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ACADEMIC COMMITTEE

(In Alphabetical Order of Surnames)

卷首语

现在摆在您面前的是最新发行的双语版《中国海洋法学评论》。我们全体编辑部成员诚挚地希望我们的读者能对我们全新的版式以及中英文全文对照的安排给予肯定和支持。这一新的改变为大中华地区以及世界其他地区之间的读者和作者间，提供了难得的交流机会。我们相信，本期所刊登的作品内容——无论是在信息的及时性或探讨论题的涵盖面上——都继续展示了我们对于高质量学术品质的追求。

另一个好消息是，我们已经与 Westlaw、万律以及北大法宝等网路信息公司合作，将所有我们刊登的作品放上了互联网，以方便更多的读者访问阅读本刊。

本期除了有若干其他有高度学术价值的文章之外，由联合国海洋法法庭的特立尼达和多巴哥国籍法官 Anthony A. Lucky 讨论了这个岛国在大陆架法律制度发展上所起到的作用。他通过梳理关于大陆架问题的历史、相关的法律惯例以及以及特立尼达和多巴国参与这些法律惯例形成过程的方式和途径。

另外，Erik Franckx 教授有关海洋地物命名问题的专文，就此一国际法学界鲜少讨论的问题，提出了非常有价值的观察报告。

桂静分析了现有的关于大陆架法律问题的国际制度的局限性以及其将来对北冰洋地区适用的可能。该文的讨论范围涉及北极圈的领土问题以及相关法律的发展趋势、其对中国的影响以及中国在未来可能采取的措施。

孔令杰聚焦在《联合国海洋法公约》及其最近的国际实践。经过深入的分析，他认为公约的效力在全球化更加深入的 21 世纪可以得到进一步的加强。

最后，姜丽和张洁将从历史的角度分析群岛法律制度及其在不同

国家的适用。他们全面阐述了这项独特的法律制度的适用与局限性以及中国在南海地区采用这项制度以提出自己主张的可能性。

《中国海洋法学评论》全体编辑部成员，衷心地希望本期的各项内容和过去各期的内容一样，丰富、趣味且集中于海洋公私法学与海洋政策的领域。感谢您一直以来对于我们杂志的持续关注与支持。虽然中英双语的翻译非常困难，我们将继续不懈努力，努力推动《中国海洋法学评论》成为世界上重要的中英文全文刊物，提供您最优质的学术论文与研究信息。

编辑部　谨识

EDITOR'S NOTE

The editorial board of China Ocean's Law Review is excited to present to our readers the newest bi-lingual edition of this journal. We hope that our readers will appreciate our new format and its new emphasis on publishing quality articles in both English and Chinese. This format provides unique and exciting opportunities for both contributors and readers within the Greater China region and internationally as well. The editors believe that the articles published in this edition demonstrate our continuing commitment to publishing high quality works that are both timely and of widespread interest.

Another good news is that beginning from this issue, we have arranged to have all our published articles included in the Westlaw, Westlaw China, Chinalawinfo and Lawchinainfo. We will continue to widen our service to our readers via other internet information service companies.

In this issue, among some other articles of high academic value, ITLOS Justice Anthony A. Lucky of Trinidad and Tobago elaborates on the role of his country in the development of the regime of the continental shelf. Justice Lucky traces the history of international legal practice regarding the continental shelf and the ways in which his island nation has participated in shaping that practice.

Next, Prof. Erik Franckx's article on the naming of maritime features offers a very valuable observation of the subject, which has rarely been discussed among the international lawyers.

Gui Jing examines the limits of the current international regime on the continental shelf and its potential applications in the Arctic Ocean. The article discusses recent legal and territorial developments within the Arctic Circle, their possible repercussions for China, and some potential responses for China moving forward.

Kong Ling Jie discusses the United Nations Convention on the Law of the Sea (UNCLOS) and its current application in international practice. After a

thorough analysis, the article suggests some ways that the effectiveness of the Convention can be improved as we advance into an increasingly connected 21st century world.

Lastly, Jiang Li and Zhang Jie present an analysis and history of the archipelagic regime and its various applications by nation states. The duo describes the uses and limits of the archipelagic regime and the potential for China to use the regime to press its claims in the South China Sea.

We at the editorial board of COLR sincerely hope that you find this edition's articles and the annexed documents and materials as interesting, thoughtful and, relevant as we have. Although we have experienced the real difficulties of translating between Chinese and English, we will continue our effort, and appreciate your continued support as we move forward with our initiative to make COLR the premiere Chinese—English language journal presenting the finest articles and research available.

COLR Editorial

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The Naming of Maritime Features Viewed from an International Law Perspective

Erik Franckx*, Marco Benatar**, Nkeiru Joe***
and Koen Van den Bossche****

Ⅰ. Introduction

Toponymy, the study of place-names, albeit a scientific endeavour, has strong political implications. The appellation of places invokes sentiments of belonging and nationalistic claims. History is replete with examples ranging from fairly benign quibbles over cartography to actual wars being waged over the names of areas. *Mutatis mutandis* similar problems have arisen and continue to endure with respect to hydronyms, the names of bodies of water, especially salt water bodies.

Setting aside for a moment these political, cultural and historical ramifications, we turn our attention in this contribution to the potential *legal* aspects of toponymy as it relates to the sea. So far, not a single piece of scholarship has been devoted to this conundrum. Thus, we can fairly ask: does international law überhaupt come into play in the naming process as regards maritime features?

The first section of this article acknowledges the usefulness of framing this issue from an international law perspective. An initial examination of the right of states to attribute appellations will be followed by an inquiry into the

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possible legal implications that can be derived from the names of maritime features. The latter will mainly draw upon a discussion of international case law, chiefly the jurisprudence of the International Court of Justice (ICJ).

The second section narrows our scope of analysis to two bodies with specific competence vis-à-vis geographical names. First of all, the work of the United Nations Group of Experts on Geographical Names (UNGEGN) will be singled out. Its procedure and the legal nature of its recommendations highlight this organ's key role as a developer of procedures as well as major promoter of place names.

Secondly, the involvement of the International Hydrographic Organization (IHO) in the naming of maritime features will be studied in some detail. This section examines the possibilities for co-operation between states in the area of hydrography. On the one hand the influence of international organizations on sovereign states in the maritime naming process cannot be underestimated. On the other hand limitations to achieving solutions in politically sensitive cases still loom large, as can be observed for areas beyond the outer limits of states' territorial seas.

Finally, this contribution offers some sober thoughts on the lacunae in the current legal framework of naming maritime features.

Ⅱ. International Legal Framework

A. The Right to Attribute Names to Maritime Features

States are singularly distinct in that they all share a fundamental attribute, sovereignty. This quality, which is entirely compatible with the notion of international law (after all, the ability to enter into international engagements is precisely an expression of sovereignty),[①] enables states to exercise their competences. The powers that accrue to states by dint of sovereignty are far-reaching, tantamount to freedom of action within the strictures of the law. Could this autonomy encompass the faculty to give names to seas? International law appears to be silent on this issue, containing no express rules regulating this matter. In the absence of a clear-cut answer, we must shed some light on the dual nature of state sovereignty.

Internal sovereignty bestows government structures with exclusive juris-

① Case of the S. S. Wimbledon, P. C. I. J., Series A, No. 1, 17 August 1923, p. 25.

diction, effectively raising them to the rank of primacy.[①] The jurisdictional reach of these governmental institutions is however confined to the territory of the state in question. Thus, territory fulfils a double function. On the one hand, it is an enabler: territory constitutes a title empowering states to exercise their full powers. On the other hand, territory operates as a boundary ("delimited in space"[②]) beyond which the state's competences cannot be exercised.[③] Although there are a limited amount of instances in which "extraterritorial" modes of jurisdiction can be exercised, these are exceptions to the general rule of "territoriality".[④] Thus, the fact that a state enjoys jurisdiction to the exclusion of others seems to imply that it can authoritatively give names to areas within its territory. Consequently, the chosen name will be *opposable*. This means that the act of attributing a name will produce legal effects and can be invoked vis-à-vis other international legal actors.[⑤] From the perspective of international law, the territory of a state not only includes the land but "extends to the internal waters and territorial sea of every State and to the air space above its territory".[⑥] The United Nations Convention on the Law of the Sea (UNCLOS) acknowledges sovereignty of the coastal state over the territorial sea,[⑦] stipulating that its breadth may not surpass 12 nautical miles as measured from the baselines pursuant to the rules it establishes.[⑧]

External sovereignty entails the independence and juridical equality of states in the international realm.[⑨] Many scholars have taken this to mean that states retain their freedom in international relations and thus their actions will be in accordance with international law as long as there is no rule expressly

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① Shaw, Malcolm, *International Law*, Cambridge: Cambridge University Press, 2008, p. 487.

② Island of Palmas case (Netherlands v. USA), *United Nations Reports of International Arbitral Awards*, vol. 2, 4 April 1928, p. 838.

③ Daillier, Patrick, Forteau, Mathias Pellet and Alain, *Droit international public*, Paris: L. G. D. J, 2009, pp. 456～457.

④ Case of the Lotus, P. C. I. J., Series A, 7 September 1927, p. 15.

⑤ Mahinga, Jean-Grégoire, L'opposabilité des normes et actes juridiques en droit international (première partie), *Revue de droit international (et de droit comparé)*, vol. 71, 1994, p. 302.

⑥ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, Merits, I. C. J. Reports 1986, 27 June 1986, p. 111.

⑦ UNCLOS, Art 2.

⑧ *Id.*, Art 3.

⑨ United Nations General Assembly: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Resolution 2625 (XXV), Annex, 24 October 1970.

prohibiting such conduct. The adherents of this school of thought approvingly cite a famous dictum in the *Lotus case* in which the Permanent Court of International Justice (the predecessor of the ICJ) held that "[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law (…). Restrictions upon the independence of States cannot therefore be presumed". ① In other words, one needn't seek a permissive rule that allows a state to take a certain course of action. This categorical take on the *Lotus* principle bears witness to a highly consensual understanding of international law which has rightly been criticized on numerous occasions. ② A better, more nuanced approach would be to accept that external sovereignty *per definitionem* is limited in scope: in a legal system in which all states are equal, the freedom of one state must be partly curtailed by that of all other states. ③

Less extensive powers inevitably have bearing upon the right to attribute names to maritime zones beyond the territory of states. It would be erroneous to treat the waters beyond the territorial sea in a monolithic fashion. The modern law of the sea has brought about a compartmentalization of the seas and other maritime features. The 1982 Convention acknowledges a variety of zones in which certain rights devolve to coastal states. Hence:

- Contiguous zone—"exercise control" in certain instances (exhaustive list). ④
- Exclusive economic zone (EEZ)—"sovereign rights" with respect to exploration and exploitation; "jurisdiction" in certain instances(exhaustive list); "other rights and duties" as set out in the Convention. ⑤
- Continental shelf—"sovereign rights" with respect to exploration and exploitation. ⑥

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① *See supra* note Case of the Lotus, p. 15.

② For a recent example, see: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, Declaration of Judge Simma, I. C. J. Reports 2010, 22 July 2010.

③ Pellet, Alain, Lotus que de sottises on profère en ton nom! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale, In: Belliard, Edwige ed., *Mélanges en l'honneur de Jean-Pierre Puissochet: L'État souverain dans le monde d'aujourd'hui*, Paris: Pedone, 2008, p. 229.

④ UNCLOS, Art 33(1).

⑤ *Id.*, Art 56(1)(a)/(b)/(c).

⑥ *Id.*, Art 77(1).

The wording used to describe the rights connected to the contiguous zone and the EEZ enumerated in Art. 56(1) (b) and in pursuance of Art. 56(1) (c) of the 1982 Convention are clearly limited in scope. Therefore, they cannot be reasonably interpreted as encompassing an entitlement to authoritatively impose toponymic choices on other states. The sovereign rights coastal states enjoy in the EEZ and the continental shelf are broader in scope, especially the continental shelf, which respect to which the sovereign rights of the coastal state are "exclusive". ① Nonetheless, these rights are meant to serve a certain purpose, namely exploration and exploitation, which does not seem to include the power to attribute names.

The silence of the 1982 Convention does not rule out the possibility for a state to create a new right to impose its chosen nomenclature of a particular maritime feature on the international community. The technique that could give birth to such an entitlement is the *unilateral act*. Indeed, the legal nature of such acts has been acknowledged② and recent years have seen a sharp rise in their usage: "(…) unilateral acts have become the most frequent tool of State interaction. They weave, so to speak, the daily web of international relations". ③ It is via this method that subjects of international law can incur obligations and assert rights. Whether a state can successfully acquire rights via this method depends on several factors. As regards the declaration itself, certain criteria must be met, including the will of the author to claim an entitlement under international law as well as the notoriety or publicity of the act. ④ Owing to the principle of sovereign equality, a unilateral act asserting a new right cannot be opposable vis-à-vis third states voicing their protest. In expressing disapproval, they shield themselves from this novel claim. If on the other hand states expressly acknowledge the assertion made by the author, they accept that the act can be invoked against them.

The situation becomes all the more complex when third states do nothing. In other words, the international community remains silent. Can one interpret

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① *Id.*, Art 77(2).

② *See* Legal Status of Eastern Greenland, P. C. I. J., Series A/B, No. 53, 5 April 1933, p. 69; Nuclear Tests (Australia v. France), Judgment, I. C. J. Reports 1974, 20 December 1974, p. 268.

③ Zemanek, Karl, Unilateral Legal Acts Revisited, In: Wellens, Karel ed., *International Law: Theory and Practice: Essays in Honour of Eric Suy*, Hague: Martinus Nijhoff Publishers, 1998, p. 210.

④ *See supra* note Shaw, Malcolm 2008, p. 122.

this lack of condemnation as a form of tacit consent? Much will depend on the specific circumstances *in casu*, such as the amount of time that has passed since the issuance of the declaration, whether or not the situation requires a reaction, etc. But in any event, one must remain wary of deducing the expression of the will of a state from a lack of response. Not all situations call for a reaction and states can remain silent for a multitude of reasons. For this reason, the ICJ has set a high standard for inferring acquiescence from silence. ①

In the context of dispute settlement before the World Court, disagreements on maritime nomenclature have not given rise to noteworthy problems. This can be ascribed to two factors. Firstly, many cases involving disputed maritime features, chiefly islands, have been entertained by the Court as a result of a special agreement (rather than via a unilateral application). In their special agreement the parties are required to indicate not only their identity, but also the subject of their contention. ② Inevitably, this will prompt the opposing sides to agree on the names to be used with respect to the disputed maritime features. When a consensus cannot be reached on a single name, the result will be a reference to both names sometimes separated by a slash ("/") with the implicit understanding that the order of the names has no legal significance whatsoever. One practical outcome is the consistent use of both names throughout the judgment as well as in the title of the case. ③ The Court specifically noted in the former case that "for the purposes of this Special Agreement the order of the use of the names Pedra Branca/Pulau Batu Puteh or vice versa shall not be treated as having any relevance to the question of sovereignty to be determined by the Court". ④ Secondly, in an effort to appear impartial, the Court in collaboration with its Registrar will strive for a high degree of "name neutrality". ⑤

B. Legal Implications of the Names of Maritime Features

1. Names as a Claim to Historic Rights

The concept of historic rights with respect to water bodies must be distin-

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① *See* e. g. Fisheries case (United Kingdom v. Norway), Judgment, I. C. J. Reports 1951, 18 December 1951, p. 139.

② Statute of the International Court of Justice (26 June 1945), Art. 40.

③ *See* Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I. C. J. Reports 2008, 23 May 2008; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I. C. J. Reports 1999, 13 December 1999.

④ *See supra* note Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), 2008, p. 18.

⑤ Kamto, Maurice, L'intitulé d'une affaire portée devant la C. I. J., *Revue belge de droit international*, vol. 34, 2001, p. 12.

guished from historic waters because whereas the latter deals with "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title,"[①] the former, a broader term, relevant to our study because it concerns rights, deals with claims to exercise "certain jurisdictional rights in what usually are international waters, most particularly fishing rights".[②] In other words, historical waters, usually bays, are zonal claims and need title to prove their existence such as the case of *El Salvador/Honduras*, vis-à-vis the Gulf of Fonseca where the Court established the joint sovereignty of the three coastal states bordering the gulf whereas historic rights refer to rights claimed to exercise jurisdictional rights in usually international waters.[③] These rights may be fishing rights, pearling rights, etc.

As historic rights are not zonal claims, nor are they exclusive to maritime features, but rather assertions of certain rights over certain zones, states may claim these rights in zones that are not necessarily appurtenant territory by establishing continuous usage and acquiesce by other relevant states. Without the hurdle of the adjacency requirement,[④] a necessary condition to claim title over historic waters, states such as Bahrain in *Qatar* v. *Bahrain* claimed historic rights for the purpose of delimitation of territories on the basis of its pearling banks, known as "Bahrain pearling banks".[⑤] Moreover, the whole Qatar peninsula and the islands were recorded in an 1838 map as Bahraini. The ICJ in its judgment held that the nature and ownership of the pearling banks had no bearing on any exclusive recognition of territorial rights, neither was it a relevant circumstance for the purpose of delimiting the boundaries.[⑥] Therefore in the event that state parties rely on name giving as an element of claims to historic rights, the Court is of the opinion that the principle of general international law with regard to claims still applies.[⑦]

One may argue that because the adverse interest in relation to this claim is the interests of other states and/or competing claims beyond territorial waters,

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① *See supra* note Fisheries case (United Kingdom v. Norway), 1951, p. 130.

② Symmons, Clive R, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal*, Leiden: Martinus Nijhoff Publishers, 2008, p. 4.

③ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment, I. C. J. Reports 1992, 11 September 1992, para. 404.

④ *See supra* note Symmons, Clive R 2008, p. 6.

⑤ Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, Merits, I. C. J. Reports 2001, 16 March 2001, p. 40.

⑥ *Id.*, pp. 236～237.

⑦ *Id.*, at 229.

claims to historic rights must be consistent and traceable to the date of competing claims, a factor that is difficult to prove with toponymy. In other words, it is "evidentially important to prove historic title so as to show evidence of sovereignty" for this will benefit claims of a historic right to a feature[①] and a toponymic argument may be insufficient. Authors such as Keyuan acknowledge that designations of fishing zones in areas such as the East China Sea beyond territorial waters may lack specific arguments in support of such designations and the ICJ may be troubled by such assumption of rights based on the argument by Keyuan that "there must have been compelling reason". [②]

2. Names as an Act of Ownership

The number of cases in the Court's jurisprudence in relation to geographical features may be arguably scarce but the case of *Minquiers and Ecrehos* is a useful starting point to establish the ICJ's jurisprudence in relation to names as a claim to ownership.

In relation to the Ecrehos group, the UK noted that its geographical features had no name. In fact these rocks had various names given by Jersey fisherman. [③] As for the names of the geographical features of the Minquiers group, British admiralty charts gave names solely for navigational purposes. [④] This absence of naming on the part of the British was highlighted in the French submission. The French submission argued that the lack of name giving by the British constituted a "*caractère limitatif*". The argument here was that failure of the British to name the disputed island in any relevant document implied that the disputed islands were outside the UK government's control. [⑤] The French report then noted that the first mention of the Ecrehos island can be found in the grant of the Ecrehos islets by Pierre de Preaux-Bailli du Cotentin in 1203, to the Abbey of Val Richer in the deed of the gift and on this basis these islands are French.

The arguments of the parties in *Minquiers and Ecrehos* case beg the question whether a lack of enumeration of a geographical feature in a key document

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① *See supra* note Symmons, Clive R 2008, p. 109.

② Keyuan, Zou, Historic Rights in International Law and in China's Practice, *Ocean Development and International Law*, vol. 32, p. 159.

③ UK Memorial in Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, para. 7.

④ *Id.*, para. 11.

⑤ France Counter Memorial in Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, pp. 382～383.

affects any claim to *effectivités* especially where name giving is claimed by one party as an act *à titre de souverain*.

The British memorial argues *au contraire* by focusing more on possession of title through acts of administration such as legislation and deeds. ① However, the question of where the name for these features comes from remained unanswered. Hence, the British argument that although the deed of Pierre de Preaux was the first document that named the Ecrehos islets, the islets came in the possession of Pierre de Preaux by the charter, by which King John of England in 1200 had given to the Bailli the islands of "Gerse, Gernese and Aurene". ② The dependency of the deed of Pierre de Preaux and the Ecrehos on the three largest Channel Islands was further proven in the fact that the deed of gift from the Bailli stated that the Islands were given to him by King John. ③ So the Pierre de Preaux deed might have named the islets Ecrehos but he was given the islands as a collective gift albeit without a definite name.

Therefore the argument that the UK's lack of name giving was a "*caractère limitatif*" as the onus was on the UK to prove that it had named the islands individually, ④ was countered by the UK argument that at that time the islands were generally referred to as groups with names such as "les Illes de Guernese", "les Isles" etc.. ⑤

The Court noted specifically that it "cannot draw any conclusion from the naming of the islands since this question must ultimately depend upon evidence which relates directly to the possession of these groups". ⑥ Name giving as an act of ownership did not therefore feature in the unanimous judgement in favour of the UK for it was taken not to be equivalent to ownership or in this case a proof of *effectivités*.

3. Name Giving as a Way of Dating Claims

There might be instances where states are keen to proceed with the dispute on the understanding that the disputed feature was not *terra nullius* at the

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① Annexes to UK Memorial (No. A47) in Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, para. 250.

② *Id.*

③ *Id.*

④ *See supra* note France Counter Memorial in Minquiers and Ecrehos (France/United Kingdom), 1953, pp. 382～383.

⑤ UK Reply in Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, paras. 118, 139.

⑥ Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, p. 55.

commencement of competing claims by the parties. In this instance, proving the origins of the feature's name and its provenance may be a useful way of dating a state's claim to a feature. *Indonesia/Malaysia* is a case where the parties relied upon name giving as a way of dating claims to disputed islands in the past with the intention of preventing any arguments that the feature was at the critical date *terra nullius*. ①

The disputed islands in this case were not included in the original cession made in 1878 and in 1903, the "confirmation of cession" made by the Sultan of Sulu with the British North Borneo Company (BNBC), they were not specifically named in the document but as a group. Indonesia argued that this proved that the Sultan of Sulu, the predecessor of Spain, never considered the islands under Malaysian sovereignty. Indonesia argued that its right over these islands lies in the boundary line that specifically attributes the island to the Dutch, subsequently Indonesia. ②

Any danger of determining these disputed islands as *terra nullius* due to the island's lack of mention on the "confirmation of cession", argued Malaysia, could be determined from the name, which was Malaysian. In an argument that was more cultural than it was cartographical, Malaysia argued that the names of the islands originated from words such as "Ligit" which means thorns in Bajau and related to the word "Palau Ligitan" which means "Islands of Thorns". ③ Sipadan, on the other hand, was argued to have originated from the word "Siparan" and in due course "Sipadan". ④

Malaysia further argued that the naming of the islands as a group in the 1903 confirmation can still be proof of ownership and occupation in the absence of which the disputed islands were therefore *terra nullius* for these cultural names existed prior to the "confirmation of cession". ⑤ Indonesia followed on this argument on the basis that not naming an island is not tantamount to a *ter-*

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① Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, para. 108.

② Indonesia Memorial in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, paras. 3. 68, 5. 48—5. 50.

③ Malaysia Memorial in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, para. 3. 10.

④ *Id.*, para. 3. 14.

⑤ Malaysia Counter Memorial in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, para. 3. 16.

ra nullius status[①] and by way of example noted that Turtle Island, unequivocally administered by the BNBC in the nineteen hundreds, was not mentioned by name specifically or generally in the treaty. [②]

Any hopes that the ICJ might consider the issue from the perspective of names was groundless for the Court decided that although "Malaysia does not name any of the islands in any of the relevant legal instruments to prove title or transfer of title",[③] it had title based on sufficient proof of *effectivités*. [④] Note here that the ground of this claim was not based on the cultural significance of the disputed island's names but on proof of *effectivités*, not proof of provenance of name. This leads this study to argue that it may be taken that the issue of name giving only went to prove and maintain that the islands in question were not *terra nullius* and therefore subject to the laws of occupation[⑤] but this was not the issue under consideration by the Court. The issue under consideration was who has sovereignty over the disputed feature and on what basis.

4. Limited Legal Implications

It follows therefore that names are not a basis for determining sovereignty. Although names may feature in competing claims and states may base claims over features on nomenclature, the Court is apt to concern itself with objective proof of sovereignty. Just as maps are taken to represent the "physical expression of the state or states concerned," its "varying reliability or unreliability"[⑥] may be comparable to the issue of names and are not a contributing factor in the Court's determination of rights and uses over maritime features in international law.

Ⅲ. Specific Bodies Having Competence Concerning Geographical Names

A. The United Nations Group of Experts on Geographical Names

1. Description

The UNGEGN is one of the seven standing expert bodies of the United

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① Indonesia Reply in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, para. 4. 9 (ii) et seq.

② *Id.*, para. 6. 18.

③ *See supra* note Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), 2002, para. 108.

④ *Id.*, para. 149.

⑤ *Id.*, para. 108.

⑥ *See* Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I. C. J. Reports 1986, 22 December 1986, pp. 582～583.

Nations (UN) Economic and Social Council (ECOSOC). ECOSOC was established under the UN Charter and comprises at present 54 member governments. ① It assists the UN General Assembly (UNGA) in promoting international economic and social cooperation and development. The ECOSOC may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the UNGA, to the members of the UN, and to the specialized agencies concerned. ②

The UNGEGN's origins are to be traced back to the ECOSOC debates held in 1948, during which the problem of standardization of geographical names was raised, particularly with regard to cartographic services. ③ It was established in pursuance of ECOSOC Resolutions 715 A (XXVII) ④ and 1314 (XLIV) ⑤ and the Decision taken by the Council at its 1854 meeting, on 4 May 1973.

Through Resolution 715 A (XXVII), the ECOSOC requested the Secretary—General to set up a small group of consultants to consider the technical problems of domestic standardization of geographical names, including the preparation of a statement of the general and regional problems involved, to prepare draft recommendations for the procedures, principally linguistic, that might be followed in the standardization of their own names by individual countries and to report to the Council on the desirability of holding an international conference on this subject and of the sponsoring of working groups based on common linguistic systems.

On the basis of the recommendations adopted at the first UN Conference on the Standardization of Geographical Names held in Geneva from 4 to 22 September 1967, the ECOSOC approved the terms of reference for the *Ad Hoc* Group of Experts, which was renamed the "United Nations Group of Experts on Geographical Names" by the ECOSOC Decision of 4 May 1973.

One of the main aims of the Group of Experts consists in emphasizing the

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① UN Charter (1945), Art. 61.

② *Id.*, Art. 62.

③ United Nations Economic and Social Council, Co-ordination of Cartographic Services of Specialized Agencies and International Organizations, Resolution 131 (VI), 19 February 1948.

④ United Nations Economic and Social Council, International Co-operation on Cartography. Resolution 715 A (XXVII), 23 April 1959.

⑤ United Nations Economic and Social Council, Standardization of Geographical Names. Resolution 1314 (XLIV), 31 May 1968.

importance of the standardization of geographical names at national and international levels and to demonstrate the benefits which could be derived from such standardization. In doing so, it builds on the results of the work carried out by national and international bodies dealing with the standardization of geographical names and proposes principles, policies and methods suitable for resolving problems of national and international standardization. ①

2. Legal Analysis of Method of Functioning

a. *Organizational Chart*

UNGEGN

The Group of Experts is composed of experts in the fields of cartography and linguistics. ② Such experts are designated by the governments of member states of the respective geographical divisions, ③ or invited in their personal capacity by the UN. ④ The Group of Experts elects a Chairperson, two Vice-chairpersons and two Rapporteurs. ⑤ The UNGEGN meets every two years, and in years when a UN Conference on the Standardization of Geographical Names is held. ⑥ One of the basic aims of the Group of Experts is to implement the tasks assigned as a result of the resolutions adopted at the Conferences. ⑦ The Group of Experts normally reports to the United Nations Conference on the Standardization of Geographical Names. In addition, the Secretary—General presents a report on each Session of the Group of Experts to the subsequent Session of the Council. To date, twenty-four UNGEGN Sessions and nine Conferences (which are convened every five years) have been held since 1967.

The Group of Experts is organized into 23 linguistic/geographical divi-

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① United Nations Group of Experts on Geographical Names, Statute, as amended by the Group of Experts and approved by United Nations Economic and Social Council Decision E/2002/306, 25 October 2002 (available at: http://unstats.un.org/unsd/geoinfo/24th—GEGN—Docs/GEGN—24—2—Rules.pdf), I. (a)—(c).

② United Nations Group of Experts on Geographical Names, Rules of Procedure, as amended by the Group of Experts and approved by United Nations Economic and Social Council Decision E/2002/307, 25 October 2002 (available at: http://unstats.un.org/unsd/geoinfo/24th—GEGN—Docs/GEGN—24—2—Rules.pdf), Rule 2.

③ *See supra* note 2002 UNGEGN Rules of Procedure, Rule 2; *supra* note 2002 UNGEGN Statute, IV. 1. 1.

④ *See supra* note 2002 UNGEGN Rules of Procedure, Rule 22.

⑤ *See supra* note 2002 UNGEGN Statute, IV. 2. 1; *see supra* note 2002 UNGEGN Rules of Procedure, Rule 5.

⑥ *See supra* note 2002 UNGEGN Rules of Procedure, Rule 3.

⑦ *See supra* note 2002 UNGEGN Statute, I. (f).

sions. [①] As demonstrated in the table below, the number of divisions, participants and countries represented at the Sessions and Conferences has varied over the past Sessions.

Table 1 Participation in the UNGEGN Sessions since 2000

Session	Number of participants	Number of countries	Number of divisions present	Observers
25 (2009)	138	53	22 out of 23	14
24* (2007)	300	90	23 out of 23	29
23 (2006)	250	67	21 out of 22	15
22 (2004)	190	63	21 out of 22	15
21** (2002)	282	88	22 out of 22	na
20 (2000)	131	52	18 out of 22	31

* held in conjunction with the Ninth United Nations Conference on the Standardization of Geographical Names.

* * held in conjunction with the Eighth United Nations Conference on the Standardization of Geographical Names.

na not available

Source: Expert Group Session reports (2000—2009).

The divisions support the Expert Group in its activities. [②] Countries decide for themselves to which division(s) they wish to belong. [③] Each division, if composed of more than one sovereign state, must select a division chairperson and an alternative representative. [④] It is the task of the divisional representative to stimulate activities in the standardization of geographical names within his or her division by all appropriate means. He/she is also responsible for ensuring that the work of the Group of Experts and its potential for technical assistance are brought to the attention of the individual countries in his or her division and for reporting any special problems in the division to the UN. [⑤]

Under the umbrella of the UNGEGN, several working groups have been created to follow up on topics and issues and to carry out special tasks which

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① *Id.*, Annex.
② *Id.*, IV. 1—2.
③ *Id.*, IV. 1. 4.
④ *Id.*, IV. 1. 5.
⑤ *Id.*, IV. 1. 7—8.

cut across the divisional structure of the UNGEGN, such as the setting up of training courses in toponymy, the comparative study of the various systems of transliteration towards a single romanization system for each of the non-Roman writing systems and the production of international gazetteers. ① Currently, there are nine working groups: Working Group on Country Names; Working Group on Toponymic Data Files and Gazetteers; Working Group on Toponymic Terminology; Working Group on Publicity and Funding; Working Group on Romanization Systems; Working Group on Training Courses in Toponymy; Working Group on Evaluation and Implementation; Working Group on Exonyms; Working Group on Pronunciation; Working Group on the Promotion of Recording and Use of Indigenous, Minority and Regional Language Group Geographical Names. Furthermore, the UNGEGN has a task team for Africa and provides assistance in coordinating the efforts of countries developing their toponymic guidelines.

During the Sessions of the Group of Experts, *ad hoc* study groups may be appointed to deal with particular issues. ② The Group of Experts may establish inter-sessional working groups composed of specialists to study particular problems between Sessions of the Group. ③

The Group of Experts is assisted by a Secretariat, responsible for making all necessary arrangements for meetings and generally performs all other work which the Expert Group may require. ④ The Secretary of the Group of Experts is appointed by the Secretary-General and acts in that capacity in all meetings of the Group of Experts. ⑤

Conferences

Each state participating in the Conference is represented by an accredited representative. If more than one representative is appointed, one of them is designated as head of the delegation. Each delegation may also include alternate

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① United Nations Economic and Social Council, Subsidiary Bodies of the Economic and Social Council and the General Assembly in the Economic, Social and Related Fields. E/2001/INF/3, 12 April 2001.

② *See supra* note 2002 UNGEGN Rules of Procedure, Rule 38.

③ *Id.*, Rule 39.

④ *Id.*, Rule 9.

⑤ *Id.*, Rule 8.

representatives, advisers and experts as may be required. ①

The Conference elects a President, two Vice－Presidents, a Rapporteur and an Editor-in-Chief among the representatives of the states participating in the Conference. ② The Executive Secretary of the Conference is appointed by the UN Secretary－General.

The Conference may establish such committees as may be necessary for the performance of its functions. ③ Each Committee elects its own Chairman, Vice－Chairman and Rapporteur. ④ The Rules of Procedure of the Conference apply to the proceedings of the committees. ⑤

Representatives designated by entities, intergovernmental organizations and other entities that have received a standing invitation from the UNGA to participate in the Sessions and work of all international Conferences convened under its auspices have the right to participate as observers in the deliberations of the Conference and its committees. ⑥ Also representatives designated by the specialized agencies and representatives designated by other intergovernmental organizations may participate in the deliberations of the Conference and its committees on questions within the scope of their activities. ⑦ Also non-governmental organizations invited to the Conference may designate representatives to sit as observers at the public meetings of the Conference and its committees. ⑧

b. *Founding Documents*

UNGEGN

The Statute and Rules of Procedure of the UNGEGN were adopted by the Group of Experts at its fifteenth and sixteenth Sessions and endorsed by the sixth UN Conference on the Standardization of Geographical Names. They were approved by ECOSOC at its substantive Session of 1993, which took place

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① Ninth United Nations Conference on the Standardization of Geographical Names, Provisional Rules of Procedure, United Nations Economic and Social Council E/CONF. 98/135, 15 August 2007 (available at: http://unstats. un. org/unsd/geoinfo/uncsgn. htm), Rule 1.

② *Id.*, Rule 6.

③ *Id.*, Rule 39.

④ *Id.*, Rule 40.

⑤ *Id.*, Rule 41.

⑥ *Id.*, Rule 42.

⑦ *Id.*, Rule 43, 44.

⑧ *Id.*, Rule 45.

in Geneva from 28 June to 30 July 1993. ① The Statutes and Rules of Procedure have been amended by the Group of Experts at its twenty-first Session and approved by ECOSOC on 25 October 2002. The Group of Experts acts as a collegiate, consultative body. Agreement on non-procedural matters is reached by consensus and not by voting. ② In the event that consensus is not achieved, the matter is deferred for reworking and re-submission. ③ In the absence of a consensus on procedural matters, the chairperson may and at the request of any member must put the proposal to a vote. ④ Each expert representing a division has one vote, and decisions of the Group of Experts must be taken by a majority of the divisional representatives present and voting. ⑤ If a vote is equally divided, a second vote is taken. If this vote is also equally divided, the proposal or motion is rejected. ⑥ Representatives of divisions who abstain from voting are considered as not voting. ⑦

Conferences

The Conferences' Rules of Procedure were adopted at the ninth UN Conference on the Standardization of Geographical Names on 21 August 2007. A majority of the representatives participating in the Conference constitutes a quorum. ⑧ Each state represented at the Conference has one vote, and the decisions of the Conference are made by a majority of the representatives of states participating in the Conference present and voting, ⑨ *i. e.*, representatives present and casting an affirmative or negative vote. Representatives who abstain from voting are considered as not voting. ⑩ The President can not vote, but may designate another member of his delegation to vote in his place. ⑪ Observers and representatives designated by the specialized agencies or other intergovernmental organizations and non-governmental organizations have no right to

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① United Nations Economic and Social Council, Report of the Secretary—General on the Seventh United Nations Conference on the Standardization of Geographical Names, Decision 1993/226, 12 July 1993.

② *See supra* note 2002 UNGEGN Statute, II. 1.

③ *See supra* note 2002 UNGEGN Rules of Procedure, Rule 23. 1.

④ *Id.*, Rule 23. 2.

⑤ *Id.*, Rule 24. 1.

⑥ *Id.*, Rule 24. 2.

⑦ *Id.*, Rule 25.

⑧ *See supra* note 2007 UNCSGN Conference Rules of Procedure, Rule 12.

⑨ *Id.*, Rule 24.

⑩ *Id.*, Rule 25.

⑪ *Id.*, Rule 7.

vote. [①]

c. *Legal Nature of Output*

The decisions of the Group of Experts are submitted as recommendations to the United Nations Conferences on the Standardization of Geographical Names, and, if approved, submitted to ECOSOC for final endorsement, with the request that member states give them the broadest possible publicity and exposure through appropriate means and channels such as professional organizations, research and scientific institutions, and institutions of higher learning. The decisions of the Group of Experts have a recommendatory character. [②] ECOSOC may make recommendations, either under Article 62(1) or, without being related to any particular study, under Article 62(2) of the UN Charter. The word "recommendation" signifies the non-obligatory character of the resolution and these are thus not binding upon the member states. [③] Nevertheless, such resolutions are not devoid of all legal value. It has often been argued that the addressees of UN recommendations have a duty to consider their content in good faith. Thus, if a state does not wish to comply with the recommendation, it must give its reasons. [④] In practice, ECOSOC has limited itself to endorsing the recommendations to organize Conferences on the Standardization of Geographical Names and to invite the Secretary—General to take measures, where appropriate and within available resources, to implement the other recommendations adopted at the Conferences. [⑤]

3. Substantive Rules Adopted

The UNGEGN is not a geographic names decision-making body, nor an arbiter of disputes. Its functions, as set out in the UNGEGN Statute, are *inter alia* to develop procedures and establish standardization mechanisms in response to national requirements and particular requests. The UNGEGN en-

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① *Id.*, Rules 42—45.

② *See supra* note 2002 UNGEGN Statute, II. 2.

③ Sands, Philippe Joseph Klein, and Pierre, *Bowett's Law of International Institutions*, London: Sweet & Maxwell, 2009, p. 59; Sloan, F. Blaine, The Binding Force of a "Recommendation" of the General Assembly of the United Nations, *British Yearbook of International Law*, vol. 25, 1948, p. 26.

④ Conforti, Benedetto, *The Law and Practice of the United Nations*, Leiden: Martinus Nijhoff Publishers, pp. 292～293.

⑤ United Nations Economic and Social Council, Recommendations made by the Eighth United Nations Conference on the Standardization of Geographical Names, Decision 2003/294, 24 July 2003 (available at: http://www.un.org/docs/ecosoc/documents/2003/decisions/edec2003—294.pdf).

courages discussions and studies on practical and theoretical steps directed towards standardization and makes mapping organizations aware of the importance of using standardized geographical names. In doing so, it liaises with international organizations dealing with related subjects. ① As recognized at the first Conference, it is up to each state to standardize the geographical names within its jurisdiction, *i. e.* to decide what the name should be of every feature, and how that name should be written. In that sense, it was recommended that "each country should have a national geographical names authority (…) having clearly stated authority and instructions for the standardization of geographical names and the determination of names standardization polity with the country". ② The UNGEGN is thus not mandated to decide on names, to compel countries to establish place names standardization processes or to follow a particular protocol or method. Likewise, the UNGEGN Statute mentions that "[i]n its activities the Group of Experts must adhere to the principle that international standardization of geographical names must be carried out on the basis of national standardization". ③ Moreover, questions involving national sovereignty cannot be discussed by the Group of Experts. ④

Some recommendations related to maritime features beyond the limits of national jurisdiction have been issued at the UNGEGN Conferences. These recommendations are worded in a general manner and mostly relate to procedural aspects and/or stress the need for cooperation with other relevant organizations: Resolution II/22 recommended the UNGEGN to study existing national and international practices concerning the delimitation and naming of oceans and seas beyond the limits of national jurisdiction, with a view to recommending improvements in nomenclatural practices and procedures; Resolution III/21 recommended the UNGEGN to coordinate its programmes with those of the IHO. Resolution IV/12 observed that the UNGEGN Working Group on Undersea and Maritime Features had completed its tasks with regard to undersea

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① *See supra* note 2002 UNGEGN Statute, III; Palmer, Trent, Geographical Names and UNCLOS, Advisory Body on the Law of the Sea (ABLOS) Conference. Marine Scientific Research and the Law of the Sea, The Balance between Coastal Rights and International Rights (available at: http://www.gmat.unsw.edu.au/ablos/ABLOS05Folder/PalmerPaper.pdf), 2005, p. 2.

② First United Nations Conference on the Standardization of Geographical Names, National Standardization. Resolution I/4, 4－22 September 1967 (available at: http://unstats.un.org/unsd/geoinfo/UNCSGN－Reports/1－UNCSGN－Rpt－en.pdf).

③ *See supra* note 2002 UNGEGN Statute, II. 4.

④ *See supra* note 2002 UNGEGN Statute, II. 3.

features, but that in regard to maritime features further coordination with the International Hydrographic Office (sic) was required. Therefore, the task of the Working Group was to be limited to maritime features. ① The UNGEGN Maritime and Undersea Feature Working Group was disbanded in 1984. ②

Some resolutions relate specifically to the names of maritime features in shared waters or beyond "a singly sovereignty". Resolution I/8 set the stage for a series of subsequent resolutions providing guidance in such cases. With respect to features common to, or extending across the frontiers of two or more nations, this resolution recommended the establishment of a common name or a common application and that in case of conflicting names or applications the nations concerned attempt to reach an agreement. ③ Resolution II/23 recommended that the UNGEGN work on a model statement on the treatment of Antarctic undersea feature names which could be suggested for adoption by interested countries. ④ Resolution II/25 recommended countries to agree on fixing a single name for features within the sovereignty of more than one country, or which are divided among two or more countries. In case such agreement could not be reached, it was recommended that for international cartographic purposes the name forms of each of the languages be accepted. Only technical reasons, *e. g.* in case of small-scale maps, could make it necessary to dispense with the use of certain name forms belonging to one language or another. ⑤ Resolution II/26 recommended the UNGEGN, for the purpose of drawing up a system for naming undersea features beyond a singly sovereignty, to cooperate with the IHO.

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① Fourth United Nations Conference on the Standardization of Geographical Names, Maritime and Undersea Feature Names, Resolution IV/12, 24 August－14 September 1982 (available at: http://unstats. un. org/unsd/geoinfo/UNCSGN－Reports/4－UNCSGN－Rpt－en. pdf).

② *See supra* note Palmer, Trent 2005, p. 5.

③ First United Nations Conference on the Standardization of Geographical Names, Treatment of Names of Features Beyond a Single Sovereignty, Resolution I/8, 4－22 September 1967 (available at: http://unstats. un. org/unsd/geoinfo/UNCSGN－Reports/1－UNCSGN－Rpt－en. pdf).

④ Second United Nations Conference on the Standardization of Geographical Names, Names of Antarctic and Undersea Features, Resolution II/23, 10－31 May 1972 (available at: http://unstats. un. org/unsd/geoinfo/UNCSGN－Reports/2－UNCSGN－Rpt－en. pdf).

⑤ Second United Nations Conference on the Standardization of Geographical Names, Names of Features Beyond a Single Sovereignty, Resolution II/25, 10－31 May 1972 (available at: http://unstats. un. org/unsd/geoinfo/UNCSGN－Reports/2－UNCSGN－Rpt－en. pdf).

4. Conclusion

The UNGEGN has not been established to decide on names with respect to maritime features outside the sovereignty of a single State, but promotes the consistent use worldwide of accurate place names. The decisions of the Group of Experts are submitted as recommendations to the United Nations Conferences on the Standardization of Geographical Names. The Resolutions adopted by the Conference have a non-binding and recommendatory character. In practice, ECOSOC has limited itself to endorsing the recommendations to organize Conferences on the Standardization of Geographical Names and to invite the Secretary—General to take measures, where appropriate and within available resources, to implement the other recommendations adopted at the Conferences, *e. g.* ECOSOC Decision 2003/294. ①

B. International Hydrographic Organization

1. Description

The IHO was established in 1967 by means of an international agreement, ② which entered into force three months after twenty-eight states had become a party to it, ③ *i. e.*, on 22 September 1970. It succeeded to the International Hydrographic Bureau (IHB) for only the governments participating in the work of that Bureau on the day of conclusion of the 1967 Convention had an automatic right to become a party to the successor organization. ④ Other states can only accede to the 1967 Convention if their application is approved by two-thirds of the members. ⑤

The predecessor of the IHO, the IHB, is a good example of the typical early development of an international organization when studied from the perspective of the law of international institutions. Starting from the obvious disad-

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① United Nations Economic and Social Council, Recommendations made by the Eighth United Nations Conference on the Standardization of Geographical Names, Decision 2003/294, 24 July 2003 (available at: http://www.un.org/docs/ecosoc/documents/2003/decisions/edec2003—294.pdf).

② Convention on the International Hydrographic Organisation (with annexed General Regulations and Financial Regulations). Multilateral convention, 3 March 1967, *United Nations Treaty Series*, vol. 751, 41 [General Regulations: 65; Financial Regulations: 81]. This treaty entered into force on 22 September 1970 (available at: http://www.iho—ohi.net/iho_pubs/misc/M1Eversion07.pdf).

③ *Id.*, Art. XIX(1).

④ *Id.*, Art. XVIII(1,2).

⑤ *Id.*, Art. XX.

vantages of convening internal *ad hoc* conferences (who takes the initiative; who to invite; how to do away with the rigidity of statements of state policy by the participants; how to do away with the strict rule of equality; *etc.*), more permanent fora were established taking the form of international organizations, especially in the administrative and technical field, where the cooperation between states imposed itself most urgently. One of the basic setups in this respect took the form of periodic conferences working in tandem with a permanent bureau. ①

When at the end of the 19th century the need for cooperation in the area of hydrography became apparent, a number of international conferences were convened on this issue: Washington (1899), Saint Petersburg (1908 and 1912), and finally in London (1919). ② By that time, it was agreed that a permanent body should be created. The Director of the French Hydrographic Service of the Navy, M. Joseph Renaud, had already floated the idea at the time of the 1912 Saint Petersburg conference. But *inter alia* because the United Kingdom was not represented at the conference, one had to wait until after the First World War for this initiative to be carried further. London invited all countries possessing hydrographic offices, of which 22 participated in the 1919 Conference. ③ The proposal to create a permanent International Hydrographic Bureau was endorsed by the 1919 conference and a triumvirate combining the French, UK and US hydrographic services was instructed to draw up statutes and subsequently obtain the adhesion of maritime states thereto. ④

The election of the Directors and Secretary of the Bureau took place on 21 June 1921, the first meeting of the Directing Board on 6 July, the first full Board meeting on 25 July, ⑤ and the organization started to work actively in September of the same year. ⑥ This multitude of dates, together with the rather peculiar legal technique by which this international organization was estab-

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① *See supra* note Sands, Philippe Joseph and Klein, Pierre 2009, pp. 3～8.

② IHO 2010: About the IHO. Official webpage of the International Hydrographic Organization (available at: http://www.iho－ohi.net/english/home/about－the－iho/about－the－iho.html).

③ Spicer Simson, G., The International Hydrographic Bureau, *Geographical Journal*, vol. 59, 1922, pp. 293～294.

④ *Id.*, vol. 59, p. 294.

⑤ International Hydrographic Bureau, Summary of the First Annual Report Prepared by the Bureau, *League of Nations Official Journal*, vol. 3(issue 4), p. 358.

⑥ Anon, President Extends Benefits to Hydrographic Bureau, *Department of State Bulletin*, vol. 38(issue 991), 1958, p. 1074.

lished, makes it rather difficult to pinpoint the exact date of establishment of the IHB. Indeed, unlike the majority of international organizations today, the IHB was not established by treaty, but rather by an informal agreement. This process has been described in the following manner: "No parties were named, and there were apparently no signatures nor ratifications. An organization was set up by informal agreement which states could join, and certain duties are established for them". ① Indeed, the statutes of this organization remained silent about ratification and various governments are said to have "informally signified their approval". ② And even though other examples exist of international organizations having been established by such a procedure, ③ the United States nevertheless made the suggestion during the meeting on 25 July 1922, mentioned above, that it might be more appropriate to conclude an agreement. ④ This request should nevertheless be placed against the broader US state practice in this respect. By 1947 this country had adhered to about half of the international organizations it was a party to by way of a mere resolution of a conference, and the other half by way of formal acceptance of a treaty or charter. ⑤ The Directing Board of the IHB, however, considered the American proposal not to be advisable since the process of approval of a mere resolution adopted by an international conference was considered to work quite satisfactorily. ⑥ During this starting up procedure of the IHB, the statutes of the organization were moreover revised in accordance with the wishes expressed by some countries prior to having signified their approval, and these revised statutes were only sent around to members in January 1922.

This results in the fact that one can find different starting dates for this organization. Some take it back to the Conference of 1919, where the initiative

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① Eagleton, Clyde, Problems of International Legislation: International Legislation and the Drafting of Treaties, *Temple Law Quarterly*, vol. 8, 1934(a), p. 230.

② Eagleton, Clyde, Problems of International Legislation: Signature, Ratification and Accession of Treaties, *Temple Law Quarterly*, vol. 8, 1934(b), p. 380.

③ Seyersted, Finn, Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon the Conventions Establishing Them?, *Nordisk Tidsskrift for International Ret*, vol. 34, 1964, p. 49.

④ International Hydrographic Bureau, Summary of the First Annual Report Prepared by the Bureau, *League of Nations Official Journal*, vol. 3(issue 4), p. 358.

⑤ Klooz, Marie Stuart, Analytical Note on Certain International Agencies in Which the United States Participates, *American Journal of International Law*, vol. 41, 1947, p. 922.

⑥ International Hydrographic Bureau, Summary of the First Annual Report Prepared by the Bureau, *League of Nations Official Journal*, vol. 3(issue 4), p. 358.

was taken,[①] others to somewhere during the course of 1921 or 1922, when states started to signify their approval of a worked out set of statutes. From an international law point of view, the better option appears to be the latter, namely that consent is given at the time states accept a concrete invitation extended to them. The Special Rapporteur of the International Law Commission explicitly referred to the example of the IHB when commenting on his draft article on acceptance of international treaties.[②] *In casu*, this uncertainty had specific legal importance for the application of the primary function of the League of Nations, *i. e.*, the promotion of international cooperation and coordination, and thus the relationship between the IHB and the League of Nations. The Covenant of the League of Nations stated in this respect:

"There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League. In all matters of international interest which are regulated by general convention but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable. The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League".[③]

On 27 June 1921 the League decided to postpone placing the IHB under its direction, for it needed more precise information on whether the IHB had been

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① Kunz mentioned a "treaty" of 30 June 1919, *see* Kunz, Josef L., Experience and Techniques in International Administration, *Iowa Law Review*, vol. 31, 1945, p. 45; Anon stated it was created by a conference held in 1919, *see* Anon, Year Book of the League of Nations: International Hydrographic Bureau, *World Peace Foundation Pamphlets*, vol. 7 (issue 3～4), 1924(b), p. 244.

② Lauterpacht H., Report of the Special Rapporteur on the Law of the Treaties, *Yearbook of the International Law Commission*, vol. 2, 1953, p. 122.

③ Covenant of the League of Nations (including Amendments adopted to December, 1924). Multilateral convention, 28 April 1919, *League of Nations Treaty Series*, vol. 1, p. 8. This treaty entered into force on 10 January 1920 (available at: http://avalon.law.yale.edu/20th_century/leagcov.asp), Art. 24.

fully constituted. ① It was only later that same year, namely on 2 October 1921, that the Council decided to place the IHB under the direction on the League, because by that time detailed information had been obtained on the final constitution of the IHB. ② It is clear from the motivation of the accompanying report that this was a case of "automatic" application of Art. 24 of the Covenant of the League of Nations, meaning that the League considered the IHB to have been constituted after its own creation. ③ Since the London 1919 Conference took place during the month of July, and thus preceded the entry into force on 10 January 1920 of the Treaty of Versailles, which contained as Part I the establishment of the League of Nations, this implies that the League considered the IHB to have been established in 1921, even though the exact date, as mentioned above, remained unclear. It is in this respect indicative that the preamble of the IHO founding document only mentions "June 1921". ④

These Bureaux retained in fact a large measure of autonomy, contrary to the conclusion that could easily be drawn from a strict reading of Art. 24. They were most certainly not merged in the League's organization, and the latter's authority over these Bureaux was in fact confined to giving moral support and did not include the authority to interfere in the internal organization or require amendments to their organizational structures. The most the League could do was to suggest and recommend improvements relative to their way of working. ⑤ Authors analyzing this particular relationship with respect to other international organizations have concluded that the League has "to all intents and purposes, made no use whatever of any authority that is may be presumed to possess" in this respect. ⑥ The League, in other words, quickly realized that a policy of as little disturbance as possible of the existing organizations was to be

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① General Principles to be observed in placing the International Bureaux under the Authority of the League: Report by M. Hanotaux, approved on June 27th, 1921, *League of Nations Official Journal*, vol. 2(issue 7), p. 761.

② International Hydrographic Bureau, Report by M. Leon Bourgeois, and Resolution adopted by the Council on October 2nd, 1921, *League of Nations Official Journal*, vol. 2(issue 10 ~12), p. 1166.

③ *Id.*

④ *See supra* note 1967 Convention, first preambular paragraph.

⑤ *See supra* note 1921 Hanotaux Report, p. 760.

⑥ Warner, Edward P., The International Convention for Air Navigation: And the Pan American Convention for Air Navigation: A Comparative and Critical Analysis, *Air Law Review*, vol. 3, 1932, p. 291.

adhered to. ① It should therefore not come as a surprise that only six Bureaux, one of which was the IHB, were formally in this relationship with the League. ② A quick study of the Official Journal of the League of Nations reveals that the IHB used this medium to provide summaries of information exchanges between national offices, one of the goals of the IHB according to its Statute, ③ as well as to communicate new adhesions to its Statute. ④ The League at times also proposed Bureaux, like the IHB, to participate in international conferences organized by it on topics related to the particular expertise of these Bureaux, ⑤ as was the case with the IHB with respect to the Conference for the Unification of Buoyage and Lighting of Coasts. ⑥ The IHB cooperated particularly with the Advisory Committee for Communication and Transit of the League. ⑦

This rather loose relationship is well illustrated by the particular situation of the United States, a non-member to the League of Nations, but which apparently had no problem in joining the IHB later on the same year it was established-this date of establishment, as discussed above, being located somewhere in 1921. This particular example has been relied upon by others when the United States started to threaten with reservations to the founding documents of other international organizations containing similar provisions of cooperation with the League of Nations. ⑧ To treat the IHB as an organ of the League in order to prove the commitment of the United States to the League is therefore

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① Myers, Denys P., National Subsidy of International Organs, American Journal of International Law, vol. 33, 1939, p. 320.

② *Id.*, at 321.

③ International Hydrographic Bureau, Communications concerning Interchange of Information Between National Offices, *League of Nations Official Journal*, vol. 3(issue 7), pp. 731～732.

④ International Hydrographic Bureau, Adhesion of Egypt to the Bureau; Communications concerning Interchange of Information Between National Offices, *League of Nations Official Journal*, vol. 3(issue 9), pp. 1041～1042.

⑤ Organisation for Communications and Transit, Convening of a Conference on the Unification of River Law applicable to Navigation on the Main Systems of Navigable Waterways in Continental Europe, *League of Nations Official Journal*, vol. 11(issue 2), p. 99.

⑥ Final Act of the Conference for the Unification of Buoyage and Lighting of Coasts, *League of Nations Official Journal*, vol. 12(issue 1), pp. 51, 55; Anon, Year Book of the League of Nations; Buoyage and Lightning of Coasts, *World Peace Foundation Pamphlets*, vol. 9, 1926, p. 294; Anon, Year Book of the League of Nations; Port and Coast Signals; Buoyage and Lightning of Coasts, *World Peace Foundation Pamphlets*, vol. 10, 1927, p. 311.

⑦ Anon, Year Book of the League of Nations, International Hydrographic Bureau, *World Peace Foundation Pamphlets*, vol. 8, 1925, p. 563.

⑧ *See supra* note Warner, Edward P. 1932, p. 292.

probably incorrect. ① The better approach when undertaking such an analysis seems to stress the cooperation with the League first, and only after concluding that part, state that there are "other Committees on which Americans have served from time to time, or in which American influence has been felt", where the IHB can then be relied upon as an example. ② Like the Permanent Court of International Justice, which had no direct link with the League, the IHB can best be described as an autonomous international organization related to the League. ③

The relationship of the IHB with respect to the general international organization competent for shipping has been along the same lines. For a long time, there was no such permanent organization with overall maritime competence in existence. ④ Prior to the establishment of the InterGovernmental Maritime Consultative Organization (IMCO) in 1959, the idea of the creation of an International Maritime Bureau, of which the IHB would form a part, had certainly been suggested, with autonomous decision-making power covering not only the coastal waters, but also beyond. ⑤ But when the *Institut de droit international* adopted its final resolution on the subject in 1934 (1934 *Résolution de l'Institut de droit international*), the final compromise took out the above-mentioned salient features. ⑥ The relationship between IMCO and the IHB was mainly one between equals, as evidenced by the practice of attending each other's conferences, ⑦ certainly not one of subordination. The IHB was not only

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① Anon, A Plan to Secure Cooperation Between the United States and Other Nations to Achieve and Preserve the Peace of the World, *International Conciliation*, vol. 10, 1924(a), p. 63.

② Hubbard, Ursula P, The Cooperation of the United States with the League of Nations and with the International Labour Organization, *International Conciliation*, vol. 14 (issue 274), 1931, p. 756.

③ Anon, A. S. I. L. S. International Law Citation Manual Draft Selections, *A. S. I. L. S. International Law Journal*, vol. 2, 1978, pp. 86～87.

④ Marx, Daniel Jr., International Organization of Shipping, *Yale Law Journal*, vol. 55, 1946, p. 1214.

⑤ Gidel, Gilbert Charles, *Le droit international public de la mer: le temps de paix*, Mellottée. Chateauroux, 1932, p. 29.

⑥ Okere, B. O., The Technique of International Maritime Legislation, *International and Comparative Law Quarterly*, vol. 30, 1981, p. 520.

⑦ Johnson, D. N. N., IMCO: The First Four Years (1959－1962), *International and Comparative Law Quarterly*, vol. 12, 1963. pp. 43, 55.

sending delegates to IMCO conferences, but also to the organization itself,[①] ever since the latter organization decided in 1963 that its SecretaryGeneral must ensure the "maintenance of co-operation and exchange of information on matters of mutual interest".[②]

What appears to be certain is that the IHB had 22 states associated with it at the end of 1922.[③] An analysis of the Statutes of the IHB for present purposes is interesting, for it clearly indicates that the IHB has no authority over the national hydrographic services whatsoever. The latter remain entirely independent and retain their complete freedom and right of initiative.[④] Moreover, it is explicitly stated that the IHB will never concern itself with questions of international politics,[⑤] nor, as a general rule, with questions which can be directly treated between two hydrographic services.[⑥] The structure created is a permanent Bureau, located in Monaco,[⑦] coupled with five yearly conferences, to which, besides the members of the IHB, also a representative of the League (without voting power), the Directing Board and the Secretary General of the IHB[⑧] are invited. These conferences have been said to constitute "the deliberative and legislative assembly" of the IHB.[⑨] Most of the decisions of the IHB were taken by simple majority,[⑩] with the admission of new members requiring a two—thirds majority of the existing members.[⑪] In the latter case, moreover, a system of weighted voting applies, with votes being allotted on the basis of

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① Silverstein, H. B., Technological Politics and Maritime Affairs: Comparative Participation in the Intergovernmental Maritime Consultative Organization, *Journal of Maritime Law and Commerce*, vol. 7, 1976, p. 385.

② IHO 2010, MoUs and Agreements, Memoranda of Understanding and Cooperative Agreements (available at: http://www.iho—ohi.net/english/letters—and—documents/mou—agreements.html).

③ International Hydrographic Bureau, Adhesion of Egypt to the Bureau; Communications concerning Interchange of Information Between National Offices, *League of Nations Official Journal*, vol. 3 (issue 9), pp. 1041～1042; Anon, Le Bureau Hydrographique International (Monaco) et la question des cartes aéronautiques, *Revue Aéronautique Internationale*, vol. 1, 1931, p. 209.

④ 1921 IHB Statutes, As partly reproduced in Anon 1931 (*See supra* note 9), Art. 7(a).

⑤ *Id.*, Art. 7(b).

⑥ *Id.*, Art. 15(b).

⑦ *Id.*, Art. 20.

⑧ *Id.*, Art. 49.

⑨ Anon, Sixth Hydrographic Conference, *Department of State Bulletin*, vol. 26 (issue 669), 1952, p. 636.

⑩ Klooz, Marie Stuart, Analytical Note on Certain International Agencies in Which the United States Participates, *American Journal of International Law*, vol. 41, 1947, p. 924.

⑪ 1921 IHB Statutes, Art. 52(b).

the maritime importance of states as reflected in the amount of shipping tonnage sailing under a particular flag. ① All members had to contribute a flat fee, augmented by a supplement based on the maritime importance measured according to the same system just explained with respect to weighted voting. ②

2. Legal Analysis of Method of Functioning

After having analyzed in some detail its predecessor, the IHB, the present part will treat the IHO mainly by comparing its functioning to that of the IHB.

a. *Organizational Chart*

If one looks at the organs involved, essentially the same structure remains as the one operational at the time of the IHB, but mostly with new names. The IHO, located in Monaco, ③ still works by means of a permanent Bureau, called the International Hydrographic Bureau in full, ④ coupled with five yearly conferences, still called as in the past the International Hydrographic Conferences. ⑤ The Bureau, new style, is still composed of what is now called a Directing Committee and retains three members, as in the past, elected for five years. The Directing Committee is headed this time by a President, who is said to represent the IHO, ⑥ assisted by the necessary technical and administrative staff. ⑦ If the present amendment procedure were to be successful, the IHO would move much more toward a "normal" contemporary international organization, with as main organs an Assembly, a Council, and a Secretariat. ⑧

On paper, the relationship between the IHO and the UN is of a totally different nature than the preexisting one between the IHB and the League of Nations. If the IHB was placed under the direction of the League of Nations in accordance with the explicit provisions of the Covenant, the IHO stayed totally outside of the UN system. ⑨ The IHO's founding documents were adopted months before Arvid Pardo gave his speech before the General Assembly of the

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① *See supra* note Spicer—Simson, G. 1922, p. 296.

② *See supra* note Klooz 1947, p. 924

③ *See supra* note 1967 Convention, Art. 1.

④ *Id.*, Art. 4.

⑤ *Id.*

⑥ *Id.*, Art. 10.

⑦ *Id.*, Art. 9.

⑧ International Hydrographic Organization: Protocol of Amendments to the 1967 Convention, November 2005. Not yet in force (available at: http://www.iho—ohi.net/mtg_docs/misc_docs/basic_docs/ProtocolNovember.pdf), new Art. 4.

⑨ Churchill, Robin and Lowe, Vaughan, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 415.

UN on 1 November 1967, triggering the Sea-bed Committee and later the Third United Nations Conference on the Law of the Sea (UNCLOS III). The IHO made interventions during both processes, highlighting the importance of hydrographic expertise, and thus the role of the IHO, in many areas related to the law of the sea. It indicated that the organization intended to cooperate fully with the work in progress and that it was willing to provide technical assistance if necessary. ① During UNCLOS III the working relationship between the IMCO and the IHO, mentioned above, was duly recognized. ② The expertise of the IHO was mainly relied upon during UNCLOS III with respect to the drawing of maps visualizing the outer limits of the continental shelf according to the different formula proposed during the debates. ③ In the ultimate outcome of these long negotiations, *i. e.*, the 1982 Convention, the IHO is finally mentioned once, namely in Annex II on the Commission on the Limits of the Continental Shelf (CLCS), allowing the latter body to cooperate with the IHO "to the extent considered necessary and useful". ④ Some proposals made during UNCLOS III would have given the IHB more extended competences with respect to the CLCS, like Canada giving it the power, together with the Intergovernmental Oceanographic Commission (IOC) of UNESCO to appoint the members of the CLCS, ⑤ but they did not succeed.

At present, the IHO has signed Memoranda of Understanding with eight other associations, federations or commissions, concluded two cooperative a-

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① Kapoor, D. C., Intervention on behalf of the IHO on 28 June 1974 during the 22nd plenary meeting of the second session of UNCLOS III, UN Doc. A/CONF. 62/SR. 22, 3 July 1974 (available at: http://untreaty. un. org/cod/diplomaticconferences/lawofthesea－1982/Vol1. html), p. 70.

② Third United Nations Conference on the Law of the Sea: The Activities of the Inter－Governmental Maritime Consultative Organization in Relation to Shipping and Related Maritime Matters, 10 June 1974, UN Doc. A/CONF. 62/27 (available at: untreaty. un. org/cod/diplomaticconferences/lawofthesea－1982/Vol3. html), paras 55 and 126.

③ Third United Nations Conference on the Law of the Sea: Preliminary Study Illustrating Various Formulae for the Definition of the Continental Shelf, 18 April 1978, UN Doc. A/CONF. 62/C. 2/L. 98 and ADD. 1－3 (available at: http://untreaty. un. org/cod/diplomaticconferences/lawofthesea－1982/Vol9. html); Third United Nations Conference on the Law of the Sea: Study of the Implications of Preparing Large－scale Maps for the Third United Nations Conference on the Law of the Sea, 9 April 1979, UN Doc. A/CONF. 62/C. 2/L. 99 (available at: http://untreaty. un. org/cod/diplomaticconferences/lawofthesea－1982/Vol11. html).

④ UNCLOS, Annex II, Art. 3(2)

⑤ Oxman, Bernard H., The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978), *American Journal of International Law*, vol. 73, 1979, p. 20.

greements with the International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA) and the International Mobile Satellite Organization (IMSO), and enjoys observer status at the UN since the end of 2001 and with IMO. ① The merging of a good number of specialized agencies with maritime interest, including the IHO, under the aegis of the IMO, even though uttered at times because of anticipated financial and operational efficiencies, does not seem realistic. ② It has moreover formed, together with the International Association of Geodesy an Advisory Board on the Law of the Sea, staffed by four members of each organization and an additional member from the UN Division for Ocean Affairs and the Law of the Sea. ③ The International Hydrographic Bureau of the IHO has also concluded an administrative agreement with the Tribunal for the Law of the Sea in Hamburg to foster future cooperation. ④ In this respect it is also worth mentioning that the proposed amendments to the founding document of the IHO intend to add a preambular paragraph elevating the organization to the status of "competent international organization, as referred to" in the 1982 Convention. ⑤

b. *Founding Documents*

A first notable difference with its predecessor, the IHB, is certainly that this time an international agreement was relied upon, which members had to sign, subject to ratification or not, in order to become a party. ⑥ If the founding documents of the IHB are hard to find because of the rather informal way of its establishment, this is most certainly not the case with respect to the IHO. On the contrary, even though the General Regulations and the Financial Regulations, which are both attached to the founding document, are explicitly stated in that agreement not to form an integral part thereof, ⑦ both were nevertheless included at the time of publication in the United Nations Treaty Series. ⑧ All

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① *See supra* note IHO 2010, MoUs and Agreements.

② Lampe, W. H., The "New" International Maritime Organization and Its Place in Development of International Maritime Law, *Journal of Maritime Law and Commerce*, vol. 14, 1983, pp. 324～325.

③ Anon, Monaco, Formation of International Hydrographic Organization (IHO) and International Association of Geodesy (IAG) Advisory Board on the Law of the Sea, *International Journal of Marine and Coastal Law*, vol. 11, 1996, p. 239.

④ International Tribunal for the Law of the Sea 2004, p. 54.

⑤ *See supra* note International Hydrographic Organization: Protocol of Amendments to the 1967 Convention, new second preambular paragraph.

⑥ *See supra* note 1967 Convention, Art. 18.

⑦ *Id.*, Art. 11.

⑧ *Id.*, Art 65－91 [General Regulations] and Art 81－99 [Financial Regulations].

these documents, together with the Rules of Procedure for International Hydrographic Conferences and the Headquarters Agreement, are also to be found on the official webpage of the IHO. ① There is even a certain tendency of duplication, for some of the provisions of the Rules of Procedure for International Hydrographic Conferences are a mere copy of identical provisions to be found in the General Regulation. ② The interrelationship between all these documents is structured in the following three leveled manner. If the General Regulations and Financial Regulations thus do not form an integral part of the 1967 Convention, as just mentioned, this implies a superiority of the 1967 Convention over both these Regulations, despite their being published together in the United Nations Treaty Series. The Rules of Procedure for International Hydrographic Conferences, on the other hand, are said, in case of conflict, to be overridden by the 1967 Convention, including the two regulations annexed thereto. ③

The 1967 Convention is not as specific as the IHB Statutes with respect to the limitation of the competence of the organization. It simply states that the organization shall only have a consultative and purely technical nature. ④ One has to turn to the General Regulations to find provisions as detailed as the IHB Statutes, namely that the IHO is a mere consultative agency with no authority over the national hydrographic offices of the member governments⑤ and that its activities, being of a mere scientific or technical nature, do not involve questions of international policy. ⑥

At present the organization is going through an amendment procedure of its founding document. The proposed amendments, which are yet to enter into force, will move the organization from an intergovernmental to an inter－state level. As already discussed, it will substantially change the structure of the IHO and intends to anchor the organization more securely to the 1982 Convention.

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① International Hydrographic Organization 2007, pp. 3～50.

② compare for instance 2007 IHO Conference Rules of Procedure[International Hydrographic Organization: Rules of Procedure for International Hydrographic Conferences (revised version 2007; available at: http://www. iho － ohi. net/iho _ pubs/misc/M1Eversion07. pdf).], Rule 14, with 2007 IHO General Regulations, [International Hydrographic Organization: General Regulations (revised version 2007; available at: http://www. iho－ohi. net/iho_pubs/misc/M1Eversion07. pdf)], Art. 9.

③ 2007 IHO Conference Rules of Procedure, Rule 14.

④ *See supra* note 1967 Convention, Art. 2.

⑤ *See supra* note 2007 IHO General Regulations, Art. 1.

⑥ *Id.*, Art. 2.

From 22 members at the end of the year of its establishment, *i. e.*, 1921, the membership of the IHB has steadily grown over the years. ① The IHO has continued this trend and lists at present 80 member states, even though two of them have been suspended since 1983. ② Five new demands for membership are listed as pending at present. ③ Even is one disregards the landlocked countries, given the fact that this organization relies primarily on the hydrographic services of its member states, the present membership, roughly speaking, still only represents about half of the remaining world community of states.

c. *Legal Nature of Output*

The Conference, whose function it is to make "decisions in respect of all proposals of a technical or administrative nature submitted by Member Governments or by the Bureau", ④ votes these normal questions "by simple majority of the Member Governments represented at the Conference". ⑤ The term "Member Governments represented at the Conference" is defined by the Rules of Procedure for International Hydrographic Conferences as meaning "Members present at the meeting. Participants in the session who are not present at the meeting at which voting takes place shall be considered as not present". ⑥ If these decisions contain resolutions to be included in the Repertory of Technical Resolutions, the above mentioned simple majority must moreover include at least one third of the Member Governments. ⑦ Voting on behalf of another Member Government is not allowed. ⑧

The founding document allows for committees to be created. ⑨ Committees are also mentioned in the General Regulations, ⑩ but for their way of creation and functioning one needs to consult the Rules of Procedure for International Hydrographic Conferences ⑪ as well as Resolution 11 of 1962 on the formation

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① *See* e. g. Anon 1958, mentioning a membership of 37.

② *See supra* note International Hydrographic Organization 2010(a), pp. 306～313.

③ *Id.*, p. 313.

④ *See supra* note 1967 Convention, Art. 5(d).

⑤ *Id.*, Art. 6(5)) with each Member Government having one vote (*Id.*, Art. 6(4); as restated in 2007 IHO Conference Rules of Procedure, Rule 56.

⑥ *See supra* note 2007 IHO Conference Rules of Procedure, Rule 51.

⑦ *See supra* note 1967 Convention, Art. 6(5); as restated in 2007 IHO Conference Rules of Procedure, Rule 52.

⑧ *See supra* note 2007 IHO General Regulations, Art. 5; as restated in 2007 IHO Conference Rules of Procedure, Rule 52.

⑨ *See supra* note 1967 Convention, Art. 6(7).

⑩ *See supra* note 2007 IHO General Regulations, Art. 8(b).

⑪ *See supra* note 2007 IHO Conference Rules of Procedure, Rules 21－26.

of IHO subsidiary organs and subordinate bodies, relating specifically to inter-sessionary subsidiary bodies. ① Decisions of committees and subsidiary bodies, according to the Rules of Procedure for International Hydrographic Conferences, are also normally taken by simple majority, with each member having one vote. ② With respect to the inter-sessionary subsidiary bodies, their Terms of Reference and Rules of Procedure must either be determined by the Conference itself, or the Finance Committee or any subsidiary organ. ③ For present purposes, only the Sub-committee on Undersea Feature Names (SCUFN) needs to be singled out (see *infra sub* III, B, 3). If one consults the Rules of Procedure of SCUFN, it is stated that this body should strive for consensus. But if consensus proves elusive, simple majority voting will be the rule, with the Chairperson having a casting vote in case of a tie. ④ Since this Sub-commission functions under a joint IHO－IOC umbrella, decisions are subsequently submitted to a joint Guiding Committee for consideration and decision, where identical voting rules apply. ⑤

It can be concluded that IHO committees normally follow the same general voting procedures as those applicable to the Conference itself. The outcome of deliberations of these committees, be they reports, conclusions or recommended resolutions, must moreover be submitted for approval either to the appropriate plenary session⑥ or to the supervising body. ⑦

This means, in practice, that as little as about 30 states can adopt "decisions" containing resolutions to be included in the Repertory of Technical Resolutions. The IHO is moreover well aware of the fact that certain countries with important hydrographic interests are not yet a member of the organization and has expressed the unanimous opinion in a 2009 resolution that the cooperation of these countries would be greatly beneficial in order to further promote the goals of the organization. ⑧

And even though the 1967 Convention, its annexes as well as the Rules of Procedure for International Hydrographic Conferences, remain absolutely silent

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① *See supra* note International Hydrographic Organization 2010(b), 2.
② *See supra* note 2007 IHO Conference Rules of Procedure, Rule 25(b).
③ *See supra* note International Hydrographic Organization 2010(b), 2.
④ *See supra* note International Hydrographic Organization (s. d.), Rule 2. 9.
⑤ International Hydrographic Organization/Intergovernmental Oceanographic Commission 2008, Rule 6.
⑥ *See supra* note 2007 IHO Conference Rules of Procedure, Rule 26.
⑦ *See supra* note International Hydrographic Organization (s. d.), Rule 2. 11.
⑧ *See supra* note International Hydrographic Organization 2010(b), 6.

on the legal nature of these resolutions, it follows from the consultative nature of the IHO, its history, and the fact that is has no authority whatsoever over hydrographic offices of the Member Governments, demonstrated above, that the content of this publication can only have a recommendatory nature for these national hydrographic offices to follow. Neither the IHB Resolution adopted in 1932 to create the said Repertory,[①] nor the preface of the Repertory itself shed any further light on this point.[②] Like all international organizations, of course, as far as internal matters are concerned like the budget, legally binding decisions can be made.[③] But whether the recommendatory powers of the IHO can lead to legal effects beyond that organization, as is sometimes the case,[④] seems highly unlikely.

The conclusion to be reached about the binding nature of the resolutions adopted by the IHO must consequently be that they are not legally binding on member states, but that through the process of harmonization, they probably nevertheless substantially affect the behavior of states in practice. Or, as stated by two US delegates to the fifth international conference held by the IHB in 1947:

"The technical recommendations, which constituted the bulk of the agenda, are not binding upon the member states, but experience has shown that they will be put into practice in nearly all instances and thereby preserve and extend a high degree of uniformity in the nautical charts and books that must, in many instances, serve the mariners of all nations".[⑤]

3. Substantive Rules Adopted

The involvement of the IHO with geographical place names has already been analyzed in some detail by one of its former directors.[⑥] It appears from this study that the IHB already showed an interest in the matter at the 1919 London Hydrographic Conference, where the need was expressed to have the limits of enclosed seas laid down.[⑦] The issue of the limits of oceans and seas

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① *Id.*, at 60.

② *Id.*, ii.

③ *See supra* note Sands and Klein 2009, pp. 284～285.

④ *Id.*, pp. 291～297.

⑤ Glover, Robert O. and Colbert, Leo O., Fifth International Hydrographic Conference, *Department of State Bulletin*, vol. 16(issue 416), 1947, p. 1204.

⑥ Kerr, Adam J., The International Hydrographic Organization and Its Involvement With Geographical Place Names, *International Hydrographic Review*, vol. 65, 1998, pp. 153～158.

⑦ *Id.*, at 154.

was subsequently placed on the agenda of the first International Hydrographic Conference held in 1929[①] and this resulted in a 1929 publication by the IHB entitled "The Limits of Oceans and Seas", a publication which was for the third and last time so far amended in 1953.[②] The latter states clearly in its preface that the limits it contains have no political significance whatsoever.[③]

A second area where the IHB became involved was the transcription of maps using another script into the Latin alphabet.[④] The third International Hydrographic Conference adopted in this respect the following resolution:

"Geographical names

a) It is desirable that, on Charts and in nautical documents, original place names (as shown on original charts in Latin characters) should be used or, at any rate, they should be inserted in brackets after the place name used;

b) Place names should be distinguished as far as possible in Sailing Directions by the type and size of the print. The country which issues the original Directions will thus itself indicate that which may be translated and that which may not".[⑤]

A third area finally where the IHB took an interest in the issue of naming relates to the submarine areas. In this area the IHB took interest by means of a circular letter of 1924 and, in a way, continued the work started by the International Geographical Congress in Berlin in 1899.[⑥]

The IHO has carried the work forward in these three domains and now has a number of resolutions adopted on the issue. It concerns first of all Resolution A4. 1, entitled Uniform Policy for Handling Geographical Names (first adopted in 1919; latest amendment in 1974).[⑦] The rules of thumb of this resolution are, *primo*, that it is up to the coastal state to name the features on its own coast; *secundo*, in naming features on foreign coasts of states using the Roman alphabet, other states have to show names "in exact agreement" with the names given by the state having sovereignty; *tertio*, same as the previous rule, but relating to the coast of a foreign country not using the Roman alphabet; a UN ap-

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① *See* surpra note Anon 1931, p. 213.

② International Hydrographic Bureau 1953.

③ *Id.*, at 2.

④ *See supra* note Kerr 1998, p. 154.

⑤ Anon, International Hydrographic Bureau, 3rd International Hydrographic Conference, *Revue Aéronautique Internationale*, vol. 2, 1932, p. 186.

⑥ *See supra* note Kerr 1998, p. 154.

⑦ *See supra* note International Hydrographic Organization 2010(b), pp. 25～26.

proved transcription method is to be used; *quarto*, with respect to features on foreign coasts, use for the generic part of complex geographical names the word (transcribed if necessary) used by the country having sovereignty; *quinto* states may use on their own charts their own conventional national usage for names of oceans and subdivisions thereof with the possibility of showing the names used internationally in a subordinate manner. The latter rule will be applied "until an international convention by the United Nations on standardization of internationally recognized names has been adopted". ①

Of more importance for present purposes is Resolution A4. 2, entitled International Standardization of Geographical Names (first adopted in 1972; latest amendment in 1974). ② The origins of this resolution are to be traced back to the first UN Conference on the International Standardization of Geographical Names held in 1967. ③ Resolution 8 adopted by that Conference, entitled "Treatment of Names of Features Beyond a Single Sovereignty", stated that even though two or more names are sometimes given to such features, the preferred solution should be to have only one common name applied and furthermore recommended states to attempt to reach agreement. More specifically with maritime and undersea features, the same reasoning applied and the Conference recommended that consultations with *inter alia* the IHB should be intensified in order to try to reach such standardization. ④ Resolution A4. 2 reciprocated by promoting further cooperation with the UN Group of Experts on Geographical Names. Of particular importance for the present study is the last paragraph of this resolution, where it is stated:

"It is recommended that where two or more countries share a given geographical feature (such as, for example, a bay, strait, channel or archipelago) under a different name form, they should endeavour to reach agreement on fixing a single name for the feature concerned. If they have different official languages and cannot agree on a common name form, it is recommended that the name forms of each of the languages in question should be accepted for charts and publications unless technical reasons prevent this practice on small scale charts. e. g. English Channel/La Manche". ⑤

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① *Id.*

② *See supra* note International Hydrographic Organization 2010(b), pp. 26～27.

③ *See supra* note Kerr 1998, p. 155.

④ United Nations Economic and Social Council, Standardization of Geographical Names. Resolution 1314 (XLIV), 31 May 1968, p. 12.

⑤ *See supra* note International Hydrographic Organization 2010(b), p. 27.

Finally, also Resolution A4. 3, entitled Naming of Undersea Features, should be mentioned here (first adopted in 1987; latest amendment in 1991). [①] During the attempt to put together a general bathymetric chart of the oceans, for which the IHB and later the IHO have been working closely with the IOC of UNESCO, the naming issue quickly became important. For this purpose SCUFN was established. It is first of all interesting to note that this Sub-committee is not allowed to consider undersea feature name proposals "that are politically sensitive". [②] In the Guidelines for the Standardization of Undersea Feature Names, one can read as first general guideline, namely I. A, that international concern in this respect is strictly limited to features beyond the 12 nautical mile territorial sea of states. [③] This is noteworthy, for it seems to be an issue that the IHO and the IOC were able to clarify. Indeed, Kerr in his 1998 publication still mentions that the term used was jurisdiction, making it unclear whether the exclusive economic zones and continental shelves should be included or not. [④] This uncertainty has now been clarified by using the word sovereignty in the first general guideline. What remained unchanged is guideline I. E, stating:

"In the event of a conflict, the persons and/or agencies involved should resolve the matter. Where two names have been applied to the same feature, the older name generally should be accepted. Where a single name has been applied to two different features, the feature named first generally should retain the name". [⑤]

to which Kerr attaches the following consideration: "It would seem that the guidelines are just that and do not provide an authority". [⑥]

4. Conclusion

Based on the above analysis, the conclusion seems to be justified that neither the IHB, nor its successor, the IHO, have the competence to settle issues of naming maritime features beyond the outer limit of the territorial seas of coastal states if different countries insist on different names. If states are not in

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① *Id.*

② *See supra* note International Hydrographic Organization (s. d.), Rule 2. 10.

③ *See supra* note International Hydrographic Organization/Intergovernmental Oceanographic Commission 2008(b), 2－1

④ *See supra* note Kerr 1998, p. 156.

⑤ *See supra* note International Hydrographic Organization/Intergovernmental Oceanographic Commission 2008(b), 2－1.

⑥ *See supra* note Kerr 1998, p. 156.

a position to solve such issues between them, it implies that one is leaving the field of technical consultations and moving into questions of international policy. The latter questions have generally been explicitly excluded from the competence of these organizations *ab initio*, either through a specific provision in the IHB Statutes or in the IHO General Regulations. Politically sensitive issues have, moreover, specifically been excluded with respect to the naming of undersea features through the Rules of Procedure of the SCUFN. Based on its still rather limited membership, where some important players are moreover still missing, and some regions clearly underrepresented, like Africa, this organization has thought it wise to adopt a low profile and leave such sensitive issues to the UN. Until the UN has adopted an international agreement on the standardization of internationally recognized names, therefore, not much is to be expected from the IHO as gremium to settle this kind of disputes. Even though the founding document of the IHO contains a rather far-reaching compulsory arbitration clause, to be used unilaterally since the arbitrator will be designated by the President of the International Court of Justice,[①] this procedure can hardly be deemed to apply to an issue which has been clearly excluded from the field of application of the treaty from the very beginning, namely the settlement of politically sensitive issues.

Ⅳ. Conclusions

In this contribution we have demonstrated that international law is relevant to maritime nomenclature by addressing a number of general legal principles as well as specific rules related to international bodies that are active in this field. At the same time, we have endeavored to highlight the limitations of the law of nations in this area.

At the level of general international law, the appellation of maritime features within the limit of 12 nautical miles can be authoritatively decided by the coastal state. Beyond this zone however, the names of the seas are "up for grabs" so to speak. When the maritime feature in question is a hotspot the end result will be a stalemate, owing to the sovereign equality of all states and the inability of imposing unilateral toponymic choices without considerable international support. How all this applies to the EEZ and continental shelf is not so clear and has given rise to specific difficulties within the UNGEGN as well as

① *See supra* note 1967 Convention, Art. 17.

the IHO. The distinction between sovereignty and sovereign rights seems detrimental in this respect, and both organizations have been struggling with it.

The current multilateral efforts to standardize maritime nomenclature have not enabled the international community to overcome this problem. Rather, we are faced once more with a malaise common to many international bodies with a technical mandate. Firstly, without the opprobrium of the political powers that be (the governments that created these bodies) the outcome of their work will be merely non-binding. Secondly, by preventing these organs from "trespassing" on politically sensitive issues, their scope of action is severely curtailed. Thirdly, the representativeness of a body such as the IHO leaves to be desired, for even in the eventuality that this organization would receive the power to bind its members, *quod non*, this would only concern the member states of that organization. For all the other members of the world community of states, such decisions would remain a *res inter alios acta* and thus not legally binding on them.

In conclusion, it seems apparent that the law as it stands today (*lex lata*) is poorly equipped for resolving maritime naming disputes in a satisfying and decisive manner. As long as a representative international body, with decision-making competences in this respect, is not created, all future efforts to standardize the names of maritime flashpoints, and thereby meaningfully contribute to interstate stability, will be relegated to the realm of power politics.

(Editors: DENG Yun-cheng; FENG Cheng-cheng)

从国际法的角度看海洋地物的命名

Erik Franckx*, Marco Benatar**, Nkeiru Joe***
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一、引 言

地名学是对地理名称的研究，但是作为一项科学研究，它很多时候蕴含着强烈的政治意义。同时，对地域的称谓也在某些层面反映着人们的民族认同感和地域情结。历史上，因为地理名称引起的各种争端屡见不鲜，甚至于最后诉诸战争的例子也不胜枚举。以上所述的问题同样会在水体的命名，尤其是咸水体的命名中产生并且持续发生影响。

我们暂且不考虑这些政治层面、文化层面和历史领域的衍生问题，而将我们的注意力转向和海洋相关的地名学所可能包含的法律层面。我们竟然发现，到目前为止，还没有过任何一篇从法律角度对海洋地名学这个问题进行研究的学术专著。因此，我们禁不住产生这样的疑惑：国际法究竟有没有在海洋地物的命名过程中发挥作用呢？

本文将首先明确，国际法在海洋地物的命名过程中发挥了重要的作用。在这一部分中，首先我们将考察基于地物命名可能牵涉到的关于国家权力的这一层面的法律问题。而后我们将对与之相关的国际判例做一些必要的梳理，主要的着眼点是与我们的主题相关的国际法院的某些具体法律实践。

在本文的第二部分中，我们将分析的范围限定在具有典型意义的普通水体和咸水体的地理名称所承载的特殊内涵上。首先，我们将对联合国地理名称专

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家组(United Nations Group of Experts on Geographical Names)通过的文件作必要的梳理。相关的程序规则及其建议的法律性质都凸显了该专家组在程序设计和推动地物命名等方面的重要作用。

其次,我们将对国际水文组织曾经介入过的一些海洋地物命名的案例进行深入研究,这里我们也将考量国家之间在相关水域中进行合作的可能性。在研究的过程中,我们也意识到如下两个方面的问题:一方面,国家主权范围内海洋地物的命名过程中,国际组织的作用不能被忽视;另一方面,解决政治敏感海域内海洋地物命名的方法还极其有限,这一点在国家领海之外的区域表现的尤为明显。

最后,本文对海洋地物命名现存法律框架的缺失之处提出一些想法和建议。

二、国际法律框架

(一)海洋地物的命名权

因为主权是所有独立国家最基本的权利,所以使得国家作为一个国际主体处于一个极其特殊甚至有些超然的地位(毕竟,参与国际事务的能力是主权独立最主要的体现之一)。[①]这一特质为国家行使其权力提供了正当性支持,而它又与国际法的理念存在着天然的一致性。基于国家主权产生的权力是意义深远而且重大的,这种权力意味着国家可以在法律的框架内自由行为。然而,这种完全自决的权力究竟有没有赋予国家对海洋地物的命名权呢?国际法在这一问题上似乎讳莫如深,并没有任何直接的法律规范。由于缺乏明确且直接的答案,我们必须对国家主权天然的两面性特质进行清晰界定。

国家主权的内部特质赋予各国政府机构独立的管辖权并将其地位提升到首要位置。[②]尽管如此,政府机构也是需要考虑它的管辖权范围的,它受到国家领土的限制。因此,在这种意义上,领土又扮演着如下两个方面的角色:一方面,它是权力的来源。"领土是由若干个地方行政区域构成并且各国政府依靠它们行使其全部权力。当然,这些地方行政区域的权力无一例外的都是来自于国家的授权"。另一方面,领土还是国家能够行使其权力的界限(以空间界定的界限),[③]超出此空间,国家就不得行使其管辖权。[④](尽管也有为数不多的例子表明国家也有可能在其领土之外行使管辖权,但是这些也只能被视为国家领土主权

① Case of the S. S. Wimbledon, P. C. I. J., Series A, No. 1, 17 August 1923, p. 25.

② Shaw, Malcolm, *International Law*, Cambridge: Cambridge University Press, 2008, p. 487.

③ Island of Palmas case (Netherlands v. USA), *United Nations Reports of International Arbitral Awards*, vol. 2, 4 April 1928, p. 838.

④ Daillier, Patrick, Forteau, Mathias Pellet, and Alain, *Droit international public*, Paris: L. G. D. J, 2009, pp. 456～457.

域内规则的例外而已。[①])因此,一国在其领土内享有排他的管辖权,实际上也就表明了国家有对其领土范围内的地物享有命名权。所以,命名权显然是可以强制行使的。这就意味着命名行为会产生法律后果并有可能与其它国际法主体产生某些法律上的联系。[②]从国际法的角度来讲,领土并不单单指一国的陆地,也包括该国的内水,领海,以及领空。[③]《联合国海洋法公约》确认沿海国家对其领海享有主权,[④]并规定其领海的范围不超过自该国的领海基线向外延伸 12 海里。[⑤]

独立自主和国际范围内的法律地位平等是国家外部主权的应有之义。[⑥]很多学者认为这意味着各国有按照其意愿处理国际关系的自由,也表明各国有权按照本国的意愿处理相关事务,只要国际法没有明文规定加以禁止的即为可行。这种思想流派的追随者认为"荷花号案"的判例是对他们观点的充分彰显,这个由常设国际法院(即国际法院的前身)做出的著名判例认为:国际法规制的是独立主权国家之间的关系,相关缔约国对其自由的限制性规定将会作为公约的组成部分或者作为共同接受的法律原则予以援用,这对于独立主权国家的约束作用是不具有预见性的。[⑦]换言之,一国根本就不必要寻求准用性规则为其某些行为提供正当性支持。"荷花号案"确定的这一原则是在各利益攸关方高度共识的基础上确立的,但是在当下的很多场合,这个观点却饱受诟病(近例可以参见西玛法官于 2010 就科索沃问题作出的咨询意见)。[⑧]因此,一个更好并且更重视细节的国际惯例越来越被认同,那就是国家的外部主权将在某些领域被限制。尽管纳入国际法律框架内的各个主权国家的法律地位是平等的,但是任何一个主权国家的自由范围都是会受到其他国家不同程度的削减或者部分限制的。[⑨]

以上所述的国家权力受限制的情况,无法避免的将相关国家引向对超出其领土范围的海域命名权的争夺。这种超出其领海范围对待水体的态度无疑是极

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① Case of the Lotus, P. C. I. J., Series A, 7 September 1927, p. 15.

② Mahinga, Jean－Grégoire, L'opposabilité des normes et actes juridiques en droit international (première partie), *Revue de droit international* (et de droit comparé), vol. 71, 1994, p. 302.

③ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, Merits, I. C. J. Reports 1986, 27 June 1986, p. 111.

④ UNCLOS, Art 2.

⑤ *Id.*, Art 3.

⑥ United Nations General Assembly: Declaration on Principles of International Law concerning Friendly Relations and Co－operation among States in accordance with the Charter of the United Nations. Resolution 2625 (XXV), Annex, 24 October 1970.

⑦ *See supra* note Case of the Lotus, p. 15.

⑧ For a recent example, see: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, Declaration of Judge Simma, I. C. J. Reports 2010, 22 July 2010.

⑨ Pellet, Alain, Lotus que de sottises on profère en ton nom! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale, In: Belliard, Edwige ed., *Mélanges en l'honneur de Jean－Pierre Puissochet: L'État souverain dans le monde d'aujourd'hui*, Paris: Pedone, 2008, p. 229.

其错误的。当代海洋法确立了海洋以及其他形形色色的海洋地物的科学划分。1982 年公约规定了不同的海洋区域,沿海国对不同的区域享有特定的权利。

其具体规定如下:在毗邻区,沿海国享有在某些情形下进行独立控制的权利;[①]在专属经济区,沿海国有权对其进行调查研究和开发利用其区域内资源的主权性权利,有权在该区域内行使某些特定情形的管辖权,同时公约也对沿海国在该区域内的权利和义务做出了详尽规定;[②]关于大陆架,相关沿海国有进行调查研究和开发利用的主权性权利。[③]

1982 年公约的第 56 条第 1 款 b 项和 c 项对沿海国在其毗连区和专属经济区的相关权利作了详尽的规定,并对其权利边界做出了清晰的界定。因此,我们不能想当然的将以上相关规定解释为这是公约对一国干涉他国地名选择权的授权。各沿海国在专属经济区和大陆架拥有极其广泛的权利,尤其是在大陆架,各沿海国拥有排他的主权性权利。[④]尽管如此,这些权利的授予更多的是为了符合各沿海国开发利用和调查研究相关海域的目的而作出的规定,并没有赋予沿海国对相关海域的命名权。

尽管 1982 年公约没有赋予沿海国对相关海域的命名权,但这并没有阻却沿海国对相关海域地物进行系统命名的可能性。单方行为应运而生。诚然如是,单方行为的法律性质早已得到了确认,[⑤]近年来,其在国际事务中扮演的角色也愈来愈重要。单方行为在当下已经成为处理国际事务最经常性的工具。可以这样说,正是因为有了单方行为的交织,才有了日常国际关系这张复杂的蜘蛛网。[⑥]但是在国际法上,单方行为的权利和义务也是相伴而生的。一国是否能够成功的通过单方行为顺利实现其权利,需要满足以下几个要素。任何国家做出的单方声明本身必须遵循一些特定的准则;要遵守国际法的相关规定;要遵守国际社会基本的道德评价标准以及国际社会成员共同认可的普遍的公序良俗。[⑦]由于主权平等原则的存在,对于一国通过单方行为实现其权利的诉求,非利害攸关方的第三方的反对意见是微不足道的。因此,第三方通常都是闪烁其辞,并不直接表达反对意见。如果与作出单方声明的一国有利害关系的他国对该宣言表示承认的话,该宣言就会对双方产生拘束力,而在特定情况下,第三方又会援引

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① UNCLOS, Art. 33(1).

② *Id.*, Art. 56(1)(a)\(b)\(c).

③ *Id.*, Art. 77(1).

④ *Id.*, Art. 77(2).

⑤ *See* Legal Status of Eastern Greenland, P. C. I. J., Series A/B, No. 53, 5 April 1933, p. 69; Nuclear Tests (Australia v. France), Judgment, I. C. J. Reports 1974, 20 December 1974, p. 268.

⑥ Zemanek, Karl, Unilateral Legal Acts Revisited, In: Wellens, Karel ed., *International Law: Theory and Practice: Essays in Honour of Eric Suy*, Hague: Martinus Nijhoff Publishers, 1998, p. 210.

⑦ *See supra* note Shaw, Malcolm 2008, p. 122.

该宣言的相关规定攻击他们。

这种情况又将在第三方不作出任何应对的情况下变得更加复杂。换言之，如果国际社会对一国的单方行为集体失声，我们是否可以将其解释为集体的默示承认呢？这个问题我们应该区别看待，在不同的情形和不同的时间节点都会有不同的理解。但是无论在什么情况下，如果一国没有任何直接的意思表示，他国都应该用一种谨慎的方式推定该国真实的意思表达。一国并没有义务在所有情况下都对他国的行为不加选择的作出反应，而是有很多理由可以对他国的单方行为保持沉默。正是因为这个原因，国际法院才对默示承认作出了比较高的认定标准。①

国际法院成立以前的争议解决体制中，在与海洋有关的命名问题上并没有产生特别重大的分歧。这可以归结为以下两个方面的原因。第一，很多与海洋地物有关的争议，主要是关于岛屿问题的争议，各方都以特别协议的形式达成和解（而不是通过单方行为的方式解决）。该特别协议要求各方详尽的表明争议各方的身份以及争议事项。②毋庸置疑的是，这种和解的形式极大地促进了各利益攸关方对海洋地物有关争议的解决。当双方无法就选定某一名称达成共识时，两个名称将会并列，共同被当作参考，其实这也是无关紧要的，因为只要双方对这两个名称都有清晰的认识就不会产生任何法律上的误解。当然，这也会产生一个现实的问题，无论是在法院做出判决时还是其他场合，该区域的名称都是并列性的出现。③法院特别强调在“白礁岛”案中对这一名称的并列使用中两者的顺序问题，并声明即使两者的顺序调换也不对双方的主权性权利构成任何影响。④第二，为了尽可能的在相关事务中看起来不偏不倚，国际法院和它的登记注册机构合作奉行高度的命名中立主义。⑤

（二）海洋地物名称的法律意义

1、名称是对其历史性权利的主张

我们必须把相关海域的历史性权利和历史性水域加以区分，后者涉及的是因为有历史性所有权的存在而被作为一国内水对待的水域，⑥而前者是一个与

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① *See* e. g. Fisheries case (United Kingdom v. Norway), Judgment, I. C. J. Reports 1951, 18 December 1951, p. 139.

② Statute of the International Court of Justice (26 June 1945), Art. 40.

③ *See* Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I. C. J. Reports 2008, 23 May 2008; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I. C. J. Reports 1999, 13 December 1999.

④ *See supra* note Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), 2008, p. 18.

⑤ Kamto, Maurice, L'intitulé d'une affaire portée devant la C. I. J., *Revue belge de droit international*, vol. 34, 2001, p. 12.

⑥ *See supra* note Fisheries case (United Kingdom v. Norway), 1951, p. 130.

我们的研究相关的一个更加宽泛的概念,它通常涉及在国际水域中行使特定的管辖权,特别是渔业方面的权利。[①]换言之,对历史性水域,通常是对海湾区域的权利主张,需要证明其所有权存在。在萨尔瓦多和洪都拉斯案中,国际法院就判定毗邻丰塞卡湾的三个沿岸国共享该海域的主权。然而,历史性权利则是在通常认定的国际水域内行使特定的管辖权,[②]这些管辖权可能包括捕鱼权、采拾珍珠(pearling)的权利,等等。

由于历史性权利不是对海域的所有权主张,而且也不仅限于对海洋地物的主张,而是一国在某些海域提出的特定权利主张,一国也可能在其领域某些边缘地带通过长期的实际控制或者利益攸关国的承认提出某些权利诉求。如果不是因为地理相近而得以满足提出历史性水域的必要条件,[③]国家之间就会因特定目的而提出历史性权利的主张,如在卡塔尔诉巴林案中,巴林就以划界为目的,在其"巴林珍珠堤"(Bahrain Pearling banks)的基础上提出历史性权利的主张。[④]此外,在1838年的地图中,整个卡塔尔半岛和相关岛屿被称作巴林地区(Bahraini)。国际法院因此做出如下判决:该珍珠堤的性质和归属并不是对主权性权利的专属承认,因此也不是海洋划界的相关因素。[⑤]因此,在国家把名称作为主张历史性权利的因素时,国际法院的观点是,和该权利主张相关的一般国际法原则仍然适用。[⑥]

有人会认为,与历史性权利主张相对的是其他国家的利益和(或)在领水之外相冲突的利益,因此,历史性权利主张必须连续,并且可以追溯至相冲突的主张产生之日,而这是仅仅依靠地域名称非常难以证明的一个要素。换言之,证明历史性权利的存在,从而显示其主权的证据非常重要,因为这有助于对一海洋地物提出历史性权利主张,[⑦]而一个单纯的地域论据可能非常不充分。邹克渊等学者就认为,在东(中国)海的领水之外划定的很多渔区可能就缺乏明确的证据支撑。由于很多权利主张缺乏邹克渊所称的具有说服力的理由,国际法院也可能为这些主张所困扰。[⑧]

2、名称作为体现所有权的方式

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① Symmons, Clive R, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal*, Leiden: Martinus Nijhoff Publishers, 2008, p. 4.

② Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment, I. C. J. Reports 1992, 11 September 1992, para. 404.

③ *See supra* note Symmons, Clive R 2008, p. 6.

④ Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, Merits, I. C. J. Reports 2001, 16 March 2001, p. 40.

⑤ *Id.*, pp. 236～237.

⑥ *Id.*, at 229.

⑦ *See supra* note Symmons, Clive R 2008, p. 109.

⑧ Keyuan, Zou, Historic Rights in International Law and in China's Practice, *Ocean Development and International Law* 32, p. 159.

国际法院受理的有关海洋地物的案件并不多，但是“英法海峡群岛案”（即敏基埃群岛与埃克里荷斯群岛案，Minquiers and Ecrehos Case）的判决中，国际法院开了在确定岛屿主权时考虑地理名称的先河。

英国强调，埃克里荷斯群岛的许多海洋地物没有正式名称。事实上，这一区域的渔民对相关岛礁的命名五花八门。[①]至于敏基埃群岛海洋地物的名称，英国海军部虽然在绘制航海地图时对其命名，但是这仅仅是在考虑航海目的的基础上作出的。[②]英国对争议岛屿命名的缺失问题，在法国提交的辩诉状中凸显出来。法国认为，英国的官方正式文件中没有对这些争议岛屿进行命名，表明这些岛屿是在英国政府控制范围以外的。[③]法国在随后的报道中指出埃克里荷斯群岛这个称谓第一次出现在正式文本中可以追溯到 1203 年科唐坦半岛的皮埃尔·德·普瑞克斯（pierre de preaux－bailli du Cotentin）作出的将埃克里荷斯群岛赐予范切尔修道院院长的文书中，据此可以充分证明这些岛域是属于法国的。

英法两国在“英法海峡群岛案”中争议的焦点在于，重要文件中没有列举地理地物的名称，是否会对“有效统治”（*effectivités*）的证据产生影响，特别是一方主张命名行为是“主权归属”（*à titre de souverain*）的重要依据时。

相反地，英国在其备忘录中认为其对这些岛屿的权利是通过立法和实际管理等行为取得的。[④]然而，关于该地域名称的起源问题仍然没有得到回答。因此，英国辩称，尽管皮埃尔·德·普瑞克斯的文件第一个命名埃克里荷斯群岛，但是，由于英格兰的约翰国王在 1200 年将 Gerse，Gernese 和 Aurene 三个岛屿赠予皮埃尔·德·普瑞克斯，后者才取得对这些岛屿的实际控制权。[⑤]皮埃尔·德·普瑞克斯文件的附属文件和三个最大的海峡群岛上的埃克里荷斯群岛也进一步证明了上述事实。[⑥]所以，尽管皮埃尔·德·普瑞克斯文件可能命名了埃克里荷斯群岛，但是皮埃尔接受的礼物（包含埃克里荷斯群岛在内的更多海峡岛屿，译者注）本身并没有特定的名字。

法国认为英国没有对相关岛屿命名构成“有限特征”（*caractère limitatif*），英国需要承担其曾经命名这些岛屿的举证责任，[⑦]因此，英国的回复是：在当时，这些岛屿通常是作为一个整体性的通用名称在使用，比如，“les llles de

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① UK Memorial in Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, para. 7.

② *Id.*, para. 11.

③ France Counter Memorial in Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, pp. 382～383.

④ Annexes to UK Memorial (No. A47) in Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, para. 250.

⑤ *Id.*

⑥ *Id.*

⑦ *See supra* note France Counter Memorial in Minquiers and Ecrehos (France/United Kingdom), 1953, pp. 382～383.

Guernese","les lsles",等等。[①]

国际法院特别指出,"不能仅仅依靠对岛屿的命名就对这些岛屿的主权作出任何结论,因为这个问题最终还要依赖于对这些岛屿直接占有和控制的证据。[②]因此,国际法院最终作出的对英国有利的判决中一致认定,命名并不等于所有权,在这个案件中,也不是有效统治的证据。

3、命名作为主张日期的方式

也有关于海洋地物争端的例子表明,相关国家认为在争议产生当时,争议区域为无主地。在此情形下,证明海洋地物名称的来源也可能是确定相关国家提出权利主张日期的有效方法。"利吉丹岛和西巴丹岛"案中,为了证明在关键日期之前,印度尼西亚和马来西亚双方的争议岛屿并非无主地,双方都依靠名称作为其过去对争议岛屿主张权利日期的方法。[③]

这个案例的争议岛屿不包括苏禄苏丹和大英北婆罗洲公司于1878年和1903年签订的割让确认书中涉及的部分,在确认书中没有特别的列出相关岛屿的名称而仅仅只给出了一个群体性的名字。印度尼西亚声称,在西班牙的统治之前,苏禄苏丹从没有承认这些岛域被纳入过马来西亚的主权之下。印度尼西亚认为,这些岛屿先后被明确划入荷兰的边界之内,然后为印度尼西亚所继承。[④]

马来西亚则辩称,因为在割让确认书中没有表明这些岛屿的名称,这些岛屿在当时应为无主地。岛屿现在的名字也可以看出,它们应归属马来西亚。马来西亚还指出,应该从更广的文化层面而不仅是地理层面来进行判断。这些岛名文字构成的起源,"ligit"在马来语中意为"荆棘",因此利吉丹岛意指"荆棘之岛",而西巴丹岛这个名称就来自于"Siparan"这个词语,后经演变而成为"Sipadan"。[⑤]

马来西亚进一步辩称,即使不能明确这些岛屿在争议产生时为无主地,1903年确认书中出现群体性的名称仍然可以作为所有权和占有的证据,因为这些岛屿的文化层面的名字早在割让确认书之前就已经存在。[⑥]随后,印度尼西亚反驳道,岛屿没有命名并不能说明其为无主地,[⑦]同时举出龟岛(Turtle Island)的例子对该主张予以说明。在19世纪这个漫长的时间段里,大英北婆罗洲公司从没有在条约

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① UK Reply in Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, paras. 118, 139.

② Minquiers and Ecrehos (France/United Kingdom), Judgment, I. C. J. Reports 1953, 17 November 1953, p. 55.

③ Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, para. 108.

④ Indonesia Memorial in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, paras. 3. 68, 5. 48－5. 50.

⑤ *Id.*, para. 3. 14.

⑥ Malaysia Counter Memorial in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, para. 3. 16.

⑦ Indonesia Reply in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, 17 December 2002, para. 4. 9 (ii) et seq.

中一般性地或专门地对该岛命名，但是却对其实现了没有争议的实际管理。[①]

任何希望国际法院从地名的角度来权衡这个案例的尝试都是没有根据的，因为国际法院已经作出如下判断：尽管“马来西亚没有在任何法律文件中命名这些岛屿以证明其权利或权利转移”，[②]它仍然基于有效统治的证据拥有对这些岛屿的主权。[③]值得注意的是，做出以上认定的依据并不是来自于对争议岛屿名称文化意义的考虑，也不是来自于对地名起源的论证，而是基于有效统治的证据。这就将本研究导向到，命名的问题仅仅是证明和维系争议岛屿并非无主地，因此要以实际占有为基本依据来判定主权，[④]但这并不是国际法院要考虑的问题。这个案例的焦点在于，哪方基于何种依据拥有争议岛屿的主权。

4、有限的法律意义

综上所述，我们不难得出如下结论：地名不能作为确定一国对该地域拥有主权的依据。尽管在很多争议事件中都在地名这个问题上纠缠不清，但是法院更多的还是采信能够证明其拥有主权的客观证据。就像地图被用来表示有关国家对某地拥有主权的物理体现，但是在争议事件中，国际法院仍然要对其证据价值进行衡量，地名也是同样的情况。[⑤]国际法院在判断有争议的海洋地物的权利归属时，不会将其作为决定性的考量因素。

三、对地理名称拥有管辖权的几个特定的组织

（一）联合国地理名称专家组

1、简介

联合国地理名称专家组（UNGEGN）是联合国经社理事会七个常设专家组之一。联合国经社理事会是根据《联合国宪章》建立的，现在由 54 个成员国政府组成。[⑥]经社理事会帮助联合国大会推动和促进国际经济和社会合作与发展。联合国教科文组织的主要工作是对世界经济、社会、文化、教育、健康以及与之相关的问题进行研究，并将这些问题向联合国大会、联合国会员国或者有关的专门机构提出建议。[⑦]

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① *Id.*, para. 6. 18.

② *See supra* note Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), 2002, para. 108.

③ *Id.*, para. 149.

④ *Id.*, para. 108.

⑤ *See* Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I. C. J. Reports 1986, 22 December 1986, pp. 582～583.

⑥ UN Charter (1945), Art. 61.

⑦ *Id.*, Art. 62.

联合国地理名称专家组的起源可以追溯到1948联合国经社理事会的辩论，当时由于制图需要，地名标准化这个问题被提了出来。[①]专家组是依据联合国经社理事会715A(XXVII)[②]号决议、1314 (XLIV)[③]号决议以及理事会1973年5月4日举行的第1854次会议决议成立。

经社理事会715A(XXVII)号决议要求联合国秘书长设立一个专门应对各国地名技术问题的咨询小组，致力于解决国内地理名称标准化的技术问题，包括起草一个关于全球性和区域性问题的声明，准备程序草案，首要的就是解决各国地名标准化过程中的语言问题并向理事会报告其就此问题举办国际会议以及建立通用术语工作组的愿望。

根据1967年9月4日至9月22日在维也纳举行的第一次联合国地理名称标准化会议的建议，联合国经社理事会批准成立特设专家组，经社理事会1973年5月4日决议将其更名为"联合国地理名称专家组"。

联合国地理名称专家组的一个主要任务就是在国内和国际层面强调地理名称标准化的重要性，并说明通过标准化可能获得的利益。在此方面，专家组在相关处理地名标准化问题的国内和国际团体的工作成果的基础上，提出解决国家和国际地名标准化问题的原则、政策和方法。[④]

2、运作方法的法律分析

(1)组织结构图

联合国地理名称专家组

联合国地理名称专家组是由绘图学和语言学方面的专家组成的。[⑤]这些专家是由各成员国政府的相关地理机构派遣，[⑥]或者因为其个人资历被联合国聘

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① United Nations Economic and Social Council, Co-ordination of Cartographic Services of Specialized Agencies and International Organizations, Resolution 131 (VI), 19 February 1948.

② United Nations Economic and Social Council, International Co-operation on Cartography. Resolution 715 A (XXVII), 23 April 1959.

③ United Nations Economic and Social Council, Standardization of Geographical Names. Resolution 1314 (XLIV), 31 May 1968.

④ United Nations Group of Experts on Geographical Names, Statute, as amended by the Group of Experts and approved by United Nations Economic and Social Council Decision E/2002/306, 25 October 2002 (available at: http://unstats.un.org/unsd/geoinfo/24th-GEGN-Docs/GEGN-24-2-Rules.pdf), I.(a)-(c).

⑤ United Nations Group of Experts on Geographical Names, Rules of Procedure, as amended by the Group of Experts and approved by United Nations Economic and Social Council Decision E/2002/307, 25 October 2002 (available at: http://unstats.un.org/unsd/geoinfo/24th-GEGN-Docs/GEGN-24-2-Rules.pdf), Rule 2.

⑥ *See supra* note 2002 UNGEGN Rules of Procedure, Rule 2; *supra* note 2002 UNGEGN Statute, IV.1.1.

请。[①]专家组选任主席一名、副主席两名、报告员两名。[②]联合国地理名称专家组每两年举行一次会议。每逢联合国地理名称标准化会议举行时，专家组成员也要举行会议。[③]专家组的主要任务是实施联合国地理名称标准化会议做出各项决议。专家组定期向联合国地理名称标准化会议汇报工作。此外，上一届专家组的秘书长要向下一届专家组做工作报告。自 1967 年开始至今，联合国地理名称标准化会议已经举行了 9 届(每五年一届)，专家组也已经举行了共计 24 次会议。

专家组由 23 个语言和地理分支机构组成。[④]如下表所示，过去每届会议机构组成、参加者和与会国都是不同的。

表 1　2000 年以后历届联合国地理名称专家组会议的参与情况

会议	参加者	与会国	与会机构	观察员
25(2009)	138	53	22/23	14
24*(2007)	300	90	23/23	29
23(2006)	250	67	21/22	15
22(2004)	190	63	21/22	15
21**(2002)	282	88	22/22	/
20(2000)	131	52	18/22	31

*　与第九次联合国地理标准化会议一起举行

**　与第八次联合国地理名称标准化会议一起举行

来源：2000－2009 历届专家组会议报告

各分支机构通过其活动支持专家组的工作，[⑤]各国自行决定其愿意加入的分支机构。[⑥]如果一个分支机构由一个以上的主权国家组成，必须选出一名主席和一名主席的替补人员。[⑦]各分支机构主席的任务是在该组织内部运用适当的方式开展推进地名标准化的活动，同时，他还要对专家组成员的工作负责，对相关国家的潜在问题有提请其注意的义务，对属于其工作范围的特定问题有向联合国报告的义务。[⑧]

在联合国地理名称专家组的工作框架下还建立了几个工作组，围绕该机构

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① *See supra* note 2002 UNGEGN Rules of Procedure, Rule 22.

② *See supra* note 2002 UNGEGN Statute, IV. 2. 1; *See supra* note 2002 UNGEGN Rules of Procedure, Rule 5.

③ *See supra* note 2002 UNGEGN Statute, I. (f).

④ *Id.*, Annex.

⑤ *Id.*, IV. 1－2.

⑥ *Id.*, IV. 1. 4.

⑦ *Id.*, IV. 1. 5.

⑧ *Id.*, IV. 1. 7－8.

的主要任务和工作主题,执行特殊的跨分支机构的工作任务,比如举办地名学培训课程,对各种非罗马化的地名体系以及国际地名索引统一成为罗马化的体系进行比较研究。[①]目前,一共有九个这样的工作组,具体如下:国家名称工作组、地名数据材料和地名索引工作组、地名术语工作组、宣传和投资工作组、罗马化体系工作组、地名学培训工作组、评估和执行工作组、外来语地名工作组、语音工作组、推进记录和使用本土化、少数民族和地区语言地名工作组。此外,专家组还派出了一支特别任务小组进驻非洲,致力于为各国发展符合其地域特色的地名体系提供帮助。

历届专家组以及之前的特设小组都会被任命进行特定事务的处理。[②]两届会议的闭会期间,专家组也会组织工作组对特定问题进行调查研究。[③]

秘书处对专家组提供必要的帮助,主要是负责会议及其相关事宜的准备工作以及完成专家组指定的其他工作。专家组的秘书由各专家组自行选任并由秘书长委任。[④]

会议

每一个与会国都有一个授权的代表。如果一国派出两名以上的代表,应该指定一名代表作为代表团的负责人,每一个代表团可能包括一名替补负责人、顾问以及一定数量的专家成员。[⑤]

会议在与会代表中选举一名主席、两名副主席、一名报告员以及一名主编。[⑥]会议的执行秘书由联合国秘书长委任。

为了保证完成专家组的工作,会议也会在需要的时候组建特别委员会。[⑦]每一个委员会选任一名主席、两名副主席以及一名报告员。[⑧]会议的程序性规定对委员会适用。[⑨]

主权国家和政府间国际组织的代表以及受到联合国大会邀请与会或者其工作符合会议目的的其他任何实体都有权利作为观察员参加会议或者委员会。[⑩]由特别机构或者其他政府间国际组织委派的代表在其业务范围内可以参加会议

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① United Nations Economic and Social Council, Subsidiary Bodies of the Economic and Social Council and the General Assembly in the Economic, Social and Related Fields. E/2001/INF/3, 12 April 2001.

② *See supra* note 2002 UNGEGN Rules of Procedure, Rule 38.

③ *Id.*, Rule 39.

④ *Id.*, Rule 8.

⑤ Ninth United Nations Conference on the Standardization of Geographical Names, Provisional Rules of Procedure. United Nations Economic and Social Council E/CONF. 98/135, 15 August 2007 (available at: http://unstats.un.org/unsd/geoinfo/uncsgn.htm), Rule 1.

⑥ *Id.*, Rule 6.

⑦ *Id.*, Rule 39.

⑧ *Id.*, Rule 40.

⑨ *Id.*, Rule 41.

⑩ *Id.*, Rule 42.

和委员会的活动。[①]此外,受邀与会的非政府组织可以指派代表作为观察员参加公开会议和委员会会议。[②]

(2)创始文件

联合国地理名称专家组

专家组第十五次和第十六次会议分别通过联合国地理名称专家组章程和程序规则,并得到了第六次联合国地理名称标准化会议与会代表的支持。1993 年 7 月 28 到 7 月 30 日在维也纳举行的联合国经社理事会通过决议,批准了上述章程和程序规则。[③]第 21 次专家组会议对该章程和程序规则进行了修改,并得到了 2002 年 10 月 25 日举行的联合国经社理事会的批准。专家组是一个研究和咨询机构。对于非程序性事项的协议采取协商一致的方式而不是投票通过。[④]如果不能协商一致,该事项将会被延期提交以期达成共识。对于程序性问题如果缺乏一致意见,主席可以将其交付投票表决。如果有成员要求票决,则主席必须将此问题交付投票。每一个分支机构的专家拥有一票的表决权,专家组的决议必须以出席并投票的多数才能通过。如果赞成票和反对票的数目相等,将重新投票。如果票数仍然相同,该提议或者议案将会被否决。[⑤]如果分支机构的代表弃权,将视其为没有参加投票。[⑥]

会议

会议的程序规则在 2007 年 8 月 21 日举行的第九届联合国地理名称标准化会议上获得通过。大多数与会代表出席会议,达到了法定人数。[⑦]每一个与会国家都有一票的表决权,每一个代表可以投赞成票或者反对票,弃权将视为没有参与投票,[⑧]该程序规则得到了与会代表多数表决通过。主席不能参加投票,但可以指定其代表团的其他成员进行投票。[⑨]观察员、特别机构以及其他政府间组织和非政府组织的代表没有投票权。[⑩]

(3)会议成果的法律意义

联合国地理名称专家组的决议将被作为建议向联合国地理名称标准化会议提交,如果获得通过,将被提交给联合国经社理事会并作出最后意见,要求各成

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① *Id.*, Rule 43, 44.

② *Id.*, Rule 45.

③ United Nations Economic and Social Council, Report of the Secretary－General on the Seventh United Nations Conference on the Standardization of Geographical Names. Decision 1993/226, 12 July 1993.

④ *Id.*, Rule 24.1.

⑤ *Id.*, Rule 24.2.

⑥ *Id.*, Rule 25.

⑦ *See supra* note 2007 UNCSGN Conference Rules of Procedure, Rule 12.

⑧ *Id.*, Rule 25.

⑨ *Id.*, Rule 7.

⑩ *Id.*, Rules 42～45.

员国尽最大可能地运用各种方式和渠道,比如通过各专业组织、科研机构和高等学术机构,向公众进行宣传。专家组的决议具有建议的性质。[①]联合国经社理事会有权按照联合国宪章第62条第1款和第2款的规定作出建议,而不必将其和任何特定的研究相关联。建议意味着对相关问题的解决不具有强制性的效力,也不对相关国家具有法律上的拘束力。[②]然而,这些决议并不是没有任何法律上的意义。通常情况下一国是否遵循联合国的建议是衡量该国是否善意的重要标准。因此,如果一国不愿意遵循建议,应该提出其理由。[③]实践中,联合国经社理事会一般是建议召开地名标准化会议或者是促请联合国秘书长利用适当的现有资源,实施会议通过的其他建议。[④]

3、通过的实体性规则

联合国地理名称专家组不是一个地名决定机构,也不是一个争议仲裁机构。它的功能详尽的规定在联合国地理名称专家组的章程中,主要是应国家或特定的请求,制定程序和标准化机制。联合国地理名称专家组鼓励实务和理论的讨论和研究,以期实现地名标准化并使制图机构了解使用标准化地名的重要性。在此方面,专家组还和其他相关的国际组织进行联络。[⑤]如同第一次会议达成的共识那样,各国自行决定地名标准化事宜,换言之,各国有权自行决定各自地物的名称以及其名称的书写方式。[⑥]在这个意义上,专家组建议各国应该有一个地名权威机构对其国内的地名标准化工作进行指导和管理,并有权保持其境内地名的一致性。因此,联合国地名专家组并不在名称的确定、推动国家建立地名标准或者是遵循特定的协议或方法等问题上作出强制规定。相反,联合国地名专家组的章程提到,专家组必须遵循的国际地名标准化必须建立在国家地名标准

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① *See supra* note 2002 UNGEGN Statute, II. 2.

② Sands, Philippe Joseph and Klein, Pierre, *Bowett's Law of International Institutions*, Sweet & Maxwell, London, 2009, p. 59; Sloan, F. Blaine, The Binding Force of a "Recommendation" of the General Assembly of the United Nations, *British Yearbook of International Law*, vol. 25, 1948, p. 26.

③ Conforti, Benedetto, *The Law and Practice of the United Nations*, Leiden: Martinus Nijhoff Publishers, pp. 292～293.

④ United Nations Economic and Social Council, Recommendations made by the Eighth United Nations Conference on the Standardization of Geographical Names, Decision 2003/294, 24 July 2003 (available at: http://www.un.org/docs/ecosoc/documents/2003/decisions/edec2003－294.pdf).

⑤ *See supra* note 2002 UNGEGN Statute, III; Palmer, Trent, Geographical Names and UNCLOS, Advisory Body on the Law of the Sea (ABLOS) Conference. Marine Scientific Research and the Law of the Sea: The Balance between Coastal Rights and International Rights (available at: http://www.gmat.unsw.edu.au/ablos/ABLOS05Folder/PalmerPaper.pdf), 2005, p. 2.

⑥ First United Nations Conference on the Standardization of Geographical Names, National Standardization. Resolution I/4, 4－22 September 1967 (available at: http://unstats.un.org/unsd/geoinfo/UNCSGN－Reports/1－UNCSGN－Rpt－en.pdf).

化的基础上这一原则。[①]此外,关于国家主权的问题不属于专家组的讨论范围。[②]

在联合国地名专家组的会议上,作出过一些国家管辖范围外海洋地物名称的建议。这些建议的用词普通,多是和程序性事项有关并强调和相关组织合作的必要:决议Ⅱ/22 建议联合国地名专家组研究目前国家和国际上存在的国家管辖范围以外的海洋划界和命名方面的国内和国际案例,以其推进系统命名的实践和程序性工作。决议Ⅲ/21 建议联合国地名专家组与国际水文组织协调相关问题。决议Ⅳ/12 中指出,联合国地名专家组的水下和海洋地物工作组已经完成了水下地物的工作任务,但是应该进一步加强与国际水文组织之间在海洋地物方面的协调工作。[③]联合国地名专家组海洋与水下地物工作组已于 1984 年被解散。[④]

一些决议还和共有水域或跨单一主权水域内海洋地物的名称特别相关。决议Ⅰ/8 对相关案例设计了一系列的解决路径图。对于共有区域或者超出两个以上国家边界的地物,该决议建议使用共有名称,为了防止因此产生冲突,相关国家应该就此达成协议。[⑤]决议Ⅱ/23 建议联合国地名专家组为南极地区水下地物的各利益攸关方的行为建立一个示范声明。[⑥]决议Ⅱ/25 建议相关国家对超越一国主权范围的地物进行统一命名。如果各国不能达成一致意见,就选用一个双方语言习惯接受的且符合国际制图学目的的名称。仅仅出于技术方面的原因,例如,在小比例尺地图中,将某一地名分别用不同的语言来标明完全没有必要。[⑦]决议Ⅱ/26 建议联合国地名专家组与国际水文组织进行合作,致力于一国主权范围外的水下地物命名的体系化。

4、小结

联合国地理名称专家组建立的目的不是对一国主权范围外的海洋地物进行

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① *See supra* note 2002 UNGEGN Statute, II. 4.

② *See supra* note 2002 UNGEGN Statute, II. 3.

③ Fourth United Nations Conference on the Standardization of Geographical Names, Maritime and Undersea Feature Names. Resolution IV/12, 24 August－14 September 1982 (available at: http://unstats. un. org/unsd/geoinfo/UNCSGN－Reports/4－UNCSGN－Rpt－en. pdf).

④ *See supra* note Palmer, Trent 2005, p. 5.

⑤ First United Nations Conference on the Standardization of Geographical Names, Treatment of Names of Features Beyond a Single Sovereignty, Resolution I/8, 4－22 September 1967 (available at: http://unstats. un. org/unsd/geoinfo/UNCSGN－Reports/1－UNCSGN－Rpt－en. pdf).

⑥ Second United Nations Conference on the Standardization of Geographical Names, Names of Antarctic and Undersea Features, Resolution II/23, 10－31 May 1972 (available at: http://unstats. un. org/unsd/geoinfo/UNCSGN－Reports/2－UNCSGN－Rpt－en. pdf).

⑦ Second United Nations Conference on the Standardization of Geographical Names, Names of Features Beyond a Single Sovereignty, Resolution II/25, 10－31 May 1972 (available at: http://unstats. un. org/unsd/geoinfo/UNCSGN－Reports/2－UNCSGN－Rpt－en. pdf).

命名,而是在全球推进持续性地使用一个标准的名称。联合国地理名称专家组的决议作为建议提交给联合国地理名称标准化会议。会议的决议没有法律的拘束力,而只是具有建议的性质。实践中,联合国经社理事会一般不会在建议书上做出太多的背书,而是组织标准化会议或邀请联合国秘书长利用适当的现有资源去推动实施大会通过的建议。①

(二)国际水文组织

1、简介

国际水文组织是在1967年通过国际协议的形式建立的,②该组织在28个国家成为其成员的三个月之后,于1970年9月22日开始运作起来。③国际水文组织的前身是国际水文局。国际水文局的成员国只要接受1967年公约就自动成为国际水文组织的正式成员,④其他国家如果想要加入1967年公约必须获得该组织三分之二以上的成员国批准。⑤

从国际组织法的观点来看,国际水文组织的前身国际水文局,是较早建立的国际组织的样本。最初,召开内部的临时会议有很多明显的弊病(会议由谁发起,邀请谁与会,怎样消除与会代表呆板的声明方式,怎样消除严格的平等规则等),此后,更多常设论坛得以通过国际组织的形式建立,特别是在国家继续加强合作的行政管理和技术领域。在此方面,基本的模式之一就是在一个常设机构内举行定期会议。⑥

19世纪末期,国家间在水文领域进行合作的需要凸显了出来,并就此议题召开了很多国际会议:1899年华盛顿会议、1908和1912年的圣彼得堡会议、1919年的伦敦会议。⑦在当时,各国达成了建立一个常设机构的共识。早在1912年的圣彼得堡会议上,法国海军水文局的M. Joseqh Renaud主任就有了这

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① United Nations Economic and Social Council, Recommendations made by the Eighth United Nations Conference on the Standardization of Geographical Names, Decision 2003/294, 24 July 2003 (available at: http://www.un.org/docs/ecosoc/documents/2003/decisions/edec2003-294.pdf).

② Convention on the International Hydrographic Organisation (with annexed General Regulations and Financial Regulations). Multilateral convention, 3 March 1967, *United Nations Treaty Series*, vol. 751, 41 [General Regulations: 65; Financial Regulations: 81]. This treaty entered into force on 22 September 1970 (available at: http://www.iho-ohi.net/iho_pubs/misc/M1Eversion07.pdf).

③ *Id.*, Art. XIX(1).

④ *Id.*, Art. XVIII(1,2).

⑤ *Id.*, Art. XX.

⑥ *See supra* note Sands, Philippe Joseph and Klein, Pierre 2009, pp. 3~8.

⑦ IHO 2010, About the IHO. Official webpage of the International Hydrographic Organization (available at: http://www.iho-ohi.net/english/home/about-the-iho/about-the-iho.html).

样一个最初的想法。但是由于英国没有参加那次会议，这个想法直到一战以后才进一步付诸实施。英国向所有拥有水文办公室的国家发出邀请，最后有 22 个国家参加了 1919 年伦敦会议。建立一个永久性的国际水文局的建议被提出并记录在 1919 年的会议纪要中，指定法国、英国和美国的水文管理机构负责相关章程的起草，并在此后获得其他海洋国家的支持。

1921 年 6 月 21 日进行了该局的主任和秘书的选举，委员会领导成员的第一次会议在 7 月 6 日召开，并于 7 月 25 日举行了委员会的全体会议，[①]同年 9 月该组织开始发挥积极作用。[②]牵涉到国际组织成立这个特定的法律技术层面上的问题，上述几个日期使得国际水文局成立的确切日期很难准确界定。的确，和今天很多其他国际组织不一样的是，国际水文局不是通过条约而是通过非正式协议成立的。它成立的过程可以被描述成这样：没有相关方的署名，没有相关各方的签名和承认，这完全是一个各国自愿加入的愿意负担特定义务的以非正式协议形式成立的组织。[③]实际上，该组织的章程并没有对各国批准做出明确的要求，各国政府也都是通过非正式的签署而加入该组织。[④]尽管也有很多其他国际组织是通过这样一种非正式的方式成立的，[⑤]但是，1922 年 7 月 25 日，美国在会议上建议改变这种做法，认为各方达成一个正式协议将更为适宜。[⑥]这个要求和美国在此方面的广泛实践并不一致。到 1947 年，美国加入的一半的国际组织仅仅是通过会议决议的形式参加的，另一半是通过正式批准条约或者宣言的形式加入的。[⑦]然而，国际水文局的管理局认为美国的这个提议并不适当，因为通过接受国际会议决议的形式成为该组织的成员也是一样可以接受的。[⑧]当国际水文局开始采用这种程序的时候，一些较早签署协议加入该组织的成员国表达了希望修改该组织条例的愿望，最终修订的章程也只是在 1922 年 1 月分发给成员国。

对于这个组织成立的具体时间一直都有争议，大家始终是莫衷一是。有的

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① International Hydrographic Bureau, Summary of the First Annual Report Prepared by the Bureau, *League of Nations Official Journal*, vol. 3(issue 4), p. 358.

② Anon, President Extends Benefits to Hydrographic Bureau, *Department of State Bulletin* 38(issue 991), 1958, p. 1074.

③ Eagleton, Clyde, Problems of International Legislation: International Legislation and the Drafting of Treaties, *Temple Law Quarterly*, vol. 8, 1934(a), p. 230.

④ Eagleton, Clyde, Problems of International Legislation: Signature, Ratification and Accession of Treaties, *Temple Law Quarterly*, vol. 8, 1934(b), p. 380.

⑤ Seyersted, Finn, Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon the Conventions Establishing Them? *Nordisk Tidsskrift for International Ret*, vol. 34, 1964. p. 49.

⑥ International Hydrographic Bureau, Summary of the First Annual Report Prepared by the Bureau, *League of Nations Official Journal*, vol. 3(issue 4), p. 358.

⑦ Klooz, Marie Stuart, Analytical Note on Certain International Agencies in Which the United States Participates, *American Journal of International Law*, vol. 41, 1947, p. 922.

⑧ International Hydrographic Bureau, Summary of the First Annual Report Prepared by the Bureau, *League of Nations Official Journal*, vol. 3(issue 4), p. 358.

认为该组织是在1919年发起会议举行的时候成立的,[①]有的认为该组织应该是1921年成立的,还有一部分则认为该组织是在1922年成立的,而后两部分人的理由是该组织是那个时候开始接受成员国加入并开始起草相关章程的。从国际法的角度来说,后者明显是比较好的选择,因为在那个时候特定的国家开始接受邀请同意加入该组织。国际法委员会特别观察员在评论其承认国际条约的草案时,曾明确提到国际水文局的例子。[②]厘清这些不明确性对国际联盟实现其特定的作用有极其重要的法律意义。例如:这种不确定性对于实现国际联盟的首要目标有明确的法律意义,也即是促进国际合作和协调,提升国际水文组织和国际联盟的关系。在此方面,国联盟约第24条有明确的规定。[③]

因为缺乏更准确的评估国际水文局是否已经完全成立的信息,国际联盟于1921年6月27日决定推迟将其纳入联盟领导范围内。[④]同年较晚的时候,1921年的10月2日,联盟委员会决定将国际水文局纳入其范围内进行统一领导,因为此时已有详细的信息表明国际水文局已经完全成立。[⑤]这清楚的表明,报告的动机是将其作为一个自动适用国际联盟盟约第24条的典型案例,意味着国联认为国际水文局已经完成了其创立工作。[⑥]因为1919年的伦敦会议是在7月举行的,因此它早于1920年1月10日签署的凡尔赛条约生效,而凡尔赛条约被认为是国联盟约的一部分,这表明国联认为国际水文局的建立时间是1921年,尽管其成立的确切时间不甚清楚。因此,国际水文组织的创始文件上仅仅在序言部分提到过"1921年6月"。[⑦]

这些组织在活动时保有很大程度的自治权,这与国联盟约第24条的严格规定是不相符的。可以确定的是这种情况是不可能在国联的组织内出现的,联盟

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① Kunz mentioned a "treaty" of 30 June 1919, see Kunz, Josef L., Experience and Techniques in International Administration, *Iowa Law Review*, vol. 31, 1945, p. 45; Anon stated it was created by a conference held in 1919, see Anon, Year Book of the League of Nations: International Hydrographic Bureau, *World Peace Foundation Pamphlets*, vol. 7 (issue 3～4), 1924(b), p. 244.

② Lauterpacht, H., Report of the Special Rapporteur on the Law of the Treaties, *Yearbook of the International Law Commission*, vol. 2, 1953. p. 122.

③ Covenant of the League of Nations (including Amendments adopted to December, 1924). Multilateral convention, 28 April 1919, League of Nations Treaty Series, vol. 1, 8. This treaty entered into force on 10 January 1920 (available at: http://avalon.law.yale.edu/20th_century/leagcov.asp), Art. 24.

④ General Principles to be observed in placing the International Bureaux under the Authority of the League: Report by M. Hanotaux, approved on June 27th, 1921, *League of Nations Official Journal*, vol. 2(issue 7), p. 761.

⑤ International Hydrographic Bureau, Report by M. Leon Bourgeois, and Resolution adopted by the Council on October 2nd, 1921, *League of Nations Official Journal*, vol. 2(issue 10～12), p. 1166.

⑥ *Id.*

⑦ *See supra* note 1967 Convention, first preambular paragraph.

对国际水文局的的权威仅限于道义支持和指导，并不干涉其组织内部事务或者要求其修改组织结构。联盟最多只能建议组织改善和提高其工作方式。[①]笔者对两者之间这种特别关系进行分析后得出如下结论：联盟成立的目的是不可能实现的，其只不过是一厢情愿，是根本不具有任何权威的。[②]联盟也迅速认识到，其政策只有尽可能少的干涉现有国际组织的事务才能得到遵守。[③]因此，只有包括国际水文局在内的六个组织与国联建立了正式关系，这并不让人感到奇怪。[④]对国际联盟的官方简报进行研究，我们很快就可以发现国际水文局通过这种渠道进行国家之间的信息交换，也是国际水文局章程规定的目标之一。[⑤]联盟也经常建议各组织参加由其发起的与这些组织的专业范围相关的国际会议，[⑥]比如邀请国际水文局参加浮标和海岸照明标准化会议。[⑦]国际水文局特别加强了与联盟的通讯和运输顾问委员会的合作。[⑧]

美国特殊的情况很好地说明了这种极其松散的关系。美国不是国际联盟的成员，但是这并没有妨碍其在国际水文局成立的同年加入该组织（关于该组织成立的具体时间，笔者在前文中已经做过详细阐述，被确定为 1921 年）。当美国声称要对其他包含和国际联盟合作条款的国际组织的创始文件作出保留时，这个特别的例子被其他国家作为反例援引。[⑨]如果因为国际水文局是国际联盟范围内的一个组织，就以此为口实来要求美国对国联承担义务可能是不正确的。[⑩]进

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① *See supra* note 1921 Hanotaux Report, p. 760.

② Warner, Edward P., The International Convention for Air Navigation: And the Pan American Convention for Air Navigation: A Comparative and Critical Analysis, *Air Law Review*, vol. 3, 1932, p. 291.

③ Myers, Denys P., National Subsidy of International Organs, *American Journal of International Law*, vol. 33. 1939, p. 320.

④ *Id.*, at 321.

⑤ International Hydrographic Bureau, Communications concerning Interchange of Information Between National Offices, *League of Nations Official Journal*, vol. 3 (issue 7), pp. 731～732.

⑥ Organisation for Communications and Transit: Convening of a Conference on the Unification of River Law applicable to Navigation on the Main Systems of Navigable Waterways in Continental Europe, *League of Nations Official Journal*, vol. 11 (issue 2), p. 99.

⑦ Final Act of the Conference for the Unification of Buoyage and Lighting of Coasts, *League of Nations Official Journal*, vol. 12 (issue 1), pp. 51, 55; Anon, Year Book of the League of Nations: Buoyage and Lightning of Coasts, World Peace Foundation Pamphlets 9, 1926, p. 294; Anon, Year Book of the League of Nations: Port and Coast Signals; Buoyage and Lightning of Coasts, *World Peace Foundation Pamphlets*, vol. 10, 1927, p. 311.

⑧ Anon, Year Book of the League of Nations: International Hydrographic Bureau, *World Peace Foundation Pamphlets*, vol. 8, 1925, p. 563.

⑨ *See supra* note Warner, Edward P. 1932, p. 292.

⑩ Anon, A Plan to Secure Cooperation Between the United States and Other Nations to Achieve and Preserve the Peace of the World, *International Conciliation*, vol. 10, 1924 (a), p. 63.

行这种分析时,更好的方法可能是首先强调与国际联盟的合作,然后表明美国还不时在一些委员会承担义务或者产生影响,国际水文局就是这样的例子。[①]就像常设国际法院一样,与国际联盟没有任何直接联系,国际水文局最好能被称为和国际联盟相关联的一个自治性国际组织。[②]

国际水文局与其他普遍性的国际航运组织的关系也是如此。长期以来,并没有一个全面涉及海洋事务的常设国际组织存在。[③] 1959年政府间海洋事务咨询组织成立之前,已经有人提出建立包括国际水文局为其一部分的国际海事局的想法,对海岸及其以外的水域实施自主的管辖。[④]但是,1934年国际法研究院就这个问题通过的最终决议中达成妥协,删除了上述提到的最显著的特征。[⑤]政府间海洋咨询组织和国际水文局之间的关系是平等的,[⑥]而不存在附属关系,实践中双方互相参加对方的会议就是一个很好的例证。国际水文局不仅派出代表团参加政府间海洋事务咨询组织的会议,同时还向该组织的机构内部派出代表,[⑦]此后,政府间海洋事务咨询组织于1963年决定,其秘书长必须保证与国际水文局就共同利益事项保持合作并交换信息。[⑧]

可以确定的是,截至1922年底,国际水文局有22个成员国。[⑨]为本文的目的对该组织的章程进行分析非常有趣,因为它明确规定国际水文局对于国家水文机构没有权威。各成员国完全独立,并拥有全部的自由和自主权利。[⑩]此外,它还清

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① Hubbard, Ursula P, The Cooperation of the United States with the League of Nations and with the International Labour Organization, *International Conciliation*, vol. 14 (issue 274), 1931, p. 756.

② Anon, A. S. I. L. S. International Law Citation Manual Draft Selections, A. S. I. L. S. *International Law Journal*, vol. 2, 1978, pp. 86～87.

③ Marx, Daniel Jr., International Organization of Shipping, *Yale Law Journal*, vol. 55, 1946, p. 1214.

④ Gidel, Gilbert Charles, Le droit international public de la mer: le temps de paix. Mellottée, Chateauroux, 1932, p. 29.

⑤ Okere, B. O., The Technique of International Maritime Legislation, *International and Comparative Law Quarterly*, vol. 30, 1981, p. 520.

⑥ Johnson, D. N. N., IMCO, The First Four Years (1959－1962), *International and Comparative Law* Quarterly, vol. 12, 1963. pp. 43, 55.

⑦ Silverstein, H. B., Technological Politics and Maritime Affairs: Comparative Participation in the Intergovernmental Maritime Consultative Organization, *Journal of Maritime Law and Commerce*, vol. 7, 1976, p. 385.

⑧ IHO 2010, MoUs and Agreements, Memoranda of Understanding and Cooperative Agreements (available at: http://www.iho－ohi.net/english/letters－and－documents/mou－agreements.html).

⑨ International Hydrographic Bureau, Adhesion of Egypt to the Bureau; Communications concerning Interchange of Information Between National Offices, *League of Nations Official Journal*, vol. 3 (issue 9), pp. 1041～1042; Anon, Le Bureau Hydrographique International (Monaco) et la question des cartes aéronautiques, Revue Aéronautique Internationale, vol. 1, 1931, p. 209.

⑩ 1921 IHB Statutes, As partly reproduced in Anon 1931 (*see supra* note 9), Art. 7(a).

楚表明，国际水文局无意介入国际政治问题，作为一般规则，也不会干涉成员国的水文机构之间的工作。[①]其常设机构位于摩纳哥，[②]每五年举行一次会议。除了国际水文局的成员国代表，国际联盟的代表（无投票权）、国际水文组织的执行理事会和秘书长都受邀参会。这些会议被认为是国际水文局的议案审议和立法大会。[③]国际水文局的大部分决议是以简单多数的方式通过，[④]但是接纳新成员需要现有成员国的 2/3 多数通过。[⑤]在后一种情况下，还采用了加权投票制度，投票权按照成员国在海洋问题上的重要性进行分配，而这种重要性体现为悬挂其旗帜的船舶总吨位。[⑥]所有的成员国都要按照上述的标准，交纳一定的费用。[⑦]

2、运作方法的法律分析

在对国际水文组织的前身国际水文局进行详细分析以后，本部分将主要对两者的运作模式进行比较。

（1）组织结构图

国际水文组织的机构设置和国际水文局时期没有太多的不同，但是多数机构被赋予一个全新的名称。新的组织机构仍位于摩纳哥，[⑧]仍然是通过常设管理局运行，[⑨]每五年举行一届会议，会议的名称依然是国际水文学会议。管理局依然由三人组成管理委员会，和过去一样每五年改选一次。[⑩]主席领导管理委员会的工作，并对外代表整个国际水文组织，[⑪]同时还有一些必要的行政人员和技术人员协助主席处理工作。[⑫]如果现在的修改程序取得成功，那么国际水文组织将发展成为一个“正常”的当代国际组织，主要机构包括大会、委员会和秘书处。[⑬]

在书面文件上，国际水文组织和联合国的关系与国际水文局和国际联盟的关系是截然不同的。如果说国际水文局接受国际联盟的领导是由国联盟约明确

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① *Id.*, Art. 15(b).

② *Id.*, Art. 49.

③ Anon, Sixth Hydrographic Conference, *Department of State Bulletin* 26 (issue 669), 1952, p. 636.

④ Klooz, Marie Stuart, Analytical Note on Certain International Agencies in Which the United States Participates, *American Journal of International Law*, vol. 41, 1947, p. 924.

⑤ 1921 IHB Statutes, Art. 52(b).

⑥ *See supra* note Spicer—Simson, G. 1922, p. 296.

⑦ *See supra* note Klooz 1947, p. 924

⑧ *See supra* note 1967 Convention, Art. 1.

⑨ *Id.*, Art. 4.

⑩ *Id.*

⑪ *Id.*, Art. 10.

⑫ *Id.*, Art. 9.

⑬ International Hydrographic Organization: Protocol of Amendments to the 1967 Convention, November 2005. Not yet in force (available at: http://www.iho—ohi.net/mtg_docs/misc_docs/basic_docs/ProtocolNovember.pdf), new Art. 4.

规定的,那么国际水文组织则完全是在联合国体系以外运作的。[①] 1967年11月1日,就在国际水文组织的成立文件生效几个月以后,Arvid Pardo在联合国大会上的演讲直接引发了海床委员会的成立以及第三次联合国海洋法会议的召开。国际水文组织积极介入上述两件事情,在海洋法的相关领域凸显了水文技术的重大意义以及水文组织的重要作用。水文组织明确和正在进行中的工作密切合作,并在必要情况下向相关方提供技术支持。[②]在第三次联合国海洋法会议召开期间,如前所述,政府间海洋事务咨询组织与国际水文组织的工作关系被正式承认。[③]在第三次联合国海洋法会议召开期间,对于确定大陆架外部界限的方法存在争议,[④]这个方面主要依赖国际水文组织的专业技术。在长期谈判后达成的会议最终成果,也就是1982年《联合国海洋法公约》附件二有关大陆架界限委员会的规定中提到了国际水文组织,允许大陆架界限委员会与国际水文组织之间展开必要的和富有成效的合作。[⑤]第三次联合国海洋法会议期间提出的一些有关大陆架界限委员会的建议,赋予国际水文组织更广泛的职权。加拿大就授权它和联合国教科文组织的政府间海洋学委员会一起任命大陆架界限委员会委员,[⑥]但是这个建议未获通过。

目前,国际水文组织同其他八个国际组织签署了谅解备忘录,与国际航标和灯塔管理局以及国际移动卫星组织达成了合作协议,并且自2001年起和国际海事组织一起成为联合国观察员。[⑦]因为财政和运作效率方面的问题,曾有人多次提议将众多涉及海洋利益的专门机构,包括国际水文组织在内,合并至国际海事

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① Churchill, Robin and Lowe, Vaughan, *The Law of the Sea*, Manchester University Press, Manchester, 1999, p. 415.

② Kapoor, D. C., Intervention on behalf of the IHO on 28 June 1974 during the 22nd plenary meeting of the second session of UNCLOS III, UN Doc. A/CONF. 62/SR. 22, 3 July 1974 (available at: http://untreaty. un. org/cod/diplomaticconferences/lawofthesea－1982/Vol1. html), p. 70.

③ Third United Nations Conference on the Law of the Sea: The Activities of the Inter－Governmental Maritime Consultative Organization in Relation to Shipping and Related Maritime Matters, 10 June 1974, UN Doc. A/CONF. 62/27 (available at: untreaty. un. org/cod/diplomaticconferences/lawofthesea－1982/Vol3. html), paras. 55, 126.

④ Third United Nations Conference on the Law of the Sea: Preliminary Study Illustrating Various Formulae for the Definition of the Continental Shelf, 18 April 1978, UN Doc. A/CONF. 62/C. 2/L. 98 and ADD. 1－3 (available at: http://untreaty. un. org/cod/diplomaticconferences/lawofthesea－1982/Vol9. html); Third United Nations Conference on the Law of the Sea: Study of the Implications of Preparing Large－scale Maps for the Third United Nations Conference on the Law of the Sea, 9 April 1979, UN Doc. A/CONF. 62/C. 2/L. 99 (available at: http://untreaty. un. org/cod/diplomaticconferences/lawofthesea－1982/Vol11. html).

⑤ UNCLOS, Annex II, Art. 3(2).

⑥ Oxman, Bernard H., The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978), American Journal of International Law, vol. 73, 1979, p. 20.

⑦ *See supra* note IHO 2010, MoUs and Agreements.

组织之下，但是这些建议看起来并不可行。[①]国际水文组织还和国际测量协会一起组成了海洋法顾问委员会，其成员由每个组织分别派出的四名代表和联合国海洋事务和海洋法司的一名代表组成。[②]国际水文组织的管理局还和在汉堡的国际海洋法法庭达成了行政协议，以加强未来的合作。[③]在此方面还值得提到的是，国际水文组织对其创立文件进行修改的建议案的序言段中，将其地位提升至1982年海洋法公约所规定的“主管国际组织”(competent international organization)的地位。[④]

(2)创始文件

国际水文组织与其前身国际水文局之间一个显著的不同是，前者有一个明确的国际协议存在，如果想要成为该组织的正式成员国，必须签署正式协议方可加入。[⑤]因为国际水文局是以非正式的方式成立，其很多文件很难找到，但是国际水文组织中不会出现此种情况。相反，该组织的创立文件中所附的一般规则和财务规则都明确规定，尽管这些规则并非创立文件的组成部分，[⑥]仍然要在发布时被纳入联合国条约系列中。[⑦]所有上述文件与国际水文会议的程序规则和总部协定等文件都可以在国际水文组织的官网上查到。[⑧]这些文件之间甚至有一个相互复本的倾向，因为国际水文学会议程序规则的部分条款和国际水文组织一般规则的相应条款完全一样。[⑨]这些文件之间的相互关系构成如下三个层次。如果一般规则和财务规则不是1967年公约的组成部分，则1967年公约优先适用，尽管这两个规则被纳入联合国条约体系中。此外，如果国际水文会议程序规则与1967年公约发生冲突，1967年公约及其所附的一般规则和财务规则

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① Lampe, W. H., The “New” International Maritime Organization and Its Place in Development of International Maritime Law, *Journal of Maritime Law and Commerce*, vol. 14, 1983, pp. 324～325.

② Anon, Monaco, Formation of International Hydrographic Organization (IHO) and International Association of Geodesy (IAG) Advisory Board on the Law of the Sea, *International Journal of Marine and Coastal Law*, vol. 11, 1996, p. 239.

③ International Tribunal for the Law of the Sea 2004, p. 54.

④ *See supra* note International Hydrographic Organization: Protocol of Amendments to the 1967 Convention, new second preambular paragraph.

⑤ *See supra* note 1967 Convention, Art. 18.

⑥ *Id.*, Art. 11.

⑦ *Id.*, Art 65－91 [General Regulations] and Art 81－99 [Financial Regulations].

⑧ International Hydrographic Organization 2007, pp. 3～50.

⑨ Compare for instance 2007 IHO Conference Rules of Procedure [International Hydrographic Organization: Rules of Procedure for International Hydrographic Conferences (revised version 2007; available at: http://www. iho － ohi. net/iho _ pubs/misc/M1Eversion07. pdf).], Rule 14, with 2007 IHO General Regulations, [International Hydrographic Organization: General Regulations (revised version 2007; available at: http://www. iho－ohi. net/iho_pubs/misc/M1Eversion07. pdf)], Art. 9.

优先适用。[①]

1967年公约的相关规定并没有像国际水文局那样明确限定组织的职能。它只是简单说明组织应为咨询性和纯粹技术性的性质。[②]只有在一般规则中才能找到和国际水文局章程一样详细的条款,也就是说国际水文组织只是一个咨询性的机构,对于其成员国的水文机构及其活动没有管理权限,[③]其咨询的范围也仅限于科学和技术层面,而不包含国际政策问题。[④]

当下,国际水文组织的创立文件正在经历较大幅度的修改。尚未生效的修正案将推动其从政府间组织向国家间组织转变。就像前面所讨论的,这种修正将根本改变国际水文组织的组织结构,同时加强其和1982年海洋法公约之间的联系。

从1921年末创立时的22个成员国开始,国际水文局的成员国数量逐渐增长,至1958年,成员国数量已达到37个。[⑤]国际水文组织也保持了这种发展势头,包括从1983年起暂停资格的两个成员国,现在组织的成员国数量已经达到80个。[⑥]目前,还有5个国家的成员国资格待确定。[⑦]由于该组织主要依赖成员国的水文机构,因此较少地关注陆锁国。即便如此,现有的成员数量大概也只是除陆锁国之外的国际社会的一半左右。

(3)会议成果的法律性质

国际水文学会议的作用是对各成员国政府和管理局提交的有关管理和技术层面的议案做出决议。[⑧]对一般问题的表决,会议采取与会成员国政府代表的简单多数通过,[⑨]每个成员国有一个投票权。[⑩]国际水文会议程序规则明确规定,出席会议的成员国政府代表,是指那些实际参加会议者,如果成员国政府代表没有实际参加投票当时的会议,视为没有出席会议。[⑪]如果以上一般问题是有关技术性报告的表决事项,则上述提到的简单多数应该包括至少三分之一的成员国政

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① 2007 IHO Conference Rules of Procedure, Rule 14.

② *See supra* note 1967 Convention, Art. 2.

③ *See supra* note 2007 IHO General Regulations, Art. 1.

④ *Id.*, Art. 2.

⑤ *See* e. g. Anon 1958, mentioning a membership of 37.

⑥ *See supra* note International Hydrographic Organization 2010(a), pp. 306～313.

⑦ *Id.*, p. 313.

⑧ *See supra* note 1967 Convention, Art. 5(d).

⑨ *Id.*, Art. 6(5).

⑩ *Id.*, Art. 6(5)) with each Member Government having one vote (id., Art. 6(4); as restated in 2007 IHO Conference Rules of Procedure, Rule 56.

⑪ *See supra* note 2007 IHO Conference Rules of Procedure, Rule 51.

府在内。[①]代表其他成员国投票是绝对不允许的。[②]

创始文件允许设立各委员会。[③]组织的一般规则中也提及委员会的建立。[④]但其具体的创立方式和功能则需要参照国际水文会议程序规则[⑤]以及 1962 年关于国际水文组织设立子机构和分支机构以及特定的会议间分支机构具体规定的第 11 号决议。[⑥]根据国际水文会议程序规则的相关规定，创立委员会和分支机构的决议，通常也是按照一国一票的简单多数制通过。[⑦]而关于跨会议间的特定分支机构，其条件和程序规则应该由会议、组织的财政委员会或其他分支机构来确定。[⑧]目前，仅仅水下地名分支委员会的相关规定和上述不一致。水下地名分委员会的程序规则规定，该机构应该遵循协商一致的原则，如果不能达成共识，则按照简单多数的原则票决。在出现票数相等的情况时，主席有决定性的投票权。[⑨]因为该分支委员会是在国际水文组织和国际海洋学委员会的联合框架内建立的，它所做出的决议应该交由联合指导委员会按照上述相同的投票方式作出决定。[⑩]

综上，我们可以得出结论，国际水文组织的委员会通常遵循国际水文会议的一般表决程序。委员会审议的结果，无论是报告、总结或者建议性的决议，必须进一步提交全体会议[⑪]或主管机构批准通过。[⑫]

这意味着，在实践中，仅有大约 30 个国家可以通过包含在技术决议报告之内的决定。此外，国际水文组织也意识到，某些具有重要水文利益的国家迄今还不是该组织的成员，因此其 2009 年的决议中，表达了和这些国家加强合作以进一步推动实现组织的目标的观点。[⑬]

尽管 1967 年公约及其附件和国际水文会议的程序规则都没有对这些决议的法律性质作出说明，根据国际水文组织的谘商性质、组织发展的历史以及以上已经阐明的其对成员国政府的水文机构没有管辖权的事实等因素判断，这些决

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① *See supra* note 1967 Convention, Art. 6(5); as restated in 2007 IHO Conference Rules of Procedure, Rule 52.

② *See supra* note 2007 IHO General Regulations, Art. 5; as restated in 2007 IHO Conference Rules of Procedure, Rule 52.

③ *See supra* note 1967 Convention, Art. 6(7).

④ *See supra* note 2007 IHO General Regulations, Art. 8(b).

⑤ *See supra* note 2007 IHO Conference Rules of Procedure, Rules 21－26.

⑥ *See supra* note International Hydrographic Organization 2010(b), 2.

⑦ *See supra* note 2007 IHO Conference Rules of Procedure, Rule 25(b).

⑧ *See supra* note International Hydrographic Organization 2010(b), 2.

⑨ *See supra* note International Hydrographic Organization (s. d.), Rule 2. 9.

⑩ International Hydrographic Organization/Intergovernmental Oceanographic Commission 2008, Rule 6.

⑪ *See supra* note 2007 IHO Conference Rules of Procedure, Rule 26.

⑫ *See supra* note International Hydrographic Organization (s. d.), Rule 2. 11.

⑬ *See supra* note International Hydrographic Organization 2010(b), 6.

议对于成员国的国内水文机构只具有建议性质。国际水文局1932年的决议没有作出相关报告,[①]报告本身的序言部分也没有对这一点做出任何说明。[②]就像所有的其他国际组织一样,对于诸如财政预算之类的内部事务,会议可以做出具有法律约束力的决议。[③]但是,国际水文组织的建议不太可能在其组织之外产生法律效果,尽管不完全排除其可能性。[④]

综上所述,我们可以得出如下结论:国际水文组织的相关决议对于其成员国来说不具备法律上的拘束力,但是在整个协调过程中,这些决议可能对各国实践产生重大的影响。或者,就像两个美国代表在国际水文局1947年会议上所述:

"由大量的日常工作事项构成的技术性建议,对各成员国不具备强制性的拘束力,但是,经验表明,各国会将这些建议付诸实践,并在海图和书籍的统一方面保持高度一致,因此在很多情况下,都服务了全世界的海洋工作者。"[⑤]

3、通过的实体规范

国际水文组织的一位前任主任已经详细分析了该组织在地理名称方面的工作。[⑥]根据其研究,1919年伦敦水文学会议上,由于要确定闭海的边界范围,国际水文局已经开始对地理名称方面的工作表现出兴趣。[⑦]在1929年举行的第一届国际水文学会议上,[⑧]海洋边界被列入了议事日程,并于同年出版了名为"海洋的边界"的文件。该文件自公布以来经历了三次修改,最近的一次修改是1953年。[⑨]1953年修改过的文件在序言中明确声称,文件中所述边界没有任何政治方面的含义。[⑩]

国际水文局涉及的第二个领域是将其他文字的地图附上拉丁文的地图副本。[⑪]第三次国际水文学会议就此问题通过如下决议:

"地名

(a)海图或者航海文件可以使用原始地名,但是无论如何都要在使用的原始地名的后面插入括号,将拉丁语地名置于其中。

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① *Id.*, at 60.
② *Id.*, ii.
③ *See supra* note Sands and Klein 2009, pp. 284～285.
④ *Id.*, pp. 291～297.
⑤ Glover, Robert O. and Colbert, Leo O., Fifth International Hydrographic Conference, *Department of State Bulletin* 16(issue 416), 1947, p. 1204.
⑥ Kerr, Adam J., The International Hydrographic Organization and Its Involvement With Geographical Place Names, *International Hydrographic Review*, vol. 65, 1998, pp. 153～158.
⑦ *Id.*, at 154.
⑧ *See* surpra note Anon 1931, p. 213.
⑨ International Hydrographic Bureau 1953.
⑩ *Id.*, at 2.
⑪ *See supra* note Kerr 1998, p. 154.

(b)标明地名的文字及其大小,应该尽量能够区分航向。为此,各国应该自行决定需要或不需要对地图标识进行修改。"①

国际水文局感兴趣的第三个领域是海水下地物的命名问题。它通过 1924 年的通函表明了对此领域的兴趣,并通过一定方式继续从事 1899 年在柏林召开的国际地理大会发起的此项工作。②

国际水文组织围绕以上三个领域开展工作,现在已经通过了很多有关这些问题的决议。首先是决议 A4.1,授权各国以统一的政策处理地理命名(1919 生效,1974 年进行最近一次修改)。③这个决议中确立的最重要的准则有:首先,各沿海国有权对其海岸的地物命名;其次,对使用罗马字母的别国海岸地物应该用罗马字母进行命名,同时要与该海岸主权国所用名称表现出高度一致;再次,和上述规则相同,但是如果主权国是不使用罗马字母的国家,需要使用联合国批准的文字转换方法;第四,对外国海岸的地物,应该使用主权国所使用的复杂地理名称的通用名称;最后,各国可以根据其一般用途在其海图上对海洋地物进行命名,但是要能够显示此名称在国际社会也有使用。④在联合国国际通用地名标准化会议通过一项国际公约前,这些规则就能够适用。

更为重要的是名为国际地理名称标准化的 A4.2 决议(1972 年通过,1974 年最近一次修改)。⑤这个决议的渊源可以追溯至 1967 年召开的第一次联合国国际地名标准化会议。⑥本次会议通过的"处理单一主权外地物名称的办法"的 8 号决议指出,尽管对此种地物常有两个或两个以上的命名,但是较好的解决办法是仅仅适用一个通用名称,并建议有关国家就此达成协议。根据上述同样的推理,对海洋地物和水下地物,会议更加明确的建议各方加强同国际水文组织管理局的联系,强化管理局的作用,以实现标准化工作。⑦决议 A4.2 还重申同联合国地名专家组加强合作的重要性。对本研究至为重要的是该决议的最后一段:

"建议共有同一地物(如海湾、海峡、海道、群岛等)但使用不同名称的有关国家尽力达成协议,为该地物确定单一名称。如果各国官方语言不同,难以就此达成协议,建议各种语言的名称都应该被接受用于海图和其他出版物中,除非由于技术原因使这种方法不能在小比例尺地图上得以实现。"⑧

最后我们认为有必要讨论的是名为"水下地物命名办法"的决议 A4.3(1987

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① Anon, International Hydrographic Bureau, 3rd International Hydrographic Conference, Revue Aéronautique Internationale, vol. 2, 1932, p. 186.

② *See supra* note Kerr 1998, p. 154.

③ *See supra* note International Hydrographic Organization 2010(b), pp. 25～26.

④ *Id.*

⑤ *See supra* note International Hydrographic Organization 2010(b), pp. 26～27.

⑥ *See supra* note Kerr 1998, p. 155.

⑦ United Nations Economic and Social Council, Standardization of Geographical Names. Resolution 1314 (XLIV), 31 May 1968, p. 12.

⑧ *See supra* note International Hydrographic Organization 2010(b), p. 27.

年通过,1991年最近一次修改)。[①]国际水文局和后来的国际水文组织在与联合国教科文组织的政府间海洋学委员会紧密合作统一海洋等深线地图的工作过程中,水下地物的命名工作变得重要起来。为了达到这个目的,建立了水下地名分支委员会。首先应该注意的是,该分支委员会的工作不允许对政治敏感的水下地物的命名建议进行考量。[②]水下地物名称标准化指南中最重要的原则就是,国际社会在此方面的工作被严格限制在沿海国12海里领海之外的海域。[③]这是非常值得注意的,因为国际水文组织和政府间海洋学委员会应该能够对其进行清晰界定。实际上,科尔在其1998年出版的著作中就提到了这个问题,他使用的是"管辖权"一词,这样专属经济区和大陆架是否应该包括在内就不甚清楚。[④]现在,这种不确定性已经被澄清,因为上述的指南已经使用了"主权"一词。指南I. E.的内容仍然没有改变,其规定如下:

> 当发生冲突时,相关人员和机构应当解决问题。如果同一地物有两个名称,通常应该接受较早使用的那个名称。如果一个名称在两个不同的地物上使用,首先使用者应该保留此名称。[⑤]

对于以上规定,科尔认为:看起来指南不是强行性的规定,仍然无法提供权威性的解决办法。[⑥]

4、小结

基于以上分析,我们可以得出以下结论:对于沿海国领海以外的海洋地物命名而产生的争议,如果各国在命名问题上不能达成一致意见,无论是国际水文局还是后来的国际水文组织,都无权解决这项争议。如果相关方不致力于解决争议,则这个问题就不再限于技术层面,而是变成了国际政策层面的问题了。国际水文局章程或者国际水文组织一般规定中都有特别的条款,明确排除了这些组织对于后一个问题的管辖权。此外,对于水下地物命名中可能涉及政治敏感的问题,也被水下地名分支委员会的程序规则排除。由于成员国数量不大,很多海洋大国也不是该组织的成员,一些地区在该组织中也还没有代表,比如说非洲。所以,国际水文组织认为在政治敏感的问题上保持低调,将其交由联合国解决的态度较为明智。在联合国通过国际协议确定国际公认的名称以前,不要期待国际水文组织在处理相关争议方面发挥更大的作用。尽管国际水文组织的创设文件中包含有意义深远的强制性仲裁条款,仲裁员由国际法院院长单方指派,[⑦]但

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① *Id.*

② *See supra* note International Hydrographic Organization (s. d.), Rule 2.10.

③ *See supra* note International Hydrographic Organization/Intergovernmental Oceanographic Commission 2008(b), 2－1

④ *See supra* note Kerr 1998, p. 156.

⑤ *See supra* note International Hydrographic Organization/Intergovernmental Oceanographic Commission 2008(b), 2－1.

⑥ *See supra* note Kerr 1998, p. 156.

⑦ *See supra* note 1967 Convention, Art. 17.

是这种仲裁程序是不能适用于解决国际政治敏感事件，因为相关条约开始就已经将这些事件排除在其适用范围外。

四、结　论

通过对许多一般法律原则以及活跃在海洋地物命名领域的国际组织特别规则的分析，我们阐明了海洋地物命名是受国际法规制的。同时，我们也强调了各国国内法对此领域的限制。

从一般国际法的层面来讲，各沿海国有权自行决定其领海基线外延 12 海里范围内的海洋地物的命名事宜。然而，这个范围之外，在海洋的命名权问题上存在角力。当产生争议的海洋地物非常重要时，角力的结果可能是个僵局。由于各国主权平等，如果不能获得较多的国际支持，对海洋地物进行单方面的命名又不太能够实现。由于能够适用于专属经济区和大陆架的相关国际法规则不甚明确，已经给联合国地名专家组和国际水文组织的工作带来了很多困难。在这个方面，厘清主权和主权性权利的概念非常重要，以上两个组织也在努力进行这方面的工作。

目前，虽然多方面都在进行海洋地物名称的标准化工作，但是国际社会还不能解决以上难题。更重要的是，各个国际组织普遍面临授权不足的问题。首先，如果得不到各成员国的授权，国际组织的工作成果不可能有拘束力。其次，为了防止这些国际组织介入政治敏感事件，其活动范围也被严格限制。第三，诸如国际水文组织之类的国际机构代表性不足，即使最终其得到了成员国的授权，其决议也仅限于对其成员国有拘束力。国际社会的其他成员仍然可以排斥其决议的效力（*res inter alios acta*）和拘束力。

综上所述，在解决海洋地物命名争端的问题上，现有法律的规定明显不足，难以发挥令人满意和决定性的作用。在此领域，如果不能建立一个具有相应决策能力的代表性国际机构，未来统一海洋地物名称并在此基础上促进国际社会稳定的努力仍将最终受制于权力政治的范畴。

（中译：卢建川　　责任编辑：邓云成　冯程程）

The Contribution of Trinidad and Tobago in the Development of the Regime of the Continental Shelf

Anthony A. Lucky*

This paper examines the development of the Regime of the Continental Shelf from a historical perspective. It considers the beginning of the legal aspects of the Regime emanating from the Gulf of Paria Treaty in 1942. The paper then assesses the development and contribution to the regime by Trinidad and Tobago, a country which recognizes that the commercial production of oil and gas is inevitably subject to laws and regulations, nationally and internationally, because of the value and effect of this resource on the economy of any oil producing country; especially where a very large percentage of oil and gas is extracted from its continental shelf.

Ⅰ. Introduction

Rapid global development of the Regime of the Continental Shelf may not have been easily envisaged in the 1930s when the exploration for oil and gas had extended to the sub-marine areas of some coastal states. The literature and articles on legal aspects of the regime are voluminous, as national and international jurists continue to examine and consider new developments in science and technology as they relate to global submarine exploitation.

In examining the contribution of Trinidad and Tobago in the development of the regime of the Continental Shelf, a historical perspective of the twin island Republic is necessary. Trinidad is the southern-most island in the Caribbean archipelago. The Caribbean Sea lies to the north of Trinidad and Tobago, the Atlantic Ocean to the east, the Columbus channel and the Venezuelan mainland to the south and the Gulf of Puria on the western coast of Trinidad. Occupying an area of approximately 1,981 square miles (5,131 sq. km.) and a population of 1,229,953 in 2009, Trinidad and Tobago is a large producer of oil and natural gas.

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Prior to 1962, Trinidad and Tobago was a colony of Great Britain, achieving its independence in August 1962 and Republican status in September 1976. Although exploration and exploitation takes place in the Caribbean Sea north of Trinidad; the major oil finds are located on the island's south eastern coast in the Atlantic Ocean on its continental shelf.

The period from 1942 onwards has shown both rapid and progressive development of the law of the Sea. I have chosen 1942 because the Gulf of Paria Treaty was concluded during that year, in which the United Kindom and Venezuela divided between themselves the submarine areas of the Gulf of Paria. It is noteworthy that the geological and scientific exploration of the Gulf of Paria began in 1935, because in that year reports revealed that there was a vast oilfield in the submarine areas of the Gulf of Paria. ① The technocrats recommended that a treaty should be concluded with Venezuela to ensure that the submarine area where the potential field was found would be within the boundary of Trinidad. It can be concluded that specific instructions from the geologists, scientific experts and negotiators were given to the official draftsmen of the Treaty to consider the anticipated results of the scientific findings as they prepared the document. After close examination of Articles 6, 7 and 8 of the Treaty, I have no doubt that the beginning of the law of the sea as it relates to the continental shelf is inextricably linked to the commercial production of oil and gas, since no such law had come into existence prior to the Gulf of Paria Treaty. ②

The Gulf of Paria Treaty was the first agreement of its kind and was the only bilateral treaty with respect to the sea which sought to regularize the legal position regarding fishing and other related rights between Trinidad and Tobago and Venezuela *inter se*. It was concluded prior to the Truman Proclamation of 1945 in which the Continental Shelf was defined. It will be argued in this paper that the Gulf of Paria Treaty created an impetus in the development of the regime of the Continental Shelf and contained some features that have become part of that regime. ③

The Treaty was intended to govern the "submarine areas" in the Gulf of Paria between Trinidad and Venezuela because at that time there was no clear definition of the Continental Shelf. The Treaty has since been superseded by the Maritime Boundaries Agreement which was concluded by the two states in 1990. ④

The Treaty and the Annexation Orders that followed were unique in that

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① Suter H. M., *The General and Economic Geology of Trinidad B. W.*, 2nd ed., London: H. M. S. O., 1960, pp. 1～4.

② Discussions with Joyce C. Lynch, Senior Legal Advisor Energy, Policy and Planning Ministry of the Attorney General, Trinidad and Tobago.

③ P. Chandrasekhara Rao, *The New Laws of Maritime Zones*, New Delhi: Milind Publications Private Limited, pp. 93～94.

④ Maritime Boundaries Agreement: Treaty between Trinidad and Tobago and Venezuela on the delimitation of Marine and Submarine Areas (signed 18 April 1990, EIF 1991).

the divided areas were annexed to and formed part of each others' territory. In fact, at that time Trinidad and Tobago was a colony of the United Kingdom and Great Britain and both the United Kingdom and Venezuela adhered to the then traditional territorial sea limit of three miles. It follows that a substantial part of the waters of the Gulf of Paria were then considered High Seas.

Ⅱ. Historical Background to the Gulf of Paria Treaty

It is necessary to reexamine the early development in order to fully appreciate the current state of the law of the sea in this age of modernity.

What was taking place in the early 1930s is, in a small way, similar to what is taking place today in the exploration and exploitation of the Continental Shelf. As technology advances the law has to keep abreast of this rapid advancement. It must be noted however that the development of the Law of the Sea in its application to the continental shelf has always been clear and consistent as it strives to keep up with the rapid advancement in science and technology.

In the early 1930s geological surveys by a British contingent showed that there were rich oil—bearing deposits in the sea bed and sub—soil of the Gulf of Paria, the southwest coast of Trinidad between Trinidad and Venezuela. Further studies revealed that these deposits were commercially viable. ① At that time technology was not what it is at present. Even so, the geologists and marine engineers envisaged that in the years to come exploration and exploitation would advance into the deeper parts of the ocean (parts of which are now defined as the Continental Shelf).

Negotiations between the United Kingdom and Venezuela began on 29 August 1936. It was agreed that the two countries would conclude an agreement after which each government would take parallel action to divide up as national territory between them the sea bed of the Gulf of Paria. ②

Exploitation of oil began in 1955 with drilling from the southwestern shore in Point Fortin and La Brea Trinidad. ③ The first oil piped from Soldado came ashore in 1957. But the first marine oil is credited to Antilles Petroleum Com-

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① Report of Geologist Hans Kluger—Report File for 1935. Ministry of Energy, Port of Spain Trinidad.

② Summary of Negotiations with the Venezuela Government for partition of the submarine areas of the Gulf of Paria; Public Records Office (P. R. O. London—FO 371/22850.) At that time partition of the sea—bed was without precedent.

③ 1955—Production from Soldado oilfield at Trinmar initiated. (See official records of the Ministry of Petroleum and Mines, now the Ministry of Energy. Further the records at H. M. S. O. were not available at the time of writing the books mentioned, i. e. The early 1960s.).

pany, which found oil offshore in 1952. ①

Ⅲ. Exploration and Exploitation in the Submarine Areas (The Continental Shelf) of Trinidad and Tobago

Drilling for oil began in Trinidad and Tobago around 1857 in the vicinity of Pitch Lake on land and exploitation had its beginnings in 1866 when Walter Darwent drilled his first successful oil well (Aripo). Exploitation that is, full commercial oil production, began on land in the vicinity of Pitch Lake (La Brea) in 1908 and forty-six years later marine drilling for oil began in the Soldado Field by Trinidad Northern Areas Ltd (Trinmar). In 1955 production from Soldado oilfield at Trinmar was initiated. T. N. A., a joint venture between Trinidad Leaseholds Limited, (Texaco—now Petrotrin) and United British Oilfields Trinidad Limited (later Shell, then Trinto, then Petrotrin, and now D'Arcy Exploration Company) later T. P. D., B. P. now Trinidad Tesoro bought a one third interest in 1939 and was granted a submarine license covering 231,000 acres in the Gulf of Paria in July 1952. Two years later T. N. A established its first high-seas drilling platform and commenced drilling of the well which would discover the Soldado Main Field. Full scale of development of this field did not get underway until late 1957; because during World War II exploration came to an almost complete halt. In the years that followed, major oil reserves were discovered in the Gulf of Paria. In 1946, after the end of the War, a crew began geophysical surveys and assisted in the exploration of new reserves in the Gulf of Paria. In 1947 a gravity crew began to carry out surveys over land holdings of Trinidad Northern Areas (TNA) and more importantly, over the unexplored marine areas in the Gulf of Paria. ②

Prior to the War, applications for leases had been submitted to the Government but these leases could not be formally granted until the conclusion of the Gulf of Paria Treaty in 1942; and appropriate legislation, related to marine operations, had been enacted by the Trinidad and Tobago Government. ③

Oil companies became concerned over the remaining production life of the island's reserves; which led to more exploration in the Gulf of Paria and surrounding marine areas. But it was not until 1954 that the first truly offshore marine exploration well was spudded. This well was TNA's High Seas No. 1. It was later renamed Soldado 1. Soldado 1 was a successful discovery that led to the giant Soldado oilfield, which would later produce more than one third of Trinidad and

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① George E. Higgins, *The History of Trinidad Oil*, Trinidad: Trinidad Express Newspapers Limited, Port of Spain, 1996, p. 124.

② TNA was a consortium of three companies: Trinidad Leaseholds, United British Oilfields and British Petroleum.

③ Higgins cit. p. 124.

Tobago's oil production during its peak development in the 1960s. ①

Early studies by the oil industry were commissioned. The first report was made by W. J. Levy, an American economist. ② The report made the following recommendations:

(*a*) *A consolidation, modernization and expansion of the present ordinances and regulations that related to the drilling, production and disposition of oil and gas, and,*

(*b*) *The establishment of a separate regulatory authority which would be directly responsible to the administrative council of Government, and charged exclusively with the administration of revised legislation.*

It is interesting to note that as a result Trinidad and Tobago was ensuring that it had an update of the practices in the various operations of the petroleum industry in other countries. The legislation that followed was in conformity with international treaties and law at that time. ③

Ⅳ. The Continental Shelf

I have read, analyzed and taken note of the opinions of renowned writers and jurists on the influence of the Gulf of Paria Treaty with respect to the development of the Regime of the Continental Shelf. For example: Zdenek J. Slouka, F. A. Vallat, and Andrassy Slouka have opined that the real impetus in the said development can be derived from the Truman Proclamation of 1945. I respectfully disagree. Three years before the Truman Proclamation, the Gulf of Paria Treaty had already been concluded.

The term *Continental Shelf* does not appear in the Treaty of 1942. The legal draftsmen of this historic document did not consider the submarine areas of the Gulf with the same legal interpretation as such areas are given today (the Territorial Sea is currently 12 nautical miles based on Article 3 of the United Nations Convention on the Law of the Sea). In fact, based on this definition there is apparently no area of high seas between the States in the Gulf of Paria.

In the case of Petroleum Development Ltd. v. Sheik of Abu Dhabi 1951 I. L. R. p144 at p. 152. Lord Asquith said:

In 1939 *neither contracting party had ever heard of the continental shelf which as a legal doctrine did not exist. No thought of it entered their heads. None such entered that of the most sophisticated jurist.*

Bearing the above in mind, it seems to me that the Contracting Parties of the Treaty, through their draftsmen, defined what later became known as the Continental Shelf as "submarine areas".

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① *The Trinidad Oil Economy or Levy Report*, Library Ministry of Energy Port of Spain, Trinidad and Tobago.

② D. R. Craig, *The Craig Report*, Library Records, Ministry of Energy Trinidad and Tobago.

③ *See* the Petroleum Act of Trinidad and Tobago Chapter 62:01 and previous legislation.

In the North Sea Continental Shelf Cases of 1969, Judge Ammoun in his separate opinion stated that: *Up to the eve of the* 1958 *conference, it could be claimed that the doctrine of the continental shelf was still not more than a custom in the process of formation.*

I am of the view that the "*custom in the process of formation*" was enshrined in the Treaty. This bilateral agreement, the Gulf of Paria Treaty of 1942, between Trinidad and Tobago and Venezuela triggered a process which could have led to an innovative legal framework for future agreements between States.

The above comments fortify my view that the Gulf of Paria Treaty of 1942 could be deemed the impetus from which the modern concept of the continental shelf emerged.

The principles set out therein with respect to navigation and protection of the environment have been specified, and an orderly process for exploration has been followed. For example, Article 5 of the said Treaty ensures that the status of islands, islets or rocks above the surface of the sea together with the territorial sea is maintained. Article 7 and 8 are a rather modern concept for that time in that they provide a legal obligation to prevent pollution of each others territorial waters during exploitation of their submarine areas. The articles are set out as follows:

Article 5

This Treaty refers solely to the submarine areas of the Gulf of Paria, and nothing herein shall beheld to affect in any way the status of the islands, islets or rocks above the surface of the sea together with the territorial waters thereof.

Article 6

Nothing in this treaty shall be held to affect in any way the status of the waters of the Gulf of Paria or any rights or passage or navigation on the surface of the seas outside the territorial waters of the Contracting Parties. In particular passage or navigation shall not be closed or be impeded by any works or installations which may be erected, which shall be of such a nature and shall be so constructed, placed, marked, buoyed and lighted, as not to constitute a danger or obstruction to shipping.

Article 7

Each of the High Contracting parties shall take all practical measures to prevent the exploitation of any submarine areas claimed or occupied by him on the Gulf from causing the pollution of the territorial waters of the other by oil, mud or any other fluid or substance liable to contaminate the navigable waters of the foreshore and shall concert with the other to make the said similarity of the prime objectives measures effective as possible.

Article 8

Each of the Contracting parties shall cause to be inserted in any concession

which may be granted for the exploration of submarine areas in the Gulf of Paria stimulations for securing the effective observance of the two preceding Articles, including a requirement for the use by the concessionaire of modern equipment, and shall cause the operation of any such concession to be supervised in order to ensure that the provisions of the present Treaty are complied with.

Article 9

All differences between the High Contracting Parties relating to the interpretation or execution of this Treaty shall be settled by peaceful means as are recognized by International Law.

I am of the view that when the comparative articles with respect to the Continental Shelf in the 1958 Convention on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea are examined there is precedent for the definition of the Continental Shelf and the United Nations Convention on the Law of the Sea provision for protection from pollution of the waters, rights of passage and navigation. The draftsmen of the Gulf of Paria Treaty and Annexation Orders demonstrated considerable foresight in respect of the current law of the Sea. They prescribed a formula for the drafting of future treaties, thereby providing the Treaty with the impetus that I mentioned above in the development of the regime of the continental shelf.

It is only fair to mention that some writers have argued that the Gulf of Paria Treaty does not constitute the beginning from which the modern continental shelf doctrine could have emerged. I do not agree. The proponents of this view contend that the Truman Proclamation of 1945 formed the real impetus for the development of the doctrine of the Continental Shelf (See the judgment of the ICJ in the 1969 North Sea Continental Shelf Cases). Other international jurists contend that the treaty could be a useful guide for the division of a common Continental Shelf by adjacent States and acquisition of same as national territory. However this would not be possible today because most, if not all, littoral States have signed, ratified, succeeded or acceded to the United Nations Convention on the Law of the Sea in which the Continental Shelf is defined.

It should be noted that the Gulf of Paria Treaty was concluded during the Second World War. The Pointe-a-Pierre refinery in Trinidad was at that time and for a period afterwards deemed to be the largest refinery in the then British Empire. Crude oil was first supplied to the refinery from the land, and thereafter from the Soldado oil field in the Gulf of Paria. Laws were then passed to provide for an orderly process and to protect the marine environment.

A. Laws (1955—Present) Prior to the 1958 Conventions on the Law of the Sea

It would be convenient to set out the laws which are in the Laws of Trinidad and Tobago from 1955 to the present because it is accepted that the commercial production of oil and gas is inevitably subject to complex laws and reg-

ulations because of the value and effect this resource has on the economy of any producing country. In light of exploration and exploitation in the past and continuing at present the following Acts in local legislation as they relate to International Treaties are relevant.

It should be noted that, like other States, Trinidad and Tobago was adhering to International Agreements and keeping pace in its laws with the continuing and rapid development of scientific and technological advancement in the oil and natural gas industries. The following Laws set out below are consistent with the recognition and implementation of International Treaties and Conventions to which Trinidad and Tobago is a party:

Oil pollution of Territorial Waters Act No. 25 of 1951 Chap. 37:03 Laws of Trinidad and Tobago.

An Act to make provisions against the discharge or escape of oil into the waters of Trinidad and Tobago.

Territorial Sea Act No. 38 of 1969

An Act to make provisions with respect to the Territorial Sea of Trinidad and Tobago, the territorial sea was established at 12 nautical miles.

Continental Shelf Act No. 43 of 1969.

An Act to make provisions as to the exploitation and exploration of the Continental Shelf; to enable effect to be given to certain provisions of Convention of the High Seas ratified in Geneva on 29th April 1958; and for matters incidental thereto. In 1986 the above Act was amended so that in would be in conformity with the 1982 United Nations Convention of the Law of the Sea.

The Continental Shelf Act of Trinidad and Tobago Chap 1:52 Laws of Trinidad and Tobago.

An Act to make provisions as to the exploration and exploitation of the Continental Shelf; to enable effect to be given to certain provisions of the Conventions on the High Seas done in Geneva on 29th April 1958; and for matters connected for those purposes. Since then the United Nations Convention on the Law of the Sea has come into force. Part Ⅵ deals with the Continental Shelf and Article 76 sets out the definition of the Continental Shelf and matters pertaining thereto. It was necessary to amend the Act so that the definition of the Continental Shelf will be consistent with the Convention. This was done by Act 23 of 1986. The definition is now consistent with the definition in the Convention.

The Petroleum Act and the Regulations Chapter 62:01 Laws of Trinidad and Tobago.

This Act consolidates and amends the law relating to petroleum so as to make better provision for the exploration for, and the development and production of, petroleum, and for matters consequential or incidental thereto.

B. After the Signing and Ratification of the United Nations Convention on the Law of the Sea (UNCLOS)

Trinidad and Tobago signed the Convention in December 1982, and in A-

pril 1986 Trinidad and Tobago ratified the Convention. In October 1994 Trinidad and Tobago signed Part XI of UNCLOS, and in July 1995 gave notice that it would be bound by Part XI. The following laws are consistent with the relevant articles of UNCLOS:

Marine Areas (Preservation and Enhancement) Act Chap. 37:02 Laws of Trinidad and Tobago

Sec. 3: Marine Areas (Restricted Area) Order (1973)

Amended by 37 of 1996

Sec. 6: Marine Areas (Preservation etc.) Regulations (1974)

Archipelagic Waters and Exclusive Economic Zone Act Chap. 51:06 Laws of Trinidad and Tobago.

An act to declare the Republic of Trinidad and Tobago an archipelagic State, and to define the new areas of marine space appertaining to Trinidad and Tobago in the exclusive economic zone, and in the archipelagic waters, and the nature and extent of the jurisdiction to be exercised by it in each of these areas and to make provision for matters connected therewith in accordance with the United Nations Convention on the Law of the Sea, done in Montego Bay, Jamaica on 10th December 1982.

Sec. 6: specifies the Archipelagic Baseline of Trinidad & Tobago Order 1988 Notice No. 206 of 1988

Amendment 1989(of Printing Error) and Legal Notice No. 77 of 1989

Trinidad and Tobago is also a party to the following Conventions: IMO Convention 48; IMO amendments; IMO amendments 93; SOLAS Convention 74; SOLAS Protocol 78; SOLAS Protocol 88; LOAD LINES Convention 66; LOAD LINES Protocol 88; Tonnage Convention 69; COLREG Convention 72; SAR Convention 79; Facilitation Convention 65; MARPOL 73/78; London Convention 72; London Convention Protocol 96; Intervention Convention 69; CLC Protocol 92; Fund Protocol 92; LLMC Protocol 96; SUA Convention 88; SUA Protocol 881; OPRC Convention 90.

C. Cartagena Convention and Its Protocols

The Cartagena Convention is a comprehensive umbrella agreement for the protection and development of the marine environment. This regional environmental convention provides the legal framework for cooperative regional and national environmental protection. It also provides the legal framework for cooperative regional and national actions in the WCR. The Convention is supplemented by the Oil Spills Protocol, the SPAW Protocol and the LBS Protocol. The Shipping (Marine Pollution) Bill includes provisions of The Cartagena Convention (See Part V of the Bill—Prevention of Pollution from Ships).

D. Territorial Waters Act (1970) Deals with the Discharge of Oil in Territorial Waters

It is envisaged and proposed that The Oil Pollution of Territorial Waters

Act, currently in force, will be replaced and superseded by a comprehensive Act, which is the Shipping (Marine Pollution) Bill.[①] The Bill provides for powers and jurisdiction in relation to pollution of the seas from ships, intervention on the high seas in cases of oil pollution, dumping of waste at sea, prevention of pollution from ships, preparedness for and response to oil pollution emergencies, liability and compensation for pollution damage and matters incidental thereto. The Bill recognizes, enhances and implements the provisions of relevant international conventions.

When the Bill is passed, it will incorporate the relevant provisions of the 1982 Law of the Sea Convention, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties; the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Catagena de Indias 1983)(Part Ⅴ, section 39); the 1996 Protocol of the London Convention; the International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol fo 1978 relating thereto and Protocol and Annexes thereto (MARPOL) and Solas 1974; the International Convention for the Safety of Life at Sea, 1974, including its Protocol of 1978 and all amendments applicable to Trinidad and Tobago.

Ⅴ. Conclusion

International Law of the Sea has come of age since the conclusion of the Gulf of Paria Treaty between Trinidad and Tobago and Venezuela in 1942. This was a noticeable landmark in the development of the Regime of the Continental Shelf. The Law of the Sea has kept abreast of modern technology and most of the principles have been codified in the United Nations Convention on the Law of the Sea in 1982 and the Protocols and Conventions that have followed.

Through active participation during the preparation of the United Nations Convention on the Law of the Sea, delegates from Trinidad and Tobago have made positive contributions in the drafting of the Convention. International jurists of Trinidad and Tobago continue to make valid contributions to the development of the Regime at conferences and symposiums.

In "coming of age" in this age of technological advancement in which there is access to the deep seabed, the law has to provide the necessary guidelines and controls for orderly exploration and exploitation. It is my view that since the very beginning the law has provided the necessary safeguards and will continue to keep abreast of technological advancement.

(Editors: Stephen Pire; WANG Danwei; LIU Yanting)

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① The Bill was being considered by a Joint Select Committee of parliament when it lapsed because parliament was prorogued and recently dissolved (elections will take place within three months from 8th April 2010, the date of prorogation).

特立尼达和多巴哥对大陆架机制发展的贡献

Anthony A. Lucky*

内容摘要:本文从历史的角度审视了大陆架机制的发展过程,关注到了从《1942年帕利亚湾条约》中引发出来的有关大陆架机制的法律问题。本文随后评估了特立尼达和多巴哥对大陆架机制发展所作的贡献。特立尼达和多巴哥意识到在国内和国际社会,尤其是在该类资源大部分取自大陆架的国家。因石油和天然气这类商品的价值对产油国经济带来的影响,因而不可避免地需要遵守复杂的法律法规。

一、引　　言

二十世纪三十年代,当对石油和天然气的探测已延伸至一些沿海国的海底区域时,人们或许很难设想大陆架机制在全球的快速发展。随着国内外法学家继续审视思考全球海底开发中的科技新动向,大量有关该机制法律问题的文章及著述便涌现出来了。

在论及特立尼达和多巴哥国对大陆架机制发展的贡献时,我们不得不从这个连体岛屿共和国的历史来审视。特立尼达是加勒比群岛最南端的岛屿。加勒比海位于特立尼达和多巴哥国的北边,东边是大西洋,南边是哥伦布海峡和委内瑞拉,特立尼达西海岸则是帕利亚湾。特立尼达和多巴哥国国土面积约1,981平方英里(5,131平方公里),2009年人口为1,229,953,是石油和天然气的产量大国。

1962年以前,特立尼达和多巴哥是大英帝国的殖民地,其1962年8月获得独立,1976年9月建立共和制。虽然对石油的勘探开发是在特立尼达岛北部的加勒比海地区,但主要的石油存储地却是在位于大西洋的该岛东南沿海的大陆

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* 国际海洋法法庭法官(2003年9月当选);2003—2008年任海洋环境争端分庭庭长。

架中。

1942 年是开启海洋法发展历程的里程碑，或者至少可以说，自该时期后，海洋法获得了快速持续的发展。我之所以选择 1942 年这个时间点是因为就在这一年，英国和委内瑞拉就帕利亚湾海底区域的划分得以解决并就此签订了《帕利亚湾条约》。值得注意的是，对帕利亚湾地质和科学上的勘探始于 1935 年，因为在那一年的报告中披露出了在帕利亚湾的海底区域有一大片油田。[①] 专家建议应和委内瑞拉签订一个协议来确保帕利亚湾海底区域即探明油田所在地应位于特立尼达境内。可以料想，那些地质学家、科学家和谈判专家在起草条约时给予了官方起草者详细的指导，以便其在起草时能考虑到科学发现中的各种预期结果。在仔细审阅完条约第 6 条、第 7 条和第 8 条后，我毫不怀疑地得出这样的结论，海洋法中关于大陆架的规定从一开始便不可避免地和石油及天然气这类商品联系在一起，因为在此条约之前不存在此类规定。[②]

《帕利亚湾条约》是那一时期关于海洋边界划分的最早的协议，同时也是唯一一个旨在海洋方面规范特立尼达和多巴哥及委内瑞拉间有关于渔业及其相关权利的法律地位的双边条约。该条约先于 1945 杜鲁门宣言对大陆架定义的阐述。本文稍后将进一步讨论《帕利亚湾条约》对大陆架机制发展所起到的推进作用及后来成为大陆架机制一部分的该条约中的一些特点。[③]

由于在那个年代对于大陆架并没有清晰定义，因而签订《帕利亚湾条约》的目的在于能够管理特立尼达和委内瑞拉间帕利亚湾中的海底区域。因此，当两国在 1990 年达成了《海洋边界协议》后，《帕利亚湾条约》便失效了。[④]

《帕利亚湾条约》及其所附的指令都是非常独特的，因为其所划分的区域被划入并成为双方相互领土的一部分。事实上，在那个时期，特立尼达和多巴哥是英国的殖民地而且英国和委内瑞拉都遵守传统的三海里的领海限制，因此在那时，帕利亚湾的大部分水域都是公海。

二、《帕利亚湾条约》签订的历史背景

为了能充分认识现代海洋法的地位，我们有必要回顾早先海洋法的发展历

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① Suter H. M., *The General and Economic Geology of Trinidad B. W.*, 2nd ed., London: H. M. S. O., 1960, pp. 1～4.

② Discussions with Joyce C. Lynch, Senior Legal Advisor Energy, Policy and Planning Ministry of the Attorney General, Trinidad and Tobago.

③ P. Chandrasekhara Rao, *The New Laws of Maritime Zones*, New Delhi: Milind Publications Private Limited. pp. 93～94.

④ Maritime Boundaries Agreement: Treaty between Trinidad and Tobago and Venezuela on the delimitation of Marine and Submarine Areas (signed 18 April 1990 EIF 1991).

程。

我们必须注意到,无论海洋法中的大陆架机制如何发展,它都始终是明确且一贯地为使我们能跟上飞速发展的科技的脚步,这在某种程度上和现今勘探开发大陆架时发生的情况类似。随着科技的进步,法律必须与之齐头并进。我们必须注意到海洋法的发展在其运用到大陆架机制方面一直都很清晰而且具有连贯性,且总是试图和科技的发展保持一致。

上世纪30年代早期,由一个英国分遣队所做的地质调查显示在特立尼达和委内瑞拉间的特立尼达西南海岸的帕利亚湾海床及底土储有丰富的石油。之后的研究表明这些储藏具有商业利益。[①]当时的科技并没有现在这么发达,然而,即便如此,地质学家和海洋工程师们都设想未来几年的勘探开发能进入到海洋的更深处(这更深的部分包括现在所定义的大陆架)。

英国和委内瑞拉之间的谈判始于1936年8月29日。两国都同意签署一个协议,并在这个协议之后,双方政府将同时采取行动,划分位于帕利亚湾海床的各领土。[②]

自1955年起,人们就开始以钻孔的方式开采位于Point Fortin和La Brea Trinidad西南海岸的石油。[③] 1957年,来自Soldado的第一根石油管道成功上岸。但是,第一根海洋石油管的建造应归功于安地列斯石油公司,该公司于1952年发现了海上石油。[④]

三、在特立尼达和多巴哥海底区域(大陆架)的勘探与开发

在特立尼达和多巴哥钻井寻求石油始于1857年左右,在Pitch湖附近的陆地上进行。而开发石油则始于1866年,沃尔特·达文特成功开凿出第一口石油井(Aripo)。1908年起在Pitch湖(La Brea)附近的陆地上开始了以商业为目的的石油开采活动,而在46年之后的Soldado油田,由特立尼达北方区域有限公

① Report of Geologist Hans Kluger—Report File for 1935. Ministry of Energy, Port of Spain Trinidad.

② Summary of Negotiations with the Venezuelan Government for partition of the submarine areas of the Gulf of Paria; Public Records Office (P. R. O. London FO 371/22850.) At that time partition of the sea—bed was without precedent.

③ 1955—Production from Soldado oilfield at Trinmar initiated. (See official records of the Ministry of Petroleum and Mines, now the Ministry of Energy. Further the records at H. M. S. O were not available at the time of writing the books mentioned. i. e. The early 1960s.).

④ George E. Higgins, *The History of Trinidad Oil*, Trinidad: Trinidad Express Newspapers Limited, Port of Spain, 1996, p. 124.

司(Trinmar)开始采取钻井方式开发石油。1955 年,Trinmar 利用 Soldado 油田出产的石油成立了 T. N. A. 公司,一家由特立尼达里斯霍资有限公司和英国油田特立尼达有限公司共同设立的合资企业,其在 1939 年购买了 Trinmar 公司三分之一的产权并且在 1952 年 7 月获得能在帕利亚海湾 231,000 英亩内活动的海底许可证。两年后,T. N. A 公司建立了它的第一个公海钻井平台,开始了开发 Soldado 主要油田的钻井活动。1955 年,由 Trinmar 公司第一个对 Soldado 油田进行生产活动,但直到 1957 年末才开始对这一块油田进行全面的开发。因为二战的原因,勘探开发活动几乎全面停止了。在接下来的几年里,在帕利亚湾发现了几块大规模的石油储存区域。在二战快结束时的 1946 年,一支小分队开始对帕利亚湾进行地质方面的调研并且试图帮助勘探海湾新的石油储存区域。1947 年,一个重力小队开始对 TNA 公司所拥有的土地进行调查,更重要的是对帕利亚湾未经开采的海洋区域进行调查。①

二战前夕,租赁申请已被提交到政府,但是这些租赁事宜只有当 1942 帕利亚条约签订后才能被正式允许通过。而特立尼达和多巴哥政府也制定了和海上作业相关的法律。②

石油公司开始关心岛上剩余的石油产能寿命,这导致了在帕利亚湾及其周边海域更大规模的开采活动。直到 1954 年发现并开采了第一个真正的海上海洋油井后,这种局面才得以结束。这口井叫做 TNA 公海一号,之后又改称为 Soldado 一号。Soldado 一号是一个非常了不起的发现,通过 Soldado 一号井,人们又进一步发现了一块巨大的 Soldado 油田,这块油田就是日后在 20 世纪 60 年代油田开发高峰期仍出产特立尼达和多巴哥石油产量三分之一的巨大油田。③

早先也有对石油行业的研究。第一份报告是由一位美国经济学家 W. J Levy 所作出的。④这份报告给出了以下建议:

(a)制定与石油、天然气的钻探、生产和分配有关的一个统一的、现代的、无所不包的法令法规,及,

(b)建立一个独立的监管机构,可直接向政府行政部门报告,并只对修订法规的行政部门负责。

有意思的是,在签订了《条约》之后,特立尼达和多巴哥在其他国家的石油领域中的各个业务操作不断与时俱进,更新操作方法,而在这之后的国内立法也和

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① TNA was a consortium of three companies: Trinidad Leaseholds, United British Oilfields and British Petroleum.

② Higgins cit. p. 124.

③ *The Trinidad Oil Economy or Levy Report*, Library Ministry of Energy Port of Spain, Trinidad and Tobago.

④ D. R. Craig, *the Craig Report*, Library Records, Ministry of Energy Trinidad and Tobago.

当时的国际条约和法律保持了一致性。[①]

四、大陆架

我阅读、分析并注意到一些知名学者和法学家对《帕利亚湾条约》影响大陆架机制发展的一些看法。比如,Zdenek J. Slouka 先生,F. A. Vallat 先生和 Andrassy 先生。Slouka 先生认为该机制发展的真正助推器是 1945 年的杜鲁门宣言。我对此不敢苟同。因为早在杜鲁门宣言发表的三年前,《帕利亚湾条约》就已经提到这点了。

"大陆架"这一术语并没有出现在 1942 年的条约中。这一历史性文件的法律起草者们所认为的帕利亚湾海底区域并不同于如今对该区域的法律解释(目前领海是 12 海里——联合国海洋法公约第三条注明)。事实上,根据这一定义,很显然帕利亚湾沿岸各国没有公海区域。

在 Petroleum Development Ltd. V. Sheik of Abu Dhabi 1951 I. L. R. 案的第 144 页至第 152 页中,Asquith 法官说:

在 1939 年,缔约双方都没有听说过当时还未存在的作为法律原则的大陆架概念,更不用提他们会想到它,即便是最精明聪慧的法学家也不可能考虑到。

基于此,我认为缔约双方,通过其条约起草者,将后来为人熟知的大陆架定义为"海底区域"。

在 1969 年的北海大陆架案中,Ammoun 法官以其个人观点说道:直到 1958 年会议前夕,大陆架原则也仅仅是一个不断形成中的习惯。

我认为"形成中的习惯"已被写进了《帕利亚湾条约》中。这个在特立尼达和多巴哥与委内瑞拉签订的双边条约(《1942 年帕利亚湾条约》)可能为日后在国家间签订条约时引导构建出一个新的法律框架。

以上这些法官、学者的意见夯实了我的观点,即:《1942 年帕利亚湾条约》可能是现代大陆架概念出现的推动力。

条约中详细列明了诸如航海、环境保护等方面的规则,并规定了勘探中的有序化石油输送过程。举例来说,条约第 5 条是确保岛屿、小岛或露出海面的岩石及领海地位的稳定。条约第 7 条和第 8 条在那个时代是一个相当现代化的概念,因为这两条为防止任何一方在开发海底区域时对其领海水域造成的污染规定了法律责任。以上条款规定:

第 5 条:

"本条约仅针对帕利亚海湾的海底区域,所含的任何条款都不能去影响到群岛、各个小岛以及露出海面的岩石以及和他们相关的领海之状态。"

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① *See* the Petroleum Act of Trinidad and Tobago Chapter 62:01 and previous legislation.

第 6 条：

“本条约中的任何内容都不影响帕利亚海湾海域的状态以及任一缔约方领土以外的海洋表面之权利、海洋通道以及航海航行。尤其是不能影响且必须开放海洋通道及航海航行，不能因任何可能建造的装置设施而使海洋通道及航海航行受到阻碍，或者采取建造、放置、标注、漂浮以及照明措施对航海产生危险或障碍。”

第 7 条：

“缔约的任意一方应当采取所有可能的操作方法去防止声称或已占据海湾某一海底区域的对方对己方领海所造成的污染。这些污染包括因石油、泥土、流体或其他物质对海滩的可航海域造成的污染。双方应当通力协作达成目标。”

第 8 条：

“缔约方在给予允许勘探帕利亚海湾海底区域特许权时要插入前述两条条款，确保能遵守前两条条款，包括遵守受特许权方的使用现代设备的要求。同时任一缔约方应该监管特许行为，使之能与目前的条约条款相符。”

第 9 条：

“缔约双方对此条约解释或实施而产生的所有异议应当由国际法所承认的和平方式解决。”

我认为，在审视《1958 年大陆架公约》和《1982 年联合国海洋法公约》中的相关条款时大家会发现，在对大陆架的定义和《联合国海洋法公约》防止水域污染及保护航海和通行权方面的规定是有先例可循的。《帕利亚湾条约》及其附件指令彰显出起草者对现行海洋法的发展具有相当的预见性。他们为未来条约的起草拟定了一个范本，从而如我所说，使得该条约成为大陆架机制发展的助推器。

应该提及的是，有些学者认为《1942 年帕利亚湾条约》并不是现代大陆架原则出现的源头，他们主张 1945 年杜鲁门宣言才是大陆架原则发展的真正推动力。[①]

我们应该注意到《帕利亚湾条约》是在二战期间达成的。皮特尔角炼油厂那时是在特立尼达并在那之后的一段时间都被认为是整个大英帝国最大的炼油厂。原油在二战前是从陆上运到炼油厂，在那之后是从帕利亚海湾的 Soldado 油田运到炼油厂的。那时便通过了一系列法律来确保石油输送过程的有序并同时保护海洋的环境。

我们很容易罗列出从 1955 年到目前为止特立尼达和多巴哥所制定的一系列法律，因为其意识到石油和天然气这类商品因其价值及该类资源对产油国经

① 请见国际法院 1969 年北海大陆架案，但我不甚赞同。另有一些国际法学家认为条约只是为毗邻国家划分共同大陆架及获得类似国家领土提供有用的指导。然而，这种观点在现今是不可能出现的，因为大部分沿海国家已经签署、批准、继承或同意了含有大陆架定义的《联合国海洋法公约》。

济的影响,[①]因而其不可避免地需要遵守复杂的法律法规。

下面将列出从过去到现在关于勘探开发方面和国际条约有关的国内立法。

(一)(1955年至今)法律效力优先于1958年海洋法公约的法律(特别是和特立尼达和多巴哥有关的法律)

以下所列的法律是特立尼达和多巴哥作为缔约一方签订的,与国际条约、公约的承认与执行保持一致的法律规范。

领海石油污染法案,1951年第25号第37章03节(此法案旨在防止石油排入或避免石油进入特立尼达和多巴哥海域内)。

领海法案,1969年第38号(此法案规定了特立尼达和多巴哥领海的相关问题,确定了领海为12海里)。

大陆架法案,1969年第43号(此法案规定了对于大陆架的勘探开发问题,确保执行在1958年4月29日日内瓦公海公约中的某些规定,及其它相关事项。1986年,上述法案进行了修订,以便与1982年《联合国海洋法公约》保持一致)。

特立尼达和多巴哥大陆架法案,第1章第52节"此法案规定对于大陆架的开发勘探问题及与此目的有关的其他事项"。自此,联合国海洋法公约开始生效。由于本法案第6章是关于大陆架的规定,而公约第76条对大陆架及其相关事项进行了定义,因而有必要对法案进行修订,使得其对大陆架的定义与公约相符。该修订即为1986年第23号法案。现在特立尼达和多巴哥大陆架法案中对大陆架的定义与公约保持了一致。

石油法案和法规,第62章第1节:

"此法案巩固和修订了与石油有关的法律,以便更好地规范对石油的勘探、开发和生产及其后续或附带的相关事宜。

值得注意的是,如同其他国家一样,特立尼达和多巴哥遵守各个国际条约,并且其国内的法律法规随着石油和天然气产业中的科学技术的持续迅猛发展而与时俱进着。"

(二)在签署和批准联合国海洋法公约(UNCLOS)后

特立尼达和多巴哥于1982年12月签署了公约。1986年4月,特立尼达和多巴哥批准了此公约。1994年10月特立尼达和多巴哥签署了UNCLOS的第11部分并于1995年7月声明其接受第11部分的约束。

以下的法律和UNCLOS的相关法条保持了一致:

(增强和保护)海洋区域法案,特立尼达和多巴哥的法律第37章第2节

第三部分:海洋区域(限制区域)法令(1973)

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① Joyce C. Lynch, Ministerial Discretion under the Petroleum Act and Selected Responsibilities of the Petroleum Engineer.

经 1996 年第 37 号法令修正

第六部分:(保护)海洋区域法规(1974)

群岛海域及专属经济区法案,特立尼达和多巴哥法律第 51 章第 6 节

此法案向世人宣示了特立尼达和多巴哥共和国是一个群岛国家,并且定义了在专属经济区及群岛水域中属于特立尼达和多巴哥海洋空间的新领域。管辖权的性质和范围根据各自领域的规定来行使,其相关事宜应该和在 1982 年 12 月 10 日在牙买加蒙特哥湾达成的联合国海洋法公约相一致。

第六部分:阐明特立尼达和多巴哥群岛基线法令 1988 年公告

1988 年第 206 号法令

1989 年修正法案(修改打印错误)及 1989 年第 77 号法律公告

特立尼达和多巴哥是以下公约的缔约方之一:1948 年国际海事组织公约;1991 年国际海事组织公约修正案;1993 年国际海事组织公约修正案;1974 年海上人命安全公约;1974 年国际海上人命安全公约 1978 年议定书;1974 年国际海上人命安全公约 1988 年议定书;1966 年载重线公约;1988 年载重线公约协定;1969 年国际船舶吨位丈量公约;1972 年国际海上避碰规则;1979 年搜救公约;1965 年国际便利海上运输公约;1973 年国际防止船舶污染公约 1978 年议定书(附则 I——防止油类污染规则;附则 II——控制散装有毒液体物质污染规则);1973 年国际防止船舶污染公约 1978 年议定书(附则 III——防止海运包装有害物质污染规则);1973 年国际防止船舶污染公约 1978 年议定书(附则 IV——防止船舶生活污水污染规则);1973 年国际防止船舶污染公约 1978 年议定书(附则 V——防止船舶垃圾污染规则);1972 年伦敦倾废公约;1972 年伦敦倾废公约 1996 年协定书;1969 年国际干预公海油污事故公约;1969 年国际油污损害民事责任公约 1992 年议定书;1971 年关于设立国际油污损害赔偿基金国际公约 1992 年议定书;1976 年海事索赔责任限制公约 1996 年议定书;1988 年制止危及海上航行安全非法行为公约;1988 年制止危及大陆架固定平台安全非法行为议定书;1990 年国际油污防备、反应和合作公约。

(三)大加勒比区域的保护和开发海洋环境公约及其议定书

大加勒比区域的保护和开发海洋环境公约是一个综合性的保护伞条约,旨在保护及改善海洋环境。这一区域性的环境公约为地区及国内的环境合作提供了法律框架,同时也为在《大加勒比区域的保护和开发海洋环境公约》项下的地区及国内的联合行动提供了法律框架。此条约之后补充了三个协定:石油泄漏议定书、SPAW 议定书及 LBS 议定书。船运(海洋污染)法案包括《大加勒比区域的保护和开发海洋环境公约相关条约》在内(见法案第五部分—防止船舶污染)。

(四)处理领海内石海排放问题的1970年领海法案

大家普遍认为,现在仍有效力的领海石油污染法案将来最终会被一个综合性的法案,即船运(海洋污染)法案[①]所替代。此法案规定了与下列事项有关的权力及管辖权:来自船舶的海洋污染,在公海受到石油污染时的干涉,向海洋倾倒废弃物,预防来自船舶的污染,准备和应对紧急石油污染,因污染造成的损失及其相关事宜的责任与赔偿。此法案承认、加强并完善了在国际条约中提及的相关条款。

当法案通过时,我们会发现在此法案中吸收了以下公约的相关条款:1982年联合国海洋法公约,国际干预公海油污事件公约,大加勒比区域的保护和开发海洋环境公约(第5章,第39段);1972年伦敦倾废公约1996年协定书,1973年国际防止船舶污染公约,1973年国际防止船舶污染公约1978年议定书和与此议定书有关的附件(MARPOL),1974年海上人命安全公约包括1974年海上人命安全公约1978年议定书以及所有的适用于特立尼达和多巴哥的修订案。

五、结 论

自特立尼达和多巴哥与委内瑞拉在1942年签署了《帕利亚湾条约》以来,国际海洋法便迎来了自己的时代。这是在大陆架机制发展过程中一个重要的里程碑。海洋法已和现代技术齐头并进,许多海洋法的原则也已被《1982年联合国海洋法公约》及其各个议定书以及之后的各个公约纳入进去。

在参与《联合国海洋法公约》的准备过程中,特立尼达和多巴哥的代表们为公约的起草作出了积极的贡献。特立尼达和多巴哥国际法学家将继续在各个国际会议和研讨会上对大陆架机制的发展作出积极有效的贡献。

在"即将到来的时代",科技的进步已使我们能勘探到深层海底,而法律也不得不对此提供必要的指导,并对有序化的勘探开发活动加以监控。我认为,从一开始,法律就已提供了必要的保护,并将一如既往地与科技进步齐头并进。

(责任编辑、中译:王丹维 刘彦婷)

① The Bill was being considered by a Joint Select Committee of parliament when it lapsed because parliament was prorogued and recently dissolved (elections will take place within three months from 8th April 2010, the date of prorogation).

外大陆架划界中的不确定因素及其在北极的国际实践

桂　静*

内容摘要:北极地区的争夺正经历着从科学考察向争夺资源的转变,且目前集中于外大陆架划界和航道方面。有关外大陆架界限的《联合国海洋法公约》第76条具有不确定性。它为相关国家主张权利提供依据的同时,也造成利用国之间的争端。客观地讲,公约内容也需要这样的国际实践对其不确定性加以丰富和确认。因此,联合国大陆架界限委员会的处理意见不仅对北极地区类似争端的解决,而且对全世界都将会有重要意义。我国对北极存在海洋利益,应当重视此问题并采取相应策略。

关键词:北极　外大陆架　罗蒙诺索夫海岭　大陆架划界

北极地区通常指北极圈(66°33′N)以北区域,包括北冰洋水域、边缘陆地海岸带及岛屿、北极苔原和最外侧的泰加林带。该地区包括欧洲、亚洲和北美洲的北方大陆,总面积2,100万平方千米。其中陆地和岛屿面积约800万平方千米,分别属于美国、俄罗斯、加拿大、丹麦、冰岛、挪威、芬兰和瑞典等8个环北极国家。北冰洋的海底地形是一个呈椭圆形的大海盆,被三条主要海岭——门捷列夫海岭(Mendeleev ridge)、罗蒙诺索夫海岭(Lomonosov ridge)和北冰洋中脊(the mid Arctic ocean ridge)——所分割。其中罗蒙诺索夫海岭高峻而陡峭,从新西伯利亚群岛穿过北极点附近一直延伸到格陵兰岛北岸,高出深海平原(abyssal plain)2,500米以上,支配着整个海盆的地形。

《联合国海洋法公约》(以下简称《公约》)生效后,国际海洋边界将由沿海国陆续划定,200海里之内海域将脱离公海,近2/5的海域被划为国家管辖海域。实践表明,专属经济区和大陆架是当前国家间海洋划界(maritime delimitation)的主要区域,其中单纯的专属经济区边界协议仅占少数,而与大陆架有关的划界

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协议占全部海洋边界协议的1/3。[①]随着国际社会对北极关注的迅速提升,北冰洋的五个沿海国包括加拿大、丹麦、挪威、俄罗斯和美国已经在为加强领土主张和管辖权主张而努力。2001年12月,俄罗斯提交其在北极的200海里以外大陆架划界(delimitation of the outer continental shelf)主张,由此成为根据《公约》向大陆架界限委员会(the Commission on the Limits of the Continental Shelf,缩写为"CLCS")提交此类资料的第一个国家。这一主张的核心论点是罗蒙诺索夫和门捷列夫海岭是俄罗斯大陆架的自然延伸。挪威也于2006年向CLCS递交了扩展其北极外大陆架界限(outer limit of continental shelf)的提议。[②]CLCS对俄罗斯的划界案(submission)的回应是,要求其进一步进行研究与收集更多的数据以修订其建议。加拿大、丹麦和美国也可能在未来几年明确其大陆架界限。

《公约》第76条提出了大陆架外缘的定义,但是由于该条缺乏对大陆架外缘定义中某些用语的准确界定,因此对该条的解释有不明确之处。

一、外大陆架界限的法律规定及其不确定性

《公约》第76条第1款将大陆架界定为: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。本款中公约以自然延伸和200海里两个标准衡量大陆架外部界限。如果从测算领海宽度的基线量起到大陆边外缘(the outer edge of the continental shelf)的距离不到200海里则扩展到200海里的距离,超过200海里则通过第4款规定的两种方式划定大陆边的外缘,但最大的宽度受到第5款和第6款的限制。在这里,距离标准为自然延伸不到200海里的情况提供了200海里的最小宽度。自然延伸是大陆架定义的关键指标,主张200海里外大陆架的沿海国必然援引这一有关自然延伸的规定。"延伸"必须要求从海岸线到大陆边外部边缘的连续性。第3款则从地貌学角度在更广泛的法律意义上对大陆边作出解释,即"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。"《公约》第76条第4—6款规

① 郭渊著:《南海地缘政治研究》,黑龙江大学出版社2007年版,第33页。

② CLCS于2009年3月完成了对挪威划界案的审议并公布其建议摘要,CLCS建议按照第76条第7款的规定,连接以经纬度坐标确定的各定点划出长度各不超过60海里的若干直线而标定的直线确定挪威海和格陵兰海的Banana Hole地区大陆架外部界限。挪威在Banana Hole的大陆架外部界限的最终建立有赖于两国之间的划界。参见Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Norway in respect of Areas in the Arctic Ocean, The Barents Sea and The Norwegian Sea on 27 November 2006, (March, 27, 2009), p. 80. 下载于http://www.un.org/Depts/los/,2009年11月30日。

定了如何界定法律意义上的大陆架，包括大陆坡脚、大陆架最大界限、大陆边外缘和海脊的确定。

（一）关于大陆坡脚

尽管许多案例在谈判过程中表现出地壳类型的影响，但是《公约》没有以地壳类型来确定大陆边的构成，可以认为沿海国陆块没入水中的延伸部分不管沉积物的特征如何都属于其大陆边（法律意义上的大陆架）。但是，地形地貌和海底沉积物厚度是判断陆块自然延伸的重要技术标准。在超过 200 海里以外的大陆架划界中，大陆坡脚（the foot of the continental slope）是确定大陆架延伸的主要因素。它是测量界限宽度的参照线，沉积物厚度至少为从该线量起到最外各定点的最短距离的 1%（爱尔兰公式，Irish formula），或该线到最外各定点的距离不超过 60 海里（海德伯格公式，Hedberg formula），[①]爱尔兰公式使用了连接以最外各定点划出长度分别不超过 60 海里的若干直线来划定界线，每一定点上的沉积岩厚度至少为从该点到坡脚最短距离的 1%。因此，如果应用该公式，从坡脚起 100 海里的沉积岩就必须有 1 海里厚度。CLCS 为执行该条款援用一贯性原则，即“(a)在同一延续沉积裙之内和之下，沿海国可在沉积厚度达到 1% 或厚度更大的最外缘位置选定各定点；和(b)委员会要求为每一选定的定点提供资料，证明这些定点上的沉积与大陆坡脚的沉积具有连续性。”[②]海德伯格公式包括从坡脚量起不超过 60 海里的有关各点进行划线。一国可以应用两个公式之一，例如从最大化其大陆架范围的意义上讲，它可以在其大陆架的某些部分应用爱尔兰公式而在其他部分应用海德伯格公式。

大陆坡脚在划定大陆架宽度中也起着非常重要的作用。第 76 条第 4 款(b)项规定，作为一般规则，在没有相反证明的情形下，大陆坡脚应定为大陆坡底坡度变动最大之点。但只是在陆坡的基础上依据坡度对坡脚作出定义，但并没有包含大陆坡坡脚的准确定义。[③]因此，在坡脚定位中应用地质和地球物理证据支持自己的主张是合理的，这就需要考虑“沉积”和“岩石”这两个词。但由于《公约》缺乏对用语“沉积岩”，特别是“坡脚”的准确定义，因此其第 76 条的解释有不明确之处。[④]

（二）关于大陆架外部界限的限制

《公约》第 76 条第 5 款对法律意义上大陆架的最大宽度作出限制。不超过

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① *See* Article 76, paragraph 4(a) (i) and (ii) of the UNLOS.

② 见《联合国大陆架界限委员会科学和技术准则》第 8.5.3 段，下载于 http://www.un.org/Depts/los/clcs_new/documents/Guidelines/CLCS_11.htm，2009 年 8 月 21 日。

③ Duncan J. McMillan, The extent of the continental shelf—Factors affecting the accuracy of a continental margin boundary, *Marine Policy*, vol. 9 No. 2., April 1985, p. 149.

④ Duncan J. McMillan, The extent of the continental shelf—Factors affecting the accuracy of a continental margin boundary, *Marine Policy*, vol. 9 No. 2., April 1985, p. 156.

从领海基线量起350海里或2,500米等深线100海里。2前者(350海里的限制)纯粹以距离标准为基础,而后者以深度/距离为标准。这两个标准可以选择适用并且大陆架的每一部分仅考虑其中之一。因此,在某些案例中大陆架外部界限可能会扩展到350海里以外。

(三)关于海脊

《公约》第76条关于海脊对确定外大陆架界限的规定,最有争议的就是如何将海底高地与海底洋脊和深洋洋脊区别开来。①

根据第76条第3款和第6款,认为本条涉及三个地貌学概念,即深洋洋底的洋脊、海底洋脊和海底高地。②公约对这些术语没有作出明确界定。大陆架界限委员会在其《科学与技术准则》中指出,第3款中的"洋脊"与第6款中的"海底洋脊"之间的关系并不明确。这两个用语均有别于第6款中"海底高地"这一用语。③大陆架界限委员会在其相关技术文件中似乎给出了三个概念之间的浅显的区分:"第3款提到了深洋洋底及其洋脊,称它们不包含在沿海国陆块没入水中的延伸部分。参照第1款,可以更清楚一些,这些洋脊不应被认为是大陆架的一部分。海底洋脊应被认为是比洋脊更通用的一个术语,它包括了洋脊及起源于大陆边但可能延伸至深洋洋底的海脊。④第6款条文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。"那么是否存在既不是深洋洋脊也非陆生洋脊的洋脊呢?

第3款中的"深洋"这一限定词即是用来指那些与深洋洋底及其底土有共同地质特征和渊源的海脊。由此看来,有两种情况的海脊可以归入深洋洋底的洋脊,一种情况是当海脊位于法律意义上的大陆边以外,并与深洋洋底有共同的地理特征和渊源时,它属于深洋洋底的洋脊;另一种情况是当海脊位于大陆边以内,但与大陆坡脚壳层分离并扩展到深洋洋底,它应当被认为是一个深洋洋底的洋脊。⑤一些海底洋脊完全位于大陆坡脚以外,并且,或者全部在深洋洋底内或大陆边外部边缘周围,这些洋脊可能源于大陆边,但是后来由于地壳运动与其分

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① Jongseong Ryu, Vladimir Kaczynski, Review on some aspects of legal and scientific understandings regarding outer continental shelf limits in the Arctic Ocean, *KMI International Journal of Maritime Affairs and Fisheries*, vol. 1(issue 1), June 2009, p. 20.

② 见《联合国大陆架界限委员会科学和技术准则》第7.1.2段,下载于 http://www.un.org/Depts/los/clcs_new/documents/Guidelines/CLCS_11.htm,2009年9月3日。

③ 见《联合国大陆架界限委员会科学和技术准则》第7.1.3段,下载于 http://www.un.org/Depts/los/clcs_new/documents/Guidelines/CLCS_11.htm,2009年9月3日。

④ 国家海洋局国际合作司、海洋勘测专项领导小组办公室,《联合国大陆架界限委员会技术文件汇编(汉英)》,北京,2000年,第134页。

⑤ Jongseong Ryu, Vladimir Kaczynski, Review on some aspects of legal and scientific understandings regarding outer continental shelf limits in the Arctic Ocean, *KMI International Journal of Maritime Affairs and Fisheries*, vol. 1(issue 1), June 2009, p. 11.

离。从地质学的角度讲,这类海脊不应归类为洋脊,因为它们不具有深洋洋底的地质特征和渊源。但是,由于它们全部位于大陆坡脚外,因此这类海脊不能构成大陆边外部边缘的组成部分。从这方面讲,严格地依据第 76 条这类海脊应当以洋脊处理。①

第 6 款利用 350 海里的最大界限将具有典型大洋特征的海脊排除在大陆边以外。但是,地壳地质类型不能作为第 76 条 6 款对海脊和海底高地进行法律分类的唯一准则,②而应当基于科学和法律考虑因素,这些因素包括陆地领土和陆块的自然延伸、海脊的地貌以及根据第 4 款规定的海脊与大陆边之间的关系,以及海脊连续性等。③因此,看来单独的地质学不足以将"海底洋脊"从大陆边自然构成部分的"海底高地"中区分出来。

总之,"海底洋脊"是一个在地质学上构成大陆边而其一部分或全部不同于沿海国陆块的洋脊,它也具有深洋洋底的地质特征和渊源。同时,"海底洋脊"至少在其向陆的部分必须与大陆边有起源上的联系,且其向海的部分不属于深洋洋底。看来当难以就各种情况作出详细规定时,CLCS 认为海脊问题应当逐案进行审查。④

另外,公约对每一类地貌学概念作出不同的处理。根据第 6 款,2,500米等深线加 100 海里的限制不适用于海底洋脊,这类海脊的最大界限确定在从基线量起的 350 海里,符合这一限制则构成大陆边,否则不构成。而第 6 款的这一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。

二、外大陆架划界在北极的国际实践

北极的争夺正在经历着从科学考察向争夺资源的转变。目前北极争夺的焦点集中在外大陆架划界及航道控制(navigation control)两个方面。本文论述的目的暂不涉及航道控制问题。

到目前为止,北冰洋五个沿海国都已经对北极的大陆架划界提出了主张,其中俄罗斯、丹麦和挪威已经向大陆架界限委员会提交外大陆架划界案。⑤已经提交划界案的俄罗斯、挪威和正在作相关准备工作的丹麦和加拿大,都利用公约第

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① 同前注,p. 10。

② 见《联合国大陆架界限委员会科学和技术准则》第 7. 1. 2 段,下载于 http://www. un. org/Depts/los/clcs_new/documents/Guidelines/CLCS_11. htm,2009 年 9 月 3 日。

③ 见《联合国大陆架界限委员会科学和技术准则》第 7. 2. 10 段,下载于 http://www. un. org/Depts/los/clcs_new/documents/Guidelines/CLCS_11. htm,2009 年 9 月 3 日。

④ 见《联合国大陆架界限委员会科学和技术准则》第 7. 2. 11 段,下载于 http://www. un. org/Depts/los/clcs_new/documents/Guidelines/CLCS_11. htm,2009 年 9 月 3 日。

⑤ 参见联合国法律事务厅海洋事务和海洋法司网站,www. un. org/Depts/los/clcs.

76条有关海底高地的规定声称对位于北极海底的罗蒙诺索夫海岭(Lomonosov Ridge)拥有主权,联合国大陆架界限委员会曾就此进行审议。[①]美国也据此声称对楚科奇海台的权利。

(一)俄罗斯提交的外大陆架划界案及国际社会的反应

1、俄罗斯外大陆架划界案

俄罗斯是于2001年第一个向大陆架界限委员会提交划界(submission)案的国家。这一申请部分涉及北冰洋海岸200海里外大陆架界限。[②]

2001年12月20日,俄罗斯已经提交主张外大陆架外部界限的文件,区域覆盖相当于德国、法国和意大利面积总和的北冰洋1,191,000平方公里。这使俄罗斯成为向CLCS提交申请的第一个国家。俄罗斯主张向北极点延伸其管辖的大陆架。俄罗斯主张的大部分区域位于其200海里专属经济区(EEZ)以外,呈三角形。由于CLCS议事规则的保密原则,无法知晓俄罗斯向CLCS提交的划界案中所援引的具体规定。但是从相关的公开文件以及先前的研究表明,俄罗斯将罗蒙诺索夫海岭和门捷列夫海岭作为其大陆边自然延伸的海底高地。根据俄罗斯的这一主张显然是根据《公约》第76条第6款有关"海底高地"的规定,只要外部各定点符合2,500米等深线100海里的界限标准,海底高地能够超越350海里的界限限制。

但这一要求遭到大陆架界限委员会的否决。同时也有专家提出质疑,指出如果按照俄罗斯的主张,那么加拿大也能依据罗蒙诺索夫海岭与北美大陆相连提出属于加拿大管辖范围的主张。专家预测,俄罗斯对罗蒙诺索夫海岭的权利主张在北极终止有两种可能性。一个是俄罗斯一侧大陆盆地恰恰在北极,另一种推测是俄罗斯有意地将其自然延伸至北极终止,以避免与丹麦和加拿大的冲突,并获得他们对于俄罗斯2001年提交的划界案中关于北冰洋海底适用"扇形划分"可能性的支持。[③]

CLCS建立了一个小组委员会来审查俄罗斯划界案。这个小组委员会2002年春季召开几次会议,要求俄罗斯就罗蒙诺索夫海岭和门捷列夫海岭需要向CLCS提供地质学证据,证明两个海岭构成俄罗斯大陆边的自然组成部分,然后向CLCS作出汇报。2002年6月,CLCS通过了俄罗斯划界案委员会建议。关

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① Robert Lee Hotz,《美国投身北极海底争夺战》,下载于http://www.cetin.net.cn/cetin2/servlet/cetin/action/HtmlDocumentAction?baseid=1&docno=320480,2009年9月3日。

② 参见Submission by Russian Federation to the CLCS in 2001,下载于http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm,2009年9月3日。

③ Jongseong Ryu, Vladimir Kaczynski, Review on some aspects of legal and scientific understandings regarding outer continental shelf limits in the Arctic Ocean, *KMI International Journal of Maritime Affairs and Fisheries*, vol. 1(issue 1), June 2009, pp. 16~17.

于巴伦支海和白令海，委员会向俄罗斯联邦建议如下：与挪威缔结的巴伦支海海洋边界协定以及与美利坚合众国缔结的白令海海洋边界协定一旦生效，即向委员会提供划界线的海图和坐标，因为这些划界线将分别是俄罗斯联邦在巴伦支海和白令海的200海里以外大陆架外部界限。[①]关于中北冰洋，CLCS建议俄罗斯联邦根据建议所载的审查结果修订有关其在该地区的外大陆架划界案。[②]

2、国际社会的反应

有五个国家对俄罗斯提交的划界案作出反应，分别是美国、加拿大、丹麦、日本和挪威。[③]除了美国，其他国家都是仅对俄罗斯大陆架延伸与其专属经济区边界重叠作出评论。加拿大的反应是，提交划界主张本身或CLCS的建议都不应损害加拿大与俄罗斯大陆架划界。[④]挪威声称，尚未解决的巴伦支海划界问题应当依据议事规则附件1第5条(a)款的规定作为海洋争端处理。[⑤]日本就鄂霍次克海作出反应，两国继续以友好的方式就最南部的Kuril诸岛和领土问题或大陆架和专属经济区划界问题进行谈判。[⑥]丹麦提到由于缺乏进行评价的明确资料和《公约》非缔约国地位，目前无法形成对这一界限主张的意见。但这不意味着丹麦对俄罗斯界限主张的同意或接受。[⑦]

美国是唯一一个提到俄罗斯划界案的科技因素的国家。关于罗蒙诺索夫海岭，美国声称该海岭是一个北冰洋盆地深洋部分的独立地貌，既不是俄罗斯也不是任何其他国家的大陆边的自然构成。[⑧]美国也对门捷列夫海岭有更多的详细论述，归纳起来其论点主要是该海岭具有大洋成因的火山特征，它不形成任何国

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① 2007年初，俄罗斯与挪威达成的《关于划分巴伦支海大陆架的协议》，两国围绕15.5万平方千米“灰色海域”近四十年的争议即将画上句号。参见郭培清：《北极“争夺战”》，《海洋世界》，2007年第9期，第24页。

② 第57届大会，联合国秘书长关于海洋与海洋法议程项目下的报告25(a)，附录A/57/57Add.1(2002年8月)，第41段。

③ 所有五个国家对俄罗斯提交案的报告书的资料下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm。

④ 译自 Notification from Canada，Ref No. CLCS.01.2001.LOS/CAN (Feb.26，2002)，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__CANtext.pdf，2009年9月3日。

⑤ 译自 Notification from Norway，Ref No. CLCS.01.2001.LOS/NOR (April 2，2002)，p.2，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__NORtext.pdf，2009年9月3日。

⑥ 译自 Notification from Japan，Ref No. CLCS.01.2001.LOS/JPN (March 14，2002)，pp.1～2，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__JPNtext.pdf，2009年9月3日。

⑦ 译自 Notification from Denmark，Ref No. CLCS.01.2001.LOS/DNK (Feb.26，2002)，p.1，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__DNKtext.pdf，2009年9月3日。

⑧ 译自 Norification from the United States of America，Ref No. CLCS.01.2001.LOS/USA (Mar 18，2002)，p.3，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf，2009年9月3日。

家大陆架的一部分。[①]为了支持这一论点,美国提供了海洋测深、航空磁测、地震和基岩这四个方面的专门资料。

(二)其他北极国家的实践

继俄罗斯提交申请后,挪威随后于2006年11月向大陆架界限委员会提出关于北冰洋区域巴伦支海和挪威海大陆架延伸的主张。[②]挪威承认,在同邻国进行上述海域的双边大陆架划界方面依然有些悬而未决的问题。包括挪威与冰岛和丹麦/法罗群岛对Banana Hole南部延伸至200海里以外的大陆架权利主张会有重叠,挪威、丹麦以及格陵兰将重新讨论格陵兰岛(Greenland)与斯瓦尔巴德群岛(The Svalbard archipelago)间海域内200海里以外大陆架划界问题,挪威与俄罗斯联邦间关于包含巴伦支海的Loop Hole和北冰洋西Nansen海盆内的200海里以外大陆架划界问题。[③]

丹麦于2004年9月宣布,北冰洋内有一条1240公里长的山脉(罗蒙诺索夫海岭)与其国土(格陵兰岛)相连,根据《公约》,丹麦对北极资源享有权益。[④]作为对2007年俄罗斯北极插旗事件的回应,2007年8月12日,丹麦的研究人员启程前往北极,他们在一个月的时间内收集罗蒙诺索夫海岭的地质数据来绘制冰层下海床的地图。丹麦还计划在2009年和2011年远征北极,主要是通过收集地质数据,并研究罗蒙诺索夫海岭在地理上是否与丹麦的格陵兰岛相连,以此证明北极属于丹麦。丹麦于2004年成为公约缔约国,丹麦应当也计划在2014年提交外大陆架划界案。[⑤]

加拿大也曾依据罗蒙诺索夫海岭与北美大陆及格陵兰岛板块相连,提出其属于加拿大管辖范围这一主张。2008年8月加拿大官方声明称,加拿大与丹麦合作完成的科学考察结果表明,北冰洋中的罗蒙诺索夫海岭与北美大陆及格陵兰岛板块相连,而不是如俄罗斯所称的这一区域应为俄方专属经济区。据此可以证明加拿大对北冰洋大片石油资源丰富区域拥有经济权利。加拿大政府计划

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① 译自Norification from the United States of America, Ref No. CLCS. 01. 2001. LOS/USA (Mar 18,002). p. 2,下载于http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf,2009年9月3日。

② Continental Shelf Submission of Norway: in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea,下载于http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm,2009年9月3日。

③ 《挪威大陆架划界案执行摘要》第10—12页,下载于http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_2006_c.pdf,2009年11月21日。

④ 东方财经网:《北极属于全人类》,下载于http://www.oribiz.cn/biznews/2007—10—8/2007—10—08—24.html,2009年8月18日。

⑤ 《丹麦将派船赴北极 欲证明罗蒙诺索夫海岭属于丹》,下载于http://news.qq.com/a/20070811/001013.htm,2009年8月18日。另外,丹麦已经于2009年4月29日提交法罗群岛北部海域外大陆架界限申请,下载于http://www.un.org/Depts/los/clcs_new/submissions_files/submission_dnk.htm,2009年8月18日。

在2013年底之前向联合国大陆架界限委员会递交划界案，正式提出对这一区域拥有管辖权利。加拿大于2003年成为联合国海洋法公约会员国，因而加拿大计划于十年期限内完成提交外大陆架划界案。

在这场北极争夺战中，美国不甘于做一个旁观者。它除了抵制俄罗斯和加拿大在北极的扩张欲望以外，也试图扩张本国的大陆架。美国把目光瞄准了楚科奇海台和波弗特海台。美国认为楚科奇海台是阿拉斯加北极陆架的自然构成，并声称拥有面积比加利福尼亚州还大一倍半的北冰洋水下管辖区。2007年8月17日，美国海岸警卫队破冰船“希利”号驶往北极进行为期四周的绘图工作。美国媒体称，“希利”号这次航行的主要任务是绘制楚科奇北部海床的海底地图，以确定阿拉斯加北部大陆架延伸的范围，研究把这部分区域纳入美国大陆架的可能性，同时向联合国大陆架界限委员会登记边界信息做准备。这次绘图活动是美国在2003年和2004年相继进行了两次绘图活动之后又进行的一次绘图工作。美国科学家称这次航行已经筹划了3年，是一个正在进行的长期项目中的一部分。①

三、趋势及影响

《公约》第76条(6)款的有利之处在于，海底高地甚至能够将大陆架进一步延伸至350海里的限制以外。这一点对于主张200海里以外大陆架界限的沿海国来说是有极大吸引力的。如上所述，俄罗斯提出外大陆架划界案后，挪威、丹麦、加拿大和美国等北极周边国家也依照俄罗斯的例子并利用北冰洋海岭主张最大限度的外大陆架界限就是最好的证明。在其他区域，许多其他国家利用海底高地的法律规定也可能提出200海里甚至350海里以外的外大陆架主张。②

同时，上述国家的主张将在国际范围内引发激烈争论。一些科学家认为一个国家要扩张大陆架的范围，必须证明该区域与其陆地领土的地质结构相似。以罗蒙诺索夫海岭为例，俄罗斯与加拿大、丹麦都欲通过科学考察收集证据，支持其分别与西伯利亚北部大陆、北美大陆以及格陵兰岛相连而提出200海里外大陆架延伸的主张。而用科学方法证明罗蒙诺索夫海岭同时与北美、亚欧大陆相连的可能性几乎不存在。③

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① 《美国海岸警卫队破冰船驶往北极进行绘图工作》，载于《海洋世界》2007年第9期，第4页。

② Jongseong Ryu, Vladimir Kaczynski, Review on some aspects of legal and scientific understandings regarding outer continental shelf limits in the Arctic Ocean, *KMI International Journal of Maritime Affairs and Fisheries*, vol. 1(issue 1), June 2009, p. 21.

③ 新京热讯：《加为抢北极提出证据》，下载于 http://m1st.cn/www/doc_on_web－sm－0－ci－401－vi－1255－rc－0－cd－47489.html，2009年8月18日。

在这种情况下,CLCS如何处理与罗蒙诺索夫海岭等有争议海岭的有关地质资料,就显得极为重要和有意义了。由于公约第76条并未明确规定海底高地与海底洋脊和深洋洋脊的区别,这给大陆架外部界限的确定造成了一定的不确定性。[①]这种不确定性使沿海国得以据此提出权利主张,同时客观上也需要这样的国际实践及相关国际司法判例对这种不确定性加以丰富和确认,使公约的规定成为国际习惯法的基础。CLCS的处理意见不仅对北冰洋而且对全世界都将会有重要意义。

可以说,俄罗斯的行动以及联合国大陆架界限委员会对俄划界案的审议以及给出的结论,无疑将推动各沿海国外大陆架划界的准备和申请步伐。

北极国家对外大陆架的权利主张,虽然只是北极事务的一个方面,但是它能够折射出北极复杂的海洋政治格局。由于《公约》确立了公海和国际海底区域制度,全人类都享有从公海和国际海底区域公平获益的权利。北极国际海底面积的缩小将使包括我国在内的国际社会在北极的诸如资源权益、环境权益、通行权益、科研权益等权益受到影响。虽然根据现行的《公约》,目前没有证据表明任何一个国家的大陆架延伸至北极,北极点及附近地区不属于任何国家,北极一带被视为国际范围,北极点周边为冰所覆盖的北冰洋属于国际海域,由国际海底管理局监督管理。[②]但是如果北极国家对外大陆架(the outer continental shelf)的主张得偿所愿,那么北极国际海底区域的面积将大为缩小。以俄罗斯提交的主张为例,如果俄罗斯的外大陆架界限申请成功,这将意味着俄罗斯将获得由北极点、到俄东西部两端即科拉半岛(Kola Peninsula)到楚科奇自治区(Chukchi Autonomous Region)顶端的海岸线构成的三角区域的权益,总面积达120万平方公里,相当于意大利、德国及法国面积的总和,还将与丹麦的格陵兰岛、加拿大、或许还有美国的水下管辖区交界。俄罗斯因此将获得相当于100亿吨标准燃料的油气储量。[③]这种情势必然影响到国际社会对北极的公平获益的权利。

四、对我国的启示

北极在气候、资源等诸多方面对我国有着非常重要的现实和潜在价值,对此已经有学者在进行研究。北极的未来安排既然能够影响全球的政治经济格局,

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① Duncan J. McMillan, The extent of the continental shelf—Factors affecting the accuracy of a continental margin boundary, *Marine Policy*, vol. 9, No. 2, April 1985, p. 156.

② 田兴春:《地球尽头的狂热角逐:插旗激起千层浪》,下载于人民网国际频道,http://world.people.com.cn/GB/89881/97034/6073364.html,2009年6月10日。

③ 三门新闻网:《八国北极争夺战:俄关键时刻不惜使用极端手段》,下载于http://sanmen.zjol.com.cn/news/2009/206380.shtml,2009年11月18日。

当然也会影响到中国，必须给予高度重视。[①]面对有可能受到的不利影响，我国应当作出认识并自醒对北极权益的维护是否到位，进而从战略角度出发，将北极纳入我国海洋权益战略部署的重要组成部分，并作出现实的安排，以预防和应对将来我国参与北极事务可能面临的被动局面。笔者认为，结合近来北极外大陆架的争夺态势，对此加以关注，并给我们如下启发：

（一）从海洋战略层面考量，应当重视我国的北极利益。

中国对北极的利益主要包括自然资源利益、环境利益、科研利益、航道利益等。[②]在全球化时代，北极资源利益通过产业链条不断向其外围国家分配，油气资源的开采、运输等环节都对外部资本的进入提供了机会，因此中国至少间接拥有北极资源利益；北极深刻影响着我国的气温和降水，有必要深究其机理；多国纷纷不惜巨资在北极建站、开展北冰洋科考的事实已经说明北极在科研方面的价值；未来开通的北极航道是对中国最现实的，北极航道是联系亚、欧、美三大洲的最短航线，我国外贸大部分途径马六甲海峡和苏伊士运河，这条航道因为大国控制和海盗猖獗，安全系数降低，航运成本提高，而且苏伊士运河通行能力已经饱和，近年壅塞现象严重，北极航道则不存在这方面的问题。正如上所述，如果北极国家对外大陆架的主张得以实现，那么包括我国在内的国际社会对北极的公平获益的权利与利益势必会减弱或减少。因此，从海洋战略层面考虑，我国应树立全球视阈下的囊括北极的海洋利益体系，因此应重视并加强对北极海洋利益的维护与研究。

（二）从海洋战略利益的维护与实现角度考虑，有助于我国对国际共享利益的拓展与实现。

目前我国学界关于海洋权益的理论，认为我国海洋权益法律制度体系应当包括四个部分，即海洋权益的基本法律制度、海洋资源环境权益法律制度、海上安全利益维护法律制度、海洋权益维护执法和海洋司法权法律制度。如果从海洋权益的完整性考虑，还应包括海岛权益法律制度、国际海底区域矿产资源法律制度、公海海洋权益法律制度、海洋科学研究法律制度等。[③]在国际法上，国际海底区域是属于全人类的共同财产，由国际海底管理局代表全人类进行管理，为整个国际社会所共有。北极地区作为公海和国际海底区域，其开发利益由世界各国共享。

我国现在对北极法律事务的影响总体来说不大，依然停留在科研领域。我

① 杨亮庆、王梦婕：《北极冰融对中国意味着什么》，载于《理论与当代》2008 年 9 期（总第 286 期），第 48 页。

② 郭培清：《大国应有全球战略，全球战略必须囊括北极》，载于《瞭望新闻周刊》2009 年第 27 期，2009 年 7 月 6 日。

③ 桂静：《海洋权益法律制度研究——以体系建设为视角》，载于《海洋开发与管理》2010 年第 1 期，第 22～26 页。

们可以此为突破口,积极地推进国家北极科学考察合作,参与相关国际规则的制订过程,不断总结相关经验。与此同时,在北极大陆架界限问题上,充分发挥我国作为大国在国际事务中的地位和作用,在与我国对外大陆架的相关主张相协调的基础上,明确我国的权利主张,强调北极地区的国际海底区域和公海的国际地位,作为全球公共领域空间的利益由世界各国共享。[①]由此,多渠道多途径地扩大我国对北极事务的影响,加强参与北极事务的决策能力,为极地外国家争取行动空间。

(三)从国际海洋法的作用方面考虑,有助于为我国的北极海洋权益提供法律依据。

国际公约是我国法律体系的组成部分。由于海洋法的国际性,这一点表现得更为明显。国际海洋法通过对法律关系的核心概念——海洋权益进行划分和规范,进而对国际海洋秩序的形成发挥着重要的作用。因此,寻求国际海洋法的途径以维护我国的海洋权益是可行且必要的。为此,针对我国在北极的权益,应当寻求相关国际法依据并深入研究和充分利用。

目前来看,为我国享有并行使北极权益提供支持的国际条约主要包括《联合国海洋法公约》和《斯匹茨卑尔根群岛条约》。[②] 1982年的《联合国海洋法公约》规定的国际海底区域制度和公海制度,为我国在北极进行资源开发和利用、海洋科学考察等提供了最为重要的法律依据。但是《联合国海洋法公约》也存在诸多缺陷,例如第76条对于确定大陆架外部界限而言就存在着上述的不确定因素。《公约》第76条提出的大陆架外缘的定义,不仅对公约的缔约国很重要,而且由于其实践可能成为习惯国际法的基础,从而对非缔约国都是重要的。[③]因此,应当关注北极外大陆架划界的进展从而掌握《公约》该条款的发展趋势。1920年的《斯匹茨卑尔根群岛条约》(现称《斯瓦尔巴德条约》)迄今为止仍是有关北极地区的唯一政府间条约。1925年,中国加入该条约成为缔约国。缔约国有权在该群岛附近开采资源、从事科研等活动。但除原苏联开采煤炭外,其他多数缔约国并未在此谋求经济利益。为了借助相关条约的作用并以此为切入点,需要对条约相关内容包括条约的基本精神、内涵、相应的权利和义务等进行深入地分析和研究,在尊重国际法的基础上使我国能够争取到在北极相应的条约权益,为维护和实现我国的国家权益争取主动地位。

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① 董跃:《论海洋法视角下的北极争端及其解决路径》,载于《中国海洋大学学报》(社会科学版)2009年第3期,第6~9页。

② 董跃、宋欣:《有关北极科学考察的国际海洋法制度研究》,载于《中国海洋大学学报》(社会科学版)2009年第4期,第11~15页。

③ Duncan J. McMillan, The extent of the continental shelf—Factors affecting the accuracy of a continental margin boundary, *Marine Policy*, vol. 9, No. 2, April 1985, p. 148.

Uncertain Factors in the Delimitation of the Outer Continental Shelf and Its International Practice in the Arctic

Gui Jing*

Abstract: Disputes over the Arctic are shifting from those regarding scientific research to those over entitlement to resources. These disputes currently focus on delimitation of the outer continental shelf and navigational channels. Provisions related to the outer continental shelf boundaries in Article 76 of the UN Convention on the Law of the Sea are uncertain. While these provisions provide the basis for surrounding countries' claims to certain rights in the region, they also are the source of disputes among these countries. Objectively speaking, it is necessary to address the uncertainty of the Convention through international practice. Therefore, opinions rendered by the UN Commission on the Limits of the Continental Shelf will have vital significance for the resolution of similar conflicts not only in the Arctic, but also in the rest of the world. As a country with existing interests in the Arctic, China should examine these opinions closely and respond accordingly.

Key words: Arctic; outer continental shelf; Lomonosov Ridge; delimitation of the continental shelf

The Arctic usually refers to the area North of the Arctic Circle (66° 33′ N), consisting of the Arctic Ocean, marginal coastal land, islands, the Arctic tundra, and, at its outer edge, the Taiga. It encompasses Europe, Asia, and the northern part of North America, totaling 21 million square kilometers. Within the region is approximately 8 million square kilometers of land and islands, belonging to eight surrounding countries: U. S. A., Russia, Canada, Denmark, Ice-

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land, Norway, Finland and Sweden. The Arctic seabed is an oval basin divided by three main mid-ocean ridges: the Mendeleev Ridge, the Lomonosov Ridge, and the Arctic Mid－Ocean Ridge. The Lomonosov Ridge, which is high and steep, and extends from the New Siberian Islands through the North Pole to the northern coast of Greenland, towering 2, 500 meters above the abyssal plain, dominates the basin.

Since the United Nations Convention on the Law of the Sea ("UNCLOS") took effect, international maritime boundaries are now delimited by agreement among coastal countries. Waters within two hundred nautical miles from the coast are no longer the High Seas, and nearly 2/5 of the world's waters now belong to coastal countries. In practice, most maritime delimitation agreements involve the exclusive economic zone ("EEZ") and the continental shelf. While there are very few purely EEZ delimitation agreements, 1/3 of all maritime delimitation agreements have to do with continental shelves. [①] As the international community focuses more attention on the Arctic, the five coastal states surrounding the Arctic Ocean—Canada, Denmark, Norway, Russia and the United States—have committed themselves to strengthening their territorial and jurisdictional claims in the region. In December 2001, Russia submitted its claim for extending its outer continental shelf in the Arctic beyond the 200－nautical mile EEZ, thus becoming the first country to submit such a claim under UNCLOS to the UN Commission on the Limits of the Continental Shelf ("UNCLCS"). The core argument of this claim is that the Lomonosov and Mendeleev Ridges are natural extensions of Russia's continental shelf. In response, the UNCLCS recommended that Russia conduct further research and data-gathering to amend its submission. In 2006, Norway also submitted its claim to the UNCLCS to extend the limits of its outer continental shelf in the Arctic. [②]

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① Guo Yuan, *Research on Geopolitics of Nanhai*, University of Heilongjiang Press, 2007, p. 33.

② The UNCLCS completed its review of Norway's submission in March 2009 and published its Summary of the Recommendations. UNCLCS, Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Norway in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006, at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf, 30 November 2009. The UNCLCS recommended that "the delineation of the outer limits of the continental shelf in the *Banana Hole* area of the Norwegian and Greenland Seas be conducted in accordance with article 76, paragraph 7 [of the UNCLOS], by straight lines not exceeding 60 M in length, connecting fixed points, defined by coordinates of latitude and longitude. The establishment of the final outer limits of the continental shelf of Norway in parts of the *Banana Hole* may depend on delimitation between States."

Canada, Denmark and the United States may also seek to delineate their continental shelves claims in the next few years.

Article 76 of the UNCLOS prescribes the definition of the outer continental shelf. However, the lack of precise definition of certain terms has resulted in ambiguity in interpreting this article.

Ⅰ. The UNCLOS Outer Continental Shelf Provisions and Their Uncertainty

Article 76, Paragraph 1 of the UNCLOS defines the continental shelf of a coastal state as "compris[ing] 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."[①] This paragraph prescribes two rules for delineating the outer limits of the continental shelf: the distance (200 nautical miles) rule and the natural extension rule. If the outer edge of the continental shelf is less than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, the distance rule applies, and the continental shelf is extended to 200 nautical miles. If the outer edge of the continental shelf is over 200 nautical miles from the baselines, the natural extension rule applies, and the continental shelf is established by one of the two methods prescribed in Paragraph 4 (a). However, Paragraphs 5 and 6 limit the maximum width of a coastal state's continental shelf. Here, the distance rule provides a minimum width of 200 nautical miles for where the continental shelf does not naturally extend to that distance. Natural extension is a key indicator of the definition of the continental shelf, and the coastal states claiming continental shelves beyond 200 nautical miles must invoke the natural extension provisions. The "extension" must be continuous from the shoreline to the outer edge of the continental margin. Paragraph 3 provides a broader legal definition of the continental margin from the geomorphological perspective: "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

① United Nations, The United Nations Convention on the Law of the Sea, 1833 U. N. T. S. 397, 1982.

deep ocean floor with its oceanic ridges or the subsoil thereof."[①] Article 76, Paragraphs 4—6 of the UNCLOS set forth how to define the continental shelf in the legal sense, including determinations based on the continental slope, the maximum limits of the continental shelf, outer continental margin and ridge.

A. The Foot of the Continental Slope

There is no UNCLOS provision regarding the effect of different crustal types on delineating the continental margin, despite evidence of their influence from the negotiation process in many cases. This implies that the submerged prolongation of the landmass of a coastal State, regardless of its sediment characteristics, belongs to its continental margin (legal continental shelf). However, topography, physiognomy and thickness of marine sediment are important technical indicators in identifying the natural extension of land mass. The foot of the continental slope is the primary feature in the delimitation of the continental shelf beyond the 200 — nautical mile limit. It serves as the reference baseline for delineating the outer limits of the continental shelf under Paragraph 7: the connecting outermost fixed points must either have sedimentary rocks at least 1% of the shortest distance from such point to the foot of the continental slope (the Irish formula), or be no more than 60 nautical miles from the foot of the continental slope (the Hudberg formula).[②] The Irish formula prescribes delimitation by connecting fixed points with straight lines not more than 60 nautical miles apart, at each of which points the thickness of sediments is at least 1 per cent of the shortest distance from such point to the foot of the slope.[③] Applying this formula, therefore, sedimentary rocks must measure at least 1 M thick at 100 nautical miles from the foot of the slope. The UNCLCS invokes "a principle of continuity" in implementing this formula, stating that:

(a) to establish fixed points a coastal State may choose the outermost location where the 1per cent or greater sediment thickness occurs within and below the same continuous sedimentary apron; and that

(b) for each of the fixed points chosen, the UNCLCS expects documentation of the continuity between the sediments at these points and the sediments at the foot of the continental slope[④]

The Hedberg formula involves drawing a line connecting points not more

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① *Id.*, art. 76, 3.

② *See id.*, art. 76, 4(a)(i)—(ii).

③ *See id.*, art. 76, 4(a)(i), 7.

④ UNCLCS, Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, CLCS/11, 1999, 8. 5. 3 (hereinafter "Scientific Guidelines").

than 60 nautical miles from the foot of the slope. ① A State may apply the two formulas alternatively, i. e. , it may apply the Irish formula in certain portions of its continental shelf and the Hedberg formula in other portions, in a manner to maximize its continental shelf ranges.

The foot of the continental slope also plays a very important role in defining the width of the continental shelf. Article 76, Paragraph 4 (b) of the Convention provides that, as a general rule, "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 But this paragraph only defines the foot of the continental slope in terms of gradient at the slope's base, without providing an actual definition of the term "the foot of the continental slope." ③ Therefore, it is reasonable for states to use geologic and geophysical evidence in supporting their claims on the positioning of the foot of the continental slope. This requires consideration of the terms "sedimentary" and "rock". However, the Convention does not provide precise definitions of the terms "sedimentary rock" and "the foot of the continental slope", and this has created uncertainty in the interpretation of Article 76. ④

B. Limitations on the Outer Limit of the Continental Shelf

Article 76, Paragraph 5 of UNCLOS limits the maximum width of the legal continental shelf to 350 nautical miles or 100 nautical miles from the 2,500 metre isobath from the baseline from which the breadth of the territorial sea is measured. The former standard (350 nautical miles) is purely based on distance, while the latter (100 nautical miles from the 2,500 metre isobath) is based on both depth and distance. The two standards can be applied selectively and separately to each part of the continental shelf. Therefore, in some cases, the outer limits of the continental shelf may be extended beyond 350 nautical miles.

C. Ridges

The most controversial issue on the identification of ridges in delimiting the outer limit of the continental shelf under Article 76 is how to distinguish

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① *See* UNCLOS, art. 76, 4(a)(ii), 7.

② UNCLOS, art. 76, 4(b).

③ Duncan J. McMillan, The Extent of the Continental Shelf—Factors Affecting the Accuracy of a Continental Margin Boundary, *Marine Policy*, vol. 9(issue 2), 1985, p. 149.

④ *Id.*, at 156.

submarine elevations from submarine ridges and deep ocean ridges. ①

Article 76, Paragraphs 3 and 6 involves three geomorphology concepts, namely the ridges on the deep ocean floor, submarine ridges and submarine elevations. ② The UNCLOS does not provide clear definitions of these terms. In its Scientific Guidelines, the UNCLCS indicates that the relationship between "the oceanic ridges" in paragraph 3 and "the submarine ridges" in Paragraph 6 is less than clear. Both terms are distinct from the "submarine elevations" in Paragraph 6. ③ The UNCLCS appears to provide the following simple distinction among the three concepts in its related technical documents:

[P]aragraph 3 refers to the deep ocean floor with its "oceanic ridges," stating that they are not included in the submerged prolongation of the land mass of the coastal State. With reference to paragraph 1, this makes it clear that these oceanic ridges are not to be considered part of the continental shelf. "Submarine ridges" must be considered a more generic term than oceanic ridges and includes both the latter and ridges which have their origin in the continental margin but may extend into the area of the deep ocean floor. The provisions of paragraph 6 do not apply to submarine elevations that are natural components of the continental margin, such as "plateaux, rises, caps, banks and spurs." ④

So are there oceanic ridges that are neither a deep oceanic ridges nor terrestrial oceanic ridges?

The term "oceanic" in Paragraph 3 refers to ridges that share geological characteristics or origins with the deep seafloor and its subsoil. There appears to be two ways in which a ridge may be classified as an oceanic ridge of the deep ocean floor. First, when an underwater ridge is located beyond the outer edge of the legal continental margin and shares geological characteristics and origin with the deep ocean floor, it is an oceanic ridge of the deep ocean floor. Second, when an underwater ridge is located within the continental margin but detached from the envelope of the foot of the continental slope and extends into

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① Jongseong Ryu and Vladimir Kaczynski, Review on Some Aspects of Legal and Scientific Understandings Regarding Outer Continental Shelf Limits in the Arctic Ocean, *KMI International Journal*, vol. 1(issue 1), 2009, p. 20.

② *See* Scientific Guidelines, 7. 1. 2.

③ *See id.*, at 7. 1. 3.

④ Int'l Cooperation Dep't of the Nat'l Oceanic Bureau and Office of Oceanic Reconnaissance Leadership Group, *The Technical Document Collection of the Commission on the Limits of the Continental Shelf (Chinese—English)*, Beijing, 2000, pp. 134, 58～59.

the deep ocean floor, it should be regarded as an oceanic ridge. ① Some submarine ridges that lie entirely beyond the foot of the continental slope and are either wholly within the deep ocean floor or around the outer edge of the continental margin, may have originated from the continental margin, but were later separated from it by geological crust movements. From a geological perspective, such ridges should not be classified as oceanic ridges because they do not share geological characteristics and origin with the deep ocean floor. However, since they lie beyond the foot of the slope over their full range, such ridges cannot become parts of the outer edge of the continental margin. In this respect, such ridges should be treated as an oceanic ridge in exactly the same manner under Article 76. ②

Paragraph 6 excludes the ridges with typical oceanic characteristics from the continental margin using the maximum limit of 350 nautical miles. However, geological crust types cannot be the sole criterion in classifying ridges and submarine elevations into the legal categories of Paragraph 6 of Article 76. ③ Rather, the determination should be based on scientific and legal considerations such as natural prolongation of land territory and land mass, morphology of ridges and their relation to the continental margin as defined in Paragraph 4, and continuity of ridges. ④ Therefore, geology alone appears to provide insufficient basis to distinguish "submarine ridges" from the "submarine elevations" that are the natural components of the continental margin.

In short, a "submarine ridge" is a ridge that is an integral part of the continental margin morphologically, but is different from the landmass of the coastal State partially or entirely. It also shares geological characteristics and origins with the deep ocean floor. At the same time, a "submarine ridge" must, at least in its landward part, be genetically linked with the continental margin and not belong to the deep ocean floor in its oceanic part. As it is difficult to define the details concerning various conditions, the CLCS states that it is appropriate to examine the ridge issue on a case-by-case basis. ⑤

In addition, the Convention treats each type of geomorphology concept differently. According to Paragraph 6, the "100 nautical miles from the 2,500 me-

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① Ryu and Kaczynski, Aspects of Legal and Scientific Understandings Regarding Outer Continental Shelf Limits in the Arctic Ocean, *supra* note 13, at 11.

② *Id.*, at 10.

③ *See* Scientific Guidelines, 7. 2. 9.

④ *See id.*, at 7. 2. 10.

⑤ *See id.*, at 7. 2. 11.

tre isobaths" limit does not apply to submarine ridges, the maximum width of which is 350 nautical miles measured from the baseline. Submarine ridges within the 350 nautical miles limit qualify as continental margins, while ridges exceeding that limit do not. However, these provisions under Paragraph 6 do not apply to other submarine elevations such as plateaus, rises, caps, banks and spurs that are natural components of the continental margin.

Ⅱ. International Practice of Outer Continental Shelf Delimitation in the Arctic

Disputes over the Arctic are shifting from those regarding scientific expedition to those over resources. At present, disputes in the Arctic focus on the delimitation of the outer continental shelf and navigational control. Disputes over navigational control are not within the scope of this article.

To date, five coastal States surrounding the Arctic Ocean have made claims for outer continental shelf delimitation. Among these, Russia, Denmark and Norway have submitted applications for the outer limit of the continental shelf to the CLCS. ① Russia and Norway, which have already submitted their delimitation applications, and Denmark and Canada, which are preparing to submit their applications, each claim to have sovereignty over the Lomonosov Ridge on the Arctic seabed pursuant to the submarine elevation provisions of Article 76. The CLCS has already once considered the matter. ② In addition, the United States has also made its sovereignty claim over the Chukchi Sea platform under the same provisions.

A. Russia's Submission and Responses from the International Community

1. Russia's Application for the Extension of Its Outer Continental Shelf

In 2001, Russia became the first country to submit an application to the CLCS. Part of the application related to waters 200 nautical miles off the Arctic coast. ③

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① *See also* The United Nations Office of Legal Affairs/ Division for Ocean Affairs and the Law of the Sea Website, at http://www.un.org/depts/los/index.htm, 3 September 2009.

② Robert Lee Hotz, The United States Threw Itself in the Fight for Contesting the Arctic, at http://www.cetin.net.cn/cetin2/servlet/cetin/action/HtmlDocumentAction?baseid=1&docno=320480, 3 September 2009.

③ *See* Submission by Russian Federation to the CLCS in 2001, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm, 3 September 2009.

Russia submitted its application to the CLCS on December 20, 2001, seeking to extend its jurisdiction to the outer limits of its continental shelf, which covers an area the equivalent of Germany, France and Italy combined, extending 1,191,000 square kilometers in the Arctic Ocean. Most of the triangular area claimed lay beyond Russia's 200—nautical mile EEZ. The specific provisions cited in Russian's submission to the CLCS are unknown, as they are protected by the confidentiality rules of the "Rules of Procedure of the Commission on the Limits of the Continental Shelf". But it appears from previously available public documents and research that Russia regarded the Lomonosov Ridge and the Mendeleev Ridge as submarine elevations constituting natural extensions of its continental margin. Thus, Russia's claim is clearly based on Article 76's provisions related to "submarine elevations"-namely, provisions that allow submarine elevations to extend the continental shelf beyond 350 nautical miles as long as the fixed points comprising the line of the outer limit of the continental shelf on the seabed comply with the "100 nautical miles from the 2,500 metre isobaths" rule.

However, Russia's claim was denied by the CLCS. It has also been questioned by certain experts who pointed out that, under Russia's argument, Canada could also claim jurisdiction of the Lomonosov Ridge based on its connection with the North American continent. Experts have predicted that Russia's claim over the Lomonosov Ridge would ultimately terminate at the North Pole, for two possible reasons. First of all, the Russian-side continental plate happens to end at the North Pole. Second, Russia may wish to terminate its natural extension at the North Pole, in order to avoid conflicts with Denmark and Canada, and to gain their support for applying "sectoral division" to the Arctic Ocean seabed, as proposed in Russia's 2001 CLCS submission. ①

CLCS established a subcommittee to review the Russian submission. This subcommittee held several meetings in Spring 2002, and urged Russia to provide geological evidence to the CLCS proving that the Lomonosov Ridge and the Mendeleev Ridge are natural components of Russia's continental margin. It then made a report to the CLCS. In June 2002, the CLCS adopted the subcommittee's recommendations for Russia's delimitation submission. Regarding the Barents and Bering Seas, the Commission recommended that the Russian Federation transmit the charts and coordinates of the delimitation lines to

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① Ryu and Kaczynski, Aspects of Legal and Scientific Understandings Regarding Outer Continental Shelf Limits in the Arctic Ocean, *supra* note 13, pp. 16～17.

the Commission once the maritime boundary delimitation agreements with Norway in the Barents Sea and with the United States of America in the Bering Sea enter into force, for they would represent the outer limits of the continental shelf of the Russian Federation extending beyond 200 nautical miles in the Barents Sea and the Bering Sea, respectively. ① As for the Central Arctic Ocean, the Commission recommended that the Russian Federation make a revised submission to extend its continental shelf in the region based on the findings contained in the subcommittee's recommendations. ②

2. Responses from the International Community

Five countries responded to Russia's submission, including the United States, Canada, Denmark, Japan and Norway. ③ With the exception of the U. S., these countries only made comments on the overlap between the extension of the continental shelf proposed in Russia's submission and their EEZ. Canada's response is that neither the Russian submission on expanding its continental shelf beyond 200 miles, nor the UNCLCS's recommendations thereon should adversely affect the continental shelf delimitation between Canada and the Russian Federation. ④ Norway claimed that the unresolved delimitation issue in the Barents Sea should be considered as a "maritime dispute" for the purposes of Rule 5(a) of Annex I to the Rules of Procedure of the Commission. ⑤ Japan's response was that for the Sea of Okhotsk the two countries

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① In early 2007, Russia and Norway entered into an "Agreement on the Delimitation of the Continental Shelf [in the] Barents Sea," which would end the dispute over the 155,000-square kilometer "gray sea area." *See* Guo Ping-qing, The Arctic in-fighting", *The Ocean World*, issue 9, 2007, p. 24.

② Fifty-seventh session, Agenda item 25 (a), Oceans and the Law of the Sea, *Report of the Secretary-General*, Addendum, A/57/57Add. 1 (8 October 2002), para. 41, at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/276/16/PDF/N0227616.pdf?OpenElement, 21 November 2009.

③ All five nations' notifications regarding Russia's submission to the UNCLCS are available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm, 3 September 2009.

④ Notification from Canada, Ref No. CLCS. 01. 2001. LOS/CAN (26 Feb. 2002), at http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__CANtext.pdf, 3 September 2009.

⑤ Notification from Norway, Ref No. CLCS. 01. 2001. LOS/NOR (2 Apr. 2002), p. 2, at http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__NORtext.pdf, 3 September 2009.

should continue vigorous negotiations in a friendly atmosphere. ① Denmark remarked that it was not able to form an opinion on the Russian submission because of the lack of more specific data to make a qualified assessment and its status as a non－party to the UNCLOS. ② However, such absence of opinion did not imply Denmark's agreement or acquiescence to the Russian Federation's submission. ③

The U. S. is the only country to refer to the scientific and technological factors in its response to the Russian submission. Regarding the Lomonosov Ridge, the U. S. claimed that "the ridge is a freestanding feature in the deep oceanic part of the Arctic Ocean Basin and not a natural component of the continental margin of either Russia or any other State. "④ More detailed statements were provided with respect to the Alpha－Mendeleev Ridge, saying that "the ridge is a volcanic feature of oceanic origin. . . It is not part of any State's continental shelf. "⑤ In order to support these statements, the U. S. provided specific bathymetric, aeromagnetic, seismic, and bedrock collection data with its response.

B. The Practice of Other Arctic States

Following on the heels of Russia's submission, Norway submitted its claim to extend its continental shelf in the Arctic Ocean, the Barents Sea and the Norwegian Sea to the UNCLCS in November 2006. ⑥ Norway acknowledged that there existed lingering issues with neighboring countries on bilateral continental shelf delimitation in this area. These include overlapping claims among Norway, Iceland and Denmark—the Faroe Islands for the continental shelf extending beyond 200 nautical miles in the southern part of the Banana Hole; renewed discussions among Norway, Denmark and Greenland on the delimitation

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① Notification from Japan, Ref No. CLCS. 01. 2001. LOS/JPN (14 Mar. 2002), pp. 1～2, at http://www. un. org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__JPNtext. pdf, 3 September 2009.

② Notification from Denmark, Ref No. CLCS. 01. 2001. LOS/DNK (26 Feb. 2002), p. 1, at http://www. un. org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__DNKtext. pdf, 3 September 2009.

③ *Id.*

④ Notification from the United States of America, Ref No. CLCS. 01. 2001. LOS/USA (18 Mar. 2002), p. 3, at http://www. un. org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext. pdf, 3 September 2009.

⑤ *Id.*, at 2.

⑥ Continental Shelf Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea, pp. 10～12, at http://www. un. org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum. pdf, 3 September 2009.

of the continental shelf beyond 200 nautical miles in the area between Greenland and the Svalbard archipelago; and the delimitation of the outer continental shelf beyond 200 nautical miles between Norway and Russia in the Barents Sea Loop Hole and in the Western Nansen Basin in the Arctic Ocean. ①

Denmark announced, in September 2004, that a 1240 km-long underwater mountain range (the Lomonosov Ridge) under the Arctic was joined with its land (Greenland), and that Denmark had an interest in the Arctic resources under the UNCLOS. ② In response to Russian's flag-setting in the Arctic in 2007, Danish researchers set off to the Arctic on August 12, 2007, and in a month collected geological data from the Lomonosov Ridge to map the seabed under the Arctic ice cap. Denmark has also planned Arctic expeditions for 2009 and 2011, mainly to study whether the Lomonosov Ridge was geographically connected to Greenland through the collection of geological data, in order to prove that the Arctic belongs to Denmark. Denmark became a member state to the UNCLOS in 2004, so Denmark also plans to make a submission to claim an extension of its continental shelf in 2014. ③

Canada has also claimed its jurisdiction over the Arctic region based on the Lomonosov Ridge's connection with the North American continent and the Greenland plate. In August 2008, Canada issued an official announcement that the Lomonosov Ridge joins with the North American continent and the Greenland plate, according to the scientific investigation jointly accomplished by Canada and Denmark, and does not belong to the Russian EEZ, as Russia had claimed. On this basis, Canada should have economic rights to the abundant oil resources in the Arctic. The Canadian government plans to make its submission to the UNCLCS before the end of 2013 to formally claim jurisdiction over this area. Canada became a member state to the UNCLOS in 2003, and so it must make its submission of the outer continental shelf delimitation within 10 years.

In this battle for the Arctic, the U. S. is unwilling to be a bystander. In addition to its resistance against the expansion ambitions of Russia and Canada,

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① *Id.*, pp. 10～12.

② Yue Ning, The Arctic Belongs to the Mankind as a Whole, *Oriental Business*, at http://www.oribiz.cn/biznews/2007－10－8/2007－10－08－24.html, 18 August 2009.

③ Denmark Will Dispatch Its Vessel to the Arctic And Prove the Lomonosov Ridge Belongs to It, at http://news.qq.com/a/20070811/001013.htm, 18 August 2009. Meanwhile, Denmark had made its submission with respect to the Faroe Islands area. *See* Submission, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_dnk.htm, 18 August 2009.

the U. S. is also attempting to expand its own continental shelf. The U. S. has set its sights on the Chukchi Sea and the Beaufort Sea. The U. S. believes that the Chukchi Platform is a natural component of the Arctic shelf in Alaska, and claims that it has jurisdiction over an area under the Arctic Ocean that is larger than the state of California. On August 17, 2007, the U. S. Coast Guard icebreaker, "Healey", embarked for the North Pole for a four-week mapping assignment. According to the U. S. media, the main task of this voyage was to map the seabed of the northern Chukchi crown and to ascertain the extension of the Northern Alaska continental shelf so as to evaluate the possibility of merging this area into the American continental shelf, and to prepare the registry of boundary data with the UNCLCS. This mapping assignment followed similar assignments in 2003 and 2004. U. S. Scientists said that the voyage had been planning for three years and was part of an ongoing long-term project. ①

Ⅲ. Trends and Effects

UNCLOS Article 76, paragraph 6 is extremely attractive to coastal states claiming outer limits of their continental shelves beyond the 200—nautical miles EEZ because the provision permits extension of the continental shelf beyond the 350 nautical miles based on submarine elevations. The fact that Arctic coastal states such as Norway, Denmark, Canada and the United States followed Russia's lead in claiming the extension of the outer continental shelf using the Arctic Ocean Ridge is proof of this. In other regions, a number of other nations may also raise claims to extend their continental shelves beyond 200 or 350 nautical miles under the UNCLOS provision on submarine elevations. ②

At the same time, the claims put forth by these states will inspire heated debates within the international community. Some scientists believe that, in order to extend the outer limits of its continental shelf, a coastal state must prove that the extended area in question shares similar geological structures with that state's territorial land. For example, Russia, Canada and Denmark all want to support their claims for extending the continental shelf by collecting scientific evidence connecting the Lomonosov Ridge with Northern Siberia, the North American continent, and Greenland, respectively. But it is nearly impossible to

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① The U. S. Coastal Guard(USCG) is Bound for the Arctic to Map, *The Ocean World*, vol. 9, 2007, p. 4.

② Ryu and Kaczynski, Aspects of Legal and Scientific Understandings Regarding Outer Continental Shelf Limits in the Arctic Ocean, *supra* note 13, at 21.

scientifically prove that the Lomonosov Ridge is linked to North America, Asia and Europe at the same time. ①

Under these circumstances, how the UNCLCS deals with the geological data relating to disputed ridges such as the Lomonosov Ridge becomes very important and significant. Article 76 of the UNCLOS does not provide precise definitions for the terms "submarine elevation", "submarine oceanic ridge" and "deep oceanic ridge". This leads to uncertainty in the delimitation of the outer edge of continental shelves, ② which allows coastal states to put forth their claims. Objectively speaking, the provisions of the UNCLOS need precisely this kind of international application and related international judicatory precedents to enhance and confirm their meaning, thus making the Convention's provisions the basis of international customary law. As such, the opinion of the UNCLCS takes on significance for not only the Arctic Ocean, but worldwide as well.

It can be said that Russia's actions and the UNCLCS's consideration of and conclusions on Russia's delimitation submission will undoubtedly spur coastal countries' preparation and applications for the delimitation of their outer continental shelves.

Although the Arctic countries' claims for the outer continental shelf are only one aspect of Arctic affairs, it reflects the complexity of the political situation in the Arctic. As the UNCLOS established the systems of high seas and international seabed areas, all of mankind has equal rights to benefit from the international seabed areas. The reduction of the international seabed area in the Arctic will affect the common interests of the international community, including China, in such aspects as natural resources, environment, navigation and scientific research, etc. Up to now, there has been no evidence to prove that that any country's continental shelf extends to the North Pole under the UNCLOS, so the North Pole and its surrounding area does not belong to any particular country and is considered to be international territory, and the ice-covered Arctic Ocean is international waters, subject to the supervision and manage-

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① Canada Provides Proof for the Purpose of Contention in the Arctic, at http://m1st.cn/www/doc_on_web-sm-0-ci-401-vi-1255-rc-0-cd-47489.html, 18 August 2009.

② McMillan, The Extent of the Continental Shelf—Factors Affecting the Accuracy of a Continental Margin Boundary, *supra* note 11, at 156.

ment by the International Seabed Authority.[①] However, if the Arctic states' claims regarding their outer continental shelves succeed, the international seabed areas in the Arctic will be drastically reduced. For example, if Russia's claim for extending the outer limit of its continental shelf proves successful, Russian will obtain the rights to the triangular area between the North Pole and Russia's Northern coastline, extending from the Kola Peninsula to the Chukchi Autonomous Region. This area spans 120,000 km^2, and is equivalent to Italy, Germany and France combined. Further, it would border the underwater jurisdiction of Denmark's Greenland, Canada, and perhaps even the U. S. Russia will thereby obtain the equivalent of 10 billion tons of fuel oil and gas reserves.[②] This situation will inevitably affect the international community's right to fairly benefit from the Arctic.

Ⅳ. Lessons for China

The Arctic is of actual and potential value to China in terms of climate, resources, and many other aspects, as is already being studied by scholars. As the future treatment of the Arctic will affect the global political situation, it will surely also affect China, and we must pay close attention to this issue.[③] We should recognize the possible adverse effects we may face in the region, and reflect on whether we have properly protected our rights in the Arctic. Further, we should take a strategic perspective in including the Arctic as an important component to our marine rights strategic planning, and take practical measures to prevent and address the possible passive position we may face in our future involvement in the Arctic. I believe that the recent disputes over the Arctic outer continental shelf provide us with the following lessons:

A. From an oceanic strategy perspective, it shows that China should pay attention to its interests in the Arctic.

China's interests in the Arctic mainly involve natural resources, environ-

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① Tian Xingchun, The Crazy Tussle in the Global Northern End: Flag－Inserting Arouses Different Responses, at http://world.people.com.cn/GB/89881/97034/6073364.html, 10 June 2009.

② The Fighting of the Eight Countries around the Arctic: Russia Does Not Hesitate in Taking Extreme Measures at the Critical Moment, at http://sanmen.zjol.com.cn/news/2009/206380.shtml, 18 November 2009.

③ Yang Liangqing, Wang Mengjie, What Does Ice Melting in the Arctic Mean for China? *Theory and the Contemporary Era*, issue 9, 2008, p. 48.

ment, scientific research and navigation. [①] In this age of globalization, interests in the Arctic resources are continuously allocated to peripheral countries through the industrial chain. The exploitation and transportation of oil and gas resources provides opportunities for the infusion of foreign capital; giving China at least indirect interests in the Arctic resources. The Arctic has profound influence on our country's temperature and precipitation, making it imperative to study its operation further. The fact that many countries have already invested heavily in setting up research stations in the Arctic and furthering their scientific research in the Arctic Ocean underscores the scientific value of the Arctic. The resource holding most practical promise for China is the new navigational route to be opened in the Arctic. This is the shortest route connecting Asia, Europe, and the Americas. Currently, the majority of China's foreign trade is routed through the Malacca Strait and the Suez Canal. However, this route has been controlled by powerful national interests and plagued by pirates, thus decreasing the level of safety and increasing the cost of utilization. Moreover, the traffic through the Suez Canal is near capacity, causing serious congestion in recent years. Arctic routes can alleviate these problems. As noted above, if the Arctic states succeed in their claims to extend their outer continental shelves, the international community's and China's right to fairly benefit from Arctic resources will be weakened. Therefore, China should form its strategies in protecting its maritime interests from a global perspective, and include the Arctic region in its strategic analysis. It should also emphasize and strengthen its research in the Arctic Ocean, in order to protect the country's maritime interests.

B. From the perspective of safeguarding and realizing China's maritime strategic interests, it argues for increasing and realizing the country's access to common international interests.

Summarizing the current Chinese scholarship on the maritime rights and interests, I believe that the legal system of China's maritime rights and interests should include four parts, namely, the basic legal regime of marine rights and interests, the legal system on marine resources and environmental rights and interests, the legal system on safeguarding the interests of maritime safety, and the legal system of maritime law enforcement and marine jurisdiction. For completeness, we should also include legal systems for the rights and interests regarding islands, mineral resources of the international seabed area, the high

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① Guo Peiqing, the great power should have global strategy which must include the Arctic, *Lookout News weekly*, issue 27, 2009, p. 64.

seas, and marine scientific research. [①] Under international law, the international seabed area is the common property of all mankind, owned by the entire international community, and managed by the International Seabed Authority on behalf of all mankind. The Arctic region consists of high seas and international seabed areas, and the right to its development is shared by all nations.

China's influence on legal affairs in the Arctic is rather limited, mainly involving scientific research. However, this can provide a point of entry for China, if we continuously add to our Arctic experience by actively promoting cooperative scientific expeditions in the Arctic and participating in the process of international rulemaking. Meanwhile, China can exercise its role and influence in international affairs as a powerful nation, clarifying our claims and positions on the issue of the delimitation of Arctic continental shelves-without contradicting our positions on outer continental shelves in other contexts and emphasizing the Arctic's status as the high seas and international seabed areas, and the resultant equal rights to the region. [②] Through these various avenues, China can increase its influence on Arctic affairs, strengthen its decision—making powers in the Arctic region, and advocate on behalf of other non—Arctic states.

C. From the perspective of the operation of international law of the sea, there is a legal basis for China's maritime rights in the Arctic.

International conventions are a part of our legal system. This is particularly true for law of the sea, which is inherently international in nature. The law of the sea plays an important role in the formation of international oceanic order by providing for maritime rights and interests. Therefore, it is possible and necessary to protect our country's maritime rights through avenues available under international law of the sea regime. For this reason, we should seek out the legal basis under international law that may be related to China's exercise of Arctic maritime rights, study these provisions and conventions in depth, and make full use of them.

Currently, the main international conventions supporting China's rights and interests in the Arctic are the UNCLOS and the 1920 Svalbard Treaty. [③]

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① Gui Jing, Research on the National Legal Regime of Marine Rights and Interests—from the Perspective of Systems Building, *Ocean Development and Management*, vol. 1, 2010, pp. 22～26.

② Dong Yue, Arctic Dispute and Its Solutions Under the Law of the Sea, *Journal of Ocean University of China* (*Social Sciences Edition*), vol. 3, 2009, pp. 6～9.

③ Dong Yue and Song Xin, A Study on International Law of the Sea Concerning Arctic Scientific Investigation, *Journal of Ocean University of China*, vol. 4, 2009, pp. 11～15.

The 1982 UNCLOS set forth the systems of high seas and international seabed areas, providing the most important legal basis for China's development and use of resources and conduct of scientific research expedition in the Arctic region. The definition of the outer limits of the continental shelf set forth in Article 76 is not only important to party states who have signed and ratified the Convention, but also to the rest of the world, because it may become the bases of customary international law through practice. ① Therefore, we should pay close attention to the delimitation of outer continental shelves in the Arctic, thereby staying up to date with the development of Article 76. The 1920 Svalbard Treaty remains the only intergovernmental treaty related to the Arctic region. In 1925, China became a party state to that treaty. Party states have the right to exploit resources and conduct scientific research around the Spitsbergen Islands. However, aside from the former Soviet Union, which mined coal in the area, most other party states have not pursued their economic interests here. In order to use related treaties as a point of entry into pursuing our Arctic interests, we need to study and analyze the spirit, content, and corresponding rights and obligations of these treaties in depth. On the basis of respect for international law, China can pursue its rights under treaties related to the Arctic, and take an active position in protecting and realizing our national interests in the region.

(Senior Editor: Tzung-lin FU
Editors: Stephen Pire; YANG Si-si)

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① McMillan, The Extent of the Continental Shelf—Factors Affecting the Accuracy of a Continental Margin Boundary, *supra* note 11, at 148.

《联合国海洋法公约》的完善*

孔令杰**

内容摘要:1982 年《联合国海洋法公约》自通过至今已经走过了近三十年,检视公约存在的不足,考察完善公约应遵守的原则及应采取的方式和机制,显得尤为必要。公约在海洋法上的宪章地位要求我们以整体海洋观审视公约,在海洋法的现有框架内与国际法的宏观架构下完善公约。鉴于公约自身规定的修正程序难以启动,通过外交协商及有关国际和区域组织的立法活动来统一国家实践仍不失为当前最为重要和有效的公约完善方式。同时,海洋的多重治理模式也要求进一步协调国际、区域组织和其他相关机构的行动,强化公约在国内的统一适用与有效执行。

关键词:联合国海洋法公约　完善　方式　机制

经过漫长的磋商,在精心平衡各国政治利益和法律权益的基础上,117 个国家于 1982 年在第三届联合国海洋法会议上,最终签署了《联合国海洋法公约》(以下简称《海洋法公约》)。[①] 在会议的闭幕式上,时任主席许通美(Tommy Koh)将该包括 320 条和 9 个附件的海洋法公约称为"海洋的新宪章"。[②] 在评述 1960 年代末至 1982 年间海洋法的发展时,马英九曾感叹:"《海洋法公约》把旧

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① UN Division for Ocean Affairs and the Law of the Sea, The United Nations Convention on the Law of the Sea: A Historical Pespective, 1998. at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm, 6 July 2010.

② Tommy Koh, A Constitution for the Oceans: Remarks by Tommy Koh, final session of the Third UN Conference on the Law of the Sea, Montego Bay, December 1982. 也有学者认为首次将海洋法公约称为"海洋大宪章"者并非许美通,而是博志斯(E. M. Borgese)。P. B. Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity*, Hague: Martinus Nijhoff Publishers, 1997, p. 49.

有的国际海洋秩序做了剧烈之调整,幅度之大、牵涉之广、影响之深,称之为革命亦不为过。"[①]如今,自公约通过之日起已28年。海洋法公约未涉及的问题、公约中悬而未决的问题、公约执行中存在的问题、社会发展给海洋法带来的新的挑战等等,都要求我们重新检视公约,在公约确立的海洋法框架内与国际法的大环境下,探讨公约的完善问题。

海洋法公约在当今海洋法上的宪章地位是毋庸置疑的,这一点也是探讨公约完善问题所必须把握的前提。公约开创了专属经济区、群岛国和深海海底区域等新制度,规定了海洋环境保护等新义务,赋予了粮农组织(FAO)、国际海事组织(IMO)等国际组织新的职责,同时还设立了国际海底管理局(ISA)、大陆架界限委员会(CLCS)和国际海洋法法庭(ITLOS)等新的机构。应该说,公约的宪法地位决定了它必须一方面致力于给海洋的管辖、利用、治理和养护构建一个稳定的法律框架,另一方面它也应当通过内在和外在的完善机制使其能够紧跟政治、经济和科技的发展步伐。[②]

海洋法公约并非面面俱到,也绝非万能灵药。自通过之日起,它就面临着众多挑战。IUU捕鱼等导致可捕鱼类的数量急剧下降,人们更加关注渔业的管理。[③]人类活动对包括珊瑚礁在内的海洋生态系统造成了严重的破坏,海洋生态系统保护与海洋生态保护区的创建等被提上了议事日程。近年来发生的严重的船舶油污事件激发了人们对船舶油污防控和治理的重视。[④]近期发生在美国墨西哥湾的原油泄漏事故迫使人们重新权衡海洋资源的开发与海洋环境保护。"9·11"事件后,尤其是索马里等海域猖獗的海盗活动促使人们反思海洋法公约的适用范围,积极探讨构建海上安全的国际和区域法律框架。这些都属于海洋法公约未能合理解决的法律问题。[⑤]此外,公约中众多规定不明的问题也日益突显。譬如,公约对沿海国在专属经济区内的剩余权利规定不明,这致使他国在沿海国专属经济区内的军事或准军事活动的合法性问题伴随着海洋强国的挑衅而变得日益突出。尤其是,继2001年发生在中国南海的中美撞击事件后,中美又因美国于2009年4月在中国的专属经济区内使用超声波雷达探测器进行"测量

① 马英九著:《从新海洋法论钓鱼台列屿与东海划界问题》,台北:台湾正中书局印行1986年版,第157页。

② David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, Oxford: Oxford University Press, 2006, p. 1.

③ FAO, *State of the World Fisheries and Aquaculture*, Rome, 2004; Robin R. Churchill, The Management of Shared Fish Stocks: The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea, in Anastasia Strati, Marla Gavouneli, and Nikolaos Skourtos ed., *Unresolved Issues and New Challenges to the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 3~19.

④ V. Frank, Consequences of the Prestige Sinking for European and International Law, *IJMCL*, vol. 20, 2005, p. 1.

⑤ David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 2.

活动”而发生“无暇号”摩擦。

如车希尔(Robin Churchill)所言,“法律,不论国际法还是国内法,都不能在真空中生长,它受到政治、经济和科技等因素的影响,并由适用它们的‘现实世界’所塑造。”[①]海洋法前进的动力也绝不仅限于海洋和海洋法自身,它还受到国际社会和国际法的驱动。自海洋法公约通过后,国际社会经历了一系列的变革,国际法也取得了相应的发展。例如,可持续发展原则逐步发展成国际环境法的一项基本原则,它也被纳入了海洋法。[②]实际上,1992 年的里约会议之后通过的众多海洋法律文件都依循了海洋资源可持续利用与海洋可持续发展的原则,如联合国粮农组织 1993 年通过的《促进公海渔船遵守国际养护与管理措施协定》[③]、1994 年达成的《关于执行 1982 年 12 月 10 日〈联合国海洋法公约〉第十一部分的协定》[④]与 1995 的《联合国跨界和高度洄游鱼类资料保护和管理协定》[⑤]。此外,在海洋法公约未规定、规定不明或无法实施的某些领域,国际社会也达成了相关的协定,如联合国教科文组织 2001 年通过的《水下文化遗产保护公约》。[⑥]

总之,稳定性和灵活性是包括海洋法公约在内的国际法和国内法所追求的两大并行不悖的基本目标。海洋法公约一方面在协调各国利益的基础上给海洋的开发、利用、管辖、管理和治理构建了一个相对稳定的法律框架,另一方面它作为宏观的海洋大宪章不可能面面俱到,而且科技、经济和国际法的发展要求其具备一定的灵活性,以应对新的挑战,实现海洋法治化的可持续利用和发展。

一、海洋法公约的宪法地位与公约的完善

探讨海洋法公约的完善问题首先应把握海洋法公约的整体海洋观,因为这决定了公约的性质,影响着公约与国际法及其他条约之间的关系,也关涉到公约

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① R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 2.

② 可持续发展原则的适用范围还拓展到国际水道的非航行使用等其他跨界共享资源的开发。Stephen C. McCaffrey, *The Law of International Watercourses*, Oxford: Oxford University Press, 2007, pp. 453～461.

③ FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1997.

④ United Nations, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, 28 July 1994.

⑤ United Nations, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 8 September 1995.

⑥ UNESCO, Convention on the Protection of the Underwater Culture Heritage, 2001.

能否以及如何应对挑战,在新世纪实现长足的发展。施福曼(Howard S. Schiffman)指出,海洋是一个完整的生态系统,海洋法公约也是一个不可分割的整体。[①]其实,公约自身在其序言部分已经明确:"各海洋区域的种种问题都是彼此密切相关的,有必要作为一个整体来加以考虑"。这也表明成员国不得不通过磋商一揽子地解决海洋法问题,来给"海洋建立一种法律秩序,以便利国际交通和促进海洋的和平用途,海洋资源的有效利用,海洋生物资源的养护以及研究、保护和保全海洋环境。"[②]

海洋法公约革新了传统海洋法主要针对航行和捕鱼所确立的自由放任体制(Laissez—Faire Regime),并将海洋划分为各种管辖海域,即领海、毗连区、群岛国、大陆架、专属经济区和公海。[③]在12海里的领海内,沿海国享有完全的主权,但他国船舶享有无害通过权。[④]沿海国在毗连区内有权防范和惩治在其领土或领海内违反其海关、财政、移民或卫生的法律和规章之行为。[⑤]公约第四部分确立了群岛国的概念,承认了特定群岛国家对其四周海域的法定权利。专属经济区制度是海洋法公约的一大创新,它确立了沿海国在专属经济区域内以勘探和开发、养护和管理海床上覆水域和海床及其底土的自然资源为目的的主权权利,以及对人工岛屿、设施和结构的建造和使用及海洋科学研究与海洋环境的保护和保全的管辖权。[⑥]海洋法公约的第六部分采纳和发展了由1958年的《大陆架公约》和国际习惯法所确立的大陆架法律制度。大面积的传统的公海海域被纳入沿海国和群岛国的管辖海域,公约第七部分将《公海公约》与相关的国际习惯法纳入其中。公约第十一部分规定的"国际海底区域"和"人类共同遗产"是最具争议的两个问题。此外,公约第十五部分还确立起一套独具特色的争端解决机制。

诺德克(M. H. Nordquist)等学者认为,第三届联合国海洋法会议所谈论的问题极其复杂,公约能取得成功的一个关键因素就在于它兼顾了有关问题的政治和法律属性,适当地平衡了各国的政治利益和法律权益。公约的众多条款是不同国家和国家团体之间讨价还价的结果,这种借助协商一致程序一揽子解决

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① Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes*, Leiden/Boston: Martinus Nijhoff Publishers, 2008, p. 3.

② 详见1982年《联合国海洋法公约》序言部分。

③ R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 2.

④ 详见1982年《联合国海洋法公约》第二部分。

⑤ 详见1982年《联合国海洋法公约》第33条。

⑥ 详见1982年《联合国海洋法公约》第五部分。See Symaa. Ebbin, Alf Hankon Hoel, and Arek. Sydnes ed., *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources*, Springer, 2005; Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature Under International Law*, Cambridge: Cambridge University Press, 1989; David Joseph Attard, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987.

所有海洋法问题的立法模式使得海洋法公约独具特色。[①]但是，这同时意味着，通过这种方式耗时近十年才通过的海洋法公约作为一个整体很难被修正，而且海洋法的各项具体制度也不得背离公约自行发展。[②]

海洋法公约的宪法地位决定了其内容的系统性和全面性。如阿罗特(P. Allot)所言，“《公约》对任何事项都作了规定。它既规定了权利，也规定了义务。它还可能通过模糊地界定权利和义务来赋予有关国家明确的自由或给其保留一定的自由。”[③]但是，公约无法全面到无需完善，因为它不旨在解决全部的法律问题，而仅旨在创制一个解决问题的法律框架和机制。因此，公约在某些有争议的问题上使用了含糊或不明的用语，或根本就未作规定。此外，海洋法公约中的70多个条款规定它们可借助双边或多边的国际协定得以完善，[④]多个条款还专门规定了公约的自我完善程序。[⑤]

二、海洋法公约的完善方式

海洋法公约的宪法地位决定了我们不可另起炉灶，以全新的方式解决海洋问题。[⑥]相反，我们应当依据现有的规则、利用既有的机制，在必要的情况下修改公约，在适当情况下发展公约。实际上，作为一项条约，海洋法公约可通过多种方式得以完善，如修正、纳入普遍性的国际标准及采纳与其相符的国际或区域协

① M. H. Nordquist ed., *United Nations Convention on the Law of the Sea* 1982: *A Commentary*, Dordrecht: Martinus Nijhoff Publishers, 1985－2003, vol. 5, p. 260.

② David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 169－221.

③ P. Allot, Power Sharing in the Law of the Sea, *American Journal of International Law*, vol. 77, 1983, p. 8.

④ R. Wolfrum, The Legal Order for the Seas and Oceans, in M. H. Nordquist and J. Norton ed., *Entry into Force of the Law of the Sea Convention*, Hague: Martinus Nijhoff Publishers, 1995, p. 190.

⑤ 海洋法公约可通过三种方式得以完善和发展，即公约自身的修正、以援引的方式并入与采纳区域和国际性的协定。关于公约修正的条款包括第311～316条；涉及以援引的方式并入其他规定的条款有第22条(3)(a)，第39条(2)，第41条(3)，第53条(8)，第60条(3)，(5)和(6)，第61条(3)，第94条(5)，第119条(1)(a)，第201条，第211条(2)、(5)与(6)(a)和(c)，第226条，第262条与第271条；涉及采纳区域和国际性协定的条款有第69条(2)、(3)，第98条(2)，第125条(2)，第197条，第207条(4)，第208条(5)，第210条(4)，第211条(3)和第243条。

⑥ David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 204.

定等。[①]由于修正程序牵涉到难以逾越的表决程序等困难,[②]通过外交协商与国际组织制定新的协定是当前和将来较长时期内完善海洋法公约的主要方式。

当然,某种特定的方式可能更适合用来解决海洋法的某些问题。弗里斯通等人根据这一标准将公约中有待完善的条款归为五类:第一,如上文所述,海洋法公约中的某些条款明确要求通过制定具体的标准来实施其自身抽象的规定。第二,海洋法公约中的某些条款已经预见到可能出现的争议,并规定了解决争议的标准。例如,根据公约第59条,"公约未将在专属经济区内的权利或管辖权归属于沿海国或其他国家而沿海国和任何其他一国或数国的利益发生冲突的情形下,这种冲突应在公平的基础上参照一切有关情况,考虑到所涉利益分别对有关各方和整个国际社会的重要性,加以解决。"例如,他国在沿海国的专属经济区内是否有权进行军事或准军事活动,就应根据本条加以解决。[③]第三,海洋法公约中的某些条款是调和不同国家利益的结果,并有意对某些问题做了模糊的规定。例如,公约第17条对军舰在沿海国领海内的无害通过权就界定不明。第四,海洋法公约中的某些条款随着国际法的发展或科技的变革而不复适用。第五,海洋法公约中的某些条款存在一定的缺陷。例如,对高度洄游性鱼类的保护,公约的规定并不全面。[④]

我们可以通过可持续发展原则、水下文化遗产保护以及渔业的管理三个方面来阐释如何借助内在和外部的工具完善海洋法公约。作为国际法的一个新兴原则,可持续发展原则已经渗透到人类开发自然资源的各个层面,这当然也包括海洋资源的开发。例如,海洋法公约第56条赋予了沿海国在专属经济区内养护上覆水域和海床及其底土的自然资源(不论为生物或非生物资源)为目的的主权权利,同时沿海国还对专属经济区内的环境保护和保全具有管辖权。公约第六

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① B. Oxman, Tools for Change: the Amendment Procedure in Proceedings of the Twentieth Anniversary Commemoration of the Opening for Signature of the United Nations Convention on the Law of the Sea, New York: United Nations, 2003, p. 195.

② David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 173～183.

③ Kaiyan Homi Kaikobad, Non Consensual Military Surveillance in the Exclusive Economic Zone, 2009; George V. Galdorisi and Alan G. Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, *Cal. W. Int'l L. J.*, vol. 32, 2002; John C. Meyer, The Impact of the Exclusive Economic Zone on Naval Operations, *Naval L. Rev.*, vol. 40, 1992; Stephen Rose, Naval Activity in the EEZ—Troubled Waters Ahead?, *Naval L. Rev.*, vol. 39, 1990; Boleslaw A. Boczek, Peacetime Military Activities in the Exclusive Economic Zone of Third Countries, *Ocean Dev. & Int'l. L.*, vol. 9, 1988; Alan V. Lowe, Some Legal Problems Arising from the Use of the Seas for Military Purposes, *Marine Policy*, vol. 10, 1986.

④ David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 15～16.

和第七部分却仅将应保全和可持续利用的大陆架和公海资源限于生物资源。由此，翁格(David Ong)提出了一个问题，即可持续发展原则是否应适用于大陆架的非生物资源。事实上，公约第六部分强调沿海国对大陆架的生物资源具有永久性的主权权利，我们也很难主张沿海国有义务保全非生物资源。但是，随着国际法的发展，非生物资源的保全和利用在将来可能也应遵循可持续发展原则。例如，海底油气资源的开发应遵守海洋环境保护原则，评价开发活动可能对海洋环境造成的影响。对大陆架的非生物资源而言，我们似乎可以主张其开发和利用应以合理及高效的方式进行，毕竟此类资源是不可再生的。[①]可持续发展原则还涉及海洋生态系统的保全。海洋内的生物组成一个与人类生存的陆地并存且交互影响的生态系统，破坏海洋生态系统不仅会影响海洋的生物多样性，更可能波及陆地和大气生态系统，进而影响人类的可持续发展。[②]

水下文化遗产保护是海洋法公约未合理解决的问题之一。[③]实际上，水下文化遗产保护并非第三届海洋法会议讨论的主要议题之一。在讨论各海域的法律制度过程中，人们主要关注的是在各海域尤其是国际海底区域和公海发现的历史文物。海洋法公约的第 149 条和第 303 条也仅对国际海底区域和公海内发现的历史文物保护作了原则性的规定。斯考瓦兹(Tullio Scovazzi)认为海洋法公约确立的水下文化遗产保护体系存在严重的不足，因为公约未在沿海国管辖海域外赋予其管辖权，同时立法者也未充分重视水下文化遗产的价值。国际社会对水下文化遗产保护并未局限于海洋法的规定，它通过针对水下文化遗产保护的法律文件、关于文化遗产保护的一般性条约以及环境保护和海事条约等逐步

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① David Ong, Towards an International Law for the Conservation of Offshore Hydrocarbon Resources within the Continental Shelf, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 93～119.

② Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservation and Vetoes*, Leiden/Boston: Martinus Nijhoff Publishers, 2008, p. 2.

③ Sarah Dromgoole ed., *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention* 2001, Leiden/Boston: Martinus Nijhoff Publishers, 2006; Roberta Garabello and Tullio Scovazzi ed., *The Protection of the Underwater Cultural Heritage: Before and After the* 2001 *UNESCO Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2004.

完善了水下文化遗产的法律保护。[①]迄今为止最为重要的条约当属《水下文化遗产保护公约》。该公约在细化和丰富海洋法公约的基础上又对其进行了补充和完善。[②]

海洋法公约对捕鱼和鱼类养护问题的规定仍存在一些重要的缺陷。例如，公约第五部分对国内渔业管理的规定就存在明显的不足。虽然沿海国管辖海域内的可补鱼类的数量和质量在明显下降且存在严重的过量捕鱼现象，很多沿海国仍放任IUU捕鱼活动。海洋法公约并未给沿海国设定强制性的义务来养护和管理鱼类，也未构建起有效的执行机制来确保沿海国合理、有效地管理国内的捕鱼活动。联合国粮农组织2008年通过的《负责任捕鱼行为准则》及1995年的《联合国跨界和高度洄游鱼类资料保护和管理协定》进一步细化和发展了海洋法公约规定的一般性的鱼类养护责任。当然，行为准则不具有法律约束力且管理协定仅适用于特定类型的高度洄游性鱼类，但它们仍通过明确有关国家的鱼类养护责任进一步完善了海洋法公约。

此外，海洋法公约第63条规定了“共享鱼类种群”的养护问题。相对于高度洄游性鱼类，共享鱼类的养护并未受到国际社会的广泛关注。车希尔在对共享鱼类进行分类的基础上，考察了共享鱼类管理涉及的主要问题，论证了海洋法公约第63条(1)的不足，并从国家实践和国际社会的角度探讨了共享鱼类养护和管理的未来发展模式。[③]“共享”意味着鱼群在两国的专属经济区内移徙和出现，

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① Council of Europe, Ad Hoc Committee of Experts on the Underwater Cultural Heritage, Final Activity Report, Doc. CAHAQ (85)5, 1985; Council of Europe, Recommendation 1846 on Maritime and Fluvial Cultural Heritage, 2000. 针对具体的水下文化遗产，不少国家达成了双边条约。Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks, 1972; the Exchange of Note between South Africa and the United Kingdom Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS Birkenhead, 1989; the Agreement between the Government of the United States of America and the Government of the French Republic concerning the Wreck of CSS Alabama, 1989; the Agreement between the Government of the United States of America and the Government of the French Republic regarding the Wreck of La Belle, 2003. 涉及水下文化遗产保护的环保条约包括：1982 Protocol concerning Mediterranean Specially Protected Areas; 1995 Protocol concerning Specially Protected Areas and Biological Diversity in Mediterranean; the 1990 Protocol Concerning Specially Protected Areas and Wildlife; 2001 IMO Guidelines for the Identification and Designation of Particularly Sensitive Sea Area; 1989 International Convention on Salvage。

② Tullio Scovazzi, The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 120～136.

③ Robin R. Churchill, The Management of Shared Fish Stocks: The Neglected “Other” Paragraph of Article 63 of the UN Convention on the Law of the Sea, in Anastasia Strati, Marla Gavouneli, and Nikolaos Skourtos ed., *Unresolved Issues and New Challenges to the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 3～21.

其管理和养护至少涉及两个国家，牵涉到鱼群的确定、科研、管理合作、鱼群的分配、执行措施及第三国的利益等一系列复杂的问题。海洋法公约第 63 条(1)要求有关国家直接或通过适当的区域组织进行善意的协商，但这些国家并无义务达成协议。必须指出的是，第 63 条要求有关国家在管理共享鱼群时，仍须遵守公约第 61 和第 62 条规定的鱼类养护义务。这些义务包括鱼群的最适度利用，防范过度捕捞，将鱼种的数量维持在或恢复到其繁殖不会受严重威胁的水平以上，以及确定渔获量的限额等。离开有关国家的通力合作，沿海国在其专属经济区内几乎不可能对共享鱼群履行上述种种义务。[①]当前，共享鱼类很难借助高度洄游性鱼类的保护模式由相关国际组织直接针对其养护制定国际条约，它更有赖于《负责任捕鱼行为准则》等软法文件及有关国际组织和国家间的通力合作。

三、海洋法公约的完善机制

为应对新出现的问题，海洋法公约要求成员国通过国际组织、地区组织或专业机构来适时、适当地发展海洋法。[②]公约中的不少条款允许并鼓励缔约国采取这种方式解决有关问题，但并未指定任何特定的组织或机构。随着科技的发展及人们对环境保护及资源和能源问题的日益关切，联合国大会在协调致力于发展海洋法的各组织和机构上发挥着越来越重要的引导作用。法耶特(Louise de la Fayette)认为，这主要是因为联合国大会具有广泛的代表性及其对国际海洋热点问题展开的定期的讨论。此外，联合国大会还具有前瞻性，它将海洋法发展的重点列入议程，给海洋法律秩序增添了不可或缺的稳定性。[③]

海洋法公约不要求成立缔约国大会，由联合国大会评价公约的执行情况成为备受争议的一种公约完善机制。虽然并非所有的联合国成员国均是公约的缔约国，但大会每年都对海洋法的重点问题做出决议。[④]此外，公约要求联合国秘书长召开必要的缔约国会议，但缔约国会议却仅担负起特定的行政和管理具体

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① M. Hayashi, The Management of Transboundary Fish Stocks under the LOS Convention, *TIJMCL*, vol. 8, 1993, p. 250.

② P. Allot, Power Sharing in the Law of the Sea, *AJIL*, vol. 77, 1983, pp. 1～30.

③ Louis de la Fayette, The Role of the United Nations in International Ocean Governance, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 63～74.

④ Tullio Treves, The General Assembly and the Meeting of State Parties in the Implementation of the LOS Convention, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 55.

职责,如国际海洋法法庭法官的推荐和任命等。[①]缔约国会议权限过小虽然饱受非议,但联合国大会仍是负责评估和发展公约的主要机构。尤其是,联合国海洋事务及海洋法非正式磋商进程的开展将进一步强化了联合国大会的上述权限。

海洋法公约还特设了专门的机构,来解决特定领域的问题,这主要包括本文开篇所提及的国际海底管理局、大陆架界限委员会和国际海洋法法庭。学界对三个组织的设立、功能和运作已有较全面和深入的研究。[②]应该说,人类共同遗产原则(Common Heritage of Mankind)是国际海底管理局的法律基石。为了在国际海底区域贯彻和执行这一原则,海洋法公约专门设立了该机构,由它负责国际海底区域资源的开发、环境保护及开发机构与国际社会之间的利益平衡。[③]然而,由于海洋资源勘探和开发强国迟迟不愿加入海洋法公约,为了使公约第十一部分更具可行性,国际社会于 1994 年达成了执行协定。[④]该协定是对海洋法公约第十一部分的修正,它也为多数国家所接受。同时,国际海底管理局还必须及时地应对新出现的问题。譬如,由于环境保护问题日益重要,执行协定要求管理局对开发活动进行环境影响评价。

此外,根据联合国宪章第 57 条,联合国大会有权向其专门机构提出建议,并由这些专门机构将建议转达给其有关机构。在这些机构中,粮农组织和国际海事组织在海洋法的发展上发挥着极其重要的作用。毋庸置疑,国际海事组织在海洋法公约生效前后对海洋法的发展均发挥了至关重要的作用。离开海事组织通过的一系列协定,海洋法公约中关于航运、污染、海上安全和生态系统保全等

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① A. G. Oude Elferink, Reviewing the Implementation of the LOS Convention: the Role of the United Nations General Assembly and the Meeting of State Parties, in A. G. Oude Elferink ed., Stability and Change in the Law of the Sea: The Role of the LOS Convention, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 75.

② P. B. Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity*, The Hague: Martinus Nijhoff Publishers, 1997; Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Heidelberg: Springer, 2008; Chandrasekhara Rao and P., K. Rahmatullah ed., *The International Tribunal for the Law of the Sea: Law and Practice*, Hague: Kluwer Law International, 2001.

③ 该机构于 1994 年在公约生效后依公约规定设立。详见 1982 年《联合国海洋法公约》第十一部分。

④ Satya Nandan, Administering the Mineral Resources of the Deep Seabed, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*. New York: Oxford University Press, 2006, p. 77.

事项的规定将成为一纸空文。[①]当然，国际海事组织的在上述领域的准立法权仍受到海洋法公约的限制。譬如，海洋法公约第 311 条(2)和第 237 条(2)均要求国际海事组织所采取的措施与公约相符。国际海事组织通过的法律文件中有些还明确指出其规则与海洋法公约相符，如 1973 年《国际防止船舶污染的公约》第 5 条。

联合国粮农组织通过一系列行为准则在渔业的养护和管理方面不断完善海洋法公约的有关条款。[②]实际上，海洋法公约并未授权粮农组织制定有关生物资源养护的规则和标准，它主要通过制定不具有强制法律效力的行为准则积极介入生物资源养护。由于海洋法公约在生物资源养护上采取了以主权国家为主导的模式，除高度洄游鱼类外，沿海国对其专属经济区内的生物资源具有主权和管辖权。[③]由此，联合国粮农组织主要借助不具强制效力的法律文件来防控 IUU 捕鱼活动也就不难理解了。[④]

司法机构在完善和发展公约上也起着一定的作用。在这方面，国际司法实践对海洋划界原则、规则和标准的影响最为明显。在专属经济区和大陆架的划界问题上，海洋法公约第 74 条和第 83 条要求沿岸相向或相邻的沿海国在国际法院规约第 38 条所指的国际法的基础上通过协议加以划定，公平解决划界争议或争端。然而，就连公约第 15 条规定的等距离/特殊情况划界方法最终也要靠公平原则来查漏补缺。离开具有普遍适用性的具体划界规则、标准和方法，海洋法公约也不得不将该领域的发展更多地置于国际司法机构之手。迄今为止，国

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① 国际海事组织通过的与海洋法相关的主要协定包括：International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969，1975 UKTS 77；Convention on the International Regulations for Preventing Collisions at Sea 1972，1977 UKTS 77；International Convention for he Prevention of Pollution from Ships，1973，as modified by the Protocol of 1978 relating thereto (MARPOL 73/78)，1340 UNTS 61；International Convention for Safety of Life at Sea 1974，1184 UNTS 2；International Convention on Maritime Search and Rescue 1979，1986 UNTS 59；Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988，1678 UNTS 221；International Convention on Salvage 1989，1996 UKTS 93。

② The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993 (1994) 33 ILM 968；FAO Code of Conduct for Responsible Fisheries；International Plan of Action for the Conservation and Management of Sharks；International Plan of Action for the Management of Fishing Capability 1999；International Plan of Action to Prevent，Deter and Eliminate Illegal，Unreported and Unregulated Fishing 2001.

③ Robin R. Churchill，The Management of Shared Fish Stocks：The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea，in Anastasia Strati，Marla Gavouneli，and Nikolaos Skourtos ed.，*Unresolved Issues and New Challenges to the Law of the Sea*，Leiden/Boston：Martinus Nijhoff Publishers，2006.

④ Kristina M. Gjerde，High Sea Fisheries Management under the Convention on the Law of the Sea，in David Freestone，Richard Barnes and David M. Ong ed.，*The Law of the Sea：Progress and Prospect*，New York：Oxford University Press，2006，pp. 280～307.

际法院所受理的案件中,涉及海洋划界的案子占了大多数。塔纳卡(Yoshifumi Tanaka)认为,在较长的一段时期内,国际法尚很难突破目前原则性的海洋划界立法,国际法院和国家也努力地在规则的可预见性与灵活性之间找到一个平衡点,尽量以个案结合一般原则的方法,以衡平的方式解决具体的海洋划界争端。①

四、海洋法公约执行机制的完善

如安德森(David Anderson)所言,海洋法未来的发展方向已经从确立标准转向监督缔约国执行已经确立的标准。②海洋法发展的重心也从创设实体法律权利和义务转向海洋的综合、有效治理。海洋治理牵涉到一系列法律文件在国内的统一适用,并涉及众多国际、区域组织和其他相关机构的协调运作。③当然,在海洋环境保护、海洋生态系统保全、海上安全保障等问题上,海洋法尚需新的规范,但它更需要通过国际、区域和国内的三重机制来强化海洋法的实施。④

保障国际法在国内得以有效的执行和实施是国际法学界的一个永恒话题。对海洋法而言,如何保障公约在各国得以统一的适用和执行是一个极为复杂的难题。车希尔在界定国家实践、分析国家实践与海洋法公约交互影响的基础上,考证了公约各部分在缔约国和非缔约国的执行情况,并最终得出以下结论:虽然各国对海洋法公约的解释和执行并不完全一致,但国家实践并不构成对公约的重新解释,也未形成与公约规定不一致的国际习惯法。⑤

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① Rainer Lagoni and Daniel Vignes ed., *Maritime Delimitation*, Leiden/Boston: Martinus Nijhoff Publishers, 2006; Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, Oxford: Hart Publishing, 2006; Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries*, Hague: Kluwer Law International, 1998—2004; Gerard J. Tanja, *The Lega Determination of Internationa Maritim Boundaries*, Denver/Boston: Kluwer Law and Taxation Publishers, 1990; Prosper Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications Limited, 1989.

② David Anderson, Freedom of the High Seas in the Modern Law of the Sea, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 345.

③ Louis de la Fayette, The Role of the United Nations in International Ocean Governance, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 63.

④ Yoshifumi Tanaka, *A Dual Approach to Ocean Governance*, Ashgate Publishing, 2008, pp. 1～27.

⑤ Robin R. Churchill, The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 91～145.

截止2010年6月1日,已经有160个国家批准或加入了联合国海洋法公约,138个国家批准或加入了1994年的关于第十一部分的执行协定,77个国家批准或加入了1995年的跨界和高度洄游鱼类资源保护和管理协定。[①]海洋法公约的批准或加入国已经占了世界上国家的大多数,但人们仍期望公约能适用于所有国家,以便给海洋的和平开发和治理提供更加明确和稳定的法律框架。[②]如车希尔所指出的,海洋法公约在各国的执行仍不统一,鼓励更多的国家批准海洋法公约仍是联合国的一项任务。对1994年的执行协定和1995年的鱼类资源保护和管理协定而言,让更多的国家加入其中也至关重要。

为了强化公约的统一适用,我们应当协调公约的全球执行机制及多边和单边方法,根据特定领域的具体需要,利用适当的立法、执法和司法监督,提升公约在全球范围内的有效执行。例如,国际海事组织借鉴WTO等国际组织的做法,将全面和彻底执行《海员培训、发证和值班标准国际公约》的国家列入绿色清单。[③]安德森(David Anderson)呼吁推广这一监督缔约国遵守公约的方法。实际上,"IMO成员国自愿审核机制"在某种程度上就采纳了这种做法。[④]当然,它并非强制性的监督措施,而是以成员国的自愿为基础,来审核国际海事组织的条约在国内的遵守和执行情况。

联合国大会是会员国讨论海洋法公约执行问题的一个重要平台,它可以确保海洋法不为少数国家所左右,保障海洋法的普适性。自海洋法公约于1994年11月16日生效以来,联合国大会每年均针对公约及其执行协定发布决议,列出急需解决的重要事项。例如,2009年的大会决议强调,必须加强主管国际组织的能力,在全球、区域、次区域和双边各级,通过与各国政府的合作方案,协助发展在海洋科学以及可持续管理海洋及海洋资源方面的国家能力;关切人类活动对海洋环境和生物多样性和海洋生态系统造成的有害影响;关切继续存在海上跨国有组织犯罪问题威胁海上安全和安保,包括海盗、海上持械抢劫、走私以及针对航运、海上设施和其他海事权益的恐怖主义行为;指出划定200海里以外的大陆架的外部界限非常重要,拥有200海里以外大陆架的沿海国向大陆架界限委员会提交有关200海里以外大陆架的划界案更符合国际社会的利益。

虽然全球和多边执行体制更能促进人类的共同利益,但它也受到各国主权利益的挑战,因为海洋法的最终实施有赖于各主权国家的配合。应该说,这是当

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① http://www.un.org/Depts/los/reference_files/status2010.pdf (2010年7月6日访问)。

② Bernard H. Oxman, The Rule of Law and the United Nations Convention on the Law of the Sea, *EJIL*, vol. 6, 1996, p. 353.

③ International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995.

④ Voluntary IMO Member State Audit Scheme, adopted in November 1993, IMO Doc A 946 (23); Framework and Procedures for the Voluntary IMO Member State Audit Scheme, IMO Doc A 974(24); Code for the Implementation of Mandatory IMO Instrument, IMO Doc A 973(24).

前以主权国家为核心的国际体系及横向的国际法实施体系在海洋法领域的具体表现。例如对船舶的管理,海洋法公约确立了以船旗国和沿海国为主导的管辖体系。该管辖体系长期以来饱受批评,因为船旗国可能缺少有效管理船舶的诱因或能力。[①]彻底摈弃船旗国制度并不现实,它可能使船舶的管理落入法律真空。联合国粮农组织的《促进公海渔船遵守国际养护管理措施协定》在加强船旗国对渔船的管理上做出了有益的尝试。它要求船旗国通过在重要领域制定与国际法相符的国内法,加强该国对其船舶的管辖。[②]加强船舶管理的另外一条途径是借助其他有关国家特别是港口国的监管力量。随着渔业协定数量的增多与打击海上恐怖活动力度的增强,不少地区对港口国监管达成了备忘录,如巴黎、东京、加勒比海、拉美、印度洋、地中海和黑海备忘录等,来强化港口国的管辖权。

上文提及,联合国大会2009年2月的决议指出,包括海盗、海上持械抢劫、走私以及针对航运、海上设施和其他海事权益的恐怖主义行为等海上跨国有组织犯罪活动威胁海上安全和安保,造成了令人痛惜的生命损失,对国际贸易、能源安全和全球经济造成不利影响。应该说,近期索马里海盗猖獗活动及国际社会共同打击海盗活动,使得海上安全保障再次成为一个热点话题。[③]实际上,海洋法公约并未直接涉及海上安全问题,保障海上安全不仅需要强化多边协作体制,更需要加强沿海国、船旗国和港口国的监督和执行权。[④]

海洋法公约的争议解决机制也是保障公约有效实施的一大途径。海洋法公约第十五部分第一节要求缔约国以和平的方式,通过协商和调节等途径解决争议和争端。如果穷尽这些方式尚未达成协议,公约则要求有关各方适用第二节所规定的强制程序。当然,自公约生效至今,强制程序并不为缔约国所青睐,只有少数案件被提交至国际海洋法法庭。但是,海洋法公约确立的强制性争议解决模式已经成为澄清和解决公约中某些问题的有效途径,而且该模式也为众多海洋法协定所采纳,如《促进公海渔船遵守国际养护管理措施协定》、《联合国跨界和高度洄游鱼类资源保护和管理协定》、《东南大西洋鱼类资源养护和管理公约》[⑤]、《太平洋西部和中部高度洄游鱼群养护和管理公约》[⑥]、《东南太平洋公海

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① R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, pp. 255～276.

② Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993.

③ Myron H. Nordquist, Rudiger Wolfrum, John Norton Moore and Rona Long ed., *Legal Challenges in Maritime Security*, Leiden/Boston: Martinus Nijhoff Publishers, 2008.

④ Henrik Ringbom, *The EU Maritime Safety Policy and International Law*, Leiden/Boston: Martinus Nijhoff Publishers, 2008; Natalino Ronzitti ed., *Maritime Terrorism and International Law*, Dordrecht: Martinus Nijhoff Publishers, 1990.

⑤ The Convention on the Conservation and Management of Fishery Resources in the South－East Atlantic Ocean, done at Windhoeck on 20 April 2001.

⑥ The Convention on the Conservation and management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, done at Honolulu on 5 September 2000.

海洋生物资源养护框架协定》[①]与《水下文化遗产保护公约》等。此外，国际法院自成立之日起就一直在海洋划界和岛屿归属等海洋法领域的发展上扮演着重要的角色。[②]

总之，海洋法公约未规定的问题、公约中悬而未决的问题、公约执行中存在的问题、社会发展给海洋法带来的新挑战等等，都要求我们适时地考察公约自身存在的不足，并采取适当、可行的方式和机制不断完善公约、发展海洋法。鉴于公约的宪法属性及其协调各国政治利益与法律权益的特性，公约自身规定的修正程序在当前仍面临着难以逾越的困难。由此，通过外交协商与国际组织或机构创设新的规则和标准来统一国家实践，就不失为当前在海洋法公约确立的海洋法框架内与宏观国际法的整体构架下逐步完善公约的必要和有效途径了。

（责任编辑：罗向韡　叶雷）

① The Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South－Eastern Pacific, signed at Santiago de Chile on 14 August 2000.

② Barbara Kwiatkowska, *The Contribution of the World Court to the Development of the Law of the Sea*, Den Bosch: Book World Publications, 2002.

To Improve the Efficacy of the UN Convention on the Law of the Sea*

KONG Lingjie**

Abstract: It has been nearly 30 years since the adoption of the UN Convention on the Law of the Sea (UNCLOS) in 1982. This article seeks to examine the status of the Convention as it is currently implemented, identify its deficiencies, and explore the principles to follow and the approaches and institutional mechanisms to adopt to enhance its efficacy. The constitutional status of the Convention in the context of the law of the sea dictates that the Convention is viewed from the vantage point of the seas as a whole and its efficacy enhanced as part of the law of the sea and international law. As the amendment procedure prescribed in the Convention renders it difficult to activate, the most effective way to enhance the efficacy of the Convention is arguably through the standardization of state practices via diplomatic negotiations and legislation at the international and regional levels. Meanwhile, the multi-tiered nature of the rule of the sea also calls for the cooperation among international and regional organizations as well as other related institutions, and the synchronization of their actions, which will have the effect of strengthening the uniform application and effective implementation of the Convention across sovereign states.

Key words: UNCLOS; Improvement; Approach; Mechanism

After nearly 10 years of negotiation and delicately balancing the political interests and legal rights of all nations involved, 117 participating nations

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signed the *United Nations Convention on the Law of the Sea* (UNCLOS) at the Third UN Conference on the Law of the Sea in 1982.[①] At the final session of the Conference, Tommy Koh, president of the Conference, called the Convention of 320 articles with nine annexes "a constitution for the oceans."[②] In his critique of the development of the law of the sea between the late 1960s and 1982, Ma Yingjiu noted, "By revamping the old order of the sea in such magnitude, to such extent, and with such impact, [the UNCLOS] arguably revolutionized the law of the sea."[③] Twenty-eight years have passed since the Convention was adopted. It is high time for us to examine the issues not addressed by the Convention, the issues only partially resolved by the Convention, the problems inherent to the implementation of the Convention, and the new challenges posed by social developments on the law of the sea, and to determine how to enhance the efficacy of the Convention within the framework of the law of the sea as established by the Convention and in the overall international legal regime.

The UNCLOS is undoubtedly the constitution of the law of the sea. We must base our research with regard to the efficacy of the Convention on this underlying premise. The UNCLOS established a system comprising archipelagic states, exclusive economic zones (EEZ's) and deep seabed areas. It created new obligations, such as the protection of the marine environment, gave existing international organizations, such as the Food and Agricultural Organization (FAO) and the International Maritime Organization (IMO), new responsibilities, and founded new institutions, such as the International Seabed Authority (ISA), the Commission on the Limits of Continental Shelf (CLCS) and the International Tribunal for the Law of the Sea (ITLOS). In fact, the constitutional status of UNCLOS dictates that it establish a firm legal framework for the jurisdiction over and the use, rule, and preservation of the seas on the one hand, and that it keep up with political, economic and social developments through in-

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① UN Division for Ocean Affairs and the Law of the Sea, The United Nations Convention on the Law of the Sea: A Historical Perspective, 1998, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (visited on 6 July 2010).

② Tommy Koh, A Constitution for the Oceans: Remarks by Tommy Koh, final session of the Third UN Conference on the Law of the Sea, Montego Bay, December 1982. Some scholars deem E. M. Borgese the first man that called UNCLOS a "constitution for the Oceans". *See* P. B. Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity*, Hague: Martinus Nijhoff Publishers, 1997, p. 49.

③ Ma Yingjiu, Tiaoyutai Islands and Maritime Delimitation in East China Sea under the New Law of the Sea, Taibei: Taiwan Zhengzhong Press, 1986, p. 157.

ternal and external mechanisms, on the other. [①]

The UNCLOS is not a master key capable of opening the locks to all issues relating to the sea. Since the day of its adoption, it has faced numerous challenges. For example, illegal, unreported, and unregulated (IUU) fishing has dramatically decreased the quantity of fish stocks, drawing people's attention to the regulation of the fishing industry. [②] Human activities causing serious damage to marine ecosystems, in particular to coral reefs, have put marine ecological preservation and establishment of marine ecological protected zones on the UNCLOS agenda. Serious pollution caused by oil leaks from ships in recent years has aroused renewed emphasis on the importance of prevention, control and handling of pollution caused by ships. [③] The recent spill of crude oil from British Petroleum's oil well in the Gulf of Mexico has also pushed us to reevaluate the balance between the exploitation of marine resources and the protection of the marine environment. After 9/11, increased pirate activities in Somalia prompted us to reconsider the scope of the UNCLOS and aggressively look at the prospects of establishing an international and regional legal framework for safeguarding marine security. These are all issues that are not properly addressed by the UNCLOS. [④] Additionally, problems arising from lack of clarity in the provisions of the Convention are becoming increasingly apparent. For example, the ownership of residual rights in the EEZ is not clearly delineated in the UNCLOS. As a result, it is difficult to determine the legitimacy of military and surveillance activities undertaken by a foreign state in the EEZ; provocation by naval forces in the EEZ lends increasing urgency to this issue. Examples of such provocation are found in the China-U. S. aircraft collision in the South China Sea in 2001 and the USNS Impeccable Incident in 2009.

As Robin Churchill noted, "Laws, whether international or municipal, do not grow up in isolation, but influence and are moulded by the politics, econom-

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① David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, Oxford: Oxford University Press, 2006, p. 1.

② FAO, *State of the World Fisheries and Aquaculture*, Rome, 2004; Robin R. Churchill, The Management of Shared Fish Stocks: The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea, in Anastasia Strati, Marla Gavouneli, and Nikolaos Skourtos ed., *Unresolved Issues and New Challenges to the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 3～19.

③ V. Frank, Consequences of the Prestige Sinking for European and International Law, *IJMCL*, vol. 20, 2005, p. 1.

④ David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 2.

ics and geography of the 'real world' to which they apply."[①] The same is true of the law of the sea, the advancement of which is fueled not only by the seas and the legal framework governing the seas, but also by the international community and international law. Since the adoption of the UNCLOS, the international community has undergone a series of changes, with international law undergoing corresponding developments. For instance, sustainable development has become one of the underlying principles of international environmental law and has been incorporated as an integral part of the law of the sea.[②] In fact, many legal instruments adopted after the 1992 UN Conference on Environment and Development in Rio de Janeiro adhere to the same principles of sustainable use of the resources of the sea and sustainable development of the sea, such as the FAO 1993 *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the FAO 1993 Agreement),[③] the 1994 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* (the 1994 Implementation Agreement),[④] and the 1995 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (the 1995 Implementation Agreement).[⑤] In addition, in areas that the UNCLOS does not cover, provides insufficient coverage, or provides coverage that is incapable of implementation, the international community has reached agreements to provide for coverage, such as the 2001 UNESCO *Convention on the Protection of the Underwater Culture Heritage*.[⑥]

In short, firmness and flexibility are the two concurrent objectives for both

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① R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 2.

② The principle of sustainable development was expanded to other natural resources, such as non-navigational uses of international watercourses. *See* Stephen C. McCaffrey, *The Law of International Watercourses*, Oxford: Oxford University Press, 2007, pp. 453～461.

③ FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1997.

④ United Nations, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, 28 July 1994.

⑤ United Nations, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 8 September 1995.

⑥ UNESCO, Convention on the Protection of the Underwater Culture Heritage, 2001.

international and domestic law. The law of the sea is no exception. The UNCLOS, on the one hand, established a firm legal framework for the jurisdiction over and the use, rule, and preservation of the seas by balancing the interests of the various countries. On the other hand, as the constitution of the law of the sea with a macro vision, the UNCLOS cannot possibly address every type of issue; rather, developments in technology, economics and international law dictate that it retain a certain degree of flexibility required to meet new challenges and, through the rule of the law of the sea, make sustainable use and development of the sea a reality.

Ⅰ. Constitutional Status of UNCLOS and Enhancement of Its Efficacy

To identify ways in which to enhance the efficacy of the UNCLOS, it is imperative that we stay focused on the fact that the UNCLOS is built on the vision of the seas as an integral whole. This underlying principle determines the nature of the UNCLOS, impacts the relationship between the UNCLOS and international law, including treaties, and dictates whether the UNCLOS will be able to meet challenges and make headway in the new millennium. As Howard S. Schiffman once said, the ocean is an integral ecosystem, and thus the UNCLOS should be considered as a whole. ① The preface of the Convention also states, "The problems of ocean space are closely interrelated and need to be considered as a whole." This is also why sovereign states are compelled to resolve issues of the law of the sea through negotiations and as a package. This way they are able to establish "a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment." ②

The UNCLOS abolished the laissez-faire regime established by the traditional law of the sea aimed at navigation and fishing, by dividing the seas into jurisdictional areas, i. e., the territorial sea, contiguous zone, archipelago, conti-

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① Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes*, Leiden/Boston: Martinus Nijhoff Publishers, 2008; Peter Bautista Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity*, Hague: Kluwer Law International, 1997, p. 3.

② *See* the Preface to UNCLOS.

nental shelf, EEZ, and the high sea. [①] Within the territorial sea of 12 nautical miles, the coastal state enjoys full sovereignty, while foreign states have the privilege of innocent passage. [②] In the contiguous zone of 24 nautical miles, the coastal state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, and to punish violations of such laws and regulations committed within its territory or territorial sea. [③] Rights of the archipelagic state over its neighboring sea are prescribed in Part IV of the UNCLOS. The EEZ is a legal system newly established under the UNCLOS, which accords sovereign rights to the coastal state for the purposes of exploring and exploiting, conserving and managing the natural resources of the waters subjacent and of the seabed and its subsoil. It also gives the coastal state jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment. [④] Part VI of the UNCLOS incorporated and expanded on the legal system of continental shelf as affirmed by the 1958 *Continental Shelf Convention* and international customary law. A large part of the traditionally free high seas was placed under the jurisdiction and control of coastal and archipelagic states. Part VII incorporated the *Convention on the High Seas* and relevant international customary law. Part XI contains provisions relating to international seabed areas and common heritage of mankind, the two most controversial issues under the UNCLOS. Part XV provides for a unique dispute resolution mechanism.

According to Myron H. Nordquist, the key to the success of The Third UN Convention on the Law of the Sea, notwithstanding the extreme complexity of the issues on the agenda, rested in the fact that that Convention was mindful of the political and legal nature of those issues and was able to strike a balance among the political interests and legal rights of the various nations. Many pro-

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① R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 2.

② Part II of UNCLOS.

③ Article 33 of UNCLOS.

④ Part V of UNCLOS. *See* Symaa. Ebbin, Alf Hankon Hoel, and Arek. Sydnes ed., *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources*, Springer, 2005; Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature Under International Law*, Cambridge: Cambridge University Press, 1989; David Joseph Attard, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987.

visions of the Convention were the result of bargaining among different states and groups of states. This way of making law through building consensus and finding packaged solutions is what makes the UNCLOS unique. ① By the same token, it also means that the UNCLOS, which took nearly 10 years of deliberation to become a reality, is virtually impossible to amend. In addition, the various discreet systems under the law of the sea are not allowed to chart their own course in contradiction with the UNCLOS. ②

The constitutional status of the UNCLOS dictates that it is systematic and comprehensive. As Philip Allot noted, the UNCLOS provides for every issue; not only does it provide for rights and obligations, it also entitles the states explicit freedom or leaves them certain discretion through ambiguous definition of relevant rights and obligations. ③ However, it is not possible for the UNCLOS to be 100% comprehensive because it is not intended to resolve all problems but rather to provide a legal framework and mechanism for problem-solving. This is why the UNCLOS addresses certain controversial issues with ambiguous or arbitrary language or stays silent on them altogether. Moreover, about 70 sections in the UNCLOS are expressly subject to the application of bilateral or multilateral international agreements. ④ Further, multiple provisions are dedicated exclusively to the amendment procedure of the Convention. ⑤

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① M. H. Nordquist ed., *United Nations Convention on the Law of the Sea* 1982: *A Commentary*, Dordrecht: Martinus Nijhoff Publishers, 1985-2003, vol. 5, p. 260.

② David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 169～221.

③ P. Allot, Power Sharing in the Law of the Sea, *AJIL*, vol. 77, 1983, p. 8.

④ R. Wolfrum, The Legal Order for the Seas and Oceans, in M. H. Nordquist and J. Norton ed., *Entry into Force of the Law of the Sea Convention*, Hague: Martinus Nijhoff Publishers, 1995, p. 190.

⑤ UNCLOS can be improved through amendment, reference to other rules and adoption of regional and international agreements. Articles 311～316 are on amendment of UNCLOS. Provisions that could be improved by reference to other rules include Article 22(3)(a), Article 39(2), Article 41(3), Article 53(8), Article 60(3), (5)&(6), Article 61(3), Article 94(5), Article 119(1)(a), Article 201, Article 211(2), (5)&(6), Article 226, Article 262 and Article 271. Provisions to be improved through other regional and international agreements include Article 69(2)&(3), Article 98(2), Article 125(2), Article 197, Article 207(4), Article 208(5), Article 210(4), Article 211(3) and Article 243.

Ⅱ. Ways to Enhance the Efficacy of the UNCLOS

The constitutional status of the UNCLOS dictates that we do not reinvent the wheel and try to resolve issues of the law of the sea through brand new approaches. ① On the contrary, we should work within the existing rules and through existing mechanisms to amend the UNCLOS where necessary and enforce the UNCLOS where appropriate. In fact, as a treaty, the efficacy of the UNCLOS can be enhanced through multiple means, by amendment, by being adopted into commonly accepted international standards, and by reference to relevant international and regional agreements. ② As the amendment procedure of the UNCLOS has built into it insurmountable obstacles such as the voting procedure, ③ the efficacy of the UNCLOS is better enhanced mainly through diplomatic negotiations and new agreements being reached by international organizations, both in the immediate term and longer term.

Of course, certain approaches may be more suitable than others in addressing certain issues in respect to the UNCLOS. Based on that premise, David Freestone categorized UNCLOS provisions which are in need of further actions into five groups: (a) abstract provisions, the implementation of which are explicitly required to be effected through the establishment of concrete standards; (b) provisions which are expected to lead to foreseeable conflict that they have built-in rules of conflict resolution. For example, Article 59 of the UNCLOS states, "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective

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① David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 204.

② B. Oxman, Tools for Change: the Amendment Procedure in Proceedings of the Twentieth Anniversary Commemoration of the Opening for Signature of the United Nations Convention on the Law of the Sea, New York: United Nations, 2003, p. 195.

③ David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 173～183.

importance of the interests involved to the parties as well as to the international community as a whole."Whether or not marine states have the right to engage in military or quasi-military activities in the EEZ of coastal states is an example of the kind of issues that should be resolved in accordance with this Article;[①](c) provisions that were agreed upon as a result of balancing the interests of different nations and thus purposely vague. For example, under Article 17 of the UNCLOS, the right of innocent passage of warships in the territorial sea of the coastal state is unclearly defined;(d) provisions which became outdated due to developments in international law or innovations in technology; and (e) provisions that are inherently deficient, such those in respect of the protection of highly migratory species. [②]

We can demonstrate how the efficacy of the UNCLOS can be enhanced through internal and external channels by examining the principle of sustainable development, the protection of underwater cultural heritage and the management of fisheries. As a newly established principle of international law, the principle of sustainable development has been widely observed in various aspects of the human exploration and exploitation of natural resources, including those of the sea. For example, Article 56 of the UNCLOS provides for the sovereign right of the coastal state in the EEZ, 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, as well as the jurisdiction in regards to marine environmental protection and preservation. However, according to Part VI and Part VII of the UNCLOS, preservation and sustainable use of resources in the continental shelf and the high seas apply only to living resources. Consequently, David Ong raised the question whether the principle of sustainable development applies to the exploration and exploitation of non-living resources in the continental

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① Kaiyan Homi Kaikobad, Non Consensual Military Surveillance in the Exclusive Economic Zone, 2009; George V. Galdorisi and Alan G. Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, *Cal. W. Int'l L. J.*, vol. 32, 2002; John C. Meyer, The Impact of the Exclusive Economic Zone on Naval Operations, *Naval L. Rev.*, vol. 40, 1992; Stephen Rose, Naval Activity in the EEZ—Troubled Waters Ahead?, *Naval L. Rev.*, vol. 39, 1990; Boleslaw A. Boczek, Peacetime Military Activities in the Exclusive Economic Zone of Third Countries, *Ocean Dev. & Int'l. L.*, vol. 9, 1988; Alan V. Lowe, Some Legal Problems Arising from the Use of the Seas for Military Purposes, *Marine Policy*, vol. 10, 1986.

② David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 15～16.

shelf. In fact, Part VI of the UNCLOS highlights the exclusive sovereign rights of the coastal state over the living resources in the continental shelf. It is also difficult for us to argue that the coastal state also has an obligation to preserve non-living resources. Nevertheless, pursuing the trends of international law, the preservation and exploitation of non-living resources will probably follow the principle of sustainable development in the future. For example, exploitation of undersea oil and gases should follow the principle of the protection of the marine environment and be subject to environmental impact assessment. In regards to the non-living resources in the continental shelf, we may be able to argue that their exploration and exploitation should take place in a reasonable and highly efficient manner; after all, these resources are not re-generable. The principle of sustainable development also plays a role in the preservation of the marine ecosystem, which coexists and interacts with the terrestrial ecosystem in which mankind lives. The destruction of the marine ecosystem will not only compromise the biodiversity of the living organisms in the ocean, but also impact the terrestrial and atmospheric ecosystems, thus threatening the sustainable development of mankind. ①

Protection of underwater cultural heritage is an important issue that has not been properly addressed by the UNCLOS. ② In fact, it was not even a main topic on the agenda of the UNCLOS. During the discussions of the legal systems of the various sea territories, attention was given mainly to historical relics discovered in the various sea territories, in particular international seabed areas and the high seas. Articles 149 and 303 of the UNCLOS merely provide general principles on the protection of historical relics discovered in international seabed areas and the high seas. Tullio Scovazzi is of the view that the UNCLOS is seriously deficient in its establishment of a protection system for underwater cultural heritage because it failed to give the coastal state jurisdiction over cultural heritage in areas of the sea beyond their control. The protection given to underwater cultural heritage by the international community is not limited to the law of the sea. Rather, comprehensive protection is accorded

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① Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservation and Vetoes*, Leiden/Boston: Martinus Nijhoff Publishers, 2008, p. 2.

② Sarah Dromgoole ed., *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention* 2001, Leiden/Boston: Martinus Nijhoff Publishers, 2006; Roberta Garabello and Tullio Scovazzi ed., *The Protection of the Underwater Cultural Heritage: Before and After the* 2001 *UNESCO Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2004.

to underwater cultural heritage through the adoption of a series of legal instruments aimed specifically at it, general agreements on cultural heritage protection, as well as environmental protection and maritime treaties. ① To date, the most important of such agreements is the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, which supplements the UNCLOS and makes it more complete. ②

With regard to fishing and the preservation of fish stocks, the UNCLOS also contains serious deficiencies. For instance, Part V is obviously lacking in its attempt to regulate domestic fishing industries. While the quantity and quality of allowable catch within the jurisdiction of many coastal states has decreased sharply and over-fishing is rampant, these coastal states nevertheless turn a blind eye to IUU fishing. Under the UNCLOS, it is not mandatory that coastal states preserve fish stocks; neither does the UNCLOS have an effective enforcement mechanism through which to ensure that coastal states reasonably and effectively regulate their domestic fishing activities. The FAO *Code of Conduct for Responsible Fisheries* adopted in 2008 (the FAO Code of Conduct) and the 1995 *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks* (the UN Fish Conference) elaborated on and gave detail to the UNCLOS as it relates to the general protection of fish stocks. While the FAO Code of Conduct is not legally binding and the UN Fish Con-

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① Council of Europe, Ad Hoc Committee of Experts on the Underwater Cultural Heritage, Final Activity Report, Doc. CAHAQ (85) 5, 1985; Council of Europe, Recommendation 1846 on Maritime and Fluvial Cultural Heritage, 2000. Many bilateral agreements on underwater cultural heritage have been signed: Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks, 1972; the Exchange of Note between South Africa and the United Kingdom Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS Birkenhead, 1989; the Agreement between the Government of the United States of America and the Government of the French Republic concerning the Wreck of CSS Alabama, 1989; the Agreement between the Government of the United States of America and the Government of the French Republic regarding the Wreck of La Belle, 2003. Environmental protection agreements that touch upon underwater cultural heritage protection include: 1982 Protocol concerning Mediterranean Specially Protected Areas; 1995 Protocol concerning Specially Protected Areas and Biological Diversity in Mediterranean; the 1990 Protocol Concerning Specially Protected Areas and Wildlife; 2001 IMO Guidelines for the Identification and Designation of Particularly Sensitive Sea Area; 1989 International Convention on Salvage.

② Tullio Scovazzi, The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 120～136.

ference is only applicable to certain types of highly migratory fish stocks, they nevertheless further fleshed out the UNCLOS in terms of a nation's obligation to preserve fish stocks.

The preservation of "shared transboundary fish stocks" is another issue inadequately addressed by the UNCLOS. Compared to highly migratory fish stocks, shared fish stocks have not received the same kind of attention from the international community. Robin Churchill categorized shared fish stocks, examined key issues concerning the management of shared fish stocks, identified shortcomings of Article 63(1) of the UNCLOS, and proposed suggestions for more effective management and preservation of shared fish stocks. ① "Shared" suggests the fish stocks appear and move between the EEZ's of two states. The management and preservation of such fish stocks involve at least two states and entail a series of complex issues such the confirmation of the presence of such fish stocks, scientific research, managerial cooperation, the classification of such fish stocks, implementation measures and the interests of third party states. According to Article 63(1), which states, "where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate sub-regional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks", costal states are not obligated to reach agreements. It is also important to note that in managing shared stocks, concerned states must still observe the obligations prescribed in Articles 61 and 62 of stock preservation. These obligations include optimal utilization of the stocks, prevention of overfishing, maintaining or restoring the level of the stocks so as to prevent serious threats to reproduction, and quota fishing. However, without full cooperation among concerned states, it is virtually impossible for coastal states to comply with these obligations on the management of shared stocks. ② At the moment, unlike highly migratory stocks, management of shared stocks must rely more on non-binding legal instruments such as the FAO Code of Conduct and the cooperation between international organizations and states, than on international treaties.

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① Robin R. Churchill, The Management of Shared Fish Stocks: The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea, in Anastasia Strati, Marla Gavouneli, and Nikolaos Skourtos ed., *Unresolved Issues and New Challenges to the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 3～21.

② M. Hayashi, The Management of Transboundary Fish Stocks under the LOS Convention, *TIJMCL*, vol. 8, 1993, p. 250.

Ⅲ. Mechanisms Supplementing the UNCLOS

To address new challenges, the UNCLOS requires the contracting states to timely and appropriately develop the law of the sea through international and regional organizations and specialized institutions. ① Many provisions in the UNCLOS allow and encourage the contracting states to take such an approach to resolve problems without designating any such organization or institutions. As technologies advance and people's concerns for environmental protection, resources and energy intensify, the General Assembly of the UN (the GA) is increasingly assuming a leading role in coordinating various organizations and institutions dedicated to the development of the law of the sea. Louise de la Fayette believes this is largely attributable to the GA's wide-reaching constituency and regularly scheduled discussions on hot topics related to the law of the sea. In addition, the GA is visionary, consistently placing highlights in the development of the law of the sea on its agenda, thus providing the stability desperately needed for the maintenance of the order sought by the law of the sea. ②

The fact that the UNCLOS does not require contracting parties to form an association but leaves the assessment of its implementation to the GA is highly controversial. Although not all members of the UN are contracting parties to the UNCLOS, the GA adopts resolutions in respect to important law of the sea issues annually. ③ On the other hand, the UNCLOS requires the Secretary General of the UN to hold Meetings of the State Parties where necessary but such Meetings are only given limited, specified administrative responsibilities, such as the nomination and appointment of judges to the ITLOS. ④ The excessively

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① P. Allot, Power Sharing in the Law of the Sea, *AJIL*, vol. 77, 1983, pp. 1～30.

② Louis de la Fayette, The Role of the United Nations in International Ocean Governance, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 63～74.

③ Tullio Treves, The General Assembly and the Meeting of State Parties in the Implementation of the LOS Convention, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 55.

④ A. G. Oude Elferink, Reviewing the Implementation of the LOS Convention: the Role of the United Nations General Assembly and the Meeting of State Parties, in A. G. Oude Elferink ed., Stability and Change in the Law of the Sea: The Role of the LOS Convention, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 75.

limited scope of responsibility for the Meeting of the State Parties is subject to widespread criticism, leaving the GA as the key institution in charge of the evaluation and development of the UNCLOS. Such a function of the GA will be further strengthened with the initiation by the UN of informal negotiations with respect to ocean policy and the law of the sea.

The UNCLOS also mandated the establishment of special institutions to address specific territorial issues. Such special institutions are primarily the ISA, the CLCS and the ITLOS. By now, the history, function and operation of these three institutions are well researched. ① It is probably fair to say that the principle of common heritage of mankind is the legal foundation of the ISA. It is for the implementation of this principle in the international seabed areas that the UNCLOS established ISA, to take charge of the exploitation of resources in international seabed areas and the environmental protection issues arising from such exploitation, and balancing the interests of the exploiters and the international community. ② As states with dominant marine resource exploitation capabilities were reluctant to join the UNCLOS, the 1994 Implementation Agreement was adopted. ③ As an amendment to Part XI of the UNCLOS, the 1994 Implementation Agreement has been accepted by a majority of the countries around the globe. The ISA also has to respond to continually emerging issues. For example, with the importance of environmental protection gaining momentum, the 1994 Implementation Agreement also requires the ISA to carry out impact assessments in respect to exploitation of resources in international seabed areas.

According to Article 57 of the Charter of the UN, the GA may make recommendations to its specialized agencies, which shall in turn relay the recommendations to the relevant institutions. Among such institutions, the FAO and the IMO are the two key players in the development of the law of the sea. The IMO has undoubtedly been playing a critical role in the development of the law

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① P. B. Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity*, The Hague: Martinus Nijhoff Publishers, 1997; Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Heidelberg: Springer, 2008; Chandrasekhara Rao and P., K. Rahmatullah ed., *The International Tribunal for the Law of the Sea: Law and Practice*, Hague: Kluwer Law International, 2001.

② It was established in 1994 in accordance with Part XI of UNCLOS.

③ Satya Nandan, Administering the Mineral Resources of the Deep Seabed, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*. New York: Oxford University Press, 2006, p. 77.

of the sea before as well as after the adoption of the UNCLOS. Without the series of agreements passed by the IMO, the provisions of the UNCLOS on navigation, pollution, maritime safety, preservation of ecosystems and many other issues would only be as good as a piece of paper. [①] Nevertheless, such quasi-legislative powers of the IMO are subject to limitations imposed by the UNCLOS. For instance, Articles 311(2) and 237(2) of the UNCLOS explicitly require that measures adopted by the IMO comply with relevant provisions of the UNCLOS. Certain legal instruments go as far as explicitly stating that they are in compliance with the UNCLOS. An example is found in Article 5 of *International Convention for the Prevention of Pollution from Ships* adopted in 1973 by the IMO.

As mentioned above, the FAO passed a series of code of conducts in respect of the preservation and management of fish stocks, which help to supplement the relevant provisions of the UNCLOS. [②] In fact, the UNCLOS does not authorize the FAO to design rules or standards regarding the preservation of living resources; it is through codes of conduct, which are non-binding, that the FAO assumes an active role in the preservation of living resources. The UNCLOS takes a sovereign state-dominated approach in the preservation of marine living resources; that is, except highly migratory fish stocks, coastal states have sovereign rights and jurisdiction over the living resources in their respective EEZ's. [③] It is therefore not hard to understand why the FAO seeks to control

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① Key agreements adopted by IMO include: International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, 1975 UKTS 77; Convention on the International Regulations for Preventing Collisions at Sea 1972, 1977 UKTS 77; International Convention for he Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), 1340 UNTS 61; International Convention for Safety of Life at Sea 1974, 1184 UNTS 2; International Convention on Maritime Search and Rescue 1979, 1986 UNTS 59; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, 1678 UNTS 221; International Convention on Salvage 1989, 1996 UKTS 93。

② The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993 (1994) 33 ILM 968; FAO Code of Conduct for Responsible Fisheries; International Plan of Action for the Conservation and Management of Sharks; International Plan of Action for the Management of Fishing Capability 1999; International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2001.

③ Robin R. Churchill, The Management of Shared Fish Stocks: The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea, in Anastasia Strati, Marla Gavouneli, and Nikolaos Skourtos ed., *Unresolved Issues and New Challenges to the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 3.

IUU *fishing activities through non-binding legal instruments.* ①

Finally, judicial bodies, in particular the International Court of Justice (ICJ) and ITLOS, also supplement the UNCLOS through their interpretation and application thereof. The significance of their role in developing the law of the sea can best be seen in the formulation of principles, rules and standards regarding maritime delimitation. Articles 74 and 83 of the UNCLOS require that the delimitation of the EEZ and continental shelf between states with opposite or adjacent coasts is effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the ICJ, in order to achieve an equitable solution. However, even the equidistance and special circumstances rule on delimitation of territorial sea under Article 15 of the UNCLOS are subject to the principle of equitability. Without generally applicable and acceptable rules, standards and approaches, development of the law on maritime delimitation is effectively left in the hands of judicial authorities. To date, cases concerning maritime delimitation account for a majority of the cases handled by the ICJ. As Yoshifumi Tanaka noted, in the foreseeable future, we will probably not see a breakthrough in the current, general principle-based law on maritime delimitation. Meanwhile, international courts and countries have been striving to achieve a balance between predictability and flexibility, resolving each delimitation dispute equitably by applying general principles to individual cases. ②

Ⅳ. Strengthening the Implementation of the UNCLOS

As David Anderson observed, development of the law of the sea has shifted from the formulation of rules to the strengthening of the enforcement of existing rules by contracting states. ③ The focal point of the development of the law

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① Kristina M. Gjerde, High Sea Fisheries Management under the Convention on the Law of the Sea, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 280～307.

② Rainer Lagoni and Daniel Vignes ed., *Maritime Delimitation*, Leiden/Boston: Martinus Nijhoff Publishers, 2006; Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, Oxford: Hart Publishing, 2006; Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries*, Hague: Kluwer Law International, 1998—2004; Gerard J. Tanja, *The Legal Determination of International Maritime Boundaries*, Denver/Boston: Kluwer Law and Taxation Publishers, 1990; Prosper Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications Limited, 1989.

③ David Anderson, Freedom of the High Seas in the Modern Law of the Sea, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 345.

of the sea is likewise shifting from the creation of rights and obligations to integral and effective governance of the seas. The governance of the seas involves the uniform application of numerous international legal instruments in sovereign states, and the coordination of international and regional organizations and other competent institutions. ① While new rules are still needed with respect to emerging issues such as marine environmental protection, preservation of marine ecosystems and marine safety, there is a more pressing need to strengthen the enforcement of the law of the sea through a three-tiered, international, regional and national approach. ②

How to ensure effective enforcement of international law by sovereign states is a long-standing topic for the international law community. For the law of the sea, how to ensure uniform application and implementation in the various states is an extremely complex question. In an effort to define state practices and determine the mutual impact between state practices and the UNCLOS, Robin Churchill conducted a survey of contracting and non-contracting states in their domestic implementation of the UNCLOS. He concluded that, although the states might have had varying interpretations and implementation of the UNCLOS, their practices did not amount to re-interpretation of the UNCLOS and did not give rise to international customary rules of law that are inconsistent with UNCLOS. ③

As of 1 June 2010, 160 parties have rectified or acceded to the UNCLOS, 138 have rectified or acceded to the 1994 Implementation Agreement, and 77 have rectified or acceded to the 1995 Implementation Agreement. ④ Although a majority of the countries in the world have rectified or acceded to the UNCLOS, we still need the UNCLOS to apply to all countries in order for it to be an explicit and stable legal framework for the peaceful development and governance of the seas. ⑤ As Robin Churchill has pointed out, the implementation

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① Louis de la Fayette, The Role of the United Nations in International Ocean Governance, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 63.

② Yoshifumi Tanaka, *A Dual Approach to Ocean Governance*, Ashgate, 2008, pp. 1～27.

③ Robin R. Churchill, The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 91～145.

④ http://www.un.org/Depts/los/reference_files/status2010.pdf (visited on 6 July 2010).

⑤ Bernard H. Oxman, The Rule of Law and the United Nations Convention on the Law of the Sea, *EJIL*, vol. 6, 1996, p. 353.

of the UNCLOS in the various states is not uniform, making the encouragement of more countries to join the UNCLOS yet another objective for the UN. The same is true of the 1994 Implementation Agreement and the 1995 Implementation Agreement.

To push for the global enforcement of the UNCLOS, we should coordinate the global enforcement mechanism of the UNCLOS with other multilateral and unilateral means based on the concrete needs of each territory, and through legislative, administrative and judicial channels, expand the scope of enforcement. For instance, the IMO followed the example of the WTO and created the "green" list of countries that fully and strictly comply with the *International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel*.[①] David Anderson advocates this approach to promoting compliance of the UNCLOS by contracting states. The *Voluntary IMO Member State Audit Scheme* also employs a similar approach.[②] As its name suggests, this method is not a compulsory measure of supervision; rather, it is based on the willingness of each member state to have its compliance and implementation assessed.

The GA is also an important platform for discussions of the implementation of the UNCLOS among the member states, because it can ensure that the UNCLOS is not controlled by a minority of states, thus preserving the general acceptance and wide application of the law of the sea. Since the UNCLOS taking effect on 16 November 1994, the GA has been publishing resolutions with regard to the UNCLOS every year, identifying core issues to be urgently addressed. For example, in its resolutions of 2009, the GA called upon competent international organizations to assist in the development of national capabilities in oceanic science and sustainable management of the seas and marine resources, through the cooperation with the governments of various states and at the global, regional, sub-regional and bilateral levels. It also expressed a concern for human activities that were causing harm to the marine environment, biodiversity and ecosystems, and for maritime organized transboundary crimes that were threatening the marine safety and security, including piracy, armed

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① International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995.

② Voluntary IMO Member State Audit Scheme, adopted in November 1993, IMO Doc A 946 (23); Framework and Procedures for the Voluntary IMO Member State Audit Scheme, IMO Doc A 974(24); Code for the Implementation of Mandatory IMO Instrument, IMO Doc A 973(24).

robbery, smuggling and other acts of terrorism targeting navigation and marine facilities and other maritime interests. It further pointed out the critical importance of the outer limit of the continental shelf beyond 200 nautical miles and that it served the interests of the international community for the coastal states owning the continental shelf beyond 200 nautical miles to submit their delimitation claims to the CLCS.

While global and multilateral enforcement mechanisms are more effective in facilitating the common interests of mankind, they are challenged by the interests of sovereign states, because the implementation of the law of the sea depends on the cooperation of sovereign states. This challenge also reflects a present day international community in which sovereign states take center stage juxtaposed against a horizontal system of enforcement of international law in the context of the law of the sea. For example, in terms of the management of ships, the UNCLOS established a system led by flag states and coastal states. Although such a system has long been criticized because flag states lack the incentive or capability to effectively manage ships, abandoning the system is not realistic as it will leave the management of ships in a legal vacuum. To strengthen the flag state's regulation of ships, the FAO adopted the FAO 1993 Agreement, which requires the flag state to enact domestic laws consistent with international law in critical areas. ① Another way to strengthen the management of ships is through the supervisory authority of relevant countries, in particular the port states. Following an increasing number of fishing conventions and the expansion of counter-marine terrorist activities, memorandums on port state's supervision of ships have been concluded for a good number of areas, such as the Paris, Tokyo, the Caribbean Sea, Latin American, the Indian Ocean, the Mediterranean Sea and the Black Sea Memorandums.

As mentioned above, in its 2009 resolutions, the UN expressed its concern for piracy, marine armed robbery, smuggling and other organized crimes against marine navigation, marine facilities and other marine interests as they have threatened marine safety and security, caused lamentable deaths, and adversely affected international trade, energy safety and the global economy. Recently, egregious piracy activities in Somalia, and the international community's concerted effort in combating such activities, once again brought marine safety to

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① Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993.

the forefront of international attention. ① In fact, the UNCLOS does not address marine safety directly. To preserve marine safety not only requires the reinforcement of a multilateral cooperation system, but also the strengthening of the rights of supervision and enforcement of the coastal states, flag states and port states. ②

The dispute resolution mechanism of the UNCLOS is another means to facilitate the effective implementation of the Convention. According to Section 1 of Part XV of the UNCLOS, disputes between contracting parties shall be resolved in a peaceful manner through consultation, mediation and other approaches. Where the parties cannot reach an agreement, the compulsory procedures laid out in Section 2 will kick in. Since the UNCLOS went into effect, the compulsory procedures have rarely been used. Only a few cases have been submitted to the ITLOS. However, such procedures have been effective in clarifying and resolving certain issues of the Convention. Moreover, the compulsory procedures have been adopted by and incorporated into many other agreements concerning the law of the sea, such as the FAO 1993 Agreement, the 1995 Implementation Agreement, the *Convention on the Conservation and Management of Fishery Resources in the South－East Atlantic Ocean*, ③ the *Convention on the Conservation and management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, ④ the *Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South－Eastern Pacific*, ⑤ and the UNESCO *Convention on the Protection of the Underwater Culture Heritage*. In addition, as mentioned above, the ICJ has been playing an important role in developing rules with respect to the law of the sea, such as on maritime delimitation and titles to islands. ⑥

In conclusion, the problems not addressed by the UNCLOS, the issues in-

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① Myron H. Norduist, Rudiger Wolfrum, John Norton Moore and Rona Long ed., *Legal Challenges in Maritime Security*, Leiden/Boston: Martinus Nijhoff Publishers, 2008.

② Henrik Ringbom, *The EU Maritime Safety Policy and International Law*, Leiden/Boston: Martinus Nijhoff Publishers, 2008; Natalino Ronzith ed., *Maritime Terrorism and International Law*, Dordrecht: Martinus Nijhoff Publishers, 1990.

③ The Convention on the Conservation and Management of Fishery Resources in the South－East Atlantic Ocean, done at Windhoeck on 20 April 2001.

④ The Convention on the Conservation and management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, done at Honolulu on 5 September 2000.

⑤ The Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South－Eastern Pacific, signed at Santiago de Chile on 14 August 2000.

⑥ Barbara Kwiatkowska, *The Contribution of the World Court to the Development of the Law of the Sea*, Den Bosch: Book World Publications, 2002.

adequately resolved by it, the difficulties in its implementation and the new challenges to it brought on by social development, all push us to reflect on its shortcomings, and to pursue proper and feasible approaches and adopt appropriate mechanisms to improve on it and further develop the law of the sea. Because of the constitutional nature of the UNCLOS and its unique role of balancing the political interests and legal rights of different parties, to amend it is presents an obstacle insurmountable at the moment. Consequently, diplomatic negotiation and reference to new rules and standards formulated by international organizations and institutions aimed at facilitating uniform state practices, are currently the key and possibly the most effective approaches for the improvement on the UNCLOS.

(Senior Editor: Jamie Jia-mei HUANG
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浅析群岛制度的适用及南海划界

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内容摘要:《联合国海洋法公约》第四部分规定“群岛国”可以适用群岛制度,但对大陆国家的洋中群岛能否适用群岛制度却未予以明确规定。随着拥有洋中群岛的各大陆国家的立法实践,以厄瓜多尔、丹麦等国家为代表的大陆国家以国内立法形式将群岛作为整体划定直线基线。我国也是拥有洋中群岛的大陆国家,在我国南海分布着东沙、西沙、中沙、南沙四大群岛。除西沙群岛基线确定外,我国其他群岛均未公布领海基点基线情况。本文试图从第三次联合国海洋法会议的历史着手,分析大陆国家究竟能否适用群岛制度,并结合其他大陆国家有关洋中群岛的法律实践,分析我国南海各群岛的基线适用问题。

关键词:群岛制度 大陆国家 洋中群岛 南海诸岛

第三次联合国海洋法会议(以下简称“第三次海洋法会议”)确立了群岛理论,并最终在《联合国海洋法公约》(以下简称《公约》)中以“群岛国”形式,原则性地规定了群岛制度。然而从群岛制度提出之日起,国际社会就对大陆国家的洋中群岛能否适用群岛制度的问题争论不休。虽然国际海洋法学界对此问题尚无定论,但部分大陆国家已在洋中群岛基线划定中将此付诸实践,这一立法实践值得引起我们的重视。就我国南海而言,南海诸岛自古就是我国的领土,但除西沙群岛外,其他三大群岛的领海基点和基线至今尚未公布。如何依据国际法的现有规定最大限度地维护我国海洋权益,同时尽量不妨碍国际航线体系,是我国海洋划界实践中面临的难题。

一、第三次海洋法会议上关于群岛制度的分歧

群岛国的概念开始被更为广泛的提出和讨论,始于联合国第三次海洋法会

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议。第三次海洋法会议从1973年召开,到1982年结束,历时九年十一期会期讨论,最终在1982年通过了《公约》。由于第三世界国家的不懈努力,群岛国概念最终为国际社会所接受并被成功载入《公约》,而对群岛问题的讨论主要集中于第二期至第四期会议,并在每一会期中先后取得了对群岛制度的确立至关重要的阶段性成果——《非正式单一协商案文》(1975年)、《修订的单一协商案文》(1976年)、《非正式综合协商案文》(1977年)。可以说,在第三次海洋法会议上,群岛国的主张基本得以实现,并被确定在《公约》第四部分"群岛国"中。

1973年在第三次海洋法会议筹备委员会的会议上,斐济、印度尼西亚、毛里求斯和菲律宾组成群岛国集团首次提出了群岛原则(或称群岛理论)。在四群岛国向海底委员会提出的《群岛原则建议》中规定:(1)群岛国可以划定连接群岛外缘岛屿和干礁最外缘各点的各直线作为基线;(2)基线内的水域,不论其深度或与海岸距离,其海床和底土、上空及其资源全部归群岛国主权管辖;(3)群岛国应依照国内法,并考虑到现行国际法规则,允许外国船舶无害通过。[①]其后,四国又将这些原则予以条文化,系统地提出了涵盖群岛国的概念、群岛直线基线的划定、群岛水域的法律地位、群岛水域的无害通过等内容的《群岛条文草案》。[②]该草案在处理群岛制度适用范围问题上,在第1条第1款即开宗明义地规定:"该条款仅适用于群岛国"。

在1974年第二期会议上,群岛集团正式提交《群岛条文草案》,该草案与之前于1973年向海底委员会提交的案文内容基本相同,代表了群岛国利益。同时,数个拥有洋中群岛的大陆国家起草了九国工作文件,对群岛集团提出的《群岛条文草案》做出了修改,最明显的修改是取消了关于"该条款仅适用于群岛国"的规定,试图将群岛制度扩大适用于大陆国家的洋中群岛。该文件代表了拥有洋中群岛的大陆国家的立场。

这两份关于群岛制度的截然相反的文件,引发了群岛国家与大陆国家两大阵营的辩论:菲律宾、印尼等群岛国反对将群岛制度扩大适用于大陆国家的洋中群岛,认为只有像它们那样由岛屿组成的国家,在划定领海或专属经济区时才适用群岛原则;印度、厄瓜多尔、葡萄牙等拥有远离大陆的群岛的国家,则主张群岛制度应适用于一切群岛,认为群岛国和构成沿海国领土这一部分的群岛是紧密相连的,应一道解决。[③]由于参加第三次海洋法会议的大部分国家反对将群岛原则扩大适用到大陆国家的洋中群岛,最终大陆国家在群岛适用范围问题的争论

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① Office for Ocean Affairs and the Law of the Sea, *Archipelagic States: Legislative History of Part Ⅳ of the United Nations Convention on the Law of the Sea*, in: United Nations, *The Law of the Sea*, New York: U. N. Publication, 1990, p. 7.

② Office for Ocean Affairs and the Law of the Sea, *Archipelagic States: Legislative History of Part Ⅳ of the United Nations Convention on the Law of the Sea*, in: United Nations, *The Law of the Sea*, New York: U. N. Publication, 1990, p. 9.

③ 赵理海著:《海洋法问题研究》,北京大学出版社1996年版,第32页。

偃旗息鼓，九国工作文件的主张并没有被记录在《非正式单一协商案文》中，予以后续讨论。

在1975年第三期会议上，会议要求将第二期会议所讨论的文件和草案综合归并为单一案文，并最终形成《非正式单一协商案文》。该案文将群岛问题作为文本的第三部分，对“群岛国”和“属于大陆国家的洋中群岛”以两节的形式分别做了规定。对于群岛制度的适用范围是否包含大陆国家的洋中群岛问题，协商文本规定得比较含混，只在第131条规定“第一节（笔者注：群岛国）的规定不影响构成一个大陆国家领土的完整部分的洋中群岛的地位”。

在1976年第四期会议上，各国代表团在对《非正式单一协商案文》加以修改的基础上，形成了《修订的非正式单一协商案文》。该案文将第七章改为“群岛国”，删去了原案文中“属于大陆国家的洋中群岛”的规定。[①]

在1977年第六期会议上，会议要求将以前提出的四部分案文加以归纳合并，组成了一份《非正式综合协商案文》，该案文成为以后1982年《公约》草案的蓝本和雏形。其中第四部分是关于群岛国的相关规定。

在1982年的第十一期会议中，基本接受了群岛国集团提出的“群岛条款草案”，并在《公约》第四部分对群岛国的群岛制度做出专门规定。但《公约》仍然未明确大陆国家的洋中群岛问题。纵观第三次海洋法会议关于群岛制度适用范围的争论，显然由于群岛国强烈反对扩展这一概念，加之在第三次海洋法会议上，对大陆国家所属洋中群岛问题的讨论没有像群岛国问题那样引起重视，而大陆国家对自己的洋中群岛的权利主张也不似群岛国家的群岛制度主张那么积极强烈，最终导致大陆国家的洋中群岛被排除在群岛制度适用范围之外。[②]

二、大陆国家的洋中群岛能否适用群岛制度

不论是从《公约》的制定过程，还是从《公约》条文来看，《公约》并未能够成功地对大陆国家的洋中群岛的法律地位做出明确规定。客观地讲，大陆国家的洋中群岛法律地位是《公约》没有做出明确规定的事项，在某种意义上看，可以说是《公约》的空白地带。[③]因而从此以后，国际社会就对大陆国家的洋中群岛能否适用群岛制度问题展开了旷日持久的辩论。迄今为止，国际海洋法界对此问题尚无定论。

（一）学者对大陆国家洋中群岛适用群岛制度的观点

1、主张群岛制度可以适用于大陆国家的洋中群岛

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① 袁古洁著：《国际海洋划界的理论与实践》，法律出版社2001年版，第238～240页。
② 袁古洁著：《国际海洋划界的理论与实践》，法律出版社2001年版，第238～240页。
③ 张海文主编：《〈联合国海洋法公约〉释义集》，海洋出版社2006年版，第83页。

以陈德恭教授、高健军教授为代表的部分国内学者认为将群岛基线制度规定在第四部分"群岛国"中,并不意味着群岛基线制度仅适用于群岛国,而不适用于属于某个大陆国家的洋中群岛。①

以英国划界专家R. R. Churchill and A. V. Lowe为代表的国外学者也指出"公约的此一限制(笔者注:即群岛制度适用于群岛国)看起来既不必要,也不合理;只要其他国家承认大陆国家对其洋中群岛所划定的基线,就应当认为这些做法是有效合法的。"②

主张大陆国家的洋中群岛适用群岛体制的主要理由如下:

第一,认为群岛国家所提出的有关群岛制度理由对于大陆国家所属的洋中群岛也同样有效,这两类群岛所面临的问题是一样的,所以解决方法也不应该有差别。首先,从政治上讲,群岛国提出群岛主张旨在维护国家政治上的一体性和国家主权的完整性——那么同样地,不应该因为大陆国家的洋中群岛远离大陆领土,就忽视大陆国家对洋中群岛行使主权;其次,从经济上讲,群岛各岛之间水域中资源是当地居民赖以生存的基础,而大陆国家虽有大陆领土作为腹地,但其洋中群岛上居民的日常生活仍然同样有赖于群岛资源的开发;再次,从安全上讲,如果沿用传统岛屿制度,就会导致国家大陆领土和洋中群岛间出现一大片公海,按照《公约》的规定,外国船舶和航空器在公海有航行、飞越的自由,而这就会给国家的海上安全带来隐患。这无论对群岛国还是对大陆国家都是同等重要的。③

第二,如果对大陆国家所属的洋中群岛不适用群岛制度,就会造成国际法上的不公平。同是群岛,如果群岛组成了群岛国,则《公约》赋予其"及于群岛水域的上空、海床和底土,以及其中所包含的资源"的主权;而大陆国家只能对组成群岛的各个岛屿分别行使主权。④这样将这两类群岛区别对待,无疑会导致主权的分裂或把这种远离大陆的岛群降至次等领土的地位。而且,这样的区分夸大了某种地理上的不平,无异于对这些国家的惩罚。

第三,虽然1982年《公约》将群岛基线制度规定在第四部分"群岛国"中,但这并不意味着群岛基线制度仅适用于群岛国,而不适用于大陆国家所属洋中群岛——至少《公约》也并没有明文规定群岛制度不适用于大陆国家的洋中群岛。只要这种做法依据习惯国际法是合法有效的,且得到其他国家的承认,就应当认为大陆国家的洋中群岛可以适用群岛制度。

2、主张群岛制度不能适用于大陆国家的洋中群岛

以赵理海、袁古洁教授为代表的部分国内专家在关于群岛制度能否适用于

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① 高健军著:《中国与国际海洋法》,海洋出版社2004年版,第138页。

② R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, pp. 120～121.

③ 黄异:《群岛理论》,载于《辅仁法学》1984年第3期,第27页。

④ 参见《联合国海洋法公约》第49条第2款,海洋出版社1996年版,第23页。

远离大陆的南海诸岛这一问题上，认为“将《公约》有关群岛的规定完全适用于南海诸岛是行不通的，根据《公约》第四部分，群岛制度的适用仅限于群岛国”。[①]

韩国著名海洋法专家朴椿浩等也认为，由众多岛屿组成的国家才能被称为群岛国，只有群岛国才能适用群岛制度。[②]

由此可知，主张大陆国家所属洋中群岛不适用于群岛制度的最主要理由也是最简明的理由，即《公约》确立的群岛制度仅适用于群岛国，包括中国在内的大陆国家不是群岛国，因而无法因此适用专属于群岛国划定基线的群岛制度。

（二）大陆国家洋中群岛适用的基线制度

根据《公约》条文分析，它只是对大陆国家的一些沿海岛屿法律地位作出了规定，《公约》第四部分（即“群岛国”）也只是对群岛国适用群岛制度进行的规定，而没有对大陆国家的洋中群岛做出专门规定。客观地讲，《公约》并没有成功地解决大陆国家的洋中群岛法律地位问题。

笔者认为，《公约》规定的群岛制度并不适用于大陆国家的洋中群岛，但大陆国家可将洋中群岛作为一个整体适用直线基线制度。理由如下：

第一，单就1982年《公约》第四部分而言，群岛制度的适用仅仅局限在“群岛国”，而不适用于远离大陆的群岛。

如第一部分所述，在第三次海洋法会议中，群岛原则的适用范围问题分歧很大。群岛国集团反对将群岛原则适用范围扩大化，而拥有洋中群岛的大陆国家，主张群岛原则同样适用于大陆国家。经过历次会议的争论和斗争，最终的结果是将《非正式单一协商案文》中“第一节（群岛国）的规定不影响构成一个大陆国家领土的完整部分的洋中群岛的地位”的条款在之后达成的《修订的非正式单一协商案文》中被删去，在其后修订的案文中，连大陆国洋中群岛这一条款也被删去。最后在《公约》第四部分的9个条款中，只字未提大陆国家的洋中群岛问题。“尽管印度、希腊、葡萄牙、西班牙和哥伦比亚等国主张群岛原则同样适用于大陆国家的洋中群岛，但遭到多数国家的反对，以致《公约》回避了大陆国家的洋中群岛问题。”[③]《公约》虽然没有明文规定群岛制度不适用于大陆国家的洋中群岛，但不能因此而做出大陆国家的群岛可以适用群岛制度的推断。因为该问题是第三次海洋法会议正式讨论却未能协调一致的，而不是未予以讨论的。在利益取舍问题上，第三次海洋法会议已经迫于群岛国的强烈反对而将大陆国家的洋中群岛从适用群岛制度这一构想中剔除。即使真要做出一个推断的话，笔者也认

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① 赵理海：《关于南海诸岛的若干法律问题》，载于《法制与社会发展》1995年第4期，第57页。

② Choon－Ho Park，*Limits in the Seas*，No. 117，*Straight Baseline Claim*，China，9 July，1996，p. 16.

③ 高伟浓著：《国际海洋法与太平洋地区海洋管辖权》，广东高等教育出版社1999年版，第32页。

为结合《公约》的制定背景,应更倾向于群岛制度仅适用于群岛国,而不包括大陆国家的洋中群岛。

正如印度海军海洋法专家O. P. Sharma所指出的,"《公约》使群岛国的概念神圣化。尽管印度代表团在海洋法会议上极力主张单独的群岛国与沿海大陆国领土一部分的群岛在地位上不存在差别,但印度不可能说服海洋法会议承认大陆国家的沿海岛屿,诸如安达曼群岛和尼科巴群岛具有与群岛国相同的法律地位。"①

第二,从直线基线与群岛基线关系角度出发,大陆国家洋中群岛不适用群岛制度,但不排除以群岛整体划定直线基线。

1951年英国—挪威渔业案的判决中承认了直线基线的合法性,但这种基线只适用于沿岸群岛,如果群岛国类推适用直线基线将产生很多问题,因此有必要建立与直线基线不同的群岛基线制度。

《公约》确立了以正常基线、直线基线为基本类型的基线系统。因此沿海国划定领海基线时首先应考虑是否可采用正常基线,如符合《公约》第7条的要求,即"在海岸线极为曲折的地方,或者如果紧接海岸有一系列岛屿"的特定情况下,"可采用连接各适当点的直线基线法";对于群岛国,《公约》第47条规定,"群岛国可划定连接群岛最外缘各岛和各干礁的最外缘各点的直线群岛基线"。但从基线类型和适用对象分析,《公约》所确立的基线体系为:正常情况下适用正常基线,不排除两种特殊情况下使用直线基线(适用于特定条件)和群岛基线(适用于特定对象)。由此可以得出这样的结论,即群岛国适用群岛制度划定群岛基线,群岛国以外的其他群岛类型,则应适用一般基线规则,即正常基线和直线基线。

虽然《公约》将群岛制度的适用范围限定在群岛国,却并不意味着《公约》否定大陆国家主张将其所属洋中群岛以群岛为整体划定其直线基线,这是划界方法和划界技巧的体现。关于群岛是否构成一个法律上整体的概念,早在19世纪就已经被国际实践所提出。1853年5月16日,当时的夏威夷王国国王在中立声明中宣布:"在我们的全部管辖范围……包括所有的通道及其它们之间的岛屿,我们的中立声明应得到尊重。"随后的几年内,汤加、斐济的土著国王也发表了同样的声明。1921年10月20日关于阿德兰群岛的划界划定也将群岛及其周围水域看做是一个整体。②古巴在1934年和1942年的国内立法中、爱尔兰在1952年关于渔业的法令中也提出了群岛构成一个法律上的整体概念。③另外,国际法理论界也在20世纪提出同样的概念。智利学者阿尔瓦雷兹于1924年向国际法协会建议:群岛应当被看做是一个政治、经济上的整体,并且在划定它们领

① O. P. Sharma, India and UN Convention on the Law of the Sea, *Ocean Development and International Law*, vol. 26, No. 4, 1995, pp. 391～412.

② Lucchini and Voeckel, *Le droit international de la mer*, Paris: Pedone, 1990, p. 359. 转引自张海文主编:《〈联合国海洋法公约〉释义集》,海洋出版社2006年版,第84页。

③ 转引自张海文主编:《〈联合国海洋法公约〉释义集》,海洋出版社2006年版,第84页。

水时应被当作一个整体予以考虑，应把距离中心最远的岛屿作为基点来划定领水。随后，在国际法学会、海洋国际法编纂会议、国际法院、国际法委员会等均对群岛整体概念的发展做出努力的基础上，《公约》最终在所确立的群岛国法律制度中，明确规定了“群岛”的概念。可见，单纯从地理事实和法律的角度看，群岛作为一个法律上的整体概念在国际法理论和国家实践中已获得了普遍承认。既然群岛能构成法律上的整体的概念，那么这一概念当然也应当包括大陆国家的洋中群岛——《公约》对此没有做出结论也不意味着群岛作为法律上的整体这一具有一定普遍性意义的概念被否定，或者这一概念不适用于大陆国家的洋中群岛。

其实从广义上讲，群岛基线也属于直线基线。但在此种基线适用于群岛国的时候有各种具体要求，包括基点的选择、水陆面积比例、基线长度等——而这些限制性要求是一般直线基线所没有的。这使得群岛直线基线成为一种独立的基线。适用一般直线基线和群岛基线的法律效果也不同：适用一般直线基线所封闭起来的水域是内水，而适用群岛直线所封闭起来的水域是群岛水域。

对于如何划定大陆国家洋中群岛的基线问题，第三次海洋法会议主席阿米拉辛格（Amnesia Singer）在“海洋法中的群岛问题”中提出，可以从英国—挪威渔业案例提出某些一般性原则，以解决大洋中群岛问题。首先，经济利益对确定基线的影响，这是根据长期利用和实际需要决定的；其次，陆地与海洋的关系有助于决定是否采用直线基线；再次，直线基线的利用应当根据海岸的一般形态；最后，虽然对基线长度没有做具体规定，但其长度应当是合理的。①

第三，对《公约》未尽事宜，应取决于由国家实践形成的一般规则或习惯。

《公约》对沿海大陆国家是否有权环绕海中群岛划出其直线基线没有作出明确的规定。《公约》的序言表明：“本公约未予规定的事项，应继续以一般国际法的规则和原则为准据。”所以确定大陆国家洋中群岛法律地位的主要依据为习惯国际法。于是，有的学者就提出：“在习惯国际法中，如果国家坚持反对环绕海中群岛划直线基线，那么沿海大陆国家的做法就不合法；而如果国家默许或明确接受这种做法，那么沿海大陆国家环绕海中群岛划直线基线就被看作与国际法一致。”而确定大陆国家洋中群岛法律地位的习惯国际法应该从国际实践中去寻找并予以证明。体现习惯国际法的国际实践是多种多样的，包括国际法院判决、国际仲裁裁决、国家单方面立法实践以及为《公约》的一些条款所确认和体现的一般法律原则等。

1975 年《非正式单一协商案文》规定“群岛国部分的规定不影响大陆国家洋中群岛的法律地位”，这意味着对大陆国家洋中群岛实践的一种承认。虽然在以后的案文中这句话被删去，但并不因此影响有洋中群岛的大陆国家继续对其洋中群岛作为整体予以划界的主张。从群岛理论的发展过程分析，群岛国和拥有

① 陈德恭著：《现代国际海洋法》，海洋出版社 2009 年版，第 105 页。

洋中群岛的大陆国家都主张群岛原则,只不过《公约》对群岛国的主张以条约的形式肯定下来,而大陆国家的洋中群岛基线没有像群岛国一样得到明确规定。这样,大陆国家的洋中群岛究竟适用何种基线制度主要依靠各国的实践。虽然国际实践认为划界具有国际性的一面,但不能因此作出偏颇理解而忽视沿海国在其国内法所表达的意志,只要这种做法能够得到其他国家的承认或者不强烈的反对。群岛制度确立前后,已经有大陆国家通过直线基线方法整体划定其洋中群岛的基线,并且没有受到他国的强烈反对,这便可以作为大陆国家对洋中群岛适用直线基线的先例予以借鉴。

可以说,《公约》将群岛国限制在领土全部由群岛组成的国家范围内,这是"国际政治现实的结果,并不表示此群岛(大陆国家的洋中群岛)的性质与群岛国不同。"[①]实践中,已经有一些大陆国家为其远离大陆的群岛划定直线基线,宣布基线内水域即成为内水或领海,而不是群岛水域,例如丹麦的法罗群岛、厄瓜多尔的加拉帕戈斯群岛等(详见下节)。这些大陆国家将洋中群岛作为一个整体,划定了不同于群岛基线的直线基线。因此,可以说,《公约》规定群岛国作为一个整体划定其群岛基线,但并未排斥大陆国家同样主张对其所属洋中群岛整体划定其直线基线。

三、我国南海诸岛能否适用群岛制度

(一)大陆国家洋中群岛的实践

《公约》没有成功解决大陆国家的洋中群岛问题,争论的结果也只是将群岛国限制在领土全部由群岛组成的国家的范围内。对大陆国家所拥有的洋中群岛而言,测量领海宽度的领海基线不适用第四部分"群岛国"所确立的群岛制度,而应该适用正常基线(沿海国官方承认的大比例尺海图所标明的沿岸低潮线),特殊情况下适用直线基线(即如果岛屿位于环礁上,或岛屿有暗礁环列,则领海基线是沿海国官方承认的海图上以适当标记显示的礁石的向海低潮线)。但是主张对构成领土一部分的洋中群岛适用群岛原则的国家仍然坚持原来的立场,并且将这一主张付诸行动。[②]

在国际实践中,不少大陆国家颁布法令,在其沿海的群岛或远离海岸的群岛采用直线基线为领海基线,并将基线以内的水域视为内水,而不是群岛水域。这种立法实践应当引起我们的关注。例如,厄瓜多尔对加拉帕戈斯群岛、丹麦对法

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① 傅崐成著:《南(中国)海法律地位之研究》,台北:一二三资讯公司1995年版,第138页。

② Hiran W. Jayewardene, *The Regime of Is lnads in International law*, Berlin: Springer, 1990, p. 240.

罗群岛、西班牙对加那利群岛、葡萄牙对亚速尔群岛和梅德林群岛、挪威对斯瓦尔巴德群岛等。[①]在这些大陆国家的洋中群岛实践中，均以国内立法的形式规定：其群岛采用直线基线制度，以直线基线方法对群岛整体划定基线，确立的直线基线系统环绕群岛外围，明确肯定基线内的水域为内水，甚至还规定了严格的内水通过制度。[②]

从现有资料分析，这些大陆国家对其所拥有的洋中群岛并未宣布其远离大陆的洋中群岛间的水域为群岛水域，而是通过连接群岛最外缘各岛上最外缘适当各点的直线基线方法划定领海基线，基线内的水域为内水，且这样的立法行动"明确地没有遭到其他国家的质疑。"[③]虽然这些国家在群岛问题上的实践尚不足以构成"一般国际法的规则和原则"，但至少可以认为这几个国家的实践代表了大陆国家洋中群岛划定领海基线的一种趋势和方向。从群岛原则的发展过程来看，群岛国各项制度就是以大量的国家实践为推动力而形成的。因此，要使大陆国家的洋中群岛基线制度在各国实践中真正建立起来，还需要大陆国家和国际社会的长期努力。然而无论如何，这些先例对我国而言可资借鉴，我国也可采用类似的方法——"只用直线基线来围绕南海诸岛的一系列岛群，不宣布为群岛基线，基线内水域为内水。"[④]

（二）我国对南海诸岛的规定和实践

南海是一个半封闭海。南海诸岛就分布在这片海域中，东起东经 117°45′的黄岩岛，西至 109°55′的万安滩，南迄北纬 4°附近的曾母暗沙，北到北纬 21°8′的北卫滩，东西相距 900 多公里，南北长达 1800 多公里。[⑤]

南海诸岛按照地理位置分为四大群岛：东沙群岛、西沙群岛、中沙群岛、南沙群岛。南海诸岛多由小岛、沙洲、暗礁、暗沙组成，岛屿和水域中特产丰富，具有极高的经济价值，在海上交通和战略上更具有举足轻重的地位。

1、我国关于南海诸岛地位的法律规定

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① 分别为：1971 年 6 月 28 日厄瓜多尔政府发布《规定测量领海直线基线的第 959－A 号最高法令》、1976 年 12 月 21 日丹麦颁布的《法罗群岛渔业领土第 598 号法令》和《关于领海划界的第 599 号法令》、1977 年 8 月 5 日西班牙第 2510 号皇家敕令及 1978 年 2 月 20 日第 15 号法令、1985 年 11 月 29 日葡萄牙颁布《第 495/85 号法令》、2002 年 6 月 1 日挪威颁布《关于斯瓦尔巴德群岛周围的挪威领海界线的规定》。

② 由于各种原因，2003 年 6 月 27 日挪威国王颁布了新的领海与毗连区法令，修正了本国的领海基线，对斯瓦尔巴德群岛不再划出直线群岛基线，而是按照海岸低潮线划出了大陆和环绕扬马延岛以及斯瓦尔巴德群岛的领海基线。

③ J. R. V. Preseott，*Maritime Jurisdiction in Southeast Asia：A Commentary and Map*，*Research Report No.* 2，January 1981，East-west Environment and Policy Institute，Printed in USA，p. 3. 转引自张海文：《适用于南海诸岛的法律制度》，北京大学法律系博士论文，1995 年，第 13～14 页。

④ 赵理海著：《海洋法问题研究》，北京大学出版社 1996 年版，第 32～33 页。

⑤ 林金枝著：《祖国的南疆——南海诸岛》，上海人民出版社 1998 年版，第 1 页。

我国是否能够将直线基线方法适用于划定南沙群岛的领海？南沙群岛附近海域在国际法上享有什么样的法律地位？对于这些问题，应从我国的海洋法律政策和实践中寻找答案。

1958年9月4日《中华人民共和国政府关于领海的声明》宣布："(一)中华人民共和国的领海宽度为十二海里。这项规定适用于中华人民共和国的一切领土，包括中国大陆及其沿海岛屿，和同大陆及其沿海岛屿隔有公海的台湾及其周围各岛、澎湖列岛、东沙群岛、西沙群岛、中沙群岛、南沙群岛以及其他属于中国的岛屿。"[①]中国大陆的基线规则为"中国大陆及其沿海岛屿的领海以连接大陆岸上和沿海岸外缘岛屿上各基点之间的各直线为基线，从基线向外延伸十二海里的水域是中国的领海"，同时该声明规定的基线规则"同样适用于……东沙群岛、西沙群岛、中沙群岛、南沙群岛以及其他属于中国的岛屿。"

需要注意的是，我国领海声明只规定直线基线适用于南海四群岛，对各群岛直线基线如何划定没有具体解释，是以每个群岛为整体，连接各岛礁外缘适当基点划定统一的领海？还是群岛中各岛单独划定各自的领海？我国发表领海声明之后，没有通过立法形式对领海内的法律制度作出全面规定，也未公布领海基点基线。

单从我国的领海声明中并不能判断出南海四群岛如何划定领海基线，但是在1973年7月14日海底委员会上我国提出《关于国家管辖范围内海域的工作文件》，其中第一条第(六)款规定："岛屿相互距离较近的群岛或列岛，可视为一个整体，划定领海范围。"[②]由此可以看出我国对群岛制度的态度，即对于南海四群岛我国主张应将各群岛视为整体，用直线基线划定统一的领海范围。

1992年2月25日《中华人民共和国领海及毗连区法》第二条规定"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、台湾及其包括的鱼岛在内的附属各岛、澎湖列岛、东沙群岛、西沙群岛、中沙群岛、南沙群岛以及其他一切属于中华人民共和国的岛屿"，并原则性地规定了基线规则，"领海的宽度从领海基线量起为十二海里"、"领海基线采用直线基线法划定，由各相邻基点之间的直线基线组成"、"领海基线向陆地一侧的水域为中华人民共和国内水"。

随后，在1996年5月15日，我国发表《中国政府关于领海基线的声明》，公布了大陆领海的部分基线和西沙群岛的领海基线。

2、我国对南海诸岛的实践与建议

根据学者观点，"中国不是群岛国，因此不能划定群岛基线。中国可以成功地对南中国海的一些或全部岛屿(例如南沙群岛)建立正常基线和直线基线"。[③]从我国现有立法实践来看，我国并没有适用群岛制度对南海各群岛划界，而是主

① 《中华人民共和国海洋法规选编》，北京：海洋出版社1998年版，第1页。

② 参阅《中国递交的关于国家管辖范围内海域的工作文件》第一条第6款，载于U. N. Doc. A. AC. 138/SC. Ⅱ/L. 34，第2页。

③ 袁古洁著：《国际海洋划界的理论与实践》，法律出版社2001年版，第238～240页。

张将东沙、西沙、中沙、南沙群岛分别作为一个整体适用直线领海基线制度的。考虑到南海四群岛的不同自然地理情况，对各群岛基点基线的选划亦应分别处理：

西沙群岛是南海诸岛中露出海面的陆地最多的一群，计有 22 个岛、7 沙洲，总面积 8 平方公里，西沙群岛按其地理分布形势又可分为宣德群岛和永乐群岛这两组群岛，因而有的学者甚至主张该两组群岛应分别划定领海。[①]但由于此两组群岛在地理上关系紧密，又对我国的安全和经济利益十分重要，所以我国将西沙群岛作为一个整体划定领海范围。1996 年 5 月 15 日我国政府发表了《中国政府关于领海基线的声明》，正式公布了大陆领海的部分基线和西沙群岛的领海基线。其中，西沙群岛的领海基线采用直线基线，选取了西沙群岛中 8 个岛礁上的 28 个基点，通过顺次连接各基点的方法划定西沙群岛的直线基线，并宣布基线内的水域为中国的内水——换而言之，西沙群岛基线向内的水域适用内水制度而非群岛水域。另外，《中国政府关于领海基线的声明》规定“中华人民共和国政府将再行宣布中华人民共和国其余领海基线”，目前，单就南海诸岛而言，尚未公布除西沙群岛以外的其他群岛的基点和基线。

东沙群岛主要由一岛（东沙岛）一礁（东沙礁）两滩（北卫滩和南卫滩）组成。其中，东沙岛是东沙群岛中唯一露出水面的珊瑚岛，符合“四面环水并在高潮时高于水面的自然形成的陆地区域”的要求，而东沙礁是低潮时部分礁环露出海面的暗礁，南卫滩、北卫滩常年隐没于海面以下，这种一岛一礁两滩的结构从地理要素分析难认定为真正的群岛。

中沙群岛的主体是位于海平面以下的中沙大环礁，属于群礁而非群岛，习惯上将距中沙群岛东南 160 海里的黄岩岛纳入中沙群岛的范围。同东沙群岛一样，中沙群岛一个岛屿和暗沙、暗滩的这种自然地形也很难构成《公约》46 条所称的群岛实体，很难对整个群岛适用直线基线制度，但黄岩岛和东沙岛可以单独适用直线领海基线。

南沙群岛岛屿众多，且多为小岛，情况复杂：如将南沙群岛视为一个整体，适用直线领海基线主张的领海范围过大，不易实现；将各群礁单独作为整体分别划定基线，将使基点的选择非常困难。相对而言对上述两种方法的折中会显得较为合理，即对南沙各群礁分别处理，在地理上位置接近、能作为整体处理的群礁就作为一个整体划定直线基线，不适合作为整体处理的群礁中的岛屿或较大的岛屿单独划定基线，较为孤立的岛礁可以依其自然条件来决定是否可以产生处领海和毗连区之外的海洋区域。

无论如何，通过研究群岛制度来分析大陆国家能否适用群岛制度解决其洋中群岛基线问题，以正确划定我国在南海的直线基线，其最终目的是在符合《公

① 邹克渊：《中华人民共和国海洋法实践》，载于《北京大学研究生学刊》1987 年第 3 期，第 76 页。

约》的基础上最大限度地维护我国的权益。当然,这仍然需要以解决同周边国家岛屿问题的争端为前提。

(责任编辑:强之恒)

A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea

Jiang Li*, Zhang Jie**

Abstract: Part IV of the United Nations Convention on the Law of the Sea provides that the archipelagic regime applies to "archipelagic states". However, it is not clearly provided whether the archipelagic regime applies to the mid-ocean archipelagos of continental countries. The recent legislative practice of the continental countries with mid-ocean archipelagos represented by Ecuador and Denmark is that they regard the archipelagos as a single unit and draw straight baselines by way of national legislation. China is also a continental country with mid-ocean archipelagos. There are four archipelagos including the Dongsha, Xisha, Zhongsha and Nansha Islands in the South China Sea. The Chinese government has not yet announced baselines and base-points for these islands except for the Xisha Islands. This article tries to analyze whether continental countries can apply the archipelagic regime based on the history of the Third United Nations Conference on the Law of the Sea, and how to draw the baselines for the South China Sea Islands based on the practices of other continental countries.

Key Words: archipelagic regime; continental countries; mid-ocean archipelagos; the South China Sea Islands

The archipelagic theory was established in the Third United Nations Conference on the Law of the Sea (hereinafter referred to as "the Third Conference on the Law of the Sea" or "the Third Conference"), and eventually the archipe-

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lagic regime is provided in general in the United Nations Convention on Law of the Sea (hereinafter referred to as the Convention or UNCLOS) in the form of "Archipelagic States". However, the international community has been continually debating on the question whether the archipelagic regime can be applied to the mid-ocean archipelagos of continental countries since the initiation of the archipelagic theory. Although no final conclusion has been made with regard to this issue, some continental countries have put it into practice in the delimitation of the baselines for their archipelagos. Special attention should be paid to this recent practice. The islands in the South China Sea have belonged to China since ancient times. However, except for the Xisha Islands, the baselines and base-points of the territorial waters for the other three Islands have not yet been published. How to maintain China's maritime interests and rights fully according to the current provisions of international law but without prejudice to international navigation system, which is a difficult problem faced by China in its practice of maritime delimitation.

Ⅰ. The Differences on Archipelagic Regime in the Third Conference on the Law of the Sea

The concept of the archipelagic state was not initiated and widely discussed until the Third Conference held from 1973 to 1982. With eleven sessions of discussion, the Convention was finally adopted in 1982. Due to the tireless efforts of third world countries, the concept of the archipelagic state was eventually accepted by the international community and adopted successfully by the Convention. The archipelago issue was mainly discussed in the second, third and fourth sessions that resulted in some documents that were critical for the final archipelagic regime. The documents covered the Informal Single Negotiating Text (1975), the Revised Single Negotiating Text (1976), and the Informal Composite Negotiating Text (1977). The positions of archipelagic states were basically supported in the Third Conference and included in the fourth part of the Convention.

The archipelagic principle or archipelagic theory was first initiated by the archipelagic states group composed of Fiji, Indonesia, Mauritius and the Philippines at the conference of the Preparatory Committee of the Third Conference in 1973. The four archipelagic states proposed Suggestions of Archipelagic Principle to the Seabed Commission which stated that: (1) The archipelagic State may draw straight archipelagic baselines joining the outermost points of

the outermost islands and dry reefs of the archipelago; (2) the waters inside the baseline, regardless of their depth or the distance from the coast, the sea-bed, subsoil, the air space over the waters and its resources belong to the sovereign jurisdiction; (3) Archipelagic States should, in accordance with domestic law, and taking the existing rules of international law into account, allow foreign ships to enjoy the right of innocent passage through archipelagic waters. ① Later on, the four countries turned these principles into specific articles. They proposed Draft Articles Relating to Archipelagic States to systemically cover the concept of the archipelagic state, the delimitation of archipelagic straight baselines, the legal status of archipelagic waters and the innocent passage through archipelagic waters. ② As to the application scope of the archipelagic regime, Article 1, Paragraph 1 of the Draft Articles explicitly states that "This provision applies only to archipelagic States".

The Draft Articles Relating to Archipelagic States was formally submitted in the second session in 1974. The contents of the Draft Articles were basically the same as the one submitted in 1973 representing the interests of the archipelagic states. Nine continental countries with mid-ocean archipelagos drew up a Working Paper, trying to revise the Draft Articles. The most obvious change was to eliminate the article "This provision applies only to archipelagic States". The purpose was to extend the archipelagic regime to the continental countries with mid-ocean archipelagos. This document represented the position of those continental countries.

These two diametrically opposite documents on a proposed archipelago regime led to debates between the archipelagic states and the continental countries. The archipelagic states, such as the Philippines and Indonesia, opposed the extension of the archipelagic regime to mid-ocean archipelagos owned by continental countries. They held that only the states constituted wholly by archipelagos could apply the archipelagic principles in the delimitation of the territorial sea or exclusive economic zone. However, the continental countries that owned mid-ocean archipelagos far from the mainland such as India, Ecuador and Portugal claimed that the archipelagic regime should apply to all archipelagos

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① Office for Ocean Affairs and the Law of the Sea, *Archipelagic States: Legislative History of Part Ⅳ of the United Nations Convention on the Law of the Sea*, in: United Nations, *The Law of the Sea*, New York: U. N. Publication, 1990, p. 7.

② Office for Ocean Affairs and the Law of the Sea, *Archipelagic States: Legislative History of Part Ⅳ of the United Nations Convention on the Law of the Sea*, in: United Nations, *The Law of the Sea*, New York: U. N. Publication, 1990, p. 9.

because the archipelagic states and the archipelagos constituting part of the coastal states were closely related and thus should be solved together. ① Because most countries attending the Third Conference opposed extending the archipelagic principles to the mid-ocean archipelagos, the continental countries' concerns finally died down in the debate about the application scope of the archipelagic regime. As a result, their claims in Working Paper were not recorded in the Informal Single Negotiating Text for further discussion.

In the third session in 1975, all documents and draft articles discussed in the second session were combined into a single text, which formed the Informal Single Negotiating Text. The archipelagic issue was included in the third part of the Text with two separate sections entitled "Archipelagic States" and "Mid-ocean archipelagos belonging to continental countries". The Negotiating Text was very vague as to whether the archipelagic regime applied to the mid-ocean archipelagos. Article 131 provided that "the provisions of Section I (The Archipelagic States) shall be without prejudice to the status of the mid-ocean archipelagos that form integral part of territories of continental countries".

In the fourth session in 1976, The Revised Single Negotiating Text was put forward on the basis of the revision of the Informal Single Negotiating Text. This new Text entitled Chapter VII with "Archipelagic States" and deleted the Section of "Mid-ocean archipelagos belonging to continental countries" in the previous Text. ②

In the sixth session in 1977, the above four texts were combined into the Informal Composite Negotiating Text which became the blueprint of the draft of the Convention in 1982. Part IV of the Convention is about archipelagic states.

In the 11th session in 1982, the Draft Articles relating to archipelagic states submitted by the archipelagic states group were basically accepted, and the special provisions of archipelagic regime for archipelagic states were stipulated in Part IV of the Convention. However, the Convention does not give clear provision regarding the mid-ocean archipelagos of continental countries.

From the debate about the application scope of the archipelagic regime through the Third Conference, it is clear that archipelagic states strongly opposed the expansion of the application scope, that the discussion on the mid-o-

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① Lihai Zhao, *A Study on the Issues relating to the Law of the Sea*, Beijing: Peking University Press, 1996, p. 32.

② Gujie Yuan, *Theories and Practices on International Maritime Delimitation*, Beijing: China Law Press, 2001, pp. 238～240.

cean archipelagos did not receive the same attention as archipelagic states, and that the continental countries did not claim their rights on the mid-ocean archipelagos as strongly as the archipelagic states did in the Conference on the Law of the Sea. ① Consequently, the archipelagic regime was excluded from applying to the mid-ocean archipelagos.

Ⅱ. Whether the archipelagic regime can be applied to the mid-ocean archipelagos of continental countries

Neither the legislation process nor the specific provisions of the Convention gave a clear indication as to the legal status of the mid-ocean archipelagos of continental countries. Objectively speaking, the legal status of the mid-ocean archipelagos is not clearly defined in the Convention. To some extent, this is a blank area in the Convention. ② Therefore, since the proposal of the archipelagic regime, a long-running dispute has continued in the international community on the issue whether the archipelagic regime could be applied to the mid-ocean archipelagos. So far, no final conclusion on this issue has been made in the circle of the international maritime law.

A. The views of scholars on whether the archipelagic regime can be applied to the mid-ocean archipelagos

1. Views advocating that the archipelagic regime can be applied to the mid-ocean archipelagos

Some Chinese scholars, represented by Professor Degong Chen and Professor Jianjun Gao argue that the fact that the archipelagic baseline regime is provided in Part Ⅳ "Archipelagic States" does not necessarily mean that it applies only to archipelagic states, but not to the mid-ocean archipelagos belonging to certain countries. ③

Some foreign scholars, represented by R. R. Churchill and A. V. Lowe, who are British experts on delimitation, also point out that "This limit in the Convention (i. e., the archipelagic regime applies only to archipelagic states) seems neither necessary nor reasonable. As long as other countries recognize the base-

① Gujie Yuan, *Theories and Practices on International Maritime Delimitation*, Beijing: China Law Press, 2001, pp. 238～240.

② Haiwen Zhang, *Commentaries on the United Nations Convention on the Law of the Sea*, Beijing: China Ocean Press, 2006, p. 83.

③ Jianjun Gao, *China and International Law of the Sea*, Beijing: China Ocean Press, 2004, p. 138.

lines delimited for the mid-ocean archipelagos belonging to continental countries, these practices should be deemed as effective and legal."[①]

The main reasons for claiming that the archipelagic regime can be applied to the mid-ocean archipelagos of continental countries are as follows:

First, the reasons for the archipelagic regime proposed by the archipelagic states are equally effective for the mid-ocean archipelagos of continental countries, because the problems faced by these two types of archipelagos are the same and therefore the solution should not be different. First of all, from a political perspective, the archipelagic regime aims to maintain the national political integration and the integrity of national sovereignty. So similarly, the continental countries' right to exercise sovereignty over their mid-ocean archipelagos should not be neglected just because those archipelagos are far away from the mainland territory. Secondly, from an economic perspective, for the archipelagic states, the resources in the waters among the islands in the archipelago are the basis on which the local populations rely on for existence. Similarly, for the continental countries, their inhabitants in the mid-ocean archipelagos also rely on the exploitation of archipelagic resources, though they could have the mainland as their supply area. Thirdly, from a security perspective, if the traditional islands regime was adopted, it would result in large high seas between the national continental territory and the mid-ocean archipelagos. According to the Convention, foreign ships and aircrafts over the high seas have freedom of navigation and overflight, which will lead to a hidden peril for national maritime safety and security. This is equally important both to the archipelagic states and the continental countries. [②]

Second, if the archipelagic regime does not apply to the mid-ocean archipelagos, unfairness will be created in international law. Being archipelagos, if they form an archipelagic state, then they are endowed with the sovereignty that "extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein". [③] However, if they only form part of a continental country, the country can only exercise sovereignty over each island therein respectively, without the same sovereignty as that of the archipelagic state. No doubt that it will lead to separation of sovereignty or make

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① R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3 rd ed., Manchester: Manchester University Press, 1999, pp. 120～121.

② Yi Huang, Archipelagic Theory, *Fu Jen Law Journal*, No. 3, 1984, p. 27.

③ Article 49 (2) of *United Nations Convention on the Law of the Sea*, Beijing: China Ocean Press, 1996, p. 23.

the islands far away from the mainland second-class territory since the two kinds of archipelagos are treated differently. Moreover, such a distinction exaggerates certain geographical inequalities, which is tantamount to a punishment for those countries.

Third, although the Convention provides the archipelagic baseline regime in Part IV "Archipelagic States", it does not mean that the archipelagic regime applies only to archipelagic states and not to mid-ocean archipelagos. At least the Convention does not explicitly state that the archipelagic regime does not apply to the mid-ocean archipelagos. As long as this practice is legal and effective according to customary international law, and recognized by other countries, it should be considered that the archipelagic regime can be applied to the mid-ocean archipelagos.

2. Views claiming that the archipelagic regime cannot apply to the mid-ocean archipelagos of continental countries

For the issue that whether the archipelagic regime can be applied to the archipelagos in the South China Sea, some Chinese experts, represented by Professor Lihai Zhao and Professor Gujie Yuan, have different views. They hold that it won't work to completely apply the provisions about archipelago in the Convention to the islands in the South China Sea. According to Part IV of the Convention, the archipelagic regime only applies to archipelagic states. ①

Prof. Park Choon—Ho, a famous expert of maritime law from South Korea, represents other experts, who also believe that only the country constituted wholly by archipelagos can be known as an archipelagic state, and only that country can apply the archipelagic regime. ②

Thus it can be seen that, the leading and also the simplest reason claiming that the archipelagic regime cannot be applied to the mid-ocean archipelagos is that the archipelagic regime established by the Convention can be applied only to the archipelagic states. Since the continental countries including China do not belong to the archipelagic states, they cannot apply the archipelagic regime which is designed exclusively for the archipelagic states to delimit their baselines.

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① Lihai Zhao, Some Legal Issues on the South China Sea Islands, *Legal Regime and Social Development*, No. 4, 1995, p. 57.

② Choon—Ho Park, *Limits in the Seas*, No. 117, *Straight Baseline Claim*, China, 9 July 1996, p. 16.

B. The baseline regime that applies to the mid-ocean archipelagos of the continental countries

The Convention has provisions on the legal status of coastal islands of the continental countries, while Part Ⅳ of the Convention ("Archipelagic States") provides that the archipelagic regime applies to archipelagic states. However, the Convention has no provision on the mid-ocean archipelagos. Objectively speaking, the Convention does not successfully resolve the legal status of the mid-ocean archipelagos.

The authors are of the opinion that mid-ocean archipelagos cannot apply the archipelagic regime which was designed specifically for the archipelago states. However, the continental countries can regard the mid-ocean archipelagos as a single unit and thus apply the straight baselines regime. The reasons are as follows:

First, as far as Part Ⅳ of the 1982 Convention is concerned, the archipelagic regime is only applicable to the archipelagic states but not to the archipelagos far from the mainland.

As mentioned above, there were completely different opinions as to the application scope of the archipelagic principles in the Third Conference on the Law of the Sea. The continental countries with mid-ocean archipelagos tried to assert that the archipelagic principles apply equally to the continental countries, a position which was strongly opposed by the archipelagic states group. The final result is that the mid-ocean archipelagos of the continental countries are not mentioned in Part IV of the Convention. The Convention intentionally avoids mentioning the mid-ocean archipelagos; though India, Greece, Portugal, Spain and Colombia insisted on the application of the archipelagic regime while most countries opposed it. ① It cannot be necessarily deduced that the archipelagic regime can be applied to the mid-ocean archipelagos just because the Convention does not provide otherwise. This application issue was formally raised and discussed at the Third Conference without agreement. The application of the archipelagic regime to the mid-ocean archipelagos of the continental countries has been denied because of opposition from the archipelagic states. Therefore, the authors believe that the correct deduction is that the archipelagic regime should only apply to the archipelagic states, if put into the context of the formulating background of the Convention.

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① Weinong Gao, *International Law of the Sea and Maritime Jurisdiction in Pacific Ocean*, Guangzhou: Senior Education Press, 1999, p. 32.

As pointed out by O. P. Sharma, an expert of the law of the sea from the Indian Navy, the Convention made the concept of the archipelagic states sacred. Although the Indian delegation at the Conference urged that there was no difference in the status between the individual archipelagic states and the archipelagos as part of the mainland territories, India could not persuade the Conference to recognize that coastal islands of the continental countries, such as the Andaman and Nicobar Islands, have the same legal status as an archipelagic State. ①

Secondly, according to the relationship between the straight baselines and the archipelagic baselines, the fact that the archipelagic regime does not apply to the mid-ocean archipelagos does not exclude the continental countries to consider the archipelagos as a whole and delimit their straight baselines.

The legitimacy of the straight baselines has been recognized in the Judgment of the United Kingdom-Norway Fisheries case in 1951. However, the straight baselines are only applicable to the coastal islands. If the archipelagic states would apply it by analogy, many problems would be created. That is why it was necessary to establish an archipelagic baseline regime which is not the same as the straight baseline regime.

The Convention establishes the baseline regime with basic types of normal baseline and straight baselines. Therefore, to delineate the baseline of a territorial sea, the coastal state should first consider whether the normal baseline can be used. In special circumstances, the straight baselines can be used, as provided in Article 7 of the Convention that "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline". For archipelagic countries, Article 47 of the Convention provides that "an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago". From the above types of baseline and their applicable objects, we can see the Convention has the following rules for drawing baselines: the normal baseline should be used in normal circumstances, while in some special circumstances the straight baselines with specific conditions and the archipelagic baselines for specific objects can be used. Therefore, we can conclude that the archipelagic states may apply the archipelagic regime to draw

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① O. P. Sharma, India and UN Convention on the Law of the Sea, *Ocean Development and International Law*, vol. 26, No. 4, 1995, pp. 391～412.

archipelagic baselines, while other archipelagos may apply the common baseline regime, i. e. normal or straight.

Although the Convention limits the application scope of the archipelagic regime to the archipelagic states, it does not mean that the Convention denies the claim that the continental country may draw straight baselines for their mid-ocean archipelagos as a whole. This could be regarded as a delimitation method and skill. The question whether the archipelagos constitute a single unit as a matter of law has been posed by international practice since early 19th century. For example, the King of the Hawaiian Islands declared in a neutral statement on May 16, 1853 that the declaration of neutrality should be respected within his jurisdiction, including all the channels and islands between them. In the subsequent years, kings of indigenous people in Tonga and Fiji made similar statements. In the delimitation of the Adelin Islands on October 20, 1921, the archipelago and its surrounding waters were regarded as a whole unit. ① Both Cuba's domestic legislation in 1934 and 1942 and Ireland's Fisheries Act in 1952 considered archipelagos as a single unit *de jure*. ② In addition, a similar concept was also used in theories of international law in the 20th century. Mr. Alvarez, a Chilean scholar, recommended to the International Law Association in 1924 that archipelagos should be seen in their political and economic entirety, and should be considered as a whole when delimiting their territorial waters. The island that is the furthest away from the center island should be treated as a base-point to draw territorial waters. Subsequently, on the basis of the development of the overall concept of an archipelago by the International Law Association, conferences for the codification of international law on the sea, International Court of Justice, and the International Law Commission, the concept of an "archipelago" was clearly defined in the archipelagic regime established in the Convention. It is thus clear that, from the geographical facts and legal point of view, archipelagos as an overall legal concept has been generally recognized by theory of international law and state practice. Since archipelagos can form an overall legal concept, the concept of an archipelago should include the mid-ocean the archipelagos of the continental countries. Although the Convention does not mention this, it does not mean that the Convention denied

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① Lucchini and Voeckel, *Le droit international de la mer*, Paris: Pedone, 1990, Tome I, p. 359. Quoted from Haiwen Zhang, *Commentaries on the United Nations Convention on the Law of the Sea*, Beijing: China Ocean Press, 2006, p. 84.

② Haiwen Zhang, *Commentaries on the United Nations Convention on the Law of the Sea*, Beijing: China Ocean Press, 2006, p. 84.

the concept, or the concept does not apply to the mid-ocean archipelagos.

In fact, broadly speaking, the archipelagic baselines also belong to straight baselines. However, to apply the archipelagic baselines to the archipelagic states, various specific requirements should be met, including the choice of base-points, the ratio of water to land, baseline length and so on. All these restrictive requirements do not exist in the straight baselines. This makes the straight archipelagic baselines an independent baseline. The legal effects for the general straight baselines and archipelagic baselines are different, i. e. the water area closed by the general straight baselines is internal waters, while the area closed by the archipelagic straight baselines is archipelagic waters.

For the issue how to delimitate the baseline of the mid-ocean archipelagos, Mr. Amnesia Singe, who was chairman of the Third Conference on the Law of the Sea, suggested in his book "Archipelagic Issue in the Law of the Sea" that some of the general principles raised in the United Kingdom-Norway Fisheries Case could be used too. First, the impact of the economic interests on the determining of the baseline should be considered. The impact is decided by long-term use and actual needs. Second, the relationship between land and sea should be considered in deciding whether or not to adopt the straight baselines. Third, the use of straight baselines should be based on the general shape of the coast. Last, although there is no specific provision on the length of baseline, its length should be reasonable. ①

Thirdly, matters that were not regulated by the Convention should be determined by general rules or custom formed by state practice.

The Convention has no explicit provision on whether the coastal continental countries have the right to delimitate straight baselines for the mid-ocean archipelagos. The Preamble of Convention states that matters not regulated by this Convention continue to be governed by the rules and principles of general international law. Therefore, the main factor that determines the legal status of the mid-ocean archipelagos of the continental countries is customary international law. Thus, some scholars argue that, according to the customary international law, if the straight baselines used to delimit the archipelagos are consistently opposed by other states, the practice of the coastal continental countries is not legal. But, if other states are acquiescent to or definitely accept this practice, it should be regarded as consistent with international law. The customary

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① Degong Chen, *Modern International Law of the Sea*, Beijing: China Ocean Press, 2009, p. 105.

international law that determines the legal status of the mid-ocean archipelagos of the continental countries should be found in and proved by international practice. International practices that reflect customary international law include the decisions of International Court of Justice, arbitral awards of international arbitration, national unilateral legislative practice and the general law principles recognized in some of the provisions of the Convention.

The Informal Single Negotiating Text in 1975 states that the regulations for the archipelagic states shall not affect the legal status of the mid-ocean archipelagos. It implied recognition of the practice of the mid-ocean archipelagos by the continental countries. Although this part was deleted in the later text, it does not affect the claim that the continental countries continue to delimitate the Mid-ocean archipelagos as a whole. Through analysis of the development process of the archipelagic theory, both the archipelagic states and the continental countries with mid-ocean archipelagos have advocated archipelagic principles. The difference is that the idea of the archipelagic states was approved in the form of a treaty, while the idea of the continental countries was intentionally neglected. As a result, which baseline regime can be applied to the mid-ocean archipelagos has to mainly rely on the practice of states. Although the international practices consider delimitation as an international issue, the real will of the coastal state, as expressed in its domestic law, should not be neglected, as long as this practice is recognized or not strongly objected to by other countries. Before and after the establishment of the archipelagic regime, some continental countries have adopted the straight baseline regime to draw the baseline for the mid-ocean archipelagos as a whole unit. No strong opposition by other countries was made. This practice can be used as precedent.

It can be said that, the fact that the Convention limits the archipelagic states to the states that are constituted wholly by archipelagos is the result of international political reality. But it does not mean that the nature of these archipelagos (the mid-ocean archipelagos of the continental countries) is different from that of the archipelagic states. [①] In practice, a number of continental countries delineate the straight baselines for the archipelagos far away from the mainland, and declare that the waters on the landward side of the baseline form part of the internal waters or territorial sea, rather than the archipelagic waters. The examples are the Faroe Islands of Denmark and the Galapagos Islands

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① Kuncheng Fu, *A Study on the Legal Status of South China Sea Islands*, Taipei: One Two Three Information Company, 1995, p. 138.

of Ecuador (to be elaborated upon in Part III). These continental countries regard the mid-ocean archipelagos as a whole to draw the straight baselines that are different from archipelagic baselines. Therefore, we can say that the Convention regulates archipelagic states as a whole to draw their baselines, but it never excludes the claim that the mid-ocean archipelagos could apply straight baselines as a whole.

Ⅲ. Whether the archipelagic regime can be applied to the South China Sea Islands

A. The Practice Relating to the Mid-ocean Archipelagos of the Continental Countries

According to the Convention, the archipelagic regime does not apply to the mid-ocean archipelagos when drawing the territorial sea baseline that is used to measure the breadth of the territorial sea. What could be applied is the normal baseline regime (the coastal low-water line on the large-scale charts officially recognized by the coastal state) and in some special circumstances, the straight baseline regime (i. e. if the islands are in the atoll, or the islands surrounded by the submerged reef, the territorial sea baseline is the low-water line to the sea of the reef showed by some marks on charts officially recognized by the coastal countries). However, some countries which claimed that the mid-ocean archipelagos should apply archipelagic principles continued to insist on their original position, and put it into practice. ①

In international practice, many continental countries have promulgated domestic decrees in which the straight baseline is used as the territorial sea baseline for coastal or mid-ocean archipelagos. And the waters inside the baselines form part of the internal waters, rather than archipelagic waters. This legislative practice should receive great concern. Some examples include the Galapagos Islands of Ecuador, the Faroe Islands of Denmark, the Canary Islands of

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① Hiran W. Jayewardene, *The Regime of Islands in International law*, Berlin: Springer, 1990, p. 240.

Spain, Azores Islands and Madelyn of Portugal and Svalbard Islands of Norway. ① All of these practices of the mid-ocean archipelagos of the continental countries, in the form of domestic legislation, provide that the straight baseline regime is used. The baselines are delimited by a straight baseline method for the whole archipelago, and the straight baselines that are established by this method are around the outer archipelagos. It clearly affirmed that the waters inside the baselines were internal waters, even providing the strict passage regime within the internal waters. ②

According to existing data, these continental countries do not announce the waters around their mid-ocean archipelagos as archipelagic waters, but draw the territorial sea baselines by the straight baseline method jointing the outmost appropriate points of the outmost islands. The waters inside the baselines are considered as internal waters. Such legislative action has not been clearly oppugned by other countries. ③ Although the practices of these countries on their mid-ocean archipelagos are still not enough to constitute a general rule and principle of international law, at least they represent a trend and direction of how to draw territorial sea baselines for the mid-ocean archipelagos. From the development process of the archipelagic principles, the different rules and regulations of the archipelagic states are formed by a large number of national practices. So, in order to actually establish the baseline regime of the mid-ocean archipelagos, it is necessary for the continental countries and the international community to make a long-term effort. In any case, these precedents can be used as reference for Chinese government. China can also consider applying the

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① For example, the Supreme Decree No. 959-A Prescribing Straight Baselines for the Measurement of the Territorial Sea released by Ecuador on 28 June 1971, the Decree No. 598 of 21 December 1976 on The Fishing Territory of the Faroe Islands and the Ordinance No. 599 of 21 December 1976 on the Delimitation of the Territorial Sea around the Faroe Islands released by Denmark, the Royal Decree No. 2510/1997 of 5 August 1977 and Act No. 15/1978 on the Economic Zone of 20 February 1978 released by Spain, the Act No. 495/85 of 29 November 1985 released by Portugal, and the Regulation relating to the Limits of the Norwegian territorial sea around Svalbard (Royal Decree of 1, June 2002) released by Norway.

② For some reason, King of Norway released a new regulation on territorial sea and contiguous zone on 27 June 2003. This regulation revised its baselines of territorial sea. It did not draw straight archipelagic baselines for Svalbard but draw its territorial baselines along mainland, Jan Mayen and Svalbard according to coastal low-tide line.

③ J. R. V. Preseott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map*, *Research Report No.* 2, January 1981, East-west Environment and Policy Institute, Printed in USA, p. 3. Quoted from Haiwen Zhang, *Legal Regime applied to the South China Sea Islands*, Doctor Paper of Beijing University, 1995, pp. 13～14.

straight baselines to the groups of islands in the South China Sea, instead of declaring them using the archipelagic baselines, and regard the waters inside the baselines as internal waters. ①

B. Chinese Regulations and Practices on the South China Sea Islands

The South China Sea is a semi-enclosed area where the South China Sea Islands are located. The Islands' furthest extent to the east is at the Huangyan Island located at 117° 45′E, to the west at the Wan-an Beach at 109° 55′E, to the south at the James Shoal close to 4° N, to the north at the Beiwei Beach at 21° 8′N. The distance from the east to the west is more than 900 kilometers; from the north to the south is more than 1800 km. ②

According to its geographical location, the South China Sea Islands can be divided into four major groups of islands: The Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands. The South China Sea Islands are mostly composed of small islands, banks, submerged reefs and shoals. There are rich resources with a high economic value on the islands or in the waters. They play a decisive role in marine traffic and strategy for China.

1. Chinese provisions of the status of the South China Sea Islands

Can China apply the straight baselines method to delimit its territorial waters of the South China Sea Islands? What is the legal status of the adjacent waters around the South China Sea Islands in international law? These questions should be answered from the policy and practice of Chinese law of the sea.

In the Declaration of the Government of the People's Republic of China on the China's Territorial Sea (September 4th, 1958), it is stated that: 1. the breadth of the territorial sea of the People's Republic of China shall be twelve nautical sea miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas. ③ The principle for drawing the baseline of the

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① Lihai Zhao, *A Study on the Issues of the Law of the Sea*, Beijing: Peking University Press, 1996, pp. 32～33.

② Jinzhi Lin, *China's South Territory-the South China Sea Islands*, Shanghai: People's Press, 1998, p. 1.

③ *Collection of the Laws and Regulations of the Sea of the People's Republic of China*, Beijing: China Ocean Press, 1998, p. 1.

Chinese mainland is that, China's territorial sea along the mainland and its coastal islands take as its baseline the line composed of the straight lines connecting base-points on the mainland coast and on the outermost of the coastal islands; the water area extending twelve nautical miles outward from this baseline is China's territorial sea. The Declaration also stated that the above principles likewise apply to the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China.

It is worth pointing out that the above Declaration only stipulates that the straight baselines apply to the four archipelagos in the South China Sea. However, there is no specific explanation on how to draw the straight baselines for every archipelago. Can we treat every archipelago as a whole and connect appropriate base-points selected from all the outer reefs to draw uniform territorial waters? Or treat all islands that consist of an archipelago as separated units and draw their respective territorial waters? After the above Declaration, the Chinese government did not have further legislation for the territorial sea or any proclamation determining the base-points or baselines.

The above Declaration did not indicate the specific methods for how to draw the baselines for the four archipelagos in the South China Sea. However, Chinese Working Paper: the Marine Area under the Jurisdiction of the State submitted to the Seabed Committee by Chinese government on July 14th, 1973 gave some clear hints. Article 1 Paragraph (6) of the Working Paper states that archipelagos or group of islands close to each other can be regarded as a whole to delimit their territorial sea. ① It is clear that, the Chinese attitude toward the archipelagos in the South China Sea is that they should be considered as a whole and their territorial seas should be delimited with straight baselines.

Article 2 of Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (February 25th, 1992) stipulates that "The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China". This Law provides the straight baselines very generally. It stipulates that "the breadth of the territorial sea of the People's Republic of China is twelve nautical miles, measured from the baselines of the ter-

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① *See* Article 1(6) of *Chinese Working Paper: Marine Area under the Jurisdiction of the State*, U. N. Doc. A. AC. 138/SC. Ⅱ/L. 34. p. 2.

ritorial sea";that "the method of straight baselines composed of all the straight lines jointing the adjacent base points shall be employed in drawing the baselines of the territorial sea of the People's Republic of China";and that "the waters on the landward side of the baselines of the territorial sea of the People's Republic of China constitute the internal waters of the People's Republic of China".

Subsequently, China issued the Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China on May 15th, 1996. In this Declaration, the government announced the territorial baselines of part of the mainland and Xisha Islands.

2. Practices and Suggestions on the Islands in the South China Sea

As mentioned above, Since China is not an archipelagic state, it can not draw archipelagic baselines for the South China Sea Islands. However, China can establish normal baselines and the straight baselines on some or all of the islands in the South China Sea (such as the Nansha Islands). ① According to China's existing legal practice, China did not apply the archipelagic regime to delimit the South China Sea Islands, rather, it intends to apply the straight baselines that consider the Dongsha Islands, the Xisha Islands, the Zhongsha Island, and the Nansha Islands as a whole, respectively. Considering the different natural and geographical conditions, the selection of base-points and baselines for each archipelago should be conducted separately as follows:

The Xisha Islands has the most islands that are above water at high tide in the South China Sea. It has twenty-two islands and seven shoals, with a total area of eight square kilometers. The Xisha Islands can be divided into the Xuande Islands and the Yongle Islands according to their geographical situation. Some scholars therefore claim that the two islands should delimit their territorial sea separately. ② Whereas because of the close relationship between the two islands in geography, and their significant importance to security and economic interests of China, the boundary of the territorial sea for the Xisha Islands shall be delimited as a whole. In China's Declaration on the Baselines of the Territorial Sea, the baselines of territorial sea of Xisha islands were drawn by straight baselines. China selected twenty-eight baselines around eight

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① Gujie Yuan, *Theories and Practices on International Maritime Delimitation*, Beijing: Law Press, 2001, pp. 238～240.

② Keyuan Zou, Chinese Practices on the Law of the Sea, *Journal of Beijing University*, No. 3, 1987, p. 76.

islands of the Xisha Islands and drew straight baselines by connecting these points sequentially. The waters on the landward side of the baselines of the territorial sea constitute internal waters of the People's Republic of China, rather than archipelagic waters. In other words, the waters on the landward side of the baselines of the territorial sea of Xisha Islands apply the internal water regime rather than the archipelagic regime. In addition, the Declaration stipulates that China will announce the remaining baselines at another time. So far, no more base-points and baselines of other islands except for Xisha Islands in the South China Sea have been published.

The Dongsha Islands consist of one island (Pratas Island), one reef (Pratas Reef) and two banks (North Vereker Bank and South Vereker Bank). Among them, Pratas Island is the only coral island that is above water. It is the island that is "a naturally formed area of land, surrounded by water, which is above water at high tide". The Pratas Reef is a submerged reef that is partially above water at low tide, while the North Vereker Bank and the South Vereker Bank submerge under the sea all the year round. An island with the structure of one island-one reef-two banks is hard to identify as a real archipelago in respect to geographical factors.

The main body of the Zhongsha Islands is Zhongsha Atoll, which is underneath the water. It is not a true archipelago but instead reefs. Traditionally, Huangyan Island (it is also called Scarborough Reef) which is 160 nautical miles from the southeast of the Zhongsha Islands is considered as part of the Zhongsha Islands. Like the Dongsha Islands, the Zhongsha Islands consist of one island and a hidden shoal that can hardly be considered as an archipelagic entity according to Article 46 of the Convention. Therefore, it is hard to apply the straight baselines regime to the whole islands. However, the Scarborough Reef and the Pratas Island can apply straight baselines to draw their territorial seas separately.

The Nansha Islands are a complex case since they have a number of islands, most of which are islets. If the Nansha Islands are considered as a whole to apply the straight baselines to draw its territorial sea, the territorial sea would be very broad. This would be hard to do. If each group of reefs is separately considered as a whole to draw its territorial sea, it would be difficult to select appropriate base-points. Comparing these two methods, it seems more reasonable to split the islands and apply different rules. For the group of reefs that are close to each other and can be considered as a whole, the straight baselines can be applied; for those islands among the reefs that are not appropriate

to be considered as a whole and some bigger islands, they can have their own separate baselines; for some isolated islands and reefs, whether to draw marine areas other than territorial sea and contiguous zone depends on their natural condition.

Nevertheless, the final purpose of studying whether the archipelagic regime applies to mid-ocean archipelagos and how to draw baselines for the South China Sea Islands is to maintain China's national rights and interests to the utmost in accordance with the Convention. Of course, the precondition is that the disputes over the islands with neighboring countries are successfully settled.

(Senior Editor: CHEN Hui-ping
Editors: Stephen Pire; QIANG Zhi-heng)

论创设船舶溢油应急反应机制资金保障制度*

梅 宏** 陈志英***

内容摘要:我国在应急处理船舶溢油事故时,由于缺乏基金支持,导致事故发生后有关单位为快速启动溢油应急反应机制而付出的开支得不到及时补偿。船舶溢油应急反应资金保障制度的缺失,直接影响船舶溢油应急反应工作的开展和溢油应急反应能力的提高。构建船舶溢油应急反应机制资金保障制度的设想,应包括基金的来源、适用范围、基金的管理、申请及支付程序等。

关键词:船舶溢油应急反应机制 溢油应急反应机制资金保障制度 船舶溢油应急反应专项基金

一、创设船舶溢油应急反应机制资金保障制度的必要性

(一)我国船舶溢油应急反应机制资金保障制度现状

近年来,我国注重在船舶溢油事故发生后及时开展应急清污、监视监测等应急反应工作,已初步建立船舶溢油应急反应机制,但未建立与之相应的资金保障制度。船舶溢油应急反应机制资金保障制度的缺失,极大地影响了应急救助、清污作业的积极性。溢油应急反应体系中负有职责的相关部门和单位,要为不时发生的溢油事故支出高昂的溢油应急费用,事后却得不到及时的偿付,导致这些

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部门因缺乏资金保障而难以充分履行其职责。且当发生无主溢油事件时，在肇事者不能明确的情况下，相关部门垫付的应急处置费用没有追偿的对象，最后只能由国家财政部门进行有限的补偿。国家在其海域受到溢油污染、国家利益遭到侵害时，还要用纳税人的钱去支付本应由肇事者和获得高额利润者承担的费用，显然是不合理的，而且若成为经常性项目，也将对现行的税收制度造成危害。

创设符合我国国情的溢油应急反应资金保障制度已成为当务之急。然而，有关溢油应急反应机制的资金保障，我国现行立法缺乏明确规定。2010 年 3 月 1 日起施行的《防治船舶污染海洋环境管理条例》规定，在国内设立船舶油污损害赔偿基金，具体办法由国务院规定。《船舶油污损害赔偿基金征收和使用管理办法》尚未出台，其草案规定的国内船舶油污损害赔偿基金以事后补偿为主。上述立法均未涉及为溢油应急反应体系提供全面、及时的资金保障。

溢油应急反应资金保障制度的缺失导致我国溢油应急反应能力无法得到持续发展，溢油应急反应能力远不适应形势需要。据统计，国际上船舶溢油污染事故的清污率已达 70％以上，而我国沿海船舶溢油污染事故的清污率只有 7％，每年在我国沿海海域发生的船舶溢油污染绝大部分只能靠海洋自净能力来清除。[①]应急反应投入严重不足，溢油应急反应所需的物资、设备无法大量配备，更无法及时更新先进设备；应急反应清污力量不足，清污手段、技术水平较低；应急队伍的人员素质和业务水平参差不齐，远远无法满足船舶溢油应急能力的要求。

（二）我国船舶溢油应急反应机制急需资金保障

截至 2009 年 11 月 27 日，我国已连续 11 次当选为国际海事组织 A 类理事国，[②]却是世界上唯一既未加入国际油污损害赔偿基金公约又没建立国内油污基金的石油进出口大国。鉴于我国的实际情况，为确保应急反应、清污作业的费用及时得到偿付，提高溢油应急反应能力和效果，支持和鼓励清污行动，应参照国际上的先进经验为溢油应急反应体系建立专项基金，为溢油应急行动提供长期、稳定的财政支持。

1、我国船舶溢油风险加大

随着我国经济的发展，对石油的需求量迅速攀升。受国内石油资源条件制约，石油国际贸易成为满足国内需求的主要渠道。海关总署的统计数据显示，从 2003 年开始我国已成为世界第二大石油进口国和消费国，2008 年我国石油（包括原油、成品油、液化石油气和其它石油产品）净进口量达 2.0067 亿吨，同比增

① 杨省世：《我国水上船舶溢油应急能力现状及规划研究》，载于《中国海事》2009 年第 3 期，第 40 页。

② 国际海事组织理事会由 40 个理事国组成，其中 10 个是在提供国际航运服务方面有最大利害关系的国家，为 A 类理事国。

长9.5%。而2007年这个数据仅为1.8328亿吨。[①] 2009年我国石油净进口量2.18885亿吨。[②]我国现阶段进口石油90%以上通过海上运输完成,而国内从事国际运输的油轮运力尚不能完全满足进口石油运输总量的需求,吸引了大量外国油轮。我国现有从事国际运输的油轮111艘,总载重约350万吨;从事国内沿海运输油轮有676艘,总载重约270万吨。[③]石油进口的大量增加使得港口和沿海油轮密度不断增加,抵达我国港口的大型油船也越来越多,以2007年为例,沿海船舶进出港266.7万艘次,其中油轮18.6万艘次,平均每天有400多艘次油轮装载300多万吨油品经行于我国沿海水域。[④]超大型油轮在我国水域频繁进出,使中国沿海水域原已十分繁忙的通航环境变得更加复杂,增大了我国海域发生船舶溢油污染的机率,导致船舶溢油事故、特别是重特大船舶溢油污染的风险增大。此外,我国沿海尚存在一定数量的单壳油轮和低质量油轮,船舶趋于老龄化,各项技术性能较为落后,更加大了发生油污事故的风险。[⑤]据统计,1998年—2008年,在我国领海共发生733起船舶污染事故,仅2008年,我国共发生溢油事故109起,造成354吨油类物质的泄漏,[⑥]这些污染事故给我国海洋环境造成了巨大的损害。

为加强水域环境保护,降低重大油污事故风险,提高国内航行油轮的安全,2009年12月7日,交通运输部发布提前淘汰国内航行单壳油轮实施方案的公告。此举显示了中国政府对海洋环境保护的坚定决心。不过,我们必须清醒地认识,随着我国海上生产、运输的不断发展,潜在的船舶溢油污染风险依然较大。[⑦]

2、国内现有油污损害赔偿制度难以保障应急反应机制资金需求

2010年3月1日施行的《防治船舶污染海洋环境管理条例》第53条规定,中华人民共和国管辖海域内航行的船舶,其所有人应当按照国务院交通运输主管部门的规定,投保船舶油污损害民事责任保险或者取得相应的财务担保。但是,1000总吨以下载运非油类物质的船舶除外。船舶所有人投保船舶油污损害民事责任保险或者取得的财务担保的额度应当不低于《中华人民共和国海商法》

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① 《2008年中国石油净进口量增至2亿多吨 同比增长9.5%》,下载于http://www.dh.gov.cn/bofcom/433480298882138112/20090209/220176.html,2009年2月9日。

② 《数据显示2009年中国石油消费量居世界第二》,下载于http://www.cinic.org.cn/shownews.php?id=73959,2010年3月2日。

③ 冯亦珍,林红梅等:《中国近海正面临船舶运输污染风险》,载于《中国海洋报》2007年2月9日第二版。

④ 朱婧,徐石明等:《维护海洋清洁 共享蓝色国土——我国海上船舶污染防治工作综述》,载于《中国水运报》2009年5月29日。

⑤ 刘功臣:《建立符合中国国情的船舶油污损害赔偿制度》,载于《2005年交通部海事海事论坛论文集》。

⑥ 赵虎:《中国何以应对溢油风险》,载于《中国水运报》2009年11月20日第7版。

⑦ 徐石明:《中国海洋防污的"应急"短板》,载于《中国船检》2010年第1期,第120页。

及我国缔结或者参加的有关国际条约规定的油污赔偿限额。2010 年 10 月 1 日起施行的《中华人民共和国船舶油污损害民事责任保险实施办法》第 2 条规定，在中华人民共和国管辖海域内航行的载运油类物质的船舶和 1000 总吨以上载运非油类物质的船舶，其所有人应当按照本办法的规定投保船舶油污损害民事责任保险或者取得相应的财务担保。上述规定将有效保障我国船舶油污强制责任保证制度的实施，缓解船舶油污损害面临的应急反应资金保障问题。但是国际溢油损害赔偿的实践表明，船东和保险方的赔偿对于船舶油污损害赔偿来说可谓杯水车薪，仍不能保障船舶溢油应急反应机制的资金需求。

（三）我国尚不宜加入国际油污损害赔偿基金公约

国际油污损害赔偿的历史进程，无不是在大型溢油事故推动下进行的，油污损害赔偿基金公约也不例外。基金公约是在民事责任公约基础上的第二重赔偿，其赔偿设定了具体的框架范围。油污损害赔偿基金公约对溢油应急反应的赔偿包括在预防措施的费用中，尽管在事后进行赔偿，但自设立以来取得了较明显的作用。同时，其运行中也呈现出不足之处。我国现在如果加入基金公约，将成为主要的义务主体，弊大于利。

综上三层论述，我们认为，我国的船舶溢油应急反应机制急需借鉴国际国内相关经验建立资金保障制度。

二、建立船舶溢油应急反应专项基金的可行性分析

（一）建立船舶溢油应急反应专项基金的法律依据

船舶溢油严重损害海洋生态，如应急处理不及时，造成的损失更加扩大。建立船舶溢油应急反应专项基金旨在保障船舶溢油的应急处置，防治溢油污染，降低和减少溢油损害。船舶溢油应急反应专项基金是随着船舶油污损害赔偿的发展出现的设想，其法律依据，主要涉及《宪法》、《海洋环境保护法》、《防治船舶污染海洋环境管理条例》、《海商法》、《海事诉讼特别程序法》、《国际油污损害民事责任公约》等国际公约。

建立船舶溢油应急反应专项基金的法律规定散见于我国相关法律、行政法规中。我国《宪法》第 26 条规定，国家保护和改善生活环境和生态环境，防治污染和其他公害。我国《海洋环境保护法》第 18 条第 3 款规定，国家海事行政主管部门负责制定全国船舶重大海上溢油污染事故应急计划，报国务院环境行政主管部门备案。第 69 条第 2 款规定，装卸油类的港口、码头，装卸站和船舶必须编制溢油污染应急计划，并配备相应的溢油应急设备和器材。上述规定为我国船舶溢油应急反应的建立确立了法律保障。第 66 条规定，国家完善并实施船舶油

污损害民事赔偿责任制度;按照船舶油污损害赔偿责任由船东和货主共同承担风险的原则,建立船舶油污保险、油污损害赔偿基金制度。实施船舶油污保险、油污损害赔偿基金制度的具体办法由国务院规定。该规定被视为我国船舶油污损害赔偿的原则性规定。《海事诉讼特别程序法》规定,对于船舶对环境、海岸或者有关利益方造成的损害或者损害威胁,为预防、减少或者消除此种损害而采取的措施,为此种损害而支付的赔偿,为恢复环境而实际采取或者准备采取的合理措施的费用,第三方因此种损害而蒙受或者可能蒙受的损失,以及与本项所指的性质类似的损害、费用或者损失,可申请扣押船舶。也就是说,船舶溢油应急反应所支出的费用包含在海事诉讼赔偿范围内。《防治船舶污染海洋环境管理条例》第56条规定,在中华人民共和国管辖水域接收海上运输的持久性油类物质货物的货物所有人或者代理人应当缴纳船舶油污损害赔偿基金。国家设立船舶油污损害赔偿基金管理委员会,负责处理船舶油污损害赔偿基金的赔偿等事务。船舶油污损害赔偿基金管理委员会由有关行政机关和缴纳船舶油污损害赔偿基金的主要货主组成。该规定确立了船舶油污损害赔偿基金的资金来源及管理运作。

目前,国际海事领域运行的船舶油污损害赔偿法律依据主要涉及《国际油污损害民事责任公约》1992年议定书(简称CLC1992),《设立国际油污损害赔偿基金公约》1992年议定书(简称Fund 1992),《2001年燃油污染损害民事责任国际公约》。1999年1月5日,我国加入了CLC1992,于2000年1月5日对我国生效。Fund 1992仅适用于我国香港地区。因此,CLC1992是我国设立船舶溢油应急专项基金的国际公约依据。CLC1992确定了造成污染的船舶所有人对污染损害负严格责任,规定了成员国船舶油污损害赔偿的范围。船舶污染损害赔偿的范围包括:(1)油类从船上的溢出或排放引起的污染在该船之外所造成的损失或损害,不论此种溢出或排放发生于何处;但是对环境损害(不包括此种损害的利润损失)的赔偿,应限于已实际采取或准备采取的合理恢复措施的费用。(2)预防措施的费用及预防措施造成的新的损失或损害。[①]从该规定中我们可以看出赔偿包含船舶溢油应急反应的费用在内。作为船舶油污损害赔偿范围的船舶溢油应急反应资金保障的建立相应的具备法律依据。

(二)石油货主承担船舶溢油应急反应资金的可行性

1、石油货主承担船舶溢油应急反应资金的法理分析

根据传统侵权法理论,过错者承担损害赔偿责任。但是船舶溢油损害赔偿的实践表明,传统赔偿责任无法适应船舶油污损害赔偿的需求。于是国际海事组织在制定CLC1969时确立了客观归责原则即无过错责任原则,由此确立了污染者付费的"谁污染谁负责"原则,船舶所有人无论有无过错都应对自己造成的

① 司玉琢编:《海商法》,法律出版社2003年版,第320页。

污染损害承担赔偿责任，但限制了船舶所有人的赔偿限额。同时采用了强制责任保证制度，保证了船舶所有人适当承担其赔偿义务。但是，船舶溢油污染损害往往大于一般侵权损害，污染损害责任主体的赔偿亦无法有效填补损害。例如，1989 年 3 月，美国埃克森石油公司的超级油轮 Exxon Valdez 轮在美国阿拉斯加威廉王子湾触礁，造成了美国历史上最严重的溢油污染事故，清污费和各种污染损失高达 80 亿美元。如果适用当时的责任公约，则赔偿额将不超过 6000 万美元。①

自 20 世纪中期以后，在环境损害赔偿领域除确立污染者负责原则外，还形成集体负担原则。集体负担原则即环境污染的成本及费用由所有的污染者来负担，特定的污染者造成的污染损害赔偿责任，不是由特定污染者而是由同一污染类型的污染者集体来承担。②这与经济分析法学的观点不谋而合，即事故一旦发生，其成本就沉淀了；法律虽然关心如何对事故中的受害方给予完全补偿的问题，但是法律更关心如何减小和控制今后可能发生的损害；合理的责任分摊能够有效激励避免损害的发生，从而使得社会总成本最小化。③石油运输的最大受益者不是船舶所有人，而是石油货主，其从石油贸易中获得巨额利润。石油货主作为海上石油运输的直接受益者，对油污损害承担一定责任，符合国际社会普遍认可的“受益者付费”原则，即既然从石油运输中获利的行业有能力承担他们造成的风险，就没有理由让受害者处于得不到赔偿或面临高额诉讼费用的境地。

基于集体负担原则和受益者付费原则，国际海事组织在民事责任公约基础上构建了由石油货主分担船舶溢油赔偿的船舶溢油损害赔偿基金，当今世界 90％以上的石油公司都向国际油污基金缴纳摊款。

2、石油货主承担船舶溢油应急反应资金的可行性

与我国航运业的快速发展相比，船舶溢油应急反应的资金保障建设明显滞后，不适应形势的需要。我国的相关部门为改变这一现状，做出大量工作。尤其是中国海事局大力推动国内油污损害赔偿基金的建立，其他部门如国家发改委、财政部、国家环境保护部、外交部、农业部等都支持国内油污赔偿基金的制定。依据财政部和交通运输部共同拟定的《船舶油污损害赔偿基金征收和使用管理办法》草案规定，每接收一吨经海上船舶运输的石油，石油货主需向船舶油污损害赔偿基金缴纳 0.3 元。中国石油化工集团公司（简称中石化）和中国石油天然气集团公司（简称中石油）是我国从水上接受石油量最大的货主，其份额占全国石油到港量的 80％。④也就是说该以中石油、中石化、中海油等为首的一些大石

① 林晓媚：《论国际油污损害赔偿基金》，载于《中山大学学报论丛》2007 年第 8 期。

② 徐国平著：《船舶油污损害赔偿法律制度研究》，北京大学出版社 2006 年版，第 20～21 页。

③ Posner R A：Economic Analysis of Law（影印本），中信出版社 2003 年版，第 167 页。

④ 宋家慧著：《防止船舶污染海洋环境“防、救、赔”系统工程》，大连海事大学出版社 2006 年版。

油公司将成为油污基金的摊款大户。从中石化和中石油两家的利润总额来看，其对摊款具有承受能力。如2005年中石油利润总额1333多亿，2006年利润总额1857亿元，尽管受经济危机影响，2009年上半年业绩报告显示上半年实现的净利润也高达331.9亿元。中国石化2005年净利润达到了396亿元。2009年，中石油、中石化、中海油、中国中化、陕西延长等五大公司全年主营业务收入3.12万亿元，同比仅下降了5.6%，利润总额2680.42亿元。[①]按照基金征收管理办法，如果0.3元/吨的基金缴纳额度得以顺利通过，按照2008年中国进口石油2亿多吨的规模测算，石油进口企业将需缴纳5700万元/年作为船舶油污损害赔偿基金。[②]2009年中国进口石油2.18885亿吨，[③]摊款数额是6000多万元。而参照美国溢油应急反应专项基金在油污信托基金中所占的比例，信托基金总额为10亿美元，应急基金额为5000万美元，占1/20；在2003年，应急基金额提升到1亿美元后，所占比例为1/10，应急反应基金所需的摊款额更少。可见，石油货主承担摊款虽然会对企业产生一定的影响，但并非十分困难。

三、创设船舶溢油应急反应专项基金的构想

船舶溢油应急反应是对船舶溢油事故的积极应对，溢油应急反应专项基金实质上是从船舶油污损害赔偿基金中独立出来的一部分，其目的是为应急行动提供更为有效的资金保障，与船舶油污损害赔偿基金有分割不掉的联系。

拟创设的我国船舶溢油应急反应专项基金设想主要包括基金的资金来源、管理、赔付等。

(一)船舶溢油应急反应专项基金的资金筹措及适用范围

1、引入多元化资金筹措

船舶溢油应急反应专项基金与船舶油污损害赔偿基金同出一源，因而其资金筹措也将采取多元化的融资机制，多方分担。专项基金的主要资金来源包括：

向接收海上运输石油的货主征收摊款。如前所述，石油货主分担基金摊款既有法理依据，又有国际实践经验和实际可行性。石油货主的摊款将成为我国船舶溢油应急反应专项基金的主要来源之一。国际油污损害赔偿基金提供船舶溢油应急反应事后的赔偿，其资金主要来源于缔约国从海上接收摊款油类的石油公司所缴纳的摊款。美国的溢油应急基金主要是从对其进口的和国内生产的

① 《工信部：2009年石油和化工行业企稳回升向好》，下载于 http://www.chinanews.com.cn/ny/news/2010/02-20/2127336.shtml，2010年2月20日。

② 彭丽：《海上环保责任石油巨头首当其冲》，载于《中国化工报》2009年11月10日。

③ 《数据显示2009年中国石油消费量居世界第二》，下载于 http://www.cinic.org.cn/shownews.php?id=73959，2010年3月2日。

油每桶征收的5%的税收总额中划拨出特定数额形成的，加拿大的应急资金同样是从对海运进口到其国内的石油每公吨征收15加分的摊款措施中获得的。因此根据国际经验，我国溢油应急专项基金同样设定具体征收标准，从管辖水域内接收从海上运输持久性油类物资（包括原油、燃料油、重柴油和润滑油等持久性烃类矿物油）的石油货主及其代理商征收摊款获得资金。征收标准依据我国实际情况由相关部门确定。同时有学者提出，船舶溢油应急专项基金的资金征收除了海上运输以外，还应包括从内河船舶接收油类物资的石油货主及其代理人。在2005年的全国海事系统危管防污工作会议上，中国海事局常务副局长刘功臣把“强化内河危防工作力度，切实行使海事监管职能”列为2005年－2006年防工作的主要任务。2006年1月1日施行的《中华人民共和国防治船舶污染内河水域环境管理规定》第40条规定，“150总吨及以上的油轮、油驳和400总吨及以上的非油轮、非油驳的拖驳船队应当持有经海事管理机构批准的《船上油污应急计划》。150总吨以下油船需制定油污应急预案。”2000年3月20日施行的《中华人民共和国水污染防治法实施细则》第30条规定，“船舶发生事故，造成或者可能造成水体污染的，海事管理机构应当组织强制打捞清除或者强制拖航，由此支付的费用由肇事船方承担。”也就是说，内河水域的船舶由海事部门管理，同样需要制定溢油应急计划，同样确立了应急反应资金由污染者付费的原则。目前，我国国内航线沿海油船共有1497艘，运力达723.6万载重吨；内河油船共有3750艘，运力为173.7万载重吨。[①]随着我国国内油品运输的管道化，内河油品运输量明显呈现逐年下降趋势，但内河水域仍存在油船溢油事故发生风险。尽管目前内河船舶油类运输所占比例甚微，尚未有征收摊款的立法规定，但考虑到其对生态环境的损害及同样需求应急救助，笔者赞同把内河船舶运输油类的货主列入征收范围之内。

政府拨款提供一定数额的启动资金。船舶溢油应急反应基金作为国内的专项基金，政府的资金投入是基金设立的有力支持和保障。该筹措方式在国际上主要借鉴美国油污责任信托基金的经验，在信托基金成立时获得联邦政府的借款。国内政府拨款建立和完善溢油应急反应机制的举措，在辽宁、深圳等地已经施行并取得了较好效果。如辽宁海事局积极报批并经辽宁省政府同意，从2005年开始，由省政府每年拨款100万元，设立了该省“海上搜救专项经费”，用于对救助过程中表现突出的非专业救助力量的奖励、慰问，也适用于船舶溢油应急处理。[②]此外，深圳也将海上搜救和防污染经费纳入该市财政地方性一般预算，政

① 陈伯卫：《加快对国内航线单壳油船的强制淘汰》，载于《水运管理》2009年第3期，第34页。

② 刘立才、刘蕴哲等：《我省首次发放“搜救先进”奖励》，下载于 http://news.sina.com.cn/s/2006－04－12/03078673824s.shtml，2010年3月1日。

府每年投入600万用于海上防污应急反应能力的建设。[①]

设立船舶溢油应急反应专项基金目的是为船舶溢油应急反应行动提供资金保障。按照环境损害赔偿领域形成的集体负担原则,环境污染的成本及费用由同一类型的所有污染者来负担,因而船舶溢油污染责任由属于船舶溢油应急反应适用范围内的所有船舶共同来承担。同时船舶溢油污染通行的归责原则是无过错的严格责任,所以所有符合条件的船舶所有人均应承担缴纳专项基金摊款的义务。鉴于船舶油污损害实行民事责任强制保险制度,船舶所有人承担的摊款费用可从船舶油污损害民事责任保险的保险费中提取,不再额外增加船舶所有人的负担。其他应急反应资金筹措的方式包括以下以及方面:(1)船舶溢油事故肇事者的赔偿款项。根据污染者付费原则,船舶溢油应急反应专项基金管理中心在先行垫付应急反应费用后,可向船舶溢油事故肇事者索赔;(2)对未按照规定投保船舶油污损害民事责任保险的船舶所有人的罚款,严格监督船舶油污损害责任保险的推行,罚款可转入基金总额;(3)基金运行过程中产生的利息收入等正常收益,包括基金进行投资产生的收益。另外船舶溢油应急反应专项基金具有公益性,公益捐款也是基金的有效来源之一。

公益捐款对资金募集具有特殊意义。我国大连于2007年进行了公益捐款性质的无主溢油应急专项基金的建立实践。该基金来源于涉船单位的自愿捐款,共有48家单位捐资25.1万元。截止2008年6月,大连依靠专项基金及时处理了6起小型无主溢油事故,充分发挥了溢油应急反应基金的资金保障功能。公益性质的捐款一方面体现了公众对于环境保护的重视,另一方面对溢油应急反应尤其是无主溢油的应急反应的意义重大。我国船舶溢油应急反应专项基金的资金筹措可借鉴大连的实践做法,发动吸收公益性质的捐款。

2、船舶溢油应急反应专项基金的适用范围

该基金主要应对溢油事故后的应急反应监视监测、清污、奖励措施等所需资金,也可考虑用于以及为提高溢油应急反应能力进行的设备配置、队伍建设、机构运作。具体如下:

其一,先行垫付溢油应急所需费用。溢油事故发生后,为事故发生区域的应急反应行动及时提供监视监测、清污、应急救助等资金支持。对于确定肇事责任方的溢油事故,事后按照法定程序追偿。先行垫付应急反应费用时,要尽量避免资金因使用不当而追偿不着的问题。在资金垫付前,按照一定的程序审核将要采取的应急反应行动项目是否是应对该溢油事故所必需的。

其二,支付无主溢油的油污清除费用。

其三,支付船舶溢油污染应急行动造成的合理损失费用。合理损失费用既包括为防止、减轻和减少持续溢油所采取行动产生的费用,又包括对第三人造成

① 杜川:《我国建立污染应急反应体系所涉及的问题及相关对策》,船舶防污染高新技术与区域合作研讨会暨第一届'港口杯'船舶防污染优秀论文奖获奖论文专集2003版。

的损失费用。该费用是否合理可聘请双方当事人认可的鉴定机构进行鉴定或者由法院依据事实进行认定。

其四,基金管理运作所需的正常管理费用等。

(二)船舶溢油应急反应专项基金的管理设想

考虑到船舶溢油应急反应专项基金与我国将要设立的船舶油污损害赔偿基金以及未来可能加入的国际油污损害赔偿基金的接轨衔接问题,我国的溢油应急反应机制专项基金的管理,国际上可以借鉴国际油污基金和美国溢油赔偿责任信托基金,国内可以借鉴《船舶油污损害赔偿基金征收和使用管理办法》草案对船舶油污损害赔偿基金的管理设置规定。

1、船舶溢油应急反应专项基金的管理及使用经验借鉴

国际油污损害赔偿基金和美国设立的溢油赔偿责任信托基金都是依据相应的法律规定,设立专门的管理机构,赋予其法人地位,独立行使权利和履行义务。《中国海洋环境保护法》第 5 条第 3 款规定,国家海事行政主管部门负责所辖港区水域内非军事船舶和港区水域外非渔业、非军事船舶污染海洋环境的监督管理,并负责污染事故的调查处理;对在中华人民共和国管辖海域航行、停泊和作业的外国籍船舶造成的污染事故登轮检查处理。第 71 条规定:“船舶发生海难事故,造成或者可能造成海洋环境重大污染损害的,国家海事行政主管部门有权强制采取避免或者减少污染损害的措施。对在公海上因发生海难事故,造成中华人民共和国管辖海域重大污染损害后果或者具有污染威胁的船舶、海上设施,国家海事行政主管部门有权采取与实际的或者可能发生的损害相称的必要措施。”《防治船舶污染海洋环境管理条例》第 4 条规定,国务院交通运输主管部门主管所辖港区水域内非军事船舶和港区水域外非渔业、非军事船舶污染海洋环境的防治工作。海事管理机构依照本条例规定具体负责防治船舶及其有关作业活动污染海洋环境的监督管理。

《船舶油污损害赔偿基金征收和使用管理办法》草案第 19 条规定,国家设立国家船舶油污损害赔偿基金管理委员会,负责受理船舶油污损害赔偿基金的具体赔偿或者补偿事务。国家船舶油污损害赔偿基金管理委员会由交通运输部、财政部、农业部、国家环境保护部、国家海洋局以及缴纳船舶油污损害基金的石油货主等代表组成,挂靠在交通部。国家船舶油污损害赔偿基金管理委员会下设执行委员会和秘书处,负责具体日常事务,秘书处挂靠在中国海事局。

我国溢油应急反应专项基金的管理使用可以借鉴《船舶油污损害赔偿基金征收和使用管理办法》草案的规定,其使用管理可以参照美国的做法,具体是在国家建立溢油应急反应中心,各个海区设立由交通运输和环境保护等多个相关部门组成的溢油防治和反应办公室作为常设机构,确定各级中心的职责分工和权限,强化沟通与协调。在发生溢油事故时,溢油防治和反应办公室能立即做出反应,进行沟通、协调,保障溢油应急行动的效果。

2、船舶溢油应急反应专项基金的管理设置及法律地位

船舶溢油应急反应专项基金可以参照美国的做法,在中国海事局内设立船舶溢油应急反应基金管理中心,赋予该中心法人地位。具体负责该基金的征收、应用及赔付等具体工作。基金将具有摊款征收和处分的权利,并可作为当事一方提起溢油事故索赔的法律诉讼。

作为专项基金,该中心接受财政部、交通部的监督。大会为基金的最高权力机构,主要职责是管理摊款,决定摊款额并具有征收及使用权力。大会可以有由交通部、财政部、农业部、国家环境保护部、国家海洋局以及缴纳基金摊款的石油货主代表等组成,其成员由大会选举产生。秘书处是处理基金日常工作的常设部门,主要职责是按照基金筹措方案代征收应急反应基金,按照基金适用范围支出各项应急反应费用,另外负责协调各地方海事部门联合执行溢油应急行动。船舶溢油应急反应专项基金被赋予法人地位,一方面是基于我国法律关于法人成立的规定,另一方面法人地位的确立,使管理中心在油污事故赔付时能以基金财产独立承担责任,能以自己的身份独立地位参加诉讼。

(三)船舶溢油应急反应专项基金的申请及赔付

1、申请船舶溢油应急反应机制专项基金的程序设置

法律制度的程序性规定是该制度实体性规定得以实施的保障。只有按照法定程序使用基金,才能保障基金制度得以公开、公正地实施。美国《1990年油污法》(简称OPA1990)原则性地规定了向基金索赔的程序,同时规定了清除费用和损害向基金索赔的时效为三年,而且美国海岸警卫队制定了《根据〈1990年油污法〉提出索赔的遵循指南》。我国《船舶油污损害赔偿基金征收和使用管理办法》草案也只是简单地规定了符合赔偿或者补偿条件的单位和个人,可向基金管理委员会提出索赔书面申请,基金管理委员会在受理索赔申请后,应当组织有关人员对索赔项目进行调查核实,确定赔偿的具体数额,同时规定向船舶油污损害基金提出索赔的时效为三年。[①]

因此我国应急反应机制专项基金可以参照前述美国的做法,先对溢油应急反应基金的使用程序作原则性的规定,再授权国务院各部门联合制定或授权中华人民共和国海事主管部门制定和公布使用程序规则,报国务院批准后施行。基金的使用程序可依据使用项目的不同分别设定。[②]专项基金先行垫付清污费用的程序设置包括以下内容:

关于先行支付所适用的事故范围,首先明确该基金适用的事故空间范围是我国所管辖水域,包括领海、专属经济区和内水,其次适用于原油和燃油造成的

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① 韩立新:《对船舶油污损害赔偿基金征收和使用管理办法的完善建议》,载于《中国海商法年刊》2008年1月,第302页。

② 胡正良:《设立我国船舶油污损害赔偿基金的法律问题研究》,下载于 http://smuiml.shmtu.edu.cn/comments.php?act=show&id=104,2010年3月9日。

所有船舶溢油事故损害，最后适用中国法律由中国法院管辖事故索赔问题。

关于先行支付申请人的范围，为确保基金的专项运作，可向基金提出先行支付申请的权利赋予溢油防治和反应办公室。关于申请的时限，考虑其先行垫付功能，可设定在溢油事故发生之后获得赔偿之前的一段时间内。关于申请人应提交的申请材料，包括事故发生的时间、地点、所涉及的船舶，污染损害的油污种类、污染程度及范围、申请的金额等。关于基金管理中心对事故的调查、申请材料审核和调查结果的告知、可由基金管理中心内设的专门事故调查、审核部门进行并在一定时间内以书面形式告知申请人。关于先行支付费用的支付与结算，按照财务管理的程序规则办理并由审计部门审计监督。另外，关于申请没有准予时申请人的复议权利、基金管理中心与索赔人之间权益转让协议的签订等，都应做出明确的程序规定。

专项基金赔偿范围内的赔付程序包括：关于索赔人的范围，包括在我国管辖水域发生的溢油污染事故的受害者，既可是国家或地方政府，也可是个人、公司及其他。关于索赔的时效，可借鉴国内国际的做法规定为三年。《中华人民共和国环境保护法》规定，因环境污染损害赔偿提起诉讼的时效期间为三年，从当事人知道或者应当知道受到污染损害时起计算。国际油污损害赔偿基金规定的油污事故索赔时效也为三年。关于索赔人提交的索赔书与证据，应用详细资料清晰地陈述事实，索赔的证据材料附有发票以及账单等其他财务证明。关于基金管理中心对事故的调查、损害的评估，依据索赔资料按程序进行。关于赔偿或者不予赔偿的决定，以书面形式做出明确答复。当索赔人不服赔偿决定时，可行使诉讼等救济权利。

提高溢油应急反应能力所需经费申请报批程序，可限定于基金管理中心和溢油防治和反应办公室之间。申请可由溢油防治和反应办公室定期向基金管理中心提出，关于具体申请人的资格条件、申请的时限、申请人应提交的申请材料，由溢油防治核反应办公室根据溢油能力建设的设备配置、队伍建设、机构运作等实际需求制定并交由基金管理中心审查。关于申请材料的审核与补充，审核结果的告知、费用的支付等，可由基金管理中心通知或支付于防治和反应办公室。

2、船舶溢油应急反应专项基金的支付设置

在船舶溢油事故发生后，基金区分用途确定不同的支付方式。对于应急作业资金，先行向溢油应急单位支付应急救助、监视监测、清污等费用；对于采取措施预防、减少、控制和清除油污产生的费用，由参加溢油清除的清污主体向溢油应急基金事后提出索赔，基金确定后支付；对于溢油投入资金及合理损失索赔申请，在组织有关人员对投入项目、索赔项目进行调查核实后按确定数额支付。

船舶溢油应急反应专项基金的基金额总是有限的，因而有必要规定基金的

单次使用限额。[①]从国际油污损害赔偿基金和美国油污信托基金的资金支付看，应急基金的支付一是进行了基金单次使用限额规定，二是赋予了基金代位求偿权。[②]而且这与我国《海商法》规定的从事国际航线运输的船舶海事赔偿责任限制的规定是一致的。根据草案，船舶油污损害赔偿基金单次事故赔偿损失的上限是5000万元。否则，发生一次重大的油污事故，就可能支出基金全部金额。

从我国近年来发生的事故看，应急反应支出资金单船金额明显增加。如2004年珠江口溢油事故，仅清污费用达1060万元。我国在制定专项基金的使用赔偿限额时，必须符合我国国情，既不能太高也不能太低。太高会增加摊款人的负担，太低起不到应有的作用。

CLC1992第9条规定了国际污染损害赔偿基金的代位求偿权，规定基金应以代位方式取得受偿人按照责任公约对船舶所有人或其保证人所享有的权利。美国OPA1990也规定了代位求偿权，根据油污责任信托基金对任何索赔或者债务的支付，应使美国政府获得索赔人或者州向责任方追偿的代位权。借鉴上述经验，我国船舶溢油应急反应专项基金也可规定代位求偿权。专项基金的代位权赋予船舶溢油应急反应机制专项基金管理中心行使。即专项基金通过代位取得受偿人依法对污染损害的责任人、其责任保险人或者其他财务保证人所享有的索赔权益。

总之，船舶溢油应急反应机制专项基金将是我国海洋环境保护和船舶溢油应急反应领域的一项创新。基金的目的不在于单纯设立，而在于其良性运作。我国要充分借鉴国际上的成熟经验，并结合我国的实际情况才能实现设立基金的初衷，同时也为日后我国与国际接轨做好应对准备。实践证明，一项好的法律制度，除了在制度创立时进行科学的制度设计外，还需要对该项制度的实践作不断的总结，根据情势变更及时做出修正，才能使该项制度逐渐趋于完善。[③]

(责任编辑：周　瑶)

① 船舶溢油应急反应专项基金是有效的资金保障措施，但非万能的。此处的规定主要是避免单次使用额度超过基金总额而导致基金无资金运转情形。

② 代位求偿权是一项民事权利，其与优先权是两个不同的权利。优先权并不随着代位权的转移而转移。

③ 胡正良：《设立我国船舶油污损害赔偿基金的法律问题研究》，下载于 http://smuiml.shmtu.edu.cn/comments.php?act=show&id=104，2010年3月9日。

On the Establishment of a Fund Guarantee System for Emergency Response Mechanism to Shipboard Oil Spill in China*

Mei Hong**

Abstract: In China, the organizations involved in starting the emergency response mechanism to cope with ship oil spillage cannot be compensated timely for their relevant expenditures, due to the lack of fund to deal with emergencies of this kind, which in turn results from the lack of the guarantee system of the fund. The immediate consequence of the lack of guarantee system is the inefficiency and retardedness of emergency responses to ship oil spillage. The concept of establishing a fund-guarantee system consists of the sources of the fund, its coverage and administration, the procedures of application and payment, among others.

Key words: Ship oil spill emergency response mechanism; Fund security system for oil spill emergency response mechanism; Special fund for oil spill emergency response mechanism

Ⅰ. The necessity to establish a fund guarantee for oil spill emergency response system

A. Current situations

Though the emergency response to shipboard oil spillage has been given increasing concern by the Chinese government, for example working mecha-

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nisms like monitoring, emergency clean-up etc. has been set up, we still find that oil spill emergency response mechanisms of China are far from perfect. In particular, China has not really established a fund guarantee for emergency response mechanism.

Due to the lack of fund support, it have been seriously affected the emergency salvage and clean-up operation. Because the relevant governmental agencies take almost full responsibility to deal with casualties and bear the high expenditure for clean-up. On the other hand, they can't receive the reimbursement from time to time. Several recent, major oil spills in the China Sea have caused severely environmental damage. The costs for clean-up will be huge, it is unreasonable to let the national finance authority take cares of this and taxpayer finally bears the cost ultimately. Clearly, it will also jeopardize the national fiscal system soon or later.

Therefore, it has become imperative to establish the fund guarantee for emergency response mechanism to shipboard oil spillage. However, there is still no specific legislation on it. On March 1, 2010, The Regulation of the People's Republic of China on the Prevention and Control of Marine Pollution from Ships (the Regulation) came into force and provides that, the Oil Pollution Compensation Fund in China shall be set up and the specific measures shall be promulgated by the State Council. But the Regulation on Collection and Use Oil Pollution Damage Fund so far has not been introduced. In its draft, it provides that the domestic oil pollution damage compensation fund mainly deal with afterward compensation. None of the above mentioned legislations provide a comprehensive, timely financial security for the emergency response mechanism to oil spillage.

Since the absence of Fund Guarantee for Emergency Response Mechanism, The Capacity of emergency response for oil spillage is very vulnerable and can't meet the needs under current situation. According to statistics, the clean-up rate for prevention of oil pollution arising from an international shipboard oil incident is above 70%, while the clean-up rate in China's coastal is only 7%. ① In China's coastal, most of the shipboard oil spillages rely on self-purification capacity of ocean to clean up. The necessary materials and equipments for the emergency response in oil spillage incident are insufficiency and also difficult to be updated timely because of financial distress. The personnel and

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① Yang Shengshi, The Capacity of Oil Spill Emergency Response in China and its Scheme for Future, *China Maritime Safety*, issue 3, 2009, p. 40.

team for emergency response are not very well trained. As a result of the absence of the special fund, Chinese emergency response capacity has not been sufficiently and sustainably developed. The clean-up capacity of emergency response for oil spillage is far from to meet the requirements.

B. It is imperative to establish a fund guarantee for emergency response mechanisms in China.

China have been consecutively elected as a Category A Council Member of the International Maritime Organization (IMO) for 11 times up to November 27, 2009. ① But, as the oil import and export power, so far she hasn't established a domestic oil fund; nor joined the Convention on the International Oil Pollution Compensation Fund. China should establish a special fund by referring to the advanced experience of international oil spill emergency response systems. Consequently, it will ensure that the cost of emergency response and clean-up operations are promptly reimbursed. Since the fund can give oil spill response operations long-term, stable financial support. It will also encourage the operations and improve the capacity of emergency response to oil spill.

1. The risk of maritime oil spills is increasing.

With China's economic development, the demand for oil has been increasing rapidly. According to the statistics from the General Administration of Customs PRC, China has become the world's second largest oil importer and consumer since 2003. In 2008, China imports 200.67 million tons oil (including crude oil, refined oil, liquefied petroleum gas and other petroleum products). It increases of 9.5% comparing the data of 2007, 183.28 million tons. ② In 2009, the figure is 218.885 million tons. ③ Over 90% of oil imports are transported by sea to China, Chinese domestic oil tankers cannot meet the total demand, so it also attracts a large number of foreign tankers. There are 111 Chinese tankers engage in international transport with about 3.5 million tons' total loading capacity and 676 coastal tankers with about 2.7 million tons' total loading ca-

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① The Council of IMO is consisted of 40 Member States elected by the Assembly, acts as the governing body, 10 States of which with the largest interest in providing international shipping services belong to Category (a).

② Net import volume of China's fuel oil climbed to 200 million tons with increasing 9.5%, visiting date on 9 Feb, 2009, http://www.dh.gov.cn/bofcom/433480298882138112/20090209/220176.html.

③ China's oil consumption ranked second in the world in 2009, visiting date on Mar 2, 2010, http://www.cinic.org.cn/shownews.php? id=73959.

pacity. [①] Taking 2007 as an example, there are 2.667 million trips entering and leaving china port, and 186 thousand of which are tanker ships. On average, Tankers sail through China's coastal waters more than 400 trips per day with carrying more than 3 million tons of oil. [②] With very large tankers coming in and out of our coastal waters, there is an increasing risk of major oil spill pollution.

In addition, there are still a number of coastal tankers with low-standard single-hull, some of which tend to be aging and have been lagging behind on technical performance. Due to this situation, it further increases the risk of oil pollution incidents[③]. According to statistics, from 1998 to 2008, there were 733 shipboard pollution incidents in China's territorial waters, 109 of which occurred in 2008. These incidents in 2008 leaked 354 tons of oil material and caused huge damage to marine environment. [④] To strengthen the protection of marine environment, improve the safety of oil tankers and reduce the risk of oil pollution, the Ministry of Transportation issued an announcement advancing the date, by which single-hulled tankers must be removed from domestic service. This shows the Chinese government's determination on protection of marine environment. However, we must clearly realize that the potential oil spill risk become more and more seriously with economic boom in china.

2. The existing system of compensation for oil pollution damage isn't adequate to ensure the funding needs of emergency response mechanism.

In accordance with Art 53 of the new Regulation on the Prevention and Control of Marine Pollution from Ships, all ships navigating in the waters under the jurisdiction of the People' Republic of China shall cover the insurance of civil liability for oil pollution damage by vessel or obtain the corresponding financial guarantee, except for those vessels of less than 1000 tonnages which carry the non-oil substance. The Regulation confirms that a domestic oil pollution compensation fund will be founded through imposing levies on persistent oil cargo owners or their agents. The Measures of the People's Republic of Chi-

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① Feng Yizhen, Lin Hongmei, China's coastal waters are facing the risk of Ship-induced pollution, *China Ocean*, 9 Feb, 2007.

② Zhu Jing, Xu Shiming, Keeping ocean clean and sharing blue territory, *Review of Ship-induced pollution prevention of China*, *China Water Transport*, 29 May, 2009.

③ Liu Gongchen, To establish an oil spill compensation system consistent with China, Collected papers of Forum of marine affair of Ministry of Transportation, 2005.

④ Zhao Hu, How China copes with the risk of oil spill, *China water transport*, 20 November, 2009.

na for the Implementation of Civil Liability Insurance for Vessel-induced Oil Pollution Damage, which have came into force since October 1, 2010. In article 2, it provides that ships navigating in the Chinese waters, which carry oil substance, and more than 1000 tonnages which carry the non-oil substance, shall cover the insurance of civil liability for oil pollution damage by vessel or obtain the corresponding financial guarantee. The fund so far is still under construction. In short, as International practice of oil spill compensation shows, it is far from enough to cover oil pollution. The ratio of oil spill damage compensation is lower than required. Emergency response against shipboard oil spillage suffers from a lack of financial security. Currently, the capacity to respond to emergencies needs to be improved. ①

C. It is not proper time for China to join the Convention on the International Oil Pollution Compensation Fund.

The international compensation regime for oil pollution arose and developed principally from public pressure following major oil tanker disasters. It includes International Oil Pollution Compensation Fund Convention, also known as the "Fund Convention". The purpose of the Fund Convention is to establish a fund to provide compensation for pollution damage to the extent that the protection afforded by the 1992 Liability Convention is inadequate. The fund only offer an afterward compensation, but it can cover the cost for emergency response to oil spill. Although there are some deficiencies in fund convention, it works very well, since the fund was set up. According to the fund convention, the oil industry that has large import volumes must contribute to the Fund. It maybe is not proper time for China to accept the Fund convention. Based on the above three arguments, it is time for China to establish the fund guarantee for emergency response mechanism to shipboard oil spillage.

Ⅱ. The feasibility of establishing a special oil spill emergency response fund

A. The legal basis for establishing a special oil spill emergency response fund

The purposes to establish the special fund are to strengthen oil spill emergency response mechanism, to reduce the damage and protect marine environment. Legal foundation in this connection mainly related to the Constitution

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① Xu Shiming, Emergency response mechanism against Ocean Pollution in China, *China Ship Survey*, issue 1, 2010, p. 120.

law of PRC, Marine Environmental Protection Law, the Regulation on the Prevention and Control of Marine Pollution from Ships, Maritime Law, Special Maritime Procedure Law, International Convention on Civil Liability for Oil Pollution Damage, and other international conventions.

Article 26 of Constitution provides that the state protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public hazards. In according with article 18 (3) of Marine Environmental Protection Law, the State administrative department in charge of maritime affairs shall be responsible for drawing up a contingency scheme to cope with any nation-wide major vessel oil spill accidents on the sea and report to the administrative department in charge of environment protection under the State Council for the record. The same legislation also provides that Ports, docks, loading and unloading spots and shipyards must draw up oil spill pollution contingency scheme and shall be equipped with corresponding contingency equipment and devices. More specific provided by article 66 of marine environmental law, quoted as follow:

"The State shall perfect and put into practice the civil liability system of compensation for vessel-reduced oil pollution, and shall establish a fund system for vessel-induced oil pollution insurance and oil pollution compensation based on the principle of the vessel owner jointly undertaking the risks of any vessel-induced oil pollution compensation liability." Special Maritime Procedure Law stipulates that the following maritime claims may apply for arresting ships, such as, payment for compensation of such damage caused by the ship to the environment; the reasonable cost for the measures taken actually or preparing to take for restoring the environment; loses the third party suffered or will probably suffer due to such damage; and the damage, fees or loses which are similar in nature specified in this Item. Article 56 of the Regulation confirms that a domestic oil pollution compensation fund will be founded through imposing levies on persistent oil cargo owners or their agents. It stipulates that the owners or agents who receive the goods of persistent oil substance transported by sea in waters under the jurisdiction of the People's Republic of China shall contribute to the fund for oil pollution damage. The specific measures on the collection, using and administration of the fund for oil pollution damage shall be jointly formulated by the finance department of the State Council and the administrative department of communications of the State Council. The state will set up the administrative commission of the fund for oil pollution damage to handle affairs such as the compensation made with the fund for oil pollution

damage. The administrative commission of the fund for oil pollution damage will be consisted of relevant administrative authorities and the main merchants who contribute to the fund for oil pollution damage. The Regulation also covers oil pollution response planning; oil spill clean-up arrangements; reporting and emergency handling of pollution incidents; investigation and compensation of pollution incidents etc..

At the international level, the legal framework involves in International Convention on Civil Liability for Oil Pollution Damage, The Protocol of 1992, (CLC1992), Establishment of an International Oil Pollution Compensation Fund Convention, The Protocol of 1992, (Fund 1992), International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention). China ratified CLC1992 in 1999 and Bunker Convention at the end of 2008. China is not a State party to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. Fund 1992 only applies to the Hong Kong Special Administrative Region. CLC1992 and Bunker Convention provide the doctrine of strict liability and set forth the scope of oil pollution's compensation, in according with article 1(6) of CLC 1992, Pollution damage means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damages caused by preventive measures. ①

B. Feasibility study on establishing the special fund contributed by the oil cargo owners

1. A jurisprudential analysis on establishing the special fund contributed by the oil cargo owners

According to traditional theory of tort law, compensation for damages is based on the determination of who was at fault and to what extent. But the practice of oil spill claim showed the traditional fault system was out of date, so IMO adopted no-fault liability, i. e. the doctrine of strict liability, in CLC 1969. Under no-fault system, it is the one who bring the pollution that shall take the responsibility, regardless of the ship owner is at fault. Meanwhile, it also provides the rules of limitation of liability and compulsory insurance for ship owner. Therefore, the loss arising from oil spill is often greater than the compensation. For example, Super tanker 'Exxon Valdez' hit Bligh Reef in Prince

① Si Yuzhou, *Maritime law*, Beijing: Law press, 2003, p. 320.

Edward Sound and spilled more than 11 million gallons of crude oil on March, 1989. The total costs of Exxon Valdez, including both cleanup and also "fines, penalties and claims settlements," ran as much as $8 billion USD. But the amounts of compensation will not more than 60 million USD under CLC 1969[①].

Since the mid 20th century, the "polluter pays" principle came into being. This principle obliges the polluter to "bear the costs of measures to reduce pollution decided upon by public authorities to ensure that the environment is in an acceptable state."[②] If this principle is not applied to covering, the costs of restoration of environmental damage, either the environment remains un-restored or the State, and ultimately the taxpayer, has to pay for it. Therefore, a first objective is to make the polluter and the benefiter liable for the damage he has caused. If polluters need to pay for damage caused, they will cut back pollution up to the point where the marginal cost of abatement exceeds the compensation avoided. Thus, environmental liability results in prevention of damage and in internalization of environmental costs. Liability may also lead to the application of more precaution, resulting in avoidance of risk and damage, as well as it may encourage investment in R&D for improving knowledge and technologies."[③]

Based upon the collective principle and the "benefiter pays" principle, IMO formulated International Fund for Compensation for Oil Pollution Damage. Nowadays, more than 90% oil companies contribute for the payment of supplementary compensation through the 1992 IOPC Fund.

2. A financial Feasibility on Establishing the Special Fund Contributed by the Oil Cargo Owners

Comparing to the rapid development of shipping industry in China, oil spill emergency response system has lagged far behind and can not meet the needs of the current situation. Some governmental agencies, like Ministry of Transportation, National Development and Reform Commission, Ministry of Finance, State Environmental Protection Administration, Ministry of Ministry of Foreign Affairs, Ministry of Agriculture and especially Maritime Safety Administration, made a lot of effort to establish a domestic oil pollution compensation fund. According to the draft of Regulation on Collection and Use Oil Pollution Damage

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① Lin Xiaomei, On the International Oil Pollution Compensation Fund, *Supplement to the Journal of Sun Yatsen University*, issue 8, 2007.

② Xu Guoping, *A Study of Legal System on Oil Pollution Compensation*, Peking University Press, 2006. p. 20～21.

③ Posner, R. A, *Economic Analysis of Law*, CITIC Publishing House, 2003, p. 167.

Fund, which prepared by Ministry of Finance and Ministry of Transportation, the fund will be founded through imposing levies CNY 0.3 per ton on persistent oil cargo owners. China Petrochemical Corporation (SINOPEC) and China National Petroleum Corporation (CNPC) are two largest oil cargo receivers, 80% of oil cargoes belong to them. ① That also means Sinopec, CNPC and China National Offshore Oil Corporation (CNOOC) will be great contributors to the special fund. According to the statistic, Sinopec recorded total amount profit of over CNY133.3 billion in 2005 and CNY 185.7 billion in 2006. The net profit of the first half year of 2009 was CNY 33.19 billion despite of the economic crisis. The net profit of SINOPEC was CNY 39.6 billion in 2005. In 2009, the five major oil companies, CNPC, SINOPEC, CNOOC, SINOCHEM, SHAANXI YANCHANG PETROLEUM, recorded revenues of CNY 3.12 trillion from main business, a decrease of 5.6% compared with the total profit of CNY 268.042 billion in 2008. ② In 2008, China imported about 200 million tons of oil. If we set this amount for calculation basis, oil importers need to pay CNY 57 million per year as compensation fund. ③ In 2009, China imported 218.885 million tons of oil, so the oil importers shall contribute about CNY 60 million. ④ In comparison with USA, the emergency response amounted fund to 50 million U.S. dollars, it is about 1/20 of the total oil pollution Trust Fund with 1 billion U.S. dollars. Obviously, it may have some negative impact to oil cargo owners, but it is not difficult for them.

Ⅲ. The Conception of Establishing a Special Fund for Emergency Response to Shipboard Oil Spillage

Oil spill emergency response is a positive measure taken to cope with ship oil spill. The special fund of oil spill emergency response is essentially a portion of the Oil Pollution Compensation Fund appropriated specially for the purpose of providing more effective financial security for oil spill emergency response.

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① Song Jiahui, *Precaution, Salvage and Compensation System against ship-induced Pollution*, Dalian Maritime University Press, 2006.

② Ministry of Industry, Oil and Chemical Industry Improve Steadily in 2009, at http://www.chinanews.com.cn/ny/news/2010/02-20/2127336.shtml, 20 February 2010.

③ Peng Li, Oil giants may bear the major responsibility to marine environmental liability, *China Chemical Industry News*, 10 November, 2009.

④ China's oil consumption ranked second in the world in 2009, at http://www.cinic.org.cn/shownews.php? id=73959, 2 March 2010.

Therefore, the special fund for oil spill emergency response mechanism is closely related to the Oil Pollution Compensation Fund.

The fund-guarantee system proposed herein for emergency response mechanism to deal with shipboard oil spill consists of the sources of fund, its administration and payment, etc.

A. The Raising of the Special Fund for Oil Spill Emergency Response Mechanism and Its Coverage

1. The Diversified Fund-raising

Special fund for oil spill emergency response is derived from the same sources as is the ship oil pollution compensation fund, thus to raise the fund, a wide range of financing mechanisms is desirable. So it will be shared by more than one party. The main sources of fund include:

The oil cargo owners are responsible for the shipment of the petroleum by sea. As mentioned earlier, the imposition on the owners is not only justifiable legally but also feasible in international practice. The contribution from the oil cargo owners should comprise the main sources of the special fund. In the compensation made by the International Oil Pollution Compensation Fund after the emergency response, the fund mainly comes from the contributions from the oil companies by way of contracting states, who receive the contributions. The oil spill emergency response fund in United States is mainly appropriated from the specified amount of tax levied on the oil imported and produced at home, 5% per barrel; Canada raises its emergency fund by imposing 15 cents per metric ton on the petrol imported by sea. Therefore, following the international practice, we can set up specific criteria to levy tax on the oil cargo owners and their agents to raise the special fund of oil spill emergency response by receiving the contribution in the waters of our jurisdiction. The oil cargo owners and their agents to be levied tax on here include those ship persistent oil supplies (including crude oil, fuel oil, heavy diesel oil and lubricant oil, and other persistent hydrocarbon mineral oil) by sea. The criteria of contributions lies with relevant authorities based on the actual situation of our country. Some scholars also proposed that the special fund of ship oil spill emergency include not only tax from maritime transport, but also contributions of the ship owners and their agents of inland shipping. At the 2005 national conference of the marine system on pollution-prevention and risk-management, Liu Gongchen, Deputy Secretary of the Chinese Maritime Safety Administration, numbered it among the chief tasks of 2005—2006 to strengthen prevention of risks in inland river transportation and to effectively exercise the maritime supervisory functions. According to Ar-

ticle 40 of the Regulations for Prevention and Control of Inland Water Pollution from Ships (coming into force from January 1, 2006), "oil tankers of 150 gross tonnage and above, the oil barge of 400 gross tonnage and above and non-oil tankers, non-oil barge's team shall hold approved by the maritime administration 'Shipboard Oil Pollution Emergency Plan.' Oil tankers less than 150 tonnage need to make oil pollution emergency plan." And according to Article 30 of the Water Pollution Control Act of the PRC (coming into force from March 20, 2000), "Ships, due to accident, having caused or may cause water pollution, maritime administration authorities shall organize forced or compulsory towing and salvage Clear. Expenditures ensued therefore should be borne by the ship accident." In other words, the inland waters ships fall under the management of the maritime authorities, and the oil spill contingency plans are also obligatory, hence the principle is there that the polluter pays for the emergency response. At present, China has a total of 1497 oil tankers on domestic routes with a capacity of 7.236 million dwt; inland oil tanker Total 3750, capacity was 1.737 million dwt. ① With oil transportation increasingly implemented through pipelines in China, inland water transportation of oil diminishes year by year. However, there are still chances of oil spill in the course of inland water transportation. Although the proportion of inland water transportation is relatively small and there is no laws governing matters of contributions, we approve of the idea that oil shippers of inland water transportation should be included in raising contributions, considering that the emergency response is also necessary should there be any oil spillage or any detrimental effect on the ecological environment caused by the oil cargo owners.

Financial grant from the state comprises part of the initial fund. Grant from government provides substantial support to the Ship Oil Spill Response Fund (SOSRF) as a special national fund. The way of raising fund models that of the United States, which loaned to the Oil Spill Liability Trust Fund when the fund was established. The establishment and improvement of the domestic oil spillage emergency response with government's grant has been implemented in Liaoning, Shenzhen and other places and has produced good result. The Maritime Safety Administration of Liaoning Province applied to the provincial government, and obtained the latter's approval to set up a "special maritime search and rescue fund". According to the application, from 2005 the provincial gov-

① Chen Bowei, To accelerate the domestic routes out of single hull tankers mandatory, *Water Management*, 2009 No. 3, p. 34.

ernment grants CNY 1 million each year to the fund. This fund is designed to award the non-professional rescue organizations that stand out the relief effort. It also covers the oil spill emergency response. ① In a similar vein, Shenzhen lists the funds for search and rescue at sea and pollution-prevention in the general budget. As such, the municipal government allocates 6 million each year for marine pollution-prevention and emergency response at sea. ②

The purpose of setting up a SOSRF is to provide financial guarantee for the emergency response to ship oil spillage. Following the principle of collective burden, the costs and expenses of environmental damage should be borne by all the polluters of the same type, which originated from environmental damage compensation practices, the liability of pollution caused by ship oil spillage should be undertaken by all the oil cargo owners that fall within the scope of the oil spill emergency response. At the same time, the prevailing criteria of liability dealing with oil pollution caused by oil spillage is strict liability, therefore, all liable ship owners shall bear the obligation to pay contributions to the special fund. In the light of the compulsory insurance system regarding the civil liability in oil pollution, the contributions ship owners undertake can be drawn from the insurance premiums the ship owners insured against oil pollution damage. The ship owners will not bare any other liabilities. There are other ways of raising the fund: a) the compensation funds from the party that is responsible for the oil spillage. According to the principle that polluter undertakes liability, the administration office of oil spill emergency response fund can make payment first and later on make claim to the polluters for compensation; b) penalty. All ships failing to cover oil pollution liability insurance will be imposed on a fine, and this fine can be transferred to the fund; c) the profit from the operation of the fund (interest, for example). Under proper administration, the fund can bring some profit from investment. Another source of the fund is public contribution. Since the special fund for oil spill emergency response is for the public interest, public contributions are also an effective source of funds.

Public donations have special significance to the fund-raising. Dalian, a

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① Liu Licai, Liu Yunzhe etc., the first release of our province, advanced search "reward", at http://news.sina.com.cn/s/2006－04－2/03078673824s.shtml, 1 March 2010.

② Du Chuan, China has established emergency response system involved in pollution problems and related measures, ship pollution prevention and regional cooperation in high-tech Conference and the first "port of Cup" ship pollution prevention Best Paper Award winning paper album, 2003.

northern city in China, established a special fund for oil spillage emergency regarding unknown shippers in 2007. This fund (totaled CNY 2.51 million) comprises voluntary donations from 48 organizations related to ships. By June 2008, Dalian has coped with 6 cases of emergencies caused by unknown resources with this fund. Dalian's example sufficiently embodies the efficacy of the Oil Spill Emergency Response Fund. Donations out of public interest represent the public's awareness of environmental protection, on the one hand; they also play a very significant role in oil spillage emergency response, especially in the case of oil spillage caused by unknown resources, on the other hand. Dalian's practice illuminates the way for us to raise the Special Fund of Ship Oil Spill Response, that is, donations from the public may comprise a significant source.

2. The Coverage of Ship Oil Spill Emergency Response Special Fund

The fund is established mainly to provide fund for ship oil spillage emergency response: monitoring, decontamination, and rewards, on the one hand; it also provide fund for the improvement of ship oil spillage emergency response: purchase of facilities, staff training, the efficient functioning of the mechanism. Specifically:

First, the advance for oil spill emergency response. After Oil spillage, the fund can provide financial security for the emergency response actions, such as the monitoring of the affected area, decontamination, emergent relief, etc. In the case that the responsible party for the oil spill accident is definite, the expenditure in the form of advance can be covered by the party on recourse according to legal procedures. Before advance, it is necessary to examine and approve the actions involved in the emergency response to be taken in order to see they are necessary for the oil spillage.

Second, the payment for the oil spillage is caused by unknown resources.

Third, the payment for the reasonable cost is caused by the emergency response. The so-called reasonable cost includes the cost of measures taken to guard against, alleviate, and reduce persistent oil spill, and the damage these measures may bring about to the third party. The parties involved can have an accreditation body or the court of law determine the reasonable cost upon the agreement of all the parties.

Fourth, the normal operational costs for the fund management are needed.

B. The Concept of the Management of the Special Fund of the Oil Spill Emergency Response

Considering the connection between the special fund for ship oil spill e-

mergency response and the Oil Pollution Compensation Fund to be established in China, and the International Oil Pollution Compensation Fund, which China may enter into in future, the management of our special fund for oil spill emergency response can model the management of the International Oil Pollution Compensation Fund and that of the Oil Spill Liability Trust Fund of the United States; or we may set up regulations of management in accordance with the "Regulation of the Collection and Use of Ship Oil Pollution Compensation Fund".

1. The Management and Use of Special Fund of the Oil Spill Emergency Response

Both the International Oil Pollution Compensation Fund and the Trust Fund of Oil Spillage Liability are established under relevant laws, with a special managerial agency. They are entitled to have their own rights and obligations since they enjoy the status of independent legal person. According to the paragraph 3 of Article 5 of Marine Environment Protection Law of the People's Republic of China, The state administrative department of marine affairs shall be responsible for organizing investigations and monitoring of and exercising surveillances over the marine environment and conducting scientific research therein; it shall also be in charge of environmental protection against marine pollution damage caused by offshore oil exploration and exploitation and by the dumping of wastes into the sea. The Harbour Superintendency Administration of the People's Republic of China shall be responsible for supervising, investigating and dealing with the discharge of pollutants from vessels and for exercising surveillance over the waters of the port areas; it shall also be in charge of environmental protection against pollution damage caused by vessels. According to Article 71 of the same law, in case of the sea accident of a vessel that has caused or may cause major pollution damage to the marine environment, the State administrative department for maritime affairs is entitled to adopt enforcement measures to avoid or reduce the pollution damage. In case of any sea accident took place on the high sea that has resulted in major pollution damage to a sea area under the jurisdiction of the People's Republic of China or in case of any vessel or facilities on the sea that threaten to pollute such sea area, the State administrative department for maritime affairs is entitled to adopt necessary measures sufficient to cope with the pollution that has actually taken place or may possibly take place. According to Article 4 of The Regulation of the Prevention of Remedy of Marine Environmental Pollution by Ships, the authorities in charge of communication and transportation of State Council are in

charge of the prevention and remedy of marine environmental pollution caused by the non-military ships in their respective administrative waters and by the non-military ships and non-fishing ships in the harbor waters. Maritime administration authorities are in charge of the supervision and administration of the marine environmental pollution in accordance with the provisions.

Article 19 of "The Regulations of the Collection and Use of Ship Oil Pollution Compensation Fund (draft)" provides that the Management Board for Oil Pollution Compensation Fund, which is established by the State, accepting compensation issues related to the Oil Pollution Compensation Fund. The National Management Board for the Oil Pollution Compensation Fund consists of delegates from the Ministry of Transport, Ministry of Finance, Ministry of Agriculture, State Environmental Protection Administration, State Oceanic Administration, and the representatives of the oil owners who contribute to the Oil Pollution Fund. It is affiliated to the Ministry of transportation. The Board has an Executive Committee and a Secretariat responsible for routine affairs. The Secretariat is affiliated to the Maritime Safety Administration of China.

The management and use of the special fund for oil spill emergency response can be performed in accordance with the stipulations in The Regulations of the Collection and Use of Ship Oil Pollution Compensation Fund (draft). The management of its use can take example of the practices of the United States. That is, setting up a national center of the oil spill emergency response, establishing offices by involving the marine transport department and environment protection department as its standing organization in respective marine region to deal with oil spillage, defining the division of power and responsibility for centers of all levels, enhancing communication and coordination. In case of oil spillage, these offices will act promptly to communicate and coordinate with each other to facilitate the oil spillage emergency response.

2. Management and Legal Status of the Oil Spill Emergency Response Special Fund

Special Fund for Ship Oil Spill Response can, taking example of the practice of the United States, establish a management center for marine oil spillage emergency response fund in the Marine Safety Administration of China and grant it with the status of legal person. This center is specifically responsible for the collection and the use of the fund. The center is entitled to the collection and disposal of contributions. It can also open legal proceedings as a party.

As a special fund, the Center receives supervision from the Ministry of Finance and the Ministry of transport. The General Assembly has the supreme

power, including being responsible for the management of the contributions, deciding the quota of contribution, collecting and disposing the contributions. The General Assembly enlists delegates from the Ministry of Finance, Ministry of Agriculture, State Environmental Protection Administration, State Oceanic Administration, and the representatives of the owners who contribute to the fund. Its members are elected by the General Assembly. Secretariat is the standing department dealing with the routine work of the Fund. Its main duty is to raise funds on behalf of the Emergency Response Fund according to the fund-raising plan, and pay the fees involved in the emergency response according to the coverage of the Fund. Additionally, it also is responsible for coordinating marine security departments of different regions to take action in case of emergencies. Since the Ship Oil Spill Response Fund is granted with the status of legal person, it can bear material responsibility for its own obligations with its own property and participate in legal proceedings in its own name.

C. The Application for Special Fund of Oil Spill Emergency Response and the Payment

1. The Procedure Design for the Application for Special Fund of Oil Spill Emergency Response Mechanism

The procedural provisions of a legal institution are the safeguard of the implementation of substantive provisions. Only in accordance with statutory procedures can the fund system be implemented openly and justly. The Oil Pollution Act of 1990 (referred to as OPA1990) of the United States in principle provides procedures for making claims to the fund. It also set the time limit of 3 years of making claims for decontamination and damage. The U. S. coast guard has formulated a Guidebook to Make Claims based on the Oil Pollution Act of 1990. The Regulations of the Collection and Use of Ship Oil Pollution Compensation Fund (draft) of China just provides roughly that the organizations and individuals eligible for indemnity or the compensation conditions can apply to the Fund Management Committee in written form to make a claim, which, after accepting the application, shall form a panel to examine and verify the claim items and determine the specific amount of compensation. It also provides the time limitation for claims to Oil Pollution Fund which is three years. ①

Therefore, regarding the management of the special fund for emergency re-

① Han Lixin, Ship Oil Pollution Compensation Fund of the collection and management approach to improve the proposed use of "containing", *China Maritime Law*, January, 2008, p. 302.

sponse mechanism, we can consult the aforementioned practice of the United States, that is, we firstly stipulate the principles as to the procedures for the use of oil spill emergency response fund. Secondly, we authorize relevant departments under the State Council jointly to formulate the procedures, or authorize the maritime administrative authorities to formulate the procedures. The procedures will come into force upon the approval of the State Council. The Procedures of using fund can be formulated separately based on the different projects. ① The procedure design for the advance of the special fund for clean-up costs includes the following:

Regarding the scope of accidents for which advance is applicable, the first thing to do is to articulate that the special scope where the Fund is applicable. The spatial coverage where the Fund is applicable is the waters under China's jurisdiction, including the territorial sea, exclusive economic zone and inner water. Secondly, the advance is also applicable to the oil spillage damages caused by shippers carrying crude oil and fuel oil. Finally, the advance is applicable to claims within the jurisdiction of the courts of China to which Chinese laws apply.

Regarding the scope of applicants for advance, the right to apply for advance can be entrusted to the office of oil spillage prevention and response in order to ensure the fund's normal operation. The time limit of the application can be defined with the period after the oil spillage takes place and before compensation is made considering the functional aspects of the advance. The data an applicant shall submit in the application include the time of the accident, the location, the ships involved, types of oil that is responsible for the pollution damage, the degree and range of the pollution, the sum to be applied, etc. The Fund Management Center's investigation of the accident, the result of the review of the data of application can be done by the related panels appointed by the Center and inform the applicants of the result in written form. The payment and settlement of the advance is carried out in accordance with the rules and regulations of the financial management and under the supervision of audit departments. In addition, the procedures should be made explicit and definite as to the applicant's right of reconsideration when his application is denied and the contract of the right-transfer agreement between the fund management center

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① Hu Zhengliang, Establishment of Oil Pollution Compensation Fund of the legal issues, Visiting date on March 9, 2010, at http://smuiml.shmtu.edu.cn/comments.php?act=show&id=104.

and claimant.

The payment procedure of the compensation of the special fund includes the following:

The scope of the claimant: the victims of oil pollution accidents occurring in waters under China's jurisdiction, including the national or local governments, individuals, corporations, among others. The time limit of the claim: consulting the practice of domestic and international regulations, we may set the time limit of the claim for three years. Environmental Protection Law of PRC stipulates that the time limit for filing an action for environmental pollution compensation is three years from the date on which the party knows or should have known the pollution damage. The time limit the International Oil Pollution Compensation Fund stipulates for the claims for oil pollution incidents is also three years. The claim letter and evidence submitted by the claimant: the documents present facts in detailed data; the evidence for claim should be attached with invoices, bills and other financial documents. The investigation of the accident and the assessment of the damage conducted by the Center: the investigation and assessment should be conducted in accordance with the data submitted for claim. Resolutions of acceptance or denial of claim for compensation: the claimant shall be informed of the resolution of acceptance or denial in written form. When the claimant refused to accept compensation decisions, he or she has the right to file a lawsuit.

The approval procedures for application for fund to improve oil spill response capability can be limited to the fund management center and the office of oil spill prevention and response. The office of oil spill prevention and response can regularly apply to the fund management center for such fund. According to the actual demand for facilities for capacity-building, team construction, and operation of the organizations, the office should also formulate the qualifications of applicants, the time limit for the application, and the data to be submitted by the application and applicant, all of which should be presented to the Center for approval. The fund management center informs of the office and prevention and response of the examination and supplementation of the data of the application, the notification of review result; it also transfers the payment of the expenditures to the office.

2. The Payment Procedure of the Special Fund for Shipboard Oil Spillage

The modes of payment depend on the purposes of fund to be used for. For emergency operations, the Fund should provide advance to the organizations involved in the emergency response for salvation, supervision, disposal, etc. As

for capital used in taking preventive measures, reducing, controlling and removing oil contamination, the organization involved in relevant responses apply to the Fund for compensation and the Fund shall confirm the amount and make payment after going through related procedures. For the cost input and the applications for reasonable claim, the Fund shall confirm the amount and make payment after forming a panel to review all the items involved in the cost input and in the applications.

Since the total amount of the special fund for oil spillage emergency response is limited, it is necessary to set a limit to the amount of fund in single use. ① From the International Oil Pollution Compensation Fund and the U. S. Oil Pollution Trust Fund, we can find there is a provision concerning the amount of fund to be used a single time, and the Fund has subrogation right. ② Their practice is much the same as the provisions in the Marine Law concerning the ships engaged in international maritime transportation. Under the draft of the regulation, the upper limit of compensation is CNY 50 million for one single accident oil pollution. Otherwise, a major oil pollution accident will claim the full amount of the Fund.

From the data of the accidents occurred in recent years, there is a significant increase in amount in terms of a single vessel. Take the 2004 Pearl River oil spillage for example. Only the clean-up expenditures were as much as CNY 10. 6 million. In stipulating the limit to the amount of compensation in the use of special fund, China's national conditions must be taken into consideration. It shall be neither too high nor too low. Too high, it will burden the contributors; too low it will not be effective.

The subrogation of the International pollution damage compensation fund is laid down in the provision of Article 9, CLC1992. This article stipulates that the Fund shall acquire by way of subrogation the right of the payee that the owner or guarantor of ship enjoys in accordance with the Liability Convention. OPA1990 of U. S. also laid down the subrogation: the payment of compensation or debt of the Oil Pollution Liability Trust Fund entrust the U. S. government the subrogation of the claimants or States to access the responsible party to recover the payment. Consulting the above mentioned practices, we may also

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① Special fund of oil spill emergency response is effective security measures, but not a panacea. This provision is mainly to avoid the condition that single-use credit more than the total fund will result in no funds to operate the fund.

② The subrogation right is a civil right, different from the priority. The priority does not shift with transfer of the subrogation right.

provide the right of subrogation in the Special Fund of Ship Oil Spill Response. The right of Subrogation is entrusted to management center of ship oil spill emergency response, that is, the Fund acquires, through subrogation, the payee's right to claim to the responsible party, or its liability insurer, or other financial guarantor.

In short, the special fund of oil spill emergency response mechanisms will be an innovation in our marine environmental protection and oil spill emergency response. The purpose of the fund lies not in its establishment, but in its benign operation. Only by consulting mature international experience in conjunction with China's actual situation can China fulfill her intention in establishing of the fund, and get well prepared for the connection with the world in the future. As practice has proved, to achieve a good legal system, not only is the scientific design of the system necessary when it is in conception, but also a constant refection and summary is necessary when it is put into practice. Additionally, the system should be amended to work better in time when the actual circumstances under which the system functions change. ①

(Senior Editor: ZHENG Zhi-hua
Editor: Stephen Pire; ZHOU Yao)

① Hu Zhengliang, Establishment of Oil Pollution Compensation Fund of the legal issues, at http://smuiml.shmtu.edu.cn/comments.php?act=show&id=104, 9 March 2010.

“生态系统方法”与海洋环境保护法创新*

——以渤海治理为例

巩 固**

内容摘要:环境问题的系统性和客观性决定了良好的环境治理必须打破区划界限,从生态系统整体出发调动利益相关者共同参与,以科学为基础针对环境特点进行“适应性”管理,此即“生态系统方法”。生态系统方法已被广泛应用于海洋管理,其在立法上的直接体现是对特定海域进行专门性综合保护的“区域海洋法”。从生态系统方法的六大实践性原则来看,我国现行海洋保护法并没有贯彻这一思想,这是渤海治理的制度困境所在,也是我国海洋管理法的根本缺陷。为解决渤海治理困境,应制定“渤海综合治理法”。而对于我国内海的整体保护而言,需要以“海区法”为单位重构我国的“内海海洋法”体系。

关键词:生态系统方法 海洋治理 渤海 变革

海洋环境保护的重要性和必要性人尽皆知。我国自1982年颁布《海洋环境保护法》以来,已逐步建立起以《海洋环境保护法》为核心,以其它涉海和环保相关法律为补充,[①]以针对各类单项活动或具体领域的法规、规章为辅助的庞大法律规范群;建立起了由众多部门参与其中的、复杂的管理网络。在政策和投入上,也受到国家高度重视。但海洋治理的实际状况却并不容乐观。在部分海域,甚至出现治理投入与环境恶化同步增长的怪现象,如此情形不由得让人反思是否海洋治理的根本思路存在问题。

在此,本文将引介国际上较为流行的、也在治理实践中取得良好效果的“生态系统方法”,并以该方法为视角,结合当前治理需求最为迫切的渤海实例,审视我国海洋环境保护法律制度的问题与不足,并提出完善建议。本文的研究将表

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① 主要有《环境保护法》、《海域使用管理法》、《渔业法》、《水污染防治法》、《水法》、《水土保持法》、《野生动物保护法》、《环境影响评价法》等。

明,依据生态系统方法,针对不同海区制定综合性的特别法,是解决海洋治理困境的有效途径,也是建设生态文明背景下我国海洋法发展的必然方向。

一、生态系统方法与海洋管理

(一)生态系统方法的源起

生态系统方法(Eco-system Approach,EA)是指遵循生态规律,从生态系统的独特性和完整性出发,综合运用各种手段,采用整体论方法管理环境资源的一种策略。它"不是一种具体的生态系统管理方法,而是一种综合各种方法来解决复杂的社会、经济和生态问题的生态系统管理策略。它提供了一个将多个学科的理论与方法应用到具体管理实践的科学和政策框架"。[①]"是一种以科学为基础保护和管理自然资源的全面方式。"[②]生态系统方法的出现,是生态环境的"自然性"与人类活动的"社会性"之间的固有矛盾使然,是人类对环境资源管理认识深化的产物。

人类对于环境问题的认识经历了从简单到复杂、由单一到综合的转变。在环境治理初期,人们只看到不同类型的单个问题,如水污染、大气污染、森林破坏、物种灭绝等,采取的是"头痛医头"式的应对策略,实行的是分类管理的治理模式。由此,在20世纪中叶以前,世界上几乎所有的环境法都表现为各类缺乏有机联系的、以对某种资源的保护或对某类污染的防治为核心的单行法,[③]依靠基于行政区划的各级政府和基于职能划分的不同部门的力量加以实施,与一般社会事务的管理并无不同。

但随着实践的深入,传统治理模式的弊端逐渐显现。尤其在面对那些范围跨越行政区划、目标具有综合性的环境资源问题,如重要江河湖泊、湿地森林或生物多样性的保护时,传统依要素分类管理的模式几乎难有作为。人们逐渐认识到环境问题的整体性和系统性,认识到对于自然而言"整体不等于部分之和"。于是,一种强调生态系统的完整性和治理手段的综合性的管理新理念逐渐浮出水面,这就是"生态系统方法"。

美国在其五大湖流域治理过程中率先提出了"生态系统方法"的概念。为恢复和维持五大湖流域生态系统水体的物理、化学和生物的完整性,1978年的《五

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① 周杨明等:《自然资源和生态系统管理的生态系统方法:概念、原则与应用》,载于《地球科学进展》2007年第2期,第171页。

② 《海洋和海洋法——联合国秘书长2006年3月9日有关海洋问题的报告》(A/61/63+Add.1),下载于 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/265/86/PDF/N0626586.pdf?OpenElement,2010年11月1日。

③ 蔡守秋:《综合生态系统管理法的发展概况》,载于《政法论丛》2006年第3期,第6页。

大湖水质协议》(The GreatLakesWaterQuality Agreement of 1978)规定了“生态系统方法”,认为必须将五大湖流域视为一个由水、气、土和生物(包括人)这些相互影响的要素构成的生态系统加以综合管理。[①]这一概念受到广泛认可,并逐渐扩展到环境资源管理各具体领域。1988 年,美国学者 Agee 和 Johnson 出版《公园和野生地的生态系统管理》一书,又提出“生态系统管理”(Ecosystem Managemen,EM)的概念,并从生态学上定义的边界、明确强调管理目标、管理者间的合作、监测管理结果、国家政策层次上的领导和公众参与等 6 个方面阐述了生态系统管理的内涵,[②]成为资源管理领域的热门理论。[③]实际上,“生态系统管理”以及后来在海洋领域广泛使用的“基于生态系统的管理”(Ecosystem－based Management,EBM)作为生态系统方法在不同领域的应用和引申,与“生态系统方法”并没有本质差别,[④]本文在此混同使用。

由于海洋具有为流动的海水所联结的特性,其生态要素之间的联系和互相影响更加紧密,“系统性”特征更加鲜明。由此,生态系统方法在海洋领域具有更加广阔的适用空间。“海洋为实施基于生态系统的管理提供了比陆地更多的机会。”[⑤]自 20 世纪 90 年代以来,生态系统方法之于海洋治理的重要性受到越来越多的认同,一些国家已经开始尝试将之付诸实践。1998 年,澳大利亚颁布《澳大利亚海洋政策》,明确实施基于生态系统的海洋管理。2002 年,加拿大政府出台《加拿大海洋战略》,也明确提出基于生态系统的海洋管理和保护措施。而美国 2003 年颁布的《2003—2008 年战略计划》、2004 年的《21 世纪海洋蓝图》、《美国海洋行动计划》及 2005 年的《基于生态系统海洋管理的科学声明》都高度重视生态系统方法在海洋治理中的应用。挪威和欧盟也都在其海洋政策中明确宣布采用生态系统方法。[⑥]尤其值得注意的是,2006 年 3 月 9 日,联合国秘书长向第 61 届联大提交的“有关海洋问题的报告”中特地单列“生态系统方法和海洋”一章,强调指出过去那种“零散的立法、政策、方案和管理计划”已经“不能防止生态系统健康的恶化”,而应“以科学信息为基础,采用更加统一、综合和适应的管理方式”。报告界定了生态系统方法的内涵,梳理和回顾了与其相关的“全球法律和政策框架”及相关项目的实施情况,并详细归纳了生态系统方法的要素和发展

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① Lee B. J,Regier H. A,Rapport D J,Ten Ecosystem Approaches to the Planning and Management of the Great Lakes,*Journal of Great Lakes Research*, 1982,8(3),pp. 505－519.

② Agee J,Johnson D Eds.,*Ecosystem Management for Parks and Wilderness*,Seattle:University of Washington Press,1988,pp. 6－12.

③ 参见于贵瑞:《略论生态系统管理的科学问题与发展方向》,载于《资源科学》2001 年第 6 期,第 1 页。

④ 参见丘君等:《基于生态系统的海洋管理:原则、实践和建议》,载于《海洋环境科学》2008 年第 1 期,第 75 页。

⑤ 丘君等:《基于生态系统的海洋管理:原则、实践和建议》,载于《海洋环境科学》2008 年第 1 期,第 75 页。

⑥ 张海文等著:《渤海区域环境管理立法研究》,北京:海洋出版社 2009 年版,第 26～27 页。

这种方法所需的能力建设。[①]该报告为生态系统方法在全球海洋管理中的应用提供了一个权威的、明确的、系统的指引,对各国的海洋治理具有指标性意义。

(二)生态系统方法的内涵与实践原则

作为一种新兴的、处于探索之中的理论,"生态系统方法"尚没有一个权威定义,不同研究者从不同角度提出了众多界定。[②]虽然具体界定不同,但对其基本内涵,学界意见基本一致。一般认为,生态系统方法的核心内涵包括:以生态系统整体为管理对象;以生态系统与社会经济系统之间的协调持续发展作为核心;要求对被管理的生态系统本身有深入的了解,管理过程中综合运用生态、社会、经济、政治等多方面的知识;强调协作和共同参与。[③]这是生态系统方法区别于传统环境管理理念的本质特征,也是生态全球化背景下第二代环境法的发展方向。[④]

如何把作为一种理念或者说策略的生态系统方法落实到人们的具体行动中来,需要一系列更为具体的实践性原则的指导。对此,相关理论也是层出不穷。其中,具有重大影响,值得关注的主要有以下几种:

1.《生物多样性》规定的原则

《生物多样性公约》第五次缔约方大会所采纳的运用生态系统方法的12条原则受到广泛接受,虽然其是针对生物多样性保护所提出,"但是其内容并不仅限于生物多样性保护,而是涵盖了自然资源管理和生态系统管理的各个方面",[⑤]具有普遍的指导意义:

(1)土地、水和生物资源的管理目标是一个社会选择问题。(2)应将管理权下放到最低的适当一级。(3)生态系统管理者应考虑其活动对相邻和其它生态系统的(实际和潜在)影响。(4)考虑到管理可能带来的利益,因此,通常需要从经济的角度理解和管理生态系统:a.减少对生物多样性有着不利影响的市场扭曲现象;b.调整奖励措施,促进生物多样性的保护和可持续利用;c.使特定生态系统的成本和效益内部化,直到实现可行性。(5)保护生态系统的结构和机能,

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① 参见《海洋和海洋法——联合国秘书长2006年3月9日有关海洋问题的报告》(A/61/63+Add.1),下载于http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/265/86/PDF/N0626586.pdf?OpenElement,2010年11月1日。

② 李笑春、曹叶军、叶立国:《生态系统管理研究综述》,载于《内蒙古大学学报(哲学社会科学版)》2009第4期,第88~89页。

③ Lackey R. T, Seven pillars of ecosystem management, *Landscape and Urban Planning*, vol. 40, 1998, pp. 31~39.

④ 关于第二代环境法所必须具备的特征中的"生态系统"因素,详可参见Nicholas A. Robinson:《第二代环境法不断发展所面临的调整》,载黎莲卿等编:《亚太地区第二代环境法展望》,法律出版社2006年版,第34~41页。

⑤ 周杨明等:《自然资源和生态系统管理的生态系统方法:概念、原则与应用》,载于《地球科学进展》2007年第2期,第173页。

以维持生态系统服务，这是生态系统方法的优先目标。(6)必须在生态系统的功能限度内管理生态系统。(7)应在适当的时空范围内应用生态系统方法。(8)由于生态系统过程具有的不同的时间尺度和滞后效应，生态系统管理的目标应当是长期性的。(9)管理必须认识到变化的必然性。(10)生态系统方法应寻求生物多样性保护和利用的适当平衡与统一。(11)生态系统方法应考虑所有形式的相关信息，包括科学知识、乡土知识、创新做法和传统做法。(12)生态系统方法应让所有相关的社会部门和学科参与。①

2.《基于生态系统的海洋管理的科学声明》中的原则

2005 年 3 月，美国 200 多位专家共同发表《关于生态系统海洋管理的科学声明》，指出用生态系统方法管理海洋是解决目前海洋危机的根本途径，并提出 9 条原则：

(1)把保护和恢复生态系统及其服务放在首位。(2)考虑不同的人类活动对生物多样性和生物之间关系的积累效应。(3)通过调控营养和物质的流动，促进生态系统之间的联通和交换。(4)必须承认生态系统管理存在的不确定性，应充分利用已有的信息，合理预防。(5)在不同的空间尺度上，都要制定完备协调的政策，并根据管理目的确定恰当的管理范围。(6)维持生物多样性，以提高自然和人类自身的稳定性。(7)在管理措施实施之前，必须保证其不对生态系统功能造成不适当的危害。(8)确定指数，评价生态系统功能及其提供能力的状态，以及管理措施的有效性。(9)利益相关者的广泛参与。②

3.联合国秘书长“海洋和海洋法”报告中的原则

前述“海洋和海洋法”报告第十部分“生态系统方法和海洋”详细阐述了“发展生态系统方法”的 11 条要素：

(1)确定采用生态系统方法的地域范围。(2) 科学地研究和分析生态系统各个组成部分、它们间相互作用和机能运作情况。(3)评估生态系统状况。(4)订立生态区生态和行动目标，以维持生物多样性、生产率、水质和生境质量。(5)查明生态系统面临的压力及其影响。(6)选定生态指标，确保生态目标得以实现。(7)分析现有的法律框架，查明空白、重叠和不一致之处。(8)管理影响或可能影响生态系统的人类活动。(9)通过生态指标来监测生态系统的自然变化及管理措施的影响。(10) 根据需要调整管理系统。(11)建立管理框架：信息透明，提高公众认识，保证所有利益相关者的参与；建立联合各级政府和不同机构

① COP 5 (Fifth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity). Decision Ⅴ/6 [EB/OL]. 下载于 http://www.biodiv.org/doc/decisions/COP－05－dec－en.pd,f 2000，2010 年 11 月 1 日。

② 转引自张海文等著：《渤海区域环境管理立法研究》，北京：海洋出版社 2009 年版，海洋出版社第 21 页。

的适当机制。[①]

4.综合上述几点,可以看出,生态系统方法要求的乃是一种打破区划和体制限制、以生态系统为单元、以环境整体为对象、充分运用科学知识、由各利益相关者共同参与、针对环境的具体特点因地制宜并不断完善的管理模式,其实施要点可进一步凝练为六个原则:

(1)综合性:把生态系统作为一个整体来对待,注重不同要素之间的协调并使其共同服务于整体目标;(2)针对性:根据生态系统的实际状况和具体特点,因地制宜,采取有针对性的保护措施;(3)区域性:根据生态系统自然状况划分管理区域,尽量覆盖所有对生态系统有直接影响的地区;(4)协调性:必须调动不同管理者的力量,公平分配利益,合理分担责任,确保利益相关者知情并积极参与;(5)科学性:以科学为基础进行决策和管理,尊重自然事实,遵循生态规律;(6)灵活性:根据环境状况的变化和前期治理的效果及时调整和不断修正和完善治理方案。

(三)生态系统方法与"区域海洋管理"

虽然从宽泛意义上来说,整个海洋都是一个大生态系统,因而"各海洋区域的种种问题都是彼此密切相关的,有必要作为一个整体来加以考虑"。[②]但过于庞大的范围将使综合管理和协调行动变动困难甚至不可能,因此,如何在自然系统的整体性和社会实践的可行性之间找到一个平衡点,对海洋作出恰当区划对海洋管理的有效性至关重要。1984年,美国生物海洋学家Kenneth·Sherman和Lewis·Alexander提出"大海洋生态系统"(Large Marine Ecosystem,LME)概念,主张从LME的角度保护海洋生物资源,[③]"为将海洋划分成有实际意义的以生态系统为基础的单位提供了科学的基础。"[④]尽管在实践中,LME仍显得面积过大且主要侧重于对生物资源的保护而具有一定局限性,[⑤]但依生态系统对海洋分区并进行综合管理的思想却受到广泛接受。"区域海洋管理"(Regional Marine Management,MMM)应运而生并成为海洋管理的新趋势。

"区域海洋管理是一种以生态系统为基础的管理方式,它通过综合考虑一个相对封闭的海洋生态系统中各种因素的相互作用,来实现对海洋和海岸资源的

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① 《海洋和海洋法——联合国秘书长2006年3月9日有关海洋问题的报告》(A/61/63+Add.1),下载于http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/265/86/PDF/N0626586.pdf?OpenElement,2010年11月1日。

② 《联合国海洋法公约》,序言。

③ SHERMAN K,Sustainability,Biomass Yields,and Health of Coastal Ecosystems:An Ecological Perspective,*Marine Ecolo-gy progress Series*,(112),1994:277-300.

④ 徐祥民、于铭:《区域海洋管理:美国海洋管理的新篇章》,载于《中州学刊》2009年第1期,第80页。

⑤ 欧文霞、杨圣云:《试论区域海洋生态系统管理是海洋综合管理的新发展》,载于《海洋开发与管理》2006年第4期,第92页。

可持续管理。”[①]其基本思路是根据海洋的自然属性差异将之划分为不同区域，从该海区生态系统的特点和整体保护需要出发，对各种有影响的人类活动加以综合协调和干预。随着海洋区划标准的不断丰富和细化，[②]区域海洋管理在实践中不断发展，目前已成为海洋管理领域落实生态系统方法的基本途径。例如，澳大利亚海洋管理的核心内容是《区域海洋规划》的实施，《加拿大海洋战略》的实施也是通过建立“大型海洋管理区”和“沿海管理区”来进行的。[③]美国则是“在全国范围内建立起了八个区域渔业委员会来管理全国的渔业资源，并尝试着以生态系统为基础对海洋资源进行管理。”[④]

二、基于生态系统方法的区域海洋法

（一）区域海洋法：海洋法实践生态系统方法的主要形式

“MMM”在海洋法中的反映，是那些以保护特定海区为目的的区域海洋法。区域海洋法的必要性在于面向通常情形的一般海洋法往往不能充分适应本海区生态系统的特点，难以形成对本海区生态系统的整体保护，因而需要通过特别立法加以专门保护。

由于海区常常与传统行政区划不一致，根据其覆盖范围的差异，可把区域海洋环境保护法分为两类：

一类是跨越国界的区域海洋法，主要表现为地区性海洋环境保护条约。目前国际上主要的区域海洋环境法共有 13 部，分别为针对北海的《奥斯陆巴黎公约》、针对波罗的海的《赫尔辛基公约》、针对地中海的《巴塞罗那公约》、针对海湾地区的《科威特公约》、针对西中非海的《阿比让公约》、针对东南太平洋的《利马公约》、针对红海和亚丁湾的《吉达公约》、针对加勒比海的《卡塔赫纳公约》、针对南太平洋的《努美阿公约》、针对黑海的《布加勒斯特公约》、针对东北太平洋的

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① 徐祥民、于铭：《区域海洋管理：美国海洋管理的新篇章》，载于《中州学刊》2009 年第 1 期，第 80 页。

② 例如，《海洋和海洋法——联合国秘书长 2006 年 3 月 9 日有关海洋问题的报告》（A/61/63＋ Add.1）中即提出了更加细致周到的划分标准：“应予考虑的因素包括：(a) 生物地理特征，如动物区系的构成及主要繁殖模式；(b) 海洋物理特征，如深度、盆地形态、潮流和洋流、温度，或是季节分层程度；(c) 海洋环境与陆地环境之间的联系，包括土地使用和分配模式及人口密度；(d) 捕鱼、采矿、航运等人类活动。”下载于 http://daccess－dds－ny.un.org/doc/UNDOC/GEN/N06/265/86/PDF/N0626586.pdf? OpenElement，2010 年 11 月 1 日。

③ 张海文等著：《渤海区域环境管理立法研究》，北京：海洋出版社 2009 年版，26—27 页。

④ 徐祥民、于铭：《区域海洋管理：美国海洋管理的新篇章》，载于《中州学刊》2009 年第 1 期，第 80 页。

《安提瓜公约》、针对里海的《保护里海海洋环境框架公约》。[①]

这些公约往往都明确指出,特别立法的原因在于"认识到本地区的水文和生态特性及其对污染的脆弱性",[②]而"现已有效的各种关于海洋污染的国际公约尽管取得了进展,但不能覆盖所有类型和来源的污染,也不能完全满足本地区国家的需要和要求",[③]因而"有必要对海洋和沿岸地区环境的利用采取综合管理的方法,从而以一种协调的形式实现环境和发展的目标。"[④]其主要内容在于打破国家疆域界限,根据本海区生态系统特点制定具有针对性的保护措施和统一行动策略,包括针对多种污染源进行防治、将防治范围拓宽至陆域和流域、进行长期环境监测和技术合作、执行具有区域性的综合防治计划等。[⑤]

另一类是国家内部的区域海洋法,也即保护内海中具有生态系统独立性的特定海区的法律。由于海洋生态系统通常覆盖面较广,具有生态独立性且完全位于一国境内的海区并不多见。据总部设在日本的"国际闭海环境管理中心"统计,世界上需要予以高度关注和特殊保护的海区级内海总共有6个,分别为美国的切萨比克湾、旧金山湾、加里福尼亚湾,加拿大的哈德逊湾,日本的濑户内海和中国的渤海。这些海区具有相对独立的完整生态系统,虽然在一国境内,但由于跨越省、州、府、市等行政区划,在协调各方力量进行综合治理方面仍有不少困难,也需要特别立法。其典型为日本的《濑户内海环境保护特别措施法》、美国治理切萨比克湾的《切萨比克湾协议》、治理旧金山湾的《McAteer Petris法案》等。

(二)《濑户内海特别措施保护法》中的生态系统方法分析

跨国界的区域海洋法属于国际海洋法的范畴。对于一国海洋治理而言,最具借鉴意义的当属内海海区法。在此方面,日本《濑户内海环境保护特别措施法》的成功经验值得学习。

濑户内海作为一个近乎封闭的海域,具有该类海区所普遍具有的生态独特性和脆弱性,同时,作为日本最大的内海和几乎为工业带所包围的超级海湾,[⑥]濑户内海承受着巨大的环境资源压力,环境一度严重恶化。[⑦]虽然日本早就制定了《环境基本法》、《水质污染防止法》、《海洋污染及海上灾害防止法》等法律,但实践证明,一般性的海洋环境保护法对濑户内海治理功效甚微。在不得已的情况下,日本于1973年专门颁布了《濑户内海环境保全临时措施法》,后发展成永

① 李海清:《特别法与渤海环境管理》,中国海洋大学2006年博士学位论文,第56～70页。
② 《卡塔赫纳公约》序言第2段。
③ 《利马公约》引言第四段。
④ 《科威特公约》引言第六段。
⑤ 李海清:《特别法与渤海环境管理》,中国海洋大学2006年博士学位论文,第78页。
⑥ "濑户内海沿岸是日本最大的新兴工业地区,已经成为全国五大工业地带之一。"张舒:《日本濑户内海工业区的工业布局与产业结构》,载《日本研究》,2004年第2期。
⑦ 详可参见宋德玲:《70—80年代日本懒户内海的公害治理》,载《日本学论坛》1999年第4期,第23～24页。

久性的《濑户内海环境保护特别措施法》，并辅之以配套规划。[①]经过十多年治理，到上世纪末期，濑户内海生态环境已获得很大恢复。

濑户内海治理的成功，有着多方面的原因，其中生态系统方法功不可没。虽然《濑户内海环境保护特别措施法》并不是明确的生态系统方法的产物，但其制度设计中很好地应用了该方法，通过前文所归纳的六大原则可以清楚地看到这一点：

(1)在综合性方面，该法把控制向水体排污、防止水体富营养化和自然海滨保护等事务加以统一规制，使其共同服务于濑户内海整体，并综合采取规划、审批、许可、环评、总量控制、行政指导、过渡措施、行政委托、劝告或建议等多种手段。(2)在针对性方面，该法对于前述影响濑户内海最大的三类事务加以重点规制，并根据地区实际制定了严格于一般法的“特别措施”，确保“因地制宜、有的放矢”，而且内容非常具体，可操作性很强。(3)在区域性方面，该法不仅详细界定了法律效力所及的海域范围，而且把沿岸府县的陆域也纳入进来。(4)在协调性方面，该法通过“基本规划”、“府县规划”对中央和地方之间的治理权责作出划分；通过授权环境厅长官对地方行政首长进行“劝告和建议权”的方式协调环保部门和地方政府的关系；通过“濑户内海环境审议会”协调不同部门之间的关系以及政府与专家的关系；该法还非常重视公共团体和公众的作用，在几乎每一项治理措施中都规定了信息公开制度和公众参与程序。(5)在科学性方面，该法根据濑户内海的环境容量推行排污总量控制制度，层层确定排放削减指标，以确保排污总量不超过生态阈值；建立了完善的环境监测系统和严格的环境监测制度；鼓励和资助水质污染净化、赤潮防治、油污处理等方面技术的改进。(6)在灵活性方面，该法从 1973 年的临时措施法到 1978 年的永久法，不断总结经验教训，进行调整和完善，至今已经过 6 次修改。

三、生态系统方法视野下我国海洋环境保护法的不足——以渤海治理为例

尽管我国《海洋环境保护法》早在 1982 年就提出了“保护生态平衡”的目标，[②]并专章规定了“海洋生态保护”，但总体而言，我国的海洋环境法并没有真正吸纳和运用“生态系统方法”。实践中起作用的，仍是依要素分类的、依地区分割的传统管理模式。这是我国海洋治理不力的症结所在。下面，本文试以渤海为例加以说明。

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① 分别为《濑户内海环境保护基本计划》及其变更方案和《兵库县沿岸地区环境保护方略》。

② 《海洋环境保护法》第 1 条。

(一)渤海及其治理概况

渤海是一个三面为陆地所包围的半封闭海。由于近乎封闭,渤海生态系统具有明显的独立性和完整性;海域内物种对原始环境高度依赖,生态系统抗干扰能力弱;渤海水体与外海水体交换速度缓慢,自净能力差,受河流作用和排污影响强烈。这些特征决定了渤海比一般海域更容易受到干扰和更需要受到保护。但与此同时,"环渤海"[①]地区又是我国重要的工业带,已形成了京津冀、辽东半岛、山东半岛三个产业聚集带,是国家着力发展的继珠江三角洲、长江三角洲之后的"经济第三极"。

生态系统脆弱而环境压力巨大,渤海情形与当年的濑户内海非常相似。自上世纪八十年代中期以来,渤海环境不断恶化,近岸海域严重污染,海岸带生境严重破坏,渔业资源严重衰竭,生物多样性大为降低,有变为"第二个死海"的危险。[②]

渤海危机引起国家高度重视,几任党和国家领导人都对渤海治理作出过重要批示。早在1986年,原国家环保总局即会同环渤海地区地方政府组成"渤海海洋环境保护协作组",编写了《环渤海地区海洋环境保护规划》。1999年,渤海被正式纳入全国环境保护"33211"重点工程"。[③]尤其是2001年10月1日,国务院批准实施《渤海碧海行动计划》,计划投资555亿元对渤海环境开展长期专项治理,对多个部委以及环渤海各省市政府都分配了任务。此外,相关部门还牵头制定了《渤海综合整治规划》、《渤海沿海资源管理行动计划》、《渤海环境管理战略》等治理规划。2001年,联合国开发规划署、全球环境基金、国际海事组织启动《建立东亚海环境保护及管理的伙伴关系——渤海示范区项目》。项目启动不久,国家海洋局与环渤海"三省一市"政府共同签署了《渤海环境保护宣言》,初步建立了国家部门与地方政府之间的合作伙伴关系。

在法律层面,上世纪九十年代以来,我国有关海洋环境保护的法律、法规和规章不断丰富和完善,环渤海地方政府也分别针对本区域内的海洋治理出台了大量地方法规、规章。据有学者统计,"目前渤海环境保护方面的配套法规、规章已达70多部。"[④]

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① "环渤海"地区,一般指"三省二市",包括辽宁省、河北省、山东省、天津市、北京市,共涉及大连、营口、盘锦、锦州、葫芦岛、唐山、秦皇岛、沧州、滨州、东营、潍坊、烟台、天津、北京14个城市。

② 周波等:《渤海污染现状与治理对策研究》,载于《中国环境管理干部学院学报》2006年第4期,第70页。

③ "33211工程"是"九五"期间,国家针对突出问题所抓的污染治理重点工程,分别是指"三河"(淮河、辽河、海河)、"三湖"(太湖、滇池、巢湖))"两控区"(二氧化硫污染控制区和酸雨控制区),"一市"(北京市)"一海"(渤海)。这里面除渤海(海域)外、辽河、海河、北京市也均属于"环渤海"地区,且是影响渤海的重要污染源。

④ 张海文等著:《渤海区域环境管理立法研究》,北京:海洋出版社2009年版,第106页。

但尽管如此，渤海治理成效甚微，环境状况依然严峻。2010 年 5 月 9 日发布的《2009 年渤海海洋环境公报》显示，渤海未达到清洁海域水质标准的海域面积依然较大，有 1/4 以上的海域海水环境受到不同程度的污染。[①]《2009 年全国海洋环境质量公报》也表明，辽东湾、渤海湾、莱州湾等渤海的重要部分，依然是全国污染最严重的海域之一。[②]

（二）生态系统方法视野下渤海治理的制度困境解析

1. 综合性缺失

现行涉及渤海治理的法律法规虽然很多，但非常零散，要么是全国通用的针对全国海洋普遍情形的国家法，要么是仅适用于特定地区的针对部分海域的地方法，没有跨地方的、从渤海生态系统整体出发的专门法。在这种法律架构下，“渤海”仅是一个地理概念，而不是一个法律概念。在治理实践中，渤海被人为“条块分割”，各种制度、举措之间也缺乏内在联系与互相配合，只有“多头治理”，难以“综合治理”：

从事项范围来看，渤海面临的主要问题有环境污染、海岸带生境破坏、入海淡水减少和生物多样性丧失四个方面。这些问题虽然内容不同，但相互联系，互相影响。例如，海洋污染和入海淡水“此消彼长”，如果入海淡水大量减少，海洋纳污能力也会降低，污染治理需要更加严格；而破坏海岸带生境的海岸工程，对海洋生物多样性的丧失构成直接威胁，并继而影响到渔业捕捞是否“过度”的问题；各类污染对生境破坏、生物多样性丧失的作用也非常直接。由此，对这些事务的管理应当有基于生态系统整体的综合考量和相互配合。但目前，对这些事项的规制散见于不同法律及诸法规、规章之中，缺乏统一考虑，制度内容往往限于该事项的最直接因素，属于典型的“头痛医头”。

从管理体制来看，我国现行以部门管理为主的海洋管理体制，划分很细。仅《海洋环境保护法》规定的涉海部门就有环保部门、海洋部门、海事部门、渔政部门、军队环保部门等，除此之外，农业、交通、林业、水利、规划、建设等部门也都和海洋治理密切相关。这导致海洋管理“区段”分明，“部门之见和各自为政的现象根深蒂固”。[③]以入海河流污染管理为例，陆域排放口至入河口由环保部门管理，入河口至入海口由水利部门管理，入海口以下海域则由海洋部门管理，水量与水质、河与岸、海与岸、普通港与渔港等，也都是分部门管理，以至于被戏称为“海洋部门不上岸、环保部门不下海、管排污的不管治理、管治理的管不了排污”。又

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① 《〈2009 渤海海洋环境公报〉发布》，下载于 http://news.163.com/10/0511/13/66DHQLUI000146BC.html，2011 年 11 月 3 日。

② 参见《国家海洋局发公报 09 年海洋环境质量仍不容乐观》，下载于 http://wap.sohu.com/news/china/hotnews/?nid=16&rid=NL223864775,ND270758231&pg=ND&lpn=1&v=2，2010 年 11 月 2 日。

③ 《渤海沿海资源行动计划》第 5 页第 5 段。

如,同为油污污染,如为海洋石油勘探所致则由海洋部门管理,船舶溢油污染则由海事部门管理,导致出现来源不明的油污事件时往往无人问津。

再次,从地方关系来看,环渤海地区行政区划复杂,地区分割严重。该地区涉及13个城市,跨越5个省级行政区。虽然多数地区制定了与渤海治理相关的地方法规或规章,但"各个省市往往各自为战,最终不能实现整体环境改善的效果。"[①]尤其在法律对地方政府环境责任规定不明、划分不清的情况下,地方政府从地方利益出发,往往具有更多地排污和使用资源的内在冲动,形成典型的"公地悲剧"。例如,陆源污染向来是渤海问题的重中之重,占到其污染总量的九成左右,[②]而陆源污染的直接管理者正是各级地方政府及其环保部门。也正因为此,经过多年治理,我们还是看到"陆源排放物超标现象依然严重。75%的监测排污口存在超标排放……在重点监测的排污口中,73%的排污口邻近海域水质不能满足海洋功能区要求"。[③]尤其值得注意的是,近年来,随着国家"环渤海经济圈"战略的日渐清晰,环渤海各省市摩拳擦掌、争先恐后,纷纷制定了以海洋开发为中心的经济计划或产业发展规划,试图挤上经济发展的快车道。但这些规划多数均以重化工业、加工制造、船舶码头等产业为主,且重复程度很高,缺乏从渤海环境整体出发的通盘考虑,更没有从生态角度与兄弟省市互相配合的科学布局,令人堪忧。

最后,虽然各类针对渤海治理的规划、计划或战略(以下简称"规划")具有一定的"全局性",但一方面,这些规划不具有法律效力,内容较笼统,执行力差。另一方面,更重要的是,即便这些规划,也由于是在不同部门的主持下制定而带具有强烈的部门色彩。"由农业部主持制定的《渤海沿海资源管理行动计划》侧重渔业资源;由国家环保总局主持制定的《渤海碧海行动计划》侧重陆源污染;由国家海洋局主持制定的《渤海综合整治规划》侧重海上的能力建设;在全球环境基金指导下制定的《渤海环境管理战略》侧重生态系统的保护。"[④]这种部门色彩,不仅使得这些规划不容易受到其它部门的充分配合而影响实施效率,而且其本身也难以保证渤海治理整体效果的最大化。

2.针对性缺失

目前我国的海洋环境保护法,只有针对全国普遍情况的一般法,和为配合一般法的具体实施而制定的地方法,没有根据海域生态特点制定的专门法,导致法律制度与渤海的生态特性不相适应:

在污染物总量控制方面,污染物排放总量大大超过其环境容量,是渤海面临

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① 刘元旭:《渤海"治污"为何越治理越恶化》,载于《今日国土》2006年第3期,第34页。

② 参见周波等:《渤海污染现状与治理对策研究》,载于《中国环境管理干部学院学报》2006年第4期,第72页。

③ 《〈2009渤海海洋环境公报〉发布》,下载于http://news.163.com/10/0511/13/66DHQLUI000146BC.html,2011年11月3日。

④ 李海清:《特别法与渤海环境管理》,中国海洋大学2006年博士学位论文,第108页。

的首要问题。渤海面积为7.7万平方公里，平均水深18米，环境容量十分有限，但却“年入海污水量28亿吨，占全国排海污水总量的32%；各类污染物质70多万吨，占全国入海污染物质总量的47.7%”。[①]对此，有专家发出警告：渤海的环境污染已到了临界点，如果再不采取果断措施遏止污染，渤海将在十年后变成“死海”。那时，即便不向渤海排入一滴污水，单靠其与外界水体交换恢复清洁，至少也需要二百年。[②]渤海环境容量的有限性决定了其必须实行总量控制。然而，《海洋环境保护法》第3条虽然对“重点海域排污总量控制制度”作出了笼统规定，但授权国务院制定的具体实施办法却一直没有出台，致使这一制度至今难以付诸实践。各类渤海治理规划中也都充分认识到这一制度的必要性并均作出了相应规定，[③]但囿于各方面原因，没有普遍实施。

在排污控制方面，渤海环境的现状及其生态脆弱性决定了其需要更加严格的排污控制，而这一点在目前法制下，也难以做到。一方面，污染物排放费用只有国家统一标准，且只计浓度不计总量，导致提高收费额度或依总量实行阶梯收费等更加严厉的举措难以实施。另一方面，污染物排放标准只有国家和省级两类，没有“中间”地带，导致环渤海诸省也难以对环海地区实行更加严格的或更有针对性的地方标准，因为其不得不考虑非环海地区的“全省普遍情况”。

在其它基本管理制度中，也存在类似问题。如“环境影响评价制度”、“海洋倾废制度”、“海域有偿使用制度”等对闭海、半闭海这类生态脆弱海域没有单独考虑和特别措施。“水体排污制度”对所有河流“一视同仁”，不考虑入海河水污染对海洋的危害；内海“捕捞许可证”凡市以上渔业部门均可发放，没有对渤海生物资源状况的特殊考虑，导致渔业资源枯竭，加剧生物多样性丧失。

3.区域覆盖面不够

海洋生态系统的复杂性体现在其虽然直接形态为海域，但受陆地的影响却非常巨大，从某种程度上说，八成以上的海洋问题都是陆地问题“酝酿”的结果。由此，有效的海洋治理离不开对相应“陆域”（也包括流域，以下皆同）的管理，需要“以海定陆、河海统筹、海陆一体”。但我国海洋环境法并没有很好地实现这一点。

首先，没有把流域纳入。海洋环境影响最大和最直接的莫过于入海河流，以河流为渠道的陆源污染物是渤海的主要污染源。但目前以《水污染防治法》为核心的水污染防治法律制度体系并没有考虑海洋因素，渤海的治理要求难以反映到河流管理中来。而以水资源的开发利用为核心的《水法》也没有任何制度保障

① 周波等：《渤海污染现状与治理对策研究》，载于《中国环境管理干部学院学报》2006年第4期，第70页。

② 周珂、吕霞：《关于制定渤海环境保护单行法必要性的思考》，载于《昆明理工大学学报（社会科学版）》2007年第3期，第2页。

③ 如《渤海沿海资源管理行动计划》、《渤海综合整治规划》《渤海碧海行动计划》均有相关规定，有些甚至提出实施时间表。

海洋的淡水需求。其次,对陆域的管辖范围过窄。目前法律规定的需要考虑对海洋的影响的陆域建设项目仅限于海岸工程和海洋工程,以海岸带附近为限。实际上,一些远离海岸的建设项目通过向水体或大气排污,对海洋的影响也很大,也需要统筹考虑。再次,对海洋管理具有重要意义的"海洋功能区划"的范围仅限于海岸线以外的海域,未把"陆地——流域——海域"作为整体考虑。而各类地方性法规,受行政区划的限制,更难以全面覆盖有影响的陆域。

4.协调性不足

海洋涉及管理部门和利益主体众多,海洋问题又复杂、综合,必须建立完善的协调机制和充分的利益表达机制,才能解决争议,形成合力。而现行立法只对特殊情形下的重大问题的协调作出了概括规定,[①]缺乏具体、可操作的常规协调机制。

在部门之间,缺乏有效的协调机制,不仅无法发挥"集团效应",有时还因权力争议造成内耗。首先,不同涉海部门之间没有常规性的"联动机制",难以及时交流信息,难以根据生态系统整体制定共同目标、合理分配任务以形成合力。其次,一些管理权限的"模糊地带"由于缺乏协调机制,长期得不到有效解决。如前述在入海河流的入海口区域的管理问题上,就长期存在水利部门和海洋部门之争;在出现原因复杂的油污污染时,海洋部门与海事部门又常出现管辖权争执。而对于那些具有综合性的问题(如赤潮),没有良好的协调机制几乎难以解决任何问题。再次,对于一些需要部门协作的事项,立法虽有所规定,但往往过于笼统,难以实践。例如,海岸工程和海洋工程的环境影响评价涉及环保、海事、海洋、渔业以及军队环保部门,法律要求审批部门在批准报告书之前要征求其它部门意见,原本很好,但规定过于笼统,缺乏可操作性,实效不佳。又如,在海洋倾倒区的设置上,法律规定海洋部门在选划海洋倾倒区和批准临时性海洋倾倒区之前,必须征求海事、渔业部门意见,但同样因缺乏具体的程序性规定而难以实施。

在地方之间,协调机制更加重要。对于环渤海各省市而言,渤海就是一个典型的"公地",没有对各地方责任、利益的明确界定和合理分配,地方政府在渤海治理上就难以形成合力,甚至产生恶性竞争。渤海治理之难,其根本原因实在于此。[②]这种责权利的界定和分配,仅靠上级政府的强令难以得到良好实施,[③]也难保证公平,而必须通过制度渠道为各地方表达意见、沟通协商、争取利益甚至依

① 《海洋环境保护法》第8条:跨区域的海洋环境保护工作,由有关沿海地方人民政府协商解决,或者由上级人民政府协调解决。跨部门的重大海洋环境保护工作,由国务院环境保护行政主管部门协调;协调未能解决的,由国务院作出决定。

② 如对渤海治理具有关键意义的污染物总量控制制度之难行,根本原因就在于地区污染物总量指标分配之难定;而地区指标分配之难定,根本原因在于其与地区经济利益的密切相关。

③ 否则仍难免虚与委蛇,正所谓"上有政策,下有对策"。

法博弈提供一个平台和机制。在各国区域海洋法中,如何把不同地区的行政首长联合起来进行有效协商向来是制度设计的重中之重,而我国法律在此方面,还未有任何制度性规定,可谓严重缺失。尤其需要注意的是,这里的协商,其内容并不限于甚至不主要是治理某海域的具体措施,[①]而更主要是对产业发展规划与布局、开发利用海洋资源的方式和收益分配、生态补偿等涉海经济性问题的协商。毕竟,对于海洋保护而言,后者才是根本原因。

另外,管理者与各种利益相关者(如海域使用权人、渔民、海岸工程建设者、排污或倾废者、普通公众)之间的协调机制也非常重要。没有与利益相关者的交流,难以保障措施的适度;没有对相关者利益的考虑和照顾,管理制度难免遭受抵制,难以得到顺利实施;而信息公开和公众参与,对于管理制度的有效实施而言,更是具有非同一般的重要意义。而目前,我国海洋法在此方面的规定几乎缺失,只有在鼓励检举和技术开发方面,有一些原则性规定。这直接导致在渤海治理中,我们几乎很难听到公众的声音,看到公众的影子。

5.科学性不足

生态系统方法要求利用环境科学技术和地理信息系统技术进行管理,我国在此方面,尚未有实践。尤其是,渤海的环境容量、纳污能力、生态系统状况的变化等重要因素,并没有与管理制度直接挂钩,也没有成为进行决策或追究责任的法定依据。

《海洋工程环境影响评价管理规定》把是否符合海洋功能区划作为环评文件审批所必须考虑的因素,这是可喜的一步,但还仅限于海洋工程,对于海岸工程及陆域相关项目的建设,尤其是对影响更大的规划环评,海洋功能区划没有作用。从2004年开始,我国开始在近岸海域建设生态监控区,监控总面积已超过5万平方公里,为以科学手段开展区域海洋管理提供了必要基础,[②]但总体尚处于探索阶段。尤其是,现在的监控还主要是一种科研性质的活动,没有明确的法律责任及相应制度举措相配合。

6.灵活性不足

《海洋环境保护法》于1982年制定,直至17年后,才进行了修订,而相关的配套法规并没有随之修订完善。新《海洋环境保护法》实施10年来,尚没有一部配套细则出台,一些重要的海洋环境标准仍是空白。而在治理渤海的地方性法规中,也很少见到根据实际运行情况进行修改、完善的情形。

不服务于生态整体、不“因地制宜”、不能覆盖全部影响区域、不能调动利益相关者广泛参与和协作、不严格依科学决策,不“与时俱进”,这是渤海治理不力

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① 《防治陆源污染物污染损害海洋环境管理条例》第21条,沿海相邻或者相向地区向同一海域排放陆源污染物的,由有关地方人民政府协商制定共同防治陆源污染物污染损害海洋环境的措施。

② 参见欧文霞、杨圣云:《试论区域海洋生态系统管理是海洋综合管理的新发展》,载于《海洋开发与管理》2006年第4期,第95页。

的制度根源,也是我国现行海洋环境法的根本缺陷之所在。

四、渤海治理的法律对策与我国海洋法变革

(一)特别立法:渤海治理的法律对策

对于渤海治理而言,最彻底、最有效,也几乎是唯一可行的方法,是通过单独立法,加以特别保护。

特别立法的必要性在于:第一,实现综合治理所必须。只有通过法律界定和制度构建,"渤海"才能从一个描述性的地理概念转化为规范性的法律概念,才能把被分散管理的各相关要素统合起来,打破体制藩篱和区划界限,共同服务于渤海生态这一整体目标。第二,实现特殊保护所必须。现行海洋法只针对一般情形,无法考虑局部海域的特殊情形,渤海的特别保护只能通过特别法实现。第三,便于制定具体、细致、操作性强的制度。对于复杂的海洋事务而言,没有操作性的制度往往形同虚设。而一般法面对全国情形,顾及地方差异,内容难以太过具体,特别法则可以轻松解决这一问题。第四,便于及时修改、灵活调整、不断完善。

特别法的适用范围,应在法律中明确为渤海海域及环渤海15城市的全部行政区域。这里的考虑是,一方面既要尽可能广泛地把对渤海具有直接影响的陆域纳入;另一方面,从管理实际出发,范围又不宜过大。同时,考虑到法律适用的统一和便利,市级区划内即使与渤海无关的地区(如个别区县)也应纳入。

特别法的主要内容是依据渤海生态系统整体保护的需要,对环渤海地区环境资源进行综合管理,以保护环境,维护生态,促进地区科学发展。因为环境保护与资源利用乃至整个海洋开发密不可分,故特别法不可避免地要涉及各类经济活动,以及科学研究活动,故以"渤海综合治理法"(以下简称"渤海法")之名为宜。

能否真正从生态整体出发进行综合管理是渤海治理的关键。在此方面,除须对目前管理体制中的模糊之处进行明确、不当之处进行调整之外,渤海法还必须建立以下两类机制:

一是设立"渤海环境资源委员会",作为渤海环境资源的最高决策机构、综合管理机构和议事协调机构,对渤海整体环境质量负总责,并全面调配渤海治理相关资源。委员会的主要职责包括:制定渤海治理的中长期规划和年度计划、从渤海生态角度审核各省市经济(产业)发展规划并提出意见、分配各地方政府治理渤海的具体任务并明确其环境责任、主导环渤海地区的生态补偿、监督检查渤海法的执行情况、根据实施情况对渤海法提出修改建议、组织环渤海地区生态环境监控与研究、以专项资助形式重点解决渤海治理中的突出问题等。由于要协调

各部门和各省市关系并履行部分监督职能，为保证权威性，该委员会应直属国务院，建议由主管生态环境的副总理或国务委员直接领导，[①]委员包括相关部委和环渤海地方省（市）的正职（或主管副职）领导人以及个别资深专家，环渤海各地市也应有相应代表列席。

二是设立“环渤海地区市长联席会议”，作为地方政府之间的常规性协调机制。该会议应建立每年不少于1次的例会制度，同时在面临重大问题时可召开临时会议。其主要内容包括：各市汇报本地区渤海治理的进展、交流渤海治理相关信息、指出渤海法实施中的问题、与其它地区或部门协商合作事宜、开展地区间排污权交易、提出有关地区间生态补偿的动议，尤其重要的是，对本地区拟定的经济计划或产业发展规划提交会议讨论，以使其它城市知情，并交流意见、听取建议。

渤海法的基本管理制度应包括：

第一，全面的污染物总量控制制度。种类应包括排海污染物、流域污染物及常规污染物（如船舶油污污染），总量应根据渤海环境容量和实际承载力制定，并根据产业结构、人口数量、城市定位、环境现状、区位生态特点等因素，按照尊重历史、照顾现状、考虑未来的原则，在整个涉海地区层层分配排污指标。其程序为：

“委员会——省（直辖市）——涉海市——区县——具体排污者”

在公平分配的基础上，还应辅以排污权交易制度。交易既可以在企业之间，也可以在地区政府之间。同时，还应把污染物总量削减水平作为考核各级政府治理绩效的重要指标。

第二，全面的环境监测制度，并以此为基础建立政府环境责任追究制度。应在各流域、各出海口、各排污口、生态脆弱区等关键区位建立完善的环境监测系统，准确掌握各区段主要环境指标的变化情况，依此确定并追究相关部门或相应地方政府的环境责任。

第三，严格、灵活的地方污染物排放制度。不仅要制定不同于全国的、针对渤海特点的、跨省级区划的“环渤海地区主要污染物排放标准”，而且还应进一步放权地市甚至区县级政府根据本地区生态特点、污染物总量和环境治理目标采取更加严厉和有针对性的措施，如禁止某种特定污染物的排放、降低浓度、提高收费标准等。

第四，全面的生态保护制度和功能区划制度。除依法设立的海洋自然保护区外，各类具有生态脆弱性和重要价值的海域也应受到相应程度的保护。应根据对渤海生态系统整体的意义，对不同海域作出不同层次、性质和功能的定位和划分，制定相应的保护策略。同时，应把陆地和经济社会发展情况综合起来制定

① 濑户内海的治理由内阁总理大臣亲自领导，详见《濑户内海环境保护特别措施法》第3条、第4条。

更为全面的“环渤海地区海洋功能区划”,作为各地区制定规划、发展产业、保护环境的重要参考,尤其是作为各类“环评”的重要依据。

第五,全面的生态补偿制度。渤海环境容量的有限性决定了环渤海各地区不可能全面发展工业,尤其是产值高、见效快的重化工业和规模小、投资少的初级工业;为了渤海的休养生息,一些地方的养殖业、捕捞业也要受到一定程度的限制。对于那些为渤海生态作出“牺牲”的地方和群体,必须要有合理补偿,才符合正义,才符合“使用者付费、受益者补偿”原则,也才能保证制度的良好执行。

第六,全面的信息公开和公众参与制度。海洋的广阔性和海洋问题的复杂性决定了公众参与的必要性,没有公众的积极参与和充分配合,仅靠行政强力,难有成效。同时,信息公开和公众参与也是防治制度“偏私”的良好手段。渤海法中的各项规划、计划、指标、制度都应当确保信息公开,并采取各种方式征求公众意见,尤其在决策涉及公众切身利益时,应有相应听证制度。还应出台具体措施,鼓励和支持民间环保组织在宣传教育、社会监督方面发挥积极作用,鼓励和资助科研院所和高校对渤海生态环境加强考察、研究。

(二)生态系统方法与我国“国内海洋法”重构

或许是因为海洋的面积过于广袤、资源过于富饶,长期以来,法律对海洋的关注主要集中于“主权归属”,以至于海洋法几乎成为“国际海洋法”的代名词。即使一国颁行的国内法,其首要任务也在于确定疆域。但随着全球海域“跑马占地”阶段的基本终结,如何科学管理、全面保护、高效利用已纳入本国主权范围内的海洋这一问题已变得越来越突出。尤其在全球环境资源危机大背景下,海洋生态的重要性与海洋资源的稀缺性日益凸显,以“保护与利用”为核心的“国内海洋法”必将崛起而撑起海洋法的半壁江山。

客观而论,近年来,随着海洋开发活动的发展和国家的重视,我国目前以《海洋环境保护法》、《海域使用管理法》、《渔业法》为核心,以其他环境资源相关法和各类配套法规、规章为补充的“国内海洋法”体系已隐然成型,在国家海洋管理中发挥着重要作用。但这一法律体系,总体而言,是只涉海不涉陆的“海域法”,是为管理体制和行政区划条块分割的“部门法”,是开发利用大于生态保护的“资源法”,是依靠行政强力而很少公众参与的“管理法”,是科学因素较少而领导意志较大的“主观法”,是“头疼医头”缺乏长远规划和协同行动的“对策法”。这一体系及其所构建出的我国整个海洋管理制度的弊端,在前述渤海治理中显露无遗,但问题绝不是仅对渤海而言的。事实上,我国海洋环境资源的全面告急,都与这一体制有着重要关系。这一状况,必须改变。

海纳百川,作为陆地污染的最终出口和汇集之地,海洋环境是全国环境状况

的风向标，海洋治理也应成为国家整个环境资源治理体系的源头和起点。[①]有鉴于海洋生态的整体性和特殊性，我国的国内海洋法，应逐步实现从分要素管理到整体统筹、从纯粹海域到“陆海一体”、从全国统一到因地制宜、从意志决策到依靠科学、从行政主导到公众参与、从注重法的“安定性”到强调管理的“适应性”的转变。为此，必须以“区域海洋综合治理法”为基本单元，重构我国的国内海洋法体系，实现全面的“区域海洋管理”，其基本思路为：

根据海洋生态系统特征，结合经济、政治、人文、历史等社会因素，把全国管辖海域划分为几个“海区”。[②]对于每一海区，以海域为基点，把具有直接影响的陆域省市纳入调整范围，进行综合治理，着重建设责任主体、协调机制和特色制度三个方面。虽然未必都专设“渤海环境资源委员会”那样的机构，但必须要有明确的“总负责人”，并建立地方间沟通协调机制，公平分配环境资源指标，层层落实治理任务，采取有针对性的治理措施。我国目前各项国家层面的海洋法，如《海洋环境保护法》，均为内容较抽象的、面向普遍情形的一般法，这为在不从根本上触动既有立法的前提下建设“海区法”体系提供了可能。当然，要真正实施这一战略，现行各类涉海立法也必须作出大量修改。

综上所述，未来我国的“国内海洋法”体系总体上应由一般法和海区法两部分构成，前者针对一般情形，奠定我国海洋管理的基本格局、制度框架和最低标准，内容较为原则、抽象，主要体现国家意志；后者针对具体海区，强调内容明确、责任具体和可操作性，并更多考虑地方实际，保证灵活性和调适空间。

结　语

在人类与自然关系空前紧张又无比紧密的21世纪，环境问题的系统性特征愈发明显：全球频发的气候灾难表明，在生态系统的整体失衡下任何个体、群体甚至国家均难独善其身，而我国国内的环境问题也越来越呈现出明显的“系统性”特征和“集群效应”。[③]环境问题的客观性和跨区域性决定了生态系统方法应

① 以水污染物为例，全国总体的水污染物排放不能超过海洋的可承载量，海洋的环境容量和纳污能力应成为国家对污染物进行总量控制的重要依据。

② 有学者提出“为了加强海洋环境恶化海区的综合治理，科学确定不同海域环境的保护与治理主攻方向，根据纬度、温度带、生物多样性及海洋环境特点以及滩涂、河口港湾及浅海的生境特点，将我国海域划分为渤海、黄海、东海、南海和台湾海峡5个海域进行环境保护和污染治理。（王淼等：《我国海洋环境污染的现状、成因与治理》，载于《中国海洋大学学报（社会科学版）》，2006年第5期，第1页。）或许划分标准和结论可以讨论，但思路总体可行。

③ 如水问题（污染和资源短缺）具有明显的流域性，以重要江河为典型体现；大气污染则具有明显的“城市集群性”，其中尤以珠三角、长三角、京津冀为重；而土地荒漠化则具有明显的地区性，以西北为甚。

用的必要性。

生态系统方法的核心思想其实很简单,无非就是尊重生态规律,从生态系统出发调整人类活动,从某种意义上,我们甚至可以将之视为"天人合一"、"道法自然"的现代版本和生态学表述。但是,我们又必须认识到,这一理念虽然美好而简单,付诸实践却并不容易。无论是打破行政区划和管理体制,还是跨地区进行事务协商和生态补偿,以及广泛的信息公开和公众参与,都对传统的政治制度、经济发展模式、社会运行方式和法秩序整体构成了根本性挑战。而作为一种主要从自然科学和管理论角度进行研究和表述的理论,生态系统方法要想转化为具有普遍实践性和利益分配性的法律制度,不仅需要高明的立法技术,还将面临复杂的立法博弈。另外,没有一系列社会条件的支撑,如发达的科技、雄厚的财力、良好的环境意识、浓厚的责任伦理氛围,再精巧的生态系统方法及制度设计也只是空中楼阁、镜花水月。所以,我们必须清醒地意识到,生态系统方法的法制化,不能一蹴而就,更不是简单地把保护生态系统的目标"写入"立法就能够完成的,[①]其必须要从具体制度着手,循序渐进,并且注定是一个长期过程。

渤海作为一个面积相对狭小、生态特性明显、产业相对集中、又在长期治理中形成了一些共识、合作机制和治理经验的海域,为我国"生态系统方法的法制化"或者说"法制的生态系统方法化"提供了难得的试验素材。如能以渤海治理为契机,从"渤海法"入手,真正开启我国海洋法的生态化之路,则不仅对于海洋治理意义重大,对于其它领域环境资源法的完善乃至整个生态文明的实现,都具有重要意义。

(责任编辑:吕 晖 刘文武)

① 如仅从法律表述来看,我国现行法律中不乏对生态的系统性保护的"规定"。如早在1982年的《海洋环境保护法》中,即提出了"保护生态平衡"的口号,但并没有贯穿、落实于制度,形同虚设。

The "Eco-system Approach"and the Innovation of Marine Environment Protection Law*

——A Case Study of Management in the Bohai Sea

Gong Gu**

Abstract: Environmental problems have the nature of systematics and objectivity. Therefore, efficacious management of environmental problems requires the breaking down of administrative divisions, the wide participation of all stakeholders based on the overall ecosystem, and the "adaptive administration" according to the environmental characteristics on the basis of science. This is the so-called "Eco-system Approach". The "Eco-system Approach" has already found wide application in marine management, which was directly reflected in the legislation of "Regional Law of the Sea" that aims at specialized and comprehensive protection of specific waters. From the perspective of the six practical principles of the Eco-system Approach, China's current marine protection law fails to implement this approach. This is where the institutional dilemma is for the management of the Bohai Sea, and the fundamental flaws of China's law of marine administration. In order to solve the management predicament of the Bohai Sea, it is necessary to draft "The Law of Comprehensive Management in the Bohai Sea". On the other hand, for an overall protection of China's inland sea, it is an advisable approach to reform the system on "The Law of Inland Sea" by the adoption of different marine zone laws.

Key Words: Eco-system Approach; Marine Management; The Bohai Sea; Reformation

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The significance and necessity of marine environmental protection is well known. Since the promulgation of China's Marine Environment Protection Law in 1982, a group of laws and norms have been progressively established which are based on it, supplemented by other laws related to the sea and environmental protection,[①] and affiliated by some regulations on individual activities or specific areas. A complex management network participated by numerous departments has also been established. At the same time, China has been attaching great attention to both policy and input. Unfortunately, the actual situation regarding marine management is far from satisfying. Worse still, a confusing phenomenon happens in certain sea areas where the environmental degradation is growing synchronously with management input. This forces people to reflect on whether there is something wrong with the fundamental ideas on marine management.

This article will first introduce the internationally popular "Eco-system Approach" (EA) which has obtained good results in the practice of management; then review the problems and defects of China's legal system of marine environment protection, from the EA perspective and using the example of the Bohai Sea; and finally present some recommendations for improvement. The present study shows that, according to EA, the enactment of different comprehensive special laws for different ocean zones is an effective way to deal with the marine management dilemma, and an inevitable trend of China's law of the sea in the context of constructing an ecological civilization.

Ⅰ. Eco-system Approach and Marine Management

A. The Origin of Eco-system Approach

Eco-system Approach is a strategy of managing environmental resources by a holistic approach, following ecological laws and using various means comprehensively on the basis of the specificity and integrity of ecosystem. It is "not a concrete means of eco-system management, but a strategy of managing ecosystems using comprehensively all kinds of methods to solve complex social, economical and ecological problems. It provides a frame of science and policy to apply the theories and methods of different disciplines to the practice of specific

① The laws mainly include Environment Protection Law, Law on the Administration of the Use of Sea Areas, Fisheries Law, Law on the Prevention and Control of Water Pollution, Water Law, Law on Soil and Water Conservation, Law on the Protection of Wild Life, Law on Environmental Impact Assessment, etc.

management."[①] This is "a comprehensive, science-based approach to the conservation and management of natural resources."[②] The emergence of EA is result of the inherent contradictions between the "naturalness" of ecological environments and the "sociality" of human activities, and product of humankind's further understanding of the management of environmental resources.

Humankind's knowledge about environmental problems has developed from simple to complex and from single to integration. In the early stage of environmental management, people were only aware of the separate problems of different types such as water pollution, air pollution, deforestation and species extinction. As a consequence, they adopted sporadic and piecemeal steps and used category administration management to handle problems. Accordingly, before the middle of 20th century, almost all environmental laws around the world appeared to be separate regulations aiming at the protection of certain resources or prevention of certain pollutions but without organic links to each other.[③] They were implemented by governments at different levels based on administrative divisions and authorities of different departments based on division of functions, showing no difference with the administrations of general social affairs.

With the deepening of these practices, the disadvantages of the traditional management mode by category administration arise gradually. The mode is hardly effective for the problems of environmental resources beyond the scope of administrative divisions and having a comprehensive target, such as the protection of vital lakes and rivers, wetland forests or biodiversity. People are becoming aware that the environmental problems are of an integral and systematic nature, and that "entirety does not simply equal to the sum of parts" for nature. Consequently, a new idea of administration has emerged that emphasizes the integrity of the eco-system and the comprehensiveness of managing means. This is what is called "Eco-system Approach".

The concept of EA was first initiated by the United States when it dealt

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① Zhou Yangming, Yu Xiubo, Yu Guirui. *Ecosystem Approach to Natural Resources and Ecosystem Management: Concept, Principle and Application*, *Advances in Earth Science*, vol. 2, 2007, p. 171.

② Oceans and the Law of the sea—Report of the Secretary—General on the problem of sea on 9 March 2006 (A/61/63), http://daccess—dds—ny. un. org/doc/UNDOC/GEN/N06/265/87/PDF/N0626587. pdf? OpenElement. 1 November 2010.

③ Cai Shouqiu, A Survey on the Development of the Integrated Ecosystem Management Law, *Journal of Political Science and Law*, vol. 3, 2006, p. 6.

with the problems in the Great Lakes Basin. In order to restore and maintain the physical, chemical, and biological integrity of the eco-system in the Great Lakes Basin, the US enacted The Great Lakes Water Quality Agreement in 1978, which provides the "Eco-system Approach". The Agreement deems it necessary that the Great Lakes Basin be regarded and managed comprehensively as an eco-system composed of elements interacting with each other, such as water, air, soil and organisms (human included). ① This notion received wide recognition and was thus extended to specific areas of environmental resources management. In the book *Ecosystem Management for Parks And Wilderness*, published in 1988 by the American scholars Agee and Johnson, the notion "Ecosystem Management" (EM) was put forward. The book elaborates the connotation of eco-system management from the following six aspects: an ecological concept of boundary, a clear emphasis on managing goals, cooperation among managers, monitoring effectiveness of the management, leading in the level of state policy, and public involvement. ② EM has become a popular theory in the field of resource management. ③ Practically, "Eco-system Management" and the later widely used "Ecosystem-based Management (EBM)", are the application and extension of the eco-system approach in different areas, has no essential difference with the "Eco-system Approach". ④ Therefore, this article will use them interchangeably.

Since the ocean is connected by flowing waters, the connection and interaction between ecological factors are closer, and thus the characteristics of a "systemic nature" are clearer. An eco-system approach, therefore, has larger room for application in marine areas. "[The] Ocean has provided more opportunities in carrying out ecosystem-based management than land." ⑤ The significance of eco-system approach for ocean management has been gaining more and more

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① Lee B. J, Regier H. A, Rapport D. J, Ten ecosystem approaches to the planning and management of the Great Lakes, *Journal of Great Lakes Research*, vol. 3, 1982, pp. 505～519.

② Agee J, Johnson D Eds, *Ecosystem Management for Parks and Wilderness*, Seattle: University of Washington Press. 1988, pp. 6～12.

③ *See* Yu Guiru. Outline of Scientific Issues and Developmental Trends of Ecosystem Management, *Resources Science*, vol. 6, 2001, p. 1.

④ Qiu Jun, Zhao Jingzhu, Deng Hongbing, Li Mingjie, Ecosystem-based Marine Management: Principles, Practices and Suggestions. *Marine Environmental Science*, vol. 1, 2008, p. 75.

⑤ Qiu Jun, Zhao Jingzhu, Deng Hongbing, Li Mingjie, Ecosystem-based Marine Management: Principles, Practices and Suggestions. *Marine Environmental Science*, vol. 1, 2008, p. 75.

recognition since the 1990s, so much so that some countries are trying to put it into practice. For example, Australia issued *Australia's Oceans Policy* in 1998, which expressly adopted Ecosystem-based Management. The Canadian government brought into force *Canada's Oceans Strategy* in 2002, whichalso proposed explicitly ecosystem-based measures of ocean management and protection. The U. S. issued *The Strategic Plan* 2003—2008 in 2003, *Ocean Blueprint for the 21st century and US Ocean Action Plan* in 2004, and *Scientific Consensus Statement on Marine Ecosystem-Based Management* in 2005. All of them attached great importance to the application of the eco-system approach in marine management. Both Norway and European Union also expressly adopted the eco-system approach in their ocean policies. ① It is worth noting that in *The Report on Oceans* submitted by the UN Secretary General during the 61st session of United Nations General Assembly on March 9th, 2006, "Ecosystem approaches and oceans" was listed as a specific chapter. The report stresses that the past "patchwork of legislation, policies, programs and management plans" "have not prevented a deterioration of ecosystem health", and thus the "more holistic, integrative and adaptive management approaches, based on scientific information" should be adopted. The report defined the connotation of the eco-system approach, carded and reviewed the relevant "Legal and policy framework at the global level" and implementation of relevant projects, and then summarized in detail the elements of the eco-system approach and the required capacity-building in developing this approach. ② It also provided an authoritative, definite, systematic guidance for the application of the eco-system approach in the global marine management, serving as an index for countries in marine management.

B. The Connotation and Principles of Implementation of Eco-system Approach

Being a new theory still undergoing research, the eco-system approach does not yet have an authoritative definition, but has been defined by different researchers from different angles. ③ Despite the differences in specific defini-

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① *See* Zhang Haiwen, Liu Yan, *Legislative Study on Regional Environmental Management of Bohai Sea*, Bei Jing: Ocean Press, 2009, pp. 26～27.

② *See* Oceans and the Law of the sea—Report of the Secretary—General on the problem of sea on March 9 2006 (A/61/63), http://daccess—dds—ny. un. org/doc/UNDOC/GEN/N06/265/87/PDF/N0626587. pdf? OpenElement, 1 November 2010.

③ Li Xiaochun, Cao Yejun, Ye Liguo, A Summary of the Ecosystem Management Studies, Journal of Inner Mongolia University (Philosophy and Social Sciences), vol. 4, 2009, pp. 88～89.

tions, scholars are in agreement on its basic connotation. It is generally believed that the core principles of the eco-system approach are: it regards the whole eco-system as the object of management; its core is the coordination and sustainable development between the ecosystem and socio-economic system; it requires a good understanding of the ecosystem itself and a comprehensive application of ecological, social, economical, political knowledge in the process of management; and it emphasizes collaboration and participation. ① These are the essential features that distinguish the eco-system approach from traditional ideas of environmental management and are also the developing direction of the second generation of environmental law in the background of ecological globalization.

The implementation of the eco-system approach is a kind of theory or strategy for actual practice and calls for a series of guidance of more specific practical principles. Relevant theories on this problem are also emerging one after another, among which the most significant and worthy of attention are as follows:

1. Principles provided in the *Convention on Biological Diversity* (CBD)

Twelve principles of applying the eco-system approach were adopted in the Fifth Ordinary Meeting of the Conference of the Parties to the *Convention on Biological Diversity* and were widely recognized later on. Although it was put forward for the conservation of biodiversity, "its contents comply with not only the conservation of biodiversity, but also all respects of management of natural resources and ecosystems". ② Thus they bear significance of universal guidance.

(1) The objectives of management of land, water and living resources are a matter of societal choice. (2) Management should be decentralized to the lowest appropriate level. (3) Ecosystem managers should consider the effects (actual or potential) of their activities on adjacent and other ecosystems. (4) Recognizing potential gains from management, there is usually a need to understand and manage the ecosystem in an economic context. Any such ecosystem-management programme should: (a) Reduce those market distortions that adversely affect biological diversity; (b) Align incentives to promote biodiversity conser-

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① *See* Lackey R. T, Seven pillars of ecosystem management, *Landscape and Urban Planning*, vol. 40, 1998, pp. 31～39.

② Zhou Yangming, Yu Xiubo, Yu Guirui. Ecosystem Approach to Natural Resources and Ecosystem Management: Concept, Principle and Application, *Advances in Earth Science*, vol. 2, 2007, p. 173.

vation and sustainable use;(c) Internalize costs and benefits in the given ecosystem to the extent feasible. (5) Conservation of ecosystem structure and functioning,in order to maintain ecosystem services,should be a priority target of the ecosystem approach. (6) Ecosystems must be managed within the limits of their functioning. (7) The ecosystem approach should be undertaken at the appropriate spatial and temporal scales. (8) Recognizing the varying temporal scales and lag-effects that characterize ecosystem processes,objectives for ecosystem management should be set for the long term. (9) Management must recognize that change is inevitable. (10) The ecosystem approach should seek the appropriate balance between,and integration of,conservation and use of biological diversity. (11) The ecosystem approach should consider all forms of relevant information,including scientific and indigenous and local knowledge, innovations and practices. (12) The ecosystem approach should involve all relevant sectors of society and scientific disciplines. ①

2. Principles in the *Scientific Consensus Statement on Marine Ecosystem-Based Management*

Scientific Consensus Statement on Marine Ecosystem-Based Management, which was jointly published by over 200 specialists from America in March, 2005,indicated that the fundamental solution to the present marine crisis is the ecosystem approach,and then it proposed the following nine principles:

(1) Make protecting and restoring marine ecosystems and all their services the primary focus. (2) Consider cumulative effects of different activities on the diversity and interactions of species. (3) Facilitate connectivity among and within marine ecosystems by accounting for the import and export of larvae, nutrients,and food. (4) Acknowledge the inherent uncertainties in ecosystem-based management,and levels of precaution should be proportional to the amount of information available. (5) Create complementary and coordinated policies over a range of spatial scales,and thus appropriate scales for management will be goal-specific. (6) Maintain historical levels of native biodiversity in ecosystems to provide resilience to both natural and human-induced changes. (7) Require evidence that an action will not cause undue harm to ecosystem functioning before allowing that action to proceed. (8) Develop multiple indicators to measure the status of ecosystem functioning,service provision and effective-

① COP 5 (Fifth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity). Decision Ⅴ/6, http://www.cbd.int/decision/cop/? id=7148, 1 November 2010.

ness of management efforts. (9) Involve all stakeholders through participatory governance that accounts for both local interests and those of the wider public. ①

3. Principles in the report "Oceans and Law of the Sea" by the Secretary General of United Nations

The tenth part of the "Eco-system Approach and Oceans" of the foregoing report "Oceans and Law of the Sea" elaborated in detail the eleven elements of the "developing eco-system approach":

(1) Identification of the geographical scope for the application of the eco-system approach. (2) Scientific research and analysis of the components of the ecosystem, their interaction and functioning. (3) Assessment of the condition of the ecosystem. (4) Establishment of ecological and operational objectives to maintain biodiversity, productivity, water quality and habitat quality in a given ecological region. (5) Identification of pressures and impacts on the ecosystems. (6) Selection of ecological indicators to ensure that ecological objectives are being met. (7) Analysis of existing legal framework and identification of gaps, overlaps and inconsistencies. (8) Management of human activities that affect or might affect the ecosystem. (9) Monitoring of natural changes in ecosystems and the effects of management measures through ecological indicators. (10) Adjustment of the management system, if necessary. (11) Management structures, transparency, awareness raising among the public and the involvement of all stakeholders, appropriate mechanisms for horizontal integration among different levels of Government and vertical integration among agencies with different mandates. ②

4. In summary, what the eco-system approach requires is a management mode that breaks the administrative divisions and institutional constraints, takes the eco-system as a whole, takes the whole environment as objective, makes full use of scientific knowledge, encourages participation by all stakeholders, and develops and perfects policies according to specific features of the environment. The main points of its implementation can be summarized into the following six concise principles:

(1) Comprehensiveness: to regard the eco-system as a whole, emphasize

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① *See* Zhang Haiwen, Liu Yan, *Legislative Study on Regional Environmental Management of Bohai Sea*, Bei Jing: Ocean Press, 2009, p. 21.

② Oceans and the Law of the sea-Report of the Secretary-General on the problem of sea on 9 March 2006 (A/61/50), http://daccess — dds — ny. un. org/doc/UNDOC/GEN/N06/265/87/PDF/N0626587. pdf? OpenElement, 1 November 2010.

the coordination of different elements, and ensure their common services for management objectives; (2) targetedness: to develop different policies and take protective measures for specific targets according to actual conditions and specific features of the eco-system; (3) regionalness: to divide management regions according to natural situations of eco-system and cover as much as possible all the regions that directly affect eco-system; (4) coordination: to mobilize the forces of different managers, distribute benefits fairly and share responsibilities reasonably among them, and ensure the awareness and involvement of stakeholders; (5) scientism: to make decision and exercise management on the basis of science, respect for natural facts and following ecological law; (6) flexibility: to regulate promptly, revise constantly and perfect management plans according to the change of environmental conditions and the effects of previous management.

C. Eco-system Approach and "Regional Marine Management (RMM)"

The world's water is, in a broad sense, a huge eco-system, so that "various kinds of problems in all marine areas are closely related to each other, and need to be considered as a whole". ① However, an ecosystem that is too broadly defined will make integrated management and coordinated action hard or even impossible. Therefore, it is vital for efficacious marine management to find a balance point between the integrity of natural systems and the feasibility of social practice, and to make an appropriate administrative division for the covered ocean. American biological oceanographers Kenneth Sherman and Lewis Alexander proposed a concept of "Large Marine Ecosystem (LME)" in 1984, and advocates to protect marine biological resources from the angle of LME. ② This concept "provides a scientific foundation for the division of oceans into units carrying a practical significance and based on eco-system." ③ Although LME has limitations in practice because it seems too large in area and is focused on the protection of biological resources, ④ the idea of differentiation and integrat-

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① Oceans and the Law of the sea-Report of the Secretary-General on the problem of sea on 9 March 2006 (A/61/50), http://daccess－dds－ny. un. org/doc/UNDOC/GEN/N06/265/87/PDF/N0626587. pdf? OpenElement, 1 November 2010.

② SHERMAN K, Sustainability, biomass yields, and health of coastal ecosystems: An ecological perspective, *Marine Ecolo-gy progress Series*, vol. 12, 1994, pp. 277～300.

③ Xu Xiangmin, Yu Ming, Regional Marine Management: New Era of American Marine Management, *Academic Journal of Zhongzhou*, vol. 2009, p. 80.

④ *See* Ou Wenxia, Yang Shengyun, Exploration on the Regional Marine ecosystem management is New Development of Comprehensive Ocean management, *Ocean Development and Management*, vol. 4, 2006, p. 92.

ed management of ocean eco-systems has been widely accepted since then. "Regional Marine Management (RMM)" came into being and developed into a new trend of marine management.

"Regional Marine Management is a management way based on eco-systems, which considers comprehensively the interactions between various elements within a relatively closed marine eco-system and achieves sustainable management of marine and coastal resources accordingly."[①] Its basic idea is to divide the oceans into several regions according to their natural differences, and exert comprehensive coordination and intervention on various kinds of influential human activities on the basis of the characteristics and necessity of overall protection of specific marine zones. Regional Marine Management has been developing in practice with the continuous enrichment and refinement of marine division criteria,[②] and is presently a basic approach to implementing the eco-system approach in the field of marine management. For instance, the core of Australian marine management is the implementation of the *Regional Marine Plan*, while the implementation of *Canadian Marine Strategy* is also through the establishment of "Large Ocean Management Area" and "Coastal Management District".[③] As for the United States, it "establishes eight regional commissions for fisheries in the whole nation to manage fishery resources, and tries to exert management on marine resources based on the eco-system."[④]

Ⅱ. Regional Law of the Sea based on the Eco-system Approach

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① Xu Xiangmin, Yu Ming, Regional Marine Management: New Era of American Marine Management, *Academic Journal of Zhongzhou*, vol. 1, 2009, p. 80.

② For example, Oceans and the Law of the sea-Report of the Secretary-General on the problem of sea on March 9 2006 (A/61/63+ Add. 1) proposed four detailed criteria: "The geographic span of management should reflect ecological characteristics and should encompass both the marine and the terrestrial components of the coastal zone. Factors to take into account include: (a) biogeographic characteristics, such as the composition of faunal communities and patterns of primary production; (b) physical oceanographic characteristics, such as depths, basin morphology, tidal and ocean currents, temperature, or degree of seasonal stratification; (c) links between the marine and terrestrial environment, including patterns of land use and distribution and density of human populations; and (d) human activities, including fisheries, mineral extraction and shipping."

③ *See* Zhang Haiwen, Liu Yan, *Legislative Study on Regional Environmental Management of Bohai Sea*, Bei Jing: Ocean Press, 2009, pp. 26～27.

④ Xu Xiangmin, Yu Ming. Regional Marine Management: New Era of American Marine Management. *Academic Journal of Zhongzhou*, vol. 1, 2009, p. 80.

A. Regional Law of the Sea

RMM is reflected those Regional Laws of the Sea which protect particular sea districts. Regional Law of the Sea is necessary because the Law of the Sea which focuses on the general circumstances will not be able to meet the special characteristic of the eco-system of a local sea district. Since it is difficult to use the Law of the Sea to protect the eco-system of sea districts in general, it is necessary to pass special legislation in order to provide special protection to the sea district.

A sea district is usually not the same as the traditional administrative district. Depending on the difference of the covering areas, Regional Marine Environmental Protection Law may have two categories:

The first category is cross border regional law of the sea. They can be found in regional marine environmental protection treaties. Internationally, there are thirteen important regional marine environmental law. The Oslo-Paris Convention focusing on the North Sea, the Helsinki Convention for the Baltic Sea, the Barcelona Convention for the Mediterranean Sea, the Kuwait Convention for the Persian Gulf area, the Abidjan Convention for the West African Sea, the Lima Convention for the South-east Pacific, the Jeddah Convention for the Red Sea and the Gulf of Aden, the Cartagena Convention for the Caribbean Sea, the Nournea Convention for the South Pacific, the Bucharest Convention for the Black Sea, the Antigua Convention for North-east Pacific and the Framework Convention for the Caspian Sea. ①

Usually, these conventions will clearly state that the reason for the special legislation is because of "the special character of the environment, the hydrology and the friability to pollution". ②"Although progress has been made through those effective international conventions concerning ocean pollution, they cannot cover all types and sources of pollutions and cannot fully satisfy the needs and the requests of the countries in the district". ③

Another category is the regional law of the sea within a state. This is legislation to protect specific sea district in inland water which has independent ecosystem. Since ocean eco-systems cover a very large area, a sea district with an independent eco-system completely within one state is rare. According to the worldwide survey of the International Closed Marine Environmental Manage-

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① *See* Li Haiqing, *Special Law and Bohai Sea Environmental Management*, Doctoral Thesis 2006 of Ocean University of China, pp. 56～70.

② Cartagena Convention, Preface, para. 2.

③ Lima Convention, Preface, para. 4.

ment Center in Japan, there are six inland waters in sea districts which are of high concern and require special protection. They are Chesapeake Bay, San Francisco Bay and California Bay in the USA, Hudson Bay in Canada, the Seto Naikai in Japan and the Bohai Sea in China. These sea districts have independent and complete eco-systems. Although they are within a particular state, they are usually inter-province, county, city etc. There are many difficulties in co-ordination of different authorities in management. Special legislations are usually required. Typical examples are the Seto Inland Sea Environmental Protection Special Measures Law in Japan, the Chesapeake Bay Agreement and the McAteer Petris Act for the San Francisco Bay in the USA.

B. Analyzing the Seto Inland Sea Environmental Protection Special Measures Law in Ecosystem

Cross border regional law of the sea is part of the international law of the sea. For the management of the sea within a state, the law of inland sea districts is more relevant. The successful experience of Japan in the Seto Inland Sea Environmental Protection Special Measures Law can be a good reference.

The Seto Inland Sea is a nearly closed sea. It has an independent and fragile ecosystem similar to the surrounding sea district. Moreover, it is the largest inland sea in Japan and almost surrounded by industrial zones. It is of great environmental value and was seriously deteriorated. Although Japan had enacted the Environmental Basic Law, the Water Pollution Control Act, the Marine Pollution and Marine Disaster Prevention Law, they were of little effect in the management of the Seto Inland Sea. In 1973, Japan enacted the Seto Inland Sea Environmental Conservation Provisional Measures Law. It later became the Seto Inland Sea Environmental Protection Special Measures Law. There are also several supplemental plans, such as the Seto Inland Sea Environmental Basic Plan and the Hyogo Prefecture Coastal Areas of Environmental Protection Strategy. After more than a decade of protection, the ecosystem of the Seto Inland Sea has recovered.

There are many reasons for the success of the management of the Seto Inland Sea. Among them is the ecosystem method. Although the Seto Inland Sea Environmental Protection Special Measures Law is not a clear product of the ecosystem method, the design of its system has well applied the method. It can be observed through the 6 principles mentioned above:

(1) In general, the Seto Law has unified the regulation of controlling the discharge of contaminants into the sea, the prevention of the eutrophication and the protection of the natural seashore. This is to ensure that businesses are ser-

ving the Seto Inland Sea as a whole and to plan, approve, allow, assess the environment, control the volume, administratively supervise, apply temporary measures, assign agents, persuade or give suggestions in general. (2) In the focusing aspect, the Seto Law focuses on the control of the three businesses which affect the Seto Inland Sea the most and the contents are very practical. (3) In regards to the geographical outline of the district, the Seto Law not only defines the sea district but also the landed areas of the coastal counties. (4) For coordination, through basic planning and the house county planning, the Seto Law divides the management rights and responsibilities of the central and the local authorities. The Environment Council has been set up to carry out the coordination. (5) In its scientific aspect, the Seto Law has set up a good environmental monitoring system and also a system to encourage the cleaning of the water and the handling of oil pollution. (6) Regarding flexibility, the Seto Law has been continuously reviewed and amended. It has been revised six times.

Ⅲ. The Lack of Ocean Environmental Protection Law using the Ecosystem Method in China

—the case of the management of the Bohai Sea

China had its Ocean Environmental Protection Law enacted in 1982 and there is a chapter on "ocean bio protection". However, it has not adopted and applied the ecosystem method. The practical functions are classified according to elements and districts. The traditional management model is being used. This is a drawback of current Chinese ocean management. The case of the Bohai Sea is used as for explanation.

A. The Bohai Sea and Its Management

The Bohai Sea is surrounded by land on three sides. Since it is nearly enclosed, its ecosystem is obviously independent and complete. The species inside the sea district are highly dependent on the original environment. The defense of the ecosystem is very weak. The exchange of the water between the Bohai Sea and the external sea is slow; this leads to limited self-cleaning power. It is highly affected by pollution and the current. These characteristics show that the Bohai Sea is easily affected and requires better protection. However, the Circum-Bohai Sea Area is an important industrial zone. Industrial areas have been developed in Beijing, Tianjin, Hebei, the Liaodong Peninsula, and the Shandong Peninsula. This has become the "third pole" of the economy.

The present situation of the Bohai Sea is very similar to that of the Seto

Inland Sea in the past because the ecosystem is fragile and the environmental pressures are high. Since the mid—1980s, the environment in the Bohai Sea has been continuously deteriorating. The coastal sea district has been seriously polluted, the bio-environment along the coast has been seriously damaged, fishing resources have been seriously reduced, and it in danger of becoming the second Dead Sea. ①

The risk to the Bohai Sea has drawn the attention of the Chinese government. As early as 1986, the Marine Environmental Protection Plan of the Circum-Bohai Sea Area was set up. In 1999, the Bohai Sea was included into the key projects of the 33211 national environment protection. ② On 1st October 2001, the State Council approved and implemented the Bohai Blue Sea Action Plan. The investment was 55 billion RMB. Moreover, other organizations have set up the Bohai Comprehensive Treatment Plan, the Action Plan for the Bohai Sea Coastal Resource Management and the Bohai Sea Environmental Management Strategy. In 2001, the United Nations Environment Program, the Global Environment Facility, and the International Maritime Organization jointly set up the Establishment of the East-Asia Sea Environmental Protection and Management of Partnerships: Demonstration Area Project of Bohai. Soon after that project, the National Ocean Bureau and the local authorities surrounding Bohai Sea signed the Bohai Sea Environmental Declaration to establish the partnership relationship between the central government and the local government.

Since the 1990s, many laws, regulations and orders concerning the protection of the oceanic environment were announced. The local governments in the Circum-Bohai Sea Area have also published many local laws and regulations. According to a survey, more than 70 laws and regulations regarding the protection of the environment of the Bohai Sea have been announced. ③

Despite these efforts, the management of the Bohai Sea has not been very successful. The environmental problems are still serious. According to the Bulletin of the Marine Protection of the Bohai Sea 2009, 1/4 of the sea environ-

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① Zhou Bo, Wen Jianping and Zhang Yanyan, Research on Current Pollution and Management Strategy of Bohai, *Journal of EMCC*, vol. 4, 2006, p. 70.

② "33211 Project" is the pollution control project for solving the important environmental problem in China during "the Ninth Five-Year Plan". It refers to "Three Rivers"(Huaihe, Liaohe, Haihe), "Three Lakes"(Taihu, Dianchi, Chaohu), "Two Areas"(Sulfur dioxide pollution control areas and Acid Rain Control areas), "One City"(Beijing), "One Sea"(Bohai). Besides Bohai, Liaohe, Haihe, Beijing belongs to the Circum-Bohai Sea area.

③ Zhang Haiwen and Liu Yan, *Legislative Study on Regional Environmental Management of Bohai Sea*, Beijing: Ocean Press, 2009, p. 106.

ment in the sea district was polluted.[①] The National Marine Environment Quality Bulletin 2009 also shows that important parts of the Bohai Sea including Liaodong Bay, Bohai Bay and Laizhou Bay were some of the most polluted sea districts in China.

B. Reasons for the Bad Management System in Bohai Sea under the Ecosystem Method

1. Lack of Comprehensive Arrangements

Although there are many laws and regulations on the management of the Bohai Sea, they are not concentrated. Some of them are national laws and focus on the sea in China in general. Some of them are local laws and focus on particular area of the sea district. There is no special law which crosses provinces and deals with the ecosystem as a whole in the Bohai Sea. Under this legal framework, the Bohai Sea is only a geographical term and not a legal concept. From the management side, the Bohai Sea has been divided into strips, which are governed under different systems. There are different heads of management and there is no comprehensive management.

The four main problems of the Bohai Sea are pollution, damage to the bio environment, reduction of fresh water flowing into the sea, and the loss of biological diversity. Although the contents of these problems are not the same, they are co-related and affect each other. For example, ocean pollution and fresh water entering the sea are co-related. If fresh water has been greatly reduced, the ability of the sea to withstand pollution will be reduced. Thus, the management of these problems should be based on a comprehensive view of the ecosystem as a whole. However, the control on these problems is found in different laws and regulations. There is a lack of total coordination.

From the aspect of management systems, the marine management system in China is based on different administrative organs. In the Marine Environment Protection Law, those departments which deal with marine matters include the environmental department, marine department, maritime department, fishery department, military environmental department. Moreover, departments in agriculture, transportation, forestry, water resources, planning and construction also have close relationships with marine management. The result is that the marine management is clearly divided into "sections". Each department will take

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① *See* The published of the Bulletin of the marine environment of Bohai Sea, at http://news.163.com/10/0511/13/66DHQLUI000146BC.html, 3 November 2010.

care of its own business. ① Take the management of pollution from river to sea as an example. The environmental department manages the discharge from land to the headwaters of the river. From the headwaters to the entrance to the sea, it is managed by the water resources department. From the entrance of the sea and further, it is managed by the marine department. The marine department will not manage the land and the environmental department will not manage the sea. Another example is oil pollution. Oil pollution from drilling is managed by the marine department. Oil pollution from vessels is managed by the maritime department. When the source of oil pollution is not known, no one will take care of that.

China's environmental protection regime also fails to properly create strong local relationships; the administrative divisions in the Circum-Bohai Sea Area are complicated and seriously divided. The Area involves 13 cities in 5 provincial districts. "Every city or province works on its own. This cannot fulfill the effect of environmental improvement as a whole." ② When the law has not been well defined the environmental responsibility of a local government, it will be guided by the local interests. There will be conflict between pollutant discharges from land and using of resources. For example, pollute discharge from land which carries 90% of the amount of pollution has always been a serious problem of Bohai Sea. ③ However, local governments and their environmental departments are the organizations to manage and control pollutant discharge from land. Because of this reason, we can still, after many years of management, see that "in 2009, the over standard discharge from the places of pollutant discharge along the coast of Bohai Sea is serious. From the controlled places of pollutant discharge, more than 75% are discharging over their limit." ④ In recent years, after the clear strategy of the economy circle in the Circum-Bohai Sea Area, all cities and provinces in that area are making economic plans based on marine development. However, these plans mainly involve the heavy chemical industry, manufacturing, and shipping terminals and the redundancy is high. It is a lack of planning regarding the Bohai Sea as a whole and

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① Bohai Blue Sea Action Plan, p. 5, para. 5.

② Liu Yuanxu, Why is the Pollution Control Getting Worse, *China Territory Today*, vol. Z3, 2006, p. 34.

③ *See* Zhou Bo, Wen Jianping and Zhang Yanyan, Research on Current Pollution and Management Strategy of Bohai, *Journal of EMCC*, vol. 4, 2006, p. 72

④ *See* The Published of the Bulletin of the Marine Environment of Bohai Sea, at http://news.163.com/10/0511/13/66DHQLUI000146BC.html, 3 November 2010.

not based on the ecosystem. All of the cities and provinces are not working together in a scientific way.

Many kinds of plans or strategies have considered Bohai Sea as a whole, but they are not legally binding. Their contents are too general and the implementation is weak. Moreover, they are drafted by different departments and all of them are looking after their own interests. The Action Plan for the Bohai Sea Coastal Resource Management which has been drafted by the Agricultural Department focuses mainly on fishery. The Bohai Blue Sea Action Plan which has been drafted by the National Environment Bureau focuses on the discharge of land contaminators. The Bohai Comprehensive Treatment Plan which has been drafted by the National Marine Bureau focuses on marine constructions. ① This kind of planning does not have the necessary interdepartmental cooperation. Thus, the scope of implementation is affected and most efforts fail to help the Bohai Sea as a whole.

2. Lack of Direction

The current Marine Environment Protection Law in China is describes a basic framework for environmental protection and there are specific local laws to supplement the general rules. There is no specific provision regarding the special ecosystem of sea districts. Thus, the legal system does not suit the special needs of the ecosystem in the Bohai Sea.

Regarding control of the total volume of contaminants, the biggest problem in the Bohai Sea is that the discharged volume of contaminants is much larger than the ecosystem's capacity to handle it. The area of the Bohai Sea is 77,000 square kilometers and the average depth is 18 meters, this limits environmental capacity to handle contaminants. It can only take 47.7% of the total volume of contaminants which are currently going into the sea. ② Experts have warned that if decisive measures are not taken to control the contaminants, the Bohai Sea will become a dead sea within 10 years. ③ By that time, even if no more contaminants are added into the Bohai Sea, it will take 200 years for external water to clean and flush out the dirty water. Thus, the total volume of

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① Li Haiqing, *Special Law and Bohai Sea Environmental Management*, Doctoral Thesis 2006 of Ocean University of China, p. 108.

② Zhou Bo, Wen Jianping and Zhang Yanyan, Research on Current Pollution and Management Strategy of Bohai, *Journal of EMCC*, vol. 4, 2006, p. 70.

③ Zhou Ke and Lu Xia. The Thought of the Necessity of Legislation of the Environment Protection Law over Bohai Sea, *Journal of Kunming University of Science and Technology*, vol. 4, 2007, p. 2.

contaminants must be controlled. Although Article 3 of the Marine Environmental Protection Law has provided in general for a control system of the total volume of contaminants in key sea districts, the State Council has not yet announced any particular implementing rules. As a result, the system has not yet been put into force. Since such a system is important, all other plans of the Bohai Sea have relevant regulations. But due to various reasons, the regulations are not implemented in general.

The legal system is not able to handle the discharge of contaminants any better. First, there is only a uniform charge for the discharge of contaminants. The charge is based on the concentration, not the total volume. It is therefore not possible to raise charges based on the total volume. Second, there are only national and provincial standards for the discharge of contaminators; there are no mid-level standards. Therefore, the Bohai Sea area is not able to have any standard or local standard focused on the seriousness of the problem.

There are similar problems in other basic systems of management; such as environmental assessment, the dumpling of rubbish into the sea, or the payment system for the use of the sea district. They have not specially considered the fragile ecosystem and any special measures for the closed sea or semi-closed sea. Water sewage systems have not properly planned for river contaminants which are harmful to the sea. Fishing permits in inland waters have not considered the biological resources of the Bohai Sea. Thus, the resources of fishery and its biological diversity are reducing.

3. Not enough coverage of area

Marine ecosystems are complicated because they are seriously affected by land. From a certain point of view, 80% of the marine problems derive from the land. Thus, effective treatment of the sea cannot be done without control of the co-related land area. In China, the Marine Environment Protection Law has not put this into practice.

First, no rivers have been included. The current Law on the Prevention and Control of Water Pollution has not considered this important marine element. The treatment of the Bohai Sea has not been reflected to the management of rivers. The Water Law which focuses on the development of water resources does not have any system to protect the ocean from polluted fresh water. Secondly, the land area under control is too narrow. The current law only considers coastal constructions and ocean constructions from land as projects which will affect the sea. In fact, even construction projects which are far from the sea or contaminations through the atmosphere can have great effects on the ocean.

Moreover, divisions of the ocean based on their functions are important in the management of the sea. The planning has to be as a whole "from land to river to sea". All kinds of local laws which are limited by administrative districts cannot have large enough coverage to include the land.

4. Insufficient co-operation

Many different authorities and interested parties are involved in the ocean. Since marine problems are complicated and comprehensive, a coordination organization and a mechanism to express interests and concerns should be set up to resolve disputes and join forces together. The current legislations only have general rules to coordinate for serious problems. There is a lack of a workable and practical coordination organization.

The lack of effective coordination among different authorities prevents pooling resources and from time to time there may also be power struggles. First, different authorities dealing with the sea do not have a long term joint operations scheme. Information cannot be exchanged timely. Forces cannot be joined together to target the ecosystem as a whole. Secondly, the grey area of responsibilities has not been clarified because of the lack of coordination. For example, there are frequent disputes between the marine department and the water resources department on the management of the area where rivers are entering the sea. When there is oil pollution, there are frequent disputes between the marine department and the maritime department for jurisdiction. For some comprehensive matters, such as the red tide, problems are almost impossible to solve because there is no coordination. Some legislation may have regulations on co-ordination among departments. However, they are usually too general and difficult to apply. For example, the environmental assessments of coastal constructions and maritime constructions involving the authorities of environment, maritime, ocean, fishery and military etc. Relevant law requires the approving department to request for comments from other departments. Although this is a good rule, it is too general and difficult to apply.

Among different local authorities, coordination is even more important. To all cities and provinces in the Circum-Bohai Sea Area, the Bohai Sea is a "public place". The responsibilities and interests of all local authorities are not clear. They will not join hands together. On the contrary, they may fight against each other. For example, it is very difficult to calculate the total volume of contaminants discharging into the sea, because it is difficult to decide and share the area index of the total volume of contaminants due to close relationships with local economic interests. To share and define the right cannot rely on the orders only

from the superiors. This cannot ensure fairness. It is better to invite all local authorities to express their views, negotiate and coordinate. The law may set up a scheme or platform to carry out this task. In China, there is no law in this area. The most important purpose of coordination is to plan the development of industries, to share the interests and use of the marine resources, to carry out biological compensation etc.

It is also important to coordinate between the administrator and the interested parties, e. g. the users of the sea district, fishermen, the coastal construction engineers, and the general public. Without the exchange of information among the interested parties, it is difficult to ensure the suitability of the measures. A management system that fails to consider the interests of the relevant parties will be boycotted. But, if the information is open and the public are invited to join, these are important to a successful management system. The current Ocean Law in China lacks provisions to have the involvement of the public.

5. Lack of scientific support

The ecosystem method requires the use of environmental scientific technology and geographical information technology to assist in management. China has not yet put this into practice. There is no direct connection between the management system and the essential elements of the Bohai Sea, such as its environmental capacity, the capacity to dissolve contamination, the change of the ecosystem etc. These elements also have not been used as the legal data for decision making and tracing of liability.

The Environmental Impact Assessment of Marine Engineering Regulations is asking whether it fits into the marine functional zoning as one of the considerations in the environmental assessment. However, it is limited to marine engineering only. The marine functional zoning will not be used in the assessment of coastal constructions and land constructions. Since 2004, biological monitoring areas have been set up in coastal sea districts and the monitoring area covers more than 50,000 square kilometers. This has provided a necessary and scientific measure to develop the management of the marine district. [①] But, this is in its early stage.

6. Lack of flexibility

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① *See* Ou Wenxia and Yang Shengyun, Exploration on the Regional Marine ecosystem management is New Development of Comprehensive Ocean management, *Ocean Development and Management*, vol. 4, 2006, p. 95.

The Marine Environment Protection Law was enacted in 1982. In 1999, after seventeen years, it was revised. However, the relevant regulations and rules were not revised at the same time. The new Marine Environment Protection Law has been in force for ten years, and there is not even the announcement of one set of regulations. It is still lacking in standards for marine environments. Local laws on the treatment of the Bohai Sea are rarely revised according to the actual operations.

The reasons that the treatment of the Bohai Sea is not doing well are: failure to serve the ecosystem as a whole, failure to focus on local problems, inability to cover all the affected areas, lack of coordination and participation with all interested parties, decisions not based on science, and failure to change with the times. These are also the weaknesses of the current marine protection law in China.

Ⅳ. Legal Strategy for The Bohai Sea Management and the Evolving Ocean Law of Our Country

A. Special Legislation: Legal Strategy for the Bohai Sea Management

For the management of the Bohai Sea, the most effective or even the only feasible step is to implement special legislation for special protection. The necessity of the legislation lies in:

First: the necessity of comprehensive control. Only by legal definition and the construction of an administrative system can we turn the descriptive concept of the "Bohai Sea" to a normative legal concept, and combine the related elements of decentralized management. Together with breaking bureaucratic and regional restrictions, the unique goal of a healthier Bohai ecological environment can be achieved. Second: the necessity for realization of special protection. The existing ocean law aims at general cases and thus cannot handle special situations in a local sea areas. The protection of the Bohai Sea can only be realized by special legislation. Third: formulating a concrete, detailed, operational system. The system would not function well in dealing with complex marine affairs without a strong operational scheme. The ordinary law is too comprehensive to take regional differences into consideration, but special legislation can easily solve this problem. Fourth: the convenience for timely amendment, adjustment, and improving the special legislation.

The special law application should cover the Bohai Sea area and the surrounding administrative areas of the fifteen cities. While the terrestrial area in-

cluded should be large, given limited management capabilities, it should not be too large.

When it comes to the unified and convenient application of the law, some prefectures under the municipal regionalization should also be included, although unrelated to the Bohai Sea.

The content of the special law is to provide integrated management on the environmental resources of the circum-Bohai Sea area according to the need of the overall Bohai Sea ecosystem. This should be done in order to protect the environment, keep its ecological balance, and promote the scientific development of the region. Because environmental protection and resource utilization interweave with marine development, the special law is inevitably involved in all kinds of economic and scientific activities, it is appropriate to name the special law "the integrated management law of the Bohai Sea" (hereinafter referred to as the "Bohai law").

The key point of the Bohai management is whether the administration starts from an integrated ecosystem perspective. Therefore, except for the clarification of ambiguity and adjustment of the impropriety in the present management system, the Bohai law should establish two kinds of mechanisms:

First, the "Bohai Sea Environment Resources Committee" needs to be established as the highest policy-making body. It should be an integrating management organization and its deliberation as well as coordination should be responsible for the overall environmental quality of the Bohai Sea and full scale deployment of administrative resources. The main responsibility of the Committee includes: working out a medium-and a long-term plan and annual planning of the Bohai Sea governance; examining economic (industrial) development planning of relevant provincial cities and offering opinions from the ecological perspective of the Bohai Sea; allocating the specific tasks and environment responsibility of Bohai management to the respective local governments; leading ecological compensation for the circum-Bohai area; supervision and inspection of the Bohai Law implementation; suggesting amendments of the Bohai Law according to its implementation; organizing ecological environment monitoring and research of the Bohai area; and solving the outstanding problems of Bohai management by special funds. To guarantee authoritativeness in the coordinative function and supervision between departments and each provincial city, the committee should be under the direct control of the State Council or directly under the leadership of the vice premier or state councilor in charge of

the ecological environment. ① The Committee members should include leaders or deputy leaders from the circum-Bohai area and relevant ministries and experts. The relevant prefectures and cities should send their representatives to sit in on the Committee meeting.

Second, setting up a "Joint meeting of the Mayors in the Circum-Bohai Sea area" as a regular coordinative mechanism between local governments is required. The session should establish a regular meeting system which requires at least one meeting per year, and ad hoc meetings may be held when serious problems occur. The contents of the session include: reports from relevant cities on the improvement of the Bohai management; exchanging information on management; finding out problems on the implementation of the Bohai Law; coordinating the emission trading and ecological compensation with other regions or departments; and lastly, each region should submit its economic and industrial development plan to the session for discussion with other cities for further suggestions.

The basic management system of the Bohai Law should include:

First: a full-scale system for controlling aggregate pollutants. Categories include land-sourced pollutants, drainage basin pollutants and regular pollutants (e. g. shipping oil pollution). The total quantity should be determined by the Bohai Sea's environmental capacity, and actual loading capability with distributed emission quotas in the Bohai region at all levels. The quotas will be based on factors such as industrial structure, population, city size, current environmental status and regional ecological characteristics. The principles are to respect history, to take maintain the status quo and to consider the future so that the pollution discharge may be allocated for all levels in the entire region. The procedure is in this order: "council — provinces (municipalities directly under the central government) — cities related to the Bohai Sea — prefectures and counties — discharger"

On the basis of fair distribution supplemented by the pollutant emission trading system, the trading could be undertaken between enterprises and regional governments. At the same time, the pollutant reduction quantity should be taken as an important index of management effectiveness for governments of all levels.

Second: a full-scale environmental monitoring system. Based on this sys-

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① The Seto Island Sea management was directly in the charge of prime minister, In: *Special Measures to Environmental Protection of the Seto Island Sea*, art. 3, 4.

tem, a government environmental accountability system should be established. A sophisticated environmental monitoring system must be set up at the key spots, e. g. drainage areas, estuaries of rivers, sewage outlets, and ecologically fragile regions, in order to accurately monitor the changes of environmental indices in every district. These are based for evaluation of the responsibilities of relevant departments or regional governments.

Third: a strict, yet flexible local pollutant discharge system. It is not only necessary to establish a "standard for major pollutant discharge in the circum-Bohai region" that is different from national one but adjustable to the characteristics of the circum-Bohai region and across the provincial regions, but also mandatory to release authority to cities or prefectures based on local ecology characteristics, pollutant quantity and environmental management goal which may be achieved by more restricted and specific actions, such as prohibiting discharge of some particular pollutants, lowering pollutant concentration and raising charges, etc.

Fourth: a full-scale ecological protection system with functional districts. Except for lawfully established marine conservations, areas of fragile ecology should be protected properly. Based on the integrated circum-Bohai ecological system, a protection strategy is to be established for different sea areas at different levels with characteristic features and functions. At the same time, terrestrial and socio-economic development should be combined to consider and formulate a more comprehensive "circum-Bohai area marine functioning zone" as an important reference for each district to conduct planning, develop industries and protect the environment, especially as references for environmental assessment.

Fifth: a full-scale ecological compensation system. The limitations of the Bohai Sea's environmental capacity made it impossible for the circum-Bohai districts to develop their industries to a larger extent, especially high value and quick yield industries like heavy chemical industries and small-scale, low-investment and low-level industries. Aquatic farming and fishing industries should be limited to a certain extent for rehabilitation of the Bohai Sea. Only by reasonable compensation for those who "sacrificed" for the Bohai ecology can a good implementation of the system be guaranteed, and the principle of "users pay, beneficiaries compensate" can be executed.

Sixth: a full-scale information disclosure and a public participation system. The broadness of the ocean and complexity of marine problems determine the necessity of public participation. Without active participation and sufficient co-

operation from the public, administrative enforcement will be ineffectual. Information disclosure and public participation are also good tactics for the prevention of injustices. Each planning, program, index and quota system of the Bohai Law must ensure the disclosure of information, and solicit public opinions. A public hearing system is needed when the policy decision affects public interests. Concrete measures should be put forward to encourage and support environmental NGOs to play an active role in propaganda, education, and public supervision, and also to encourage and support research institutes and universities to study the Bohai ecological environment.

B. Ecosystem Method and Restructure of Internal Law of the Sea of Our Country

Perhaps due to the vastness of ocean areas and their abundant resources, the law has focused on sovereignty for a long time, and ocean law has become a synonym for "International Ocean Law". Even the primary function of the internal law promulgation in a country is to preserve its national borders. But as the sea area had been occupied by nations, problems such as scientific management, full-scale protection, and efficient utilization have become more and more serious within the context of oceanic sovereignty issues. Especially against the background of international environmental resource crises, the importance of marine ecology and the scarcity of marine resources have become increasingly apparent. Nations' "Internal Ocean Laws" have become indispensible parts of ocean law with "protection and utilization" as core values.

Objectively, with growing marine development activities in recent years and the attention of the central government, an internal ocean law system is gradually taking shape. This consists of the Marine Environment Protection Law of the People's Republic of China, Maritime Space Use and Administration Law of the People's Republic of China, Fisheries Law of the People's Republic of China as its core and supplemented by other environmental laws and related regulations or relevant rules. This system plays an important role in national marine management. But in general it is: a "Marine Space Law" with no regard to territorial affairs; a "Department Law" compartmentalized by management system and administrative regionalization; a "Resource Law" focusing more on exploitation and utilization rather than ecological protection; an "Administrative Law" mostly relying on administrative enforcement rather than public participation; a "Subjective Law" characteristic of less scientific elements but more bureaucratic determinations; and a "Countermeasure Law" with no long-term programming or cooperative action. The drawbacks of the system have been totally exposed in the Bohai Sea management as previously mentioned. The prob-

lem is not just for the Bohai Sea, in fact, the grave situation of national environmental resources is closely tied to the system, and this situation must be changed.

All rivers run into the sea, where terrestrial pollutants ultimately exit and accumulate. The marine environment is like the weather vane of national environmental conditions, and thus marine management should serve as the starting point for national environmental resources management systems. ① Based on the integrity and particularity of marine ecology, the internal ocean law of our country should be phased over from elements management to comprehensive coordination, from marine management to marine-terrestrial management, from a unanimous procedure to the one adaptive local conditions, from decision-making by responsible leaders to science-oriented decision-making, from executive charge to public participation, from emphasis on the legal certainty to administrative adaptability. Therefore, we must reconstruct the internal ocean law system of our country on the basis of the "Regional Marine Comprehensive Administrative Law" to achieve a full-scale "Regional Marine Management". The basic ideas are:

Based on the characteristics of a particular marine ecological system and combined social factors such as economics, politics, humanities, and history, the national marine jurisdiction can be divided into several "maritime spaces". ② Each space is based on the sea area and the provinces and cities with direct influence are brought into adjusting range for comprehensive administration focusing on three aspects: liability subjects, coordinative mechanism, and specially established units. Special units such as the "Bohai Environment and Resources Commission" are not necessary for each area, but the responsible person must be specified and a regional communicating and coordinating mechanism is es-

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① To take water pollutant for an example, the whole national water pollutant discharge can not exceed the ocean capacity, the marine environmental and receiving ability should be considered as an important index for national pollutant total control.

② Some scholars mooted "in order to strengthen comprehensive management of deteriorating marine environment, determine focusing point of protection and management of different marine environment, and carry out environment protection and pollution management by dividing marine areas into Bohai Sea, Yellow Sea, East China Sea, South China Sea and Taiwan Straits according to characteristics of latitude, temperature band, biodiversity, marine environment and biological features of tidal-flat area, estuary, shallow sea." *See* Wang Miao and so forth, The Status Quo, Origin and Control of China's Maritime Environmental Pollution, *Journal of Ocean University of China* (*Social Sciences Edition*), vol. 5, 2006, p. 1. Maybe the standard and conclusion should be deliberated, but the conception is feasible.

tablished to distribute environmental resources quota fairly. Management tasks are implemented at every level, with specific management measures. The present ocean laws at the national level, e. g. Marine Environment Protection Law of the People's Republic of China, are common law in dealing with abstract and general situations, and also provide feasibility for establishment of a "Sea Area Law" system without influencing existing legislation. Of course, to implement this strategy, the present marine-related laws and regulations in force must be significantly amended.

To sum up, the future internal ocean law system of our country should be composed of basic lawand the maritime space law, with the former focusing on general situations, thus forming a basic pattern, an institutional framework, and minimum standard of national marine management. The contents of the basic law should be more in principle and abstract, mainly embodying the state's will while the maritime space law aims at a specific sea areas, emphasizing the specification of contents, responsibility and feasibility, taking more practical situation of the local into consideration to ensure flexibility and space for adjustment.

Epilogue

In the 21st century when the relation between man and nature reaches a situation of unprecedented tension and cooperation, systematic environmental problems have become more and more apparent. Frequent global climatic disasters indicate that when the whole ecological system is out of balance, there's no single person, group or country that can survive. The environmental problems of our country assume a distinct feature of systematics and domino effects. ① The objectivity of environmental problems and their trans-regional nature determine the necessity of using methods of an ecological systems management scheme.

The linchpin of ecological administration is nothing but respecting the law of ecology, and adjusting human activities from an ecological perspective. It could even be properly seen as modern vision of "Harmony of Man with Na-

① For instance the water problem (pollution and scarcity) possess obvious basin features, and typically represented by main rivers; the air pollution bears an obviousness of "urban concentration" clustered in the Pearl river delta, Yangtse delta region and Beijing, Tianjin and Hebei region; the land desertification found mainly in northwest regions.

ture", "Taoistic Thought Emulates Nature" and ecological expression in a certain way. But at the same time we should bear in mind that it's easier said than done. Either dismantling administrative regionalization and management systems, or trans-regional coordination on ecological compensation and far reaching information disclosure with public participation, it constitutes a challenge to traditional political systems, economic development models, social functioning ways and the order of law. But on the basis of research and theory mainly from natural science and management perspectives, the ecological system administration requires not only skillful legislative techniques, but also complicated processes of legislation in order to convert to a legislative system of universal practice and profit allocation. Also, without the support of a series of social conditions such as developed scientific technology, powerful financial support, cultivated environmental consciousness, and strong conscientious ethical spirits, any ecological system management and the system design will be in vain. Thus we must be conscious that legalization of ecological management can not be accomplished in a single step. We cannot realize the objective of ecological protection by simply legislating it into law. ① The legislation is destined to be a long-term process and so we must advance gradually within specific systems.

As a sea area of relatively limited proportion with distinct ecological characteristics and relatively concentrated industries, the Bohai Sea has achieved consensuses, cooperation mechanism and management experiences in long-term management, providing precious reference materials for "Ecological System Management Legislation", or perhaps "Implementation of Legislative Ecological System Management". If we could initiate the ecological management implementation of national ocean law by making an opportunity of the Bohai administration, it is of significant importance not only for the marine management but also for the improvement of environmental resource law of other fields or even the realization of an entire ecologically friendly civilization.

(Editors: Stephen Pire; LV Hui; LIU Bin)

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① Judging from legislative expression, there's no lack of systematic ecological protection regulations in present legal system. Like the 1982 Marine Environment Protection Law of the People's Republic of China proposed slogan "protect ecological balance", but it didn't implement system, performed practically no function.

中华人民共和国主席令第二十二号

《中华人民共和国海岛保护法》已由中华人民共和国第十一届全国人民代表大会常务委员会第十二次会议于2009年12月26日通过，现予公布，自2010年3月1日起施行。

中华人民共和国主席　胡锦涛

2009年12月26日

中华人民共和国海岛保护法

（2009年12月26日第十一届全国人民代表大会常务委员会第十二次会议通过）

第一章　总　则

第一条　为了保护海岛及其周边海域生态系统，合理开发利用海岛自然资源，维护国家海洋权益，促进经济社会可持续发展，制定本法。

第二条　从事中华人民共和国所属海岛的保护、开发利用及相关管理活动，适用本法。

本法所称海岛，是指四面环海水并在高潮时高于水面的自然形成的陆地区域，包括有居民海岛和无居民海岛。

本法所称海岛保护，是指海岛及其周边海域生态系统保护，无居民海岛自然资源保护和特殊用途海岛保护。

第三条　国家对海岛实行科学规划、保护优先、合理开发、永续利用的原则。

国务院和沿海地方各级人民政府应当将海岛保护和合理开发利用纳入国民经济和社会发展规划，采取有效措施，加强对海岛的保护和管理，防止海岛及其周边海域生态系统遭受破坏。

第四条　无居民海岛属于国家所有，国务院代表国家行使无居民海岛所有

权。

第五条 国务院海洋主管部门和国务院其他有关部门依照法律和国务院规定的职责分工,负责全国有居民海岛及其周边海域生态保护工作。沿海县级以上地方人民政府海洋主管部门和其他有关部门按照各自的职责,负责本行政区域内有居民海岛及其周边海域生态保护工作。

国务院海洋主管部门负责全国无居民海岛保护和开发利用的管理工作。沿海县级以上地方人民政府海洋主管部门负责本行政区域内无居民海岛保护和开发利用管理的有关工作。

第六条 海岛的名称,由国家地名管理机构和国务院海洋主管部门按照国务院有关规定确定和发布。

沿海县级以上地方人民政府应当按照国家规定,在需要设置海岛名称标志的海岛设置海岛名称标志。

禁止损毁或者擅自移动海岛名称标志。

第七条 国务院和沿海地方各级人民政府应当加强对海岛保护的宣传教育工作,增强公民的海岛保护意识,并对在海岛保护以及有关科学研究工作中做出显著成绩的单位和个人予以奖励。

任何单位和个人都有遵守海岛保护法律的义务,并有权向海洋主管部门或者其他有关部门举报违反海岛保护法律、破坏海岛生态的行为。

第二章 海岛保护规划

第八条 国家实行海岛保护规划制度。海岛保护规划是从事海岛保护、利用活动的依据。

制定海岛保护规划应当遵循有利于保护和改善海岛及其周边海域生态系统,促进海岛经济社会可持续发展的原则。

海岛保护规划报送审批前,应当征求有关专家和公众的意见,经批准后应当及时向社会公布。但是,涉及国家秘密的除外。

第九条 国务院海洋主管部门会同本级人民政府有关部门、军事机关,依据国民经济和社会发展规划、全国海洋功能区划,组织编制全国海岛保护规划,报国务院审批。

全国海岛保护规划应当按照海岛的区位、自然资源、环境等自然属性及保护、利用状况,确定海岛分类保护的原则和可利用的无居民海岛,以及需要重点修复的海岛等。

全国海岛保护规划应当与全国城镇体系规划和全国土地利用总体规划相衔接。

第十条 沿海省、自治区人民政府海洋主管部门会同本级人民政府有关部

门、军事机关，依据全国海岛保护规划、省域城镇体系规划和省、自治区土地利用总体规划，组织编制省域海岛保护规划，报省、自治区人民政府审批，并报国务院备案。

沿海直辖市人民政府组织编制的城市总体规划，应当包括本行政区域内海岛保护专项规划。

省域海岛保护规划和直辖市海岛保护专项规划，应当规定海岛分类保护的具体措施。

第十一条 省、自治区人民政府根据实际情况，可以要求本行政区域内的沿海城市、县、镇人民政府组织编制海岛保护专项规划，并纳入城市总体规划、镇总体规划；可以要求沿海县人民政府组织编制县域海岛保护规划。

沿海城市、镇海岛保护专项规划和县域海岛保护规划，应当符合全国海岛保护规划和省域海岛保护规划。

编制沿海城市、镇海岛保护专项规划，应当征求上一级人民政府海洋主管部门的意见。

县域海岛保护规划报省、自治区人民政府审批，并报国务院海洋主管部门备案。

第十二条 沿海县级人民政府可以组织编制全国海岛保护规划确定的可利用无居民海岛的保护和利用规划。

第十三条 修改海岛保护规划，应当依照本法第九条、第十条、第十一条规定的审批程序报经批准。

第十四条 国家建立完善海岛统计调查制度。国务院海洋主管部门会同有关部门拟定海岛综合统计调查计划，依法经批准后组织实施，并发布海岛统计调查公报。

第十五条 国家建立海岛管理信息系统，开展海岛自然资源的调查评估，对海岛的保护与利用等状况实施监视、监测。

第三章 海岛的保护

第一节 一般规定

第十六条 国务院和沿海地方各级人民政府应当采取措施，保护海岛的自然资源、自然景观以及历史、人文遗迹。

禁止改变自然保护区内海岛的海岸线。禁止采挖、破坏珊瑚和珊瑚礁。禁止砍伐海岛周边海域的红树林。

第十七条 国家保护海岛植被，促进海岛淡水资源的涵养；支持有居民海岛淡水储存、海水淡化和岛外淡水引入工程设施的建设。

第十八条 国家支持利用海岛开展科学研究活动。在海岛从事科学研究活动不得造成海岛及其周边海域生态系统破坏。

第十九条 国家开展海岛物种登记,依法保护和管理海岛生物物种。

第二十条 国家支持在海岛建立可再生能源开发利用、生态建设等实验基地。

第二十一条 国家安排海岛保护专项资金,用于海岛的保护、生态修复和科学研究活动。

第二十二条 国家保护设置在海岛的军事设施,禁止破坏、危害军事设施的行为。

国家保护依法设置在海岛的助航导航、测量、气象观测、海洋监测和地震监测等公益设施,禁止损毁或者擅自移动,妨碍其正常使用。

第二节 有居民海岛生态系统的保护

第二十三条 有居民海岛的开发、建设应当遵守有关城乡规划、环境保护、土地管理、海域使用管理、水资源和森林保护等法律、法规的规定,保护海岛及其周边海域生态系统。

第二十四条 有居民海岛的开发、建设应当对海岛土地资源、水资源及能源状况进行调查评估,依法进行环境影响评价。海岛的开发、建设不得超出海岛的环境容量。新建、改建、扩建建设项目,必须符合海岛主要污染物排放、建设用地和用水总量控制指标的要求。

有居民海岛的开发、建设应当优先采用风能、海洋能、太阳能等可再生能源和雨水集蓄、海水淡化、污水再生利用等技术。

有居民海岛及其周边海域应当划定禁止开发、限制开发区域,并采取措施保护海岛生物栖息地,防止海岛植被退化和生物多样性降低。

第二十五条 在有居民海岛进行工程建设,应当坚持先规划后建设、生态保护设施优先建设或者与工程项目同步建设的原则。

进行工程建设造成生态破坏的,应当负责修复;无力修复的,由县级以上人民政府责令停止建设,并可以指定有关部门组织修复,修复费用由造成生态破坏的单位、个人承担。

第二十六条 严格限制在有居民海岛沙滩建造建筑物或者设施;确需建造的,应当依照有关城乡规划、土地管理、环境保护等法律、法规的规定执行。未经依法批准在有居民海岛沙滩建造的建筑物或者设施,对海岛及其周边海域生态系统造成严重破坏的,应当依法拆除。

严格限制在有居民海岛沙滩采挖海砂;确需采挖的,应当依照有关海域使用管理、矿产资源的法律、法规的规定执行。

第二十七条 严格限制填海、围海等改变有居民海岛海岸线的行为,严格限制填海连岛工程建设;确需填海、围海改变海岛海岸线,或者填海连岛的,项目申

请人应当提交项目论证报告、经批准的环境影响评价报告等申请文件，依照《中华人民共和国海域使用管理法》的规定报经批准。

本法施行前在有居民海岛建设的填海连岛工程，对海岛及其周边海域生态系统造成严重破坏的，由海岛所在省、自治区、直辖市人民政府海洋主管部门会同本级人民政府有关部门制定生态修复方案，报本级人民政府批准后组织实施。

第三节 无居民海岛的保护

第二十八条 未经批准利用的无居民海岛，应当维持现状；禁止采石、挖海砂、采伐林木以及进行生产、建设、旅游等活动。

第二十九条 严格限制在无居民海岛采集生物和非生物样本；因教学、科学研究确需采集的，应当报经海岛所在县级以上地方人民政府海洋主管部门批准。

第三十条 从事全国海岛保护规划确定的可利用无居民海岛的开发利用活动，应当遵守可利用无居民海岛保护和利用规划，采取严格的生态保护措施，避免造成海岛及其周边海域生态系统破坏。

开发利用前款规定的可利用无居民海岛，应当向省、自治区、直辖市人民政府海洋主管部门提出申请，并提交项目论证报告、开发利用具体方案等申请文件，由海洋主管部门组织有关部门和专家审查，提出审查意见，报省、自治区、直辖市人民政府审批。

无居民海岛的开发利用涉及利用特殊用途海岛，或者确需填海连岛以及其他严重改变海岛自然地形、地貌的，由国务院审批。

无居民海岛开发利用审查批准的具体办法，由国务院规定。

第三十一条 经批准开发利用无居民海岛的，应当依法缴纳使用金。但是，因国防、公务、教学、防灾减灾、非经营性公用基础设施建设和基础测绘、气象观测等公益事业使用无居民海岛的除外。

无居民海岛使用金征收使用管理办法，由国务院财政部门会同国务院海洋主管部门规定。

第三十二条 经批准在可利用无居民海岛建造建筑物或者设施，应当按照可利用无居民海岛保护和利用规划限制建筑物、设施的建设总量、高度以及与海岸线的距离，使其与周围植被和景观相协调。

第三十三条 无居民海岛利用过程中产生的废水，应当按照规定进行处理和排放。

无居民海岛利用过程中产生的固体废物，应当按照规定进行无害化处理、处置，禁止在无居民海岛弃置或者向其周边海域倾倒。

第三十四条 临时性利用无居民海岛的，不得在所利用的海岛建造永久性建筑物或者设施。

第三十五条 在依法确定为开展旅游活动的可利用无居民海岛及其周边海域，不得建造居民定居场所，不得从事生产性养殖活动；已经存在生产性养殖活

动的,应当在编制可利用无居民海岛保护和利用规划中确定相应的污染防治措施。

第四节 特殊用途海岛的保护

第三十六条 国家对领海基点所在海岛、国防用途海岛、海洋自然保护区内的海岛等具有特殊用途或者特殊保护价值的海岛,实行特别保护。

第三十七条 领海基点所在的海岛,应当由海岛所在省、自治区、直辖市人民政府划定保护范围,报国务院海洋主管部门备案。领海基点及其保护范围周边应当设置明显标志。

禁止在领海基点保护范围内进行工程建设以及其他可能改变该区域地形、地貌的活动。确需进行以保护领海基点为目的的工程建设的,应当经过科学论证,报国务院海洋主管部门同意后依法办理审批手续。

禁止损毁或者擅自移动领海基点标志。

县级以上人民政府海洋主管部门应当按照国家规定,对领海基点所在海岛及其周边海域生态系统实施监视、监测。

任何单位和个人都有保护海岛领海基点的义务。发现领海基点以及领海基点保护范围内的地形、地貌受到破坏的,应当及时向当地人民政府或者海洋主管部门报告。

第三十八条 禁止破坏国防用途无居民海岛的自然地形、地貌和有居民海岛国防用途区域及其周边的地形、地貌。

禁止将国防用途无居民海岛用于与国防无关的目的。国防用途终止时,经军事机关批准后,应当将海岛及其有关生态保护的资料等一并移交该海岛所在省、自治区、直辖市人民政府。

第三十九条 国务院、国务院有关部门和沿海省、自治区、直辖市人民政府,根据海岛自然资源、自然景观以及历史、人文遗迹保护的需要,对具有特殊保护价值的海岛及其周边海域,依法批准设立海洋自然保护区或者海洋特别保护区。

第四章 监督检查

第四十条 县级以上人民政府有关部门应当依法对有居民海岛保护和开发、建设进行监督检查。

第四十一条 海洋主管部门应当依法对无居民海岛保护和合理利用情况进行监督检查。

海洋主管部门及其海监机构依法对海岛周边海域生态系统保护情况进行监督检查。

第四十二条 海洋主管部门依法履行监督检查职责,有权要求被检查单位

和个人就海岛利用的有关问题作出说明，提供海岛利用的有关文件和资料；有权进入被检查单位和个人所利用的海岛实施现场检查。

检查人员在履行检查职责时，应当出示有效的执法证件。有关单位和个人对检查工作应当予以配合，如实反映情况，提供有关文件和资料等；不得拒绝或者阻碍检查工作。

第四十三条 检查人员必须忠于职守、秉公执法、清正廉洁、文明服务，并依法接受监督。在依法查处违反本法规定的行为时，发现国家机关工作人员有违法行为应当给予处分的，应当向其任免机关或者监察机关提出处分建议。

第五章 法律责任

第四十四条 海洋主管部门或者其他对海岛保护负有监督管理职责的部门，发现违法行为或者接到对违法行为的举报后不依法予以查处，或者有其他未依照本法规定履行职责的行为的，由本级人民政府或者上一级人民政府有关主管部门责令改正，对直接负责的主管人员和其他直接责任人员依法给予处分。

第四十五条 违反本法规定，改变自然保护区内海岛的海岸线，填海、围海改变海岛海岸线，或者进行填海连岛的，依照《中华人民共和国海域使用管理法》的规定处罚。

第四十六条 违反本法规定，采挖、破坏珊瑚、珊瑚礁，或者砍伐海岛周边海域红树林的，依照《中华人民共和国海洋环境保护法》的规定处罚。

第四十七条 违反本法规定，在无居民海岛采石、挖海砂、采伐林木或者采集生物、非生物样本的，由县级以上人民政府海洋主管部门责令停止违法行为，没收违法所得，可以并处二万元以下的罚款。

违反本法规定，在无居民海岛进行生产、建设活动或者组织开展旅游活动的，由县级以上人民政府海洋主管部门责令停止违法行为，没收违法所得，并处二万元以上二十万元以下的罚款。

第四十八条 违反本法规定，进行严重改变无居民海岛自然地形、地貌的活动的，由县级以上人民政府海洋主管部门责令停止违法行为，处以五万元以上五十万元以下的罚款。

第四十九条 在海岛及其周边海域违法排放污染物的，依照有关环境保护法律的规定处罚。

第五十条 违反本法规定，在领海基点保护范围内进行工程建设或者其他可能改变该区域地形、地貌活动，在临时性利用的无居民海岛建造永久性建筑物或者设施，或者在依法确定为开展旅游活动的可利用无居民海岛建造居民定居场所的，由县级以上人民政府海洋主管部门责令停止违法行为，处以二万元以上二十万元以下的罚款。

第五十一条 损毁或者擅自移动领海基点标志的,依法给予治安管理处罚。

第五十二条 破坏、危害设置在海岛的军事设施,或者损毁、擅自移动设置在海岛的助航导航、测量、气象观测、海洋监测和地震监测等公益设施的,依照有关法律、行政法规的规定处罚。

第五十三条 无权批准开发利用无居民海岛而批准,超越批准权限批准开发利用无居民海岛,或者违反海岛保护规划批准开发利用无居民海岛的,批准文件无效;对直接负责的主管人员和其他直接责任人员依法给予处分。

第五十四条 违反本法规定,拒绝海洋主管部门监督检查,在接受监督检查时弄虚作假,或者不提供有关文件和资料的,由县级以上人民政府海洋主管部门责令改正,可以处二万元以下的罚款。

第五十五条 违反本法规定,构成犯罪的,依法追究刑事责任。

造成海岛及其周边海域生态系统破坏的,依法承担民事责任。

第六章 附 则

第五十六条 低潮高地的保护及相关管理活动,比照本法有关规定执行。

第五十七条 本法中下列用语的含义:

(一)海岛及其周边海域生态系统,是指由维持海岛存在的岛体、海岸线、沙滩、植被、淡水和周边海域等生物群落和非生物环境组成的有机复合体。

(二)无居民海岛,是指不属于居民户籍管理的住址登记地的海岛。

(三)低潮高地,是指在低潮时四面环海水并高于水面但在高潮时没入水中的自然形成的陆地区域。

(四)填海连岛,是指通过填海造地等方式将海岛与陆地或者海岛与海岛连接起来的行为。

(五)临时性利用无居民海岛,是指因公务、教学、科学调查、救灾、避险等需要而短期登临、停靠无居民海岛的行为。

第五十八条 本法自2010年3月1日起施行。

关于印发《海洋特别保护区管理办法》、《国家级海洋特别保护区评审委员会工作规则》和《国家级海洋公园评审标准》的通知

（国海发〔2010〕21号）

沿海各省、自治区、直辖市及计划单列市海洋厅（局），局属各单位：

为了进一步健全开发与保护相协调的海洋生态保护法规制度，根据《中华人民共和国海洋环境保护法》第二十三条的规定以及国务院“三定”规定赋予我局“监督管理海洋自然保护区和海洋特别保护区”的职责，我局在认真总结海洋特别保护区建设和管理经验、分析不足和问题的基础上，对《海洋特别保护区管理暂行办法》进行了修改完善，形成了《海洋特别保护区管理办法》，以及《国家级海洋特别保护区评审委员会工作规则》、《国家级海洋公园评审标准》等配套文件，现印发给你们，请遵照执行，原《海洋特别保护区管理暂行办法（国海发[2005]24号）》同时废止。

二〇一〇年八月三十一日

海洋特别保护区管理办法

第一章 总 则

第一条 为了保护和恢复特定海洋区域的生态系统及其功能,科学、合理利用海洋资源,促进海洋经济与社会的持续发展,根据《中华人民共和国海洋环境保护法》、《中华人民共和国海岛保护法》和国务院"三定"规定,制定本办法。

第二条 本办法所称海洋特别保护区,是指具有特殊地理条件、生态系统、生物与非生物资源及海洋开发利用特殊要求,需要采取有效的保护措施和科学的开发方式进行特殊管理的区域。

第三条 中华人民共和国内水、领海、毗连区、专属经济区、大陆架以及中华人民共和国管辖的其他海域和海岛建立、建设、管理海洋特别保护区,适用本办法。

第四条 国家对海洋特别保护区实行科学规划、统一管理、保护优先、适度利用的原则。海洋特别保护区应当采取科学、合理、有效的措施,保护和恢复海洋生态,维护海洋权益,利用海洋资源。

第五条 国家海洋局负责全国海洋特别保护区的监督管理,会同沿海省、自治区、直辖市人民政府和国务院有关部门制定国家级海洋特别保护区建设发展规划并监督实施,指导地方级海洋特别保护区的建设发展。

沿海省、自治区、直辖市人民政府海洋行政主管部门根据国家级海洋特别保护区建设发展规划,建立、建设和管理本行政区近岸海域国家级海洋特别保护区;组织制定本行政区地方级海洋特别保护区建设发展规划并监督实施;建立、建设和管理省(自治区、直辖市)级海洋特别保护区。

国家海洋局派出机构根据国家级海洋特别保护区建设发展规划,建立、建设和管理本海区领海以外的或者跨省、自治区、直辖市近岸海域的国家级海洋特别保护区。

沿海市、县级人民政府根据地方级海洋特别保护区建设发展规划,建立、建设和管理本行政区近岸海域地方级海洋特别保护区。

第六条 国家保障和推动海洋特别保护区建设,促进海洋特别保护区的综

合管理和科学研究。

沿海各级人民政府应当切实履行海洋生态系统保护职责，保障对海洋特别保护区建设的投入，加强海洋特别保护区的宣传、教育，促进海洋特别保护区建设事业的发展。

对于在海洋特别保护区建设、管理和保护中做出突出贡献的单位和个人，沿海县级以上人民政府应当予以奖励。

第七条 沿海县级以上人民政府海洋行政主管部门会同同级财政部门设立海洋生态保护专项资金，用于海洋特别保护区的选划、建设和管理。

第八条 国家海洋局从国家海洋生态保护专项资金中对国家级海洋特别保护区的建设、管理给予一定的补助。

第九条 任何单位和个人都有保护海洋生态系统、协助和支持海洋特别保护区建设和管理的义务，并有权对破坏、侵占海洋特别保护区的单位和个人进行检举和控告。

第二章 建 区

第十条 根据海洋特别保护区的地理区位、资源环境状况、海洋开发利用现状和社会经济发展的需要，海洋特别保护区可以分为海洋特殊地理条件保护区、海洋生态保护区、海洋公园、海洋资源保护区等类型。

在具有重要海洋权益价值、特殊海洋水文动力条件的海域和海岛建立海洋特殊地理条件保护区。

为保护海洋生物多样性和生态系统服务功能，在珍稀濒危物种自然分布区、典型生态系统集中分布区及其他生态敏感脆弱区或生态修复区建立海洋生态保护区。

为保护海洋生态与历史文化价值，发挥其生态旅游功能，在特殊海洋生态景观、历史文化遗迹、独特地质地貌景观及其周边海域建立海洋公园。

为促进海洋资源可持续利用，在重要海洋生物资源、矿产资源、油气资源及海洋能等资源开发预留区域、海洋生态产业区及各类海洋资源开发协调区建立海洋资源保护区。

第十一条 具有重大海洋生态保护、生态旅游、重要资源开发价值、涉及维护国家海洋权益的海洋特别保护区列为国家级海洋特别保护区。

除前款之外的其他海洋特别保护区列为地方级海洋特别保护区。

第十二条 国家建立海洋特别保护区评审制度。建立海洋特别保护区应当经过海洋特别保护区评审委员会的评审论证。

海洋特别保护区评审委员会由海洋行政主管部门会同有关部门组织成立。

海洋特别保护区评审委员会由相关专业的专家和管理部门的代表组成。

第十三条 沿海省、自治区、直辖市近岸海域内国家级海洋特别保护区的建立由沿海省、自治区、直辖市人民政府海洋行政主管部门提出申请,经沿海同级人民政府同意后,报国家海洋局批准设立。

领海以外海域和跨省、自治区、直辖市近岸海域国家级海洋特别保护区的建立由国家海洋局派出机构提出申请,报国家海洋局批准设立。

国家海洋局依据相关法律法规,根据国家级海洋特别保护区评审委员会评审结论,审批国家级海洋特别保护区。

地方级海洋特别保护区的建立由沿海县级以上人民政府海洋行政主管部门提出申请,经地方级海洋特别保护区评审委员会评审后,报沿海同级人民政府批准设立。

跨区域地方级海洋特别保护区的建立,由所在地相关地方各人民政府共同的上一级海洋行政主管部门协调,经相关海洋特别保护区评审委员会评审,并由各相关地方人民政府同意后,报共同的上一级人民政府批准设立。

建立海洋特别保护区,应当在报请批准机关批准之前,由提出申请的机关向社会公示,征求公众意见。

第十四条 沿海县级以上人民政府海洋行政主管部门根据海洋功能区划、海洋资源环境状况、海洋经济发展状况,选划并申报建立海洋特别保护区。

海洋特别保护区选划工作应当符合海洋特别保护区选划论证技术标准的有关要求。

第十五条 申请建立海洋特别保护区应当按本办法附件的要求填写建立海洋特别保护区申报书,并提交海洋特别保护区选划论证报告。

第十六条 海洋特别保护区的调整、撤销,应当按照第十二、十三条规定的程序办理,由原批准机关批准。

第十七条 海洋特别保护区建立后,其管理机构应当按照批准的海洋特别保护区的范围和界线,在适当位置设立界标和标牌,标牌应公布海洋特别保护区边界坐标,并公布海洋特别保护区管理的规章、制度、措施等相关信息。

任何单位和个人不得移动、污损和破坏海洋特别保护区界标和标牌。

第三章 管理制度

第十八条 已经批准建立的海洋特别保护区所在地的县级以上人民政府应当加强对海洋特别保护区的管理,建立管理机构。必要时可以在海洋特别保护区管理机构内设立中国海监机构,履行海洋执法职责,并接受中国海监上级机构的管理和指导。

第十九条 海洋特别保护区管理机构的主要职责包括:

（一）贯彻落实国家及地方有关海洋生态保护和资源开发利用的法律法规与方针政策；

（二）制订实施海洋特别保护区管理制度；

（三）制订实施海洋特别保护区总体规划和年度工作计划，并采取有针对性的管理措施；

（四）组织建设海洋特别保护区管护、监测、科研、旅游及宣传教育设施；

（五）组织开展海洋特别保护区日常巡护管理；

（六）组织制订海洋特别保护区生态补偿方案、生态保护与恢复规划、计划，落实生态补偿、生态保护和恢复措施；

（七）组织实施和协调海洋特别保护区保护、利用和权益维护等各项活动；

（八）组织管理海洋特别保护区内的生态旅游活动；

（九）组织开展海洋特别保护区监测、监视、评价、科学研究活动；

（十）组织开展海洋特别保护区宣传、教育、培训及国际合作交流等活动；

（十一）建立海洋特别保护区资源环境及管理信息档案；

（十二）发布海洋特别保护区相关信息；

（十三）其他应当由海洋特别保护区管理机构履行的职责。

第二十条 海洋特别保护区管理机构应当在成立后一年内，组织编制完成海洋特别保护区总体规划，报请该海洋特别保护区的设立机关批准。

国家级海洋特别保护区的总体规划由国家海洋局批准。

海洋特别保护区总体规划应当按照《海洋特别保护区功能分区和总体规划编制技术导则》的要求编制。

海洋特别保护区内的保护与利用活动应当符合海洋特别保护区总体规划。

第二十一条 沿海县级以上人民政府海洋行政主管部门应当为保护和适度利用海洋特别保护区海洋资源、公益性海洋生态与资源恢复活动提供实施场所和指导。

海洋特别保护区内从事海洋生态与资源恢复活动的单位和个人，应当按照沿海县级以上人民政府海洋行政主管部门的管理要求实施有关活动。

第二十二条 沿海县级以上人民政府海洋行政主管部门负责组织建立由政府有关部门及利益相关者组成的海洋特别保护区协调机制，负责协调解决保护区管理机构职责以外的各类涉海活动；审议保护区内的执法巡护方案、重大生态保护项目、生态旅游及其他资源开发活动方案和涉及社区公众利益的重大事件。

第二十三条 海洋特别保护区内保护与利用活动使用海域的应当按照《中华人民共和国海域使用管理法》等有关法律规定进行。

第二十四条 经依法批准在海洋特别保护区内实施开发利用活动者应当制订并落实生态恢复方案或生态补偿措施，区内外排污及围填海等活动造成海洋特别保护区生态环境受损的应当支付生态补偿金。

第二十五条 海洋特别保护区管理机构应当根据有关技术标准，定期组织

实施保护区内的社会经济状况、资源开发利用现状调查和生态环境监测、监视和评价工作。

第二十六条 海洋特别保护区实行管理评估制度。海洋行政主管部门应当对海洋特别保护区进行监督检查,组织开展海洋特别保护区建设和管理评估。

海洋特别保护区管理评估办法由国家海洋局另行制定。

第二十七条 沿海县级以上人民政府海洋行政主管部门及其所属中国海监机构,依照《中华人民共和国海洋环境保护法》、《中华人民共和国海域使用管理法》和《中华人民共和国海岛保护法》等相关法律法规的规定,负责海洋特别保护区内的监督检查,依法查处违法行为。检查人员在履行执法检查职责时,应当向被检查人员出示执法证件;被检查人员应当配合检查人员的检查工作。

第二十八条 海洋特别保护区管理机构应当组织区内的单位和个人参加海洋特别保护区的建设和管理,吸收当地社区居民参与海洋特别保护区的共管共护,共同制定区内的合作项目计划、社区发展计划、总体规划和管理计划。

第二十九条 国家鼓励单位和个人在自愿的前提下,捐资或者以其他形式参与海洋特别保护区建设与管理。

第三十条 海洋行政主管部门负责组织建立海洋特别保护区应急系统,制定保护区及其周围区域应急预案。发生海洋环境污染、生态破坏事故和自然灾害时,海洋行政主管部门应当与有关部门和单位配合,按照应急预案采取措施,消除或者减轻灾害。

海洋特别保护区内应当配备应急设备和设施,并进行定期检查和维护。

第三十一条 海洋特别保护区实行功能分区管理,可以根据生态环境及资源的特点和管理需要,适当划分出重点保护区、适度利用区、生态与资源恢复区和预留区。

海洋特别保护区的功能区划遵循以下原则:

(一)以自然属性为主兼顾社会属性的原则;

(二)有利于促进海洋经济和社会发展原则;

(三)有利于海洋综合管理和资源可持续利用原则;

(四)国家主权权益和国防安全优先原则。

第三十二条 海洋特别保护区生态保护、恢复及资源利用活动应当符合其功能区管理要求。

在重点保护区内,实行严格的保护制度,禁止实施各种与保护无关的工程建设活动。

在适度利用区内,在确保海洋生态系统安全的前提下,允许适度利用海洋资源。鼓励实施与保护区保护目标相一致的生态型资源利用活动,发展生态旅游、生态养殖等海洋生态产业。

在生态与资源恢复区内,根据科学研究结果,可以采取适当的人工生态整治与修复措施,恢复海洋生态、资源与关键生境。

在预留区内，严格控制人为干扰，禁止实施改变区内自然生态条件的生产活动和任何形式的工程建设活动。

第四章 保 护

第三十三条 严格保护典型海洋生态系统分布区、自然景观、历史遗迹、珍稀濒危海洋生物物种及重要海洋生物的洄游通道、产卵场、索饵场、越冬场、栖息地等各类重要海洋生态区域。

任何单位和个人不得擅自改变海洋特别保护区内海岸、海底地形地貌及其他自然生态环境条件；确需改变的，应当经科学论证后，报有批准权的海洋行政主管部门批准。

第三十四条 严格限制将外来物种引入海洋特别保护区；确需引入的，由海洋特别保护区管理机构组织论证后，报物种主管部门批准，物种主管部门在批准前应当征求同级海洋行政主管部门的意见。

第三十五条 任何单位和个人不得破坏海洋特别保护区内领海基点等海洋权益保护标志和设施。经依法批准，在海洋特别保护区内从事保护、恢复和资源利用等活动，不得影响领海基点的安全。

第三十六条 禁止在海洋特别保护区内进行下列活动：

（一）狩猎、采拾鸟卵；

（二）砍伐红树林、采挖珊瑚和破坏珊瑚礁。

（三）炸鱼、毒鱼、电鱼；

（四）直接向海域排放污染物；

（五）擅自采集、加工、销售野生动植物及矿物质制品；

（六）移动、污损和破坏海洋特别保护区设施。

第五章 适度利用

第三十七条 根据海洋特别保护区生态环境及资源特点，经有审批权的部门批准后允许适度开展下列活动：

（一）生态养殖业；

（二）人工繁育海洋生物物种；

（三）生态旅游业；

（四）休闲渔业；

（五）无害化科学试验；

（六）海洋教育宣传活动；

(七)其他经依法批准的开发利用活动。

第三十八条 海洋特别保护区内严格控制各类建设项目或开发活动,符合海洋特别保护区总体规划的重点建设项目,须经保护区管理机构同意后,按照相关法律法规的要求进行海洋工程环境影响评价和海域使用论证。海洋工程环境影响报告和海域使用论证报告应当设专章编写生态环境保护、生态修复恢复和生态补偿赔偿方案及具体措施。

第三十九条 严格限制在海洋特别保护区内实施采石、挖砂、围垦滩涂、围海、填海等严重影响海洋生态的利用活动。确需实施上述活动的,应当进行科学论证,并按照有关法律法规的规定报批。

第四十条 应当按照养殖容量从事海水养殖业,合理控制养殖规模,推广健康的养殖技术,合理投饵、施肥,养殖用药应当符合国家和地方有关农药、兽药安全使用的规定和标准,防止养殖自身污染。

第四十一条 应当科学确定旅游区的游客容量,合理控制游客流量,加强自然景观和旅游景点的保护。禁止超过允许容量接纳游客和在没有安全保障的区域开展游览活动。

在海洋公园组织参观、旅游活动的,必须按照经批准的方案进行,并加强管理;进入海洋特别保护区参观、旅游的单位和个人,应当服从海洋公园管理机构的管理。

禁止开设与海洋公园保护目标不一致的参观、旅游项目。

第四十二条 进入海洋特别保护区拍摄影视片、采集标本的单位或个人,应当严格遵守国家有关规定,经海洋特别保护区管理机构同意并报负责批准建立该保护区的海洋行政主管部门备案。

从事前款活动的单位或个人,应当将其活动成果的副本提交海洋特别保护区管理机构。

第四十三条 海洋公园内可以建设管护、宣教和旅游配套设施,设施建设必须按照总体规划实施,并与景观相协调,不得污染环境、破坏生态。重点保护区、重要景观及景点分布区,除必要的保护和附属设施外,不得建设宾馆、招待所、疗养院和其他工程设施。

第四十四条 海洋特别保护区可以作为海洋生态保护和资源可持续利用的科研、教学和实验基地。

在海洋特别保护区内从事科研、教学及其相关活动,建设实验基地的人员,不得破坏海洋生态系统。

在海洋特别保护区内开展的科学研究成果应当与保护区管理机构共享,并向保护区管理机构提交副本。

第四十五条 在海洋特别保护区内开展活动,需要调整已经确定的海洋特别保护区生态保护方案和资源利用方案的,在调整前,应当报请海洋特别保护区管理机构批准。

第四十六条 海洋特别保护区内的经营性开发利用活动，可以依照有关法律法规和海洋特别保护区管理制度及总体规划，由海洋特别保护区管理机构实施，也可以在海洋特别保护区管理机构监管下，采用公开招标方式授权企业经营。授权企业经营的，海洋特别保护区管理机构应当与企业签订特许经营协议，实行资源有偿使用制度，有偿使用收入应当专门用于海洋特别保护区的保护和管理以及对有关权利人损失的补偿。

在海洋特别保护区内发生事故和突发性事件对保护区造成污染和损害的单位和个人必须及时采取处理措施，减少或消除对海洋特别保护区生态与资源的影响，并对所破坏的海洋景观给予恢复。

第六章 法律责任

第四十七条 违反本办法，对海洋特别保护区造成破坏的，由县级以上人民政府海洋行政主管部门及其所属的中国海监机构依照《中华人民共和国海洋环境保护法》第七十六条的规定，责令限期改正和采取补救措施，并处一万元以上十万元以下的罚款；有违法所得的，没收其违法所得。

第四十八条 海洋特别保护区内从事资源开发利用活动的单位和个人造成领海基点及其周围环境被侵蚀、淤积或者损害的，由县级以上人民政府海洋行政主管部门依照《中华人民共和国防治海洋工程建设项目污染损害海洋环境管理条例》第四十九规定，责令停止建设、运行，限期恢复原状；逾期未恢复原状的，海洋行政主管部门及其所属的中国海监机构可以指定具有相应资质的单位代为恢复原状，所需费用由建设单位承担，并处恢复原状所需费用的 1 倍以上 2 倍以下的罚款。

第四十九条 海洋特别保护区内从事海水养殖，对海洋环境造成污染或者严重影响海洋景观的，由县级以上人民政府海洋行政主管部门及其所属的中国海监机构依照《中华人民共和国防治海洋工程建设项目污染损害海洋环境管理条例》第五十四的规定，责令限期改正；逾期不改正的，责令停止养殖活动，并处清理污染或者恢复海洋景观所需费用 1 倍以上 2 倍以下的罚款。

第五十条 对破坏海洋特别保护区，给国家造成重大损失的，按照《中华人民共和国海洋环境保护法》第九十条规定，由行使海洋环境监督管理权的部门代表国家对责任者提出损害赔偿要求。

第五十一条 海洋行政主管部门、海洋特别保护区内其他行政管理部门、沿海县级以上人民政府及其工作人员违反本办法规定，情节轻微的，对直接负责的主管人员和其他直接责任人员，依法给予行政处分。

第七章 附 则

第五十二条 沿海省、自治区、直辖市人民政府海洋行政主管部门根据本办法,结合当地实际情况,制定具体的管理规定。

第五十三条 本办法自发布之日起施行。

关于印发《无居民海岛使用权证书管理办法》的通知

（国海岛字〔2010〕776号）

沿海各省、自治区、直辖市海洋厅（局）：

为规范无居民海岛使用权证书管理工作，保障无居民海岛使用权人的合法权益，根据《中华人民共和国物权法》、《中华人民共和国海岛保护法》，我局制定了《无居民海岛使用权证书管理办法》，现印发给你们，请遵照执行。

二〇一〇年十二月七日

无居民海岛使用权证书管理办法

第一条 为了规范无居民海岛使用权证书和无居民海岛使用临时证书（以下简称临时证书）的发放与管理工作，保障无居民海岛使用权人的合法权益，根据《中华人民共和国海岛保护法》，制定本办法。

第二条 无居民海岛使用权证书及临时证书是无居民海岛使用权人享有无居民海岛使用权的证明，由无居民海岛使用权人持有。

第三条 国家海洋局负责无居民海岛使用权证书及临时证书的统一印制、编号和监督管理。

第四条 沿海省、自治区、直辖市人民政府海洋主管部门可以根据本地区实际情况，向国家海洋局提出空白无居民海岛使用权证书及临时证书领取申请。

国家海洋局分期分批印制和发放空白无居民海岛使用权证书及临时证书。

第五条 无居民海岛使用权证书和无居民海岛使用临时证书统一编号。

证书编号采用6位编码，由2部分组成：年号（取最末2位），序号（4位）。序号以年度为周期，每年启用新的序号，年度内连续使用，按由小到大顺序发放，

不得空号。

第六条 沿海省、自治区、直辖市人民政府海洋主管部门依法完成登记审查后,在颁发无居民海岛使用权证书或者临时证书前,应当向国家海洋局申请无居民海岛使用权证书或者临时证书编号。

国家海洋局在2个工作日内按规定核发无居民海岛使用权证书及临时证书编号。

由无居民海岛使用临时证书换发无居民海岛使用权证书的,可以直接使用原临时证书编号。

第七条 无居民海岛使用权登记机关为无居民海岛使用权证书及临时证书的发证机关。

无居民海岛使用权证书及临时证书由登记机关负责登记工作的人员,根据无居民海岛使用权登记表填写。

第八条 无居民海岛使用临时证书有效期限一般为3年,最长不得超过5年。到期后确有需要续期的,可以续期1次。

第九条 颁发无居民海岛使用权证书及临时证书,应当向社会公告。

第十条 无居民海岛使用权证书内容如有变更,无居民海岛使用权人应当及时报登记机关,并按规定程序办理变更手续。

第十一条 无居民海岛使用权证书及临时证书如有遗失或损毁,无居民海岛使用权人应当及时向登记机关申请补发或者换发。

补发或者换发证书,原证书编号不变。

第十二条 无居民海岛使用权证书及临时证书不得擅自涂改,擅自涂改的证书一律无效。

第十三条 无居民海岛使用权证书及临时证书的内容与无居民海岛使用权登记表不一致的,除有证据证明无居民海岛使用权登记表确有错误外,以无居民海岛使用权登记表为准。

第十四条 各级人民政府有关行政主管部门检查或者了解无居民海岛使用有关情况时,持证人应当出示无居民海岛使用权证书或者临时证书。

第十五条 因各种原因作废的无居民海岛使用权证书及临时证书,由登记机关收回并销毁。

第十六条 本办法自发布之日起施行。

关于印发《中国海监海岛保护与利用执法工作实施办法》的通知

（国海办字〔2010〕782号）

中国海监总队，各分局，沿海省、自治区、直辖市海洋厅（局）：

现将《中国海监海岛保护与利用执法工作实施办法》下发给你们，请认真遵照执行。

二〇一〇年十二月十三日

中国海监海岛保护与利用执法工作实施办法

《中华人民共和国海岛保护法》（以下简称《海岛保护法》）明确规定，中国海监是《海岛保护法》的执法主体，承担海岛保护与开发利用活动的执法职能。为全面保护海岛及其周边海域生态系统，规范海岛开发利用秩序，有效维护我国海洋权益，依据《海岛保护法》、《海洋行政处罚实施办法》等相关法律法规和规定，现就中国海监海岛保护与开发利用执法工作提出如下办法：

一、区域管辖

中国海监各级机构开展海岛保护与开发利用的执法工作实行区域管辖制度，各级执法机构的区域管辖范围如下：

中国海监总队负责中华人民共和国所属海岛的保护与开发利用执法工作。

中国海监北海总队负责渤海和黄海北部我国所属海岛的保护与开发利用执法工作。

中国海监东海总队负责东海和黄海南部我国所属海岛的保护与开发利用执

法工作。

中国海监南海总队负责南海我国所属海岛的保护与开发利用执法工作。

中国海监各海区总队所属的海区支队,按海区总队的分工,负责相关海域内的海岛保护与开发利用执法工作。

各省级、市级、县级海监机构负责本行政区内的海岛保护与开发利用执法工作。

各级海洋自然保护区和特别保护区海监机构负责本保护区内的海岛保护与开发利用执法工作。

根据工作需要,上级海监机构可以指定下级海监机构开展特定区域海岛的保护与开发利用执法工作。

二、层级管理

中国海监各级机构开展海岛保护与开发利用的执法工作,实行层级管理制度。各级海监机构层级管理如下:

中国海监总队负责全国海岛执法工作的领导和监督检查,制定全国海岛执法工作的方针政策,组织重大的海岛执法行动,办理有必要由中国海监总队直接查处的案件。

中国海监各海区总队负责组织协调和指导监督本辖区内各级海监机构的海岛执法工作,组织开展本辖区内的重大海岛执法行动。全面开展本辖区内海岛的执法检查工作,负责查处领海基点所在海岛和国防用途海岛的违法案件,查处国务院审批权限内的无居民海岛开发利用项目的违法案件。

中国海监各海区总队所属支队根据海区总队的分工,负责本辖区内的海岛执法检查和案件查处工作,对省级、市级、县级海监机构的海岛执法工作进行监督。

省级、市级、县级海监机构负责本行政区内海岛执法工作的领导和监督检查工作,制定本辖区内海岛执法工作的规划和计划,组织本辖区内海岛执法检查和违法案件的查处工作。

国家级、省级、市级、县级海洋自然保护区和特别保护区内的海岛,执法检查和案件查处工作由保护区海监机构和设立保护区的人民政府所属海洋主管部门的海监机构共同负责。

中国海监各级机构可以根据海岛执法工作需要,指定下级海监机构异地检查和查处案件。

三、检查内容

中国海监依法对有居民海岛及其周边海域生态保护、无居民海岛保护和开发利用活动和特殊用途海岛保护进行监督检查。重点检查内容如下:

(一)有居民海岛

1.是否存在未经批准,填海、围海等改变有居民海岛岸线和填海连岛;在有居民海岛周边海域进行违法开发利用活动的行为。

2.是否存在采挖、破坏珊瑚和珊瑚礁,砍伐有居民海岛周边海域红树林的行为。

3.是否存在向有居民海岛及其周边海域违法排放污染物的行为。

4.是否存在未经批准,在有居民海岛沙滩上建造构筑物或者设施、擅自采挖海砂的行为。

(二)无居民海岛

1.是否存在未经批准,在无居民海岛填海、围海;是否存在未经批准,进行生产、建设或者组织开展旅游活动;是否存在未经批准,采石、挖海砂、采伐林木或者采集生物、非生物样本;是否存在未经批准,严重改变无居民海岛自然地形、地貌的行为。

2.经批准在无居民海岛进行开发利用活动的,是否按照海岛保护规划实施,是否按照批准的开发利用具体方案的内容实施;开展旅游活动的,是否存在建造居民定居场所的行为;临时性利用无居民海岛的,是否存在建造永久性建筑物或者设施的行为。

3.无居民海岛开发利用过程中产生的废水,是否按照规定进行处理和排放;产生的固体废物,是否按照规定进行无害化处理、处置;是否存在向无居民海岛及其周边海域违法排放污染物的行为。

4.开发利用无居民海岛的单位是否依法交纳海岛使用金。

(三)特殊用途海岛

1.是否存在未经批准改变海洋自然保护区内海岛的海岸线,填海、围海等改变海岛岸线和填海连岛的行为。

2.在领海基点保护范围内是否存在未经批准的工程建设以及其他可能改变该区域地形、地貌的活动;领海基点标志是否损毁或者移动。

3.国防用途无居民海岛的自然地形、地貌是否遭到破坏;有居民海岛国防用途区域及其周边的地形、地貌是否遭到破坏;国防用途无居民海岛是否存在用于与国防无关的行为。

4.特殊用途或者具有特殊保护价值的海岛,是否存在其它违反相关保护规定的行为。

四、检查方式

中国海监各级机构开展海岛保护与开发利用的执法工作,应采取卫星遥感、航空巡视、船舶巡航和登岛巡查相结合的手段进行,要充分发挥海监飞机的航空巡视优势,利用航空拍摄、摄像及遥感技术及时掌握海岛保护和开发利用情况,引导海监船舶和执法人员开展海岛巡航和登岛巡查工作。海岛执法检查主要采取以下方式:

(一)定期执法巡查

中国海监各级机构都要建立定期执法巡查制度,每季度对本辖区内海岛进行一次执法巡查,及时发现和制止各种破坏海岛资源与生态环境的行为。定期执法巡查工作要对本辖区内所有海岛进行全面的执法巡查,重点海岛进行登岛巡查。航空执法巡查要覆盖我国管辖海岛,对各海岛进行航空拍摄、摄像,每年不少于一次。要采用航空遥感技术,获取有居民海岛海岸线周边和无居民海岛的三维影像等本底信息。每次定期巡查工作都要对巡航路线、巡查海岛及巡航中发现和处理的情况进行详细记录,海监总队负责组织制定相关工作标准。

(二)不定期执法检查

根据工作需要,中国海监各级机构可以开展不定期海岛执法检查。不定期执法检查主要是配合海岛管理部门开展的海岛管理中心工作,纠正本辖区内海岛保护与开发利用中存在的主要或倾向性的问题。不定期执法检查应作为各级海监机构履行海岛执法职能的一种常规工作形式。

(三)专项执法检查

中国海监各级机构对本辖区内发生的海岛突发事件、重大或多发违法事件、严重侵权事件等,应当及时组织专项执法检查行动。开展海岛专项执法检查行动必须有明确的执法检查任务,建立有效的组织系统,制定详细的专项执法检查方案并报上级海监机构备案。

(四)联合执法检查

中国海监各级机构在本辖区内开展的定期执法巡查、不定期执法检查、专项执法检查等执法活动,可以采取与相关海监机构联合执法的形式进行。联合执法检查行动可以采取统一组织、统一检查的形式进行,也可以采取统一组织、分区或分类检查的形式进行。对在联合执法检查行动中发现的违法行为,可以以组织该行动的海监机构的名义查处,也可以由有管辖权的海监机构查处。

五、案件查处

中国海监各级机构的海岛违法案件查处工作,实行层级管理和"谁发现谁查处"相结合的原则,除已有明确规定外,实行"谁发现谁查处",即先发现违法行为的海监机构可以直接进行查处,也可以将案件移交给有管辖权的海监机构查处。直接进行查处的,要将查处结果通报有管辖权的海监机构。

中国海监各级机构查处的违法案件,可以采取以下管理方法:

(一)移交查处:下级海监机构如认为确有必要,可以把海岛违法案件报请上一级海监机构查处;上级海监机构认为确有必要,可以把海岛违法案件移交下级海监机构查处;各级海监机构发现的不属于中国海监管辖的违法行为,移交给有管辖权的部门查处。

(二)指定查处:中国海监各级机构已立案的案件,立案的海监机构认为不宜由本级海监机构查处的,可以请求上级海监机构指定其他海监机构查处。上级

海监机构认为不宜由立案海监机构查处的，可以指定其他海监机构查处。对管辖权有争议的海岛违法案件，由共同的上级海监机构指定案件查处机构。

（三）挂牌督办：对于造成恶劣或者重大社会影响的海岛违法行为的查处工作，由中国海监总队实行挂牌督办。挂牌督办案件的办案机关由中国海监总队指定，办案机关必须按照中国海监总队规定的时限等要求执行。中国海监总队对挂牌督办案件实行全过程的跟踪、指导和监督，对工作不力的办案机关要按照相关规定追究责任。

（四）案件通报：中国海监各级机构应加强海岛违法案件的通报工作，每季度将案件查处情况向上级海监执法机构和同级海岛管理部门及相关部门书面通报，重大海岛违法案件的处理应及时通报。对执法中发现的重大问题和有关情况提请海岛管理部门会商。

中国海监各级机构开展海岛执法工作，是《海岛保护法》赋予的法定职责，切实开展好各项执法活动，是各级海监队伍的重要任务，对于维护我国海洋权益、保护海岛生态环境、规范海岛开发秩序、促进海岛经济又好又快发展具有十分重要的意义。中国海监各级机构一定要高度重视海岛执法工作，认真把海岛执法的各项制度落到实处。

IMO Safety Committee Adopts Historic Ship Construction Regulations

Maritime Safety Committee (MSC), 87th session: 12—21 May 2010

IMO's Maritime Safety Committee (MSC) has instigated an historic change in the way international standards for ship construction are to be determined and implemented in the future.

The adoption of so—called "goal—based standards" (GBS) for oil tankers and bulk carriers by the MSC, yesterday (20 May 2010), means that newly—constructed vessels of these types will have to comply with structural standards conforming to functional requirements developed and agreed by the Committee. This means that, for the first time in its history, IMO will be setting standards for ship construction.

The Committee also adopted guidelines that, equally for the first time, give the Organization a role in verifying conformity with SOLAS requirements. The guidelines establish the procedures to be followed in order to verify that the design and construction rules of an Administration or its recognized organization, for bulk carriers and/or oil tankers, conform to the adopted GBS. The verification process consists of two main elements: self assessment of the rules by the entity submitting them to IMO for verification; followed by an audit, to be carried out by experts appointed by the Organization, of the rules, the self—assessment and the supporting documentation.

Since the beginning of the 2000s, Governments and international organizations had expressed the view that the Organization should play a larger role in determining the structural standards to which new ships are built. The philosophy underpinning this move has been that ships should be designed and constructed for a specified design life and that, if properly operated and maintained, they should remain safe and environmentally friendly throughout their service life.

The MSC formally adopted International Goal based Ship Construction Standards for Bulk Carriers and Oil Tankers, along with amendments to Chapter II－1 of the International Convention for the Safety of Life at Sea (SOLAS), making their application mandatory, with an entry into force date of 1 January 2012.

The new SOLAS regulation II－1/3－10 will apply to oil tankers and bulk carriers of 150m in length and above. It will require new ships to be designed and constructed for a specified design life and to be safe and environmentally friendly, in intact and specified damage conditions, throughout their life. Under the regulation, ships should have adequate strength, integrity and stability to minimize the risk of loss of the ship or pollution to the marine environment due to structural failure, including collapse, resulting in flooding or loss of watertight integrity.

The MSC further adopted Guidelines for the information to be included in a Ship Construction File.

The notion of "goal－based ship construction standards" was introduced in IMO at the 89th session of the Council in November 2002, through a proposal by the Bahamas and Greece, suggesting that the Organization should develop ship construction standards that would permit innovation in design but ensure that ships are constructed in such a manner that, if properly maintained, they remain safe for their entire economic life. The standards would also have to ensure that all parts of a ship can be easily accessed to permit proper inspection and ease of maintenance. The Council referred the proposal to the 77th meeting of the MSC in May/June 2003 for consideration.

The MSC commenced detailed technical work on the development of goal－based ship construction standards at its 78th session in May 2004, when a comprehensive general debate of the issues involved took place and the Committee agreed to utilize a five tier system initially proposed by the Bahamas, Greece and the International Association of Classification Societies (IACS), consisting of the following:

Tier I － Goals
High－level objectives to be met.

Tier II — Functional requirements
Criteria to be satisfied in order to conform to the goals.

Tier III — Verification of conformity
Procedures for verifying that the rules and regulations for ship design and construction conform to the goals and functional requirements.

Tier IV — Rules and regulations for ship design and construction
Detailed requirements developed by IMO, national Administrations and/or recognized organizations and applied by national Administrations, and/or recognized organizations acting on their behalf, to the design and construction of a ship in order to conform to the goals and functional requirements.

Tier V — Industry practices and standards
Industry standards, codes of practice and safety and quality systems for shipbuilding, ship operation, maintenance, training, manning, etc., which may be incorporated into, or referenced in, the rules and regulations for the design and construction of a ship.

The goal—based standards adopted at this session reflect tiers I to III.

IMO Secretary—General Efthimios E. Mitropoulos has described the adoption of GBS as "a significant and important breakthrough for the Organization, not only in terms of how future regulations will be developed, but also with respect to the role that IMO will play in verifying conformity with SOLAS requirements." He added, "the concept that IMO should state what has to be achieved, leaving classification societies, ship designers and naval architects, marine engineers and ship builders the freedom to decide on how best to employ their professional skills to meet the required standards is a sound one and I congratulate the Committee on the painstaking and hard work carried out to turn the concept into reality."

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