政府时期实现。

关键词: 东海　原则共识　战略互惠关系　共同开发

《中日东海问题原则共识》（以下简称"《原则共识》"）是 2008 年 6 月 18 日达成的。据报道，中日双方即将就《原则共识》所涉东海共同开发谅解制定条约举行磋商。[1]《原则共识》做出了哪些安排、有什么特点，中日东海共同开发协定磋商将主要涉及哪些方面、前景如何，本文将对这些问题进行探讨。

一、《原则共识》的历程回顾

《原则共识》是中日双方历时 3 年多、经过 11 轮正式磋商和后续磋商的成果，解决的是 2004 年 5 月我国开发东海"春晓"油气田，日本以"吸管"理论要求提供油气田资料和停止开发活动被拒绝、进而采取竞争性活动所引起的油气开发争端。以第三轮磋商为界，中日东海问题磋商可大致分为前后两个阶段。第一阶段为 2004 年 10 月和第二年 5 月举行的第一、二轮磋商，磋商议题集中于阐述各自对"春晓"油气田开发的立场与关切，并就启动东海划界谈判、推进共同开发等问题交换意见。第二阶段自 2005 年 9 月第三轮磋商开始。由于日本接受了我国倡导的共同开发解决原则，所以如何实现共同开发成为磋商的主题。

但在共同开发区的设立和具体开发方式上，双方在 2007 年 3 月第七轮磋商

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1 《日媒担心钓鱼岛争议影响合作开发东海》（中央社东京 12 月 14 日电），载于《参考消息》2008 年 12 月 15 日，第 8 版。

中的主张"严重对立"。[2] 分歧的焦点在于是否应把日本所称东海"中间线"西侧的"春晓"、"天外天"、"断桥"和"龙井" 4 个油气田纳入共同开发区内。中方建议在东海北部的大陆架争议区域和钓鱼岛周边海域建立共同开发区;日本则提议在包括"中间线"在内的"广泛区域"进行共同开发。[3] 为制造法律依据,日本还声称其专属经济区是 200 海里范围,即涵盖了 4 个油气田的海域,并给它们分别冠以日文名字。中方拒绝了日本方案,因为它是以"中间线"为基础。"中间线"只是日本的单方面主张,中方从未接受,将来也不会接受。而且,"春晓"等油气田完全位于没有争议的中国一侧,开发这些油气田是中国行使主权权利的正常活动。同样,日本以所谓"钓鱼岛是日本领土"为由,不接受中方共同开发钓鱼岛周围海域的设想,因此这五轮磋商并没有取得应有进展。

东海问题磋商开始取得进展是在 2007 年 4 月温家宝总理访问日本之后。作为访问成果的组成部分,两国领导人就东海问题达成了 5 点共识,包括:坚持使东海成为和平、合作、友好之海;根据互惠原则,在双方都能接受的较大海域进行共同开发;在需要时举行更高级别的磋商;以及加快磋商进程,争取在秋天就共同开发具体方案向领导人报告。[4] 这些共识为打破谈判僵局提供了强有力的政治支持。在 5 月举行的第八轮磋商中,日本的新提案避开了敏感的"中间线",建议在距离两国海岸等距离"中线"周围进行共同开发,并表示愿意负担中方已投资油气田的资金。[5] 在随后第九、十和十一轮磋商中,双方就东海问题的具体解决方案进行了认真和实质性的探讨,取得了积极进展。

2007 年 12 月,日本前首相福田康夫访华,与我国领导人就东海问题达成了新共识,这进一步推进了磋商的良好势头。新共识除重申 5 点共识精神外,还特别强调,将根据需要继续举行副部级磋商,在迄今所取得进展的基础上共同努力,争取在进一步发展两国关系的进程中尽早就解决办法达成一致。[6] 2008 年 2 月,日本采取了分步走的策略,将实现对"春晓"油气田的共同出资作为优先任务,以此换取他同意在"中间线"自己一侧海域进行共同开发。[7] 5 月胡锦涛主席的日本

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2 《外交部副部长武大伟谈东海问题》(新华社北京 6 月 19 日电),载于《人民日报》2008 年 6 月 20 日,第 3 版。

3 《2006 年 3 月 9 日外交部发言人秦刚在例行记者会上答记者问》,下载于 http://www.fmprc. gov. cn/chn/xwfw/ fyrth/t239432. htm,2008 年 6 月 17 日。

4 《中日联合新闻公报》(新华社东京 4 月 11 日电),载于《人民日报》2007 年 4 月 12 日,第 3 版。

5 《中日东海油气田谈判无进展》(中央社东京 6 月 2 日电),载于《参考消息》2007 年 6 月 3 日,第 8 版。

6 《中日两国领导人关于东海问题达成新共识》(新华社北京 2007 年 12 月 28 日电),下载于 http://news.xinhuanet.com/newscenter/2007-12/28/content_7329258.htm,2008 年 6 月 17 日。

7 《日中东海油气田联合开发方案将分两步走》,载于《日本经济新闻》2008 年 2 月 4 日;《日报分析日提议出资开发"春晓"用意》(中央社东京 2 月 17 日电),载于《参考消息》2008 年 2 月 18 日,第 8 版。

之行加速了磋商进程。双方不仅发表了构筑战略互惠关系的重要政治文件——《中日关于全面推进战略互惠关系的联合声明》，而且解决了油气田开发的最敏感问题。[8] 时隔一个多月后，双方即达成了《原则共识》。

中日取得《原则共识》有 2 个主要原因。一是两国领导人的共同政治决断和两国关系的持续改善。众所周知，中日关系曾一度出现困难，这致使初期谈判收效甚微。2006 年两国领导人打破政治坚冰，相继进行了“破冰”、“融冰”、“迎春”和“暖春”之旅，一致同意建立并全面推进战略互惠关系，决心使东海成为和平、合作和友好之海。两国高层的频繁政治互动和新型国家间关系的定位极大地推动了双方关系的明显改善和迅速发展，为加快磋商进程注入了动力。仅 2007 年双方就密集地举行了五轮磋商。尤其胡锦涛主席的访问将中日关系提升到一个新水平。比如，双方举办了大型中日青少年交流活动；在汶川特大地震发生后，第一支外国救援队和外国医疗队来自日本，日本政府 2 次向灾区提供资金和物资援助，日本前首相福田康夫前往中国驻日使馆悼念汶川地震遇难者；以及日本海上自卫队军舰首次访问我国港口。这些为最终达成东海问题共识和谅解创造了更融洽的氛围和沟通条件。

二是两国坚持外交解决。中日都是 1982 年《联合国海洋法公约》的缔约国，协商解决有关海洋权益的分歧是优先义务。双方秉承国际义务，从改善和发展两国关系大局出发，决定以谈判方式和平解决，为此启动了东海问题磋商。尽管谈判进展不是很顺利，时而伴随某些杂音（比如，日本有的高官无理地将没有取得进展的责任推在中国身上；[9] 此外，日本还通过了强化其立场的《海洋基本法》和《海洋构筑物安全水域设定法》），但双方始终坚持谈判解决的原则，在每次磋商结束后不仅重申继续谈判解决的意愿，而且就下一次磋商的时间和地点预先作出安排。这样就排除了诉诸第三方解决的可能选择，避免了矛盾升级的单方面行为。事实上，为防止海上不测事态的发生，第六轮磋商就建立海上热线联络机制问题达成了原则共识；在温总理访日时，双方决定加强两国防务当局联络机制。[10] 因此，双方能够将注意力集中在尊重事实的基础上求同存异、逐步缩小分歧、积累共识，稳步地朝解决问题的目标迈进。

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8 《外交部副部长武大伟谈东海问题》（新华社北京 6 月 19 日电），载于《人民日报》2008 年 6 月 20 日，第 3 版。

9 《就中日东海磋商问题：外交部发言人答记者问》（新华社北京 10 月 19 日电），载于《人民日报》2007 年 10 月 20 日，第 4 版。

10 《中日联合新闻公报》（新华社东京 4 月 11 日电），载于《人民日报》2007 年 4 月 12 日，第 3 版。

二、《原则共识》的内容、特点与意义

《原则共识》规划了中日东海合作的基本框架，由 3 项谅解组成：一是东海合作不损害各自法律立场，二是在东海中北部选定的一个共同开发区块（以下简称“区块”）内进行共同开发，三是日本法人按照我国对外合作开采海洋石油资源的有关法律参与“春晓”油气田开发。[11] 与其他合作协议相比，《原则共识》具有一些独特之处，主要表现在以下方面：

(1) 它是一个政治协议，而非正式的条约或协定。条约或协定是建立国家之间法律关系的形式，主要是指 2 个或 2 个以上的国家以国际法为准，确立他们之间权利义务的书面协议。判断一项协议是否构成条约的其中一个标准是协议是否规定了当事国之间在国际法上的权利与义务。[12]《原则共识》是中日关于东海油气开发的协议，但它只是确立了开发合作的几项基本原则，并没有进一步规定开发的具体细节，也没有提到协议的批准或生效，所以它不是一个正式的条约或协定。《原则共识》的名称本身也表明了这一点。按照我国《缔结条约程序法》第 7 条和第 8 条，《原则共识》既无需全国人大常委会决定批准，也无需国务院核准。

(2) 它创立了一种复合型的资源开发合作方式。东海问题磋商是在共同开发原则指导下展开的，但《原则共识》并不是一个纯共同开发协议，而是将共同开发与合作开发结合起来。也就是说，在双方共同选定的“区块”内进行共同开发，在“春晓”油气田实行合作开发。共同开发与合作开发完全不同。前者是国际法上的一种国际合作形式，是中日两国暂时搁置东海主权权利争议，在相互间协定的基础上，以某种合作方式勘探和开发指定“区块”内的石油资源。后者是国内法上的对外合作形式，是日本企业依照我国《对外合作开采海洋石油资源条例》参与“春晓”油气田的开发，与先前尤尼科和壳牌公司的参与没有实质不同。因而中日在“区块”内的开发是由两国政府主导磋商，并依照双方商定的办法和原则进行；“春晓”油气田的开发则必须按照我国法律进行，由两国相关企业进行磋商。

东海问题的双轨处理方式既与相关区域的地位有一致性，又有其特殊性。从有关图示上观察，东海“区块”的一部分位于日本“中间线”与我国依据大陆架自然延伸原则主张至冲绳海槽的中轴线或自领海基线起 200 海里专属经济区外部界限之间的争议区内，另一部分位于无争议的“中间线”以西我国一侧。简言之，“区块”跨越了“中间线”。这与在权利重叠区域设立共同开发区的惯常做法有所不同，但也不是没有先例。1965 年科威特与沙特阿拉伯协定建立的共同开发区包括争

11 《中日就东海问题达成原则共识》（新华社北京 6 月 18 日电），载于《人民日报》2008 年 6 月 19 日，第 4 版。

12 李浩培著：《条约法概论》，北京：法律出版社 1987 年版，第 19 页。

议区以外的海域，即所划分的中立区以及 6 海里领海以外的大陆架。[13]

至于“春晓”油气田，其完全处于日本没有争议的“中间线”西侧，无论日本采取什么行动和理论，都改变不了我国享有主权权利的事实。所以它的开发问题是我国自主决定的事情。但是我国又承诺日本企业可以参与开发，这实际上赋予了日本企业既定合作方的身份，因而与通常的对外合作开发有所区别。根据《对外合作开采海洋石油资源条例》第 7 条，招标是外国石油公司获得合作开发权的一个必要程序，且中外合作方之间的石油合同必须得到商务部批准方为有效。在《原则共识》下，日本企业参与合作开发显然无需招标程序，石油合同得到批准也是自然而然的事。而且，两国政府还将确认此种合作，并为此缔结必要的换文和履行必要的国内手续。[14] 这种因对外合作开发而换文的情况在我国对外石油开发合作中尚属首次。

(3) 它仅是东海油气开发合作的开始。《原则共识》是初步的、原则性的。这不仅体现在关于东海合作的一般原则中明文提到双方基于合作目的“迈出了第一步，今后将继续进行磋商”，而且反映在开发合作的谅解上。共同开发谅解只涉及作为东海共同开发第一步的几个步骤，包括在北纬 29°31' —30°04' 与东经 125°53'30" —126°26'00" 之间划定一个由 7 个坐标点顺序连线组成的共同开发区块；在“区块”内选择双方一致同意的地点进行共同开发；以及为实现共同开发，双方将努力履行各自的国内手续，尽快达成必要的双边协议。[15] 同样，合作开发谅解只是我国企业欢迎日本法人依照我国法律参加“春晓”现有油气田的开发。至于共同开发的具体事宜和合作开发中有关补偿中方投资的额度、投资比例、资本回收与利益分配、产品处置和权利义务转让等，则需要双方政府或石油公司进一步协商确定。因此，《原则共识》还需要两国有关部门通过平等协商和务实合作来落实，因此还有较长的路要走。

(4) 强调双方的法律立场不受影响。自上世纪 70 年代东海“海底石油战”出现以来，中日在东海管辖权界限划分问题上一直各持己见。中方主张按自然延伸原则和衡平原则划界，日方则坚持以“中间线”为界。《原则共识》是双方暂时冻结划界争议、优先开发资源的一个临时替代解决方案，符合《联合国海洋法公约》第 74 条和第 83 条。这两条都规定，在达成专属经济区或大陆架划界协议以前，有关国家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。这类安排及其活动不妨碍当事国在争议海域的权利主张或立场，也不构成支持或否定对方

13 余民才著：《海洋石油勘探与开发的法律问题》，北京：中国人民大学出版社 2001 年版，第 132、141 页。

14 《中日就东海问题达成原则共识》（新华社北京 6 月 18 日电），载于《人民日报》2008 年 6 月 19 日，第 4 版。

15 《中日就东海问题达成原则共识》（新华社北京 6 月 18 日电），载于《人民日报》2008 年 6 月 19 日，第 4 版。

权利主张或立场的法律基础，更不创设任何新的权利或扩大现有权利主张。《原则共识》开宗明义，不损害双方法律立场是在实现东海划界前的过渡期间进行合作的前提。[16] 因此，中方在东海有关问题上的一贯主张和立场没有变化，中方不承认“中间线”和“春晓”油气田与共同开发无关的立场没有改变。[17]

形式灵活、合作安排有特色的《原则共识》是中日关系划时代的大事，具有里程碑意义。首先，它解决了两个能源进口大国之间悬而未决的棘手问题，将一个可能的潜在冲突因素转化为联结双方共同利益的纽带。这有利于东海的和平与稳定，有助于推动建设和谐周边、和谐亚洲，显示了双方有能力通过对话与合作有效化解两国关系中的敏感、复杂问题。就如日本前外相高村正彦评价的，《原则共识》的达成是双方无论在怎样困难的问题上都能通过对话加以解决的良好例证。[18] 其次，《原则共识》反映并适当平衡了双方各自的关注与目标，实现了互利双赢。这为两国全面推进战略互惠关系奠定了一个重要基础，有利于双边关系健康稳定发展，有利于增进互信，加强在能源等领域的互利合作。可以相信，“区块”的共同开发和“春晓”油气田的合作开发将深化两国石油界的合作，扩大在第三国合作开发石油的兴趣和互信基础。最后，它是检验我国“搁置争议、共同开发”倡议的一个标志性指标，丰富了共同开发实践，对于解决南海和世界其他海区的类似争端有积极的示范作用。

三、东海“区块”共同开发协定磋商的主要方面

中日落实《原则共识》的一项主要后续步骤是制定在“区块”进行共同开发的协定，健全共同开发制度。[19] 创建一个什么样的共同开发协定，对中日双方来说都很重要。这里有 3 个方面首先值得注意。第一，双方必须认真对待共同开发细节的磋商。因为《原则共识》申明双方将继续协商在东海其他海域的共同开发，[20] 这使“区块”的共同开发具有“实验田”或“窗口”的性质，可能成为适用于其他海域的标准模式。第二，双方已有的成功经验需予重视。中日都有共同开发的实践。2005 年，我国与周边海上邻国签订了第一个共同开发协定，即中朝《关于海上共

16 《中日就东海问题达成原则共识》（新华社北京 6 月 18 日电），载于《人民日报》2008 年 6 月 19 日，第 4 版。

17 《外交部发言人姜瑜举行例行记者会》，下载于 http://www.mfa.gov.cn/chn/xwfw/fyrth/t448227.htm，2008 年 6 月 17 日。

18 《日外相说中日东海问题共识是两国战略互惠关系的重大成果》，下载于 http://news.xinhuanet.com/newscenter/2008-06/18/content_8395561.htm，2008 年 6 月 17 日。

19 “春晓”油气田的合作开发这里不作讨论，因为它是国内法上的问题，中国海洋石油总公司有相当丰富的对外合作开发经验。

20 《中日就东海问题达成原则共识》（新华社北京 6 月 18 日电），载于《人民日报》2008 年 6 月 19 日，第 4 版。

同开发石油的协定》；中、菲、越 3 国的 3 家石油公司签署了《在南中国海协议区三方联合海洋地震工作协议》。1974 年，日韩订立了《关于共同开发邻接两国南部大陆架的协定》。[21] 这些为共同开发协定的拟订提供了有价值的借鉴。第三，共同开发合作安排应采用政府间协定的形式。因为国家间条约或协定的批准问题可能引起开发活动的不适当延迟，而且经济合作开发类协定不应该属于《缔结条约程序法》第 7 条所列需要全国人大常委会决定批准的"条约和重要协定"范畴。

中日东海"区块"共同开发协定磋商除双方已经确定的原则和"区块"外，将主要涉及以下方面：费用负担与收益分配、管辖权与法律适用、"区块"的管理、开发方式选择以及作业者的指定。按照争议海域共同开发的通常做法，中日双方在"区块"内应该平均分摊勘探、开发费用，均享开发收益。这是中朝和日韩共同开发协定均采用的费用承担与收益分配方式，《原则共识》也要求"本着互惠原则"进行共同开发。[22]

管辖权与法律适用是与开发活动的管理相关的问题，涉及当事国在立法、行政、司法和防务等方面的权力。中日可供考虑的模式有：(1) 一国单独管辖并依其法律行使；(2) 将共同开发区分成 2 部分，双方各自采用本国法律在其中一个分区块进行管辖；(3) 两国共同管辖；(4) 作业者的国籍国管辖。第一种模式不具有可接受性，因为"区块"无论由中日哪一方单独管辖，都难以得到对方的同意。第二种模式有一定可行性，实践中泰国与马来西亚曾基于刑事和民事管辖的目的将他们在泰国湾的共同开发区分成泰国小区和马来西亚小区。但中日接受这种安排的可能性不大，因为如何划分"区块"将成为一个困扰进程的问题。

第三种模式通常是由相关国家委派同等数目的代表组成一个"超国家"机构在共同开发区内适用一套统一的法律制度，而非其中一国的法律。中日双方如果有耐心和诚意就此达成一致，无疑应该是最理想的一个选择。然而，就其现实性而言，这种模式最终不可能被采纳。因为制订一套适用于"区块"的新法律制度不仅耗时费力，而且更需要相互作出妥协。比如，1979 年泰国和马来西亚共同开发案中，双方对联合管理局制定和实施什么样的法律都有顾虑，直到 1990 年才达成有关联合管理局章程及其他事项的协定。[23] 日韩在谈判共同开发协定之初，也曾设想为共同开发区专门订立一套法律，但因无法在短时间内完成而作罢。中日能够就适用统一的法律迅速取得协议或准备"持久战"都是令人怀疑的。

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21 该协定因无视我国在东海的权利，遭到我国抗议。

22 《中日就东海问题达成原则共识》（新华社北京 6 月 18 日电），载于《人民日报》2008 年 6 月 19 日，第 4 版。

23 萧建国著：《国际海洋边界石油的共同开发》，北京：海洋出版社 2006 年版，第 125 页。

显而易见，作业者的国籍国管辖模式或“作业者公式”是最现实的选择。这种模式是指作业区块由作业者的所属国管辖，也就是作业者只受其本国法律的约束。这其实是日韩共同开发协定所采用的方式。该协定第19条规定，除另有规定外，如果一方已同意承租人作为“小区”的作业者，有关该区内自然资源的勘探或开发事项应适用该国的法律规章。虽然这种方式与日韩双方将一个面积为2万多平方公里的共同开发区分成若干小区相关，中日“区块”面积不大（2600平方公里）而无法分成小区，但这不会成为一个障碍。由于“作业者公式”是日本的“发明”，且经实践证明行之有效，[24] 日本自然乐于采用其所熟知的定型模式。中方也应该有充分理由表示同意。第一，这种方式清楚、简便易行；第二，双方将尽早商定在东海其他海域的共同开发，这实际上形成了“小区”格局；第三，《原则共识》本身预留了适用“作业者公式”的空间，因为它将整个开采过程分成了勘探和开发两个阶段。[25] 这使双方可以约定“区块”的作业者必须随勘探、开发的不同阶段进行轮换，因而双方都获得了适用其法律的平等机会。

基于上述同样的理由，“区块”的管理不可能采用一国代理另一国管理的模式和“超国家”管理模式，只能是双方各自进行管理。这也是日韩共同开发协定建立的管理方式。在这种制度下，中日双方保留对各自石油公司授权和进行宏观管理的权力，被授权的石油公司则享有在“区块”排他的勘探开发权，并负责具体作业活动。按照我国《对外合作开采海洋石油资源条例》第6条，中国海洋石油总公司是中方在“区块”的被授权公司。它与日本授权的石油公司必须订立共同作业协议，以合资机构的形式对“区块”的石油资源进行勘探开发。而共同作业协议必须得到中日双方政府的批准，以确保他们对“区块”开发的战略控制。为监督、协调“区块”内的活动，双方还应该筹建一个联合委员会，由各自外交和能源主管部门一定数目的代表组成。委员会的作用应定位于协商或咨询的职能。也就是说，它本身不拥有授权勘探开发许可或执行共同开发协定的权力，也不对“区块”本身的作业活动承担责任，只是就与执行共同开发协定有关的事项进行协商，向双方政府提出建议。

至于开发方式的选择，这与中日两国存在不同的石油合作开发制度有关。中国采用合同制，日本采用租让制。合同制与租让制的本质区别在于：前者是资源国将勘探开发的专属权利授予其国有石油公司，外国石油公司必须同国有石油公司订立合同，才能在国家确定的合作区块内从事石油活动；后者是资源国将某一特定区块的勘探开发权利授予不特定的石油公司，取得租让权的石油公司在租让区内享有勘探、开发和取得石油的专属权利。合同是中日在“区块”的一个适当选择，

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24 萧建国著：《国际海洋边界石油的共同开发》，北京：海洋出版社2006年版，第150页。

25 《中日就东海问题达成原则共识》（新华社北京6月18日电），载于《人民日报》2008年6月19日，第4版。

因为租让制不能确定在“区块”内获得双方政府授权的石油公司之间的具体权利义务，而且我国《对外合作开采海洋石油资源条例》所要求以及待批准的合作形式是合同。更重要的是，《原则共识》要求被授权石油公司进行联合勘探，在“区块”内一致同意的地点进行共同开发。[26] 这就是说，要将“区块”作为一个整体来对待，而只有合同才能对双方在勘探、开发阶段的权利义务作出安排，实现整体经济利益最大化。在采用不同石油开发制度的国家之间的共同开发实践中，合同是颇受欢迎的一种形式。如澳大利亚、泰国采用租让制，印度尼西亚、马来西亚采用产品分成合同，而泰马共同开发协定、1989 年澳大利亚与印度尼西亚在帝汶海合作区的 A 区（即共同开发区）都采用了产品分成合同。即使是采用租让制的国家之间，他们在共同开发区内也采用合同形式。如 1995 年英国与阿根廷《关于在西南大西洋合作进行近海活动的联合声明》规定，特别合作区的石油勘探开发活动是在合资的基础上进行；法国与西班牙 1974 年在比斯开湾、冰岛与挪威 1981 年在扬马延岛周围海域进行共同开发的协定都要求双方指定的石油公司按合资合同进行开发；日韩共同开发协定本身也规定，双方的承租人必须以合资形式进行开发。

作业者的指定涉及由哪一方的石油公司负责“区块”内石油勘探或开发活动的问题。这是由共同开发的效率原则决定的，因为双方各自的被授权石油公司不可能在“区块”内从事竞争性勘探或开发活动，必须将它作为一个单元来勘探开发，也就是需要一个单一的作业者代表双方的石油公司从事单一的勘探开发活动。日韩共同开发协定提供了指定作业者程序和保留政府控制的模式。即双方各自指定的石油公司必须订立联合作业协议，指定一个作业者，但这种指定须经双方同意，且随勘探、开发阶段互换。如果在一定期限内不能就作业者的指定达成协议，双方应就此进行协商。如果在协商开始后一定期限内仍未指定作业者，则由双方的被授权石油公司以抽签的方式决定。

东海“区块”共同开发协定的其他方面，如勘探开发期限、区块面积撤消、关税与税收、对第三方赔偿责任的承担、跨区矿藏联合开发、第三国权利、污染防治以及争端解决等，双方应该容易取得一致意见，不会引起多大问题。

四、东海“区块”共同开发的前景

东海“区块”共同开发之路可能因福田康夫辞职、麻生太郎出任日本新一任首相而充满变数。这在于与“鸽派”的福田不同，麻生是日本“鹰派”的代表人物，曾多次发表激进的日本右翼言论，所以他的当选将使正朝着改善势头发展的中日

26 《中日就东海问题达成原则共识》（新华社北京 6 月 18 日电），载于《人民日报》2008 年 6 月 19 日第 4 版。

关系面临新的考验，东海“区块”共同开发的前景也可能因此不甚明朗。然而，仔细观察起来，东海“区块”共同开发并不会因麻生执政而延缓进程，在麻生时代实现“区块”的共同开发是完全可以期待的。

首先，中日关系持续改善和发展的大格局不可逆转。中日两国互为重要近邻，保持双方关系长期健康稳定发展符合两国和两国人民的根本利益。麻生不可能颠覆安倍晋三和福田努力营建的中日关系，任由它倒退到小泉纯一郎时代。因此，麻生延续其两位前任的对华政策的基调不会改变。事实上，麻生还是一个务实、理性的政治家，重视发展中日关系，不仅曾在帮助促进两国关系缓和方面发挥了关键作用，而且上任后在联合国大会的演讲、施政演说以及在日本参议院全体会议上回答有关对华外交的提问时都再三表示，他将寻求与中国发展友好关系，加强两国合作，增进“互惠与共益”，推动构建两国战略互惠关系，共筑地区和平与繁荣。[27] 2008 年 10 月下旬，麻生出席了在北京举行的亚欧首脑会议和纪念《中日和平友好条约》缔结 30 周年庆典，与我国领导人达成了进一步深化中日战略互惠关系和建立热线电话的协议。[28] 12 月，中日韩三国领导人在日本福冈举行会议，共同签署了《三国伙伴关系联合声明》，并发表了《国际金融和经济问题的联合声明》、《三国灾害管理联合声明》和《中日韩合作行动计划》。麻生在与温家宝总理的会谈中说，日方将坚持日中友好的大方向，愿同中方保持经常性高层交往，深化政治互信，妥善解决分歧，不断推进日中战略互惠关系。他还利用致新年贺词的机会，明确表示 2009 年要借日中关系发展的良好势头，进一步推进日中战略互惠关系。[29]

其次，将共同开发付诸行动是麻生可取得的一笔外交资产。东海共同开发经过麻生两位前任的培育和耕耘，到他手中时正是全面收获的时节。只要他努力维护，瓜熟蒂落是顺理成章的事，从而可在他外交成绩单上写下浓重的一笔。因此，他将寻找时机，推动“区块”共同开发协定的磋商，力争在其任期内实现共同开发。可以相信，我国也会积极配合和促成早日在“区块”展开共同开发活动。

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27 《麻生表示增进日本与中韩互惠与共益》（新华社东京 9 月 26 日电），载于《人民日报》2008 年 9 月 27 日，第 3 版；《麻生发表首次施政演说》（法新社东京 9 月 29 日电），载于《参考消息》2008 年 9 月 30 日，第 2 版；《麻生称将推进中日战略互惠关系》（共同社东京 10 月 2 日电），载于《参考消息》2008 年 10 月 4 日，第 1 版。

28 《胡锦涛会见日本首相麻生太郎》（本报 10 月 24 日电），《人民日报》2008 年 10 月 25 日，第 2 版；《中日领导人统一建立热线》（共同社北京 10 月 24 日电），载于《参考消息》2008 年 10 月 25 日，第 8 版。

29 《温家宝出席中日韩领导人会议》、《温家宝会见日本首相麻生太郎》（本报日本福冈 12 月 13 日电），载于《人民日报》2008 年 12 月 14 日，第 1 版；《日本首相在〈日本与中国〉发表新年贺词》（本报东京 12 月 19 日电），载于《人民日报》2008 年 12 月 20 日，第 3 版。

钓鱼岛海域渔业资源与划界之争分析

王泽林[**]

内容摘要：钓鱼台列屿不仅涉及到主权纠纷，而且涉及到中国与日本之间的渔业资源纠纷，特别是台湾地区与日本的渔业资源纠纷更加严重。岛屿在划界中的效力对渔业资源纠纷有重大影响，所以分析钓鱼台列屿在海洋划界中的效力及其对渔业资源纠纷的影响，有助于界定二者之间的关系以及纠纷的解决。

关键词：钓鱼台列屿　渔业纠纷　海洋划界

Disputes over Fishery Resources and Maritime Boundary Delimitation of the Diaoyu Islands: An Analysis

Abstract: Disputes over the Diaoyu Islands between China and Japan involve not only sovereignty disputes, but also disputes over fishery resources. Particularly, the tension between China Taiwan and Japan is severer. The effect of islands in maritime boundary delimitation exerts a significant impact on disputes over fishery resources. Therefore, an analysis on the effect of the Diaoyu Islands in maritime boundary delimitation and its influence on the disputes over fishery resources will help clarify the connections between the two issues and resolve these disputes.

Key Words: Diaoyu Islands; Fishery disputes; Maritime delimitation

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一、钓鱼岛及其渔业资源纠纷的现状

钓鱼岛是钓鱼台列屿的简称，位于我国台湾省东北部，散布在北纬25度44分到25度55分以及东经123度30分到124度34分之间，共有8个岛屿，包括5个无人小岛（钓鱼岛、黄尾屿、赤尾屿、南小岛和北小岛），岛屿总面积6.7平方公里。[1]

钓鱼岛的重要意义主要表现在军事战略、石油资源与渔业资源三个方面。本文重在讨论渔业资源方面的争议，所以对战略与石油资源问题暂不讨论。对我国台湾渔民而言，在钓鱼岛海域，每年约有5万～6万吨的渔获量，占台湾沿近海渔获量约25%，对渔民生计颇为重要，目前台湾每年沿近海渔获量约20万吨。[2]

中国和日本都对钓鱼岛主张领土主权，目前该岛实际在日本的控制之中。中国于1992年2月25日通过并生效的《中华人民共和国领海及毗连区法》第2条规定“中华人民共和国的陆地领土包括中华人民共和国大陆及其沿海岛屿、台湾及其包括钓鱼岛在内的附属各岛……”，这意味着钓鱼岛不仅是中国的领土，而且拥有领海及毗连区。[3] 1998年6月26日通过并生效的《中华人民共和国专属经济区和大陆架法》规定，中国的专属经济区为中华人民共和国领海以外并邻接领海的区域，从测算领海宽度的基线量起延至200海里。大陆架为中华人民共和国领海以外依本国陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土；如果从测算领海宽度的基线量起至大陆边外缘的距离不足200海里，则扩展至200海里。[4] 至于钓鱼岛是否拥有自己的专属经济区和大陆架，我国政府尚未明确表态，国内学者之间也有争议，有的学者否认其拥有专属经济区和大陆架，[5] 但更多的学者主张其拥有专属经济区和大陆架。中国大陆尚未表态的原因是1996年5月15日宣布领海基点基线时，有意省略中国台湾及其附属岛屿（包括钓

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1 刘浩：《甲午战争前钓鱼列屿主权归属再考证》，载于《国际法评论》2007年第2卷，第303页。

2 中新网：《台当局称将与日本就钓鱼岛海域开发问题再次讨论》，下载于http://www.chinanews.com/n/2003-08-06/26/332504.html，2003年8月6日。

3 《中华人民共和国领海与毗连区法》第2条规定“中华人民共和国领海为邻接中华人民共和国陆地领土和内水的一带海域”，第4条规定“中华人民共和国毗连区为领海以外邻接领海的一带海域”，因为该法已经规定“中华人民共和国的陆地领土包括……钓鱼岛在内的附属各岛”，所以钓鱼岛作为台湾的附属岛屿当然拥有自己的领海和毗连区。

4 《中华人民共和国专属经济区和毗连区法》第2条。

5 王可菊：《钓鱼岛及其在东海划界中的地位》，载于《中国海洋法学评论》2006年第1期，第48页。

鱼岛）的基点基线，而中国台湾在 1998 年 12 月 31 日公布其领海基点基线时，也有意省略了大陆的基点基线，但是明白地将钓鱼岛的基点基线列入其公布的基点基线表内，双方都声明未来还会公布目前没有公布的其他部分的领海基点基线，而且台湾已经在行政区域中将钓鱼岛列入宜兰县管辖，这是两岸的默契配合。[6]

我国台湾于 2003 年公布第一批专属经济海域暂定执法线，这条暂定执法线部分位于钓鱼岛的南侧与东侧，将钓鱼岛海域包含在其专属经济海域内，但是日本并不承认我国台湾的这条暂定执法线，同时中国也不承认日本划定的中间线（该

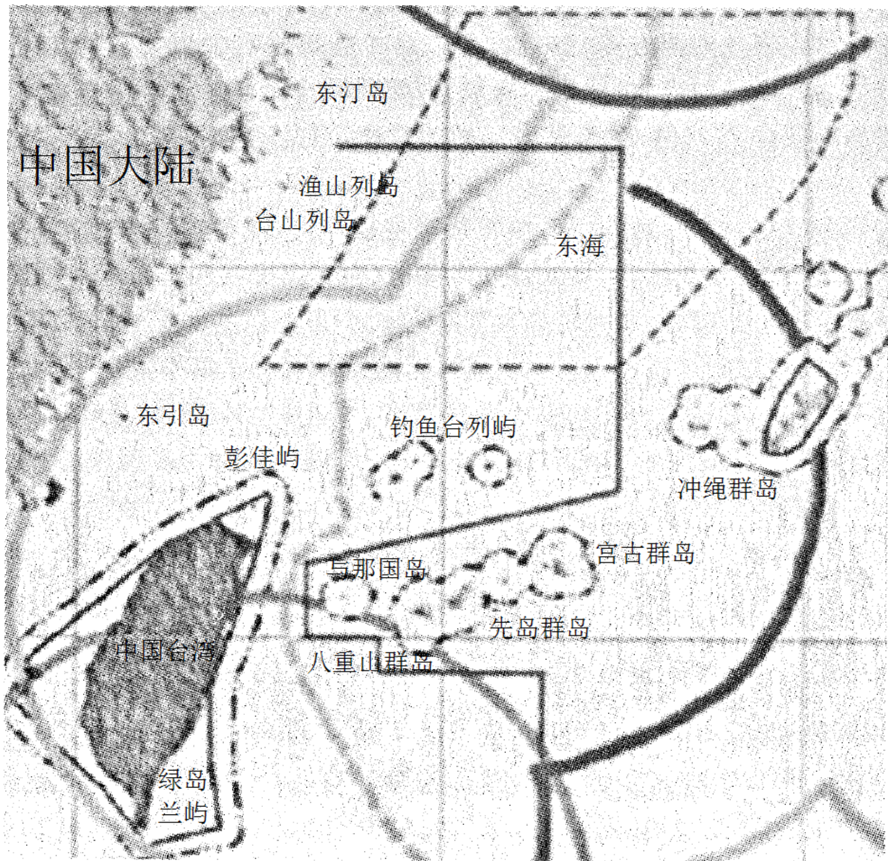

图 1 台湾 2013 年公布第一批专属经济海域暂定执法线 [7]

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6 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 8 页。

7 本示意图来自于台湾陈荔彤教授《海洋事务总论——暂定执法线的功能与定位》讲义，放在本文中仅供读者参考。此外关于《中日渔业协定暂定措施水域管理暂行办法》中规定的“暂定措施水域”位置可见下文中日本官方示意图。图中的中间折线为台湾第一批专属经济海域暂定执法线，较细虚线框内区域为 1997 年《中日渔业协定暂定措施水域管理暂行办法》中所规定的“暂定措施水域”，较粗虚线为日本单方主张与中国划分重叠专属经济区的中间线。

中间线将钓鱼岛划为日本的国土）。1996 年至今，我国台湾与日本渔业会谈已历经 15 次，双方主要是在专属经济区的重叠及共管渔场方面无法达成共识，双方基本立场歧义颇大：专属经济区及大陆架的划界，日方强调依照中间线原则划界，台湾方面希望依照衡平原则划界，双方无法达成共识也造成双方渔民对钓鱼岛附近海域认定的困惑，[8] 但这里还有一个问题是目前中国大陆并不承认中国台湾与日本渔业会谈的合法性。

日本于1996年6月20日批准《联合国海洋法公约》，日本国会1996年通过《关于排他性经济水域及大陆架的法律》，所谓"排他性经济水域"即专属经济区之意。该法规定"排他性经济水域，是从我国的基线至从基线开始测量出的最近距离为200 海里的所有点所构成的线段之间的海域（领海除外）及其海床和底土"。该法还规定，在国家间海岸相邻或相向时，如果这一"从基线开始测量出的最近距离为200 海里的所有点所构成的线段"超过了"从基线起测定的中间线（即与双方国家基线等距离的线）"，"其超过部分以中间线为准（或以我国与外国协商一致的取代中间线的线为准）"，这就是日方主张的"等距离中间线"原则。[9] 日本单方面确立了以中间线作为两国重叠专属经济区的边界，在涉及钓鱼岛的海域，尽管中日之间存在钓鱼岛的主权之争，但日本仍然将钓鱼岛纳为其领土，主张专属经济区和大陆架，并在钓鱼岛与中国台湾之间的海域单方划定了中间线。

二、中日渔业协定关于钓鱼岛海域安排缺失的问题

岛屿主权或者海域划界存在争议，不影响争议国家在渔业方面先行做出过渡性安排。1997 年 11 月 11 日中国和日本签署《中日渔业协定暂定措施水域管理暂行办法》（以下简称"《中日渔业协定》"）确定了双方"暂定措施水域"，主要内容如下：在东海大部分水域，即北纬 27 度至 30 度 40 分，距两国领海基线 52 海里外，设立"暂定措施水域"，由双方共同管理；在暂定措施水域以南（北纬 27 度以南，东经 125 度 30 分以西），维持现有的渔业关系；在暂定措施水域北限（北纬 30 度40 分）以北，东经 124 度 45 分至 127 度 30 分之间的东海水域是中间水域，基本维持现状，双方渔船无须领取对方许可证即可作业；暂定措施水域和中间水域的东西两侧，分别由两国管理。

8　台湾有关方面称："撞船事件"是重启台日渔业谈判契机，下载于 http://www.gzxw.com.cn/news/china/2008/6/19/17403924.html，2009 年 5 月 4 日。

9　关希：《关于中日东海权益之争》，下载于 http://ijs.cass.cn/files/kycg/donghai.htm，2009 年 5 月 4 日。

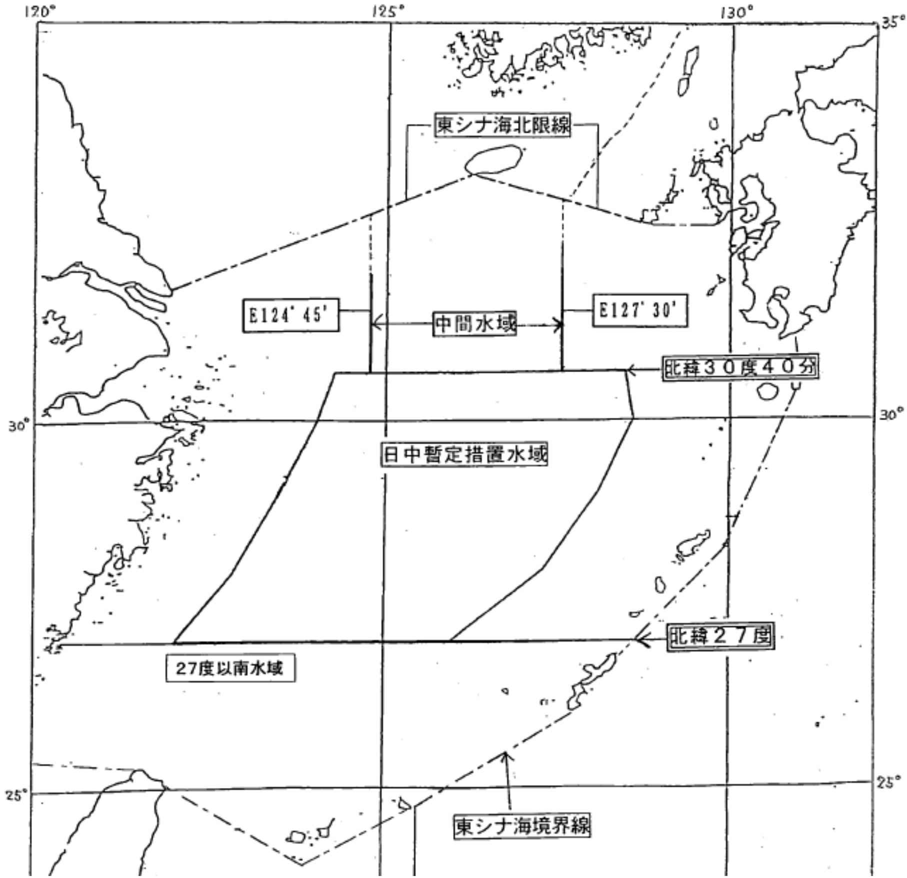

图 2 《中日渔业协定》水域 [10]

从《中日渔业协定》所规定的“暂定措施水域”的范围可以看出，暂定措施水域并不包含钓鱼岛主要海域在内，钓鱼岛海域是属于暂定措施水域以南的水域，《中日渔业协定》回避了钓鱼岛海域的范围，只是规定该水域维持“现有的渔业关系”。中国政府的观点是钓鱼岛附近海域是中国渔民的传统渔场，[11] 因此中国渔民有权利在该海域捕鱼。历史上，日本渔民若要到该海域捕鱼则要经过风浪较大的冲绳海槽水域，所以不轻易到该海域捕鱼，从这个角度理解，中国渔民在钓鱼岛海域捕鱼是在传统渔场作业，这种活动一直从过去持续到现在，当然也应受到《中日渔业协定》的规范与保护，这也是中方所认为的“现有的渔业关系”状态。

钓鱼岛海域正是处于这样一个复杂的局面之中。台湾渔船进入该海域捕鱼，

10 图表来自于日本水产厅，下载于 http://www.jfa.maff.go.jp/j/press/kokusai/pdf/090212-02.pdf，2009 年 3 月 18 日。

11 外交部：《日驱赶钓鱼岛海域台湾渔民侵害中国主权》，下载于 http://www.chinanews.com.cn/news/2005/2005-06-09/26/584683.shtm，2005 年 6 月 9 日。

从基隆出发约 50 海里就进入日本主张的中间线东侧，进入日本主张的“专属经济区”，但是却还在台湾主张的专属经济海域，因此台湾渔船经常会遭到日本军舰的驱逐或查扣。2008 年 6 月 10 日上午，日本海上保安厅船只在钓鱼岛近海与一艘台湾渔船相撞，并导致该渔船沉没。中国大陆发表声明要求日本政府停止在中国钓鱼岛附近海域的非法活动。[12] 但是，日本在钓鱼岛附近的这种阻挠行为时常发生，中国政府本应保护我国渔民在钓鱼岛海域进行捕鱼的权利，但实践中多是台湾渔民在此作业，这种保护多是台湾地方当局去实施，这也是当前的政治格局所决定的。

日本政府正是利用大陆与台湾的这种现有格局，在渔业会谈中玩弄“两面派手法”。日本在与大陆谈判时，顽固坚持根据其《关于排他性经济水域及大陆架的法律》来处理东海渔业和钓鱼岛争端，同时不断暗示如果大陆方面不满足日方要求，其将转而主要与台湾方面就此事进行会谈。而另一方面，日本在和台湾的会晤中则指出台湾方面不是独立国家，无法与日本进行对等谈判，并且提出，台湾方面要想在会谈中取得成果，要想日本在国防安全等方面给予支持，就必须放弃自己的主要主张，答应日方的主要要求。中国大陆目前不承认也不同意中国台湾与日本进行单方面的渔业谈判，外交部发言人刘建超在 2005 年 7 月 1 日的记者招待会上严正声明“中日两国已经签订了渔业协定，作为中国的一部分，有关台湾的渔业事宜已经在协定中作了妥善安排，中日两国应该按协定的规定行事。如果日方跟台湾当局进行渔业谈判，那将违背一个中国原则，也不符合中日渔业协定的原则，中方将表示强烈反对。中方对日方强行驱赶在中国领土钓鱼岛海域进行正常作业的渔民表示强烈不满。我们一直在关注事态的发展。我们要求日本政府重视中方的关切，切实慎重、妥善地处理好有关问题。”[13]

三、岛屿在海洋划界中的效力对渔业的影响

岛屿在海洋划界中的效力不同，则对渔业的影响也不相同。从实践而言，岛屿在海洋划界中的效力依据岛屿的位置和性质分别具有完全效力、部分效力或零效力。依岛屿的位置而言，岛屿或临近大陆，或位于中间线，或邻近其他国家的领

12 中新社：《中方要求日本停止在钓鱼岛海域非法活动》，下载于 http://www.chinanews.com.cn/gn/news/2008/06-17/1284644.shtml，2008 年 6 月 17 日。

13 新华网：《日方谈判气势嚣张，台湾提议与日本共管钓鱼岛》，下载于 http://news.xinhuanet.com/taiwan/2005-07/08/content_3193198.htm，2005 年 7 月 8 日。

域;依性质而言,岛屿的重要性取决于其大小、人口、经济能力和政治及法律地位。[14]

为了确定岛屿在海洋划界中的效力，本文将岛屿区分为主权无争议的岛屿与主权有争议的岛屿。对于主权无争议的岛屿，其在海洋划界中的效力如上所述，具有三种效力。对于接近大陆的岛屿，沿海国一般将其作为基点划入直线基线之内，所以具有全效力，但是如果该岛屿明显偏离海岸的一般方向，则不能作为基点，[15] 实践中这种情况下的岛屿仅被赋予部分效力或零效力。岛屿远离本国大陆、接近与邻国的中间线或接近他国的领土，则通常被赋予部分或零效力。而对于面积很小的无人岛屿或岩礁，或远离本国大陆领土对本国并不十分重要的岛屿在国家划界实践中，相关国家基于各种因素的考虑，一般不给予其划界的效力。除了上述考虑的因素外，由于岛屿在划界中的作用往往涉及到相邻国家的利益，所以其效力往往是国家间相互协商而确定或由仲裁或法院裁决确定，因此岛屿在海洋划界中的效力并无一个确定的公式可以遵循，上述方法也只是基于国际社会的实践而总结的一般规律。

对于主权归属有争议的岛屿，其在海洋划界中的效力是难以确定的。实践中有两种情况，一是争议的岛屿在海洋划界中不被赋予效力，二是争议岛屿附近的海洋边界线暂不予划定。1974 年伊朗与阿拉伯联合酋长国的划界协定中，波斯湾中的小岛阿布穆萨因为两国均主张主权，所以双方同意不以该岛为基点，该岛在划界中被赋予零效力。[16] 1974 年印度和斯里兰卡的划界协定中，双方对卡恰提伍岛的主权有争议，因而双方同意不给该岛任何划界效力。[17] 在丹麦和加拿大的大陆架划界协定中，因为对位于航道中央的汉斯岛存在主权及划界效力的争议，使得该岛屿附近的第 122 和第 123 点之间无法划界，出现该段的划界空白。[18]

关于钓鱼岛，首先要确定它是否符合《联合国海洋法公约》第 121 条的规定，如果符合该条的规定，则拥有其自己的专属经济区和大陆架。如上文所述，国内外学者在学术讨论中对此问题尚存在争议，中国法律尚未明确规定但并不意味着否定，中国台湾 2003 年已经将钓鱼岛周边海域列入其第一批专属经济海域，日本法律也视钓鱼岛为其领土，以其拥有专属经济区和大陆架为条件单方面划定与中国的中间线。因此可见，钓鱼岛不仅仅是领土主权之争，而且其周边海域丰富的自然资源也是争夺的目标，丰富的渔业资源就是其中之一。

主权归属明确的岛屿，其在海洋边界的划定中相对较好处理，因而对岛屿周

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14 傅崐成著：《国际海洋法——衡平划界论》，台北：三民书局 1992 年版，第 141 页。

15 《联合国海洋法公约》第 7 条第 3 款和第 47 条第 3 款。

16 Office of the Geographer, U.S. Department of State, “Limits in the Seas”, No. 63, 30 September 1975, p. 4.

17 Office of the Geographer, U.S. Department of State, “Limits in the Seas”, No. 66, 12 December 1975, p. 3.

18 Office of the Geographer, U.S. Department of State, “Limits in the Seas”, No. 72, 4 August 1976, p. 7.

围的渔业影响也较小。对于主权有争议的岛屿，如果此岛屿附近海域还有丰富的自然资源，又远离本土，例如钓鱼岛，不解决它的主权归属问题而先去解决它在海洋划界中的效力问题，此举难度之大可以想象。从现状看，根据国际社会的实践，在划界中忽略岛屿的存在，以零效力对待的方法在钓鱼岛海域的划界中基本不可能实现；另一种方法是中日在海洋划界协商时，暂不考虑对钓鱼岛附近的海域进行划界，留待主权归属问题解决之后再去考虑，而之前可就其它事项达成协议，搁置争议，共同开发资源，这也是中国一贯的主张，但是目前的问题是日本拒绝接受中国的这种建议，因为日本一直坚持钓鱼岛无主权争议，完全是日本的领土。中国坚决主张钓鱼岛是中国的固有领土，因此中国做出“搁置争议，共同开发”资源的主张已经是巨大的让步。

四、岛屿主权之争的新发展对钓鱼岛问题的影响

岛屿的主权纠纷，无非是通过国家之间协商解决或通过司法或仲裁解决。对于钓鱼岛的主权争议，从现状观察，中日两国不会将此纠纷诉诸司法或仲裁解决。《国际法院规约》对国家之间的争议确立了 3 种管辖权，即各当事国提交的一切案件（自愿管辖）、《联合国宪章》或现行条约中所特定的一切事件（协定管辖），以及国家事先声明接受国际法院管辖的一切法律争端（任择性强制管辖）。[19] 中国和日本目前的声明中从未寻求国际法院或仲裁机构对钓鱼岛主权纠纷进行管辖。日本拒绝司法或仲裁解决的原因是钓鱼岛目前在其实际控制之中，日本认为钓鱼岛不存在主权纠纷，甚至拒绝与中国谈判来解决钓鱼岛争端。日本政府虽然在 1958 年 9 月 15 日根据《国际法院规约》第 36 条第 2 款接受国际法院的强制管辖，但仅将其范围限于该日后的“情势或事实”而引起的争端，而钓鱼岛争端的事实或情势是在 1958 年之前就发生的，因而也无法就钓鱼岛争端接受国际法院的强制管辖。[20] 中华人民共和国政府于 1972 年撤回中华民国政府 1946 年关于接受国际法院强制管辖的声明，中国政府迄今未就任何政治、领土等争端提交国际司法或仲裁解决。另外，2006 年 8 月 25 日中国依据《联合国海洋法公约》第 298 条规定，向联合国秘书长提交声明，“对于《联合国海洋法公约》第 298 条第 1 款（a）、（b）和（c）项所述的任何争端，中国政府不接受《联合国海洋法公约》第 15 部分第 2 节规定的任何国际司法或仲裁管辖。”所以依据上述的声明分析，中日目前不会将钓鱼岛争端提交国际法院或国际仲裁机构解决，但是国际法院或仲裁机构的其它相关裁决依然会对争端解决具有影响，不得不引起注意。

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19 《国际法院规约》第 36 条。
20 *I. C. J. Yearbook 1969–1970*, The Hague: I. C. J., 1970, pp. 62~63.

国际法院新近审理结束的两个关于岛屿主权争端的案件对钓鱼岛争端的解决有所启示。2002 年 12 月 17 日国际法院就印度尼西亚与马来西亚之间的岛屿主权争端案作出判决。两国争议的两个岛屿分别是西巴丹岛与利吉丹岛。19 世纪末印尼是荷兰的殖民地，马来西亚是英国的殖民地，1891 年 6 月 20 日英荷之间签订了一个条约，印尼认为根据该条约上述两岛归荷兰殖民地管辖，据此认为两岛应该属于印尼继承。国际法院判决认为历史上的条约规定不够清晰，无法确定这些岛屿的归属，双方的国家继承理由也不充分，应独立地考虑国际法上的有效统治理论，而印尼 1960 年 2 月 18 日颁布的《印度尼西亚水域法》并没有明确提到利吉丹岛和西巴丹岛这两个岛屿，也没有足够的证据能够证明荷兰海军和印度尼西亚海军曾经在这两个小岛的附近海域巡逻，印尼渔民的活动不能视为是印尼政府的行为，因此印尼提供的证据并不能充分证明其有行使主权的意愿和行使主权的能力。但 1917 年马来西亚订立了关于在此两岛上采集海龟蛋的法令，颁布了捕鱼许可证；1933 年，马来西亚在西巴丹岛实施鸟类禁猎区；1962 年和 1963 年，马来西亚在此两岛上建立了灯塔。而且在马来西亚和英国行使这些主权的时候，印尼和荷兰从来没有提出过抗议，鉴于以上双方提供的证据比较，国际法院认为，马来西亚的证据更能支持其对利吉丹岛和西巴丹岛的主权要求，并以 16 票对 1 票判决这两个岛屿的主权属于马来西亚。[21] 这个案件意味着国际法院对于类似的争端偏重于以实际管辖权或有效统治而不是历史上的所有权来作为裁决的依据。

马来西亚与新加坡之间因为 3 个岛礁的主权争端，即白礁岛、中岩礁和南礁，于 2003 年 2 月 6 日签署特别协定，同意将争端提交国际法院裁决。2008 年 5 月 23 日国际法院以 12 票对 4 票作出判决，[22] 裁定白礁岛主权归新加坡，以 15 票对 1 票裁决中岩礁主权归马来西亚，而南礁的主权属于其所在海域的国家所有。国际法院的裁决认为，当柔佛是个独立国家时，1953 年 6 月 12 日新加坡英殖民地秘书曾经致函柔佛询问白礁岛的主权状况，以确定殖民地（新加坡）的海域，但结果是同年 9 月 21 日，柔佛秘书回信告知柔佛政府并不拥有白礁岛的主权。因此国际法院认为双方来函表明柔佛并未拥有白礁岛的主权，柔佛后来加入马来西亚，马来西亚也不能继承白礁岛的主权。国际法院认为 1953 年后，新加坡在白礁岛海域调查船只沉没事件，批准马来西亚官员测量附近水域，1977 年在白礁岛上设立军事通讯器材，以及新加坡出版的刊物地图包含白礁岛等事件，马来西亚一直持默许态度，并未作出抗议，一直到 1979 年出版的地图才将白礁岛纳入其中，

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21 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgement of 17 December 2002, *I.C.J. Reports*, 2002, p. 625.

22 因为两国在国际法院均无人选担任法官，因此双方各自委托一位为临时法官，但因国际法院时任院长希金斯曾因白礁纠纷向新加坡提供咨询，因而主动要求退出裁判，所以参与裁判的法官为 16 人。

从而引发争议。[23] 因此国际法院认为上述证据证明新加坡拥有白礁岛的主权。

从上述国际法院两个涉及岛屿主权之争的案件可以看出，国际法院在岛屿主权历史归属不明的情况下，倾向于实际有效控制的国家拥有主权，前提是相应争议国家没有自始一直提出抗议。而日本政府正是借机不断加强对钓鱼岛的控制，例如，日本政府曾以每年约 2200 万日元的租金向一个日本“岛民”租借钓鱼岛等 3 个无人岛，以加强对这 3 岛的管理。[24] 虽然租借合同是否持续未知，但无论是公开租借还是秘密租借，其目的无疑是通过国内法的方式加强对钓鱼岛的管辖，进行有效的实际控制。再如，日本控制着钓鱼岛及其附近海域的安全，禁止中国公民进入该海域或登临钓鱼岛。针对日本的这些行为，中国政府一直主张日方对这些岛屿采取的任何单方面行动都是无效的。从国际法角度而言，中国政府的主张或抗议是对日本“实际有效控制”的反对，因此日本不会因实际有效控制而达到窃取钓鱼岛主权的目的。

五、结论与建议

依据《中日渔业协定》规定的“暂定措施水域”的范围可以看出，“暂定措施水域”之外的钓鱼岛海域维持“现有的渔业关系”，而究竟什么是现有的渔业关系，如何界定“现有”的内涵，是亟需澄清的问题。中国政府的观点是，钓鱼岛附近海域是中国渔民的传统渔场，所以中国渔民现在依然有权在该海域捕鱼。针对日本渔民是否有权利到钓鱼岛海域捕鱼的问题中国政府并无表态，据笔者分析，应该是可以的，因为中国政府尚未对日本渔民到该海域的捕鱼活动提出抗议。这可能就是《中日渔业协定》中所谓“现有的渔业关系”的内涵，即中日两国渔民均可以到该海域进行捕鱼作业。

问题在于，大陆渔民相对台湾渔民而言，较少到钓鱼岛海域捕鱼，所以也少见大陆渔民在钓鱼岛海域被日本驱逐之报道，而台湾渔民因距离较近，经常到钓鱼岛海域捕鱼，但却会遭到日本巡逻舰的骚扰或驱逐。这里需要强调的是，尽管日本有些学者认为钓鱼岛是日本领土，不存在主权纠纷，但是中日之间存在钓鱼岛主权争议是客观事实，是毋庸置疑的。中国政府目前坚持“搁置争议，共同开发”的方针，应该说《中日渔业协定》关于钓鱼岛海域维持“现有的渔业关系”就是这一方针的具体落实措施之一。而日本对在该海域进行捕鱼作业的台湾渔民进行骚扰或驱逐表面上看是违反《中日渔业协定》的行为，但从深层次而言就是意图控制钓鱼岛海域主权权利的行为，行使对钓鱼岛的实际控制权；另外从政治角度分析，

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23 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), Judgement of 23 May 2008, *I.C.J. Reports*, 2008, p. 12.

24 《外交部发言人答记者问》，载于《人民日报》2003 年 1 月 3 日第 4 版。

日本利用大陆与台湾的政治障碍，运用钓鱼岛海域捕鱼事件离间大陆与台湾的友好关系，从中渔利之政治意图昭然若揭。

最近，据日本共同社报道，2009 年 2 月 27 日，日本与中国台湾的渔业部门在“民间渔业谈判”中决定设立紧急联络窗口，以迅速解决钓鱼岛海域的渔业纠纷。[25] 这就引发另外一个重要的问题，即中国大陆早就声明“如果日方跟台湾当局进行渔业谈判，那将违背一个中国原则，也不符合中日渔业协定的原则，中方将表示强烈反对。”[26] 日本政府的这种行为无疑会损害中日之间的关系，因为虽然日本打的是“民间渔业谈判”的旗号，做的却是主权国家的事项。

笔者建议，在目前局势之下，中国政府应该在外交上与日本交涉，要求日本遵守一个中国的原则、《中日渔业协定》的原则，大陆渔政部门应与我国台湾当局联合共同做好在钓鱼岛海域的护渔工作。

25　环球时报：《日台决定设“联络窗口”处理渔业纠纷》，下载于 http://www.taihainet.com/news/twnews/twdnsz/2009-02-28/379950.shtml，2009 年 3 月 18 日。

26　中国外交部发言人刘建超记者招待会之发言，下载于 http://news.xinhuanet.com/taiwan/2005-07/08/content_3193198.htm，2005 年 7 月 1 日。

海域有偿使用制度的法理分析

梅 宏*

内容摘要: 海域国家所有权是创设海域有偿使用制度的基础，而实行海域有偿使用制度是在市场经济条件下依法维护国家海域所有权的根本措施。海域使用权是建立海域有偿使用制度的支柱，同时海域有偿使用制度是保障海域使用权流转的必然要求。海域有偿使用制度与海域权属制度相辅相成，共同为海域产权制度在市场经济法制环境中的建立、运行提供制度保障，使“海域国有、依法用海、用海有偿”的立法原则得以实现。

关键词: 海域有偿使用制度　海域国家所有权制度　海域使用权制度　海域产权制度

海域有偿使用制度是实现海域价值的制度需求，已成为世界沿海各国的通行做法。公民、法人使用海域进行生产经营活动，必须向国家缴纳海域使用金。同时，立法根据海域用途，对公益用海、行政用海和军事用海等作出免收海域使用金的规定；根据经营性用海情况和收入、风险差异的不同情况，对有些项目作出按规定减收或免收使用金的规定，以保证各类用海活动健康、协调发展。海域的有偿使用是海域产权制度框架中的一项主干性制度。它具有使“产权”在海域资源领域具体实现的功能。该制度的实行，不仅有助于国家海域所有权在经济上的实现，而且有利于杜绝海域使用中的资源浪费和国有资源性资产流失。本文分析海域有偿使用制度与海域国家所有权制度、海域使用权制度之间的关系，论述海域有偿使用制度对于构建海域产权制度的意义。

一、海域国家所有权：创设海域有偿使用制度的基础性制度

海域产权制度安排的目标是保障海域可持续地满足一国经济和社会的可持续

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发展。可持续发展当然要求效率，因此，产权制度的架构必须充分考虑海域价值的实现。在产权制度安排中，所有权是基础。促进海域价值的实现，当然要重视海域的权属问题。海域的社会属性要求海域所有权必须为一个强大的、同时又能为社会全体服务的主体所享有。国家既是海域主权的享有者、海域开发利用的管理者，又是国有财产的所有者，有强大的宏观调控能力和社会控制力；国家的各种行政机关的设立和权力的行使也在组织上保证了海域所有权的实现，因此，国家是海域所有权的当然主体。

国家是主权所及海域及其资源资产产权或物权的唯一主体。立法上对海域国家所有权制度作出规定，不仅能正本清源，澄清过去在海域权属上“谁占领，谁所有”的错误观念，而且有助于从根本上理顺国家和用海主体之间海域所有权与使用权的权属关系，从而维护国家的所有权权益。明确国家对海域的所有权，将侵占、买卖海域或者以其他方式转让海域的行为明确列为违法行为并加以禁止，有助于树立海域国家所有的意识和有偿使用海域的观念，使国家的所有权权益在经济上得到实现。

我国是由政府配置自然资源，从国家主权支配与自然资源归全体人民所有的政治观念出发，我国现行宪法规定重要的自然资源属于国家所有。在私法尚未对具有财产性的自然资源（如土地、水资源、海域等）的所有权做出明确规定之前，《土地管理法》、《水法》、《海域使用管理法》等自然资源行政管理法在规范自然资源行政管理活动的同时，确定或者创设了土地物权、水权、海域物权等自然资源权属制度。海域与土地的所有制不同，土地分为国家所有和集体所有，而海域则全部属于国家所有，海域所有权只能由国家统一行使，具有唯一性和统一性，国家以外的任何社会团体和个人都不得作为海域的所有权人。所有权的权能包括占有、使用、处分和收益等支配权能，对于我国海域，国务院代表国家行使海域所有权。为了及时澄清社会公众在海域所有权问题上模糊不清的认识，纠正沿海居民误认为海域属于本县、本乡或本村的错误观念，《海域使用管理法》宣示国家享有海域的单一所有权，[1] 并以海域所有权为基础权利，通过海域使用过程中的权利分配实现相关主体的利益平衡。

明确了海域归国家所有和国家作为海域所有权主体的地位，所谓海域有偿使用才有了坚实的基础。实行有偿使用制度的前提是确立海域的所有权制度。有偿意味着使用者有偿，而有偿的要求产生于有权受偿者的要求。当有使用价值的物品被使用时，对使用者提出受偿要求的资格是对物品享有所有权。稳定的海域有偿使用制度需要稳定的海域所有权制度作支撑。海域国家所有权制度在各国立法上得以确立，为创设海域有偿使用制度奠定了基础。

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1 《海域使用管理法》第 3 条规定：“海域属于国家所有，任何单位和个人不得侵占、买卖或者以其他方式非法转让海域。”

从操作的角度看，海域有偿使用，即海域的所有者（国家）将其所有的海域交给个人或单位使用，后者作为海域的使用者或者使用权人向国家缴纳海域使用金，国家从海域使用者那里受偿。海域有偿使用制度的基础是海域国家所有权制度，而海域有偿使用制度运行的基本环节有二：其一，国家将所有的海域交给公民或法人使用，在法理上的解释就是海域所有权与海域使用权分离；其二，海域的使用者就其使用海域向国家予偿，在法理上就是实现海域所有权主体（国家）的收益权。

二、海域使用权：建立海域有偿使用制度的支柱性制度

海域所有权的内容包括对海域的占有、使用、收益和处分四项权能，其中，海域所有权的占有权能、使用权能和收益权能具有相对独立性，可以由所有权人之外的其他主体行使，而不会影响国家对海域的所有权。海域使用权是由海域所有权派生的一项权利，其权利内容就是对特定海域的使用价值进行开发、利用，并依法取得收益。海域使用权的确立明晰了海域所有人和海域使用人之间以及海域使用人相互之间的权利义务关系，可以有效地保护海域使用人的合法权益。以海域使用权流转为中心的海域使用权制度，不仅是海域产权制度的核心，也是海域有偿使用制度得以建立的支柱。

所谓海域使用权，是指单位或个人依法定程序并经登记而取得的，对国家所有的某一海域在一定期限内持续从事具有排他性的开发利用活动并取得收益的权利。这一定义表明，海域使用权的主体是海域所有权人（国家）之外的单位或个人；其客体是国家所有的特定海域；海域使用权的取得须经过法定的申请、审批和登记程序；从性质上看，海域使用权是于一定期限内对特定海域的排他使用权，同时又是对特定海域使用、收益的物权权利。

建立海域使用权流转机制是海洋产业发展到一定阶段的必然要求，也是当代海洋开发与管理得以有效开展的前提条件。所谓海域使用权的流转，是指海域使用权在不同权利主体之间的流动和转让。虽然立法上已确定了海域归国家所有，但是长期以来，海域的使用权却是海域使用者任意占有的。海域使用者开发无序、使用无偿、利用无度，不仅造成海域资源的巨大浪费，而且破坏了海域环境，降低了开发效益。只有通过海域使用权的流转，让不合理占用的海域转让到合理开发者手中，才能提高海域利用的绩效，科学、合理地实现海域的价值。

海域使用权的界定和海域使用权流转机制的建立，将市场机制引入了海域使用权制度中。建立海域使用权流转机制不能选择别的机制，只能选择市场机制。这是海域权属管理尊重市场规律的必然选择。具体言之，只有依市场机制建立海

域使用权制度，海域使用者才能自主地根据市场情况做出扩大用海或缩小用海的决策，真正落实海域使用者的经济自主权。依市场机制建立海域使用权制度，可以使经常发生的劳动力与海域比例失调情况及时得到调整，从而使海洋生产力要素在总体上保持一个动态的优化结构。海域使用权在等价交换基础上的有偿转让，可以使投资者解除对海洋产业投资，特别是长期投资的顾虑，有利于海洋产业的集约化生产和经营，提高劳动生产率和海域资源利用率。通过对海岸带资源开发利用的“级差地租”和使用权流转，能够促使一部分开发者将目光投向深海远洋，另辟新区，充分利用海域资源。海域使用权从政府供给走向市场供给，还将促使海域使用者合理开发、利用海域，积极保护海洋生态，兼顾海域的经济价值与生态价值。这是因为，海域开发者如果不注意保护海域生态，导致其使用海域的生产力降低，既给自己的产业造成危害，减少收益，又因海域价值降低，难以流转出去，其在负担海域使用金的同时，还可能受到有关部门的依法处罚。

海域使用权作为用益物权，存在着权利人将其用于流转的客观需要，这符合市场机制要求。海域使用权制度围绕海域使用权流转这一中心，规范海域使用权流转一级市场，建立规范有序的海域使用权流转二级市场，[2] 规定海域使用权出让的条件和程序、流转的条件和程序，确立海域使用权的取得、登记、证书颁发、变更或终止、流转的公示、争议调解处理等方面的制度。可见，海域使用权制度涉及实体法、程序法上的多种制度，兼具公法与私法性质，内容丰富，影响面广。其法律渊源不限于民事基本法，还包括行政法性质突出的海域管理法。[3] 我国就是在《海域使用管理法》中率先规定了“海域使用权”，就海域使用权的设立、变更、消灭及其内容与保护等作出具体规定，标志着海域使用权正式被法律确认，成为一种重要的、独立的民事权利类型。2006 年 10 月 13 日，国家海洋局发布的

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2 海域使用权市场包括一级海域使用权市场（以下简称“一级海域市场”）和二级海域使用权市场（以下简称“二级海域市场”）。一级海域市场是国家依法将其海域使用权有偿转让给使用者的交易关系。二级海域市场是海域使用者在承租期限内依法将海域使用权再转包给第三者的交易关系，而且这种转包可能会继续多个层次。但是这种流转，无论有多少层，只要是在海域使用者之间进行，都应属于二级海域市场的范畴。

3 从目前世界各国海域使用立法情况来看，多数法律在名称上均冠有“管理”二字，纵使一些法律法规未冠以“管理法”的名称，其内容也仍是以管理为主。可见，各国海域使用立法的重点普遍在于管理方面，整体上属于行政法范畴。而从行政管理的角度看，海域使用管理制度主要涉及管理权限的划分和管理机构的建立这两个方面。参见刘保玉、崔凤友：《海域使用权制度研究》，下载于 http://www.fatianxia.com/paper_list.asp?id=14512，2008 年 5 月 4 日。

《海域使用权管理规定》则对获得海域使用权的方式以及海域使用权流转作了全面、具体的规定。[4] 同一天出台的《海域使用权登记办法》则对海域使用权的初始登记、变更登记和注销登记等内容作出规定，并首次明确将海域使用权派生的他项权利[5]（由出租、抵押海域使用权而形成的承租权和抵押权）写入海域使用权登记范围，并在各章中予以详细规定。我国在 2007 年的《物权法》中明确规定了包括海域所有权和海域使用权的海域权属制度。为保护各类海域使用者的合法权益，增强他们对海域开发投资的信心，《物权法》将海域的国家所有权和海域使用权相分离，在“用益物权”编第 122 条规定了“依法取得的海域使用权受法律保护”，进一步明确了海域使用权派生于海域的国家所有权，是基本的用益物权。为了有效实现海域的经济价值，运用市场手段优化配置海域资源，《物权法》规定，在海域使用权有效期限内，海域使用权可依法转让、出租、抵押、继承，即实现海域使用权流转。在海域使用受到阻挠、妨害时，海域使用权人可以请求海洋行政主管部门排除妨害、消除危险；造成损失时，还可依法请求损害赔偿，追究侵权人的民事责任。在海域使用权期满前，因公共利益和国家安全的需要被提前收回时，还可依法获得相应的补偿。可见，海域使用权人在受到行政法保护的同时，还可以受到民法的保护；依市场机制建立的海域使用权制度可有效调整海域的所有权人与使用权人、各使用权人之间的产权交易关系，改变我国海域使用“无序、无度、无偿”的局面。

在市场经济发达的国家，海域使用权制度是在市场机制条件下建立的，对海域使用权的取得、海域的利用、海域的权益分配进行市场化的调节。既然海域的所有权人（国家）自身并不能实际对海域加以利用，法律又禁止海域所有权的买卖与转让，那么，就必须创设一种制度，使海域使用权的出让、租赁、抵押等交易方式得到法律调整。由此，海域使用权制度和与之相配套的海域有偿使用制度便应运而生。

海域使用权制度是建立海域有偿使用制度的支柱性制度。这是因为，从逻辑关系上讲，建立海域有偿使用制度必须首先构建海域使用权制度。没有依市场机制建立的海域使用权制度，海域有偿使用制度便成为无源之水，无本之木。海域有偿使用法律制度的实践，无论是在理顺不合理用海关系上，或是在海域使用制度方面创建公平竞争环境，或是调整海域使用人之间的用海关系，合理配置海域资源，实现海域价值等目标上，都要依赖海域使用权流转市场及相应制度的建立才能实现。从内容的关联性上讲，海域使用权制度的内容相当丰富，其为海域有

4 《海域使用权管理规定》规定，使用海域应当依法进行海域使用论证、用海预审，并对海域使用的申请与审批，海域使用权的招标、拍卖，海域使用权转让、出租、抵押，海域使用权收回补偿制度作出规定。这一部门规章自 2007 年 1 月 1 日起施行。

5 《海域使用权登记办法》第 2 条第 2 款：“他项权利，是指出租、抵押海域使用权形成的承租权和抵押权。”

偿使用制度的建设提供了内容，也提出了要求。海域有偿使用制度以海域使用权制度已确立作为立法的预设前提，该制度与海域权属制度（主要包括海域所有权制度、海域使用权制度及海域相邻权制度）[6] 相辅相成，共同构建海域产权制度。图示如下：

<table>
<tr><td rowspan="4">海域产权制度</td><td rowspan="3">海域权属制度</td><td>海域所有权制度</td></tr>
<tr><td>海域使用权制度</td></tr>
<tr><td>海域相邻权制度</td></tr>
<tr><td colspan="2">海域有偿使用制度</td></tr>
</table>

三、海域有偿使用：构建海域产权制度不可缺少的制度

海域权属制度的确立，需要海域有偿使用制度与之衔接。应运而生的海域有偿使用制度与海域权属制度相辅相成，共同为海域产权制度在市场经济法制环境中建立、运行提供制度保障，使“海域国有、依法用海、用海有偿”的立法原则得以体现并落实。

（一）实行海域有偿使用制度：维护国家海域所有权的根本措施

海域国家所有权制度为创设海域有偿使用制度奠定了基础，而实行海域有偿使用制度是在市场经济条件下依法维护国家海域所有权的根本措施。

海域国家所有权除了在法律上得到明确规定外，还应在国家经济利益上得以体现。实行海域有偿使用制度便是国家维护国有资源性资产利益的具体体现。对使用国有海域从事生产经营活动的单位和个人，依法征缴海域使用金，可以科学、合理地开发利用海域资源，有效避免国有海域资源性资产的流失；可以协调海域使用人之间的关系，减少矛盾、纠纷导致的损失；可以规范海域开发利用秩序，实现

6 海域权属制度，是海域产权制度的基础，其内容主要包括海域所有权制度、海域使用权制度及海域相邻权制度。其中，海域相邻权指海域的所有人或使用人在处理相邻关系时所享有的权利。在相互毗邻的海域的所有人或者使用人之间，任何一方为了合理行使其所有权或使用权，享有要求其他相邻方提供便利或是接受一定限制的权利。如果因权利的行使，给相邻人的人身或财产造成危害的，相邻人有权要求停止侵害、消除危险和赔偿损失。海域相邻权实质上是对海域所有权的限制和延伸。由于海域是可以特定化的区域，故应当建立海域相邻权制度。

社会效益、经济效益与生态效益的统一，促进海洋经济的健康、持续发展。

（二）建立海域有偿使用制度：保障海域使用权流转的必然要求

由海域的资源属性产生的对海域最有效和合理利用的立法目的，决定了海域使用制度应当是能够保障海域在市场上自由流转的制度。

海域国家所有权制度的实质决定了海域所有权自身流转的不可能性。要实现海域价值，法律上就应当允许海域这一使用对象在不同市场主体之间的依法转让、出租、抵押或继承。为此，立法上接受了海域所有权与海域使用权两权分离的理论，将海域使用权确立为一项独立的物权，并适应市场经济发展的要求，围绕海域使用权流转这一中心，建立了海域使用权制度。

社会的需要赋予了海域使用权以社会功能，即用海行为物权化，而法律确认海域使用权的独立物权属性，对于创设海域使用权制度，理顺海域使用权法律关系，实现整个海域使用制度的良性运转具有十分重要的意义。

海域使用权流转，是市场经济条件下产权交易的要求与体现。产权交易的特点决定了海域使用权在各交易主体之间的流转，必然是有偿的、符合市场规律的；否则，无偿的、不讲“对价”的海域使用权的流转，不仅会破坏市场机制的运行，还会造成海域利用无序、低效的后果。因此可以说，建立海域有偿使用制度是保障海域使用权流转的必然要求。

实行海域有偿使用制度，不仅体现了海域国有原则，而且为海域使用权引入市场机制提供了制度支持。海域有偿使用必然增加海域使用者的投资成本。为实现利润最大化，海域使用者一方面进行资源合理配置，选择高效产业，增加产业边际效益，另一方面遵循优胜劣汰的市场竞争法则，按照海域使用权的商品流通性，实行开发主体的合理兼并，实现海域资源利用的规模化、效益化。

国家对海域既作为自然资源管理，又作为国有资产管理，只有通过实行海域有偿使用制度，建立一种自然资源更新的经济补偿机制，才能实现国有海域资源性资产的保值和增值。海域使用者开发、利用海域，按标准缴纳海域使用金，上缴国库，不仅增加了国家的财政收入，实现了资源的价值补偿，而且保证了国家有足够资金用于海域资源的再生产过程，且有利于杜绝海域使用中的资源浪费和国有资源性资产的流失。在目前海洋产业各自为政、海上纠纷增多、开发秩序较乱、整体效益不高的情况下，国家想要坚持开发与保护相结合的原则，有必要实行海域有偿使用制度。实行海域有偿使用制度，可以促使海域使用权人充分考虑投入产出比，避免盲目圈占海域，有效遏制因海域无偿使用引发的开发无度、利用无序的混乱状况，实现国有海域资源的合理配置和最佳利用。

（三）完善海域有偿使用制度：构建海域产权制度的关键

海域的资源属性要求在整个社会建立一种最大限度发挥海域资源经济效应和社会效应的合理利用制度。这一制度就是海域产权制度。产权制度在自然资源法律制度安排中具有基础性作用。一国可持续发展的实现首先依赖于产权制度安排的合理性。自然资源产权制度[7]在资源行政权制度、资源环境制度、资源技术创新制度及权利救济制度所组成的自然资源法律制度中的架构将决定其他自然资源法律制度的安排。

从理论上看，产权就是交易的产权，交易就是产权的交易。一项产权不能交易就没有存在的价值。[8]对于海域产权来说，也是如此。只有不断地、更大规模地实现海域使用权的交易，海域资源才能向效率最大化的方向流动，海域价值才能向最有利于实现的方向转移。那么，怎样才能促成不断地和更大规模地实现海域使用权的交易呢？关键取决于海域使用权交易市场能否贯彻、落实有偿使用的交易规则，从而顺应市场机制的要求。

海域产权制度安排的目标应是海域资源可持续满足一国经济和社会的可持续发展。可持续满足当然是有效率的发展，所以，产权的架构必须充分考虑到海域价值的实现。海域产权作为民事权利，属于市场经济的产物，应当按照平等互利、等价有偿的民事权利运行规则进行产权交易。必须将海域资源的产权结构置于海域产权交易市场中进行选择和完善。产权的界定具有渐进性，产权结构优化是一个演进的过程，初始界定的产权常常是不清晰、不完善的，有效的产权结构必须也只能在市场选择中产生，产权结构将在市场选择中逐渐优化，逐渐明晰。同理，海域资源在市场配置中出现的市场失灵问题，应该通过市场机制本身的运行来纠正。而实行海域有偿使用是市场经济体制下通过海域市场开展海域产权交易的必然选择。

法律在产权安排及实现中具有决定作用。如果说，海域权属制度的安排是海域产权制度的基础性安排，那么海域产权制度的顺利运行还有赖于海域有偿使用制度的完善与落实。海域有偿使用制度具有使“产权”在海域资源领域具体实现的功能。海域有偿使用制度的实践，就是以调节不同的用海单位或个人之间利益关系为目的，把社会经济生活中由用海因素产生的额外经济利益从生产或经营利

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7 在肖国兴、肖乾刚编著的《自然资源法》一书中，将“自然资源产权制度”定义为“自然资源法律规范安排与实施的厂商从事自然资源开发利用的产权法律制度。它是法律制度安排与操作的厂商从事自然资源开发利用博弈规则的总和及其运作。此项制度的初衷是有效率地开发利用自然资源。”参见肖国兴、肖乾刚编著：《自然资源法》，北京：法律出版社 1999 年版，第 62~63、68 页。

8 肖国兴、肖乾刚编著：《自然资源法》，北京：法律出版社 1999 年版，第 80 页。

润中分离出来，使这种应由国家获得但长期被海域使用人以生产经营利润占有的收益，由国家以海域所有人的资格享有。该制度的实行，既有助于国家海域所有权在经济上的实现，也有利于杜绝海域使用中的资源浪费和国有资源性资产流失。实行海域有偿使用制度，就是要发挥市场机制在资源配置中的基础性作用，建立和完善各类海域市场体系。海域使用者在海域使用权流转的市场上取得海域使用权，通过开发、利用海域，取得经济效益。国家依法向海域使用者征收海域使用金，并将所收受的海域使用金用于海域资源的再生产过程，不断增加社会投入，促进海域资源的新陈代谢，实行取之于海、用之于海的政策，日益形成海域开发、整治、保护和管理的良性循环。可见，海域有偿使用制度不仅有利于海域资源的综合利用开发，也有利于海域产权交易的开展，从而保证海域资源的可持续利用和经济社会的可持续发展。

需要指出是，在市场机制初步形成的国家，如我国，由于海域使用权流转的市场尚未发育成熟，民众尚未充分认识缴纳海域使用金的原因以及海域使用金和有关税费在性质上的区别，这给实践中海域有偿使用制度的施行带来了一定的难度。鉴于海域使用权流转市场的完善不可能一蹴而就，在构建海域产权制度的过程中，完善海域有偿使用制度就成为关键。如果海域有偿使用不能深入人心，海域有偿使用制度不能全面落实，那么，海域使用权流转市场不仅难以有效运行，海域产权制度也难以体现其应有的绩效。对此，除了加强宣传"海域有偿使用"外，重视完善海域有偿使用制度，针对海洋产业发展中的各种现实情况做出可操作性强的立法规定，可谓应对之策。就我国立法而言，虽然《海域使用管理法》中对"海域有偿使用制度"已做出专门规定，[9] 但该法施行 7 年来，学界、实务界一直在不断呼吁进一步完善海域有偿使用制度，为保障海域使用权流转提供有效的制度支持。可见，新的立法势在必行。

9 《海域使用管理法》第五章"海域使用金"中，第 33 条、第 34 条、第 35 条、第 36 条对"海域有偿使用制度"有所规定。

《物权法》中的船舶登记制度

李荣存* 陈敬招**

内容摘要：《中华人民共和国船舶登记条例》未区分船舶国籍登记和船舶物权登记性质的不同，而是将船舶国籍登记与船舶物权登记穿插、混合规定，不利于形成对船舶物权制度的正确理解。《中华人民共和国物权法》实施以后，澄清了船舶物权的属性，明确了船舶物权登记的基本属性和效力。本文从《中华人民共和国物权法》的规定出发，对船舶国籍登记与船舶物权登记进行区分比较，分析船舶登记的法律特征和效力，以正确理解船舶登记制度。

关键词：船舶登记 船舶国籍登记 船舶物权登记

理论上，对船舶登记概念一般有 2 种观点：一是船舶登记为船舶国籍登记。如日本学者水上千之认为船舶登记是为证明船舶国籍的文书程序，是国家向国际社会表明其对船舶授予国籍的事实。其作用是保存船舶登记材料和提供船舶的各项数据并公示，以监督有关行政管理。在实行船舶登记单一制度的国家，船舶登记又是船舶所有权的法定证明。[1] 我国也有学者认为船舶登记是指将特定船舶的资料在某一特定国家进行公开登记。船舶在某一特定国家登记后就拥有该国国籍，有权悬挂该国国旗航行。[2] 二是船舶登记包括船舶国籍登记和船舶权利登记 2 种登记。我国学界有人提出船舶登记是给予船舶以国籍和赋予它以权利与义务的行政行为。[3] 也有人认为船舶登记是船舶所有人向特定国家船舶登记机关提出申请，按规定提交相应文件，经登记机关审查后，对符合条件的予以注册并签发相应文书的法律行为。船舶登记可分为公法意义上和私法意义上的船舶登记。前者指船舶国籍登记，后者指船舶所有权、抵押权和租赁权等民事权利登记。[4] 日本和我国台湾地区均将船舶国籍登记和船舶物权登记区分开来。

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3 马军：《船舶登记若干法律问题研究》，载于《航海技术》2000 年第 5 期，第 72 页。

4 赵德铭主编：《国际海事法学》，北京：北京大学出版社 1999 版，第 35 页。

我国现行法律法规中，有关船舶登记的规定主要是国务院1995年颁布实施的《中华人民共和国船舶登记条例》（以下简称“《船舶登记条例》”），该条例采取的是上述第二种观点，即不区分船舶国籍登记和船舶物权登记。《船舶登记条例》第一章为总则，第二章为船舶所有权登记，第三章为船舶国籍，第四章为船舶抵押权登记。在总则和各个章节中，将船舶国籍登记穿插在船舶物权中进行规定。但笔者认为，《船舶登记条例》对船舶国籍、物权登记的规定缺乏严密的逻辑性，混淆了船舶物权登记与船舶国籍登记应有的区别，应当予以调整。尤其是在2007年3月16日颁布的《中华人民共和国物权法》（以下简称“《物权法》”）对船舶物权登记的基本属性予以规定的背景下，立法机构更应当及时对《船舶登记条例》予以修订，对船舶国籍登记和船舶物权登记予以明确的区分。

一、船舶登记的基本法律属性

（一）船舶登记在公法意义和私法意义上的区分

笔者认为，首先应在公法意义和私法意义上区分船舶登记。公法上的船舶登记为船舶国籍登记，私法上的船舶登记为船舶物权登记，包括船舶所有权、担保物权、留置权等。船舶国籍登记具有明显的公法性质，船舶物权登记则是私法行为。

首先，法律属性和体系归属上。船舶物权登记具有权利确定和证明作用，属于私法上的权利，在规范上应纳入私法的范畴。《物权法》对船舶物权的规定，从私法基本法层面确认了船舶物权的私法属性和体系归属，从另外一个角度理解，《物权法》实际上将船舶国籍登记排除在私法范畴之外。而船舶国籍登记的功能主要在于使船籍国行使对船舶的有效管辖，具有较强的公法性和强制性，在规范上属于公法范畴。如1958年的《日内瓦公海公约》、1982年的《联合国海洋法公约》、1986年的《联合国船舶登记条件公约》等3个国际公约均只规定了船舶的国籍登记，而未涉及船舶物权。此外，1993年的《船舶优先权和抵押权国际公约》并未涉及抵押权登记条件，而是将抵押权登记条件、抵押登记的效力，尤其是对第三人的效力，均留给登记国国内法调整。

其次，登记所涉及的内容上。船舶物权登记是通过登记展示船舶上的物权状况和物权变动，调整的是船舶物权人与其他平等主体之间的权利和义务。而国籍登记涉及到船舶的身份，调整的是船籍国对船舶的管辖和控制，是不平等主体之间的法律关系。在国际法上，船舶应当具有国籍并悬挂该国国旗航行，才能享有公海航行自由和进出他国港口从事航运经营活动。无国籍船舶在国际法上不受保护，并可能遭到扣押或没收。船舶在一国登记后即确认了船舶与船籍国的联系，必须接受船籍国对船舶的管辖和控制。

（二）船舶登记在实体问题与程序问题上的区别

船舶国籍是指船舶所有人按照某一国家的船舶登记管理规范进行登记，取得该国签发的船舶国籍证书并悬挂该国国旗航行，从而使船舶隶属于登记国的一种法律上的身份。此即表明该艘船与登记国有了法律上的隶属关系，拥有这一国家的国籍。船舶国籍证书是船舶国籍法律上的证明，船舶悬挂的国旗是该船国籍的外部象征或标志。[5] 而船舶物权是指权利人依法对船舶享有直接支配和排他的权利，包括所有权、用益物权和担保物权等。

根据登记的结果和效力不同，登记的法律规范包括实体性和程序性的内容，可以区分为实体性登记与程序性登记，两者有着不同的法律属性、构造、功能以及法律适用。实体性登记是指通过登记引起权利义务的变动，当权利义务设立、变更或者终止时，登记是权利义务变动生效的依据和公示方式。程序性登记则是将某种权利义务记载在权利义务登记簿的过程，是否登记并不影响权利义务的变动。

根据现行的法律，船舶在经过登记具有中国国籍后，船舶即享有在沿海和内河的航行权、在领海的捕鱼和其他事业权、本国税收优惠与根据条约在国外享有最惠国待遇、我国海军护航权、无害通过外国领海权、我国使领馆的保护与帮助权等权利。而船舶物权的登记不影响船舶物权的变动。因此，笔者认为船舶国籍登记既包括实体性的登记，也包括程序性的登记，而船舶物权登记仅为程序性的登记，不包括实体性的登记。

二、船舶国籍登记与船舶物权登记的具体区别

就船舶登记而言，除了上述基本法律属性上的区分外，船舶国籍登记与船舶物权登记还有如下具体区别：

（一）登记是否为船舶国籍及船舶物权变动的依据

1. 船舶国籍的取得必须经过船舶国籍登记

根据《船舶登记条例》，船舶要获得中国的国籍、悬挂中国的国旗，必须经过船舶所有人的申请和中国船舶登记机关的依法登记。而且，船舶不得具有双重国籍，未中止或注销原登记国国籍的，不得取得中国国籍。显然，船舶国籍的获得只能通过登记，登记是取得船舶国籍的唯一途径。

2. 船舶物权登记不影响船舶物权变动

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5 司玉琢等著：《海商法详论》，大连：大连海事大学出版社 1995 年版，第 60~61 页。

传统的观点认为,船舶因其体积庞大和价值昂贵,在涉及诸如船舶物权变动、公示公信等船舶物权问题时应将其视为不动产，在船舶物权登记上应按照不动产登记规则处理,并将船舶登记视为船舶物权变动的依据。如2001年7月20日的《全国海事法院院长座谈会纪要》认为，“对根据船舶建造合同、船舶买卖合同、船舶租购合同等合法方式接受船舶，但没有依法进行所有权登记的委托建造方或者买受方，其与合同对方之间的权利义务关系依据合同约定和法律规定予以保护;但其对合同之外的第三人提出的船舶所有权主张（包括以船舶所有人名义向他人请求船舶损害赔偿）或者抗辩，法院依法不应支持和保护”。《广东省高级人民法院关于海事审判若干问题的意见》（粤高法发 [2001]49 号）第 1 条“关于船舶所有权变更登记的效力问题”也规定，“船舶所有权的转移以登记为准，未办理新所有权登记的，视为所有权未转移”。

《物权法》对船舶属性的规定突破了传统的观点，将船舶认定为动产。首先，在“动产交付”章节第 24 条规定：“船舶、航空器和机动车等物权的设立、变更、转让和消灭，未经登记，不得对抗善意第三人”。其次，在船舶物权的变动上，《物权法》采取登记对抗主义，而不是不动产的登记生效主义。从第 24 条规定可以看出，《物权法》并未强制规定船舶物权的变动必须经登记后生效，只是限制为“未经登记，不得对抗善意第三人”。因此，大多数的学者认为，根据《物权法》的规定，船舶在法律属性上应视为动产，船舶物权的变动适用动产物权变动的一般规则。结合《物权法》的规定，动产物权与不动产物权变动的主要区别在于，动产物权变动是“自交付时发生法律效力”，而不动产物权的变动是“自记载于不动产登记簿时发生效力”。因此船舶物权的设立和转让，自交付时发生效力，交付除实际交付外，还应包括简易交付、指示交付等交付方式。

因此，船舶物权登记不是船舶物权变动的必要条件，船舶物权的变动取决于双方当事人的意思表示和交付。在船舶买卖中，船舶一经交付，其所有权即从卖方转移至买方。至于买方是否办理所有权登记，卖方是否办理注销登记，并不影响所有权的取得。船舶物权变动登记仅为船舶物权变动的一种记载，不决定船舶物权的变动。

（二）船舶登记是否为法律的强制要求

1. 船舶国籍登记是法律的强制要求

按照《中华人民共和国海商法》（以下简称“《海商法》”）和《船舶登记条例》的规定，凡属于中华人民共和国国家、集体或个人所有的船舶，除军事、公安舰艇外，都应在中华人民共和国的港口进行登记。只有完成登记手续，取得船舶国籍证书，才能悬挂中华人民共和国国旗在海上航行。在国外接受的船舶，由驻在该国的中国使领馆签发临时船舶国籍证书。未领有中华人民共和国船舶国籍证书或

临时船舶国籍证书的船舶，无权悬挂中国国旗航行，但新造船的下水或试航，以及经港务监督部门许可的特殊情况不在此限。对非法悬挂中国国旗航行的船舶，应视情节轻重对船长处以罚款，甚至没收船舶。

2. 船舶物权登记并非法律的强制要求

在登记对抗主义的立法模式下，登记与否影响的只是物权的保护程度，并不影响物权变动，法律并不强制权利人进行物权登记。我国的法律也是如此。我国《物权法》规定，船舶物权变动“未经登记，不得对抗善意第三人”。从该规定也可以看出，船舶物权登记是船舶物权人自由选择的一项权利，而不是一项法律义务，法律并不强制当事人必须登记；船舶物权是否登记，影响的只是该物权的对外效力，并不影响当事方之间的对内效力；没有登记的船舶物权，法律也予以保护，但这种保护是一种有限的保护，即“善意第三人”可以不承认未登记的船舶物权。

（三）船舶登记是否产生新的权利义务

1. 船舶国籍登记产生新的权利义务

船舶取得了一国的国籍，就如同自然人、法人获得该国国籍一样，在该国享受法定的权利并承担法定的义务。

第一，船籍国依法对该船舶及其所有人的合法权利进行保护。当船舶具有某一国的国籍时，首先它能在该国领海及内水享有完全的航行权；如果属于渔船、海洋作业平台，则能在该国领海、专属经济区以及大陆架进行捕鱼、勘探及开发。

第二，船舶可以依据国籍享受船籍国提供的各种优惠。由于世界各国大多实行航运保护主义，对外轮从事本国沿海运输都作了一定的限制，原则上只允许国轮从事本国沿海运输。此外，船籍国与其他海运国家缔结的双边或多边通商航海条约中所提供的各种优惠也只有取得该船籍国国籍的船舶才能享受，而且国轮在航运政策、税收优惠和造船差额补贴等方面也享受照顾和奖励。

第三，船舶的国籍是船籍国对该船舶进行监督管理以及保障其海上安全的依据。对船舶在公海或外国领海、港口发生的刑事或民事案件，船籍国可依法行使管辖权并适用船籍国法。

2. 船舶物权登记仅起到对抗善意第三人的效力

《物权法》在物权登记问题上，只规定了对不动产物权变动登记的审查，对船舶等动产登记未作出强制性规定，登记机关自然不得超出其职责范围，要求对船舶物权登记进行法律规定以外的其他审查。同时，《物权法》在“动产交付”和“一般抵押权”的章节中作出了“……未经登记，不得对抗善意第三人”的规定。由此可以看出，《物权法》对船舶物权登记审查采取形式审查的方式，船舶物权登记取决于当事人的意思自治，登记机关对实体法上的权利关系不得加以审查，如果当事人提交的资料符合程序上的规定，则登记机关就应当给予登记。

《物权法》、《海商法》对船舶物权变动均采取登记对抗主义，并区分债权行为和物权行为。债权行为不受物权行为的约束，债权行为是物权变动的发生原因，物权变动是债权行为的履行结果。债权行为只要遵循普通法律行为的成立生效要件即可成立生效。显然，在《物权法》中，船舶物权变动独立于船舶物权的登记，船舶物权登记仅起到对抗善意第三人的效力。船舶物权的登记并不产生新的权利义务关系，只是对已经发生的物权变化进行确认，仅具有对抗善意第三人的效力。

三、结论

船舶登记因内容的不同而具有明显、根本的区别。根据登记行为的法律属性，船舶登记应明确分为船舶国籍登记和船舶物权登记。船舶国籍经登记而取得，并引起权利义务关系的变化，船舶国籍登记既包括实体的问题，也包括程序的问题，船舶国籍的获得与船舶国籍登记紧密联系。而船舶物权登记仅是程序性的问题，物权变动取决于当事人的意思一致和交付，船舶登记机关对船舶物权登记只采取形式审查，船舶物权登记仅起到对抗善意第三人的作用。

综上，笔者认为，《船舶登记条例》应进行修订以保持与《物权法》的协调：第一，在总则中将船舶登记明确区分为船舶国籍登记和船舶物权登记，并将第二章改为“船舶国籍”，将总则中有关国籍的规定与原有第三章合并，使其包括国籍登记、国籍证书、船舶检验、船舶丈量、船舶载重线、船舶设备、船舶管理等事项；第二，在第二章“船舶国籍”之后，分别对船舶所有权、抵押权、光船租赁等物权的登记条件及效力进行规定，物权登记条件及效力应以《物权法》为基础；第三，参照《物权法》，相应地规定船舶国籍及物权登记预告、登记审查、登记异议、登记查询等程序，以尽量避免条文矛盾。这样既有利于区分船舶国籍登记与船舶物权登记的不同属性、完善船舶登记的程序，另一方面也修正了《船舶登记条例》的混乱结构，有利于维护法律体系的协调统一，确保船舶登记制度在经济社会中最大程度地发挥效用。

期租合同中留置权条款相关法律问题分析

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内容摘要: 结合英国商业法庭审理的相关案例，本文着重探讨英国法下期租合同中留置权条款的法律地位，对留置货物、转租运费和转租租金的相关法律问题进行分析，并对中国法下期租合同中留置权条款的法律效力进行论述。

关键词: 期租合同 货物留置权 转租运费留置权 转租租金留置权

一、问题的提出

近年来，在国际干散货运输市场中，定期租船是使用最为普遍的一种类型。在租约期内，承租人根据租约的规定在允许航行区域自主营运，包括安排揽货，订分租约，挂港、货载及调度等。在此期间船长要在经营方面服从承租人的命令，租金则以每天或每载重吨为单位按月支付。[1] 租金对于船东来说至关重要，是期租船舶营运活动的唯一收入。那么，一旦承租人未能按时足额地支付租金，船东有何应对措施呢？根据《纽约土产 46 标准格式》（以下简称“NYPE46”）第 5 条的规定，如果承租人未能足额按时支付租金，船东可以撤船；另外，根据 NYPE46 第 17 条的规定，船东还可以通过仲裁索赔经济损失。但这些应对措施都有其局限性或针对性，在不同情况下不一定都可用或者均有效。在如今航次期租盛行的情况下，船东想撤船的时候通常都有货物在船上，提单也已签发给无辜的收货人。在此情况下，船东何苦去选择撤船，把不可避免的航次责任揽在自己身上？[2] 而且，在市场下滑之时，选择撤船的话也只能索赔已经拖欠的租金，而不能向承租人索赔剩余租期内合同租金与市场租金之间的差价损失，除非承租人欠付租金的行为已经构成了明显的毁约。

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1 杨大明：《期租合同》，大连：大连海事大学出版社 2007 年版，第 3 页。
2 杨大明：《期租合同》，大连：大连海事大学出版社 2007 年版，第 581 页。

事实上，期租合同中的留置权条款也涉及到租金的支付问题，例如，NYPE46 第 18 条规定："出租人得因任何根据本租船合同应得的款项，包括共同海损分摊，而对所有货物和所有转租运费行使留置权。"《纽约土产 93 标准格式》（以下简称"NYPE93"）第 23 条规定："出租人得因根据本租船合同应得的任何款项，包括共同海损分摊，而对所有货物和所有转租运费和 / 或转租租金行使留置权。"[3]《巴尔的摩标准格式》（以下简称"BALTIME"）第 18 条规定："出租人得因根据本租船合同提出的任何索赔对属于定期承租人的所有货物和转租运费以及任何提单运费行使留置权。"在这里，"本租船合同应得的任何款项"主要是指承租人欠下的租金，"本租船合同提出的任何索赔"主要是指涉及租金的索赔。可见，期租合同中的留置权条款赋予了船东留置货物、转租运费和 / 或转租租金的权利。然而，该条款能否在一定程度上保障船东按时足额地获得租金？与此同时，对比 NYPE 与 BALTIME 关于留置权条款的规定可以发现，二者在船东所留置的货物是否属于承租人所有的问题上截然相反。那么，船东留置权的有效行使是否需要承租人对船载货物享有所有权呢？下文将具体探讨这些问题。

二、相关案例

在 Steelwood Carriers Inc. of Monrovia, Liberia v. Evimeria Compania Naviera S.A. of Panama（圣乔治亚号案）[4] 中，英国商业法庭在一定程度上澄清了上述问题，即期租船东没有权利留置不属于承租人所有的货物，尽管双方之间的期租合同明确约定了留置权条款。

（一）基本案情

1972 年 7 月 6 日，船东 Evimeria Compania Naviera S.A. 将其所有的船名为圣乔治亚号的船舶以航次期租形式租给承租人 Steelwood Carriers Inc.，用于从事韩国至美国查尔斯顿和诺福克的运输航次，期租合同为 NYPE46。1972 年 9 月 17 日，承租人在支付租金时扣减了 19860 美元，声称船东违反了船舶航速保证。而船东认为承租人无权扣减上述金额，于是指示船长在下一目的港诺福克拒绝卸

3 参见 NYPE93 第 23 条规定："The Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire for any amounts due under this Charter Party, including general average contributions."

4 See The Agios Giorgis, *Lloyd's Law Reports*, Vol. 2, 1976, pp. 192~204, at http://www.oabpr.org.br/comissoes/relacoesinternacionais/Law%20documents/Carriage%20of%20Goods%20by%20Sea/7%20Time%20Charterparty/The%20Agios%20Giorgis.doc, 1 December 2008.

货，除非承租人支付其扣减的租金。9月24日至9月26日，货物一直被滞留在船上，直到承租人同意支付其扣减的租金时才被卸下。随后，双方依据租约中的仲裁条款在伦敦进行仲裁程序。

（二）主要争议

上述案例中双方当事人的主要争议为：

1. 承租人是否有权在支付租金时扣减一部分航速索赔的金额（19860 美元）？

2. 如果争议1的答案是否定的，那么船东是否有权依据租约第5条规定撤船？他的行为是否构成撤船？

3. 船东是否有权指示船长在诺福克拒绝卸货？他的行为是否违反租约第 8 条规定的义务？

（三）仲裁裁决

在仲裁裁决中，仲裁员克利福德•克拉克先生认为承租人无权在支付租金时扣减 19860 美元，只能扣减其中一部分。同时，他还认为船东有权依据租约第 5 条撤船，但是船东的行为并不构成撤船。而且，依据租约第 8 条规定，船东无权指示船长在诺福克拒绝卸货。仲裁员克利福德•克拉克先生并未作出裁决，而是将该案作为特殊案件移交英国商业法庭继续审理。

（四）法院判决

英国商业法庭的莫卡塔法官完全同意仲裁员的意见，作出了与其一致的判决。对于第 2 个法律争议，莫卡塔法官认为：依据租约第 5 条的规定，如果承租人未按时足额地支付租金，船东有权通过撤船的方式拒绝提供服务。然而，船东所主张的“部分、暂时中止或撤船”不能得到支持。要么撤船，要么继续提供服务，而不存在依据租约第 5 条暂时撤船。这样，问题的关键又归结到第 3 个法律争议。

对于第 3 个法律争议，莫卡塔法官认为：

1. 船东从未通知承租人其正在行使货物留置权，也没有通过其他方式向承租人传递这样的意图，只是拒绝在诺福克卸货直到收到被承租人扣减的租金；

2. 因提单项下货物的运费已付，而且货物并非为承租人所有（货物所有权人为一家美国公司），依据美国法律，租约第 18 条的规定违反了美国强行性法律规定，因此是无效的，即船东无权留置不属于承租人所有的货物。而且，提单中没有任何并入条款表明，提单项下的货物受制于租约中的留置权条款；

3. BALTIME 第 18 条[5]规定，船东仅有权对属于承租人所有的货物行使留置权；

4. 在英国法下，如果所运输货物不属于承租人所有，那么船东不能依据租约第 18 条规定行使留置权。[6]

三、英国法下期租合同中留置权条款的法律分析

（一）留置权的概念与性质

在英国法中，留置权是指一个人享有对属于他人的财产予以保留、占有直至该占有人针对该他人的请求权得以清偿的权利。[7]留置权的种类很多，既包括海事优先权，也包括衡平法以及普通法下的留置权等等。不少先例对于留置权的本质与定义都有提及，例如格罗斯法官在 Hammonds v. Barclay 一案中说："留置权是指一个人保留被其占有的、属于他人的财产，直到该人的一定要求得以清偿的权利。"贵族院在 Great Eastern Railway Co. v. Lord's Trustee 一案中说："留置权是持有他人财产，直到请求权得以清偿的权利。"在 Molthes Rederi Aktieselskabet v. Ellerman's Wilson Line Ltd. 一案中，"留置权是指一种请求权，指实际占有他人财产，并有权占有直到被占有人支付赋予占有人留置权的债务。"[8]可见，我们可以从以下几个方面理解留置权的概念。

首先，留置权的有效行使需要债权人实际占有债务人的财产并且保持这种占有状态直至债务获得清偿，而且享有留置权的一方必须有占有财产与保持占有的

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5 参见《巴尔的摩标准格式》第 18 条规定："The Owners to have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter, and the Charterers to have a lien on the Vessel for all moneys paid in advance and not earned."

6 See The Agios Giorgis, *Lloyd's Law Reports*, Vol. 2, 1976, pp. 192~204, at http://www.oabpr.org.br/comissoes/relacoesinternacionais/Law%20documents/Carriage%20of%20Goods%20by%20Sea/7%20Time%20Charterparty/The%20Agios%20Giorgis.doc, 1 December 2008.

7 参见戴维 • M•沃克著，李双元等译：《牛津法律大辞典》，北京：法律出版社 2003 年版，第 700 页。

8 杨良宜著：《船舶融资与抵押》，大连：大连海事大学出版社 2003 年版，第 90 页。

合法权利，不是强抢或非法占有。[9] 一旦失去了占有的财产，也就不能继续行使留置权了。

其次，债权人占有的财产须为债务人享有所有权的财产，即债权人无权留置属于债务人之外的第三者所有的财产。当然，这只是普通法中关于被留置财产的所有权归属的默示法律地位，双方当事人可以通过明示的约定予以改变。

最后，债权人占有债务人财产的目的是为了获得债务的清偿，即留置权是一种担保权益。对"担保权益"的准确定义，可见布朗•威尔金森大法官在 Bristol Airport plc v. Powdrill 案中所说："当债务人因法律或合约对债权人负有债务时，除了债务人保证履行债务的个人承诺，债权人还可对债务人拥有权益的财产行使权利，以促使债务人履行对债权人的债务。这种情形下，担保就产生了。"[10]

（二）期租合同中货物留置权的法律地位

由此可见，上文案例的最终判决似乎能得到很好的法律支持，即期租船东没有权利留置承租人不享有所有权的货物，尽管双方之间的期租合同明确约定有留置权条款。然而，笔者认为，上述案件的最终判决存在一定问题。的确，普通法下留置权的默示法律地位是债权人只能留置债务人享有所有权的财产。然而，双方当事人之间的明示条款是足以改变上述默示法律地位的，期租合同当中的留置权条款就是一个很好的例证。

一般认为，留置权可以分为 4 类：普通法或占有留置权、衡平法留置权、船舶优先权、法定 / 立法留置权。[11] 这其中，普通法或占有留置权是最为重要的一种留置权，由法律默示或者合约明示而产生。[12] 也就是说，普通法或占有留置权可以细分为法律默示留置权和合约留置权。在航运实践中，法律默示留置权是指基于运

9 杨良宜著：《船舶融资与抵押》，大连：大连海事大学出版社 2003 年版，第 104 页。
10 杨良宜著：《船舶融资与抵押》，大连：大连海事大学出版社 2003 年版，第 85 页。
11 杨良宜著：《船舶融资与抵押》，大连：大连海事大学出版社 2003 年版，第 91 页。
12 杨良宜著：《船舶融资与抵押》，大连：大连海事大学出版社 2003 年版，第 92 页。

费、共同海损分摊以及航行途中为货物花费的特殊费用[13]等债务的留置权，而合约留置权是指基于滞期费、租金以及分租金等债务的留置权。对于法律默示留置权，即使双方当事人没有在租约中予以约定，债权人仍然享有留置权；而对于合约留置权，双方当事人必须在租约中予以约定，否则债权人不能享有该项权利。另外，由于有订约自由，当事人可以改变普通法的默示规定，只要不违反“公共政策”。[14]

期租合同NYPE中的留置权条款就是一种合约留置权，船东有权依照NYPE第18条对合同相对方（承租人）行使留置权。而且，NYPE46以及NYPE93均没有说明货物属于承租人时船东才可以留置，反而NYPE46以及NYPE93均在留置权条款说明船东可以留置“所有货物”，只要在租约下有欠钱。任何事物都有其存在的理由，为何当事人要在期租合同中通过约定改变留置权的默示法律地位呢？原因是：现在绝大多数船上的货物都不属于承租人所有。就算是FOB买方要租船，也往往是用另一家公司去做承租人，或者是交给有关系的公司作为营运人来租船。[15]可见，BALTIME中规定的船东只能留置承租人拥有的货物的留置权条款几乎没有实践意义，因为在当今的国际贸易中，货物所有权往往不会由期租合同下的承租人享有。也就是说，船东只有通过期租合同中明示的留置权条款才能改变普通法下留置权的默示法律地位，才能通过留置权的有效行使保证其租金收入的稳定获得。

上述案例出现不久，英国商业法庭就改变了对上述法律问题的态度。在The Aegnoussiotis一案[16]中，唐纳森大法官认为只要租约说得清楚就应该依照文字来解释。所以，既然是说“所有”货物，法院的解释就不应该局限在承租人自己享有所有权的货物，而完全忽视和扭曲“所有”这一词。固然，船东若根据期租合同留置第三者的货物，第三者（即无辜收货人）因与期租合同无关，只关心提单项下不欠船东任何钱，是有权采取行动迫使船东依据提单马上交货。但承租人没有权利在期租合同下埋怨船东，或是迫使船东卸货，或是就船东错误留置提单下货物导致的损失提出索赔。原因是：承租人明确在期租合同的第18条允许船东留置“所有”的货物，因而留置提单下货物的合法性也不关承租人的事，这纯是收货人与船东之间的另一个运输合同。也就是说，期租合同中的明示条款改变了普通法下留置权的默示法律地位，船东有权留置承租人不享有所有权的货物以保证其租金收入的获得。上述2个案件的主要争议都涉及期租船东能否依据期租合同中的留置权条款行使留置权的问题，但是最终的判决结果却截然不同。

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13 Scrutton on Charterparties and Bills of Lading 第19版第183条规定：“By common law he has a lien for: (i) freight; (ii) general average contributions; (iii) expenses incurred by the ship Owners or master in protecting and preserving the goods.”

14 杨良宜著：《船舶融资与抵押》，大连：大连海事大学出版社2003年版，第94页。

15 杨大明著：《期租合同》，大连：大连海事大学出版社2007年版，第585页。

16 See Aegnoussiotis Shipping Corporation of Monrovia v. A/S Kristian Jebsens Rederi of Bergen (The Aegnoussiotis), *Lloyd's Law Reports*, Vol. 1, 1977, p. 268.

通过分析笔者认为，当事人约定的留置权条款可以改变普通法下留置权的默示法律地位，因此，The Aegnoussiotis 一案的判决结果是正确的，这在日后案件的判决中也得到了其他法官的支持。[17]

（三）期租合同中的货物留置权与提单持有人提货权之间的矛盾

正如上文所述，期租合同中的留置权条款是当事人之间的明示约定条款，其效果是可以改变留置权的默示法律地位，即期租船东行使留置权时不需要考虑货物所有权是否必须为承租人享有。然而，期租船东行使留置权时需要考虑的问题是其与提单持有人之间的法律关系。换句话说，期租船东是否为提单运输合同关系中的承运人，依据提单条款的规定其是否有权行使留置权。

在国际散装货运输中，通常情形是期租承租人要求船长（或代船长）签发船东提单。[18] 这样的话，期租船东就是承运人，其与提单持有人之间就有运输合同关系。尽管在期租合同中有明示的留置权条款允许船东在承租人未足额按时支付租金时行使留置权，但是在提单中却不会并入期租合同中的留置权条款，理由是：很少会有在提单上明确合并一个期租合同的情形，因为期租合同的内容与提单的一般条款格格不入。[19] 一个是船舶租用合同，一个是运输合同，性质是不一样的。所以，提单中并入的会是一份程租合同，即二船东（期租承租人）与程租承租人之间的合同。而程租合同中一般会有留置权条款，例如，金康航次租船标准格式（以下简称“GENCON94”）第 8 条规定：“出租人得因未收取的运费、亏舱费、滞期费、滞留损失以及所有应付费用包括为取得该笔收入所花费的费用而对货物和该批货物的转租运费有留置权。”[20] 可见，该留置权条款也是一种约定留置权条款，因为诸如亏舱费、滞期费、滞留损失等费用并非普通法默示的船东可以行使留置权的债务。在这些债务种类中并没有约定有租金，也就是说，期租船东在提单下没有合法权利去留置货物，要求提单持有人支付欠下的期租租金。如果船东这样做，很容易促使无辜提单持有人采取对应行动，如向法院申请扣船或作出禁令强迫卸货。而且，由于带来了延误，提单持有人可能在卸了货之后再去控告船东违约（如果提单适用《海牙规则》，则要求合理速遣），要求赔偿延误损失。这种损失是英

17　See The Cebu, *Lloyd's Law Reports*, Vol. 1, 1983, p. 302; The Miramar, *Lloyd's Law Reports*, Vol. 2, 1983, p. 319.

18　杨大明：《期租合同》，大连：大连海事大学出版社 2007 年版，第 472 页。

19　See The SLS Everest, *Lloyd's Law Reports*, Vol. 2, 1981, p. 389.

20　参见 GENCON94 第 8 条（Lien Clause）规定：“The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, dead freight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering same.”

国普通法下也充分承认的。[21]

问题产生了：一方面，依据期租合同中的留置权条款船东有权对货物行使留置权，即使承租人不享有货物所有权；另一方面，依据并入提单的留置权条款船东无权对货物行使留置权，提单持有人可以强迫卸货。在航运实践中，期租船东应该如何应对呢？

（四）期租船东的对策

笔者认为，期租船东应当认真理解 The Aegnoussiotis 一案的判决，毕竟随后的仲裁都倾向于接受该案件的观点。一旦承租人欠下租金，不论承租人是否享有货物所有权，船东都可以通过留置货物来迫使承租人及时支付欠下的租金。理由是：既然货物留置权的本质是一种合同留置权，船东当然可以对合同相对方（承租人）行使上述权利。通常的做法是：只要指示船长在卸货港的锚地抛锚，拒绝靠泊卸货即可。[22] 行动前，船东应先把留置货物的意图通知承租人，一方面可给承租人压力，迫使其把欠租或扣租还给船东；另一方面，这种合理的做法可保护船东免受因不恰当的留置货物而带来的停租索赔。既然不属于停租事项，那么时间损失的风险在承租人身上。而对于提单持有人提出的延误交货索赔，船东可否依据期租合同要求承租人补偿他已承担的延误交货责任？如果船东 / 船长明知货物所有权并非为承租人享有，明知依据提单条款其无权行使留置权，但由于错误留置货物的行为而导致承租人损失的，船东是不能从承租人那里获得赔偿的。仅有的一种不太可能的情形，即船东不知道货物的所有权人以及提单条款时，船东有权从承租人那里获得赔偿，但这种情形几乎不会发生。实践中，上述做法对于那些一流的或者有一定声誉的承租人来说是有作用的，可以迫使承租人支付欠款或者提供担保仲裁解决，因为有声誉的承租人才会担心更多的时间损失，同时，提单持有人也会向承租人施加压力以求早日卸货。[23] 然而，如果承租人是皮包公司或者即将破产的公司的话，那么无论是船东还是提单持有人对他的施压作用都不会太大。

在国际班轮运输市场中，班轮公司通常拥有自己的船队，签发印有自己公司抬头的提单。当班轮公司运力不足时，也会向其他船东租船以补充运力，对外仍然是签印有自己公司抬头的提单。也就是说，班轮公司签发的通常是承租人提单，即班轮公司的法律地位是承运人。这样的话，上述期租合同中的留置权条款与提单持有人的矛盾就不会存在，理由是：期租船东与提单持有人之间并无合同关系。

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21 See The Heron II, *Lloyd's Law Reports*, Vol. 2, 1967, p. 457.
22 See The Chrysovalandou Dyo, *Lloyd's Law Reports*, Vol. 1, 1981, p. 159.
23 杨大明：《期租合同》，大连：大连海事大学出版社 2007 年版，第 587 页。

在班轮公司欠付租金时，期租船东完全可以选择撤船来解除合同，[24] 或者行使留置权来给承租人施加压力。期租船东也不会遭到提单持有人的索赔，有风险的只会是承租人。

（五）期租承租人的对策

笔者认为，期租承租人可以在如下几个方面应对船东对货物行使的留置权：首先，既然期租合同中的留置权条款是一种合约留置权，那么当事人完全可以通过约定改变 NYPE 中的内容。例如，在"船东可以留置所有货物"后面加上"只限于承租人拥有的"。这样的话，船东就无权对承租人不享有所有权的货物行使留置权。其次，如果不能在期租合同中加入上述条文，那么顾及声誉的承租人对于船东的留置行为就不能坐视不管，毕竟由此造成的时间损失的风险将由承租人承担。承租人可以提供适当担保给法院或者仲裁机构，使得货物及早卸下，以避免一切不必要的损失。[25] 最后，既然期租合同中的留置权条款与提单持有人之间存在着矛盾，那么承租人也可以利用这种矛盾。从上文论述可以看出，依据提单船东是无权对货物行使留置权的，所以可以通过提单持有人给船东施加压力。通常情况下，提单持有人是可以依据提单向法院要求强制卸货的。毕竟，提单持有人已经履行了支付运费的义务，而船东拒绝卸货的行为显然是违反了其合理速遣的义务。而如果签发的是承租人提单，作为承租人的班轮公司也是承运人的话，那么他将身处两个合同之中，违反任何合同中的义务都将会造成连锁反应。如果承租人欠付租金，船东行使留置权的话，那么承租人将面临分承租人的索赔。因此，承租人应尽可能参照前两项对策的做法。

（六）转租运费留置权与转租租金留置权

事实上，期租合同中的留置权条款不仅针对所有货物的留置，还针对所有转租运费或者转租租金的留置。与针对货物的留置权相似，对于转租运费或者转租租金的留置也是一种合约留置权。然而，这里"留置"的用词并不准确，因为船东并没有占有该转租运费，其实际上是一种衡平法转让。[26] 对此，也存在不同观点，有学者认为上述"留置"的权利是一种中途拦截的权利，即将本应该由承租人支付

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24 《烟台海运遭遇撤船危机，船载货物被卸在香港码头》，下载于 http://www.mysteel.com/11/hydx/hyyw/2008/08/25/092944,0,0,1856519.html，2008 年 12 月 1 日。

25 杨大明：《期租合同》，大连：大连海事大学出版社 2007 年版，第 587 页。

26 参见 The Cebu, *Lloyd's Law Reports*, Vol. 1, 1983, p. 302. Lloyd's 大法官说："On the true construction of cl. 18 I would hold that (Charterer) has assigned to the Owners by way of equitable assignment, not only subfreights due to it as Charterer."

给船东的运费或者租金中途拦截的权利。[27] 笔者暂且支持衡平法转让的观点，这样的话，构成有效转让的条件是：首先，有一个转让通知，该通知可以由船东直接发给分承租人，也可以由承租人发给分承租人；其次，转让通知中要写明期租合同下欠的债务，也就是要根据程租合同转让多少运费；最后，程租合同下的运费还没有支付给承租人。然而，在国际干散货运输市场中，通常情形是运费预付。也就是说，很难符合衡平法转让的条件。可见，期租合同中关于转租运费的"留置"权条款对于船东的保障也是微乎其微的。

比较而言，关于转租租金的"留置"对于船东的保障则更加优越。因为，租金与运费不同，租金并非一次付清或者付清一大部分，而是随着时间的推移逐渐累计的，这样就使得船东有时间和机会去"留置"转租租金。然而，对于船东是否有权去"留置"转租租金也存在过一些争议。因为，NYPE46 只规定有转租运费，并没有规定有转租租金。那么，转租运费是否包括转租租金呢？英国商业法庭针对这个问题先后作出了 2 个截然不同的判决。在 The Cebu 一案中，劳埃德法官采用了一种宽泛的解释方法，其认为转租运费包括转租租金。然而，在随后的 The Cebu (No. 2) 一案中，斯戴恩法官重新审视了劳埃德法官的观点，其认为不能将转租运费的范围扩大到转租租金。虽然一般情况下，同级别法院较晚时间作出的判决更具权威性。但考虑到之前的判决理由，关于转租运费是否包括有转租租金的问题还是存在着很大的争议。因此，NYPE93 明确将转租租金规定进来，避免了不必要的争议。

实践中，船东在获取了转租承租人的具体信息后便会向后者发出"留置"转租租金的通知，而且船东要向尽可能多的相关方发出通知。顺利的情况是承租人确认船东的留置权，那么转租承租人也就会将转租租金支付给船东。但是，问题是承租人通常会否认船东享有有效的留置权，同时要求转租承租人将转租租金直接支付给他。这时，转租承租人就处于一个两难的境地：一方面，船东已经向其发出有效的通知，如果不顾及船东的留置权而直接向承租人支付转租租金的话，很有可能会再向船东支付一次租金；另一方面，和转租承租人有合同关系的是承租人，在未能确定船东是否真正享有留置权之前，贸然将转租租金支付给船东也很有可能使其再向承租人支付一次租金。所以，转租承租人合理的选择是，将争议的转租租金汇入船东与承租人之间的托管账户，等待船东与承租人之间的仲裁结果再在二者之间分配。毕竟，对于转租承租人而言，这笔租金是必须支付的，支付到一个第三方账户之后，他就会跳出这个争议的泥潭。船东也要积极地促成这样的结局，只要转租租金没有支付给承租人，船东就有希望拿到这些钱。如果转

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27 See Michael Wilford, Terence Coghlin and John D. Kimball, *Time Charters*, 5th ed., London: Lloyd's of London Press Ltd, 2003, p. 534 ("It operates not as a right to retain possession of something already in the Owners, possession but as a right to intercept that which is moving from a third party to the Charterers.").

租承租人还是担心承租人会扣其账户上的钱，船东可以将其享有的对承租人的债权转让一部分或者全部给转租承租人，这样的话，转租承租人就可以向承租人主张相互抵消债权债务关系，即用船东转让而来的债权抵消其未支付给承租人的租金，借此对抗承租人的威胁。总之，船东首先要考虑的问题就是要求转租承租人停付租金。

四、关于中国法中期租合同内留置权条款的分析

（一）留置权的概念和法律性质

我国现行立法对于留置权的含义进行了定义，如《民法通则》第 89 条规定："按照合同约定一方占有对方的财产，对方不按照合同给付应付款项超过约定期限的，占有人有权留置该财产，依照法律的规定以留置财产折价或者以变卖财产的价款优先得到偿还。"《担保法》第 82 条规定："本法所称留置，是指依照本法第 84 条的规定，债权人按照合同约定占有债务人的动产，债务人不按照合同约定的期限履行债务的，债权人有权依照本法规定留置该财产，以该财产折价或者以拍卖、变卖该财产的价款优先受偿。" 2007 年 3 月 16 日第十届全国人民代表大会第五次会议通过的《物权法》第 230 条规定："债务人不履行到期债务，债权人可以留置已经合法占有的债务人的动产，并有权就该动产优先受偿。前款规定的债权人为留置权人，占有的动产为留置财产。"

在我国的民法理论中，留置权是指当债的一方逾期不履行债务时，合法占有债务人财产的一方有权扣留物品并享有对该物品的优先受偿权。可以从以下 4 个方面理解留置权的内涵：第一，债权已届清偿期，[28] 即债务人逾期不履行债务；第二，债权人合法地占有并扣留属于债务人的财产，占有并扣留第三人的财产则为非法；第三，债权和扣留的财产之间存在牵连关系，[29] 例如物之修缮请求权、物之运费请求权、物之保管费请求权，系以就物所为之契约为原因，其物与债权的发生为有关联；[30] 第四，债权人享有的是一种优先受偿权，其受偿顺序优先于普通债权，但是后于抵押权、优先权等担保物权。

（二）期租合同中的留置权条款

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28 梁慧星编著：《中国物权法研究（下）》，北京：法律出版社 1998 年版，第 1011 页。

29 参见《最高人民法院关于适用担保法若干问题的解释》第 109 条规定："债权人的债权已届清偿期，债权人对动产的占有与其债权的发生有牵连关系，债权人可以留置其所占有的动产"。

30 史尚宽著：《物权法论》，台湾：台湾荣泰印书馆 1979 年版，第 451~452 页。

事实上，我国民法理论中的留置权与英国法中的占有留置权十分相似，也可以细分为法定留置权与合约留置权。论及国际航运，法定留置权在我国《海商法》第 87 条和第 141 条都有规定，第 87 条规定："应当向承运人支付的运费、共同海损分摊、滞期费和承运人为货物垫付的必要费用以及应当向承运人支付的其他费用没有付清，又没有提供相当担保的，承运人可以在合理的限度内留置其货物。"第 141 条规定："承租人未向出租人支付租金或者合同约定的其他款项的，出租人对船上属于承租人的货物和财产以及转租船舶的收入有留置权。"虽然这 2 个条款都是法定留置权，但是二者的法律效力却是不同的。前者规定在"海上货物运输合同"一章，是强制性规定，当事人必须遵守；而后者规定在"船舶租用合同"一章，是任意性规定，只在当事人没有约定或者没有不同约定时有约束力。后者的规定与 BALTIME 的规定一样，都要求船东只能对承租人享有所有权的货物行使留置权。这样的话，作为合约留置权的 NYPE 中的留置权条款就可以优先于《海商法》第 141 条适用，即船东行使留置权时毋须考虑货物所有权归属问题。

明确了 NYPE 中的留置权条款优先适用，我们还得分析期租船东是否受提单约束的问题，即期租船东是否为承运人。英国法是通过一系列先例来确认承运人；而我国是成文法系国家，只能通过法律条文进行判断。我国《海商法》第 42 条第 1 款规定："'承运人' 是指本人或者委托他人以本人名义与托运人订立海上货物运输合同的人。"第 72 条规定："货物由承运人接收或者装船后，应托运人的要求，承运人应当签发提单。提单可以由承运人授权的人签发，提单由载货船舶的船长签发的，视为代表承运人签发。"这样看来，在期租合同下，由于船东不可能与托运人直接接触并订立海上货物运输合同，所以船东不是承运人，与托运人签订程租合同的承租人（二船东）是承运人。不论是承租人签发提单，或是承租人授权的人签发提单，或者是船长签发提单，都视为是承租人提单。这显然与英国法中的理论不一致，后者认为海上运输合同在提单签发之前已经成立，提单证明或者包含了运输合同的条款。在提单签发之前，大副收据已经证明了这个运输合同直到其被随后签发的提单所取代。[31] 对于非承租人的提单持有人，不论其是托运人还是其他的提单持有人，提单是判断持有人的唯一标准：如果提单是船长或以船长的名义签发，那么该提单是船东提单；如果提单由承租人签发并标明承租人是承运人，那么该提单是承租人提单。[32] 暂不分析我国《海商法》规定的合理性问题，如果一律认定为承租人提单的话，那么期租船东在行使留置权时就毋须顾及提单持有人的提货请求了。

31 See Pyrene Co Ltd. v. Scindia Steam Navigation Co Ltd., *Lloyd's Law Reports*, Vol. 1, 1954, p. 321; *Queens Bench Division*, Vol. 2, 1954, p. 420.

32 下载于 http://www.cpiweb.org/showonenews.jsp?news_id=31，2008 年 12 月 1 日。

五、结语

综上，期租合同中留置权的法律性质是一种合约留置权，只对合同相对方即承租人，而不对提单持有人产生效力。英国商业法庭对于圣乔治亚号案的判决明确了下述观点：期租合同中的留置权条款可以改变普通法下留置权的默示法律地位，即当承租人无故扣减租金时，期租船东有权对于承租人不享有所有权的货物行使留置权。当然，这只是期租合同下的约定权利，如果期租船东同时也是提单承运人的话，那么他将很有可能面临提单持有人的索赔。即使如此，由于留置权行使而造成的时间损失的风险也是由承租人承担的。因此，期租合同中的留置权条款对于船东要回承租人无故扣减的租金还是很有帮助的，毕竟真正想长期经营的公司占大多数。更多的情况是，期租船东提出留置货物的要求仅仅是一种商业上的手段，通过施加压力来迫使承租人就范，而通常不会走到申请法院拍卖货物那一步。而对于转租运费以及转租租金的留置一定要及时发出通知，必要时候要向法院申请禁止支付的禁令。因为，转租运费或者转租租金一旦支付给承租人的话，将不会构成有效的衡平法上的转让。船东的明智之举是同承租人达成协议将转租运费或者转租租金汇付到一个托管账户中，等待仲裁结果的最终获得，胜利一方将有权获得转租运费或者转租租金的受偿。另外，中国法下同样承认期租合同中留置权条款的法律效力，而且依照我国《海商法》关于承运人的规定，通常情形下期租船东不是提单承运人，所以他会更好地利用期租合同中的留置权条款来保障自己的租金收入。

《联合国海洋法公约》三个制度的对比研究及其对海底资源影响分析

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内容摘要: 随着陆地资源的逐渐枯竭，海洋资源的战略地位急剧上升。自1982年《联合国海洋法公约》（以下简称"《公约》"）生效以来，世界各国对海洋权益和海洋资源越来越重视，并开展大规模的海底资源勘查和相关法理研究，以期在《公约》框架下最大限度地争取和扩展各自的海洋空间和权益。面对严峻的国际海洋形势，我们应加强对《公约》的法理和实践研究。本文主要论述了《公约》建立的专属经济区制度、大陆架制度、国际海底区域制度及其相互之间的关系，讨论了《公约》第76条对大陆架外部界限划定的相关规定，最后就各沿海国大陆架外部界限的确定对全球海底资源的归属与分配带来的影响进行了初步分析。

关键词: 专属经济区制度　大陆架制度　国际海底区域制度

《联合国海洋法公约》（以下简称"《公约》"）于1982年12月10日开放签署，并于1994年11月16日对那些批准和加入《公约》的国家生效，《公约》第一次为管理世界大部分海域提供了一个全面的框架。

随着科学技术的发展，对海洋的研究利用越来越深入，随之也带来了各种问题，而《公约》作为一部管理世界海域的法律，为解决世界各国的海域争端提供了依据和手段。因而仔细研究《公约》内容，尤其是《公约》新建立的各种制度，对保障各国合法海洋权益十分重要。

本文主要论述了《公约》建立的专属经济区制度、大陆架制度、国际海底区域制度（以下简称"'区域'制度"）及其相互之间的关系，并仔细研究了《公约》第76条对大陆架界限划定的相关规定，对如何划定大陆架的外部界限给予了必要的解释，最后就各沿海国大陆架外部界限的确定对未来全球海洋资源的分配带来的

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影响进行了初步分析。

一、《公约》建立的三个制度及其相互之间的关系

1958 年第一次联合国海洋法会议通过的《日内瓦海洋法公约》中，划分了领海、毗连区、公海和大陆架 4 个海洋区域，1982 年生效的《公约》又增加了专属经济区、国际海底区域和群岛水域（图 1）。[1] 这里需要指出的是，《公约》中的“大陆架”概念是一个全新的概念，它不同于《日内瓦海洋法公约》中的“大陆架”概念；“公海”和“国际海底区域”则有不同的划分原则，它们分别取决于专属经济区和大陆架的外部界限。本文重点介绍一下《公约》建立的三个制度，即专属经济区制度、大陆架制度和“区域”制度。

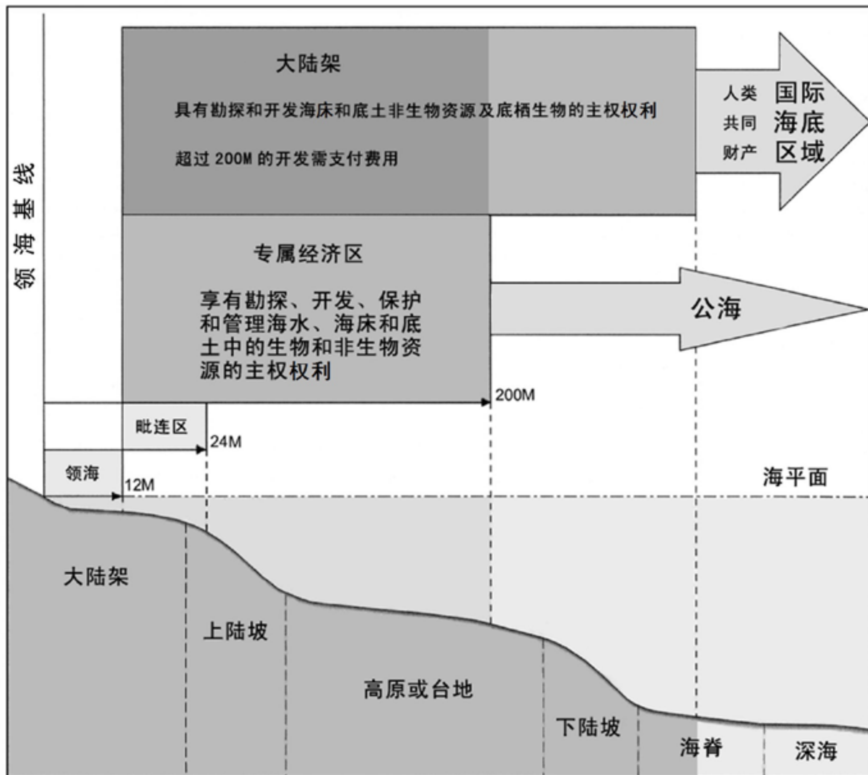

图 1 各海域及其与海底地貌的关系 [2]

1 国家海洋局国际合作司编：《大陆架外部界限——科学与法律的交汇》（内部资料）2003 年版，第 8 页。

2 Peter J. Cook and Chris M. Carleton, *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford: Oxford University Press, 2000, p. 10.

（一）专属经济区制度

专属经济区是第三次联合国海洋法会议上确立的一项新制度。专属经济区是指领海之外并邻接领海、从测算领海宽度基线量起不超过 200 海里的一个区域。《公约》关于专属经济区制度的内容，主要为：

第一，关于专属经济区的范围。《公约》第 55、57 条规定，专属经济区是领海以外并邻接领海的一个区域，从测算领海宽度的基线量起，不应超过 200 海里。同时，《公约》第 56 条第 1 款规定，沿海国在专属经济区内有以勘探和开发、养护和管理海床和底土及其上覆水域的自然资源为目的的主权权利。可见，沿海国最多可对邻接领海以外 200 海里内的自然资源（生物资源或非生物资源）具有主权权利，且这种主权权利是综合性的，具有排他性。在此应注意的是，沿海国对专属经济区内自然资源的管辖主要涉及生物资源的开发、养护及利用。因为，《公约》第 56 条第 3 款规定，沿海国对专属经济区内关于海床和底土的权利，应按照《公约》第六部分（大陆架）的规定行使。[3]

第二，关于专属经济区的划界。一般情况下是从测算领海宽度基线量起 200 海里的距离。对于海岸相向且海域之间距离不足 400 海里的沿海国来说，由于主张重叠而存在争端。在第三次联合国海洋法会议上，就这一特殊情况，衡平原则派与等距离原则派在专属经济区划界适用的原则上产生了严重的对立与分歧，且互不妥让。在争论双方不能达成协议的情况下，会议主席提出了折中案文并获得了通过。关于专属经济区划界方面的规定，主要是在《公约》第 74 条中。

（二）大陆架制度

《公约》第 76 条规定，“沿海国的大陆架包括其领海以外依其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土，如果从测算领海宽度的基线量起到大陆边的外缘的距离不到 200 海里，则扩展到 200 海里的距离”。《公约》第 76 条“大陆架”术语和有关规则定义的是大陆边（缘）的外缘，是一个法律概念的大陆架。

第一，《公约》关于大陆架的范围。《公约》所定义的大陆架的外部界限存在两种情况：一是如果全部自然延伸不到 200 海里，则扩展到 200 海里；二是如果全部自然延伸超过 200 海里，则不应超过从测算领海宽度的基线量起 350 海里，或不应超过连接 2500 米深度各点的 2500 米等深线外 100 海里。

第二，大陆架外部界限的划定。根据《公约》第 76 条第 8 款规定，从测算领

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3 金永明：《专属经济区与大陆架制度比较研究》，载于《社会科学》2008 年第 3 期，第 123~131 页。

海宽度的基线量起 200 海里以外大陆架界限的情报应由沿海国提交根据附件Ⅱ在公平地区代表制基础上成立的大陆架界限委员会。委员会应就有关划定大陆架外部界限的事项向沿海国提出建议，沿海国在这些建议的基础上划定的大陆架界限应有确定性和拘束力。

第三，相邻和相向国之间大陆架划界原则。理论上，国内外学者对相邻和相向国大陆架划界原则说法不一，以往的划界案例表明大致有三种：自然延伸原则、中间线（等距离线）原则、衡平原则。在不存在争端的情况下，一般以自然延伸为主，同时兼顾衡平。若主张区域存在重叠，则情况比较复杂，以自然延伸和衡平原则为主，可能会在具体判定的时候用到等距离方法。其中，中间线（等距离线）原则是一种便利的划界方法，并且在习惯法规则中，只有在能带来公平结果时才被采用，[4] 而且有部分观点认为不应该把这种方法作为划界的原则，因为只有符合衡平原则的中间线（等距离线）原则才能被接受。自然延伸原则是大陆架划界的法律依据，是划界的基础；衡平原则是大陆架划界的基本原则和目标。这两个原则都是得到普遍承认的大陆架划界原则，并且已经成为习惯国际法的一部分，对大陆架划界的实践具有重要的指导意义。[5]

（三）“区域”制度

国际海底是指国家管辖范围以外的海床和洋底及其底土。

1967 年马耳他大使帕多教授在联大的提案中建议，国际社会应把国家管辖范围以外的海床洋底及其底土规定为人类共同继承财产，并应建立管理该区域资源的国际管理制度，包括管理机构，以维护和平。由此拉开了国际社会审议讨论国际海底区域法律地位及其资源开发制度的序幕。“国际海底区域”自提出以来，经过联大机构和第三次联合国海洋法会议的审议和讨论，终于在 1982 年通过的《公约》中作出了明确的规定，确立了人类共同继承财产原则在《公约》中的法律地位，并进而发展成为海洋法的基本原则。

《公约》不仅丰富了帕多教授建议的人类共同继承财产概念的内容及联大于 1970 年通过的“国际法原则宣言”决议宣告的原则，而且还制定了建立以人类共同继承财产原则为基础的“区域”制度，实质性地推动了海洋法的发展。

笔者认为，《公约》制定“区域”制度的主要目的是为了合理有序地开发“区域”范围内的资源，因为在“区域”内蕴含着丰富的海底资源，如富钴结壳、多金属结核、天然气水合物、海底热液硫化物以及与热液硫化物矿床伴生的深海生物基因资源

4　赵庆龙：《大陆架划界原则的国际法实践》，载于《科技信息》2008 年第 8 期，第 153~154 页。

5　陈屹：《大陆架划界原则浅探》，载于《中山大学研究生学刊（社会科学版）》2001 年第 3 期，第 114~121 页。

等。其中，多金属结核富含丰富的锰、铜、镍和钴等矿产资源，是一种重要的战略资源，为各国尤其是少数拥有开采技术和资金的西方主要工业国家所重视。而为能使各国勘探和开采“区域”内各种资源，必须确保勘探和开采者对这些资源的排他性权利。[6]

（四）三者之间的联系和区别

1. 专属经济区和大陆架

两制度的区别主要为：(1) 设立目的不同。设立大陆架制度的主要目的为开发海底的矿物资源，其仅侧重于沿海国对原处于公海的矿物资源的勘探开发行使管辖权；而设立专属经济区制度的基本目的在于保留沿海国对渔业资源的开发所行使的管辖权，即侧重对与经济有关的活动行使管辖。(2) 法律基础不同。沿海国对大陆架的权利不依据其对大陆架的占领或宣布，而是根据存在的事实；而沿海国对专属经济区的权利则不同，除非沿海国宣布对专属经济区的主张，否则，该海域仍为公海。即沿海国对大陆架的权利是固有的，而对专属经济区的权利依据为国际条约，并要有一定的宣示行为。(3) 管辖范围不同。200 海里为专属经济区的最大范围，却是大陆架的最小范围，大陆架范围最远可达 350 海里或 2500 米等深线外 100 海里。(4) 权利内涵不同。沿海国在专属经济区内的主权权利涉及生物资源和非生物资源，包括水体和海床及其底土；而沿海国在大陆架的主权权利仅限于海床和底土的矿物资源和非生物资源，以及属于定居种的生物。

同时，专属经济区和大陆架制度又是有联系的，主要为：(1) 关于海床和底土的权利问题，《公约》第 56 条第 3 款规定，沿海国在专属经济区内关于海床和底土的权利，应按照大陆架制度的规定行事。可见，对于海床和底土的权利，大陆架制度优先于专属经济区制度。(2) 在关于大陆架定义的《公约》第 76 条第 1 款中，规定沿海国的大陆架如果宽度不到 200 海里时，可扩展到 200 海里的距离，其引入了专属经济区的 200 海里距离标准。(3) 关于大陆架上的人工岛屿、设施和结构，《公约》第 80 条规定，专属经济区第 60 条比照适用于大陆架上的人工岛屿、设施和结构。(4) 关于倾倒造成的污染及其执行，《公约》第 210 条和第 216 条的规定同样适用于专属经济区和大陆架，即对专属经济区和大陆架适用相同的规则。由此可以看出，专属经济区和大陆架制度的联系主要为调整或协调两者的关系。可见，专属经济区和大陆架制度是各自独立不可替换的，两制度的区别还体现在

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6 金永明著：《国际海底区域的法律地位与资源开发制度研究》，上海：华东政法学院国际法学 2005 年版。

海域划界应考量的要素上。[7]

2. 国际海底区域与大陆架

国际海底区域的确定最终取决于沿海国大陆架外部界限的划定。由此可见，大陆架的外部界限是确定国际海底区域大小的关键。

专属经济区制度、大陆架制度和“区域”制度三者之间的关系如图 1 所示。

二、《公约》建立的大陆架制度内涵

（一）法律概念大陆架与地质概念大陆架的联系和区别

1.《公约》大陆架定义

沿海国的大陆架包括其领海以外陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土，如果从测算领海宽度的基线量起到大陆边的外缘的距离不到 200 海里，则扩展到 200 海里，“沿海国大陆架不应扩展到第 4 至第 6 款所规定的界限以外”。“大陆边包括沿海国陆块没入水中的延伸部分，由陆架、陆坡和陆基的海床和底土构成，它不包括深洋洋底及其洋脊，也不包括其底土”。

2. 科学上的大陆边缘 [8]

陆架是大陆的水下延续和自然延伸。它通常只环绕大陆周围坡度极小的平缓海底和浅海地带，即从海岸（多指低潮线）起逐渐向深海方向延伸，直到坡度显著增大（倾斜急剧变陡）的陆架坡折处为止。陆架坡折处的水深变化在 20~550 米之间，平均约 130 米（图 2）。

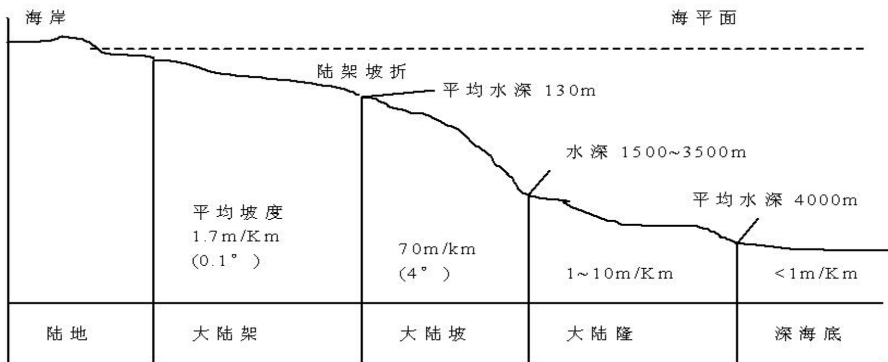

图 2　大陆架、大陆坡和大陆隆剖面示意图 [9]

7　金永明著：《国际海底区域的法律地位与资源开发制度研究》，上海：华东政法学院国际法学 2005 年版。

8　范时清著：《海洋地质科学》，北京：海洋出版社 2004 版，第 212 页。

9　范时清著：《海洋地质科学》，北京：海洋出版社 2004 版，第 212 页。

《公约》第 76 条定义的大陆架是一个法律概念的大陆架，其范围要大于地质学上的大陆架，法律上的大陆架实际上是地质学上大陆边缘的概念，包括地质学上的大陆架、大陆坡和大陆隆。它们之间的区别可以用下图（图 3）表示。

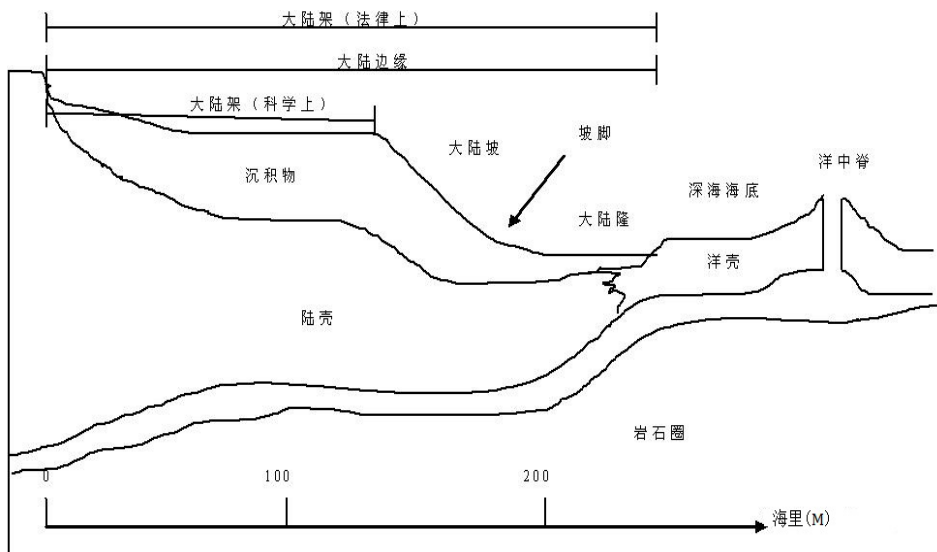

图 3　法律大陆架和科学概念的大陆边缘

（二）《公约》第 76 条的相关分析 [10]

第 1 款："沿海国的大陆架包括其领海以外依其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土，如果从测算领海宽度的基线量起到大陆边的外缘的距离不到 200 海里，则扩展到 200 海里的距离。"

这一款确立了沿海国有权以 2 种标准，即自然延伸和距离法则划定大陆架外部界限。

第 2 款："沿海国的大陆架不应扩展到第 4 至第 6 款所规定的界限以外。"

这一款规定仅适用大陆架超过 200 海里的情况，即界定 200 海里以外大陆架外部界限的 2 条公式线和 2 条制约线。

第 3 款："大陆边包括沿海国陆块没入水中的延伸部分，由陆架、陆坡和陆基的海床和底土构成，它不包括深洋洋底及其洋脊，也不包括其底土。"

这一款则定义了大陆边，同时该条款"重申了大陆架的法律概念及其与自然延伸的客观事实的联系"。这个延伸必须是"陆架、陆坡和陆基"，也就是大陆边。

10　国家海洋局国际合作司编：《大陆架外部界限——科学与法律的交汇》（内部资料）2003 版，第 18~19 页。

另一方面，深洋洋底及其洋脊不在沿海国主权权利范围内，相反，深洋洋底处在国际海底管理局的资源管辖范围之中，它不处于任何国家的管辖范围，除非它位于 200 海里范围内。

第 4 款："(a) 为本公约的目的，在大陆边从测算领海宽度的基线量起超过 200 海里的任何情形下，沿海国应以下列两种方式之一，划定大陆边的外缘：(1) 按照第 7 款，以最外各定点为准划定界线，每一定点上沉积岩厚度至少为从该点至大陆坡脚最短距离的百分之一；或 (2) 按照第 7 款，以离大陆坡脚的距离不超过 60 海里的各定点为准划定界线。(b) 在没有相反证明的情形下，大陆坡脚应定为大陆坡坡底坡度变动最大之点。"

第 4 款 (b) 项规定的是各沿海国如何确定大陆坡脚。沿海国可以在其大陆架的某些位置适用该款 (a) 项 (1)，而在其他位置适用 (a) 项 (2)，以最大化其主张。确定大陆坡坡脚的基本法则是通过大陆坡底部梯度变化最大的点来确定。存在多个复杂的梯度变化点，难以确定梯度变化最大点时可采用"相反证据"的方法确定大陆坡坡脚。

第 4 款 (a) 项提出了界定 200 海里以外大陆架的 2 条公式线，本款是沿海国是否具有 200 海里以外大陆架的权利基础。其中 (a) 项 (1) 提出的沉积物厚度公式是以陆基上最外各定点为准划定界线，每一定点上沉积岩厚度至少为从该点至大陆坡脚最短距离的 1%。因此，如果适用该公式在离大陆坡脚 X 海里的地方，其沉积物的厚度一定是 0.01X。该公式也称"爱尔兰公式"，最初是由爱尔兰代表团中的一个地质学家加德纳提出，该公式的目的是确保沿海国的主权权利能扩展至大陆基主要部分，这部分有望储存重要的碳氢化合物资源。而 (a) 项 (2) 提出的公式，也称为"海登堡公式"，该公式提出大陆边的外缘是以离大陆坡脚不超过 60 海里的各定点的连线所确定。2 个公式可以兼用，如果兼用 2 条公式线，它们的外部包络线就决定了大陆架权利的最大范围。

第 5 款："组成按照第 4 款 (a) 项 (1) 和 (2) 目划定的大陆架在海床上的外部界线各定点，不应超过从测算领海宽度的基线量起 350 海里，或不应超过连接 2500 公尺深度各点的 2500 公尺等深线 100 海里。"

这一款规定了划定 200 海里以外大陆架界线的两条制约线，组成按照第 4 款 (a) 项 (1) 和 (2) 划定的大陆架在海床上的外部界限的各定点，不应超过：1. 从测算领海宽度的基线量起距离为 350 海里之处划的线；或 2. 从 2500 米等深线量起距离为 100 海里之处划的线。

而关于 2500 米等深线的划定，也分为两种情况：当等深线比较简单时，2500 米等深线可以直接确定；当等深线复杂或有多条等深线时，例如，沿大陆边缘的断层、褶皱和仰冲作用可产生多个 2500 米等深线。除非有相反证据，在这种情况下，委员会建议使用从领海基线算起的第一条 2500 米等深线作为参考等深线。

第 6 款："虽有第 5 款的规定，在海底洋脊上的大陆架外部界限不应超过从

测算领海宽度的基线量起 350 海里。本款规定不适用于作为大陆边自然构成部分的海台、海隆、海峰、暗滩和坡尖等海底高地。”

这一款和第 3 款联合起来，对不同类型的洋脊限制了不同的大陆架延伸范围，即：(1) 深洋洋脊（第 76 条第 3 款），最远可划至 200 海里；(2) 海底洋脊（第 76 条第 6 款），最远可划至 350 海里；(3) 海底高地（第 76 条第 6 款），最远可划至 2500 米等深线外 100 海里。

《公约》未对三种类型的洋脊给出明确的界定，造成沿海国运用和解释这些概念时出现了很大的模糊和弹性空间。[11]

三、沿海国大陆架划界现状及其对海底资源影响

深海海域作为地球上最后一片人类未开发区域，蕴藏着丰富的海底资源。200 海里专属经济区和大陆架界限的划定对于沿海国的利益和未来发展有着至关重要的作用，尤其是 200 海里以外大陆架界限的具体划分。大陆架制度突出涉及的是对非生物资源（尤其是海床中的石油和天然气）的管辖和开发，关系到各国的重大利益，势必要求国家之间划定大陆架界线，以便确定在一个特定的大陆架区域中哪个国家有权行使主权权利。[12] 由于大陆架外部界限是沿海国有主权权利和管辖权海域的最外界限，也是全人类共同继承财产——国际海底区域的边界，决定着国际海底区域的最终范围，因此，沿海国所能划定的大陆架范围和国际海底区域是一个此消彼长的关系。根据《公约》开展大陆架划界是沿海国面临的重大机遇，大部分沿海国都在《公约》的框架下最大限度地争取和扩展大陆架范围，使本国的海洋权益最大化。

国际海底区域是全人类共同继承的财产，如果各沿海国不是忠实地按照《公约》规则划定他们的外大陆架将会引起国际海底区域的缩小，必定会影响全人类的共同利益。如何保持沿海国和人类共同继承财产这两方面利益的平衡和和谐是顺利履行《公约》的关键，因此国际社会有必要对 200 海里外大陆架划界是否忠实地按照《公约》规则和对全人类共同继承财产造成损害等问题给予足够的关注（图 4）。

11　方银霞、周建平：《〈联合国海洋法公约〉大陆架的法理和应用条件》，载于《中国海洋法学评论》2006 年第 1 期，第 73~84 页。
12　陈屹：《大陆架划界原则浅探》，载于《中山大学研究生学刊（社会科学版）》2001 年第 3 期，第 114~121 页。

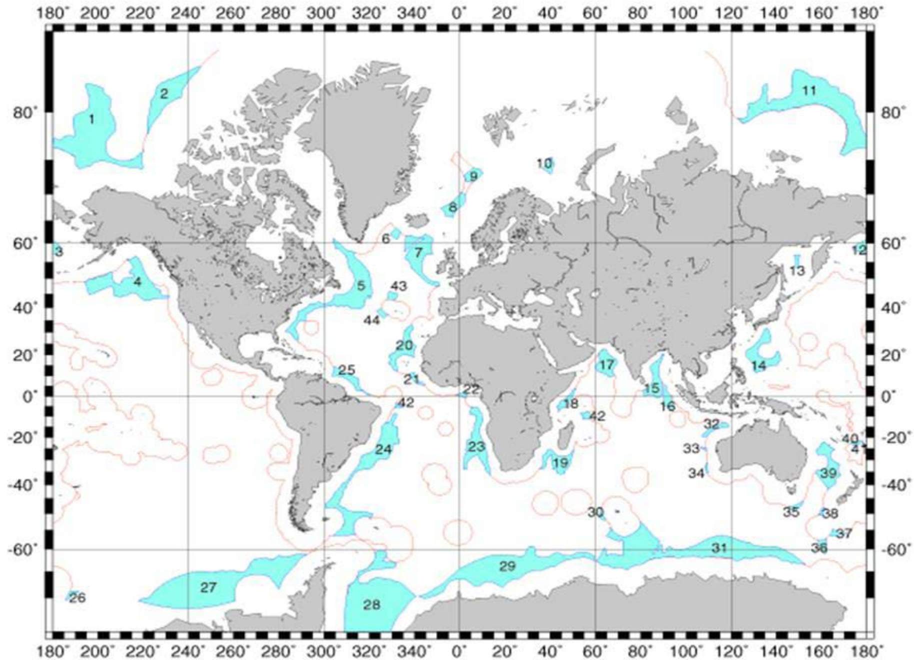

图 4 全球 200 海里外大陆架潜在区域分布图 [13]
（红线表示 200 海里线，蓝色区域是 200 海里外大陆架区域）

根据对大陆架的初步调查，专家评估至少有 65 个沿海国的大陆架有可能依据《公约》条文扩大到 200 海里以外的管辖范围。俄罗斯政府于 2002 年第一个向联合国秘书长和大陆架界限委员会提交了俄罗斯 200 海里以外大陆架划界案，到目前为止，巴西、澳大利亚、爱尔兰、新西兰、英法西爱四国联合、挪威、法国、墨西哥政府等 16 个划界案都已经正式提交了，在未来几年里还将有一批发达和发展中国家相继提交他们的外大陆架划界案。

但由于《公约》第 76 条所定义的大陆架是法律意义上的大陆架，是一个科学与法律政治的结合体，因此在具体操作中存在一定的复杂性。加拿大的 Ted L. McDorman 博士曾分别于 1995 年和 2002 年在《国际海洋和海岸法杂志》上发表文章阐述有关《公约》第 76 条外大陆架界限划定存在的问题。他认为，第 76 条第 3 到 6 款为大陆架外部界限的确定建立了多种关系的公式。这些条款是“地理学、地质学、地貌学和法学”内容的结合。写入第 76 条外部界限公式的措词存在意义上的复杂性或科学上的不确切性。由于确定海底沉积物的厚度、大陆坡脚、2500 米等深线和区别作为大陆边自然构成部分的海台、海隆、海峰、暗滩和坡尖

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13 J. R. V. Prescott, *The Maritime Political Boundaries of the World*, London: Methuen and Co., Ltd., 1985, p. 44.

等海底高地的技术上和意义上的困难性，在给定的任何情况中，应用《公约》第 76 条中规定的各项标准都是很不容易的事。[14] 如《公约》第 76 条中规定的“洋脊”可以分为深洋洋脊、海底洋脊和海底高地三种情况，而不同属性的洋脊有着不同的划界标准。俄罗斯划界案的北冰洋部分就是期望利用有关“洋脊”规则将俄罗斯的外大陆架一直划到北极极点，如果该划界案成立，将导致整个北冰洋被瓜分。另外澳大利亚、冰岛、新西兰等岛国也利用了有关“洋脊”条款的规定来扩展他们的外大陆架。[15] 因此必须加强对《公约》第 76 条应用条件的研究，应对由于沿海国过分扩展他们外大陆架可能对全人类共同利益造成损害的问题。

深海蕴藏着丰富的海底矿产资源，随着科学技术的发展，深海矿产资源的开发越来越成为可能，我国也在国际海底区域进行了大规模的深海资源勘探研究活动。因此，了解深海资源的分布，确定勘探研究靶区是否位于沿海国潜在的大陆架主张范围内，对指导我们在国际海底区域的勘探和研究工作有着十分重要的意义。

海底热液硫化物矿是具有战略意义的海底多金属矿产资源，主要元素为铜、铅、锌及银、金、钴、镍、铂等，在大洋中脊和弧后断裂活动带广有分布。[16] 当前，国际海底管理局正在制定有关热液硫化物的勘探规章制度，因此摸清全球热液硫化物的分布状况及其与各沿海国大陆架主张范围间的关系就极为重要。为此，笔者收集了全球已发现的海底热液矿点位置、主要沿海国家正式公布的领海基线、世界水深数据等信息，绘制了全球热液矿点分布与各沿海国潜在大陆架主张范围的关系图，图中两条线分别为 200 海里和 350 海里线，而绿色区域即为潜在的大陆架范围（图 5）。由图可见，有相当一部分热液点就位于沿海国的 200 海里专属经济区内，不属于国际海底管理局的管辖范围；有些则落在 350 海里范围内，为潜在的外大陆架主张区。由于世界范围的外大陆架界限还没有最终确定，因此建议在进行国际海底矿产资源调查研究时最好选取 350 海里以外的区域作为工作调查靶区，尽可能避开可能造成权利冲突的区域，以免造成被动和不必要的损失。

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14 仲光友、赵宝庆：《大陆架划界标准及对解决东海划界争端的启示》，载于《中国海洋大学学报（社会科学版）》2007 年第 5 期，第 20~23 页。

15 方银霞、周建平：《〈联合国海洋法公约〉大陆架的法理和应用条件》，载于《中国海洋法学评论》2006 年第 1 期，第 73~84 页。

16 陈新明、高宇清、吴鸿云、丁六怀、孙大伟：《海底热液硫化物的开发现状》，载于《矿业研究与开发》2008 年第 5 期，第 1~5 页。

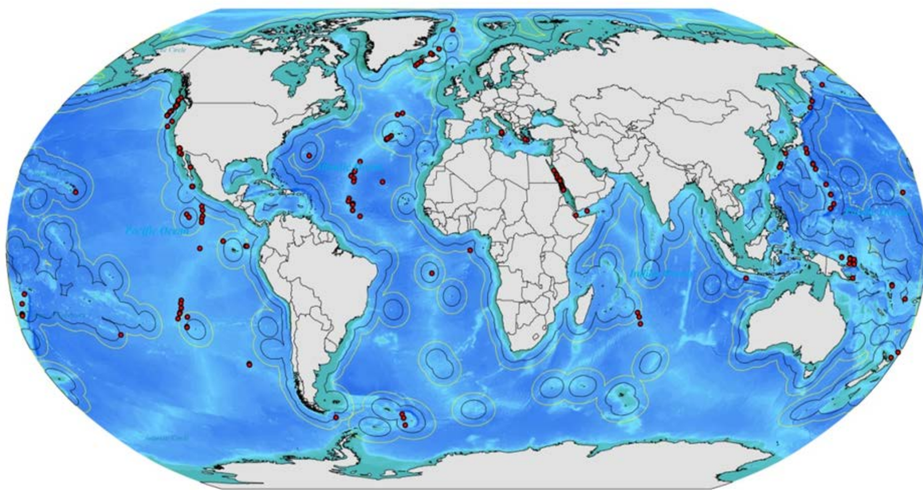

图 5 全球热液点分布与潜在大陆架关系图

四、结束语

21 世纪是人类开发利用海洋的世纪，越来越多的国家将目光投向海洋，海洋中丰富的资源也有待我们去挖掘。而专属经济区和大陆架划界是在《公约》框架下对世界海洋区域进行重新分配，直接涉及相关沿海国的海洋权益和全人类的共同利益。我国作为一个海洋大国，维护海洋权益的任务繁重，应结合中国海的具体情况，加强对《公约》大陆架制度的相关科学技术和法理研究，为保障我国的海洋权益提供科学和法理支撑。

2008 年中国海洋法学研究综述

本刊课题组 *

2008 年，我国海洋法学研究取得了一些新的突破和成绩，为了使相关研究人员能够更好地把握中国海洋法学的研究现状和动态，本刊现将 2008 年关于海洋法律和政策方面的著述分多个方面加以综述。

一、海洋主权纠纷与划界

（一）关于海洋划界的一般理论

虽然和 2007 年相比，2008 年讨论海洋划界一般原则的文章较少，但是出现了新的讨论角度，提出了新的观点：赵庆龙先生从国际法实践的角度讨论了大陆架划界的自然延伸原则和衡平原则，他通过对相关国际法的司法与仲裁实践的研究，认为自然延伸原则和衡平原则作为大陆架划界原则的地位是在国际实践中逐步确立的，其他的划界原则及方法只有在符合衡平原则的基础上才能加以适用。[1] 张卫彬先生认为海洋划界中除了经常提到的等距离原则、衡平原则、自然延伸原则等，还存在着禁止反言原则。在 1929 年塞尔维亚贷款案中，常设国际法院适用了禁止反言原则，在国际海洋划界领域，禁止反言原则包含在衡平原则之中，其适用对我国海域划界具有重要意义。[2]

（二）东海问题

1. 中韩苏岩礁纠纷

苏岩礁位于中国东海北部海域，东经 125 度、北纬 32 度，在江苏南通和上海

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1 赵庆龙：《大陆架划界原则的国际法实践》，载于《科技信息》2008 年第 8 期，第 153 页。

2 张卫彬：《论海洋划界中的禁止反言原则》，载于《常熟理工学院学报》2008 年第 1 期，第 68 页。

崇明岛以东约 150 海里，距离中国舟山群岛最东侧的童岛 132 海里（247 公里），是江苏外海大陆架延伸的一部分，属于东海海区，位于东海北部，靠近黄海南部。[3] 1995 年以来，韩国开始在东海苏岩礁上大兴土木，于 2003 年建成"韩国离于岛（即苏岩礁，韩国称其为岛）综合海洋科学基地"，并打着进行海洋和地球环境变化研究的旗号，多次派遣飞机和船舰在该礁附近海域进行活动。在苏岩礁问题上，刘亚丁先生认为，苏岩礁是一个水下暗礁，不是低潮高地，更不是岛屿，根据《联合国海洋法公约》它不能作为划定领海基线的依据，即使韩国在苏岩礁修建了海洋基地，也无法改变苏岩礁不可能成为领土的法律事实，但苏岩礁对中韩两国而言均有着十分重要的经济和战略意义，针对韩国在苏岩礁的行为，我国应予以足够重视并采取相应的措施。[4]

2. 中日东海争端

(1) 划界原则探讨

同 2007 年一样，大部分学者批驳日本提出的中间线原则，认为自然延伸原则和衡平原则在适用东海大陆架划界上具备坚实的国际法文本依据、地理法律事实依据和国际司法判例依据。[5] 然而有学者提出了新的观点：李令华先生认为中国目前主张和坚持"衡平原则和大陆架自然延伸原则"来解决东海问题与只坚持"大陆架自然延伸原则"在本质上是相同的，衡平原则本身具有不确定性，充满着变数，而自然延伸理论在划界中使一国水域处在另一国的大陆架上，它在概念上是模糊的，在具体操作上没有可行性。两种理论的混合会使划界理论更加混乱和难以掌控。[6]

(2) 钓鱼台列屿问题

同 2007 年相比，一些学者从新的角度讨论了钓鱼台列屿对中日东海领土划界的影响：张植荣先生通过对近年来日本知华派学者对尖阁列岛（钓鱼台列屿，日本称尖阁列岛）的研究，以及对 2000 年前后至 2008 年的研究状况、观点与资料进行整理和对比，认为近年来日本的相关研究，出现了区别于传统"两分法"观点的一缕新气象。[7] 李金明先生认为由于钓鱼列岛位于中国东海大陆架的边缘，在中日海域划界中占有重要地位，为公平起见，故在划界中可以考虑把大陆架和专属

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3 刘亚丁：《苏岩礁的法律地位及其意义》，载于《世纪桥》2008 年第 3 期，第 68 页。

4 刘亚丁：《苏岩礁的法律地位及其意义》，载于《世纪桥》2008 年第 3 期，第 68 页。

5 明廷权、李慧玲：《中日东海争端的国际法评析》，载于《南阳师范学院学报》2008 年第 2 期，第 17 页；林于暄、于耀东：《中日东海大陆架划界的适用原则》，载于《上海海事大学学报》2008 年第 1 期，第 83 页。

6 李令华：《关于最终解决东海划界的理论基础问题——对坚持"公平原则和自然延伸原则"划界主张的质疑》，载于《中国海洋大学学报（社会科学版）》2008 年第 2 期，第 5 页。

7 张植荣：《日本尖阁列岛研究述评——兼论中日学术交流与共同研讨的意义》，载于《中国海洋大学学报（社会科学版）》2008 年第 6 期，第 1 页。

经济区分开进行谈判，不排除分别划出两条不同边界线的可能。[8] 国际法院2008年5月23日对新加坡与马来西亚之间存在主权争议的3个岛屿中的2个作出裁决，将其中的白礁岛主权裁定给新加坡，熊良敏女士对国际法院裁决的理由进行分析，并得出国际法院在领土主权纠纷裁决过程中所重视的依据，对我国如何保护钓鱼台列屿的主权提供了重要参考意义。[9]

(3)“冲之鸟”岛礁之争

“冲之鸟”是岩礁抑或岛屿？学界多有争论。吴卡认为从1982年《联合国海洋法公约》第121条第3款规定中就可以看出岩礁和岛屿有重大的区别。岩礁是岛屿，但由于它不能拥有专属经济区和大陆架，所以又具有特殊性。“冲之鸟”属于岛屿范畴，但不过是岛屿中的岩礁。日本主张“冲之鸟”是岛屿有其合理性，但其根本错误在于片面强调“冲之鸟”的岛屿属性，而否定了其作为岩礁的特殊属性。[10] 王秀英则认为“冲之鸟”是不能维持人类居住或其本身经济生活的，由此看来，“冲之鸟”并非国际法意义上的岛屿，而只能是岩礁。日本将其说成“岛屿”，只是截取岩礁与岛屿的共性，而故意遮蔽岩礁的特性，并借此偷换概念，混淆视听。日本企图通过将“冲之鸟”化“礁”为“岛”，获得其专属经济区海域权利，无异于缘木求鱼。[11]

(4) 共同开发问题

2008年，不少学者讨论了共同开发的法律性质和法律特征。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。龚迎春副教授结合谅解的具体内容，对共同开发问题展开了更具体的分析，她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。[12]

（三）南海问题

1. 历史性权利问题

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8 李金明：《钓鱼台列屿归属问题及其在海域划界中的地位》，载于《福建论坛（人文社会科学版）》2008年第11期，第47页。

9 熊良敏：《白礁岛主权争议案评论》，载于《中国海洋法学评论》2008年第1期，第49~55页。

10 吴卡：《“冲之鸟”岛礁属性辨析》，载于《浙江师范大学学报（社会科学版）》2008年第1期，第102~106页。

11 王秀英：《日本在“冲之鸟”缘木求鱼》，载于《海洋世界》2008年第5期，第75页。

12 《中国海洋法学评论》卷首语，载于《中国海洋法学评论》2008年第2期，第1页；龚迎春：《争议海域的权利冲突及其解决途径》，载于《中国海洋法学评论》2008年第2期，第78~89页。

历史性权利是国家经常在主张领土主权或特定水域主权权利时提出的依据，郭渊博士从海洋法的角度对历史性权利的内涵进行解析，并结合国际社会在海洋法中的实践，对历史性权利的本质进行深入分析，并对我国在南海诸岛的历史性权利进行论证。[13]

2.“U 形线”问题

南中国海的“U 形线”也被称为“断续线”、“九段线”，它的法律性质一直是国内学者探讨的问题，罗婷婷、王勇智、宋军、韩雪双以及薛桂芳认为“U 形线”内的海域是我国的历史性水域，在该水域内我国拥有历史性权利。[14]

3. 共同开发问题

南海共同开发是当今世界的热点问题之一，但目前南海共同开发的现状没有达到中国与有关争端国的期望值。李国选先生以南海共同开发制度化的内涵为逻辑起点，提出南海共同开发制度化的完成至少需要 4 个基本条件：南海共同开发逐渐成为强势的区域共识；南海共同开发制度化符合各方利益，经得起利益的考量；南海共同开发的不断实践；南海共同开发的外在压力。但有许多因素阻碍了南海共同开发制度化的进程，南海共同开发制度化还需要很长的路要走。[15]

（四）“蓝色圈地运动”问题

近 2 年来，不少国家开展了“蓝色圈地运动”，并向大陆架界限委员会提出 200 海里以外大陆架外部界限的申请：日本表示 2009 年 1 月提交申请，菲律宾表示 2009 年 5 月提交，印度尼西亚和越南表示 2009 年 5 月 13 日前提交，韩国表示 2009 年 5 月 12 日提交，马来西亚表示 2009 年 5 月 13 日提交申请。[16] 高健军博士对 2008 年各国提出的 200 海里以外大陆架外部界限的申请以及委员会对申请情况的分析进行总结和评价，从而为我国向委员会提交申请的准备工作提供了参考。[17]

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13 郭渊：《论海洋法中的“历史性权利”》，载于《中国海洋法学评论》2008 年第 1 期，第 1 页。

14 罗婷婷：《“九段线”法律地位探析——以四种学说为中心》，载于《中国海洋法学评论》2008 年第 1 期，第 56 页；王勇智、宋军、韩雪双、薛桂芳：《关于南海断续线的综合探讨》，载于《中国海洋大学学报 (社会科学版)》2008 年第 3 期，第 1 页。

15 李国选：《南海共同开发制度化：内涵、条件与制约因素》，载于《南洋问题研究》2008 年第 1 期，第 68 页。

16 《联合国海洋法公约》缔约国会议，有关大陆架界限委员会工作量的问题——提交划界案的初定日期，SPLOS/INF/20，下载于 http://daccessdds.un.org/doc/UNDOC/GEN/N08/209/60/PDF/N0820960.pdf?OpenElement，2009 年 5 月 4 日。

17 《中国海洋法学评论》卷首语，载于《中国海洋法学评论》2008 年第 1 期，第 1 页；高健军：《200 海里以外大陆架外部界限的划定：目前为止的实践综述》，载于《中国海洋法学评论》2008 年第 1 期，第 1~30 页。

二、海洋污染与环境保护

船舶是海上运输的重要工具，海洋运输业飞速发展的同时给海洋环境带来了极大的破坏。防治船源污染依然是 2008 年度国内学者探讨的重点及热点问题。

《中华人民共和国防治船舶污染海洋环境管理条例》作为我国防治船舶污染海域管理的基本法规，对 1984 年颁布实施的《中华人民共和国防治船舶污染海域管理条例》作了修改与调整，张晓和陈爱玲认为新条例的内容更加充实，并具有前瞻性和实际操作性。它保留了原条例的核心内容，没有改变对船舶污染物的排放进行强力监督和控制的基本原则。但是，他们指出新条例有关处罚的规定互相矛盾，让人难以理解。例如，新条例规定，发现船舶及其有关作业活动可能对海洋环境造成严重污染危害的，应当立即向就近的海事管理机构报告，但没有明确在什么情况下必须报告海事管理机构；在新条例中多处提到海事行政许可的问题，但没有明确海事行政许可的条件；新条例中多处提到对有关单位、人员的资质要求问题，但没有明确怎样证明这些资质。另外，新条例的一大遗憾是没有提到有关船舶压载水管理的问题。[18]

2008 年 9 月 17 日生效的《2001 年国际控制船舶有害防污底系统公约》（以下简称"《AFS 公约》"）是继 MARPOL73/78 公约之后国际海洋环境保护的又一部重要法规，也是防治船舶污染的重要法规。刘晓东等对《AFS 公约》生效后我国所面临的问题作了如下分析：我国目前虽未加入该公约，但是根据该公约第 3 条的相关条款，对非本公约缔约国的船舶，缔约国并不给予更优惠的待遇。随着《AFS 公约》的生效，我国船舶在进入《AFS 公约》缔约国时也必须接受缔约国依照公约相关内容的检查。另外，因为未及时加入该公约，我国将失去对其他国家船舶实施监督控制的权利，也丧失了对所属海洋水域的保护，使我国处于不利局面。但刘晓东等也提出我国加入该公约面临着以下问题：更换环保型防污底漆的成本，国内航行船舶是否适用该公约，我国相关企业的技术和研发实力是否在该公约的技术范围内有优势，国内相关立法应当如何制定并使用等。[19]

鉴于我国在海洋船舶污染方面虽有相关的法律规定，但没有形成较完整的系统框架。王涌、芮震峰等提出防治国内船舶海洋污染，需建立和完善我国的船舶海洋污染防治法律体系。原则上，必须坚持在全面系统审查现有船舶污染防治立法的基础上进行必要修改、补充和完善，处理好与相关环境法的关系。建立起内

18　张晓、陈爱玲：《研析我国防治船舶污染海洋环境管理条例》，载于《航海技术》2008 年第 4 期，第 76~78 页。

19　刘晓东、徐洪明、陈炜：《〈AFS 公约〉生效后对我国的影响与对策》，载于《航海技术》2008 年第 6 期，第 78~80 页。

容全面、层次分明、协调统一、适用高效的船舶海洋污染防治法律体系。在层次上，形成由国际公约、基本法律、专门性法规和其他法规等构成的多层次关系。在内容上，形成以防、治、赔三个环节为主线的船舶海洋污染防治法律体系。在方法上，既要注重调查研究，结合国家的实际情况，又要善于学习和借鉴外国船舶污染防治立法的先进经验和行之有效的管理办法，将国际公约具体化、国内化，尽力与国际接轨。在体制上，海事主管部门要对船舶污染法律体系及时跟踪、研究，充分发挥业务部门、职能部门的积极性，形成运转高效的法律法规制定、修改、补充和清理机制，在不断健全完善船舶海洋污染防治法律体系的同时，确保体系的有效性。[20] 崔阳提出我国应积极借鉴国外的经验，尽快完善防治船舶污染体系；加快同国际相关法的接轨，针对防治船舶污染建立专门性法律法规，统一监管部门，避免造成管理上的混乱和法律适用上的冲突；参加相关的国际公约；加强同其他国家的合作以及完善我国的赔偿制度。[21] 林建祥在其《港口国监督组织全球化趋势》一文中提出，港口国监督是对进入其港口的外国籍船舶的安全检查，以确保其船况、设备以及船员配备和操作符合国际公约的要求。防治船舶污染，港口国监督尤为重要。[22]

在我国现有的海洋污染索赔中，国家行政部门进行民事索赔的主体资格颇受争议。陈刚探讨了海洋污染中行政部门作为民事索赔主体的问题，提出要改变我国目前海洋污染中国家求偿所面临的困境，就现阶段而言，应该厘清海洋污染各损失项目的性质，从而明确作为索赔主体的主管部门。同时，为了更好地促进海洋环境保护，在涉及到其他海洋管理部门时，各部门应该加强横向联系，如在信息交流、资源共享等方面进行合作，或者通过联合执法、专项整治等方式以形成合力监督，促进他们在海洋污染民事索赔中的协调行动。从发展的角度看，要彻底清除行政部门行使海洋污染民事索赔权的法律障碍，必须改变目前“条块分割”式的海洋管理体制，未来的海洋管理体制应该整合现有的海上执法资源，向集中执法模式靠拢，同时授予集中执法机构在海洋污染中唯一民事索赔主体的权利，代替目前对海洋行政部门、海事部门、渔政部门的分别授权，并赋予其协调受损害的海洋环境的复原职责，这样，既能落实海洋污染的索赔责任，又能更好地协调和统一海洋环境的复原行动，从而最大限度的保护海洋环境。[23]

近年来，船舶溢油事故时有发生，由此引起的环境损害赔偿问题也越来越多地受到关注。船舶溢油事故中海洋环境损害的赔偿对于保护海洋环境、恢复受损的生态系统具有重要意义。国际社会已初步建立相关规则，我国目前立法尚不完

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20 王涌、芮震峰、张志强：《海洋环境保护与船舶海洋污染防治》，载于《世界海运》2008 年第 2 期，第 50 页。

21 崔阳：《对我国船舶污染的法律分析及建议》，载于《法制与社会》2008 年第 19 期，第 41 页。

22 林建祥：《港口国监督组织全球化趋势》，载于《中国水运》2008 年第 3 期，第 14 页。

23 陈刚：《海洋污染中行政部门作为民事索赔主体的探讨》，载于《武汉理工大学学报（社会科学版）》2008 年第 1 期，第 53 页。

善，司法实践中应把握此类损害赔偿的原则，合理确定损害赔偿范围。邓丽娟等认为在确定船舶溢油污染事故中环境损害的赔偿范围时，应遵循以下原则：第一，不论案件是否有涉外因素均应采用相同的标准；第二，国际公约优先适用；第三，与国际接轨。据此，作者提出我国船舶溢油事故中海洋环境损害的赔偿范围应限定在"实际已采取或行将采取的合理复原措施的费用"。具体包括海洋生态环境资源损失、合理恢复措施的费用和合理的研究费用。[24]

王艳玲探讨了跨界海洋环境损害的国家责任问题，作者认为国家责任的承担似乎是跨界海洋环境损害责任追究的必然结果，但国家在此领域责任承担所遇到的法理论与法实践困扰和障碍，使得跨界海洋环境损害责任私法化趋势明显，而且以广泛国际合作为基础的针对跨界海洋环境损害风险预防机制的强化将弱化责任追究本身的重要性，作者提出如何实现国际合作的问题将成为导致国际海洋环境管理体制遭遇困境的深层次原因，并建议进一步探讨如何实现国际合作的问题。[25]

海洋环境污染的管辖是一个涉及在不同海域发生不同来源的污染行为应由哪个国家管辖以及以什么标准进行管辖的问题。虽然沿海国相关管辖权的正式确立时间不长，但它打破了奉行已久的船旗国管辖的传统，对于国际海洋立法而言不仅是一种改革和进步，对于海洋整体环境的保护与保全也意义深远。我国应积极而全面的参与有关海洋环境保护的国际交流与活动、参与有关的国际立法，同时还应不断完善国内的相关规则，增强国内法律法规的操作性与执行力，并在此基础上尽最大可能保护现有的海洋资源，以实现海洋的可持续发展。[26]

解决海洋环境污染问题仅靠个别国家的单项法律法规是不够的，还需要各国的合作建立一整套完善的海洋环境保护的国际法律制度。张晨在其《海洋环境污染防治的国际合作研究》一文中将海洋污染防治的国际合作作为研究对象，将海洋污染防治的整个环节划分为2个阶段，首先是海洋污染的预防阶段，要进行实施风险预防原则的国际合作；若防范不到位，出现海洋污染事故，就进入海洋污染的治理阶段，该阶段要解决的问题主要是管辖权问题和责任认定问题。要实现沿海国、船旗国和港口国对污染管辖权的协调，在海洋污染责任认定方面，民事责任方面有CLC1969和FUND1971两个国际公约规范，落实得较好；国家责任的实现则有一定的难度，这方面还需要各国的合作。[27]

海洋环境保护是环境保护这一基本国策的重要组成部分，海洋环境保护法是

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24 邓丽娟、金聪、童梅：《船舶溢油事故中海洋环境损害的赔偿范围》，载于《集美大学学报（自然科学版）》2008年第1期，第62~66页。

25 王艳玲：《跨界海洋环境损害的国家责任问题探讨》，载于《河北法学》2008年第6期，第151页。

26 焦欣欣：《浅析船员污染的沿海国管辖权》，载于《法制与社会》2008年第8期，第278页。

27 张晨：《海洋环境污染防治的国际合作研究》，载于《华章》2008年7月，第48页。

指有关开发、利用、保护和改善海洋环境的法律规范总体。郭院认为中国海洋环境保护法的基本理论有如下几方面：1.以海洋生态保护为核心进行海洋环境保护；2. 海洋资源开发和海洋环境保护同步规划、同步实施；3.合理开发利用海洋资源，海陆统筹，以陆为主、陆海兼顾；4.以重点海域为主，兼顾其他近岸海域。中国海洋环境保护法的实践主要有以下几方面：1.实行海洋功能区划和近岸海域环境功能区划；2.实行重点海域污染物总量控制；3.征收海洋排污费（倾倒费），对超标排污者进行处罚；4.建立和完善溢油防备、应急体系，应对重大海上污染事故；5.设立船舶油污保险和油污损害赔偿基金，建立船舶油污损害民事赔偿机制。作者提出当务之急是尽快健全和完善国内船舶油污损害赔偿法律法规，早日全面加入《设立国际油污损害赔偿基金公约》的1992年议定书，使中国具有应付特大溢油事故风险的能力。[28]

海洋自然保护区制度被确立为海洋环境维护的最有效手段之后，海洋自然保护区在世界各沿海国家相继建立，与之相适应，海洋自然保护区立法引起各国重视。我国海洋自然保护区立法在法律法规数量、规定内容、地方法规和实施条例制定等方面存在诸多问题。崔凤、刘变叶认为我国海洋自然保护区立法中主要存在的问题有：直接规范海洋自然保护区制度的《自然保护区条例》和《海洋自然保护区管理办法》法律位阶低、权威性不够；法律规定内容不合理；在管理体制的规定上，条例和办法在海洋自然保护区的选划和管理上给了地方政府太大的权力，海洋自然保护区养护经费太依赖地方政府，不利于海洋自然保护区的建设和管理。作者认为要完善我国《海洋自然保护区管理办法》，首先要协调《海洋自然保护区管理办法》和《自然保护区条例》的关系，改善《海洋自然保护区管理办法》的一些规定。在立法原则上，海洋自然保护区的立法应该遵循生态利益第一的原则；在操作性方面，要提高《海洋自然保护区管理条例》的针对性和实践操作性；针对《海洋自然保护区管理办法》应尽快出台详尽的实施细则。作者认为，要真正实现海洋自然保护区的有效管理，减少或杜绝肆意开发、破坏行为，必须采用强制性手段，那就是实行“一区一法”，法律的强制实施是当今各项政策开展和推行的最重要的手段。作者还建议在国家海洋局设立一个部门，专门管理和审查海洋自然保护区立法。[29]

28　郭院：《论中国海洋环境保护法的理论和实践》，载于《中国海洋大学学报（社会科学版）》2008年第1期，第14页。

29　崔凤、刘变叶：《关于完善我国海洋自然保护区立法的构想》，载于《中国海洋大学学报（社会科学版）》2008年第5期，第7页。

三、港口管理与船运

（一）港口管理

在全球经济波动的背景下，我国港口业随着国内出口导向型经济向内需增长的转变，高耗能的增长模式已不可持续，这对该行业的竞争格局产生了重要影响。在 2008 年 12 月发布的《中国港口行业信用报告》中，新华财经有限公司指出，我国港口行业目前已步入下行周期，并首次出现供求关系的逆转。但是，中国港口业的投资惯性尚在延续，港口投资从规划到建成，历时颇长，难以根据一时的供求关系进行调整。在这种情况下，报告进一步提出地方政府间应加强港口间的合作力度，发挥协作优势，着眼港口效率的提高，并将经济增长的重点引导到物流、航运信息与金融服务等第三产业上来。[30]

由交通运输部主办的 APEC（亚太经合组织）港口服务网络成立大会于 2008 年 11 月 5 日在浙江宁波召开，大会宣布：由中方倡议，并经 APEC 领导人一致批准的 APEC 港口服务网络正式成立。作为港口间合作和信息交流的平台，APEC 港口服务网络的正式成立，不仅符合亚太地区航运经济迅速发展的需要，而且为港口和相关行业间的合作开辟了广阔前景。APEC 港口服务网络的建立搭建了以港口为中心的公共贸易平台和信息平台，通过加快港口和相关行业间的联系及融合，促进共同协调发展。APEC 港口服务网络为区域内的港口及相关产业建立了定期的交流与沟通机制，有利于实现信息共享，提高本地区港口业的整体效率和服务水平。同时，它还有利于推动贸易和投资的便利化和自由化，提高供应链保安水平，保障 APEC 地区经济和贸易的健康持续发展。[31]

在港口管理新法规方面，交通部发布了《港口规划管理规定》，该《规定》自 2008 年 2 月 1 日起施行。《规定》作为《港口法》的一个配套行政法规，力求反映我国港口规划建设的发展要求，达到规范港口规划工作，科学利用、有效保护港口资源，促进港口健康、持续发展的立法目的。《规定》明确了港口规划审批部门、核准部门、港口行政管理部门等在港口规划审批、执行和管理中的责任，提出了明确的处罚措施。对于相关部门违规审批规划、违反规划审批项目、不履行监督检查职责等行为，要对其直接负责的主管人员和其他直接责任人员依法给予行政处

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30 《我国港口业供求关系首次出现逆转》，下载于 http://www.moc.gov.cn/zizhan/zhishujigou/zhuhangju/shuiluyunshu/gangkouguanli/gongzuodongtai/200812/t20081223_546304.html，2009 年 4 月 5 日。

31 《APEC 港口服务网络正式成立》，载于《水运工程》2008 年第 11 期，第 111 页；《APEC 港口服务网络在宁波成立，国务院副总理张德江致贺信》，下载于 http://www.moc.gov.cn/zizhan/zhishujigou/zhuhangju/shuiluyunshu/gangkouguanli/gongzuodongtai/200811/t20081106_534361.html，2009 年 4 月 5 日。

分，构成犯罪的，依法追究刑事责任。[32] 除此之外，交通部部长李盛霖于 2007 年 12 月 17 日签署的第 10 号部令《中华人民共和国港口设施保安规则》已经自 2008 年 3 月 1 日开始正式施行。我国是《1974 年国际海上人命安全公约》（以下简称 "《SOLAS 公约》"）的缔约国，根据公约要求，我国必须采取措施预防和控制针对船舶或通过船舶对各国进行的恐怖活动。为此，我国所有的对外开放港口设施必须进行保安评估，制定保安计划并付诸实施。而该《规则》正是根据修订的《SOLAS 公约》等有关国际公约及规定制定的，旨在加强港口设施保安工作，其适用于为国际航线的客船、500 总吨及以上的货船、500 总吨及以上的特种用途船以及移动式海上钻井平台服务的港口设施的保安工作。[33]

（二）《联合国全程或者部分海上国际货物运输合同公约》

2008 年 12 月 11 日，联合国大会第 63 届会议通过了《联合国全程或者部分海上国际货物运输合同公约》。大会授权在 2009 年 9 月 23 日于鹿特丹举行的签署仪式上开放《公约》供签署，并建议将《公约》所体现的规则定名为"鹿特丹规则"。[34]《公约》自第 20 份批准书、接受书、核准书或加入书交存之日起一年期满后的下一个月第一日生效。[35]

《公约》在诸多方面都给国际货物运输法注入了新的活力，其对航运实践的体察以及制度上的创新为学界和实务界称道。[36] 该《公约》的通过，是贸易法委员会运输法工作组（第三工作组）与各有关国际政府间组织和非政府间组织密切合作的结果。自 2002 年 4 月到 2008 年 1 月，工作组历经 13 届会议拟定了公约草案，2008 年 7 月 3 日贸易法委员会在纽约核准了公约草案，随后将其送呈大会第 63 届会议通过。[37]

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32 《交通部综合规划司有关负责人解读〈港口规划管理规定〉》，下载于 http://www.moc.gov.cn/zhuzhan/zhengcejiedu/zhengcewenjian_JD/gangkouguihua_GLGDJD/，2009 年 4 月 5 日。

33 《交通部水运司有关负责人解读〈中华人民共和国港口设施保安规则〉》，下载于 http://www.moc.gov.cn/zhuzhan/zhengcejiedu/zhengcewenjian_JD/gangkousheshibaoan_GZJD/，2009 年 4 月 5 日。

34 《大会会议报道（GA/10798）》，下载于 http://www.uncitral.org/pdf/english/working-groups/wg_3/ga-10798.pdf，2009 年 4 月 5 日。

35 《联合国全程或者部分海上国际货物运输合同公约》第 94 条第 1 款。

36 向力：《论海运条约冲突的解决模式——以联合国货物运输法草案为中心》，载于《中国海商法年刊》第 19 卷，第 203 页。

37 《大会会议报道（GA/10798）》，下载于 http://www.uncitral.org/pdf/english/working-groups/wg_3/ga-10798.pdf，2009 年 4 月 5 日。

2008 年围绕着贸易法委员会对《公约》草案的核准以及联大会议的最后通过，许多文章从不同角度对这一问题展开了深入的探讨。[38] 在该《公约》之前，国际上已经有《1924 年海牙规则》、《1968 年海牙—维斯比规则》和《1978 年汉堡规则》3 个海运国际公约。而继这 3 个公约之后，《联合国全程或者部分海上国际货物运输合同公约》的通过，旨在创立一套统一的当代法律，《公约》对包括国际海运段，但不限于港对港货物运输的现代门到门集装箱运输作出规定。《公约》包含许多新颖之处。中国船级社法律顾问徐庆岳作为中国代表团成员从 2002 年起就参与制定工作，他介绍了《公约》的6大变化，主要包括：适用范围扩大，新公约首次确立"海运＋其他"（海运区段以及海运前后其他运输方式的区段）的法律制度，港口营运商被纳入新公约的适用范围；提高了承运人的责任限额；取消了"承运人的航海过失免责"条款；赋予批量合同当事人较大的合同自由；托运人义务也有明确规定；增加了有关控制权和权利转让方面的规定，以便解决货物买卖过程中一些与运输相关的问题。[39]

郭萍、朱柯认为，历来的国际海运公约条文都是船货双方利益的体现和反映，船货双方的利益之争会伴随着国际贸易和国际航运实践一直持续。在《从国际海上货物运输公约的变革看船货双方利益的博弈》一文中，作者以《1924 年海牙规则》船货双方利益的第一次博弈为起点，一直到新的《公约》的出台，船货双方利益博弈的持续，清晰地展示了现有国际海运公约变革的脉络，探析船货双方利益博弈在公约中的痕迹。从国际海运条约的变革分析来看，代表货方利益的力量逐渐强大。作者认为，与以往的国际公约相比较，特别是与《海牙规则》、《海牙—维斯比规则》相比较而言，《公约》更多地考虑了货方的利益，甚至有些规定比《汉堡规则》还要严格，例如责任期间的规定。但同时，作者也提醒读者注意，《公约》在起草过程中，并没有出现一边倒，完全地偏袒货方利益，只能说是公平的砝码再一次偏向货方。因为相较于以往的公约而言，《公约》也用了较多篇幅明确了托运人的义务

38 郭萍、朱柯：《从国际海上货物运输公约的变革看船货双方利益的博弈》，载于《大连海事大学学报（社会科学版）》2008 年第 3 期；姚莹：《国际海上货物运输中的权利转让问题研究——以 UNCITRAL〈运输法公约（草案）〉为视角》，载于《当代法学》2008 年第 3 期；陈琳：《论国际运输法统一下的海商法"上岸"——以〈UNCITRAL 运输法草案〉为起点》，载于《海南大学学报（人文社会科学版）》2008 年第 5 期；余妙宏：《UNCITRAL 运输法公约（草案）托运人制度之变革及对策》，载于《大连海事大学学报（社会科学版）》2008 年第 4 期；周虹：《浅析〈UNCITRAL 运输法草案〉中的电子提单》，载于《中国海洋法学评论》2008 年第 2 期；徐英：《〈UNCITRAL 运输法草案〉下发货人法律地位之研究》，载于《中国海洋法学评论》2008 年第 2 期。

39 《鹿特丹规则能否一统天下》，下载于 http://www.shipol.com.cn/xw/zcfg/87495.htm，2009 年 4 月 7 日。

和责任，如接受货物的义务、告知货物信息的义务等。[40]

“航海过失免责”是海商法中一项特有的制度，从 1893 年美国的《哈特法》确定航海过失免责制度，迄今已经有一百多年了。航海过失免责制度对于合理分担船货双方的风险，促进国际贸易和海上运输的发展起到了积极的促进作用。《1924 年海牙规则》以及《1968 年海牙—维斯比规则》均确认了承运人的“航海过失免责”，但《公约》却废除了这一制度，实行了与《汉堡规则》相一致的承运人的严格责任制度。但孟雨博士认为，中国当前不应当废除航海过失免责，因为现今并不存在废除航海过失免责的实际条件。她认为，《海商法》与《合同法》反映了不同的价值取向，国内沿海、内水货物运输的严格责任不可能取代国际海上货物运输实施的不完全过失责任制度，航海过失免责应当保留；而且保留航海过失免责仍然是当今世界的主流做法，从国家利益角度考虑，中国没有必要率先放弃航海过失免责制度，承担发达海运国家均未承担、中国更无国力承担的均衡船货双方利益的国际义务。针对取消航海过失免责的国际趋势，孟雨博士进一步认为，中国应该不断完善船舶责任保险、货物保险、共同海损制度等法律制度，为我国的国际贸易提供有力保障；正确对待有关的国际立法，求真务实，从我国实际情况出发，发展我国的航运能力。[41]

托运人是海上货物运输合同重要的一方当事人。在一般国际贸易术语下，往往由卖方向承运人租船订舱来安排运输，也是由卖方将货物交付承运人运输，因此运输合同中的托运人和发货人为同一人。但是 FOB 价格条件下，一方面是由买方租船订舱，这即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；但另一方面，向承运人交付运输货物的却是卖方。为了解决 FOB 项下卖方对货物的控制权，《汉堡规则》设置了两类托运人，即缔约托运人和发货托运人，将发货人纳入托运人概念之中。但是《公约》的出台，却对既有的托运人制度进行了重大的变革。一方面，它保留了《汉堡规则》下的缔约托运人概念，但另一方面却也新设了“单证托运人”的概念。“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被指定为“托运人”的人。余妙宏博士在《UNCITRAL 运输法公约（草案）托运人制度之变革及对策》一文中也指出，与托运人相比较而言，单证托运人的地位具有替补性质，表现在绝大多数情况下，单证托运人权利取得的先决条件是经过托运人的指示或同意，或者是在承运人无法找到托运人时享有托运人的权利并承担相应的义务。《公约》与《汉堡规则》有关托运人定义的最大区别是将发货人从托运人概念之中排除以后，单独就发货人下了一个定义。《公约》将发货人与托运人分别定义，并将其权利、义务进行了区分，

40　郭萍、朱柯：《从国际海上货物运输公约的变革看船货双方利益的博弈》，载于《大连海事大学学报（社会科学版）》2008 年第 3 期，第 1~4 页。

41　孟雨：《关于“航海过失免责”的再思考》，载于《首都经济贸易大学学报》2008 年第 3 期，第 99~104 页。

这是一种理念进步，这种机制使得发货人与托运人从一种纠缠不清的权利义务关系中摆脱出来，具有非常积极的意义。这样有助于解决《汉堡规则》及我国《海商法》中因为设置了两种托运人而引发的权利、义务难以界定的问题。[42]

但是同时他也认为，《公约》的新规定使得 FOB 卖方丧失了法定托运人的护身符。因为我国《海商法》借鉴《汉堡规则》的规定，将托运人分为缔约托运人和发货托运人两大类，只要是将货物实际交付给海上货物运输合同有关的承运人的 FOB 卖方，其作为托运人的地位是法定的。FOB 卖方的名字有没有记载在运输单证的"托运人"一栏中并不改变 FOB 卖方作为托运人的法律地位。但依据《公约》之规定，托运人与发货人是相互独立的，FOB 卖方要想再以托运人的身份享有托运人的权利与义务，则必须成为"单证托运人"，而运输单证上的记载是构成单证托运人的必要条件，因此，FOB 的卖方应积极争取成为单证托运人。只有 FOB 下卖方记载于运输单证上，才可以成为单证托运人，才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《公约》通过单证托运人概念的设置完成了 FOB 下发货人（卖方）向托运人的转化。但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。[43]

《海牙规则》、《海牙—维斯比规则》和《汉堡规则》对于运输合同或运输单证下的权利转让问题都没有明确规定。但《公约》却专列了一章（第十一章），试图对运输合同下的权利转让的有关规则作出明确规定。姚莹博士认为引入权利转让制度符合国际立法趋势，能够满足贸易商的合理预期，并且鼓励银行提供融资服务以及有利于推动电子商务发展，这在衔接贸易法与运输法方面迈出了重要的一步。但是，对于《公约》的规定我们却无法得出"它是完善的"这样的结论，《公约》在许多方面还存在不足，需要进一步的探讨，诸如持单人行使权利和承担责任的基础规定上的缺陷、持单人承担责任的条件规定上的缺陷、删除了未签发任何可转让运输单证和电子记录的情况以及与其他条款协调方面的缺陷等。[44] 针对我国在权利转让问题方面存在严重的立法缺失，姚莹进一步建议作为起草《公约》过程中重要的参加国，我们可以考虑在《海商法》修订时在第 4 章第 4 节"运输单证"中加入权利转让的内容，包括签发转让权利的可转让运输单证或者可转让电子运输记录规定以及持有人的赔偿责任规定。

42　余妙宏：《UNCITRAL 运输法公约（草案）托运人制度之变革及对策》，载于《大连海事大学学报》2008 年第 4 期，第 4~8 页。

43　徐英：《〈UNCITRAL 运输法草案〉下发货人法律地位之研究》，载于《中国海洋法学评论》2008 年第 2 期，第 118 页。

44　姚莹：《国际海上货物运输中的权利转让问题研究——以 UNCITRAL〈运输法公约（草案）〉为视角》，载于《当代法学》2008 年第 3 期，第 92~99 页。

四、水下文化遗产国际保护

联合国教科文组织于 2001 年 11 月 2 日在其第 31 届大会上通过的《保护水下文化遗产公约》已经于 2009 年 1 月 2 日生效，目前有 22 个缔约国。该公约的生效必将在全球范围内推动水下文化遗产的保护。虽然我国学术界对此领域的研究仍然比较稀少，但研究范围却分布较广，相关论文既涉及水下文化遗产的定义、归属权问题以及为全人类利益保护水下文化遗产原则等总体性问题，也涉及到对中国水下考古实践经验教训的总结，有关法律法规的分析与评价，更关注到了美国若干有关水下文化遗产打捞的典型案例。

赵亚娟博士在其研究中试图厘清“水下文化遗产”的概念。她在系统梳理了有关文化遗产保护的国际公约后认为传统上，法律是将“文化遗产”作为财产看待的，最经常使用的是“文化财产”一词，有时还采用“文物”之类的措辞。但“文化遗产”一词的内涵更丰富，也越来越多地为国际公约所采纳。遗憾的是，相关国际公约既没有区分“文化财产”和“文化遗产”，也没有达成一个普遍接受的概念，更没有界定“水下文化遗产”。《联合国海洋法公约》规定要保护“在海洋发现的考古和历史文物”，但未能界定何谓“在海洋发现的考古和历史文物”，实践中难免会引起纷争。《保护水下文化遗产公约》明确地、详尽地界定了“水下文化遗产”。虽然该定义可能存在一定不足，但仍然是一大进步。相比之下，中国立法采用的“水下文物”虽然在时间限定上更为宽松，但似乎更偏重“物”，没有强调遗存所在的具有考古和历史价值的环境，也没有包括人类遗骸，这就窄于公约所界定的“水下文化遗产”，中国应当参照公约对“水下文化遗产”的定义，适当扩大水下文物的范围。[45]

周冠认为水下文化遗产属于人类共同继承遗产，《保护水下文化遗产公约》确立了为全人类利益保护水下文化遗产这项原则，构成了对国家主权权利的一定限制，会造成缔约国的权利损失，对像中国这样拥有丰富沉船沉物的航海大国和文明古国十分不利。[46] 刘春梅探讨了水下文物的归属问题，针对水下文物所在海域位置的不同，分析了其与来源国的法律关系。[47]

2007 年年末，宋代古沉船“南海 I 号”的整体打捞与保护成为举国关注的考古盛事。魏峻博士以“南海 I 号”沉船的保护与发掘为研究主题，回顾了“南海 I 号”整体打捞的基本思路和实施过程，认为“南海Ⅰ号”本身具有物质文化和非物质文

45　赵亚娟：《国际法视角下“水下文化遗产”的界定》，载于《河北法学》2008 年第 1 期，第 143~147 页。

46　周冠：《全人类共同利益原则对国家主权的挑战——从水下文化遗产的保护谈起》，载于《法制与社会》2008 年第 15 期，第 271~272 页。

47　刘春梅：《水下文物归属于来源国的法律问题研究》，载于《法制与社会》2008 年第 34 期，第 359 页。

化遗产的双重属性，针对该沉船的考古工作是水下考古与海洋工程的有机结合，开创了我国水下文化遗产保护的一种全新模式。这一考古项目提倡的水下文化遗产保护思路完全符合教科文组织遗产保护“原真性”、“完整性”的要求，符合《保护水下文化遗产公约》的精神。[48]《抢救中国的水下历史》一文介绍了中国水下考古的发展历史与取得的重要成果，以及东亚、东南亚、南亚诸国发现的与中国海上贸易相关的沉船和水下遗存。该文在分析了《文物保护法》和《水下文物保护管理条例》的规定后认为，现行法律的规定不足以充分保护中国的水下文化遗产，要捍卫华夏海洋文明，批准《保护水下文化遗产公约》才是长久之计。[49]

赵亚娟博士认为水下文化遗产资源是重要的文化资源，原则上应当将其视为一种公共资源，由国家妥善保管在开放性的公共场所中，供后世不断欣赏、研究和借鉴。面对中国水下文化遗产资源遭受的各种破坏，她认为现行法律法规的不完善是一个重要原因，应修改《水下文物保护管理条例》，特别应增加就地保护原则，细化现有的文物发现报告和奖励制度，严格限制可能严重扰乱水下文化遗产的合法活动，增加促进社会宣传和公众教育的规定，以期使全社会都来关注、热爱祖先们留给我们的文化资源、自觉地保护这些资源。[50]

除了中国的水下文化遗产保护实践与立法，美国历史性沉船（属于水下文化遗产）的打捞与保护也得到了一定关注。赵亚娟博士较为详尽地分析了美国法院关于“阿图夏”号、“阿迈然特”号、“中美洲”号等4宗有关沉船的诉讼判决，认为美国法院已经将传统的海难救助法扩大适用于历史性沉船的救助，并结合历史性沉船的特点在一定程度上改进了救助法，比如限定了救助对象是美国领海之外所有权已经被抛弃的沉船，在授予历史性沉船的发现者对沉船的独占打捞权时会考虑其以往打捞历史性沉船的表现以及自身的资金、人力等因素，可能根据案情适用救助法或结合适用发现物法，确定救助报酬时会考虑救助者为保全沉船的历史和考古价值而付出的努力等。但即使有这些新发展，法院仍然无法改变救助法追求经济利益最大化的本质，这并不适合对历史性沉船的保护。考虑到陆地文化遗产黑市交易旺盛的教训，更可取的做法是建立一种能够平衡各种价值和利益考量的保护体制，而不是将装备精良的打捞公司和历史性沉船打捞隔绝。[51]

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48 魏峻：《“南海Ⅰ号”沉船考古与水下文化遗产保护》，载于《文化遗产》2008年第1期，第148~153页。

49 《应对篇：抢救中国的水下历史》，载于《文明》2008年第5期，第68~73页。

50 赵亚娟：《中国水下文化遗产保护现状与建议》，载于《华南理工大学学报》2008年第1期，第27~30页。

51 赵亚娟：《美国海难救助制度的新发展——以若干历史性沉船救助案例为视角的研究》，载于《国际经济法学刊》2007年第14卷第4期，第163~182页。

五、海洋资源与能源

海洋是人类的天然宝藏，不仅拥有种类繁多的生物、化学资源和丰富的石油、天然气等海底能源资源，而且还储有取之不尽、用之不竭的再生性能源——潮汐能、波浪能、海水温差能、海流能及盐度差能等动力资源。作为巨大的能源宝库，海洋能源资源的合理开发和保护为各国所瞩目。随着全球能源消费的迅速增长，能源安全问题和能源环境问题也成为国内各界和国际社会越来越关注的问题。

（一）石油、天然气等海底能源资源的开发和保护

2008 年度，国内外普遍关注的焦点莫过于中日东海油气田的开采问题，以及南中国海油气资源的安全开发和保护问题。

1. 中日就东海油气田开采达成共识

庞中鹏指出，根据联合国亚洲及远东经济委员会的结论，东海石油、天然气储量丰富，达 77 亿吨，被称为“第二个中东”。我国将东海视为涉及国家兴衰的能源资源重要战略基地。能源自足率只有 4% 的日本更是将能源视为关系到国家生死存亡的核心战略资源，因此将东海油田视为兵家必争之地。[52] 由于中日双方在东海海域划界问题上的主张存在较大分歧，至今划界问题一直未能解决。中方主张，在东海划界问题一时难以解决的情况下，先搁置争议，在有争议的海域进行共同开发。据《招商周刊》时政报道，在 2005 年 9 月 30 日至 10 月 1 日举行的中日第 3 轮东海问题磋商中，中日双方在共同开发问题上首次达成初步共识。在 2004 年 10 月至 2007 年 11 月近 4 年的时间里，共举行了 11 轮东海问题磋商，一直到 2008 年 6 月，中日东海悬案终现曙光。[53] 2008 年 6 月 18 日，外交部发言人姜瑜宣布，中日双方通过平等协商，就东海问题达成 3 点原则性共识。首先，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，使中日之间尚未划界的东海成为和平、合作、友好之海。第二，在东海共同开发问题上达成谅解。作为中日在东海共同开发的第一步，双方决定在东海北部海区一个面积为 2600 平方公里的区块内通过联合勘探进行共同开发。该区块位于我国龙井油田的南侧，由 7 个坐标点围成，双方将本着互惠原则，通过联合勘探，在上述区块中选择双方一致同意的地点进行共同开发。第三，在日本法人依照中国法律参加春晓油气田开发问题上达成谅解。日本法人将按照中国对外合作开采海洋

52 庞中鹏：《试析中日东海能源之争》，载于《吉林广播电视大学学报》2008 年第 1 期，第 33 页。

53 《中日东海悬案终现曙光》，载于《招商周刊》2008 年第 13 期，第 16 页。

石油资源的有关法律，参与春晓油气田的开发。[54]针对这3点共识，江新凤进一步分析到，中日都必须明确2点：第一，此次划定共同开发区是中日双方海域划界前的一种过渡性安排。“共同开发”，是在划界问题一时难以解决的情况下，搁置主权争议，在不影响双方法律主张的前提下，选择一个双方都能接受的海域进行共同开发。在东海划定的这块海区内进行的共同开发，既不是依照中国法律，也不是依照日本法律，而是根据两国政府商定的办法和原则来进行开发。东海共同开发是在“互惠原则”共识下，为实现互利共赢而采取的临时性措施，符合国际惯例。目前，已有20多个国家进行过大陆架的共同开发，这种做法既不妨碍有关各方最后协议的达成，也不意味着任何一方放弃其权利主张，更不能视为承认对方的权利主张。因此，东海共同开发的前提是不承认日方的“中间线”主张，中国在东海的主权权利不受影响，日方也不能把共同开发作为其强化“中间线”主张的依据。第二，春晓油气田是合作开发，而非共同开发。中日两国企业对春晓油气田的开发属于合作开发，其法律依据是《对外合作开采海洋石油资源条例》。日方企业应该按照中国法律的规定参与春晓油气田的有关合作，接受中国法律管辖。[55]

2. 南中国海油气资源的安全开发和保护

童岱在文章中披露，整个南海海域有“海底油田”200多个，油气田180个，石油地质储量大致在230~300亿吨之间，约占中国总资源量的三分之一，属于世界四大海洋油气聚集中心之一，有“第二个波斯湾”之称。[56]刚刚过去的2008年，越南、菲律宾、马来西亚等国曾悄悄掀起了一个侵占南沙的“小高潮”。毛春初等认为，菲越马等国长期以来蚕食南中国海岛礁的一系列行为，不仅是对我国领土主权的严重侵犯，更表明了其对南中国海丰富油气资源觊觎已久的野心。而且，它们在2008年掀起的侵占“小高潮”也是在为2009年向联合国提交领海基线声明做准备，以便“长期”、“合法”、“持续”地开发南中国海的油气资源。如果中方无实质性的相应措施，长此以往，被侵占的南海数十座岛礁将会离中国越来越远。而中国在海洋油气资源开发方面提出的“搁置争议、共同开发”，在一定程度上也会转变为“中方搁置、他国开发”。[57]对此，《国际先驱导报》特约观察员海韬分析指出，南海并非单纯的岛礁争议问题，储量丰富的油气资源决定了其重要的战略地位，关系到国家的长远发展，必须将南海问题提升到国家战略层面去经营和筹划。从长远讲，“搁置争议、共同开发”的政策仍然适用，但就目前南海严峻

54 新华新闻：《外交部发言人姜瑜就中日就东海问题达成原则共识发表谈话》，下载于http://news.xinhuanet.com/newscenter/2008-06/18/content_8394182.htm，2009年3月28日。
55 江新凤：《中日：东海油气田怎样开发》，载于《世界知识》2008年第14期，第27页。
56 童岱：《第二个波斯湾：南中国海的领域之争》，载于《今日国土》2008年第9期，第42页。
57 毛春初、潘杰、妙乾、宋晓：《南海中国怎么办》，载于《晚报文萃》2008年第2期，第59页。

的局势看，中国必须尽快“有所作为”，否则“维持现状”只能导致“单边搁置”。[58]《2008 年中国的国防白皮书》指出，“中国把捍卫国家主权、安全、领土完整放在高于一切的位置”，并“坚持军事斗争与政治、外交、经济、文化、法律等各领域的斗争密切配合”。在目前形势下，保持外交压力，加速海洋立法进程，向国际社会明确公布南海岛礁基点坐标，将海军巡航范围逐步向南沙纵深方向拓展，军地协调保障南海油气资源开发安全，应该成为近阶段中国“有所作为、经略南海”的重要战略举措之一。[59]

（二）海洋新能源的开发利用

2007 年 9 月 4 日，国家发改委发布《可再生能源中长期发展规划》，明确了可再生能源发展的重要战略地位。2008 年 8 月，新的国家能源局正式成立，并将可再生能源的开发利用作为其工作要点。自此，我国海洋新能源的开发迎来了新的发展契机。

国际方面，根据国家能源局公布的信息，2008 年 3 月 4 日至 6 日在华盛顿召开了第三次国际可再生能源大会。会议对开发利用可再生能源，尤其是海洋能的重要性有了普遍认识。与会各国认为，加快开发利用潮汐能、波浪能等可再生能源，是增加能源供应、保障能源安全、应对气候变化的重要措施。各国一致同意加强和促进可再生能源开发，尤其是开发技术方面的国际合作。为了支持贫穷国家解决能源供应和环境保护等问题，美国还建议设立一个由发达国家出资的国际清洁技术发展基金，呼吁美国国会为此基金提供 20 亿美元，同时还提出，要真正解决全球气候变化与环境保护问题，必须打破保护主义，取消对环境产品和服务的一切关税和贸易壁垒，促进清洁能源技术在全球自由流动。[60] 蔡一鸣对这次会议给予了高度评价，认为这不仅为我国海洋新能源的开发利用营造了良好的国际氛围，推动了海洋能源的规模性开发，更加速了我国能源结构向可持续模式的转变。[61]

不过，中国可再生能源学会海洋能专业委员会秘书长王传崑指出，我国对于海洋新能源的利用才刚刚开始，尚未形成规模开发，海洋风电、潮汐等产业存在着科技创新水平相对落后，激励机制不够完善，尚未形成新能源持续发展的长效机制等方面的问题。特别是海洋新能源研发、生产投资成本高，短时间内难有明显

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58 海韬：《中国南海战略遇严重挑战，逐渐丧失岛礁控制权》，载于《国际先驱导报》2009 年 2 月 17 日。

59 北方新闻网：《中国南海岛礁控制权渐进丧失，解放军巡航迫在眉睫》，下载于 http://www.northnews.cn/news/2009/200902/2009-02-27/190638.html, 2009 年 5 月 11 日。

60 国家能源局：《2008 华盛顿国际可再生能源大会召开》，下载于 http://nyj.ndrc.gov.cn/gjkzsnydh/t20080314_197575.htm，2009 年 3 月 28 日。

61 蔡一鸣：《海权论与和谐海洋大战略观》，载于《浙江海洋学院学报（人文科学版）》2008 年第 4 期，第 12 页。

经济效益，目前在大多数沿海地区海洋新能源开发仍受到冷落，没有引起有关方面足够的重视。[62] 令人欣慰的是，我国早在“十一五”规划中就已经规定要大力发展新能源，实行优惠的财税投资政策和强制性的市场份额，鼓励生产和消费新能源。根据中国新能源网发布的新闻，国家能源局成立后确定了 8 项重点工作，其中一项就是积极发展核电、水电、风能、太阳能、生物质能等可再生能源和新能源，不断提高清洁能源在中国一次能源消费中的比重。到 2010 年要使可再生能源消费量占到能源消费总量的 10%，到 2020 年可再生能源消费将占到全国能源消费的 15%。这预示着，国家对新能源产业的政策介入和支持的力度将不断增强。[63] 这都为海洋新能源的开发提供了很好的发展机遇。

此外，国家海洋局发布的《2008 年中国海洋经济统计公报》显示，海洋资源与能源开发利用产业的经济运行情况良好。其中，受国际油价大幅波动影响，海洋油气业产值上半年增长较快，下半年增幅回落。全年实现增加值 874 亿元，比上一年减少 1.1%。2008 年，我国继续加强对海砂开采的管理力度，非金属矿的开采得到有效控制，金属矿业的生产规模不断扩大，海洋矿业产业结构进一步优化。全年实现增加值 9 亿元，比上一年增长 21.3%。在国家节能减排和发展清洁能源政策的支持和引导下，我国海洋电力业在本年度成长较快。山东、江苏、福建等地区对海洋能利用的投入力度不断加大，一批海上风电项目投入运营，带动了海洋电力业的快速发展。海洋电力业全年实现增加值 8 亿元，比上一年增长 51.6%。与此同时，沿海地区继续贯彻落实《海水利用专项规划》，海水淡化和综合利用生产规模不断扩大，海水利用技术取得较大进展。全年实现增加值 8 亿元，比上一年增长 22.7%。[64]

（三）海上能源通道安全

2008 年，索马里海盗事件频发并日益升级，其影响超出了所在国家和地区，对包括中国在内的世界各国海上能源通道的安全造成了严重威胁。针对海盗问题，中国海事局发出紧急通知，要求我国船东、船舶经营人和船长应当提高防海盗意识，除按照国际海事组织打击海盗和武装劫持船舶的有关通函采取措施外，还应该采取以下特别措施：一是公司和船舶应注意接收有关海盗活动的信息，特别是有关航行警告；二是公司应加强船舶保安值班，随时保持与航经海盗活动猖獗海域

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62 谭志娟：《我国海洋能开发开始起步——访中国可再生能源学会海洋能专业委员会秘书长王传崑》，载于《中国电子商务》2008 年第 10 期，第 59~60 页。

63 中国新能源网：《中国应加档提速迎接新能源时代到来》，下载于 http://www.in-en.com/newenergy/html/newenergy-1243124317327587.html, 2009 年 4 月 20 日。

64 国家海洋局：《2008 年中国海洋经济统计公报》，下载于 http://www.soa.gov.cn/hyjww/hyjj/2009/02/16/1225332549834419. htm，2009 年 3 月 28 日。

的船舶的联系；三是公司一旦获悉发生海盗袭击事件，应立即报告中国海上搜救中心，并保持与海事主管机关的联系；四是根据航行计划，船长可采取适当绕航措施，尽量远离海盗活动猖獗海域；五是船长应加强值班力量，建立“反海盗班”值班制度。[65] 李星光对此作了进一步的建议，我国海军舰队应当按照国际公约（《1958 年公海公约》、《1982 年联合国海洋法公约》）和联合国安理会针对海盗的有关决议（1816 号、1838 号、1846 号、1851 号）出兵近期海盗活动最为猖獗的索马里海域为途经船只护航，防范和打击海盗。[66] 我国南海舰队已于 2008 年 12 月 26 日启程赴亚丁湾、索马里海域，首次执行护航和打击海盗任务。根据相关国际公约，我国护航舰队还享有无害通过权、豁免权和登临权等 3 项主要权利。

《光明日报》特约观察员殷卫滨认为，打击海盗、维护海上能源运输安全，重点在于加强统一协调，建立国际合作机制。红海附近阿拉伯国家于 2008 年 11 月 20 日决定建立联合机制，加强红海地区航运安全，共同监督、跟踪和打击任何试图进入红海海域的海盗活动，并通过阿拉伯国家联盟协调各国在国际和地区间打击海盗问题上的立场，呼吁国际社会为此提供物质和技术帮助。对此，我国也应当在保持行动自主性的前提下，积极建立与世界各国，尤其是与全球和地区大国合作的机制，包括情报共享机制、协同行动机制，共同维护世界海上能源通道的安全。[67]

根据上海国际问题研究所研究员马嫈的分析，除了索马里海盗出没频繁的亚丁湾海域之外，我国的能源进口安全还受印度洋、马六甲海峡、霍尔姆斯海峡等海上咽喉的制约。其中，南海—马六甲—印度洋航线是我国最为重要的能源运输通道。据了解，我国进口原油的 80%左右是通过这条航线运输，每天通过马六甲海峡的船只近六成是中国船只。更值得注意的是，中国、日本、韩国等国家的海上石油供应线与欧洲的海上贸易线正好在这一区域重叠。[68] 对此，2008 年在全国政协十一届一次会议上，来自民盟中央的政协委员们建议要继续加强该条海上能源运输通道的建设，尽快在南沙群岛和西沙群岛部署海洋环境高技术监测能力的研究试验，加强马六甲海峡和印度洋海域海洋环境的科学考察与研究，部署建设南海—马六甲—印度洋能源大通道的海洋环境信息保障体系。另外，通过加强国内外合作与交流及信息共享，有效提高我国在该海域的海洋环境保障能力和信息优势。[69]

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65 林红梅：《海事局紧急通知防范索马里海盗避免不必要损失》，下载于 http://www.gov.cn/jrzg/2007-05/22/content_622601.htm，2009 年 3 月 28 日。

66 李星光：《中国军舰赴索马里护航合理合法》，载于《解放军报》2008 年第 7 期，第 16 页。

67 殷卫滨：《困局与出路：海盗问题与中国海上战略通道安全》，下载于 http://guancha.gmw.en/content/2008-12/31/content_874761.htm，2009 年 3 月 28 日。

68 马嫈：《9•11 以来南海通道的安全形势及其影响》，载于《创新》2008 年第 2 期，第 52 页。

69 《海上能源运输通道受关注》，下载于 http://oil.in-en.com/html/oil-1429142958168132.html，2009 年 3 月 28 日。

如同胡庆亮所指出的那样，中国在能源安全问题的处理上压力重重，其中南海油气能源的开发和如何破解中国能源进口的“马六甲困局”对保障中国海上能源通道的安全尤为突出。鉴于此，中国应当积极参与海洋能源安全保障的国际合作，以《联合国海洋法公约》为基础，采取共同体与条约并驾齐驱、国内立法与国际法并重、长期供应合同和特许协议互补、海域与地区合作先行的合作模式，保障能源的长期开发和安全供应。[70]

六、海洋渔业

在 2008 年，渔业资源的养护和管理问题，海水养殖、远洋捕捞和休闲渔业等渔业产业问题，渔业补贴等渔业制度问题，以及渔业执法和渔业权问题仍是学者们关注的焦点，是海洋渔业中的研究热点。

第一，渔业资源的养护和管理方面。对于渔业的增殖放流，上海海洋大学的尹增强和章守宇指出，渔业资源增殖放流是恢复渔业资源、提高渔业生产力的有效手段。他们分析：我国当前增殖放流尚存在管理体制不健全；经费投入不足；技术规程欠规范，部分地方增殖放流品种的亲体选育和苗种培育单位设备简陋，技术不过关等问题。并对此提出了应建立健全渔业资源增殖放流管理体制；拓宽融资渠道，加大渔业资源增殖放流资金的投入；加大科学研究；建立健全技术操控规程的标准，对渔业资源增殖放流品种的亲体选育和苗种培育单位实行资格准入制度的建议。[71] 重庆鱼种站周瑜认为渔业增殖放流应注意以下问题：放流种类的选择要因地制宜；放流品种的数量搭配要合理；放流的各单位应将放流的实际数量上报；应有或设立专门的机构进行放流苗种检疫和验收，增殖放流后应对其效果进行统计等。[72]

对于伏季休渔，山东海洋与渔业厅的宋虎指出目前我国的伏季休渔管理已逐步趋于正规，但也存在一些问题，如各种网具的开捕时间不一致，客观上给伏季休渔管理增加了难度和压力；渔政管理体制不顺，管理装备落后，经费不足，已影响到休渔管理的正常进行等。对此应强化措施，突出管理重点；并在完善法律制度的同时，理顺渔业管理体制。[73] 中国南海水产研究所的史赞荣等分析了 10 年来南海伏季休渔的实施效果，指出南海伏季休渔制度为缓解南海渔业资源可捕量不足和捕捞强度过大这一矛盾起了一定作用，但目前还无法从根本上达到遏制资源衰

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70 胡庆亮：《印度海洋战略及其对中国能源安全的影响》，载于《南亚研究季刊》2008 年第 1 期，第 25 页。

71 尹增强、章守宇：《对我国渔业资源增殖放流问题的思考》，载于《中国水产》2008 年第 3 期，第 9~10 页。

72 周瑜：《鱼类增殖放流及其应注意的问题》，载于《重庆水产》2008 年第 4 期，第 49~50 页。

73 宋虎：《关于伏季休渔管理的几点意见》，载于《渔政》2008 年第 3 期，第 20~21 页。

退、全面养护资源的目的，尚存在几个亟待解决的难题，如缺乏对开捕后捕捞作业的后续管理，休渔对象、时间、区域有待进一步修订，渔民增收有限等。[74]

对于生态渔业管理，山东大学的王亚民和黄增金指出成功的以生态系统为基础的渔业管理应注意以下 6 个要素：在以生态系统为基础管理原则的政策框架内设计执行，确定管理的经济、社会和文化利益，确定资源开发对生态学价值产生的影响，注意信息汇总，建立所有利益相关者全面参与的管理计划，综合考虑可能影响资源的外部因素。[75] 中国渔政的王宪璋认为生态渔业是按照经济生态学的原理使用先进科学技术，使渔业形成科学的生态体系，并使这个体系建立在能量转换率高、物质良性循环和多极利用的基础上，获得最大的产出，形成良好的生态环境，以求经济、社会、生态效益的统一。[76]

国外渔业管理的成功经验对我国渔业管理具有重要的借鉴意义。上海海洋大学的袁华等通过捕捞活动中的人、船和渔获物 3 个管理对象介绍了澳大利亚控制 IUU 捕捞的措施。如在对人管理方面，澳大利亚《1991 年渔业管理法》确立的捕捞权是将一定的捕鱼权利分配给符合条件的国民和外国人；在对渔船的管理方面，凡想在澳大利亚领海以外作业的渔船必须根据《1981 年船舶登记法》第 29 条进行登记；在对渔获物管理方面，澳大利亚《1991 年渔业管理法》第 91 条要求渔产品加工者、批发商和零售商等应持有相应的渔获物接收许可。对此，我国可借鉴澳大利亚 IUU 渔业管理的成功经验，加快渔业权法制建设，完善渔业许可制度，加强对非法捕鱼的监管。[77] 中国海洋大学的焦桂英等对韩国海洋渔业管理作了分析，指出由于海洋渔业资源的衰退以及《联合国海洋法公约》引起的捕捞区域缩小，韩国海洋渔业已从近海捕捞转向远洋捕捞和海洋养殖。[78]

上海海洋大学的乐家华和刘丽燕指出日本对渔业实行中央政府和地方政府相结合的双重管理模式。目前日本针对国际渔业的新发展和新变化，对渔业政策作了适当调整。在水产品安定供给方面，政府十分重视资源管理型渔业的建设，把水产资源的持续利用放在重要位置；在水产业健康发展方面，着重加强渔业生产结构的调整，通过培育安定并且高效的渔业经营体、促进渔场的合理化利用、渔业人才的培养、水产加工流通业的合理化、渔业基础的强化等方面建设。[79] 中国海洋大

74 史赞荣、李永振、孙冬芳、卢伟华：《从资源变化、生态保护、经济效益和社会影响分析南海伏季休渔十年效果》，载于《中国水产》2008 年第 9 期，第 14~16 页。

75 王亚民、黄增金：《探索以生态系统为基础的渔业管理方式——我国渔业未来管理方向的思考》，载于《中国水产》2008 年第 5 期，第 21~22 页。

76 王宪璋：《浅谈生态渔业建设》，载于《内陆水产》2008 年第 8 期，第 1~2 页。

77 袁华、唐建业、黄硕琳：《澳大利亚控制 IUU 捕捞的国家措施及其对我国渔业管理的启示》，载于《上海水产大学学报》2008 年第 3 期，第 362~364 页。

78 焦桂英、孙丽、刘洪滨：《韩国海洋渔业管理的启示》，载于《海洋开发与管理》2008 年第 12 期，第 42~48 页。

79 乐家华、刘丽燕：《日本渔业的双重管理模式及发展方向》，载于《渔业经济研究》2008 年第 6 期，第 33~37 页。

学的王淼和宋蔚提取了各渔业大国的成功管理经验，如美国渔业管理法的发展演变及管理模式，挪威渔业管理机构的设置，日本渔业自主性管理方式。并据此提出我国应引进总可捕量制度，以弥补和完善传统渔业管理制度，谋求建立综合性的渔业管理制度；提高渔业管理的科学含量，加强基础设施建设；注重渔业组织在渔业管理中的协助作用。[80]

第二，海洋渔业的重要组成部分——海水养殖方面。中国海洋大学的宇文青探讨了海水养殖对海洋环境的影响，指出海水的自净能力是有限的，当海水养殖释放到水体中的物质超过其所能承受的最大限度，即海水的环境容量时，养殖便会对海洋环境造成一定程度的污染。海水养殖对近岸海域海洋环境的污染具体来说主要源于 3 方面：一是来源于残饵、排泄物等营养物的污染，二是来源于养殖药物使用的污染，三是来源于底泥的富集污染。[81] 宁波大学的周颖和钟昌标指出近海养殖影响海洋渔业资源的途径分为直接影响和间接影响。直接影响主要是直接输出污染物导致水体资源的富营养化及其诱发的赤潮等自然灾害；间接影响包括对近海生物群落的影响、对沿岸生态环境的破坏等等。对此，应借鉴“清洁生产”的概念，从产前规划、产中控制、产后治理 3 个环节实现近海养殖的可持续发展。[82]

第三，远洋渔业方面。中国农业发展集团的刘身利指出我国远洋渔业经过 23 年艰苦创业、滚动发展，已经成为我国渔业产业结构调整和“走出去”发展的重点。目前，我国远洋渔业产业除面临高油价问题外，还面临企业渔船设备老化、技术落后、资金紧缺、不适应竞争需要等问题。对此，我国应提高远洋渔业产业地位，加大对基础建设、渔船更新改造等的投入力度。[83] 中国海洋大学的霍军分析了我国远洋渔业发展的现状，认为改革开放以后，我国的远洋渔业取得了长足发展，但在发展过程中，也面临许多问题，如远洋作业设备落后、远洋作业人员素质不高以及风险意识不强、资金投入不足等。并提出应从以下几个方面促进远洋渔业的持续发展：注重科技研发，加强远洋作业船员培训力度，加大资金投入，调整远洋渔业

80 王淼、宋蔚：《境外海洋渔业的做法对我国的重要启示》，载于《中共青岛市委党校青岛行政学院学报》2008 年第 4 期，第 22~25 页。

81 宇文青：《海水养殖对海洋环境影响的探讨》，载于《海洋开发与管理》2008 年第 12 期，第 113~117 页。

82 周颖、钟昌标：《近海养殖对海洋渔业环境的影响分析》，载于《渔业经济研究》2008 年第 6 期，第 11~17 页。

83 刘身利：《我国远洋渔业亟待国家重点扶持以加快发展》，载于《中国渔业经济》2008 年第 3 期，第 54~56 页。

作业结构和生产布局，完善远洋渔业产权制度和政策性保险制度。[84]

第四，休闲渔业方面。一些学者对国内某些沿海城市的休闲渔业作了具体分析。浙江海洋学院的王迎宾和俞存根对舟山休闲渔业的现状及存在的问题作了剖析，指出舟山休闲渔业自 1999 年首推“渔家乐”休闲渔业项目以来，已经取得一定成效。但是，其中也不乏问题，如多数休闲渔业基地规模小，功能单一，基础设施简陋，缺乏竞争优势；休闲渔业项目季节性较强等问题。对此，可以根据舟山的实际情况，制定舟山市休闲渔业发展规划；招商引资，促进投资多元化；出台优惠政策，重点扶持，努力做大规模等。[85] 大连水产学院的宋玮、勾维民以大连市为例，指出休闲渔业是具有得天独厚区位和气候条件的大连市渔业发展的重点方向。大连休闲渔业开发应注意挖掘渔家民俗文化、海洋渔业文化等内涵，组成形式多样的休闲渔业产品，从文化旅游的终极关怀角度和文化旅游兴趣的转换角度，实现休闲渔业产品的有效连接，构筑大连休闲渔业产品体系。[86]

中国海洋大学的陈明宝还对目前我国休闲渔业研究现状作了总结，并指明了未来我国休闲渔业的发展方向。其认为目前国内对休闲渔业的研究还处于萌芽阶段，主要是对休闲渔业经验方面的介绍，较少涉及休闲渔业的理论研究。这种实用主义思路在解决当地渔业转产转业方面起到了一定的积极作用，但是对如何制定休闲渔业的长期发展规划、促进休闲渔业与其他产业的和谐发展等方面则缺乏足够的重视和关注。因此，未来我国休闲渔业的研究应注重从以下几个方面取得突破：对休闲渔业所包括的范围进行科学而明确的界定，从而逐步建立起我国休闲渔业的统计指标体系；休闲渔业与“三渔”问题；加强休闲渔业经济价值方面的研究；注重休闲渔业理论研究与具体实践相结合等。[87]

他山之石，可以攻玉。中国海洋大学的方百寿等对比分析了国内外休闲渔业的研究内容、研究方法和研究视角等，指出国外休闲渔业较为重视休闲渔业的管理和可持续发展研究，并采用实证研究的方法从多角度进行跨学科研究。进而提出我国休闲渔业应进一步加强相关术语和内涵的研究；并借鉴社会学、心理学、统计学、经济学等学科的成熟概念、理论和方法，多层面、多角度地展开休闲渔业研

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84 霍军：《我国远洋渔业发展现状及对策浅析》，载于《渔业经济研究》2008 年第 4 期，第 24~27 页。

85 王迎宾、俞存根：《舟山市休闲渔业现状及发展探讨》，载于《中国水产》2008 年第 2 期，第 77~78 页。

86 宋玮、勾维民：《大连市休闲渔业的 SWOT 分析》，载于《中国渔业经济》2008 年第 1 期，第 46~48 页。

87 陈明宝：《我国休闲渔业研究现状与未来研究发展方向》，载于《中国水产》2008 年第 5 期，第 76~79 页。

究。[88] 中国水产科学研究院的方海等也在介绍了国外休闲渔业的兴起和发展以及在此过程中出现的环境、资源破坏等突出问题的基础上，指出我国休闲渔业应进一步加强立法工作，加强对休闲渔业的监督管理，并建立休闲渔业管理信息系统。[89]

第五，渔业补贴方面。广东海洋大学的李良才指出 2008 年 5 月 28 日 WTO 公布的渔业补贴规则文本草案代表了未来渔业补贴纪律的发展方向。我国应当据此调整我国渔业补贴政策并积极应对其他贸易伙伴对华采取的渔业反补贴调查行动。对于国际补贴，我国应适时调整我国渔业补贴的方向与力度，加强渔业资源管理工作以规避补贴嫌疑。对于国际反补贴，我国应加强渔业反补贴调查理论研究，尽快建立渔业反补贴调查预警机制。[90] 广东海洋大学的乔俊果指出 WTO 框架下的渔业补贴谈判正在进行中。渔业补贴规则的任何变动，都势必对我国渔业国际竞争力产生冲击。未来我国渔业补贴政策应作以下方面的调整：加大渔业补贴总额；向不可诉渔业补贴倾斜，促进可诉渔业补贴的转型；研究 WTO 运行规则，争取特殊和区别待遇；建立渔业补贴核算评估体系等。[91]

第六，渔业执法方面。江苏渔政的张力和姚善群针对渔业执法中存在的执法环境不理想、渔业执法水平不高、缺乏有效的执法监督等问题，提出今后我国渔业执法应：提高队伍整体素质；加大宣传力度，充分发挥公众参与、舆论监督在渔业执法中的作用；规范执法工作，加大监管力度；切实加大渔业行政执法力度；优化渔业执法的外部条件等。[92] 江苏海洋渔业指挥部的张斌对海洋渔业执法中的自由裁量权作了分析，指出渔业法律、法规规定了两种自由裁量权，即处罚种类的自行决定和规定幅度内罚款数额的自由裁量。并且自由裁量权的行使应符合以下 4 个方面：符合立法目的，正确理解法律原意，基于正当动机，公正和公平。[93]

第七，渔业权方面。自 2007 年《物权法》颁布以来，渔业权一直是学术界研究的重点。上海海洋大学的任和平指出渔业权是以环境保护和自然资源的可持续发展为前提，赋予渔民和合法的渔业组织在特定水域进行养殖和捕捞的正当权利；我国渔业权的权利主体是渔民和合法的渔业组织；我国的渔业权当前可以分为两类，即养殖权和捕捞权。养殖权的权利客体为“特定水域”，捕捞权的权利客体

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88 方百寿、卢飞、宫红平：《国外休闲渔业研究及对我国的启示》，载于《中国水产》2008 年第 8 期，第 77~78 页。

89 方海、谢营梁、李励年：《国外休闲渔业可持续发展管理现状及我国休闲渔业管理对策》，载于《现代渔业信息》2008 年第 10 期，第 16~18 页。

90 李良才：《国际渔业补贴与反补贴问题及我国对策研究》，载于《全国商情（经济理论研究）》2008 年第 16 期，第 117~119 页。

91 乔俊果：《论 WTO 框架下我国渔业补贴问题》，载于《河北渔业》2008 年第 7 期，第 4~6 页。

92 张力、姚善群：《试析渔业执法中存在的问题与对策》，载于《渔政》2008 年第 2 期，第 21~23 页。

93 张斌：《试论渔业行政执法自由裁量权的合理运用》，载于《海洋开发与管理》2008 年增刊，第 71~72 页。

为“捕捞行为”。我国渔业权的权利性质是一种受到公权力“有限限制”的“私权”，为一种用益物权。[94] 华中农业大学的黄季伸和龙文军也指出渔业捕捞权是法律赋予渔民或渔民团体依照有关的规定，在一定水域采集、捕捞、收获水生动植物资源，并从中获取经济利益的用益物权。渔业捕捞权具有用益物权性、排他性、许可性和物上请求权等法律特征。其中渔业捕捞权的请求权主要表现在停止侵害请求权、排除妨害请求权、消除危险请求权 3 个方面。[95] 广东海洋大学的赵万忠针对我国《物权法》仅对渔业权作了原则性规定，难以满足日常渔业活动和司法实践需要的问题，提出以司法解释的方法进一步细化渔业权，并指出相关司法解释应进一步解决好以下几个方面的问题：渔业权的概念和种类；渔业权法律关系的主体、客体和内容；渔业权的取得、转让和消灭以及渔业权的期限；渔业权的保护。[96] 中国农业大学的马洁蓉和任大鹏针对我国现行渔业权流转立法的不足，在借鉴其他国家和地区经验的基础上，提出了完善我国渔业权流转制度的对策和建议。其认为完善我国渔业权流转立法，主要应考虑以下几个方面：确立渔业权流转立法的原则；明确渔业权流转的形式，其中包括抵押、继承、租赁、出售、交换、赠与及作价出资入股等多种方式；设立渔业权流转的条件；规范渔业权流转的程序等。[97]

目前我国海洋渔业研究已初成体系，对一些热点问题的研究也取得了较为突出的成果。但是，还存在研究点过于集中、研究方法单一、缺乏深度等问题。今后，可进一步拓宽海洋渔业的研究对象，多方位选取研究视角，开拓新的研究方法，深化并细化理论研究，同时加强理论与实践相结合。

七、南北极问题

（一）南极问题

“熊猫计划”是 2007—2008 年第 4 次国际极地年中国行动的核心计划，全称为南极普里兹湾—埃默里冰架—冰穹 A 考察计划，持续 3 年。南极有 4 大公认

94 任和平：《我国渔业权基本理论的综述和探讨》，载于《中国渔业经济》2008 年第 1 期，第 14~18 页。
95 黄季伸、龙文军：《海洋渔业捕捞权的法律特征分析》，载于《中国渔业经济》2008 年第 4 期，第 21~24 页。
96 赵万忠：《论我国渔业权的立法完善》，载于《广东海洋大学学报》2008 年第 2 期，第 1~5 页。
97 马洁蓉、任大鹏：《我国渔业权流转立法问题研究》，载于《社会科学论坛》2008 年第 11 期，第 59~63 页。

的科学制高点即极点、磁点、冰点和高点，前 3 个已建有其他国家的考察站，[98] 高点就是南极冰盖最高点冰穹 A，而建立在冰穹 A 的昆仑站[99] 是中国第 25 次南极科考留给第 4 次国际极地年的宝贵遗产。

2008 年 10 月 20 日，中国第 25 次南极科考极地科考船“雪龙”号从上海启程，于南极中山站时间 2009 年 3 月 9 日启程回国，完成第 25 次科考任务，科考队员建立了中国第一个南极内陆考察站——中国南极昆仑站，[100] 完成“熊猫计划”冰穹 A 到中山站断面的科学考察，完成包括南极埃默里冰架考察、普里兹湾大洋调查和中山站常规科学观测、中山站建设改造等国际极地年中国行动计划内容。

为避免各国争夺南极而引发冲突，1959 年 12 月 1 日，美国和前苏联等 12 个在南极从事过实质性科考的国家，[101] 发表了埃斯库德罗宣言，[102] 共同签署《南极条约》（1961 年 6 月 23 日生效），[103] 冻结领土纷争，禁止各国提出新的主权要求，但对曾经提出的领土主权要求既不承认也不否认。《南极条约》规定生效期满 30 年后，任一缔约国可以要求召开会议变更或修改条约，[104] 这表明条约内容 30 年内不能修改。《南极条约》到 1991 年 6 月 23 已满 30 年，当年（1991 年）10 月 4 日第 11 届南极条约特别协商会议在西班牙马德里签署《关于环境保护的南极条约议

98 美国在南极点建立了阿蒙森斯科特站；法国在南极磁点建立了迪蒙迪维尔站；前苏联在南极冰点建立了东方站。参见国家海洋局极地考察办公室网站，下载于 http://www.chinare.cn/caa/gb_article.php?modid=03002，2009 年 3 月 2 日。

99 2009 年 2 月 2 日南极时间上午 9 时 25 分，北京时间中午 12 时 25 分，中国政府代表团团长、国家海洋局副局长陈连增在南极中山站代表中国政府宣布南极昆仑站开站，首任昆仑站站长为内陆队队长李院生，副站长为内陆队副队长夏立民、李侍明。参见国家海洋局极地考察办公室网站，下载于 http://www.chinare.en/caa/gb_news.php?modid=01001&id=732，2009 年 3 月 2 日。

100 截至目前为止，我国在南极拥有 3 个科学考察站，分别是长城站（1985 年 2 月 20 日）、中山站（1989 年 2 月 26 日）和昆仑站。参见国家海洋局极地考察办公室网站，下载于 http://www.chinare.cn/caa/gb_article.php?modid=03002，2009 年 3 月 2 日。

101 这 12 个国家分别是阿根廷、澳大利亚、新西兰、智利、英国、美国、日本、法国、前苏联、比利时、挪威和南非。参见国家海洋局极地考察办公室网站，下载于 http://www.chinare.cn/caa/gb_article.php?modid=07001，2009 年 3 月 2 日。

102 1948 年智利法学家埃斯库德罗建议，南极的主权之争至少要暂停 5 年，相关国家应集中精力从事科学研究，科学考察人员可自由进入南极大陆，并在政治上保持中立地位，这被称为埃斯库德罗宣言。参见郭培清：《埃斯库德罗宣言与南极中立化》，载于《海洋世界》2007 年第 4 期。

103 2001 年 7 月，第 21 届协商会议决定将南极条约常务秘书处总部设在阿根廷首都布宜诺斯艾利斯。中国于 1983 年 6 月 8 日加入南极条约组织，同日条约对中国生效。1985 年 10 月 7 日中国被接纳为协商国。目前《南极条约》共有 47 个缔约国，其中 28 个是协商国。下载于 http://www.ats.aq/devAS/ats_parties.aspx?lang=e，2009 年 4 月 15 日。

104 《南极条约》第 12 条。

定书》（1998 年 1 月 14 日生效），10 月 7—18 日在德国波恩召开的第 16 届南极条约协商国会议发表了南极条约 30 周年宣言，重申《南极条约》的宗旨与原则，并且迄今为止没有缔约国要求召开会议审查条约的实施情况或要求变更修改条约，《南极条约》从规定到实施而言是一个无期限的条约。[105]

近几年，一些国家对南极的争夺“暗占明抢”风云再起，这种争夺可以分为 2 种性质：一是对南极领土主权的争夺，二是对南极周边海洋大陆架的争夺。因为《南极条约》对南极领土主权的冻结，保护了 3 类不同国家的利益，即主权要求国利益、潜在主权要求国利益和非主权要求国利益，[106] 但是并未否定有关国家以前提出的领土主权，因此就引发了这些国家的南极外大陆架之争。

《南极条约》并未明确规定南极洲周边的大陆架问题。因为外大陆架申请各国须在 2009 年 5 月 13 日之前向联合国大陆架界限委员会提交，随着这一时间的逼近，2007 年 10 月，英国政府表示将对南极约 100 万平方公里的海床提出领土要求，遭到了与南极领土要求区域重叠的阿根廷和智利的强烈反对。2008 年 5 月 9 日，英国向联合国大陆架界限委员会提交的申请并未包含该地区的外大陆架申请，[107] 但是英国政府仅是暂时不对南极外大陆架正式提出要求，保留了在今后提出要求的权利。[108] 因而在 2009 年 3 月 6 日，阿根廷和智利议员代表团在阿根廷位于南极的基地发表联合声明，反对英国对南极地区大陆架提出主权要求。[109] 阿根廷与智利反对的主要原因是，外大陆架的申请依据是申请国拥有相应的领土，而英国主张的南极外大陆架的领土依据是南极洲的马尔维纳斯群岛，而该群岛也一直为阿根廷与智利所主张主权，3 个国家的领土主权主张存在重叠区域，如果英国申请该群岛的外大陆架成功，则间接证明该群岛为英国领土，所以无论从自然资源还是领土主权方面的原因考虑，阿根廷与智利的坚决反对是理所当然的。最新的消息是，英国于 2009 年 5 月 11 日向联合国大陆架界限委员会提交另一份申请，正式对南极地区的福克兰群岛（即马尔维纳斯群岛）、南乔治亚和南桑德韦奇群岛提出

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105 《南极条约》规定生效 30 年后，缔约国可以要求召开全体缔约国会议，审查条约实施情况以及要求变更或修改条约，该规定应该视为条约本身并未规定有效期，只是规定条约生效 30 年之后缔约国的一些权利，所以笔者理解《南极条约》是一个无期限的条约。

106 颜其德、朱建钢：《〈南极条约〉与领土主权要求》，载于《海洋开发与管理》2008 年第 4 期，第 79 页。

107 英国这次只是针对中大西洋的阿森松岛提出外大陆架申请，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_gbr.htm，2009 年 4 月 8 日。

108 参见 2008 年 5 月 11 日新华网《英国暂不对南极海床提出领土要求》，下载于 http://news.xinhuanet.com/newscenter/2008-05/11/content_8147626.htm，2009 年 4 月 8 日。

109 参见 2009 年 3 月 7 日新华网《阿根廷和智利反对英国对南极大陆架提出主权要求》，下载于 http://news.xinhuanet.com/world/2009-03/07/content_10964183.htm，2009 年 4 月 8 日。

外大陆架申请。[110]

2008 年召开的第 31 届南极条约协商国会议批准了中国提出的格罗夫山哈丁山南极特别保护区管理计划，这是中国设立的第一个南极特别保护区。南极的环境保护已经成为各国关注的焦点。美国地质勘探局 2009 年 4 月 3 日发表的新闻公报显示，自上世纪 60 年代开始解体的南极沃迪冰架现已完全消失，而另一个名为拉森的冰架的北半部分已经不见；欧洲航天局 2009 年 4 月 3 日也发表公报说威尔金斯冰架出现新裂缝，可能加速该冰架的断裂，过去一年该冰架的面积减少了约 1800 平方公里，占其面积的 14%。[111] 所以 2009 年 4 月 6 日在美国巴尔的摩举行的第 32 届南极条约协商国会议更加注重讨论加强极地环境保护和人类活动对极地环境的影响。

另外，吴依林阐述了美国、英国、澳大利亚和新西兰的南极科学研究战略，南极科学研究委员会在国际南极研究合作中的作用；[112] 颜其德通过对南极的环境观察分析了南极在全球气候变化中的关键作用；[113] 效存德对“南极与全球气候系统计划”专家委员会发布的“南极与南大洋气候系统”白皮书的内容进行解读，预估南极地区未来的气候系统；[114] 张青松和王勇对我国南极考察 28 年的成果进行回顾与总结，指出中国的南极科考为人类“和平利用南极”作出了重要的贡献；[115] 张林对南极目前面临的挑战进行分析，并对我国南极区域海洋权益的保护提出建议；[116] 徐世杰分析了“议定书”对南极事务的重大影响，提出了中国的对策。[117]

110 See Submission of the United Kingdom of Great Britain and Northern Ireland – in Respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands, at http://www.un.org/Depts/los/clcs_new/commission_submissions.htm, 12 December 2009.

111 参见国家海洋局极地考察办公室网站，下载于 http://www.chinare.cn/caa/gb_news.php?modid=01001&id=780，2009 年 4 月 9 日。

112 吴依林：《南极研究及其趋势展望》，载于《中国科学技术大学学报》2009 年第 1 期，第 11~14 页。

113 颜其德：《南极——全球气候变暖的寒暑表》，载于《自然杂志》2008 年第 5 期，第 259~261 页。

114 效存德：《南极地区气候系统变化：过去、现在和将来》，载于《气候变化研究进展》2008 年第 1 期，第 1~7 页。

115 张青松、王勇：《中国南极考察 28 年来的进展》，载于《自然杂志》2008 年第 5 期，第 252~258 页。

116 张林：《南极条约体系与我国南极区域海洋权益的维护》，载于《海洋开发与管理》2008 年第 2 期，第 69~74 页。

117 徐世杰：《“关于环境保护的南极条约议定书”对南极活动影响分析》，载于《海洋开发与管理》2008 年第 3 期，第 51~53 页。

（二）北极问题

北极正在成为国际社会关注的焦点，北极的重要性不言而喻。继俄罗斯 2007 年在北极海底"插旗"事件之后，北极的争夺进入实质性阶段。

这种争夺首先体现在对北极的资源争夺上，具体表现为北极周边国家对北冰洋外大陆架的主张。俄罗斯早在 2001 年就向联合国大陆架界限委员会提交申请，主张北冰洋的外大陆架，包括对 1948 年由苏联科考队发现并命名的"罗蒙诺索夫海岭"和"门捷列夫海岭"俄方一侧的大陆架行使主权管辖。[118] 除俄罗斯外，其它已经明确提出外大陆架主张的北极周边国家有：丹麦和冰岛于 2006 年 9 月 20 日对法罗群岛的外大陆架进行划界（但这两个国家尚未向大陆架界限委员会提交申请）；挪威于 2006 年 12 月 27 日向大陆架界限委员会提交了申请；[119] 另外英国和爱尔兰也加入申请队伍之中，两国同时在 2009 年 3 月 31 日向大陆架界限委员会提交了申请主张哈顿罗卡尔地区 [120] 的外大陆架。[121] 在北极其它区域，虽然没有明确提出外大陆架主张，但有可能主张的国家有美国、加拿大。联合国大陆架界限委员会对这些申请国的申请给出什么建议，以及未申请的国家会有怎样的反应以及行动，尚需要继续追踪观察。

其次，由于北极冰融速度的加快，特别是 2008 年 8 月北极"西北航道"和"东北航道"第一次同时全线冰融，其航运价值显得更加重要，加拿大与俄罗斯对这 2 个航行通道的态度表现不一。俄罗斯法律要求航经"东北航道"的船舶事先取得许可，强制使用俄罗斯破冰和导航服务，并收取高额费用，引起各国的不满。美国认为"西北航道"是国际航道，应该适用"过境通行"制度，而加拿大认为是其本国内水，不能适用该项制度。2008 年 8 月 27 日，而加拿大总理哈珀在北极地区波弗特海沿岸举行的新闻发布会上宣布，凡驶入"西北航道"的船只必须在加拿大海岸警卫队登记备案，要求各国船舶遵守这一规定。[122] 如此看来，俄罗斯和加拿大并没有放弃"西北航道"和"东北航道"的主权要求，虽然对其他国家的船舶开放通行，但是要求外国船舶须遵守其国内相关的通行制度，这种严格的通行制度是一些国家特别是美国尚不能完全接受的，所以北极通航的问题并未彻底解决，其中存在的矛盾会在今后北极更加适于航行的时候爆发。

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118 王郦久：《北冰洋主权之争的趋势》，载于《现代国际关系》2007 年第 10 期，第 17~21 页。

119 At http://www.un.org/Depts/los/clcs_new/submissions_files/submissionnor.htm,10 April 2008.

120 罗卡尔岛位于北纬 57º35'，西经 13º48'，主权尚存争议，目前英国、爱尔兰、丹麦和冰岛都对其主张领土主权。

121 At http://www.un.org/Depts/los/clcs_new/submissions_files/submission_gbrl. htm, 10 April 2008.

122 刘江萍、管清蕾：《北极"黄金航道"起争端》，载于《环球》2008 年第 22 期。

全球气候变暖已经影响到北极，因此北极的环境保护也成为各国关注的焦点。2008 年 5 月 27 日至 29 日，北极周边 5 国（丹麦、美国、俄罗斯、挪威和加拿大）在丹麦的伊路利萨特市召开会议，通过“伊路利萨特宣言”，与会 5 国表示将在现有的法律框架内，比如通过《联合国海洋法公约》，一起“有序地解决这一问题”。宣言还表示加强“互信和合作”特别是对环境问题的合作，5 国表示，将在保护北极生态体系方面承担起“管理性”的责任。[123] 虽然北极尚不能达成与《南极条约》类似的条约，但北极的各国合作一直在积极进展之中。[124]

2009 年以来，北极周边国家对北极的争夺日趋激烈，并呈现日益明显的军事化趋势。1 月 9 日，美国发布新的北极政策国家安全指令，提出了今后一段时期美国的北极安排，强调美国在北极地区有着广泛的根本性的国家利益，美国将每年投入 4 亿美元用于北极地区的考察和开发。2 月 9 日，丹麦、挪威、冰岛、瑞典、芬兰 5 国召开北冰洋军事安全合作机制会议，北约、欧盟以集体方式加入北极争夺行列。欧盟希望“公平”分享北极蕴藏的石油、天然气、矿藏和渔业资源，5 国表示未来将合作控制北极水域，保证石油和天然气运输通道的畅通。3 月中旬，加拿大宣布派考察队至北极点附近开展外大陆架勘测，计划在北极投入更多的军事力量。加拿大制定的系列计划包括在北极地区建立新军事基地和开辟深水码头，并建造 6 艘用于北极巡逻的军舰，以扩大北极地区的军事存在。3 月下旬，北极争夺的军事化色彩更见明显。挪威军队在北极海域进行军事演习，设定了北极资源争夺冲突激化的场景；加拿大陆军司令部发言人 3 月 23 日宣布，计划在近年内建成一支庞大的北极陆军兵团；而俄罗斯的表现更为积极，俄军方高调宣布潜艇部队将参与旨在确定俄罗斯北极大陆架边界的科考活动，在未来几年将建造至少 6 艘核潜艇。3 月 27 日，俄罗斯宣布组建北极部队。[125]

2008 年 7 月 11 日，“雪龙”号从上海出发，开始执行中国第 3 次北极科学考察任务，这是中国北极科考史上规模最大、耗资最多的一次，考察北极气候变化对中国气候变化的影响、北冰洋的独特生物资源和基因资源、北极大气污染和持久性有机污染物情况等。此外，科学家们还将开展北极地质和地球物理研究，科研人员将使用重力仪和磁力仪等设备对北极的海底构造及资源分布进行研究。2008 年 9 月 9 日，“雪龙”号极地破冰船驶离北极圈，圆满完成中国第 3 次北极科考的

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123 栾慧：《就切割“北极”蛋糕发出宣言，环北冰洋 5 国接受联合国调解》，下载于 http://qnck.cyol.com/content/2008-06/03/content_2210128.htm, 2009 年 4 月 11 日。

124 郭培清、田栋：《摩尔曼斯克讲话与北极合作——北极进入合作时代》，载于《海洋世界》2008 年第 5 期，第 67~73 页。

125 徐冰：《北极之争潜藏经济利益，各国博弈“冰融相见”》，载于《经济参考报》2009 年 4 月 10 日，下载于 http://jjckb.xinhuanet.com/gnyw/2009-04/10/content-153020.htm，2009 年 4 月 11 日；赵继才：《北极无冰谁主世界——浅析俄罗斯组建北极部队意图》，载于《中国青年报》2009 年 4 月 10 日，下载于 http://zqb.cyol.com/content/2009-04/10/content_2617191.htm，2009 年 4 月 11 日。

各项任务。[126]

目前“雪龙”号已成为我国极地考察最薄弱的环节。“雪龙”号是我国唯一的一艘极地科学考察破冰船，自 1994 年首航南极以来，已先后 12 次赴南极、3 次赴北极执行科学考察与补给运输任务。这种薄弱首先表现在“雪龙”号的破冰能力不足，无法满足极地冰区关键海域科学考察的实际需求；其次，随着我国极地考察事业的拓展，“雪龙”号运输任务繁重，科考时间严重不足。目前“雪龙”号承担了南北极考察的后勤物资运输、人员输运和海洋科学考察任务，在恶劣的极地自然环境中和有限的工作时段内，一艘船要同时兼顾南北极多项任务，无奈之举致使海洋科考时间被迫大量压缩和挤占。[127]

八、海洋科研

2008 年，国内和国外海洋科研法律与政策方面的焦点主要集中在海洋生物多样性问题上。这一年，国外涉及此问题的比较重大的会议有：2008 年 4 月 28 日—5 月 2 日在美国纽约召开的海洋生物多样性问题不限成员名额非正式特设工作组会议、2008 年 11 月 11 日—11 月 15 日在西班牙瓦伦西亚召开的世界海洋生物多样性大会、2008 年 11 月 17 日—11 月 21 日在英国伦敦召开的第二届生物多样性与气候变化特设技术专家组首次会议[128]以及 2008 年 11 月 7 日—11 月 13 日在中国厦门开展的国际海洋周上对生物多样性问题的关切。国内比较重大的会议有：2008 年 10 月 17 日—10 月 19 日在浙江金华召开的生物多样性与生态安全会议及 2008 年 11 月 6 日—11 月 7 日在厦门召开的“全球气候变化与台湾海峡及其周边海洋环境”学术研讨会。

影响生物多样性的 3 大问题主要是外来物种入侵、动植物生境丧失及全球气候变化。[129] 2008 年 3 月 14 日，联合国大会第 62 届会议在议程 77(a) 海洋和海洋法主题的决议（以下简称“大会决议”）中提到，“人类活动对海洋环境和生物多样

126 参见国家海洋局极地考察办公室网站，下载于 http://www.chinare.cn/caa/gb_news.pgh?modid=01002，2009 年 4 月 11 日。

127 《“雪龙”号单兵作战成中国极地考察最薄弱环节》，下载于 http://news.ifeng.com/mil/2/200904/0412_340_1103488.shtml，2009 年 4 月 11 日。

128 会议信息来自中国科学院生物多样性委员会网站，下载于 http://www.brim.ac.cn/index.asp，2009 年 3 月 30 日。

129 严音莉：《外来物种入侵的国际法问题探析》，载于《安徽电子信息职业技术学院学报》2008 年第 4 期，第 80 页。

性，特别是对包括珊瑚在内的脆弱海洋生态系统造成的有害影响，这些活动包括……引进外来扩散性物种……”，“人类引起的和自然产生的气候变化目前和预计会对海洋环境和海洋生物多样性产生的不利影响”。[130] 本节主要就外来物种入侵和全球气候变化涉及海洋生物多样性方面的法律问题进行综述。

（一）外来物种入侵所涉及的法律问题

1. 定义

按照世界自然保护同盟的定义，所谓外来物种，是指那些出现在其过去或现在的自然分布范围及扩散潜力以外（即在其自然分布范围以外或在没有直接或间接引入或人类照顾之下而不能存在）的物种、亚种或以下的分类单元，包括其所有可能存活继而繁殖的部分、配子或繁殖体。而外来入侵物种即是指在一个特定地域的生态系统中，通过不同的途径从其他地区传播过来的物种，在自然状态下生长和繁殖并对环境和周围物种产生一定的危害。[131]

2. 外来物种入侵的国际法律规制

2002 年 5 月 22 日，联合国大会把“生物多样性与外来入侵物种管理”确定为国际生物多样性日的主题，迄今为止，国际社会已大约制定了 50 多个防治外来物种入侵的法律文件。其中有拘束力的国际协议大约有 40 多个。严音莉认为，具有较大影响力的全球性法律文件包括 3 个，分别是《生物多样性公约》、《联合国海洋法公约》和《国际植物保护公约》。此外还有国际组织的决议、政府间组织的决议和相关区域性法律文件。[132] 以下主要简述《生物多样性公约》和《联合国海洋法公约》中的规定。

《生物多样性公约》第 8 条“就地保护”第 8 款规定：“（每一缔约国应尽可能并酌情）防止引进、控制或消除那些威胁到生态系统、生境或物种的外来物种。”[133]《联合国海洋法公约》第 196 条“技术的使用或外来的或新的物种的引进”第 1 款规定：“各国就采取一切必要措施以防止、减少和控制由于在其管辖或控制下使用技术而造成的海洋环境污染，或由于故意或偶然在海洋环境某一特定部分引进外来的或新的物种致使海洋环境可能发生重大和有害的变化。”[134] 另外，第 53 届

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130 联合国第 62 届会议决议，A/RES/62/215。

131 王艺：《跨国界环境损害国家责任——外来物种入侵承责问题研究》，载于《北方法学》2008 年第 3 期，第 150 页。

132 严音莉：《外来物种入侵的国际法问题探析》，载于《安徽电子信息职业技术学院学报》2008 年第 4 期，第 80 页。

133 1992 年《生物多样性公约》第 8 条第 8 款。

134 1982 年《联合国海洋法公约》第 196 条第 1 款。

联合国大会还通过了“压舱水中的有害水生生物体”的联合国海洋法公约报告。[135] 管松在其论文《〈控制和管理船舶压载水和沉积物国际公约〉研究》中具体评述了该公约，对中国目前相应的立法情况进行总结并提出立法建议。[136]

外来物种入侵涉及到跨界损害责任制度。万霞认为，联合国国际法委员会二读通过的《关于预防危险活动的跨界损害的条款草案》和《关于危险活动造成的跨界损害案件中损失分配的原则草案》准确地把握住了跨界环境损害中最为关键和核心的部分：一方面强化和明确了国家作为环境保护者和治理者的责任，国家有义务依据国内法，对国内发生的各类行为进行监管；另一方面用国际制度落实了各国国内经营者的跨界损害责任，为受害者最终实现跨界索赔提供了国际层面的保障。[137]

在防范外来物种入侵的国际法律管制上，除了有成文的法律文件外，还有基本的国际法原则。严音莉认为有 3 个，分别是预警原则、加强国际合作与跨界合作原则及信息公开和公众参与原则。[138]

3. 防范外来物种入侵的国家措施

大会决议“鼓励各国批准或加入有关保护和保全海洋环境及其海洋生物资源，防止引进有害水生物、病原体和各种来源海洋污染及其他形式的实际退化的国际协定以及规定赔偿海洋污染造成的损害的协定，并采取与《联合国海洋法公约》一致的必要措施，以执行和实施这些协定中的规则”。并鼓励各国及有关组织和机构协助国际海事组织，制订国际措施以尽量减少“因水中生物附着在船体上而造成的蔓延性水生物种迁移”。[139]

王艺认为，我国在防范外来物种入侵的过程中要注意的问题有很多，例如如何防止在国际环境中受到跨界活动的损害、如何尽量避免引起国家责任以及如何追究责任国的责任等方面的制度建设还须加强。首先要端正立法目的，其次应制定专门性的外来物种防治法，对现有法规进行修改。同时，要建立统一的监督管理体制，进一步明确各部门的权限划分和相应的职责。第三，积极开展国际合作。一方面，我国的法律规范应与国际公约接轨；另一方面要加强与周边国家以及主要交往国家的合作，建立共同防范机制。[140]

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135 严音莉：《外来物种入侵的国际法问题探析》，载于《安徽电子信息职业技术学院学报》2008 年第 4 期，第 80 页。
136 管松：《〈控制和管理船舶压载水和沉积物国际公约〉研究》，载于《中国海洋法学评论》2008 年第 1 期，第 84~96 页。
137 万霞：《跨界损害责任制度的新发展》，载于《当代法学》2008 年第 1 期，第 121 页。
138 严音莉：《外来物种入侵的国际法问题探析》，载于《安徽电子信息职业技术学院学报》2008 年第 4 期，第 81 页。
139 联合国第 62 届会议决议，A/RES/62/215。
140 王艺：《跨国界环境损害国家责任——外来物种入侵承责问题研究》，载于《北方法学》2008 年第 3 期，第 155 页。

严音莉认为，我国在防范外来物种入侵问题时首先要确立正确的立法指导思想及立法目的，把目前只片面考虑短期和局部的经济发展转为以可持续发展作为立法指导思想。其次，应构建更为科学可行的监督管理体制，实行统一监督管理与部门分工负责相结合、中央监管与地方监管相结合的原则，避免部门之间出现重复、交叉或空缺。再次，应构建与完善相关制度，主要有环境风险评估制度，外来物种引进许可证制度和出口国出口证制度，外来入侵物种名录制度以及跟踪监测、早期预警和快速反应制度。[141]

（二）全球气候变化对海洋生物多样性的影响

1. 气候变化引发珊瑚礁白化

2008年是第2届国际珊瑚礁年。海洋科学家们认为，珊瑚礁白化主要是由全球气候变暖引起海水温度上升造成的。珊瑚礁白化的发生，有可能给海洋生态系统带来毁灭性的后果。李纪云博士认为，气候变化及海平面上升将导致海岸带生态系统及人类居住和工业风险增加。88％的亚洲珊瑚礁将在未来30年内消失，海岸带区域，特别是南亚、东亚及东南亚重污染区域将有最严重的洪涝危险。[142]

珊瑚礁白化是造礁石珊瑚对海洋升温反应的集中表现，影响因素主要是沉积物污染、核三厂的温排水和藻类覆盖。目前，中国濒危物种科学委员会已将珊瑚列入第二类濒危动物以予保护。邹仁林认为，首先应从立法上保护珊瑚礁。其次，通过申请基金在海南岛进行恢复珊瑚生态系统的试验研究，采用人工移植石珊瑚的方法加速珊瑚生态系统的恢复。[143]

大会决议则“重申支持国际珊瑚礁倡议，注意到2007年4月22日至24日在东京举行的国际珊瑚礁倡议大会和2008年7月将在美利坚合众国劳德代尔堡举行的第十一次国际珊瑚礁专题讨论会，支持按照《关于海洋和沿海生物多样性的雅加达任务规定》和与珊瑚礁有关的海洋和沿海生物多样性扩展工作计划开展的工作……”[144]

2. 海洋酸化问题

温室气体还导致大气中的二氧化碳大量累积，从而令全球海洋快速酸化。海洋酸化不仅影响珊瑚礁，还会影响鱼苗、幼鱼、植物以及那些利用碳酸钙来构造外

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141 严音莉:《外来物种入侵的国际法问题探析》，载于《安徽电子信息职业技术学院学报》2008年第4期，第82页。

142 李纪云:《海洋周:促进海洋生态文明建设论坛》，材料来自2008厦门国际海洋周会议。

143 邹仁林:《中国珊瑚礁的现状与保护对策》，下载于 http://www.brim.ac.cn/index.asp，2009年3月30日。

144 联合国第62届会议决议，A/RES/62/215。

壳的动物。[145]

大会决议认为，尽管尚无记载认定已观察到的海洋酸化对海洋生物圈产生影响，但海洋的逐渐酸化预期会对海洋贝壳生成生物及其寄生物种产生不利影响。为此鼓励各国紧急对海洋酸化进行进一步研究，特别是执行观察和测量方案。[146]

希望各国加紧努力，根据《联合国气候变化框架公约》所载原则减少温室气体的排放，以便减少和应对气候变化预计对海洋环境和海洋生物多样性的不利影响。

3. 气候变化的国际法律规制

这方面较有影响力的国际公约主要有《联合国气候变化框架公约》和《京都议定书》（以下简称"《议定书》"）。《联合国气候变化框架公约》于 1992 年 5 月 22 日达成，是世界上第一个为全面控制二氧化碳等温室气体排放以应对气候变化的国际公约，也是国际社会在对付气候变化问题上进行国际合作的一个基本框架。而作为公约第一个附加协议的《议定书》，则建立了旨在减排温室气体的 3 个灵活合作机制，即清洁发展机制、国际排放贸易机制和联合履行机制。[147]

以清洁发展机制为例，《议定书》指出："清洁发展机制的目的是协助未列入附件一的缔约方实现可持续发展和有益于《联合国气候变化框架公约》的最终目标，并协助附件一所列缔约方实现遵守第 3 条规定的其量化排放限制和减少排放的承诺。"[148] 依清洁发展机制："(a) 未列入附件一的缔约方将获益于产生经证明的减少排放的项目活动；(b) 附件一所列缔约方可利用通过此种项目活动获得的经证明的减少排放，促进遵守由作为本议定书缔约方会议的《联合国气候变化框架公约》缔约方会议确定的依第 3 条规定的其量化的限制和减少排放的承诺之一部分。"[149] 即，通过这一机制的实施，发达国家缔约方通过提供资金和技术的方式与发展中国家进行合作，实施具有温室气体减排效果的项目，用比较低廉的成本获得温室气体减排量，以抵消其部分减排义务。而另一方面，发展中国家也可以通过这种合作获得资金和技术，是一种国际合作的"双赢"机制。[150]

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145 《2008 国际珊瑚礁年——关注地球、关注海洋、关注珊瑚白化》，下载于 http://blog.worlddiy.net/index.php/36108/viewspace-27963.html，2009 年 3 月 30 日。

146 联合国第 62 届会议决议，A/RES/62/215。

147 杨华：《合作与牵制：气候变化的国际法律机制及其应对》，载于《河北法学》2008 年第 5 期，第 29 页。

148 《京都议定书》第 12 条第 2 款。

149 《京都议定书》第 12 条第 3 款。

150 《我国成为实现〈京都议定书〉清洁发展机制减排量最多国家》，下载于 http://news.xinhuanet.com/newscenter/2008-02/29/content_7694644.htm，2009 年 3 月 30 日。

图 1 京都议定书 [151]

值得关注的是，在气候变化和温室气体减排方面的谈判是一个合作和牵制的过程。杨华在《合作与牵制：气候变化的国际法律机制及其应对》一文中，具体分析了合作的必然性、必要性、表现、成果，以及牵制的原因、表现、影响等。并得出，牵制的集中体现即共同和有区别的责任。

海洋生物多样性保护是人类社会面临的一个新问题。如何养护和可持续利用海洋生物多样性因此也为各国所重视。赵伟在其《养护和可持续利用海洋生物多样性的国际法律框架》一文中就中国目前的实际情况，从法律和科技两方面提出了一些建议。从法律的角度说，中国应积极参与国际立法进程，并切实履行国际义务。从科技的角度说，中国应通过不断加强海洋科学的研究，提高技术水平，在遵守国际义务、不危害海洋生物多样性的同时，获得更多的可开发和利用的海洋利益。[152]

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151 《京都议定书》，下载于 http://news.xinhuanet.com/ziliao/2002-09/03/content_548525.htm，2009 年 3 月 30 日。

152 赵伟：《养护和可持续利用海洋生物多样性的国际法律框架》，载于《中国海洋大学学报（社会科学版）》2008 年第 1 期，第 9 页。

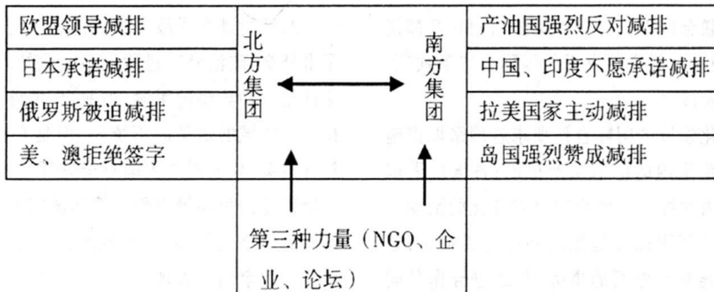

图 2　国际经济集团利益纷争[153]

九、海上执法与海洋军事运用

2008 年海上执法和海洋军事力量运用方面的研究成果主要围绕海上执法、海上安全、海上权益保护等问题展开。

（一）海上执法

1. 登临权和紧追权

关于登临权，张立锋先生认为作为国际海洋法赋予各国行使公海普遍管辖权的一种主要方式，登临权来自《联合国海洋法公约》的有关规定，但作为执法主体的军舰等毕竟属于某一主权国家，其行为需要有国内立法依据。中国当前的海洋法体系中没有登临权的相关规定，建议将来在相关立法中依据《联合国海洋法公约》的精神，对公海登临权行使的具体程序、行使登临权时是否可以使用武力、登临权行使不当的国家责任等问题明确规定，以便中国军舰更加有理有力地对公海上的嫌疑船舶行使登临权力。[154]

紧追权的应用在海洋执法实践中是一种较为极端的执法形式，中国海监在我国管辖海域的执法中还未曾尝试，但必须清醒地认识到，伴随着海上周边态势的日趋复杂化和海洋权益斗争的逐步深入，紧追权这一强力执法手段的应用将不可避免，在必要的情况下准确、及时、有效地行使紧追权对维护国家的核心利益至关重要。吴强、赵胜汝以国际法和国内法对紧追权的规定为依据，结合中国海监的职能和执法实践，指出中国海监行使紧追权须重视的问题包括：针对中国海监海洋权益维护的主体职能给予一次性授权或建立应急条件下的紧急授权机制；立法机

153　杨华：《合作与牵制：气候变化的国际法律机制及其应对》，载于《河北法学》2008 年第 5 期，第 30 页。
154　张立锋：《关于中国公海登临权的立法思考》，载于《河北学刊》2008 年第 4 期，第 166~168 页。

关根据我国执法实践和维护海洋权益的需要，按照《联合国海洋法公约》和国际习惯法，尽快着手开展紧追权立法的相关工作，至少应制定与《领海及毗连区法》、《专属经济区和大陆架法》相配套的实施细则，对紧追权的法律要件作明确、完整、统一、系统的规定，以适应海洋执法的需要；高度重视法理和理论研究，根据《日内瓦公海公约》、《联合国海洋法公约》对紧追权的规定，从实施紧追权的各个环节、各个层次、不同角度进行全方位的法理研究和分析，形成完备的理论体系；尽快加强海监队伍的能力建设，落实装备能够对抗外方船舶武力威胁的海监船和配备适合海上执法需要的武器装备的工作。[155]

2. 海上执法体制

张宝晨先生通过对韩国、俄罗斯、加拿大等国海洋管理和海上执法机构的研究，揭示了海洋大国海洋管理与海上执法机构体制的一般规律：世界各国的海洋管理与海上执法体制，大致分为多部门管海与分散执法、多部门管海与相对集中执法和海洋管理与海上执法职能都相对集中这 3 种模式；海洋大国都没有建立绝对统一的海上执法机构体制；主要职能和执法业务工作量决定了履行相对集中执法权的海上执法机构的隶属关系。文章最后阐述了我国应加强海洋管理和海上执法、建立高层涉海协调机制和整合海上执法资源的重要性。张宝晨先生认为研究我国海上执法机构体制，既不能简单地谈“统一”，也不能永远坚持机构林立和抱残守缺，关键在于认清海洋大国海上执法机构体制的基本规律，应从国情出发建立适应我国社会经济发展和海洋大国地位的海上执法体系。[156]

周立波先生认为海洋行政执法协调机制能够有效地促进各涉海行政部门之间在执法活动中的沟通和合作，通过协同目标、统筹规划和决策以及充分的信息交流和协调，避免各部门间矛盾的产生；海洋行政执法协调机制能够有效解决“执法盲点”，迅速提高海上执法力度；海洋行政执法协调机制以会议制作为其开展活动的主要方式，具有成本低、灵活性强的特性，该机制可以长期有效地实施，也可以作为海洋行政体制改革的过渡。他主张为保障海洋行政执法协调机制有效运行，应建立以下制度：海洋工作协调会议制度、海上联合执法制度、涉海案件移交和协查制度、海洋行政执法争议协调制度、海洋行政执法信息综合管理制度，以及海洋行政执法协调工作的监督制度和奖惩制度。[157]

何忠龙、任兴平、冯永利认为当前我国施行的是以行业管理为主的分散性海上执法体制，这种执法体制存在着执法成本高、执法效率低、装备重复建设和难以

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155 吴强、赵胜汝：《中国海监行使紧追权有关问题的思考》，载于《海洋开发与管理》2008 年 10 期，第 96~104 页。

156 张宝晨：《海洋大国海上执法机构体制的基本规律与启示》，载于《中国海事》2008 年第 4 期，第 23~27 页。

157 周立波：《浅论海洋行政执法协调机制若干问题》，载于《海洋开发与管理》2008 年第 4 期，第 15~19 页。

开展国际间交流与合作等弊端。对我国管辖海域实施综合执法，可以有效地克服现行海上执法中存在的问题，提高我国对海洋国土的管控能力。并指出在我国全面实施海上综合执法，主要应做好以下 4 个方面的工作：统一我国海上执法队伍，完善海洋法律法规，发展大型巡逻舰艇执法装备以及加大人才教育培训力度。[158]

（二）海上安全

1. 我国海上安全战略

“9•11”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，扩充海洋势力。面对新的海上安全形势，史克功先生认为我国应积极完善海上安全战略部署。具体可以通过以下途径展开：对海洋安全进行全面评估，查找薄弱环节；完善海上安全法律框架，奠定法律基础；完善海上安全机构整合，统一海上安全执法权；积极参与国际海洋事务，争得海洋话语权。[159] 张莉女士则设计了维护我国海洋国土安全的基本思路：正确处理民族利益与意识形态的关系，正确处理主权归属与搁置争议、共同开发的关系，正确处理和平方式与武力解决的关系，正确处理经济建设与海洋国防建设的关系。[160]

2. 海运反恐与海盗问题应对

海上恐怖主义直接威胁着国际海运业的安全。张丽娜女士着重针对我国海运安全制度建设中的海上反恐问题进行了研究。她指出海上恐怖主义是具有政治目的的海上恐怖组织或海上恐怖分子以暴力手段从事危害海洋安全，危害船舶以及船上财产和人命安全，危害港口设施安全的恐怖活动。在海运反恐立法方面，国际海事组织、世界海关组织、国际劳工组织等的反恐国际安排具有一定的代表性，构成了国际海运安全制度的主要内容。最后提出了我国海运安全制度的应对措施：积极进行国际合作和重构海运反恐的立法格局。[161]

在全球海盗和武装劫船犯罪问题应对上，杨帆先生认为，当前世界范围内的海盗和武装劫船犯罪形势依然严峻，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

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158 何忠龙、任兴平、冯永利：《我国海上综合执法的特点及对策》，载于《海洋开发与管理》2008 年 1 期，第 100~102 页。

159 史克功：《海上安全形势变化对海洋法秩序的影响》，载于《中国海洋法学评论》2008 年第 2 期，第 34~47 页。

160 张莉：《海洋国土的特征及中国海上安全问题》，载于《中国海洋大学学报（社会科学版）》2008 年第 4 期，第 15~17 页。

161 张丽娜：《海上反恐与国际海运安全制度研究》，载于《河北法学》2008 年第 2 期，第 148~152 页。

和武装劫船问题，但多集中于航运、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来入手，彻底改变海盗和武装劫船产生的土壤。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行为；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。[162]

3. 南海安全与区域开发

南海地区不仅具有重要的战略地位，而且是世界上最繁忙的国际航道之一，其安全正面临着海盗与恐怖分子的威胁。李金明先生借助详尽的案例有力地揭示了近年来频繁的海盗袭击和恐怖主义威胁已经严重影响了南海地区安全的事实。他认为随着国际海事局对海盗采用了较宽的定义，使南海周边的一些群岛国家打击海盗的范围加大，而这些群岛国家本身执行海洋管理的能力有限，唯有依赖更多的地区和国际合作。最近几年南海地区海盗袭击次数逐渐减少的事实证明，通过密切的国际合作，能够更加有效地打击海盗袭击和恐怖主义，确保南海地区的航行安全。[163] 王胜、黄丹英认为“9•11”事件后，由领土和海洋权益纠纷引发南海冲突的可能性进一步降低，南海的稳定局势是可以预测的，但是南海的非传统安全问题却日益突出，任何国家都不可能凭借一己之力妥善地解决复杂的非传统安全问题，南海地区非传统海上安全威胁主要源于周边沿岸国家的海洋污染、猖獗的海盗行为、能源安全利益竞争以及过度的海洋捕捞，唯有通过双边和区域合作才能遏制和消除非传统安全的威胁。[164]

4. 海上安全通道建设

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、恐怖行动、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。亚太地区所有海上通道都具有重要的战略意义，可以说是东亚各国的“海上生命线”。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”。吴春庆先生认为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是必行之路，而关于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。他从亚太地区海上通道相关问题的界定入手，在此基础上论及

162　杨帆：《全球海盗和武装劫船犯罪问题及其应对》，载于《中国海洋法学评论》2008 年第 2 期，第 12~33 页。

163　李金明：《南海地区安全：打击海盗与反恐合作》，载于《南洋问题研究》2008 年第 3 期，第 9~15 页。

164　王胜、黄丹英：《非传统安全与南海区域开发合作》，载于《地域研究与开发》2008 年第 2 期，第 25~29 页。

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的法律框架的必要性，并对法律框架的特征、原则、内容、组织等方面提出一点设想，总结构建法律框架的积极和消极因素，展望亚太地区海上通道安全合作法律框架的前景。最后进一步指出在构建合作机制与法律框架的过程中，中国应该发挥提倡、促进、协调和维护等作用。[165]

（三）海洋权益的维护

在如何维护中国海洋权益问题上，学者普遍认为应该继续完善相关立法和管理体制。[166] 许维安先生着重分析了我国维护海洋权益的法律制度在立法、守法、执法和司法等方面存在的问题，并从法治建设的角度提出完善我国海洋权益保护法律制度的建议。[167] 于淑文先生建议应该组建国家海洋事务管理局，独立行使海洋开发与海洋安全维护等的综合管理职能。[168] 在加强海军建设提高我国海防能力方面，他指出应加大海上军事力量的投入，实现海空军的现代化，利用高科技缩小空间距离，有效保护我国远海岛屿的主权及资源开发与经济发展。[169] 陈万平主张应加强国际合作，建立国际范围内的海洋安全组织体系；应加强对争议海域的实际控制，充分利用法律、政治、经济、外交、科研、文化、旅游等手段强化中国在争议海域的实际存在。[170]

（四）防扩散安全协议

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及相关物资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。杨泽伟教授简要介绍了防扩散安全倡议的缘起和实践，指出《〈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。然后重点分析了防扩散安全倡议的实践活动对现代

165 吴春庆：《构建亚太地区海上通道安全合作的法律框架》，载于《中国海洋法学评论》2008 年第 2 期，第 48~77 页。
166 于淑文：《关于加强海洋安全和海洋权益保护的思考》，载于《行政与法》2008 年第 8 期，第 71 页。
167 许维安：《略论维护我国海洋权益的法治建设》，载于《广东海洋大学学报》2008 年第 5 期，第 7~10 页。
168 于淑文：《关于加强海洋安全和海洋权益保护的思考》，载于《行政与法》2008 年第 8 期，第 71~72 页。
169 于淑文：《关于加强海洋安全和海洋权益保护的思考》，载于《行政与法》2008 年第 8 期，第 71 页。
170 陈万平：《维护我国海洋权益的策略思考》，载于《中国国情国力》2008 年第 7 期，第 30~33 页。

国际法发展产生的重要影响：侵犯了无害通过权，破坏了公海航行自由原则，违背了禁止以武力相威胁或使用武力原则和国家主权等国际法基本原则。最后指出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。[171] 刘宏松先生则从防扩散安全倡议作为非正式国际机制的形式特征出发，透视其局限和困境。他首先依据该倡议的协议文本对其非正式性进行了判定，然后从机制遵守行为的非约束性、机制规定的模糊性、机制目标与成员国范围的不相合性以及机制的非正式安排对普遍性国际规范扩展的制约这 4 个方面，对非正式机制的局限性展开分析。他主张为扩大该倡议对国际防扩散治理的正面作用，一种可行的做法是对其决策程序进行制度化调整，建立拦截决策体制。[172]

（五）军事测量

专属经济区“军事测量”活动是沿岸国与非沿岸国围绕海洋军事利用及科学研究活动引发争论、争端的焦点问题。非沿岸国主张“军事测量”与水文测量一样都属于行使“航行”和“飞越自由权”，别国无权干涉。沿岸国认为“军事测量”属于“海洋科学研究”，必须得到沿岸国的批准并接受管辖。万彬华先生认为专属经济区“军事测量”属于 1982 年《公约》规定的“海洋科学研究”范畴，同时也是军事利用活动。因此，非沿岸国在沿岸国专属经济区内进行的任何形式的“海洋科学研究”以及“军事测量”活动，必须得到沿岸国同意和接受管辖，出于“和平目的”，适当顾及沿岸国的合法权益，所得信息和情报应与沿岸国共享，禁止一切非法活动。[173]

十、海域使用权

（一）海域使用权与抵押权

海域使用权应属一种财产（权利），既属财产，则有利用其交换价值以为融资的需要，在物权价值化趋势日益明显的背景下，利用海域使用权的交换价值作为融资担保工具的需要亦日益紧迫。

中国人民大学法学院的高圣平认为，就海域使用权而言，若设定质权，在移

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171 杨泽伟：《防扩散安全协议：国际法的挑战与影响》，载于《中国海洋法学评论》2008 年第 2 期，第 1~11 页。

172 刘宏松：《防扩散安全倡议的局限与困境：非正式国际机制的视角》，载于《世界经济与政治论坛》2008 年第 6 期，第 59~65 页。

173 万彬华：《论专属经济区“军事测量”的法律问题》，载于《海洋开发与管理》2008 年第 2 期，第 75~78 页。

转权利的“占有”之后，海域使用权人已无权行使海域使用权，债权人亦无法行使海域使用权，此际海域使用权即成为沉淀财产，未能达到该权利的设定目的。海域使用权人在海域使用权之上为债权人设定担保之后，仍可行使海域使用权以取得收益，达到通过设定担保促进生产，并进而活跃经济、增进社会财富的目标。准此以解，高圣平认为海域使用权之上应当设定抵押权，而不是质权。[174]

在探讨完海域使用权上应设定抵押权而不是质权后，高圣平继而对海域使用权的抵押权设立进行了阐述：我国《物权法》对建设用地使用权抵押权、土地承包经营权抵押权均采登记生效主义，海域使用权作为与建设用地使用权、土地承包经营权同类的用益权利，本着同一事件作同一处理的法律适用原理，应对海域使用权抵押权作同一处理，即亦应从登记之日起生效。高圣平认为从法学方法论方面讲，这实际上涉及类推适用的问题：就物权法定主义，在类型强制领域不得类推适用，但在类型固定方面可以类推适用，即物权的内容只要不违反物权本身的性质及强制性规定，在没有法律规定或出现法律漏洞时，就可以类推适用。准此以解，海域使用权抵押权的公示效力即可类推适用建设用地使用权抵押权和土地承包经营权抵押权的规定，即未经登记，海域使用权抵押权不设立。[175]

继明确了海域使用权抵押权应经登记生效后，高圣平进而对其登记制度进行了探讨。高圣平认为国家海洋局 2006 年 10 月印发的《海域使用权登记办法》将海域使用权抵押权登记放在“初始登记”[176] 一节中予以规定，颇值商榷。由于我国海域属于国家所有，[177] 而国家对海域的所有权无须登记，[178] 因此，海域使用权的设立登记即具有初始登记的地位。但海域使用权抵押权属于海域使用权之上所设定的权利负担，其登记在性质上属于海域使用权抵押权的设立登记，属于海域使用权上的他项权利登记，放在“初始登记”一节显然不大合适，应参照我国的《土地登记规则》和《城镇房屋权属登记管理办法》来对海域使用权抵押权登记的归属作重新考量。[179]

对于登记机构的赔偿责任，《物权法》第 21 条规定了登记错误的赔偿责任，即“当事人提供虚假材料申请登记，给他人造成损害的，应当承担赔偿责任”，“因登记错误，给他人造成损害的，登记机构应当承担赔偿责任，登记机构赔偿后，可

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174 高圣平：《〈物权法〉背景下的海域使用权抵押制度——兼及物权法上的类推适用》，载于《海洋开发与管理》2008 年第 2 期，第 3 页。

175 高圣平：《〈物权法〉背景下的海域使用权抵押制度——兼及物权法上的类推适用》，载于《海洋开发与管理》2008 年第 2 期，第 4~5 页。

176 通说认为，“初始登记”是就某一不动产首次进行的登记，它是不动产权利登记的基础和开端，是其后进行的一系列登记的起始点。

177 《物权法》第 46 条。

178 《物权法》第 9 条第 2 款。

179 高圣平：《〈物权法〉背景下的海域使用权抵押制度——兼及物权法上的类推适用》，载于《海洋开发与管理》2008 年第 2 期，第 5 页。

以向造成登记错误的人追偿”。高圣平认为这一规定比较原则，还有待具体化，这是在修改《海域使用权登记办法》时应当具体规定的。他认为《物权法》的该条款确定了 2 种责任，一是如果登记申请人弄虚作假，提供虚假材料申请登记给他人造成了损害，首先应由登记申请人对他人的损害进行赔偿；二是追究登记申请人的责任并不能免除登记机关的责任，如果登记机构没有尽到适当的审查义务，也要对第三人的损害承担责任。第 1 款属于过错责任，第 2 款属于严格责任。除了第 1 款规定的情况外，登记机关都应该赔偿，包括无正当理由拖延登记时间、应当办理登记而无正当理由拒绝办理登记、登记簿与权属证书不一致，登记机构对权属证书拒不更正、办理异议登记后又办理变更登记等，都属于登记错误，应当适用严格责任。至于登记机构赔偿责任的性质是民事赔偿责任还是国家赔偿责任，《物权法》对此并没有作出明确规定。一方面，我国目前的登记机构虽然是事业单位，但其人员基本上还是公务员编制，依靠财政拨款，而《物权法》第 22 条又规定了不动产登记的收费原则，这使得民事赔偿根本无法实现。但另一方面，如果实行国家赔偿，囿于国家赔偿范围的限制，受害人的损失又得不到完全的补救。高圣平建议可借鉴德国和瑞士的“登记赔偿金制度”和阿尔巴尼亚的“限额赔偿制度”。[180]

对于海域使用权抵押权的实现问题，高圣平亦作了相关的探讨。作为抵押权的一种，在债务人不履行到期债务或者发生当事人约定的实现抵押权的情形时，自有海域使用权抵押权实现的可能。我国《物权法》第 195 条规定：“债务人不履行到期债务或者发生当事人约定的实现抵押权的情形，抵押权人可以与抵押人协议以抵押财产折价或者以拍卖、变卖该抵押财产所得的价款优先受偿。协议损害其他债权人利益的，其他债权人可以在知道或者应当知道撤销事由之日起一年内请求人民法院撤销该协议。抵押权人与抵押人未就抵押权实现方式达成协议的，抵押权人可以请求人民法院拍卖、变卖抵押财产。抵押财产折价或者变卖的，应当参照市场价格。”但高圣平认为海域使用权的特殊性决定了海域使用权抵押权实现的特殊性，实践中普遍存在海域使用权抵押权实现难的问题，并就其进行了阐述。[181]

第一，海域使用权人与海域使用权抵押权人协议以海域使用权折价时，应当符合《海域使用管理法》和《海域使用权管理规定》规定的海域使用权转让的条件，不能自由转让。我国对海域使用权的转让作了严格的限制，如转让海域使用权应当达到法定的条件，即：(1) 开发利用海域满一年；(2) 不改变海域用途；(3) 已缴清海域使用金；(4) 除海域使用金以外，实际投资已达计划投资总额 20％以上；(5) 原海域使用权人无违法用海行为，或违法用海行为已依法处理。转让海域使用权

180 高圣平：《〈物权法〉背景下的海域使用权抵押制度——兼及物权法上的类推适用》，载于《海洋开发与管理》2008 年第 2 期，第 5~6 页。

181 高圣平：《〈物权法〉背景下的海域使用权抵押制度——兼及物权法上的类推适用》，载于《海洋开发与管理》2008 年第 2 期，第 6 页。

还应报经原批准用海的人民政府海洋行政主管部门批准。高圣平认为如果在海域使用抵押权可得实现时，并未达到上述转让条件，当事人之间达成的实现海域使用权抵押权的协议的效力如何认定，不无疑问。[182]

第二，海域使用权抵押权人是否可以直接向人民法院申请执行？通说认为，作为执行根据的法律文书应当符合以下条件：(1) 实质要件，即必须表明法律文书已经生效并具有执行力，必须指明债务人应为特定给付以及给付的具体内容，给付的内容必须合法且适合于执行；(2) 形式要件，即必须是公文书，必须指明债权人和债务人，必须表明应执行的事项。高圣平认为姑且将实质要件搁置不论，由于担保合同不是公文书，所以其亦无从作为执行根据。但高圣平继而认为对于海域使用权抵押权的实现，抵押权人原则上可以直接申请法院作出许可拍卖、变卖海域使用权的裁定，理由是：抵押权作为一种物权，权利人可直接对物的价值加以支配并排除其他一切人的干涉，而不需借助义务人的给付行为。抵押权人请求法院拍卖海域使用权以实现其抵押权，正是将物权转化为法院对海域使用权实施的强制执行行为，仍然属于抵押权人依海域使用权价值直接取偿的一种表现，而无需依靠义务人来实施某种行为。法院作出的许可拍卖、出卖海域使用权的裁定即为执行根据。[183]

（二）海域使用权与物权

中国人民大学的王利明教授认为我国《物权法》的第 122 条确认了海域使用权制度，该权利属于物权的范畴，但又不同于一般的用益物权，在我国物权体系中应当属于准用益物权。海域使用权与养殖权在内容上有一定的交叉，但二者毕竟是 2 种不同性质的准用益物权；同时海域使用权与在特定的海域内开采矿产的采矿权也有密切的联系。王利明认为海域使用权之所以尚不能完全等同于用益物权，主要表现在如下几方面：(1) 权利的取得方式不同；(2) 权利客体不同；(3) 权利内容不同；(4) 权利的行使方式不同；(5) 法律适用不同。[184]

山东师范大学政治法律学院的吴春岐通过法理分析，论证了作为海域使用权客体的海域是能够特定化的不动产，其性质为集合物。吴春岐认为海域使用权在我国物权法用益物权体系中拥有了一席之地，标志着传统的物权法理论已经出现了一些新的变化和发展：第一，不动产的范围扩大，由传统的土地逐渐发展到海域、

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182 高圣平：《〈物权法〉背景下的海域使用权抵押制度——兼及物权法上的类推适用》，载于《海洋开发与管理》2008 年第 2 期，第 6 页。

183 高圣平：《〈物权法〉背景下的海域使用权抵押制度——兼及物权法上的类推适用》，载于《海洋开发与管理》2008 年第 2 期，第 6~8 页。

184 王利明：《试论〈物权法〉中海域使用权的性质和特点》，载于《社会科学研究》2008 年第 4 期，第 94~98 页。

空间等新类型的物;第二,集合物不仅可以作为担保物权的客体,也应当可以作为用益物权的客体;第三,用益物权是一个开放的体系,其随着社会的发展,不断进行扬弃。[185]

对于性质是集合物的海域作为用益物权的客体是否违反一物一权原则,吴春岐进行了探讨。一物一权原则是指一物之上不能成立2个所有权或者几个相互冲突的他物权。我妻荣教授与有泉亨教授曾认为:“物的一部分和物的集合物,不能作为一个物权的客体,这是一物一权主义的原则。”[186]但实际上,随着社会的发展,一物一权原则已经发生了变化,从最初的一物之上不能并存2个所有权发展为一物之上的物权不能发生冲突。[187]例如,为了充分发挥抵押物的价值,在抵押物上设定抵押权之后,对于超出抵押物价值的部分还可以再设定抵押权,这样有利于发挥物的最大效用。对于海域这种不动产来说,由于各个部分所具有的独立的使用价值,当在其中一部分设定海域使用权以后,如果在后的权利人申请的海域使用权目的和用途并不与在先的权利相冲突,应当允许在后的海域使用权的设定,这种分层设定海域使用权的方法有利于实现对海域的充分利用。当然如果2个海域使用权并不相容,不应同时设定。例如,对于同一海域,如果某一权利人已经取得旅游娱乐用途的海域使用权,在后如果有人申请以倾倒排污为目的的海域使用权,显然不能允许此种海域使用权设定。可见,在集合物作为用益物权客体的情况下,判断是否可以设定2个以上的用益物权需要借助事实上的权利目的和用途。当2个或2个以上的权利之间并不发生冲突时,为了实现对集合物的价值的利用,应当允许其并存。这种2个以上的用益物权并存于同一集合物之上的情形并不违反一物一权原则。[188]

《海域使用管理法》和《物权法》确立了海域使用权的物权性质,因此海域使用权具有一般物权的效力,同时海域使用权作为一种新型的用益物权,其效力又有特殊之处。中国海洋大学法政学院的刘惠荣和许枫认为从物权角度来说,海域使用权的效力基础是海域使用权的用益物权性质,而其效力内容包括海域使用权的优先效力、排他效力和妨害排除效力。通过对海域使用权效力的理解和分析,刘惠荣和许枫认为海域使用法律制度可以从突出海域使用权的物权性、建立海域区分使用制度和加强海域使用权宏观保护等3方面加以完善。[189]

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185 吴春岐:《从海域使用权制度透视物权法理论的新发展》,载于《山东师范大学学报(人文社会科学版)》2008年第2期,第146页。

186 田山辉明著,陆庆胜译:《物权法(增订本)》,北京:法律出版社2001年版,第12页。

187 吴春岐:《从海域使用权制度透视物权法理论的新发展》,载于《山东师范大学学报(人文社会科学版)》2008年第2期,第148页。

188 吴春岐:《从海域使用权制度透视物权法理论的新发展》,载于《山东师范大学学报(人文社会科学版)》2008年第2期,第148~149页。

189 刘惠荣、许枫:《海域使用权的效力探析》,载于《海洋开发与管理》2008年第7期,第55页。

（三）海域使用权与土地使用权

广西国土资源规划院的宁德对实践中将海域使用权更改为土地使用的问题进行了总结和研究。宁德首先对沿海各省区市的做法进行了总结：(1) 海域使用权变更登记为土地使用权时，不得收取土地出让金，如辽宁省；(2) 海域使用权变更登记为土地使用权时，不收取土地出让金，但转让围垦填海形成的土地使用权，须经批准并补缴土地出让金，如江苏省；(3) 海域使用权变更登记为土地使用权时，部分情形不收取土地出让金，部分情形须补缴土地出让金，如福建省；(4) 海域使用权变更登记为土地使用权时，须缴纳土地出让金，如海南省；(5) 海域使用权变更登记为土地使用权时，重新办理用地审批手续，视不同情况决定是否缴纳土地出让金，如广东省。而除上述 5 个省对海域使用权变更为土地使用权问题作出了相应的规定外，山东、天津、河北、上海、浙江、广西这 6 个沿海地区均没有作出相应的规定。宁德将沿海各省区市在实际工作中主要遇到的问题总结为以下 3 点：(1) 是否按土地管理的有关规定重新审批；(2) 是否缴纳土地出让金；(3) 不知道怎样办理土地登记和换发国有土地使用权证书。[190]

对于是否按土地管理的有关规定重新审批，宁德从土地管理法律法规、行政行为的性质以及行政许可的法律原理这 3 方面进行了分析，得出的结论是：不需要也不能重新审批。[191]

宁德亦认为补缴土地出让金也是不合适的，补缴差价的理由不成立：填海造地是具有很大风险的，填海区域的海水深度、填海范围的地质情况、海潮涨退等问题都具有不可预见性，即使其代价比相邻土地低，但由于其风险大、投资开发时间长，权利人在填海造地中获得的增值收益也是合法、合理的，是符合市场规律的。宁德认为收取差价的做法相当于政府掠夺了合法权益人的风险收益，不符合市场规律。宁德还认为海域使用权人缴纳海域使用金，目的是以国家规定的代价获得法律规定年限的海域使用权，并经过填海用于项目建设，如果要收取差价，实际上就是不承认海域使用权人依法拥有用海的权利，而只承认其是“工程承包者”而已。[192]

对于海域使用权证书换发国有土地使用权证书的具体做法，宁德从按土地变更登记申请办理、填海项目竣工后应当申请办理竣工验收、申请土地登记的要求

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190 宁德：《关于海域使用权变更为土地使用权若干问题的研究》，载于《南方国土资源》2008 年第 1 期，第 21~22 页。

191 宁德：《关于海域使用权变更为土地使用权若干问题的研究》，载于《南方国土资源》2008 年第 1 期，第 22 页。

192 宁德：《关于海域使用权变更为土地使用权若干问题的研究》，载于《南方国土资源》2008 年第 1 期，第 23 页。

和做法及土地登记确认的事项与做法这 4 个方面进行阐述。[193]

国家海洋局东海分局的张惠荣等对土地使用权与海域使用权相互转化的相关制度构建进行了阐述。(1) 建立填海工程动态监管与验收制度：海洋主管部门对于相对人的填海项目，应当建立事前、事中、事后的监管制度，重点监督、核查当事人是否按照海域论证、环评报告进行施工，有无不当污染、损害海洋环境；工程建设完毕，海洋主管部门应当及时验收，并主动做好与土地部门的工作衔接，为当事人变更相关手续提供便利。(2) 建立海洋与土地部门的信息共享与通报制度：对于填海工程，海洋部门应当定期向土地部门通报，为土地部门及时受理当事人海域使用权证、换发土地使用权证提供便利与基础。(3) 建立健全海域使用人权益保障制度：海洋行政等主管部门应当更新管理理念，拓宽服务领域，采取得力措施，着力做好用海人的权益保护工作，尽快完善用海纠纷、侵权、违法的调解、仲裁、查处制度，为海域使用权与土地使用权的相互转化提供法律保障。(4) 完善海域、土地的价值评估与市场流转制度，保证海域和土地资源开发、利用的保值和增值，推动海域与土地管理工作向纵深发展。[194]

（四）海域使用权与海洋环境损害救济

大连海事大学法学院的马得懿和中国人民大学社会与人口学院的於嘉认为，作为一种颇为新颖的用益物权，海域使用权在船舶油污损害海洋环境法律救济领域发生合理性膨胀成为一种应然。海域使用权的使用和收益功能发生异化，不仅存在着一定的实定理由，而且海域使用权权能的合理性膨胀是对传统国际法下“航行权”的一种挑战。海域使用权权能的合理性膨胀，促使船舶油污损害海洋环境基金制度得到重新塑构，预示着传统国际法某些法律制度私法化的趋势。[195]

马得懿和於嘉认为作为用益物权之一的海域使用权一向是民法体系的一个范畴，为了某种特定的法律目的，即法律出于对海洋环境油污损害的救济之目的，海域使用权权能发生了合理性膨胀，衍生出了航行权基金。海域使用权权能的合理性膨胀的理念，使得国际法上的“航行权”受到空前的挑战。马得懿和於嘉进而认为在现有法律体系下，海域使用权固然具有公法的色彩，但基本是隶属于私法概念；而航行权则基本上属于公法概念。海域使用权权能的合理性膨胀对船舶油污损害海洋环境基金制度的塑构，是私权对公法上权利的侵袭和遏制的结果。但

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193 宁德：《关于海域使用权变更为土地使用权若干问题的研究》，载于《南方国土资源》2008 年第 1 期，第 23~24 页。

194 张惠荣、施星平、高中义：《海域使用权与土地使用权相互转化中的法律问题探讨》，载于《海洋开发与管理》2008 年第 12 期，第 53 页。

195 马得懿、於嘉：《海域使用权权能的合理性膨胀：海洋环境损害救济之维》，载于《中国海洋大学学报（社会科学版）》2008 年第 4 期，第 1 页。

如从反向的视角来考察，由于国际法上公认的航行权受到了海域使用权的影响，使得航行权发生了向私权方向的嬗变，即航行权的私权化。《物权法》使得海域使用权的新颖性再一次得到基本法的强化，这为海域使用权权能的合理性膨胀奠定了法理基础。以海域使用权为根基，设计出合理膨胀的海域使用权制度，对于塑构船舶油污损害海洋环境基金制度具有实用的价值；而海域使用权权能的合理性膨胀对传统国际法上“航行权”的挑战，彰显了作为公法意义上的航行权的私法化趋势。[196]

（五）海域使用权与其他涉海权利

国家海洋局东海分局的张惠荣等对海域使用权和其他涉海权利的关系进行了分析，得出了以下结论：海域使用权与渔业、矿业、取水等权利既非针对同一物，又在其权利性质上存在本质区别，因此二者间不存在实质上的矛盾或冲突，从法学理论上讲二者并行不悖。渔业、矿业、取水等权利只能算作行业特许权，其行使若涉及用海，还须取得海域使用权。因而与前者相比，海域使用权可谓是一项基础权利。在涉海情况下，没有海域使用权，渔业、矿业、取水等权利也将缺乏一个合法载体。海域使用审批管理与其他涉海部门的许可管理各有针对，性质上并无冲突，也没有相互替代的法律要求。海洋行政主管部门是履行海域使用管理职责的职能部门，其他部门管理的用海事项，都必须依据《海域使用管理法》的规定，在依法取得使用相关海域的权利后，方可按照有关部门的审批要求予以实施。因此，在海域使用权属管理中，海洋行政管理部门应当按照全国人大环资委在《关于〈海域法〉实施检查情况的报告》中所明确提出的“管理区域的重叠，并不意味管理职能的冲突；海洋行政管理部门和水利、滩涂、矿产管理部门依据各自的法律行使管理”的要求，主动加强同其他涉海管理部门的沟通和协调，建立健全监管制度，依法管海，进一步保障和促进海洋的开发与利用。[197]

山东师范大学政治法律学院的吴春岐认为海域使用权与矿业权、渔业权的冲突是客观存在的，这将极大的损害物权主体对物权取得的期待利益。另一方面，从公法角度看这也不利于公民对政府的信赖，并最终延缓我们国家法治建设的进程。吴春岐进而认为根据物权法的基本原理，可在现行法律制度框架内采取一些具体的规则解决海域使用权与矿业权、渔业权之间的冲突：(1) 物权设定的“先来后到”原则；(2) 权利之间的利益衡量规则；(3) 程序保障规则；(4) 利益评估规则；(5) 利用现代网络技术，实现海域权利审批方面的资源共享；(6) 禁止重复收费，

196 马得懿、於嘉：《海域使用权权能的合理性膨胀：海洋环境损害救济之维》，载于《中国海洋大学学报（社会科学版）》2008 年第 4 期，第 7 页。

197 张惠荣、刘振东、施星平、杨明礼：《海域使用权与其他涉海权利分析研究》，载于《海洋开发与管理》2008 年第 11 期，第 64~68 页。

并规定相应的法律责任予以保障。吴春岐认为解决海域使用权与相关权利冲突的根本途径是"统一登记"，具体而言：(1) 实现海域使用权与相关权利的统一登记；(2) 对相关法律、行政法规进行清理，建立统一登记的法律依据；(3) 逐步建立海域使用登记的统一登记机关。[198]

十一、国际关系与国际海洋法

（一）"海权"的涵义与《联合国海洋法公约》

国际关系中的"海权"是指一种海上控制力，即海上权力或者海上力量。[199] 尹年长律师和程涛先生从《联合国海洋法公约》的角度重新解读"海权"，认为"海权"不是海上霸权，而是国家主权的自然延伸：是一种具有权利义务内容的"法权"，是国家在海洋中享有的基本权利，是一种安全权和自卫权，是主权国家的发展权。[200]

（二）国际关系与领海制度

刘中民博士从国际关系的角度分析，认为以《联合国海洋法公约》为主体的国际海洋制度是各国围绕自身权利与利益既斗争又妥协的博弈过程。传统的 3 海里规则在本质上是西方海洋强国主宰国际海洋秩序的产物，而 3 次联合国海洋法会议的召开和《联合国海洋法公约》的缔结，在本质上反映了当代国际社会围绕海洋权利的分享构建国际海洋制度的现实需要，即主张宽领海界限的国家以沿海利益为基础的结盟，与主张窄领海界限的国家以主张海洋利益为基础的结盟相对抗，构成了围绕领海宽度斗争的焦点，而发展中国家在此过程中发挥了重要作用。[201]

（三）国际关系与东海问题

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198 吴春岐：《解决海域使用权与相关用益物权冲突的具体规则和根本途径》，载于《山东警察学院学报》2008 年第 3 期，第 51~55 页。

199 张旭、张勇池：《现实主义海权理论和中国海权意识的觉醒》，载于《法制与社会》2008 年第 10 期，第 354 页。

200 尹年长、程涛：《海权的国际法释义——以〈联合国海洋法公约〉的相关规定为中心》，载于《广东海洋大学学报》2008 年第 5 期，第 1 页。

201 刘中民：《领海制度形成与发展的国际关系分析》，载于《太平洋学报》2008 年第 3 期，第 17 页。

东海划界争议问题是影响当前中日关系的重要问题之一。韩占元先生认为“搁置争议，共同开发”的原则虽然加强了我国与相关争端国家的合作，促进东亚地区的和平与发展，但是这一原则并没有彻底解决相关的领土争端甚至有纵容之嫌，现在应当对这一政策做出调整。[202] 谢晓光副教授则分析了中日海洋权益争端的国际政治原因，明确了中日在解决东海划界问题上应该遵循的国际政治基本原则，在此基础上，提出了邓小平“搁置争议，共同开发”的外交思想对我国和平解决东海争端具有重大现实意义，认为贯彻落实这一战略原则的实际应用是两国的现实选择。[203] 而蔡鹏鸿研究员认为国内外有关中日东海争议的研究大多是从法律角度分析并提出解决办法，法律是一个相对稳定的制度，一旦制定后就难以再行修改，即使存在修改的必要性和可能性，实施和完成过程也需要很长时间，从这个意义上讲，法律仅仅是一把静态的尺子。当前，在各国都可以利用国际法提出各自主张的背景下，依法划界将是一场旷日持久的谈判，想在较短时间内通过划界来解决东海问题相当困难，甚至是不可能的。为此，通过磋商和对话寻求一项临时性措施，实施“搁置争议，共同开发”不失为一个维持现状、防止局势失控的好办法。[204] 2008 年 6 月，中国外交部宣布，中日两国就东海问题达成了原则性共识。张植荣先生介绍了中日东海磋商的主要成果及其启示，指出首脑外交及日本东海政策转变等因素推动了东海磋商的进展。[205]

（四）国际关系与南海问题

李明江博士从国际关系中的“相互依存”理论出发，认为区域内国家密切的经济往来对改善地区安全环境、减少甚至消除地区冲突不无裨益。冷战后，世界上有很多地方仍有军事冲突，而南海一向被认为是世界上极不稳定的热点，虽然也有许多关于主权、渔业、海底资源勘探、环境保护等的争端，却没有经历大规模的军事冲突，各方进行的主要还是外交仗，这在经验的层面上证明了上述所说的经济与安全之间的联动关系。[206] 因此加强和东南亚各国的经济合作，对于处理南海争端有极大的意义。

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202 韩占元：《试析解决领土主权争端的有效控制原则——兼论我国的无人岛屿主权争端问题》，载于《太原师范学院学报（社会科学版）》2008 年第 2 期，第 55~57 页。

203 谢晓光：《从国际政治视角看中日东海划界问题的解决》，载于《学理论》2008 年第 6 期，第 50 页。

204 蔡鹏鸿：《中日东海争议现状与共同开发前景》，载于《现代国际关系》2008 年第 3 期，第 45 页。

205 张植荣：《中日东海磋商的阶段性成果及其启示》，载于《现代国际关系》2008 年第 11 期，第 25 页。

206 李明江著，梁春扬译：《泛北部湾合作与区域安全：关注南海》，载于《东南亚纵横》2008 年第 1 期，第 14 页。

2008 年海峡两岸海洋合作问题研讨会综述

王泽林 [*]　徐 鹏 [**]　董 琳 [***]

鉴于近年来海峡两岸关系大幅改善，两岸对共同开发管理海洋事务有着同样的关切，为促进海峡两岸共同的海洋发展利益，厦门大学海洋政策与法律中心与《中国海洋法学评论》于 2008 年 11 月 15 日至 16 日成功举办了主题为“海峡两岸海洋合作问题”的学术研讨会。

研讨会的主要议题如下：两岸在东海和南海共同开发过程中的合作机制问题；两岸共同发展与管理海洋渔业问题；两岸造船、航运交流与合作问题；两岸海上执法机构在台湾海峡的合作机制问题；两岸水下文化遗产保护合作问题。

一、两岸在东海和南海共同开发过程中的合作机制问题

2008 年 11 月 15 日上午，台湾中兴大学国际政治研究所的宋燕辉教授首先为与会专家作了题为《两岸在东海和南海共同开发油气资源的对话机制与可能的合作平台》的报告，该报告分为 4 部分：即东海油气资源现状，海峡两岸对于东海油气资源共同开发的对话机制与可能的合作平台，南海油气资源的开发现状，海峡两岸对于南海油气资源共同开发的对话机制与可能的合作平台。

报告首先对东海资源的开发历史进行了回顾。从 1961 年开始，各国就猜测在东海存在油气资源，特别是在 1973 年发生了严重的石油危机，东亚各国对东海油气资源的开发给予了极大的重视。在此背景下，中日两国在 1980 年至 1991 年间针对东海大陆架划界举行了多次会谈，但谈判未果。1992 年钓鱼岛问题争端再起，两国谈判中断。1993 年，大陆的中国海洋石油总公司（以下简称“中海油”）主动邀请台湾的中国石油公司（以下简称“台湾中油”）共同参与东海大陆架上的平湖

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和钓鱼岛区域的勘探开发，但该计划并没有实施。进入 21 世纪，随着平湖与春晓油气田的开发，再次加剧了中日两国关于东海大陆架的争议。对此，两国在 2004 年 10 月至 2007 年 12 月间举行了 11 次正式磋商，其间，两国领导人积极推动谈判并达成了一定的共识，即在互利、互惠的基础上进行对话与谈判，使东海成为和平、合作与友好之海。在双方努力下，最终于 2008 年 6 月达成了《中日东海问题原则共识》（以下简称"《原则共识》"）。《原则共识》在东海划出了面积达 2600 平方公里的区域为双方共同开发区，该区域跨越了日方单独划定的中间线，部分包含了不存在争议的归中国管辖的区域，《原则共识》欢迎日方法人依据中国涉及外资管理的法律参与春晓油气田的开发。《原则共识》表明中日两国在东海问题上达成了原则上的一致，并愿意积极合作推动相关问题的解决，以实现两国领导人达成的共识。作者指出，虽然中日双方达成《原则共识》，但下一步如何实施仍是个复杂的问题。《原则共识》中划定的共同开发区只是面积达 77 万平方公里的东海大陆架中很小的一部分，其象征意义大于实际意义。大陆方面在下一步《原则共识》的实施中应该进一步做好工作，更好地维护本国国家利益。在这其中，台湾扮演什么样的角色是一个应该被关注的问题。作者提醒大家有一点值得注意，即日本在 2008 年 10 月 31 日做出决定，其将向联合国提交一个面积极大的外大陆架界限申请。

对于第二部分，宋燕辉教授首先回顾了 2008 年 6 月份发生在钓鱼岛海域的台湾渔船联合号被日本海岸警卫队船只撞沉事件，以及由此引发的台湾与日本关于钓鱼岛主权、专属经济区和渔区的冲突，从而引起了各界的关注。然后提及马英九先生在 2008 年 6、7 月间提出的希望海峡两岸针对东海油气资源能够有一些合作，以及岛内报纸猜测两岸可能进行的油气资源合作。自 1993 年以来，两岸间交流频繁，目前双方已经建立了合作平台，即中海油与台湾中油（以海外投资石油公司的名义）之间的合作，两公司签署了《南日岛盆地协议区联合研究协议》并获双方主管部门批准。双方可以此为平台开展在东海以及钓鱼岛、台湾海峡甚至南海的油气资源合作，但其间在怎样进行合作以及协议如何签署方面还有很多值得探讨之处。作者建议，由于东海涉及中日韩三国的海域，因此应在搁置列屿主权争议、进行海洋合作与共同管理开发的政治意愿以及维护共同利益的前提下，建立东海海洋合作机制，而台湾则以中华台北的名义参与其中。在东海南半部，则由中国大陆、中国台湾和日本三方合作，可以通过大陆海协会、台湾海基会亚东关系协会以及日本交流协会三方海洋合作机制的方式进行，同时加强大陆海协会与台湾海基会的合作。关于两岸在东海钓鱼岛海域油气资源共同开发的合作机制，则可采用经济实体，即中海油与台湾中油合作开发的方式。除了前述的对话机制外，还可仿效已经实施的海峡两岸南海民间学术论坛的方式，建立海峡两岸东海民间学术论坛，甚至组建涉及国家全部海域的海峡两岸海洋资源共同开发合作民间学术论坛，并邀请两岸官方代表出席。

在南海油气资源开发方面，宋教授简要介绍了中国与东盟各国于2002年11月共同签署的《南海各方行为宣言》、中菲越于2005年3月共同签订的《在南中国海协议区三方联合海洋地震工作协议》以及东盟在2008年7月发表的《第41届东盟外长会议联合公报》与《第15届东盟区域论坛》，指出前述国际文件的目的是要把南海由存在争执的地区转变为一个和平、合作与友好之海，并承诺依据国际法原则采取和平方法解决南海争端。但对于下一步的发展，作者提出了质疑，如对于中菲越三方签署的协议，他指出，该协议为期3年，第一阶段至2008年6月已经结束，在越南不顾中国的反对，坚持邀请美国公司参与开发西沙油气资源的情况下，第二阶段是否还能继续、何时开始以及可能包含中国台湾吗？到目前为止，南海真的已经转变为和平、合作与友好之海了吗？越南以及菲律宾对此持何种态度？

针对报告第四部分，宋教授提出，在中菲越合作存在众多变数以及南海沿海各国存在海域争议的情况下，海峡两岸是否有可能携手开发南海油气资源呢？借鉴中海油与台湾中油的成功合作，可否在南海北部区域进行油气资源共同开发合作呢？这种合作可以通过两岸海基会与海协会之间协商达成油气资源共同开发协议的方式进行。另一种合作方式就是举办两岸南海问题学术会议，该会议自1990年至今已举办多次，最近一次于2007年11月在台湾政治大学国际关系中心举行。在两岸可能的合作项目方面，作者列举了涉及海洋环境保护、资源勘探、航行安全、研究人员交流、海洋科学研究以及海洋执法等众多项目。作者指出，还有一种两岸合作的平台不应该被忽视，即在印度尼西亚召开的南海会议，此会议从1990年开始每年都定期举行，今年11月将召开第18次会议。除第一次外，两岸均共同参加了历次会议。海峡两岸可以此为平台，共同探讨南海合作的开发机制。

在回答厦门大学法学院陈辉萍副教授提出的“在‘大三通’之后，海峡两岸之间的合作还存在什么障碍？”的问题时，宋燕辉教授指出，两岸合作开发最大的障碍就是互信，应该寻找策略性的双赢思考模式，即高阶的经济的信心建立措施合作计划，不同于一般的经济合作计划，它牵涉到与日本、东南亚各国的外交层面，因此两岸应该有互信的政治意愿，然后在此基础上寻找合作平台。

华东政法大学周洪钧教授对台海两岸的合作问题发表了看法。他认为海峡两岸的问题是我们的内部事务，在国际场合如亚太经合组织内谈论两岸关系及合作问题是不合适的，其实在两岸内部有很多渠道可以而且已经开展了交流与合作。两岸若想合作维护我国权利，首先在对外方面的主张要统一，如两岸在钓鱼岛、南沙群岛以及东沙群岛方面对外主张权利时，要先统一我们内部的意见。又如，关于钓鱼岛的名称，大陆称为钓鱼岛而台湾学者称为钓鱼台，至于使用哪种名称，是可以由双方进行研究讨论的，但学界应统一称呼。其次，两岸在理论上要统一，而且这种统一更重要。比如钓鱼岛，它是不是符合《联合国海洋法公约》（以下简称“《公约》”）规定的岛屿？是不是可以主张专属经济区和大陆架？在中日划界时

应赋予何种效力等？这些问题要首先在海峡两岸内部达成统一。

对于两岸在东海与南海的合作问题，台湾政治大学赵国材教授作了题为《论两岸在东海及南海共同合作的议题》的报告，围绕东海、南海天然资源勘探开发争端作了深入的探讨，并提出了应对之道。

对于海峡两岸在南海的开发合作，赵国材教授认为主要涉及以下方面。设立海洋资源保护区。南海生物资源相当丰富，在南海开发中应首要关注环境生态保护，尤其在现今全球变暖、海平面上升对南海岛礁永续利用带来威胁之时，两岸应相互合作，并敦请各国优先考虑将南海划为海洋生态保护区，而非进行海洋资源的掠夺。对于南海海底古代沉船的保护，两岸应共谋推动水下考古、培训专业人员；在海洋文化资产保护方面，需要两岸进行协调，共谋改进。两岸在考古方面各有特长，大陆的优势在于水下或地下文物的发掘，而台湾的优势则是在实物证史方面，如台湾的故宫博物院里有大量的文物。因此，双方在考古方面有较大的合作空间。如何维护南海海域环境质量及防治、应变重大海洋污染事件，皆与海洋的永续利用息息相关，两岸应合作共同深入研讨，建立适当机制，并应共同促进海洋环境保护及科学合作研究。两岸应建立协调机制，避免不必要的误会。在国际场合（如参与国际性南海会议等），两岸应事先进行沟通、协调一致，不能因为我们内部的纷争而使他国从中渔利。两岸应协商台湾加入《南海行为准则》的方式及参与南海生态环境共同合作计划等的可能性。

赵教授认为，东海与南海海域形势复杂，与临近国家有海洋资源权利争执。对此，政府应从务实观点出发，加强与周边国家的海洋合作，并落实共同开发海域天然资源的目标。具体可采取如下方式：在东北亚地区，中日应以能源储备方面的合作为首要任务，以中日为核心，中、日、俄为基础，进而建构能源共同体及多边能源合作机制，将此区域相关国家纳入，以增强信任、化解矛盾和减少对抗；在东海与南海地区，两岸应与日本、韩国、越南、菲律宾等相邻国家进行官方交流，并采取“搁置主权，共同开发”的原则，籍此引进外资及技术，对东海及南沙群岛的油气资源进行勘探及开采。两岸方面应保持良好的经贸关系，共同协调海洋政策，共同开发东海及南海天然资源。两岸在法律领域也应当进行合作，两岸的法制应当逐渐向国际法看齐，如共同适用 WTO 法律，通过各自对国际海洋法的了解与实践使两岸在海洋法制上逐渐趋向一体化。目前的情况是两岸四地（大陆、台、港、澳）存在三种法律体系，在法律术语方面存在较大差异，如英文名称“Continental Shelf”，大陆称为“大陆架”，而在台湾则称为“大陆礁层”等，这种状况对于两岸的交流以及共同对外主张权利是不利的。由于大陆架已逾 200 海里范围，是海域油气矿藏富集地区，故大陆架划界不仅涉及主权权利与管辖权，也牵涉广大海域的经济利益，周边邻国无不积极地去拓展海权，两岸确保及伸张其海洋资源的主权权利与管辖权实已刻不容缓。总之，两岸在东海和南海的资源勘探开发与保护、海洋水下考古与打捞，以及海洋环境保护等方面都有众多的合作空间，两岸应共

同努力，将两岸对立的十多年时间补回来。

二、共同开发区和争议海域的主权权利及管辖权冲突

外交学院国际法研究所龚迎春副教授的报告主要涉及2个部分，即共同开发区的主权权利和管辖权冲突问题，以及争议海域的主权权利和管辖权冲突问题。第一部分主要围绕中日东海共同开发区所涉及的国际法问题作了探讨，第二部分主要就钓鱼岛、东海海域以及冲之鸟礁的执法问题进行了讨论。

报告的第一部分共分4个方面：

1. 共同开发模式的性质和可适用范围及其法律效果

在争议水域内实施的共同开发协议性质是争端当事国“谋求”最终解决争端的一种涉及资源开发、管理和分配的临时性安排，这种安排不应对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产生影响。随后，报告讨论了中日东海争议所涉及的海域问题，其中提到了日方某些学者主张的“权原论”，即200海里内，国际法的发展结果是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。对此，作者认为，日方提出的200海里“权原”主张显然违反了国际法中禁止反言的原则;在不足400海里的东海海域，200海里距离标准只是《公约》中规定的一个虚拟权利，而非现实可主张的权利。相对日方的200海里“权原”主张，中国主张的大陆架自然延伸则不但是《公约》中规定的权原，同时也是在东海海底现实存在的权利。

2. 中日东海共同开发区内的主权权利和管辖冲突

作者对《中日关于东海共同开发的谅解》进行了解读，认为谅解中提到的关于在共同开发水域不适用中国法和日本法的说明有可能被曲解，即中方认可了中日双方存在专属经济区和大陆架的争议海域，那将意味着日方主张的200海里“权原”论受到中方一定程度的承认。随即，作者对中日在共同开发区内可能产生的主权权利和管辖权冲突进行了详细论述，指出在东海共同开发区内中日之间存在潜在冲突的几个方面:专属经济区内油气资源以外的其他资源主权权利的冲突，如海水、海流和风力等;专属经济区内海洋科学研究和海洋环境保护与保全的管辖权冲突;在共同开发协议中未作规定的大陆架上其他资源的主权权利和管辖权冲突，如锰结核、底栖生物等;对第三国船舶的管辖权冲突等。

3. 中日东海共同开发区内海上石油平台等设施和结构及其周边安全水域的管辖权问题

首先，依据《公约》的规定，类似石油平台等设施和结构不具有岛屿的地位，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，但可以为其设置合理的安全地带，并可采取措施以确保航行及设施自身的安全。其次，由于共同开发区处于争议水域内，在该区域内不适用中日两国国内法，而对于平台的建设、使用和管理，以及勘探、开采中发生的海洋环境污染的管辖权等方面又是急需解决的现实法律问题，所以在未来的共同开发协定中有必要对石油平台等设施和结构的法律适用和管辖权归属问题做出具体安排。最后，作者指出目前我国还没有涉及海上设施和结构及其周边安全水域的专门立法，强调鉴于在该领域的立法空白，可能使得我国在共同开发区内的权利不能得到较好的维护。为借鉴国外实践，作者主要介绍了日本涉及这些领域的立法，并指出日本的国内法将海上设施和结构作为拟制领土，安全水域则被赋予了类似于内水的法律地位。

4. 共同开发区内管辖权冲突的解决途径及其问题点

在前述分析的基础上，作者主张，鉴于共同开发区作为争议水域的性质以及中日两国搁置争议、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与油气资源的勘探、开发直接有关的活动应采用各自船旗国管辖的做法，这样可以有效避免两国之间在管辖权问题上的冲突。但作者也认为，由于协定中未涉及共同开发区内其他主权权利和海洋科学研究、海洋环境保护等事项的管辖权问题，因此前述权利的归属和冲突问题依然存在，并且在共同开发区内依然存在对第三国船舶或其他海洋活动的管辖权冲突问题。为解决此类冲突，作者提出了四种国际实践方式：(1) 划定专属经济区和大陆架界限，各国在共同开发区内的本国海域和大陆架上实施沿岸国管辖。(2) 在未划定界限的情况下，当事国在共同开发区内实施共同管理。(3) 在未划定界限的情况下，当事国在共同开发区内仅就资源开发进行合作，在管辖权方面，采取船旗国管理方式。但此方式不利于区内的资源养护、环境保护和海洋科学研究等事项的管理，并且对于第三国的管辖会产生冲突。(4) 在未划定界限的共同开发区内如果包含了部分非争议海域，在该海域内对第三国船舶的管辖将会产生两个问题，即当事国在本不属于本国的管辖海域是否有权对第三国船舶行使管辖权的问题和第三国是否有义务接受此种管辖的问题。

在报告第二部分，作者首先谈到海峡两岸在钓鱼岛海域的维权问题。国际常设仲裁法院官员认为，在主权争议的海域实施武力不是合法的海上执法行动，属于《联合国宪章》所禁止的武力行为。依此观点，我们可以更清晰地分析钓鱼岛海域问题，即由于日本实际占有着中日存在主权争议的钓鱼岛，可能他会以“执法”的名义对中国大陆以及中国台湾在该海域的船舶行使“执法权”，但我们不应被这种表象所迷惑，因为我国也主张钓鱼岛主权，所以从我国政府的角度看这种行为

是非法的，不是一般的执法活动。如果在“执法”中日方实施了武力，更不应被看作是在普通执法当中实施的武力，而应被认为是国际法中的非法使用武力或武力威胁。对于此种行为，依据国际法我们可以从实施自卫权的角度去考虑采取相应的武力对抗措施。

关于东海争议海域的权利冲突。由于东海争议海域并不涉及主权争议问题，而是属于《公约》所调整的沿海国专属经济区和大陆架的主权权利和管辖权冲突问题，此类问题应适用和平解决争端的方式，无论任何一方使用武力都是违反《联合国宪章》的行为。但《公约》并不制止沿海国对其管辖的海域实施诸如紧追权方面的武力，即使在有主权权利和管辖权争议的海域，各沿海国在遵循《公约》要求的实施要件前提下皆有此类权利，因此，中日两国在东海争议海域内都有权实施管辖，在符合《公约》要求的情况下都可以采取包括紧追权等类似的措施。

厦门大学海洋政策与法律中心主任傅崐成教授对共同开发区问题提出了自己的观点，他认为，该区域的法律性质还没有定论，而将来的法律定性问题体现为中日协议的准据法问题，是适用我国的还是日方的合同法，其法律的性质相差很多。我国的立法还不够完善，如海上平台现在还没有立法，而日方已在这方面相当完备。将来在签订协议时，日方就可以将他的法律条款大量引进来，而我们却没有，会导致使用日方法律对海上平台安全以及安全海域进行执法。另外，该区域的右上角紧靠着日韩于 1979 划定的共同开发区，由于是日韩在我国的大陆架上搞开发，所以中国大陆与中国台湾对该区域的划定是坚决反对的，而中日共同开发区现在的划定方式则隐含着我国在某种程度上对日韩开发区的承认。所以，傅教授主张，台湾对中日共同开发区的立场应该是坚决反对，大陆的学界也应适度地主张反对，只有这样才能有助于我国外交官与日方的谈判，且在签署共同开发协议以及确定该区域的法律性质时更有利于我方。

三、钓鱼岛问题

钓鱼岛列屿由钓鱼岛、黄尾屿、赤尾屿等 8 个岛礁组成，面积共计 6.16 平方公里。自 20 世纪 60 年代末期在钓鱼岛周边水域发现油气资源以来，中国大陆、中国台湾与日本三方便在主权归属上发生争执，进入 20 世纪 70 年代，争端更趋白热化。在 1972 年美国将托管的钓鱼岛移交日本时，强调移交的是行政权而非主权。中日建交后，双方达成妥协，同意将此问题搁置。进入 21 世纪后，钓鱼岛主权问题又浮出水面，成为中日两国争执的焦点。中方主张，有充分历史证据证明钓鱼岛由中国首先发现、命名和使用，并在 1895 年以前即为中国领土；并且依据 19 世纪以前的国际法，即单纯发现即可建立法律上的权利，中国对钓鱼岛的占有已符合领土主权取得的要求。日方强调，钓鱼岛在 1895 年之前是无主地，日方

依据先占而取得所有权，并于 1895 年 1 月并入其领土。赵国材教授指出，中国台湾四面环海，与他国大陆架重叠之情形严重，若以台湾为点延伸 200 海里：向东将与日本及菲律宾两国的大陆架重叠；向北可延伸至东海与黄海，将与中国大陆、日本及韩国大陆架重叠；向南亦有与菲律宾专属经济区重叠之争议，及南海诸岛主权纷争；而向西则几乎全部与中国大陆大陆架重叠，且台湾整个西部的大陆架均是从中国大陆自然延伸而来，台湾海峡之底层属东海大陆架，水深皆不超过 200 公尺，东西平均宽度约 108 海里（78 至 350 海里）。在国际大陆架划界实践中，岛屿的效力主要有 4 种，即全部效力、部分效力、零效力以及主权有争议的岛屿不赋予效力。借鉴此种实践，在解决中日东海海域划界问题时，可考虑给予钓鱼岛“零效力”，即在划界中不给予钓鱼岛任何效力。如此不仅能解决中日东海海域划界问题，也有利于解决钓鱼岛的主权争议。但他也同时认为，我国应该主张钓鱼岛的专属经济区和大陆架，因为主张的权利越大，谈判的空间也就越大。根据联合国之规定，如欲主张 200 海里以外之大陆架至 350 海里，必须在 2009 年 5 月 13 日前向联合国大陆架界限委员提交大陆架相关科学与技术佐证资料，才能主张其大陆架继续向外自然延伸的权益。两岸的合作空间可以放在大陆架的自然延伸方面，即两岸合作调查大陆架，由中国台湾方面提供台湾部分的详细资料，中国大陆则于 2009 年 5 月 13 日前提交联合国大陆架界限委员会共同主张我们的权利。他进一步指出钓鱼岛问题的关键在于琉球的法律地位，琉球本是独立的国家，美军军事占领仅有行政管理权，并不产生主权，因此美国对于琉球和钓鱼岛仅是托管而没有所有权，更无权力将两地的所有权转移给日本。赵教授称，钓鱼岛无论从地理、地质、历史、使用及国际法来说，绝对是中国的领土，我们固然主张和平解决国际争端，但要求进行主权谈判，而非搁置争议。应技巧地展现主张管辖及执法能力，如技术性地进入钓鱼岛 12 海里内巡逻，或在钓鱼岛 12 海里内从事渔捕，须知没有钓鱼岛的主权，就没有渔权。

宋燕辉教授指出，既然日本可以主张冲之鸟礁有 200 海里专属经济区，那么中国在谈判时要不要主张钓鱼岛的专属经济区呢？依据《公约》第 121 条，钓鱼岛属于岛的一种，可以拥有专属经济区和大陆架，而冲之鸟礁属于礁石，可以拥有领海和毗连区，但不可拥有专属经济区和大陆架。既然日本连一块礁石都可主张专属经济区，为何我们的岛屿却要放弃这项权利呢？对于宋教授的主张，龚迎春副教授表示赞同，她认为，依据《公约》第 121 条，钓鱼岛完全是个岛，肯定符合维持自身经济生活这一条件，而且还有人曾经在上面居住，所以在谈判之前就主张它不应拥有专属经济区和大陆架是十分荒唐的。她还指出，岛屿在《公约》中的法律地位与在划界中的法律地位是两个层面的问题，在划界时可能双方约定不予考虑该岛的地位，但并不影响该岛在《公约》中拥有专属经济区和大陆架。傅崐成教授主张，钓鱼岛是由 8 个小岛组成的，钓鱼岛仅是其中一个较大的岛而已，因此为更准确反映它的现状，我们应该称之为钓鱼台列屿，该岛上存在淡水并且

以前曾有人居住。台湾当局在批准1958年《大陆架公约》时曾声明海上无人居住的岛礁不享有大陆架，因此如果现在台湾对钓鱼岛主张大陆架则会受到国际法“禁止反言”的限制。而对于大陆则不存在此问题，中国大陆不是1958年公约的缔约国，而且也已经声明对于台湾曾盗用中国名义签订的条约不予承认，因此大陆主张钓鱼岛的专属经济区和大陆架权利是没有问题的。但由于钓鱼岛是台湾的附属岛屿，主张权利又会涉及两岸的政治问题，因此需要两岸协商来共同解决。

四、春晓油气田的开发问题

春晓油气田距宁波350公里，位于日本单方划定的所谓“中日中间线”西侧的中国海域。日方以该油气田的开采将产生“吸聚效应”损害日方利益为由，要求中方停止开发。中方认为中日东海尚未划界，不承认日方的所谓“中日中间线”，春晓油气田的开发是在中方主权范围内，从而对日方的要求予以拒绝。2004年至2007年间，中日双方举行了11轮磋商，原则上同意共同开发，但对于共同开发的区域存在重大分歧。学界认为中日如果要达成共同开发协议必须解决以下3个问题，即主权问题、利益分享以及战略安全考量。春晓油气田所涉及的争议主要是中日东海大陆架的争端，中方主张“衡平原则”是国际法公认的大陆架划界原则，而“自然延伸原则”是《公约》规定的大陆架划界的一个重要原则，中日两国应在衡平原则与自然延伸原则的基础上划分东海大陆架。日方在大陆架划界上坚持“中间线原则”，即主张以“中间线原则”划分中日两国间在东海的重叠大陆架。针对此争议，赵国材教授认为，依据《公约》的规定，存在大陆架争议的各国应在国际法的基础上协议划定。中日双方身为《公约》的缔约国，有义务通过谈判达成协议，而在协议达成前的过渡期间应共同制定切实可行的临时安排，如中日双方暂时搁置主权或主权权利争议，在协商基础上，共同勘探和开发重叠主张海域的油气资源。共同开发是双赢局面，既不影响有关国家的权利主张，又能以符合双方经济利益的原则，及时、有效地勘探开发海底资源，使双方从商业性开发和生产中获得最大利益。在政治上，共同开发也有助于维护东海地区的稳定，为两国关系的发展注入新的活力。因此，中日对于围绕东海春晓油气田的海域划界争端，只有通过和平谈判才能获得妥善解决，而“搁置争议，共同开发”是目前最实际可行的政策。宋燕辉教授认为今年中日达成的《原则共识》仅是原则性的共识，而非所谓的共同开发协议。《原则共识》对于春晓油气田的表述是，欢迎日本的法人到中国有主权权利的春晓油气田参与开发。龚迎春副教授的主张在中日双方的《原则共识》中已明确，即主权在我国，合作开发，适用我国法律。而中日共同开发区则不适用中日双方的国内法律，但却没有说明我国是因为承认了存在争议海域才不适用两国法律，还是说该区域是包括无争议海域的区域，只是不适用两国法律。在这方面，

我国政府应该进一步表明主张。

五、冲之鸟礁问题

冲之鸟礁位于日本东京南 1740 公里处，由两个仅有 1 米高、数米宽的岩石组成。日方依据《公约》的规定，在该礁周围水域划定了 200 海里专属经济区以及面积达 74 万平方公里的大陆架，并准备向联合国大陆架界限委员会提出申请以确定前述权利。中方认为，冲之鸟礁不是岛屿，不应享有专属经济区和大陆架，中方在附近海域进行海洋调查未侵入日本的专属经济区。赵国材教授指出，依据《公约》第 121 条第 3 款，“不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区或大陆架”。海峡两岸应坚持认定冲之鸟礁面积狭小，是无法维持人类居住或其本身经济生活的“岩礁”，而非岛屿，不得主张 200 海里的专属经济区和大陆架。依据《公约》，各国管辖范围外的深海洋底应属于人类共同继承财产，在法律上，日本不得以其一国之私利侵占人类共同继承财产。须知，如能善用国际压力，要比两岸的力量大得多。为此，我们要运用国际上的力量对日本施加压力，因为日本扩张海域的行为必然会侵占人类共同继承财产，影响到其他国家的权益，是以我们应团结其他国家，特别是第三世界国家，对日本扩张海域的行为予以抵制，例如我们可以联合其他国家向国际海底管理局大会或理事会请求将日本以冲之鸟礁来扩张海域的争端提交海底争端分庭，请求其行使咨询管辖权，发表咨询意见，限制日本侵占人类共同继承财产。龚迎春副教授认为冲之鸟礁问题纯粹是《公约》解释的问题，而且它不是《公约》中规定的强制性争端解决程序的例外情况。此外，该问题不仅涉及中日两国的利益，而且涉及世界各国诸如航行权等权利以及侵占了人类共同的财产——国际海底区域。因此，从国际社会共同利益的角度出发，我国也可主张利用《公约》中强制争端解决程序来处理冲之鸟礁问题。

六、台湾海峡中线问题

来自福建省海洋与渔业执法总队的陈亮主任提出了台湾海峡中线的问题，他对中线划定的具体位置、谁划定以及有何依据提出了疑问，并认为它的存在妨碍了两岸合作执法的实施。对于这个问题，傅崐成教授进行了说明，他指出中线不是中国台湾或中国大陆划定的，而是在美军“协防”台湾时代，由美军内部自行划定的一条防御线，从未有官方正式划定过此线。此外，傅教授谈到了海峡两岸“92 共识”问题。1992 年台湾和大陆都公布了各自的行政命令，即 1992 年 10 月，台湾“国防部”公布命令，划定了台湾及附近驻军岛屿的限制区和禁止区。船舶或

军舰如果在限制区内会被驱离，在禁止区内则会被武装攻击。同年 8 月，大陆方面也发布了一条行政命令，要求大陆公船舶在经过台湾海峡时尽量不要跨过中间线，如果经过有台湾驻军的岛屿（主要指澎湖、金门和马祖等岛屿），不要进入到近岸 10 海里（如果规定是 12 海里的话，就等于默示台湾是个国家了）以内，从这两个命令就可以看出，两岸建立了一种默契，它证明了两岸“92 共识”的存在。另外，关于限制区和禁止区的规定在金马地区近几年已经不再执行了。国家海洋局中国海监总队的何时都处长也介绍了目前在执法中的实际做法，为避免冲突，实际工作中是建议大陆船舶在经过海峡时尽量不要越过中线，而在执法时我们可能也会越过中线，但不会很多。此外，他还希望两岸执法机构在互信的前提下，能够相互交流执法模式以及建立通道沟通各自的执法情况。来自台湾高雄海洋科技大学航运管理系暨研究所的杨钰池副教授认为中线问题主要应由两岸的军方机构相互沟通协调并妥善解决。另外，他还谈到两岸渔业以及资金的合作。目前台湾雇佣了很多大陆船员进行作业，而大陆渔业也需要台湾的资金和技术，因此双方有很大的合作空间。最后，他也提出希望两岸的海关加强合作，以打击不法商人走私商品以及毒品。

七、两岸造船与航运的交流与合作问题

2008 年 11 月 15 日下午会议第一阶段由厦门大学法学院何丽新教授主持，议题是两岸造船与航运的交流与合作问题。

台湾国际造船公司李志诚总经理先作《两岸造船与航运交流之合作机制探讨》的报告。报告分为 6 个部分，首先提及目前世界造船的重心在亚洲，中国未来可能取代韩国成为最大的造船国，造船产业非常重要，对国防建设、航运与海洋资源开发具有重大贡献，可以带动重工业发展，促进对外贸易并创造外汇收入，促进地区经济发展，提供就业机会，为高新技术的应用提供重要阵地。接着分析了西方造船业由盛转衰的原因。报告第三部分分析两岸造船与航运的现状，先介绍了各国船舶制造业在世界上的市场占有率以及台湾国际造船公司的经营状况和技术特长，接着分析大陆造船产业的现状，结论是：台湾造船产业规模不大，但已积累良好的技术与管理经验，民营化后将积极对外发展，寻求合作伙伴；大陆的造船产业正在迅速崛起，拥有广大的市场、充沛的人工、低成本以及完整的配套产业，未来发展潜力巨大。报告第四部分重点论述两岸交流合作的必要性。大陆造船业与台湾造船业均存在优劣势，两岸也面临着一些共同问题，例如世界造船产业过剩，成本压力加大等。两岸造船产业各具不同的优势与潜力，具有互补性，面对国际竞争，应该透过合作创造双赢的机会。报告第五部分讨论两岸交流合作的议题与机制，建议通过学术研讨与产业交流、经合组织造船工作委员会和第二次“江陈会

谈”这样的平台或契机，在造船与航运相关技术方面进行合作，共同开发海洋资源，开展海上搜救的技术合作等，并对合作的前景进行展望。报告最后对上述内容进行总结，并提出了相应的合作建议。

来自台湾高雄海洋科技大学航运管理系暨研究所的杨钰池副教授作《应用灰预测法比较台湾与韩国海运支援政策之实施成效》的报告。报告基于台湾国轮经营环境不如外轮理想，纷纷选择改挂他旗出走，船舶的数量、总吨数和载重吨数都在大幅下降的状况，探讨了海运支援政策是否与此有关。报告运用灰预测法对 2001 年到 2004 年台湾与韩国之间轮船的船舶数量、船舶总吨数以及船员人数等资料进行分析，得出结论：台湾国轮船舶数量从 2001 年 280 艘下降到 2010 年 267 艘，成长率为 -4.64%，相反韩国国轮船舶数量从 2001 年 429 艘增加到 2010 年 825 艘，成长率高达 92.31%；从总吨数分析，台湾国轮从 2001 年 474 万吨预估减少到 2010 年 228.7 万吨，下降 -51.75%，韩国则从 1218.4 万吨提高到 1534.3 万吨，增加 25.93%。报告结论认为，海运支援政策对台湾国轮船队提升相当有益，而金融支援政策的实施成效优于行政支援政策，应该借鉴韩国的一系列海运支援政策，例如吨税制度、国际船舶制度、船舶金融制度等，将这些方案运用到台湾；台湾当局应定期制定五年中长期海运发展政策和关于提升航运、造船以及船舶金融业的整体发展计划，期待强化台湾航运业在全球海运市场中的竞争优势。

厦门船舶重工股份有限公司总经理助理李振均先生接着发言，首先介绍厦门造船厂的情况，然后重点针对今年的金融危机对公司造船业务的影响进行分析，金融危机引起接单困难、交船困难、融资困难等现象，但也有优点，即人才稳定、钢材价格下降，可以借机进行产能扩张，李先生表示愿意与台湾造船界进行合作。

最后来自上海交通大学法学院的赵劲松教授认为两岸在造船合作的领域很广，赞成台湾研发、大陆制造这种模式。赵教授认为这次金融危机给大陆的航运业和造船业提供了休整机会，可以借机由政府主导进行产业调整。一是产业重组，对小规模的造船厂进行组合；二是制度创新，设计一个平台使不参与重组的小船厂能进入产业链；三是国际海事组织关于新建船舶压载舱防护涂层性能标准，大陆这些小造船厂如果不联合，就难以解决新标准的实行，否则就得推迟实行。赵教授认为两岸三通后，还需要考虑直航的后续问题，例如术语统一、船舶维修问题、两岸在设立责任限制基金方面的互认问题，以及可能出现的管辖权、扣船、执行等一系列问题。最后，赵教授认为船舶制造业已经不适合发达国家，而适合具有钢材、电子、劳动力、海岸线等优势的发达的发展中国家，中国特别是沿海地区很适合做此产业。

八、两岸海上执法机构在台湾海峡的合作机制问题

2008 年 11 月 15 日下午会议第二阶段由台湾政治大学赵国材教授主持，议题是两岸海上执法机构在台湾海峡的合作机制问题。

首先是国家海洋局中国海监总队维权执法处黄任望先生作《海峡两岸海上执法交流与合作前景初探》报告，该报告由海监总队常务副总队长孙书贤和其合作完成。报告认为两岸尝试开展海上执法交流与合作，面临历史性机遇，存在现实基础。两岸的海洋政策特质近似，例如双方对新时期海洋战略价值认知基本相同，对“重陆轻海”的传统思维局限和文化心理习惯有类似的反省，双方的海洋政策都具有可持续发展和维护国家海洋权益这两个重要维度，双方的海洋管理和海上执法政策、路径、目标、方法相似。目前两岸面临着相同的挑战，例如面临海洋生态环境恶化，与中国周边的海洋权益斗争趋热，实践中也面临着海上人道主义援助的特殊需要。所以两岸开展交流合作，符合“中华民族命运共同体”的两岸人民的利益与福祉。

黄先生接下来对中国海监队伍的性质、特点、职责进行了详细的介绍，并与台湾的“海岸巡防总署”进行简要比较，说明二者的相同点及区别所在。然后提出两部门进行交流合作的建议：一是队伍建设方面，如机构、组织建设与人力资源培育，装备建设与技术；二是执法业务方面，如海洋权益维护、海洋资源开发管理、海洋环境与生态保护、海洋灾害救护等。交流合作的方式可以是以下几种，例如信息沟通、人员互访、业务交流、人才培训、海上行动协调与配合、海上平台共享。双方可以彼此开放海洋信息，相互提供海洋气象、水文、环境、生态以及海洋污染事件、违法案件信息；可以请求对方给予帮助，安排就近船舶与飞机紧急搜寻、监视、控制目标或完成其他可行任务；双方可以尝试开放彼此所在南海部分岛礁以用补给、救援，例如开放永兴岛、太平岛等的码头和机场设施。黄先生最后认为上述交流与合作，可以一揽子计划，整体部署全面推进，也可以先易后难，逐步达成。

第二位报告人是来自厦门市海洋与渔业局的钟向前先生，报告是由其与该局周鲁闽共同提交的《台湾海峡两岸海上执法合作机制探析》。报告首先分析了两岸关系对两岸社会经济发展的重要性，指出海峡两岸亟需加强海上执法合作，原因有交通安全问题、生态安全问题及社会安全问题等。接下来从政治环境、执法职责、合作实践等方面说明目前海峡两岸海上执法合作的基础扎实，但是实践中的合作都是个案或意向，缺少常态化的沟通平台，因此要整合各种资源和优势，建立合作机制。报告人提出了建立合作机制的构想，认为重点从三方面进行构建：一是遵循互利、互信、务实及事务性原则；二是慎重选择海上执法协商沟通合作模式，可以综合考虑两种模式，其一是依托“民间白手套”（民间协会）协商一般事务，其二是依托“两会”（海协会和海基会）处理重大议题；三是围绕交通、生态和社会

安全领域开展合作。

福建省海洋与渔业执法总队陈亮主任针对上述 2 位报告人的内容发言。他首先结合工作实践，指出海峡两岸联合执法存在的问题。例如两岸管理制度不一样，互不了解内容;双方渔船有时躲到对方控制区，难以调查;台湾海峡狭窄，容易出现船舶碰撞，而渔船之间求助速度较快。上述内容都需要双方共同的协查机制或救助制度，而目前只能通过海协会和海基会处理纠纷，效率很低。面对这样的局面，陈先生提出两岸联合执法的一些构想。他认为双方就合作内容、组织架构、合作方式应达成共识。双方可以指定某一部门成立小组相互沟通，这样可操作性强，可以定期召开联系会议，双方互访。另外，合作内容涉及渔业资源保护方面，需要相互通报对方的渔业管理法规，公布禁渔期、禁渔区、捕捞方式，公布保护鱼种等;渔业纠纷方面，需要建立协调机制，例如第一时间如何通报、空中通讯混乱形成电波污染、执法船舶的通道这些内容均要管理。陈先生最后认为针对联合执法问题，高层最好订立一些执法原则，由下级部门进行谈判，这样操作起来比较灵活方便。

报告之后，参会代表进行了热烈的自由讨论。针对台湾学者提出的大陆维权的经济海域范围和南海执法合作问题，中国海监总队维权执法处处长何时都先生解释大陆的维权范围包括主张的所有海域，海峡两岸执法合作在法理、执法依据方面无太多的分歧，主要在具体操作层面如何合作与交流，共同维护好海峡。对于南海合作，我们本着开放的态度，欢迎两岸交流，对于越南、菲律宾和印度尼西亚在我国主张的海域进行海上科学研究，如果我们发现，会采取执法措施。另外宋燕辉教授提及的中国大陆与中国台湾能否在南海进行联合军事演习，这涉及军方，不在我们的讨论范围。傅崐成教授认为海上执法维权合作主要存在技术方面问题，而这个问题的原因是政策所致，例如台湾民进党执政时不愿意去推动这项事宜。另外还要与媒体进行良好的合作与沟通，否则一些误会容易被媒体扩大宣传，所以合作能让更多人知道充分的信息。

九、两岸共同发展与管理海洋渔业的问题

2008 年 11 月 16 日上午，由台湾对外渔业合作发展协会[1]的傅家骥先生首先作了题为《营救被扣远洋渔船经验分享——台湾经验简析》的主题报告，其在报告中指出台湾邻近海域的渔业资源已基本枯竭，所以台湾大力发展远洋渔船，使得

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1 “台湾对外渔业合作发展协会”的性质是由政府和业界筹资成立的财团法人。该协会成立的目的是配合政府政策，推动对外渔业合作，开拓作业渔场，处理渔船暨船员在国外遇难及被扣事宜;其工作范围包括渔业合作、处理渔船被扣事宜、渔业统计、VMS 监控及参与国际渔业会议。

远洋渔业扮演了重要角色，[2] 故台湾的捕鱼场所高度依赖公海及他国专属经济水域，并且台湾大量的远洋渔业船员为非台湾籍船员。

在谈到台湾远洋渔船被扣的原因时，傅家骥先生总结了以下 4 点：一是蓄意或意外闯入他国水域进行作业；二是违反渔业合作规定，包括违反补鲨规定、捕捞不应捕捞之鱼种、未填报渔捞日志及未依规定进行转载；三是违反沿岸国或合作国关于税务、环保、交通及劳动等方面的法令；四是其它诸如海盗行为、合约或商业纠纷及沿岸国的不当扣押等。

根据傅家骥先生的报告，近 3 年来，台湾遭扣之渔船共有 48 艘，其中扣押台湾渔船最多的国家分别为日本（11 艘）、菲律宾（7 艘）、索马里亚（5 艘）、帛琉（4 艘）及密克罗尼西亚（3 艘）。

对于台湾远洋渔船被扣后所面临的问题，傅家骥先生指出主要有以下几点：一是语言交流障碍，依被扣地点的不同，船员有可能面临日文、英文、法文、西班牙文及阿拉伯文等的交流困难；二是经济能力有限，船东无力支付调查或诉讼期间的生活、渔船补给、官司诉讼（如律师费用）、船员遣返或返国所需费用；三是法律知识不足，包括没有正确的法律知识、[3] 不知如何保存有利证据、[4] 迫于形势而签署看不懂或不甚了解的文件；四是部分船主担心通报渔船被扣消息后而另外受罚，因此希望自行解决，此举常造成不法掮客欺骗被扣渔船主（员）或家属，增加问题的严重性；五是若审判过程耗时太久或船主委任之代理商无法处理，被扣船员家属急于寻求民意代表或经过媒体渲染将平添处理难度，并造成政府及相关承办人员之压力。紧接着，傅家骥先生阐述了台湾处理远洋渔船被扣的方式：一是应及时遵循通报系统通知电台或驻外单位；二是“外交部”驻外人员及 / 或代理商 / 华侨前往探问及了解案情，并视需要担任翻译或介绍当地律师；三是“渔业署”、县市政府与渔会前往慰问，提供急难救助金，并视需要转洽其他单位协助；四是对外渔业合作发展协会视需要提供遣返有关经费的垫借[5] 或补助，陪同家属前往扣船国了解案情，并协助办理船员遣返及保险。

之后，傅家骥先生以中西太平洋渔业委员会为例，阐述了非法、不报告和不受管制（IUU）渔船的认定标准：(1) 未登记渔船之作业；(2) 非法入侵作业；(3) 未记录、未回报或低报捕捞之渔获；(4) 在委员会宣布之禁渔区作业；(5) 使用委员会禁止之渔具作业；(6) 支援在 IUU 名单内之渔船，包括转载补给等活动；(7) 渔船从事违反委员会养护管理措施之作业活动；(8) IUU 渔船名单内之渔船主所

2　2007 年台湾远洋渔业所创造的价值大约占台湾 GDP 的 0.75%。

3　例如某些船员认为“渔船在专属经济区之外，渔具在专属经济区之内”的情况为未闯入他国专属经济区的行为。

4　“有利证据”包括：记下遭扣时间及经纬度位置、扣押我船之军舰名称及其所属国、妥为保管对我船有利之文件资料及请扣船官员开具拿取物品之明细收据并签字证明。

5　“垫借”是针对非法捕鱼活动而言的，是需要船东归还所垫借的本金的。

持有的其它渔船。而对于被确认为 IUU 渔船之后果，傅家骥先生亦总结为以下 6 点：(1) 不得出海作业，(2) 不得卸货、转载、卖鱼或补给，(3) 其它船不得支持或补给该 IUU 渔船，(4) 该船船主之其他渔船亦列入 IUU 渔船，(5) 遭各区域性渔业组织会员国联合抵制，(6) 损害国家声誉、渔业形象或船队权益。

最后，傅家骥先生就“防范渔船被扣的改进方向”和“在处理渔船被扣时可能的合作”两个方面提出了自己的建议。对于“防范渔船被扣的改进方向”，傅先生认为：首先要持续宣导与教育渔民，包括要改变渔民思维，确定被扣消息的流通，提升渔民的法律知识水平及加强守法观念；其次要不断强化渔业管理，包括利用 VMS 加强监控，派驻观察员及加强港口检查等措施。而“在处理渔船被扣时可能的合作”方面，傅先生指出两岸应及时透过民间机构相互通报及联系案情，提供当地处理惯例及律师资讯，收集和提供渔业法规及管理规定资讯，增加了解并降低纷争的可能性，以及交换援救被扣渔船的经验。

第二位发言的福建省海洋与渔业执法总队陈亮主任在其报告中指出，大陆发生渔船被扣现象较多的地方集中在北方，例如辽宁渔船时有发生越界到韩国邻近水域进行捕鱼作业，当发生渔船被扣后，主要有 3 个解决途径：(1) 政府出面，(2) 船东互保协会出资担保，[6] (3) 通过民间途径。

陈亮主任就台湾的“红珊瑚渔业”问题询问了傅家骥先生，傅先生回答到台湾的“红珊瑚渔业”渔船大约有 90 艘，[7] 尽管在台湾对于是否应从事“红珊瑚渔业”还存在较多争议，但政府倾向于有限制的开展此项活动，对外渔业协会负责船位监控的技术支持以协助政府进行行政管理。

厦门大学海洋政策与法律中心的傅崐成教授指出，掮客和船东的心态问题对于被扣渔船事件的解决有着较大的影响。船东一般有着传统的“送红包”思想，即从渔船在公海被临检那一刻便开始“送红包”，此举往往加大了解决被扣船东（员）或渔船事件的难度。傅崐成教授为台湾对外渔业协会设计了一套中英文对照的对话卡片，该套卡片几乎囊括了进行远洋捕捞活动时可能遇到的一系列情景对话，这大大方便了船员与扣船国官员之间的沟通，傅教授表示乐于将此套卡片提供给大陆方面使用。

傅家骥先生在回答相关专家的问题时指出，台湾有些远洋渔船闯入他国专属经济区内进行捕鱼活动，当时并未被发现，而利益被损害国在事后将该事件提交国际组织并要求将该渔船列入 IUU 渔船名单，其主要原因是台湾对该渔船的处罚力度未达到利益被损害国的期望值。

傅家骥先生在回答厦门大学法学院何丽新教授的问题时谈到：大部分台湾渔民被扣后比较倾向于寻求和解途径，而不寻求司法途径，除非确实受到了明显不

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6 对于违法的捕鱼活动，船东互保协会是不予出资担保的。

7 2009 年实际作业之“红珊瑚”渔船为 55 艘。

当的扣押;在渔船遭到海盗非法扣押后（如索马里海盗），一般是通过缴交赎款来解决;两岸在海事相关律师名单交换方面的工作仍有待加强。

十、两岸水下文化遗产保护合作问题

赵国材教授在其发言中指出，一些发达国家凭借其经济技术实力对他国的文化遗产进行掠夺，突出表现为:这些发达国家在打捞出他国的历史沉船后，往往将船上有价值的古董占为己有，并且时常挑选出其中的精品保存，而将其它损毁，以提高这些精品古董的价格。赵教授还特意指出联合国教科文组织通过的《水下文化遗产保护公约》的最大革命之处是不得对水下文化遗产进行商业开发。他还指出“泰坦尼克号”的沉没其实是诈骗保险金。“泰坦尼克号”原是英国籍客轮，船东为英国白星轮船公司，1912 年在加拿大纽芬兰岛东南海域撞上冰山而沉没，船上总人数达 2227 人，但救生艇仅能供 1178 人使用，致使 1532 名乘客葬身大海。客舱内的珠宝价值数亿英镑，直到 1985 年，美国木洞海洋研究所与法国海洋开发研究院在加拿大纽芬兰外海约 388 海里的海域中发现该船舶遗骸。尽管当时国际社会要求将这艘船作为一座群葬墓和考古遗址加以保存，可是 1987 年后，却被不同的探险队从沉船上捞走许多有历史价值的文物，这些水下文化遗产有被掠夺和毁坏的危险，且有被变卖之虞。“泰坦尼克号”一直被认为是因碰撞冰山而沉没，但 2004 年英国学者加迪诺和牛顿却发现“泰坦尼克号”其实是白星轮船公司旗下的“奥林匹克号”，当年船公司因撞船受损而导致该公司负债累累，因而将“奥林匹克号”鱼目混珠包装为“泰坦尼克号”，并暗中策划沉船计划，以诈取高额保险，化解财务危机，船公司本安排救援船“加利福尼亚号”赶赴现场拯救 2000 多名溺水乘客，孰料救援船误判失事位置，使得罹难者成为无辜牺牲品。有人以为，“泰坦尼克号”肇事，主因系使用错误的海图。事实上，海图不可能标注冰山，此说不攻自破。“泰坦尼克号”原为有主物，为英国白星轮公司所有，沉没在水下，并不自动变为无主物，而当年为“泰坦尼克号”承保的“英国保诚集团”也还存在。保诚集团成立于 1848 年，前身为“The Prudential Mutual Assurance, Investment and Loan Association”。在 1912 年时，英国保诚集团已高额赔偿了 324 个罹难家庭。就法律而言，“泰坦尼克号”沉船在加拿大海域发现，非经加拿大同意不得进行打捞。对沉船遗骸及乘客遗物提出权利主张的有:英国白星轮公司、英国保诚保险公司，美国、法国及其他国家乘客遗属，是以打捞“泰坦尼克号”沉船涉及多方利益，须与所有利害关系者协商，始能进行。

厦门大学吴春明教授指出对于“公有水下文化遗产”和“私有水下文化遗产”的保护明显具有差异性:对于“私有水下文化遗产”，由于其为“有主物”而使得对其权利的主张较为充分;对于“公有水下文化遗产”，由于其为“无主物”而使得对

其权利的主张往往出现缺失。吴教授通过举例，说明了目前在中国，尤其是在潜在争议地区，对水下文化遗产的考古、打捞及保护等工作并未受到如同石油开采般的重视。他还谈到目前大陆所谓的"水下文化遗产保护"一般均是发现渔民大量打捞之后才进行的，也就是一种事后的补救措施，而不是像陆地文化遗产那样进行规模系统的保护。他亦指出，在涉及争议海域的水下文化遗产打捞时，各方政府都尽量避免介入，而这种合法主体缺失的情况导致了非法[8]打捞的猖獗。

傅崐成教授在回应相关专家的问题时谈到以下 5 点：(1)《水下文化遗产保护公约》还未生效，而且其条款跟中国现行法律规定有冲突；(2) 按照中国的法律，对于内水和领海内打捞出的水下文化遗产，其所有权归沿海国所有，而公约规定为不处理其所有权；(3) 在专属经济区和大陆架范围内打捞出的水下文化遗产，按照中国的法律，要确定其来源国，而公约同样规定为不处理其所有权，并且按照公约的规定，此海域的打捞权仅归沿海国所有；(4) 对于在"区域"中的水下文化遗产，中国法律和公约都不对其所有权进行处理，但公约规定由联合国教科文组织和国际海底管理局来共同进行协调；[9] (5) 两岸水下文化遗产的合作保护势必要秘密的进行。

会议结束之前，主持人上海交通大学周洪钧教授邀请台湾中兴大学宋燕辉教授和厦门大学何丽新教授分别做简短总结。宋教授指出在现今两岸关系日益改善的情况下，海洋合作事务有了更大的发展空间，而在区域海洋事务合作领域，此次会议尤其关注了石油共同开发、渔业资源共同开发、航运和造船业的共同合作、渔业共同管理以及水下文化遗产的保护问题。宋教授提议今后应加强双方的交流，尤其在合作的机制方面应进行更深层次的探讨。何教授认为此次会议在公法和私法、理论与实践、海峡东岸与海峡西岸以及法律和政策之间找到了很好的融合点，给与会学者专家带来了很大的"震撼"，并期望今后能开展专题性更为细致的学术研讨会。最后，周洪钧教授总结认为此次会议非常成功，首先表现在与会专家学者的代表性，其次表现在探讨内容的丰富性和深度性，还表现为各专家学者的互动性，并期望能有进一步的研讨活动以扩大此次会议的影响。

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8 此处的"非法"指"商业性打捞"。

9 在国家管辖范围内的水域，公约规定由联合国教科文组织和利益相关国家共同进行协调。

The Indian Coast Guard: Shaping for the Future

Vijay Sakhuja*

Contemporary world has witnessed interesting ocean politics that have attempted to bring sovereignty, jurisdiction and good order in the oceans from the earlier concept of "mare liberum" (freedom of the seas). The 1958 Law of the Sea Conference and the 1982 United Nations Convention on the Law of the Sea (or the UNCLOS III) were significant international developments that created new territories at sea. This resulted in State sovereignty in the Exclusive Economic Zone (EEZ) for commercial activities to exploit both living and nonliving marine resources. Today, the sea territory under the jurisdiction of a State is a national asset which has added responsibilities on States to maintain order. These entail policing of the new territories not only in the aspects of against illegal fishing, gun running, drug smuggling, and piracy but also in the aspects of protecting marine environment and monitoring sea pollutions since these potentially impact the national security.

At another level, the "territorialization" of the seas has brought to the fore the disputed boundaries among States. Any loss of territory, however small or uninhabited, is construed as a threat to a State's sovereignty, security and integrity. States have responded through enactment of national legislations at sea and developed capabilities for law enforcement and protection of territory. What have emerged are constabulary forces such as Coast Guard and Marine Police that are tasked to conduct a host of operations including responding to asymmetric threats at one end of the spectrum to humanitarian assistance and disaster relief (HADR).

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There are several reasons for States to build Coast Guards and other marine enforcement agencies. Firstly, Coast Guard units, unlike warships, are considered less offensive.[1] They are normally painted white and are more benign in their outlooks. Besides, the armament fitted onboard is relatively "less offensive" that makes them "less provocative". Secondly, the platforms are not very complex, thus the cost of constructing such a platform is so less that a large number of platforms can be afforded. Thirdly, these platforms are designed for high endurance so that they can be deployed for long durations. The large vessels are normally provided with helicopters and, in some cases, the deployment of UAVs (Unmanned Aerial Vehicle) is being explored to extend their patrol and surveillance area. It is argued that the sole purpose of the navy is to prepare for war and the Coast Guard exists for the purpose of performing duties that are not connected with war but have direct implications for national security.[2]

The Indian Coast Guard [Bharatiya Thatrakshak] (ICG) was constituted as an armed force of the country in 1976 under the act of the Indian Parliament for enforcement of national enactments in the Maritime Zones of India (MZI).[3] With its motto as "Vayam Rakshamah" that translated as "We Protect", the ICG is tasked with (a) Ensuring safety and protection of the artificial islands, offshore installations and other structures in India's maritime zones, (b) Providing protection to fishermen and assistance to them at sea while in distress, (c) Preservation and protection of maritime environment including prevention and control of maritime pollutions, (d) Assistance to the Department of Custom and other authorities in anti-smuggling operations, (e) Enforcement of MZI Acts, and (f) Initiating measures for the safety of life and property at sea.[4]

Headed by a Director General, the ICG is responsible for protecting India's Exclusive Economic Zone (EEZ) measuring 2.02 million sq km. This area of responsibility is likely to expand to nearly three million sq km after the delimitation of the continental shelf. Over the years, a large number of Coast Guard Stations have emerged along India's coastline (7,516 km) and over island territories in the

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1 Sam Bateman, Coast Guards: New Forces for Regional Order and Security, *Asia Pacific Issues*, No. 65, January 2003.

2 Prabhakaran Paleri, *Coast Guard in the Maritime Security of India*, New Delhi: Knowledge World, 2004, pp. 48~49.

3 Prabhakaran Paleri, *Coast Guard in the Maritime Security of India*, New Delhi: Knowledge World, 2004, p. 262.

4 For more details, see the official website of Indian Coast Guard, at http://www.indiancoastguard.nic.in, 15 March 2009.

Bay of Bengal and the Arabian Sea. These outposts are responsible for preserving order in the sea areas under their respective jurisdiction. In addition, the ICG is required to provide Search and Rescue (SAR) at sea in the 4.6 million sq km Indian Search and Rescue Region (ISRR) that extends 1450 nautical miles out into the sea from the Indian coast.[5]

Currently, the ICG has strength of about seven thousand personnel. The force levels have grown from a motley collection of just half a dozen vessels transferred by the Indian Navy in 1976, to a formidable force with a sizable fleet of ships, boats and aircraft, including helicopters (Appendix I). During the course of its development, the ICG, has engaged in ensuring the safety and security of maritime enterprise, seaborne trade, patrolling Indian EEZ, fisheries safety, protection of offshore assets, environmental protection and humanitarian assistance (Appendix II). These responsibilities necessitate continuous surveillance and response at sea, placing great demand on the force. The force has recorded some very significant successes that have been applauded by the international maritime community and have provided the necessary impetus for cooperative engagements with foreign Coast Guards and marine policing agencies. In the context, this paper attempts to highlight some of the areas in which the ICG has been engaged.

I. Anti Piracy Operations

The ICG's capability to maintain order at sea was well demonstrated in November 1999 capturing the 7000 ton *MV Alondra Rainbow*, a Panama registered vessel belonging to Japanese owners and hijacked by pirates in the Malacca Strait. The vessel was en-route from Kuala Tanjung, Indonesia to Miike in Japan. On receiving the worldwide broadcast from the Piracy Reporting Center (PRC) of the International Maritime Bureau (IMB) that pirates had captured the vessel, the ICG and the Indian Navy ordered air surveillance and were able to track the vessel. What followed was an intense drama at sea between stubborn pirates and Indian maritime forces. The vessel was captured after the Special Forces boarded it and apprehended 15 pirates of Indonesian nationality.

However, the biggest challenge for the ICG was prosecuting the pirates. The 15 pirates were in Indian police custody and housed in a jail in Mumbai. Anton

5 Arun Kumar Singh, Indian Coast Guard – 2020, *Indian Defence Review*, Vol. 23, No. 2, April/June 2009, pp. 85~86.

Yenes, one of the pirates died of illness while in custody. In 2003, the Mumbai Sessions Court announced conviction and the fourteen pirates were sentenced to seven years of imprisonment including fines amounting to Indian Rupees 28,000. 00 for each. The international community was delighted with the prosecution and the IMB observed, "we are delighted that India took the difficult decision to assume jurisdiction and are very pleased with the outcome… It has been a long hard road for them to get to this day, but hopefully this conviction will deter other pirates. I hope this case serves as a warning that the world will no longer tolerate this crime and that those who engage in it can expect tough justice when they are caught... But it does underline how vital it is to have deterrent prison sentences like the one handed down in India today."

But this was short lived and the 250-page verdict was appealed in the Mumbai High Court on the grounds that there were discrepancies in the prosecution's case and that both the ICG and the Indian Navy had claimed apprehending the vessel. Also, the prosecution had earlier claimed that the vessel was apprehended 350 nautical miles off Goa and this was later changed to 50 nautical miles. It was also noted that the main witness, Mr Ikeno, had failed to identify the accused as the pirates. On April 18, 2005, the Mumbai High Court overruled the Sessions Court ruling and acquitted all the convicted in the *MV Alondra Rainbow* sea piracy case. The reason proffered was that there were some "systemic/organizational failures", which led to the acquittal of the criminals.

II. Search and Rescue

Maritime search and rescue (SAR) is an important function of the ICG. The Director General, ICG is the Chairman of National Maritime SAR Board (NMSAR-B), the designated apex body for coordinating, controlling and executing SAR operations of the country. The Indian SAR (INDSAR) region has been divided into three SAR areas with Maritime Rescue Coordination Centres (MRCC) located at Mumbai, Chennai and Port Blair. For an efficient and coordinated response, the MRCCs have been divided further into Maritime Rescue Sub-Centres (MRSC) located at Porbandar, Goa, New Manglore, Mumbai and Kochi along the west coast to cover the Arabian Sea and Vishakhapatnam, Paradip and Haldia on the east coast and Diglipur and Campbell Bay in Andaman and Nicobar group of islands to cover the Bay of Bengal. Being the designated lead agency responsible for search and rescue in the INDSAR, the ICG instituted a system under which merchant

vessels transiting through the region would voluntarily report their entry and exit and this helped develop a comprehensive picture of the INDSAR. This was critical to respond to vessels in distress so that response assets could be dispatched to the scene of accident.

The ICG has established linkages with littoral State Coast Guards and Marine Police for SAR response initiatives. In 2005, the ICG ships Vigraha and Annie Besant visited Male, Maldives and participated in the Eighth Combined Exercise with the Maldivian National Security Service (Coast Guard). Likewise, in 2006, the ICG engaged in SAR exercises with the Bangladesh Coast Guard ships when they visited Haldia. With Pakistan, the ICG and the Pakistan Maritime Security Agency signed a Memorandum of Understanding (MoU) for setting up a communication link between the two agencies for exchange of information on SAR, natural disasters in coastal areas and maritime crimes.

III. Fisheries Protection

The Indian fishery activities are carried along the coastline and in the EEZ. There are 6 major and 59 minor fishing harbours and 189 Fish Landing Centres (FLC) and the fishing fleet comprises of 181,000 traditional non-motorized craft, 45,000 traditional motorized craft, 54,000 mechanized craft (bottom trawlers and purse-seiners) and 180 deep sea fishing vessels.[6] The current catch level of 2.94 million metric tons has potentially increased to nearly 3.93 million metric tons through the use of modern technologies and techniques.

The mission statement of the ICG clearly defines the relationship between the force and the sea based fish industry. At the primary level, ICG is required to prevent illegal fishing and poaching by foreign vessels. In the past, the ICG has intercepted several fishing vessels from Pakistan, Bangladesh, Sri Lanka, China Mainland, China Taiwan and several Southeast Asian countries illegally fishing in the Indian EEZ, particularly in the sea areas off Gujarat coast in the Arabian Sea and around Andaman & Nicobar Islands in the Bay of Bengal. For instance, vessels apprehended for poaching in Indian EEZ from 1981 to May 1999 reveal some disturbing trends in the Andaman Seas.[7] From 1981 to 1985, of the 79 vessels

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6 Government of India, *Economic Survey of India 2006–2007*, pp. 166~167.

7 Vijay Sakhuja, *Confidence Building From The Sea – An Indian Initiative*, New Delhi: Knowledge World, 2001, p. 53.

apprehended, 22 were in the Andaman & Nicobar region which constitutes 27.8% of the total apprehensions. Similarly between 1986–1990 and 1991–1995 the percentage works out to 27.8 and 24.03 respectively. However, between 1996 and May 1999, out of 137 vessels apprehended for poaching in Indian EEZ, 55 were in Andaman & Nicobar region, which constitutes 40.1%~44.2%, increasing over 1981–1985 and 1986–1990 periods.

Illegal fishing in Indian waters by Pakistani fishermen has been an issue of security concern and fishermen have been taken into custody by the ICG on a regular basis. While interestingly, they are released as part of confidence building measures between the two countries. For instance, in the peak season, fishermen from India and Pakistan are found fishing off Jakhau in the Kutch coast. It is sometimes very difficult to control the boats that enter each other's waters and can result in a major security lapse particularly after the revelation that terrorists had used hijacked fishing trawlers to carry out attacks on Mumbai in November 2008. A "hotline" between the ICG and the Maritime Security Agency of Pakistan has been established and according to Indian Commander, Coast Guard Region (West), "Now, if an Indian fishing boat enters Pakistan waters, they call us to shepherd it back to our side instead of arresting the fishermen and we must have received about a dozen such calls in the past three months." [8]

At another level, the ICG is responsible for providing assistance to Indian registered vessels in distress due to accidents, break downs, pirate attacks and those lost at sea due to cyclones or adverse sea conditions. As part of broader security measures and also to help fishermen in distress, the ICG has supported the development of a low-cost Global Positioning System (GPS) transmitter-based fisheries alert system for use by fishermen at sea.[9] The ICG is also closely associated with the development and trials of low cost Distress Alert Transmitter (DAT) which could in the future be a "Must Carry" safety device for use by fishermen.

IV. Environmental Protection

Environmental protection is a statutory function of the ICG. It is the national

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8 Hotline between Coast Guards of India and Pakistan Working Well, *The Hindu*, 28 January 2008.

9 R. F. Contractor, Chairman National Maritime Search & Rescue Board Remarks, *Safe Waters*, Vol. VIII, Issue 2, October 2008, p. 2.

agency for ensuring marine environment security in India's sea areas. The force identifies its role through (a) Protection of marine environment, (b) Preservation of marine environment, (c) Prevention of marine pollution, and (d) Control of marine pollution.[10] It is India's nodal agency in the meetings of the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO). The ICG engages in combating oil spill at sea and marine pollution control exercises regularly and also imparts training to interested agencies. For instance, on January 21, 1993, the ICG undertook Operation Safai to control the oil-spill resulting from a collision between two super tankers off the Straits of Malacca. The spill had spread over 8000 sq nautical miles and the slick was observed as close as 10 nautical miles from Nicobar Island. The spill was managed efficiently and a major environmental catastrophe was avoided.[11] On another occasion, on 23 March 2005, the ICG responded to a collision between two vessels off Goa on the west coast of India. Advanced Offshore Patrol Vessel (AOPV) Sagar, Offshore Patrol Vessel (OPV) Vigraha, Interceptor boats and Dornier aircraft were deployed to combat the spillage by spraying chemicals through spill spray arm.[12] The spill was successfully managed in less than four days. In order to enhance its capacity for combating oil spill, in 2007 the ICG ordered three special vessels from ABG Shipyard. These ships are equipped with two arms that pump water and oil inside the ship.[13]

V. Protection of Offshore Platforms

India's rising demand for energy resources leads to aggressive oil exploration activities at sea to locate new oil and gas fields. India's EEZ is dotted with offshore platforms engaged in offshore exploration of oil and gas in Cambay/Mumbai basin, Cauvery basin, Krishna-Godavari basin, Kutch basin, Mahanadi and West Bengal basins, Andaman and Nicobar Islands basin, and Kerala basin. Among these, the Mumbai High Basin located 160 km west of the Mumbai coast is the largest one

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10 Prabhakaran Palen, Role of the Coast Guard in Marine Environment Security: The P3C Factors, paper presented at the Oil Spill Management Workshop, Goa, 19–20 July 2002.

11 Coast Guard: Samaritans of Sea, at http://mod.nic.in/samachar/febl-03/html/chl.htm, 20 March 2009.

12 Trajectory of an Oil Spill off Goa, Eastern Arabian Sea: Field Observations and Simulations, at http://drs.nio.org/drs/bitstream/2264/618/1/Environ_Pollut_148438.pdf, 15 March 2009.

13 Coast Guard to Buy 3 More Ships, *The Hindu*, 23 March 2007.

with a capacity of 80,000 barrels per day of crude production. It has been operated as a production platform for the Oil and Natural Gas Corporation (ONGC) since 1974. In 2005, a major fire broke out on a production platform after *MV Samudra Suraksha*, a Shipping Corporation of India support vessel chartered by the ONGC to supply essentials to the oil rig hit the platform. It caused a massive fire, resulting in loss of life and disruption of production.[14]

The ICG dispatched ships and aircraft to rescue the stranded personnel and also to respond to the oil spill. The INDSAR and International Safety Net (ISN) were activated by MRCC calling all vessels in the vicinity to render assistance. An ICG Dornier aircraft reached the site and dropped life rafts. ICG vessels with Pollution Response Equipment and Oil Spill Dispersant were deployed and the damaged vessel was escorted by ICG vessels to Mumbai port.[15]

VI. Protection of Marine Life

ICG's role in the protection of marine life is noteworthy. Its services have been sought by conservationists for the protection for Dugongs, Whale Sharks, Sea Cucumber, Olive Ridley Turtles, Giant Clams and other species identified for special protection under various programmes. As part of its charter, the ICG has engaged in Operation Olive for the protection of turtles. The operation aims to protect the endangered species of Olive Ridley Turtles during nesting time. ICG ships and aircraft are deployed for patrolling along the Orissa Coast.

Olive Ridley Turtles were first discovered at the Gahirmatha rookery in 1974 and by 1981 mass nesting was observed at the river mouth of Devi River, 55 nautical miles south of Gahirmatha coast. In 1994, another mass nesting area was discovered at the mouth of Rushikulya River, 162 nautical miles south of Gahirmatha. Significantly, thousands of turtles arrive and nest along the 480 km Orissa coast. The ICG is mandated by its charter for protection and conservation of

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14 Bombay High Rig Gutted, 4 Die, *Times of India*, Mumbai edition, 28 July 2005. As much as 30% of India's annual crude production of 33 million tonnes comes from Bombay High. Bombay High North platform alone processes about 14% of the country's crude output.

15 For more details see SAR And Pollution Response off Bombay High-BHN 27 July–02 August 2005, at http://indiancoastguard.nic.in/IndianCoastGuard/sar/archive_sar2.html, 26 March 2009.

marine environment in the MZI and protecting Olive Ridley Turtles is one of their responsibilities. The ICG surveillance mission over the years has brought to the fore the "unscientific and indiscriminate fishing methods" adopted by Indian fishermen and the force has urged the Central and State Government authorities to protect the Olive Ridley Turtles and institute programmes for the education of the fishermen.

VII. Illegal Migration

The ICG has also successfully apprehended vessels on the high seas attempting to land illegal migrants on Indian shores. For instance, in June 2000, 14 people (9 Iranians and 5 Iraqis) were discovered onboard the Italian freighter *MV Medstar*.[16] They had threatened to blow up the ship but after long negotiations, were deported back to the country of their origins. Similarly, in November 2003, the ICG was on the lookout for a Maltese flag cargo ship *MV Thai*[17] carrying stowaways from Karachi port of Pakistan.

However, India has witnessed significant illegal migration from Sri Lanka, particularly of Tamils and in the Bay of Bengal from Bangladesh and Myanmar. These activities are quite natural given their geographical proximity to India and short distance by the sea route. In 2009, the ICG rescued, in the Andaman Sea, over one hundred Rohingya boat people from western Myanmar's Arakan State who had been at sea for nearly a fortnight. Rohingyas are a stateless Muslim minority and a marginalized society in Myanmar and have been persecuted by the authorities. Reportedly, Thai maritime security agencies had set over four hundred people adrift on boats without ration or water or any other form of propulsion. After having been at sea, nearly three hundred had perished and the rest made it to Indian shores in the Andaman and Nicobar Islands. According to Commander, Coast Guard (Andaman & Nicobar Region), "the survivors include both Bangladesh and Myanmar nationals. As per their account, 412 of them were adrift for nearly 15 days on the high seas after leaving from Cox Bazaar in Bangladesh for Malaysia in mid-November.

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16 Stowaway Crisis Ends, Ship Sails Out, at http://www.indiainfo.com, 26 March 2009. The joint interrogation team comprised of officials from the Research and Analysis Wing, Intelligence Bureau, customs, immigration, navy and coast guards said that there were no weapons or ammunition on the ship.

17 Afghan Stowaways Keep Gujarat Police on Tenterhooks, *Indo-Asian News Service*, 27 November 2003.

They were without food and potable water for nearly 12 days. Upon spotting a lighthouse on the Andaman coast, most of them dived into the sea in a bid to swim to the shore."[18] It was also observed that "there was no way to steer the boat as the rudder and tiller were also broken. It appears to be of the type used for cargo… Prima facie it seems to be a case of human trafficking. During interrogation the survivors said they had paid between 20,000 to 25,000 Bangladeshi Takaeach to the touts for jobs in Malaysia's fishing industry."

VIII. Humanitarian Assistance and Disaster Relief

The ICG has rendered humanitarian assistance to the victims of the 2001 Gujarat earthquake. Coast Guard ships were the first to arrive off Kandla Portand and controlled vessels carrying relief material. Similarly, the ICG ships undertook relief operations when the state of Orissa was hit by a super cyclone. ICG's response during the 2004 Indian Ocean Tsunami was commendable. Relief operations by air and surface units of the ICG were undertaken in India, Sri Lanka and Maldives which involved search and rescue, providing relief materials and humanitarian assistance.

IX. International Cooperation

In its effort to fight piracy in Asian waters, the ICG has established institutional engagements with several Asian coast guards. For instance, the ICG and the Japanese Coast Guard have developed institutional linkage since 2000. In 2006, the two sides signed a Memorandum of Cooperation (MoC). The salient features of the MoC are (a) Sharing information on preventing and responding to acts of crimes at sea such as piracy, armed robbery, maritime violence and crimes, acts against maritime security, drug trafficking, smuggling and illegal migration at sea as well as protection of marine environment; (b) Carrying out search and rescue operations at sea; (c) Exchange of information and facilitation of technical assistance on combating marine pollution; and (d) Exchange of technical assistance, wherever feasible, for taking preventive and protective measures for addressing natural

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18 Ravik Bhattacharya and Kartyk Venkatraman, 300 Illegal Immigrants Still Missing off Andamans, *Indian Express*, 31 December 2008.

disasters like Tsunamis and super cyclones.[19] So far, both the sides have undertaken eight joint exercises involving operations related to search and rescue, anti-piracy, drugs smuggling and gun running, illegal immigration, environmental protection, disaster management and response, boarding operations and training.[20]

Similarly, there is a MoU between the ICG and Korea Coast Guard (KCG) which was ratified in 2006. The maritime cooperation between ICG and KCG started in October 2004. During his visit to India in 2004, the President of Republic of Korea (RoK) had proposed a bilateral cooperation between the two Coast Guards as part of broader India–Korea bilateral relations. Common areas of interest were identified in the fields of maritime search and rescue, piracy and armed robbery, transnational crimes and contingencies for other major disasters in the region. Pursuant to the signing of the MoU, the two Coast Guards engaged in joint exercises in 2006 off Chennai. The KCG ship Tea-pyungyang No. 6 with integral helicopter and seven Indian Coast Guard vessels participated in the exercises on the theme of pollution control. The focus was on pollution control and response through use of onboard equipment like booms and skimmer equipment including sharing best business practices.[21]

In February 2008, the Philippine Coast Guard and the ICG carried out joint anti piracy exercises which also included cross-training programs and other forms of cooperations such as information and technology sharing.[22] Likewise, the ICG has linkages with the Royal Omani Police Coast Guard.[23]

In 2008, the Indian Coast Guard conducted a five-day advanced maritime security training programme for 21 Coast Guard officers from 10 countries including Russia, China, Indonesia, Singapore, Laos, Vietnam, Sri Lanka, Myanmar and South Korea. The course focused on anti-piracy strategies, vessel identification, ship security assessment, real-time situation response exercises, international maritime

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19 For more details see the official website of the ICG, at http://indiancoastguard.nic.in/indiancoastguard/FORGEIN/ICC-JCG%20ex%20mumbai%202006.htm, 26 March 2009.

20 Indian, Japanese Coast Guards to Ramp up Ties, at http://www.nerve.in/news:25350052551, 26 March 2009.

21 Minstry of Defence, India Press Release, 6 July 2006.

22 RP, Indian Coast Guards to Conduct Joint Exercises, at http://www.gmanews.tv/story/137065/RP-Indian-coast-guards-to-conduct-joint-exercises, 26 March 2009.

23 Coast Guard Efficient and Dependable Maritime of India: Antony, at http://www. thaindian.com/newsportal/india-news/coast-guard-efficient-and-dependable-maritime-of-india-antony_10099582.html, 12 March 2009.

laws and inter-agency cooperation.[24]

As part of regional cooperation to fight piracy, the ICG is an active participant in the 16 Asian nations' anti-piracy initiative called the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). This Japan-led initiative aims to enhance multilateral cooperation among the 10 members of the Association of Southeast Asian Nations (ASEAN) plus Japan, India, China, South Korea, Sri Lanka and Bangladesh. The Director General ICG holds the post of Vice-chairman of ReCAAP and an ICG officer is appointed to the Information Sharing Centre (ISC) based in Singapore.

X. Mumbai Terror Attacks: Coast Guard and India's Maritime Security Apparatus

The Indian government, military forces, intelligence and security agencies have examined various pieces of evidence including satellite telephone intercepts relating to the 26th November, 2008 terror attacks on two prestigious hotels, railway station and a local Jewish congregation place in south Mumbai, India. A clear and coherent picture of the sequence of events with the death of nearly 200 people including foreign nationals has emerged. The Lashkar-e-Tayyeba (LeT), a Pakistan based terrorist outfit was responsible for planning the attacks and the only captured terrorist has been identified as a Pakistani national. In essence, all fingers pointed towards the port city of Karachi to be a base for sea training and the start point of the attacks. Furthermore, the Pakistan's Federal Investigation Agency enquiry and the Government of India's "Mumbai Dossier" substantiated the fact that Lashkar-e-Taiba (LeT) was the mastermind behind the 26th November terror attacks in Mumbai.

The terror attacks on Mumbai had raised several questions relating to the porous nature of India's coastline and the inability of the maritime security forces i.e. Indian Navy, Coast Guard and marine police to secure India's maritime borders. Post Mumbai terror attacks, India's maritime security apparatus has been overhauled and significant changes have been instituted in the organizational structure for enhancing maritime security. The plans also include establishment of nine additional Coast Guard stations and Sagar Prahari Bal, a specialized force of about one

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24 Coast Guards from 10 Nations Get Lessons on Tackling Piracy, *The Economic Times*, 21 November 2008.

thousand personnel equipped with 80 fast attack craft. It is planned to put into place a national command, control, communication, and intelligence (C31) network to link the Indian Navy and Coast Guard. The government has supported expansion of the Coast Guard and plans are afoot to equip it with modern systems to meet the overwhelming responsibility of continuous and persistent surveillance and provide a seamless observation of littoral maritime spaces that remain chaotic and contentious.

The overhauled Indian coastal security system adopts a layered approach. The innermost layer is under the operational control of the Director General, Coast Guard who functions as Commander-in-Chief, Coastal Command while the Indian navy would take on the responsibility for coordinating the security on the high seas and offshore installations. Joint Operation Centre (JOC) has been set up at Mumbai, Kochi, Port Blair and Vishakhapatnam and these would enhance coordinations among various agencies including the Indian Navy and the ICG.

XI. Shaping for the Future

In 2007, the Coast Guard launched its 15-year perspective plan which is co-terminus with the 11th Five-year Plan and this would result in a structured growth of the force.[25] As of 2007, 24 ships, including five Fast Patrol Vessels, two Advanced Offshore Patrol Vessels and 11 Interceptor Boats were under construction in Indian shipyards.[26] The ICG also hopes to acquire UAVs in the future for surveillance and reconnaissance of the sea areas under its jurisdiction. According to official sources, "the projected requirement is of as many as 268 ships, 113 aircraft, 18 UAVs and a wide array of radars by 2017 to effectively meet the growing operational challenges of maritime security".[27] A former Director General of ICG has argued that the optimum force level of the ICG by 2020 should include a variety of ocean going deepwater OPVs (three each for three Coast

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25 S. Anandan, Meltdown: Coast Guard Not Spared, *The Hindu*, 11 November 2008.

26 Indian Coast Guard Eyes Major Expansion, at http://news.indiamart.com/news-analysis/indian-coast-guard-e-14747.html, 12 March 2009.

27 Coast Guard Defending India's Shores with Depleted Assets, at http://www.thaindian.com/newsportal/south-asia/coast-guard-defending-indias-shores-with-depleted-assets_100126572.html, 22 March 2009.

Guard Regions), larger patrol vessels, interceptor boats and aviation platforms. [28] Accordingly, his wish list includes:

- Deepwater, 5000 ton OPVs – 9
- 2000 ton OPVs – 27
- 2000 ton PCVs (with secondary OPV role) – 9
- Patrol Boats of 350 to 500 tons – 60
- Interceptor Boats of 60 to 100 tons – 90
- Interceptor Craft of 5 to 10 tons – 30
- Hovercraft – 18
- UAVs – 18
- Dornier type aircraft (5 hour endurance) – 30
- Multi-mission, multi role, long range aircraft (10–12 hour endurance) – 9
- ALH type (5 tons) helicopters – 30
- Light Helicopters (two tons) or existing Chetak type – 30

The existing sensors and armament package are also considered inadequate and need to be upgraded. The critical requirements include night vision, low-light devices and automatic 76 mm Oto Melara guns to replace the manually operated 40 mm, or 30 mm or 12.7 mm HMG and the 7.62 mm MMG.

As far as human resource is concerned, the ICG would need to increase the current manpower from 7000 personnel to 20,000 with a "teeth to tail ratio" of 2:1. At the institutional level, ICG must establish its own training academy.

XII. Concluding Remarks

The ICG has emerged as a fine force in a short span of time and gained a wealth of operational expertise. It has evolved into an effective, efficient and dependable maritime force of the country for advancing national interests. As a national law enforcement agency, it has played a pivotal role in maintaining good order and governance at sea. It has managed the overwhelming responsibility in India's maritime domain that has its own peculiarities and complexities due to the presence of asymmetric actors that have mushroomed in the littorals, due to political instability and ineffective governance, resulting in insurgencies and separatist movements. The ICG has developed sophisticated strategies to contend with the existing and

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28 Arun Kumar Singh, Indian Coast Guard – 2020, *Indian Defence Review*, Vol. 23, No. 2, April/June 2009, pp. 85~86.

emerging challenges for ensuring the security of sea areas under its jurisdiction.

At another level, the force has developed operational linkages with several coast guards and marine police agencies resulting in interoperability which is the bedrock of cooperative responses to asymmetric threats. These interactions and institutional linkages have resulted in synergy in operations, convergence of ideas on maritime security and development of best business practices.

Appendix I

Ships in the Inventory of Indian Coast Guard

1	Advanced Offshore Patrol Vessels (AOPVs)	5	2000 T, range: 4000 nm, capable of carrying light helicopter
2	Offshore Patrol Vessels (OPVs)	9	1224 T, range: 2400 nm, capable of carrying light helicopter
3	Fast Patrol Vessels (FPVs)	11	188 T, range: 2375 nm
4	Seaward Defence Boats (SDBs)	2	185 T, range: 1500 nm
5	Interceptor Boats (IBs)	12	32 T, range: 400 nm
6	Interceptor Crafts (Vadyar)	8	2.4 T, range: 120 nm
7	Interceptor Crafts (Bristol)	4	5.5 T, range: 75 nm
8	Hovercraft	6	Range: 400 nm

Aviation Platforms in the Inventory of Indian Coast Guard

1	Fixed Wing Dornier-228 Aircraft	24	Endurance: 6 Hrs 30 Min (Approx.)
2	Chetak Helicopters	17	Endurance: 3 Hrs 10 Min (Approx.)
3	Advanced Light Weight Helicopter	4	Endurance: 4 Hrs (Approx.)

(Source: Official website of Indian Coast Guard)

Appendix II

Major achievements of ICG during 2004–2008

SL.	Achievement	2004	2005	2006	2007	2008*
(a)	Poaching boats apprehended	21	20	27	21	27
(b)	Smuggling vessels apprehended	1	—	3	Nil	4
(c)	Contraband confiscated	3 Crores	—	238.58 Crores	Nil	5.5 Lakhs
(d)	Lives saved at sea	1111	789	321	195	247

(Continued from the previous page)

SL.	Achievement	2004	2005	2006	2007	2008*
(e)	Ships saved from distress	24 (Merchant Ships–5, Fishing Vessel–19)	13 (Merchant Ships–1, Fishing Vessel–12)	23 (Merchant Ships–1, Fishing Vessel–22)	20 (Merchant Ships–9, Fishing Boats–11)	19 (Merchant Ships–2, Fishing Boats–117)
(f)	Sea pollution averted	—	1	11	1	—
(g)	Sea pollution combated	2	3	2	Nil	Nil

* till 30 Jun 2008

(Source: Ministry of Defence, Government of India)

美国与《联合国海洋法公约》

John B. Bellinger III 著 * 季烨译 **

译者按: 1982 年的《联合国海洋法公约》(以下简称"《公约》")是当今国际社会公认的"海洋宪章"。作为世界上海岸线最漫长的国家之一,美国在海洋方面拥有巨大的政治、经济和军事利益。但长期以来,由于国内相关利益集团担心加入《公约》可能侵蚀美国的国家主权或限制美国在全球的行动"自由",美国这一海洋大国至今仍游离于《公约》的框架之外。本文详细阐述了美国行政当局力主尽快加入《公约》的缘由,介绍了 2007 年以来行政部门敦促参议院加快批准《公约》的种种努力,并对国内反对派拒绝加入《公约》的主要论点加以反驳。同时,文章还介绍了美国在国内法及其他国际条约中向《公约》靠拢的立法和实践。最后,针对北极地区日益复杂的形势,文章指出了《公约》及其它法律规则在该地区的作用,并建议加快建立或完善国际和区域的合作机制,以应对未来的挑战。

首先,我要感谢 David Caron 先生以及本次会议的其他组织者。今天,很高兴能与各位谈谈海洋法。关于这个话题,我们要知道的第一件事便是,这只是一场无休止的文字游戏,仅仅是提到了《联合国海洋法公约》(以下简称"《公约》")和玩弄了双关语。2001 年加入行政部门时,我还对海洋法知之甚少。从那时起,我一直都在思考这个问题,有时甚至完全沉浸其中。但是在我钻到一定的深度,并对细节问题展开研究后,我的结论是(现在是时候说出我的结论了):加入《公约》是明智之举。

言归正传。首先,我会和大家分享行政当局为获得参议院对《公约》的批准所做的共同努力;随后,我将讨论一些困扰我们法律顾问办公室的海洋法问题;最后,我想针对最近的"热门"话题——北极地区的融冰问题谈谈我的想法。

在担任国家安全委员会法律顾问时,我曾带领团队审查了布什当局执政时参议院所有尚未批准的条约。上一届的行政部门已经将《公约》指定为应争取优先

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获得批准的一类，而我们面临的主要问题是，是否要继续维持这样的指定。考虑到《公约》的历史，包括里根总统因对《公约》第十一部分有所顾虑而拒绝在 1982 年签署，我们要确保对《公约》及修正其第十一部分的《1994 年执行协定》进行详细审查。在与大量机构对《公约》进行一番仔细研究之后，行政部门在 2003 年秋决定强烈支持美国加入《公约》。

我们认为，加入《公约》有以下几点重要好处：

首先，《公约》将有力地加强美国的国家安全利益。因为它保证了我们的军事和商用船只（不管是船舶还是航空器）在全球海洋内的航行权和航行自由，包括无害通过和飞越外国领海和国际海峡的权利。我们认为，当前，美国正在伊拉克和阿富汗展开军事行动，也在进行诸如“防扩散安全倡议”之类的新倡议，在这些全球活动面临日益严峻的挑战之时，上述保护尤其重要。《公约》对航行权的保障促使军队的所有部门都强烈支持加入《公约》。

其次，《公约》将促进美国的经济利益。它将使美国对其海岸线外 200 海里专属经济区的海洋、海床及其底土的所有资源所享有的主权权利法律化。美国是世界上海岸线最长的国家之一，拥有最广阔的专属经济区，它将从《公约》的规定中受益匪浅。同时，《公约》还使（沿海国对）200 海里以外的海床及其底土资源的主权权利法律化，只要这些地区符合《公约》规定的地质条件。《公约》成立了一个专门机构——大陆架界限委员会，为沿海国 200 海里以外大陆架获得最大化的国际承认和法律确定性提供了机会。目前，这是《公约》特别有价值的一点，因为美国对其广阔的近海地区（包括阿拉斯加以北至少 600 英里地区）所蕴藏的能源资源的权利，将通过《公约》获得最大的法律确定性。

《公约》带来的第三个主要好处是，它提出了一个保护海洋环境免于各种污染的全面的法律框架，并设定了基本义务。该框架合理配置了监管权和执法权，以在沿海国保护海洋环境及其自然资源的利益与所有国家的航行权和航行自由之间实现平衡。

除了这些实体性条款所带来的好处之外，加入《公约》还将为美国在解释和发展海洋法方面赢得“一席之地”。作为领先的海洋大国，并且是世界上海岸线最长的国家之一，美国在这方面拥有巨大的利益，而我们需要确保与我们的利益相称的影响力。尽管《公约》最初几年在该方面的实践相对较少，但如今，其规定却被积极应用并发展着。例如，大陆架委员会和国际海底管理局正积极运转，而作为一个可能与海洋法问题具有最大得失关系的国家，我们绝不应该袖手旁观。在促进美国利益方面，《公约》非缔约方的地位使我们相当被动。

加入《公约》除了能带来一系列好处之外，加入的最大障碍也已消除。里根总统之所以拒绝签署《公约》，是因为他对《公约》关于深海海底采矿一章和要求技术转让的规定，以及美国在决策方面的影响力不足等心存顾虑。随着 20 世纪 80 年代末至 90 年代初国际政治经济形势的变化，其他国家也承认集体主义的深

海海底采矿方式亟待修改。1994年达成的《执行协定》便对《公约》关于深海海底采矿一章作出了具有法律约束力的改变。行政部门认为，美国对《公约》提出的每一处反对，1994年协定都作出了相应变更，也达到了里根总统的目标，即保证美国产业界在合理的条款和条件下进行深海海底采矿活动。

基于以上原因，行政部门于2003年确认:美国加入《公约》是一件头等大事，并敦促参议院予以批准。参议院外交关系委员会于2004年2月一致批准了《公约》，但由于选举年政治的影响，批准《公约》的计划不幸受阻，在当年并没有被参议院全体会议审议通过。

2005年，我开始担任国务院法律顾问，并决定将获得参议院对《公约》的批准作为我的优先议程。考虑到加入《公约》种种显而易见的好处，以及行政部门对《公约》的全力支持，我不得不承认，当时的我很乐观。国家安全顾问Stephen Hadley于2007年2月向参议员Biden写了一封信，代表总统敦促参议院尽快批准《公约》，并强调《公约》将“保护并加强美国的国家安全、经济和环境利益”。布什总统本人也于2007年5月发表声明，敦促参议院积极行动，争取在第110届国会第一次会期批准《公约》。

此外，《公约》还获得了各种力量的支持，这在华盛顿通常预示着胜利。军方的支持是毫无疑问的，一封来自参谋长联席会议的所谓“24星”信呼吁参议院通过《公约》。同时，《公约》得到了众多非军方机构高层官员的支持。国土安全部部长Michael Chertoff、内政部长Dirk Kempthorne以及商务部长Carlos Gutierrez均写信，强烈敦促参议院积极行动。为表示高层行政管理当局对此的承诺，副国务卿John Negroponte和国防部副部长Gordon England也都于2007年9月参议院的听证会上作证支持通过《公约》。此外，包括前国务卿George Shultz和前大使Ken Adelman在内的多位里根时代的官员都公开主张，里根总统对《公约》的担心都已得到解决，是美国加入的时候了。最后，每个主要的海洋行业，包括航运、渔业、油气、钻井承包商、造船商以及电信公司，都强烈支持加入《公约》，油气、航运和电信业的代表还在参议院外交关系委员会上作出了支持《公约》的证词。

与此同时，在经济方面关于加入《公约》的争论愈发激烈。公众的注意力越来越多地集中到北极融冰及其对油气开发的影响上。2007年8月，一艘俄罗斯潜艇将一面国旗插在北极，尽管这不具有任何法律意义，却凸显了北冰洋周边国家将北极视为额外的财富之源。俄罗斯以及其他北极周边国家，如加拿大、丹麦和挪威，均为《公约》的缔约国，而且都向大陆架界限委员会提交了或准备提交其大陆架外部界限的方案。这些方案将使相关国家在北极地区的外大陆架获得最大的国际承认，包括对油气储备的主权权利。鉴于美国在阿拉斯加的大陆架拥有类似的储备，Stevens和Murkowski两位参议员也都积极支持《公约》，州长Sarah Palin在2007年9月写给参议员的信中也表明了类似态度。她特别强调，其他北

极地区的周边国家都在忙着保卫他们的大陆架权利，而美国却无动于衷。

2007 年 10 月，参议院外交关系委员会以 17 比 4 的投票结果通过了《公约》。委员会报告建议，参议院全体会议应对《公约》提出意见并予以同意，并出台一套委员会和行政部门早已认真完成的宣言、谅解和条件。

然而，参议院全体会议再一次丧失了对《公约》进行投票的机会。反对派一再强调关于美国加入《公约》的讨论可能触发程序性问题，并将占用参议院过多的时间，最终成功地将其阻截在参议院表决程序之外。在此情况下，参议院多数党领袖决定不将《公约》付诸表决。过去的一年，《公约》一直被搁置在参议院的议程上。

在阻碍加入《公约》的努力中，毫不客气地讲，《公约》的反对者基于的是一些不准确、过时或不完整的论点和主张。很多人知道，反对派总称《公约》为“LOST”（英文首字母缩写），而赞成派却偏爱强调《公约》的众多好处，将《公约》称为“LOTS” (Law of the Sea)。在此，我想谈谈我经常听到的《公约》反对者的批评意见。

相对古怪的反对《公约》的论点包括如下主张：《公约》授权建立一个“联合国海军”或课征“联合国税”，或联合国将通过《公约》控制全球海洋，或加入《公约》将妨碍美国的情报活动或使美国丧失“主权”。这些主张都毫无道理，但批评家们却设法将其表现得似是而非。例如，一个关于情报的主张认为，《公约》禁止潜艇在水下通过沿海国的领海。诚然，潜艇必须浮出水面，才能行使无害通过领海的权利。但错误的地方在于，他们认为《公约》禁止在水下通过领海。潜艇享有在水下通行的自由，只是无权在这种情况下行使无害通过权。这些规定已经盛行数十年，美国已经签署的一项 1958 年条约也有这种规定，但《公约》的批评家们对这一事实要么毫无所知，要么不愿承认。

关于《公约》掠夺了美国“主权”这一指控尤其令人不解，根本不存在放弃了国家主权，事实上，《公约》反映了主权和资源向美国的大量转移。《公约》将美国对广阔的海洋领土和海岸以外自然资源享有的主权和主权权利法律化，我们的外大陆架预计有 2 个加州那么大。

《公约》的反对者们关于深海海底采矿的论点早已过时。例如，他们声称《公约》要求向欠发达国家转让敏感的海洋技术。该论点及诸如此类的说法在过去是正确的，也确实是里根总统决定不加入原《公约》的理由。但是 1994 年《执行协定》弥补了这些缺陷，《公约》如今删除了关于强制技术转让的规定，确保了美国在海洋法决策机构享有恰如其分的影响力，并总体上促进了在合理条件下进行采矿活动。支持者和反对者们都同意，原有《公约》存在瑕疵，但那不是参议院要批准的版本。其实，《公约》和 1994 年《执行协定》共同象征了美国外交的胜利。

反对者还主张，对美国享受《公约》的好处来说，加入《公约》基本上没有必要。这一观点认为，世界上其他国家认为《公约》的规定构成国际习惯法，我们将直接

受益于此，无需再签署《公约》。该观点进一步认为，如果我们的法律权利得不到保障，美国海军可以通过武力或武力威胁来解决。既然如此，为什么要加入《公约》，使自己受制于诸如第三方争端解决的机制呢？

但该论点没有看到以下几个关键点：

首先，主张国际习惯法并不能保证我们享有《公约》带来的全部好处。例如，作为非缔约方，我们不能加入大陆架界限委员会，也不能提名我们的国民在该委员会任职。

其次，依赖国际习惯法并不能保证我们长久地享受目前的好处。习惯法并非保护和维护美国国家安全和经济权利的最坚实基础。它并未得到普遍接受，而且会基于国家实践随着时间有所变动。因此，我们不能假设习惯法总是与《公约》完全一致，而需要通过条约法的方式确保《公约》赋予的权利。正如海军司令Mullen在担任副总指挥时的证词所言："继续依赖不成文的国际习惯法作为美国海军行动的主要法律依据，实在冒险。"在这场辩论中，具有讽刺意味的是，《公约》的部分反对者正是那些对国际习惯法的可行性质疑最多的人。

第三，为获得融资和保险并规避诉讼风险，美国公司需要《公约》的程序所保证的法律确定性，以开发我们外大陆架上的油气和矿产。因此，虽然是否签署《公约》海军都可以继续行使航行权，但美国公司却不乐意在缺乏《公约》好处的情况下，从事勘探和开发这一成本高昂的活动。

第四，用军事力量保护我们所主张的国际习惯法上的权利（尤其是经济权利）的方式过于生硬。仅仅依靠海军来从根本上保护《公约》（本可赋予我们）的好处，完全是不切实际的，而且存在潜在危险。海军本身也清楚地表明，以条约为基础的权利也是其需要的一种武器。

反对者批评的最后一点是关于《公约》的争端解决条款。第三方争端解决总的来说是"对"还是"错"，通情达理的人可能对此存有不同意见，但我认为，这些规定是有用的而且是精心设计的，决不能构成放弃《公约》的理由。美国肯定能在《公约》中找到鼓励遵守并通过和平的方式推动争端解决的程序。我们找到并实现了法庭选择方面的灵活程序。例如，《公约》允许缔约一方选择仲裁庭，并不强求任何争端均提交国际法院。《公约》的程序同样具有灵活性，允许缔约一方选择将一些类型的争端，比如涉及军事行动的争端，排除在《公约》的管辖之外。在这方面，一些人已经提出疑问，根据《公约》，是由美国还是法庭来决定什么才是美国的"军事行动"？我们提议在参议院关于《公约》的建议与批准加入《公约》的决议中加入一条声明，以表明任何一方都有排他性的权利来决定什么才是其"军事行动"。我可以向在座的各位保证，当法庭关于军事行动的决定和美国的决定不一致时，在法律上不存在任何受制于前者的可能性。

好了，我是不是说可以保证美国在对任何国家提起的诉讼或任何国家对美国提起的诉讼中都能获胜？显然没有。但这不是一个鱼与熊掌（要么加入，要么不

加入）的问题。提交争端解决肯定有风险，但不加入《公约》将意味着更大的风险：美国将失去其重大国家安全、经济和环境利益的坚实法律保护。

简言之，我认为，反对者们关于争端解决以及《公约》其他方面的顾虑要么毫无理由，要么言过其实。进一步讲，他们并没有提供一个令人信服的不加入《公约》的替代方案，以保护美国 200 海里以外大陆架的主权权利。坦率地讲，随着最近的能源危机与美国再次出现的能源安全问题，越来越少的美国人积极要求美国加入《公约》并在勘探和保护其外大陆架方面赶上那些北极周边国家，对此，我觉得不可思议。作为一项国内决策，我们是否决定允许开发大陆架油气资源是一回事，但为什么我们不去最大化这种开发的潜在可能呢？不可想象。

作为世界上海军最为庞大、海岸线漫长、大陆架油气资源储备丰富、商业航运利益重大的国家，美国加入《公约》当然是利大于弊。在我看来，一个虽小却善于鼓吹的少数派，用一系列站不住脚的论点来武装自己，已经耽误并违背了美国的国家利益，这是最为不幸的。但是，我深信这会改变，我也有信心，美国参议院会在适当的时候批准《公约》。

与此同时，美国将继续恪守《公约》并在其框架内行事。即便我们徘徊在《公约》之外，法律顾问办公室仍会在日常工作中不断遇到海洋法问题。例如，我们参与国际海事组织的相关工作，在区域层面通过制定规则减少船源污染、海洋倾倒和其他来源的海洋污染，保护海洋环境。最近，我们成功地推动美国批准了一项旨在限制船舶造成的大气污染的条约——《国际防止船舶污染公约》附件 6, 以及一项限制加勒比地区陆源海洋污染的议定书。《伦敦议定书》这一国际海洋倾倒条约也在等待参议院全体会议的通过。在国内层面，我们与司法部进行协调，确保涉及外国船舶的诉讼与《公约》关于海洋污染一章的规定相一致，我们仔细审视执行机构与国会的立法建议，以确保美国对海洋污染的管辖是根据海洋法的规则来适用和执行。

我们也在根据《公约》的规定，就海上边界条约与邻国展开协商。大多数人认为美国仅有 2 个邻国：加拿大和墨西哥。事实上，基于所拥有的岛屿，我们的海洋范围主张与其他国家重叠的多达 30 多起，只有不到半数的问题已经解决。一些争议涉及应在海洋划界中赋予岛屿多少效力。在波弗特海（靠美国阿拉斯加州东北岸和加拿大西北岸——译者注）一案中，加拿大主张，划定阿拉斯加与加拿大陆地边界的既有条约也应用来决定海洋的边界。我们法律顾问办公室也主张应由国务院领导下的工作组来决定美国 200 海里以外大陆架的外部界限。美国海岸警卫队的破冰船 Healy 号最近在北冰洋进行了多次巡游，包括美国大陆从海岸延伸 600 海里所及的楚科奇海边界地区。

美国和国际社会反对恐怖主义和核扩散的努力业已产生一些与海洋法相关的问题。与《公约》相一致，我们修改了登临检查协定以推进“防扩散安全倡议”在海上拦截方面的规定。我们还将海洋法的衡平要素引入关于打击海上犯罪活动的

条约。事实上，美国参议院刚刚提出意见，并同意批准 2 项关于打击海上不法活动的补充议定书：《制止危及海上航行安全非法行为公约 2005 年议定书》及《制止危及大陆架固定平台安全非法行为议定书之 2005 年议定书》。

在联合国安理会关于索马里海盗问题的讨论和决议中，海洋法问题也起到了显著作用。例如，联合国安理会 1816 号决议的一个关键要素便是，为打击海盗，索马里的领海将被视为公海。[1]

鉴于资源枯竭已经成为一个主要的经济和环境问题，渔业问题也引发了我们的法律关注。各国都寻求在世界上更多地区成立区域性的渔业管理组织，并加强对非法、不规范和未报告的捕鱼活动的打击手段。

在过去一年左右的时间，一些最有趣的海洋法问题来自于北极，该地区的气候变化使得航运、油气开采、旅游和渔业活动的前景日益广阔。因此，海洋法也比以往任何时候都更重要。结束之前，我想就北极融冰问题的出路提出一些个人看法和观点。

我的第一点看法是，一些人认为北极是一个"法律真空"地带的担忧并非事实。举例来说，《公约》所反映的海洋法为解决与北极相关的问题提供了一个广泛的法律框架。《公约》规定了商用或军用船舶及航空器在各个海域的航行权和航行自由。通过对领海界限和可适用规则的规定，它也涉及了北极地区 5 个周边国家——美国、俄罗斯、加拿大、丹麦和挪威的主权。《公约》通过设定专属经济区和大陆架的界限及该区域内的规则来解决资源的主权权利问题。它提供了一个建立 200 海里以外大陆架外部界限的地质学标准，鉴于北极周边国家正寻求拓展国际法所允许的大陆架界限，这是现今一个利益重大的话题。对于《公约》的 4 个缔约方，也就是 4 个其它的周边国家，《公约》规定了确保其大陆架外部界限得到国际承认的程序。国际法也规定了解决沿海国海洋主张重叠的规则。最后，海洋法还规定了在北极地区从事海洋科学研究的规则，规定了沿海国、船旗国和港口国之间在海洋环境保护方面各自的权利和义务。

但是，海洋法并不是管辖北极地区的唯一法律，各种各样涉及空气的协定也间接保护着北极，例如《关于臭氧层的蒙特利尔议定书》和《气候变化框架公约》。还存在所谓的"软法"可适用于北极地区，诸如国际海事组织 2002 年《冰封水域船舶操作指南》等不具有法律约束力的规则。此外，还有一个政府间论坛——北极理事会，由陆地领土在北极圈内的 8 个国家组成。对环境问题极为关注的北极理事会已经出台了关于北极地区近海油气活动的"指南"。

我的第二点看法是，媒体关于北极地区"赛跑"的报道夸大其词，我们不应该被他们牵着鼻子走。诚然，在那些法律确定性之前不是特别重要的地区，各国已经在努力确保这种确定性，但这不是"狂野西部"。2007 年 5 月，来自加拿大、丹麦、

1 S. C. Res. 1816, U. N. Doc. S/Res/1816 (2008).

挪威、俄罗斯和美国的政府官员齐聚格陵兰岛，以平息一股急于瓜分和开发北极自然资源的担忧。在所谓的《伊卢利萨特宣言》中，上述国家明确，已经有坚实的国际法律规则可适用于北极地区，他们承诺将恪守这些规则。

第三点看法是，虽然可能有必要加强北极地区某些方面的国际合作，但一个全面的北极条约却显得多余。正如部长们在《伊卢利萨特宣言》中所言："我们……看不出有任何建立一套新的全面的国际法律机制来管理北冰洋的需要。"关于建立一个与《南极条约》类似的《北极条约》的呼吁，显然是被误导了，因为这两个地区的法律、地理以及其他方面都大不相同。此外，世界上大多数国家并不承认 7 个国家对南极洲的主权主张，条约的作用是搁置这些主张以便进行科学研究。而与南极洲不同，北极地区的领土几乎毫无争议。同样，北极的绝大多数地区都是海洋，并被公认为受海洋法的规制。

我的最后一点看法还是关于《伊卢利萨特宣言》。一些人心存疑虑地想知道，宣言是否旨在反映一个新的北极周边"5 国集团"的出现？根本不是。这些国家仅仅是在地理上位于这个地区，他们在此的海洋法权利和义务与北冰洋密切相关。对他们来说，维持相互之间在这些问题上的对话关乎切身利益。此外，对于北极理事会的其他成员，即芬兰、冰岛和瑞典，以及其他在北极事务上有利益的国家，我们不认为《伊卢利萨特宣言》或格陵兰岛部长会议排除了他们所享有的正当利益。

既然北极是一个不存在法律真空，没有"竞赛"，不需要新条约，也不存在新国家集团的地方。我想谈谈有待进一步完善的地方。首先，随着北极地区海上交通和旅游的增多，可能需要加强搜救方面的合作。事实上，北极的舰载旅游数量已经在增长。根据《公约》，每个沿海国都应"促进有关海上和上空安全的足敷应用和有效的搜寻和救助服务的建立、经营和维持，并应在情况需要时，为此目的通过相互的区域性安排与邻国合作"。美国海岸警卫队正在努力加强其自身在北极地区的搜救能力，我们也在考虑加强与北极邻国合作安排的方式，确保合理分配资源、避免覆盖范围留白等。

其次，正如 5 国部长在《伊卢利萨特宣言》中提到的，不论是北极沿海国之间，还是和其他利益相关国家之间，在北极问题上开展科学合作的机遇将更加广阔。尽管美国和加拿大在波弗特海的海洋边界仍未划定，在过去的这个夏天，两国的科学家还是通力合作，搜集与北极大陆架外部界限有关的地震和深海测量方面的数据。

第三个方面是关于环境的合作。参加伊卢利萨特会议的部长们注意到，各国在保护北冰洋的独特生态系统方面都扮演着"管理员的角色"。在北极理事会层面，这些国家和其他国家正在评估该地区生物多样性的态势，应对影响气候效应物质（非二氧化碳）的区域性影响，推进现有《北极近海油气指南》在 2009 年 4 月举行的北极地区部长会议上通过。该指南的这次更新很大程度上是基于北极理事会

2008年的《北极油气活动评估》，将反映2002年上一次更新后到现在的技术进步，并包含更详细的环境影响评估条款。更广泛的国际社会所涉及的另一个环境问题是，通过国际海事组织，更新其《冰封水域船舶操作指南》，也就是人们常说的《极地法典》。目前，国际海事组织正在寻求强化法典的途径，包括改进船舶设计、增加安全和救生设备等。

最后，我认为一个非常积极的发展是，国内和国际层面的专家们都在思考北极气候变暖带来的法律问题。北冰洋的安全、治安和环境保护中的一个或多个方面在一定程度上都需要加强，相信大家能在事情成为必要之前达成一致意见并付诸实施。

结束之前，我希望我已经让大家更好地理解，为什么行政部门支持在参议院批准《公约》，并为此付出的努力，以及我们对北极融冰问题的看法。尤其是考虑到北极地区的变化，我希望不要再花更多的时间去等待参议院批准《公约》，希望能够将我们的权利建立在坚实的法律基础之上，希望当《公约》的其他缔约方作出影响世界海洋的决策时，我们能与他们并驾齐驱。

Submissions, through the Secretary-General of the UN, to the CLCS, pursuant to article 76, paragraph 8, of the UNCLOS of 10 December 1982

Updated on 29 May 2009

Please note that submissions are listed in the order received. Please also note that the designations employed in the submissions, including description of the areas, are as contained in the communications from submitting States or in the executive summaries. Their listing on this web site and the presentation of material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

	Submission by [State]	Date of submission	Presentation to the CLCS*	Subcommission established	Recommendations adopted on
1	Russian Federation	20 December 2001	See CLCS/32	See CLCS/32	27 June 2002
2	Brazil	17 May 2004	See CLCS/42	See CLCS/42	4 April 2007
3	Australia	15 November 2004	See CLCS/44	See CLCS/44	9 April 2008
4	Ireland - Porcupine Abyssal Plain	25 May 2005	See CLCS/48	See CLCS/48	5 April 2007
5	New Zealand	19 April 2006	See CLCS/52	See CLCS/52	22 August 2008
6	Joint submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland - in the area of the Celtic Sea and the Bay of Biscay	19 May 2006	See CLCS/52	See CLCS/52	24 March 2009

7	Norway - in the North East Atlantic and the Arctic	27 November 2006	See CLCS/54	See CLCS/54	27 March 2009
8	France - in respect of the areas of French Guiana and New Caledonia	22 May 2007	See CLCS/56	See CLCS/56	2 September 2009
9	Mexico - in respect of the western polygon in the Gulf of Mexico	13 December 2007	See CLCS/58	See CLCS/58	31 March 2009
10	Barbados	8 May 2008	See CLCS/60	See CLCS/62	
11	United Kingdom of Great Britain and Northern Ireland - Ascension Island	9 May 2008	See CLCS/60	See CLCS/62	
12	Indonesia - North West of Sumatra Island	16 June 2008	See CLCS/62	See CLCS/62	
13	Japan	12 November 2008	See CLCS/62		
14	Joint submission by the Republic of Mauritius and the Republic of Seychelles - in the region of the Mascarene Plateau	1 December 2008	See CLCS/62		
15	Suriname	5 December 2008			
16	Myanmar	16 December 2008			
17	France - areas of the French Antilles and the Kerguelen Islands	5 February 2009			
18	Yemen - in respect of south east of Socotra Island	20 March 2009			
19	United Kingdom of Great Britain and Northern Ireland - in respect of Hatton Rockall Area	31 March 2009			

(Continued from the previous page)

	Submission by [State]	Date of submission
20	Ireland - in respect of Hatton-Rockall Area	31 March 2009
21	Uruguay	7 April 2009
22	Philippines - in the Benham Rise region	8 April 2009
23	The Cook Islands - concerning the Manihiki Plateau	16 April 2009
24	Fiji	20 April 2009
25	Argentina	21 April 2009
26	Ghana	28 April 2009
27	Iceland - in the Ægir Basin area and in the western and southern parts of Reykjanes Ridge	29 April 2009
28	Denmark - in the area north of the Faroe Islands	29 April 2009
29	Pakistan	30 April 2009
30	Norway - in respect of Bouvetøya and Dronning Maud Land	4 May 2009
31	South Africa - in respect of the mainland of the territory of the Republic of South Africa	5 May 2009
32	Joint submission by the Federated States of Micronesia, Papua New Guinea and Solomon Islands - concerning the Ontong Java Plateau	5 May 2009
33	Joint submission by Malaysia and Viet Nam - in the southern part of the South China Sea	6 May 2009
34	Joint submission by France and South Africa - in the area of the Crozet Archipelago and the Prince Edward Islands	6 May 2009
35	Kenya	6 May 2009
36	Mauritius - in the region of Rodrigues Island	6 May 2009
37	Viet Nam - in North Area (VNM-N)	7 May 2009
38	Nigeria	7 May 2009
39	Seychelles - concerning the Northern Plateau Region	7 May 2009
40	France - in respect of La Réunion Island and Saint-Paul and Amsterdam Islands	8 May 2009
41	Palau	8 May 2009
42	Côte d'Ivoire	8 May 2009
43	Sri Lanka	8 May 2009
44	Portugal	11 May 2009
45	United Kingdom of Great Britain and Northern Ireland - in respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands	11 May 2009
46	Tonga	11 May 2009
47	Spain - in respect of the area of Galicia	11 May 2009
48	India	11 May 2009
49	Trinidad and Tobago	12 May 2009
50	Namibia	12 May 2009

＊ Presentation of the submission by coastal State representatives at a session of the Commission. Rule 52 of and section II, paragraph 2, of Annex III to the rules of procedure of the Commission (CLCS/40/Rev.1) refer.

中国对越南提交外大陆架申请之声明（CML/18/2009）

纽约
联合国秘书长
潘基文先生阁下

中华人民共和国常驻联合国代表团向联合国秘书长致意，并谨就越南于2009年5月7日向大陆架界限委员会（下称“委员会”）提交的二百海里以外大陆架划界案表达如下立场：

中国对南海诸岛及其附近海域拥有无可争辩的主权，并对相关海域及其海床和底土享有主权权利和管辖权（见附图）。中国政府的这一一贯立场为国际社会所周知。

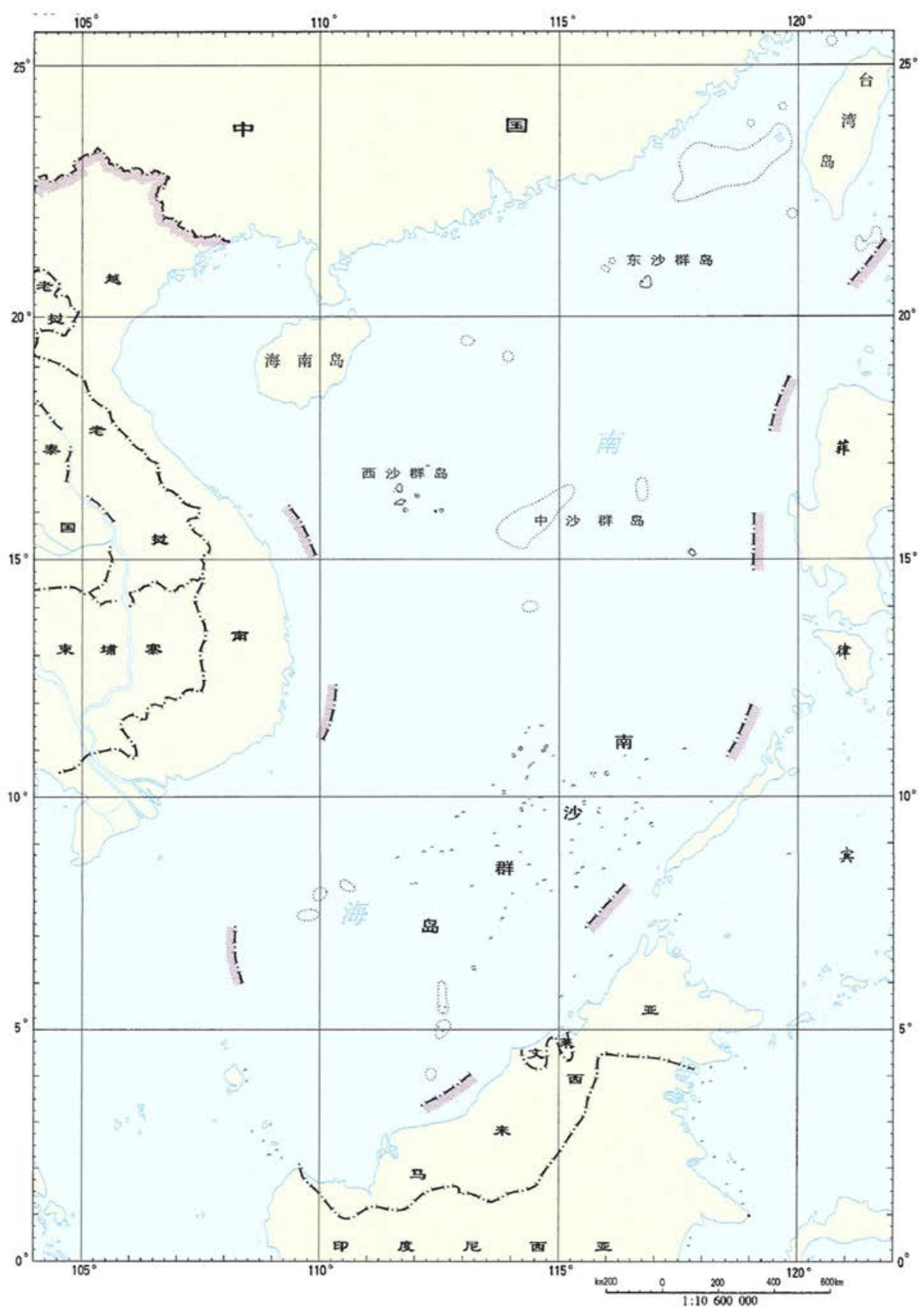
上述越南划界案，严重侵害了中国在南海的主权、主权权利和管辖权。根据《大陆架界限委员会议事规则》附件一第5条（a）项，中国政府郑重要求委员会对越南划界案不予审理。中国政府已将上述立场知会越南。

中华人民共和国常驻联合国代表团请秘书长将本照会周知大陆架界限委员会全体委员、《联合国海洋法公约》全体缔约国和联合国全体会员国。

顺致最崇高敬意。

中华人民共和国常驻联合国代表团（章）
二00九年五月七日于纽约

附图:



中国对马来西亚和越南联合提交外大陆架申请之声明（CML/17/2009）

纽约
联合国秘书长
潘基文先生阁下

中华人民共和国常驻联合国代表团向联合国秘书长致意，并谨就马来西亚和越南联合于2009年5月6日向大陆架界限委员会（下称“委员会”）提交的二百海里以外大陆架划界案表达如下立场：

中国对南海诸岛及其附近海域拥有无可争辩的主权，并对相关海域及其海床和底土享有主权权利和管辖权（见附图）。中国政府的这一一贯立场为国际社会所周知。

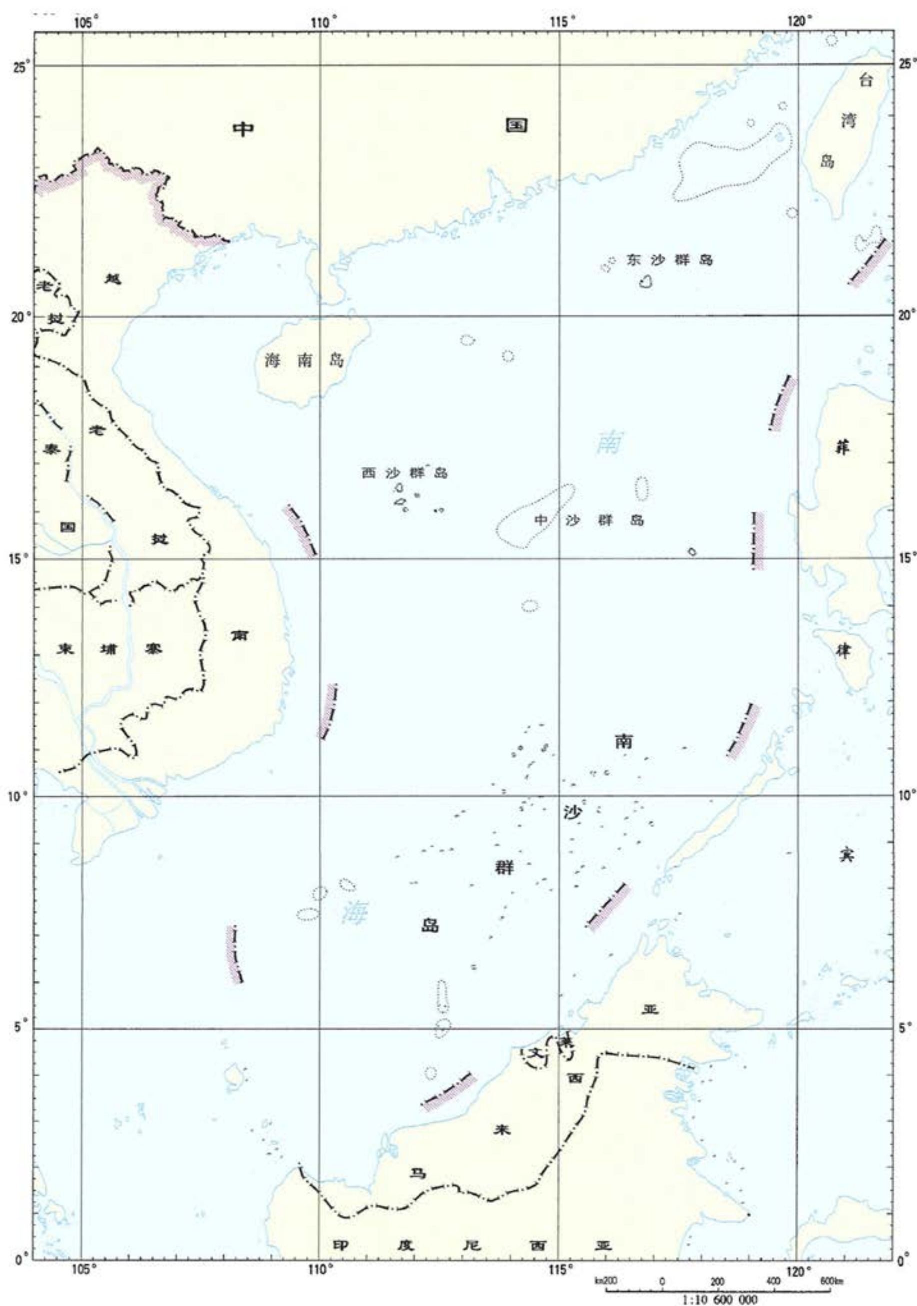
上述马来西亚和越南联合划界案所涉二百海里以外大陆架区块，严重侵害了中国在南海的主权、主权权利和管辖权。根据《大陆架界限委员会议事规则》附件一第5条（a）项，中国政府郑重要求委员会对马来西亚和越南联合划界案不予审理。中国政府已将上述立场知会马来西亚和越南。

中华人民共和国常驻联合国代表团请秘书长将本照会周知大陆架界限委员会全体委员、《联合国海洋法公约》全体缔约国和联合国全体会员国。

顺致最崇高敬意。

中华人民共和国常驻联合国代表团（章）
二00九年五月七日于纽约

附图：



中国对日本提交外大陆架申请之声明（CML/2/29）

纽约
联合国秘书长
潘基文先生阁下

中华人民共和国常驻联合国代表团向联合国秘书长致意，并谨就日本国 2008 年 11 月 12 日向大陆架界限委员会（下称“委员会”）提交的 200 海里以外大陆架划界案表明如下立场：

中国政府认为，《联合国海洋法公约》（下称“《公约》”）缔约国提交 200 海里以外大陆架的外部界限划界案，是其依《公约》应享有的权利。同时，《公约》缔约国在行使其确定大陆架外部界限的权利的同时，也负有确保尊重作为人类共同继承财产的国际海底区域（下称“区域”）范围的义务，不应影响国际社会的整体利益。《公约》的所有缔约国都应全面遵守《公约》，确保《公约》的完整性，特别是不使“区域”范围受到任何不合法的侵蚀。

中国政府认真研究了日本划界案的执行摘要，尤其注意到该划界案以“冲之鸟岛”为基点延伸的 SKB、MIT 和 KPR 三处 200 海里外大陆架。应当注意，所谓的“冲之鸟岛”实际上是《公约》第 121 条第 3 款所指的岩礁。因此中国政府提请委员会委员、《公约》缔约国和联合国会员国注意，日本将冲之鸟礁列入其划界案中是不符合《公约》的。

《公约》第 121 条第 3 款规定，“不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区和大陆架。”现有的科学资料充分表明，冲之鸟礁依其自然状况，显然是不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区和大陆架，更不具备扩展 200 海里以外大陆架的权利。

鉴于冲之鸟礁不具备拥有任何范围大陆架的权利基础，日本划界案中以冲之鸟礁为基点划出的 200 海里以内及以外的部分均超出了《公约》有关委员会作出建议的授权。中国政府谨要求委员会不对上述部分采取任何行动。

中华人民共和国常驻联合国代表团请秘书长将上述立场周知委员会全体委员、《公约》全体缔约国和联合国全体会员国。

顺致最崇高敬意。

中华人民共和国常驻联合国代表团（章）

二00九年二月六日

交通部关于国际海事组织《2001 年国际燃油污染损害民事责任公约》生效的公告

（交通部 2009 年第 1 号）

经国务院批准，我国于 2008 年 12 月 9 日向国际海事组织递交了有关加入《2001 年国际燃油污染损害民事责任公约》（以下简称公约）的加入书，同时声明如下：

一、本公约第七条不适用于中华人民共和国内河航行船舶；

二、根据《中华人民共和国香港特别行政区基本法》和《中华人民共和国澳门特别行政区基本法》，中华人民共和国政府决定，本公约适用于中华人民共和国澳门特别行政区；在另行通知前，本公约不适用于中华人民共和国香港特别行政区。

公约将于 2009 年 3 月 9 日对我生效，同时适用于澳门特区，暂不适用于香港特区。

关于国际海事组织经修正的《1974 年国际海上人命安全公约》和《国际船舶和港口设施保安规则》的修正案生效的公告

（中华人民共和国交通运输部 2008 年第 45 号文件）

国际海事组织海上安全委员会第 80 届会议和第 82 届会议分别于 2005 年 5 月 20 日和 2006 年 12 月 8 日以 MSC.194(80) 号和 MSC.216(82) 号决议通过了经修正的《1974 年国际海上人命安全公约》（以下简称“安全公约”）的修正案，第 80 届会议还以 MSC.196(80) 号决议通过了《国际船舶和港口设施保安规则》（以下简称规则）的修正案。

根据安全公约第Ⅷ (b) (vii) (2) 条关于修正案默认接受程序的规定，上述安全公约的修正案将于 2009 年 1 月 1 日生效，上述规则在安全公约下也为强制性规定，其修正案亦将与安全公约修正案同时生效。

我国是安全公约的缔约国，在上述安全公约和规则的修正案通过后未对其内容提出任何反对意见，修正案对我国具有约束力。

现将安全公约和规则的修正案中文本予以公告，请遵照执行。

中华人民共和国交通运输部（章）

2008 年 12 月 25 日

关于加强船舶防范海盗工作有关事项的公告

（中华人民共和国交通运输部 2009 年 04 月 09 日公布）

据国际海事局最新公布的统计数据，自 2009 年 3 月 19 日至今，全球各海域共发生 21 起海盗袭击事件，其中 11 起发生在索马里沿海，4 起发生在亚丁湾。2009 年 4 月 4 日至 6 日期间，海盗袭击事件呈现出连续频发态势：48 小时内，来自英国、德国、也门、中国台湾和法国的 5 艘船舶接连被索马里海盗劫持。

情报分析显示，海盗活动呈现出新的趋势，主要体现在以下几个方面：一是海盗活动由亚丁湾海域向索马里以南印度洋远海转移，以规避多国海军的护航区域；二是海盗活动由白天转为夜间进行，海盗使用的武装设备设施不断升级；三是海盗劫持目标不再限于船舶与货物，劫持船员也成为海盗勒索赎金的主要方式之一；四是西非海域，特别是尼日利亚沿海海域海盗问题日趋严重。

另外，海盗袭击地点距海岸越来越远，在最近发生的海盗袭击事件中，至少有 5 起发生在距海岸 400 海里以外的区域，其中有 1 起发生在索马里首都摩加迪沙东南 630 海里的水域。

上述情况表明，尽管国际社会加强了防范、打击海盗力度，有关国家为航行船舶提供护航保障，但海盗活动仍然十分猖獗，安全形势依然十分严峻。为保障船舶、船员及运输物资安全，防范可能发生的海盗袭击，现公告如下：

一、航经亚丁湾和索马里海域的中国籍船舶，应按照《关于中国船舶在亚丁湾和索马里海域申请护航有关事项的公告》（交通运输部 2008 年第 43 号）的要求，积极申请护航并积极做好编队航行前的各项准备工作。编队航行期间要严格遵守编队指挥船的指挥，参照船舶保安等级 2 的要求采取防范性保安措施。

二、各航运公司要密切关注海盗动态信息，及时为船舶提供信息服务和岸基支持。

三、鉴于近期除上述海域外，马来西亚、越南、泰国、坦桑尼亚及塞舌尔群岛附近海域均有海盗劫持事件发生，船舶航经这些海域时也应采取积极有效的海盗防范措施。

特此公告。

交通运输部

2009 年 4 月 9 日

国际集装箱班轮运价备案实施办法

（征求意见稿, 2009 年 4 月）

为维护我国国际集装箱班轮运输市场秩序，保护公平竞争，保障运输各方当事人的合法权益，促进航运业健康发展，根据《中华人民共和国国际海运条例》（以下简称《国际海运条例》）第 20 条规定，实施国际集装箱班轮运价备案。现将实施办法公告如下：

一、基本原则

国际集装箱班轮运价属于市场调节价，由班轮经营者自主制定。班轮经营者应遵循依法经营、诚实信用的原则，提高运输服务质量和效率，降低经营成本，根据运输经营成本和航运市场供求状况，以正常、合理的运价提供运输服务，禁止以“零运价”、“负运价”方式承揽货物。

二、备案义务人

持有交通运输部颁发的《国际班轮运输经营资格登记证》并经营集装箱船舶运输业务的经营者为运价备案义务人。

三、备案范围

备案的运价包括公布运价和协议运价。

运价备案义务人应报备中国港口至外国基本港的出口集装箱货物海运运价（Ocean Freight）幅度，即对外报价的上限和下限。备案的运价幅度应正常、合理。实际执行的运价超出备案公布运价幅度的，按照协议运价的方式报备，协议运价生效时间为受理备案之时起满 24 小时。

基本港是指在交通运输部确定公布的范围内，各班轮经营者经营船舶（含租用舱位、共享舱位的船舶）直接挂靠的港口。

班轮经营者根据各自经营的航线，自行确定运价幅度，并应按照上海航运交易所经交通运输部备案同意的格式报备。

各班轮经营者可根据实际情况自行调整运价幅度，备案的公布运价幅度自受理之日起满 30 日生效，但本办法生效后首次备案的运价幅度自受理之日起生效。

四、受理机构

交通运输部指定上海航运交易所为运价备案受理机构。上海航运交易所应根据本办法制定运价备案操作指南，并提供相应的技术服务。

上海航运交易所及其工作人员应当保守涉及商业秘密的运价备案信息。

五、监督检查

各有关省级交通运输主管部门和港口航运管理机构应加强对本地区国际海运市场监管，加大现场检查力度，对违反《国际海运条例》的企业，应责令其限期改正，并向交通运输部报告。

六、处罚措施

（一）未按规定履行运价备案手续或未执行备案运价的，将依照《国际海运条例》第 49 条规定，责令限期改正，并处 2 万元以上 10 万元以下的罚款。

（二）如班轮经营者备案的运价超出正常、合理的范围，严重偏离同一航线同类规模班轮经营者的平均运价水平，可能对公平竞争造成损害的，交通运输部将依照《国际海运条例》第五章规定实施调查。

调查期间，被调查人应将每航次的所有有关运输单证、运费发票、服务合同文本、会计账簿等有关资料如实提供给调查机关，不得拒绝调查或隐匿真实情况、谎报情况。对拒绝调查或不如实提供调查资料的，依照《国际海运条例》第 53 条规定，责令改正，并处 2 万元以上 10 万元以下的罚款。

经调查，班轮经营者对公平竞争造成损害的，将采取限制其航班数量、中止运价本或者暂停受理运价备案等限制性、禁止性措施。

关于修改《中华人民共和国水路运输服务业管理规定》的决定

（2009 年 4 月 13 日交通运输部第 4 次部务会议通过，自 2009 年 4 月 20 日起施行）

交通运输部决定对《中华人民共和国水路运输服务业管理规定》（交通部令 1998 年第 6 号）作如下修改：

一、第十二条第二款修改为：国务院交通运输主管部门和市（包括直辖市）交通运输主管部门（以下简称审批机关），应当自收到水路运输服务企业开业申请书和其他文件之日起 20 日内决定批准或者不批准。对批准设立的，颁发水路运输服务许可证书（以下简称许可证书）。

二、删除第二十九条和第三十二条。

此外，对条文的顺序和部分文字作了相应的调整和修改。

本决定自公布之日起施行。

《中华人民共和国水路运输服务业管理规定》根据本决定作相应修正，重新发布。

中华人民共和国水路运输服务业管理规定

(1996 年 6 月 18 日交通部发布 根据 1998 年 7 月 30 日交通部《关于修改〈中华人民共和国水路运输服务业管理规定〉的决定》第一次修正根据 2009 年 4 月 20 日交通运输部《关于修改〈中华人民共和国水路运输服务业管理规定〉的决定》第二次修正）

第一章 总 则

第一条 为规范水路运输服务行为，维护水路运输市场秩序，保障旅客、托运人、收货人、承运人及其代理人的合法权益，促进水运事业发展，依据《中华人民共和国水路运输管理条例》，制定本规定。

第二条 本规定适用于在中华人民共和国境内为国内水路运输提供水路运输服务及相关业务的活动。

第三条 本规定所称水路运输服务业，是指接受旅客、托运人、收货人以及承运人的委托，以委托人的名义，为委托人办理旅客或者货物运输、港口作业以及其他相关业务手续并收取费用的行业，分为船舶代理业和客货运输代理业。

第四条 水路运输服务企业必须依法取得中华人民共和国企业法人资格。

第五条 国务院交通运输主管部门负责对全国水路运输服务业实施行业管理。

各级地方人民政府交通运输主管部门或者其设置的航运管理部门（以下简称交通运输主管部门）依照本规定，负责对本行政区域内的水路运输服务业实施行业管理。

第六条 对水路运输服务业实施管理，应当遵循布局合理、服务方便、竞争有序、适应运输市场发展需要的原则。

第七条 水路运输服务企业应当遵循方便、迅速、准确、节省的经营方针，为旅客和托运人、收货人、承运人提供服务。

水路运输服务企业应当遵守中华人民共和国的法律、法规和规章，接受主管机关的监督和管理。

第八条 任何企业从事水路运输服务业务，必须经过交通运输主管部门的批准，领取《水路运输服务许可证》后，方可经营。

外资企业、中外合资企业、中外合作企业（以下简称"三资企业"）经营水路运输服务业务，应当经国务院交通运输主管部门批准。

第二章 审批条件和程序

第九条 设立水路运输服务企业，应当具备下列条件：

（一）有稳定的水路运输客源、货源和船舶业务来源；

（二）有与经营范围相适应的组织机构和专业人员；

（三）有固定经营场所和必要的营业设施；

（四）有符合下列规定的最低限额的注册资本：

1. 经营船舶代理业务的，为20万元人民币；

2. 经营客货运输代理业务的，为30万元人民币；

3. 同时经营船舶代理和客货运输代理业务的，为50万元人民币。

第十条 申请设立水路运输服务企业，申请人应当向拟设立水路运输服务企业所在地的县级交通运输主管部门提出申请，由该部门审核后转市（设区的市，下同）交通运输主管部门审查批准，并报省级交通运输主管部门备案。

申请设立经营水路运输服务业务的"三资企业"，申请人应当向拟设立"三资企业"所在地的县级交通运输主管部门提出申请，经各级交通运输主管部门逐级审核后由省级交通运输主管部门转报国务院交通运输主管部门审查批准。

申请人所在地没有县级人民政府交通运输主管部门的，申请人应当直接向市

（包括直辖市）交通运输主管部门提出申请。

第十一条 申请设立水路运输服务企业，应当报送下列材料：

（一）水路运输服务企业开业申请书；

（二）可行性研究报告；

（三）企业章程草案；

（四）拟注册地方工商行政管理机关签发的“企业名称预先核准通知书”；

（五）资信证明；

（六）办公经营场所产权证明（或者租赁证明、协议等）；

（七）主要出资单位同意设立企业的文件（董事会决议、联营协议或者经济担保人证明）；

（八）企业负责人和主要业务人员姓名、职务和身份证明；

（九）国务院交通运输主管部门规定的其他文件。

第十二条 县级交通运输主管部门应当自收到水路运输服务企业开业申请书和其他文件之日起 10 日内提出审核意见并转报市交通运输主管部门，或者逐级转报国务院交通运输主管部门。

国务院交通运输主管部门和市（包括直辖市）交通运输主管部门（以下简称审批机关），应当自收到水路运输服务企业开业申请书和其他文件之日起 20 日内决定批准或者不批准。对批准设立的，颁发水路运输服务许可证书（以下简称许可证书）。

第十三条 水路运输服务企业应当凭审批机关颁发的许可证书，依照有关法律和法规的规定，办理企业登记、税务登记手续。

第十四条 申请人取得许可证书后无正当理由连续 180 日未营业的，审批机关应当撤销其许可证书。

第十五条 许可证书有效期限为 3 年。

水路运输服务企业在许可证书有效期限届满时需要继续从事水路运输服务业务的，应当在许可证书届满之日前 30 日内，向审批机关申请换领许可证书；未按本规定申请换领许可证书的，其水路运输服务经营资格自许可证书届满之日起自动丧失，审批机关应当在办理注销手续后通知工商行政管理机关依法注销该企业营业执照或者营业执照中相关项目。

第十六条 水路运输服务企业要求变更经营范围、企业名称、住所、法定代表人和经济类型等事项，应当申请办理变更审批手续。

申请变更经营范围的，应当报送下列材料：

（一）水路运输服务企业变更申请书；

（二）可行性研究报告；

（三）修改后的企业章程；

（四）原许可证书；

（五）国务院交通运输主管部门规定的其他文件。

申请变更企业名称、经济类型等事项的，应当报送本条规定的第（一）、（三）、（四）项文件。

申请变更企业法定代表人、住所等事项的，应当报送本条规定的第（四）项文件和拟变更项目的证明文件。

第十七条 水路运输服务企业申请变更经营范围、企业名称、住所、法定代表人或者经济类型事项，应当依照本规定第十条规定的审批程序，报经原审批机关批准后，换领许可证书。企业凭换领的许可证书办理企业变更登记手续。

第十八条 水路运输服务企业终止营业，应当依照本规定第十条规定的审批程序办理停业注销手续。原审批机关应当收回许可证书，并转请工商行政管理机关依法注销企业营业执照中相关项目。

第三章 经营管理

第十九条 水路运输服务企业的业务范围包括：

（一）船舶代理业务，是指接受承运人委托，为其代办下列部分或者全部业务：

1. 承揽货源或者客源（含旅游客源）；

2. 安排和联系货物配积载、船舶装卸或者旅客乘降以及船舶作业所需拖轮、浮吊等；

3. 办理旅客中转、货物中转或者储存；

4. 代售客票或者签订运输合同，缮制运输单证、票据；

5. 结算、交付票款或者运杂费；

6. 通报船期和货物到港情况，办理承运验收、货物交付手续；

7. 联系船舶修理和船舶燃物料及其他用品供应；

8. 协助处理属于承运人责任事宜和客货运事故；

9. 办理承运人委托的其他事项。

（二）客货运输代理业务，是指接受旅客或者托运人、收货人委托，为其代办下列部分或者全部业务：

1. 联系船舶，确定舱位，签订运输合同，代订客票；

2. 联系货物装卸、储存或者驳运，签订装卸合同；

3. 办理货物提取、交付手续；

4. 结算、交纳运费票款和港口费；

5. 办理货物运输、作业所需证明；

6. 协助处理旅客或者托运人、收货人责任事宜和客货运事故；

7. 办理旅客或者托运人、收货人委托的其他事项。

第二十条 水路运输服务企业应当在批准的经营范围内从事业务活动。

第二十一条 经营港口业务的企业不得经营水路运输服务业务，但客运站除外。

第二十二条 水路运输服务企业的分支机构不得从事经营活动。

第二十三条 水路运输服务企业不得以本人名义为他人托运、承运货物，收取运费的差价。

第二十四条 水路运输服务企业不得就同一委托事项同时接受当事人双方的委托。

第二十五条 水路运输服务企业与委托方应当本着协商自愿的原则订立合同，并认真履行。由于一方责任造成另一方损失，应当由责任方负责赔偿。

第二十六条 水路运输服务企业不得未受委托强行代办业务；不得以不正当竞争手段从事经营活动。

水路运输服务企业不得出租、出借、转让或者涂改许可证书和有关货运业务单证。

第二十七条 水路运输服务企业不得为无水路运输经营资格或者超越经营范围的经营人和船舶提供水路运输服务业务。

第二十八条 水路运输服务企业代办业务应当使用统一规定的单证和票据。

第二十九条 水路运输服务企业应当分别于每年 1 月底和 7 月底以前向企业注册所在地的交通运输主管部门报送上一年度和上半年度统计报表与有关经营情况资料。

第四章 罚 则

第三十条 违反本规定第二十八条规定的，由县级以上交通运输主管部门视情节轻重给予警告或者处 1 万元以下的罚款。

第三十一条 违反本规定第二十六条第一款规定的，由县级以上交通运输主管部门处 1 万元以上10万元以下的罚款；情节严重的，并可以暂扣或者吊销许可证。

第三十二条 违反本规定第二十条、第二十一条、第二十三条规定的，由县级以上交通运输主管部门没收违法所得，并处违法所得 1 倍以上 3 倍以下的罚款；没有违法所得的，处 2 万元以上 20 万元以下的罚款。

第三十三条 违反本规定第八条、第二十二条规定的，由县级以上交通运输主管部门没收违法所得，并处违法所得 2 倍以上 3 倍以下的罚款；没有违法所得的，处 3 万元以上 25 万元以下的罚款。

第三十四条 违反本规定第二十四条规定，给被代理人造成损失的，依法承担民事责任。

第三十五条 当事人对交通运输主管部门的处罚决定不服的，可以向上一级交通运输主管部门申请复议；对上一级交通运输主管部门的复议决定不服的，可以自

接到复议决定书之日起 15 日内向人民法院起诉。当事人逾期既不起诉又不履行处罚决定的，交通运输主管部门可以申请人民法院强制执行。

第五章 附 则

第三十六条 本规定由国务院交通运输主管部门负责解释。

第三十七条 本规定自 1996 年 10 月 1 日起施行。

关于修改《国内船舶管理业规定》的决定

（2008年12月29日中华人民共和国交通运输部经第12次部务会议通过，现予公布，自2009年7月1日起施行）

交通运输部决定对《国内船舶管理业规定》作如下修改：

一、第六条修改为：从事国内船舶管理业务的企业应当根据其提供海务管理、机务管理服务的船舶数量，配备满足下列数量要求的海务、机务专职管理人员：

（一）管理沿海普通货船1至10艘的，至少分别配备1人；11至20艘的，至少分别配备2人；21至30艘的，至少分别配备3人；30艘以上的，至少分别配备4人。

（二）管理内河普通货船1至10艘的，至少分别配备1人；11至50艘的，至少分别配备2人；51至100艘的，至少分别配备3人；100艘以上的，至少分别配备4人。

（三）管理沿海散装液体危险品船或者客船1至5艘的，至少分别配备1人；6至10艘的，至少分别配备2人；11至20艘的，至少分别配备3人；20艘以上的，至少分别配备4人。

（四）管理内河散装液体危险品船或者客船1至10艘的，至少分别配备1人；11至20艘的，至少分别配备2人；21至30艘的，至少分别配备3人；30艘以上的，至少分别配备4人。

前款要求的海务、机务专职管理人员应当具有与所管理船舶种类和航区相对应的船长、轮机长任职的从业资历；并与该船舶管理企业签订1年以上全日制用工的劳动合同，在合同期限内不得在船上或者其他企业兼职。

二、第八条修改为：申请经营国内船舶管理业务，应当向其所在地人民政府交通运输主管部门提交下列材料：

（一）申请书；

（二）《企业法人营业执照》（筹建的提供《企业名称预先核准通知书》）及其复印件；

（三）企业股东的基本情况和说明股东投资情况的证明文件，法人股东提供《企业法人营业执照》及其复印件，自然人股东提供身份证及其复印件；

（四）公司章程及其复印件，固定办公场所使用证明及其复印件；

（五）本规定要求的专职管理人员配备情况的证明文件，包括专职管理人员

名单、任职文件、身份证、任职资历材料、劳动合同（筹建的提供意向协议）及其复印件；

（六）覆盖其所管理船舶范围的有效船舶安全与防污染管理体系“符合证明”或者“临时符合证明”证书及其复印件。

三、第九条修改为：受理申请的交通运输主管部门应当在核实申报材料中的原件和复印件后，盖章确认复印件的内容与原件一致，将材料原件退还申请人；并在15日内完成初步审查，将初步审查意见和全部申请材料转报至省级人民政府交通运输主管部门。

四、第十一条修改为：经当事人申请，具有相应审批权限的交通运输主管部门可以参照本规定要求的经营资质条件，对于筹建期的国内船舶管理企业出具筹建通知书。当事人凭筹建通知书办理工商注册登记、安全与防污染管理体系申请审核等手续。

五、第十二条修改为：省级人民政府交通运输主管部门应当自收到转报材料之日起20日内完成审核，符合条件的，作出许可决定，向申请人颁发《水路运输服务许可证》并报交通运输部备案；不符合条件的，作出不予许可决定，并且应当书面通知申请人不予许可的理由。

六、第二十六条后增加一条为：违反本规定第六条规定，责令改正，并处以5000元以上1万元以下罚款。

七、删除第二条第二款第（四）项、第七条、第十条、第二十八条。

此外，对条文的顺序和部分文字作了相应的调整和修改。

本决定自2009年7月1日起施行。

《国内船舶管理业规定》根据本决定作相应修正，重新发布。

国内船舶管理业规定

（2001年7月4日交通部发布 根据2009年1月5日交通运输部《关于修改〈国内船舶管理业规定〉的决定》修正）

第一章 总 则

第一条 为规范船舶管理业经营活动，维护船舶管理市场秩序，保障水路运输安全，促进水路运输业健康发展，根据有关法律、行政法规，制定本规定。

第二条 本规定适用于在中华人民共和国境内的国内船舶管理业务经营和监督管理活动。

本规定所称船舶管理业，是指船舶管理经营人根据约定，为船舶所有人或者船舶承租人、船舶经营人提供下列船舶管理服务：

（一）船舶机务管理；

（二）船舶海务管理；

（三）船舶检修、保养；

（四）船舶买卖、租赁、营运及资产管理；

（五）其他船舶管理服务。

第三条　从事船舶管理业经营活动，应当遵守合法经营、公平竞争的原则。

第四条　县级以上人民政府交通运输主管部门根据本规定和国家其他规定对船舶管理业实施管理，并可委托其设置的航运管理机构负责船舶管理业的具体管理工作。

第二章　经营资质

第五条　经营船舶管理业，应当具备下列条件：

（一）有符合国家规定的注册资本；

（二）有符合本规定的专职管理人员；

（三）有与经营业务相适应的设备、设施；

（四）有符合国家规定的船舶安全与防污染管理体系；

（五）法律、行政法规规定的其他条件。

第六条　从事国内船舶管理业务的企业应当根据其提供海务管理、机务管理服务的船舶艘数，配备满足下列数量要求的海务、机务专职管理人员：

（一）管理沿海普通货船 1 至 10 艘的，至少分别配备 1 人；11 至 20 艘的，至少分别配备 2 人；21 至 30 艘的，至少分别配备 3 人；30 艘以上的，至少分别配备 4 人。

（二）管理内河普通货船 1 至 10 艘的，至少分别配备 1 人；11 至 50 艘的，至少分别配备 2 人；51 至 100 艘的，至少分别配备 3 人；100 艘以上的，至少分别配备 4 人。

（三）管理沿海散装液体危险品船或者客船 1 至 5 艘的，至少分别配备 1 人；6 至 10 艘的，至少分别配备 2 人；11 至 20 艘的，至少分别配备 3 人；20 艘以上的，至少分别配备 4 人。

（四）管理内河散装液体危险品船或者客船 1 至 10 艘的，至少分别配备 1 人；11 至 20 艘的，至少分别配备 2 人；21 至 30 艘的，至少分别配备 3 人；30 艘以上的，至少分别配备 4 人。

前款要求的海务、机务专职管理人员应当具有与其所管理船舶种类和航区相对应的船长、轮机长任职的从业资历；并与该船舶管理企业签订 1 年以上全日制用工的劳动合同，在合同期限内不得在船上或者其他企业兼职。

第七条　申请经营国内船舶管理业务，应当向其所在地人民政府交通运输主管部门提交下列材料：

（一）申请书；

（二）《企业法人营业执照》（筹建的提供《企业名称预先核准通知书》）及其复印件；

（三）企业股东的基本情况和说明股东投资情况的证明文件，法人股东提供《企业法人营业执照》及其复印件，自然人股东提供身份证及其复印件；

（四）公司章程及其复印件，固定办公场所使用证明及其复印件；

（五）本规定要求的专职管理人员配备情况的证明文件，包括专职管理人员名单、任职文件、身份证、任职资历材料、劳动合同（筹建的提供意向协议）及其复印件；

（六）覆盖其所管理船舶范围的有效船舶安全与防污染管理体系“符合证明”或者“临时符合证明”证书及其复印件。

第八条　受理申请的交通运输主管部门应当在核实申报材料中的原件和复印件后，盖章确认复印件的内容与原件一致，将材料原件退还申请人；并在 15 日内完成初步审查，将初步审查意见和全部申请材料转报至省级人民政府交通运输主管部门。

第九条　省级人民政府交通运输主管部门应当自收到转报材料之日起 20 日内完成审核，符合条件的，作出许可决定，向申请人颁发《水路运输服务许可证》并报交通运输部备案；不符合条件的，作出不予许可决定，并且应当书面通知申请人不予许可的理由。

第十条　经当事人申请，具有相应审批权限的交通运输主管部门可以参照本规定要求的经营资质条件，对于筹建期的国内船舶管理企业出具筹建通知书。当事人凭筹建通知书办理工商注册登记、安全与防污染管理体系申请审核等手续。

第十一条　船舶管理经营人领取《水路运输服务许可证》后，应当在开业前 15 日内将《水路运输服务许可证》复印件送所在地和船籍港海事管理机构备案。

第十二条　船舶管理经营人扩大经营范围，应当按照本规定的有关规定报原批准机关批准，并报所在地和船籍港海事管理机构备案。

船舶管理经营人的名称、经营场所、法定代表人等事项发生变更，应当在 15 日内向原批准机关、所在地和船籍港海事管理机构备案。

第十三条　船舶管理经营人歇业或者停业，应当向原批准机关、所在地和船籍港海事管理机构备案。

第三章　经营行为

第十四条　船舶管理经营人应当在依法核准的经营范围内从事船舶管理业

经营活动。

第十五条 船舶管理经营人与船舶所有人或者船舶经营人、船舶承租人签定船舶管理合同后，应当将船舶的名称、国籍、船舶类型、总载重吨、船籍港，及船舶所有人或者船舶经营人、船舶承租人的名称、住所等情况报所在地和船籍港的海事管理机构备案。

第十六条 船舶管理经营人应当根据船舶管理合同和国家有关规定，履行有关船舶安全和防止污染的义务。

船舶所有人、船舶经营人、船舶承租人有关船舶安全和防止污染的义务，不因将船舶已委托给船舶管理经营人管理而改变。

第十七条 船舶管理经营人所管理的船舶发生交通事故和污染事故，必须接受海事管理机构依法进行的调查处理。

第十八条 经营船舶管理业，不得有下列行为：

（一）以低于正常、合理水平的价格提供船舶管理服务，妨碍公平竞争；

（二）在会计账簿之外暗中给予船舶所有人、船舶经营人、船舶承租人回扣，承揽船舶管理业务；

（三）滥用优势地位，限制他人选择其他船舶管理经营人提供船舶管理服务；

（四）允许不具备船舶管理经营资格的单位或者个人以本企业的名义从事船舶管理业务；

（五）法律、行政法规禁止的其他不正当竞争行为。

第十九条 船舶管理经营人应当按规定向县级以上人民政府交通运输主管部门报送有关业务统计资料。

第四章 监督检查

第二十条 县级以上人民政府交通运输主管部门依法对船舶管理经营活动进行监督检查，并对违反本规定的行为实施行政处罚。

海事管理机构依法对船舶安全、船舶污染水域进行监督检查，并对违反本规定不履行有关船舶安全管理和防止污染管理的法定义务的行为实施行政处罚。

第二十一条 船舶管理经营人接受船舶管理经营监督检查，应当如实提供必需的凭证、文件以及其他有关资料。

第二十二条 船舶管理经营人开业后达不到规定经营资质条件的，县级以上人民政府交通运输主管部门应责令其限期整改。

第五章 罚则

第二十三条 违反本规定，有下列行为之一，有违法所得的，处违法所得3倍

以下的罚款，但最高不得超过 3 万元；没有违法所得的，处 1 万元以下的罚款：

（一）未经批准，擅自经营船舶管理业；

（二）超越经营范围经营船舶管理业；

（三）强行限制他人选择其他船舶管理经营人提供船舶管理服务。

第二十四条 违反本规定，有下列行为之一的，给予警告，并处 5000 元以下的罚款：

（一）不履行备案手续；

（二）不报送有关业务资料。

第二十五条 违反本规定第六条规定，责令改正，并处以 5000 元以上 1 万元以下罚款。

第二十六条 县级以上人民政府交通运输主管部门的工作人员在执行本规定中，滥用职权、玩忽职守、徇私舞弊的，依法给予行政处分。

第六章 附则

第二十七条 本规定自 2001 年 10 月 1 日起施行。

水生生物增殖放流管理规定

（2009 年 3 月 20 日经农业部第 4 次常务会议审议通过，自 2009 年 5 月 1 日起施行。）

第一条 为规范水生生物增殖放流活动，科学养护水生生物资源，维护生物多样性和水域生态安全，促进渔业可持续健康发展，根据《中华人民共和国渔业法》、《中华人民共和国野生动物保护法》等法律法规，制定本规定。

第二条 本规定所称水生生物增殖放流，是指采用放流、底播、移植等人工方式向海洋、江河、湖泊、水库等公共水域投放亲体、苗种等活体水生生物的活动。

第三条 在中华人民共和国管辖水域内进行水生生物增殖放流活动，应当遵守本规定。

第四条 农业部主管全国水生生物增殖放流工作。

县级以上地方人民政府渔业行政主管部门负责本行政区域内水生生物增殖放流的组织、协调与监督管理。

第五条 各级渔业行政主管部门应当加大对水生生物增殖放流的投入，积极引导、鼓励社会资金支持水生生物资源养护和增殖放流事业。

水生生物增殖放流专项资金应专款专用，并遵守有关管理规定。渔业行政主管部门使用社会资金用于增殖放流的，应当向社会、出资人公开资金使用情况。

第六条 县级以上人民政府渔业行政主管部门应当积极开展水生生物资源养护与增殖放流的宣传教育，提高公民养护水生生物资源、保护生态环境的意识。

第七条 县级以上人民政府渔业行政主管部门应当鼓励单位、个人及社会各界通过认购放流苗种、捐助资金、参加志愿者活动等多种途径和方式参与、开展水生生物增殖放流活动。对于贡献突出的单位和个人，应当采取适当方式给予宣传和鼓励。

第八条 县级以上地方人民政府渔业行政主管部门应当制定本行政区域内的水生生物增殖放流规划，并报上一级渔业行政主管部门备案。

第九条 用于增殖放流的人工繁殖的水生生物物种，应当来自有资质的生产单位。其中，属于经济物种的，应当来自持有《水产苗种生产许可证》的苗种生产单位；属于珍稀、濒危物种的，应当来自持有《水生野生动物驯养繁殖许可证》的苗种生产单位。

渔业行政主管部门应当按照“公开、公平、公正”的原则，依法通过招标或者议标的方式采购用于放流的水生生物或者确定苗种生产单位。

第十条 用于增殖放流的亲体、苗种等水生生物应当是本地种。苗种应当是

本地种的原种或者子一代，确需放流其他苗种的，应当通过省级以上渔业行政主管部门组织的专家论证。

禁止使用外来种、杂交种、转基因种以及其他不符合生态要求的水生生物物种进行增殖放流。

第十一条 用于增殖放流的水生生物应当依法经检验检疫合格，确保健康无病害、无禁用药物残留。

第十二条 渔业行政主管部门组织开展增殖放流活动，应当公开进行，邀请渔民、有关科研单位和社会团体等方面的代表参加，并接受社会监督。

增殖放流的水生生物的种类、数量、规格等，应当向社会公示。

第十三条 单位和个人自行开展规模性水生生物增殖放流活动的，应当提前15 日向当地县级以上地方人民政府渔业行政主管部门报告增殖放流的种类、数量、规格、时间和地点等事项，接受监督检查。

经审查符合本规定的增殖放流活动，县级以上地方人民政府渔业行政主管部门应当给予必要的支持和协助。

应当报告并接受监督检查的增殖放流活动的规模标准，由县级以上地方人民政府渔业行政主管部门根据本地区水生生物增殖放流规划确定。

第十四条 增殖放流应当遵守省级以上人民政府渔业行政主管部门制定的水生生物增殖放流技术规范，采取适当的放流方式，防止或者减轻对放流水生生物的损害。

第十五条 渔业行政主管部门应当在增殖放流水域采取划定禁渔区、确定禁渔期等保护措施，加强增殖资源保护，确保增殖放流效果。

第十六条 渔业行政主管部门应当组织开展有关增殖放流的科研攻关和技术指导，并采取标志放流、跟踪监测和社会调查等措施对增殖放流效果进行评价。

第十七条 县级以上地方人民政府渔业行政主管部门应当将辖区内本年度水生生物增殖放流的种类、数量、规格、时间、地点、标志放流的数量及方法、资金来源及数量、放流活动等情况统计汇总，于 11 月底以前报上一级渔业行政主管部门备案。

第十八条 违反本规定的，依照《中华人民共和国渔业法》、《中华人民共和国野生动物保护法》等有关法律法规的规定处罚。

第十九条 本规定自 2009 年 5 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：

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《中国海洋法学评论》编辑部 敬启

《中国海洋法学评论》书写技术规范

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（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。

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（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。

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（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》，

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（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。

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（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.

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（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。

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《中国海洋法学评论》编辑部编订

International Cooperation in Fisheries Law Enforcement at Sea: China Mainland's Practice

HUANG Shuolin[*] LIU Yanhong[**]

Abstract: The lack of effective monitoring, management, surveillance and enforcement mechanisms has been one of the crucial problems confronting marine fisheries for a long time. Therefore, strengthening intergovernmental cooperation in law enforcement is a clear trend in the international legal regime on fisheries. This article explains the legal bases for cooperation in fisheries law enforcement at sea and introduces the three fisheries law enforcement approaches adopted by China Mainland based on its cooperation practice with the United States, Japan, South Korea, and Vietnam: (1) dispatching authorized law enforcement officers to participate in law enforcement patrols at sea and conducting joint visits and investigations on board illegal fishing vessels, but leaving the flag State to assess the penalty; (2) forming a joint patrol team with fisheries law enforcement vessels or with patrol planes from both Parties but, once a suspected vessel is detected, leaving the flag State to conduct investigation and decide on the penalty for illegal activities; (3) informing the other Party's competent authorities of a suspected illegal fishing vessel flying the other Party's flag, and leaving the flag State to conduct investigation and decide on the penalty. The international cooperation undertaken by China Mainland for fisheries law enforcement at sea has the following features: (1) enforcement cooperation is conducted under the framework of current international law, highlighting the principle of flag State jurisdiction. Cooperation for fisheries law enforcement, whether on the high seas or in agreed-upon fishing waters, demonstrates China's respect for the sovereignty and jurisdiction of the flag State as well as the respect for the other

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party; (2) cooperation on fisheries law enforcement at sea greatly improves the performance of law enforcement at sea and effectively cracks down on fishing activities that violate international and domestic laws.

Key Words: Marine fishery; Law enforcement; International cooperation

The lack of effective monitoring, management, surveillance and law enforcement mechanisms has been one of the crucial problems confronting marine fisheries for a long time. Conventional international law gives jurisdiction over illegal activities in the high seas only to the flag State. However, for fishing in the high seas, granting jurisdiction to the flag State does not suffice to ensure that fishing vessels obey proper conservation and management measures for high seas fishery resources. Therefore, strengthening cooperation in law enforcement to ensure effective monitoring, management, surveillance and enforcement offers a clear direction for improving the situation of high seas fisheries.

China boasts the world's largest fishery industry and the most fishing vessels for sea catch. Statistics show that by the end of September 2005, about 194,700 fishing vessels of China Mainland had obtained licenses for fishing at sea, with a total weight of 5.4101 million tons and a total power of 12.6218 million KW.[1] China's fishery activities at sea not only extend to the high seas, but also reach the exclusive economic zones of a number of States and the agreed-upon waters under bilateral fishery agreements, all of which add weight to the task of effectively enforcing fishery law at sea.

To conduct effective monitoring, management, surveillance and enforcement, the fishery administration and fisheries law enforcement organs of China Mainland have cooperated with the U.S. Coast Guard in fisheries law enforcement on the high seas of the North Pacific since the 1990s. From early 2000, the Fishery Agreement between the People's Republic of China and Japan (hereinafter "China–Japan Fishery Agreement"), the Fishery Agreement between the People's Republic of China and the Republic of Korea (hereinafter "China–South Korea Fishery Agreement"), and the 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 "China–Vietnam Fishery Cooperation Agreement") became effective

1 Tang Jianye, Zhang Jianguo, Zhao Tiewu and Tang Wensheng, Discussions on Perfecting China's Management on Fishing Vessels, in *A Collection of Theoretical Research Papers on Fishery Policy*, 2006. (in Chinese)

one after another, bearing witness to the beginning of international fisheries law enforcement cooperation between the fishery administration and fisheries law enforcement organs of China Mainland in the agreed-upon waters with other countries.

I. Legal Bases for International Cooperation in Fisheries Law Enforcement at Sea

The implementation of international fishery conventions and agreements has posed a big challenge to the international community. Due to ineffective implementation, conservation and management measures for fishery resources of the high seas had not played their due role. Therefore, since the 1980s, the trend in the international fishery legal regime has been toward establishing a legal framework for international cooperation in enforcement at sea.

The UN Convention on the Law of the Sea (UNCLOS) enacted in 1982 only provides that States shall cooperate in the conservation and management of living resources. As provided in Article 118 of the UNCLOS, "[s]tates shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned…"[2]

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas enacted in 1993 (hereinafter "Agreement on Fishing Vessels on the High Seas") puts further requirements for international cooperation in enforcement. As provided in Article 5 of the Agreement on Fishing Vessels on the High Seas, "[t]he Parties shall cooperate as appropriate in the implementation of this Agreement, and shall, in particular, exchange information, including evidentiary material, relating to activities of fishing vessels in order to assist the flag State in identifying those fishing vessels flying its flag reported to have engaged in activities undermining international conservation and management measures, so as to fulfill its obligations under Article III… The Parties shall, when and as appropriate, enter into cooperative agreements

2 UN Convention on the Law of the Sea, Article 118.

or arrangements of mutual assistance on a global, regional, sub-regional or bilateral basis so as to promote the achievement of the objectives of this Agreement."[3]

The Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995 (hereinafter "Agreement for Implementation") provides details for cooperation in enforcement. It not only sets more demanding requirements for international cooperation in enforcement, but also provides detailed guidelines regarding sub-regional and regional cooperation in enforcement. As required by the Agreement for Implementation, States shall pursue cooperation either directly or through appropriate sub-regional or regional fisheries management organizations or arrangements, to ensure compliance with and enforcement of conservation and management measures; a flag State conducting an investigation of an alleged violation of conservation and management measures may request the assistance of any other State whose cooperation may be useful in the conduct of that investigation. The Agreement for Implementation further requires that States assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of conservation and management measures.

Apart from the above mentioned conventions and agreements that have provided for the responsibilities and obligations of States regarding international cooperation in enforcement, the China–Japan Fishery Agreement, the China–South Korea Fishery Agreement, and the China–Vietnam Fishery Cooperation Agreement have also provided for matters concerning cooperation in enforcement. As provided in the China–Vietnam Fishery Cooperation Agreement, authorized organs of a contracting party shall conduct surveillance and investigation of the nationals and fishing vessels of both parties that have entered the waters of its side in common fishing zones and have the authority to deal with any nationals and fishing vessels of the other party in its waters that have violated the provisions, and inform the other party of the results. If necessary, both contracting parties can conduct joint surveillance and investigation. As provided by the China–Japan Fishery Agreement, if a contracting party finds any nationals and fishing vessels of the other Party have violated the provisions, this party may notify the said nationals and fishing vessels, and report the facts to the other party. The other contracting party shall inform this

3 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Article 5.

party of the results after taking necessary measures.

A Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China on Effective Cooperation and Implementation of UN General Assembly Resolution 46/215 (MOU) was signed on 3 December 1993. According to the MOU, officials of one party upon encountering a fishing vessel flying the other party's flag on the high seas, or claiming to be registered with the authorities of the other party that is found using or is equipped for use of a large-scale pelagic driftnet inconsistent with the provisions of UN General Assembly Resolution 46/215, shall transmit to the appropriate officials of the other party a request to conduct a cooperative visit and verification of said vessel. The MOU further provides that a qualified official of each party shall be entitled to ride on board each high seas driftnet enforcement vessel of the other party.

The above legal documents constitute the legal basis for China's cooperation with other countries in fisheries law enforcement. Since the 1990s, the fishery administration and fishery harbor surveillance and management agencies of China Mainland have started to cooperate with various States in fisheries law enforcement at sea based on these international and domestic laws and regulations, which has improved the effectiveness of enforcement, boosted mutual understanding with the relevant countries, and helped present China as a responsible great power taking up its obligation for the conservation and management of marine living resources.

II. Cooperation between China and the U.S. in Fisheries Law Enforcement in the North Pacific

The North Pacific high seas, located north of 38°N and west of 167°W, is rich in squid resources. Hence, prior to the 1980s many States had engaged in squid fishing and driftnet operations in these waters. China's squid fishing in the Northwest Pacific started in 1990, and has moved eastward into the North Pacific since 1991. In the late 1990s, with the signing and implementation of fishery agreements between China and Japan and between China and South Korea, operation fields for Chinese fishing vessels narrowed, resulting in fishing vessels previously engaged in offshore fishing turning to squid fishing in the North Pacific. Squid fishing has since become an important trade involving over 30 fishing enterprises, over 400 squid fishing vessels, and over 10,000 fishermen and tens of thousands of squid processing and sales workers, playing an important role in the

ocean fishery industry of China. Statistics show that in 2007, the gross product value of the squid fishing business in the North Pacific alone reached CNY 678 million, which played an active role in providing jobs and developing regional economy.[4]

The squid fishing vessels in the North Pacific mainly use hand or machine fishing and usually operate at night, involving high labor intensity, but with limited output. Some fishing vessels, driven by economic interests, ignore the international and domestic laws and regulations to engage in driftnet fishing for squids, which not only disturbs the fishing order, but also poses serious threat to shipping safety.

On 22 December 1989, the 44th Session of the UN General Assembly adopted Resolution 44/225, Large-scale Pelagic Driftnet Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas. This Resolution recommended that all members of the international community completely prohibit all large-scale pelagic driftnet fishing since 30 June 1992 to prevent unacceptable impact of such fishing practices on fishery resources in any region. The UN General Assembly Resolution 45/197 adopted at the 45th Session on 20 December 1990, reiterated the gist of Resolution 44/225 and called for the international community to fully implement the UN General Assembly Resolution 44/225. It again stressed that the international community take necessary measures to ensure compliance with the UN general assembly resolutions. On 20 December 1991, at the 46th Session, the General Assembly adopted Resolution 46/215, Large-scale Pelagic Drift-net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas, further reiterating Resolutions 44/225 and 45/197 and explicitly calling for a global moratorium on all large-scale pelagic driftnet fishing to start from 1 January 1993.

To push forward the implementation of Resolution 46/215, the UN General Assembly adopted a series of resolutions at the 49th Session (1994), the 51st Session (1996), the 52nd Session (1997), and the 53rd Session (1998), urging each State to take proper sanction measures to combat activities that violate Resolution 46/215. The High Seas Driftnet Fisheries Enforcement Act of 1992 enacted by the United States explicitly prohibits driftnet fishing on the high seas and the importation of fish, fish products and sport fishing equipment from nations in violation of the aforementioned UN resolutions.

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4 See documents of the Regional Bureau of East China Sea Fishery Management, People's Republic of China.

The Chinese government strongly supported the UN resolutions prohibiting large-scale driftnet fishing on the high seas and voted in favor of UN Resolutions 44/225, 45/197, and 46/215. On 10 November 1990, the Ministry of Agriculture of the People's Republic of China issued the Notice of UN General Assembly Resolution Prohibiting the Use of Large-scale Driftnet on the High Seas, in which it declared a stop to approval of driftnet fishing projects on the high seas. Further, the Ministry of Agriculture issued the Notices of Prohibiting the Use of Large-scale Driftnet Fishing on the High Seas in 1991 and 1993 respectively, prohibiting Chinese fishing vessels from engaging in driftnet fishing or partial driftnet fishing and prescribing strict penalties for fishing vessels in violation of these provisions. In December 1993, the Chinese government and the U.S. government signed an MOU. According to the provisions in the MOU, the Chinese government would send fisheries law enforcement inspectors on board U.S. Coast Guard ships in the North Pacific to check the implementation of UN General Assembly Resolution 46/215 since 1994. In implementing the MOU, the Chinese fisheries law enforcement inspectors exercised jurisdiction over the Chinese fishing vessels on behalf of the Chinese government. In the process, the officials of China and the U.S. jointly boarded and investigated any vessel suspected of violating the resolution, but handed the vessel over to the flag State for disposal applying the flag State's domestic laws.

For example, on 5 October 2007, the fleet *Boutwell* of the U.S. Coast Guard on its China–U.S. joint enforcement task noticed that *Lu Rong Yu 2659*, *Lu Rong Yu 2660*, and *Lu Rong Yu 6105* were suspected of engaging in illegal driftnet fishing at 42°30' W, 152°22' E on the North Pacific high seas. According to the provisions of the MOU between the Chinese government and the U.S. government, the enforcement officials of China and the U.S. jointly boarded and inspected the vessels *Lu Rong Yu 2659*, *Lu Rong Yu 2660*, and *Lu Rong Yu 6105*. The field inspection confirmed that the three fishing vessels had engaged in activities violating UN Resolution 46/215 and the enforcement officials arrested the vessels. According to the instruction of the China Fisheries Law Enforcement Command, the Regional Bureau of East China Sea Fishery Management of the People's Republic of China (hereinafter "East China Sea Bureau") sent *China Yuzheng 201* on 11 October 2007 to the sea areas of 29°03'N, 131°11'E, to meet U.S. Coast Guard Ship 726 which was responsible for escorting the three illegal fishing vessels. The *Yuzheng 201* took over the three vessels from the U.S. Ship 726 and brought them back to Shanghai Harbor on

17 October after 4 days and nights of continuous escort. Afterwards, the East China Sea Bureau conducted investigations verifying the illegal activities of these three vessels and issued administrative penalties: confiscating the illegal catch of around 81.33 tons from driftnet fishing (after auction, the proceeds were submitted to the National Treasury); fining each vessel CNY 50,000; confiscating fishing equipments (1909 pieces of driftnet, 3 sets of driftnet gears); confiscating the vessels *Lu Rong Yu 2659*, *Lu Rong Yu 2660*, and *Lu Rong Yu 6105*.[5] The East China Sea Bureau informed the U.S. Coast Guard of the above results.

For six years beginning in 2002, the China fishery administrative authorities sent fisheries law enforcement boats to the North Pacific high seas to perform patrol tasks and monitor and inspect Chinese fishing vessels. In 2005 and 2006, the China fisheries law enforcement boats and the U.S. Coast Guard patrol ships performed joint patrols, and held bilateral meetings, leading to new models and enhanced mechanisms for joint enforcement between the two countries in the region. In August 2007, *Boutwell* of the U.S. Coast Guard made a sucessful trip to Shanghai. The delegation of the China Fisheries Law Enforcement Command met officers of the U.S. Coast Guard and communicated to them the illegal driftnet fishing cases attended to by the Fisheries Law Enforcement Command in the North Pacific. The two parties reached a consensus regarding how to enhance cooperation in law enforcement. [6]

In the North Pacific, the China Fisheries Law Enforcement Command also cooperates with countries such as Japan and Canada to crack down on illegal driftnet fishing on the high seas. In 2006, based on photographic information provided by the Japanese government and Canadian government, the Fisheries Law Enforcement Command successfully intercepted four fishing vessels engaged in illegal driftnet fishing on the high seas: *Zhe Yuan Dong 601*, *Zhe Yuan Dong 607*, *Zhe Yuan Dong 801* and *Zhou Shun Yu 2007*; the fishing vessels and catches involved were all confiscated.

Through international cooperation in law enforcement at sea, the East China Sea Bureau has tracked down 116 illegal fishing cases and confiscated 19 vessels and in severe cases, prosecuted parties involved for criminal liabilities.

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5 Information from the Briefing of Driftnet Cases by Zhang Qiuhua, vice director of the Regional Bureau of East China Sea Fishery Management, 10 January 2008.

6 Information from the speech of Li Furong, director of the Regional Bureau of East China Sea Fishery Management at the Ceremony for Destructing Driftnet Fishing Tools Obtained on the North Pacific High Seas.

Interception of illegal driftnet fishing has effectively attacked vessels illegally engaged in driftnet fishing on the high seas. Such measures demonstrate the quality performance and legal knowledge of the Fisheries Law Enforcement Command personnel, as well as the determination of the Chinese government to rigorously implement international conventions and prevent illegal driftnet fishing in the North Pacific.

III. Regional Cooperation in Fisheries Law Enforcement

A. Cooperation in Fisheries Law Enforcement between China and Vietnam

The China–Vietnam Fishery Cooperation Agreement was signed on the basis of the delimitation of the territorial seas, the exclusive economic zones, and the continental shelves of both countries in the Beibu Bay, and the agreement consists of seven parts, twenty-two articles and one annex. Effective as of 30 June 2004, the agreement provides for the scope for common fishery waters (Fig. 1) and requires that both Parties, in view of mutual benefits, be engaged in long-term cooperation in the Common Fishery Zone. Considering the natural conditions and features of living resources in the area, the need for sustainable development and environmental protection, and the impacts on contracting parties' fishing activities, both parties will jointly decide on measures to conserve, manage, and sustainably use the living resources in the Common Fishery Zone. Sino-Vietnamese Joint Fishery Committee in the Beibu Bay (JFC) is to decide on the number of fishing vessels of each contracting party allowed to fish in the zone each year. Fishing vessels that plan to fish in this zone must make an application to the authorized organ of their home State to obtain a fishing license and paint the proper markings as provided.

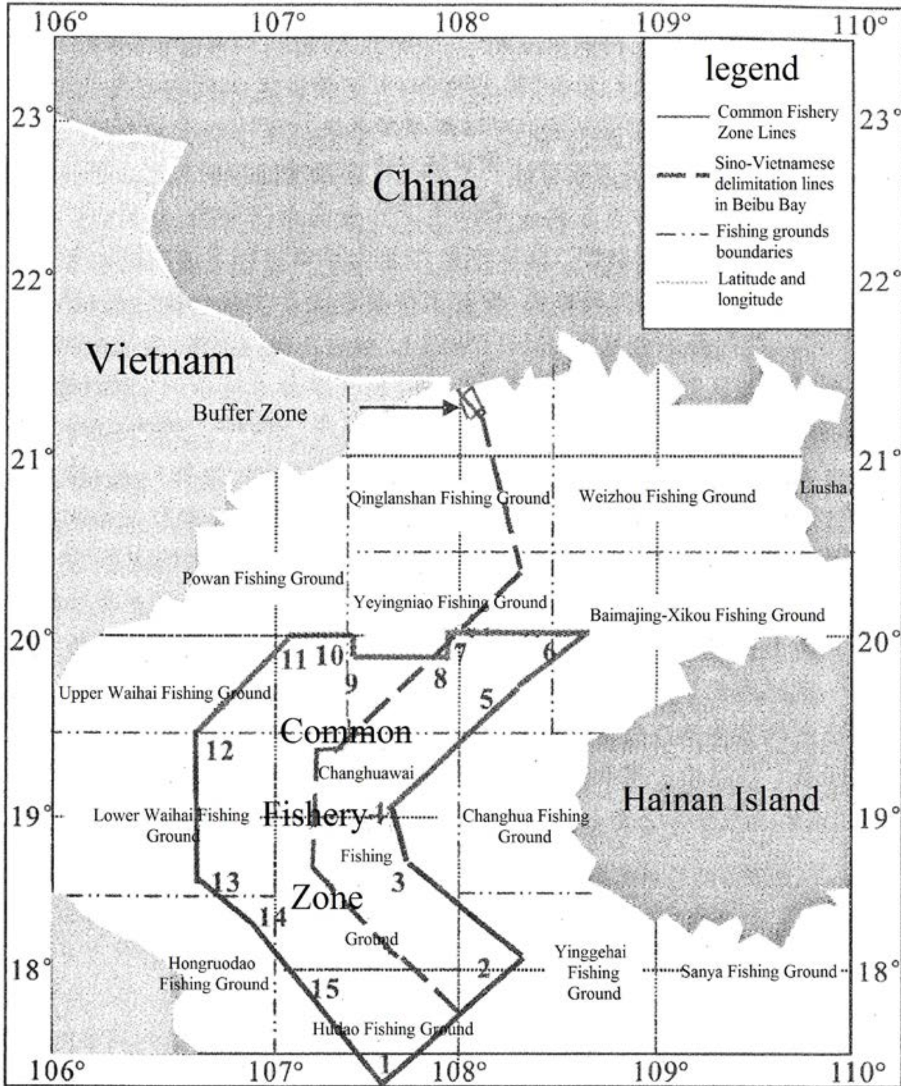

Fig. 1 Sketch of Waters of the China–Vietnam Fishery Cooperation Agreement in Beibu Bay

The authorized organs of the contracting parties can conduct surveillance and inspection on nationals and fishing vessels of the other party that enter its own waters, and are enpowered to regulate those nationals and fishing vessels which are in violation of relevant rules and inform the other party of the results. If necessary, the two contracting parties can make joint surveillance and inspection.

In February 2004, China and Vietnam together formulated the Regulations on Fishery Resources Conservation and Management in Beibu Bay Common Fishery

Zone, requiring that any person or fishing vessel entering the Common Fishery Zone for fishing obtain a fishing license to fish in that zone. Both parties shall issue licenses to fishing vessels of their nationalities according to the number of fishing vessels permitted under the JFC. Besides, both Parties shall provide anti-counterfeit labels to each other based on the agreed number of fishing vessels, and when issuing a license, the issuing party shall affix an anti-counterfeit label provided by the other party to the designated column of the license.

The surveillance organs of both parties conduct surveillance and inspection on fishing vessels and nationals that have entered their respective side of the Common Fishery Zone and assess penalties in case of violation; when dealing with any illegal activities of the other party's fishing vessels and nationals, the organ shall inform the other party's enforcement organ of the relevant illegal case within 72 hours; if the fishing vessel is to be detained, the case must be reported within 48 hours, and the penalty decision reported within 72 hours. Normal fishing activities of fishing vessels and nationals that have obtained a license should be respected and not be interfered with; double inspections and penalties shall be avoided. The surveillance organs of both parties can conduct joint inspections in the Common Fishery Zone, which can be done by either deploying officials to the other's patrol boats or having a joint inspection by both parties' vessels.

Over the four years since the entry into force of the agreement, the South China Sea Fleet of the China Fisheries Law Enforcement Command and the fisheries law enforcement departments of Guangdong Province, Guangxi Autonomous Region, and Hainan Province have conducted surveillance by fleets patrol or through check points comprising of enforcement vessels. When sea conditions permit, at least one enforcement vessel will patrol at sea on a daily basis to monitor fishing activities on key waters such as the Common Fishery Zone of Beibu Bay, waters in transitional arrangement, and buffer zones for small-sized fishing vessels, so as to prevent illegal cross-border operations by fishing vessels and to intercept Vietnamese fishing vessels illegally entering Chinese waters for production. During these four years, fisheries law enforcement vessels have been deployed 208 times to perform surveillance and inspection tasks at the Beibu Bay for a total of 2,148 days: monitored and recorded 42,782 fishing vessels; drived away 434 Vietnamese fishing vessels; investigated and dealt with 37 Vietnamese fishing vessels that entered into China's waters for fishing activities without proper licenses; and rendered assistance to 70 fishing vessels and 543 fishermen in

distress.[7]

Starting in 2006, the Regional Bureau of South China Sea Fishery Management of the Agriculture Ministry of China and the Vietnam Coast Guard began conducting annual joint inspections in the Common Fishery Zone of the Beibu Bay, and have conducted this for three times so far. Successful exercises of joint inspections have enhanced mutual trust between law enforcement agencies of both sides, facilitated mutual understanding and communications, and deepened the traditional friendship between China and Vietnam.

China has also developed operational linkages to supervise fisheries in the Beibu Bay between the China Fisheries Law Enforcement Command and the China Coast Guard. Since implementation of the agreement four years ago, the China Fisheries Law Enforcement Command and the China Coast Guard have performed joint surveillance and inspection for eight times and deployed Yuzhen/Haijing vessels over 50 times. The China Fisheries Law Enforcement Command and the China Coast Guard actively execute the tasks as provided for by the agreement and cooperate under the framework of joint surveillance over fisheries in the Beibu Bay. They work together to intercept foreign fishing vessels engaged in illegal fishing and crack down on criminal activities against fishermen such as sealing and robbing fishing equipment. Thanks to such efforts, cases of Vietnamese fishing vessels entering the waters under China's jurisdiction for illegal fishing and robbing fishermen of fishing equipments have dropped substantially. The China Fisheries Law Enforcement Command and the China Coast Guard continually work to enhance the joint surveillance mechanism over fisheries in the Beibu Bay and strengthen external cooperation for law enforcement. They cooperate and coordinate their efforts with respect to onboard visits, arrests, confiscation, punishment, escorts, custody, and deportations of foreign fishing vessels (fishermen) and have successfully completed tens of fishery cases involving a foreign party, underlying the smooth implementation of the China–Vietnam Fishery Cooperation Agreement.

B. Cooperation in Fisheries Law Enforcement between China and South Korea

7 The Fourth Anniversary of Smooth Implementation of China–Vietnam Fishery Cooperation Agreement in Beibu Bay, at http://www.jsof.gov.cn/art/2008/7/9/art_37_27096.html, 9 July 2008. (in Chinese)

The China–South Korea Fishery Agreement came into effect on 30 June 2001. It provides that, if a contracting party notices that any nationals or fishing vessels of the other contracting Party violate the decision of the China–South Korea Joint Fishery Committee, that party may warn the nationals and fishing vessels of their violation and notify the other party; the other contracting party should give due regard to this notification and notify the informing party of the results after taking necessary measures; joint conservation and measures in right amount can be taken in the transitional waters, while joint surveillance and inspection measures are also applicable, including joint vessel rides, forced stoppages, on-board inspections, etc.

In practice, according to the number of allowed fishing vessels and catch quota provided for by the China–South Korea Fishery Agreement, the officials from China and South Korea shall hold an annual meeting to report their compliance with the agreement during the previous year to each other and decide the number of fishing vessels and catch quota to be allowed for the next year. From 2001 to 30 June 2006, over 200,000 messages about Chinese fishing vessels that newly entered the fishery business have been sent from China to South Korea. A fisheries law enforcement command patrol fleet has been organized to supervise the exclusive economic zone in order to enhance the joint inspection in the relevant waters of the China–South Korea Fishery Agreement, especially the waters around the forbidden zone of South Korea, as well as the transitional waters. This has served to effectively regulate the fishing operations of Chinese fishing vessels and reduce violations involving foreign parties.[8]

China and South Korea communicate regularly on topics such as maintaining the fishing order in the agreed-upon waters under the China–South Korea Fishery Agreement and cooperating in fisheries law enforcement, and proactively promote exchange pertaining to fisheries law enforcement. By 2006, China's fisheries law enforcement organs had dispatched enforcement vessels to conduct 14 joint inspections with the counterpart of South Korea and intercepted 50 illegal fishing vessels. In May 2007, the fishery officers from one country rode the other party's enforcement vessels and in the October, the fisheries law enforcement vessels from both countries visited each other, which are important events for strengthening mutual understanding. Both parties have further agreed to establish a liaison

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8 Niu Yushan, A Success Case in Modern Fishery Management: Reviews and Discussions on Implementation of the China–South Korea Fishery Agreement, *China Fishery News*, 25 August 2006. (in Chinese)

mechanism between their organs in charge of the communication on fisheries law enforcement in order to exchange opinions over enforcement activities and illegal fishing incidents in a timely manner.[9]

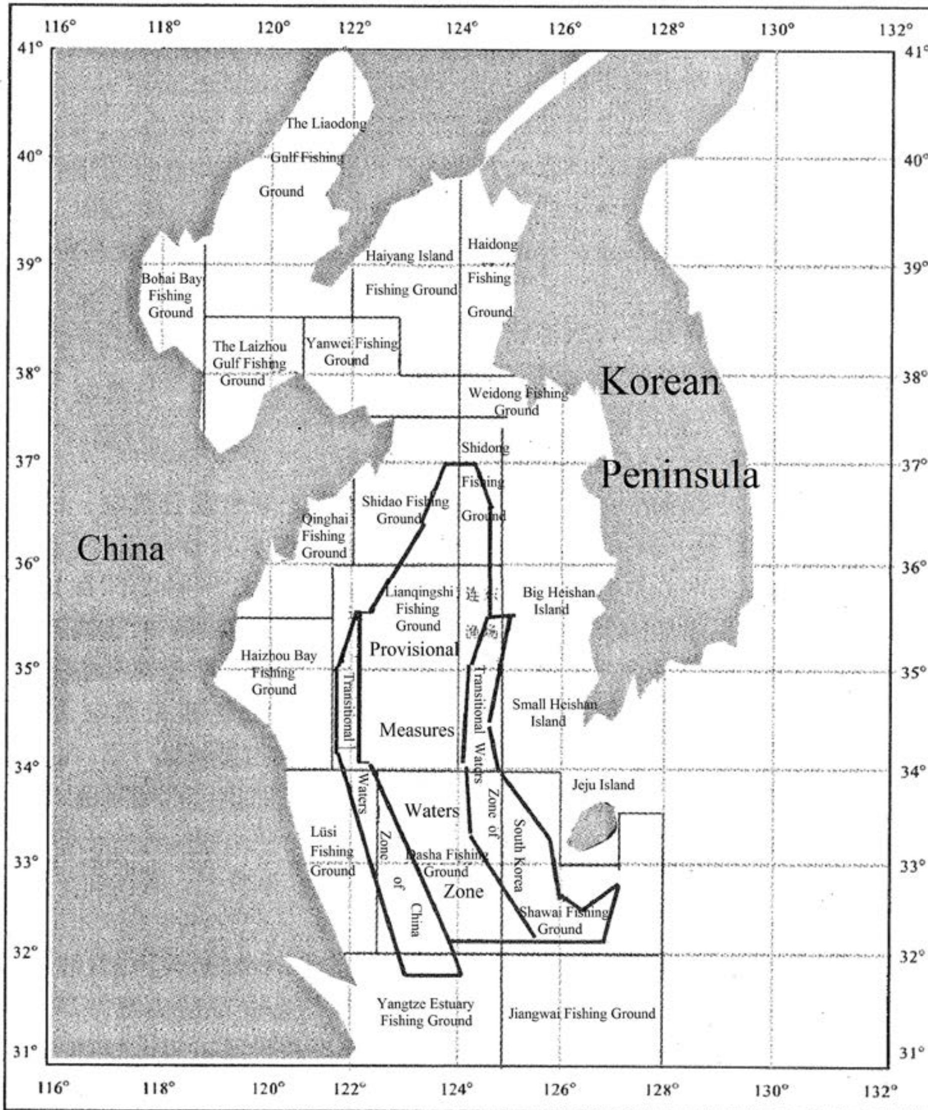

Fig. 2 Sketch of Waters of the China–South Korea Fishery Agreement

9 Lyu Wei, The 2006 Colloquium on China–South Korea Fisheries Law Enforcement Held Successfully, *China Fishery News*, 21 October 2006. (in Chinese)

C. Cooperation in Fisheries Law Enforcement between China and Japan

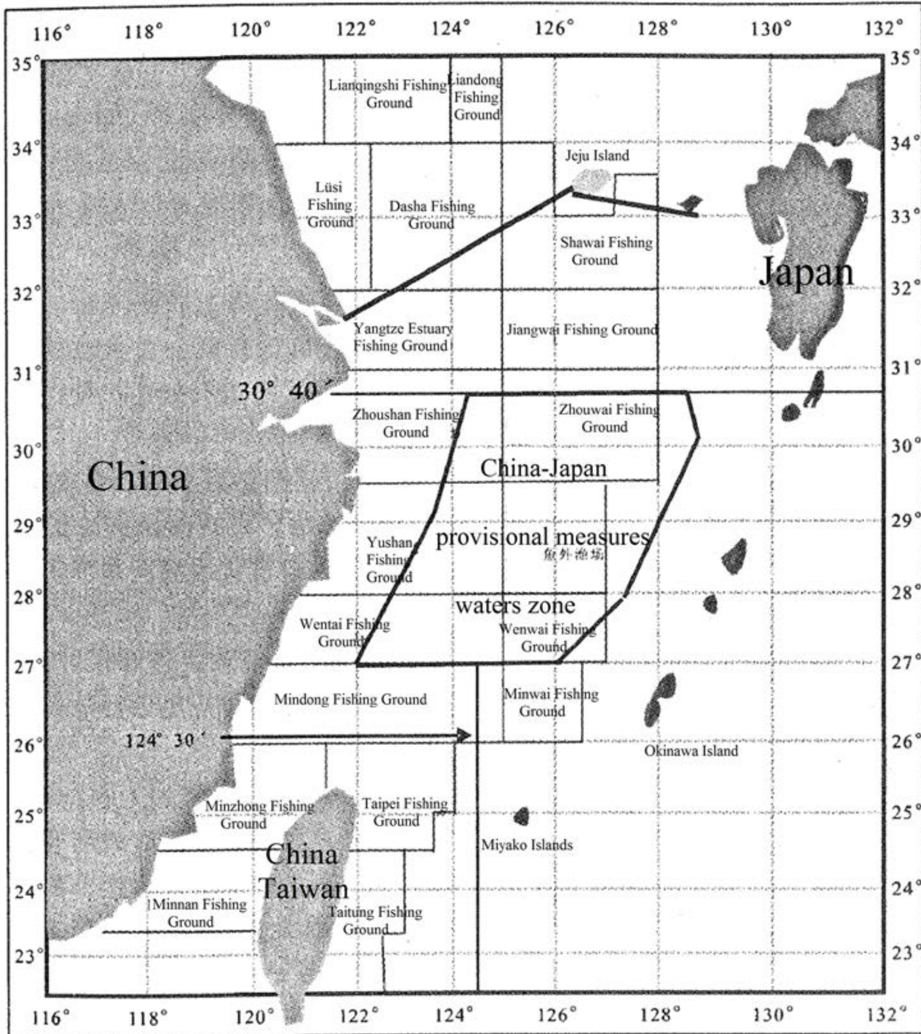

Fig. 3 Sketch of Waters of the China–Japan Fishery Agreement

The China–Japan Fishery Agreement came into effect on 1 June 2000, which clearly provides that "the contracting parties shall not take administrative or any other measures towards the other party's nationals and fishing vessels that are engaged in fishing activities in this area." The Agreement further provides that if a contracting party finds the other party's nationals or fishing vessels in violation of the agreement, the said party can issue warnings to the violating nationals or fishing

vessels, and inform the other party of the fact of violations. The other contracting party should take necessary measures and inform the reporting party of the result. Jurisdiction over violations rests with the flag State, and it may deal with its own fishing vessels based on its domestic laws.

In practice, China and Japan hold a joint fishery committee meeting every year to decide on the number of allowed fishing vessels and management measures to be taken by both parties, and give the other party the list of vessels engaged in fishing. When spotting an illegal fishing vessel of the other party, one shall inform the other party in a timely manner, and the other party should investigate and handle the case under its own domestic laws and regulations and inform the other party of the result. This differs from the aforementioned two fishery agreements in that a joint law enforcement mechanism has not yet been established.

IV. Characteristics of China's Practice regarding International Cooperation in Fisheries Law Enforcement

Over ten years of cooperation in fisheries law enforcement indicates that China's participation in international cooperative fisheries law enforcement includes the following methods:

First, law enforcement officers ride on the patrol ship of the cooperating party and jointly conduct law enforcement at sea. In the case of spotting suspected illegal fishing vessels from either party, the enforcement officers of both parties jointly conduct on-board inspections. Together with the fishing vessel intercepted, evidence for illegal activities will be handed over to the flag State which will handle the case based on its domestic laws. The outcome of the case will be communicated to the cooperating party.

Second, joint marine fleet patrols to conduct joint law enforcement are undertaken. Law enforcement vessels of both parties are included in the fleet, or alternatively, enforcement vessels from China cooperate with patrol planes of the cooperating party for joint law enforcement. In the case of suspected illegal fishing by vessels of any party, the enforcement vessel of the flag State will make on-board inspections and handle the case based on its domestic laws.

Third, both parties must notify the other party of information of observed illegal fishing vessels from the other party. The flag State investigates, gathers evi-

dence, and based on its domestic laws, punishes fishing vessels engaged in illegal activities. The result of the case is communicated to the cooperating party.

These varied methods of cooperation in law enforcement share some common characteristics:

First, these methods of cooperation in law enforcement are all grounded in international and domestic laws and regulations, and cooperative countries have heightened awareness and a strong willingness to abide by the legally-required measures of conserving and managing living resources at sea. Only when both parties share the willingness for strict law enforcement can the cooperation be fully supported and cooperation effectiveness be improved.

Second, in the practice of enforcement cooperation, jurisdiction of the flag State is stressed. Whether on the high seas or in agreed-upon waters of a fishery agreement, disposal of the fishing vessel which is suspected of illegal activities is to be made by the flag State according to its own domestic laws, an embodiment of respect for the sovereignty and jurisdiction of the flag State. This also strengthens the responsibility of the flag State. The practice of informing the cooperating party of the disposition result not only reflects respect for the cooperating party in law enforcement but also indicates the sanctity of international cooperation.

Third, cooperation in fisheries law enforcement has potently cracked down on fishing vessels engaged in illegal fishing activities on the high seas and in agreed-upon waters of fishery agreements, thus greatly enhancing the effectiveness of law enforcement at sea. The number of illegal fishing vessels has dropped greatly owing to such international cooperation. Take for example the cooperation in fisheries law enforcement on the high seas of the North Pacific: in 2006 China's fisheries law enforcement organs communicated to relevant countries 53 illegal fishing vessels that were intercepted; in 2007 the number of illegal fishing vessels that was communicated dropped to six; to the time of this article's [original] draft in 2008, no illegal fishing vessel has been reported.

Certainly, the law enforcement organs must meet basic requirements in order to carry out enforcement cooperation at sea. First, the quality of the law enforcement team needs to satisfy standards for international enforcement cooperation. The law enforcement officers should have a good knowledge of not only the relevant domestic laws and regulations, but also relevant international and the other party's laws and regulations. These officers need to be capable of communicating with fishermen of their own country and law enforcement officers from the cooperating party. China's fisheries law enforcement organs have made significant efforts in this

regard: to provide qualified enforcement officers to attend patrols with cooperating parties, China began law enforcement training for enforcement personnel in 1993, including trainings in international law, law enforcement techniques and English. Any staff scheduled for deployment for joint law enforcement abroad must have sufficiently completed these trainings in order to ensure smooth implementation of joint operations. Second, the equipment of the law enforcement team must meet the requirements for joint law enforcement. Beginning in 1998, in order to address the demands for joint fisheries law enforcement, China spent significant sums of money to build four 1,000-ton, thirteen 500-ton, and twelve 300-ton enforcement vessels; most of these vessels are equipped with advanced communication and enforcement facilities such as satellite C-stations, satellite B-stations, electronic sea maps, multi-target follow-up radar systems, etc.[10] Use of these enforcement vessels has laid down a foundation for international cooperation for fisheries law enforcement at sea.

V. Conclusion

Since the 1990s, China has participated in international cooperation for law enforcement on the high seas and in agreed-upon waters of fishery agreements according to relevant international laws. From deployment of fisheries law enforcement personnel to participate in foreign States' patrols at sea to exercise of joint fleets patrol comprising enforcement vessels of both countries (including foreign patrol aircraft) at sea, China has rolled out new ways for joint law enforcement. This has effectively attacked illegal fishing activities at sea, rectified disorderly fisheries operations, and protected the rights and interests of both marine fisheries workers and the State. Cooperation with various countries in fisheries law enforcement at sea has not only showed a good image of China, a responsible country rigorously implementing multilateral and bilateral treaties, but is also in line with the new trend of international fisheries management.

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10 Achievements in Fisheries during the 10th Five-Year Plan: Highly Effective Patrol in the 200 Nautical Miles Exclusive Economic Zone, at http://www.wzsci.com, 27 December 2005. (in Chinese)

Sino-Japanese Joint Development in the East China Sea and the Outer Continental Shelf of China

JIA Yu*

Abstract: The continental shelf beyond 200 nautical miles, pursuant to the United Nations Convention on the Law of the Sea, is a natural component of the coastal State's continental shelf. Joint development, an effective method to reduce the tensions pertaining to the delimitation of the continental shelf, is often carried out in the continental shelf areas with overlapping claims. The area to be selected for joint development between China and Japan should be the sea areas between the maximum water depth of the Okinawa Trough and the so-called median line proposed by Japan. The "Consensus on the East China Sea", a political will reached between the governments of China and Japan, is the foundation for joint development in accordance with international law. While the participation of Japanese enterprises in cooperative development of the Chunxiao Oil and Gas Field is a commercial arrangement made in accordance with Chinese law, which is not a joint development in the sense of international law and has no relevance to the Understanding between China and Japan on Joint Development of the East China Sea.

Key Words: Joint development; Continental shelf beyond 200 nautical miles

I. Fundamentals of the Continental Shelf Regime

A. Legal Concept of the Continental Shelf

The Continental shelf used to be a concept limited to marine geography and

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geology, and the legal concept of continental shelf emerged after the Second World War. On September 28, 1945, the U.S. President Truman issued the Presidential Proclamation 2667 – Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (hereinafter "Truman Proclamation"), announcing that "the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."[1] Also, the U.S. government made a press release, proclaiming that the scope of the continental shelf is not more than 100 fathom depth of water. Shortly thereafter, many countries, especially the Latin American countries, successively claimed the rights to their respective adjoining sea areas, sea bed and resources therein, but with variation in the range and contents of those claims.

With the development of both the science and technology and international law, the legal concept of the continental shelf has experienced dramatic changes. The process of the changes can be clearly seen from the relevant provisions of the Convention on the Continental Shelf (CCS) adopted at the First United Nations Conference on the Law of the Sea in 1958 and those of the United Nations Convention on the Law of the Sea (UNCLOS) adopted at the Third United Nations Conference on the Law of the Sea in 1982. According to the 1958 CCS, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[2] According to this definition, the continental shelf is a dynamic concept with great uncertainty, constantly changing with the progress of science and technology of the mankind and with the increasing level of exploitation of marine resources.

With the rapid improvement in the capability to explore and exploit submarine resources, the increase of international judicial decisions and arbitral awards, along with the development in State practice, the ambiguities and uncertainties of the CCS could not meet the needs of that time anymore. At the Third UN Conference on the Law of the Sea, tough and highly technical discussions and negotiations were conducted on the continental shelf system, and the legal concept of continental

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1 Teaching and Research Section of International Law of Peking University School of Law ed., *Compilation of Materials on the Law of the Sea*, Beijing: People's Publishing House, 1974, pp. 386~387. (in Chinese)

2 Article 1 of the Convention on the Continental Shelf.

shelf was revised materially, resulting in more detailed provisions and redefining the concept of continental shelf in scientific and legal terms.[3]

According to the UNCLOS, the continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines

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3 Article 76 of the UNCLOS provides that "1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. 2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6. 3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. 4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either: (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slop; or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base. 5. The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4(a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobaths, which is a line connecting the depth of 2,500 metres. 6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs. 7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by co-ordinates of latitude and longitude. 8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding. 9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto. 10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."

from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. It is further provided that the continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

For those coastal States with broad continental shelves, the outer limits of the continental shelf shall be determined in accordance with "two formulae lines" and "two constraint lines" as stipulated in Article 76(4) to (6) of the UNCLOS:

1. Two Formulae Lines – Article 76(4) of the UNCLOS provides two formulae lines for the coastal States to select to delimit the outer limits of their continental shelf extending beyond 200 nautical miles. (1) "1% sedimentary rocks thickness line". A line delineated by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope. (2) "slope foot + 60 nautical miles line". A line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

2. Two Constraint Lines – The fixed points comprising the line of the outer limits of the continental shelf, drawn in accordance with above-mentioned formulae lines, either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobaths.

Coastal States shall decide by themselves to apply the two formulae and the two constraint lines either simultaneously or alternately, based on their own situations, to maximize the range of their continental shelves beyond 200 nautical miles. If a coastal State has no naturally prolonged continental shelf within 200 nautical miles, it is natural that the State has no continental shelf beyond 200 nautical miles.

B. Rights of the Coastal State over the Continental Shelf

1. Sovereign Rights

Article 77(1) of the UNCLOS provides that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. These rights have the following features: 1) they directly relate to natural resources, thus they are resources based rights. In the evolution of the

continental shelf system, Truman Proclamation was targeted at the natural resources of the sea bed and subsoil of the continental shelf. As for resources, the CSC and the UNCLOS have the same rules. Considering the nature of the continental shelf system, the continental shelf comprises the sea bed and subsoil within a certain distance off the coasts of States. Therefore, the rights conferred upon coastal States by the continental shelf system are undoubtedly related to the natural resources of the sea bed and the subsoil of the continental shelf; 2) they are exclusive to the coastal States. If the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State;[4] 3) they are inherent rights of coastal States. The rights of the coastal State over the continental shelf do not depend on effective or notional occupation, or on any express proclamation.

2. Jurisdiction

Coastal States have two kinds of jurisdiction over the continental shelf. 1) According to Article 79(4) of the UNCLOS, the coastal State has jurisdiction over the exploration of the continental shelf and the exploitation of its natural resources. 2) According to Article 80 of the UNCLOS, Article 60 which concerns artificial islands, installations and structures in the exclusive economic zone applies *mutatis mutandis* to those on the continental shelf. Article 60(2) provides that the coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations. Such provisions are also applicable to similar structures which a coastal State may establish upon its continental shelf.

3. Exclusive Right

According to Article 81 of the UNCLOS, the coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes. The exclusive right emphasizes the exclusive authorization and management by coastal States.

The continental shelf system is based on the coastal State's rights of exploration and exploitation of the resources of the sea bed and subsoil. Therefore, the coastal State's exercise of its rights over the continental shelf is limited. Under the UNCLOS, the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or the air space above those waters, that is, the superjacent waters to the continental shelf shall continue to maintain the statuses as the contiguous zone, exclusive economic zone or high seas, and the air space above those waters shall maintain the original status of being open to

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4 Article 77 of the UNCLOS

international use. Due to the special status of the continental shelf, the UNCLOS especially emphasizes that coastal State's exercise of the rights over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States. Meanwhile, the UNCLOS ensures that all States shall have the right of laying submarine cables and pipelines on the continental shelf. Save the right of taking reasonable measures for the exploration of the continental shelf and the development of its natural resources, and the prevention, reduction and control of pollution produced by the pipelines, the coastal State shall not hinder the laying and maintenance of submarine cables or pipelines. The benefits the coastal State draws from the continental shelf beyond 200 nautical miles shall be shared with the international community by means of payments or contributions.

In order to achieve an equitable solution, the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 83 of the UNCLOS. Pending agreement, the States concerned shall make every effort to enter into provisional arrangements of a practical nature.

C. Continental Shelf beyond 200 Nautical Miles

The continental shelf is a unified and integrated legal concept, whereas the so-called "outer continental shelf" is not a strict one. "[T]here is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf."[5] Although many coastal States have submitted information and materials on the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (CLCS) set up under Article 76(8) and Annex II of the UNCLOS, it doesn't indicate that the continental shelf of the coastal State is "extending" or "expanding". Instead, it means that the coastal State is gradually clarifying where the continental shelf beyond 200 nautical miles lies and its outer limits.

For a coastal State with broad continental shelf, the part of the continental shelf within 200 nautical miles and that beyond 200 nautical miles are all subject to its sovereign rights. If the difference between the continental shelf within 200 nautical miles and that beyond 200 nautical miles must be distinguished, the continental shelf regime established by the UNCLOS is both "the same to the

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5 Barbados/Trinidad and Tobago, Award of the Arbitral Tribunal, para. 213 (11 April 2006), [PCA], at http://www.pca-cpa.org/upload/files/Final0%20Award.pdf, 1 May 2009.

'inside' and the 'outside'", and "different between the 'inside' and the 'outside'".

On one hand, according to Article 76 of the UNCLOS, the continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend throughout the natural prolongation of its land territory to the outer edge of the continental margin. If it is delimited on the basis of distance, the continental shelf includes the parts within and beyond 200 nautical miles. In terms of the rights over natural resources of the continental shelf under the UNCLOS, the coastal State's sovereign rights, jurisdiction, and exclusive rights shall be the same with regard to the continental shelf inside and outside the 200-nautical-mile line, and not be affected by their locations as being inside or outside of that line; there is no difference in the legal status between the "inside continental shelf" and "outside continental shelf".

On the other hand, the rights of the coastal State with a broad continental shelf "differ between the outside and the inside". The UNCLOS requires that the coastal State with extended continental shelf shall share the production with the international community by means of giving payments or contributions to the International Seabed Authority when non-living resources of the continental shelf beyond 200 nautical miles are exploited. [6] It should be stressed that such "sharing" shall not divide the naturally prolonged continental shelf of the coastal State into two parts. In other words, this "sharing" won't alter the legal nature of the continental shelf as the whole natural prolongation of the land mass of the coastal State and it does not indicate that the legal status of the continental shelf beyond 200 nautical miles differs from the continental shelf within 200 nautical miles essentially or the former inferior to the latter.[7]

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6 Article 82 of the UNCLOS, "payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles," states that "1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. 2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. Production does not include resources used in connection with exploitation. 3. A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource. 4. The payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them."

7 Articles 76, 82 and 83 of the UNCLOS.

Meanwhile, the UNCLOS characterizes the sovereign rights of the coastal State over the continental shelf as exclusive and inherent, and these rights do not depend on an effective or notional occupation or on any express proclamation. However, the coastal State shall submit information and data of the outer limits of the continental shelf beyond 200 nautical miles to the CLCS, and the final and binding delimitation of the continental shelf beyond 200 nautical miles shall be made on the basis of the recommendations of the CLCS.[8]

The delineation of the outer limits of the continental shelf beyond 200 nautical miles differs from the delimitation of the continental shelf between States with opposite or adjacent coasts. The outer limits of the continental shelf beyond 200 nautical miles established according to Article 76 of the UNCLOS determine the boundary between the continental shelf of the coastal State and international sea bed area (termed "The Area" in the UNCLOS clearly). On the other hand, Article 83 lays out the delimitation principle of the continental shelf between States with opposite or adjacent coasts, disputes settlement mechanism, and provisional arrangements prior to the delimitation in four paragraphs. Also, Article 76(10) confirms that the relevant provisions on the delimitation of the continental shelf beyond 200 nautical miles "are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."

To sum up, provisions of the UNCLOS on the continental shelf, reiterate the legal concept of the continental shelf and its relationship with the geological fact of natural prolongation, set up the connection between the continental shelf as a legal concept and the continental margin as a geomorphologic concept, and introduce the "200 nautical miles distance standard", so that a coastal State, whether it has a natural prolongation geologically, can claim the continental shelf up to 200 nautical miles from its territorial sea baseline. For those coastal States with broad continental shelf, the UNCLOS provides for their rights and obligations over the part of the natural prolongation beyond 200 nautical miles. However, if the land territory of a coastal State does not naturally extend toward the sea, the State can still claim the continental shelf of not more than 200 nautical miles. The UNCLOS takes into consideration the two totally different situations but brings certain confusion and difficulties in explaining and applying relevant provisions of the UNCLOS.

D. Submission of the Information of Continental Shelf beyond 200 Nautical Miles

8 Article 76(8) of the UNCLOS.

According to Annex II to the UNCLOS, "where a coastal State intends to establish, in accordance with Article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State."[9] Obviously, due to the complex nature of the technical rules for delimiting the outer limits of the continental shelf under Article 76(4) to (6) of the UNCLOS, it is very hard to fulfill the requirements of the article, and submitting the relevant information and materials is a rigorous challenge to the scientific and technological capabilities of coastal States.

In light of the significance of the outer limits of the continental shelf beyond 200 nautical miles and the fact that many developing countries do not have the capabilities to provide such information and materials, the 11th Meeting of States Parties to the UNCLOS held in May 2001 adopted a resolution, confirming that the time limit of the 10 years begins to run on 13 May 1999, the date the CLCS issued the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf (hereinafter "Scientific and Technical Guidelines").[10] This means that those States that had ratified or acceded to the UNCLOS prior to 13 May 1999 shall complete the delimitation of the continental shelf beyond 200 nautical miles and relevant legal process prior to 13 May 2009. The resolution adopted at the 11th Meeting has, in fact, revised the time limit for submitting the information pertaining to delimitation.

Even so, most developing coastal States have been unable to submit these information and materials to the CLCS prior to the deadline. By December 2008, only 13 States completed the submissions, most of which are only partial sub-

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9 Article 4 of Annex II (Commission on the Limits of the Continental Shelf) to the UNCLOS.

10 Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea, SPLOS/72, the 11th Meeting of States Parties to the United Nations Convention on the Law of the Sea (29 May 2001), at http://daccessdds.un.org/doc/UNDOC/GEN/N01/387/64/PDF/N0138764.pdf?OpenElement, l May 2009.

missions.[11]

In June 2008, the 18th Meeting of States Parties to the UNCLOS adopted a new resolution on the time limit for the submission: the coastal State submits to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and of a description of the status of preparation and intended date of making a submission. This will be regarded as the deadline referred to in the UNCLOS is satisfied and there is no need to submit a formal submission at once.[12] Although the resolution demands that the preliminary information shall include the date of making a submission by the coastal State, the date shall be decided by itself in accordance with the specific conditions of that State rather than be confined to the deadline of 13 May 2009. Obviously, the resolution on the preliminary information once again revised the deadline of the submission.

As the preliminary information is not a final submission, the CLCS shall not consider it. When a coastal State submits the preliminary information, it does not affect its formal submission in accordance with Article 76 of the UNCLOS, Rules of Procedure of the CLCS and Scientific and Technical Guidelines, nor does it affect the CLCS's consideration of the formal one.

II. Joint Development in the Political and Legal Sense

Since Bahrain and Saudi Arabia signed an agreement on the joint development of the continental shelf of the Persian Gulf in 1958, the theory and practice of joint development has been through half a century of development and gradually evolved into a relatively complete legal system.

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11 13 States and their submission time are respectively as follows: Russia Federation (20 December 2001), Brazil (17 May 2004), Australia (15 November 2004), Ireland (25 May 2005), New Zealand (19 April 2006), a joint submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland (19 May 2006), Norway (27 November 2006), French Guiana and New Caledonia (22 May 2007), Mexico (13 December 2007), Barbados (8 May 2008), the United Kingdom of Great Britain and Northern Ireland (9 May 2008), Indonesia (16 June 2008) and Japan (12 November 2008). At http://www.un.org/Deps/los/cles_new/cles_home.htm, 1 May 2009.

12 Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfill the requirements of article 4 of Annex II to the Convention, SPLOS/183, as well as the decision contained in SPLOS/72, paragraph (a), the l8th Meeting of States Parties to the United Nations Convention on the Law of the Sea, (20 June 2008), at http://daccessdds.un.org/doc/UNDOC/GEN/N08/398/76/PDF/N0839876.pdf?OpenElement, l May 2009.

A. The Legal Concept of Joint Development

The emergence and spread of joint development has enriched international legal theories and State practice. Joint development as a legal concept has multiple explanations, and what is widely acknowledged is joint development as a provisional arrangement prior to delimitation.

Joint development, as a legal concept deriving from politics, refers to shelving the dispute over delimitation and conducting a joint development of oil and gas resources in the disputed area when the States concerned reach a deadlock on the delimitation of the sea area. Some delimitation agreements between States even stipulate a "joint development clause", which requires that regarding oil and gas resources, discovered or to be discovered across the border line, transboundary joint development areas shall be set up. This is joint development in a broad sense.

With regards to joint development prior to delimitation, the author contends that as a provisional arrangement between sovereign States to shelve disputes and explore and exploit natural resources in the disputed areas before final delimitation, it is based on the premise that it does not reflect the positions of the States concerned on maritime delimitation and has no bearing on the final boundary.

B. Basis of Joint Development in International Law

Joint development originates from State practice; some experts and scholars have studied and elaborated on this issue; and the UNCLOS sets general provisions; all of these form the legal basis for joint development.

The basis in international law for joint development is first derived from as the practice and experience of States. There are more than 20 cases pertaining to States' joint development of marine oil and gas resources which have successfully defused and relieved the tension and confrontation in the disputed areas. Such practice and experience have enriched and developed international legal theories and provide other States with precedents for reference.

The research and writings of international law scholars also offer important references for arrangement of joint development between States. In 1968, an article titled "Apportionment of an International Common Petroleum Deposit" authored by William T. Onorato, made a comprehensive theoretical exploration on joint development,[13] which exerted a significant influence on the opinion of the *North*

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13 William T. Onorato, Apportionment of an International Common Petroleum Deposit, *International and Comparative Law Quarterly*, Vol. 17, Issue 1, 1968, pp. 85~102.

Sea Continental Shelf case by the International Court of Justice (ICJ) in 1969. The ICJ introduced the concept of joint development of offshore resources for the first time and suggested the State parties to establish "a regime of joint jurisdiction, user and exploitation" for the disputed zones.[14] Thereafter, British Institute of International and Comparative Law specifically studied the issue of joint development, drafted a model agreement on joint development, and published the *Joint Development of Offshore Oil and Gas*. This piece of work furnished important reference for States to conclude agreements on joint development.[15]

The relevant provisions of the UNCLOS are the most direct basis in international law on joint development between States. Article 83 of the UNCLOS requires that pending agreement, the States concerned, "in a spirit of understanding and co-operation, 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 arrangement. Such arrangements shall be without prejudice to the final delimitation." This is a framework provision on joint development stipulated in the UNCLOS, and a legal principle to guide the arrangement of a joint development between concerned States.

C. Factors Affecting Joint Development

State practice shows that there are many factors affecting joint development. The political will of the concerned States has a decisive impact on the effective implementation of the joint development. As a provisional arrangement with a strong political complexion, the political will of the State is the critical factor that decides whether joint development will be actualized.

In the joint development agreement between Norway and Iceland, Iceland had no objection over Norway's sovereignty over Jan Mayen. Although both parties believed that the continental shelf surrounding Jan Mayen was not a natural prolongation of Iceland's continental shelf, Norway agreed that Iceland could extend its continental shelf to a distance of 92 nautical miles to Jan Mayen. 70% of the joint development zone established by both parties was located on the Norwegian side of the dividing line, and the contents of the agreement regarding such as operations and exploitation were in favor of Iceland. The agreement was clearly influenced by international politics and national security policy in the late

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14 The Research Office of Policy of State Oceanic Administration eds., *The Treaty Series of International Sea Areas Delimitation*, Beijing: China Ocean Press, 1989, p. 81. (in Chinese)

15 Hazel Fox and Paul McDade eds., *Joint Development of Offshore Oil and Gas (Vol. 1)*, London: British Institute of International and Comparative Law, 1989 &1990.

period of the cold war: Norway made a big concession in exchange for Iceland's continued stay in NATO, which it can, in turn, continue to use the military base in Iceland to balance against the powerful North Fleet of the USSR. This would help Norway gain protection from NATO, for it was directly in face of USSR but strictly prohibited the garrison of foreign troops.[16]

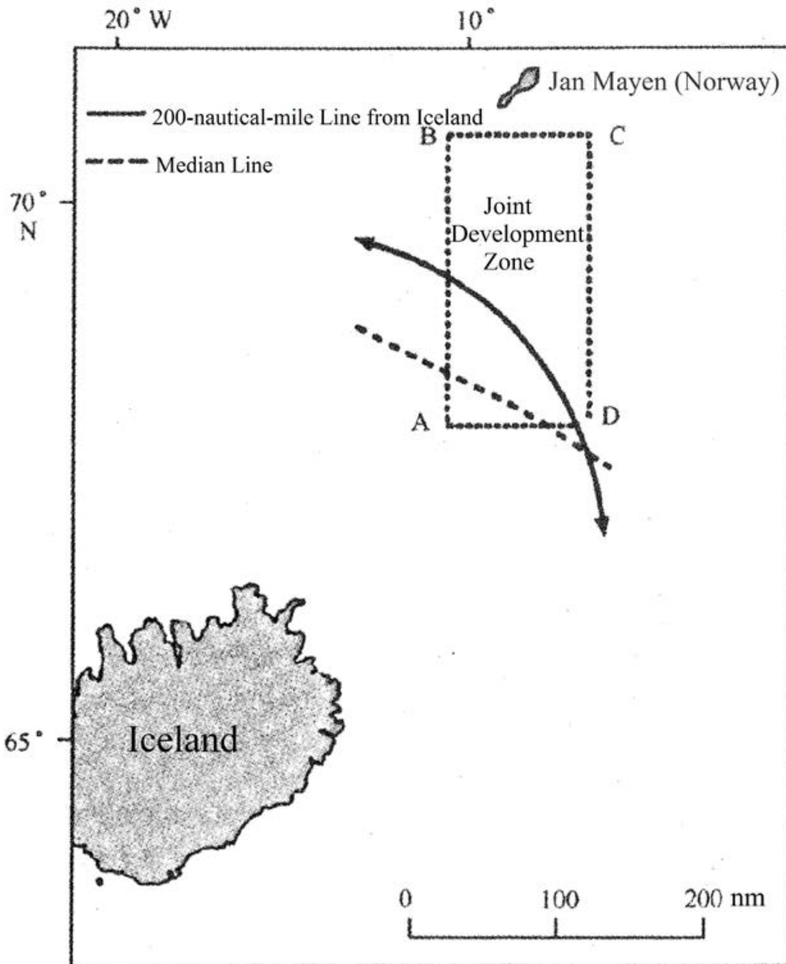

Fig. 1 Joint Development of Continental Shelf Sourrounding Jan Mayen between Norway and Iceland

16 Cai Penghong, *The Management Model of Joint Development in the Disputed Sea Area: A Comparative Study*, Shanghai: Shanghai Social Sciences Press, 1989, pp. 96~108. (in Chinese)

To determine the area for joint development is one of the key issues. In the international legal theory and State practice, States generally set the area with overlapping maritime claims of the State parties as the joint development area. Alternatively, the area for joint development could be selected from part of the overlapping area. The joint development in the Timor Sea between Australia and Indonesia provides a meaningful model for the determination of the area for joint development. Australia and Indonesia face each other across the ocean. The overlapping claims over the delimitation of the continental shelf of the two States form an area of about 61,000 sq. km. In December 1989, the two States signed the Treaty on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and North Australia, recognizing the overlapping claims area of the two States as the area for cooperation[17]. The area between the median line of the two States and the 1500 meters isobaths is the material joint development area. In July 2001, independent East Timor and Australia signed the Memorandum of Understanding of Timor Sea Arrangement, which confirmed and retained the joint development area mentioned above.

17 Cai Penghong, *The Management Model of Joint Development in the Disputed Sea Area: A Comparative Study*, Shanghai: Shanghai Social Sciences Press, 1989, pp. 95~103. (in Chinese)

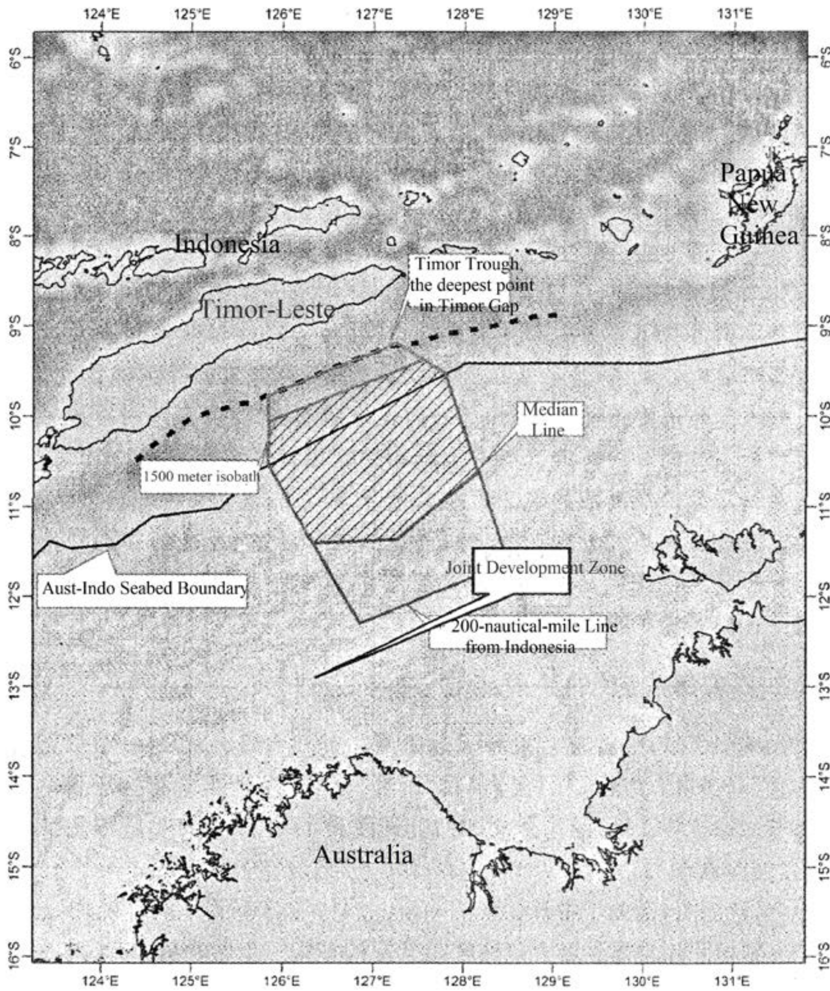

Fig. 2 Australia–Indonesia/Australia–East Timor Joint Development Zone

III. Relevant Issues on the Sino-Japanese Joint Development of the East China Sea

A. Historical Development

In the 1970s, China and Japan exchanged views on the issue of joint development in the East China Sea, and the stance of both parties on joint development became clear. In June 1979, the Chinese side formally proposed to Japan a plan for joint development of the oil and gas resources in the vicinity of the Diaoyu Islands. It was the first time of China to state clearly that it was willing to solve the disputes

concerning its territorial and maritime rights and interests with neighboring States by means of "shelving differences and seeking joint development". Afterward, both parties exchanged views on the joint development in the East China Sea several times. The Chinese side has reiterated constantly the principle of natural prolongation of the continental shelf, and put forward the preliminary plan of shelving the disputes over territorial sovereignty and conducting joint development of the sea area adjacent to the Diaoyu Islands. But Japan refused to acknowledge the existence of disputes over the sovereignty of the Diaoyu Islands, nor did it agree to work towards joint development in the adjacent sea area. Instead, it strongly proposed to develop the waters across the so-called "median line" in the East China Sea that it asserts unilaterally.

In 1985, the oil companies of both sides started to discuss joint development on non-governmental level. Companies such as CNOOC and JNOC, held multiple rounds of conferences to reach consensus on many specific issues and contents of the joint development. It was suggested that the non-governmental negotiations serve as a precursor; after agreements are reached, both companies submit requests to their respective governments for approval to carry out the agreement or alternatively, the two governments directly sign an agreement for joint development. Due to rapid changes in the international and regional circumstances, the non-governmental consensus has not been elevated to that of governmental level. In terms of technology, the geological conditions in the East China Sea are quite complicated which lead to a high development risk. The offshore oil and gas developments carried out by some Japanese oil companies or operated under the Japanese-South Korean joint development have not achieved satisfying results.[18] Hence, Japan has for a long time held a wait-and-watch attitude towards the joint development of oil and gas resources of the East China Sea.

B. Main Contents of the Consensus on the East China Sea

In October 2004, China and Japan restarted negotiations on the issues of the

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18 On 30 January 1974, Japan and South Korea signed the Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf adjacent to the Two Countries. Chinese government on 4 February 1974 made a strong protest against it. In 1977, when the Japanese government ratified the agreement, the Chinese government on 13 June 1977 made a statement again: "according to the principle of the continental shelf as the natural prolongation of the land territory, PRC has the inviolable sovereignty over the continental shelf of the East China Sea." "Any State or individual shall not conduct exploitation on the continental shelf without the consent of the Chinese government; otherwise, they shall be liable for all the consequences."

East China Sea. Since October 2006, the leaders of both countries visited each other in a series of trips titled “ice-breaking”, “ice-melting”, “spring-heralding”, and “warm-spring” to establish and further strategic reciprocal relations in all aspects. Finally, in June 2008, the foreign ministries of the two countries respectively announced the “Principled Consensus on the East China Sea Issue” (hereinafter “Consensus on the East China Sea”).

The Consensus on the East China Sea is composed of three parts: Cooperation between China and Japan in the East China Sea, the Understanding between China and Japan on Joint Development of the East China Sea, and the Understanding on the Participation of Japanese Legal Person in the Development of Chunxiao Oil and Gas Field in Accordance with Chinese Laws. It divides the cooperation and development in the East China Sea between the two parties into two aspects: first, the two governments reach consensus on joint development in the East China Sea, and select a block for joint development; second, Chinese side welcomes the participation of Japanese enterprises in the cooperative development of Chunxiao Oil and Gas Field.

1. Cooperation between China and Japan in the East China Sea

In order to make the East China Sea, of which the delimitation between China and Japan is yet to be made, a “sea of peace, cooperation and friendship”, China and Japan have, in keeping with the common understanding reached by leaders of the two countries in April 2007 and their new common understanding reached in December 2007, agreed through serious consultations that the two sides will conduct cooperation in the transitional period prior to delimitation without prejudicing their respective legal positions. The two sides have taken the first step to this end and will continue to conduct consultations in the future.

2. Understanding between China and Japan on Joint Development of the East China Sea

As the first step in the joint development of the East China Sea between China and Japan, the two sides will work on the following:

(1) The block for joint development shall be the area that is bounded by straight lines joining the 7-point coordinates.

(2) 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.

(3) To carry out the above-mentioned joint development, the two sides will work to fulfill their respective domestic procedures and reach the necessary bilateral agreement at an early date.

(4) The two sides have agreed to continue consultations for the early realization of joint development in other parts of the East China Sea.

3. Understanding on the Participation of Japanese Legal Person in the Development of Chunxiao Oil and Gas Field in Accordance with Chinese Laws

Chinese enterprises welcome the participation of Japanese legal person in the development of the existing oil and gas field in Chunxiao in accordance with the relevant laws of China governing cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources.

The governments of China and Japan have confirmed this, and will work to reach agreement on the exchange of notes as necessary and exchange them at an early date. The two sides will fulfill their respective domestic procedures as required.

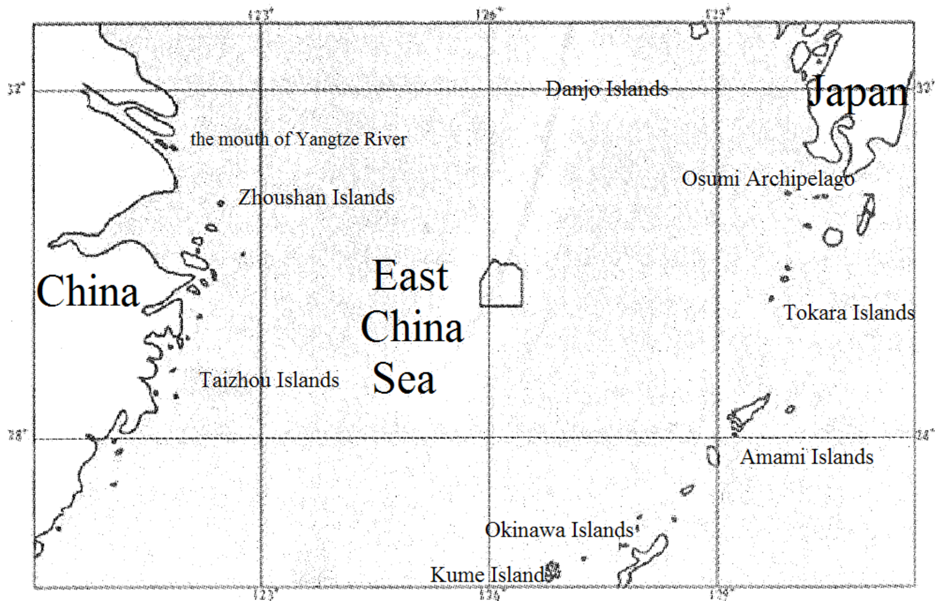

Fig. 3 The Block for Joint Development between China and Japan in the East China Sea (from Xinhuanet)

C. Interpretation of the "Consensus on the East China Sea"

1. "Consensus on the East China Sea" and Political Will of China and Japan

Joint development is in essence a provisional arrangement with a strong political complexion. The political will of the States concerned exerts a decisive

influence on the effective implementation of joint development and is a critical factor to reach an agreement for joint development. "Understanding between China and Japan on Joint Development of the East China Sea", a document made by the two governments after political consultations, reflects the political will of both States that they are willing to shelve the clashes concerning maritime delimitation and give priority to joint development. Thus, the Understanding is a political intension or a political arrangement.

The consensus on joint development is a political document and a prerequisite for actual joint development operations, but it is not a treaty or agreement in terms of international law. To materialize joint development in legal sense, both parties should sign a treaty or agreement setting out specific matters for the joint development through negotiations and consultations. Only after the approval of the highest organ of the State can the "provisional arrangement" prior to the final delimitation be endowed with legal effects, and only then, can it constitute a joint development in legal sense.

2. "Consensus on the East China Sea" and the Delimitation Stances of the Both Parties

The huge differences between the delimitation proposals by China and Japan has left the delimitation of the East China Sea hanging in the air. The Japanese side has always avoided the issue of the delimitation of the continental shelve and has instead, unilaterally proposed, a "median line" method to delimit the sea area. The Chinese side believes that both the parties should delimit the sea area under the equitable principle and in accordance with the relevant provisions of the UNCLOS, while the principle of natural prolongation should be applicable to the delimitation of the continental shelf therein. The natural prolongation of the Chinese land territory in the East China Sea extends to the maximum water depth of the Okinawa Trough. On the issue of the delimitation in the East China Sea, the Chinese side does not acknowledge the so-called "median line" put forward by Japan, and takes the position that there is no "median line" between China and Japan.

In the "Consensus on the East China Sea", both parties unanimously agree that "the two sides will conduct cooperation in the transitional period prior to delimitation without prejudicing their respective legal positions". This indicates that the "Consensus on the East China Sea" will not affect the stands on the delimitation of any party involved. Therefore, the "Consensus on the East China Sea" does not affect China's sovereign rights and jurisdiction over the continental shelf in the East China Sea and its natural resources, nor does it affect China's legal stand and claims concerning the issue of the East China Sea. China proposes to achieve an equitable solution on the delimitation of the continental shelf in the East China Sea

under the principle of natural prolongation. China did not and will not acknowledge the so-called "median line" proposed by Japan. The principled consensus of both parties on joint development does not relate to the claims of each other in the past, nor affect the maritime delimitation in the future. The ultimate solution of the issue of delimitation in the East China Sea shall be determined through negotiations between both parties.

3. Nature and Features of the Block for Joint Development

Understanding between China and Japan on Joint Development of the East China Sea stipulates a block for joint development in the East China Sea, which turns the political will of the States to conduct joint development of oil and gas resources in the East China Sea into more concrete actions. The joint development zone is a square shaped sea area with 7 points coordinates, when connected together, enclosing an area of about 2700 square kilometers. The point coordinates of the block are as follows:

Table1 Coordinates of the Block for Sino-Japanese Joint Development in the East China Sea

Serial No.	North Latitude	East Longitude
1	29°31′	125°53′30″
2	29°49′	125°53′30″
3	30°04′	126°03′45″
4	30°00′	126°10′23″
5	30°00′	126°20′00″
6	29°55′	126°26′00″
7	29°31′	126°26′00″

Understanding between China and Japan on Joint Development of the East China Sea delimits the block for joint development, which is the first step towards the realization of joint development. To determine the specific issues involved in the process of the joint development such as the selection of the areas for development in the block mentioned above, cooperation pattern, form of development, selection of operators, share in expenses and income, setting up of administrative organizations and execution of joint development agreement. Both parties should consult with each other and reach agreements so as to give legal effects to the joint development.

4. The Relation between the Participation of Japanese Enterprises in Chunxiao Oil and Gas Field and Joint Development

Chunxiao Oil and Gas Field in the offshore continental shelf of China, is located in the west of the so-called "median line" proposed by Japan without any

connection with the delimitation dispute. According to provisions of the UNCLOS related to the legal regime of the continental shelf, the sovereign rights over Chunxiao Oil and Gas Field totally belong to China. The development of Chunxiao Oil and Gas Field by China's offshore oil enterprises is China's exercise of sovereign rights over the natural resources of the undisputed continental shelf of China, subject to China's sovereignty, and the exercise of the rights is granted by the UNCLOS.

"Understanding on the Participation of Japanese Legal Person in the Development of Chunxiao Oil and Gas Field in Accordance with Chinese Laws" indicates that Chinese enterprises welcome the participation of Japanese legal person in the development of the existing oil and gas field in Chunxiao in accordance with the relevant laws of China governing cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources. The aforementioned Chinese law refers to the Regulations of the PRC on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises issued in 1982 and revised in 2001. According to Article 1 of the Regulations, it "permit[s] foreign enterprises to participate in the cooperative exploitation of offshore petroleum resources of the PRC on the premise of maintaining national sovereignty and economic interests". The petroleum resources in internal waters, territorial sea and continental shelf of the PRC and other sea areas within the limits of China's jurisdiction are owned by the PRC (Article 2). It is required by the Regulations that all activities concerning the cooperative exploitation of offshore petroleum resources shall abide by Chinese laws, decrees and relevant regulations; all enterprises and individuals who are engaged in petroleum operations shall be subject to Chinese laws and shall be supervised and inspected by the relevant competent authorities of the Chinese government (Article 3).[19]

Sino-foreign cooperation in accordance with the above-mentioned Chinese laws is Chinese enterprises' absorption of foreign capital in accordance with domestic laws. Such cooperative development is far from the concept of joint development and has a very different legal nature. Participation of Japanese enterprises in the cooperative exploitation of Chunxiao Oil and Gas Field is not joint development in international law, but a commercial arrangement based on the Understanding on the Participation of Japanese Legal Person in the Development of Chunxiao Oil and Gas Field in Accordance with Chinese Laws. In nature, it is

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19 Office of Regulations and Rules of State Oceanic Administration ed., *Collection of the Ocean Laws and Regulations of the People's Republic of China*, Beijing: China Ocean Press, 2001, pp. 95~101. (in Chinese)

a cooperative development of China's offshore oil and gas resources, rather than joint development in international law. It has no connection with the Understanding between China and Japan on Joint Development of the East China Sea.

Participation of Japanese enterprises in the cooperative development of Chunxiao Oil and Gas Field shall abide by laws and regulations such as Regulations of the PRC on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, and shall be supervised and inspected by the relevant competent departments of the Chinese government. This "consensus" fully embodies China's sovereign rights over Chunxiao Oil and Gas Field, and Japan's confirmation of this unequivocal fact.

Japanese enterprises will be qualified to participate in the cooperative development of Chunxiao Oil and Gas Field by signing commercial contracts and investing adequate capital. This is a form of cooperation that Chinese enterprises absorb foreign capital according to law, not different from other Sino-foreign cooperation for absorption of foreign capital. Previously, foreign petroleum companies, including UNICO of the USA, had similar cooperation with China's offshore petroleum enterprises. The nature of the participation of Japanese enterprises in the development of Chunxiao Oil and Gas Field in accordance with Chinese laws is the same as that of Sino-foreign cooperation mentioned above.

IV. Relationship between Sino-Japanese Joint Development in the East China Sea and China's Continental Shelf beyond 200 Nautical Miles

The continental shelf is the entire natural prolongation of the land territory of the coastal State. If the natural prolongation exceeds 200 nautical miles measured from the baselines from which the breadth of the territorial sea is measured, the exceeding parts form the continental shelf beyond 200 nautical miles, but naturally are the constituent parts of the continental shelf of the coastal State. According to the UNCLOS, the coastal State has sovereign rights over the natural resources of the continental shelf (including the continental shelf beyond 200 nautical miles), which is the legal basis for the coastal State to develop the natural resources of the continental shelf.

Considering the importance of the continental shelf and its natural resources to the political and economic interests of the coastal State, the States with adjacent or opposite coasts lay stress on maritime delimitation. None of the parties involved will compromise easily. Many States are unwilling to present the dispute to a third party such as the International Court of Justice for a compulsory settlement.

Therefore, it is no wonder that about 70% of the maritime boundaries in the world are to be delimited.[20] However, the long-term impasse in maritime delimitation does harm the stability of nations' relations and the development of economy. Assuming the continued insistence on their respective maritime claims, it is a way of relieving tensions that the relevant States provisionally shelve disputes over the maritime boundary and in turn execute joint development of the resources valued by both parties. The UNCLOS lays out framework provisions on joint development as a means of successfully defusing and relieving tensions and conflicts in the disputed regions. Article 83 of the UNCLOS requires that prior to reaching an agreement on delimitation, "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", and that "[s]uch arrangements shall be without prejudice to the final delimitation". This is viewed as the most direct basis in international law for joint development by States, and also the legal principle guiding the States concerned to make arrangements for joint development. Obviously, the physical space where the joint development is to be implemented is the disputed area with overlapping continental shelf claims by coastal States and the object of joint development is the oil and gas resources therein.

The continental shelf in the East China Sea is a continuation of the Chinese mainland in terms of topography, geomorphology and geology, and is the submerged natural extension of the Chinese mainland. The Okinawa Trough constitutes the natural delimitation line between the continental shelf in the East China Sea and the island shelf of Ryukyu Islands. Therefore, the outer limits of China's continental shelf in the East China Sea shall be the maximum water depth of the Okinawa Trough. Japan has only a narrow island shelf in the East China Sea but insists on delimiting the sea area with China by the median line principle and puts forward a so-called median line unilaterally. The overlapping claims continental shelf between China and Japan is the area between the maximum water depth of the Okinawa Trough proposed by China and the so-called "median line" proposed by Japan. According to relevant provisions of the UNCLOS and the existing State practice on joint development, the Sino-Japanese joint development zone in the East China Sea shall be confined to this sea area. In addition, the Diaoyu Islands, which are inherently Chinese territory, are now illegally occupied

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20 According to statistics of *The Political Geography of the Oceans* (1975) by a world-known jurist on the law of the sea John Robert Victor Prescott, there were nearly 400 maritime boundaries of various kinds between the coastal States in the world to be delimited, at that time only 1/3 delimited.

by Japan. Thus, there is not only a dispute over territorial sovereignty but also a resulting dispute over maritime delimitation between China and Japan. Therefore, the sea area adjacent to the Diaoyu Islands is also the area with overlapping claims of both parties, which can be chosen as a joint development zone.

According to the UNCLOS, the coastal State shall share benefits with the international community by means of payments or contributions to the International Seabed Authority when developing the non-living resources on the continental shelf beyond 200 nautical miles. If joint development in international law sense between China and Japan is carried out on the continental shelf beyond 200 nautical miles from China with overlapping claims of both parties, China does not need to pay or give contributions as per the provisions mentioned above. This is because although this area is located in the continental shelf beyond 200 nautical miles of China, it is also located in the east of the “median line” proposed by Japan, which is not on the Japanese continental shelf beyond 200 nautical miles. Therefore, the joint development is not in its full sense the development of the natural resources of the continental shelf beyond 200 nautical miles.

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The Contents of Japan's Submission on the Extended Continental Shelf and China's Position

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Abstract: After five consecutive years of surveying the continental shelf, Japan finally made the submission to establish the limits of its continental shelf to the Commission on the Limits of the Continental Shelf (CLCS). The submission covers an extremely vast area that is about twice the size of Japan's land area. To prepare its submission, Japan committed itself to providing robust support and collaborative efforts to configure the organizational structure, divide the survey's tasks, and guarantee the finances, completing the survey ahead of schedule. It should be noted that in Japan's submission on the limits of the continental shelf, Oki-no-Tori acts as the base point. This claim does not comply with the provisions on islands in the United Nations Convention on the Law of the Sea, and the relevant content in the submission definitely will not be approved in the CLCS's considerations.

Key Words: Japan's extended continental shelf; Relevant measures and features; Position of China

As is well known, a significant achievement of the United Nations Convention on the Law of the Sea (UNCLOS) is the establishment of the extended continental shelf regime and, based on Article 76 of the Convention, an organization that deliberates on the limits of the continental shelf – the Commission on the Limits of the

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Continental Shelf (CLCS).[1] Since its founding in 1997, the CLCS has held 22 sessions of meetings, and has done some fundamental work to facilitate the implementation of the extended continental shelf regime. This work mainly includes formulating and amending its Rules of Procedure, Scientific and Technical Guidelines, the Internal Code of Conduct for Members, and the Modus Operandi for the Consideration of a Submission Made to the CLCS, as well as other documents. These documents provide the basis and the guarantees for the international community's submissions on the limits of their continental shelves. Of course, the most important work of the Commission is to deliberate and make recommendations on the coastal States' submissions on the limits of their continental shelves. The international community began the process of making submissions within the extended continental shelf regime when Russia made the first submission to the CLCS on December 20, 2001. By February 11, 2009, 17 submissions on extended continental shelf limits had been made to the CLCS.

It should be pointed out here that the so-called "extended continental shelf" (i.e., the continental shelf beyond 200 nautical miles as defined in the UNCLOS) refers to the portion which exceeds 200 nautical miles or is beyond 200 nautical miles from the baselines from which the breadth of territorial sea is measured, and whose outer limit either does not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or 100 nautical miles from the 2,500 metre isobaths, which is a line connecting the depth of 2,500 metres.[2] The so-called "extended continental shelf regime" refers to the regulations and procedures that States should follow in establishing the outer limit of its continental shelf beyond 200 nautical miles.

This article will describe the main contents of Japan's submission on the limits of its extended continental shelf, the policies and measures related to the survey of the continental shelf, and the special features of these policies and measures.

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1 For example, Article 1 of Annex II (Commission on the Limits of the Continental Shelf) to the UNCLOS provides that, in accordance with the provisions of Article 76, a Commission on the Limits of the Continental Shelf beyond 200 nautical miles shall be established in conformity with the articles in the Annex. Article 2(1) of Annex II states that: "The Commission shall consist of 21 members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to this Convention from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacities."

2 UNCLOS, Art. 76(4), 76(5), and 76(8).

I. Outline of Japan's Submission on the Limits of Its Extended Continental Shelf

On November 12, 2008, Japan made its submission on the limits of its extended continental shelf to the CLCS via the Secretary-General of the United Nations. Japan's submission mainly consists of the following parts. First, the scope of the submission. The submission involves seven sea areas to the south and southeast of Honshu, namely, the southern Kyushu–Palau Ridge region, the Minami-Ioto Island region, the Minami Torishima Island region, the Mogi Seamount region, the Ogasawara Plateau region, the southern Oki-Daito Ridge region, and the Shikoku Basin region. Second, disputes with the United States. There is no dispute between Japan and other countries over the continental shelf covered by the submission. However, if the United States makes a submission on the extended continental shelf, there will be potential overlap in the sea areas where Hahajima and Minami Torishima act as the base points and also where Minami-Ioto acts as the base point. These areas will be the subject of negotiation between the two countries. Of course, Japan's submission to the CLCS and the CLCS's consideration of and recommendations on the submission will have no impact on the delimitation of the continental shelf beyond 200 nautical miles between Japan and the United States. This is because the U.S. government has indicated to the Japanese government that it will not object to the CLCS's consideration of and recommendations on the submission, and the submission will not affect delimitations between the two countries.[3] Third, disputes with the Republic of Palau. If the Republic of Palau makes a submission for an extended continental shelf in the sea area where Oki-no-Tori acts as the base point, there will be potential overlapping areas that will be the subject of negotiation between the two countries. However, Japan's submission to the CLCS and the CLCS's consideration of and recommendations on the submission do not affect the delimitation of the continental shelf beyond 200 nautical miles between the two countries. This is because the government of Palau has indicated to the Japanese government that it will not object to the CLCS's

3 On December 22, 2008, the United States submitted a diplomatic note concerning Japan's submission to the CLCS to the Secretary-General of the United Nations. The contents of the note were that the potential conflicts over continental shelves between the United States and Japan would not affect the Commission's consideration of the submission or its recommendations on the submission.

consideration of and recommendations on the submission, and the submission will not affect delimitations between the two countries.

The following are the main measures taken by Japan in order to be able to make its submission to the CLCS by 2009. First, setting up an organizational structure and formulating basic principles: to prepare its submission to the CLCS, Japan set up the "Ministries and Agencies Concerned with the Continental Shelf Survey and Maritime Resources Liaison Council" in the Cabinet, which called for the participation of the main governmental departments. On August 6, 2004, Japan also established the Basic Plan for Drawing the Outer Limits of the Continental Shelf. Japan carried out the survey based on this basic plan, with the Cabinet Secretariat coordinating the collaboration among the relevant ministries and agencies. Second, the division of labor: many types of activities that comprised the survey were divided based on the functions of relevant agencies. The Japan Coast Guard (JCG) surveyed the precise topography and the crustal structure of the sea floor.[4] The Ministry of Education, Culture, Sports, Science and Technology (hereinafter "Ministry of Education and Science") surveyed the crustal structure, and the specific work was done by the Japan Agency for Marine-Earth Science and Technology.[5]

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4 The Japan Coast Guard was founded on May 1, 1948 based on Article 1 of the Coast Guard Law (formulated on April 27, 1948, implemented from May 1, 1948 and last modified on November 2, 2001). For example, according to Article 1 of the Coast Guard Law, the Coast Guard is an external organization under the jurisdiction of the Minister of the Ministry of Land, Infrastructure, Transport, and Tourism. Its mission is to protect the life and property of people on the seas and to prevent, detect, and suppress violation of law at sea. With regards to the organizational structure of the Coast Guard, Article 10 of the Coast Guard Law provides that the Coast Guard is led by a Coast Guard Commandant, who in turn is under the direction and supervision of the Minister of the Ministry of Land, Infrastructure, Transport, and Tourism. The Commandant manages the agency affairs and directs and supervises his subordinate personnel. According to Article 2 of the Coast Guard Law, the Coast Guard's responsibilities are: strictly enforce maritime laws, provide maritime search and rescue, prevent marine pollution, pursue and arrest criminals at sea, regulate sea traffic, provide services concerning hydrography and aids to navigation, and other affairs that ensure maritime safety. See Policy Evaluation and Public Relations Office of the Japan Coast Guard ed., *Coast Guard (internal data)*, April 2006.

5 The main objective of the Japan Agency for Marine-Earth Science and Technology (JAMSTEC) is to contribute to the advancement of academic research and the improvement of marine science and technology, through undertaking fundamental marine research and development as well as cooperative activities on academic marine research for the benefit of peace and human welfare. On April 1, 2004, JAMSTEC was inaugurated as an independent administrative institution when its predecessor entity, the Japan Marine Science and Technology Center founded in October 1971, was reorganized. JAMSTEC, at http://www.jp/j/about/index.html and http: //www.jamstec.jp/j/about/outline/index.html, 31 January 2009. (in Japanese)

The Ministry of Economy, Trade and Industry (hereinafter "Ministry of Economy") was in charge of extracting rock from the sea floor, and the specific work was done by the Japan Oil, Gas and Metals National Corporation[6] and the National Institute of Advanced Industrial Science and Technology.[7] Third, the decision to make the submission. Article 19 of Japan's Basic Act on Ocean Policy, which went into effect on July 20, 2007, prescribes that the government shall take necessary measures to develop, use, and safeguard its continental shelf and exclusive economic zones. Meanwhile, the Basic Plan on Ocean Policy, adopted by the Japanese Cabinet on March 18, 2008 based on the Basic Act on Ocean Policy, also requires that the government develop plans and comprehensive policies or measures for the submission on the extended continental shelf because this was one of its emphasized ocean policies. In addition, with the implementation of the Basic Act on Ocean Policy, the functions of the Ministries and Agencies Concerned with the Continental Shelf Survey and Maritime Resources Liaison Council were transferred to an agency that included director-level personnel from each ministry and agency and which was affiliated with the Headquarters for Ocean Policy, which was also established

6 The Japan Oil, Gas and Metals National Corporation (JOGMEC) was established as an independent administrative institution on February 29, 2004. JOGMEC's missions include: providing the necessary financing for the prospecting for oil, natural gas, and metallic minerals; securing a stable supply of oil, natural gas, and metallic mineral resources; providing funds, loans, and other services to prevent mining pollution caused by metallic minerals; and contributing to the protection of the health of the citizenry and the environment and the healthy development of metallic minerals. The latest survey activities of the Japan Oil, Gas and Metals National Corporation are as follows: on request from the Japan Agency for Marine-Earth Science and Technology and for the purpose of surveying the fundamental marine environment, it used the research ship *Kairei* and the unmanned survey plane *Kaikou7000* to survey the environment surrounding the hot-water seabed deposit areas near Izu, Ogasawara and Okinawa. It set out from Yokohama's new port on January 7, 2009, it was estimated that the survey would take 20 days. JOGMEC, at http://www.jogmec.go.jp/index.html, 31 January 2009. (in Japanese)

7 The seabed rock survey for which the National Institute of Advanced Industrial Science and Technology is responsible involved the following: rock samples were taken from more than 200 predetermined excavation points in Japan's surrounding sea areas for testing to ascertain whether they were the same seabed rock varieties and related fringe materials that constituted the Japanese islands. This was an attempt to provide the geological basis for expanding the extended continental shelf. AIST, at http://www.unit.aist.go.jp/igg/csj-pj/index.html, 31 January 2009. (in Japanese)

based on the Basic Act on Ocean Policy.[8] Therefore, the Headquarters for Ocean Policy, with Prime Minister Taro Aso as its director, held a meeting on October 31, 2008 and decided to make the submission on the outer limits of its continental shelf to the CLCS, with the total area of the claim being approximately 740,000 square kilometers, twice the size of Japan's land area.[9] After accepting the decision of the Headquarters for Ocean Policy, the Japanese government made its submission on the continental shelf to the CLCS via the Secretary-General of the United Nations.

II. Features of the Policies and Measures for Japan's Survey of the Extended Continental Shelf

Japan had to conduct a survey of the continental shelf to make its submission on the limits of its continental shelf. To this end, Japan employed meticulous strategies and measures. The features of these strategies and measures included the following:

A. The Meticulousness of the Organizational Structure and the Comprehensiveness of the Agencies Involved

To coordinate the work of the continental shelf survey and prepare its submiss-

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8 For example, Japan's Basic Act on Ocean Policy, Art. 29, provides that the Headquarters for Ocean Policy are set up at the Cabinet to facilitate the implementation of the marine policies intensively and comprehensively. The duties of the Headquarters for Ocean Policy are, according to the Basic Act on Ocean Policy, Art. 30, to promote the formulation and implementation of the Basic Plan on Ocean Policy; to synthesize coordination of the policies implemented by relevant administrative agencies according to the Basic Plan; and to plan, draft, and make synthesis coordination to important marine policies. In addition, the Headquarters for Ocean Policy consist of the Director-General (the Prime Minister), the Vice Director-General (who will be the Chief Cabinet Secretary and the Secretary for Ocean Policy) and other members (who will be all the secretaries of the government), according to the Basic Act on Ocean Policy, Arts. 31~34. See Jin Yongming, *Study on the Solutions to the Issues of the East China Sea*, Beijing: Law Press, 2008, pp. 223~231. (in Chinese)

9 The Headquarters for Ocean Policy have held 4 meetings (July 31, 2007; November 9, 2007; March 18, 2007; and October 31, 2008) since they were established. At the fourth meeting, Prime Minister Taro Aso remarked that, because of the importance of the continental shelf, those involved in the project were able to submit the enormous amount of data to the United Nations after 5 years of effort. However, the United Nations' approval would still take several years. It was hoped that those involved could continue their close cooperation and do their best to ensure a favorable result. The Cabinet Secretariat, at http://www.kantei.go.jp/kaiyou/kaisai.html, 31 January 2009. (in Japanese)

ion, Japan not only established the liaison council specifically for the continental shelf survey, but also a Workgroup for the Continental Shelf Survey under the liaison council; and below the Workgroup, a Sea Area Survey Committee, a Submission Drafting Committee, and an International Environment Cultivation Committee (December 27, 2004). This hierarchical organizational structure established a step-by-step, layer-by-layer approach to the survey, and was nothing if not thorough, exacting, and comprehensive.

Japan's Ministries and Agencies Concerned with the Continental Shelf Survey and Maritime Resources Liaison Council was established on August 4, 2004, and part of it was modified on December 22, 2006.[10] The council included the following parts. First, the purpose of the council was defined. The Ministries and Agencies Liaison Council was established in the Cabinet, with the close cooperation of relevant ministries and agencies, to facilitate the survey of the continental shelf, to take necessary measures to delimit the continental shelf beyond 200 nautical miles and the exclusive economic zones, and to formulate policies concerning maritime resources, all according to the UNCLOS. Second, the composition and function and power of the liaison council. The above-described liaison council was made up of the personnel from the following 12 departments, but members could be added

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10 The Ministries and Agencies Concerned with the Continental Shelf Survey and Maritime Resources Liaison Council has held 6 meetings and one Executive Committee meeting since it was established. The meetings held were as follows: the first meeting was held on August 6, 2004, where issues concerning maritime law and present management, as well as resources distribution and the prospecting status of the Japanese water areas were discussed, and the Basic Plan for Drawing the Outer Limits of the Continental Shelf was formulated. The second meeting was held on December 27, 2004, where issues concerning the Japanese ocean patrol and present management as well as the geophysical prospecting of the seabed in the East China Sea were discussed, and the system and budget for the survey on continental shelf were adjusted. The third meeting was held on March 24, 2005, where the status of the survey for the submission on the limits of the continental shelf was discussed, and issues concerning the Japanese ocean patrol and geophysical prospecting of the seabed in East China Sea were discussed again. The fourth meeting was held on September 5, 2005, where the current status on the continental shelf survey, the 2006 budget summary, relationships and their current status with neighboring countries on ocean issues, the geophysical prospecting of the seabed in the East China Sea, and the licensing of trial mining rights were the issues discussed. The fifth meeting was held on March 23, 2006, where the status of the extended continental shelf survey and the relationships with neighboring countries concerning ocean issues and their present status were discussed again. The sixth meeting was held on June 13, 2007, where the status of the extended continental shelf survey was discussed again, and the Basic Plan for Drawing the Outer Limits of the Continental Shelf was partially modified. The Executive Committee meeting was held on September 27, 2004. At http://www.cas.go.jp/sei-saku/tairikudana/kaisai.html, 31 January 2009. (in Japanese)

if the chairperson considered it necessary: the chairperson was the Deputy Chief Cabinet Secretary (in charge of operations); the vice-chairperson was the Assistant Deputy Chief Cabinet Secretary (in charge of foreign affairs); the team members included the Assistant Deputy Chief Cabinet Secretary (in charge of internal affairs), the Councilor of the Cabinet Secretariat, the Director-General of the Foreign Policy Bureau of the Ministry of Foreign Affairs; the Director-General of the Research and Development Bureau of the Ministry of Education and Science, the Director-General of the Fisheries Agency, the Director-General of the Agency for Natural Resources and Energy, the Director-General of the Policy Bureau of the Ministry of Land, Infrastructure, Transport, and Tourism (hereinafter "Ministry of Land"), the Commandant of the Japan Coast Guard, the Director-General of the Global Environment Bureau of the Ministry of the Environment, and the Director-General of the Bureau of Operational Policy of the Ministry of Defense. The secretary of the liaison council was a staff member of a relevant administrative agency and was supposed to be an official from one of the above agencies appointed by the chairperson. When he or she considered it necessary, the chairperson could ask experts, staff from other relevant administrative agencies, and other relevant individuals to participate in the council. Workgroups, which included the staff of relevant offices and agencies, were set up to run the liaison council smoothly. The logistics of the liaison council were jointly assigned to the Ministry of Foreign Affairs, the Ministry of Land, the Agency for Natural Resources and Energy, and other relevant administrative agencies, and were handled through the Cabinet Secretariat. Undetermined issues, issues related to the operation of the liaison council, and other necessary issues were decided by the chairperson. Third, the membership of the Executive Committee was described. The Executive Committee of the liaison council included the following nine secretaries: the Counselor of the Cabinet Secretariat, the Director of the Policy Coordination Division of the Foreign Policy Bureau of the Ministry of Foreign Affairs, the Chief of the Ocean and Earth Division of the Research and Development Bureau of the Ministry of Education and Science, the Chief of the Resources Management Division of the Resources Management Department of the Fisheries Agency, the Chief of the Policy Planning Division of the Resource and Fuel Department at the Agency for Natural Resources and Energy, the Chiefs of the Environmental Policy and Ocean Policy Divisions of the Policy Bureau at the Ministry of Land, the Chief of the Government Affairs Division of the JCG's Administrative Department, the Chief of the Environment Protection Strategy Division of the Global Environment Bureau of the Ministry of

the Environment, and the Chief of the Investigations Division of the Defense Policy Bureau at the Ministry of Defense. [11]

The Workgroup for the Continental Shelf Survey under the liaison council consisted of the following personnel. The chairperson of the workgroup was the Assistant Deputy Chief Cabinet Secretary and was in charge of the foreign affairs related to the survey's work. The team members included the Deputy Chief Cabinet Secretary (in charge of internal affairs), the Councilor of the Cabinet Secretariat, the Director-General of the Economics Bureau at the Ministry of Foreign Affairs, the Director-General of the Research and Development Bureau at the Ministry of Education and Science, the Deputy Director-General of the Fisheries Agency, the Deputy Director-General of the Agency for Natural Resources and Energy, the Director-General of the Policy Bureau of the Ministry of Land, the Vice Commandant of the JCG, the Director-General of the Global Environment Bureau at the Ministry of the Environment, and the Director-General of the Bureau of Operational Policy at the Ministry of Defense. The workgroup's secretary was a staff member of a relevant administrative agency and was designated by the chairperson. The logistics of the workgroup were handled at the Cabinet Secretariat with the assistance of the Ministry of Land. Undetermined issues, issues related to the operation of the workgroup, and other necessary issues were decided by the chairperson. In the event that the liaison council was abolished, the issues decided at the liaison council will become the responsibility of the workgroup. In addition, the Executive Committee of the workgroup consisted of the following 9 staff from 9 departments: the Counselor of the Cabinet Secretariat, the Chief of the Ocean Division of the Economic Affairs Bureau at the Ministry of Foreign Affairs, the Chief of the Ocean and Earth Division of the Research and Development Bureau at the Ministry of Education and Science, the Chief of the Resources Management Division of the Resources Management Department of the Fisheries Agency, the Chiefs of the Environmental Policy and Ocean Policy Divisions of the Policy Bureau at the Ministry of Land, the Director of the Hydrographic Surveys Division of the JCG's Hydrographic and Oceanographic Department, the Chief of the Environmental Protection Policy Division of the Global Environment Bureau at the Ministry of the Environment, and the Chief of the Investigations Division of the

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11 At http://www.cas.go.jp/jp/seisaku/tairikudana/renrakukaigi.html, 31 January 2009. (in Japanese)

Defense Policy Bureau at the Ministry of Defense.[12]

The Sea Area Survey Committee, operating under the Workgroup for the Continental Shelf Survey, was in charge of drafting the survey implementation plan and coordinating the schedule for the ships involved in the survey. This committee included the following personnel: the Counselor of the Continental Shelf Survey Strategy Office of the Cabinet Secretariat, the Chief of the Ocean and Earth Division of the Research and Development Bureau of the Ministry of Education and Science, the Chief of the Mineral and Natural Resources Division of the Natural Resources and Fuel Department of the Agency for Natural Resources and Energy of the Ministry of Economy, and the Chief of the Hydrographic Surveys Division of the JCG's Hydrographic and Oceanographic Department at the Ministry of Land. Whenever the Sea Area Survey Committee considered necessary, it could ask relevant individuals who were responsible for carrying out the continental shelf survey to attend the meeting. At the same time, the Sea Area Survey Committee could also designate its own members who evaluated and gave advice with regards to the continental shelf survey as consultants. The logistics of the Sea Area Survey Committee were handled at the Cabinet Secretariat and were the joint responsibility of the JCG, the Ministry of Education and Science, and Ministry of Economy.[13]

The main task of the Submission Drafting Committee, which operated under the Workgroup for the Continental Shelf Survey, was to draft and summarize the information on the limits of the continental shelf that was to be submitted to the CLCS. The information would be based on the results of the continental shelf survey and would relate to the terrain and geology of the continental shelf. This committee included the following personnel: the Counselor of the Continental Shelf Survey and Strategy Office of the Cabinet Secretariat, the Chief of the Economic Security Division of the Economic Affairs Bureau at the Ministry of Foreign Affairs, the Chief of the Ocean and Earth Division of the Research and Development Bureau of the Ministry of Education and Science, the Chief of the Mineral and Natural Resources Division of the Natural Resources and Fuel Department of the Agency for Natural Resources and Energy at the Ministry of Economy, and the Chief of the Hydrographic Surveys Division of the JCG's Hydrographic and Oceanographic Department at the Ministry of Land. The committee also set up a drafting team for the purpose of submitting the limits of the

12 At http://www.cas.go.jp/seisaku/tairikudana/wg.html, 31 January 2009. (in Japanese)
13 At http://www.cas.go.jp/seisaku/tairikutana/kaiiki.html, 31 January 2009. (in Japanese)

extended continental shelf to the United Nations. The team members were named by the committee. The team leader was expected to attend the committee meetings frequently and report on the progress made by the drafting team. Those responsible for conducting the actual continental shelf survey (the Japan Agency for Marine-Earth Science and Technology, the Japan Oil, Gas and Metals National Corporation, the National Institute of Advanced Industrial Science and Technology, and the JCG at the Ministry of Land) were often expected to attend the committee meetings. The committee could designate as consultants the members who evaluated and made advice on the continental shelf survey. The logistics of the committee were handled at the Cabinet Secretariat, and were the joint responsibility of the Ministry of Foreign Affairs, the Ministry of Education and Science, the Ministry of Economy, and the JCG. [14]

An International Environment Cultivation Committee was set up under the Workgroup for the Continental Shelf Survey to collect information on the United Nations and other countries that were making submissions on their extended continental shelves, to cultivate a favorable international environment for the CLCS's review, and to further adjust the relevant policies and measures. This committee consisted of the following personnel: the Counselor of Continental Shelf Survey and Strategy Office of the Cabinet Secretariat, the Chief of the Economic Security Division of the Economic Affairs Bureau at the Ministry of Foreign Affairs, the Chief of the Ocean and Earth Division of the Research and Development Bureau of the Ministry of Education and Science, the Chief of the Mineral and Natural Resources Division of the Natural Resources and Fuel Department of the Agency for Natural Resources and Energy of the Ministry of Economy, and the Chief of the Hydrographic Surveys Division of the JCG's Hydrographic and Oceanographic Department at the Ministry of Land. The committee could designate as consultants the members who evaluated and gave advice on the continental shelf survey. The logistics of the International Environment Cultivation Committee were handled at the Cabinet Secretariat with the assistance of the Ministry of Foreign Affairs.

Finally, it should be noted that before the Ministries and Agencies Concerned with the Continental Shelf Survey and Maritime Resources Liaison Council was established, Japan actually had already set up a Liaison Council for Ocean Development-related Ministries and Agencies in 1980, and had modified it partially

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14 At http://www.cas.go.jp/seisaku/tairikutana/seisakuiinkai.html, 31 January 2009.

six times.[15] At the same time, the Cabinet had set up the Continental Shelf Survey Liaison Council on June 7, 2002 for the purpose of facilitating the work of the survey by the relevant ministries and agencies.[16] In June 2003, the Continental Shelf Survey Evaluation and Advisory Council, which included experts in marine science and international law, was set up under the Continental Shelf Survey Liaison Council to add a professional perspective and to receive evaluations and suggestions about the survey. In December 2003, the Continental Shelf Survey Strategy Office was set up at the Cabinet Secretariat to integrate the policies and measures related to the continental shelf survey and to make necessary adjustments to them. Subsequently in August 2006, the Continental Shelf Survey Liaison Council was reorganized into the Ministries and Agencies Concerned with the Continental Shelf Survey and Maritime Resources Liaison Council, with the Deputy Chief Cabinet Secretary as the chairperson, and the Basic Plan for Drawing the Outer Limits of the Continental Shelf was formulated.[17] In addition, with the implementation of the Basic Act on Ocean Policy, the functions of the Ministries and Agencies Concerned with the Continental Shelf Survey and Maritime Resources Liaison Council passed to the Headquarters for Ocean Policy, whose

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15 Regarding the content of the "Liaison Council for Ocean Development-related Ministries and Agencies": the Council was set up at the Cabinet to facilitate the comprehensive implementation of the policies and measures to ocean development and the close cooperation among relevant administrative agencies. The liaison council consisted of the following personnel, but members may be added if the chairperson considered it necessary: the Deputy Chief Cabinet Secretary (chairperson, in charge of general affairs), the Assistant Deputy Chief Cabinet Secretary (vice-chairperson), the Director-General of the Research and Development Bureau of the Ministry of Education and Science (vice-chairperson), the Director-General of the Information and Communications Bureau of the Ministry of Internal Affairs and Communications, the Director-General of the Economic Affairs Bureau of the Ministry of Foreign Affairs, the Deputy Director-General of the Fisheries Agency at the Ministry of Agriculture, Forestry, and Fisheries, the Deputy Director-General of the Agency for Natural Resources and Energy at the Ministry of Economy, Trade and Industry, the Director-General of the Policy Bureau at the Ministry of Land, and the Director-General of Global Environment Bureau at the Ministry of the Environment. The liaison council's secretary was a staff person of a relevant administrative agency and was appointed by the chairperson. The logistics of the liaison council were handled at the the Cabinet Secretariat and the Research and Development Bureau of Ministry of Education and Science, with the assistance of other relevant ministries and agencies. Unspecified issues, issues related to the operation of the liaison council and other necessary issues were decided by the chairperson. At http://www.cas.go.jp/seisaku/kaiyou/konkyo.html, 31 January 2009. (in Japanese)

16 Japan Coast Guard ed., *Japan Coast Guard Annual Report*, Tokyo: Niyo Printing Co., Ltd., 2008, p. 15. (in Japanese)

17 Japan Coast Guard ed., *Japan Coast Guard Annual Report*, Tokyo: National Printing Bureau, 2006, p. 42. (in Japanese)

secretariat was the Prime Minister.

From the above, it is evident that Japan set up a comprehensive and integrated organizational structure to conduct the continental shelf survey. The continual supplementation and expansion of this structure made the preparations for its submission effective through all-around collaboration. At the same time, because of the early planning, the submission was made ahead of schedule.

B. The Specificity of the Continental Shelf Survey Policies and the Clear Division of Labor

The Ministries and Agencies Concerned with the Continental Shelf Survey and Maritime Resources Liaison Council formulated the Basic Plan for Drawing the Outer Limits of the Continental Shelf on August 6, 2004, which were partially modified on June 17, 2007. This document prescribed the policies and the schedule for the future survey based on the Basic Perspectives on the Future of the Limits of the Continental Shelf (formulated in August 2003). That is to say, from April 2004 onwards, the Japanese government began to make all-out efforts on the continental shelf survey with the collaboration of the relevant ministries and agencies, and planned to submit information on the limits of the extended continental shelf to the CLCS by May 2009.

The main contents of the Basic Plan for Drawing the Outer Limits of the Continental Shelf included the following:

(1) The significance of the submission. If Japan's submission on the limits of the continental shelf was approved by the CLCS, Japan would be able to prospect the extended continental shelf and ensure the exercise of sovereign rights over the exploitation of natural resources on the extended continental shelf.

(2) Japan's international experience as well as relevant measures and the outlook related to extended continental shelf surveys. Since 1983, the JCG had been surveying the continental shelf as part of its work in measuring the waterways. Survey results showed that the maritime territory of the potential new continental shelf was about 1.7 times the size of Japan's land area. Of course, the Ministry of Education and Science and the Ministry of Economy, were also carrying out survey activities regarding the flexible use of the continental shelf. In May 1999, the CLCS formulated the Scientific and Technical Guidelines for the review of information submitted on extended continental shelves. Thereafter, Russia made a submission on the limits of its continental shelf to the CLCS for the first time in

December 2001. In its comments disapproving the contents of the submission, the CLCS stated that there were not sufficient, objective, highly scientific, or detailed data for it to conduct the review. Therefore, the Japanese government decided in June 2003 to set up the Continental Shelf Survey Evaluation and Advisory Council to effectively facilitate Japan's survey and to make suggestions on the contents of the survey. This council included scholars in marine science and international law. In addition, the Continental Shelf Survey Strategy Office was set up in December 2003 at the Cabinet Secretariat for the purpose of integrating relevant government policies and making necessary comprehensive adjustments. The specific process of the survey was as follows. Based on the suggestions of the Evaluation and Advisory Council, the government made all-out efforts to start the first stage of the survey in April 2004 with the assistance of the relevant ministries and agencies. At the same time, it explored the contents of the survey, effective survey systems, and ways to reduce costs. On July 15, 2004, the Continental Shelf Survey Evaluation and Advisory Council believed that the methods and scope of the survey had fully met the CLCS's standards of review. On May 24, 2007, the Evaluation and Advisory Council proposed further investigating the findings of the first stage based on the latest scientific knowledge.

(3) Principles on the actual implementation of the limits of the continental shelf. The relevant ministries and agencies, working under the coordination of the Continental Shelf Survey Strategy Office of the Cabinet Secretariat, carried out their tasks according to the relevant provisions of the UNCLOS concerning the continental shelf beyond 200 nautical miles. First, they would conduct the survey of the sea area. Based on the suggestions of the Evaluation and Advisory Council, the findings of the first stage in 2004, information from the United Nations, and the survey plan, the following agencies conducted the second stage of the survey starting from 2005. Specifically, the JCG completed a precise topographic survey of the ocean floor and, with the Ministry of Education and Science, prospected the crustal structure. The Ministry of Economy sampled the rock on the ocean floor. Other ministries and agencies collaborated whenever possible, providing information, ships, and other equipment. During the actual survey, maximum use of the existing findings was expected as was the sharing of the existing data on the ocean floor topography, and relevant ministries and agencies were instructed to cooperate closely with the JCG, which controlled the data. Meanwhile, at meetings among those responsible for conducting the survey, the sharing of information was expected, and the survey schedule was adjusted accordingly. In addition, to

effectively draft the submission, a system that would collect, organize, maintain, and provide the necessary survey results should be developed. Second, collecting information for and drafting the submission on the limits of continental shelf. With the overall coordination of the Cabinet Secretariat's Continental Shelf Survey Strategy Office, the Ministry of Foreign Affairs, the Ministry of Education and Science, the Ministry of Economy and the JCG should cooperate with each other to immediately start, from April 2004 onwards, to draft the submission on the limits of the continental shelf, and to discuss an organization system for collecting information that would include experts in marine science and international law. Third, submitting information on the limits of the continental shelf to the CLCS, and collecting information from the United Nations and other organizations. The Ministry of Foreign Affairs would submit information to the CLCS, and it would also act as the center for collecting information from the United Nations and other organizations. By paying attention to the CLCS's deliberations on the review standards and enhancing the collection of information from the United Nations and other applicant States, Japan would bring about a favorable result of the CLCS's review of its submission.

(4) The future survey schedule. Japan's submission to the CLCS should follow the following schedule: start the second stage of the survey in April 2005; elect the members of the CLCS in June 2007; finish the sea area survey in June 2008; finish collecting information on the limits of the continental shelf in December 2008; go through the relevant domestic procedures and make the submission on the limits of the continental shelf to the CLCS in January 2009. May 2009 was the deadline for making the submission. [18]

The formulation and implementation of the above policies brought about the successful completion of Japan's survey of the continental shelf.

C. Strong Budgetary Guarantees

As described above, departments from three of Japan's major administrative agencies were responsible for conducting the continental shelf survey. This section discusses the JCG as an example.

As is well known, submissions on the limits of the continental shelf from coastal States to the CLCS should, according to the suggestions of its Scientific and

18 At http://www.cas.go.jp/seisaku/tairikudana/kettei.html, 31 January 2009. (in Japanese)

Technical Guidelines, include bathymetric, geodesic, geophysical, and geological data, both digital and non-digital, and a checklist of relevant supporting information and data. The data provided should demonstrate the methods used by the coastal States and support the results, to prove that the proposed base points of the outer limits are actually legal. In addition, the coastal States should also answer, in a timely manner, the questions raised by the CLCS and the subcommission established to deliberate on the submission, to enable the CLCS to deliberate and make recommendations. [19]

In view of the importance of data for the submission and the difficulty of carrying out the survey, the JCG prioritized an organized structure, and Japan gave strong financial backing to the project. This was despite the JCG's many achievements and the prior extensive experience since it began surveying the continental shelf in 1983. All these ensured the accelerated implementation and completion of the survey. For example, the JCG added the position of the Information Management Officer for the Continental Shelf. This officer was in charge of collecting, managing, maintaining, and furnishing information on the results of the survey and was part of a complete organizational system for effectively submitting the information to the United Nations.[20] In terms of financial support, the JCG's 2005 budget for the survey was 6.686 billion Japanese yen.[21] The 2006 budget was 6.735 billion Japanese yen.[22] The 2007 budget was 6.687 billion Japanese yen,[23] and for 2008 it was 307 million.[24] This financing supported JCG's 2007 precise seafloor topographic survey and crustal structure prospecting in the areas surrounding Minami Torishima and the Daito Islands, as well as areas far from the islands' shores. In addition, during the topographic surveys and the prospecting of the

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19 At the fifth session of meetings of the CLCS, the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf were unanimously adopted on May 13, 1999. The passage of these guidelines provided a basis for the coastal States for their extended continental shelf submissions and substantively facilitated the work surrounding submissions in the extended continental shelf regime.

20 Japan Coast Guard ed., *Japan Coast Guard Annual Report*, Tokyo: National Printing Bureau, 2005, p. 40. (in Japanese)

21 Japan Coast Guard ed., *Japan Coast Guard Annual Report*, Tokyo: National Printing Bureau, 2005, p. 40. (in Japanese)

22 Japan Coast Guard ed., *Japan Coast Guard Annual Report*, Tokyo: National Printing Bureau, 2006, p. 56. (in Japanese)

23 Japan Coast Guard ed., *Japan Coast Guard Annual Report*, Tokyo: National Printing Bureau, 2007, p. 43. (in Japanese)

24 Japan Coast Guard ed., *Japan Coast Guard Annual Report*, Tokyo: Niyo Printing Co., Ltd., 2008, pp. 46 and 86. (in Japanese)

crustal structure with survey boats such as the Shoyo and the Takuyo, the JCG also discovered many new seamounts, including 7 seamounts between Chichijima and Minami Torishima. With the newly-obtained scientific data, Japan further expanded the area claimed as its so-called "extended continental shelf" in its submission.[25]

Evidently, Japan's efforts in setting up a sound organizational structure, making policies, division of labor and collaboration, and strong financial support led to the completion of the survey and the making of the submission ahead of schedule. If Japan's survey and submission are approved, there will be an adverse impact on China's navigation, survey, and measurement activities on the high seas, as well as its national security, particularly in the areas near Oki-no-Tori. This deserves our attention.

III. Japan's Submission on the Limits of the Extended Continental Shelf and China's Position

As is well known, the extended continental shelf regime is a new regime established by the UNCLOS, with its main contents prescribed in Articles 76 and 83 of and Annex II ("Commission on the Limits of the Continental Shelf") to the UNCLOS. The CLCS was set up by the UNCLOS. Its main functions include reviewing the various types of data submitted by coastal States on the limits of the continental shelf beyond 200 nautical miles, making recommendations according to Article 76 of the UNCLOS and Annex II of the Final Act of the Third UN Conference on the Law of the Sea ("Statement of Understanding on Using a Specific Method to Define Continental Shelf Edge") passed on August 29, 1980 and, on request of the coastal States, providing scientific and technical comments when they compile the above data. The outer limits of the continental shelf established by the coastal States, based on the CLCS's recommendations, are final and binding. As mentioned above, the CLCS has so far received 17 submissions, and its deliberative workload is considerable. It may be predicted that the coastal States will pay attention to the following aspects of the CLCS's review: first, efficiency when considering the submissions; second, confidentiality "surrounding" the submissions; third, subsidizing developing countries in making their submissions; fourth, the contents of the recommendations on the approved

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25 Japan Coast Guard ed., *Japan Coast Guard Annual Report*, Tokyo: National Printing Bureau, 2007, pp. 32~33. (in Japanese)

submissions, including the criteria for the recommendations.

A glaring problem in Japan's submission is that it treats Oki-no-Tori as an island and uses it as a base point for its claimed continental shelf. In fact, Oki-no-Tori is not an island as defined in Article 121 of the UNCLOS, but a rock, and it is impossible to base a claim for a continental shelf on a rock.

Oki-no-Tori is located in the sea area east of Chinese Taiwan Island and south of the Ryukyu Islands. It is actually a coral reef. At low tide, it is 4.5 kilometers long from east to west, 7 kilometers wide from south to north, and 11 kilometers in circumference. At high tide, the entire reef is almost submerged. Only two small reefs called the "North Islet" and the "East Islet" rise to the surface, each with a height of between one and two meters and a width of about 4.6 meters, and their total area does not exceed 10 square meters.[26] At the same time, due to the rich fishery resources around Oki-no-Tori and concentrations of manganese nodules in the seabed, Japan attempted to expand its sea area with Oki-no-Tori as a territorial sea base point. Therefore, Japan invested heavily to construct a round reinforced-concrete protective facility 50 meters in diameter around the two reefs, and built a marine observation platform 7 meters above the surface of the sea to prevent it from vanishing under water.[27] These efforts show the seriousness of Japan's intentions. Japan's submission turned out to include a part of the extended continental shelf that had Oki-no-Tori as a base point.

Although located far from the coast of China, Oki-no-Tori has a severe impact on our country. It is unjustifiable for Japan to take it as a base point to claim an exclusive economic zone of 200 nautical miles and an extended continental shelf. This not only seriously affects the free navigation and marine scientific research carried out by every country in this part of the high seas and infringes on the maritime interests of surrounding countries, but also poses a grave military threat to China's navigation in and out of the Pacific. We must pay close attention to this threat.

In light of the above considerations, China's Permanent Mission to the UN submitted a position statement regarding Japan's submission on the limits of the

26 Gao Zhiguo, Thoughts and Suggestions on the Suyan Islet and Oki-no-Tori, in Gao Zhiguo, Zhang Haiwen and Jia Yu eds., *Research on Developing Trends in International Maritime Law*, Beijing: China Ocean Press, 2007, pp. 3~4. (in Chinese)

27 Gao Zhiguo, Thoughts and Suggestions on the Suyan Islet and Oki-no-Tori, in Gao Zhiguo, Zhang Haiwen and Jia Yu eds., *Research on Developing Trends in International Maritime Law*, Beijing: China Ocean Press, 2007, pp. 3~5. (in Chinese)

continental shelf to the Secretary General on February 6, 2009. The statement includes the following: "The Chinese government has carefully studied the Executive Summary of Japan's submission, and has noted, in particular, of 200-nautical-mile extension of its continental shelf measured from the basepoint Oki-no-Tori, as well as the three regions, namely SKB, MIT and KPR, of the continental shelf extended beyond 200 nautical miles from the Oki-no-Tori Shima Island. It is to be noted that the so-called Oki-no-Tori Shima Island is in fact a rock as referred to in Article 121(3) of the Convention. Therefore, the Chinese government wishes to draw the attention of the members of the Commission, the States Parties to the Convention, as well as the Members of the United Nations to the inconformity with the Convention with regard to the inclusion of the rock of Oki-no-Tori in Japan's Submission." According to Article 121(3) of the UNCLOS, "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Available scientific data has adequately shown that the rock of Oki-no-Tori, in its natural state, obviously cannot sustain human habitation or economic life of its own. Therefore, it cannot have an exclusive economic zone or continental shelf, or the right to an extended continental shelf beyond 200 nautical miles. Since the rock of Oki-no-Tori does not provide grounds for a claim to a continental shelf, making any recommendations on the portions of continental shelf within and beyond 200 nautical miles measured from the rock of Oki-no-Tori is outside the mandate of the CLCS. The Chinese government therefore requested the CLCS not to take any action on the above-described portions of Japan's submission, and the Permanent Mission of the People's Republic of China to the UN requested that this position be circulated to all the members of the CLCS, all the States that are parties to the UNCLOS, and all the members of the UN.

In addition, South Korea's Permanent Mission to the UN also submitted a note verbale concerning the rock of Oki-no-Tori to the Secretary General on February 27, 2009. Its content was the same as that of China's position.

It is evident that the continental shelf and extended continental shelf claimed in Japan's submission, with the rock of Oki-no-Tori as the base point, fail to comply with the relevant provisions of the UNCLOS on islands. The CLCS has no right to make recommendations in this regard. [28]

In short, the move to enclose territory in the form of extended continental

28 For example, UNCLOS, Art. 121(1) provides that "[a]n island is a naturally formed area of land, surrounded by water, which is above water at high tide."

shelves based on the UNCLOS has emerged in the international community. For this reason, China should make active efforts to study the extended continental shelf regime to safeguard its maritime rights and interests.

Although China is a maritime power, it has an extremely limited extended continental shelf. Specifically, the continental shelf beyond 200 nautical miles that belongs to China may exist in the South China Sea.

China has implemented a special national plan for its submission on the limits of the continental shelf and has actively prepared to file the submission. But should China make its submission to the CLCS before May 13, 2009? This decision requires comprehensive deliberations. However, judging by the coastal States' obligations as derived from the provisions of the UNCLOS, it seems the answer should be yes. For example, Article 4 of Annex II to the UNCLOS states that: "Where a coastal State intends to establish, in accordance with Article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State." However, due to the highly complex and difficult nature of making the submission for the outer limits, the 11th Conference of States Parties to the UNCLOS (2001) adopted a resolution to extend the submission deadline: any country that officially ratified or joined the UNCLOS before May 13, 1999 may have a statutory submission period of 10 years, starting from that day. Of course, there are appeals for extending the submission deadline yet again from the international community. However, before the CLCS or the Conference of States Parties to the UNCLOS adopts any new resolution, coastal States have to abide by the existing deadline. Otherwise, they will suffer the consequences for not performing their duties under the UNCLOS. For this reason, China must be assertive and confront the situation.

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The Sino-Japanese Principled Consensus on the East China Sea Issue: A Commentary

YU Mincai*

Abstract: The Sino-Japanese Principled Consensus on the East China Sea Issue is the achievement of the two States' joint effort to settle the East China Sea oil and gas field dispute and promote their strategic and mutually beneficial relations. The Consensus is different from other development cooperation arrangements in some aspects. As one of the major follow-up steps for the implementation of the Principled Consensus, an agreement on the joint development of the agreed Block in the East China Sea should be concluded to promote joint development of the resources therein. This agreement is expected to be actualized within Taro Aso's term.

Key Words: East China Sea; Principled Consensus; Strategic and mutually beneficial relations; Joint development

China and Japan reached the Principled Consensus on the East China Sea Issue (hereinafter "the Principled Consensus") on June 18, 2008. It has been reported that they were to negotiate an agreement formalizing the understandings of the Principled Consensus on joint development in the East China Sea.[1] This article will explore the features and arrangements of the Principled Consensus as well as the main contents of the Sino-Japanese negotiation and the prospects for the joint development in the East China Sea.

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1 Tokyo, Central News Agency, Japanese Media Worry Diaoyu Islands Disputes May Affect East China Sea Cooperative Development, *Reference News*, 15 December 2008, p. A8. (in Chinese)

I. In Retrospect: the History of the Principled Consensus

The Principled Consensus was reached after eleven official and follow-up negotiations over more than three years. It settled the Sino-Japanese petroleum development dispute in May 2004 in which Japan, in response to China's development of the Chunxiao oil and gas field and in line with the "sucker effect" theory, demanded that China stop its development and provide Japan with relevant information on the field. China's refusal to comply led to Japan's competitive measures against China. The Sino-Japanese negotiations on the East China Sea issue can be divided into two stages with the third round of negotiations as the dividing line between the stages. The initial stage was the first and second rounds of negotiations held in October 2004 and May 2005 in which both sides stated their respective positions on the development of the Chunxiao oil and gas field. Both parties also voiced their concerns for the issue, and exchanged their views on beginning a series of East China Sea delimitation negotiations and promoting joint development in the area. The second stage began with the third round of negotiations held in September 2005, the theme of which was how to carry out joint development since Japan had accepted China's proposal.

However, in the seventh negotiation held in March 2007, the two sides put forward "sharply different" proposals[2] on the setup of the joint development area, and they both voiced very different development approaches. The focus of disagreement was whether the joint development area should include four oil and gas fields on the west side of the "median line" determined unilaterally by Japan, namely, Chunxiao, Tianwaitian, Duanqiao, and Longjin. China proposed that the joint development area should be established in the disputed continental shelf areas in the northern East China Sea and surrounding waters of the Diaoyu Islands, while Japan proposed "extensive areas" including the "median line".[3] In order to create a legal basis, Japan claimed that the four fields were part of its 200-nautical-mile exclusive economic zone, and even established a Japanese name for each of them. China rejected Japan's proposal as it was based on the "median line", which Japan

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2 Beijing, Xinhua, Chinese Vice Foreign Minister Wu Dawei Talks about East China Sea Issue, *People's Daily*, 20 June 2008, p. A3. (in Chinese)

3 Press Conference Hosted by the Spokesman for the Ministry of Foreign Affairs Qin Gang on 9 March 2006, at http://www.fmprc.gov.cn/chn/xwfw/fyrth/t239432.htm, 17 June 2008. (in Chinese)

unilaterally claimed but China had never accepted and would not accept in the future. What's more, as the four fields lay completely within China's border over which China exercises sovereign rights, it is China's right to unilaterally develop these fields. Similarly, Japan claimed, "the Diaoyu Islands are Japanese territory" and rejected China's proposal of joint development of the sea areas around the Diaoyu Islands. These disagreements kept the five rounds of negotiations from achieving due progress.

During Chinese Premier Wen Jiabao's April 2007 visit to Japan, bilateral negotiations on the East China Sea issue began to achieve progress. Part of Premier Wen's achievements during the visit was the creation of a five-point consensus. The consensus set out to turn the East China Sea into a sea of peace, cooperation and friendship. It also included proposals for joint development in large-scale sea areas that both sides accepted according to the principle of reciprocity, higher-level consultations when necessary, and accelerated negotiations in the hope of reporting specific joint development proposals to both sides' top leaders in the fall.[4] This consensus provided strong political support for breaking the deadlock of the negotiations. In the eighth round of negotiations in May of the same year, Japan put forward a new proposal, which avoided the unilaterally claimed "median line" and instead proposed that the joint development should be conducted in sea areas along the equidistant "median line" between the two states' coastlines, and expressed its willingness to compensate the investment China had made into those fields.[5] In the ninth, tenth and eleventh rounds of negotiations, both sides made positive progress on concrete solutions after a serious and substantive discussion.

In December 2007, former Japanese Prime Minister Yasuo Fukuda reached a new consensus on the East China Sea issue with top Chinese leaders during his visit to China, giving new impetus to the bilateral negotiations. Besides restating the essentials of the five-point consensus, the new consensus emphasized that the two States should hold further vice-ministerial level consultations when necessary and join their efforts to achieve further progress so as to reach agreements on

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4 Tokyo, Xinhua, China–Japan Joint Press Communiqué, *People's Daily*, 12 April 2007, p. A3. (in Chinese)

5 Tokyo, Central News Agency, Sino-Japanese Negotiations on Oil and Gas Fields in the East China Sea Make No Progress, *Reference News*, 3 June 2007, p. A8. (in Chinese)

specific solutions as soon as possible.[6] In February 2008, Japan adopted a step-by-step strategy in which it gave priority to joint investment in Chunxiao oil and gas field and as an exchange for its actualization would agree to joint development of the sea areas on the Japanese side of the "median line".[7] In May, Chinese President Hu Jintao's visit to Japan accelerated the negotiation. Both sides not only issued the Sino-Japanese Joint Statement on All-round Promotion of Their Strategic and Mutually Beneficial Relations, an important political document aimed at building strategic and mutually beneficial relationships, but also resolved the most sensitive issues on the oil and gas field development.[8] Over a month later, the Principled Consensus was reached.

There are two main factors contributing to China and Japan's success in reaching the Principled Consensus. First, top leaders of both States made unanimous political decisions that brought about continued improvement of Sino-Japanese bilateral ties. For reasons known to all, the Sino–Japanese relationship encountered difficulties for a time and little progress was made in the early negotiations. Nonetheless, top leaders of both States reached out to each other by making the "ice-breaking", "ice-melting", "spring-heralding" and "warm-spring" visits, showing their unanimity in the establishment and all-round promotion of strategic and mutually beneficial relations and expressing their determination to turn the East China Sea into a sea of peace, cooperation and friendship. Frequent exchanges of high-level political visits between the two States and their unanimous orientation towards a new pattern of bilateral relations contributed greatly to the significant improvement and rapid development of the bilateral relationship and powered the acceleration of negotiations. In 2007 alone, five rounds of negotiations were held. And President Hu Jintao's visit to Japan pushed the Sino-Japanese relationship to a new high. There are many examples displaying the improvement of the bilateral relationship. Japan and China arranged large-scale youth exchanges and after the Great Wenchuan Earthquake in China, Japan not only sent the first foreign rescue

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6 Beijing, Xinhua, Sino-Japanese Heads Reach New Consensus on East China Sea Issue, at http://news.xinhuanet.com/newscenter/2007-12/28/content_7329258.htm, 17 June 2008. (in Chinese)

7 Sino-Japanese Joint Development Plan on East China Sea Oil and Gas Fields Proceeds in Two Phases, *Nihon Keizai Shimbun*, 4 February 2008 (in Japanese); Tokyo, Central News Agency, Japanese Newspapers Analyze Japan's Purpose of Investing in Chunxiao Oil and Gas Field, *Reference News*, 18 February 2008, p. A8. (in Chinese)

8 Beijing, Xinhua, Chinese Vice Foreign Minister Wu Dawei Talks about East China Sea Issue, *People's Daily*, 20 June 2008, p. A3. (in Chinese)

and medical teams, but also twice provided financial and material assistance. Former Prime Minister Yasuo Fukuda also went to the Chinese Embassy in Japan to mourn the earthquake victims. Japanese Maritime Self-Defense Force ships also visited Chinese ports for the first time in history. All these events created a harmonious atmosphere and favorable conditions for the reaching of the Principled Consensus.

Second, both China and Japan adhered to the diplomatic solution. As contracting States to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), both States have a prioritized obligation to resolve their disagreements on maritime rights and interests through negotiation. In order to fulfill their international obligations and improve bilateral relations, both sides decided to seek peaceful solutions and launched negotiations on the East China Sea issue. However, the negotiations did not go smoothly and noises accompanied every now and then. For example, some high-ranking Japanese officials shifted the blame to China for causing the stalemate in the negotiations.[9] Furthermore, Japan passed the Basic Act on Ocean Policy and the Act on the Establishment of Safety Zones around Marine Structures to strengthen its position. Nonetheless, both sides adhered to the principle of solution through negotiation, not only restating their willingness to conduct further negotiations at the end of each negotiation but also making prior arrangements about the time and place of next negotiation. The insistence on solution through negotiation prevented possible third party intervention and unilateral escalation of the disagreement. In fact, both sides had reached a principled consensus on the establishment of a maritime liaison mechanism to guard against accidental escalation, and decided to enhance the liaison mechanism between defense authorities during Chinese Premier Wen Jiabao's visit to Japan.[10] In doing so, both States should concentrate their systematic efforts towards the solution of the issue by seeking common ground, and narrowing differences on the basis of respecting facts.

II. Contents, Features and Significance of the Principled Consensus

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9 Beijing, Xinhua, Foreign Ministry Spokesman's Response in Press Conference on Sino-Japanese Negotiation on the East China Sea Issue, *People's Daily*, 20 October 2007, p. A4. (in Chinese)

10 Tokyo, Xinhua, China–Japan Joint Press Communiqué, *People's Daily*, 12 April 2007, p. A3. (in Chinese)

The Principled Consensus has outlined the basic framework for Sino-Japanese cooperation in the East China Sea. It is comprised of three understandings: first, the legal positions of both sides will not be prejudiced in the cooperation; second, a joint development block (hereinafter "the Block") should be set up in the north central part of the East China Sea; third, Japanese legal person's participation in the development of Chunxiao oil and gas field should be in compliance with relevant Chinese laws on Sino-foreign cooperative offshore petroleum resources exploitation.[11] Compared with other cooperation agreements, the Principled Consensus has the following unique features:

1. It is a political accord rather than a formal treaty or agreement. As one of the ways to establish legal relations between States, a treaty or agreement is a written instrument with two or more States determining their rights and obligations in line with international law. One way to distinguish an accord from a treaty is to see whether it has prescribed the rights and obligations of the States concerned.[12] The Principled Consensus is an agreement on Sino-Japanese joint development of oil and gas fields in the East China Sea. As its name suggests, it is not a formal treaty because it only establishes basic principles for development cooperation. It does not elaborate on specific details, nor does it require the ratification and validation of a treaty. Therefore, it is not subject to the approval of the National People's Congress (NPC) Standing Committee or the State Council according to Articles 7 and 8 of the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties.

2. It has created a hybrid approach to resources development cooperation. Although negotiations on the East China Sea issue are conducted in the principle of joint development, the Principled Consensus is not a pure joint development agreement, but rather a combination of joint development and Sino-foreign cooperative development approaches. In other words, joint development and Sino-foreign cooperative development are distinct approaches to development in the East China Sea because the former would be conducted in the Block agreed to by both sides but the latter only in Chunxiao oil and gas field. To put it more accurately, the former is a form of international cooperation in line with international law in

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11 Beijing, Xinhua, China and Japan Reach Principled Consensus on the East China Sea Issue, *People's Daily*, 19 June 2008, p. A4. (in Chinese)

12 Li Haopei, *An Introduction to the Treaty Law*, Beijing: Law Press, 1987, p. 19. (in Chinese)

which both States shelve disputes temporarily and cooperate with each other to explore and exploit petroleum resources in designated Block. However, the latter is a form of Sino-foreign cooperation in which Japanese enterprises participate in the development of Chunxiao oil and gas field just like any other foreign company such as Niko and Shell in accordance with Regulations of the People's Republic of China on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises. Therefore, the development in the Block is conducted in line with approaches and principles both sides agreed upon through government-led negotiations whereas the development of Chunxiao oil and gas field is negotiated by relevant enterprises from both States and has to be conducted in line with Chinese law.

The dual-track approach to the East China Sea issue is designed to solve both consistent and particular issues that characterize the two different relevant areas. Maps of the relevant Block show that one part of the Block locates on the east side of the "median line" Japan unilaterally claims and on Chinese side of the axis of the Okinawa Trough. China also claims this area in line with the UNCLOS principle of natural prolongation or within 200 nautical miles from the baseline. However, the other part of the Block lies on the undisputed western, Chinese side of the "median line". In short, the Block lies on both sides of the "median line". It is different from the usual practice of establishing joint development area in an area of overlapping entitlement, but not without precedent. In 1965, Kuwait and Saudi Arabia established a joint development area that included sea areas beyond those directly disputed by the parties, such as the Kuwait–Saudi Arabia Neutral Zone and the continental shelf beyond six-nautical-mile territorial sea. [13]

As the Chunxiao oil and gas field lies on the west side of the "median line", it is located within Chinese territory and no actions and theories on the Japanese side can change the fact that China has sovereign rights over it and that its development is subject to China's own decision. However, China has promised the participation of Japanese enterprises in the development of the field, which actually established Japanese enterprises' status as its fixed partner and thus, distinguished this development from a usual cooperative development. In accordance with Article 7 of the Regulations of the People's Republic of China on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, bidding

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13 Yu Mincai, *Legal Issues in Exploring and Exploiting Offshore Oil*, Beijing: China Renmin University Press Co., LTD, 2001, pp. 132, 141. (in Chinese)

is a necessary procedure for foreign petroleum enterprises to obtain the right to cooperative development, and the petroleum contract between Chinese and foreign parties is invalid until approved by the Ministry of Commerce. However, according to the Principled Consensus, Japanese enterprises do not have to win the bid in order to obtain the right to cooperative development and the petroleum contracts between Chinese and Japanese parties will certainly be approved; furthermore, governments of both sides will conclude a necessary exchange of notes and go through necessary domestic formalities to confirm the cooperative development.[14] It will mark the first time China has concluded an exchange of notes on Sino-foreign cooperative development.

3. It is only the beginning of Sino-Japanese development cooperation in the East China Sea. The Principled Consensus is in principle a preliminary agreement, as can be seen not only in the general principles on the cooperation in the East China Sea which explicitly mention that both sides "have taken the first step" towards cooperation and "will continue to conduct consultations in the future" but also from the mutual understandings on development cooperation. The understanding on joint development only includes several sub-steps of the initial step towards joint development in the East China Sea. These sub-steps include: establishing a joint development Block bounded by straight lines joining seven location coordinates between latitude 29°31'–30°04' North and longitude 125°53'30"–126°26'00" East; selecting mutual agreement areas for joint development in the above-mentioned Block; working to fulfill their respective domestic procedures and arrive at the necessary bilateral agreement at an early date, so as to actualize joint development.[15] Similarly, the understanding on cooperative development only makes clear that Chinese enterprises welcome Japanese enterprises to participate in the development of Chunxiao oil and gas field. It still requires further negotiations between governments and enterprises of both sides to settle specific issues in joint development as well as those, such as the amount of Japanese compensation for Chinese investment, the proportion of investment, the amount of capital recovery and distribution of profits, product disposition, the transfer of rights and obligations, etc., in cooperative development. Therefore, the implementation of the Principled Consensus still has a long way to go and

14 Beijing, Xinhua, China and Japan Reach Principled Consensus on the East China Sea Issue, *People's Daily*, 19 June 2008, p. A4. (in Chinese)

15 Beijing, Xinhua, China and Japan Reach Principled Consensus on the East China Sea Issue, *People's Daily*, 19 June 2008, p. A4. (in Chinese)

concerned authorities on both sides should actualize it through equal consultations and pragmatic cooperation.

4. It emphasizes that it will not affect the legal stance of each side. China and Japan have been taking different stances on jurisdictional delimitation in East China Sea since the 1970s Sino-Japanese "underwater battle" for petroleum. China insists on delimitation in line with the principle of natural prolongation and equity while Japan insists on the "median line" bounary. The Principled Consensus is a temporary makeshift solution in compliance with Articles 74 and 83 of the UNCLOS that will enable both sides to temporarily shelve their disputes on delimitation and give priority to resource development. The two articles provide that pending agreement on the delimitation of the exclusive economic zone or the continental shelf, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature. Such arrangements and relevant activities will not hinder either party's claim or stance on the disputed sea areas, nor will they constitute a legal basis of one side supporting or disapproving the claim or stance of the other side, to say nothing of the creation of any new right or expanding of existing claimed right. The beginning of the Principled Consensus clearly states that in the transitional period prior to delimitation of the East China Sea a prerequisite of bilateral cooperation is that each party's legal stance should not be prejudiced.[16] Therefore, the consistent claim and stance of China have not changed. It continues to refuse to accept the "median line" and insists that joint development should not be adopted in the Chunxiao oil and gas field.[17]

The establishment of the epoch-making Principled Consensus that is both flexible in form and unique in its arrangements is a milestone in the Sino-Japanese relationship. First, it succeeds in resolving the knotty issues that have been troubling two of the biggest energy consuming countries in the world and turning a potential conflict-provoking factor into a bond of common interests. It will contribute to the peace and stability of the East China Sea as well as to the construction of a harmonious Chinese periphery and a harmonious Asia. What's more, it has proved that the two States can resolve effectively any sensitive and complicated issue through dialogue and cooperation. As former Japanese Foreign

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16 Beijing, Xinhua, China and Japan Reach Principled Consensus on the East China Sea Issue, *People's Daily*, 19 June 2008, p. A4. (in Chinese)

17 Press Conference Hosted by the Spokesman for the Ministry of Foreign Affairs Jiang Yu, at http://www.mfa.gov.cn/chn/xwfw/fyrth/t448227.htm, 17 June 2008. (in Chinese)

Minister Masahiko Komura appraised, the Principled Consensus displays the ability of the two States to resolve any issue through dialogue, no matter how difficult the issue is.[18] Second, the Principled Consensus has achieved a win-win situation in which both sides' priorities and targets have been reflected and properly balanced, forming an essential base for promoting strategic and mutually beneficial relations in an all-around way. It is beneficial not only for the healthy and steady development of bilateral ties, but also for the promotion of mutual trust and mutually beneficial cooperation in areas such as energy. The joint development of the Block and the cooperative development of the Chunxiao oil and gas field will intensify the cooperation between the petroleum industry of the two States and expand their interest in and mutual trust through cooperative development in a third country. Third, it is a symbolic indicator to test China's proposal of "shelving differences and seeking joint development", which has provided another example of international joint development and will serve as an active role model for the solution of similar disputes in the South China Sea and other sea areas of the world.

III. Main Aspects of the Negotiation towards an Agreement on the Joint Development of the East China Sea Block

One of the major follow-up steps for the implementation of the Principled Consensus is to sign an agreement on the joint development of the Block so as to improve the joint development regime.[19] It is of great importance to both China and Japan that a joint development agreement be established. There are three note-worthy aspects. First, both sides should be serious about the negotiation on the joint development details. Because the Principled Consensus has made it clear that both sides will continue to hold negotiations on the joint development of other sea areas in the East China Sea,[20] the joint development of the Block can

18 Japanese Foreign Minister Says Sino-Japanese Consensus on the East China Sea is a Major Achievement in Developing the Strategic and Mutually Beneficial Relationship, at http://news.xinhuanet.com/newscenter/2008-06/18/content_8395561.htm, 17 June 2008. (in Chinese)

19 The cooperative development of Chunxiao oil and gas field will not be discussed here, for it is an issue of domestic law, and that China National Offshore Oil Corporation has abundant experience in development in collaboration with foreign enterprises.

20 Beijing, Xinhua, China and Japan Reach Principled Consensus on the East China Sea Issue, *People's Daily*, 19 June 2008, p. A4. (in Chinese)

be considered an experimental field or a window leading to joint development of other East China Sea areas in which the experience of the Block may become the standard model. Second, both sides already have successful experiences in joint development that should be considered. In 2005, China and North Korea signed the Agreement on Joint Development of Offshore Oil between the Government of PRC and the Government of DPRK, the first joint development agreement between China and a maritime neighbor. In 2005, three national oil companies from China, the Philippines and Vietnam signed the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea. In 1974, Japan and South Korea signed the Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries.[21] All such experiences can be utilized during the drafting of the joint development agreement between China and Japan. Third, cooperation arrangements of the joint development should be in the form of an intergovernmental agreement. The approval procedure for inter-State treaties or agreements may delay joint development. Besides, economic cooperation development agreements do not fall into the category of "treaties and important agreements" that are subject to the approval of the NPC Standing Committee in accordance with Article 7 of the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties.

Besides the agreed principles and location of the Block, the Sino-Japanese negotiations on the joint development agreement will cover the following aspects: sharing of costs and benefits, governing law and jurisdiction, management of the Block, specific approaches to development, and designation of operators. In line with the usual practices adopted in joint development of disputed sea areas, both China and Japan should have an equal share of not only the cost of exploration and exploitation but also the benefits. This way of sharing costs and benefits has been adopted in the joint development agreement between not only China and North Korea but also Japan and South Korea, and furthermore the Principled Consensus requires that the joint development follow "the principle of mutual benefit".[22]

The issue of governing law and jurisdiction is related to that of development management, both of which concern State parties' authorities on legislation, ad-

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21 The agreement which disregarded China's rights and interests in the East China Sea faces China's protest.

22 Beijing, Xinhua, China and Japan Reach Principled Consensus on the East China Sea Issue, *People's Daily*, 19 June 2008, p. A4. (in Chinese)

ministration, judicial matters and defense. Possible modes China and Japan can choose include: (1) single jurisdiction by one State and single governing law of that State; (2) separate jurisdiction over divisions of the Block by both States and in turn separate governing laws; (3) joint jurisdiction by the two States; (4) jurisdiction by the State of nationality of operators. The first mode is unacceptable as neither side would agree to single jurisdiction by the other side. The second mode is feasible in certain aspects, for such practice has been tried by Thailand and Malaysia who divided their joint development zone in the Gulf of Thailand into separate Thai and Malaysian subzones for the purpose of criminal and civil jurisdiction. However, this mode is unlikely to be accepted by both sides either, for the division of the Block would be a difficult issue impeding the process of joint development.

In the third mode, a supranational organization would usually be established with an equal number of delegates from each State party concerned and an integrated legal system would be applied instead of the laws of any concerned State parties. This would be the perfect choice if China and Japan had enough patience and sincerity to reach an agreement on the relevant issues. However, when it comes to feasibility, the third mode is unlikely to be the final choice, because the establishment of a new legal system not only involves significant time and effort but also compromises from both sides. For example, Thailand and Malaysia began their negotiations on joint development in 1979 but did not reach an agreement on the chapter of joint authorities and other issues until 1990, because they were scrupulous in determining what laws the joint authorities would formulate and enforce.[23] At the beginning of the negotiations between Japan and South Korea on their own joint development agreement, the two States had considered formulating a new legal system but eventually abandoned the idea because it would not be completed in a short time. Therefore, it is doubtful that China and Japan will soon reach an agreement on an integrated system of laws or they will prepare for "a protracted (legal) battle".

Therefore, the most feasible mode is the fourth mode – jurisdiction by the State of nationality of operators, or "the formula of operators". In this mode, the State of nationality of the operator exercises jurisdiction over its respective operation areas. In other words, operators are bound only by the laws of their own State. Actually, this is the mode adopted in the joint development agreement

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23 Xiao Jianguo, *Joint Development of Offshore Oil & Gas across the International Maritime Boundaries*, Beijing: China Ocean Press, 2006, p. 125. (in Chinese)

between Japan and South Korea. As stipulated in Article 19 of the agreement, unless otherwise provided, if a State party has agreed to choose a lessee as the operator of an area, the exploration and exploitation of natural resources in the area should be governed by the laws of the State party. Though the choice has something to do with the fact that Japan and South Korea have divided the over 20,000 km^2 joint development area into several sub-areas, while in comparison, the Sino-Japanese joint development Block (about 2,600 km^2) is too small to be further divided. As "the formula of operator" is the "invention" of Japan and has been proved feasible in practice,[24] Japan will be likely to accept a course of action it is familiar with. Besides, China has every reason to accept this mode. First, it is clear, simple and convenient. Second, both sides will negotiate as soon as possible on the joint development of other areas in East China Sea, which would actually make the Block a sub-zone. Third, the Principled Consensus itself has created conditions for the application of "the formula of operator". The Principled Consensus has divided the whole development process into exploration stage and exploitation stage,[25] thus making it possible for both parties to agree upon the rotation of designated operators in the two different operation stages and thus apply their laws on equal stance.

For the above analysis, management by a State or by a supranational organization are both infeasible modes for the management of the Block, thus China and Japan have no choice but to manage separately, which is also the management mode adopted in the joint development agreement between Japan and South Korea. If this mode is adopted, both China and Japan can reserve their power to authorize and conduct macro-management of their own petroleum companies while authorized petroleum companies have exclusive right to the exploration and exploitation of the Block and are responsible for specific operations. In accordance of Article 6 of the Regulations of the People's Republic of China on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, China National Offshore Oil Corporation (CNOOC) is China's authorized company in the Block. A joint operation agreement should be established between CNOOC and the authorized company of Japan before the petroleum resources in the Block can be explored and exploited in the form of a joint institution. Besides, the joint operation

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24 Xiao Jianguo, *Joint Development of Offshore Oil & Gas across the International Maritime Boundaries*, Beijing: China Ocean Press, 2006, p. 150. (in Chinese)

25 Beijing, Xinhua, China and Japan Reach Principled Consensus on the East China Sea Issue, *People's Daily*, 19 June 2008, p. A4. (in Chinese)

agreement should be approved by the governments of both China and Japan so as to ensure their strategic control over the Block. In order to supervise and coordinate joint development in the Block, both sides should prepare to establish a joint committee comprised of a certain number of diplomatic representatives as well as relevant individuals from the energy establishment in both States. The functions of the joint committee should be limited to negotiation and consultation. In other words, the joint committee does not have the power to authorize exploration and exploitation and to execute the joint development agreement, nor does it have to take the responsibility for the operations in the Block; its duty is only to negotiate issues concerning the implementation of the joint development agreement and provide suggestions to both Chinese and Japanese governments.

The main obstacle to the choice of development approach is that China and Japan implement two different systems for petrol cooperative development: China implements a contract system while Japan a concession system. There is an essential difference between the former and the latter. In a contract system, exclusive right to exploration and exploitation is granted by the country which owns the resources to their State-owned petroleum companies; only by establishing a contract with the authorized State-owned petroleum company can foreign petroleum companies be engaged in the exploration and exploitation of the cooperative areas determined by host countries. However, in a concession system, unspecified petroleum companies that have been granted concessions by the country which owns the resource have the exclusive right to exploration, exploitation and acquisition of oil in a specific area. A contract system is an appropriate choice for the Block because in a concession system it does not define the specific rights and obligations between the petroleum companies authorized by the respective governments. Besides, the implementation of a contract system has been stipulated in the Regulations of the People's Republic of China on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises. Furthermore, the Principled Consensus requires that authorized companies should conduct a joint exploration of the Block before their joint development of a specific area is agreed to by both sides.[26] In other words, the Block has been treated as a whole and only in a contract is it possible to define each side's rights and obligations in the exploration and exploitation stages so as to maximize overall economic

26 Beijing, Xinhua, China and Japan Reach Principled Consensus on the East China Sea Issue, *People's Daily*, 19 June 2008, p. A4. (in Chinese)

benefits. Contract systems are very popular in the joint development practices between States that have different cooperative development systems with regards to petroleum resources. There are many examples of these compromises. For example, while domestic oil exploitation is operated by means of concessions in Australia and Thailand or in Indonesia and Malaysia through products sharing contracts, joint development between Thailand and Malaysia as well as development of Zone A (a joint development zone established in Timor Sea in 1989) between Australia and Indonesia were both carried out in the form of products sharing contracts. Even States in which concessions are used in internal operations would conduct joint development via contracts between each other rather than concessions. For example, as is provided for in the Joint Declaration of Argentina and the United Kingdom on Cooperation over Offshore Activities in the South West Atlantic, petroleum exploration and exploitation in the special cooperative area is conducted in the form of a joint venture. Other examples would be the agreement on joint development of the Bay of Biscay established by France and Spain in 1974 and the agreement on joint development of sea areas surrounding Jan Mayen Island by Iceland and Norway in 1981. Both made it clear that the joint development should be carried out by both parties' designated petroleum companies on the basis of a joint venture contract. Likewise, the Japanese–South Korean Joint Development Agreement requires a joint venture be established between the lessees from both States.

The designation of operators is a matter of which side's designated petroleum company will be in charge of the exploration or exploitation in the Block. Under joint development approaches it is determined by the principle of efficiency. The Block has to be explored and exploited as a whole by a single operator on behalf of both sides' petroleum companies and it is impossible for companies authorized by different States to compete in the exploration and exploitation of the Block. The joint development agreement between Japan and South Korea created the procedure of designating operators as well as the means for maintaining governmental control. In the joint development between Japan and South Korea, the petroleum company designated by Japan should enter into a joint operation agreement with the company designated by South Korea. Both companies should designate an operator they agree on for each stage of the operation and designated operators should rotate during the two different stages of the operation. Both sides should hold a negotiation if they cannot agree upon the designation of the operator within a given time, and if negotiation, too, fails to produce an agreed upon operator

within a given time, lots from a list of authorized petroleum companies of both sides should be drawn.

Reaching an agreement on the other aspects of joint development for the East China Sea should not be very difficult for the parties. Such aspects include the duration of the exploration and exploitation stages, a reduction of the extent of the Block, tax and tariff issues, matters of third party compensation, the joint development of transboundary mineral resources, third State rights issues, pollution prevention, and a mechanism for the settlement of disputes.

IV. In Prospect: the Future of the Joint Development of the Block

With the resignation of Fukuda Yasuo and Taro Aso's succession, the future of the joint development of the Block has become unpredictable. Unlike the former who is rather dovish, the latter is known as the representative of Japanese Hawks who has repeatedly made right-wing speeches. Therefore, his succession is thought to have confronted the gradually improving Sino-Japanese relationship with new challenges and the prospects on the joint development of the East China Sea Block have become uncertain. However, if we make a careful analysis, we may come to the conclusion that the joint development in the Block will not be slowed down by Taro Aso's succession, and it can be reasonably expected to be actualized in his term.

Above all, the overall trend of the improvement of Sino-Japanese relations is irreversible because China and Japan are important next-door neighbors and to maintain a long-term, healthy, and stable relationship conforms to the fundamental interests of both States and their people. Taro Aso is not likely to subvert the current Sino-Japanese relationship cultivated by Abe and Fukuda and allow it to be reduced to the state during the era of Junichiro Koizumi. Thus, Aso is very likely to follow the same foreign policy toward China of his two predecessors. In fact, Taro Aso is a practical and rational political leader who attaches great importance to the Sino-Japanese relationship. Not only did he play a key role in easing tensions between China and Japan, but also has repeatedly expressed his wish towards a friendly Sino-Japanese relationship as well as his plan to promote cooperation, mutual benefit and joint maintenance of regional peace and prosperity in a series of speeches since assuming office. These speeches include: the speech at the United Nations, the first policy speech and his response to questions on Sino-

Japanese relations in the Senate plenary session.[27] During Aso's visit to Beijing in late October 2008 to attend the Asia–Europe Meeting and commemorate the 30th anniversary of the signing of the China–Japan Treaty of Peace and Friendship, he signed with his Chinese counterpart an agreement on further promoting the Sino-Japanese strategic relationship of mutual benefit and establishing a hot line between Tokyo and Beijing.[28] In December 2008, he met with the Chinese premier and the South Korean president in Fukuoka. During this meeting they signed the Joint Statement for Tripartite Partnership, and released three joint statements, namely, Joint Statement for Tripartite Cooperation on Disaster Management, Joint Statement on the International Finance and Economy, and Tripartite Cooperative Action Plan. In his talk with Chinese Premier Wen Jiabao, Aso expressed that Japan would stick to the direction of Sino-Japanese friendship and further promote the Sino-Japanese strategic relationship of mutual benefits by maintaining regular high-level interactions with China, deepening political trust, and handling disputes properly. In his New Year address, he made clear that in 2009 he would make best of the growing momentum of Sino-Japanese relations to further promote the mutual benefits of the Sino-Japanese strategic relationship. [29]

In addition, the actualization of the joint development of the Block is an attainable legacy for Taro Aso. After the careful cultivation of his two predecessors, now is the time for him to harvest the fruits of this process. If he makes efforts to maintain the agreement, he will reap the rewards, and add a glorious page to his diplomatic achievements. To this end, he is likely to seek opportunities to promote negotiations on the joint development agreement and strive to actualize joint development in his term. It is therefore reasonable that China will actively welcome Japan to join its efforts to actualize joint development in the Block as soon as

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27 Tokyo, Xinhua, Aso Expresses Willingness to Promote Mutual Benefit between China, Japan and South Korea, *People's Daily*, 27 September 2008, p. A3 (in Chinese); Tokyo, L'Agence France-Presse, Aso Delivers His First Policy Speech, *Reference News*, 30 September 2008, p. A2 (in Chinese); Tokyo, Kyodo News, Aso Expresses Willingness to Promote Sino-Japanese Strategic and Mutually Beneficial Relationship, *Reference News*, 4 October 2008, p. A1. (in Chinese)

28 Chinese President Hu Jintao Meets Japanese Prime Minister Taro Aso, *People's Daily*, 25 October 2008, p. A2 (in Chinese); Beijing, Kyodo News, Heads of China and Japan Establish Hotline, *Reference News*, 25 October 2008, p. A8. (in Chinese)

29 Wen Jiabao Attends Leaders' Meeting of China, Japan and South Korea, Wen Jiabao Meets Japanese Prime Minister Taro Aso, *People's Daily*, 14 December 2008, p. A1 (in Chinese); Aso Gives New-year Greeting in *Japan and China*, *People's Daily*, 20 December 2008, p. A3. (in Chinese)

possible.

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Disputes over Fishery Resources and Maritime Boundary Delimitation of the Diaoyu Islands: An Analysis

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Abstract: Disputes over the Diaoyu Islands between China and Japan involve not only sovereignty disputes, but also disputes over fishery resources. Particularly, the tension between China Taiwan and Japan is severer. The effect of islands in maritime boundary delimitation exerts a significant impact on disputes over fishery resources. Therefore, an analysis on the effect of the Diaoyu Islands in maritime boundary delimitation and its influence on the disputes over fishery resources will help clarify the connections between the two issues and resolve these disputes.

Key Words: Diaoyu Islands; Fishery disputes; Maritime delimitation

I. Status Quo of Disputes over the Diaoyu Islands and Fishery Resources Therein

The name “Diaoyu Islands” is short for Diaoyutai Islands. This group of islands is located in the northeast of China’s Taiwan province, between 25°44'N and 25°55'N, and from 123°30'E to 124°34'E. The archipelago consists of five uninhabited islets (Diaoyu Dao, Huangwei Yu, Chiwei Yu, Nanxiao Dao, and Beixiao Dao) among a total of eight islands, covering an area of 6.7 square kilometers.[1]

The significance of the Diaoyu Islands are reflected in the following three

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1 Liu Hao, The Research of Sovereignty over the Diaoyu Islands before the Sino-Japanese War, *International Law Review*, Vol. 2, 2007, p. 303. (in Chinese)

aspects: militarily strategic location, oil resources and fishery resources. This paper focuses on the disputes pertaining to fishery resources. Therefore, no attention is paid to their military significance or oil resources therein. The waters surrounding the Diaoyu Islands are important for the livelihood of the Taiwanese fishermen in China. In the approximately 200,000 tons of Taiwan's annual fish catch along the coast, nearly 50,000 to 60,000 tons are caught in the waters surrounding the Diaoyu Islands, accounting for about 25% of Taiwan's coastal fishing.[2]

Currently, both China and Japan have claimed territorial sovereignty over the Diaoyu Islands. However, Japan is in the actual control of the islands. On February 25, 1992, the Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China was adopted and came into effect at the same time. Article 2 of this law states that:

> *The PRC's territorial land includes the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island[s]…*

which means the Diaoyu Islands are not only a part of Chinese territory, but also have their own territorial sea and contiguous zone.[3] The Exclusive Economic Zone and Continental Shelf Act of the People's Republic of China adopted and enacted on June 26, 1998 states that:

> *The exclusive economic zone of the People's Republic of China is an area beyond and adjacent to the territorial sea of the People's Republic of China extending to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.*
>
> *The continental shelf of the People's Republic of China comprises the seabed and subsoil of the submarine areas that extend beyond its territorial*

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2 Taiwan Authorities Said It Would Re-discuss the Development of Waters Surrounding the Diaoyu Islands with Japan, at http://www.chinanews.com/n/2003-08-06/26/332504.html, 6 August 2003. (in Chinese)

3 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, Article 2 provides that "[t]he PRC's territorial sea refers to the waters adjacent to its territorial land or internal waters;" Article 4 provides that "[t]he PRC's contiguous zone refers to the waters that are outside of, but adjacent to, its territorial sea." Because it prescribes that "[t]he PRC's territorial land includes ... the various affiliated islands including Diaoyu Island[s]..."As affiliated islands to Taiwan, the Diaoyu Islands certainly have their own territorial sea and contiguous zone.

sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[4]

As to whether the Diaoyu Islands have their own exclusive economic zone and the continental shelf, the Chinese government has not yet made it clear, and there are also conflicting arguments among various Chinese scholars. Some scholars oppose the idea of the Diaoyu Islands having their own exclusive economic zone and continental shelf,[5] but most scholars support it. The reason why the Chinese government has not declared the exclusive economic zone and the continental shelf of the Diaoyu Islands is that China Mainland deliberately omitted China Taiwan and its affiliated islands' (including the Diaoyu Islands) territorial sea base points and baselines in its announcement of May 15, 1996. China Taiwan also omitted China Mainland's territorial sea base points and baselines deliberately in its announcement on December 31, 1998, but it clearly enlisted Diaoyu Islands' territorial sea base points and baselines in its published table. However, both China Mainland and China Taiwan declared that the rest of the territorial sea base points and baselines would be published in future statements. In addition, China Taiwan has already brought the Diaoyu Islands under the administration of its Yilan County, which is a tacit understanding reached between the two sides across the Strait.[6]

In 2003, China Taiwan announced the first set of provisional law enforcement lines in the exclusive economic zone. A section of these lines is to the south and east of the Diaoyu Islands, which has the effect of making the waters surrounding the Diaoyu Islands within Taiwan's exclusive economic zone. However, Japan does not recognize these provisional law enforcement lines. Meanwhile, China does not recognize Japan's median line (the median line which designates the Diaoyu Islands as part of Japan) either. Since 1996, China Taiwan and Japan have gone through 15 fishery cooperation talks. However, no consensus has been reached

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4 Exclusive Economic Zone and Continental Shelf Act of the People's Republic of China, Article 2.

5 Wang Keju, Diaoyu Islands and Their Positions in the East China Sea Maritime Boundary Delimitation, *China Oceans Law Review*, No. 1, 2006, p. 48. (in Chinese)

6 Kuen-chen FU, The Delimitation Method and Problems of Chinese Continental Shelf, *Journal of Ocean University of China (Social Sciences)*, No. 3, 2004, p. 8. (in Chinese)

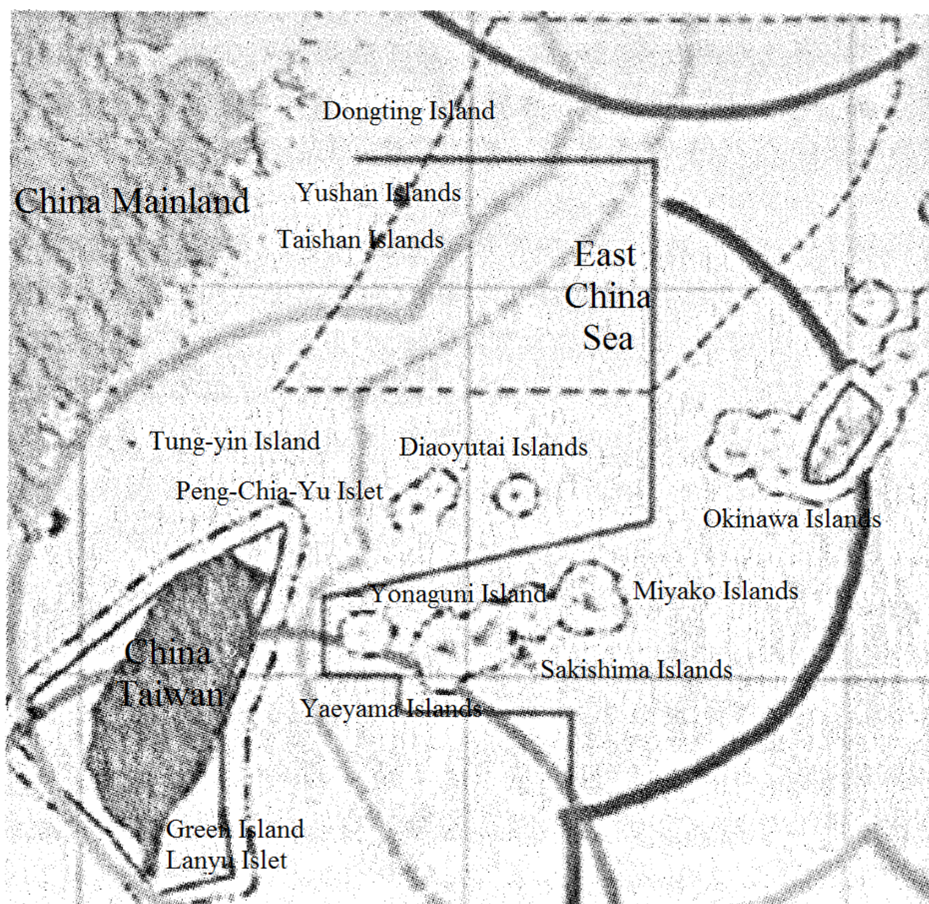

Fig. 1 China Taiwan Published the First Set of Provisional Law Enforcement Lines in the Exclusive Economic Zone in 1993[7]

between them on the overlapping exclusive economic zones and fisheries co-management and there is considerable differences between their basic positions.

7 The chart is from the handouts of Taiwan Professor Chen Litong "Marine Affairs General: Functions and Positioning of the Provisional Enforcement Line" and only serves to understand this article. The "provisional measures zone" in the Interim Measures for the Management of the Provisional Measures Zones in the Sino-Japanese Fishery Agreement can be seen in the Japan's official schematic diagram in the following. The broken line in the middle of the chart is the first set of provisional law enforcement lines of Taiwan's exclusive economic zone. The area within the thin dashed line is the "provisional measures zone" according to the Interim Measures for the Management of the Provisional Measures Zones in the Sino-Japanese Fishery Agreement formulated in 1997. The thick dashed line is the median line to delimit the overlapped exclusive economic zones with China and was claimed by Japan unilaterally.

The major disagreement is the delimitation of the exclusive economic zone and continental shelf. Japan persists in delimiting by the principle of equidistant line, while China Taiwan insists on the equitable principle of delimitation. They are unable to reach any consensus, which leads to the confusion of fishermen about the status of the Diaoyu Islands and their surrounding waters.[8] In addition, another problem is that China Mainland does not consider the fishery talks between China Taiwan and Japan legitimate.

On June 20, 1996, Japan ratified the United Nations Convention on the Law of the Sea (UNCLOS). Also in 1996, the National Diet of Japan passed the Japanese Law on the Exclusive Economic Zone and the Continental Shelf, which provides 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 suboil.*

The Law also provides that,

> *where any part of that line [every point of which is 200 nautical miles from the nearest point on the baseline of Japan] lies beyond the median line ("The median line" here is the line every point of which is equidistant from the nearest point on the baseline of Japan and the nearest point on the baseline from which the breadth of the territorial sea pertaining to the foreign coast which is opposite the coast of Japan is measured.) 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.*

This is the principle of equidistant median line advocated by Japan.[9] Japan has unilaterally established the median line as the boundary in the overlapping claim

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8 A Concerned Party from China Taiwan Said that the Collision Was an Opportunity to Re-start Fisheries negotiations between Taiwan and Japan, at http://www.gzxw.com.cn/news/china/2008/6/19/1740-3924.html, 4 May 2009. (in Chinese)

9 Guan Xi, On the Fight over the Rights and Interests in the East China Sea between China and Japan, at http://ijs.cass.cn/files/kycg/donghai.htm, 4 May 2009. (in Chinese)

exclusive economic zones. Although there are disputes between China and Japan over the sovereignty of the Diaoyu Islands, Japan still proclaims the Diaoyu Islands as being its own territory, claiming an exclusive economic zone and a continental shelf and demarcating a median line unilaterally between the waters surrounding the Diaoyu Islands and China Taiwan.

II. Lack of Provisions on the Waters Surrounding the Diaoyu Islands in the Sino-Japanese Fishery Agreement

The disputes regarding the islands' sovereignty or maritime delimitation do not preclude transitional arrangements for fishery management between China and Japan. The Interim Measures for the Management of the Provisional Measures Zones in the Sino-Japanese Fishery Agreement (hereinafter "the Fishery Agreement") were signed on November 11, 1997 by China and Japan, in which both States decided on a "provisional measures zone". The main content was to establish a "provisional measures zone" for joint management covering most of the waters of the East China Sea, i.e. from 27° N to 30°40' N, 52 nautical miles off the territorial sea baselines of the two States. South of the provisional measures zone (south of 27° N, west of 125°30' E), the current fishery management should be maintained. North of the Provisional Measures Zone (north of 30°40' N, from 124°45' E to 127°30' E) is the Central Zone where fishing activities maintain the status quo and licenses are not required for fishing vessels of either country to fish in this area. The east and west to the Provisional Measures Zone and to the Central Zone are governed by Japan and China separately.

The Provisional Measures Zone provided for in the Fishery Agreement excludes most of the sea area surrounding the Diaoyu Islands. The waters in the immediate vicinity of the Diaoyu Islands are to the south of the Provisional Measures Zone and the Fishery Agreement deliberately omits the waters surrounding the Diaoyu Islands, only providing for the maintenance of the existing jurisdiction over fisheries in this area. From the Chinese government's point of view, these waters are a traditional fishing ground for Chinese fishermen.[10] Therefore, the Chinese fishermen have the right to fish in this area. Historically speaking,

10 Ministry of Foreign Affairs, Japan Expelling Taiwanese Fishermen in the Diaoyu Islands Waters Infringes on China's Sovereignty, at http://www.chinanews.com.cn/news/2005/2005-06-09/26/584683.shtm, 9 June 2005. (in Chinese)

Japanese fishermen rarely fished in these waters, for they had to take the risk of sailing through strong winds and waves in the waters of the Okinawa Trough. For this reason, Chinese fishermen are fishing in a traditional fishing ground in the Diaoyu Islands waters. Hence, these fishing activities continuing from the past to the present should be regarded as the status quo under the regulation and protection of the Fishery Agreement.

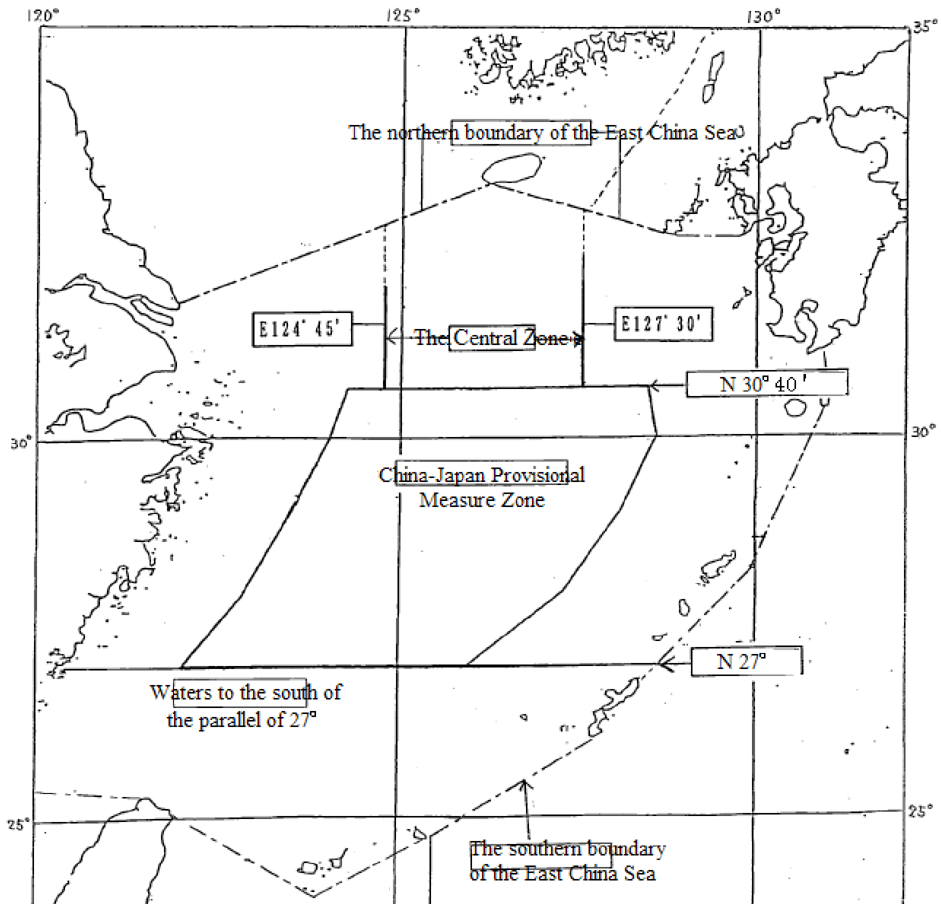

Fig. 2 Waters of the Sino–Japanese Fishery Agreement[11]

The waters surrounding the Diaoyu Islands see a complicated situation: Embarking from Keelung, Taiwan, a fishing vessel will enter the waters east of the median line claimed by Japan after traveling 50 nautical miles. Since most of the

11 From Japan's Fisheries Agency, at http://www.jfa.maff.go.jp/j/press/kokusai/pdf/090212-02.pdf, 18 March 2009. (in Japanese)

sea area around the Diaoyu Islands is within the overlap between the exclusive economic zones asserted by China and Japan, fishing boats from Taiwan have frequently been expelled and seized by Japanese warships. In the morning of June 10, 2008, Japanese Coast Guard vessels had a collision with a Taiwanese fishing vessel, causing the vessel to sink. The Chinese government issued a statement demanding that the Japanese government stop the illegal activities in waters around the Diaoyu Islands of China.[12] However, such actions of Japan still often occur near the Diaoyu Islands, so the Chinese government should strengthen protection of the fishing rights of fishermen in these waters. But in practice, mainly Taiwanese fishermen fish in this region. The protection of their rights is mostly provided by the local authorities of Taiwan. This situation is caused by the current politics.

The Japanese government took advantage of the existing political pattern between China Mainland and China Taiwan, engaging in "double-dealing tactics" in negotiations on fisheries. In negotiation with China Mainland, Japan had been stubbornly sticking to the Japanese Law on the Exclusive Economic Zone and the Continental Shelf in dealing with disputes over fishery in the East China Sea and the Diaoyu Islands. Japan suggested that if the China Mainland failed to meet its demands, it would turn to China Taiwan for talks. On the other hand, while in negotiation with China Taiwan, Japan pointed out that China Taiwan was not an independent sovereign State and thus unable to deal with Japan on a reciprocal basis. In addition, Japan offered that, to make progress in negotiation and receive Japan's support in national defense, security etc., China Taiwan should give up its major claims and compromise to Japan's claims. Till now, China Mainland has not recognized or agreed to the fishery negotiations between China Taiwan and Japan. On July 1, 2005, the Foreign Ministry spokesman Liu Jianchao in a press conference stated solemnly that

> *China and Japan have signed a fishery agreement. But as part of China, Taiwan fishery matters have already been arranged properly in the agreement. Both the States should act according to the provisions of the agreement. The fact that Japan only talks to the Taiwan authorities in fishery negotiations is contrary to the One-China Principle and breaks the principles of the Sino-Japanese Fishery Agreement. The Chinese government is strongly against*

12 China Urges Japan to Stop Illegal Activities in the Diaoyu Islands Waters, at http://www.chinanews.com.cn/gn/news/2008/06-17/1284644.shtml, 17 June 2008. (in Chinese)

such behavior. China has expressed strong dissatisfaction towards the forced expulsion of fishermen fishing legally in Chinese territory of the Diaoyu Islands waters. This situation has been claiming our attention. We demand that the Japanese government pay attention to China's concerns and handle the relevant issues effectively, prudently and appropriately.[13]

III. The Impacts of Islands' Effects in Maritime Delimitation on Fishery

The different effects of islands in maritime delimitation have different impacts on fishery. In practice, in terms of the location and characteristics of an island, its effects in maritime delimitation can be classified into three kinds: full effect, partial effect and zero effect. With regards to location, some islands are near the mainland, some in the median line, and some close to neighboring States. As to characteristics, the importance of an island depends on its size, population, economic capacity, and political and legal status.[14]

In order to determine the effects of islands in maritime delimitation, this article will classify islands into islands with uncontested sovereignty and islands with disputed sovereignty. For islands with uncontested sovereignty, their effects on maritime delimitation have three types just as discussed above. For an island close to the mainland, the coastal State can take it as a base point and include it in the straight baselines. Therefore, such islands have full effect. However, if an island deviates significantly from the general direction of the coast, it cannot be taken as a base point.[15] Practically, in this case, the islands are given only partial effect or even zero effect. Islands far away from the mainland and close to the median line or close to the territory of a neighboring country are usually given partial effect or zero effect. As for the uninhabited islands and rocks of small sizes, or islands away from the land and of little importance, after taking various factors into consideration, governments seldom give them effects in delimitation in State practice. Besides, in practice, as the effect of islands in delimitation usually relates

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13 Japan Negotiated Arrogantly, China Taiwan Proposed Joint Supervision over Diaoyu Islands with Japan, at http://news.xinhuanet.com/taiwan/2005-07/08/content_3193198.htm, 8 July 2005.(in Chinese)

14 Kuen-Chen Fu, *Equitable Ocean Boundary Delimitation*, Taipei: San Min Book Co., Ltd., 1992, p. 141. (in Chinese)

15 UNCLOS, Art. 7(3) and Art. 47(3).

to the interests of neighbor States, their effects on maritime delimitation are often determined by mutual agreement between States or by international arbitration or adjudication. Therefore, there is no single rule to abide by to determine the effects of islands in maritime delimitation, and the methods discussed above are only general rules summarized from the practice of the international community.

As to the islands involved in sovereignty disputes, their effects in maritime delimitation are difficult to determine. Practically, there are two approaches: one is that the disputed islands have no effect on maritime delimitation, and the other is that maritime boundary is not delimited around the disputed islands. In 1974, in the negotiations for maritime delimitation between Iran and the United Arab Emirates, both States asserted sovereignty over Abu Musa, a small island in the Persian Gulf. Eventually, both sides agreed not to take this island as a base point, and the island had zero effect in this delimitation.[16] In the 1974 delimitation agreement between India and Sri Lanka, since India and Sri Lanka had disputes over the sovereignty of Kachchativu Island, both sides reached an agreement under which the effect of this island on the delimitation was negated.[17] In the agreement for delimitation of the continental shelf between Denmark and Canada, the disputes over the sovereignty of Hans Island, a small island located in the central channel, and its effect on delimitation made delimiting the maritime boundary between point 122 and point 123 impossible and leaving the maritime boundary around the island undetermined.[18]

As far as the Diaoyu Islands are concerned the first question is whether they meet the definition of islands under Article 121 of the UNCLOS. If the islands indeed meet the conditions of this Article, they are entitled to have their own exclusive economic zone and continental shelf. As mentioned above, in academia, scholars at home and abroad have varying opinions. The status of the Diaoyu Islands is not clearly defined in the legislation of China Mainland, but that does not mean China considers them not islands. China Taiwan expressly included the Diaoyu Islands and the waters in the vicinity in its exclusive economic zone first in 2003. Japanese law has also stated that the Diaoyu Islands are their own territory,

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16 Office of the Geographer, U.S. Department of State, “Limits in the Seas”, No. 63, 30 September 1975, p. 4.

17 Office of the Geographer, U.S. Department of State, “Limits in the Seas”, No. 66, 12 December 1975, p. 3.

18 Office of the Geographer, U.S. Department of State, “Limits in the Seas”, No. 72, 4 August 1976, p. 7.

and unilaterally draws a median line based on its claim that the islands are entitled to the exclusive economic zone and continental shelf. Thus it can be seen that the clash over the Diaoyu Islands is not only a conflict for territorial sovereignty, but also for the abundant natural resources in their surrounding waters such as fishery resources.

Islands with a definite sovereign status are relatively easier to deal with during the delimitation of maritime boundary. As a result, the delimitation has little influence on fishing activities around the islands. As to disputed islands, away from the coast and rich in natural resources, such as the Diaoyu Islands, one can imagine how difficult it would be to determine their effects on maritime delimitation without resolving the question of their sovereignty. In view of the current situation, ignoring them and treating them as having zero effect in maritime delimitation which is usual practice in the international community concerning an island of this sort is not feasible. In addition, China has consistently proposed China and Japan keep the issue of Diaoyu Islands aside during delimitation negotiations and do not deal with it until their sovereignty is determined; China and Japan shelve disputes and conduct negotiations on other issues such as joint development of resources at present. However, currently the problem is that Japan refuses to accept such a proposal because it has been insisting that there is no dispute of sovereignty over the Diaoyu Islands. Japan regards the Diaoyu Islands as Japanese territory. On the other hand, China has been asserting that the Diaoyu Islands are Chinese inherent territory. Therefore, it is already a great concession of China adopting the policy of "shelving differences and seeking joint development."

IV. How New Developments in the Sovereignty Disputes over Islands Influence the Diaoyu Islands Issues

Disputes over the sovereignty of islands can be resolved through negotiations or through judicial or arbitral procedures. As can be observed from the current circumstances, the disputes between China and Japan over the sovereignty of the Diaoyu Islands are not likely to be settled through a judicial or arbitral procedure. The Statute of the International Court of Justice has established three kinds of jurisdiction to resolve disputes between States – all cases submitted by the parties by consent (voluntary jurisdiction), all matters specially provided for in the UN Charter or any existing valid treaty (treaty jurisdiction), and all legal disputes for which the country has unilaterally declared to accept the compulsory jurisdiction

of ICJ, in relation to other States accepting the same obligation (compulsory jurisdiction under the optional clause).[19] To date, China and Japan have not sought the jurisdiction of the ICJ or any arbitral body over the Diaoyu Islands disputes. Japan refuses to refer the problem to judicial or arbitral bodies, claiming that it is lawfully in charge of the Diaoyu Islands. Japan does not recognize any disputes over the sovereignty of the Diaoyu Islands, and refuses to negotiate with China. According to the declaration made by Japan on September 15, 1958, the Japanese government, under Article 36(2) of the Statute of the International Court of Justice, would accept the compulsory jurisdiction of the ICJ, provided that such jurisdiction is only over disputes arising on and after September 15, 1958 with regard to situations or facts subsequent to the same date. However, the "situations or facts" concerning the Diaoyu Islands disputes happened before 1958. Therefore, Japan is not under the compulsory jurisdiction of the ICJ in accordance with international law.[20] In 1972, the government of the People's Republic of China withdrew the statement of accepting the compulsory jurisdiction of the ICJ announced in 1946 by the government of the Republic of China. So far, the Chinese government has not brought any political, territorial or other disputes before international judicial or arbitral bodies. In addition, based on Article 298 of the UNCLOS, the Chinese government presented a statement on August 25, 2006, declaring that the government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the UNCLOS with respect to all the categories of disputes referred to in paragraph 1(a), (b) and (c) of Article 298 of the UNCLOS. Based on the analysis of the facts mentioned above, China and Japan are not likely to settle the Diaoyu Islands disputes by submitting them to international courts or arbitral panels. But they still have to pay attention to relevant judicial rulings of the ICJ or arbitral tribunals, as such jurisprudence is influential in resolving disputes of this sort.

Recently, the judgments of two cases concerning the sovereignty of islands by the ICJ may be enlightening for the settlement of the Diaoyu Islands disputes. On December 17, 2002, the ICJ entered the judgment on disputed sovereignty of islands between Indonesia and Malaysia. Sipadan and Ligitan were the two disputed islands. At the end of the 19th century, Indonesia was a Dutch colony and Malaysia was a British colony. On June 20, 1891, a treaty was signed between Great Britain

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19 Article 36 of the Statute of the International Court of Justice.
20 *I. C. J. Yearbook 1969–1970*, The Hague: I. C. J., 1970, pp. 62~63.

and the Netherlands. Indonesia claimed that the two islands were part of the Dutch colony and thus could be succeeded by Indonesia. The ICJ ruled that the provisions of the historical treaty were not clear enough to determine the title to the two islands and the ground of succession alleged by the two parties was not sufficient. Therefore, the *effectivités* as a separate basis should be taken into consideration. The Indonesian Waters Act promulgated on February 18, 1960 did not include Ligitan and Sipadan Islands explicitly and there was no sufficient evidence to prove that the Dutch or Indonesian navies ever patrolled around the two islands. The fishing activities of the Indonesian fishermen in that area cannot be regarded as the acts of the Indonesian government. Therefore, the evidence provided by Indonesia was not sufficient to prove its will and the ability to exercise sovereignty. However, Malaysia in 1917 enacted acts to regulate the collecting of turtle eggs on the islands and issued fishing licenses. In 1933, it established a bird sanctuary on Sipadan. In 1962 and 1963, Malaysia also built lighthouses on both islands. However, neither the Netherlands nor Indonesia ever protested when Great Britain and Malaysia carried out these activities. In view of the evidence provided by the two States, the ICJ ruled that the evidence offered by Malaysia was more convincing of its sovereignty over Ligitan and Sipadan. Finally, Ligitan and Sipadan were adjudged to belong to Malaysia by a vote of 16 to 1.[21] This case shows that the ICJ is more likely to follow the principle of actual control or effective display of sovereignty rather than that of historical title when adjudging similar disputes.

Out of the three disputed reefs – Pedra Branca, Middle Rocks, and South Ledge, Malaysia and Singapore reached a special agreement on February 6, 2003 to submit the disputes to the ICJ. On May 23, 2008, the ICJ found sovereignty over Pedra Branca belonged to Singapore by a vote of 12 to 4;[22] sovereignty over Middle Rocks to Malaysia by 15 to 1; and sovereignty over South Ledge belonged to the State in the territoral waters of which it is located. The ICJ believed that when Johor was still an independent country, the Colonial Secretary of Singapore wrote to Johor on June 12, 1953 asking for information about the sovereignty of Pedra Branca to determine the territorial waters of its colony (Singapore). However, on

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21 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgement of 17 December 2002, *I.C.J. Reports*, 2002, p. 625.

22 The two countries had no judges on the Bench, so each of the parties chose an *ad hoc* judge. However, as the president of the International Court of Justice Rosalyn Higgins had advised Singapore on the Pedra Branca dispute prior to this case, he quitted participating in the adjudication. Therefore, there were 16 judges in this case.

September 21 of the same year, the State Secretary of Johor replied that the Johor government did not claim ownership of Pedra Branca. Therefore, the ICJ ruled that the correspondence indicated that Johor did not have sovereignty over Pedra Branca. As later Johor joined Malaysia, therefore Malaysia cannot successfully claim sovereignty over Pedra Branca. The ICJ also found that it was not until 1979 when Malaysia included Pedra Branca in its map that the dispute began. Before that, Malaysia had implicitly acquiesced to and never protested over Singapore's acts of sovereignty such as investigating shipwrecks in the territorial waters of Pedra Branca and approving Malaysian officials to survey the waters surrounding the island after 1953, establishing military communications equipment on Pedra Branca, and including Pedra Branca in the official map published by Singapore.[23] Therefore, the ICJ held that pursuant to the evidence as mentioned above, it was proved that Singapore had sovereignty over Pedra Branca.

The above two cases show that in order to determine the sovereignty over an island, the ICJ tends to hold that the sovereignty belongs to the country displaying effective control conditioned that other States involved have not made consistent protest. In the Diaoyu Islands dispute, the Japanese government has continued to strengthen its control over the islands. For example, the Japanese government once rented the Diaoyu Dao and two other uninhabited islands from a Japanese islander for about 22 million yen annually in order to enhance the management of these three islands.[24] Whether the lease contract is still in force is unknown, but by way of renting publicly or secretly, the real purpose of Japan is undoubtedly to strengthen administration over and exercise actual control of the Diaoyu Islands through the operation of domestic law. Japan also patrols the Diaoyu Islands and their surrounding waters, prohibiting Chinese citizens to enter the waters or access the Diaoyu Islands. However, the Chinese government has been contending that any unilateral action adopted by Japan towards the Diaoyu Islands is invalid. From the perspective of international law, the Chinese government's claims or protests constitute opposition against the real and effective control by Japan. Therefore, Japan cannot be successful in claiming sovereignty over the Diaoyu Islands through *effectivités*.

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23 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), Judgment of 23 May 2008, *I.C.J. Reports*, 2008, p. 12.

24 Foreign Ministry Spokesman Takes Questions from the Press, *People's Daily*, 3 January 2003, p. A4. (in Chinese)

V. Conclusion and Suggestions

It can be seen from the Sino-Japanese Fishery Agreement that the existing fishery relations between the two countries should be maintained in the waters surrounding the Diaoyu Islands which are out of the Provisional Measures Zone. But what the existing jurisdiction over fishery is and how to define "existing" are questions that need clarification rapidly. The Chinese government holds the view that the waters surrounding the Diaoyu Islands are China's traditional fishing grounds, and therefore Chinese fishermen have the right to fish in the area. However, the Chinese government has not clarified if Japanese fishermen also have the right to fish in this area. According to the above analysis, the answer should be "yes" because the Chinese government has not yet protested against the fishing activities of Japanese fishermen in the area. This may be the connotations of the "existing fishery relations" referred to in the Sino-Japanese Fishery Agreement, namely both Chinese and Japanese fishermen being free to enter this sea area for fishing.

The problem is that, compared with fishermen from China Taiwan, the fishermen from China Mainland seldom fish in the waters surrounding the Diaoyu Islands. Therefore, it is rare to see reports of expulsion of China Mainland's fishermen by Japan. However, as the Diaoyu Islands are closer to China Taiwan and Taiwanese fishermen often fish there, they are more likely to be harassed or ejected by Japanese patrol boats. It should be pointed out that, although some Japanese scholars believe that the Diaoyu Islands are Japanese territory without dispute, clash between China and Japan over their sovereignty is a reality beyond doubt. The Chinese government insists on the principle of "shelving differences and seeking joint development." The Sino-Japanese Fishery Agreement is a concrete measure under this policy. At a glance, the harassment or expulsion of Taiwanese fishermen by Japan in the waters surrounding the Diaoyu Islands is a violation of the Sino-Japanese Fishery Agreement. In essence, Japan attempts to assert sovereign rights in these waters and exercises effective control over the islands. Analyzing from a political perspective, it is clear that Japan exploits the fishing incidents around the Diaoyu Islands to discord the friendly relations between China Mainland and China Taiwan for its own political benefits.

It is reported recently by Japan's Kyodo News Agency that on February 27, 2009, Japan and China Taiwan's fisheries authorities decided to establish an emergency contact channel during the "nongovernmental negotiations on fishery"

to quickly solve fishing disputes in waters surrounding the Diaoyu Islands.[25] In this regard, the Chinese government stated unequivocally that "Japan's talks with the Taiwan authorities on fisheries is contrary to the One-China Principle and breaks the principles of the Sino-Japanese Fishery Agreement. The Chinese government strongly protests against this behavior."[26] There is no doubt that Japan's behavior harms the relationship between China and Japan. Even though Japan called the talks nongovernmental negotiations, the talks are actually of a sovereign nature.

The author suggests that, currently the Chinese government should hold diplomatic negotiations with Japan, and urge Japan to comply with the One-China Principle and the principles elaborated in the Sino-Japanese Fishery Agreement. The Mainland's fisheries law enforcement agencies should cooperate with relevant Taiwanese organs on the protection of fishing rights in the Diaoyu Islands sea area.

Translator: WANG Zhi
Editor (English): Arpita Goswami

25 Japan and China Taiwan Decided to Set up a "Contact Channel" to Deal with Fisheries Disputes, *Global Times*, at http://www.taihainet.com/news/twnews/twdnsz/2009-02-28/379950.shtml, 18 March 2009. (in Chinese)

26 Remarks by spokesman for the Ministry of Foreign Affairs Liu Jianchao in a press conference, at http://news.xinhuanet.com/taiwan/2005-07/08/content_3193198.htm, 1 July 2005. (in Chinese)

A Jurisprudential Analysis of a System of Compensation for the Use of Sea Areas

MEI Hong*

Abstract: State ownership of sea areas is the basis for the system of compensation for their use. The system of compensation serves as the basic measure to legally protect the State ownership of sea areas in a market economy. The right to use sea areas is the mainstay of the system of compensation, which in turn is indispensible for guaranteeing the transferability of the rights of use. The system of compensation for the use of sea areas and the system of entitlements to sea areas complement each other, guarantee the establishment and functioning of the system of property rights for sea areas in a market-oriented economic and legal environment, and help realize the following legislative principles: State ownership of sea areas, the use of sea areas according to law, and compensation for the use.

Key Words: System of compensation for the use of sea areas; State ownership of sea areas; System of the right to use sea areas; System of property rights for sea areas

A system of compensation for the use of sea areas, which is necessary for realizing the value of the sea areas, has become generally accepted among coastal countries. Every citizen or legal person who utilizes sea areas for economic production and operations must pay the government for the use. At the same time, the law may exempt public, administrative, and military use from fees, and may also grant fee reductions or exemptions to certain projects based on differences in use, revenue, and risks of particular operating activities to ensure the healthy and coordinated development in the use of sea areas. The system of compensation is

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fundamental in the framework of the system of property rights for sea areas; it monetizes the property rights for marine resources. The system not only helps realize the value of a country's ownership of its sea areas, but also curbs waste during use and the loss of State-owned resources. This paper analyzes the relationship between the compensation system and State ownership of and the right to use sea areas, and discusses the significance of the compensation system in building a system of property rights for sea areas.

I. State Ownership: the Basis for a Compensation System for the Use of Sea Areas

The goal of a system of property rights for sea areas is to guarantee the long-term ability of the sea to provide resources for a country's sustainable economic and social development. Sustainable development, of course, demands efficiency. The monetization of sea areas should be fully considered in a property rights system for sea areas. Ownership is the basis for a system of property rights; to promote the monetization of sea areas, the ownership of sea areas should be a focus of the inquiry. The societal attributes of sea areas require that they be owned by a powerful body that, at the same time, serves the entire society. The State has sovereignty over sea areas, manages their development and utilization, and owns State property. It has enormous ability to control and regulate the economy and society. The establishment of administrative departments and the exercise of power by the State also provide the organizational structure to realize the value of ownership of the sea areas. Therefore, the State is the natural owner of sea areas.

In the sea areas where it enjoys sovereignty, the State is the only body that owns the sea areas and the resources therein. The law on State ownership of sea areas not only clarifies the misconception of "possession by occupation," but also helps define the relationship between the State and the users of the sea areas and the relationship between the ownership and the rights of use, thereby securing the State's ownership rights. Spelling out State ownership of sea areas and criminalizing the seizure or transfer of sea areas (by buying and selling, or other means) would help establish the awareness of State ownership of sea areas and the concept of compensation for the use of sea areas, and would contribute to realizing the economic benefits of State's ownership rights.

In China, the government allocates the natural resources. Based on the political concepts of allocation by the sovereignty and ownership by the people,

the current Chinese constitution prescribes that important natural resources are owned by the State. Before private law clearly defines the ownership of natural resources with property attribute such as land, water, and sea areas, laws on management of natural resources such as the Law of Land Administration, Water Law, and the Law on the Administration of the Use of Sea Areas define or create property right systems for natural resources when they regulate these resources. The ownership of sea areas is different from land ownership. While land can be State-owned or collectively owned, sea areas are solely owned by the State and the right of ownership can only be exercised by the State. No organization or individual may own sea areas. Ownership confers control and includes rights such as the possession, use, disposal, and deriving of benefit. In China, the State Council exercises the rights of ownership of sea areas on behalf of the State. To promptly clarify the public's confusion with regard to the ownership of sea areas, and coastal residents' misunderstanding that sea areas are owned by their counties, towns, or villages, the Law on the Administration of the Use of Sea Areas declares the State's sole and exclusive ownership of its sea areas[1] and, on the basis of its ownership, balances the interests of relevant entities through allocating their rights in the use of these areas.

Only with clarity on the State's ownership of sea areas and the State's status as the entity that exercises the rights of ownership will there be a solid foundation for a compensation system for the use of sea areas. The recognition of the ownership of sea areas is a prerequisite for a compensation system, in which compensation is paid by users to those entitled to compensation. When property with use value is utilized, the condition of claiming compensation from users is one's ownership of the property. A stable compensation system for the use of sea areas needs to be based on stable ownership of these areas. Coastal countries establish the ownership of their sea areas by legislation and thereby lay the foundation for the creation of a compensation system.

From an operational standpoint, the paid use of sea areas refers to the permission granted by the State – the owner of sea areas – to individuals or entities to use these areas, the payment of fees by these individuals or entities as users of sea areas or holders of the right to use to the State, and the resulting compensation to

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1 According to Article 3 of the Law on the Administration of the Use of Sea Areas, "[t]he sea areas are owned by the State... No entity or individual may seize, buy or sell sea areas, or illegally transfer them in other ways."

the State. The compensation system is based on State ownership of these sea areas. There are two aspects to the implementation of the compensation system. First, the State grants the right to use sea areas to citizens or legal persons. In legal terms, with respect to sea areas, the rights of ownership are separate from the rights of use. Second, users pay compensation to the State. Again, legally speaking, the compensation realizes the right of the State to the proceeds as the owner of sea areas.

II. The Right to Use Sea Areas: a Building Block for a System of Compensation for the Use of Sea Areas

The rights of ownership of sea areas include the possession, use, and the disposal of, as well as the enjoyment of benefits derived from the areas. Among them, the rights of possession, use, and enjoyment of benefits are relatively independent and may be exercised by other entities other than the owner without affecting the State's ownership of the sea areas. The right to use sea areas derives from the ownership, and refers to the right to develop and utilize the use value in certain sea areas and to derive benefits from the utilization according to law. The establishment of a right to use clarifies the rights and obligations between the owners and users of sea areas and those amongst users, and effectively protects the users' legitimate rights and interests. The system of the right to use sea areas, with the transferability of the right at its core, is not only central to the property right system for the areas; it also underlies the establishment of a system of compensation for their use.

The right to use sea areas refers to the right to continually engage in the exclusive development and exploitation and to obtain the benefits of these activities in a specific sea area owned by the State within a certain period. The right is acquired by legal procedures and through registration by an entity or individual. This definition indicates that the subject exercising the right to use sea areas is the entity or individual other than the owner of the sea areas (the State), and the object is the specific sea area owned by the State. The right to use sea areas is acquired through legal procedures of application, approval, and registration. In terms of its nature, the right to use a sea area is the exclusive right to use specific sea areas within a certain time frame, and is also a property right to use and benefit from the

specific sea area.

A system for transferring the right to use sea areas is indispensable when marine industries have evolved to a certain stage. It is also a prerequisite for the efficient development and management of the seas. The transfer of the right to use sea areas refers to the circulation and transfer of the right among different holders. Although the law has granted the ownership of sea areas to the State, users of sea areas have long exploited them at will. The users' disorderly development, free use, and excessive exploitation have not only dissipated marine resources, but also damaged the marine environment and made development inefficient. Only when the right to use sea areas is returned from illegitimate occupiers to legitimate developers can sea areas be productively utilized and their values realized in a scientific and reasonable manner.

Defining the right to use sea areas and establishing a system for its transfer introduce the market into the system of the right to use sea areas. The market mechanism is the only choice for a system for transferring the right to use sea areas and for managing the ownership of sea areas in a way that respects the laws of the market. Specifically, when the system of the right to use operates according to the laws of the market, then users can decide on their own whether to expand or narrow the scope of their use on the basis of market conditions and thereby exercise their economic autonomy. Building a system of the right to use based on the market makes it possible to adjust the frequent imbalance between the size of sea areas and the available labor. Elements of production in the ocean industry would thus generally be able to maintain a dynamic and optimized structure. The paid transfer of the right to use on the basis of exchanges for equal value would relieve investors of doubts over investing in the ocean industry, especially for the long term, thereby streamlining production and operations in the ocean industry and promoting productivity and efficiency in the exploitation of marine resources. Rent differentials for the development and exploitation of coastal resources and the transfer of the right to use would draw some developers' attention to deep sea areas and fully tap into marine resources. Moving from a government-supplied to a market-supplied right to use would spur the users to reasonably develop and exploit sea areas, as well as to take the initiative to protect marine ecology, giving due regard to both the economic and the ecological value of the sea areas. If sea developers do not take care to protect the marine ecology, the productivity of sea areas would decrease, industries and revenues would suffer, the transfer of the right to use would be difficult due to its reduced value, and fines might even be imposed

by government agencies at the time when the developers still have to shoulder user fees.

Since the right to use sea areas is a usufructuary right, the holder of the right needs to transfer it as circumstances require, which is in line with the laws of the market. With the transferability of the right at its core, a system of the right to use sea areas sets regulations for the primary market for transfers, an orderly secondary market,[2] the conditions and procedures for transfers, the acquisition and registration of the right to use, the issuance of certificates for the right, changes in or termination of the right, public notice of transfers, the mediation and the settlement of disputes, etc. It is apparent that a system of the right to use sea areas spans a variety of systems involving substantive and procedural law, has features of both public and private law, covers many subjects, and impacts many areas. Its sources of law include not only basic civil law, but also law on the administration of sea areas, which has obvious features of administrative law.[3] The Law on the Administration of the Use of Sea Areas defined "the right to use sea areas" in China for the first time with specific provisions on the establishment, change, termination, and protection of the right, as well as its substance. This officially and legally recognized the right to use sea areas as a significant and independent right in civil law. On October 13, 2006, the Regulations on the Administration of the Right to Use Sea Areas issued by the State Oceanic Administration set comprehensive and

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2 The market for the transfer of the right to use sea areas includes the primary and secondary markets. In the primary market, the State legally transfers the right to use sea areas to users in exchange for compensation. In the secondary market, users of sea areas legally transfer the right to use to third parties within the term of the lease, and this type of transfer may occur multiple times among different users. However, the secondary market encompasses all transfers among users regardless of the number of transfers and users involved.

3 Internationally, most current laws on the use of sea areas include the word "administration" in their titles. Even when some laws or regulations do not include the word "administration" in their titles, their content mainly revolves around administration and management. It is evident that administration and management are the focus of legislation on the use of sea areas which as a whole pertains to administrative law. From the perspective of administrative management, the administrative system on the use of sea areas mainly involves the definition of administrative authority and the establishment of governing agencies. See Liu Baoyu and Cui Fengyou, A Study on the System of the Right to Use Sea Areas, at http://www.fatianxia.com/paper_list.asp?id=14512, 4 May 2008. (in Chinese)

specific rules on the acquisition and transfer of the right to use sea areas.[4] The Rules for the Registration of the Right to Use Sea Areas, issued on the same date, include provisions on the initial registration, changes in registration, the registration of cancellations, etc. for the right to use sea areas. The Rules incorporated rights derived from the right to use sea areas[5] – leaseholds and mortgages arising from the lease and mortgage of the right to use sea areas – into the scope of the registration of the right to use for the first time, and have detailed provisions on these other rights in their various chapters. The 2007 Property Law of the People's Republic of China introduces clear rules on property rights pertaining to sea areas, including ownership and the right to use. To protect the users' legal rights and boost their confidence in investing in the development of sea areas, the Property Law separates the ownership of sea areas from the right to use. Article 122 in the Chapter of Usufructuary Rights provides, "[t]he right to use sea areas, acquired according to law, shall be protected by law." This makes explicit that the right to use sea areas is derived from the State's ownership, and is a basic usufructuary right. And to effectively realize the economic value of sea areas and optimize the allocation of marine resources in the market, the Property Law also provides that the right to use sea areas may be transferred, leased, mortgaged, or inherited, namely, the right being circulated while valid. When the use of sea areas is hampered or jeopardized, the holder of the right to use may ask marine administrative agencies for help; when losses are incurred, he or she may hold the infringer liable for civil damages. If the right needs to be expropriated before it expires for reasons of public interest or national security, the holder of the right would be compensated according to law. Therefore, the holder of the right is protected by both administrative and civil law; the system for the right to use sea areas, based on market principles, can effectively regulate the relationships between the owner of sea areas and the holders of the right to use and amongst holders themselves in property right transactions and correct the disorderly, excessive, and free use of Chinese sea areas.

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4 According to the Regulations on the Administration of the Right to Use Sea Areas, to use any sea area, a justification and a preliminary examination are required. The Regulations also include provisions on the application and approval process; the bidding, auction, transfer, lease, and mortgage of the right to use; and a system of compensation for when the right to use is revoked. These departmental regulations have been effective since January 1, 2007.

5 The Rules for the Registration of the Right to Use Sea Areas, Article 2(2) states, "[o]ther rights refer to leaseholds and mortgages arising from the lease and mortgage of the right to use sea areas."

In developed market economies, the systems for the use of sea areas are established according to market principles. The acquisition of the right to use sea areas, the allocation of rights involving sea areas, and the utilization of sea areas are regulated by the market. Since the owner – the State – cannot make use of the sea areas and the law prohibits the purchase, sale, or transfer of titles to sea areas, it is necessary to create a system that regulates transactions such as the transfer, lease, and mortgage of the right to use sea areas. A system for the right to use sea areas and a corresponding system of compensation for their use emerge from this need.

A system of the right to use sea areas is fundamental to a system of compensation for their use: logically, a system of compensation rests on the establishment of the former. A system of compensation for the use of sea areas, without a system of right to use based on market principles, would be like water without a source or a tree without roots. A market for the transfer of the right to use sea areas and related mechanisms are the only way in which a system of compensation for the use of these areas can be implemented, whether it is to rectify improper relationships in the use, create a fair environment for competition, regulate relationships among users, reasonably allocate marine resources, or realize the value of the sea areas. In terms of relevant content, the system of the right to use sea areas is quite rich, providing substance and the requirements for the establishment of a system of compensation. The existence of a system of the right to use sea areas is a prerequisite for legislating on a system of compensation. A system of compensation for the use of sea areas and the system of entitlements to sea areas (which mainly includes the rights of ownership, the right to use, and the rights of adjacency)[6] complement each other and constitute the system of property

6 The system of entitlements to sea areas forms the basis for the system of property rights for sea areas. It includes the system of ownership, the system of the right to use, and the system of the rights of adjacency. Rights of adjacency refer to the rights enjoyed by the owners or users of sea areas in their relationships with their neighbors: among owners or users of adjoining sea areas, any party may ask an adjacent party or parties to provide conveniences or accept certain restrictions so that the requesting party may reasonably exercise their ownership of or the right to use the sea areas. If the adjacent party's person or property is damaged due to the exercise of the rights, the adjacent party may demand a stop to the infliction of the damage, the elimination of the threats of damage, and compensation for losses. Rights of adjacency, in essence, both restrict and extend the ownership rights to sea areas. Since sea areas can be identified with particularity, a system of rights of adjacency for sea areas should be established.

rights for sea areas. Their relationships can be shown as follows:

<table>
<tr><td rowspan="4">Property rights for sea areas</td><td rowspan="3">Entitlements to sea areas</td><td>Rights of ownership</td></tr>
<tr><td>Rights to use</td></tr>
<tr><td>Rights of adjacency</td></tr>
<tr><td colspan="2">Compensation for the use of sea areas</td></tr>
</table>

III. A System of Compensation for the Use of Sea Areas: Indispensable for the System of Property Rights for Sea Areas

The system of entitlements to sea areas needs to be connected to a system of compensation for their use. The system of compensation, which has emerged with the circumstances, complements the system of entitlements. Further, the two systems work together to serve as a systemic guarantee for the establishment and functioning of the system of property rights for sea areas in a market-oriented economic and legal environment. It enables the expression and implementation of the following legislative principles: “State ownership of sea areas, the use of the sea areas according to law, and compensation for the use.”

A. The Implementation of a System of Compensation for the Use of Sea Areas: a Fundamental Policy that Protects the State’s Ownership

While the State’s ownership of sea areas lays the foundation for creating the system of compensation for their use, the implementation of a system of compensation is the fundamental policy that legally protects the State’s ownership in the market economy.

In addition to being explicitly provided for in law, the State’s ownership of sea areas should also be reflected as a national economic interest. The implementation of a system of compensation for the use of sea areas is an embodiment of the State’s efforts to protect its resources. The legally-based collection of fees from entities and individuals who use State-owned sea areas for production or operational activities would promote the scientific and reasonable development and exploitation of marine resources and effectively prevent the dissipation of State-owned marine

resources; mediate the relationships among sea area users and keep the losses arising from tensions or disputes to a minimum; and regulate marine development and exploitation, balance social, economic, and ecological priorities, and encourage the healthy and sustainable development of the marine economy.

B. A System of Compensation for the Use of Sea Areas: an Indispensible Guarantee for Transfers of the Right to Use

The nature of sea areas as a resource dictates that legislation should aim to facilitate their efficient and reasonable utilization. Therefore, a system of the right to use sea areas should guarantee the free transfer of the right in the market.

The State's ownership of sea areas, in essence, makes the transfer of ownership impossible. But to realize the value of sea areas, the law must allow the sea areas – the objects of the use – to be transferred, leased, mortgaged, or inherited among different entities in the market. Therefore, the law has accepted the separation of ownership rights from the right to use sea areas and has identified the right to use as an independent property right. Adapting to the demands of the market economy, a system of the right to use sea areas has been established, with the ability to transfer the right to use as its core.

The needs of society have conferred societal functions on the right to use sea areas; namely, they have turned the act of using sea areas into a property right. The law's affirmation of the right to use sea areas as an independent property right has great significance for the establishment of the system of the right to use sea areas, the definition of legal relationships with respect to the right to use, and the smooth functioning of a system of the right to use.

The transfer of the right to use sea areas is demanded by, and is an embodiment of, the property right transactions in a market economy. The features of property right transactions require that the transfer of the right to use among the parties must be compensated and compliant with the laws of the market. Not only would transfers of the right to use without compensation or consideration impair the functioning of the market, they would also lead to the disorderly and inefficient utilization of sea areas. Therefore, a system of compensation for the use of sea areas is necessary to protect the transferability of the right.

The implementation of a system of compensation for the use of sea areas not only expresses the State's ownership as a principle, but also provides systemic support for the introduction of the market into the right to use. The system of

compensation would certainly increase the sea area users' investment costs. To maximize profits, the users would on one hand allocate resources rationally, choose high-output industries, and work to boost marginal benefits; on the other hand, they would have the developer entities undergo reasonable mergers to achieve economies of scale in the utilization of marine resources, relying on the market principle of the survival of the fittest and the liquidity of the right to use sea areas.

The State manages its sea areas as a natural resource and as a State-owned asset. Only by implementing a system of compensation for the use of sea areas and an economic compensation mechanism for the renewal of natural resources can State-owned marine resources hold and increase their value. The users' payment to the State treasury for their legal development and utilization of sea areas not only increases revenue and compensates the State for the use of resources, but also guarantees sufficient funds for the State in its work to renew marine resources and helps to halt waste in the use of sea areas and the dissipation of State-owned resources. At present, the various entities in ocean industries do not coordinate with each other, disputes have increased, and development is disorderly and inefficient. If the State is to adhere to the principle of integrating development with protection, it should implement a system of compensation for the use of sea areas. The system of compensation would spur holders of the right to use sea areas to fully consider their costs versus their profits, avoid unplanned occupation of sea areas, put an end to the excessive development and disorderly utilization arising from free use, and rationally allocate and optimize State-owned marine resources.

C. Perfecting the System of Compensation for the Use of Sea Areas: the Key to the Establishment of a System of Property Rights for Sea Areas

The nature of sea areas as a resource requires the establishment of a system for the rational utilization of sea areas that maximizes the economic and societal benefits from marine resources. This would be a system of property rights for sea areas, which is fundamental in legal arrangements involving natural resources. The sustainable development of a country, first and foremost, relies on the reasonableness of its system of property rights. Within the legal framework for natural resources – which includes systems for their administration, on the environment, on technological innovations, and a remedy system for rights, etc. – the system of

property rights for natural resources[7] dictates the organization of the other systems.

Theoretically, property rights are the property rights that are traded, and transactions are the transactions that involve property rights. A property right that cannot be transferred has no value.[8] It is the same with property rights for sea areas. Marine resources would approach maximum efficiency, and the value of sea areas would move in a direction where they are most easily monetized, only if trading of the right to use occurs continually and on a large scale. Then how can we promote the continual trading of the right to use on a large scale? It mostly depends on whether the market for the right to use can implement the rules for the trade of paid use and keep pace with the demands of the market.

A system of property rights for sea areas should aim to guarantee the ability of the sea areas to provide resources for the sustainable economic and social development of a country. The sustainability of sea areas, of course, means efficient development. Therefore, a structure of property rights for sea areas should fully consider the realization of the value of sea areas. As civil rights, property rights for sea areas are products of the market economy. The trade of property rights should be based on the rules for exercising civil rights: mutual benefit on a basis of equality and the exchange of equal value. The framework of property rights for marine resources must be placed in the market for selection and improvement. The definition of property rights and the optimization of their structure are an evolving process. Initial definitions of property rights are often unclear and not well-developed. An effective structure of property rights can only be developed, clarified, and perfected through choices made by the market. By the same logic, failures of the market in allocating marine resources should be corrected by the market itself. And a system of compensation for the use of sea areas is the inevitable choice for developing the trade of property rights for sea areas in the market.

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7 In *Natural Resources Law,* written and edited by Xiao Guoxing and Xiao Qiangang, a system of property rights for nature resources is defined as “a legal system of organizing and implementing, by natural resources laws and regulations, the property rights of manufacturers to develop and utilize natural resources. It refers to the sum of rules for manufacturers to develop and utilize natural resources in the legal system as well as the operation of these rules. It is initially intended for the efficient development and utilization of natural resources.” See Xiao Guoxing and Xiao Qiangang eds. *Natural Resources Law*, Beijing: Law Press China, 1999, pp. 62~63, 68. (in Chinese)

8 Xiao Guoxing and Xiao Qiangang eds., *Natural Resources Law*, Beijing: Law Press China, 1999, p. 80. (in Chinese)

The law plays a decisive role in the organization and enforcement of property rights. If the system of entitlements to sea areas is fundamental to the system of property rights for sea areas, then the smooth operation of the system of property rights depends on the perfection and implementation of a system of compensation for the use of sea areas. A system of compensation effectuates property rights in the arena of marine resources. Aimed at balancing the interests among the individuals and entities who use the sea areas, the system separates the extra economic benefits that stem from the use of sea areas from the profits of production or operations in social and economic activities so that the State, as the owner of the sea areas, can enjoy these benefits. These benefits, which should always have been enjoyed by the State, have long been taken by the users of the sea areas as profit from production or operational activities. The system's implementation helps monetize the State's ownership of sea areas and curb the waste and dissipation of State-owned resources. In implementing a system for compensation for the use of sea areas, we should bring into full play the fundamental function of the market in resource allocation and establish and improve various marine market systems. Users of sea areas acquire the right to use in the market where rights are transferred, and obtain economic benefits through developing and utilizing the sea areas. The State collects fees from the users according to law, invests the fees in the renewal of marine resources, and continues to increase social investment in the seas. In giving back to the seas that which has been taken from them, such a policy creates a benign cycle of development, improvement, protection, and management. Therefore, a system of compensation for the use of sea areas benefits the overall utilization and development of marine resources as well as the development of the trade of property rights for the sea areas. It guarantees the sustainable utilization of marine resources and sustainable economic and social development.

It should be noted that, in countries where the market is at an initial stage of development, such as China, the implementation of a system of compensation for the use of sea areas faces certain difficulties because the market for the transfer of the right to use has not matured and because the public does not fully understand the reasons for collecting fees for the use of sea areas or the differences between the nature of the fees and the related taxes. Since the market for the transfer of the right to use sea areas cannot be perfected immediately, improving the system of compensation is the key to the establishment of a system of property rights for sea areas. If the system of compensation is not in the public awareness and the system of compensation is not fully implemented, then the market for the transfer of the

right to use would not function effectively and the system of the property rights for sea areas would not deliver the benefits that it should. Besides publicizing the paid use of sea areas as a concept, measures should focus on improving the system of compensation and on designing practical laws that are based on actual conditions in the development of ocean industries. In China, although the Law on the Administration of the Use of Sea Areas already has specific provisions on a system of compensation for the use of sea areas,[9] both academia and industry have been calling for improvements that provide effective systemic support for transfers of the right to use. New legislation is both necessary and inevitable.

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9 Provisions on the "system of compensation for the use of sea areas" can be found in the Law on the Administration of the Use of Sea Areas, Ch. V "Fees for the Use of Sea Areas", Arts. 33, 34, 35 and 36.

The Ship Registration System under the Property Law of the People's Republic of China

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Abstract: The Regulations of the People's Republic of China Governing the Registration of Ships do not differentiate between the registration of ships' nationality and that of ships' property rights, but prescribe these two registration systems in a mixed way, which would hamper a correct understanding of the regime of ships' property rights. The Property Law of the People's Republic of China defines the attributes of ships' property rights, and clarifies the legal nature and effects of the registration of ships' property rights. In light of the Property Law, this paper compares the differences between these two registration systems and analyzes the legal characteristics and effects of ship registration, in an effort to properly understand the system of ship registration.

Key Words: Ship registration; Registration of ships' nationality; Registration of ships' property rights

In theory, two views exist on the definition of ship registration. One is that ship registration refers to the registration of a ship's nationality. For instance, the Japanese scholar Chiyuki Mizukami maintains that ship registration is a documenting procedure to demonstrate a ship's nationality, by which a State indicates to the international community that it has conferred nationality on the ship. The function of such registration is to keep records and to collect ships' data for public notice, making relevant administrative authorities accountable. In a State where only the registration system of ships' nationality is implemented, ship registration also serv-

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es as a legal evidence of a ship's ownership.[1] In China, some academics also contend that ship registration refers to maintaining public records of a ship's information in a State. After being registered in a specific State, a ship is granted this State's nationality and entitled to fly the flag of this State.[2] The other position is that ship registration consists of the registration of a ship's nationality and that of the ship's property rights. In academia, it is held by some Chinese scholars that ship registration is an administrative act which confers nationality, rights and obligations upon the registered ship.[3] On the other hand, some argue that it is a legal act in which a shipowner files an application with the ship registration administration by submitting relevant documents, and after examination of the documentation, the ship registration administration registers the ship and issues an instrument to the owner upon qualification. Ship registration can be defined in a public law sense and in a private law sense. The former refers to the registration of a ship's nationality while the latter means the registration of a ship's ownership, mortgage and lease.[4] In Japan and China Taiwan, these two kinds of registrations are separated.

In China, currently-effective provisions concerning ship registration are mainly contained in the Regulations of the People's Republic of China Governing the Registration of Ships (hereinafter "Regulations") promulgated in 1995, which adopt the second view: not making a distinction between the two sorts of registration. Chapter One of the Regulations lays out General Provisions; Chapter Two is titled the Registration of Ownership of Ships; Chapter Three, Nationality of Ships; and Chapter Four, the Registration of Ship Mortgage. The provisions regarding the registration of ships' nationality are incorporated into the provisions on the registration of ships' property rights as provided in the General Provisions and other chapters. However, the authors argue that the Regulations, of which the provisions on registration of nationality and that of property rights lack logic and fail to differentiate between these two registrations, should be amended, especially after the adoption of the Property Law of the People's Republic of China (hereinafter

1 Chiyuki Mizukami, translated by Quan Xianshu, *The Nationality of Ships and the Nationality of Ships Flying Flag of Convenience*, Dalian: Dalian Maritime University Press, 2000, p. 70. (in Chinese)

2 Yang Liangyi and Lin Yuanmin, *Sale and Purchase of Ships*, Beijing: China Communications Press, 1995, p. 35. (in Chinese)

3 Ma Jun, A Study on Several Legal Issues regarding the Registration of Ships, *Marine Technology*, No. 5, 2000, p. 72. (in Chinese)

4 Zhao Deming ed., *International Maritime Law,* Beijing: Peking University Press, 1999, p. 35. (in Chinese)

"Property Law") on 16 March 2007. The Property Law states the nature of the registration of ships' property rights, and accordingly, the legislature should amend the Regulations in a timely manner to separate the registration of ships' nationality from that of ships' property rights.

I. The Legal Nature of the Registration of Ships

A. Registration in a Public Law Sense and in a Private Law Sense

In the authors' opinion, to begin with it is necessary to distinguish between the registration of ships in a public law sense and that in a private law sense. The former refers to the registration of ships' nationality, while the latter means the registration of ships' property rights, including ownership, security interests, liens, etc. It is evident that the registration of ships' nationality is an act under public law while the registration of ships' property rights is one under private law.

First, the two types differ in legal nature and fall within different legal systems. The registration of ships' property rights has the function of confirming and proving private rights and should be governed by private law. The provisions on the property rights to ships in the Property Law, a basic private law, recognize that the property rights to ships have a private law attribute and belong to the private law system. In other words, the Property Law actually excludes the registration of nationality from its scope. In comparison, as the registration of ships' nationality is mainly for the purpose of exercising effective jurisdiction and control over ships by the flag State, it is mandatory, of a strong public law feature and should be governed by public law. For example, the Geneva Convention on High Seas (1958), the United Nations Convention on the Law of the Sea (1982), and the United Nations Convention on Conditions for Registration of Ships (1986) merely refer to the registration of ships' nationality, paying no attention to the registration of ships' property rights. Nor does the International Convention on Maritime Liens and Mortgages (1993) have any provisions on the conditions for registration of ship mortgages. Rather, the conditions and effects of registration of ship mortgages, in particular, the effect against a third party are left to the State of registry to regulate.

Second, the two types are different in terms of registration content. The registration of ships' property rights demonstrates the previous changes to and the status quo of the property rights on the vessel, and relates to the rights and obligations between the owner and other parties on an equal footing. Nevertheless,

the registration of ships' nationality relates to identity of ships and the flag State's jurisdiction and control over ships, which concerns the legal relationship between parties of unequal statuses. In international law, only ships that have nationality and fly the flag of the State with which they are registered are entitled to exercise the freedom of navigation on the high seas and operate shipping business in foreign ports. Ships without a nationality are not protected under international law and might be arrested or confiscated. Once a ship is registered, the link between the flag State and it is established and the ship shall accept the jurisdiction and control by the flag State.

B. Substantive Registration and Procedural Registration

The nationality of a ship is a legal identity acquired by the ship in order to put it under the jurisdiction of the State of registry after the ship is registered by the shipowner in accordance with the regulations relating to ship registration of that State. The ship then obtains a Certificate of Nationality issued by the State and flies the flag of that State. It indicates that legally the ship is subject to the State of registry and has the nationality of that State. The Certificate of Nationality is the legal proof of the ship's nationality and the flag the ship flies is the external symbol or mark to identify such a nationality.[5] By contrast, the property rights of a ship are the exclusive rights over the ship directly exercised by the holder including ownership, usufructuary rights, security interests, etc.

Due to differences with respect to consequences and effects, the regulation consists of both substantive and procedural rules and consequently, registration can be divided into substantive registration and procedural registration. These two types of registration differ in legal nature, structure, functions and applicable laws. Substantive registration alters rights and obligations through registration. In the event that any right or obligation is established, altered or terminated, registration is the legal basis for the effectiveness of such changes and the method for publicity. Procedural registration, on the contrary, is the process of recording specific rights and obligations in the register, and whether they are recorded or not does not affect the holder's rights and obligations.

According to the current laws and regulations, once a ship is granted the

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5 Si Yuzhuo et al., *A Detailed Analysis of Maritime Law*, Dalian: Dalian Maritime University Press, 1995, pp. 60~61. (in Chinese)

Chinese nationality by registration, it enjoys the following rights: the right of navigating along the coasts and on the inland rivers, the right of fishing and conducting other operations in the territorial sea, the right to domestic preferential tax policy, the right to most-favored-nation treatment in foreign countries pursuant to specific treaties, the right to be escorted by Chinese navy, the right of innocent passage through the territorial seas of other States, the right to be protected and assisted by Chinese embassies and consulates, etc. Nonetheless, the registration of ships' property rights has no impact on the state of the property rights over the ship. Thus, the authors contend that the registration of ships' nationality encompasses both substantial registration and procedural registration, whereas the registration of ships' property rights is merely procedural rather than substantive.

II. Differences between Registration of Ships' Nationality and Registration of Ships' Property Rights

Apart from the differences in legal nature as discussed in the preceding paragraphs, a number of other differences exist between the registration of ships' nationality and that of ships' property rights, as demonstrated as follows.

A. Whether Registration is the Legal Basis for the Change of Nationality or That of Property Rights to Ships

1. Registration of Ships' Nationality Is a Requisite for the Acquisition of Nationality

In accordance with the Regulations, only after the application by the shipowner and the registration by the ship registration administration of China will a ship be granted Chinese nationality and be entitled to fly the Chinese flag. Furthermore, a ship shall not have dual nationalities and a ship registered abroad shall not be granted Chinese nationality unless its former registration of nationality has already been suspended or canceled. Thus, it is obvious that a ship can acquire the nationality only after being registered.

2. Registration of Ships' Property Rights Has No Bearing on the State of Ships' Property Rights

The traditional view is that, when it comes to the property rights to ships including the effectiveness and publicity of transferring the property rights, ships should be deemed as real estate, taking into account their huge size and high value.

As such, the registration of property rights to ships should comply with the relevant rules concerning real estate and be considered as the legal basis for the transfer of ships' property rights. For instance, according to the Summary of the Colloquia of Presidents from Countrywide Maritime Courts held on 20 July 2001, "if the contracting builder or buyer accepts a ship in accordance with a shipbuilding contract, a purchase contract or a lease-purchase contract or in any other lawful manner but does not lawfully register the ownership of the ship, the rights and obligations between the parties of the contract shall be governed by the terms of the contract as well as relevant laws; notwithstanding, the court shall not support or protect the ownership claim or any defense raised by the contracting builder or buyer against a third party (including claims against a third party for damages in the name of the shipowner)." It is also stipulated in Article 1 (The Effects of Registration of Ship Ownership Transfer) of the Guidelines of the Supreme Court of Guangdong Province concerning Several Issues on Maritime Trials (*YueGaoFaFa* [2001] No. 49) that "the transfer of ship ownership shall take effect upon registration and it is deemed that the ownership has not been transferred if without registration".

Contradicting the conventional view, ships are regarded as movable property in the Property Law: first, Article 24 of Chapter "Delivery of the Movables" provides that "[b]efore registration, the creation, alteration, transfer or extinction of the property right of the vessels, aircraft, motor vehicles, etc. shall not be used against a *bona fide* third party;" second, with respect to the transfer of property rights to ships, the Property Law adopts the principle that the transfer does not take effect against a third party unless registered rather than the principle that the transfer takes effect upon registration, the one governing real estate. It can be read from the provisions of Article 24 that the Property Law does not require registration as a condition precedent to the effectiveness of the transfer. Instead, it prescribes that the transfer cannot bind a *bona fide* third party unless registered. By virtue of this, most scholars hold that in line with the Property Law, ships should be viewed as movables in terms of legal nature and the general rules on the changes of property rights to movables should be applied to ships. Under the Property Law, the major distinction between the property rights to movable and that to real estate is that the transfer of property rights on movable takes place when the movable is delivered, whereas as for real estate, the transfer takes place when it is recorded in the real estate register. Consequently, the establishment and transfer of the property rights to a ship come into force when the ship is delivered. Further, apart from

actual delivery, delivery also comprises other means such as *traditio brevi manu* and *traditio longa manu*.

In summary, the registration of ships' property rights is not a prerequisite for changing ships' property rights. Instead, the change depends on the meeting of minds of the parties and delivery. In ships sales, once a ship is accepted, the ownership is transferred from the seller to the buyer. Whether the buyer registers his ownership or the seller cancels the previous registration would not affect the acquisition of the ownership. The registration of the transfer is merely a documenting of the change, thereby not effecting the change of ships' property rights.

B. Whether Registration Is a Mandatory Requirement

1. The Registration of Ships' Nationality Is a Mandatory Requirement

In accordance with the Maritime Code of the People's Republic of China (hereinafter "Maritime Code") and the Regulations, all ships owned by the State, collectives or individuals of China, save military or police ships, shall be registered in the ports of China. Only after completing the registration and being granted the Certificate of Nationality will a ship be entitled to fly the flag of China. If a ship is acquired in a foreign State, the ship can obtain a Provisional Certificate of Nationality from the Chinese embassy or consulate located in that foreign State. A Ship, which has not been granted a Certificate of Nationality of China or a provisional certificate has no right to fly the Chinese flag, save trial navigation of newly-built ships or on other occasions specifically permitted by harbor superintendency departments. Ships, which illegally fly the Chinese flag, are subject to fines or confiscation, depending upon the severity of the offense.

2. The Registration of Ships' Property Rights Is Not a Mandatory Requirement

If the legislation provides that the transfer does not take effect against a third party unless registered, the registration only affect the degree of protection given by law but does not impact the transfer of property rights, as the law does not require that the holder has his property rights registered. China adopts such legislation. According to the Property Law, before registration, the creation, alteration, transfer or extinction of the property rights shall not be used against a *bona fide* third party. In this connection, to register the property rights or not is a freedom of the holder other than a legal obligation, as it is not a mandatory requirement in law.

The registration only relates to the external effects of the holder's property rights against a third party but does not relate to the internal relations between the parties of the contract. Law protects the property rights over unregistered ships as well; however, such protection is limited in that any *bona fide* third party could deny the property rights on an unregistered ship.

C. Whether Registration Creates Rights and Obligations

1. The Registration of Ships' Nationality Creates Rights and Obligations

Once a ship is granted the nationality of a State, it shall enjoy the rights and assume the obligations in accordance with law like a citizen or a legal person obtains the nationality.

First, the flag State shall protect legitimate rights and interests of the ship and its owner. Once a ship acquires the nationality of a specific State, it is entitled to navigate in the internal waters and territorial sea of that State. If the ship is a fishing vessel or an offshore platform, it has the right to fish or to explore and exploit resources in the territorial sea, exclusive economic zone and continental shelf of that State.

Second, the ship can enjoy a wide range of preferential treatment provided by the flag State on account of its nationality. Protectionism is a common practice among States for the purpose of developing domestic shipping industry. Generally, States will set restrictions on foreign vessels operating coastal shipping businesses and only the ships of the State are allowed to conduct such operations. In addition, preferential treatment provided for in bilateral or multilateral treaties of commerce and navigation signed between the flag State and other States is only available to ships that are granted the nationality; the ship also enjoys special treatment in shipping, taxation and shipbuilding subsidies in the flag State.

Third, nationality is the legal basis for the flag State to supervise and administer the ships and to safeguard their maritime safety. The flag State can exercise jurisdiction over and apply its national law to civil or criminal cases aboard occurring on the high seas or in foreign territorial seas or ports.

2. The Registration of Property Rights Only Has an Effect on a *Bona Fide* Third Party

As concerns property rights registration, the Property Law provides that the registration administration is only empowered to supervise changes to

property rights on real estates, whereas owners have no compulsory obligations of registering changes of rights to ships or any other movables. Therefore, the registration administration cannot demand registration items beyond the scope of its authority. At the same time, the chapters of "Delivery of the Movables" and "General Interest Obtained from Mortgage" in the Property Law state that "before registration … shall not be used against a *bona fide* third party". It is obvious that under the Property Law, the registration administration can only conduct a formality review on the registration of ships' property rights and it is up to the parties concerned to decide whether to register. The registration administration has no competence to review the substance of the relationship between the parties. Should the documentation submitted by the parties satisfy the procedural requirements, the registration administration shall register it.

Both the Property Law and the Maritime Code recognize that transfer of property rights is not binding on a third party unless registered and they both differentiate between verpflichtungsgeschäfte and verfügungsgeschäfte. Verpflichtungsgeschäfte is not limited by verfügungsgeschäfte; verpflichtungsgeschäfte is the factor leading to changes to verfügungsgeschäfte; changes of verfügungsgeschäfte is a result of performing verpflichtungsgeschäfte. The conditions for the creation of a verpflichtungsgeschäfte are the same as those for a normal legal right. Under the Property Law, change of ships' property rights is independent from the registration of ships' property rights and the registration only takes effect against a *bona fide* third party. The registration of ships' property rights does not create any rights, obligations or legal relationships, but merely confirms the changed property rights, with the effect of acting against a *bona fide* third party.

III. Conclusion

Due to differences in content, ship registration can be divided into two distinct types. Given their different legal natures, the registration of ships' nationality should be separated from the registration of ships' property rights. The nationality of a ship is acquired through registration and consequently, a new legal relationship is created. The registration of nationality not only involves procedural issues, but also substantive ones. And the acquisition of nationality is closely linked to the registration of ships' nationality. However, the registration of property rights to a ship is just a procedural issue and changes of property rights are determined by the consensus of the parties involved and delivery. The ship registration administration

only conducts a formality review over the registration of ships' property rights and registration of this kind only functions against a *bona fide* third party.

To conclude, the authors suggest the Regulations should be amended to keep in line with the Property Law: firstly, in chapter of General Provisions, registration of ships should be classified into the registration of ships' nationality and the registration of ships' property rights, and following the chapter of General Provisions a separate chapter ought to be devoted to "Nationality of Ship". This chapter should integrate the provisions on nationality in the chapter of General Provisions with the existing Chapter III "Nationality of Ship" and comprise registration of nationality, certificate of nationality, survey of ships, tonnage measurement certificate, load line certificate, ship equipments, and ships administration. Secondly, in subsequent chapters, the conditions and effects of registration of property rights including ownership, mortgage and bareboat charter should be spelled out on the basis of the Property Law. Thirdly, with the guidance of the Property Law, it should provide for procedures concerning advance notice of registration, registration review, dissidence registration, registration inquiries, among others, with a view to avoiding unnecessary statutory conflict. Such amendment will not only distinguish between the registration of ships' nationality and that of ships' property rights in terms of legal nature and improve the procedures for registering ships, but also rectify the disorganized structure of the Regulations, thereby maintaining the coherency and unity of the legal system and maximizing the efficacy of the ship registration system in the economic society.

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An Analysis of the Legal Issues in Lien Clause in the Time Charter Party

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Abstract: By referencing cases in the Commercial Court (England and Wales), this article focuses on the legal status of the lien clause in time charter parties under English law and analyzes the legal issues related to liened cargo, sub-freights, and sub-hires. It also discusses the legal effects of the lien clause in a time charter party under Chinese law.

Key Words: Time charter party; Cargo lien; Sub-freight lien; Sub-hire lien

I. Background

The time charter (T/C) has been the most widely used shipping arrangement in the international dry bulk cargo transportation market in recent years. Within the period of the charter, charterers may operate independently within the shipping zones defined in the time charter party and arrange the booking of cargo, sub-hiring, port rotation, loading, scheduling, etc. During this period, the master must obey the charterer's orders in operational matters. The hire, calculated by the day or by deadweight tonnage, is paid monthly.[1] As the only source of income from operating time-chartered vessels, the hire is essential for the shipowner. What measures could be taken if the charterer fails to pay the hire in full or on time? According to Article 5 of the New York Produce Exchange Time Charter 1946 (hereinafter "NYPE46"), if the charterer fails to pay the hire in full or on time, the shipowner may withdraw the vessel from service; Article 17 of the NYPE46 also permits the owners to resort to arbitration to recover economic losses. However, these measures have their own

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1 Yang Daming, *Time Charter*, Dalian: Dalian Maritime University Press LLC., 2007, p. 3. (in Chinese)

limits and specific purposes, and are not necessarily applicable or valid under all circumstances. With shipping on a time charter trip (TCT) basis prevalent today, when the shipowner intends to withdraw a ship from service, the ship is usually loaded with cargo and the bill of lading has already been issued and delivered to the innocent consignee. In this circumstance, why would the shipowner exercise his option to withdraw the ship and take the inevitable responsibility for the voyage? [2] Moreover, in a souring market, withdrawing the ship would enable the shipowner to claim only the arrears of the hire, and not the difference between the charges for the remaining contract term and market-rate hire. The exception is if the charterer's non-payment has amounted to an obvious repudiation of the contract.

In fact, the lien clause in a time charter party may also bear on the payment of the hire. For example, Article 18 of the NYPE46 prescribes that "[t]he Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Average contributions"; under Article 23 of the New York Produce Exchange Time Charter 1993 (hereinafter "NYPE93"), "[t]he Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire for any amounts due under this Charter Party, including general average contributions"; and Article 18 of the Baltimore Charter Party (hereinafter "BALTIME") states that the owners shall "have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any bill of lading (B/L) freight for all claims under this Charter." "[A]ny amounts due under this Charter Party" refer mainly to the hire owed by the charterer, and "all claims under this Charter" mainly target claims involving the hire. In effect, the lien clause gives the owner a lien on cargo, sub-freights, and/or sub-hires. However, can the clause guarantee, at least to a certain extent, that the shipowner will receive the full and punctual payment of the hire? At the same time, whether the cargo encumbered with a lien in favor of the shipowner belongs to the charterer is a question that receives completely opposite treatments under the lien clauses in the NYPE and the BALTIME. The next section will discuss whether the effective enforcement of the shipowner's lien is predicated on the charterer's ownership of the cargo.

II. A Case Study

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2 Yang Daming, *Time Charter*, Dalian: Dalian Maritime University Press LLC., 2007, p. 581. (in Chinese)

In *Steelwood Carriers Inc. of Monrovia, Liberia v. Evimeria Compania Naviera S.A. of Panama* (*The "Agios Giorgis"*),[3] the above-described issue was clarified to some extent by the Commercial Court (England and Wales): in a time charter, the shipowner does not have a lien on cargo that does not belong to the charterer, even though a lien clause is expressly included in the time charter party between the parties.

A. Facts of the Case

On July 6, 1972, Evimeria Compania Naviera S.A. (hereinafter "the owner") leased its ship, the *Agios Giorgis*, to Steelwood Carriers Inc. (hereinafter "the charterer") for transport between Korea, and Charleston and Norfolk in the United States on a TCT basis. The NYPE46 was used as the time charter party. On September 17, 1972, the charterer deducted $19,860 from the hire payment, claiming that the shipowner had violated the speed warranty; however, the shipowner contended that the charterer had no right to deduct the amount and ordered the master to refuse to unload at Norfolk, the next port of destination, until the deducted money was paid. The cargo was stranded on board from September 24 to September 26, and was finally unloaded when the charterer agreed to pay the deducted amount. Afterwards, the two parties began arbitration proceedings in London in accordance with the arbitration clause in the contract.

B. Major Disputes

The main disputes in the case were the following:

1. Did the charterer have the right to deduct $19,860 from the hire payment for his speed warranty claim?

2. If the answer to the first question is no, did the shipowner have the right to withdraw the vessel from service under Article 5 of the contract, and did his actions constitute a withdrawal?

3. Did the owner have the right to order the master to refuse to unload at Norfolk, and did his actions constitute a breach of his obligations in Article 8 of the

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3 See The Agios Giorgis, *Lloyd's Law Reports*, Vol. 2, 1976, pp. 192~204, at http://www.oab-pr.org.br/comissoes/relacoesinternacionais/Law%20documents/Carriage%20of%20Goods%20by%20Sea/7%20Time%20Charterparty/The%20Agios%20Giorgis.doc, 1 December 2008.

contract?

C. Results of the Arbitration

Mr. Clifford Clark, the arbitrator, believed that (1) the charterer was entitled to deduct only a portion of the $19,860 from the hire at the time of remittance; (2) the owner was entitled to withdraw the vessel from service under Article 5, but his actions did not constitute a withdrawal; and (3) under Article 8, the owner was not entitled to order the master to refuse to unload at Norfolk. Mr. Clifford Clark did not issue an arbitration award, but transferred the case as a special case to be decided by the Commercial Court (England and Wales).

D. Court Decision

Judge Mocatta of the Commercial Court (England and Wales) agreed with the arbitrator's opinion in its entirety. With respect to the second issue, Judge Mocatta held that if the charterer failed to pay the hire in full and on time, the shipowner was entitled to refuse to provide services by withdrawing the vessel under Article 5. However, he did not support the shipowner's assertion of his right of "partial or temporary suspension or withdrawal": either withdraw the vessel, or continue to provide services. Temporary withdrawal was not allowed under Article 5. Therefore, the third issue became the key issue.

With respect to the third issue, Judge Mocatta held that:

1. The shipowner neither informed the charterer that he was enforcing his lien on the cargo, nor communicated, by other means, his intent to do so. Instead, he simply refused to allow the master to unload at Norfolk until the charterer paid the deducted amount;

2. The freight under the B/L had been paid, and the cargo belonged to an American company and not the charterer. Because Article 18 violated mandatory statutes of the United States, it should be invalid, and the shipowner had no lien on cargo that did not belong to the charterer. Moreover, the B/L did not state in its incorporation clause that the cargo under the B/L would be bound by the lien clause in the time charter party;

3. Article 18 of the BALTIME[4] prescribed that the shipowner only "ha[d] a lien upon all cargoes ... belonging to the Time-Charterers"; and

4. According to English law, under Article 18, the shipowner had no lien on cargo that did not belong to the charterer.[5]

III. An Analysis of the Lien Clause in a Time Charter Party under English Law

A. The Concept and Nature of Liens

Under English law, a lien is a right of one person to retain and hold the property belonging to another until the former's claim against the latter is satisfied.[6] There is a wide variety of liens, such as the maritime lien, the equitable lien, the common law lien, etc. Many cases have discussed the definition and the nature of a lien. For example, in *Hammonds v. Barclay*, Judge Grose stated that "a lien [was] a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied"; *Great Eastern Railway Co. v. Lord's Trustee*, heard in the House of Lords, defined a lien as "the right to hold property of another until a claim is satisfied"; and according to *Molthes Rederi Aktieselskabet v. Ellerman's Wilson Line Ltd.*, "a lien is a claim by a person in possession of the property of another who has the right to keep possession until the owner pays the debt in respect of which the possessor is entitled to the lien."[7] Generally speaking, we can define the concept of liens from their characteristics as follows:

First, the effective exercise of a lien requires that (1) the creditor actually possess the debtor's property and maintain the possession until the debt is paid, and

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4 See BALTIME, Art. 18: "The Owners to have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter, and the Charterers to have a lien on the Vessel for all moneys paid in advance and not earned."

5 See The Agios Giorgis, *Lloyd's Law Reports*, Vol. 2, 1976, pp. 192~204, at http://www.oab-pr.org.br/comissoes/relacoesinternacionais/Law%20documents/Carriage%20of%20Goods%20by%20Sea/7%20Time%20Charterparty/The%20Agios%20Giorgis.doc, 1 December 2008.

6 David M. Walker, translated by Li Shuangyuan et al., *The Oxford Companion to Law*, Beijing: Law Press China, 2003, p. 700. (in Chinese)

7 Yang Liangyi, *Ship Finance & Mortgage*, Dalian: Dalian Maritime University Press LLC., 2003, p. 90. (in Chinese)

(2) the lienor be entitled to possess and keep the property, and have not forcibly seized or illegally possessed it.[8] Once the property is lost, the creditor can no longer exercise the lien.

Second, the property held by the creditor must belong to the debtor, in other words, the creditor cannot have a lien on property that belongs to a third party. Of course, this refers to the status of the ownership of property subject to lien implied by common law, and can be changed by explicit agreement between the parties involved.

Finally, the creditor's goal in retaining the debtor's property is to ensure the payment of the debt; *i.e.,* a lien is a kind of security interest. Lord Chancellor Browne-Wilkinson gave a precise definition of "security interest" in *Bristol Airport plc v. Powdrill*: "security is created where a person (the creditor) to whom an obligation is owed by another (the debtor) by statute or contract, in addition to the personal promise of the debtor to discharge the obligation, obtains rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtor's obligation to the creditor."[9]

B. The Legal Status of the Cargo Lien in a Time Charter Party

The decision of the case discussed above appears to be supported by law: *i.e.,* the shipowner should not have a lien on cargo that did not belong to the charterer despite an explicit lien clause in the time charter party. However, the authors believe that the decision of the case is in part incorrect. It is true that, in accordance with the status of liens implied by common law, the creditor can only have a lien on property that belongs to the debtor; however, the explicit terms between two parties are sufficient to change the liens' implied legal status. The lien clause in a time charter party is a good example.

Liens can be divided into four categories: the common law or possessory lien, the equitable lien, the maritime lien, and the statutory lien.[10] The common law or possessory lien, the most important type, is either implied by law or expressly

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8 Yang Liangyi, *Ship Finance & Mortgage*, Dalian: Dalian Maritime University Press LLC., 2003, p. 104. (in Chinese)

9 Yang Liangyi, *Ship Finance & Mortgage*, Dalian: Dalian Maritime University Press LLC., 2003, p. 85. (in Chinese)

10 Yang Liangyi, *Ship Finance & Mortgage*, Dalian: Dalian Maritime University Press LLC., 2003, p. 91. (in Chinese)

provided for by contract.[11] In other words, common law or possessory lien can be subdivided into legally-implied lien and contractual lien. In shipping, legally-implied lien includes the right to collect freights, general average contributions, special expenditures with respect to the cargo during the voyage, etc.,[12] while contractual lien arises from debts, such as demurrage, hires, sub-hires, etc. In the absence of any agreement in the contract, a creditor has the benefit of legally-implied lien but not contractual lien. In addition, the freedom of contract allows the parties to deviate from the common law, as long as public policy is not violated.[13]

The lien clause under the NYPE creates a contractual lien. Under Article 18, the shipowner is entitled to enforce his liens against his counterparty, the charterer. In addition, neither the NYPE46 nor the NYPE93 limits the shipowner's lien to property that belongs to the charterer. To the contrary, the lien clause in both documents provides that the shipowner shall have a lien on "all cargoes," as long as there is a debt under the charter. Everything has its *raison d'être*; and the parties change the reach of the legally-implied liens in the time charter party because most of the cargo on board today does not belong to the charterer. Even an FOB buyer who intends to charter a vessel usually retains another company to act as the charterer, or a relevant company as the operator.[14] Therefore, the lien clause in the BALTIME, which limits the extent of the owner's lien to property belonging to the charterer, is practically meaningless: the cargo involved in international trade today often does not belong to the charterer under the time charter party. In other words, to guarantee stable income from the payment of hire through the effective enforcement of liens, the owner must change the extent of the legally-implied lien through an explicit lien clause in the time charter party.

The Commercial Court (England and Wales) changed its views toward the above-described legal issue soon after *The Agios Giorgis* case was decided. In *The Aegnoussiotis*,[15] Lord Chancellor Donaldson held that contractual provisions should

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11 Yang Liangyi, *Ship Finance & Mortgage*, Dalian: Dalian Maritime University Press LLC., 2003, p. 92. (in Chinese)

12 *Scrutton on Charterparties and Bills of Lading*, 19th ed., Art. 183 states: "By common law he has a lien for: (i) freight; (ii) general average contributions; (iii) expenses incurred by the ship Owners or master in protecting and preserving the goods."

13 Yang Liangyi, *Ship Finance & Mortgage*, Dalian: Dalian Maritime University Press LLC., 2003, p. 94. (in Chinese)

14 Yang Daming, *Time Charter*, Dalian: Dalian Maritime University Press LLC., 2007, p. 585. (in Chinese)

15 See Aegnoussiotis Shipping Corporation of Monrovia v. A/S Kristian Jebsens Rederi of Bergen (The Aegnoussiotis), *Lloyd's Law Reports*, Vol. 1, 1977, p. 268.

be interpreted literally as long as they were clear. Since the contract stated that "the owner shall have a lien upon all cargoes," the court should not limit the cargo to that belonging to the charterer and completely ignore and distort the word "all". Of course, if the cargo belonging to a third party is retained by the shipowner under the time charter party, the third party (*i.e.*, the innocent consignee) is entitled to press the shipowner for immediate delivery of the goods under the B/L. The consignee is not a party to the charter, and he is concerned only with paying all his debts to the shipowner under the B/L. However, the charterer cannot protest against the shipowner under the time charter party, or force unloading, or claim losses against the shipowner arising from the shipowner's unjustified retention of the cargo: it is expressly provided in Article 18 that the shipowner shall have a lien on "all cargoes". If the provision of a lien is not permitted by the B/L that has nothing to do with the charterer; the B/L is simply a contract of carriage between the consignee and the shipowner. In other words, the legally-implied liens under common law have been modified by the explicit lien clause, so that the shipowner has a lien on cargo that does not belong to the charterer to guarantee his hire income. The major dispute in both cases discussed above was whether the shipowner could enforce his liens in accordance with the lien clause under the time charter party, but the results were completely different.

Basing on the above analysis, the authors believe that the extent of liens implied by common law can be changed by a lien clause agreed on by the parties. Therefore, the decision of *The Aegnoussiotis* is correct. The decision was also supported by other judges in subsequent cases. [16]

C. The Inconsistency between the Cargo Lien in a Time Charter Party and the Bill of Lading Holder's Right of Taking Delivery of Cargo

As discussed above, the lien clause in a time charter party is an express provision between the parties to the contract and can, in effect, change the status of liens implied by law: when the shipowner enforces his lien, he does not have to consider whether the cargo belongs to the charterer. However, the shipowner does need to consider his legal relationship with the B/L holders when enforcing a lien.

16 See The Cebu, *Lloyd's Law Reports*, Vol. 1, 1983, p. 302; The Miramar, *Lloyd's Law Reports*, Vol. 2, 1983, p. 319.

In other words, whether he assumes the status of a carrier under the B/L, rather than whether the cargo belongs to the charterer, determines whether the shipowner is entitled to exercise a lien in accordance with the provisions of the B/L.

In international bulk cargo transportation, the time charterer usually requires the master (or his agent) to issue a B/L on behalf of the shipowner.[17] The shipowner then becomes the carrier and is in a contractual relationship with the B/L holder. Although the lien clause, which allows the shipowner to enforce a lien when the charterer fails to pay the full amount of the hire on time, is expressly included in the time charter party, it is not part of the B/L. The time charter party is a contract to lease a vessel, which is a matter of an entirely different nature from the subject of the B/L, a contract of carriage.[18] Therefore, the contract incorporated into the B/L is a voyage charter party between the sub-shipowner (the time charterer) and the voyage charterer. A voyage charter party usually includes a lien clause. For example, Article 8 of the Gencon Voyage Charter Party (hereinafter "GENCON94") states that "[t]he Owner shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, dead freight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering same." This lien clause is a contractual lien provision: dead freights, demurrage, and claims for damages for demurrage are not debts for which the common law implies liens in favor of the owner. Hire is not included among these enumerated debts, which means that the shipowner has no right to enforce a lien against the cargo under the B/L in order to demand the B/L holder to discharge a debt under the T/C. If the shipowner takes these actions, the innocent B/L holder may be prompted to respond by, for example, asking the court to detain the vessel or for injunction to force unloading. Further, after unloading, the B/L holder may also accuse the shipowner of breaching the contract (if the Hague Rules are applicable, reasonable dispatch is required under the B/L) and claim damages for delay. This type of damages is fully recognized under English common law.[19]

Here lies the problem: on one hand, the lien clause in the time charter party gives the shipowner a lien on the cargo, even if the cargo does not belong to the charterer; on the other hand, according to the lien clause incorporated into the B/L, the shipowner has no lien on the cargo, and the B/L holder may force unloading.

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17 Yang Daming, *Time Charter*, Dalian: Dalian Maritime University Press, 2007, p. 472. (in Chinese)

18 See The SLS Everest, *Lloyd's Law Reports*, Vol. 2, 1981, p. 389.

19 See The Heron II, *Lloyd's Law Reports*, Vol. 2, 1967, p. 457.

What practical solutions are available to the shipowner?

D. The Shipowner's Solutions

The authors believe that shipowners should understand the holding of *The Aegnoussiotis*. After all, arbitration results subsequent to the decision have been inclined to accept the views expressed in the case. As soon as the charterer fails to pay the hire, the shipowner may retain the cargo to force the charterer to pay the hire regardless of whether the cargo belongs to the charterer. Because the cargo lien is essentially contractual, the shipowner can obviously enforce the lien against his counterparty, the charterer. The usual manner of enforcement is to order the master to anchor the vessel in the anchorage of the port of discharge and to refuse to unload in the berth.[20] The shipowner should first communicate his intent to enforce the lien to the charterer beforehand: on one hand, it pressures the charterer to pay the late hire or the amount deducted from the hire, and on the other hand this reasonable action indemnifies the shipowner from claims for damages resulting from unjustified cargo retention. Since the charterer cannot justify a refusal to pay the hire, he bears the risks related to the loss of time. And as for the B/L holder's claim for the delay in the delivery: Can the shipowner be indemnified under the Time Charter Party for the damages paid to the B/L holder? If the shipowner or the master unjustifiably detains the cargo and causes the charterer to sustain losses, with full knowledge that the cargo does not belong to the charterer and that they have no lien on the cargo based on the B/L, then the shipowner cannot maintain a claim against the charterer for indemnification. The exception is when the shipowner was unaware of the true ownership of the cargo or the provisions in the B/L, but that is rarely the case. In reality, the above practice is effective in compelling reputable charterers to pay the debt or provide an arbitration guarantee, as reputable charterers will care about avoiding a greater loss of time. In the meantime, the B/L holder will also pressure the charterer to expedite unloading.[21] However, if the charterer is a shell corporation or about to go bankrupt, neither pressure from the owner nor the B/L holder would be helpful.

In the international liner shipping market, most shipping lines have their

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20 See The Chrysovalandou Dyo, *Lloyd's Law Reports*, Vol. 1, 1981, p. 159.

21 Yang Daming, *Time Charter*, Dalian: Dalian Maritime University Press LLC., 2007, p. 587. (in Chinese)

own vessels and the B/Ls usually bear their letterheads. When a shipping line has insufficient capacity, it may charter ships from other shipowners, but the B/Ls would still bear the shipping line's own letterhead. In other words, the instruments issued by a shipping line are usually B/Ls for the charterer, which means that the shipping line assumes the legal status of a carrier. In this case, the conflict between the lien clause in the time charter party and the B/L holder does not exist because the shipowner and the B/L holder are not in a contractual relationship. If the shipping line fails to pay the hire on time, the shipowner can withdraw the vessel and terminate the contract[22] or enforce the lien to pressure the charterer. In this manner, the charterer bears all the risk, and the shipowner is indemnified from claims by the B/L holders.

E. Solutions for the Charterer

The authors believe that the charterer has the following options when the shipowner enforces a lien on the cargo. First, since the lien clause in the time charter party is contractual, the parties can enter into an agreement to modify the provisions of the NYPE. For example, after the words "the Owner shall have a lien on all cargoes," they can add "but only restricted to those cargoes belonging to the Charterer at the time of exercise of lien under this clause." With this modification, the shipowner will not be entitled to retain the cargo that does not belong to the charterer. Second, if the lien clause in the time charter party cannot be modified as described above, a charterer who is concerned with his reputation would of course make efforts to stop the shipowner from retaining the cargo. After all, the charterer bears the risks of the loss of time arising from the retention. In this situation, the charterer may want to provide an adequate guarantee to the court or an arbitration agency, so that the cargo can be unloaded as soon as possible and unnecessary losses can be avoided.[23] Finally, the charterer may also make use of the conflict between the lien clause in the time charter party and the B/L holder. From the above analysis, it is evident that the owner does not have a lien on the cargo under the B/L, and the charterer may pressure the owner through the B/L holder. Typically, the B/L

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22 Yantai Shippers in Ship Withdrawal Crisis, with Cargo Unloaded at Hong Kong Pier, at http://www.mysteel.com/11/hydx/hyyw/2008/08/25/092944,0,0,1856519.html, 1 December 2008. (in Chinese)

23 Yang Daming, *Time Charter*, Dalian: Dalian Maritime University Press LLC., 2007, p. 587. (in Chinese)

holder can ask a court to force unloading under the B/L because the B/L holder has paid the freight due, while the shipowner's refusal to unload is an obvious breach of his obligation of reasonable dispatch. If the B/L issued is for the charterer and the shipping line, as both the charterer and the carrier, is involved in two different contracts, any breach of the obligations under either contract would cause a ripple effect. Once the charterer fails to pay the hire on time and the shipowner enforces the lien, the sub-charterers may assert a claim against the charterer. Therefore, the charterer should give priority to the first two options.

F. The Sub-Freight Lien and the Sub-Hire Lien

In fact, the lien clause in a time charter party creates a lien not only on all cargo, but also on all sub-freights or sub-hires. Like the cargo lien, the sub-freight lien and the sub-hire lien are also contractual. However, the term "lien" is not accurate because the sub-freight is not held by the owner. It is in fact an equitable assignment.[24] Different points of view exist in this regard. Some scholars believe that the "lien" is a right to intercept the freight or hire that the charterer is supposed to pay to the owner.[25] The authors favor the theory of equitable assignment. A valid assignment includes the following elements: (1) notice of the assignment, which may be given to the sub-charterer by the shipowner directly, or by the charterer; (2) the notice of the assignment must specify the debt due under the time charter party, *i.e.*, the amount of the freight under the voyage charter party that would be assigned; and (3) the freights under the voyage charter party have not been paid to the charterer. However, in the international dry bulk cargo transportation market, freight is usually prepaid, and it is difficult to meet the conditions for equitable assignment. Therefore, the "lien" on the sub-freights provided in the lien clause in the time charter party provides almost no protection for the shipowner.

In comparison, the sub-hire lien protects the owner to a greater extent. Unlike freight, hire accrues gradually and is not paid in one or multiple lump sums. This arrangement leaves the shipowner time and opportunity to enforce the lien on sub-

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24 See The Cebu, *Lloyd's Law Reports*, Vol. 1, 1983, p. 302. "On the true construction of cl. 18 I would hold that (Charterer) has assigned to the Owners by way of equitable assignment, not only subfreights due to it as Charterer."

25 See Michael Wilford, Terence Coghlin and John D. Kimball, *Time Charters*, 5th ed., London: Lloyd's of London Press Ltd, 2003, p. 534 ("It operates not as a right to retain possession of something already in the Owners, possession but as a right to intercept that which is moving from a third party to the Charterers.").

hires. However, there has been some controversy as to whether the owner may have a lien on sub-hires because the NYPE46 only includes sub-freights and not sub-hires. Are sub-hires in fact included in the sub-freights? With respect to this issue, the Commercial Court (England and Wales) has issued two completely different decisions. In *The Cebu*, Judge Lloyd used a broad interpretation and held that the sub-freights included not only sub-freights, but also sub-hires. However, subsequently in *The Cebu (No. 2)*, Judge Steyn reviewed Judge Lloyd's arguments and believed that the scope of sub-freights could not be extended to include sub-hires. The more recent decisions from the courts at the same level usually have greater authority; however, due to the reasons stated in the earlier decision, this issue is still highly contentious. Therefore, the NYPE93 expressly includes sub-hires to avoid unnecessary disputes.

In practice, as soon as the shipowner obtains the sub-charterer's information, the shipowner will send a notice with regards to the sub-hire lien to the sub-charterer and as many other parties in interest as possible. If all goes smoothly, the charterer will recognize the shipowner's lien and the sub-charterer pays the sub-hire to the shipowner. However, the charterer usually refuses to recognize the validity of the shipowner's lien and directs the sub-charterer to pay the sub-hire directly to him. This leaves the sub-charterer in a dilemma. On one hand, the sub-charterer has already received a valid notice from the shipowner; if the sub-charterer ignores the shipowner's lien and pays the sub-hire directly to the charterer, the sub-charterer risks paying the sub-hire a second time, to the shipowner. On the other hand, the charterer is the person with whom the sub-charterer has a contractual relationship; if the sub-charterer pays the sub-hire to the owner without ascertaining whether the shipowner in fact has a lien on the sub-hire, the sub-charterer may pay the sub-hire a second time, to the charterer. Therefore, the reasonable choice for the sub-charterer is to remit the sub-hire to an escrow account established between the shipowner and the charterer, and the sub-hire will be distributed in accordance with the eventual arbitration award. After all, the sub-charterer has to pay the sub-hire one way or the other. Once he remits the sub-hire to the escrow account, he no longer has to be involved in the dispute. The shipowner should also encourage this deposit into the escrow account, as he would have a chance to be awarded the sub-hire as long as it has not been paid to the charterer. If the sub-charterer is worried that the charterer may deduct from his deposit, the shipowner can transfer part or all of the creditor's rights against the charterer to the sub-charterer. The sub-charterer can then propose to set off his debt to the charterer with the creditor's

rights transferred from the owner. In short, the shipowner should first of all request the sub-charterer to stop paying the sub-hire.

IV. An Analysis of the Lien Clause in the Time Charter Party under Chinese Law

A. The Concept and Nature of Liens

The nature of a lien can be found in Chinese statutes. Article 89 of the General Principles of the Civil Law provides: "[i]f a party has possession of the other party's property according to contract, and the other party violates the contract by failing to pay a required sum of money within the specified time limit, the possessor shall have a lien on the property and may keep the retained property to offset the debt or have priority in satisfying his claim out of the proceeds from the sale of the property pursuant to relevant legal provisions." Article 82 of the Guaranty Law states: "'[l]ien' as used in this Law means that the creditor shall possess the debtor's movables according to the terms of the contract as provided by Article 84 of this Law. If the debtor defaults on his debt, the creditor shall be entitled to retain the property in accordance with the provisions of this Law and to the priority of having the debt paid with the money converted from the property or proceeds from sale or auction of the property." And Article 230 of the Property Law, adopted at the 5th Session of the 10th National People's Congress on March 16, 2007, states that "[i]f a debtor defaults, the creditor may retain the debtor's movables which have been legally possessed by the creditor and shall have priority in being paid with the said property. The creditor mentioned in the preceding paragraph is the lien holder, and the movables in his possession are the retained property."

Under Chinese civil law, a lien is the right of the person – while in legal possession of the debtor's property – to retain the property and to enjoy priority in satisfying his claim from the property upon the debtor's default on the debt owed to him. It includes four elements. First, the term for the discharge of the debtor's obligation has expired,[26] meaning that the debtor has defaulted on his debt. Second, the lien creditor's possession and retention of the debtor's property is legal (while the possession or retention of a third party's property is illegal). Third, there is

26 Liang Huixing ed., *A Study of the Property Law of the PRC (II)*, Beijing: Law Press China, 1998, p. 1011. (in Chinese)

a relationship between the lien creditor's rights and the retained property.[27] For example, claims for repairs, freights, and custody fees arise from the contracts involving the property, and the lien creditor's rights are created in relation to the property.[28] Fourth, the lien creditor has priority in satisfying his claims, meaning priority over ordinary creditors. However, his rights are inferior to real rights for security, such as mortgages and priority rights.

B. The Lien Clause in the Time Charter Party

In fact, the lien in Chinese civil law is very similar to the lien in English law, and can also be divided into statutory and contractual liens. Provisions regarding statutory liens in the arena of international shipping are found in Articles 87 and 141 of the Maritime Code. Article 87 states, "[i]f the freight, contribution in general average, demurrage to be paid to the carrier and other necessary charges paid by the carrier on behalf of the owner of the goods as well as other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier may have a lien, to a reasonable extent, on the goods." Article 141 states, "[i]n case the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the shipowner shall have a lien on the charterer's goods, other property on board and earnings from the sub-charter." Both are statutory liens, but their legal effects are different. The former is included in Chapter IV: Contract of Carriage of Goods by Sea as a mandatory provision, while the latter is included in Chapter VI: Charter Parties as an elective provision and only binding when there is no agreement, or no agreement distinct from the statute, between the parties. The latter, like the BALTIME, gives the shipowner a lien only on cargo that belongs to the charterer. It follows that the lien clause in the NYPE, which creates a contractual lien, takes precedence over Article 141 of the Maritime Code, and the shipowner has a lien on all cargo and not only the cargo that belongs to the charterer.

After concluding that the NYPE lien clause is applicable preferentially, we

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27 See Judicial Interpretation of the Supreme People's Court on Some Issues Regarding the Application of Guaranty Law of the People's Republic of China, Art. 109: "If the term for discharge of the debtor's obligation has expired and the possession of the movables by the creditor of such obligation is linked to the incurrence of the obligation, the creditor has a lien on the movables in his possession."

28 Shi Shangkuan, *A Discussion of Property Law*, Taiwan: Rongtai Press, 1979, pp. 451~452. (in Chinese)

still need to analyze whether the shipowner assumes the legal status of a carrier who is bound by the B/L. Under English law, legal precedents give guidance for the identification of the carrier; in China, which operates under the civil law system, the carrier is identified by statute. Article 42(1) of the Maritime Code defines a carrier as "the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper." Article 72 states, "[w]hen the goods have been taken over by the carrier or have been loaded on board, the carrier shall, on demand of the shipper, issue to the shipper a B/L. The B/L may be signed by a person authorized by the carrier. A B/L signed by the Master of the ship carrying the goods is deemed to have been signed on behalf of the carrier." Under these provisions, it is impossible for the shipowner to contact the shipper directly and enter into a contract of carriage of goods by sea with the shipper. The shipowner is not the carrier; the charterer who has leased the ship from the shipowner is the carrier that enters into a time charter party with the shipper. Regardless of whether the B/L is signed by the charterer, the charterer's agent, or the master, it is regarded as the charterer's B/L. This is obviously different from English law, where a contract of carriage by sea already exists before the B/L is issued, and the B/L either proves or includes the provisions of the contract. Before a B/L is issued, the mate's receipt is an evidence of the contract of carriage until it is replaced by the B/L.[29] For a B/L holder other than the charterer (including the shipper as well as other B/L holders), the B/L is the sole criterion for identifying the holder: if the B/L is signed by or in the name of the master, it is deemed as a shipowner B/L; if it is signed by the charterer and provides that the charterer will assume the status of the carrier, it is a charterer's B/L.[30] Leaving aside for the reasonableness of the provisions in the Maritime Code, if all B/Ls are deemed as charterers' B/Ls, the shipowner does not have to take the B/L holder's delivery request into consideration when enforcing a lien.

V. Conclusion

In sum, the lien in the time charter party is a contractual lien. It only binds the charterer and not the B/L holder. In *The Agios Giorgis*, the Commercial Court

29 See Pyrene Co Ltd. v. Scindia Steam Navigation Co Ltd., *Lloyd's Law Reports*, Vol. 1, 1954, p. 321; *Queens Bench Division*, Vol. 2, 1954, p. 420.

30 At http://www.cpiweb.org/showonenews.jsp?news_id=31, 1 December 2008. (in Chinese)

(England and Wales) made it clear that the legal status of liens implied by common law can be changed by a lien clause in a time charter party, and the shipowner may have a lien on cargo that does not belong to the charterer when the charterer unreasonably withholds part of the hire. This is, of course, a contractual right under the time charter party. A shipowner who is also the carrier under the B/L may have to entertain claims from the B/L holder. Still, the charterer bears the risk of the loss of time arising from the enforcement of liens. Therefore, the lien clause in the time charter party is still useful for the shipowner for recovering unjustified deductions from the charterer; after all, most charterers intend to be in business for the long term. But more often, the shipowner's demand to retain cargo is simply a means to turn the heat on the charterer, and the shipowner usually achieves the desired result before it becomes necessary to turn to the courts and auction the cargo. Before enforcing the sub-freight lien and the sub-hire lien, notice should be issued in a timely manner and when necessary, an injunction should be requested from the courts to stop payment of the sub-freight and the sub-hire to the charterer: once the money is paid to the charterer, a valid equitable assignment would be impossible. It would be wise for the shipowner to have the charterer agree to have the sub-freight and sub-hire remitted to an escrow account and the money awarded to the prevailing party of the arbitration proceeding. In addition, Chinese law also recognizes the validity of the lien clause in a time charter party. According to the relevant provisions in the Maritime Code, in most circumstances the shipowner under the time charter does not assume the status of a carrier under the B/L. Therefore, he would be better able to use the lien clause in the time charter party to protect his hire income.

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A Comparative Study of Three UNCLOS Regimes and Their Impact on Seabed Resources

LI Jinrong* FANG Yinxia** ZHOU Jianping***

Abstract: The gradual depletion of land resources has made the strategic position of marine resources increasingly prominent. Since the United Nations Convention on the Law of the Sea (UNCLOS) came into effect in 1982, all countries in the world have been paying more and more attention to maritime rights and interests and marine resources, while launching extensive exploration into seabed resources as well as relevant legal research, in an attempt to maximize their respective marine space and maritime rights and interests under the UNCLOS framework. Thus, faced with the severe situation of international ocean, we should strengthen the legal theory and practice studies of the UNCLOS. This paper mainly expounds the exclusive economic zone, continental shelf and international deep seabed area regimes established under the UNCLOS and their relationship between each other, with particular emphasis on the relevant provisions concerning outer limits of continental shelf contained in Article 76 of the UNCLOS. Finally, the authors make a preliminary analysis of the effect on the ownership and distribution of the global seabed resources exerted by coastal States' determination of their outer limits of continental shelves.

Key Words: Exclusive economic zone regime; Continental shelf regime;

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International deep seabed area regime

The United Nations Convention on the Law of the Sea (UNCLOS), which was open for signature on December 10, 1982 and came into effect on November 16, 1994 for those countries which ratified it and became members of the UNCLOS, provided a comprehensive framework for the management of most oceans in the world for the first time.

The development of science and technology enables the research and exploitation of the oceans to go deeper, which, however, also gives rise to various problems. The UNCLOS, as a law on ocean governance, provides basis and means for all countries in the world for maritime dispute settlement. Therefore, it is of great importance to conduct a careful study of the UNCLOS, especially the regimes newly established under it, so as to guarantee the legitimate maritime rights and interests of all countries.

This paper mainly deals with the regimes of the exclusive economic zone (EEZ), the continental shelf and the international deep seabed area established under the UNCLOS and their relationship between each other, which is followed by a study on the relevant provisions regarding delimitation of the continental shelf in Article 76 of the UNCLOS, and the necessary explanation on how to delimit the outer limits of the continental shelf. Finally, a preliminary analysis on the effect on the future distribution of the global marine resources brought by coastal States' determination of outer limits of continental shelf is provided.

I. Three Regimes Established in the UNCLOS and Their Relationship between Each Other

The Geneva Convention on the Law of the Sea, adopted by the First United Nations Conference on the Law of the Sea in 1958, divided the ocean areas into four types: the territorial sea, the contiguous zone, the high seas and the continental shelf. The UNCLOS adopted in 1982 added the EEZ, the international seabed area and the archipelagic waters (Fig. 1).[1] It should be noted that "continental shelf" in the UNCLOS, different from that in the Geneva Convention on the Law of the

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1 International Cooperation Office of State Oceanic Administration, *The Outer Limits of the Continental Shelf – The Intersection of Science and Law (Internal Material)*, 2003, p. 8. (in Chinese)

Sea, is a brand new concept and that "high seas" and "international seabed area" have different division principles, which respectively depend on the outer limits of the EEZ and of the continental shelf. This paper focuses on the three regimes established by the UNCLOS, namely, the regimes of the EEZ, the continental shelf and the international deep seabed area.

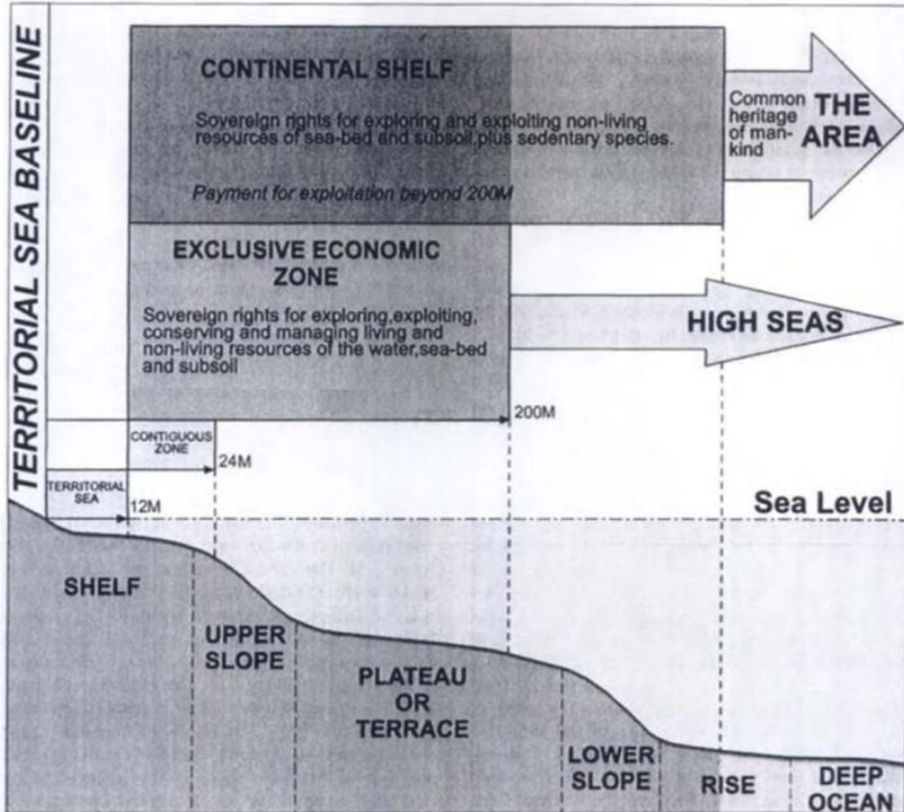

Fig. 1 Maritime Zones and Their Relationship to Submarine Topography[2]

A. The EEZ Regime

As mentioned above, the EEZ was a new regime established in the Third UN Conference on the Law of the Sea (UNCLOS III), and refers to an area beyond and adjacent to the territorial sea and not extending beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The major

2 Peter J. Cook and Chris M. Carleton, *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford: Oxford University Press, 2000, p. 10.

features of EEZ regime in the UNCLOS is as follows:

Regarding the range of EEZ, Articles 55 and 57 of the UNCLOS provide that the EEZ is an area beyond and adjacent to the territorial sea and shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Meanwhile, Article 56(1) of the UNCLOS states that the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil in the EEZ. Thus it can be seen that the coastal State only has sovereign rights over natural resources of the area beyond and adjacent to the territorial sea and shall not extend beyond 200 nautical miles, and these sovereign rights are comprehensive but exclusive. What should be noted in this regard is that the jurisdiction of the coastal State over the natural resources in the EEZ mainly covers the exploration, conservation and exploitation of living resources, as Article 56(3) of the UNCLOS provides that the rights of the coastal State with respect to the seabed and subsoil shall be exercised in accordance with Part VI (Continental Shelf).[3]

As to the delimitation of the EEZ, generally it is a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. For those coastal States with opposite coasts which are separated from each other by waters less than 400 nautical miles, disputes exist due to overlapping claims. During the UNCLOS III, the supporters of the equitable principle were uncompromisingly opposed to those of the equidistance principle on the applicable principle in the delimitation of the EEZ. Given the failure of the two parties to reach an agreement, the Chairman of the Conference put forward an eclectic proposal, which was eventually adopted. The provisions on the delimitation of the EEZ are mainly contained in Article 74 of the UNCLOS.

B. The Continental Shelf Regime

As provided in Article 76 of the UNCLOS, "[t]he continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from

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3 Jin Yongming, On the Exclusive Economic Zone and the Continental Shelf Systems, *Journal of Social Sciences*, No. 3, 2008, pp. 123~131. (in Chinese)

the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." That is to say, the term "continental shelf" defined in Article 76 of the UNCLOS and relevant rules is a legal concept which refers to the outer edge of the continental margin.

Regarding the range of the continental shelf, if we follow Article 76 of the UNCLOS, the outer limits of the continental shelf fall into two categories: first, that continental shelf extending up to 200 nautical miles in the event that the natural prolongation is less than 200 nautical miles; second, that continental shelf that shall not extend beyond 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2500 meter isobaths, in the event that the natural prolongation extends beyond 200 nautical miles.

As for the delimitation of the outer limits of the continental shelf, Article 76(8) of the UNCLOS provides that information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

Finally, in relation to the principle of the delimitation of the continental shelf between States with opposite or adjacent coasts, it must be noted that scholars worldwide have various opinions. In light of past delimitation cases, three kinds of principles have been roughly adopted: the natural prolongation principle, the median line (equidistant line) principle, and the equitable principle. In the absence of disputes, the natural prolongation principle will first apply, with the equitable principle also taken into account. Conversely, in an area with overlapping claims, the natural prolongation principle and the equitable principle will be given priority, while the equidistance method might be used in case judgment. The median line (equidistant line) principle is a convenient delimitation method, and under the rules of customary law, it can be adopted only when equitable results will consequently

be generated;[4] and some maintain that this method should not be considered a delimitation principle, because only the median line (equidistant line) principle, which conforms to the equitable principle, can be accepted. The natural prolongation principle is the legal ground for the delimitation of the continental shelf, serving as the basis for delimitation; the equitable principle is the basic principle and goal of the delimitation of continental shelf. These two principles are generally accepted principles in the delimitation of continental shelf, and have been part of customary international law, being of great guiding significance in the practice of the delimitation of the continental shelf.[5]

C. The International Deep Seabed Area Regime

The international deep seabed refers to the seabed, ocean floor and subsoil beyond the limits of national jurisdiction.

Professor Arvid Pardo, Ambassador of Malta, suggested in his proposal at the United Nations General Assembly in 1967 that the international community should declare the seabed, ocean floor and subsoil beyond the limits of national jurisdiction as the common heritage of mankind, and that international regulatory institutions including a management authority, should be established to manage the resources of that area in order to maintain peace. Professor Pardo's proposal initiated the deliberation and discussion about the legal status of the international deep seabed area and the regime of resource exploitation in the international community. After deliberation and discussion at the UN General Assembly and the UNCLOS III, the concept of the "international deep seabed area" was finally clearly provided for in the 1982 UNCLOS. The due legal status of the principle of common heritage of mankind was thus established, and has further developed into a basic principle of the law of the sea.

The UNCLOS has not only enriched the content of the concept "common heritage of mankind" proposed by Professor Pardo and the principles contained in the Declaration on Principles of International Law adopted by the UN General Assembly in 1970, but also established the International Deep Seabed Area Regime

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4 Zhao Qinglong, Practice of International Law on the Principle of the Delimitation of the Continental Shelf, *Science & Technology Information*, No. 8, 2008, pp. 153~154. (in Chinese)

5 Chen Yi, On the Principle of the Delimitation of the Continental Shelf, *Journal of the Graduates Sun Yat-Sen University (Social Sciences)*, No. 3, 2001, pp. 114~121. (in Chinese)

(hereinafter "'the Area' regime"), based on the principle of common heritage of mankind, thus substantially promoting the development of the law of the sea.

In the authors' view, the main purpose for the UNCLOS in establishing "the Area" regime is to exploit the resources within the limits of the "Area" in a reasonable and well-organized way, because the "Area" boasts abundant submarine resources, such as cobalt-rich crust, polymetallic nodules, natural gas hydrate, submarine hydrothermal sulfide, seep sea biological gene resources concomitant with the hydrothermal sulfide deposit, etc. For example, the polymetallic nodules rich in mineral resources like manganese (Mn), copper (Cu), nickel (Ni) and cobalt (Co), are important strategic resources highly valued by all countries, especially a small number of Western industrialized countries, which possess the technology and capital for their exploitation. Therefore, the exclusive rights of the explorers and exploiters must be guaranteed in order to make sure that all countries are able to explore and exploit various resources in the "Area".[6]

D. Relation and Distinction between the Three Regimes

1. EEZ vs. Continental Shelf

The main distinctions between the two regimes are the following: 1) Different purposes in establishment. The main purpose of establishing the continental shelf regime is to exploit the submarine mineral resources, which places particular emphasis only on the jurisdiction of the coastal State over the exploration and exploitation of the mineral resources originally in the high seas; the main purpose of establishing the EEZ regime is to retain the jurisdiction of the coastal State over the exploitation of the fishery resources, while placing emphasis on the jurisdiction over activities related to the economy. 2) Different legal bases. The coastal State's title over the continental shelf does not depend on the occupation or declaration of the continental shelf but is based on facts. The coastal State's title over the EEZ is different, in that unless the coastal State declares its claim over the EEZ, the waters remain part of the high seas. In other words, the coastal State's title over the continental shelf is inherent, while its entitlement over the EEZ should be based on international treaties, and should be effected with certain declaratory action. 3)

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6 Jin Yongming, *Study on the Legal Status and Resources Development Regimes of International Seabed Area*, Shanghai: International Law of East China University of Political Science and Law, 2005. (in Chinese)

Different ranges of jurisdiction. 200 nautical miles is the maximum range of the EEZ but is the minimum range of the continental shelf, the farthest range of the latter being 350 nautical miles or 100 nautical miles from the 2500 meter isobaths. 4) Different contents of the rights involved. The sovereign rights of the coastal State in the EEZ cover living resources and non-living resources, including the water body, the seabed and its subsoil, while the sovereign rights of the coastal State over the continental shelf are limited to the mineral resources and non-living resources of seabed and subsoil, as well as sedentary species.

However, the EEZ and the continental shelf are related to each other, which is mainly manifested as follows: 1) Rights over the seabed and the subsoil. According to Article 56(3) of the UNCLOS, the rights of the coastal State with respect to the seabed and subsoil in the EEZ shall be exercised in accordance with the continental shelf regime. Therefore, the continental shelf regime precedes the EEZ regime with respect to rights over the seabed and subsoil. 2) Article 76(1) of the UNCLOS, concerning the definition of the continental shelf, provides that the continental shelf of the coastal State can extend to a distance of up to 200 nautical miles where the outer edge of the continental margin does not extend up to that distance, thus introducing the 200-nautical-mile distance standard of the EEZ. 3) The artificial islands, installations and structures on the continental shelf. Article 80 of the UNCLOS provides that Article 60 pertaining to the EEZ applies *mutatis mutandis* to the artificial islands, installations and structures on the continental shelf. 4) Pollution by dumping and enforcement with respect to pollution by dumping. The provisions in Articles 210 and 216 of the UNCLOS are applicable to both the EEZ and the continental shelf. That is to say, the EEZ and the continental shelf are subject to the same regulations in this respect.

From the above analysis, it can be perceived that the EEZ regime and the continental shelf regime are related mainly for their mutual adjustment or coordination. Therefore, the EEZ regime and the continental shelf regime are at once independent and irreplaceable, and their distinctions are also reflected in the factors that should be taken into account in the delimitation of maritime zones.[7]

2. International Deep Seabed Area vs. Continental Shelf

The determination of the international deep seabed area is ultimately subject

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7 Jin Yongming, *Study on the Legal Status and Resources Development Regimes of International Seabed Area*, Shanghai: International Law of East China University of Political Science and Law, 2005. (in Chinese)

to the delimitation of the outer limits of the continental shelf of the coastal States. Hence the outer limits of the continental shelf are the key to determining the range of the international deep seabed area.

The relationship between the EEZ regime, the continental shelf regime and "the Area" regime is shown in Fig. 1.

II. The Connotation of the Continental Shelf Regime Established under the UNCLOS

A. Relation and Distinction between Concepts of the Continental Shelf in Law and Geology

1. The Definition of Continental Shelf in the UNCLOS

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. "The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6" of Article 76. "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

2. The Continental Margin in Science[8]

The shelf is the submerged prolongation of the land and its natural prolongation. Generally it only encircles the gentle seabed with an extremely slight slope around the continent and the sublittoral, extending from the coast (mainly referred to as the low water line) to the deep sea until the continental shelf breaks with a remarkably increased slope (the slope steepens sharply). The depth of the water in the continental shelf break fluctuates between 20 and 550 meters, 130 meters on average (Fig. 2).

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8 Fan Shiqing, *Marine Geology Science*, Beijing: China Ocean Press, 2004, p. 212. (in Chinese)

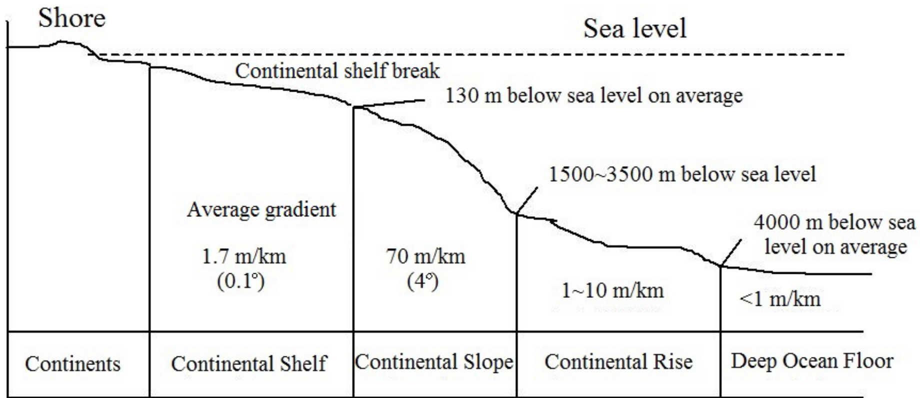

Fig. 2 The Diagrammatic Cross-section of the Continental Shelf, Slope and Rise[9]

It should be noted that the continental shelf as defined in Article 76 of the UNCLOS is a legal concept, whose scope is in fact larger than its geological counterpart. The continental shelf in law is, in essence, the concept of continental margin in geology, which includes the continental shelf, the continental slope and the continental rise in geology. The relationship between them is shown in the figure below (Fig. 3).

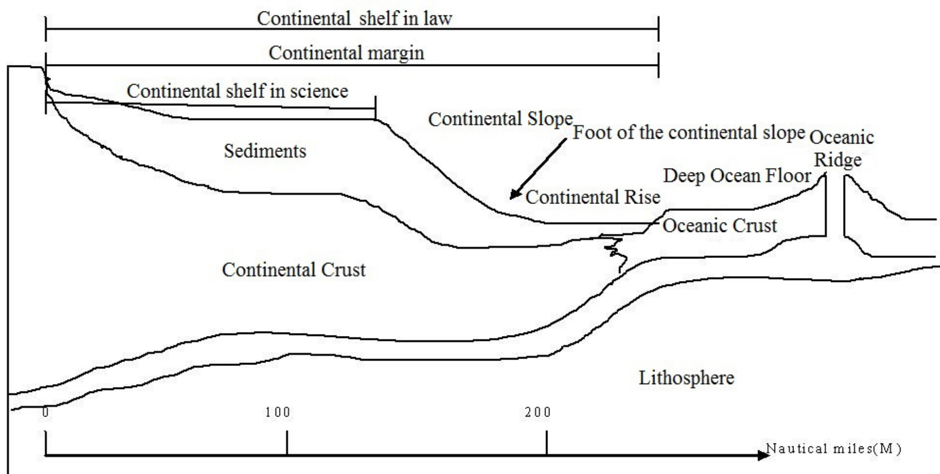

Fig. 3 The Continental Shelf in Law and the Continental Margin in Science

9 Fan Shiqing, *Marine Geology Science*, Beijing: China Ocean Press, 2004, p. 212. (in Chinese)

B. A Relevant Analysis of Article 76 of the UNCLOS [10]

Paragraph 1: "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

This paragraph determines that coastal States have the right to delimit the outer limits of the continental shelf according to either of two criteria, the natural prolongation principle or the distance principle.

Paragraph 2: "The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6."

This provision is only applicable to the continental shelf extending beyond 200 nautical miles, namely the two formulae lines and the two constraint lines in the delimitation of the continental shelf beyond 200 nautical miles.

Paragraph 3: "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

This paragraph defines the continental margin, and meanwhile "reiterates the legal concept of the continental shelf and its objective connection with natural prolongation". The prolongation must be "the shelf, the slope and the rise", which is in fact the continental margin. On the other hand, the deep ocean floor and its oceanic ridges are not included in the sovereign rights of the coastal State, but on the contrary, the deep ocean floor is under the jurisdiction of the International Sea-bed Authority, not within the jurisdiction of any countries in the world, except for the section within the range of 200 nautical miles.

Paragraph 4: "(a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measures, by either: (i) a line delineated in accordance

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10 International Cooperation Office of State Oceanic Administration ed., *The Outer Limits of the Continental Shelf – The Intersection of Science and Law (Internal Material)*, 2003, pp. 18~19. (in Chinese)

with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slop; or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base."

Paragraph 4(b) provides how the coastal States shall determine the foot of the continental slope. A coastal State can apply paragraph 4(a)(i) to some locations of its continental shelf, and paragraph 4(a)(ii) to others, in order to maximize its claims. The primary principle to determine the foot of the continental slope is based on the point of maximum change in the gradient at its base. In case that the foot of the continental slope has complicated change points in the gradient that might render it difficult to determine the point of maximum change, the "evidence to the contrary" method can be adopted to determine the foot of the continental slope.

Paragraph 4(a) provides the two formula lines in the delimitation of the continental shelf, which serves as the foundation to decide whether the coastal State is entitled to a continental shelf beyond 200 nautical miles. The formula to determine the thickness of sediments provided for in paragraph 4(a)(i) consists in a line delineated by reference to the outermost fixed points, at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental slope. As a result, if a point applicable to this formula is of X nautical miles from the foot of the continental slope, the thickness of its sediments must be 0.01X. This formula, also called the "Irish Formula", was first put forward by P. R. R. Gardiner, a geologist of the Irish Delegation to the UNCLOS III, and is intended to ensure that the sovereign rights of a coastal State can extend to the major part of the continental rise with prospects of containing important hydrocarbon resources. The formula provided for in paragraph 4(a)(ii), also known as the "Heidenburg Formula", consists in determining the outer edge of the continental margin by a line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. It is important to mention that both formulas can be simultaneously adopted. If both formula lines are used, their outer envelope line determines the largest range of the rights over the continental shelf.

Paragraph 5: "The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4(a)(i) and

(ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobaths, which is a line connecting the depth of 2,500 metres."

This paragraph provides the two constraint lines delimiting the outer limits of the continental shelf beyond 200 nautical miles. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4(a)(i) and (ii), either shall not exceed: 1. a line delineated by reference to all fixed points with a distance of 350 nautical miles from the baselines from which the breadth of the territorial sea is measured; or 2. a line delineated by reference to all fixed points with a distance of 100 nautical miles from the 2,500 metre isobaths.

The delineation of the 2,500 metre isobaths can fall into one of the following two cases: 1) where the isobaths are simple, the 2,500 metre isobaths can be directly determined; 2) where the isobaths are complicated or there are several isobaths (for example, faults, folds and obductions along the continental margin generating multi-isobaths), the Commission on the Limits of the Continental Shelf suggests that, unless there are evidences to the contrary, the first 2,500 metre isobaths from the baselines from which the breadth of the territorial sea is measured should be taken as the referential isobaths.

Paragraph 6: "Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limits of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs."

This paragraph, combined with paragraph 3, provides that different oceanic ridges have different expanded ranges of the continental shelf: 1) the oceanic ridges of the deep sea (Article 76(3)), extending up to as far as 200 nautical miles; 2) submarine ridges (Article 76(6)), extending up to as far as 350 nautical miles; 3) submarine elevations (Article 76(6)), extending up to as far as 100 nautical miles from the 2,500 metre isobaths.

As mentioned before, the UNCLOS has not provided a clear definition of the three types of oceanic ridges, which has led to great ambiguity and flexibility of

these concepts, when exercised and explained by the coastal States.[11]

III. Status Quo of the Delimitation of the Continental Shelf among Coastal States and Its Impact on the Seabed Resources

As the last area of the earth unexploited by humankind, the deep sea area contains rich submarine resources. The delimitation of the EEZ and the continental shelf plays a crucial role in the interests and future development of the coastal States, especially that of the continental shelf extending beyond 200 nautical miles. The continental shelf regime highlights the jurisdiction and exploitation of non-living resources (especially the petroleum and gas in the seabed), which are related to the great interests of all countries. It is therefore imperative to delimit the continental shelf between countries to make clear which country has the right to exercise sovereign rights in a specific continental shelf area.[12] The outer limits of the continental shelf are the outermost limits of the waters over which a coastal State has sovereign rights and jurisdiction, and also serve as a boundary with the international deep seabed area which is the common heritage of mankind – thus determining the eventual extent of the international deep seabed area. In this way, the relationship between the continental shelf as delimited by the coastal States and the international deep seabed area is such that if one expands the other narrows. In this regard, it is a big opportunity for the coastal States to launch the delimitation of the continental shelf in accordance with the UNCLOS, where most coastal States can strive for and maximize the extent of their continental shelf, so as to further their own maritime rights and interests.

The international deep seabed area is the common heritage of mankind. If a coastal State does not delimitate its outer continental shelf pursuant to the UNCLOS provisions, the international deep seabed area will be thereby reduced, undoubtedly affecting the common interests of mankind. How to maintain the balance and harmony between the interests of the coastal States and the common heritage of mankind is the key to a smooth implementation of the UNCLOS.

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11 Fang Yinxia and Zhou Jianping, Legal Theories and Applicable Terms of Continental Shelf in the UNCLOS, *China Oceans Law Review*, No. 1, 2006, pp. 73~84. (in Chinese)

12 Chen Yi, On the Principle of the Delimitation of the Continental Shelf, *Journal of the Graduates Sun Yat-Sen University (Social Sciences)*, No. 3, 2001, pp. 114~121. (in Chinese)

For this reason, it is necessary for the international community to pay adequate attention to whether the delimitation of the continental shelf extending beyond 200 nautical miles is in faithful accordance with the provisions of the UNCLOS and whether it actually does harm to the common heritage of mankind (Fig. 4).

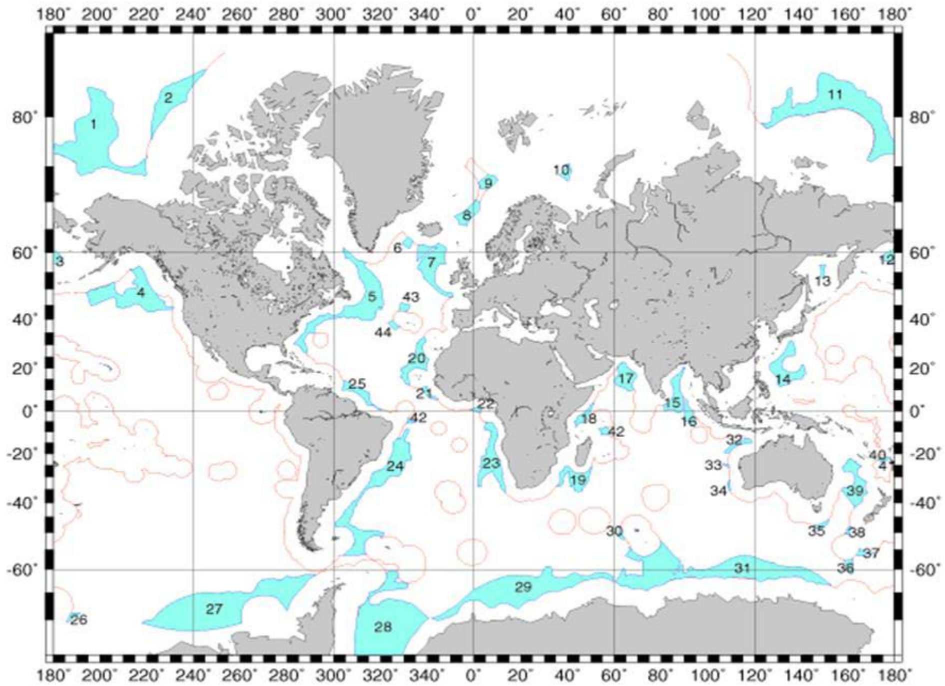

Fig. 4 Map of the Potential Areas of the Continental Shelf Extending beyond 200 Nautical Miles in the World[13]

(Red lines refer to 200-nautical-mile lines; the blue areas are the areas of the continental shelf extending beyond 200 nautical miles)

Based on preliminary research conducted on the continental shelf, experts expect that at least 65 coastal States have the potential to extend their jurisdiction over the continental shelf extending beyond 200 nautical miles in accordance with the provisions of the UNCLOS. In 2002, the Russian government became the first country to make its submission of the continental shelf extending beyond 200 nautical miles to the Secretary General of the United Nations and the Commission on the Limits of the Continental Shelf. So far, 16 submissions from Brazil, Austra-

13 J. R. V. Prescott, *The Maritime Political Boundaries of the World*, London: Methuen and Co., Ltd., 1985, p. 44.

lia, Ireland, New Zealand, the alliance of Britain, France, Spain and Ireland, Norway, France, Mexico, among others, have been officially made. It is expected that, in the years to come, a number of other developed and developing countries will make their submissions of the outer continental shelf.

However, as the continental shelf defined in Article 76 of the UNCLOS is a definition in law, as well as a combination of science, law and politics, its operation in practice will thus present certain complexity. Dr. Ted L. McDorman from Canada published articles in the *International Journal of Marine and Coastal Law* in 1995 and 2002 to analyze the problems stemming from the delimitation of the outer continental shelf under Article 76 of the UNCLOS. He maintained that paragraphs 3 to 6 of Article 76 set multi-tiered formulae for the determination of the outer limits of the continental shelf, which are the combination of "geography, geology, geomorphology and law". The formulae wording in Article 76 thus led to a complexity in its meaning and an inexactness in science. Due to the difficulty in determining the thickness of sediments on the seabed, the foot of the continental slope and the 2,500 metre isobaths, as well as the technical and definitional difficulties for distinguishing submarine elevations (plateaux, rises, caps, banks and spurs) that are actually natural components of the continental margin, the criteria provided for in Article 76 of the UNCLOS are not easily applicable in any given situation.[14] For instance, the "oceanic ridges" provided for in Article 76 of the UNCLOS can be divided into three types: oceanic ridges of the deep sea, submarine ridges and submarine elevations, but oceanic ridges of different attributes have different delimitation criteria. As a point of fact, the Arctic Ocean formed part of Russia's delimitation submission, and Russia intended to make use of the rules related to "oceanic ridges" to extend its outer continental shelf to the arctic point. If this delimitation submission is approved, the whole Arctic Ocean will be carved up. What is more, island countries such as Australia, Iceland and New Zealand also make use of the rules relating to "oceanic ridges" as a means to extend their outer continental shelf.[15] Therefore, it is imperative to intensify the study on the conditions of applicability of Article 76 of the UNCLOS, to cope with the possible harm to the common interests of humankind, caused by an overextension of the

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14 Zhong Guangyou and Zhao Baoqing, The Standard of Delimitation of Continental Shelf and Its Enlightenment on Disputes of East China Sea Delimitation, *Journal of Ocean University of China (Social Sciences)*, No. 5, 2007, pp. 20~23. (in Chinese)

15 Fang Yinxia and Zhou Jianping, Legal Theories and Applicable Terms of Continental Shelf in the UNCLOS, *China Oceans Law Review*, No. 1, 2006, pp. 73~84. (in Chinese)

outer continental shelf of coastal States.

The deep sea abounds in submarine mineral resources. With the development of science and technology, the submarine mineral resources become more and more exploitable, and China is also undertaking large-scale exploration and research activities on the submarine resources located in the international deep sea area. Consequently, to understand the distribution of such resources and to make sure whether the target region of exploration and research is within the potential ranges of the continental shelf claimed by coastal States is of great guiding value to China's exploration and research activities in the international deep sea area.

Submarine hydrothermal sulfide is a multi-metal mineral resource of strategic significance located in the seabed. Its main elements are Cu, Pb, Zn, Ag, Au, Co, Ni, Pt, among others, distributed in mid-oceanic ridges and back-arc fault active zones.[16] At present, the International Seabed Authority is preparing rules and regulations on the exploration of hydrothermal sulfide. For this reason, it is tremendously important to sort out the distribution of hydrothermal sulfide in the world and its relationship with the claimed ranges of the continental shelf of all the coastal States. In this regard, the authors have collected the mineral occurrence points of submarine hydrothermal solution that have been detected in the world, the baselines of the territorial sea of major coastal States that have been officially proclaimed, and information data of the depth of waters in the world, among other elements. Based on the data obtained, the authors have been able to map out the mineral occurrence distribution of the hydrothermal solution in the world and its relationship with the potential range of the continental shelf claims of all the coastal States. The two lines in the map refer to 200-nautical-mile line and 350-nautical-mile line respectively, and the green areas are the potential ranges of the continental shelf (Fig. 5). As one can see in the map, a considerable part of the hydrothermal solution points are within the coastal States' 200 nautical miles EEZs, and not under the jurisdiction of the International Seabed Authority, while others are in the range of 350 nautical miles, which are the potential extension of the outer continental shelves to be claimed. As the final delimitation of the outer continental shelf in the world has not been determined yet, it is suggested that China should better choose the area extending beyond 350 nautical miles as the target region for

16 Chen Xinming, Gao Yuqing, Wu Hongyun, Ding Liuhuai and Sun Dawei, Current Investigation and Exploitation of Seafloor Hydrothermal Sulfide, *Mining Research and Development*, No. 5, 2008, pp. 1~5. (in Chinese)

investigation and research on the international submarine mineral resources. In that way, it would avoid areas with potential conflicting claims, while being subject to a passive position or unnecessary loss thereof.

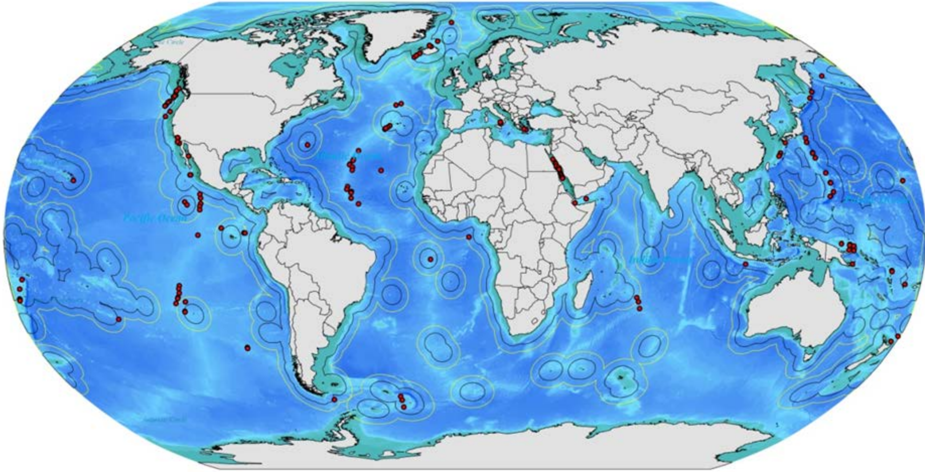

Fig. 5 Diagram of the Hydrothermal Solution Distribution and Potential Continental Shelf Claims

IV. Concluding Remarks

The 21st century witnesses mankind's intensified efforts in the exploration and exploitation of the ocean. An increasing number of countries have been turning their attention to the ocean, where there are ample resources available for exploration. The delimitation of the EEZ and the continental shelf under the UNCLOS framework is a reallocation of the maritime zones in the world, which directly concerns the maritime rights and interests of related coastal States and the common interests of mankind. As a maritime power, China is encumbered with the heavy task of maintaining its maritime rights and interests, and should, in light of the specific circumstances prevailing in the China sea areas, strengthen relevant scientific and legal research concerning the continental shelf regime in the UNCLOS, in order to provide scientific and legal support for safeguarding its maritime rights and interests.

Translator: ZHANG Zhen

Editor (English): Adrian Cisneros-Aguilar

Summary of the Research on China Oceans Law in the Year of 2008

Research Team of the Journal*

The year 2008 has witnessed quite a few new breakthroughs and achievements in China's research on oceans law. The journal makes a summary of the works on oceans law and policies during the year from the following perspectives, enabling relevant researchers to know more about the status-quo and developments of China's research on oceans law.

I. Sovereignty Disputes and Maritime Delimitation

A. General Theories of Maritime Delimitation

Compared to the year 2007, there are fewer articles during the year 2008 about the general principles for maritime delimitation, but new perspectives and concepts have been proposed. Mr. Zhao Qinglong discusses the natural prolongation principle and equitable principle for the delimitation of continental shelf from the perspective of international law practices; and through research on judicial and arbitral practices, he argues that the natural prolongation principle and equitable principle have been established as principles for delimitation of continental shelf on a gradual basis in international practices, and that other principles and methods for delimitation could only be adopted on the basis of the equitable principle.[1] Mr. Zhang Weibin claims that there should be the principle of estoppel for maritime

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* Research team of the Journal, directed by Kuen-chen FU, Professor of Xiamen University, includes Chen Sisi, Chu Xiaolin, Dong Lin, Guan Song, Li Jing, Lin Jing, Tang Yan, Wang Danwei, Wang Yanan, Wu Yuanyuan, Wang Zelin, Xiong Liangmin, Zhang Yongkai, Zhao Yajuan.

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1 Zhao Qinglong, International Law Practices regarding the Principles of Delimiting Continental Shelf Boundaries, *Science & Technology Information*, No. 8, 2008, p. 153. (in Chinese)

delimitation, in addition to the frequently-mentioned equidistance principle, equitable principle, natural prolongation principle, etc. In the 1929 *Serbian Loans Case*, the Permanent Court of International Justice adopted the principle of estoppel. The adoption of this principle, which has been incorporated into the equitable principle in the international maritime delimitation, bears a great significance on China's maritime delimitation.[2]

B. East China Sea

1. Disputes over Socotra Rock between China and South Korea

Socotra Rock is located in the north of the East China Sea, with coordinates at 125° E and 32° N . It is about 150 nautical miles east to Nantong City, Jiangsu Province and Chongming Island, Shanghai. It is located 132 nautical miles (247 kilometers) to the Tong Island which is at the eastern end of Zhoushan Islands in China. The rock, an extension of the continental shelf in Jiangsu's open sea, is within the East China Sea. It is in the north of the East China Sea and adjacent to the south of the Yellow Sea.[3] From 1995 to 2003, South Korea has built the Ieodo Ocean Research Station on the rock, and on many occasions dispatched airplanes and ships to undertake operations near the rock in the name of research on changes of marine and earth environment. Mr. Liu Yading believes that it is a submerged reef, instead of low tide elevation or an island; based on the UN Convention on the Law of the Sea (UNCLOS), it can't be the basis for drawing a baseline; although South Korea has built an ocean station on the rock, it is a legal fact that the rock cannot be claimed as territory; since Socotra Rock possesses vital economic interest and is of strategic significance to both China and South Korea, China should attach great importance to and undertake measures in response to South Korea's operations on the rock.[4]

2. Sino–Japanese Disputes over the East China Sea

a. Probe into the Principles for Delimitation

Just like the year 2007, most of the Chinese scholars oppose the median

2 Zhang Weibin, An Analysis of the Principle of Estoppel in Maritime Delimitation, *Journal of Changshu Institute of Technology*, No. 1, 2008, p. 68. (in Chinese)

3 Liu Yading, The Legal Status and Significance of Socotra Rock, *Bridge of Century*, No. 3, 2008, p. 68. (in Chinese)

4 Liu Yading, The Legal Status and Significance of Socotra Rock, *Bridge of Century*, No. 3, 2008, p. 68. (in Chinese)

line principle proposed by Japan, and contend that the application of the natural prolongation principle and equitable principle in delimitating continental shelf of the East China Sea is built on solid basis of international law instruments, geographical facts and International judicial decisions.[5] But some scholars have raised new opinions. For example, Mr. Li Linghua holds that the equitable principle and natural prolongation principle upheld by China for settling East China Sea disputes are essentially equivalent to adopting the natural prolongation principle only. The equitable principle itself conveys uncertainty and change, and the natural prolongation principle, which results in the sea waters of one country superjacent to the continental shelf of another country, is ambiguously defined and would find no possibility for practical use. The admixture of the two principles would add more confusion to the delimitation theory and make it more difficult to apply.[6]

b. Diaoyu Islands

Compared with 2007, some scholars discuss the impact of Diaoyu Islands on the delimitation of the East China Sea between China and Japan. Mr. Zhang Zhirong has probed into the research in recent years by Japanese scholars of the China School on Senkaku islands (Diaoyu Islands), sorting out and comparing the developments of their research, views and documents from around the year 2000 to 2008. He believes that the Japanese have developed new perspectives in their research, different from the traditional dichotomy approach.[7] According to Mr. Li Jinming, the Diaoyu Islands are particularly important for Sino–Japanese maritime delimitation, due to their locations on the border of the continental shelf of the East China Sea; for fairness and equality, it may be feasible to negotiate separately for delimiting the continental shelf and exclusive economic zone and

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5 Ming Tingquan and Li Huiling, Comments on Sino-Japanese Dispute in the East China Sea from the Perspective of International Law, *Journal of Nanyang Normal University*, No. 2, 2008, p. 17 (in Chinese); Lin Yuxuan and Yu Yaodong, Applicable Principles in Delimitation of Continental Shelf in the East China Sea between China and Japan, *Journal of Shanghai Maritime University*, No. 1, 2008, p. 83. (in Chinese)

6 Li Linghua, On the Theoretical Bases of Final Settlement of the Delimitation in the East China Sea – Query the Adoption of Equitable Principle and Natural Prolongation Principle in Delimitation, *Journal of Ocean University of China (Social Sciences)*, No. 2, 2008, p. 5. (in Chinese)

7 Zhang Zhirong, Discussions on Japanese Research on Senkaku Islands – and the Significance of Sino-Japanese Academic Exchange and Joint Research, *Journal of Ocean University of China (Social Sciences)*, No. 6, 2008, p. 1. (in Chinese)

delimit two respective boundary lines.[8] On May 23, 2008, the International Court of Justice made a ruling on two of the three disputed islands between Singapore and Malaysia, granting the sovereignty of Pedra Branca to Singapore. Ms. Xiong Liangmin analyzes the reasons underlying the ruling of the International Court of Justice, and concludes on the evidence that the Court would consider in dealing with territorial disputes, thereby providing significant reference for China to protect its sovereignty over the Diaoyu Islands.[9]

c. Disputed Okinotorishima

There has been much debate in the academia over whether Okinotorishima is a rock or an island. Wu Ka believes that significant differences between rock and island can be seen from Article 121(3) of the 1982 UNCLOS. A rock, though categorized as island, bears special features different from an island since it shall not have the exclusive economic zone or continental shelf. Okinotorishima is a rock within the category of island. In this way, there may be some rationality for Japan to claim Okinotorishima as an island, but basically Japan's claim is wrong because it partially lays stress on Okinotorishima's categorization as an island and denies its special features as a rock.[10] Wang Xiuying believes that because Okinotorishima cannot sustain human habitation or economic life of its own, it is a rock instead of an island under international law. Japan's claim of Okinotorishima as an island is based on the similarity between island and rock and ignores the special features of rock. Japan's such claim is a disguised replacement of concept and creates confusion to the public. Japan's attempt to identify Okinotorishima Rock as an island and claim sovereign rights over the exclusive economic zone, is no different from climbing a tree to look for a fish.[11]

d. Joint Development

In 2008, many scholars discuss the legal nature and features of joint development. On June 18, 2008, the Chinese and Japanese governments, through negotiations on an equal footing, reached principled consensus on the East China

8 Li Jinming, Ownership of Diaoyutai Islands and Their Importance in Maritime Delimitation, *Fujian Tribune (The Humanities & Social Sciences Monthly)*, No. 11, 2008, p. 47. (in Chinese)

9 Xiong Liangmin, Comments on the Case of Sovereignty Disputes over Pedra Branca/Pulau, *China Oceans Law Review*, No. 1, 2008, pp. 49~55. (in Chinese)

10 Wu Ka, Okinotorishima: Rocks rather than Islands, *Journal of Zhejiang Normal University (Social Sciences)*, No. 1, 2008, pp. 102~106. (in Chinese)

11 Wang Xiuying, Japan is Climbing a Tree to Look for Fish on the Issue of Okinotorishima, *Ocean World*, No. 5, 2008, p. 75. (in Chinese)

Sea issue and an understanding on joint development. Associate Professor Gong Yingchun makes a more detailed analysis on joint development based on the Sino-Japanese understanding on this issue. She probes into the conflicts of sovereign rights and jurisdiction between States within the provisional joint development block in the undelimited exclusive economic zone and continental shelf with overlapping claims before the final delimitation, as well as approaches for resolving these conflicts.[12]

C. South China Sea

1. Historic Rights

Historic rights is one of the basis of international law upon which a State can claim territorial sovereignty or sovereign rights for certain waters. Doctor Guo Yuan discusses the connotations of historic rights in the view of oceans law, explores the nature of historic rights with reference to the international community's practices regarding the law of the sea, and expounds on China's historic rights over islands in the South China Sea.[13]

2. U-shaped Line

The legal nature of U-shaped line (also called dotted line, or nine-dash line) has been under discussion by domestic scholars, among whom Luo Tingting, Wang Yongzhi, Song Jun, Han Xueshuang and Xue Guifang assert that the sea area within the U-shaped line should be China's historic waters and China boasts historic rights in this sea area.[14]

3. Joint Development

The joint development of the South China Sea, which is in the spotlight of the world, has not met the expectations of China and other States involved in the territorial disputes over this sea area. Mr. Li Guoxuan, initiating his arguments from the contents of institutionalizing the joint development in the area, proposes

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12 Editor's Note, *China Oceans Law Review*, No. 2, 2008, p. 1 (in Chinese); Gong Yingchun, Conflicts of Rights in Disputed Sea Areas and Their Solutions, *China Oceans Law Review*, No. 2, 2008, pp. 78~89. (in Chinese)

13 Guo Yuan, "Historic Rights" under the Law of the Sea, *China Oceans Law Review*, No. 1, 2008, p. 1. (in Chinese)

14 Luo Tingting, On the Legal Status of the "Nine-dash Line": Focusing on Four Theories, *China Oceans Law Review*, No. 1, 2008, p. 56 (in Chinese); Wang Yongzhi, Song Jun, Han Xueshuang and Xue Guifang, General Discussions on the U-shaped Line in the South China Sea, *Journal of Ocean University of China (Social Sciences)*, No. 3, 2008, p. 1. (in Chinese)

that at least four requisites are indispensable for the institutionalization of the joint development: the concept of joint development is gradually and widely accepted around the sea area; the institutionalization would benefit all the parties involved; continuous practice of the joint development; external pressure exerted on the joint development. Quite a few factors have hindered the institutionalization of the joint development and there is still a long way to go.[15]

D. Ocean Enclosure Movement

For the past two years, many States have participated in "ocean enclosure movement" and applications have been submitted to the Commission on the Limits of the Continental Shelf with respect to the establishment of the outer limits of the continental shelf beyond 200 nautical miles. For instance, Japan expressed its willingness to submit in January, 2009, the Philippines intended to submit in May, 2009, Indonesia and Vietnam planned its submission before May 13, 2009, South Korea expected on May 12, 2009, and Malaysia on May 13, 2009.[16] Doctor Gao Jianjun summarizes and comments on the submissions for establishing the outer limits of the continental shelf beyond 200 nautical miles by the States in 2008 and the Commission's consideration on these submissions, thereby serving as a reference for China's bid to present a submission to the Commission.[17]

II. Marine Pollution and Environmental Protection

Vessels are important vehicles for marine transportation. The rapid development of marine shipping industry has posed tremendous damage to the marine environment. And prevention and control of vessel-sourced pollution is still one of the highlights in Chinese scholarship in 2008.

Regulation on the Prevention and Control of Vessel-induced Pollution to the

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15 Li Guoxuan, Institutionalization of Joint Development of the South China Sea: Connotation, Conditions and Restrictive Factors, *Southeast Asian Affairs*, No. 1, 2008, p. 68. (in Chinese)

16 Meeting of States Parties to the UNCLOS, Issues related to the workload of the Commission on the Limits of the Continental Shelf – tentative dates of submissions, SPLOS/INF/20, at http://daccessdds.un.org/doc/UNDOC/GEN/N08/209/60/PDF/N0820960.pdf?OpenElement, 4 May 2009. (in Chinese)

17 Editor's Note, *China Oceans Law Review*, No. 1, 2008, p. 1 (in Chinese); Gao Jianjun, Delineation of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles: Submissions to Date, *China Oceans Law Review*, No. 1, 2008, pp. 1~30. (in Chinese)

Marine Environment of the People's Republic of China, as the fundamental law for prevention and control of vessel-sourced pollution, has made amendments to the Regulation on the Prevention and Control of Vessel-induced Pollution to Sea Waters of the People's Republic of China promulgated in 1984. Zhang Xiao and Chen Ailing believe that the amended Regulation is more substantial in content, forward-looking and practical. On one hand, it retains the core concepts of the original and the essential principles for vigorous supervision and control on the discharge of vessel-sourced pollutants. On the other hand, Zhang and Chen hold that some of the new provisions on punishment are contradictory and difficult to comprehend. For example, according to the new regulation, if it is discovered that any vessel or its operations may pose a severe threat of pollution to marine environment, the situation shall be immediately reported to the closest maritime administrative agency; however, it makes no clear provisions on the specific circumstances for the reporting. Moreover, although the new regulation mentions for several times the maritime administrative approval and the qualifications of relevant enterprises and the personnel, it makes no definite stipulations on the conditions for the approval or the ways to verify the qualifications. And it is regretful that the amended Regulation does not involve the management of ships' ballast water.[18]

The 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships, which is referred to as AFS Convention in short and took effect on September 17, 2008, is another important convention after MARPOL73/78 Convention for the international marine environmental protection, and a vital convention on prevention and control of vessel-sourced pollution. Liu Xiaodong et al. discuss the problems that China would have to face after the AFS Convention takes effect: China has not acceded to the Convention; according to relevant provisions of Article 3 of the Convention, the contracting States would not offer preferential treatment to ships of non-contracting States. After AFS Convention comes into force, when entering into the territory of contracting States to AFS Convention, Chinese vessels shall undergo checks according to the Convention. Moreover, China would fail to enjoy the rights to impose supervision and control on ships of other States and would be unable to protect its sea areas, leaving itself in a disadvantageous position. However, Liu Xiaodong et al. believe that

18 Zhang Xiao and Chen Ailing, Research and Analysis of the Regulation on the Prevention and Control of Vessel-induced Pollution to the Marine Environment, *Marine Technology*, No. 4, 2008, pp. 76~78. (in Chinese)

China would be confronted with the following problems after its accession into the Convention: the costs of using eco-friendly anti-fouling paint; whether the Convention is applicable to domestic shipping vessels; whether the technological and research & development capacities of Chinese enterprises have any advantages within the technical scope of the Convention; how domestic legislation would be made and enforced accordingly, etc.[19]

In spite the fact that relevant laws and regulations on vessel-sourced marine pollution are already enacted, China still lacks a holistic legal framework in this area. Wang Yong, Rui Zhenfeng et al. hold that a legal regime for preventing and controlling marine pollution from vessels should be put in place. In principle, it is necessary to conduct an overall and systematic review of existing legislation on preventing and controlling vessel-sourced marine pollution, make amendments, supplements and improvements accordingly and properly handle the relation between the legislation on vessel-sourced marine pollution and existing environmental laws. It is essential to establish an inclusive, well-arranged, coherent, and efficient legal regime for preventing and controlling vessel-sourced marine pollution. The legal regime should comprise international conventions or treaties, a basic law, specific legislation, among others. It should revolve around prevention, control and compensation. We should learn from advanced experiences and effective managerial measures of other countries while attaching importance to do research on our own actual situations so as to apply international conventions in a concrete way based on China's circumstances and comply with international standards. In terms of legal regime, the competent maritime departments shall timely track the developments of legislation on vessel-sourced marine pollution, bring into full play the role of relevant departments, adopt an efficient mechanism for the enactment, amendment and update of laws and regulations, so as to improve the legal regime for preventing and controlling vessel-sourced marine pollution on a continuous basis and ensure its effectiveness.[20] Cui Yang believes that China should proactively learn from other countries and timely ameliorate the regime for preventing and controlling vessel-sourced pollution; speed up the efforts in incorporation of international conventions or treaties, promulgate specific laws

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19 Liu Xiaodong, Xu Hongming and Chen Wei, The Impacts of AFS Convention on China after It Takes Effect and China's Strategies, *Marine Technology*, No. 6, 2008, pp. 78~80. (in Chinese)

20 Wang Yong, Rui Zhenfeng and Zhang Zhiqiang, Marine Environmental Protection and Vessel's Marine Pollution Prevention, *World Shipping*, No. 2, 2008, p. 50. (in Chinese)

and regulations for vessel-sourced pollution prevention and control and coordinate supervisory departments so as to avoid confusion and conflict in application of law; accede to relevant international conventions; enhance the cooperation with other countries and improve the compensation system.[21] Lin Jianxiang proposes in his article Trends of Globalization of Port State Control Organizations that port State control refers to the security check on foreign vessels in its ports so as to ensure that the vessels' conditions, equipment, manning and operation meet the requirements of international conventions. Supervision by port States is of vital importance to the prevention and control of vessel-sourced pollution.[22]

In respect to the claim for marine pollution compensation in China, the role of administrative department as the claimant in civil claims for compensation is under controversy. Chen Gang discusses on the difficulty of the administrative department as the claimant and holds that it's requisite to identify the nature of losses from marine pollution and define the specific department as the claimant for respective losses. In this way will China get out of the predicaments it is in. Moreover, when the endeavor to promote marine environmental protection involves the responsibilities of a number of marine administrative departments, they should collaborate on information exchange and resources sharing, and conduct joint enforcement or specialized operations so as to enhance coordinated efforts in claiming marine pollution compensation. The existing compartmentalized regime for maritime administration shall be reformed in order to clear up the legal barriers facing the administrative departments in exercising their rights to claim marine pollution compensation. As to the future regime for maritime administration, the available resources for maritime enforcement shall be grouped together towards an integrated enforcement model; an integrated enforcement agency shall be granted the sole and exclusive rights to bring civil claims for marine pollution compensation, in place of the separate empowerment among the marine administrative department, maritime department, and fisheries administrative department; the agency should also be entrusted with the responsibilities of coordinating the endeavors to restore damaged marine environment. Thereby, the marine pollution compensation could be collected and the efforts to restore the marine environment be better coordinated, in order for the best protection of the

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21 Cui Yang, Legal Analysis and Suggestions on Vessel-induced Pollution in China, *Legal System and Society*, No. 19, 2008, p. 41. (in Chinese)

22 Lin Jianxiang, Trends of Globalization of Port State Control Organizations, *China Water Transport*, No. 3, 2008, p. 14. (in Chinese)

marine environment.[23]

In recent years, ships' oil spilling accidents have occurred occasionally and environmental damage compensation arising therefrom has also won increasing attention. Environmental damage compensation from oil spilling accidents is of great significance to protect marine environment and restore damaged ecosystem. While the international community has put rules in place, China's legislation in this aspect is still underdeveloped. Therefore, in judicial practices, China should comply with general principles for compensation of this sort and define the reasonable scope of the compensation. Deng Lijuan et al. assert that the following fundamentals should be followed for defining the scope of compensation for environmental damage in ships' oil pollution accidents: first, consistant standards should be carried out no matter whether it is related to foreign vessels; second, international conventions enjoy priority in application; third, criteria should be geared toward international standards. Hereby, the authors hold that the scope of compensation should be limited to "the expenses for reasonable restoring measures already undertaken or to be undertaken", including losses of marine eco-environmental resources, reasonable expenses for research and restoring measures.[24]

Wang Yanling discusses the responsibilities of States in respect to transboundary marine environmental damage. She believes that when assigning the responsibilities for the damage, it would be evitable for the States to bear due responsibilities. However, the predicaments in legal theories and practices in this area have tended to result in privatization of such responsibilities; as to the precautionary mechanism for transboundary marine environmental damage based on extensive international cooperation, the reinforcement of such a mechanism would weaken the significance of liability assumption. The author believes that the obstacles in international cooperation would become the deep-rooted cause of the predicaments facing the international regime for marine environment management, and suggests further inquiry into the conduct of international cooperation.[25]

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23 Chen Gang, Discussion on State Administrations' Civil Claim for Marine Pollution Compensation, *Journal of Wuhan University of Technology (Social Sciences Edition)*, No. 1, 2008, p. 53. (in Chinese)

24 Deng Lijuan, Jin Cong and Tong Mei, Scope of Compensation for Oceanic Environmental Damage in Ships' Oil Spills, *Journal of Jimei University (Natural Science)*, No. 1, 2008, pp. 62~66. (in Chinese)

25 Wang Yanling, Research on the National Liability of Trans-boundary Environmental Damages by Sea, *Hebei Law Science*, No. 6, 2008, p. 151. (in Chinese)

The jurisdiction over marine environmental pollution refers to which State should administer the acts of pollution from different sources involving several sea areas and the standards for such administration. Though officially established a short time ago, the coastal States' jurisdiction has broken down the long-standing tradition of jurisdiction by flag States, which not only implies reformation and progress of international marine legislation, but also would exert far-reaching effects on the protection and preservation of the holistic marine environment. Hence, China should proactively and thoroughly participate in international exchanges for and activities of marine environmental protection and relevant international legislation, while at the same time improving domestic regulations on a continuous basis and enhancing the implementation of domestic laws and regulations. China should make utmost efforts to protect the existing marine resources so as to achieve sustainable development of the ocean.[26]

To control the marine environmental pollution, it would not suffice to just rely on laws or regulations by individual countries. Instead, a complete set of international law for marine environmental protection should be put in place through international cooperation. Zhang Chen, in the article titled Research on International Cooperation in the Prevention and Control of Pollution to Marine Environment, researches on the international cooperation in preventing and controlling marine pollution, and divides the whole process of the prevention and control into two phases: the phase of prevention, which dictates international cooperation in implementing the precautionary principles; if the prevention fails and a marine pollution accident occurs, then comes the phase of pollution control, which mainly involves the legal problems of jurisdiction and the assigning of responsibilities. To conduct the coordination among the coastal States, flag States and port States on jurisdiction over pollution, there are two international conventions – CLC1969 and FUND1971 for identifying the civil liabilities in marine pollution, which have been implemented well; but more difficulties occur in assigning responsibilities among States, which requires collaboration among the States.[27]

Marine environmental protection constitutes an important part of China's basic State policy of environmental protection. Law on marine environmental protection refers to the whole complex of laws and regulations on development, utilization,

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26 Jiao Xinxin, Brief Discussion on Coastal States' Jurisdiction over Vessel-sourced Pollution, *Legal System and Society*, No. 8, 2008, p. 278. (in Chinese)

27 Zhang Chen, Research on International Cooperation in the Prevention and Control of Pollution to Marine Environment, *Huazhang*, July 2008, p. 48. (in Chinese)

protection and improvement of marine environment. Guo Yuan holds that the legal principles for marine environmental protection in China consist of the following aspects: 1. marine environmental protection should focus on marine ecological protection; 2. marine resources development and marine environmental protection should be planned and carried out at the same time; 3. rational development and utilization of marine resources; both development of marine and terrestrial resources should be considered, with focus on terrestrial development; 4. focus should be given to major sea areas with due regard to other coastal waters. China's practices in enforcing marine environmental protection law are mainly as follows: 1. establishment of functional zones at sea and in offshore waters; 2. controlling the total amount of pollutants in major sea areas; 3. collecting fees for dumping of wastes into the sea and punishing those whose discharge of wastes exceeds limits; 4. establishing and perfecting prevention and response regime for oil spills, in order to tackle major marine pollution accidents; 5. providing insurance against vessel-sourced oil pollution and establishing compensation funds for oil pollution damage, and building a regime for civil compensation for vessel-sourced oil pollution damage. She believes that it is imperative to improve as soon as possible the domestic laws and regulations concerning the compensation for vessel-sourced oil pollution damage, and accede to the 1992 Protocol to the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, so that China is enabled to respond to the risks of great oil spill accidents.[28]

After marine nature reserves were identified as the most effective way to maintain marine environment, they have been established in coastal States around the world and the legislation for the reserves has raised attention of States. There are quite a few problems in China's legislation for marine nature reserves in terms of the number and contents of laws, the formulation of local regulations and implementing rules, etc. Cui Feng and Liu Bianye believe that the major problems in China's legislation for marine nature reserves are as follows: Regulations on Nature Reserves and Administrative Measures on Marine Nature Reserves, which squarely govern marine nature reserves, rank low in legal hierarchy; they incorporate unreasonable contents in the provisions; in terms of the managerial re-

28 Guo Yuan, Discussion on the Theory and Practices of Marine Environmental Protection Law in China, *Journal of Ocean University of China (Social Sciences)*, No. 1, 2008, p. 14. (in Chinese)

gime, they grant too much power to local governments with respect to the selection and designation of marine nature reserves, and the funding for maintaining the reserves relies too much on local governments, which would be unfavorable for the development and management of these reserves. The authors hold that to improve China's Administrative Measures on Marine Nature Reserves, its relationship with Regulations on Nature Reserves should be well coordinated. Some provisions in the Administrative Measures on Marine Nature Reserves should be amended and the legislation for marine nature reserves should follow the principle of "biological interests come first". The Administrative Measures on Marine Nature Reserves should also be improved to be more targeted and practical for implementation. And more detailed rules for implementing the Administrative Measures should be promulgated as soon as possible. They also believe that mandatory measures should be taken to realize effective management over marine nature reserves and to reduce or put an end to willful development and damage, as making specific laws or regulations for a specific nature reserve and compulsory enforcement of law may be the most significant way for launching and implementing policies nowadays. Moreover, they propose to set up a department under the State Oceanic Administration which is in charge of managing and reviewing the legislation on marine nature reserves.[29]

III. Port Administration and Shipping

A. Port Administration

Against the backdrop of a turbulent global economy and with the export-oriented national economy transforming into an economy driven by domestic demands, the energy-intensive growth model in China's port industry would not sustain further development, which has exerted a significant influence on the operational pattern of the industry. In the Report on Credit of China's Port Industry published in December 2008, Xinhua Finance Limited notes that China's port industry has entered a downturn phase and experienced a reversal in the relations between supply and demand for the first time. However, the industry still

29 Cui Feng and Liu Bianye, Conceptions on Improving China's Legislation of Marine Nature Reserves, *Journal of Ocean University of China (Social Sciences)*, No. 5, 2008, p. 7. (in Chinese)

continues its customary way of investment, and a port from investment planning to establishment takes a very long duration. Hence, it would be too difficult to adjust to meet the supply and demand change within a short period of time. In this context, the Report proposes that the local governments should intensify their efforts in cooperation and bring into full play the advantages of collaboration to enhance the efficiency of the ports, and steer the focus of economic growth towards the tertiary industry such as logistics, shipping information, financial services, etc.[30]

The Inauguration Conference of the APEC Port Services Network sponsored by the Ministry of Transport of China was held in Ningbo, Zhejiang on November 5, 2008, which announced that the APEC Port Services Network proposed by China and unanimously approved by the leaders of APEC was officially established. As the platform for cooperation and information exchange among ports, APEC Port Services Network not only meets the demand driven by the rapid development of shipping industry in the APEC region, but also opens up new vistas for cooperation among port and port-related industries. It builds up public platforms of trade and information centering on port industry, and promotes the joint and coordinated development of port and port-related industries by accelerating their integration. It establishes a regular exchange and communication mechanism for port and port-related industries within the APEC region, which facilitates information sharing and enhances the overall efficiency and service level of port industry in the region. Moreover, it serves to promote the trade and investment liberalization and facilitation, improve the security of supply chain and ensure the healthy and sustainable development of economy and trade in the APEC region.[31]

In terms of new administrative laws and regulations, for example, the Port Planning Administrative Provisions, promulgated by the Ministry of Transport, has been effective as of February 1, 2008. As a supplement to the Port Law of the People's Republic of China, the Provisions are formulated to reflect the demands on the development of China's port planning and construction, for the purposes of regularizing the port planning work, utilizing and protecting port resources in a

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30 The First Reversal in the Demand–Supply Relationship in China's Port Industry, at http://www.moc.gov.cn/zizhan/zhishuji-gou/zhuhangju/shuiluyunshu/gangkouguanli/gongzuodongtai/200812/t20081223_546304.html, 5 April 2009. (in Chinese)

31 The Establishment of APEC Port Services Network, *Port & Waterway Engineering*, No. 11, 2008, p. 111 (in Chinese); Letter of Congratulations from Zhang Dejiang, Vice-premier of China's State Council, on the Establishement of APEC Port Services Network in Ningbo, at http://www.moc.gov.cn/zizhan/zhishujigou/zhuhangju/shuiluyunshu/gangkouguanli/gongzuodongtai/200811/t20081106_534361.html, 5 April 2009. (in Chinese)

scientific and efficient way, and enhancing the healthy and sustainable development of ports. The Provisions specify the duties of the review departments, approval departments, port administrative departments, etc., in their review, approval, implementation and administration of port planning, as well as clear and definite liabilities. Where competent departments review and approve a port planning or a project by violating the prescribed authority or procedure, or fail to fulfill their supervision and inspection duties according to law, administrative punishments shall be imposed on the person-in-charge and other persons who are directly liable. If any crime is constituted, the liable persons shall be subject to corresponding criminal liabilities.[32] Moreover, Rules on Port Facility Security of the People's Republic of China (No.10 order of the Ministry of Transport), which was signed by Minister of Transport Li Shenglin on December 17, 2007, has been effective since March 1, 2008. China is a State party to the International Convention for the Safety of Life at Sea, 1974 (SOLAS), which requires that China take measures to prevent and suppress terrorist activities against ships or by ships. Therefore, China shall evaluate the security of the facilities in open ports, and formulate and implement a security plan. These Rules have been laid down in accordance with international conventions such as the amended SOLAS and aim to enhance security of facilities in the ports. They apply to the facilities serving in the ports for passenger vessels navigating on international routes, cargo ships of 500 gross tonnage and above, ships for special purposes of 500 gross tonnage and above, and movable offshore drilling platforms.[33]

B. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

On December 11, 2008, the 63rd session of the UN General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The General Assembly authorized the opening for signature of the Convention at a signing ceremony to be held on 23 September

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32 Interpretations of Port Planning Administrative Provisions by Officer of Department of Overall Planning, Ministry of Transport, at http://www.moc.gov.cn/zhuzhan/zhengcejiedu/zhengcewenjian_JD/gangkouguihua_GLGDJD/, 5 April 2009. (in Chinese)

33 Interpretations of Rules on Port Facility Security of the People's Republic of China by Officer of Department of Water Transport, Ministry of Transport, at http://www.moc.gov.cn/zhuzhan/zhengcejiedu/zhengcewenjian_JD/gangkousheshibaoan_GZJD/, 5 April 2009. (in Chinese)

2009 in Rotterdam, the Netherlands, and recommended that the rules embodied in the Convention be known as the "Rotterdam Rules."[34] This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.[35]

The Convention creates new vitality in the law of the international carriage of goods, and its observation on shipping practices and institutional innovation have been well acclaimed in the academia and profession.[36] The Working Group on Transport Law of UNCITRAL (Working Group III) worked in close cooperation with interested inter-governmental and non-governmental organizations for the creation and adoption of the Convention. The draft Convention was prepared over thirteen sessions of the Working Group from April 2002 to January 2008, and was approved by UNCITRAL in New York on July 3, 2008, following which it was sent to the General Assembly for adoption at its 63rd session.[37]

There are quite a few articles in 2008 that made in-depth discussion on the UNCITRAL's approval and the General Assembly's adoption of the draft Convention from different perspectives.[38] Prior to the Convention, there are three international conventions on shipping, namely 1924 Hague Rules, 1968 Hague-Visby Rules and 1978 Hamburg Rules. The United Nations Convention on Con-

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34 Report on Sessions of UN General Assembly (GA/10798), at http://www.uncitral.org/pdf/english/working-groups/wg_3/ga-10798.pdf, 5 April 2009.

35 Article 94(1) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

36 Xiang Li, Analysis on the Models for Solving Conflicts of Maritime Treaties: Research Taking United Nation's Draft Convention on the Carriage of Goods Wholly or Partly by Sea as Centre, *Annual of China Maritime Law*, Vol. 19, 2008, p. 203. (in Chinese)

37 Report on Sessions of the UN General Assembly (GA/10798), at http://www.uncitral.org/pdf/english/working-groups/wg_3/ga-10798.pdf, 5 April 2009.

38 Guo Ping and Zhu Ke, Struggle between Ship Owner Interests and Cargo Owner Interests from View of Development of International Conventions on Carriage of Goods by Sea, *Journal of Dalian Maritime University (Social Science Edition)*, No. 3, 2008 (in Chinese); Yao Ying, Study on Transfer of Rights: from the Perspective of the Draft Instrument on Transport Law Proposed by UNCITRAL, *Contemporary Law Review*, No. 3, 2008 (in Chinese); Chen Lin, On Maritime Law "Applying to Shore" under the Unification of International Transport Laws: with UNCITRAL Draft as a Starting Point, *Humanities & Social Sciences Journal of Hainan University*, No. 5, 2008 (in Chinese); Yu Miaohong, Transformation and Countermeasure of Shipper System under UNCITRAL Transport Law Draft, *Journal of Dalian Maritime University (Social Science Edition)*, No. 4, 2008 (in Chinese); Zhou Hong, A Preliminary Analysis of Electronic B/Ls under the UNCITRAL Draft Instrument on the Carriage of Goods, *China Oceans Law Review*, No. 2, 2008 (in Chinese); Xu Ying, The Legal Status of the Consignor under UNCITRAL Draft Convention on the Carriage of Goods, *China Oceans Law Review*, No. 2, 2008. (in Chinese)

tracts for the International Carriage of Goods Wholly or Partly by Sea aims to create a contemporary and uniform law providing for modern door-to-door container transport including an international sea leg, but not limited to port-to-port carriage of goods. There are many innovative features contained in the Convention. Xu Qingyue, legal consultant to China Classification Society, had been engaged in the drafting of the Convention since 2002 as a member of the Chinese delegation. He gives an introduction to the Convention's six aspects of change to the previous rules, mainly including: the scope of application is widened; the legal regime of "carriage by sea + other modes of transport" (a sea leg and other modes of transport prior to and/or after the sea leg) is established for the first time, and port operators are covered within the scope of application of the Convention; the limits of the carrier's liability are lifted; the carrier's "nautical fault exemption" is abolished; greater freedom of contract is granted to parties of volume contracts; specific provisions are made on the liability of shippers; provisions on right of control and transfer of rights are added so as to tackle transportation-related issues arising during sale and purchase of goods.[39]

Guo Ping and Zhu Ke believe that, the international conventions on ocean shipping have been reflections of the interests of both the shippers and carriers; the struggle between carriers' interests and cargo owners' interests would continue with the practices of international trade and ocean shipping. In the paper Struggle between Carriers Interests and Cargo Owner Interests from the View of Development of International Conventions on Carriage of Goods by Sea, the authors clearly present the development of international conventions on ocean shipping, from the first struggle between the interests of carriers and cargo owner in 1924 Hague Rules to the continued struggle after the adoption of the current Convention, and explore the traces of the struggle in these international conventions. Based on the analysis of the development of international conventions on ocean shipping, the party on behalf of cargo owners' interests has been gaining momentum gradually. The authors hold that compared to previous international conventions, especially the Hague Rules and the Hague-Visby Rules, the Convention tilts the balance of power to cargo owners, some of the provisions of which on carriers' liability are more strict than those in Hamburg Rules, such as the duration of the voyage. Moreover, the authors also remind the readers that during

39 Would the Rotterdam Rules Play a Dominant Role, at http://www.shipol.com.cn/xw/zcfg/87495.htm, 7 April 2009. (in Chinese)

the drafting of the Convention, the drafters were not totally partial to the interests of the cargo owners; it would be safe to say that the balance of equality was again poised towards the cargo owners. The Convention also sets out specific provisions on the obligations and liabilities of the shippers such as the obligation of accepting delivery and providing information.[40]

Nautical fault exemption, a special regime in maritime law, was established over a century ago when the US Harter Act 1893 set out provisions of relieving the carrier from liability for negligence. This regime has played a great role in reasonable sharing of risks between carriers and cargo owners, and promoting international trade and maritime carriage. It was adopted by the 1924 Hague Rules and 1968 Hague-Visby Rules, but has been abolished in the Convention, which retains the strict liability of the carrier in Hamburg Rules. Doctor Meng Yu advocates that China should not abolish the nautical fault exemption at the moment, because there are no appropriate conditions for the abolition. She believes that China's Maritime Code and Contract Law reflect different value orientations; the strict liability of the carrier in coastal areas and internal waters shipping shall not extend to international carriage of goods by sea where the carrier has been relieved of negligence liability and the nautical fault exemption should carry on; moreover, contemporarily it is common practice to retain the nautical fault exemption. Therefore, in view of China's national interests, it is unnecessary for China to take the lead in abolishing the exemption, and shoulder the international obligation of balancing the interests of carriers and cargo owners that the developed shipping countries have not yet assumed and China has not possessed the national strength to assume. With respect to the international tendency of abolishing the exemption, Doctor Meng Yu further argues that China should improve on a continuous basis the legal regimes of ships liability insurance, cargo insurance, general average, etc., as an effective guarantee for China's international trade; be realistic and pragmatic about international legislation in this regard and develop China's shipping capacities based on the actual conditions.[41]

Shipper is an important party to the contract of carriage of goods by sea.

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40 Guo Ping and Zhu Ke, Struggle between Carrier Interests and Cargo Owner Interests from the View of Development of International Conventions on Carriage of Goods by Sea, *Journal of Dalian Maritime University (Social Science Edition)*, No. 3, 2008, pp. 1~4. (in Chinese)

41 Meng Yu, Think about Exemption of Liabilities of Nautical Fault Again, *Journal of Capital University of Economics and Business*, No. 3, 2008, pp. 99~104. (in Chinese)

Under international trade terms, it is customary for the seller to charter a ship or book a shipping space from the carrier for the carriage of cargoes, namely the delivery of goods from the seller to the carrier for carriage. Therefore, the seller is the shipper in the contract. But under the FOB terms, on one hand, the buyer charters a ship or books a shipping space, which means that the buyer signs the contract for carriage of cargoes with the carrier and is the shipper in the contract; on the other hand, the seller delivers the goods to the carrier. In order to deal with the seller's right of control over the goods under FOB terms, Hamburg Rules identify two types of shipper, namely the person by whom (or in whose name or on whose behalf) a contract of carriage of goods is concluded with a carrier and the person by whom (or in whose name or on whose behalf) the goods are actually delivered to the carrier, incorporating the latter into the concept of shipper. The Convention made a big transformation to the existing shipper system. While it retains the concept of "shipper of the carriage contract" from the Hamburg Rules, it creates the term of documentary shipper which refers to the person, other than the shipper, who appears in the transport document or electronic transport record as the shipper. Doctor Yu Miaohong notes in Transformation and Recommendations of Shipper System under UNCITRAL Transport Law Draft that the documentary shipper serves as a substitute to the shipper. In most circumstances, the documentary shipper has to obtain instructions or approval from the shipper before acquiring his rights; when the carrier is unable to contact the shipper, the documentary shipper has the shipper's rights and obligations. The biggest difference between the definitions of shipper in the Convention and Hamburg Rules is that the Convention separates the person who delivers the goods to the carrier from shipper and gives an independent definition to the former. The Convention gives respective definitions to them, and differentiates their respective rights and obligations, which signifies a conceptual progress and helps to sort out the vague relationship between them. Thereby, the difficulties in distinguishing the rights and obligations between two types of shippers in Hamburg Rules and China's Maritime Code, would be solved.[42]

He believes that the new provisions in the Convention deprive FOB seller of the protection from its legal status as shipper. China's Maritime Code inherits the provisions in Hamburg Rules classifing shipper into two categories, according

42 Yu Miaohong, Transformation and Recommendations of Shipper System under UNCITRAL Transport Law Draft, *Journal of Dalian Maritime University (Social Science Edition)*, No. 4, 2008, pp. 4~8. (in Chinese)

to which the FOB seller that actually delivers the goods to the carrier is the shipper legally. Whether or not FOB seller is named as shipper in the transport document would not change its legal status as shipper. However, in accordance with the Convention, the shipper and the person delivering goods to the carrier are independent and FOB seller shall become “documentary shipper” if it intends to assume the rights and obligations of shipper under the Convention; and for a FOB seller to become documentary shipper, it is requisite to be named as shipper in the transport document. Therefore, FOB seller should make himself a documentary shipper. Only when FOB seller is named as the documentary shipper in the transport document could it be entitled to acquire the transport document that evidences or contains the contract of carriage and then realize the rights to control the goods and collect the payment for goods. Hence, the Convention makes it possible to convert FOB seller into shipper by creating the concept of documentary shipper. The conversion is subject to the shipper’s consent and will be made under the shipper’s instruction to the carrier.[43]

While the Hague Rules, the Hague-Visby Rules and the Hamburg Rules do not refer to transfer of the rights provided for in the contract of carriage or incorporated in the transport document, Chapter 11 of the Convention attempts to make provisions on this issue. Doctor Yao Ying holds that introducing the regime for the transfer of rights, which follows the trends of international legislation, would meet the rational expectations of traders, encourage banks to provide financing services and enhance the e-commerce development; it would be a significant stride in connecting trade law with the law of carriage. But we should not conclude that the Convention is perfect. Instead, it still leaves much room for improvement, including the following issues: legal bases for document holder to exercise rights and obligations; the circumstances under which the document holder is liable; missing of the provisions on the transfer of rights when negotiable transport document or electronic record has not been issued; and the inconsistency between the “transfer of rights” part and other provisions.[44] With regard to deficiency in China’s legislation on the transfer of rights, Yao Ying further recommends that China, as one of the major States participating in the drafting of the Convention,

43 Xu Ying, The Legal Status of the Consignor under UNCITRAL Draft Convention on the Carriage of Goods, *China Oceans Law Review*, No. 2, 2008, p. 118. (in Chinese)

44 Yao Ying, Study on Transfer of Rights: from the Perspective of the Draft Instrument on Transport Law Proposed by UNCITRAL, *Contemporary Law Review*, No. 3, 2008, pp. 92~99. (in Chinese)

may consider incorporating the "transfer of rights" into Chapter IV, Section IV "transport document" when making amendments to the Maritime Code and including provisions on transfer of the rights of a negotiable transport document or negotiable electronic transport record as well as liability of the holder.

IV. Protection of Underwater Cultural Heritage

The General Conference of the United Nations Educational, Scientific and Cultural Organization adopted the Convention on the Protection of the Underwater Cultural Heritage on November 2, 2001 at its 31st session. The Convention took effect on January 2, 2009 and has twenty-two contracting States. It would facilitate the protection of underwater cultural heritage worldwide. The research in this field is relatively less in China, but ranges widely from general topics such as the definition and ownership of underwater cultural heritage and the principle of protecting underwater cultural heritage for the benefit of humanity, to summary of the experiences and lessons drawn from China's underwater archaeological work, analysis and comments on relevant laws and regulations and typical cases of US salvage of underwater cultural heritage.

Doctor Zhao Yajuan tries to make clear the concept of underwater cultural heritage in her research. After probing into the international conventions on underwater cultural heritage, she argues that it is a legal tradition to deem cultural heritage as a property, mostly frequently referred to as "cultural property" and sometimes as "cultural relics". However, the term "cultural heritage" conveys richer connotations and has been adopted by more and more international conventions. It is regretful that these international conventions haven't differentiated cultural property from cultural heritage, nor did they reach any generally-accepted concept, not to mention defining "underwater cultural heritage." The UNCLOS provides that States should protect "objects of an archaeological and historical nature found at sea", but without further definition of these objects which would raise controversy in practice. However, the Convention on the Protection of the Underwater Cultural Heritage explicitly defined "underwater cultural heritage", which might be insufficient but should still be considered making a big stride. Comparatively, the expression of "underwater cultural relics" adopted by China's legislation, covers a broader time frame, but seems to focus more on physical items and fails to pay regard to the environments of archaeological and historical values or human remains. It encompasses a narrower scope in contrast to "underwater cultural

heritage" under the Convention. Thereby, China should accordingly widen the scope of its underwater cultural relics with reference to the Convention's definition of "underwater cultural heritage".[45]

Zhou Guan holds that the principle that underwater cultural heritage is common heritage of mankind and that of preserving the underwater cultural heritage for the benefit of humanity established by the Convention on the Protection of the Underwater Cultural Heritage, impose certain limits on the sovereign rights of the States and would impair the contracting States' rights, especially unfavorable to China which was an ancient civilization and is a shipping giant with abundant shipwrecks and relics.[46] Liu Chunmei discusses the ownership of underwater cultural relics and based on the positions of the relics in the sea, analyzes the legal relationship between the relics and their countries of origin.[47]

In late 2007, the salvage and protection of a Song Dynasty shipwreck – South China Sea I won nationwide attention. Doctor Wei Jun, with protection and excavation of South China Sea I as research subject, reviews the plan of salvaging the shipwreck and its implementation, and believes that South China Sea I is both tangible and intangible cultural heritage and that the archaeological work of the shipwreck, an integration of underwater archaeology and marine engineering, creates a brand-new mode to protect underwater cultural heritage in China. The idea of protecting underwater cultural heritage advocated by this archaeological project is in full compliance with the UNESCO's requirements on cultural heritage protection – authenticity and integrity, and the principles of the Convention on the Protection of the Underwater Cultural Heritage.[48] The article Salvaging China's Underwater History introduces the development and achievements of China's underwater archaeology, and the shipwrecks and underwater remains related to China's maritime trade discovered in East Asia, Southeast Asia and South Asia. After making an analysis on the Law of the People's Republic of China on

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45 Zhao Yajuan, Evolution of the Meaning of the "Underwater Cultural Heritage" in the Context of International Law, *Hebei Law Science*, No. 1, 2008, pp. 143~147. (in Chinese)

46 Zhou Guan, The Challenges to State Sovereignty Posed by the Principle of Common Interest of Mankind: Discussion from the Protection of Underwater Cultural Heritage, *Legal System and Society*, No. 15, 2008, pp. 271~272. (in Chinese)

47 Liu Chunmei, Research on the Legal Issues concerning the Ownership of Underwater Cultural Heritage by the Country of Origin, *Legal System and Society*, No. 34, 2008, p. 359. (in Chinese)

48 Wei Jun, Wreck Archaeology of "South China Sea I" and the Conservation of the Underwater Cultural Heritage, *Cultural Heritage*, No. 1, 2008, pp. 148~153. (in Chinese)

Protection of Cultural Relics and Regulations concerning the Administration of the Work for Protection of Underwater Cultural Relics, the article concludes that China's existing legislation would not suffice to fully protect its underwater cultural heritage and it is necessary to accede to the Convention on the Protection of the Underwater Cultural Heritage for safeguarding Chinese maritime civilization for the long term.[49]

Doctor Zhao Yajuan believes that underwater cultural heritage, as important cultural resources, should be treated as public resources in principle and properly kept in public places by the government for appreciation, research and reference by the following generations. She believes that underdeveloped legislation in China is a major cause for the damages the underwater cultural heritage has suffered from, and that Regulations concerning the Administration of the Work for Protection of Underwater Cultural Relics should add provisions on *in situ* conservation, make specific provisions for a discovering, reporting and rewarding regime of cultural relics, and strictly limit legal activities that may severely disturb underwater cultural heritage; the Regulations should also add stipulations about enhancing social publicity and education, so as to steer the public into being concerned about and proactively preserving the cultural resources inherited from our ancestors.[50]

In addition to China's practices and legislation in protecting underwater cultural heritage, the salvage and protection of U.S. historic shipwrecks (categorized as underwater cultural heritage) have also won some attention. Doctor Zhao Yajuan makes a detailed analysis of U.S. courts' decisions on four cases in relation to shipwrecks including Nuestrqa Senora de Atocha, Almiranta, S. S. Central America and holds that the U.S. courts have already applied the traditional law of salvage at sea to the historic shipwrecks and adapted the law with due regard to the features of the historic shipwrecks. For example, the object of salvage is limited to the shipwrecks outside the territorial waters of the U.S whose ownership has been abandoned; as for granting the exclusive salvage rights to a discoverer of historic shipwrecks, the discoverer's previous performance in salvaging historic shipwrecks, their capital and manpower among others, are taken into consideration; the law of salvage may be applied, or applied together with the law of finds according to the circumstances; the salvagers' endeavors to preserve the historic

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49 Salvaging China's Underwater History, *Civilization*, No. 5, 2008, pp. 68~73. (in Chinese)

50 Zhao Yajuan, Status-quo of China's Underwater Cultural Heritage Protection and Some Suggestions, *Journal of South China University of Technology (Social Science Edition)*, No. 1, 2008, pp. 27~30. (in Chinese)

and archaeological values of shipwrecks would be taken into account when rewards of salvage are being determined. In spite of these new developments, the courts are still unable to change the nature of the law of salvage of pursuing maximum economic benefits, which would be unfavorable to the protection of historic shipwrecks. In consideration of the lessons learned from the thriving black market for underground cultural heritage, it would be advisable to establish a protection regime to balance different values and interests, instead of preventing well-equipped salvage companies from the salvage of historic shipwrecks.[51]

V. Marine Resources and Energy

Oceans are full of natural treasures for the humanity, ranging from biological and chemical resources of different varieties and rich seabed resources such as oil and natural gas, to inexhaustible renewable energy – the power resources such as tidal energy, wave energy, ocean thermal energy, ocean current energy and salinity gradient energy. The reasonable development and protection of the tremendous marine resources has won worldwide attention. With the rapid increase of global energy consumption, the people both at home and abroad have been increasingly concerned about the energy safety and energy & environment.

A. Development and Protection of Seabed Resources such as Oil and Natural Gas

In 2008, the focus of attention was the exploitation of Sino-Japanese East China Sea oil & gas fields and the safe development and protection of South China Sea oil and gas resources.

1. Sino-Japanese Consensus on East China Sea Oil and Gas Fields

Pang Zhongpeng notes that according to the findings of UN Economic Commission for Asia and the Far East, the East China Sea stands comparison with the Middle East for its abundant reserves of oil and natural gas amounting to 7.7 billion tons. China considers the East China Sea a major strategic base for energy and resources that greatly matters to the flourish and decline of the nation. And

51 Zhao Yajuan, The New Development of Salvage Law in the United States: Perspective from Salvage of Historic Shipwrecks, *Journal of International Economic Law*, Vol. 14, No. 4, 2007, pp. 163~182. (in Chinese)

Japan, whose energy self-sufficiency rate is as low as 4%, is also craving for energy as the core strategic resource for life and death of its nation. Therefore, the East China Sea oil and gas fields are heatedly contested.[52] However, the delimitation remains pending because of the big difference between China and Japan in their claims to delimit the East China Sea. China proposed to set aside the sovereignty dispute and to engage in joint development of the disputed sea areas since there is no immediate solution to the delimitation of the East China Sea. According to *Merchants Weekly*, China and Japan reached a preliminary consensus on the joint development in the 3rd round of consultations regarding the East China Sea from September 30 to October 1, 2005. From October 2004 to November 2007, eleven rounds of consultations regarding the East China Sea were held. And it was not until June 2008 that some prospects began to emerge for Sino-Japanese dispute over the East China Sea.[53] On June 18, 2008, Jiang Yu, then spokesperson of Ministry of Foreign Affairs, announced that China and Japan had reached principled consensus on the East China Sea issue through consultation on an equal footing. First, in order to make the East China Sea, of which the delimitation between China and Japan is yet to be done, a "sea of peace, cooperation and friendship", China and Japan have agreed that the two sides will conduct cooperation in the transitional period prior to delimitation without prejudice to their respective legal positions. Second, the understanding between China and Japan on joint development of the East China Sea. As the first step in the joint development of the East China Sea between China and Japan, the two sides will work on joint exploration and exploitation of a block with an area of 2600 square kilometers in the north of the East China Sea. The block for joint development is an area that is located south of China's Longjing Oil Field and bounded by straight lines joining seven coordinate points. 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. Third, the understanding on the participation of Japanese legal person in the development of Chunxiao Oil and Gas Field in accordance with Chinese laws. Japanese legal person would participate in the development of the existing Chunxiao Oil and Gas Field in accordance with the relevant laws of China governing cooperation with foreign enterprises in the exploration and exploitation

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52 Pang Zhongpeng, An Analysis of Fights for Energy in the East China Sea between China and Japan, *Journal of Jilin Radio & TV University*, No. 1, 2008, p. 33. (in Chinese)

53 Prospects Has Emerged in the Issue of Sino-Japanese Disputes in the East China Sea, *Merchants Weekly*, No. 13, 2008, p. 16. (in Chinese)

of offshore petroleum resources.[54] Jiang Xinfeng further maintains that China and Japan should make clear: first, the established block for joint development is a provisional arrangement prior to delimitation of the disputed sea areas between China and Japan. Joint development indicates that since there is no immediate solution to the delimitation of the East China Sea, the two sides should set aside the sovereignty dispute and engage in joint development of an agreed-upon area without prejudicing their respective legal claims. Joint development in the block would be undertaken in accordance with the measures and principles agreed upon by the governments of both sides instead of Chinese or Japanese domestic legislation. Both sides adopt joint development as interim measures under the principle of mutual benefit, which conforms to international practices. Currently, over twenty States have been engaged in joint development of continental shelf, which does not hinder the conclusion of a final agreement by all parties, or signify waiver of any claims by any party or recognition of any claims by the other party. Therefore, the prerequisite for joint development of the East China Sea is to deny the "median line" claimed by Japan; Joint development shall not affect China's sovereign rights in the East China Sea nor be used by Japan as arguments to reinforce its claim of the "median line". Second, China and Japan would carry out cooperative development in Chunxiao Oil and Gas Field instead of joint development, the legal basis for which is the Regulations of the People's Republic of China on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises. The Japanese enterprises should participate in the development of the Chunxiao Oil and Gas Field in accordance with the relevant laws of China and accept jurisdiction by Chinese laws.[55]

2. Safe Development and Protection of the South China Sea Oil and Gas Resources

Tong Dai reveals in his article that the South China Sea boasts over 200 seabed oil fields, 180 oil and gas fields and 23 to 30 billion tons geological oil reserves, about one third of the total resources in China. It is one of the four marine oil and

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54 Jiang Yu, Spokesperson of Ministry of Foreign Affairs, Made a Public Announcement on Sino-Japanese Principled Consensus on the East China Sea Issue, *Xinhua News*, at http://news.xinhuanet.com/newscenter/2008-06/18/content_8394182.htm, 28 March 2009. (in Chinese)

55 Jiang Xinfeng, China and Japan: How to Develop the Oil and Gas Fields in the East China Sea, *World Affairs*, No. 14, 2008, p. 27. (in Chinese)

gas terminals in the world and is acclaimed as the second Persian Gulf.[56] In 2008, Vietnam, the Philippines, Malaysia, etc. made many attempts to unobtrusively seize the Nansha Islands. Mao Chunchu et al. argue that the prolonged encroachment on China's islands or rocks by Vietnam, the Philippines, Malaysia, etc. not only infringes on China's territorial sovereignty but also exposes their covetousness of the abundant oil and gas resources in the South China Sea. Moreover, their attempts to seize Nansha in 2008 were intended as a warm-up for submitting their territorial sea baseline proclamations to the United Nations, so as to develop the oil and gas resources on a "long-term, legal and continuous" basis. If China takes no effective countermeasures, tens of islands and rocks in the South China Sea seized by those States would be getting farther from China's reach. And China's proposal of "shelving differences and seeking joint development" may turn out to be China setting aside the dispute and other States developing the areas.[57] The special observer of *International Herald Leader* Hai Tao analyzes that the South China Sea issue is not merely an issue of island or rock dispute; the South China Sea, which is strategically important because of its abundant oil and gas resources, would impact the long-term development of China. Therefore, we should make plans for and handle the issue on the level of national strategy. From a long-range perspective, the policy of "shelving differences and seeking joint development" should still apply to the issue. However, in view of the severe situations, China should take proactive actions as soon as possible; otherwise, "maintaining the status quo" would only lead to "unilaterally setting aside the issue".[58] According to the Whitepaper on China's National Defense in 2008, "China places the protection of national sovereignty, security, territorial integrity … the paramount issue", and China "strives for close collaboration between military forces and political, diplomatic, economic, cultural and legal endeavors". Against the current backdrop, China should maintain its diplomatic pressure, expedite its maritime legislation, make clear the base-point coordinates of the South China Sea islands and rocks to the global community, gradually extend its patrol area deeper into Nansha, guarantee the security of the development of the South China Sea oil and gas

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56 Tong Dai, The Second Persian Gulf: Territorial Disputes in the South China Sea, *China Territory Today*, No. 9, 2008, p. 42. (in Chinese)

57 Mao Chunchu, Pan Jie, Miao Qian and Song Xiao, How Should China Tackle the Issue of the South China Sea, *Evening Newspapers Abstracts*, No. 2, 2008, p. 59. (in Chinese)

58 Hai Tao, China Is Confronted with Great Challenges to Its Strategy on the South China Sea and Is Gradually Losing Control over the Islands and Rocks, *International Herald Leader*, 17 February 2009. (in Chinese)

resources with the assistance of military forces, as part of the significant strategy of "taking proactive actions, managing and planning for the South China Sea".[59]

B. Development and Utilization of New Marine Resources

On September 4, 2007, National Development and Reform Commission issued a Medium and Long-Term Development Plan for Renewable Energy, identifying the strategic importance of renewable energy development. On August 2008, the new National Energy Administration was officially established and placed the development and utilization of renewable energy on top of its agenda. Thereon, China's development of new marine energy has opened a new chapter.

In the international arena, according to the information released by National Energy Administration, the third International Renewable Energy Conference was held on March 4 to 6, 2008 in Washington. At the conference, there was a common understanding on development and utilization of renewable energy especially on the importance of marine energy. The participating States believed that expediting the development and utilization of tidal energy, wave energy and the like is a vital move to increase energy supply, guarantee energy security and address the climate change. These States agreed to promote the development of renewable energy, especially through international cooperation in technology. In order to aid the poverty-stricken countries in solving the issues of energy supply and environmental protection, the U.S. government proposed to set up a foundation for international clean technology development funded by rich countries and called on the U.S. Congress to donate 2 billion dollars to the foundation; moreover, it proposed that the States shall shatter protectionism, abolish tariffs and trade barriers to environmental goods and services and promote the free flow of clean energy technology around the world, so as to address the issues of global climate change and environmental protection.[60] Cai Yiming highly acclaimed the conference, saying that it not only creates a favorable global environment for China's development and utilization of new marine energy and facilitates the massive development of marine

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59 China Is Gradually Losing Control over the Islands and Rocks in the South China Sea and Patrols by the People's Liberation Army Are in Urgent Need, *Northnews*, at http://www.northnews.cn/news/2009/200902/2009-02-27/190638.html, 11 May 2009. (in Chinese)

60 National Energy Administration, The Opening of 2008 Washington International Renewable Energy Conference, at http://nyj.ndrc.gov.cn/gjkzsnydh/t20080314_197575.htm, 28 March 2009. (in Chinese)

energy, but also speeds up China's energy structure reform into a sustainable mode.[61]

However, Wang Chuankun, Secretary-general of Ocean Energy Committee of Chinese Renewable Energy Society, noted that China's utilization of new marine energy had just been initiated and had not started massive development yet; the industries of marine wind energy and tidal energy were featured by low-level scientific and technological innovation, a deficient incentive regime, and the underdeveloped long-term mechanism for sustainable development of new energy. Currently, the development of new marine energy has not been given due regard to in a majority of coastal regions because the high costs of the research & development and production & investment make it a difficult task to achieve considerable economic benefits in a short term.[62] But thankfully, China in its 11th Five-year Plan sets out to make great efforts to develop new energy by adopting preferential policies in finance, tax and investment, granting a mandatory market share and encouraging the production and consumption of new energy. According to the news issued by newenergy.com.cn, National Energy Administration has identified eight highlights on the top of its agenda since its inauguration, one of which is to proactively develop the renewable energy and new energy such as nuclear energy, hydroelectric energy, wind energy, solar energy, biomass energy, etc., and to continuously increase the percentage of clean energy in the total primary energy consumption in China. The consumption of renewable energy should account for up to 10% of the total energy consumption in China by 2010, and 15% by 2020. It heralds that the government's policy of intervention and support for new energy would be strengthened continuously.[63] Thereby, the development of new marine energy would be exposed with great opportunities.

According to 2008 Statistical Bulletin of China's Marine Economy issued by the State Oceanic Administration, the industry of developing and utilizing marine resources and energy functioned well. As influenced by the dramatic fluctuations of international oil price, the marine oil and gas industry achieved a more rapid

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61 Cai Yiming, On the Theory of Maritime Hegemonies and Harmonious Oceanography, *Journal of Zhejiang Ocean University (Humanities Sciences)*, No. 4, 2008, p. 12. (in Chinese)

62 Tan Zhijuan, The Launch of Marine Energy Development in China: An Interview with, Wang Chuankun, Secretary-general of Ocean Energy Committee of Chinese Renewable Energy Society, *Discovering Value*, No. 10, 2008, pp. 59~60. (in Chinese)

63 China Should Accelerate Efforts to Welcome the Advent of New Energy Era, *Newenergy.com.cn*, at http://www.in-en.com/newenergy/html/newenergy-1243124317327587.html, 20 April 2009. (in Chinese)

increase in output value in the first half of the year and the increase dropped in the second half of the year. The increase in output value amounted to 87.4 billion yuan for the whole year, but was 1.1% less than last year's increase. In 2008, China continued to strengthen the administration on sea sand exploitation, effectively managed the exploitation of nonmetallic minerals, expanded the production scale of metallic minerals and continued to improve the industrial structure of ocean mining. The whole year witnessed an increase in value of 900 million yuan, 21.3% more than last year. With the support and guidance of the policies of energy conservation and emission reduction as well as clean energy development, marine power industry has achieved quick development. The regions such as Shandong, Jiangsu and Fujian have been intensifying their efforts in utilizing marine energy, and put a group of offshore wind power projects into operation, which has promoted robust growth of marine electric power industry. The industry has brought about an increase in value of 800 million yuan, 51.6% higher than that of last year. Moreover, Chinese coastal regions have been carrying out the Special Plan of Seawater Utilization, expanding the scale of seawater desalinization and comprehensive utilization and achieving greater progress in developing seawater utilization technology. Increase of value in this field has reached 800 million yuan, 22.7% higher than that of last year.[64]

C. Security of Seaborne Energy Transport Routes

In 2008, Somali pirates' attacks occurred frequently and escalated, having negative effects beyond Somali regions and severely threatening the security of seaborne energy transport around the world including that of China. As a countermeasure to piracy, Maritime Safety Administration of China sent emergency notices to the ship owners, operators and masters to raise awareness of anti-piracy. In addition to the measures combating piracy and armed robbery against ships recommened in the letters of notice issued by the International Maritime Organization, the following special measures should also be taken: first, companies and vessels should pay attention to information on piracy, especially navigational warnings; second, companies should strengthen ship security watch-keeping and maintain contact with their ships when the ships navigate through

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64 State Oceanic Administration, 2008 Statistical Bulletin of China's Marine Economy, at http://www.soa.gov.cn/hyjww/hyjj/2009/02/16/1225332549834419.htm, 28 March 2009. (in Chinese)

the sea areas rampant with piracy; third, the company shall immediately report to China Maritime Search and Rescue Centre once informed of any piracy attack, and keep contact with the competent maritime administrative departments; fourth, the ship masters may make a detour in accordance with the navigation plan to keep away from the sea areas rampant with piracy; fifth, the ship masters should strengthen watch-keeping and build up a regular anti-piracy onduty system.[65] Li Xingguang makes further suggestions that China's navy fleets should, according to international conventions (1958 Convention on the High Seas and 1982 UNCLOS) and relevant decisions of U.N. Security Council against piracy (No. 1816, No. 1838, No. 1846 and No. 1851), escort the ships navigating along the Somali coast where piracy is most rampant to prevent and fight against the pirates.[66] South China Sea Fleet set out for the Gulf of Aden and Somali coast on December 26, 2008 on their first mission to escort the ships and combat the piracy. Based on relevant international conventions, China's escort fleet enjoys the rights of innocent passage, immunity and visit.

The special observer Yin Weibin of *Guangming Daily* believes that to combat piracy and safeguard the security of seaborne energy transport, the key is to improve coordination and establish an international cooperative regime. The Arabian States near the Rea Sea, on November 20, 2008, decided to set up a joint mechanism to enhance the navigation security in the Red Sea region, by jointly supervising, tracking and combating any piracy in the region, coordinating the States' stances through the League of Arab States on combating piracy at international and regional levels and calling on the international community to provide material and technological support. In this respect, on the basis of maintaining autonomy of actions China should also proactively initiate cooperative mechanisms with other States, especially global and regional great powers, including mechanisms of intelligence sharing and collaborative actions, to jointly safeguard the security of global seaborne energy transport routes.[67]

Ma Ying, researcher of Shanghai Institutes for International Studies, ana-

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65 Lin Hongmei, Emergency Notice from Maritime Safety Administration of China to Caution Somali Pirates and Avoid Losses, at http://www.gov.cn/jrzg/2007-05/22/content_622601.htm, 28 March 2009. (in Chinese)

66 Li Xingguang, Reasonable and Legal for Chinese Navy Fleets to Escort Ships Navigating along Somali Coast, *PLA Newspaper*, No. 7, 2008, p. 16. (in Chinese)

67 Yin Weibin, Dilemma and Way out: Piracy Issue and the Security of China's Seaborne Strategic Routes, at http://guancha.gmw.en/content/2008-12/31/content_874761.htm, 28 March 2009. (in Chinese)

lyzes that besides the Gulf of Aden, the security of China's energy imports is constrained by the sea routes in the Indian Ocean, Strait of Malacca and Strait of Hormuz, among which the sea route of the South China Sea–Malacca–Indian Ocean is the most important energy transport route for China. Reportedly, 80% of China's imported crude oil is transported through this sea route and 60% of the vessels navigating through the Strait of Malacca are from China. It is noteworthy that the seaborne routes for oil supply to China, Japan and South Korea overlap with the European seaborne trade routes in this area.[68] On the first session of the 11th National Committee of Chinese People's Political Consultative Conference (CPPCC) in 2008, the CPPCC members from the China Democratic League proposed to improve the development of this seaborne energy transport route, conduct research and experiments on high-tech monitoring on the Nansha Islands and Xisha Islands, enhance scientific observation and research on the marine environment of the Strait of Malacca and the Indian Ocean, and establish a marine environment information guarantee regime covering the sea route of the South China Sea–Malacca–Indian Ocean. China should effectively boost capacities in safeguarding marine environment and collecting information through domestic and international cooperation and exchange, especially information sharing.[69]

As noted by Hu Qingliang, China is faced with quite a lot of pressure with regard to energy security. The development of the South China Sea oil and gas and the solution of "Malacca dilemma", are particularly important to the security of China's marine energy transport route. China should proactively participate in international cooperation for safeguarding seaborne energy security. It should, on the basis of the UNCLOS, adopt the cooperative model of Community & Treaty keeping pace with each other, domestic legislation & international law equally important, long-term supply contracts & concession agreements mutually complementary, and maritime and regional cooperation taking the lead, so as to ensure the long-term development and safe supply of energy.[70]

VI. Marine Fisheries

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68 Ma Ying, The Security of Sea Lanes in the South China Sea after September 11 Terrorist Attack and Its Impacts, *Innovation*, No. 2, 2008, p. 52. (in Chinese)

69 Seaborne Energy Transport Routes Drawing Attention, at http://oil.in-en.com/html/oil-1429142958168132.html, 28 March 2009. (in Chinese)

70 Hu Qingliang, India's Marine Strategy and Its Effect on China's Energy Security, *South Asian Studies Quarterly*, No. 1, 2008, p. 25. (in Chinese)

In 2008, the research on marine fisheries revolved around the conservation and management of fishery resources, the development of mariculture, pelagic fishing and leisure fishery industries, the regime of fisheries subsidies, fisheries law enforcement and fisheries rights.

First, the conservation and management of fishery resources. Yin Zengqiang and Zhang Shouyu from Shanghai Ocean University, note that catch and release of fish serves as an efficient way to restore fishery resources and increase fisheries productivity. They contend that China's fisheries stock enhancement is generally featured by an underdeveloped managerial regime, insufficient funding, and unsound technical specifications, and primitive machinery and technology in some areas for parent selection and seed rearing. Thereby, for the development of fisheries stock enhancement, they propose to establish and improve the managerial regime, widen the funding channels to increase investment, enhance scientific research, establish sound standards for technical specifications, and implement a qualification regime for the entities engaged in parent selection and seed rearing.[71] Zhou Yu from Chongqing Fish Fingerling Station holds that the following aspects should be noted for fisheries stock enhancement: the selection of fish varieties for releasing should be conducted in line with local conditions and in appropriate proportion; the entities involved in the release work should report the actual number of the released parent fish or fingerling to higher authorities; with regards to fingerlings release, specialized agencies should be in place for inspection, and to collect statistics on the effects.[72]

Song Hu from Shandong Provincial Department of Ocean and Fisheries notes that China's administration on summer fishing moratorium has been on track, but some problems still exist. For example, different opening dates for different fishing nets and tools increase difficulty to and pressure on the administration of the moratorium; the underdeveloped fisheries administrative regime and administrative technical equipment, and insufficient funding have affected normal operation of administration on the moratorium. Hence, China should take measures to reinforce some priorities of administration, and improve the fisheries administrative regime

71 Yin Zengqiang and Zhang Shouyu, Reflections on China's Fisheries Stock Enhancement and Releasing, *China Fisheries*, No. 3, 2008, pp. 9~10. (in Chinese)

72 Zhou Yu, Notes to Fisheries Stock Enhancement and Releasing, *Chongqing Fishery*, No. 4, 2008, pp. 49~50. (in Chinese)

on the basis of ameliorating relevant laws.[73] Shi Zanrong et al. from South China Sea Fisheries Research Institute analyze the results of imposing the summer fishing moratorium in the South China Sea in the past decade, and note that the moratorium has certain effects on easing the contradiction between limited fisheries resources and over-harvesting, but the moratorium couldn't ultimately stop the decline of resources and conserve the resources in a thorough way because a few urgent problems need to be solved first, such as the lack of follow-up administration on fishing operations after the end of moratorium, further revisions needed to the target, time and area of the moratorium and limited revenue of the fishermen.[74]

With respect to ecological fishery management, Wang Yamin and Huang Zengjin, from Shangdong University, argue that to achieve successful ecosystem-based fishery manegement, due regard should be paid to the following six aspects: design and implement the administration under the policy framework of ecosystem-based administrative principles; make clear the economic, social and cultural benefits of the administration; make clear the impacts on ecological value posed by resources development; take note of information collection; make an administrative plan that all the stakeholders would fully participate in; take overall consideration of the external factors that may have impacts on the resources.[75] Wang Xianzhang, from China Fishery Administration holds that ecological fishery refers to creating a scientific ecosystem for the fishery industry by adopting the principles of economic ecology and applying advanced science and technology, and making the most output and creating a favorable eco-environment with high energy conversion rate, and a benign circle and multi-use of materials, so as to achieve harmony among economic, social and ecological interests.[76]

China may draw on the successful experiences in fishery administration from other States. Yuan Hua et al., Shanghai Ocean University, introduce Australia's measures in controlling IUU fishing from the perspectives of fishermen, fishing

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73 Song Hu, Views on Summer Fishing Moratorium Administration, *Fishery Administration*, No. 3, 2008, pp. 20~21. (in Chinese)

74 Shi Zanrong, Li Yongzhen, Sun Dongfang and Lu Weihua, Analyzing the Effects of the Ten-year Summer Fishing Moratorium from the Perspectives of Changes in Resources, Ecological Protection, Economic Benefits and Social Impacts, *China Fisheries*, No. 9, 2008, pp. 14~16. (in Chinese)

75 Wang Yaming and Huang Zengjin, Probe into Ecosystem-based Fisheries Management: Reflections on the Future Direction of China's Fisheries Management, *China Fisheries*, No. 5, 2008, pp. 21~22. (in Chinese)

76 Wang Xianzhang, Discussion on the Development of Ecological Fishery, *Inland Fisheries*, No. 8, 2008, pp. 1~2. (in Chinese)

vessels and catches in fishing activities. For example, in terms of administration over fishermen, certain fishing rights, according to Australia's Fisheries Administration Act 1991, should be granted to nationals and foreigners who meet relevant qualifications; with respect to administration over fishing vessels, the vessels that intend to get engaged in fishing activities outside Australia's territorial sea shall register according to Article 29 of Shipping Registration Act 1981; as regards catches, Article 91 of Australia's Fisheries Administration Act 1991 provides that processors, wholesalers and retailers of fish products shall hold relevant permits to receive fish. China may learn from Australia's successful experiences, accelerate the development of legal institutions on fisheries rights, improve the approval mechanism for fishing industry, and enhance the supervision on illegal fishing.[77] Jiao Guiying et al. from Ocean University of China make an analysis on the fishery administration in Republic of Korea and note that its fishing industry has shifted from offshore fishing to pelagic fishing and mariculture, due to the decline of fishery resources and the narrowing of fishing zone because of the UNCLOS.[78]

Le Jiahua and Liu Liyan, from Shanghai Ocean University, note that Japan adopts the dual model of co-management for fishery industry by central and local governments. Now, Japan has geared its fishery policies to the latest developments of international fishery industry. In the field of stable supply of aquatic products, the government has attached great importance to the development of fishery industry based on resources management, and put the sustainable exploitation of aquatic resources on high agenda; with respect to healthy development of fishery, it focuses on the restructure of fishery production by fostering stable and efficient fishery operators, promoting rational use of fishing grounds, training fishery professionals, developing a proper processing and distribution industry for aquatic products, enhancing the bases for fishery industry, etc.[79] Wang Miao and Song Wei, from Ocean University of China, draw on successful management experiences from the major States in fisheries, such as the evolution history and management model of the United States' legislation on fisheries administration, Norway's establishment

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77 Yuan Hua, Tang Jianye and Huang Shuolin, Analyse on Australian National Action to Deter IUU Fishing and Its Illumination to China's Fisheries Management, *Journal of Shanghai Fisheries University*, No. 3, 2008, pp. 362~364. (in Chinese)

78 Jiao Guiying, Sun Li and Liu Hongbin, Inspirations from the Fishery Administration in Republic of Korea, *Ocean Development and Management*, No. 12, 2008, pp. 42~48. (in Chinese)

79 Le Jiahua and Liu Liyan, The Dual Management Model and Development Trend of Japanese Fishery, *Fisheries Economy Research*, No. 6, 2008, pp. 33~37. (in Chinese)

of fisheries management authorities and Japan's independent fisheries management. Therefrom, they propose that China should introduce a TAC regime to supplement and improve its traditional fisheries management system and build up a holistic regime for fisheries administration; promote scientific fisheries management and enhance infrastructure development; and attach importance to the role of fisheries associations in assisting the management.[80]

Second, marine aquaculture, an important component of marine fisheries. Yu Wenqing, Ocean University of China, by discussing the influence of marine aquaculture on the marine environment, notes that the ocean waters have limited capacities in self-purification; when the substances discharged by marine aquaculture exceed the maximum limits that the waters could endure, namely the environmental capacity of the waters, the aquaculture would cause pollution to the marine environment. Marine aquaculture's pollution to offshore environment mainly derives from three sources: first, the nutrients such as baits or excreta; second, the use of aquaculture drugs; third, the enrichment of sediments.[81] Zhou Ying and Zhong Changbiao, from Ningbo University, hold that offshore aquaculture would exert direct and indirect influences on fisheries resources; direct influences mainly refer to the directly-discharged pollutants that cause eutrophication (enrichment of waters with nutrients) and natural disasters such as red tides; indirect influences include influences on offshore biological community and damages to the coastal ecological environment and the like. China should adopt the concept of "clean production", and achieve sustainable development of offshore aquaculture by pre-production planning, control during the production and post-production management.[82]

Third, pelagic fishery. Liu Shenli, from China National Agricultural Development Group Co., Ltd., notes that pelagic fishery has become one of the highlights of China's fisheries industry restructure and "go-global" strategy after twenty-three years of strenuous efforts. At present, China's pelagic fishery is confronted with such difficulties as the aging of equipment in fishing ships, underdeveloped technology, shortage of funds, and poor adaptability to the demands of competition,

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80 Wang Miao and Song Wei, Significant Inspirations from Fisheries Practices of Other States, *Journal of the Party School of C.P.C. Qingdao Municipal Committee (Qingdao Administrative College)*, No. 4, 2008, pp. 22~25. (in Chinese)

81 Yu Wenqing, Probe into the Influence on Environment Caused by Marine Aquaculture, *Ocean Development and Management*, No. 12, 2008, pp. 113~117. (in Chinese)

82 Zhou Ying and Zhong Changbiao, Analysis of the Effect of Inshore Cultivation on Ocean Fishery Environment, *Fisheries Economy Research*, No. 6, 2008, pp. 11~17. (in Chinese)

in addition to the high oil price. Therefore, China should improve the importance of pelagic fishery industry and invest more in renovation and reconstruction of infrastructure and fishing ships.[83] Huo Jun, from Ocean University of China, analyzes the current situations of China's pelagic fishery and believes that China's pelagic fishery has made a stride since "reform and opening-up", but many problems have arisen during its development, such as underdeveloped equipment for ocean operations, weak capacities and low risk-awareness of crewmen in ocean operations, insufficient funding, etc. He also proposes that sustainable development of pelagic fisheries would be promoted in the following aspects: due regard to scientific and technological research and development; intensified efforts in training crewmen of ocean operations; more funding; adjustment of operation structure and production arrangement of pelagic fishery; improvement on the property rights regime and insurance regime for pelagic fishery.[84]

Fourth, leisure fishery. Some scholars have made a detailed analysis on leisure fishery in some coastal cities. Wang Yingbin and Yu Cungen, from Zhejiang Ocean University, probe into the current situations and existing problems of leisure fishery in Zhoushan, and note that leisure fishery in Zhoushan has made some achievements since the debut of "fisherman's household touring" project in 1999. However, quite a few problems have also occurred. For example, most leisure fishery bases are small-scale with a single function, humble infrastructure and lack of competitiveness; the leisure fishery projects have a high degree of seasonality, etc. The government may formulate a plan for the development of leisure fishery in Zhoushan based on its actual conditions; invite merchants and investors and promote diversified investment; implement preferential policies, put the development of this industry on high agenda and promote the scale of its development.[85] Song Wei and Gou Weimin, from Dalian Ocean University, note that leisure fishery would be on top agenda in the development of fisheries in Dalian – a city that boasts particularly favorable conditions in terms of location and climate. For the development of leisure fishery in Dalian, due regard should be paid to folk culture of fishing families and marine fishery culture, so as to create

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83 Liu Shenli, Pelagic Fishery in China Earnestly Needs to Be Supported by the Government in Order to Speed Its Development, *Chinese Fisheries Economics*, No. 3, 2008, pp. 54~56. (in Chinese)

84 Huo Jun, The Current Status and Countermeasure Analysis of the Development for Distance Water Fishery of China, *Fisheries Economy Research*, No. 4, 2008, pp. 24~27. (in Chinese)

85 Wang Yingbin and Yu Cungen, Probe into the Current Situations and Development of Leisure Fishery in Zhoushan City, *China Fisheries*, No. 2, 2008, pp. 77~78. (in Chinese)

a variety of leisure fishery products. A leisure fishery products system in Dalian would be built up by effectively connecting the leisure fishery products in light of ultimate concerns and changes of the tastes of the cultural tourism.[86]

Chen Mingbao, from Ocean University of China, makes a summary of the status quo of China's leisure fishery research, and indicates the direction of future development of the industry. He believes that China's research on leisure fishery is still at an initial stage, mainly introductions to practices in the industry with relatively little theoretical research. This pragmatic approach has played an active role to certain extent in promoting local fisheries to turn to other lines of productions, but due regard has not been paid to drafting a long-term development plan or enhancing the harmonious development of leisure fishery with other industries. Therefore, China's future research on leisure fishery should be conducted in the following aspects: to scientifically and explicitly delimit the scope of the leisure fishery industry, for the purpose of the gradual establishment of a statistical indicators system; leisure fishery and the issues of "fishery industry, fishing village and fisherman"; to reinforce research on the economic values of leisure fishery; integration of theoretical research and practices in leisure fishery, etc.[87]

Learning from the experiences of other countries. Fang Baishou et al., from Ocean University of China, make a comparative analysis on the contents, approaches and perspectives of research on leisure fishery at home and abroad, and note that other States attach more importance to the research on the management and sustainable development of leisure fishery and conduct inter-disciplinary research from different perspectives with empirical approaches. They further propose that China should improve its research on relevant terminologies and connotations of leisure fishery and conduct research from a variety of facets and perspectives by reference to mature concepts, theories and approaches of sociology, psychology, statistics, economics, etc.[88] Fanghai et al., from Chinese Academy of Fishery Sciences, introduce the emergence and development of leisure fishery in other States and the prominent issues of environmental pollution and resources destruction arising therefrom, and note that China should enhance its legislation and supervison on lei-

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86 Song Wei and Gou Weimin, SWOT Analysis of Leisure Fishery Development in Dalian, *Chinese Fisheries Economics*, No. 1, 2008, pp. 46~48. (in Chinese)

87 Chen Mingbao, Status-quo of China's Leisure Fishery Research and the Direction of Its Future Research, *China Fisheries*, No. 5, 2008, pp. 76~79. (in Chinese)

88 Fang Baishou, Lu Fei and Gong Hongping, Overseas Research on Leisure Fishery and Its Insights to China, *China Fisheries*, No. 8, 2008, pp. 77~78. (in Chinese)

sure fishery, and put in place an information system for the industry.[89]

Fifth, subsidies for fishery industry. Li Liangcai, from Guangdong Ocean University, points out that the draft text of the Rules on fisheries subsidies issued by WTO on May 28, 2008 represents the future direction for the development of fisheries subsidies disciplines. China should gear its fisheries subsidies policies to the Rules and proactively respond to the anti-subsidy investigation into China's fisheries initiated by other trade partners. With regard to the international subsidies, China should timely adjust its direction and intensity of fisheries subsidies, and enhance its management on fisheries resources to avoid allegations of subsidization. In respond to anti-subsidy efforts by the international community, China should strengthen its theoretical research on anti-subsidy investigation on fisheries industry and build up a pre-warning regime for anti-subsidy investigation as soon as possible.[90] Qiao Junguo, from Guangdong Ocean University, notes that the negotiations on fisheries subsidies under the WTO framework are underway. Any changes to the Rules of fisheries subsidies would definitely impact the international competitiveness of China's fisheries. China should make the following adjustments to its fisheries subsidies policy, including but not limited to: increase the amount of subsidies; strengthen non-actionable fisheries subsidies and promote the turning of actionable fisheries subsidies into other types; research on WTO rules and endeavor for special and differentiated treatment in WTO policies; and set up an accounting and evaluation regime for fisheries subsidies.[91]

Sixth, fisheries law enforcement. Zhang Li and Yao Shanqun, from Fishery Administration of Jiangsu Province, in response to the unfavorable environment, underdeveloped law enforcement capacities, ineffective supervision, etc., propose that China should improve the overall competence of enforcement personnel; strengthen publicity efforts and bring into full play the role of participation of the public and supervision by public opinion; regulate law enforcement and strengthen supervision; reinforce the efforts of fisheries administrative law enforcement;

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89 Fang Hai, Xie Yingliang and Li Linian, Status of Sustainable Management of Foreign Recreational Fisheries and Management Countermeasure for Recreational Fisheries in China, *Modern Fisheries Information*, No. 10, 2008, pp. 16~18. (in Chinese)

90 Li Liangcai, International Fisheries Subsidies & Anti-subsidization and China's Countermeasures, *China Business*, No. 16, 2008, pp. 117~119. (in Chinese)

91 Qiao Junguo, A Discussion on the Fisheries Subsidy of Our Country under the WTO Framework, *Hebei Fisheries*, No. 7, 2008, pp. 4~6. (in Chinese)

improve the external conditions for fisheries law enforcement.[92] Zhang Bin, from Jiangsu Provincial Command Department of Marine Fisheries, analyzes the discretionary power in the law enforcement for marine fisheries. He notes that there are two types of power according to fisheries laws and regulations, namely the discretion to decide the category of punishment and the discretion to set the amount of fines within a certain range. The exercise of discretionary power should conform to the legislative purpose, and be based on a correct understanding of the intentions of the legislation, justifiable motives and justice and fairness.[93]

Seventh, fisheries rights. Since the promulgation of the Property Law in 2007, fisheries rights have been the focus of research in academia. Ren Heping, from Shanghai Ocean University, holds that fisheries rights refer to the legitimate rights of fishermen and fisheries organizations to conduct aquaculture and fishing within specific waters taking into consideration environmental protection and sustainable development of natural resources; the entities entitled to the fisheries rights in China refer to fishermen and fisheries organizations; the fisheries rights in China are categorized into aquaculture rights and fishing rights. The object of aquaculture rights is “specific waters” and that of fishing rights is “fishing activities”. The legal attribute of the fisheries rights in China is private rights limited by certain public power and a type of usufructuary right.[94] Huang Jishen and Long Wenjun, from Huazhong Agricultural University, note that fishing rights refer to a usufructuary right legally granted to fishermen or fishermen’s organizations, to gather, fish and harvest marine living resources within specific waters to acquire economic benefits according to relevant laws. Fishing rights bear the legal features of being usufructuary, exclusive, permissible and able to assert some property rights. These property rights mainly encompass the right to apply for injunction against physical invasion, nuisance and threat of dangers.[95] China’s Property Law only makes principled provisions on fisheries rights, which are insufficient for the protection of fisheries activities and judicial practices. In response to the situation, Zhao

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92 Zhang Li and Yao Shanqun, Analysis on Existing Issues in Fisheries Law Enforcement and the Countermeasures, *Fishery Administration*, No. 2, 2008, pp. 21~23. (in Chinese)

93 Zhang Bin, Discussion on the Rational Application of Discretionary Power in Fisheries Administrative Law Enforcement, *Ocean Development and Management*, No. S2, 2008, pp. 71~72. (in Chinese)

94 Ren Heping, A Study on the Basic Theories of Fishery Rights in China, *Chinese Fisheries Economics*, No. 1, 2008, pp. 14~18. (in Chinese)

95 Huang Jishen and Long Wenjun, The Analysis on Legal Features of Marine Fishing Rights, *Chinese Fisheries Economics*, No. 4, 2008, pp. 21~24. (in Chinese)

Wanzhong, from Guangdong Ocean University, proposes to specify the fisheries rights with judicial interpretations, and to deal with the following issues: the concept and categories of fisheries rights; the subjects, the objects and contents of the legal relationship arising from the exercise of fisheries rights; the acquisition, transfer, abolition, and time limit of the rights; protection of the rights.[96] Ma Jierong and Ren Dapeng, from China Agricultural University, in view of China's deficiencies in its existing legislation on the transfer of fisheries rights, draw on experiences from other countries and regions and put forward suggestions to improve the regime for transfer of fisheries rights in China. They believe that China should create principles for the legislation on the transfer; make clear means of transfer including mortgage, inheritance, lease, sale, exchange, gift, and share-holding by capital contribution etc.; set out the terms and regulate the procedures for the transfer.[97]

Up to now, the research on marine fisheries in China has begun to take shape with relatively fruitful results on some heated issues. However, there also arise problems such as over-concentrated research on some issues, simple and primitive research methodologies and lack of in-depth insights. Therefore, we should further expand the objects of research on marine fisheries from varied perspectives and with new methodologies, make deeper and more detailed theoretical research, and facilitate the integration of theory and practice.

VII. The Arctic and Antarctica

A. The Antarctica

PANDA Program, with the full name of Pridz Bay – Amery Ice Shelf – Dome A Observation Program, is a three-year major initiative taken by China to participate in the Fourth International Polar Year (2007–2008). The Antarctic is widely acknowledged to have four commanding heights of science, namely South Pole, Magnetic Pole, Pole of Cold and Culminating Point, on the first three of

96 Zhao Wanzhong, Improvements of Legislation on Fisheries Rights, *Journal of Guangdong Ocean University,* No. 2, 2008, pp. 1~5. (in Chinese)

97 Ma Jierong and Ren Dapeng, Research into the Legislation on Fisheries Rights Transfer in China, *Tribune of Social Sciences*, No. 11, 2008, pp. 59~63. (in Chinese)

which other States have established their observation stations.[98] Dome A is the culminating point on the Antarctic Ice Sheet. The Kunlun Station on Dome A[99] is a valuable heritage to the Fourth International Polar Year left by China on its 25th scientific expedition in the Antarctic.

On October 20, 2008, *Xuelong*, a polar research vessel on China's 25th scientific expedition mission to the Antarctic, departed from Shanghai, and on March 9, 2009 (Time in Antarctic Zhongshan Station), set sail for China after the completion of the 25th mission. The crewmen on this mission established Kunlun Station, the first Chinese inland observation station in the Antarctica,[100] and completed the scientific expedition from Dome A to Zhongshan Station, including expedition on the Amery Ice Shelf, survey on Prydz Bay, routine scientific observation in Zhongshan Station, construction and improvements of Zhongshan Station, etc., as part of the Chinese Initiative in the International Polar Year.

To avoid armed conflicts because of States' claims for the Antarctica, on December 1, 1959, the twelve States that had engaged in scientific expeditions in the Antarctic including the United States and former Soviet Union[101] issued

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98 The United States established Amundsen-Scott South Pole Station; France built Dumont d'Urville Station in Antarctic Magnetic Pole; Former Soviet Union established Vostok Station in southern Pole of Cold. Please refer to the website of Chinese Arctic and Antarctic Administration, at http://www.chinare.cn/caa/gb_article.php?modid=03002, 2 March 2009.

99 At 9:25 am (Antarctic time) or 12:25 pm (Beijing time) on February 2, 2009, Chen Lianzeng, head of the Chinese Delegation and Deputy Director of State Oceanic Administration, announced the inauguration of the Kunlun Station in the Antarctica on behalf of the Chinese government; the first Director of the Kunlun Station is Li Yuansheng, Captain of Inland Team, and Deputy Directors are Xia Limin and Li Shimin, Vice Captains of Inland Team. Please refer to the website of Chinese Arctic and Antarctic Administration, at http://www.chinare.en/caa/gb_news.php?modid=01001&id=732, 2 March 2009. (in Chinese)

100 Up to now, China has three research stations, namely Changcheng Station (February 20, 1985), Zhongshan Station (February 26, 1989) and Kunlun Station. Please refer to the website of Chinese Arctic and Antarctic Administration, at http://www.chinare.cn/caa/gb_article.php?modid=03002, 2 March 2009. (in Chinese)

101 The twelve States are Argentina, Australia, New Zealand, Chile, the United Kingdom, the United States, Japan, France, former Soviet Union, Belgium, Norway, and South Africa. Please refer to the website of Chinese Arctic and Antarctic Administration, at http://www.chinare.cn/caa/gb_article.php?modid=07001, 2 March 2009. (in Chinese)

Escudero Declaration,[102] and signed the Antarctic Treaty (effective on June 23, 1961),[103] suspending the territorial claims, prohibiting the States from making new sovereignty claims and indicating neither acceptance nor denial to previous sovereignty claims. According to the Antarctic Treaty, any State party may call for convening a conference to change or amend the Treaty thirty years after the Treaty took effect,[104] which indicates that the Treaty shall not be amended within thirty years. Up to June 23, 1991, the Treaty had reached its thirtieth anniversary and On October 4, 1991, the 11th Special Antarctic Treaty Consultative Meeting SATCM XI) signed the Protocol on Environmental Protection to the Antarctic Treaty in Madrid, Spain, which took effect on January 14, 1998. On October 7 to 18, the Sixteenth Antarctic Treaty Consultative Meeting issued a Declaration in Bonn, Germany commemorating the 30th anniversary of the Antarctic Treaty's entry into force, reiterating the purposes and principles of the Antarctic Treaty, and up to now, no State party has called for convening a conference to review the implementation of the Treaty or change or amend the Treaty; therefore, the provisions and implementation of the Antarctic Treaty has unlimited duration.[105]

In recent years, fight over the Antarctica has been gaining momentum among some States, for territorial sovereignty and the continental shelves adjacent to the Antarctica. Since the Antarctic Treaty has frozen the territorial claims over the Antarctica, it actually protects the interests of three types of States, namely the States claiming sovereignty, the potential States which may claim sovereignty, and

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102 In 1948, the Chilean jurist Julio Escudero Guzman proposed a five-year moratorium on Antarctic sovereignty disputes. He suggested during this period the States concerned concentrated on scientific research, and expedition scientists have free access to the region while maintaining politically neutral. This had been recognized as Escudero Declaration. See Guo Peiqing, Escudero Declaration and Antarctic Neutrality, *Ocean World*, No. 4, 2007. (in Chinese)

103 In July 2001, the 21st Antarctic Treaty Consultative Meeting decided to set up the Antarctic Treaty Secretariat Headquarters in Buenos Aires, Argentina. China acceded to the Antarctic Treaty on June 8, 1983 and the Treaty became effective for China on the same day. China was acknowledged as a consultative party on October 7, 1985. At present, the Antarctic Treaty has 47 contracting States, 28 of which are consultative States. At http://www.ats.aq/devAS/ats_parties.aspx?lang=e, 15 April 2009.

104 See the Antarctic Treaty, Article 12.

105 According to the Antarctic Treaty, any State party may call for convening a conference for all the State parties to review the implementation of the Treaty or change or amend the Treaty thirty years after the Treaty takes effective. According to the provision, it should be deemed that the Treaty does not make any provision on the term of its validity, and only stipulates that the State parties are granted certain rights thirty years after the Treaty takes effect. Therefore, the authors hold that the Antarctic Treaty has unlimited duration.

the States that do not claim sovereignty;[106] however, it does not deny the territorial sovereignty that have previously been claimed by relevant States, which have led to their conflicts on the continental shelves adjacent to the Antarctica.

The Antarctic Treaty does not make specific provisions on the continental shelves adjacent to the Antarctica. States shall make their submissions of extended continental shelf prior to the deadline of May 13, 2009 to the UN Commission on the Limits of the Continental Shelf. In October 2007, the British government stated that they would submit territorial claims to the seabed of about one million square kilometers in the Antarctic. It was strongly opposed by Argentina and Chile, whose claimed territory overlapped with that. The submission made by the UK on May 9, 2008 to the Commission on the Limits of the Continental Shelf, did not include the outer continental shelf adjacent to the Antarctica,[107] but reserved the right to claim in the future.[108] And on March 6, 2009, the congressional delegations of Argentina and Chile announced a joint statement in Argentine Station in Antarctica against the UK's submitting claim to the continental shelf adjacent to the Antarctica.[109] The main reasons for their opposition: the claim for outer continental shelf shall be based on the ownership of relevant territory by the States; while the UK claimed outer continental shelf adjacent to the Antarctica based on its claim to the ownership of Malvinas Islands, Argentina and Chile had also been claiming sovereignty over the Malvinas Islands, therefore the three States' territorial claims overlapped with each other; if the UK was to be successful in its claim for outer continental shelf of the islands, it meant that the islands were UK's territory, so it was reasonable for Argentina and Chile to strongly oppose UK's claim, in view of their interests in natural resources and territorial sovereignty therein. The latest development is that the UK has made another submission to the Commission on May 11, 2009 for outer continental shelf adjacent to Falkland Islands (namely

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106 Yan Qide and Zhu Jiangang, Antarctic Treaty and Claims for Territorial Sovereignty, *Ocean Development and Management*, No. 4, 2008, p. 79. (in Chinese)

107 UK's submission this time was only aimed at its extended continental shelf around Ascension Island in Mid-Atlantic Ocean, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_gbr.htm, 8 April 2009.

108 Please refer to xinhuanet.com on May 11, 2008, The United Kingdom Temporarily Would Not Claim Territory in the Antarctic Seabed, at http://news.xinhuanet.com/newscenter/2008-05/11/content_8147626.htm, 8 April 2009. (in Chinese)

109 Please refer to xinhuanet.com on March 7, 2009, Argentina and Chile Oppose the United Kingdom Claiming Sovereignty over the Antarctic Continental Shelf, at http://news.xinhuanet.com/world/2009-03/07/content_10964183.htm, 8 April 2009. (in Chinese)

Malvinas Islands) and South Georgia and South Sandwich Islands.[110]

The 31st Antarctic Treaty Consultative Meeting in 2008 endorsed China-proposed Management Plan for Antarctic Specially Protected Area for Mount Harding and Grove Mountains. China thereby sets up its first Antarctic specially protected area. Antarctic environmental protection has garnered worldwide attention. According to the news bulletin issued on April 3, 2009 by the United States Geological Survey, the Antarctica Wordie Ice Shelf has already disappeared completely since the start of its dissolution in the 1960s and the northern part of the Larsen Ice Shelf has also vanished. The European Space Agency also made an announcement on April 3, 2009 that new cracks occurred in the Wilkins Ice Shelf, which may accelerate its disintegration; in the past year, the acreage of this ice shelf decreased by about 1.8 thousand square kilometers, about 14% of the total.[111] Therefore, discussions at the 32nd Antarctic Treaty Consultative Meeting held in Baltimore, United States on April 6, 2009, focused more on enhancing polar environmental protection and on human activities' impacts on polar environment.

Moreover, Wu Yilin expounds on the Antarctic scientific research strategies of the United States, the United Kingdom, Australia and New Zealand, and the role of the Scientific Committee on Antarctic Research in international cooperation for Antarctic research.[112] Yan Qide analyzes the significant effects that the Antarctic has on the global climate change, through environmental observations on the Antarctic;[113] Xiao Cunde interprets the white paper on State of the Antarctic and Southern Ocean Climate System issued by the expert committee of the Antarctica and the Global Climate System, and foresees the future climate system in the Antarctic.[114] Zhang Qingsong and Wang Yong review and summarize China's achievements in the Antarctic expeditions in the past twenty-eight years and conclude that China's scientific expeditions in the Antarctica have made vital

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110 See Submission of the United Kingdom of Great Britain and Northern Ireland – in Respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands, at http://www.un.org/Depts/los/clcs_new/commission_submissions.htm, 12 December 2009.

111 Please refer to the website of Chinese Arctic and Antarctic Administration, at http://www.chinare.cn/caa/gb_news.php?modid= 01001&id=780, 9 April 2009. (in Chinese)

112 Wu Yilin, Trends of Antarctic Research, *Journal of University of Science and Technology of China*, No. 1, 2009, pp. 11~14. (in Chinese)

113 Yan Qide, Antarctic: The Thermometer of Global Climate Warming, *Chinese Journal of Nature*, No. 5, 2008, pp. 259~261. (in Chinese)

114 Xiao Cunde, Changes in Antarctic Climate System: Past, Present and Future, *Advances in Climate Change Research*, No. 1, 2008, pp. 1~7. (in Chinese)

contributions to "peaceful utilization of the Antarctica" by mankind.[115] Zhang Lin makes an analysis on the challenges confronted by the Antarctic and proposes suggestions for China to protect its maritime rights and interests in the Antarctic.[116] Xu Shijie analyzes the great impacts of the Protocol on the Antarctic affairs and suggests China's strategies.[117]

B. The Arctic

The Arctic is drawing growing attention of the global community and its importance is beyond doubt. The global fight over the Arctic kicked off in 2007 when Russia planted its flag on the Arctic Ocean seabed.

The scramble is first centered on the natural resources in the Arctic; more specifically, the States bordering the Arctic Ocean claim extended continental shelf adjacent to the Arctic. As early as 2001, Russia made a submission to the UN Commission on the Limits of the Continental Shelf to claim outer continental shelf adjacent to the Arctic, including the exercise of jurisdiction over the continental shelf of the Lomonosov ridge and Mendeleyev ridge on the Russia's side as discovered and designated by Soviet Union scientific expedition team in 1948.[118] Besides Russia, other States around the Arctic that have specifically claimed outer continental shelf include: Denmark and Iceland, which delimited the outer continental shelf of the Faroe Islands on September 20, 2006 (but have not yet made submissions to the UN Commission on the Limits of the Continental Shelf); Norway, which made a submission to the Commission on the Limits of the Continental Shelf on December 27, 2006;[119] and the United Kingdom and Ireland have also made respective submissions on March 31, 2009 to the Commission for

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115 Zhang Qingsong and Wang Yong, Antarctic Research Progress of China in the Past 28 Years, *Chinese Journal of Nature*, No. 5, 2008, pp. 252~258. (in Chinese)

116 Zhang Lin, The Antarctic Treaty System and the Safeguarding of China's Maritime Rights and Interests in the Antarctic Regions, *Ocean Development and Management*, No. 2, 2008, pp. 69~74. (in Chinese)

117 Xu Shijie, Analysis of the Impacts on Activities in the Antarctica by the Protocol on Environmental Protection to the Antarctic Treaty, *Ocean Development and Management*, No. 3, 2008, pp. 51~53. (in Chinese)

118 Wang Lijiu, Trends in the Scramble for Sovereignty in the Arctic Ocean, *Contemporary International Relations*, No. 10, 2007, pp. 17~21. (in Chinese)

119 At http://www.un.org/Depts/los/clcs_new/submissions_files/submissionnor.htm,10 April 2008.

the outer continental shelf in Hatton Rockall Area.[120] [121] And though no specific submissions for outer continental shelf in other Arctic regions have been made up to now, it is possible that the United States and Canada will submit their claims. We need to keep abreast of what recommendations the Commission would give to the submissions of the States, and the responses of the States that have not made the submissions yet.

Moreover, the expedited melting of the Arctic ice, especially the overall melting of Arctic Northwest Passage and Northeast Passage for the first time in August 2008, highlights the shipping value of the passages. Canada and Russia take different attitudes toward the two passages. Russia's legislation provides that the vessels navigating through the Northeast Passage shall obtain approval from the Russian government in advance, and use of icebreaking and navigation services from Russia are mandatory and shall be charged with high expenses, which raise complaints from other countries. With regards to the Northwest Passage, the United States holds that for it is an international sea route and should adopt the legal regime of "transit passage", while Canada argues that the passage is within its internal waters and shall not adopt the regime. On August 27, 2008, Stephen Harper, the Canadian Prime Minister, announced at a press conference held in the coastal area of Beaufort Sea in the Arctic that the vessels navigating through the Northwest Passage shall be registered with the Canadian Coast Guard, and the vessels of all States shall abide by the stipulation.[122] In this regard, Russia and Canada do not waive their claims for the sovereignty over the Northwest Passage and Northeast Passage; they open the passages for navigation to the vessels of other States but require the vessels to conform to their relevant domestic rules and regulations during the transit. However, some States, especially the United States, can't totally accept these strict rules and regulations; the disputes over the transit through the Arctic haven't been rooted out and would erupt when the Arctic is more suitable for navigation.

The global warming has affected the Arctic and the environmental protection in the area has also drawn wide attention. On May 27 to 29, 2008, the five coastal

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120 Rockall Island is located at 57°35' N, 13°48' W, whose sovereignty is still under dispute; up to now, the United Kingdom, Ireland, Denmark and Iceland have claimed territorial sovereignty over the island.

121 At http://www.un.org/Depts/los/clcs_new/submissions_files/submission_gbrl.htm,10 April 2008.

122 Liu Jiangping and Guan Qinglei, Disputes over the Arctic "Golden Sea Routes", *Globe*, No. 22, 2008. (in Chinese)

States of the Arctic Ocean including Denmark, the United States, Russia, Norway and Canada, convened a conference in the City of Ilulissat, Denmark and adopted the Ilulissat Declaration. The five States declared that they remained committed to the orderly resolution of any overlapping claims in the Arctic region under the legal framework provided in the UNCLOS; the declaration also advocated mutual trust and cooperation, especially cooperation on environmental issues; the five States pledged to undertake "stewardship" to protect the Arctic ecosystem.[123] Although the States have not reached a similar treaty like the Antarctic Treaty in the Arctic region, their cooperation has been actively undergoing.[124]

Since 2009, the scramble among the coastal States bordering the Arctic Ocean has been growing ever more intense and has increasingly tended to resort to military means. On January 9, the United States released the National Security Presidential Directive 66/Homeland Security Presidential Directive 25 (NSPD 66/ HSPD 25), which established a new U.S. policy for the Arctic region, outlined its plans for a period in the future and stressed that it has wide-ranging and fundamental national interests in the area; it would invest 400 million dollars every year in research and development of the region. On February 9, Denmark, Norway, Iceland, Sweden and Finland held the Meeting of Military Security Cooperation Mechanisms for the Arctic Ocean, which marked that NATO and European Union had joined in the battle over the Arctic region as blocs. The European Union hoped to share on equitable basis the oil, natural gas, mineral and fisheries resources in the region and the five States declared that they would cooperate to control Arctic waterways in the future to ensure the smooth transport of oil and natural gas. In mid-March, Canada announced that it dispatched expedition teams near the North Pole to conduct the exploration of outer continental shelf and planned to deploy more military forces in the Arctic region. Its series of plans involve establishing new military bases, opening a deepwater wharf, and building six naval vessels to patrol in the Arctic region, to expand Canadian military presence in the Arctic. In late March, the scramble for the Arctic by military means among the States became more prominent. Norway launched military exercises in the Arctic waters, which simulated the situation of intensified conflicts for the Arctic resources.

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123 Luan Hui, Five Coastal States Bordering the Arctic Ocean Announced Ilulissat Declaration and Accepted UN Mediation for Disputes in the Arctic Region, at http://qnck.cyol.com/content/2008-06/03/content_2210128.htm, 11 April 2009. (in Chinese)

124 Guo Peiqing and Tian Dong, Murmansk Speech and Cooperation in the Arctic Region – Era of Cooperation for the Arctic, *Ocean World*, No. 5, 2008, pp. 67~73. (in Chinese)

The spokesperson of Canadian Land Force Command declared on March 23 that Canada planned to build a great Arctic army in the following years; Russia took more proactive actions, and made a high-profile announcement that its submarine forces would participate in the scientific expeditions aimed to delimit the boundary of its continental shelf adjacent to the Arctic and that it would build at least six nuclear-powered submarines in the following years. On March 27, Russia declared the establishment of its Arctic forces.[125]

On July 11, 2008, *Xuelong* polar research vessel departed from Shanghai and initiated China's third scientific expedition to the Arctic which is the largest and the most expensive one in Chinese history. The scientists on this mission explored the impacts of the Arctic climate changes on the climate changes in China, unique bio-logical and genetic resources in the Arctic Ocean, Arctic atmospheric pollution and persistent organic pollutants; they conducted research on Arctic geology and geophysics, and also on the topography and resources distribution of the seabed with gravimeters and magnetometers. On September 9, 2008, the polar icebreaker *Xuelong* successfully completed China's third scientific expedition mission and left the Arctic Circle.[126]

Xuelong is the only icebreaker in China's polar scientific expeditions and has gone to the Antarctic 12 times and to the Arctic 3 times for scientific expeditions and supplies transportation. However, *Xuelong* has become the weakest section of China's polar expeditions. First, its icebreaking capacity fails to meet the actual needs for scientific expeditions in key marine areas in polar ice regions; second, with the development of China's polar expeditions, *Xuelong* is burdened with transportation missions and lacks the time for scientific expeditions. Right now, *Xuelong* has been engaged in supplies & personnel transportation and marine scientific research for the Antarctic and Arctic expeditions; therefore, under harsh natural environments of polar regions and with limited time for work, *Xuelong*, compelled to keep a balance between the various missions to the Antarctic and

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125 Xu Bing, Economic Interests behind the Disputes in the Arctic Region and Fierce Scramble among the States, *Economic Information Daily*, 10 April 2009, at http://jjckb.xinhuanet.com/gnyw/2009-04/10/content-153020.htm, 11 April 2009 (in Chinese); Zhao Jicai, Who Would Dominate in the Arctic Region – Discussion on Russia's Intentions of the Establishment of Arctic Forces, *China Youth Daily*, 10 April 2009, at http://zqb.cyol.com/content/2009-04/10/content_2617191.htm, 11 April 2009. (in Chinese)

126 Please refer to the website of Chinese Arctic and Antarctic Administration, at http://www.chinare.cn/caa/gb_news.php?modid=01002, 11 April 2009. (in Chinese)

Arctic, has to greatly reduce its time for marine scientific research.[127]

VIII. Marine Scientific Research

In 2008, the legislation and policy for domestic and international marine scientific research mainly focused on marine biodiversity. In the global arena, important meetings and conferences on marine biodiversity include: the meeting of Ad Hoc Open-Ended Informal Working Group on Marine Biodiversity held in New York, United States on April 28 to May 2, 2008; World Conference on Marine Biodiversity held in Valencia, Spain on November 11 to 15, 2008; First meeting of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change held in London, United Kingdom on November 17–21, 2008;[128] and World Ocean Week in Xiamen, China on November 7–13, 2008. Important domestic meetings on marine biodiversity are: Biodiversity and Ecological Security Meeting held in Jinhua, Zhejiang on October 17 to 19, 2008 and Symposium on Global Climate Change and Marine Environment in Taiwan Strait and Its Adjacent Waters, held in Xiamen, China on November 6 to 7, 2008.

The three major issues impacting biodiversity are alien species invasion, plants and animals habitats loss and global climate change.[129] On March 14, 2008, the sixty-second session of UN General Assembly refers to in its Agenda item 77(a) – resolution on oceans and the law of the sea "the adverse impacts on the marine environment and biodiversity, in particular on vulnerable marine ecosystems, including corals, of human activities, such as ... the introduction of invasive alien species...", "the current and projected adverse effects of anthropogenic and natural climate change on the marine environment and marine biodiversity".[130] In this part, we will give a general review of the legal issues with respect to the impacts of alien species invasion and global climate change on marine biodiversity.

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127 Icebreaker *Xuelong* Fight Alone, Becoming the Weakest Section of China's Polar Expeditions, at http://news.ifeng.com/mil/2/200904/0412_340_1103488.shtml, 11 April 2009 (in Chinese)

128 Information of meetings and conferences is from the website of Biodiversity Committee of the Chinese Academy of Sciences, at http://www.brim.ac.cn/index.asp, 30 March 2009. (in Chinese)

129 Yan Yinli, Study on the International Law of Alien Species Invasion, *Journal of Anhui Vocational College of Electronics & Information Technology*, No. 4, 2008, p. 80. (in Chinese)

130 Resolution adopted by sixty-second session of UN General Assembly, A/RES/62/215.

A. Legal Issue with Respect to Alien Species Invasion

1. Definition

According to the IUCN, an "alien species" means a species, subspecies, or lower taxon occurring outside of its natural range (past or present) and dispersal potential (i.e. outside the range it occupies naturally or could not occupy without direct or indirect introduction or care by humans) and includes any part, gametes or propagule of such species that might survive and subsequently reproduce. "Invasive alien species" means alien species introduced by different ways from other regions into the ecosystems in certain regions where they root and disperse in natural conditions, generating a negative impact on the local environment and species.[131]

2. International Law on Invasive Alien Species

On May 22, 2002, the UN General Assembly promulgated "biodiversity and management of invasive alien species" as the theme for International Biodiversity Day. Up to now, the international community has formulated more than fifty legal documents on the prevention and control of invasive alien species, among which over forty are binding international agreements. Yan Yinli believes that the most influential international legal documents are the Convention on Biological Diversity, the UNCLOS and the International Plant Protection Convention. Moreover, there are resolutions by international organizations or intergovernmental organizations and other regional legal documents.[132] The following part will briefly introduce the provisions of the Convention on Biological Diversity and the UNCLOS.

The Article 8(h) "In-situ Conservation" of the Convention on Biological Diversity provides "[each Contracting Party shall, as far as possible and as appropriate] prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species".[133] Article 196 "Use of technologies or introduction of alien or new species" of the UNCLOS provides in its paragraph 1 that "[s]tates shall take all measures necessary to prevent, reduce and control

131 Wang Yi, On State Liability for Cross-border Environmental Damage: Research on Assuming Liability for Invasive Alien Species, *Northern Legal Science*, No. 3, 2008, p. 150. (in Chinese)

132 Yan Yinli, Study on the International Law of Alien Species Invasion, *Journal of Anhui Vocational College of Electronics & Information Technology*, No. 4, 2008, p. 80. (in Chinese)

133 1992 Convention on Biological Diversity, Art. 8(h).

pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto."[134] Moreover, the fifty-third session of the UN General Assembly adopted a UNCLOS report with respect to "harmful aquatic organisms in ballast water".[135] Guansong, in her paper, A Study on the International Convention for the Control and Management of Ships' Ballast Water and Sediments, comments on this Convention, reviews China's relevant legislation and puts forwards suggestions to China's legislation in this respect.[136]

The issue of invasive alien species involves liability for transboundary harm. Wan Xia holds that the draft articles of Prevention of Transboundary Harm from Hazardous Activities and the Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, adopted on second reading by the International Law Commission, have dealt with the most crucial parts of transboundary harm: on one hand, they underline and make clear the responsibilities of the State as an actor in environmental protection and restoration, according to which the State is obligated to supervise various actions according to domestic laws within its territory; on the other hand, the international regime allocates the responsibilities for transboundary harm among domestic operators and provides international guarantee for the victims to claim damages in other countries.[137]

The international legal governance on prevention and control of invasive alien species involves written legal instruments and fundamental principles of international law. Yan Yinli believes that there are three fundamental principles, namely precautionary principle, principle of enhancing international and trans-boundary cooperation, and principle of information publicity and public partici-

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134 UNCLOS, Art. 196(1).

135 Yan Yinli, Study on the International Law of Alien Species Invasion, *Journal of Anhui Vocational College of Electronics & Information Technology*, No. 4, 2008, p. 80. (in Chinese)

136 Guan Song, A Study on the International Convention for the Control and Management of Ships' Ballast Water and Sediments, *China Oceans Law Review*, No. 1, 2008, pp. 84~96. (in Chinese)

137 Wan Xia, The New Development of the Liability for Transboundary Harm, *Contemporary Law Review*, No. 1, 2008, p. 121. (in Chinese)

pation.[138]

3. Measures Taken by States to Prevent and Control Invasive Alien Species

The resolution adopted by the sixty-second session of the UN General Assembly "[e]ncourages States to ratify or accede to international agreements addressing the protection and preservation of the marine environment and its living marine resources against the introduction of harmful aquatic organisms and pathogens and marine pollution from all sources, and other forms of physical degradation, as well as agreements that provide for compensation for damage resulting from marine pollution, and to adopt the necessary measures consistent with the UNCLOS aimed at implementing and enforcing the rules contained in those agreements". It also encourages States and relevant organizations and bodies to assist the International Maritime Organization in developing international measures for minimizing "the translocation of invasive aquatic species through biofouling of ships".[139]

Wang Yi believes that China should take note of many issues in preventing and controlling alien species invasion. For example, relevant regimes should be enhanced with respect to preventing harm of transboundary activities in the global environment, avoiding as far as possible the inccurring of State responsibilities, and seeking liabilities of other States. First and foremost, we should take proper views on the purposes of legislation; second, specific laws on prevention and control of alien species should be enacted and relevant amendments should be made to existing laws and regulations. At the same time, a unified supervision regime should be established with clear authorities of relevant agencies; third, we should proactively engage in international cooperation. On one side, China's laws and regulations should keep abreast with international conventions; on the other side, we should enhance cooperation with neighboring States and other major States, and establish a joint prevention and control mechanism.[140]

Yan Yinli notes that first, China should set out proper guiding principles and purposes of legislation with respect to prevention and control of alien species invasion, shift the focus from short-term and local economic growth to sustainable

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138 Yan Yinli, Study on the International Law of Alien Species Invasion, *Journal of Anhui Vocational College of Electronics & Information Technology*, No. 4, 2008, p. 81. (in Chinese)

139 Resolution adopted by the sixty-second session of UN General Assembly, A/RES/62/215.

140 Wang Yi, On State Liability for Cross-border Environmental Damage: Research on Assuming Liability for Invasive ALien Species, *Northern Legal Science*, No. 3, 2008, p. 155. (in Chinese)

development and set sustainable development as the guiding principle. Second, it should put in place a more science-based and practical regime of supervision, conduct unified supervision with division of labor and responsibility among the departments, and exercise supervision by both central and local governments, so as to avoid overlapping or gap of functions among the departments. Third, the regimes for environmental risk assessment, for alien species introduction license and export State certificate, for invasive alien species directory, and for tracking & monitoring, pre-warning and quick response, should also be set up and improved.[141]

B. The Impacts of Global Climate Change on Marine Biodiversity

1. Coral Bleaching Caused by Climate Change

2008 is the second International Year of the Coral Reef. Marine scientists hold that coral bleaching is mainly due to the rise of ocean temperatures caused by global climate change. Coral bleaching may pose devastating impacts on marine ecosystem. Doctor Li Jiyun believes that climate change and sea level rise would increase risks to coastal zone ecosystems, human habitation and industry. 88% of the coral reefs in Asia would disappear within thirty years and the coastal zones, especially in the severely-polluted areas of South Asia, East Asia and Southeast Asia, would be endangered with the greatest flooding.[142]

Coral bleaching is the hermatypic corals' intensive reaction to rising ocean temperatures, and is mainly impacted by sediment pollution, warm water discharge from nuclear plants and algae coverage. Nowadays, China Endangered Species Scientific Commission has identified coral reefs as the second category of endangered species under protection. Zou Renlin notes that legislation should be enacted to protect coral reefs; we should also apply for funding to conduct experimental research on restoring coral reef ecosystem in Hainan Province, and accelerate the restoration of coral reef ecosystem by artificial transplanting.[143]

The resolution adopted by the sixty-second session of the UN General Assembly "[r]eiterates its support for the International Coral Reef Initiative, takes note of

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141 Yan Yinli, Study on the International Law of Alien Species Invasion, *Journal of Anhui Vocational College of Electronics & Information Technology*, No. 4, 2008, p. 82. (in Chinese)

142 Li Jiyun, Ocean Week: A Forum on Promoting the Development of Marine Eco-civilization, materials from the 2008 World Ocean Week in Xiamen.

143 Zou Renlin, The Status-quo of China's Coral Reefs and Protective Measures, at http://www.brim.ac.cn/index.asp, 30 March 2009. (in Chinese)

the International Coral Reef Initiative General Meeting, held in Tokyo from 22 to 24 April 2007, and the upcoming eleventh International Coral Reef Symposium, to be held in Fort Lauderdale, United States of America, in July 2008, supports the work under the Jakarta Mandate on Marine and Coastal Biological Diversity and the elaborated programme of work on marine and coastal biological diversity related to coral reefs..."[144]

2. Ocean Acidification

Greenhouse gases also lead to a vast accumulation of carbon dioxides in the atmosphere and thereby the rapid ocean acidification around the globe. Ocean acidification not only affects coral reefs, but also fish fingerlings, young fishes, plants and animals that form their shells with calcium carbonate.[145]

The resolution adopted by the sixty-second session of the UN General Assembly notes that, while the effects of observed ocean acidification on the marine biosphere are as yet undocumented, the progressive acidification of oceans is expected to have negative impacts on marine shell-forming organisms and their dependent species, and urges States to conduct further research on ocean acidification, especially to implement programmes of observation and measurement.[146]

The resolution calls upon States to make every effort to reduce the emission of greenhouse gases, in accordance with the principles contained in the United Nations Framework Convention on Climate Change, in order to reduce and tackle projected adverse effects of climate change on the marine environment and marine biodiversity.

3. International Law on Climate Change

Influential international conventions in this regard mainly include the United Nations Framework Convention on Climate Change (hereinafter "the Convention on Climate Change") and the Kyoto Protocol. The Convention on Climate Change, reached on May 22, 1992, is the first international treaty for the overall control of emissions of carbon dioxide and other greenhouse gases to tackle the challenge of climate change, and sets the framework for the global community to conduct international cooperation in dealing with climate change. The Kyoto Protocol is the first international protocol to the Convention on Climate Change and offers

144 Resolution adopted by the sixty-second session of UN General Assembly, A/RES/62/215.

145 The 2008 International Year of Coral Reef – Care and Concern for the Planet, the Ocean and Coral Bleaching, at http://blog.worlddiy.net/index.php/36108/viewspace-27963.html, 30 March 2009. (in Chinese)

146 Resolution adopted by the sixty-second session of UN General Assembly, A/RES/62/215.

three flexible cooperative mechanisms for reducing greenhouse gas emissions, i.e. Clean Development Mechanism, International Emissions Trading and Joint Implementation.[147]

The Kyoto Protocol notes that "[t]he purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3".[148] "Under the clean development mechanism: (a) Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and (b) Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol."[149] That is ,with the implementation of the mechanism, the developed countries cooperate with the developing countries through provision of funds and technologies and implement emission-reduction projects, so as to earn emission reduction credits at relatively low costs and to offset part of their obligations in emission reductions; the developing countries may also obtain funds and technologies from this cooperation. Therefore, it is a win-win international cooperative mechanism.[150]

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147 Yang Hua, Cooperation and Diversion: the International Law Mechanism of Climate Change and the Policy of China, *Hebei Law Science*, No. 5, 2008, p. 29. (in Chinese)

148 Article 12(2) of the Kyoto Protocol.

149 Article 12(3) of the Kyoto Protocol.

150 China Achieved the Most Emission Reductions in Implementing Clean Development Mechanism of the Kyoto Protocol, at http://news.xinhuanet.com/newscenter/2008-02/29/content_7694644.htm, 30 March 2009. (in Chinese)

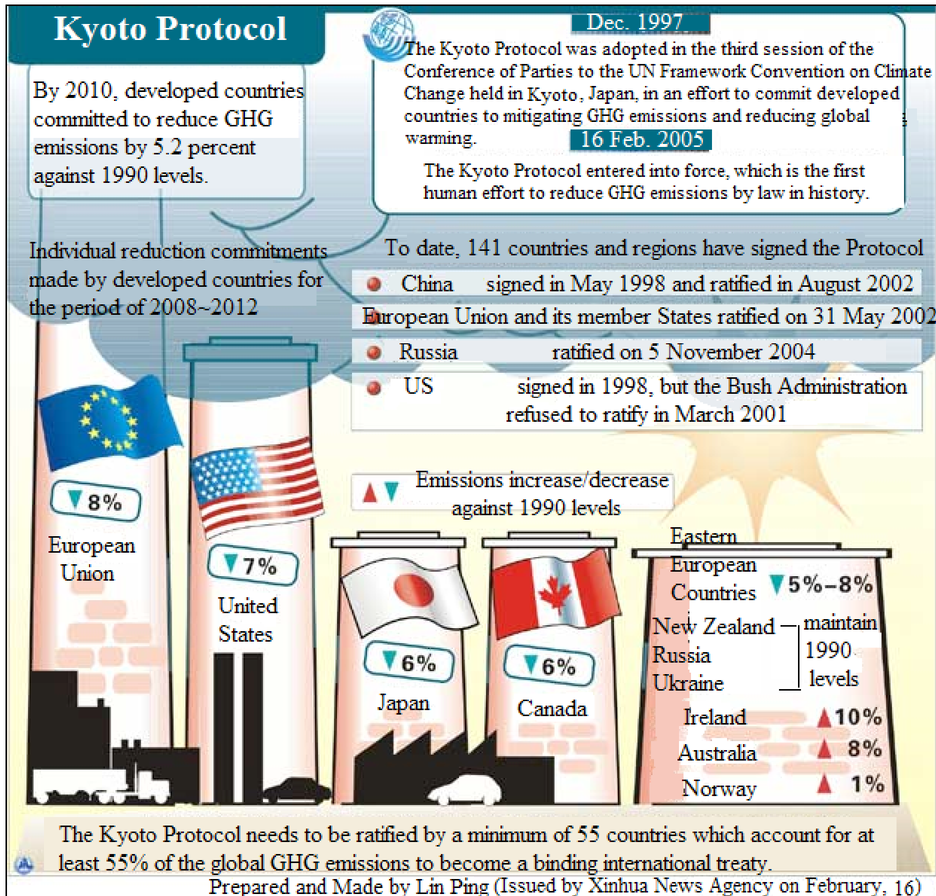

Fig. 1 The Kyoto Protocol[151]

It is worth noting that the negotiations on climate change and greenhouse gas emissions reduction would be a process of cooperation and diversion. Yang Hua in the paper Cooperation and Diversion: the International Law Mechanism of Climate Change and the Policy of China, makes a detailed analysis on the inevitability, necessity, phenomena and outcomes of cooperation and the causes, phenomena and impacts of diversion, and concludes that diversion is intensively manifested in the common and differentiated responsibilities.

The mankind has to take on another new mission, i.e. to protect marine biodiversity. The States have been paying due regard to conserving and utilizing

151 Kyoto Protocol, at http://news.xinhuanet.com/ziliao/2002-09/03/content_548525.htm, 30 March 2009. (in Chinese)

in a sustainable way the marine biodiversity. Zhao Wei in his paper International Legal Framework for Conserving and Utilizing in a Sustainable Way the Marine Biodiversity, proposes some legal and scientific & technological suggestions on China's current situations in this regard. In terms of legal suggestions, China should proactively participate in the international legislative process and well perform its international obligations in this respect. And in terms of scientific & technological suggestions, China should enhance its research on marine sciences and its level of technology, and strive for more maritime interests in exploration and exploitation of the ocean on the requisite of performing its international obligations and causing no harm to marine biodiversity.[152]

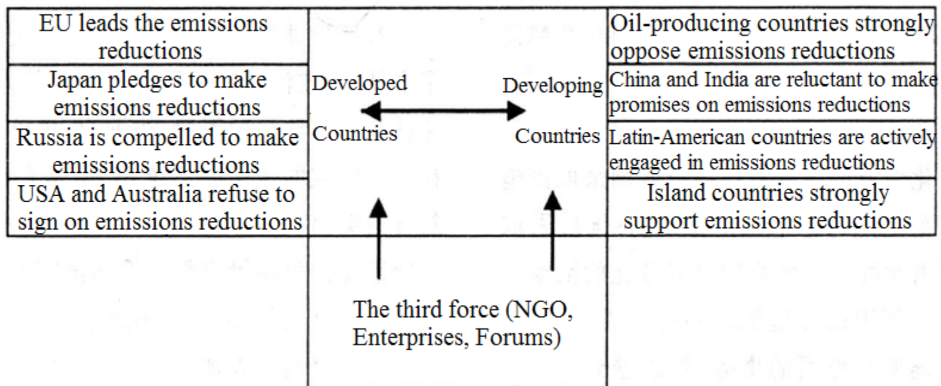

Fig. 2 Interest Disputes between International Economic Blocs[153]

IX. Maritime Law Enforcement and Maritime Military Forces

The research with respect to maritime law enforcement and maritime military forces in 2008 revolves around maritime law enforcement, maritime security, protection of maritime rights and interests, etc.

A. Maritime Law Enforcement

152 Zhao Wei, International Legal Framework for Conserving and Utilizing in a Sustainable Way the Marine Biodiversity, *Journal of Ocean University of China (Social Sciences Edition)*, No. 1, 2008, p. 9. (in Chinese)

153 Yang Hua, Cooperation and Diversion: the International Law Mechanism of Climate Change and the Policy of China, *Hebei Law Science*, No. 5, 2008, p. 30. (in Chinese)

1. Right of Visit and Right of Hot Pursuit

Mr. Zhang Lifeng argues that the right of visit is the major form of the States exercising the universal jurisdiction on the high seas, as is granted by the law of the sea, specifically the United Nations Convention on the Law of the Sea; however, the warship, as the main force in law enforcement and belonging to a State of sovereignty, should act in accordance with the State's domestic legislation. China has not yet made relevant provisions on the right of visit. Therefore, it is suggested that China, on the basis of the guidelines contained in the United Nations Convention on the Law of the Sea, formulate specific provisions in its legislation on the procedures for the exercise of the right of visit on the high seas, the use of force in the exercise of the right of visit, the State's liabilities for its improper exercise of the right of visit, etc., so that it may be more justifiable and powerful for Chinese warships to exercise the right of visit over the suspected ships on the high seas.[154]

The application of the right of hot pursuit in maritime law enforcement is a relatively extreme means and has not yet been resorted to by China Marine Surveillance in the sea areas within China's jurisdiction. Nevertheless, China should be acutely aware that with increasingly complicated situations in its surrounding sea areas and progressively intense conflicts for maritime rights and interests, it is inevitable to adopt hot pursuit in law enforcement; and proper, timely and effective exercise of hot pursuit if necessary, is of vital importance to protect a State's core interests. Wu Qiang and Zhao Shengru, in the light of the provisions on the right of hot pursuit under domestic and international legislation, and looking into the functions and law enforcement practices of China Marine Surveillance, note that China Marine Surveillance should pay due regard to the following issues in its hot pursuit: A mechanism for a single or urgent authorization should be established to better respond to crises and fulfill duties by China Marine Surveillance; the legislative authority should as soon as possible embark on relevant legislation on the right of hot pursuit in accordance with the UN Convention on the Law of the Sea and international customary law. As is required by China's law enforcement practices and protection of maritime rights and interests, China should at least formulate specific administrative regulations for implementing the Law on the Territorial Sea and the Contiguous Zone and the Exclusive Economic Zone

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154 Zhang Lifeng, On the Legislation of Right of Visit on the High Seas in China, *Hebei Academic Journal*, No. 4, 2008, pp. 166~168. (in Chinese)

and Continental Shelf Act, to make explicit, complete, coherent and systematic provisions on the elements of the right of hot pursuit and meet the demands of maritime law enforcement; China should also attach great importance to the jurisprudence and theoretical research, and in light of the provisions on the right of hot pursuit under the Geneva Convention on the High Seas and the UN Convention on the Law of the Sea, make a thorough analysis on different stages, objects and perspectives in implementing the right, in order to forge a full-fledged theoretical regime in this field; moreover, it should accelerate capacity building of the marine surveillance force, and equip the surveillance force and arms with vessels capable to combat against the threat of force from foreign ships and enforce maritime law.[155]

2. Maritime Law Enforcement Mechanism

Mr. Zhang Baochen probes into the competent departments engaged in marine management and law enforcement in major marine countries such as South Korea, Russia and Canada. And he discovers that mechanisms for marine management and law enforcement of the major marine countries generally bear the following characteristics. Firstly, they basically adopt one of the three modes of marine management and law enforcement, i.e. 1) multi-department marine management, and decentralized maritime law enforcement; 2) multi-department marine management, and relatively centralized maritime law enforcement; 3) relatively centralized marine management and maritime law enforcement. Also, they do not build up an absolutely centralized regime for maritime law enforcement departments. Moreover, the main functions and law enforcement workloads define subordinate departments that exercise relatively centralized power in law enforcement. He discusses in the concluding part of his paper the significance of China to strengthen marine management and law enforcement, establish high-level coordination mechanisms and integrate maritime law enforcement resources. He believes that China should not resort to simple unification of maritime law enforcement departments, nor stick to decentralization or outmoded enforcement patterns; it is vital for China to recognize the general rules of law enforcement for a maritime power, and forge a maritime law enforcement regime that fits with

155 Wu Qiang and Zhao Shengru, Reflections on Issues concerning China Marine Surveillance Exercising the Right of Hot Pursuit, *Ocean Development and Management*, No. 10, 2008, pp. 96~104. (in Chinese)

China's social and economic development and its status as a maritime power.[156]

Mr. Zhou Libo asserts that a coordination mechanism for law enforcement at sea would efficiently promote the communication and cooperation among the administrative departments, by shared goals, overall planning and decision-making as well as sufficient information exchange and coordination, to avoid disagreements among the departments; the coordination mechanism would effectively address "blind spots" in law enforcement, and rapidly strengthen maritime law enforcement; the mechanism uses meetings as the main way to operate, which is cost-efficient and flexible. As such, the mechanism may be effectively implemented over a long duration and serve as a transitional stage for the reform of maritime administrative system. He argues that the following regimes should be founded to ensure the efficient functioning of the coordination mechanism: regular meetings to coordinate maritime affairs; joint enforcement at sea; cases transfer and investigation assistance; disputes settlement; a comprehensive management regime for the information of enforcement; a supervisory regime; and a reward & punishment regime for coordination of maritime enforcement.[157]

He Zhonglong, Ren Xingping and Feng Yongli believe that China is now adopting a decentralized regime of maritime law enforcement mainly by industry associations; the regime is featured by high costs and low efficiency in law enforcement, redundant equipment, and difficulty in international exchange & cooperation. Comprehensive law enforcement in the sea areas under China's jurisdiction, would effectively overcome the problems in the existing maritime law enforcement and enhance China's capacities in the control of ocean territory. They also note that China should take the following measures for comprehensive law enforcement at sea: to unify China's maritime law enforcement forces; to make improvements on maritime laws and regulations; to develop large cruisers for law enforcement; and to intensify the efforts in educating and training professionals.[158]

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156 Zhang Baochen, Insights of General Characteristics of Mechanisms of Maritime Law Enforcement Departments in Major Marine Countries, *China Maritime Safety*, No. 4, 2008, pp. 23~27. (in Chinese)

157 Zhou Libo, Discussion on Several Issues concerning Coordination Mechanism for Maritime Administrative Enforcement of Law, *Ocean Development and Management*, No. 4, 2008, pp.15~19. (in Chinese)

158 He Zhonglong, Ren Xingping and Feng Yongli, Features of and Measures for China's Maritime Comprehensive Law Enforcement, *Ocean Development and Management*, No. 1, 2008, pp. 100~102. (in Chinese)

B. Maritime Security

1. China's Maritime Security Strategy

After the "9/11" terrorist attack, the United States has been taking active initiatives to enforce its maritime security strategy by domestic legislation and enhanced international cooperation, to anchor its dominance on the seas. And Japan also spares no efforts in allying with the United States to launch a multilateral maritime security regime, with a view of safeguarding its maritime rights and interests and expanding its maritime power. Against the new backdrop, Mr. Shi Kegong holds that China should proactively improve its maritime security strategy in the following ways: to overall assess the maritime security and detect the weakest parts; to ameliorate the legal framework for maritime security to lay out the legal foundation; to enhance the integration of maritime security departments to centralize the power in maritime security law enforcement; to actively participate in international maritime affairs and strive for power of discourse.[159] Ms. Zhang Li proposes the basic ideas to safeguard China's maritime territorial security: properly tackle the relationship between national interests and ideology, the relationship between sovereignty and the principle of "shelving differences and seeking joint development", the relationship between peaceful settlement and the use of force, the relationship between economic growth and maritime defense build-up.[160]

2. Maritime Counter-terrorism and Response to Piracy

Maritime terrorism threatens the security of international shipping industry. Ms. Zhang Lina focuses her research on China's maritime counter-terrorism during its development of a maritime security regime. She notes that maritime terrorism refers to that maritime terrorist organizations or terrorists conduct terrorist activities that endanger maritime security, including security of ships, property & life on board ships and port facilities, by use of violence and with political purposes. In terms of legislation on maritime counter-terrorism, the provisions formulated by the International Maritime Organization, World Customs Organization and International Labour Organization are representative and also the major part of the international maritime security regime. She finally proposes strategies for China maritime security regime: to proactively undertake international cooperation and to

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159 Shi Kegong, The Impact of the Changing World Maritime Security Order on the Admiralty Law Regime, *China Oceans Law Review*, No. 2, 2008, pp. 34~47. (in Chinese)

160 Zhang Li, Features of Ocean Territory and China's Maritime Security, *Journal of Ocean University of China (Social Sciences Edition)*, No. 4, 2008, pp. 15~17. (in Chinese)

rebuild a legislative pattern for maritime counter-terrorism.[161]

With regards to the response to global piracy and armed robbery against ships, Mr. Yang Fan believes that the piracy and armed robbery against ships are still severe worldwide, which have greatly impacted China's maritime oil transport and shipping of other cargoes and fisheries. In spite that the global community has already taken quite a lot of measures to prevent and control piracy and armed robbery against ships, these measures mainly revolve around shipping and law enforcement and are hard to root out piracy and armed robbery against ships. The global community should start from improving the living standards of the inhabitants in coastal regions of developing countries and the governance in these regions, to transform the environments that lead to piracy and armed robbery against ships. China should actively support international organizations and big powers to combat piracy and armed robbery against ships; integrate its law enforcement forces and dispatch navy ships to protect the security in the South China Sea; and also assist the East Asian States as far as possible to change the poor conditions in the coastal regions.[162]

3. South China Sea Security and Regional Development

The South China Sea is not only strategically important, but also has the busiest international sea route, however, its security is threatened by piracy and terrorism. Mr. Li Jinming reveals with detailed examples that the frequently-occurring piracy attacks and terrorist threats have severely affected the security in the South China Sea. He believes that since the International Maritime Bureau made a relative broad definition of pirates, the archipelago States have widened their scope of anti-piracy efforts. However, they have limited capacities in maritime management and therefore should resort more to regional and global cooperation. In recent years, the decrease of piracy attacks in the South China Sea proves that through close international cooperation we could combat piracy attacks and terrorism more effectively and ensure the navigational security in the area.[163] Wang Sheng and Huang Danying hold that after the "9/11" event, the possibility of conflicts in the South China sea arising from disputes over territory and maritime

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161 Zhang Lina, Study on Anti-terrorism at Sea and International Ocean Shipping Security System, *Hebei Law Science*, No. 2, 2008, pp. 148~152. (in Chinese)

162 Yang Fan, Global Piracy and Armed Robbery against Ships: Problems and Strategies, *China Oceans Law Review*, No. 2, 2008, pp. 12~33. (in Chinese)

163 Li Jinming, Security of the South China Sea: Cooperation on Combating Piracy and Anti-terrorism, *Southeast Asian Affairs*, No. 3, 2008, pp. 9~15. (in Chinese)

rights and interests continues to diminish and stable situations in the South China Sea could be anticipated; however, the non-traditional security issues in the area are growing prominent and any State is unable to properly solve complicated non-traditional security issues all by itself. The threats of non-traditional maritime security in the South China Sea are mainly due to the marine pollution, rampant piracy, scramble for energy and over-fishing in the coastal States in the region; only by bilateral and regional cooperation could we curb and eliminate the non-traditional security threats.[164]

4. Secure Sea Route Development

With the growing dependence on overseas resources, energy and commodity market, the dramatic increase of shipping loads and traffic, and the continuous occurance of illegal acts such as smuggling, terrorism, piracy, pollution, arms proliferation, etc., the security of sea routes becomes a prominent issue. All the sea routes in Asia-Pacific regions are strategically important, and could be considered as marine lifelines for East Asian States. However, the Asia-Pacific sea routes are internationally recognized as a weak point in security, with rampant piracy and terrorist attacks in the Strait of Malacca (considered as the most dangerous sea area in the world). Mr. Wu Chunqing believes that due to the significance and vulnerability of Asia-Pacific sea routes, it is imperative to enhance security in the region through international cooperation and the optimal way for underlying and guaranteeing the cooperation is to build up a specific, multi-lateral and holistic legal framework. Starting from the identification of issues regarding the Asia-Pacific sea routes, he then discusses the status-quo and the way out for security and cooperation, and further on the necessity of building up a legal framework for security and cooperation from the perspectives of theory and practices; he also proposes some ideas on the features, principles, contents, structure, etc., of the legal framework, summarizes the positive and negative factors in building up the framework and foresees the prospects of the legal framework for cooperation on sea route security in Asia-Pacific regions. He finally notes that China should play an active role in advocacy, promotion, coordination and maintenance during the

164 Wang Sheng and Huang Danying, Non-Traditional Security and the South China Sea Regional Development Cooperation, *Areal Research and Development*, No. 2, 2008, pp. 25~29. (in Chinese)

building-up of the cooperative regime and legal framework.[165]

C. Safeguarding the Maritime Rights and Interests

It is widely acknowledged in the academia that relevant legislative and managerial regimes should be further improved in order to safeguard China's maritime rights and interests.[166] Mr. Xu Wei'an analyzes the existing problems in legislation, compliance with laws, law enforcement and adjudication with respect to China's maritime rights and interests, and makes suggestions to improve China's legal regime for safeguarding maritime rights and interests from the perspective of rule of law.[167] Mr. Yu Shuwen proposes that State Administrative Bureau of Maritime Affairs should be built up to independently undertake the holistic administrative functions in marine development and maritime security maintenance.[168] With respect to enhancing naval build-up and maritime defense, he notes that more efforts should be devoted to the development of maritime military forces, to achieve modernization of navy & air forces and to shorten spatial distance with the help of high-tech, in order to effectively safeguard China's sovereignty over mid-ocean islands, resources exploitation and economic development.[169] Chen Wanping holds that international cooperation should be promoted and a worldwide organizational system of maritime security should be established; China should enhance its actual control of disputed sea areas, and also its presence in these areas by legal, political, economic, diplomatic, scientific research, cultural and tourist means.[170]

D. Proliferation Security Initiative

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165 Wu Chunqing, Establishment of a Legal Framework for Asia-Pacific Sea Lane Security Cooperation, *China Oceans Law Review*, No. 2, 2008, pp. 48~77. (in Chinese)

166 Yu Shuwen, On the Sea Security Being the Premise of Safeguarding the Sea Rights, *Public Administration & Law*, No. 8, 2008, p. 71. (in Chinese)

167 Xu Wei'an, Discussion on Achieving Rule of Law in the Protection of Our National Maritime Rights and Interests, *Journal of Guangdong Ocean University*, No. 5, 2008, pp. 7~10. (in Chinese)

168 Yu Shuwen, On the Sea Security Being the Premise of Safeguarding the Sea Rights, *Public Administration & Law*, No. 8, 2008, pp. 71~72. (in Chinese)

169 Yu Shuwen, On the Sea Security Being the Premise of Safeguarding the Sea Rights, *Public Administration & Law*, No. 8, 2008, p. 71. (in Chinese)

170 Chen Wanping, Strategic Reflections on Safeguarding China's Maritime Rights and Interests, *China National Conditions and Strength*, No. 7, 2008, pp. 30~33. (in Chinese)

The Proliferation Security Initiative (PSI), launched by the United States, is a global effort that aims to stop trafficking by air, land and sea of weapons of mass destruction (WMD), and related materials to and from States of proliferation concern. Professor Yang Zewei gives a brief introduction to the origins and practices of PSI, and notes that Protocol of 2005 to Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, No.1540(2004) Resolution by the Security Council and Treaty on the Non-Proliferation of Nuclear Weapons, among others, have constituted the legal bases for PSI. He then analyzes the impacts of the PSI activities on the development of modern international law: the infringement on right of innocent passage; violation of freedom of navigation on the high seas; violation of the fundamental principles in international law such as prohibition of threat or use of force, and State sovereignty. He finally notes that China's accession to PSI would help to build its image as a responsible great power and enable China to participate in the formulation of relevant rules.[171] Mr. Liu Hongsong probes into PSI's limitations and dilemmas from the perspective of the forms and features of PSI as an informal international regime. Firstly, he comments on the informality of PSI in light of PSI's agreement text and analyzes the limitations of the regime: nonbinding requirements on the States' compliance with the regime, ambiguous provisions of the regime, less than universal inclusion of member States in conflict with the regime's goal of universality, and the constraints on the diffusion of universal international norms due to the regime's informal arrangements. He holds that in order to enhance PSI's positive effects on global non-proliferation governance, one practical way would be to make institutional adjustments to the decision-making processes and establish an interdiction decision-making regime.[172]

E. Military Survey

"Military survey" in the exclusive economic zones is one issue under heated discussions and raising disputes between coastal States and non-coastal States with

171 Yang Zewei, The Proliferation Security Initiative: Challenges to and Implications for International Law, *China Oceans Law Review*, No. 2, 2008, pp. 1~11. (in Chinese)

172 Liu Hongsong, Limitations and Dilemmas of Proliferation Security Initiative: from the Perspective of Informal International Regime, *Forum of World Economics & Politics*, No. 6, 2008, pp. 59~65. (in Chinese)

respect to maritime military utilization and scientific research. Land-locked States argue that "military survey", like hydrographic survey, would be categorized into the exercise of "freedom of navigation and freedom of overflight", which other States shall not interfere with. The coastal States hold that military survey should be categorized into marine scientific research and shall be subject to the approval and jurisdiction of the coastal States. Mr. Wan Binhua believes that "military survey" in the exclusive economic zones should be categorized into "marine scientific research" under the 1982 UNCLOS and also maritime military utilization. Therefore, if non-coastal States intend to undertake any form of marine scientific research and military survey in the exclusive economic zones of the coastal States, they shall obtain approval from and accept the jurisdiction of the coastal States, conduct survey for peaceful purposes, pay due regard to the legitimate rights and interests of the coastal States, share with the coastal States the information and intelligence acquired from the above activities, and not conduct any illegal activities.[173]

X. The Right to Use Sea Areas

A. The Right to Use Sea Areas and the Right of Mortgage

The right to use sea areas is a kind of property (right) and generally it is necessary to make use of the exchange value of the property for funding. With the growing monetization of the right *in rem*, it is increasingly imperative to make use of the exchange value of the right to use sea areas as a financing guarantee.

Gao Shengping, from Law School of Renmin University, believes that if pledge is set on the right to use sea areas and after the possession of the right is transferred, the person previously granted the right to use sea areas is not entitled to exercise the right to use sea areas any longer and the creditor has no right to use sea areas either; in this case, the right to use sea areas becomes a sunken asset and the purpose for setting up the right can't be achieved. However, where the holder of the right to use sea areas can use the right while providing security to the creditor, he can still obtain benefits from the exercise of the right to use sea areas. Setting a security in this way would promote production and further enliven the economy

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173 Wan Binhua, Discussion on the Legal Issues of Military Survey in Exclusive Economic Zone, *Ocean Development and Management*, No. 2, 2008, pp. 75~78. (in Chinese)

and increase social wealth. He believes that therefore, mortgage, instead of pledge, should be established on the right to use sea areas.[174]

After the above discussion, he further expounds on the creation of mortgage on the right to use sea areas. According to the Property Law of the People's Republic of China, in terms of the right to use land for construction and the right to land contractual management, mortgage of these rights becomes effective upon registration. And the right to use sea areas is in the same category of usufructuary right as the right to use land for construction and the right to land contractual management; mortgage of this right shall also become effective since registration of the mortgage according to law, on the basis of the principle that the same legal provisions should be applied to the same category of rights. He argues that in terms of legal methodology, it is actually related to application of analogy: categories and contents of real rights shall be created by law, instead of the free will of the parties concerned; analogy may be applied in fixed categories, but shall not in compulsory categories. That is, only if the contents of another real right conform to the nature of this real right and relevant compulsory provisions, analogy may be applied when legal loopholes occur. Thus, the provisions on mortgage on the right to use land for construction and the right to land contractual management may be applied to that on the right to use sea areas. That is to say, without registration, mortgage can not be created on the right to use sea areas.[175]

Gao Shengping then makes further discussions on the registration system for mortgages of the right to use sea areas. The Measures on the Registration of the Right to Use Sea Areas issued by the State Oceanic Administration in October, 2006 place the registration of the right to mortgage the right to use sea areas under the section "Initial Registration".[176] He believes this arrangement is open to discussion. As the sea areas are owned by the State,[177] the State's ownership of sea areas is not required to be registered.[178] Therefore, the registration for the creation

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174 Gao Shengping, Mortgages of the Right to Use Sea Areas under the Property Law and Application of Analogy in the Property Law, *Ocean Development and Management*, No. 2, 2008, p. 3. (in Chinese)

175 Gao Shengping, Mortgages of the Right to Use Sea Areas under the Property Law and Application of Analogy in the Property Law, *Ocean Development and Management*, No. 2, 2008, pp. 4~5. (in Chinese)

176 It is conventionally believed that "initial registration" refers to the registration of a specific real property for the first time, which lays the foundation for and marks the beginning of a series of subsequent registrations of property rights on the real estate.

177 Article 46 of the Property Law of the People's Republic of China.

178 Article 9(2) of the Property Law of the People's Republic of China.

of the right to use sea areas should be counted as initial registration. But the right to mortgage the right to use sea area should be categorized as an encumbrance on the right to use sea area, and the registration of it should be interpreted as registration of a separate right on the right to use sea area, so it is inappropriate to place this registration in the section "Initial Registration". We need to reconsider incorporating this registration into other parts by reference to the Rules for Land Registration and the Administrative Measures for the Premise Ownership Registration in Cities and Towns.[179]

Article 21 of the Property Law provides for the liability of compensation for mistakes in registration made by the registration authority, i.e. (1) "Where the party concerned submits false materials when applying for registration, thus causing damages to another person, he shall be liable for compensation." (2) "Where damages are caused to another person due to the errors made in registration, the registration authority shall be liable for compensation. After making the compensation, the said authority may seek indemnification from the person who makes the errors in registration." Gao Shengping believes that the foregoing is more of principled provisions and should be specified when making amendments to the Measures on the Registration of the Right to Use Sea Areas. He holds that the provision identifies two kinds of liability: if applicant submits false application materials for registration and causes damages to any other person, he shall compensate the other person for the damages; besides the applicant who provides false application materials being held responsible, if the registration authority does not perform its due obligations in examining the materials, it shall also assume liability for the damages caused to the third party. Paragraph 1 lays out liability for fault and paragraph 2 is strict liability. Besides the circumstance in paragraph 1, the registration authority shall make compensation and assume strict liability for any mistake in registration, including delay in registration without proper causes, refusal to make registration without proper causes, inconsistency between the register and the ownership certificate, refusal to make any alteration for the ownership certificate, registering transfer of right despite a dissenting registration on the right, etc. The Property Law does not make any specific provisions on whether the registration authority's liability of compensation should be defined as

179 Gao Shengping, Mortgages of the Right to Use Sea Areas under the Property Law and Application of Analogy in the Property Law, *Ocean Development and Management*, No. 2, 2008, p. 5. (in Chinese)

civil liability or State liability. On one hand, although the registration authority in China is a public organ, its staff is basically civil servants, paid by the State budget. In addition, Article 22 of the Property Law stipulates the principle of collecting fees for the registration of real property. Thus, civil liability in this regard is impossible to realize. On the other hand, the victim's damages would not be fully recovered if State liability is sought, due to the limits of the scope of State liability. Gao Shengping suggests that we may learn from the "compensation regimes for registration" from Germany and Switzerland and the "limited compensation regime" from Albania.[180]

Gao also makes discussion on the enforcement of the mortgages of the right to use sea areas. Where the debtor fails to pay his due debts or any other circumstance for the mortgagee's foreclosure as agreed upon by the parties concerned occurs, the right to foreclose the right to use sea areas has the possibility to be realized. Article 195 of the Property Law provides that "where the debtor defaults or the conditions for enforcement of the mortgage interest thereof, as agreed upon by the parties concerned, arise, the mortgagee may enter into an agreement with the mortgagor that he will be given the priority in being paid with the money into which the mortgaged property is converted or the proceeds obtained from auction or sale of the property. If such an agreement undermines the interests of other creditors, they may apply to the people's court for cancellation of the agreement within one year from the date they come to know or should have known the cause for cancellation. If the mortgagee and mortgagor fail to reach an agreement on the means of enforcing the mortgage interest, the mortgagee may apply to the people's court for auction or sale of the mortgaged property. The mortgaged property shall be converted into money or be sold off by referring to its market price." But Gao argues that the specific features of the right to use sea areas determine the particularity of its foreclosure and says that it is usually difficult to foreclose on the right to use sea areas in practice.[181]

Firstly, that the mortgagee, by concluding an agreement with the owner of the right to use sea areas, convert the right to use sea areas into money should conform

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180 Gao Shengping, Mortgages of the Right to Use Sea Areas under the Property Law and Application of Analogy in the Property Law, *Ocean Development and Management*, No. 2, 2008, pp. 5~6. (in Chinese)

181 Gao Shengping, Mortgages of the Right to Use Sea Areas under the Property Law and Application of Analogy in the Property Law, *Ocean Development and Management*, No. 2, 2008, p. 6. (in Chinese)

to the requirements of the Law on the Administration of the Use of Sea Areas and the Provisions on the Administration of the Right to Use Sea Areas regarding the transfer of the right to use sea areas, and the right to use sea areas can not be freely transferred. China has imposed strict limitations on the transfer of the right to use sea areas. For example, the transfer of the right to use sea areas should meet statutory requirements: (1) the development and utilization of sea areas have been undergoing for one year; (2) sea areas' original use will be maintained; (3) royalties to State for using sea areas have been paid off; (4) besides the royalties, actual investment has already amounted to at least 20% of the total planned investment; (5) the original holder of the right to use sea areas does not commit any illegal acts in the use of sea areas, or his such illegal acts have been dealt with according to law. The transfer of the right to use sea areas should be submitted to the competent maritime administrative department who originally approves the right. Gao Shengping believes that when the circumstances for foreclosure arise but the above-mentioned requirements have not been met, a problem lies in determining the effect of the agreement on mortgage as agreed upon by the parties concerned.[182]

Secondly, is it possible for the mortgagee to directly apply to the people's court for enforcement? It is generally believed that the legal documents as the basis for enforcement should conform to the following requirements: (1) substantial elements, namely, the legal documents shall have taken effect and eligible for enforcement; the documents shall indicate the particular obligations to be performed by the debtor; the contents of obligations shall be legal and eligible for enforcement; (2) formal elements, namely, the legal documents shall be governmental documents and indicate the debtor and the creditor, and the duties to be enforced. Gao Shengping holds that without considering the substantial elements, a security contract, which is not a governmental document, shall not serve as the basis for enforcement. But Gao further argues that for the enforcement of foreclosure, the mortgagee in principle may directly request the people's court to approve the auction or sale of the right to use sea areas, because the mortgagee with a claim to the property – a real right, may directly deal with the value of the property, and remove the interference by any other person or entity, without the need of assistance from the obligor. The mortgagee requests the court to auction

182 Gao Shengping, Mortgages of the Right to Use Sea Areas under the Property Law and Application of Analogy in the Property Law, *Ocean Development and Management*, No. 2, 2008, p. 6. (in Chinese)

the right to use sea areas to foreclosure the mortgage, which turns the realization of his right into the court's enforcement on the right to use sea areas. It is one manifestation of the mortgagee obtaining compensation from the value of the right to use sea areas, and does not require the obligor to take act. The court's ruling on approving the auction and sale of the right to use sea areas is the basis for the enforcement.[183]

B. The Right to Use Sea Areas and Real Right

Professor Wang Liming, from Renming University of China, believes that Article 122 of China's Property Law affirms the regime of the right to use sea areas; the right to use sea areas should be categorized as a real right; it is different from an ordinary usufructuary right and should be classified as quasi-usufructus. The right to use sea areas and the right to aquaculture overlap in certain aspects, but they are quasi-usufructus of different nature; the right to use sea areas is also closely related with the right to mine within certain waters. Wang Liming believes that the right to use sea areas is not equivalent to a usufructuary right mainly in the following aspects: (1) difference in the acquisition of the right; (2) difference in the object of the right; (3) difference in the contents of the right; (4) difference in the way to exercise the right; (5) difference in the application of law.[184]

Wu Chunqi, from the School of Politics and Law of Shandong Normal University, demonstrates through theoretical analysis that sea areas as object of the right to use sea areas are a real property that can be identified with particularity, and are in nature an aggregate. Wu Chunqi believes that the right to use sea areas has a place in the regime of usufructuary rights under the Property Law, which marks that some new changes have occurred in the traditional theory of property law: firstly, the scope of real property expands from the traditional type of land to new types of properties such as sea areas and space; secondly, an aggregate could serve as object both of security and of a usufructuary right; thirdly, usufructuary right is

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183 Gao Shengping, Mortgages of the Right to Use Sea Areas under the Property Law and Application of Analogy in the Property Law, *Ocean Development and Management*, No. 2, 2008, pp. 6~8. (in Chinese)

184 Wang Liming, Discussion on the Nature and Features of the Right to Use Sea Areas in Property Law, *Social Science Research*, No. 4, 2008, pp. 94~98. (in Chinese)

an open system, which would evolve with the development of the society.[185]

Wu Chunqi discusses whether the sea area, as an aggregate in nature and the object of a usufructuary right, violates the principle of "one property, one right". "One property, one right" refers to that two ownerships or several conflicting *jus in re aliena* should not be established over one property. Professor Wagatsuma Sakae and Professor Ariizumi Toru once believed that: "part of a property and the aggregate of properties should not be identified as the object of a property right, i.e. the principle of 'one property, one right'".[186] However, in reality, with the development of the society, the meaning of the principle of "one property, one right" has changed, from non-coexistence of two ownerships over one property to non-conflicting real rights over a property.[187] For example, after the establishment of a mortgage over a property, additional mortgages may be set up on the part exceeding the value of the previous mortgage, in order to bring the value of the property into full play. For sea area as real property, its parts have independent use value; when the right to a kind of use is created on a part of the sea area, and a subsequent application for another use does not conflict with the previously-established use, the subsequent application should be allowed; the stratified use of sea areas would be beneficial to full utilization of the sea areas. If two uses of sea areas may conflict with each other, they should not be created simultaneously. For example, in the same sea area, if the holder has obtained the right to use sea area for tourism and recreation, another application for the right to use sea area for dumping waste shall not be allowed. Hence, with an aggregate as the object of usufructuary rights, whether two or more usufructuary rights could be created needs to refer to the actual purposes and uses of the rights. When two or more rights do not conflict with each other, these rights should be allowed to co-exist so as to utilize the value of the aggregate. The coexistence of two or more usufructuary rights on one

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185 Wu Chunqi, On the New Developments of the Theory of the Law of Real Property Right from the Perspective of the System of the Right to Use Sea Areas, *Journal of Shandong Teachers' University (Humanities and Social Sciences)*, No. 2, 2008, p. 146. (in Chinese)

186 Tayama Teruaki, translated by Lu Qingsheng, *Property Law* (revised and enlarged edition), Beijing: Law Press China, 2001, p. 12. (in Chinese)

187 Wu Chunqi, On the New Developments of the Theory of the Law of Real Property Right from the Perspective of the System of the Right to Use Sea Areas, *Journal of Shandong Teachers' University (Humanities and Social Sciences)*, No. 2, 2008, p. 148. (in Chinese)

aggregate does not violate the principle of “one property, one right”.[188]

The Law on the Administration of the Use of Sea Areas and the Property Law identify the nature of the right to use sea areas as a real right, so the right to use sea areas has the legal effects of a usual real right and, as a new type of usufructuary right, it also has special features. Liu Huirong and Xu Feng, from Law and Politics School of Ocean University of China, believe that from the perspective of real right, the effects of the right to use sea areas are based on the nature of the right as a usufructuary right, and include the effects of being superior, exclusive and able to remove interference. By interpretations and analysis on the effects of the right to use sea areas, Liu Huirong and Xu Feng hold that the legal regime for the use of sea areas may be improved in the three aspects: highlighting the nature of the right to use sea areas as a real right, establishing a regime for differentiated uses of sea areas, and enhancing the macro-protection of the right to use sea areas.[189]

C. The Right to Use Sea Areas and the Right to Use Land

Ning De, from Guangxi Land and Resources Planning Institute, researches and makes a summary on the practice of changing the right to use sea areas into the right to use land in the register. Firstly, he makes a summary of the measures taken by the provinces, regions and cities in coastal areas of registering the right to use sea areas as a right to use land: (1) fees shall not be collected when the right to use sea areas is changed into the right to use land in record, such as in Liaoning Province; (2) fees are generally not charged when the right to use sea areas is changed into the right to use land in record, but with respect to land reclamation, the change shall be done after approval and fees will be collected, such as in Jiangsu Province; (3) fees will be collected as the situation requires, such as in Fujian Province; (4) fees shall be collected, such as in Hainan Province; (5) the procedures for approving the use of the land shall be completed when the right to use sea areas is changed into the right to use land in record, and fees would be collected as the situation requires, such as in Guangdong Province. Except

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188 Wu Chunqi, On the New Developments of the Theory of the Law of Real Property Right from the Perspective of the System of the Right to Use Sea Areas, *Journal of Shandong Teachers' University (Humanities and Social Sciences)*, No. 2, 2008, pp. 148~149. (in Chinese)

189 Liu Huirong and Xu Feng, Analysis on the Effectiveness of the Right to Use Sea Areas, *Ocean Development and Management*, No. 7, 2008, p. 55. (in Chinese)

the above-mentioned five provinces, the other six coastal regions, i.e. Shandong, Tianjin, Hebei, Shanghai, Zhejiang and Guangxi have not made relevant provisions on the registration change of the right to use sea areas into the right to use land. Ning De summarizes the three main questions that the provinces, regions and cities in coastal areas have encountered in this practice as follows: (1) whether it needs a new examination and approval according to relevant provisions on land management; (2) whether fees are collected; (3) how to make registration and issue a new certificate of the right to use State-owned land.[190]

Ning De makes an analysis on whether the change should be reexamined and reapproved according to relevant provisions on land management from three perspectives: land management laws & regulations, the nature of administrative acts and the legal theory for administrative approval, and concludes that reexamination and reapproval are unnecessary and shouldn't be made either.[191]

Ning De also believes that fees are also inappropriate and groundless in land reclamation: land reclamation is of great risk. The depth of the waters, geological conditions of reclamation and the rise & fall of the tide are unpredictable; even if reclamation is less costly than purchase of a neighboring land, it is legitimate and reasonable and conforms to the laws of the market for the holder to acquire added value from land reclamation, due to the great risk and long duration in investment and development of land reclamation. Ning De holds that charging price difference is equal to the government taking away the investment return from the holder of legitimate rights and interests, which violates the laws of the market. He also believes that in case of land reclamation, holder of the right to use sea areas pays the royalties for using the sea areas, with a view to exercising the right to use sea areas within the statutory period according to the State's regulations and undertaking development projects after reclamation; in this regard, if additional fees are collected, it indicates that the State does not acknowledge the legal rights to use sea areas held by the holder and only admits that the holder is merely "a

190 Ning De, Research on Several Issues with Respect to the Change of the Right to Use Sea Areas into the Right to Use Land, *Southern Land and Resources*, No.1, 2008, pp. 21~22. (in Chinese)

191 Ning De, Research on Several Issues with Respect to the Change of the Right to Use Sea Areas into the Right to Use Land, *Southern Land and Resources*, No.1, 2008, p. 22. (in Chinese)

project contractor".[192]

As to issuing the certificate of the right to use State-owned land to replace the certificate of the right to use sea areas, Ning De expounds on applications for registering the change, application for completion acceptance after the reclamation project is completed, applications for land registration and land registration confirmation.[193]

Zhang Huirong et al., East China Sea Branch of the State Oceanic Administration, discuss the building of relevant regimes for the interconversion between the right to use land and the right to use sea areas. (1) To establish a regime for dynamic supervision and acceptance of reclamation projects: competent maritime department should build up a regime of prior, during and post supervision over reclamation projects; supervision and check should focus on whether the parties concerned undertake the construction according to argumentations and environmental impact assessment for sea areas, and on whether there is any pollution that causes damage to marine environment; it should also timely accept the project after its completion and take the initiative to contact the land administrative department to provide convenience for the change of registration. (2) To build up an information sharing and reporting regime between the competent maritime department and land administrative department: competent maritime department should regularly communicate the progress of land reclamation projects to land administrative department, to provide convenience for land administrative department to timely handle applications and issuance of the certificate of the right to use land. (3) To establish and improve the regime for guaranteeing the rights and interests of the holder of the right to use sea areas: maritime administrative department and other competent departments should update their management concepts, expand the scope of services, take effective measures, focus on protecting the rights and interests of sea users, and improve the regime for mediation, arbitration, and investigation in case of disputes and illegal acts in the use of sea areas, so as to provide a legal guarantee for the interconversion between the right to use sea areas and the right to use land. (4) To improve the regime for value

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192 Ning De, Research on Several Issues with Respect to the Change of the Right to Use Sea Areas into the Right to Use Land, *Southern Land and Resources*, Issue No.1, 2008, p. 23. (in Chinese)

193 Ning De, Research on Several Issues with Respect to the Change of the Right to Use Sea Areas into the Right to Use Land, *Southern Land and Resources*, Issue No.1, 2008, pp. 23~24. (in Chinese)

assessment and market-based transfer of sea areas and land, to maintain and increase value of sea areas and land resources in their development and utilization and to promote in-depth development of management work on sea areas and land.[194]

D. The Right to Use Sea Areas and Remedy for Damage to Marine Environment

Ma Deyi, from Law School of Dalian Maritime University and Yu Jia, from the School of Sociology and Population Studies, Renmin University of China, believe that it is natural for the right to use sea areas, as a kind of new usufructuary right, to expand to a reasonable extent in the field of legal remedy for damage to marine environment from vessel-sourced oil pollution. The use and deriving benefits functions of the right to use sea areas are dissimilated, which is based on reasonable causes. Reasonable expansion of the right to use sea areas poses a challenge to "right of navigation" in traditional international law, promotes the restructuring of the regime with respect to funds for vessel-sourced oil pollution damage to marine environment, and heralds the privatization trend of some legal regimes in traditional international law.[195]

Ma Deyi and Yu Jia believe that the right to use sea areas, as one of the usufructuary rights, is generally governed by civil law; and for a specific legal purpose, namely legal remedy for oil pollution damage to marine environment, the functions of the right to use sea areas are reasonably expanded and funds for right of navigation are derived therein. The concept of reasonable expansion of the right to use sea areas, poses an unprecedented challenge to the "right of navigation" in international law. They further argue that in the existing legal regime, the right to use sea areas has some features of public law, but overall should be categorized into private law; right of navigation is basically a concept in public law. Reasonable expansion of the functions of the right to use sea areas promotes the restructure of the regime with respect to funds for vessel-sourced oil pollution damage to marine environment, which is the result of private rights' invasion into and restraint on the

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194 Zhang Huirong, Shi Xingping and Gao Zhongyi, Discussion on the Legal Issues of the Interconversion between the Right to Use Sea Areas and the Right to Use Land, *Ocean Development and Management*, No. 12, 2008, p. 53. (in Chinese)

195 Ma Deyi and Yu Jia, Reasonable Expansion of the Functions of the Right to Use Sea Areas: Remedy for Damage to Marine Environment, *Journal of Ocean University of China (Social Sciences Edition)*, No. 4, 2008, p. 1. (in Chinese)

rights in public law. Viewing from the opposite perspective, the right of navigation, widely acknowledged in international law, has been impacted by the right to use sea areas and as a result, is turning into a private right. The Property Law as a basic law once again strengthens the novelty of the right to use sea areas, which lays the foundation for the reasonable expansion of the functions of the right to use sea areas. On the basis of the right to use sea areas, to design a system of reasonably expanded right to use sea areas would be of practical value for structuring the fund for vessel-sourced oil pollution damage to marine environment; and reasonable expansion of the functions of the right to use sea areas poses a challenge to "right of navigation" in traditional international law, which indicates the trend of the right of navigation in public law turning into a private right.[196]

E. The Right to Use Sea Areas and Other Maritime Rights

Zhang Huirong et al., from East China Sea Branch of State Oceanic Administration, make an analysis on the relationship between the right to use sea areas and other maritime rights, and conclude that: the right to use sea areas and other rights such as fisheries right, mining right and water right, are not aimed at the same object, and are basically different in nature. Therefore, they do not contradict or conflict in essence, and are compatible in legal theory. Fisheries right, mining right, water right, etc., are just business concessions, and if the exercise of these rights is concerned with the use of sea areas, the right to use sea areas shall be obtained simultaneously. Compared with these rights, the right to use sea areas should be considered as a basic right. Without the right to use sea areas, fisheries right, mining right, water right, etc., would be lack of a legal carrier when these rights are exercised over sea areas. The administration on approving the use of sea areas, and administration on other rights by other maritime departments, are targeted at different objects, do not conflict with each other in nature and do not have the legal requirements of mutual replacement. Competent maritime administrative department is the functional department performing the administrative responsibilities over the use of sea areas, while the maritime affairs under the management of other departments shall be carried out after approval of relevant departments on

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196 Ma Deyi and Yu Jia, Reasonable Expansion of the Functions of the Right to Use Sea Areas: Remedy for Damage to Marine Environment, *Journal of Ocean University of China (Social Sciences Edition)*, No. 4, 2008, p. 7. (in Chinese)

the premise that the right to use sea area is obtained according to the provisions in the Law on the Administration of the Use of Sea Areas. Therefore, with respect to the management of the right to use sea areas, maritime administrative departments should follow the specific requirements issued by Environment Protection and Resources Conservation Committee of National People's Congress in the Report on Check-up of the Implementation of the Law on the Administration of the Use of Sea Areas – "overlapping administrative areas do not indicate conflicts in administrative functions; the maritime administrative department and other departments for hydropower, wetlands and minerals may conduct management according to respective laws". They should proactively enhance communication and coordination with other maritime administrative departments, establish and improve the supervisory regime, manage the sea according to law, and further protect and promote the development and utilization of the sea.[197]

Wu Chunqi from the School of Politics and Law of Shandong Normal University, holds that there are conflicts between the right to use sea areas and mining & fisheries rights, which would severely damage the expectation interest of the holders. On the other hand, in light of public law, the conflicts would also be detrimental to the citizens' trust to the government, and would eventually delay the process of China's development of rule of law. Wu Chunqi further believes that on the basis of the fundamental principles of the property law, we may follow certain rules as follows within the existing legal framework to address the conflicts between the right to use sea areas and mining & fisheries rights: (1) the principle of "first come, first served" in establishing a real right; (2) balance of interests between different rights; (3) procedural guarantee; (4) interests assessment; (5) adoption of modern internet technology for resources sharing in terms of administration of approving maritime rights; (6) to prohibit double collection of fees and to make provisions for relevant legal liability. He asserts that the essential way to solve the conflicts between the right to use sea areas and other rights would be "unified registration", specifically speaking: (1) to adopt unified registration of the right to use sea areas and relevant rights; (2) to sort out relevant laws and regulations, and establish the legal bases for unified registration; (3) to build up on a gradual basis a

197 Zhang Huirong, Liu Zhendong, Shi Xingping and Yang Mingli, Analysis and Research on the Right to Use Sea Areas and Other Maritime Rights, *Ocean Development and Management*, No. 11, 2008, pp. 64~68. (in Chinese)

competent agency for unified registration of the use of sea areas.[198]

XI. International Relations and the Law of the Sea

A. Connotations of Maritime Rights and the UNCLOS

Maritime power in international relations refers to a kind of maritime control, i.e. sea power or maritime influence.[199] Yin Nianzhang (lawyer) and Mr. Cheng Tao interpret maritime rights from the perspective of the UNCLOS and believe that "maritime rights" do not refer to maritime hegemony, but are the natural extension of State sovereignty and a kind of "legal rights" with certain rights and obligations; they're basic rights enjoyed by the State in maritime affairs; they're a kind of right to security and self-defense of the State; and they include the right of development for the sovereign State.[200]

B. International Relations and Territorial Sea Regime

Doctor Liu Zhongmin analyzes from the perspective of international relations that the international maritime regime, mainly based on the UNCLOS, is the process of struggle and compromise among the States for their own rights and interests. The conventional three-nautical-mile limit has been essentially a product of the international maritime order dominated by the Western sea powers; the three United Nations Conferences on the Law of the Sea and the conclusion of the UNCLOS, reflect, in essence, the practical needs of the modern global community to build an international maritime regime for the sharing of maritime rights. The struggle between the alliance of the States claiming broader limits of territorial waters and seeking coastal interests and the alliance of those States claiming narrower limits and seeking ocean interests, becomes the highlight of the conflicts

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198 Wu Chunqi, Rules and Fundamental Ways to Address the Conflicts between the Right to Use Sea Areas and Other Usufructuary Rights, *Journal of Shandong Police College*, No. 3, 2008, pp. 51~55. (in Chinese)

199 Zhang Xu and Zhang Yongchi, Realism Theory of Sea Power and the Awakening of China's Awareness in Maritime Rights, *Legal System and Society*, No. 10, 2008, p. 354. (in Chinese)

200 Yin Nianzhang and Cheng Tao, The Interpretation of Maritime Rights in International Law: A Discussion on the Related Stipulations of the UNCLOS, *Journal of Guangdong Ocean University*, No. 5, 2008, p. 1. (in Chinese)

over the breath of territorial sea, in which developing countries have played a significant role.[201]

C. International Relations and the East China Sea Disputes

Disputes over the delimitation of the East China Sea is one of the most important issues that have impacted Sino-Japanese relations. Mr. Han Zhanyuan believes that although the principle of "shelving differences and seeking joint development" has promoted the cooperation between China and the States concerned as well as peace & development in the East Asian region, it does not thoroughly address or even turns a blind eye to their territorial disputes; therefore, it is time to make adjustment to the policy.[202] Associate Professor Xie Xiaoguang analyzes the causes in international politics that lead to Sino-Japanese disputes over maritime rights and interests and makes clear the fundamental principles in international politics which China and Japan should adhere to in the delimitation of the East China Sea; on the basis of such fundamental principles, he further argues that the diplomatic policy of "shelving differences and seeking joint development" proposed by Deng Xiaoping, bears practical significance on China's peaceful settlement of the East China Sea disputes, and that it is a realistic choice for China and Japan to implement this strategic principle.[203] According to researcher Cai Penghong, domestic and overseas research on Sino-Japanese disputes in the East China Sea mainly makes analysis and proposes solutions from the legal perspective. Since law is a relatively stable regime, it is hard to make amendments once enacted; even if it is necessary and possible to make any amendments, the process of completing the amendments and implementing requires a long duration. In this sense, law only serves as a static tool of measurement. Currently, whereas the States are entitled to assert their claims by reference to international law, delimitation according to laws would be equivalent to prolonged negotiations; it would be rather difficult or even impossible to solve in a short run the disputes in the East China

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201 Liu Zhongming, Analysis on the Formation of Territorial Sea Regime and the Evolution of International Relations, *Pacific Journal*, No. 3, 2008, p. 17. (in Chinese)

202 Han Zhanyuan, An Analysis of Effective Control Principle in Solving Territorial Sovereignty Disputes: Sovereignty Disputes of China's Uninhabited Islands, *Journal of Taiyuan Normal University (Social Science Edition)*, No. 2, 2008, pp. 55~57. (in Chinese)

203 Xie Xiaoguang, Discussion on Sino-Japanese Settlement of the Delimitation in the East China Sea from the Perspective of International Politics, *Theory Research*, No. 6, 2008, p. 50. (in Chinese)

Sea by delimitation. Hence, it would be the best policy to follow a provisional strategy through negotiations and dialogues, such as the policy of "shelving differences and seeking joint development", in order to maintain the status-quo and avoid loss of control over the situations.[204] In June 2008, the Ministry of Foreign Affairs of the People's Republic of China declared that China and Japan reached principled consensus on the issues of the East China Sea. Mr. Zhang Zhirong introduces major achievements of and enlightment from Sino-Japanese negotiations on the East China Sea, and notes that these factors such as leadership of the heads of the two countries and Japan's adjustments of its East China Sea policies have promoted the progress of the East China Sea negotiations.[205]

D. International Relations and the South China Sea Disputes

Doctor Li Mingjiang, on the basis of "interdependence theory" in international relations, argues that close economic relations among the States in a region would be beneficial to improve regional security environment and reduce or even eliminate regional conflicts. After the Cold War, military clashes occur quite a lot in many places worldwide. And the South China Sea has been considered to be one of the most instable regions in the world, with many disputes over sovereignty, fisheries, seabed resources exploitation, environmental protection, etc. However, the region has not witnessed any large-scale military clashes and there have only been diplomatic fights among the States in the region, which in empirical terms indicates the above-mentioned association between economy and security.[206] Therefore, to enhance China's economic cooperation with Southeast Asian countries would have a great significance on tackling the disputes in the South China Sea.

Translator: YE Lin

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204 Cai Penghong, The Status-quo of Sino-Japanese Disputes in the East China Sea and the Prospects for Joint Development, *Contemporary International Relations*, No. 3, 2008, p. 45. (in Chinese)

205 Zhang Zhirong, Achievements of Sino-Japanese Negotiations on the East China Sea in the First Phrase and the Insights, *Contemporary International Relations*, No. 11, 2008, p. 25. (in Chinese)

206 Li Mingjiang, translated by Liang Chunyang, Pan-Beibu-Gulf Cooperation and Regional Security: Focusing on the South China Sea, *Around Southeast Asia*, No. 1, 2008, p. 14. (in Chinese)

The 2008 Conference on Cross-strait Marine Cooperation: A Summary Report

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In recent years, the relationship between China Mainland and China Taiwan has greatly improved and both sides share the concern about cooperation on development and management of marine affairs. Therefore, to maximize the benefits of the cross-strait marine development, XMU-COPL and the *China Oceans Law Review* successfully held a conference on the issue of cross-strait marine cooperation from November 15 to November 16, 2008.

The main issues discussed during the conference are as follows: the cooperative mechanisms for development in the East and South China Seas between China Mainland and China Taiwan; cooperation on development and management of marine fishery resources by China Mainland and China Taiwan; communication and cooperation between China Mainland and China Taiwan on shipbuilding and shipping; cooperative mechanism between maritime law enforcement agencies of China Mainland and China Taiwan in the Taiwan Strait; and co-protection of the underwater cultural heritage of China Mainland and China Taiwan.

I. Cross-Strait Cooperative Mechanism for Development of the East and South China Seas

In the morning of November 15, 2008, Song Yann-huei, a professor from the Graduate Institute of International Politics of Taiwan Chung Hsing University, presented a paper titled "The Dialogue Mechanism and the Potential Cooperative Platform for the Co-exploitation of the Oil and Gas Resources in the East and Sou-

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th China Seas by China Mainland and China Taiwan", to the experts and scholars at the conference. The paper consisted of four parts: (i) the current situation of the oil and gas resources in the East China Sea; (ii) the dialogue mechanism and the potential cooperative platform for the cross-strait co-exploitation of the oil and gas resources in the East China Sea; (iii) the current situation of the exploitation of the oil and gas resources in the South China Sea; and (iv) mechanisms for dialogue and potential cooperative platform for the cross-strait co-exploitation of the oil and gas resources in the South China Sea.

First, the paper reviewed the history of the exploration of the East China Sea's resources: since 1961, it was speculated that there was oil and gas in the East China Sea. When the oil shock broke out in 1973, East Asian countries paid great attention to the exploitation of the oil and gas resources in the East China Sea. Against this background, China and Japan held several talks on the issue of delimiting the continental shelf of the East China Sea from 1980 to 1991, yet achieving no agreement. In 1992, the Diaoyu Islands dispute reemerged, which suspended the negotiations between China and Japan. In 1993, China National Offshore Oil Corporation (CNOOC) of China Mainland took the initiative to invite CPC Corporation (CPC) of China Taiwan to jointly explore and exploit the Pinghu oil and gas field on the continental shelf in the East China Sea and the Diaoyu Islands waters, but the plan failed to get implemented. In the early 21st century, the exploitation of the Pinghu and Chunxiao oil and gas fields aggravated the dispute between China and Japan over the continental shelf in the East China Sea. In order to resolve the problem, two countries held eleven official negotiations from October 2004 to December 2007, during which leaders of these two countries proactively advanced negotiations to reach consensus on the following issues, namely, to communicate and negotiate on the basis of mutual benefits, and to make the East China Sea a sea of peace, cooperation and friendship. Due to the efforts made by both countries, they finally reached the Principled Consensus on the East China Sea Issue (hereinafter "Principled Consensus") in June 2008. The Principled Consensus delimited a 2600-square-kilometer area for joint development by both the countries in the East China Sea, which straddles the median line drawn unilaterally by Japan, and partially includes undisputed areas under China's jurisdiction. The Principled Consensus welcomed Japanese legal persons to participate in exploiting the Chunxiao oil and gas field according to the Chinese laws concerning the management of foreign investment. The Principled Consensus indicated that China and Japan had, in principle, reached a consensus on the East China Sea issue, and were

willing to cooperate and solve relevant issues to realize the consensus made by leaders of these two countries. The speaker pointed out that although China and Japan have made the Principled Consensus, it would not be easy to implement it. The joint development block delimited in the Principled Consensus was merely a small part of the 770,000-square-kilometer East China Sea continental shelf, yet its symbolic significance outweighed the practical one. For China Mainland, while implementing the Principled Consensus, it should do a better job in furthering and safeguarding its own interests. As for China Taiwan, what role it would play was still a concern. The speaker reminded that it should be noticed, that on October 31, 2008 Japan made a decision to make a submission to the United Nations for the delimitation of the extended continental shelf in which it would claim enormous areas.

In the second part, Professor Song Yann-huei reviewed the incident that China Taiwan's fishing vessel "the United" was ran down by a Japanese Coast Guard vessel, which occurred close to Diaoyu Islands in June 2008. The incident sparked off the dispute between China Taiwan and Japan over the sovereignty of Diaoyu Islands, the exclusive economic zones and fishing zones, catching the attention of the public. Professor Song then mentioned that from June to July, Mr. Ma Ying-jeou had proposed that China Taiwan and China Mainland should cooperate on the exploitation of the resources in the East China Sea. Professor Song also noted the opportunity which newspapers in China Taiwan had speculated for potential cooperation between China Taiwan and China Mainland on oil and gas resources. Since 1993, cross-strait communication has increased, and a cooperative platform has been established, namely the cooperation (in the name of overseas private investment corporations) between CNOOC and CPC. These two companies have signed the Agreement on Joint Research of the Agreed Areas in the Nanri Island Basin, which was approved by both competent authorities. Making this cooperation as a platform, these two sides can cooperate on oil and gas resource exploitation in the East China Sea, Diaoyu Islands, Taiwan Strait and even in the South China Sea. However, issues such as how to cooperate and how the specific agreement would be should be further discussed. The speaker suggested that since the East China Sea involves the sea areas of three countries, namely, China, Japan and Korea, cooperative mechanisms in the East China Sea shall be established on the premise that the disputes over the sovereignty of islands are suspended, all three parties have the political will for cooperation on marine management and exploitation, and common interest is maintained, while China Taiwan shall participate in

cooperation under the name of China Taipei. In the southern half of the East China Sea, China Mainland, China Taiwan and Japan could cooperate through tripartite collaborations by China Mainland's Association for Relations across the Taiwan Straits, the Association of Eastern Asia Relations of China Taiwan's Straits Exchange Foundation and the Japan Interchange Association. Meanwhile, cooperation between China Mainland's Association for Relations across the Taiwan Straits and China Taiwan's Straits Exchange Foundation should be enhanced. As for the cooperative mechanism for the cross-strait co-exploitation of the oil and gas resources in waters surrounding the Diaoyu Islands, cooperation should be carried out by economic entities such as CNOOC and CPC. Apart from the above mentioned dialogue mechanism, the existing Cross-strait Nongovernmental Academic Forum on the South China Sea Issues could be followed to establish a cross-strait nongovernmental academic forum on the East China Sea issues, or even to establish a cross-strait nongovernmental academic forum for co-exploiting marine resources in the entire sea areas of the nation. Government representatives from both sides could attend these forums.

As for the exploitation of the oil and gas resources in the South China Sea, Professor Song gave a brief introduction to the Declaration on the Conduct of Parties in the South China Sea signed by China and ASEAN member States in November 2002, the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea signed by China, the Philippines and Vietnam in March 2005, and the Joint Communique of the 41st AMM and the 15th ARF published by ASEAN in July 2008. He pointed out that the purposes of the above mentioned international instruments, which promised to resolve the South China Sea disputes in a peaceful way according to the principles of international law, were to turn the South China Sea from a disputed area to a sea of peace, cooperation and friendship. However, the speaker pointed out that the Tripatite Agreement signed by China, the Philippines and Vietnam would last 3 years, and the first phase had ended in June 2008. However, regardless of the opposition of China, Vietnam insisted on inviting American companies to participate in exploiting oil and gas resources in Xisha. Therefore, the speaker raised doubts about the continuation of the agreement: can the second phase start, when can it start and is it possible that China Taiwan also participate in it? Has the South China Sea by far really turned into a sea of peace, cooperation and friendship? What are the attitudes of Vietnam and the Philippines toward this?

For the fourth part of the report, Professor Song asked that since uncertainty

existed in the cooperation between China, the Philippines and Vietnam and maritime disputes existed among coastal States bordering the South China Sea, whether it is possible for China Mainland and China Taiwan to co-exploit the oil and gas resources in the South China Sea. Can we co-exploit the northern part of the South China Sea by learning from the successful cooperation experiences between CNOOC and CPC? The cooperation can be carried out through negotiations between the Association for Relations across the Taiwan Straits and Straits Exchange Foundation to reach an agreement on co-exploitation of the oil and gas resources. Another way to carry out cooperation is to hold cross-strait academic conferences on the South China Sea issues. Such conferences have been held several times since 1990. The recent one was held at the Institute of International Relations of Taiwan Chengchi University in November 2007. As for the potential fields in which China Mainland and China Taiwan may cooperate, the speaker listed a number of areas including marine environmental protection, resource exploration, navigation safety, academic exchanges, marine scientific research and maritime law enforcement. The speaker pointed out that there was another cross-strait cooperative platform that shall not be ignored, the annual South China Sea Conference held in Indonesia. This conference was held since 1990, and the 18th Session of the Conference was to be held in November this year. Except for the first session, representatives from China Mainland and China Taiwan have attended all the conferences. It may be another platform for discussing exploitation cooperation mechanism in the South China Sea.

When answering the question "after implementing the 'Three Direct Links' (direct links in mail, transportation, and trade between China Mainland and China Taiwan), what obstacles still hinder the cooperation between China Mainland and China Taiwan" raised by Chen Huiping, an associate professor of the School of Law of Xiamen University, Professor Song Yann-huei indicated that the biggest obstacle for cross-strait cooperation is mutual trust. We should find a strategic mode to achieve a win-win situation: the cooperative plan is unusual as it is hard to avoid diplomatic matters involving Japan and Southeast Asian States and needs high-level, economic confidence building measures. China Mainland and China Taiwan should forge the political will for mutual trust, and then seek for a cooperative platform on this basis.

Professor Zhou Hongjun at the East China University of Political Science and Law expressed his opinions on cross-strait cooperation. He suggested that cross-strait issues are our internal affairs and thus, it is inappropriate to discuss the

relationship between China Mainland and China Taiwan and their cooperation on international occasions, such as APEC. In fact, there are several channels between China Mainland and China Taiwan by which communication and cooperation can and have taken place. To safeguard China's rights, China Mainland and China Taiwan should first keep uniformity of their external policies. For instance, when claiming the rights to the Diaoyu Islands, Nansha Islands and Dongsha Islands, China Mainland and China Taiwan should achieve a consensus first. For example, for the name of the Diaoyu Island, China Mainland named it Diaoyudao, whereas China Taiwan called it Diaoyutai; which name should be adopted can be decided by discussion, yet the name should be uniform in the academia across the Strait. Secondly, China Mainland and China Taiwan should coordinate their legal bases for claims, which is even more important. For instance, do the Diaoyu Islands meet the definition of island prescribed in the United Nations Convention on the Law of the Sea (UNCLOS)? Are they entitled to an exclusive economic zone and continental shelf? What effect should be given to the Diaoyu Islands in maritime delimitation between China and Japan? A consensus on these issues should first be reached between China Mainland and China Taiwan.

For cross-strait cooperation in the East and South China Seas, John K. T. Chao, a professor of Taiwan Chengchi University, gave a report titled "On Cross-strait Cooperation in the East and South China Seas", which made an in-depth analysis of the disputes over the exploration and exploitation of the natural resources in the East and South China Seas and suggested solutions to the disputes.

Regarding cross-strait development and cooperation in the South China Sea, Professor Chao held that it mainly involved the following issues. Establishing a Marine Resource Reserve should be considered. Since the South China Sea abounds in living resources, environmental protection should be given priority to in the development of the South China Sea, especially in the context that sustainable utilization of islands and reefs in the South China Sea is threatened by global warming and sea level rise. Cross-strait cooperation should contribute to and other coastal States should be requested to consider making the South China Sea a marine resource reserve instead of plundering the marine resources therein. Regarding protection of ancient ship wrecks lying in the waters of the South China Sea, both sides across the Taiwan Strait should jointly enhance and encourage underwater archeology and training of relevant professionals. Concerning the protection of marine cultural assets, cross-strait coordination should be improved. Both sides have their own strengths in archeology. China Mainland is good at excavating

underwater and underground artifacts, while China Taiwan is advanced in verifying history through physical evidence. Besides, an enormous amount of artifacts are kept in the Taiwan Palace Museum. Therefore, there is huge room for cooperation in archeology. How to maintain the marine environmental quality of the South China Sea and prevent and respond to serious marine pollutions are closely related to the sustainable utilization of the sea, and both sides should collaborate to have in-depth discussions, establish a proper mechanism, and jointly promote marine environmental protection and scientific research. A cross-strait coordination mechanism should be established to prevent unnecessary misunderstanding. Prior to attending international meetings regarding the South China Sea, cross-strait communication should be made to reach a consensus in that internal quarrels would profit other States. Cross-strait negotiation should be made to look for an appropriate approach that China Taiwan can join the Code of Conduct in the South China Sea and examine the possibility of Taiwan's participation in the cooperation plan for ecological environment protection in the South China Sea.

Professor Chao contended that politics around the East and South China Seas are complex and disputes exist over marine resource rights between China with neighboring States. The Chinese government should take a pragmatic approach to strengthen marine cooperation with surrounding States and work towards the goal of joint development of the marine natural resources. This can take the following forms: in the Northeast Asia, China and Japan should make energy preservation a priority in collaboration. An energy community and a multilateral cooperative mechanism can be established with China and Japan as the core States on the basis of the cooperation among China, Japan, and Russia and all other States concerned to boost trust, resolve conflicts and reduce contradictions; in the East and South China Seas, both sides of the Taiwan Strait need to maintain official communications with neighboring States such as Japan, South Korea, Vietnam, and the Philippines on the principle of "shelving differences and seeking joint development", and attract foreign capital and import technology to explore and exploit the oil and gas resources in the East China Sea and around the Nansha Islands. With good cross-strait economic and trade relations, both parties should coordinate their ocean policies and jointly explore the natural resources in the East and South China Seas. Regarding cooperation in the legal field, legal regimes of both sides should gradually move towards conformity with international law. China Mainland and China Taiwan may jointly implement the WTO law, and integrate maritime legal regimes by exchange of understandings and practices about

international maritime laws. Currently three legal systems exist in the four regions, i.e. China Mainland, China Taiwan, China Hong Kong, and China Macau, and there are significant differences in legal terms, e.g. the continental shelf in Chinese Mandarin is "Dalujia," while that in China Taiwan is called "Dalu Jiaoceng", which is not conducive to cross-strait communication or claim to rights. As the continental shelf extends beyond 200 nautical miles and is rich in oil and gas deposits, delimitation of the continental shelf is not only an issue of sovereign rights and jurisdiction, but also relates to the economic interests in vast waters, which is why the surrounding States are all actively expanding their maritime power. It is high time that both sides of the Taiwan Strait ensured and executed their sovereign rights and jurisdiction over the marine resources therein. To sum up, there is a lot of room for cross-strait cooperation in the exploration, exploitation and conservation of the resources in the East and South China Seas, underwater archeology and excavation, and conservation of marine environment. China Mainland and China Taiwan should make joint efforts to make up for the time lost in more than a decade when they were in conflict.

II. Conflicts on Sovereign Rights and Jurisdiction over Joint Development Zone and Disputed Waters

Gong Yingchun, Associate Professor from the Institute of International Law, China Foreign Affairs University, presented a report consisting of two parts: conflicts of sovereign rights and jurisdiction over the joint development zone and conflicts of sovereign rights and jurisdiction over disputed waters. The first part mainly addressed international law issues arising from the establishment of a joint development zone between China and Japan in the East China Sea, while the second part discussed law enforcement issues in the East China Sea waters and around the Diaoyu Islands and the Okinotori Reef.

The first part of the report covered four aspects:

1. Nature, Scope and Legal Effects of the Joint Development Model

A joint development agreement over disputed waters is a provisional arrangement made by the States concerned with an "aim" to ultimately resolve the dispute, which involves resource exploration, management and distribution. Such an arrangement is not supposed to affect other sovereign rights and jurisdiction of

the States concerned in the disputed waters with overlapping claims. The report then talked about the disputed waters in the East China Sea between China and Japan, and mentioned the "entitlement theory" that some Japanese scholars hold. This theory argues that, with regard to the area within 200 nautical miles, the development of international law makes the continental shelf and the exclusive economic zone legally integrated, and thus the principle of natural prolongation becomes pointless when claiming entitlement to areas within this scope. In response to the theory above, the speaker held that the argument of "entitlement" to 200 nautical miles put forward by Japan obviously violates the principle of estoppel in international law. In the East China Sea waters with a width of less than 400 nautical miles, the standard of 200 nautical miles distance is only a virtual right provided for in the UNCLOS instead of a tenable right in reality. Compared to the claim for "entitlement" to 200 nautical miles proposed by Japan, the principle of natural prolongation of the continental shelf proposed by China is not only an entitlement provided for in the UNCLOS, but also a *de facto* right to the seabed of the East China Sea.

2. Conflicts between China and Japan on the Sovereign Rights and Jurisdiction over Joint Development Zone in the East China Sea

The speaker examined the Understanding between China and Japan on Joint Development of the East China Sea, and held that the statement in the Understanding that the waters for joint development were not governed by either Chinese laws nor Japanese laws might be misunderstood: it seemed that China confirmed the disputes exist over the exclusive economic zone and continental shelf, and the "entitlement theory" claimed by Japan was accepted by China to a certain extent. Then the speaker discussed in detail the possible conflicts between China and Japan of sovereign rights and jurisdiction over the joint development zone in the East China Sea, and pointed out that the potential conflicts may arise mainly in the following aspects: (1) sovereign rights over other resources than oil and gas in the exclusive economic zone, such as sea water, sea current, wind power, etc.; (2) jurisdiction over marine scientific research and marine environmental protection and conservation in the exclusive economic zone; (3) sovereign rights and jurisdiction over other resources on the continental shelf, such as manganese nodules and benthos; and (4) jurisdiction over vessels of a third State, etc.

3. Jurisdiction over Installations and Structures such as Oil Platforms and Surrounding Safety Zones in the Joint Development Zone between China and Japan in the East China Sea

First, as provided for in the UNCLOS, installations and structures such as oil platforms do not have the status as islands, have no territorial sea, nor do they affect the delimitation of territorial sea, exclusive economic zone or continental shelf, but a reasonable safety zone may be delimited and measures may be taken to ensure the safety of navigation and the structures themselves. Second, the joint development zone is located in disputed waters governed by neither Chinese laws nor Japanese laws, but urgent legal issues will arise from the establishment, utilization, and administration of platforms and marine pollution caused by resources exploration and exploitation. Thus, it is necessary to make detailed arrangements regarding governing laws and jurisdiction over installations and structures such as oil platforms in the future joint development agreement. Finally, the speaker pointed out that as China does not have a special law regarding offshore installations and structures and its surrounding safety zones, (a legal loophole in this regard), this may put China in a position where its rights will not be well protected in the joint development zone. To learn from international practice, the speaker mainly introduced Japanese laws in these fields, and further pointed out that Japanese domestic law takes the offshore installations and structures as a fictional territory, while the safety zones are vested with a legal status similar to that of internal waters.

4. Solutions to the Conflicts over Jurisdiction in the Joint Development Zone and Their Problems

On the basis of the above analysis, the speaker held that considering the nature of the disputed waters in the joint development zone and the political will of China and Japan for joint development while setting the disputes aside, both States should adopt the principle of flag State jurisdiction over activities directly related to oil and gas resources exploration and exploitation by nationals and vessels of both States in the zone in order to avoid conflicts of jurisdiction. Meanwhile, the speaker also held that as the joint development agreement did not cover sovereign rights over other matters as well as jurisdiction over marine scientific research and environmental protection in the zone, distribution of these rights remain unsolved. So does conflict of jurisdiction over a third State's vessel and other marine activities in the joint development zone. To resolve such conflicts, the speaker mentioned four international practices: (1) the States concerned delimit the borders of the exclusive economic zone and continental shelf so that the coastal State exercises jurisdiction over the portions of the joint development zone within its respective waters and continental shelf; (2) in case of absence of delimitation, the States concerned exercise joint management in the joint development zone;

(3) in case of absence of delimitation, the States concerned cooperate only in the fields of resource development and jurisdiction shall be exercised by the flag State. However, this approach is not helpful for issues such as resource conservation, environmental protection, and marine scientific research, and conflicts may arise regarding jurisdiction over a third State's vessel; (4) if the undelimited joint development zone includes part of undisputed waters, jurisdiction over a third State's vessel will cause two problems: first, whether the State concerned has the right to exercise jurisdiction over a third State's vessel in the waters that are not under its jurisdiction, and second, whether the third State's vessel has the obligation to accept such jurisdiction.

In the second part of the report, the speaker first talked about protection of rights over the Diaoyu Islands waters by China Mainland and China Taiwan. Arbitrators from the Permanent Court of Arbitration held that enforcement by force in waters whose sovereignty is under dispute is not a lawful enforcement activity at sea, but instead is use of force forbidden by the Charter of the United Nations. In light of this view, we can consider the issue of the Diaoyu Islands waters more clearly: as Japan actually occupies the Diaoyu Islands, whose sovereignty is under dispute between China and Japan, Japan may, under the name of "law enforcement," exercise the "law enforcement rights" over vessels from China Mainland and China Taiwan that enter into the waters. However, we should not be fooled by such activities. They should be considered illegal from the perspective of the Chinese government, as we also claim sovereignty to the Diaoyu Islands. If Japan uses force in "law enforcement", such exercise of force shall not be considered as ordinary law enforcement, but instead an illegal threat or use of force under international law. As to such a behavior, we can take corresponding military confrontation actions based on the right of self-defense.

With respect to the conflict of rights to the disputed waters in the East China Sea, it does not involve sovereignty disputes, but is an issue on sovereign rights and jurisdiction over the exclusive economic zone and continental shelf regulated by the UNCLOS. Therefore, a peaceful approach should be adopted to address the conflict, and it will violate the Charter of the United Nations if either party resorts to the use of force. However, the UNCLOS does not prevent the coastal State from using force when exercising the right of hot pursuit in waters under its jurisdiction. Even in waters in which sovereign rights or jurisdiction are disputed, each coastal State has this right as long as it meets the conditions for execution as provided for in the UNCLOS. In this sense, both China and Japan have the right to exercise

jurisdiction over the disputed waters, and may take measures such as hot pursuit as long as it is done pursuant to the requirements of the UNCLOS.

Professor Kuen-chen FU, Director of XMU-COPL, put forward his opinions regarding the joint development zone. He held that there is no final conclusion yet regarding the legal nature of the zone, but, in the future, the issue of the legal nature will be reflected in the choice of law in the Sino–Japanese agreement. The legal nature will differ vastly if it is governed by Chinese contract law instead of by Japanese law. China's legislation is not fully developed yet in this regard, and we do not have an act regarding oil rigs at sea, while Japanese law is already mature in this regard. At the time of signing the agreement, the Japanese party can readily cite its legal provisions while we would have nothing to refer to, which will result in the adoption of Japanese laws for law enforcement over offshore platforms and safety zones. In addition, the northeast of the zone is adjacent to the joint development zone defined by Japan and South Korea in 1979. Since, in fact, it transgresses upon China's continental shelf, China Mainland and China Taiwan have been firmly against the establishment of the zone, but the setup of the China–Japan joint development zone implicitly accepts the Japan–South Korea joint development zone to a certain extent. Therefore, Professor Fu held that China Taiwan should take the position of being firmly against the China–Japan joint development zone, and academia from China Mainland should also be moderately against it, for only by doing so can we help the Chinese diplomats to negotiate with their Japanese counterparts, and give them leverage when it comes to signing the joint development agreement and determining the legal nature of the zone.

III. Diaoyu Islands

The Diaoyu Islands, consisting of eight islands and reefs such as the Diaoyu Island, Huangwei Islet, and Chiwei Islet, have a total area of 6.16 square kilometers. Since oil and gas resources were found in the late 1960s, the three parties – China Mainland, China Taiwan and Japan, have had disputes over the sovereignty thereof and the disputes became heated in the 1970s. When the U.S. transferred the mandated Diaoyu Islands under its administration to Japan, it stressed that what transferred was the administrative power instead of the sovereignty. When China and Japan entered into a diplomatic relationship, both parties compromised and agreed to set the issue aside. Entering the 21st century, the sovereignty issue of the Diaoyu Islands has loomed again and become a focal point of dispute between

China and Japan. China argues that sufficient historical evidence exists that the Diaoyu Islands were first discovered, named and used by China, and had been part of China's territory before 1895. According to international law before the 19th century, discovery could establish legal rights, and China's occupation of the Diaoyu Islands already meets the requirement of obtaining sovereignty over the territory. However, Japan advocates that Diaoyu Islands were *terra nullius* prior to 1895, and Japan obtained their ownership based on the principle of occupation of *terra nullius* and gained these islands in January 1895. As pointed out by Professor John K. T. Chao, surrounded by the sea in all directions, China Taiwan's continental shelf overlaps with other States in large portions. Taking China Taiwan as the starting point of the 200 nautical miles prolongation, its continental shelf overlaps with those of Japan and the Philippines in the east; with the continental shelf of China Mainland, Japan, and South Korea in the north as it extends to the East China Sea and the Yellow Sea; with the EEZ of the Philippines in the south (there are also disputes over the sovereignty over some islands in the South China Sea); and a complete overlap with China Mainland in the west. The whole continental shelf west of China Taiwan is a natural prolongation from China Mainland; the seabed of Taiwan Strait belongs to the continental shelf of the East China Sea, the water therein is no deeper than 200 meters and the width of the Strait is around 108 nautical miles on average (78~350 nautical miles). In international practice of delimiting the continental shelf, an island is vested with four types of effects, i.e. full effect, partial effect, zero effect, and for islands under sovereignty disputes, no effect. By reference to such practices, we may consider giving the Diaoyu Islands zero effect as an attempt to solve the delimitation issue in the East China Sea between China and Japan. However, he also held that China should claim for the exclusive economic zone and continental shelf of the Diaoyu Islands, as the more rights are claimed, the more room there will be for negotiation. According to the provisions of the UNCLOS, to claim a continental shelf beyond 200 nautical miles up to a maximum limit of 350 nautical miles, a State must submit relevant scientific and technical information to the United Nations Commission on the Limits of the Continental Shelf (CLCS) by 13 May 2009. Cross-strait cooperation can be made with regards to the natural prolongation of the continental shelf, for instance, investigation of the continental shelf. China Taiwan provides detailed information of the China Taiwan's part of the continental shelf, while China Mainland submits the information to the CLCS by 13 May 2009 to make claim of rights on behalf of both. He further pointed out that the key to the Diaoyu Islands issue was the legal

status of Ryukyu, which used to be an independent State and that during the U.S. military occupation it only exercised administrative power with no sovereignty. Therefore, mandates over Ryukyu and the Diaoyu Islands by the U.S. came with no ownership, not to mention a transfer of ownership of these two places to Japan. Professor Chao claimed that the Diaoyu Islands were absolutely China's territory in terms of geography, geology, history, usage, and international law. While he agreed to solving international disputes in a peaceful manner, he proposed negotiations for sovereignty disputes instead of setting the dispute aside. We should tactically show our claimed jurisdiction and law enforcement capacities, such as tactically conducting patrol within 12 nautical miles of the Diaoyu Islands, or conducting fishing activities within 12 nautical miles of the Diaoyu Islands. It should be noted that no sovereignty means no fishing right.

As pointed out by Professor Song Yann-huei, given that Japan claims the 200 nautical miles exclusive economic zone of the Okinotori Reef, should China also claim the exclusive economic zone of the Diaoyu Islands during the negotiation? According to Article 121 of the UNCLOS, the Diaoyu Islands are islands that are entitled to an exclusive economic zone and continental shelf, whereas the Okinotori Reef is a rock that is entitled to territorial waters and contiguous zone but no exclusive economic zone or continental shelf. If Japan claims an exclusive economic zone on the basis of a rock, why should we forgo such a right to our islands? Associate Professor Gong Yingchun agreed to what Professor Song put forward. She held that according to Article 121 of the UNCLOS, the Diaoyu Islands are islands in every sense of the term as they definitely meet the requirement of sustaining economic life of their own, and people once lived on the islands, so it is rather absurd not to claim the exclusive economic zone or continental shelf even before negotiation starts. She further pointed out that the legal status of an island in the UNCLOS and its legal status in delimitation are two separate issues, for both parties may agree not to consider the status of the island for delimitation, but it does not affect the fact that the island, according to the UNCLOS, is entitled to the exclusive economic zone and continental shelf. Professor Kuen-chen FU held that the Diaoyu Islands consist of eight islets, among which the Diaoyu Island is just a big one. They should be called the Diaoyutai Islands to accurately reflect their statuses. There is sweet water on the island and people once lived there. Taiwan authorities claimed that uninhabited islands and rocks were not entitled to the continental shelf when it ratified the 1958 Convention on the Continental Shelf, and it will violate the principle of "estoppel" under international law if China

Taiwan claims a continental shelf for the Diaoyu Islands now. However, this is not an issue for China Mainland, as it is not a contracting party to the 1958 Convention on the Continental Shelf, and it also announced that it did not accept agreements signed by China Taiwan under the name of China. Therefore, there is no problem if China Mainland claims Diaoyu Islands' entitlement to an exclusive economic zone and continental shelf. However, the Diaoyu Islands are affiliated to China Taiwan, and the claim of rights may cause political issues across the Strait. Cross-strait negotiation needs to be conducted to find a solution.

IV. Development of Chunxiao Oil and Gas Field

350 km away from Ningbo, the Chunxiao oil and gas field is located in the Chinese waters west of the so-called "median line" unilaterally delimited by Japan. Japan requires China to stop the development of the field on the basis that development of the oil and gas field may cause "suction effect" that will impair Japan's interests, while China rejects the request as it maintains that China and Japan have not delimited the East China Sea yet and does not accept the so-called "median line". The development of Chunxiao oil and gas field is within the sovereignty of China**.** Between 2004 and 2007, China and Japan held 11 rounds of negotiations and agreed in principle on joint development, but major dispute still exists regarding the joint development zone. The academia maintains that the following three issues need to be addressed before China and Japan can reach a joint development agreement, i.e. sovereignty, profit sharing, and strategic security concern. The dispute over Chunxiao oil and gas field is mainly about the continental shelf of the East China Sea between China and Japan. China maintains that "equitable principle" is a universally accepted principle for delimitation of the continental shelf under international law, and the "natural prolongation principle" is another important principle provided for in the UNCLOS. Thus, China and Japan should delimit the continental shelf in the East China Sea on these two principles. However, Japan insists on the "median line principle" for delimiting the continental shelf. Regarding this dispute, Professor John K. T. Chao held that as provided by the UNCLOS, States having dispute over the continental shelf shall negotiate to delimit on the basis of international law. As State parties to the UNCLOS, both China and Japan are obligated to reach an agreement through negotiation, and make practical provisional arrangements for the transitional period prior to the agreement, such as setting the dispute over sovereignty or sovereign

rights aside for the time being and negotiating for joint exploration and exploitation of the oil and gas resources that are in the overlappingly claimed waters. Joint development will be a win-win case, as it maximizes the benefits from commercial development and production via timely and efficient exploration and exploitation of the underwater resources; it takes into account both parties' economic benefits without affecting the claims of the States concerned. Politically, joint development also helps to maintain a stable situation in the East China Sea region and brings new life to the bilateral relationship. Therefore, only through peaceful negotiation is the conflict over maritime delimitation related to the Chunxiao oil and gas field between China and Japan likely to be resolved, and "shelving differences and seeking joint development" is currently the most pragmatic approach. Professor Song Yann-huei stressed that the Principled Consensus reached by China and Japan this year is a common understanding in principle rather than a joint development agreement. Description of Chunxiao oil and gas field in the Principled Consensus states that legal persons from Japan are welcome to participate in the development of Chunxiao oil and gas field, whose sovereign rights belong to China. Associate Professor Gong Yingchun held that the Sino–Japanese Principled Consensus clearly states that the field's sovereign rights belong to China, and the development should be governed by Chinese laws. However, the China–Japan joint development zone is not governed by the domestic laws of either China or Japan. It does not clearly state the reason why the domestic laws of both States are not applicable. Is it because China accepts part of the zone is under dispute or the zone encompasses undisputed waters but are not governed by the laws of either State? In this regard, China should make its claims clearer.

V. Okinotori Reef

Located 1,740 km south of Tokyo, Japan, the Okinotori Reef consists of only two rocks around 1 meter high and several meters wide. Japan has designated a 200-nautical-mile exclusive economic zone and a continental shelf of 740,000 square kilometers around the reef, and plans to apply for a confirmation of the above rights to the CLCS. China maintains that the Okinotori Reef is not an island and shall have no exclusive economic zone or continental shelf and that it will not constitute a violation in Japan's exclusive economic zone when China conducts marine investigations in the nearby waters. As pointed out by Professor John K. T. Chao, according to Article 121(3) of the UNCLOS,

Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Both sides across the Taiwan Strait should firmly advocate that due to its limited area, the Okinotori Reef cannot sustain human habitation or economic life of their own, and thus is a rock instead of an island; hence there is no valid ground for the 200-nautical-mile exclusive economic zone or continental shelf. According to the UNCLOS, the deep-ocean seabed beyond each State's jurisdiction shall be the common heritage of mankind, and legally, Japan should not seize the common heritage of mankind for its own benefits. It should be noted that it will be much more effective to resort to international pressure than cross-strait efforts alone. Therefore, we should draw international attention to exert pressure on Japan, as Japan's act of expanding its waters definitely infringes the common heritage of mankind and harms the interests of other States. We should collaborate with other States, especially those from the third world to protest Japan's activities of expanding its waters by filing a petition with other States to the Assembly or the Council of the International Seabed Authority. As such, we could request the International Seabed Authority to submit the dispute over Japan expanding its waters by making use of the Okinotori Reef to the Seabed Disputes Chamber and to request the Chamber to exercise advisory jurisdiction, issue an advisory opinion and stop Japan's infringement on the common heritage of mankind. Associate Professor Gong Yingchun held that the issue of Okinotori Reef is simply a matter of interpretation of the UNCLOS, and it does not warrant an exception to the compulsory dispute settlement procedures provided for in the UNCLOS. In addition, it involves not only interests of China and Japan, but also the navigational rights of all States in the world. Futher, it infringes on the common heritage of mankind – the international seabed area. Therefore, from the perspective of common interests of the international community, China may assert to deal with the issue of the Okinotori Reef through compulsory dispute settlement procedures as provided for in the UNCLOS.

VI. Median Line in the Taiwan Strait

Director Chen Liang from the Fujian Provincial Law Enforcement General Force of Ocean and Fisheries put forward the issue of median line in the Taiwan Strait. He asked about the actual position of the median line, the authorities who

designated it and what was its basis. He held that the existence of the median line hampered cross-strait cooperation in law enforcement. Professor Kuen-chen FU explained that the median line was drawn neither by China Mainland nor China Taiwan, but instead it was a defense line that the U.S. Army internally delineated during the time when the U.S. Army was "supportively protecting" China Taiwan, and there was never an official announcement of such a line. Furthermore, Professor FU mentioned the cross-strait "92 Common Understanding". In 1992, China Taiwan and China Mainland issued their respective administrative order. In October 1992, "Ministry of Defense" of China Taiwan issued an order delimiting a "restricted area" and a "forbidden area" around the Taiwan Island and other garrisoned islands nearby. Vessels or warships entering the "restricted area" would be driven away, while those entering the "forbidden area" would be attacked. In August of the same year, China Mainland also issued an administrative order requiring public vessels from China Mainland not to cross the median line when they passed through the Taiwan Strait. If the vessels were to pass by the islands garrisoned by China Taiwan (mainly Penghu, Kinmen, and Matsu Islands), they were required not to enter the waters within 10 nautical miles of the shore (the limit was not 12 nautical miles, because if so, it would imply a tacit recognition of China Taiwan's statehood). The administrative orders indicated that a tacit agreement was reached across the Strait and offered evidence of the existence of the cross-strait "92 Common Understanding". Furthermore, the "restricted area" and "forbidden area" have not been maintained in Kinmen–Matsu Area in the past years. He Shidu, Director of the Marine Surveillance of the State Oceanic Administration of China introduced the current practice of law enforcement: to avoid conflicts, it is recommended that vessels from China Mainland shall not cross the median line when going through the Taiwan Strait; but for law enforcement we might cross the median line, though not often. Furthermore, on the basis of mutual trust between the law enforcement organs across the Strait, he expected to exchange views on law enforcement models across the Strait and establish a channel to inform each other of law enforcement situations. Yang Yi-Chih, Associate Professor from the Department of Shipping and Transportation Management, Taiwan Kaohsiung Marine University, held that the issue of median line should be resolved by the cross-strait military authorities through communication and negotiation. He further talked about cross-strait cooperation in fishery and its investment. Currently many sailors hired in China Taiwan are from China Mainland to carry out operations, while the mainland fishery corporations need the capital and technology from China

Taiwan. Thus, there is a lot of room for cooperation. He finally hoped to strengthen the cross-strait cooperation to crack down on smuggling and drug trafficking.

VII. Cross-Strait Communication and Cooperation in Shipbuilding and Shipping

The first session in the afternoon of 15 November 2008, presided by Professor He Lixin from the School of Law, Xiamen University, focused on the topic of cross-strait communication and cooperation in shipbuilding and shipping.

Li Chi-Cheng, General Manager of Taiwan's China Shipbuilding Corp., gave a report titled "Discussions on Cross-strait Communication and Cooperation Mechanism in Shipbuilding and Shipping", which was divided into six parts. First, it mentioned that currently Asia had become the focus of shipbuilding industry in the world, and that China may surpass South Korea becoming the world's largest shipbuilding country in the future. The shipbuilding industry is very important as it can make great contributions to national defense, shipping and marine resource exploitation, drive the development of heavy industry, increase foreign trade and foreign exchange income, boost regional economic development, provide employment opportunities, and serve as a key front for application of advanced new technology. In the second part, he talked about the reasons why western shipbuilding industry moved from a boom to a recession. The third part of the report analyzed the status quo of cross-strait shipbuilding and shipping. It introduced the market share of each country in the global shipbuilding market and discussed in depth the operational status of Taiwan's China Shipbuilding Corp. as well as its technical strengthes. He then observed an analysis of the status quo of the shipbuilding industry in China Mainland. Finally, he drew the conclusions that while the size was not big, China Taiwan's shipbuilding industry had accumulated excellent technology and management experience and was now proactively looking for partners for further development after privatization; and that the shipbuilding industry in China Mainland was rapidly rising and had a great potential with its sufficient labor, low cost and complete supporting industries. The fourth part illustrated the necessity of cross-strait communication and cooperation. The shipbuilding industry in China Mainland and China Taiwan have their own advantages as well as disadvantages, and are also faced with common challenges such as the global overcapacity in shipbuilding industry and increased cost. As cross-strait shipbuilding industries have different advantages and

complementary potential, both should cooperate to create a win-win situation and cope with international competition. The fifth part of the report discussed issues and mechanisms pertaining to cross-strait communication and cooperation and proposed that both parties conduct technological cooperation in shipbuilding and shipping, joint development of marine resources, and technological cooperation in rescue and salvage at sea through the platforms and opportunities created by academic seminars and industrial exchanges, OECD's Council Working Party on Shipbuilding and the second "Jiang-Chen Talk." It also talked about the prospects of cooperation. Finally, the report summarized the above points and gave advice for cooperation.

The next speaker was Yang Yi-Chih, Associate Professor from the Department of Shipping and Transportation Management, Taiwan Kaohsiung Marine University. Mr. Yang made a report titled "Comparison of Marine Transportation Support Policies and the Effectiveness of Implementation between China Taiwan and South Korea Using the Grey Prediction Model". Based on the fact that the operating environment for China Taiwan's vessels is not as good as that for foreign vessels, many vessels have chosen to fly other States' flags, thus driving the number of vessels, total tonnage, and deadweight tonnage to drop dramatically. When it comes to whether the marine transportation support policy is related to the situation above, the report used the grey prediction model to analyze the number of vessels, gross tonnage, and the number of crew members between China Taiwan and South Korea between 2001 and 2004. It concluded that the number of vessels belonging to China Taiwan was expected to drop from 280 in 2001 to 267 in 2010, with a growth rate of -4.64%; by contrast, the number of vessels from South Korea was expected to jump from 429 in 2001 to 825 in 2010, a growth of 92.31%; in terms of total tonnage, the tonnage of vessels registered in China Taiwan was expected to reduce from 4.74 million tons in 2001 to 2.287 million tons in 2010, a drop of 51.75%, while that of South Korea was expected to increase from 12.184 million tons to 15.343 million tons, a rise of 25.93%. The report concluded that marine support policy will be helpful in improving China Taiwan registered fleets, and that financial policy is more effective than administrative policy for support. China Taiwan should learn from the marine support policies introduced by South Korea such as its tonnage dues policy, international vessel policy, finance policy, etc.; China Taiwan should make regular 5-year policy plans for a medium to long term marine development and draft a holistic development plan to boost shipping, shipbuilding and vessel financing industry, in the hope of strengthening China

Taiwan's competitiveness in the global maritime transportation market.

Mr. Li Zhenjun, Assistant General Manager of Xiamen Shipbuilding Industry Co., Ltd., was the next to take the floor. He first introduced the status quo of Xiamen shipbuilding factories, and then analyzed the effects of financial crisis on his company this year. The financial crisis had led to the decrease of orders and difficulty in delivery and financing, but it had also brought favorable conditions such as a stable work force and reduced steel price which may be used to expand production capacity. Mr. Li expressed willingness to cooperate with shipbuilding industry in China Taiwan.

Finally, Professor Zhao Jingsong from KoGuan Law School of Shanghai Jiao Tong University held that there is a lot of room for cross-strait cooperation in shipbuilding and he supported the structure of research and development in China Taiwan and manufacture in China Mainland. Professor Zhao believed that the financial crisis provided a chance for the shipping and shipbuilding industries in China Mainland to undergo an industrial reconstruction led by the government: (1) industrial restructuring to integrate small-scaled shipbuilding factories; (2) institutional innovation of designing a platform so that small shipbuilding factories that are not incorporated in the restructuring plan can still enter the industrial chain; (3) given that the International Maritime Organization had issued the Performance Standard for Protective Coatings (PSPC) of Dedicated Seawater Ballast Tanks on All New Ships and of Double-side Skin Spaces of Bulk Carriers, small shipbuilding factories in China Mainland can hardly implement the new standards unless they are consolidated. Otherwise, the implementation of such standards in China would have to be postponed. Professor Zhao held that when the policy of "Three direct links" across the Taiwan Strait is executed, we need to consider subsequent issues such as terminology standardization, boat maintenance, and investment in the liability limitation fund as well as possible issues of jurisdiction, arrest of ships, enforcement, etc. Finally, professor Zhao held that developed countries are not suitable for developing shipbuilding industry any more, but instead developing countries with competitive advantages in steel, electronics, labor, and long coastal lines. Thus, China, especially its coastal regions, is ideal for this industry.

VIII. Cross-Strait Cooperative Mechanism for Law Enforcement in the Taiwan Strait

The second session in the afternoon of 15 November 2008, hosted by Professor John K. T. Chao from Taiwan Chengchi University, focused on the cross-strait cooperative mechanism for law enforcement in the Taiwan Strait.

First, Mr. Huang Renwang from the Division of Rights Protection and Law Enforcement, Marine Surveillance of the State Oceanic Administration of China, made a report titled "Preliminary Analysis of Cross-Strait Communication and Cooperation Prospects in Law Enforcement at Sea," which was jointly written by him and Sun Shuxian, Executive Deputy Director General of China Marine Surveillance. The report maintained that now it was a historic opportunity and there existed a practical basis for cross-strait communication and cooperation in law enforcement at sea. The cross-strait ocean policies have similar characteristics such as both basically having the same understanding of strategic oceanic values in the new era, both having some reflection on the deficiencies of the conventional thoughts and cultural mindsets of "being focused on the land while ignoring the sea", and both sides' ocean policies covering two important dimensions, i.e. sustainable development and protection of national marine interests. Furthermore, both parties are similar with regard to ocean management and policies, patterns, goals, and approaches of law enforcement at sea. Currently both sides are faced with similar challenges, such as deterioration of marine ecological environment and increased skirmishes with neighboring States over maritime interests. In practice, there is also a special need for humanitarian assistance at sea. Therefore, cross-strait communication and cooperation is for the interests and wellness of the people on both sides of the Taiwan Strait – "the Chinese community of shared destiny."

Mr. Huang then provided a detailed introduction of the nature, characteristics, and responsibilities of the China Marine Surveillance, and made a brief comparison of it with the "Coast Guard Administration" of China Taiwan to illustrate the similarities and differences between the two organs. He also gave advice for the communication and cooperation between them: (1) in the aspect of organizational construction: including setting up organizations, training the staff, and updating equipment and technology; (2) in the aspect of law enforcement operations, including safeguarding marine rights and interests, development and management of marine resources, marine environmental and ecological protection, and rendering assistance to ships in distress. Communication and cooperation may take the following forms, such as, information sharing, exchange of staff, communication of operations, personnel training, coordination of and cooperation in operations at sea, and platform sharing. Both parties can make their ocean-related information

accessible to the other party, provide information regarding marine meteorology, hydrology, environment, ecology, marine pollution events, maritime law violations, etc., and request the other party to render assistance by arranging nearby vessels for emergency search, surveillance, target control or other feasible tasks. Both parties can try opening its islands and rocks in the South China Sea region to provide supplies and assistance to ships, for example, opening the harbor and airport facilities in Yongxing Island and Taiping Island. Finally, Mr. Huang held that the above proposed communication and cooperation measures may be rolled out as a holistic arrangement or alternatively, be executed step by step starting with the easier.

The second speaker, Mr. Zhong Xiangqian, from Ocean and Fisheries Bureau of Xiamen, presented a report entitled "A Tentative Analysis of the Cross-strait Cooperation Mechanism of Law Enforcement at Sea", jointly prepared with Zhou Lumin from the same bureau. The report started with an analysis of the importance of the cross-strait relationship to the social economic development of both sides, and pointed out that both sides urgently need to strengthen cooperation in law enforcement at sea for the sake of transportation safety, ecological safety, and social security. It then explained that there is a solid foundation for cross-strait cooperation in law enforcement at sea from the perspectives of political environment, functions of law enforcement, and cooperation practices. However, instances of cooperation are isolated or the intention to cooperate has yet to be put into actions. There is no regular communication platform, and hence it is necessary to integrate all resources and advantages to set up a cooperative mechanism. The speaker put forward his ideas on how to set up the cooperative mechanism mainly from three aspects: (1) adopting the principles of mutual benefits, mutual trust and practicability; (2) carefully choosing the cooperative model for negotiation and communication for law enforcement at sea, for which two models may be considered. One depends on the "civil white gloves" (civil associations) to negotiate general issues, and the other depends on the Association for Relations across the Taiwan Straits and Straits Exchange Foundation to address major issues; (3) launching cooperation in fields such as transportation, ecology and social security.

Chen Liang, Director from the Fujian Provincial Law Enforcement General Force of Ocean and Fisheries, responded to the above reports. With his work experience, he pointed out some problems for cross-strait joint law enforcement: the cross-strait administration systems differ; one side does not understand the content of the other side's policies; and fishing vessels sometimes hide in the waters

controlled by the other party, making it difficult to investigate. Further, the Taiwan Strait is narrow and vessels collisions happen often. Assistance from other fishing vessels are usually more prompt. The aforementioned issues call on both parties to establish a mechanism for joint investigation and assistance, while currently these issues are only handled through the Association for Relations across the Taiwan Straits and Straits Exchange Foundation and it is inefficient. Faced with such a situation, Mr. Chen put forward his ideas on cross-strait joint law enforcement. He held that both parties needed to reach a common understanding regarding the contents of cooperation, organizational structure, and approaches. Both parties may designate an organ to set up a working group for communication with each other such as holding regular liaison meetings and making visits, which is practicable. Regarding cooperation on fishery resource protection, both parties should inform the other party of its fishery regulations, closed fishing seasons and areas, fishing methods and protected species; in terms of fishery disputes, a coordination mechanism also needed to be established to deal with issues such as informing the other party quickly, regulation of air-wave pollution resulting from chaotic air communication, arrangement of sea lanes for law enforcement vessels, etc. Finally, Mr. Chen held that for joint law enforcement, it was better for the top-level authorities to define the principles for law enforcement and then let the executing departments negotiate, as this way provides more flexibility in operation.

Following the reports, experts and scholars present entered into hot discussions. Regarding the question of the scope of marine law enforcement of China Mainland and the difficulty of cooperation in law enforcement in the South China Sea put forward by scholars from China Taiwan, He Shidu, Director of Division of Rights Protection and Law Enforcement of China Marine Surveillance, answered that the scope covered all the waters claimed by China, and that legal principles and basis for joint law enforcement were almost agreed on by the authorities across the Strait. He said, thus, attention should be drawn to the operational level namely how to cooperate and communicate to jointly safeguard the Strait. Regarding cooperation in the South China Sea, he stated China Mainland was open to and welcomed cross-strait exchanges; if China noticed any scientific research made by Vietnam, the Philippines, or Indonesia in its claimed waters, it will take enforcement measures. In addition, he said the question raised by Professor Song Yann-huei that whether China Mainland and China Taiwan might conduct joint military exercises in the South China Sea would be a decision made by the military authorities, thus beyond our discussion. Professor Kuen-chen FU held that the

challenges for cooperation in law enforcement and protection of maritime interests were mainly technical, which was caused by policies. For instance, China Taiwan was not willing to further the cooperation when it was under the administration of the Democratic Progressive Party. Besides, communications with the media were also necessary to avoid exaggerated reports and misunderstandings. Cooperation will make sufficient information accessible to more people.

IX. Cross-Strait Joint Development and Management of Marine Fishery

In the morning of 16 November 2008, Mr. Chia-Chi Fu from China Taiwan's Overseas Fisheries Development Council[1] gave a speech titled "Experience Sharing in Rescuing Detained Pelagic Fishing Vessels – Briefing on China Taiwan's Experiences". It pointed out that due to the depleting fishery resources around China Taiwan, China Taiwan strongly supported pelagic fishing, and pelagic fishing had played an important role[2] in the fishery industry. China Taiwan's fishing industry was highly dependent on fishing on the high seas and exclusive economic zones of other countries, and many of pelagic fishing crew were not citizens from China Taiwan.

Talking about the reasons for detention, Mr. Chia-Chi Fu summarized four points: (1) fishing in another State's waters on purpose or by accident; (2) violation of fishery cooperation agreement, such as fishing sharks, catching protected species, failing to fill out fishing catch logs and illegally transfering the catch to another vessel; (3) violation of orders regarding tax, environmental protection, transportation and labor of the coastal States or cooperative States; (4) piracy, contract or other commercial disputes, and improper detention by the coastal States.

According to the report by Mr. Chia-Chi Fu, a total of 48 fishing vessels of China Taiwan have been detained during the past three years, and the following countries have detained the vessels of China Taiwan most frequently: Japan (11

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1 Overseas Fisheries Development Council of China Taiwan is a legal person funded by the government and the fishing industry, the functions of which are, to supplement the implementation of government's policies, pushing forward overseas fisheries cooperation, exploring fishing grounds, handling wrecks and our detained fishing vessels and crew in other countries. Its tasks include fishery's international cooperation, handling detained fishing vessels, statistics collection, VMS surveillance and attending international meetings.

2 In 2007, pelagic fishing in China Taiwan created a value amounting to 0.75% of China Taiwan's GDP.

vessels), the Philippines (7 vessels), Somalia (5 vessels), Palau (4 vessels), and Micronesia (3 vessels).

Mr. Chia-Chi Fu pointed out the following issues facing the detained China Taiwan pelagic fishing vessels: (1) language – Depending on the place of detention, the crew may have the difficulty in communicating in Japanese, English, French, Spanish or Arabic; (2) limited financial resources – the ship owner is unable to pay for the living costs, vessel supply, litigation expenses (including lawyer's fees), the costs for the crew to return to their home State during the investigation and litigation period; (3) insufficient legal knowledge – including lack of legal knowledge,[3] no knowledge of preserving useful evidence,[4] or signing documents that they don't understand in an intimidating situation; (4) certain vessel owners are worried that they may be imposed with penalty if their vessels are reported as detained and thus prefer to settle the issue on their own, which often leads to that an illegal broker cheats the vessel owner/crew and their relatives, making the case even worse; (5) if the trial lasts too long or the agents entrusted by the owner are unable to handle the case, the relatives of the detained crew may resort to activists or public media, which makes handling of the case even more challenging and creates unnecessary pressure for the government and relevant officials who are handling the case. Mr. Chia-Chi Fu then illustrated China Taiwan's practice on how to handle the cases of detention of pelagic vessels: (1) fishing radio stations or the government's organs stationed overseas should be informed in time through the reporting system; (2) officers from the "Ministry of Foreign Affairs" and/or agencies/local overseas Chinese visit them and inquire about the case, and act as interpreters or refer local lawyers if necessary; (3) the "Fisheries Agency", county and municipal government of China Taiwan and Fishermen's Association visit them and provide emergency funds, and seek additional help from other governmental departments if necessary; (4) Overseas Fisheries Development Council provides advances[5] or subsidies for deportation fees if necessary, accompanies the relatives

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3 For example, some crew believe "fishing with the vessel sailing outside the exclusive economic zone though fishing gear inside the exclusive economic zone" is not a transgression into other State's exclusive economic zone.

4 Collecting helpful evidence by: taking note of time and position (by latitude and longitude) of detention; warship's name and registered country that detains our vessels; properly keeping useful documents; and requesting a list of items that are taken by the detaining officer and asking him to sign on it.

5 Advances are paid for detention caused by illegal fishing activities, and ship owners need to return the principal of the advances.

to the detaining State to know the facts of the case, and assists in deportation and insurance.

Then, Mr. Chia-Chi Fu explained the criteria of being listed as an Illegal, Unreported and Unregulated (IUU) fishing vessel taking the standards of Western and Central Pacific Fisheries Commission (WCPFC) as an example: (1) conducting fishing activities by an unregistered fishing vessel; (2) conducting fishing activities without proper permission of that State; (3) not recording or not reporting or underreporting the catch; (4) fishing in closed fishing areas; (5) use of fishing gear prohibited by the WCPFC; (6) supporting fishing vessels in the IUU list, including transhiping with or re-supplying those ships; (7) conducting fishing activities that are considered to undermine WCPFC conservation measures; and (8) being owned by the owner of any vessel on the WCPFC IUU fishing vessel list. Consequences of being listed in the IUU fishing vessel list were summarized by Mr. Chia-Chi Fu as follows: (1) forbidden to conduct fishing activities at sea; (2) forbidden to land, transship, sell the catch, or re-supply; (3) other vessels shall not support or re-supply vessels on the IUU fishing vessel list; (4) other fishing vessels of the same owner are also listed in the IUU list; (5) the vessel is jointly boycotted by the member States of other regional fishery organizations; and (6) it hurts the flag State's reputation, image of the fishery industry and the rights and interests of other fishing vessels.

Finally, Mr. Chia-Chi Fu put forward his suggestions regarding precaution measures against detention and possible cooperation in case of a detention. Regarding the former, Mr. Fu held that it was necessary to constantly educate fishermen in order to change their perceptions, ensure report of detentions and improve their legal knowledge and awareness of abiding by laws. Second, fisheries regulation should be strengthened, including surveillance via VMS, deployment of monitoring officers, strengthened harbor checking, etc. In terms of possible cooperation in case of a detained fishing vessel, Mr. Fu pointed out that both sides of the Taiwan Strait should inform each other in time and communicate via civil organizations, provide information about local practice in dealing such cases and lawyers, and collect and provide information on each other's fishery regulations in order to boost understanding, reduce potential for dispute, and share experiences in rescuing detained shipping vessels.

Then it was followed by a report by Chen Liang, Director from the Fujian Provincial Law Enforcement General Force of Ocean and Fisheries. He pointed out that detention of fishing vessels of China Mainland mainly happens in the northern

part of Chinese waters. For instance, fishing vessels from Liaoning Province often fish in the nearby waters of South Korea. When a fishing vessel is detained, there are generally three channels to resolve the issue: (1) the government will step in; (2) China Shipowners Mutual Assurance Association will fund the bail;[6] and (3) a civil approach will be taken to look for a resolution.

Director Chen Liang asked Mr. Chia-Chi Fu about the red coral fisheries issue. Mr. Fu answered that there were about 90 fishing vessels[7] engaging in red coral fisheries. While there was still dispute on whether to engage in red coral fishing or not, the government prefered to support it with certain restrictions, and the Overseas Fisheries Development Council was responsible for providing technical support for supervision of fishing vessels' positions to complement the government's administration.

As pointed out by Professor Kuen-chen FU from the XMU-COPL, the perceptions of the broker and vessel owner had a significant impact on the handling of the detained vessel. The owner usually had the conventional thought of "giving a red envelop". They started to give money as soon as the fishing vessel was investigated on the high seas, which actually added a lot of difficulty in solving the detention issue. Professor Kuen-chen FU has designed a set of Chinese–English dialogue cards for Taiwan Overseas Fisheries Development Council, covering almost all scenes that one may encounter during a pelagic fishing activity, which greatly facilitates communications between the crew and officers from the detaining State. Professor Fu expressed his willingness to provide the set of cards to China Mainland as well.

In addressing questions from other experts, Mr. Chia-Chi Fu pointed out that some pelagic fishing vessels from China Taiwan trespassed on other States' exclusive economic zones for fishing. While they might not be caught on the spot, the State whose interests had been infringed upon would report the vessels to the relevant international organization and request to put them on the IUU list. The main reason behind this was that the penalty imposed by China Taiwan was not as severe as expected by the State concerned.

In answering the question from Professor He Lixin from the School of Law, Xiamen University, Mr. Chia-Chi Fu mentioned that most detained fishermen

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6 China Shipowners Mutual Assurance Association will not provide bail to vessels detained because of illegal fishing.

7 In 2009, 55 fishing vessels were engaged in actual red corel fishing operations.

prefer to solve the detention through reconciliation rather than the judicial channel, unless it is an evident improper detention. When the fishing vessel is illegally detained (e.g. by Somali pirates), it is usually solved by paying the ransom; there is still room for improvement in cross-strait sharing lists of maritime law attorneys.

X. Cross-Strait Cooperation in Protection of Underwater Cultural Heritage

In his speech, Professor John K. T. Chao pointed out that relying on economic and technological advantages, some developed States plundered other States' cultural heritage, which are mainly reflected as: once such developed countries have salvaged other States' ship wrecks, they will take the valuable artifacts as their own, and even keep high-quality ones and destroy the rest so that the ones kept will become more valuable. Professor Chao especially pointed out that the most revolutionary aspect of the Convention on the Protection of Underwater Cultural Heritage (CPUCH) enacted by the UNESCO is that no commercial development is allowed for underwater cultural heritage, and he further contended that the *Titani*c sank as a conspiracy for insurance money. *Titanic* was a British registered passenger liner owned by White Star Line. In 1912, it was hit by an iceberg and sank in the waters southeast of the Newfoundland of Canada. 2,227 people were on board, yet there were only enough lifesaving boats for 1,178 passengers, and in the end 1,532 people died. The jewelry inside the cabins was worth millions of pounds. It was not until 1985 that the Woods Hole Oceanographic Institute of the U.S. and the French Research Institute for Exploitation of the Sea (IFREME) found the wreck of *Titanic* under the waters 388 nautical miles off Newfoundland, Canada. While the international community then requested for keeping the wreck as a cemetery for these who died there and an archeological site. Starting from 1987, many exploration teams have salvaged a lot of valuable artifacts from the wreck, and the underwater cultural heritage is at risk of being plundered, destroyed and sold. *Titanic* has long been believed to have sank because it was hit by an iceberg, but in 2004, British scholars Robin Gardiner and Andrews Newton found that the so-called *Titanic* was actually another liner, the *Olympic*, of the White Star Line. As the company was deep in debt due to collision of ships, it packaged the *Olympic* as the *Titanic* and planned for sinking the ship to collect the huge amount of insurance claim to shed its financial crisis. The company had planned to send a rescue ship *California* to save the over 2000 passengers. Unfortunately, the rescue ship erred

in judging the position of the accident, and many people died as sacrifices. Some people suggested that the tragedy of the *Titanic* occurred because of its use of a wrong sea map, but in fact, a sea map can't mark the positions of icebergs, making this suggestion untenable. *Titanic* was owned by the White Star Line, and the fact that it sank underwater did not automatically make it *res nullius*, as the then insurer for the *Titanic*, the British Prudential, still existed. Established in 1848, the Prudential was formerly The Prudential Mutual Assurance, Investment and Loan Association. In 1912, the Prudential paid out huge damages to 324 families injured or killed in this accident. From a legal perspective, the wreck of the *Titanic* was found in the waters of Canada, thus, no attempts of salvage should have been made without Canada's consent. Those who can lay claims to rights and interests of the wreck and the artifacts of the passengers include the British White Star Line, British Prudential, and remaining relatives of passengers from America, France, and other countries. Therefore, salvage of the *Titanic* involves interests from various parties, and it can only be done after consultation with all parties concerned.

Professor Wu Chunming from Xiamen University pointed out that there were obvious differences between protection of public underwater cultural heritage and private underwater cultural heritage. For the private underwater cultural heritage, there are quite a few claims to it as it has clear owners; for public underwater cultural heritage, claims are often missing due to its *res nullius* status. With some examples, Professor Wu illustrated that in China, especially in the potential disputed waters, archeology, salvage and protection of underwater cultural heritage were not given as much attention as oil exploration. He also mentioned that currently the so-called protection of underwater cultural heritage in China Mainland was conducted only when fishermen were found to have salvaged a large amount of artifacts. This is an ex post remedy, rather than a systematic protection as cultural heritage on land enjoys. He further pointed out that all States tried to stay away from salvage of underwater cultural heritage in disputed waters, and lack of legal owners resulted in rampant illegal[8] salvage.

Professor Kuen-chen FU mentioned the following five points in answering questions from the meeting: (1) the CPUCH was not in effect yet, and its clauses were in conflict with current Chinese laws; (2) according to Chinese laws, ownership of the underwater cultural heritage salvaged in the internal waters and territorial sea belonged to the coastal State, while the Convention left out the issue of

8 "Illegal" here means "commercial salvage".

ownership; (3) underwater cultural heritage salvaged in the exclusive economic zone and continental shelf, according to Chinese laws, should determine the State of origin, while the Convention again left out the issue of ownership, and according to provisions of the CPUCH, the salvage right in such waters only belonged to the coastal State; (4) for underwater cultural heritage in "the Area", neither the Chinese laws nor the CPUCH provides any clauses regarding its ownership, but the CPUCH specifies that this issue shall be coordinated by the UNESCO and the ISA;[9] and (5) cross-strait cooperation in protection of underwater cultural heritage needed to be executed in secret.

At the conclusion, the host, Professor Zhou Hongjun from Shanghai Jiao Tong University, invited Professor Song Yann-huei from Taiwan Chung Hsing University and Professor He Lixin from Xiamen University to make concluding remarks. Professor Song pointed out that as the cross-strait relationship became increasingly friendly, there was greater room for cooperation in oceanic affairs. In the field of cooperation on regional oceanic affairs, this meeting paid special attention to joint oil exploitation, joint development of fishery resources, cooperation in shipping and shipbuilding industries, joint management of fisheries and protection of underwater cultural heritage. Professor Song expected strengthening of communication between the two parties, and deeper discussions concerning cooperation mechanisms. Professor He held that the meeting reflected good interactions between public and private laws, theories and practice, the east side and the west side of the Taiwan Strait, as well as laws and policies, a stimulating experience for the scholars and experts present, and expected that in the future, seminars could be held for further in-depth discussions on certain topics. Finally, Professor Zhou Hongjun concluded that it was a successful meeting, as reflected in the representation of the scholars and experts present, the richness and depth of the discussions, and also the interaction between the participants, and expected that follow-up seminars and activities would further expand the impact of the meeting.

Translator: YANG Xianghong
Editor (English): Arpita Goswami

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9 In waters under the jurisdiction of a State, the Convention on the Protection of Underwater Cultural Heritage provides that UNESCO shall coordinate with the States concerned.

印度海岸警卫队：塑造未来

Vijay Sakhuja*

当今世界见证了从早期的“海洋自由”到试图将主权、管辖权、良好秩序引入海洋的有趣的海洋政治演变。1958 年的联合国海洋法会议和 1982 年的《联合国海洋法公约》（或第三次联合国海洋法会议）创造了海上新领土，堪称重大国际发展，使专属经济区能够同时开展海洋生物和非生物资源的商业活动。如今，在一国管辖范围内的海域已成为一种国家资产，并额外赋予了国家维持秩序的责任。由于对国家安全的潜在影响，对新领土的监管不仅限于打击非法捕捞、军火走私、毒品走私和海盗等方面，而且涉及海洋环境保护和海洋污染监测等方面。

另一方面，海洋的“领土化”凸显了国家间的边界争议问题。任何领土的丧失，无论多小或是否有人居住，都被理解为对一国主权、国家安全和领土完整的威胁。各国已通过制定国内海洋法和增强执法、领土保护能力等措施加以应对。海岸警卫队和水警等警察部队成为了海洋保护的新兴力量，其活动范畴从应对非对称性威胁到涉及人道主义援助和救灾等行动。

各国建立海岸警卫队和其他海洋执法机构的原因如下。第一，海岸警卫队与军舰不同，具有较小的攻击性。[1] 它们往往被漆成白色，外表更为亲切。此外，船上装备的武器“攻击性相对较小”，使它们“挑衅性更低”。第二，舰船平台并不十分复杂，因而如此之低的平台造价使得国家能够负担建造大量平台的费用。第三，高耐用性是这些平台的设计目标，以便长期部署使用。大型船舶通常配有直升机，且在某些情况下还部署有一定数量的无人机来探索扩大船舶的巡逻和监视区域。有人认为，海军的唯一目的是为战争做准备，而海岸警卫队的存在是以履行非关战争但直接影响国家安全的职责为目的。[2]

印度海岸警卫队是在 1976 年依据为在印度海域施行国内立法的印度议会法

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1 Sam Bateman, Coast Guards: New Forces for Regional Order and Security, *Asia Pacific Issues*, No. 65, January 2003.

2 Prabhakaran Paleri, *Coast Guard in the Maritime Security of India*, New Delhi: Knowledge World, 2004, pp. 48~49.

案，作为国家军队组建的。[3] 其座右铭是“Vayam Rakshamah”即“我们保护”，印度海岸警卫队负责：（1）保护和保证印度海域的人工岛屿、近海设施和其他结构的安全；（2）对渔民提供保护和遇难时的海上援助；（3）保全和保护海洋环境，包括预防和控制海洋污染；（4）协助海关和其他政府部门打击走私；（5）执行有关印度海域的法案，和（6）对海上生命和财产采取安全措施。[4]

印度海岸警卫队由一名总司令领导，负责保护印度 202 万平方公里的专属经济区。在大陆架划界后，其职责范围有可能延伸至近 300 万平方公里。多年来，大量的海岸警卫站沿着印度的海岸线（7516 公里）并在孟加拉湾和阿拉伯海上的岛屿领土建立起来。这些前哨站负责维护各自辖区内的海域秩序。此外，印度海岸警卫队还被要求在 460 万平方公里、从印度海岸向海延伸 1450 海里的印度搜索与救援区提供海上搜救。[5]

如今，印度海岸警卫队大约有 7000 人。其实力水平已经从 1976 年印度海军移交的 6 艘混杂船舶，发展成由舰艇、船舶和包括直升机在内的飞行器组成的大型舰队的强大力量（附录 I）。整个发展历程中，印度海岸警卫队一直从事保障海事企业安全、保护海上贸易，巡查印度专属经济区，渔业安全，近海设施维护，环境保护和人道主义援助等活动（附录 II）。这些职责需要海上的持续监察和应对，对警力有很大的需求。这些警力已取得了一些为国际海事界所称道的非常显著的成就，这些成就也带动了与外国海岸警卫队和海洋政策机构的合作。在这种背景下，这篇文章将突出展现部分印度海岸警卫队所参与的领域。

一、打击海盗行动

印度海岸警卫队维持海上秩序的能力在 1999 年 11 月份抓获载重 7000 吨的“亚龙卓彩虹”号事件中得到了淋漓尽致的体现，这是一艘在马六甲海峡被海盗劫持的为日本船东所有的巴拿马籍船舶。该艘船舶当时正在由印度尼西亚库拉坦姜港驶往日本三池港的途中。在接收到由国际海事局海盗报案中心发布的该船舶已被劫持的全球性广播后，印度海岸警卫队和印度海军展开空中监察并成功跟踪该船。随后，顽固的海盗和印度海上武装力量在海上演绎了一出紧张激烈的动作剧。特种部队登船后捕获了这艘船，并逮捕了 15 名印度尼西亚籍的海盗。

然而，印度海岸警卫队面临的最大挑战却是起诉海盗。这 15 名海盗由印度

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3 Prabhakaran Paleri, *Coast Guard in the Maritime Security of India*, New Delhi: Knowledge World, 2004, p. 262.

4 更多细节请参见印度海岸警卫队官方网站，下载于 http://www.indiancoastguard.nic.in/，2009 年 3 月 15 日。

5 Arun Kumar Singh, Indian Coast Guard – 2020, *Indian Defence Review*, Vol. 23, No. 2, April/June 2009, pp. 85~86.

警方拘留并羁押在孟买的一座监狱中。其中一名海盗安东•叶涅斯在羁押过程中因病死亡。2003 年，孟买地方法院宣布犯罪成立，14 名海盗被判 7 年监禁和人均 28000 印度卢比的罚款。国际社会对这次控诉表示欣喜，国际海事局称：“我们很高兴印度做出了受理案件这个艰难的决定，并且对该案的结果十分满意……他们走过了一段艰难的路途才达到今天这一步，但愿这个判决能够威慑其他的海盗。我希望这个案例能成为一个警告——全世界都不会再容忍这种犯罪，参与犯罪的人被逮捕后将受到严厉的法律制裁……但是这强调了，像印度今天宣布的威慑性的监禁是至关重要的。”

但是没过多久，这份 250 页的判决就被上诉到孟买高等法院，原因是检方的控诉中有矛盾的地方，而且印度海岸警卫队与印度海军同时宣称逮捕了该船只。此外，检方在较早时宣称该船只在离果阿 350 海里被逮捕，随后又改成 50 海里。也有人指出，主要证人池野先生，并不能指认被告即为作案的海盗。2005 年 4 月 18 日，孟买高等法院驳回了地方法院的判决并无罪释放了已被判刑的“亚龙卓彩虹”号案中的所有海盗，原因是某些“系统 / 组织缺陷”导致了犯罪嫌疑人的无罪释放。

二、搜索与救援

海上搜救是印度海岸警卫队的一项重要职能。海岸警卫队总司令为印度国家海事搜救委员会主席，是被指定负责协调、控制和执行国家搜救任务的最高负责人。印度海上搜救区被划分为三块区域，其海上搜救协调中心分别位于孟买、金奈和布莱尔港。为了实现高效和协调地应对（搜救），海上搜救协调中心进一步划分成海上搜救分中心，包括沿着西海岸以覆盖阿拉伯海的博尔本德尔、果阿、新芒格洛尔、孟买和科钦分中心，东海岸的维萨卡帕特南、巴拉迪布和霍尔迪亚分中心，以及在安达曼—尼科巴群岛以覆盖孟加拉湾的底格里布尔和坎布尔湾分中心。作为印度海上搜救区的指定搜救领导机构，印度海岸警卫队构建起一套系统，当商船通过该区域将自发地报告它们的驶入和驶出，这有助于对印度海上搜救区的全面监控。这对回应遇难船舶，尽速派遣救援队伍到事故现场起到相当关键的作用。

印度海岸警卫队就海上搜救行动已与沿海国家的海岸警卫队和海上警察建立起联系。2005 年，印度海岸警卫队的“维格拉哈”号和“安妮•贝桑特”号船舰访问了马尔代夫的马累，与马尔代夫国家安全机构（海岸警卫队）共同举行了第八届联合演习。同样地在 2006 年，印度海岸警卫队在霍尔迪亚访问时参与了孟加拉国海岸警卫队舰艇的搜救演习。同巴基斯坦的合作中，印度海岸警卫队和巴基斯坦海事安全局共同签署了一份谅解备忘录，以建立双方在海上搜救、沿海地区自然灾害和海上犯罪方面的情报交换联络机制。

三、渔业保护

印度的渔业活动活跃于其海岸线和专属经济区。印度有 6 个主要的和 59 个小型的捕渔海港和 189 个水产卸载中心，以及由 18.1 万艘传统非机动渔船、4.5 万艘传统机动渔船、5.4 万艘机械化渔船（底拖网渔船与围网渔船）和 180 艘深海渔业船组成的捕鱼船队。[6] 目前的 294 万吨捕捞量因为运用现代化科技与工艺，可能已增至近 393 万吨。

印度海岸警卫队的职责陈述清晰地定义了其与海洋渔业之间的关系。印度海岸警卫队主要是防范非法捕捞和外国渔船的偷猎。过去，印度海岸警卫队已拦截了数艘来自巴基斯坦、孟加拉国、斯里兰卡、中国大陆、中国台湾和数个东南亚国家在印度专属经济区（特别是在阿拉伯海古吉拉特沿岸水域以及孟加拉湾安达曼—尼科巴群岛周边水域）进行非法捕捞的渔船。例如，1981 年至 1999 年 5 月因在印度专属经济区偷猎被逮捕的渔船显示出安达曼海上某些令人不安的趋势。[7] 1981 年至 1985 年，被抓获的 79 艘渔船中有 22 艘是在安达曼—尼科巴群岛区域，占逮捕总数的 27.8%。同样地，1986 年至 1990 年与 1991 年至 1995 年间，该比例分别为 27.8% 和 24.03%。然而，1996 年至 1999 年 5 月，因在印度专属经济区偷猎被捕的 137 艘渔船中，有 55 艘是在安达曼—尼科巴群岛区域被捕，占逮捕总数的 40.1%~44.2%，超过 1981 至 1985 年与 1986 至 1990 年间的比例。

巴基斯坦渔民被印度海岸警卫队关押已成为常态，他们在印度水域的非法捕捞已成为让人担忧的安全问题。然而有趣地是，释放渔民被作为建立印巴两国互信措施的一部分。例如，在捕鱼旺季，来自印度和巴基斯坦的渔民均被发现在喀齐海岸的杰考海域进行捕捞。有时候很难控制进入各自水域的渔船，从而可能导致严重的安全漏洞，尤其是在 2008 年 11 月恐怖分子利用劫持的拖网渔船对孟买进行袭击的事件被披露之后。印度海岸警卫队和巴基斯坦海事安全局之间已建立起“热线电话”。印度海岸警卫队西区指挥官指出：“如今，如果一艘印度渔船进入了巴基斯坦水域，他们会打电话让我们去指挥该船回到印度海域，而不是逮捕渔民。在过去的 3 个月中我们已经接到大约 12 个类似的电话。”[8]

印度海岸警卫队的其他职责包括对由于事故、故障、海盗袭击而陷入危难，以及由于飓风或不利的海上情况而失踪的印度籍船舶提供援助。作为更广泛的安

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6 Government of India, *Economic Survey of India 2006–2007*, pp. 166~167.

7 Vijay Sakhuja, *Confidence Building From The Sea – An Indian Initiative*, New Delhi: Knowledge World, 2001, p. 53.

8 Hotline between Coast Guards of India and Pakistan Working Well, *The Hindu*, 28 January 2008.

全保障措施的一部分，也为了帮助遇难的渔民，印度海岸警卫队已支持建立一套低成本的基于全球定位系统信号传输的渔业警报系统，以供海上的渔民使用。[9] 印度海岸警卫队也密切参与低成本遇险警报发送器的开发和试验，该发送器有可能在未来成为渔民“必备”的安全保障装置。

四、环境保护

环境保护是印度海岸警卫队的法定职能。印度海岸警卫队是在印度海域保护海洋环境安全的国家级机构，其将自身的任务定义为：（1）保护海洋环境；（2）保全海洋环境；（3）防止海洋污染；（4）控制海洋污染。[10] 印度海岸警卫队是印度在国际海事组织海洋环境保护委员会会议的办事机构。印度海岸警卫队致力于应对海上石油泄漏事故和定期的海洋污染控制，也为相关机构提供训练。例如，1993 年 1 月 21 日，印度海岸警卫队开展代号“萨法伊”行动，处理由于两艘巨型油轮在马六甲海峡相撞导致的石油泄漏。泄漏的石油已经蔓延超过 8000 平方海里，发现的浮油距离尼科巴岛仅 10 海里。此次泄漏事故得到了有效控制，避免了一场严重的环境灾难。[11] 此外，2005 年 3 月 23 日，印度海岸警卫队处理了发生在印度西海岸果阿海域两艘轮船间的一起海上碰撞，动用先进近海巡逻舰“萨格尔”号和“维格拉哈”号、拦截艇和道尼尔飞机，通过喷臂喷洒化学物质来控制石油泄漏。[12] 泄漏在不到 4 天之内就得到成功控制。印度海岸警卫队为了增强其应对石油泄漏事故的能力，在 2007 年从 ABG 造船厂定购了 3 艘特种船舶，均配备了 2 只能够将水和油抽取到船内的机械臂。[13]

五、海上平台的保护

印度对能源资源需求的扩张带来了积极的海上石油勘探活动，以定位新的油气田。印度专属经济区遍布从事近海石油和天然气勘探的海上平台，这些平台分布在坎贝 / 孟买盆地、高弗里盆地、克里希纳—戈达瓦里盆地、喀齐盆地、默哈纳

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9 R. F. Contractor, Chairman National Maritime Search & Rescue Board Remarks, *Safe Waters*, Vol. VIII, Issue 2, October 2008, p. 2.

10 Prabhakaran Paleri, Role of the Coast Guard in Marine Environment Security: The P3C Factor. 论文提交于 2002 年 7 月 19 至 20 日在果阿举办的石油泄漏管理研讨会。

11 Coast Guard: Smaritans of Sea, at http://mod.nic.in/samachar/febl-03/html/chl.htm, 20 March 2009.

12 Trajectory of an Oil Spill off Goa, Eastern Arabian Sea: Field Observations and Simulations, at http://drs.nio.org/drs/bitstream/2264/618/1/Environ_Pollut_148438.pdf, 15 March 2009.

13 Coast Guard to Buy 3 More Ships, *The Hindu*, 23 March 2007.

迪及西孟加拉邦盆地、安达曼—尼科巴群岛盆地、以及喀拉拉盆地，其中产量最大的孟买高盆地位于孟买海岸以西 160 公里，每日的原油产量达 8 万桶。该地从 1974 年开始就成为印度石油天然气公司的采油平台。2005 年，印度石油天然气公司的一个采油平台在受到“萨姆德拉•萨拉卡萨”号船撞击后突发大火，这艘船是印度石油天然气公司包租的一家印度航运公司的补给船，用以给钻油平台供应必需品。这起火灾严重，造成了数人丧生和石油开采的中断。[14]

印度海岸警卫队派遣舰船和飞机救援受困的员工，并应对石油泄漏。印度海上搜救协调中心启用印度海上搜救和国际安全网，呼吁所有附近船舶提供援助。一架印度海上警卫队的道尼尔飞机到达事故地点并投掷救生筏。配有污染应对设备和溢油分散剂的印度海岸警卫队船舰（也）被派往救援，并且事故船舶也由印度海岸警卫队的舰船护送至孟买港口。[15]

六、海洋生物的保护

印度海岸警卫队在海洋生物保护方面的贡献值得注意。环保人士请求其为儒艮、鲸鲨、海参、榄蠵龟、巨蚌和其他被各种项目认定为需要特别保护的物种提供保护。作为其章程的一部分，印度海岸警卫队开展了保护海龟的“橄榄”行动，意在保护濒危的筑巢期的榄蠵龟，印度海岸警卫队派遣舰船和飞机沿着奥利萨海岸巡逻。

榄蠵龟在 1974 年首次于加海马萨群栖地被发现，到 1981 年在加海马萨海岸以南 55 海里的德维河河口发现其大规模筑巢地。1994 年，在加海马萨以南 162 海里的拉许库尔亚河河口发现另一个大规模筑巢地。引人注目的是，成千上万只海龟抵达奥利萨海岸并沿着 480 公里长的海岸筑巢。印度海岸警卫队依其章程授权，负有保护和保全印度海域海洋环境的职责，而保护榄蠵龟是其职责之一。印度海岸警卫队多年来的监控工作使印度渔民采取的“不科学、任意的捕鱼方法”问题得到关注，警卫队已敦促中央和邦政府保护榄蠵龟并开展针对渔民的教育项目。

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14 Bombay High Rig Gutted, 4 Die, *Times of India*, Mumbai edition, 28 July 2005. 印度每年高达 330 万吨原油产量的 30% 都来自孟买高盆地。仅孟买高盆地北部平台就加工近 14% 的全国原油。

15 更多细节请参考 SAR And Pollution Response off Bombay High-BHN 27 July – 02 August 2005，下载于 http://indiancoastguard.nic.in/IndianCoastGuard/sar/archive_sar2.html，2009 年 3 月 26 日。

七、非法移民

印度海岸警卫队成功在公海逮捕了试图在印度登岸的非法移民的船舶。例如，2000 年 6 月，在意大利货船“美迪斯达”号上发现了 14 名非法移民（9 名伊朗人和 5 名伊拉克人）。[16] 他们威胁要炸掉货船，但在长时间谈判后被遣返回各自国家。同样地，2003 年 11 月，印度海岸警卫队注意到马耳他籍“泰”号 [17] 货船，该船载有来自巴基斯坦卡拉奇港口的偷渡者。

然而，印度已目睹了从斯里兰卡，特别是泰米尔族，以及在孟加拉湾来自孟加拉国和缅甸的大量非法移民。由于这些地区在地理上接近印度，航海路线距离很短，这些行为也是很自然的。2009 年，印度海岸警卫队在安达曼海域营救了超过 100 名来自缅甸西部若开邦的罗兴亚船民，这些船民已在海上漂流了近 14 天。罗兴亚族是一个无国籍的穆斯林少数民族，在缅甸是被边缘化的团体，已被缅甸当局迫害多年。据报告，泰国海事安全机构将超过 400 名船民置于没有口粮、水和任何动力的船舶上。在海上漂泊多日后，已有近 300 人死亡，幸存者漂到了安达曼—尼科巴群岛的印度海岸。据安达曼—尼科巴区海岸警卫队指挥官所说：“幸存者既有孟加拉国也有缅甸国国民。依据他们的说法，他们有 412 人在 11 月中旬离开孟加拉国的科尔斯巴扎尔，准备前往马来西亚。他们在公海上已经漂流了近 15 天，已经有近 12 天没有食物和可饮用的水了。在看见安达曼海岸上的灯塔后，大部分人都跳入海中试图游到海岸。” [18] 海岸警卫队同时也注意到，“船舵和船柄都损坏了，已没有办法驾驶该船。这艘船似乎是一艘运货的船……初步看来这似乎是一起人口贩卖。在调查中，幸存者表示他们每人已经向人贩子支付了 2 万到 2.5 万孟加拉塔卡，以获得在马来西亚渔业的工作。”

八、人道主义援助和救灾

印度海岸警卫队为 2001 年古吉拉特地震中受灾的灾民提供人道主义援助。海岸警卫队的舰船是最先到达坎德拉港并携带救灾物资的可控船舶。同样地，印度海岸警卫队的舰船在奥利萨邦遭遇超级飓风时也展开了救灾行动。印度海岸警卫队在 2004 年印度洋海啸期间的行动值得称赞，在印度、斯里兰卡和马尔代夫等

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16 Stowaway Crisis Ends, Ship Sails Out, at http://www.indiainfo.com, 26 March 2009. 联合审讯小组由来自调查与分析小组、情报局、海关、移民局、海军和海岸警卫队的官员组成，均声明船上并没有武器或弹药。

17 Afghan Stowaways Keep Gujarat Police on Tenterhooks, *Indo-Asian News Service*, 27 November 2003.

18 Ravik Bhattacharya and Kartyk Venkatraman, 300 Illegal Immigrants Still Missing off Andamans, *Indian Express*, 31 December 2008.

地通过空中和海上力量，开展了包括搜救、提供救灾物资以及人道主义援助的救灾行动。

九、国际合作

在亚洲海域打击海盗的努力中，印度海岸警卫队已与数个亚洲国家的海岸警卫队建立起了机构层面的合作。例如，印度海岸警卫队和日本海岸警卫队从2000年起就开始发展机构层面的联系。2006年，双方签订了合作备忘录。该合作备忘录的突出特点是：(1)在预防和应对海盗、武装劫船、海上暴力和犯罪、破坏海上安全的行为、贩毒、走私和海上非法移民等海上犯罪行为，以及海洋环境保护上信息共享；(2)执行海上搜救行动；(3)防治海洋污染方面的信息交流和促进技术援助；及(4)在可行的情况下，为采取预防和保护性措施来应对海啸和超级飓风等自然灾害进行技术支持方面的交流。[19] 迄今为止，双方共同开展了8次联合演习行动，涉及搜救、打击海盗、毒品和军火走私、非法移民、环境保护、自然灾害管理和应对、登船行动和训练等。[20]

类似地，印韩两国海岸警卫队也签署了一份谅解备忘录，在2006年得到正式批准。印韩两国海岸警卫队的海上合作开始于2004年10月。2004年韩国总统访问印度时，提议在两国海岸警卫队之间展开双边合作，作为更广泛的印韩双边关系中的一部分。确认双方存在共同利益的领域为区域内的海上搜救、打击海盗和武装劫船、跨国犯罪和其他重大灾害的意外事件等。依照签署的谅解备忘录，两国海岸警卫队2006年在钦奈海域进行了联合演习。带有直升机的韩国海岸警卫队"茶—平壤"6号舰船和印度海岸警卫队的7艘船舰参与了此次主题为污染控制的演习。演习的焦点在于通过使用吊杆和油污分离装置等船上设备进行污染控制和应对，也包括分享最佳业务实践。[21]

2008年2月，菲律宾海岸警卫队和印度海岸警卫队开展了联合打击海盗的演习，其中包括交叉培训项目和其他形式的合作，如信息和技术共享等。[22] 同样地，印度海岸警卫队也与阿曼皇家海岸警卫队间保有联系。[23]

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19 更多细节请参见印度海岸警卫队官方网站，下载于 http://indiancoastguard.nic.in/indiancoastguard/FORGEIN/ICG-JCG%20ex%20mumbai%202006.htm，2009年3月26日。

20 Indian, Japanese Coast Guards to Ramp up Ties, at http://www.nerve.in/news:25350052551, 26 March 2009.

21 Ministry of Defence, India Press Release, 6 July 2006.

22 RP, Indian Coast Guards to Conduct Joint Exercises, at http://www.gmanews.tv/story/13706-5/RP-Indian-coast-guards-to-conduct-joint-exercises, 26 March 2009.

23 Coast Guard Efficient and Dependable Maritime of India: Antony, at http://www.thaindian.com/newsportal/india-news/coast-guard-efficient-and-dependable-maritime-of-india-antony_10099582.html, 12 March 2009.

2008 年，印度海岸警卫队开展了一项为期 5 天的高级海上安全训练项目，对象是来自俄罗斯、中国、印度尼西亚、新加坡、老挝、越南、斯里兰卡、缅甸和韩国等 10 个国家的 21 名海岸警卫队军官。课程主要涉及打击海盗策略、船舶识别、船舶安保评估、实时应对演习、国际海事法和机构间合作等内容。[24]

作为打击海盗区域合作的一部分，印度海岸警卫队是 16 个亚洲国家发起的《亚洲地区反海盗及武装劫船合作协议》的打击海盗行动的积极参与者。这个项目由日本主导发起，目标在于促进东盟 10 国和日本、印度、中国、韩国、斯里兰卡以及孟加拉国间的多边合作。印度海岸警卫队总司令是该项目的副主席，并且一名印度海岸警卫队的军官任职于（该协定）在新加坡的信息共享中心。

十、孟买恐怖袭击：海岸警卫队和印度的海事安全机构

对于 2008 年 11 月 26 日发生的针对两家豪华酒店、火车站和一个位于孟买南部的当地犹太人聚居点的恐怖袭击，印度政府、军队、情报机构和安全机构调查了包括拦截的卫星电话等大量证据。（由此）该事件的前因后果清晰连贯地得以呈现，这起袭击造成了包括外国公民在内的近 200 人死亡。“拉什卡—塔伊巴”，一个以巴基斯坦为基地的恐怖组织策划了此次袭击，且唯一一名被抓获的恐怖分子已被证实为巴基斯坦籍。实际上，所有的矛头都指向（巴基斯坦）港口城市卡拉奇，认为该港口是恐怖袭击的始发地和海上训练基地。此外，巴基斯坦联邦调查局的调查和印度政府的“孟买档案”证实了“拉什卡—塔伊巴”是 11 月 26 日孟买恐怖袭击案的幕后策划者。

孟买恐怖袭击事件暴露出印度海岸存在漏洞，以及海事安全机构即印度海军、海岸警卫队和水警在保卫印度海上边界上能力不足等问题。在孟买恐怖袭击发生后，为了增强海事安全，印度海事安全体系全面改革，在组织结构上发生了显著改变。这些计划也包括增加 9 个海岸警卫站和一个名为“海上卫队”的拥有约 1000 人并配备 80 艘快速攻击艇的特种部队。政府计划建立一个国家级的指挥、控制、通讯和情报网络来联合印度海军和海岸警卫队。政府已支持扩充海岸警卫队，并且已着手计划为其装备现代化的系统，以担负起连续而持久的监测重任，并对仍然混乱和存有争议的沿海区域提供无缝监控。

全面改革后的印度海岸安全系统采取层级式方法。最内层由作为海岸司令部统帅的海岸警卫队总司令控制管理，而印度海军将承担协调公海和近海设施安全的责任。联合行动中心已在孟买、科钦、布莱尔港和维萨卡帕特南建立起来，这些

24 Coast Guards from 10 Nations Get lessons on Tackling Piracy, *The Economic Times*, 21 November 2008.

中心将促进包括印度海军和印度海岸警卫队在内的不同机构之间的协调。

十一、塑造未来

2007 年，海岸警卫队推出了一项将与第 11 个五年计划同时结束的 15 年远景规划，该规划将带来其力量的结构性增长。[25] 自 2007 年起，就有包括 5 艘快速巡逻舰、2 艘高级近海巡逻舰和 11 艘拦截艇在内的 24 艘舰艇在印度的造船厂建造。[26] 印度海岸警卫队也希望在未来拥有无人机用于管辖海域内的监控和侦察。根据官方资料，“预期的要求是到 2017 年拥有多达 268 艘舰艇、113 架飞机、18 架无人机和大量雷达，以有效地满足海事安全中不断增长的在操作上的挑战。”[27] 一位印度海岸警卫队前总司令认为，到 2020 年印度海岸警卫队的最佳规模应该包括一系列的远洋深水巡逻舰（3 个海岸警卫区各 3 艘），更大的巡逻舰、拦截艇和航空平台。[28] 据此，他的愿望清单包括：

- 5000 吨级深水巡逻舰——9 艘
- 2000 吨级巡逻舰——27 艘
- 2000 吨级污染控制船（带二级巡逻舰功能）——9 艘
- 350 至 500 吨级巡逻艇——60 艘
- 60 至 100 吨级拦截艇——90 艘
- 5 至 10 吨级拦截船——30 艘
- 气垫船——18 艘
- 无人机——18 架
- 道尼尔飞机（5 小时续航能力）——30 架
- 多任务多角色远程飞机（10 至 12 小时续航能力）——9 架
- 高级轻型直升机（5 吨级）——30 架
- 轻型直升机（2 吨级）或现有的“印度豹”型飞机——30 架

现有的传感器和武器装备包也被认为是不够的，需要升级。关键性要求包括夜视、低亮度设备和自动 76 毫米“奥托•梅莱拉”舰炮以取代手动 40 毫米、30 毫米或 12.7 毫米重机枪以及 7.62 毫米中型机枪。

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25 S. Anandan, Meltdown: Coast Guard Not Spared, *The Hindu*, 11 November 2008.

26 Indian Coast Guard Eyes Major Expansion, at http://news.indiamar.com/news-analysis/indian-coast-guard-e-14747.html, 12 March 2009.

27 Coast Guard Defending India’s Shores with Depleted Assets, at http://www.thaindian.com/newsportal/south-asia/coast-guard-defending-indias-shores-with-depleted-assets_100126572.html, 22 March 2009.

28 Arun Kumar Singh, Indian Coast Guard – 2020, *Indian Defence Review*, Vol. 23, No. 2, April/June 2009, pp. 85~86.

就人力资源而言，印度海岸警卫队需要将现有的 7000 人增加到 2 万人，并且前线士兵和后备力量的比率达到 2:1。在机构层面，印度海岸警卫队必须建立自己的培训学院。

十二、结语

印度海岸警卫队在短时间内已展露为一支优秀的军队，并累积了丰富的操作经验。该警卫队已发展成为印度的一支有效、高效、可靠的推进国家利益的海上军事力量。作为国家执法机关，它在维持海上的良好秩序和治理方面扮演了关键角色。由于政治动荡和低效治理导致的叛乱和分裂主义运动，使得滨海地区存在大量（力量）不对称的行为者，印度海域因而有其独特性和复杂性，然而印度海岸警卫队成功地担负起这一艰巨的职责。印度海岸警卫队为应对现有和新兴的挑战，已发展出富有经验的策略，以保障其管辖海域的安全。

此外，该警卫队已与数个海岸警卫队和海事警察机构建立了业务联系，从而形成了（多机构）协同能力，这是合作应对非对称威胁的基础。这些互动和机构联系已经产生了行动上的协同力、海上安全思路的汇集和最佳业务实践的发展。

附录 I　印度海岸警卫队舰艇清单

1	高级近海巡逻舰	5	2000 吨，范围：4000 海里 , 能够承载轻型直升机
2	近海巡逻舰	9	1224 吨，范围：2400 海里，能够承载轻型直升机
3	快速巡逻舰	11	188 吨，范围：2375 海里
4	海上防卫舰	2	185 吨，范围：1500 海里
5	拦截艇	12	32 吨，范围：400 海里
6	拦截船（韦德雅）	8	2.4 吨，范围：120 海里
7	拦截船（布里斯托）	4	5.5 吨，范围：75 海里
8	气垫船	6	范围：400 海里

印度海岸警卫队航空平台清单

1	道尼尔 228 式固定翼飞机	24	续航时间：6 小时 30 分钟 (近似)
2	“印度豹”直升机	17	续航时间：3 小时 10 分钟 (近似)
3	高级轻型直升机	4	续航时间：4 小时 (近似)

（来源：印度海岸警卫队官方网站。）

附录 II　2004—2008 年印度海岸警卫队主要成就

	成就	2004	2005	2006	2007	2008*
(a)	抓获非法捕捞渔船	21	20	27	21	27
(b)	抓获走私船	1	—	3	无	4
(c)	没收的违禁品	3 千万卢比	—	23.858 亿卢比	无	55 万卢比
(d)	救援人数	1111	789	321	195	247
(e)	救援船舶	24（商船 5 艘，渔船 19 艘）	13（商船 1 艘，渔船 12 艘）	23（商船 1 艘，渔船 22 艘）	20（商船 9 艘，渔船 11 艘）	19（商船 2 艘，渔船 17 艘）
(f)	避免的海上污染	—	1	11	1	—
(g)	治理海上污染	2	3	2	无	无

* 至 2008 年 6 月 30 日

（来源：印度政府国防部。）

（中译：郑蔚茗　单位：厦门大学）

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