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卷首语

自2005年创刊以来，在各位专家学者和广大读者的关心支持下，《中国海洋法学评论》如同一个婴儿长成了翩翩少年，在学界受到了越来越多的关注和重视。自本期（2009年卷第2期）开始，《中国海洋法学评论》已正式改由大陆与港台四所高校合作办刊。这四所高校分别是：上海交通大学、厦门大学、香港理工大学及台湾中山大学。这是国内一个崭新的合作尝试。另外，自本期开始，经双盲审查录用的中文论文，均附有一份英文摘要，以方便英文读者了解其内容。未来《中国海洋法学评论》还将继续朝国际化方向迈进，优先采用更多优秀的英文论文。

本期《中国海洋法学评论》刊发了海洋划界、打击海盗、海岸带管理、海洋环境和渔业资源等领域的专论和译文。

长期以来，乌克兰和罗马尼亚在黑海海域边界划分问题上存在严重分歧。2004年9月罗马尼亚向国际法院提起诉讼，要求对两国黑海大陆架和专属经济区进行划分，2009年2月国际法院对该案作出了判决。张卫彬先生对该案争议的法律问题和国际法院的判决要点进行了分析评述，能够让读者对国际海洋划界的新发展趋势有所了解。

近年来，不少国家在本国的专属经济区内设立各种海洋保护区域，并在这些区域内适用限制船舶航行和其他人类活动的保护措施和执法管辖权。龚迎春女士的论文对这些特别区域、冰封区域和特别敏感海域的形成背景、国际法依据、设定的要件和程序、沿海国的立法和执行权的范畴进行了比较研究，并且探讨了我国在该领域的立法现状和存在的问题。

日本提交了200海里以外大陆架划界案，并以冲之鸟礁为基点主张专属经济区和200海里以外大陆架。部分国家和国际社会质疑日本此举的合法性。丘君和柳文华撰写的论文将该案与提交给大陆架界限委员会审议的其他类似案件，如澳大利亚、新西兰、所罗门群岛以及塞舌尔对无居民岛礁主张大陆架权利的案件进行了对比分析，并考察了罗科尔礁未能获得岛屿地位的国际实践，认为冲之鸟礁应属于《联合国海洋法公约》所规定

的岩礁，不能拥有专属经济区和大陆架。

海盗和海上武装抢劫长期以来威胁着全球海上安全与秩序。日本于 2009 年 6 月发布了《处罚与应对海盗行为法》，对其国内相关行政部门应对海盗行为的职责和协作义务做出了明确规定，庄玉友先生的译文为读者了解日本的这一新立法提供了素材。林菁对马六甲海峡沿岸各国针对海盗和海上武装抢劫的单边及多边防治机制进行了研究，着重指出促使合作机制有效的因素和发展的方向。

海岸带是陆海相互作用的敏感区域。对海岸带的合理开发和综合管理已成为各国海洋可持续发展面临的共同现实问题。美国早在 1972 年就颁布了联邦《海岸带管理法》，此后多次进行了修订。目前美国绝大多数沿岸州和地区都颁布了海岸带管理的法律，建立起了比较完备的海岸带综合管理的法律体系。2009 年 1 月美国环境法协会发布《扩大海洋生态系统管理在<海岸带管理法>中的作用》的白皮书，建议修订现有的《海岸带管理法》，加强基于生态系统的海岸带管理。由桂静编译的这份白皮书将让读者了解美国《海岸带管理法》发展的这一趋势。与此相呼应，姜玉环和方珑杰的论文对我国海岸带管理相关立法进行了梳理，以美国《海岸带管理法》及其发展为借鉴，对完善我国海岸带管理法提出了若干建议。

当今海洋环境污染损害案件日益增多，我国《海洋环境保护法》授权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。但该条规定并不明确，可操作性不强。王炳蔚和高蕾的论文分析了在不同类型的海洋环境污染索赔案件中如何确定适格的国家行政机关原告问题，有助于解决实践中的争议。

国际生物资源养护的严峻形势要求港口国加强相应的管理。2009 年 11 月联合国粮农组织通过了《港口国措施协定》。唐建业先生的论文对这一新协定的主要内容及其对我国可能产生的影响进行了详细分析。2001 年美国内政部出台一项法规禁止在巴尔米拉环礁海域从事商业性渔业活动。投资者根据美国宪法第五修正案中的征收条款起诉美国内政部，最终美国内政部打赢了这场官司。Owen Tang 以该案为中心，分析了与渔业相关的征收条款的法律问题。

这些内容丰富、闪烁着真知灼见的论文是各界专家学者智慧的结晶，相信能对各位读者有所助益。我们期待四所高校的鼎力合作将为《中国海洋法学评论》的进一步发展注入源源不断的动力，我们也期待大家一如既

往地关心和支持《中国海洋法学评论》，让他走得更快更稳。

编辑部　谨识

EDITOR'S NOTE

With the support and care of scholars and readers, the *China Oceans Law Review* has thriven like an infant growing up to a teenager, and drawn more and more attention from the academia since its very first issue in 2005. From this Issue (Volume 2009, Number 2) on, the journal will be jointly published by four schools from China Mainland, HK and China Taiwan, which include Shanghai Jiao Tong University, Xiamen University, The Hong Kong Polytechnic University and Sun Yat-Sen University (Kaohsiung Taiwan). This is a brand-new trial of jointly publishing in China. In addition, English abstracts will be attached to the Chinese essays accepted by blind review from this Issue on for the convenience of English readers. In the following issues, excellent English articles will enjoy priority, as a demand of the forward steps to the internationalization of the journal.

The current Issue contains articles and translations on maritime delimitation, combat with piracy and armed robbery against ships, coastal zone management, marine environment and fishery resources among others.

A severe dispute had existed for a long time between Ukraine and Romania over the delimitation of their maritime boundary in the Black Sea. On 16 September 2004, Romania lodged a lawsuit before the International Court of Justice (ICJ) and requested the delimitation of the continental shelves and the exclusive economic zones between Ukraine and Romania in the Black Sea. In February 2009, the ICJ rendered a final Judgment. The analysis and comments of ZHANG Weibin on the legal issues in question and fundamental points of the ICJ Judgment acknowledge readers with the recent tendency in maritime delimitation.

In recent years, many countries have been establishing marine protected zones while taking protective measures and jurisdiction to enforce to restrict navigation and other human activities in these areas. The paper of GONG Yingchun is aimed to conduct comparative research on the backgrounds, bases in international law, requirements and procedures for establishment, coastal States' powers of legislation and enforcement, with respect to particular areas, ice-covered areas and particularly sensitive sea areas, and explore China's legislation in marine protected areas and the

existing problems.

Japan submitted information on the limits of its continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (CLCS) and claimed exclusive economic zone and continental shelf beyond 200 nautical miles based on the Okinotori Reef. Japan's actions were challenged by members of the international community. This paper written by QIU Jun and LIU Wenhua compares the submissions submitted to the CLCS, for example, the Bishop and Clerk Islets and the McDonald Islands of Australia, the Bounty Islands of New Zealand, Fatutaka Island of the Solomon Islands, and Birds Island of Seychelles, which are all related to claims of continental shelf based on inhabited islets, and studies the international practice on the failure of Rockall Rock to get legal status as an island. Hence conclusion is drawn that the Okinotori Reef should be recognized as a rock defined in article 121(3) of UNCLOS, and should have no EEZ or continental shelf.

Piracy and armed robbery against ships have been a threat to the global maritime safety and order for a long time. In June 2009, Japan promulgated the Bill Concerning the Punishment of Piracy and Anti-piracy Missions, which stipulates the specific rules on the duty and responsibility of relevant administrative departments towards piracy. The translation of ZHUANG Yuyou provides the readers documents to acquaint the new legislation in Japan. Also LING Jing focuses on the related bilateral, trilateral, and multilateral prevention and control mechanisms against piracy and armed robbery against ships of coastal States around the Strait of Malacca, and emphasizes the elements that attribute to the efficiency of existing cooperative mechanisms, and the developmental direction.

A coastal zone is a sensitive area of land-ocean interaction. Maritime powers are facing the common issue of rational development and effective management of coastal zones. The United States enacted the Coastal Zone Management Act (CZMA) as early as 1972, which has been amended many times since then. At present, most coastal states/regions have already enacted pertinent laws on coastal zone management and a complete legal system of coastal zone management has been established. In January 2009, the Environmental Law Association (ELI) issued a white paper on Expanding the Use of Ecosystem-based Management in the Coastal Zone Management Act, which suggested the CZMA be amended in order to strengthen the ecosystem-based coastal zone management. The white paper translated and edited by GUI Jing acknowledges the readers with the tendency of continuous development of the CZMA in America. As a response, the article of JIANG Yuhuan and FANG Longjie, by analyzing the Chinese legislation of the coastal zone manageme-

nt, provides several suggestions on the improvement of the law of coastal zone management with reference to the CZMA and its continuous development.

Serious marine environmental pollution will inevitably result in the rise of the number of claims against relevant damages. Article 90, paragraph 2 of the Marine Environment Protection Law of the People's Republic of China provides the departments invested by this law with the power of marine environment supervision and administration shall, on behalf of the State, claim against those who are responsible for compensation. But deficiency of operability contributes to that there are questions demanding exploration. The article of WANG Binwei and GAO Lei, points out how to fix an administrative authority as the proper plaintiff in claims against different types of pollution in order to solve the disputes in practice.

The grave situation confronting the conservation of international living resources has urged the development of port State control in this regard. In November 2009, the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing was approved by the FAO Conference. The article of TANG Jianye analyses the content of the Agreement and possible impact on China in detail. In 2001, the US Department of the Interior issued a regulation on closure of commercial fishery in Palmyra Atoll, which resulted in prosecution against the federal government by the investor based on the Fifth Amendment Takings Clause under the US Constitution. The Interior Department won the case in the US Court of Appeals. Based on this case, Owen Tang analyses the legal issues related to the taking clauses of fisheries.

These insightful and perspicacious articles with substantial content are the crystallization of scholars' wisdom, which would be rewarding and beneficial to readers. We are looking forward to the cooperation of the four schools making essential contribution to the further development of the journal. And consistent support and care for the journal will be always appreciated, for it is the support and care that makes the journal grow and thrive faster and more stably.

COLR Editorial

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专属经济区内的管辖权问题研究
——特别区域、冰封区域和特别敏感海域

龚迎春 *

内容摘要: 根据《联合国海洋法公约》的规定，沿海国在其专属经济区内的管辖权包括三个方面:海洋科学研究，海洋环境的保护和保全，人工岛屿、设施和结构的建造、管理和使用。沿海国对上述事项的管辖权事实上包括立法管辖权和执法管辖权两个方面，而涉及海洋环境保护和保全的沿海国执法管辖权的行使又要受到公约中其他条款的严格限制，其目的是达到沿海国利益和他国航行等利益之间的平衡。但是，近年来，不少国家以保护海洋生物资源、特殊的航行条件或脆弱的海洋生态自然环境等理由，在本国的专属经济区内设立海洋保护区、特别敏感海域、海洋自然公园等保护目的和名称各异的海洋保护区域，并在这些区域内适用限制船舶航行和其他人类活动的保护措施和执法管辖权。这些措施对建立在《联合国海洋法公约》相关条款之上的沿海国和他国之间权利义务的微妙平衡产生了影响，另一方面也存在针对外国船舶的执法管辖权以及这些保护措施本身的国际法依据问题。为此，有必要对特别区域、冰封区域和特别敏感海域的形成背景、国际法依据、设定的要件和程序、沿海国的立法和执行权的范畴进行比较研究，并探讨我国在该领域的立法现状和存在的问题。

关键词: 专属经济区 特别区域 冰封区域 特别敏感海域 执行管辖权

近年来，不少国家以保护海洋生物资源、特殊的航行条件或脆弱的海洋生态自然环境等理由，在本国的专属经济区内设立海洋保护区、特别敏感海域、海洋自然公园等保护目的和名称各异的海洋保护区域，并在这些区域内适用包括强制性船舶通报制度、国际航行线路回避海域或季节性回避海域、船舶禁止停靠水域等限制船舶航行和人类活动的保护措施，反映了海洋环境保护领域的国家实践和环保理念交化。上述保护措施一方面对建立在《联合国海洋法公约》（以下简称“《公约》”）第 56 条和第 58 条之上的沿海国和他国之间权利、义务的微妙平衡产生了

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影响，另一方面也涉及到沿海国对于违反这些保护措施的外国船舶的执行权、以及这些保护措施本身的国际法依据同题。本文将对特别区域制度、冰封区域制度和特别敏感海域的形成背景、国际法依据、设定的要件和程序、沿海国的立法和执行权进行比较研究。

一、特别区域制度

（一）特别区域制度的形成背景

沿海国在本国专属经济区内设立特别区域的国际法依据是《公约》第 211 条，该条款的目的在于防止来自船舶的污染。

特别区域制度是由防止海洋油污的一系列国际公约逐渐形成、发展而来的。1954 年防止海洋油污的第一次外交会议通过《防止海洋石油污染的国际公约》，该公约禁止油轮在距岸 50 海里的范围内排放油类和油性混合物。1962 年政府间海事协商组织（即国际海事组织的前身）召开防止海上油污的伦敦会议，对 1954 年公约进行了修订，扩大了禁止排放的海区范围。其中，北海、波罗的海、地中海、亚得里亚海、黑海、亚速海、红海等公约中规定的禁止排放区域的范围扩大到 100 海里。1973 年政府间海事协商组织在伦教会议上通过了《国际防止船舶造成污染公约》，并于 1978 年进行了修订。该公约将 1954 年公约中规定的“禁区”改称为“特别区域”。[1]

《公约》采用了特别区域的概念，《公约》第 211 条对沿海国设定特别区域的要件和程序、立法和执行权限等作了严格的规定。

（二）特别区域的设定水域、设定要件和程序

根据《公约》第 211 条的规定，特别区域的设定海域为沿海国的专属经济区内，且必须有明确划定的范围。换句话说，《公约》第 211 条所指的特别区域的法律地位为沿海国的专属经济区。

关于特别区域的设定要件，《公约》第 211 条第 6 款（a）规定：“如果第 1 款所指的国际规则和标准不足以适应特殊情况，又如果沿海国有合理根据认为其专属经济区某一明确划定的特定区域，因与其海洋学和生态条件有关的公认技术理由，以及该区域的利用或其资源的保护及其在航运上的特殊性质，要求采取防止来自船只的污染的特别强制性措施，该沿海国通过主管国际组织与任何其他有关

1 张海文主编：《联国海洋法公约释义集》，北京：海洋出版社 2006 年版，第 407 ～ 408 页。

国家进行适当协商后，可就该区域向该组织送发通知，提出所依据的科学和技术证据，以及关于必要的回收设施的情报。”

上述规定表明，专属经济区内特别区域的设定需符合两个要件。第一，设定特别区域的海域必须是需要采取特别保护措施的海域，其特殊性表现为:和海洋学和生态条件有关的公认技术理由的存在，该区域的利用和资源保护的需要，航运上的特殊性质等。第二，《公约》第 211 条第 1 款[2]所指的国际规则和标准不足以适应该区域的特殊性。

关于设定特别区域的程序，沿海国在其专属经济区内设定特别区域或其他名称的海洋保护区域行为本身并不需要获得主管国际组织的同意或与其他国家进行协商。但是，沿海国若意图对其特别区域制定并执行高于《公约》第 211 条第 1 款所指的国际规则和标准的国内法律规章、并对船舶采取特别强制性措施，则设定程序必须符合《公约》第 211 条第 6 款规定的以下四个步骤:第一，向主管国际组织提出所依据的科学和技术证据;第二，通过主管国际组织与“任何其他有关国家进行适当协商”;第三，主管国际组织应在 12 个月内确定该区域的情况是否符合上述要件，如果该组织确定是符合的，沿海国即可制定防止、减少和控制来自船只的污染的法律和规章;第四，沿海国制定的法律和规章，须在向主管国际组织发送通知满 15 个月后，才能适用于特别区域内的外国船舶。

上述步骤显然是属于缺一不可的关系。主管国际组织在确定沿海国提交的科学和技术证据是否符合《公约》规定的要求方面起决定作用，沿海国在本国专属经济区内的特别区域内适用高于国际规则和标准的国内法律、规章和特别强制性措施，必须获得主管国际组织的认可。这里的“主管国际组织”是指主管船舶航行与安全事务的国际海事组织。至于“任何其他有关国家”具体是指该海域的所有利用国、国际海事组织的所有成员国、还是《公约》的所有缔约国在《公约》中则是不确定的。有学者认为“任何其他有关国家”并非限定于某个特定地理区域内的国家。由于与“任何其他有关国家进行适当协商”要通过主管国际组织，因此，“协商”应该是在国际海事组织的框架内进行。《公约》未规定若其缔约国不是国际海事组织的成员国，该国应通过何种途径与沿海国进行“适当协商”或表示反对，以及反对是否能够阻止国际海事组织作出相关认可的决定。

（三）沿海国对特别区域的立法权和执行权

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2 各国应通过主管国际组织或一般外交会议采取行动，制订国际规则和标准，以防止、减少和控制船只对海洋环境的污染，并于适当情形下，以同样方式促进对划定航线制度的采用，以期尽量减少可能对海洋环境，包括对海岸造成污染和对沿海国的有关利益可能造成污染损害的意外事件的威胁。这种规则和标准应根据需要随时以同样方式重新审查。

在立法权方面，根据《公约》第211条第5款的规定，沿海国的法律首先要遵守和实行普遍接受的旨在防止、减少及控制来自船舶的污染的国际规则和标准。所谓普遍接受的国际规则和标准是指《国际防止船舶造成污染公约》和其他国际公约中规定的规则和标准。只有当国际规则和标准不足以适应特殊情况，且沿海国有合理根据认为其专属经济区某一明确划定的特定区域要求采取防止来自船舶的污染的特别强制性措施时，沿海国在向国际海事组织提出所依据的科学和技术证据、与"任何其他相关国家"进行适当协商并经国际海事组织确定为符合条件后，才可对特别区域制定并适用高于国际规则和标准的国内法律规章和特别强制性措施。此外，沿海国还可增定涉及排放和航行办法的法律和法规，但此类法律和法规不应要求外国船舶在船舶的设计、建造、人员配备或装备标准方面遵守"一般接受的国际规则和标准"以外的标准或规则。

沿海国在其专属经济区内的立法权和执行权是两个层面的问题。沿海国在《公约》规定的条件下对特别区域的立法权虽高于其专属经济区的其他部分，但在执行权方面，并没有被赋予更高的权限，仍然必须在《公约》第220条的范围内行使。《公约》第220条规定，对于违反关于防止、减少和控制船只造成的污染的国际规则和标准或沿海国法律、规章的外国船舶，沿海国可根据其违反的程度和后果，采取下列不同步骤的执行权：(1)要求船舶提供相关情报。如果沿海国有明显根据认为在其领海或专属经济区内航行的外国船舶在其专属经济区内违反了相关国际规则和标准或沿海国的相关法律、规章，沿海国可要求该船提供关于该船的识别标志、登记港口、上次停泊和下次停泊的港口，以及其他必要的有关情报，以确定是否已有违反行为发生；(2)对船舶进行实际检查。由于船舶检查可能影响专属经济区内外国船舶的航行权，《公约》将沿海国实施实际检查的权限限定于以下情形：外国船舶违反沿海国相关法律、规章并导致大量排放，对海洋环境造成重大污染或有造成重大污染的威胁，该船在拒不提供情报、或所提供的情报与实际情况显然不符，并且依案件情况确有进行检查的理由时，可就有关违反行为的事项对该船进行实际检查；(3)提起司法程序，包括对船舶的扣留在内。如有明显客观证据证明在一国专属经济区或领海内航行的船只，在专属经济区内因上述违反行为而导致排放，对沿海国的海岸或有关利益，或对其领海或专属经济区内的任何资源造成重大损害或有造成重大损害的威胁，该国在有充分证据时，可在第十二部分第七节限制下，按照该国法律提起司法程序，包括对该船的拘留。

沿海国对来自船舶的污染的执行权除了应在上述第220条的范围内行使外，在执行权的具体行使方式方面也要受到以下限制。(1)对执行权的行使主体的限制。为海洋环境保护和保全的目的而对外国船只的执行权力，只有官员或军舰、军用飞机或其他有清楚标志可以识别为政府服务并经授权的船舶或飞机才能行使；(2)执行主体在行使权力时承担避免不良后果的义务。在对外国船舶行使执行权力时，各国不应危害航行的安全或造成对船舶的任何危险，或将船只带至不

安全的港口或停泊地，或使海洋环境面临不合理的危险。(3)应避免不必要的实际检查。对于船舶的实际处查，各国应合作制定程序，以避免在海上对船只作不必要的实际检查。任何对外国船只的实际检查应只限于查阅该船按照一般接受的国际规则和标准所须持有的证书、记录或其他文件，对船只的进一步实际检查应在查阅上述文件并发生了以下情况时才可进行:有明显根据认为该船的情况或其装备与这些文件所载有重大不符，这类文件的内容不足以证实或证明涉嫌的违反行为，该船未持有有效的证件和记录。(4)对外国船只的无歧视。各国在行使其权利和履行其义务时，不应在形式和事实上对任何国家的船只有所歧视。(5)对羁留外国船舶的执行权的限制。各国羁留外国船只不得超过第 216、第 218 和第 220 条规定的为调查目的所必需的时间。如果调查结果显示有违反关于保护和保全海洋环境的可适用的法律和规章或国际规则和标准的行为，则应于完成提供保证书或其他适当财政担保等合理程序后迅速予以释放。但是，如船只的释放可能对海洋环境引起不合理的损害威胁，可拒绝释放或以驶往最近的适当修船厂为条件予以释放。在拒绝释放或对释放附加条件的情形下，必须迅速通知船只的船旗国，该国可按照第十五部分(争端的解决)寻求该船的释放。(6)对沿海国提起司法程序的限制。《公约》虽然在第 220 条规定了沿海国在一定条件下对外国船舶可以提起司法程序，但同时又规定，别国是否已经提起司法程序不妨碍船旗国按照本国法律采取任何措施，包括提起加以处罚的司法程序的权利。事实上，当船旗国和沿海国的这种司法管辖权发生冲突时，如果“船旗国在这种程序最初提起之日起 6 个月内就同样控告提出加以处罚的司法程序时，应即暂停进行，除非这种程序涉及沿海国遭受重大损害的案件或有关船旗国一再不顾其对本国船只的违反行为有效地执行可适用的国际规则和标准的义务”。(7)刑事处罚的不适用。《公约》第 230 条第 1 款规定：“对外国船只在领海以外所犯违反关于防止、减少和控制海洋环境污染的国内法律和规章或可适用的国际规则和标准的行为，仅可处以罚款。”

综上所述，依据《公约》第 56 条的规定，沿海国对专属经济区海洋环境的保护和保全拥有管辖权。但沿海国对于来自船舶的污染的执行权受到《公约》第十二部分(海洋环境的保护和保全)的严格限制，沿海国在特别区域内的执行权也不例外。虽然沿海国在符合《公约》规定的前提下，对专属经济区内的特别区域可制定高于国际规则和标准的国内法律、规章，但是，对于违反的外国船舶的执行权则仍然必须在《公约》第 220 条(沿海国的执行)和第十二部分第七节(保障办法)的范围内行使。

(四)沿海国在特别区域内可采取的特别保护措施

《公约》未对沿海国在其专属经济区内的特别区域具体可采取哪些特别保护

措施作出规定。事实上，到目前为止还没有一个沿海国依据《公约》第 211 条第 6 款 (a) 项的规定设立特别区域。

尽管如此，沿海国依据国内法在其特别区域准备或正在实施的特别强制性措施必须获得主管国际组织，即国际海事组织的“确认”这一点是确定无疑的。从专属经济区制度的产生过程来看，该制度是建立在沿海国和其他国家之间权利和管辖权分配的微妙平衡之上，沿海国为防止、控制和减少来自船舶的污染的目的，在实施特别强制性措施方面并不具有特别的自由裁量权。正如有学者指出的那样，《公约》第 211 条第 6 款要求“即使是在特殊情况下沿海国实施严格的防污控制法规也必须获得国际海事组织的批准，并且有科学技术方面的证据作为支持。因此，《公约》并没有赋予沿海国在专属经济区内单方面防止污染的额外自由。强制报告制度或强制航线制度如果要适用于专属经济区，必须得到国际海事组织的批准”。[3] 可以说，《公约》中的特别区域制度只是一个框架规定，而涉及到特别区域的设定程序、沿海国在特别区域内可采取的特别保护措施等实质性问题，《公约》把决定权赋予了国际海事组织。

然而，如上文所述，特别区域制度的目的很大程度上是为了防止沿海国于在专属经济区防止、控制来自船舶的污染方面肆意扩大其立法和执法权，因而该制度规定了非常严格的设定要件和繁琐的设定程序，从而使得该制度在国际海事组织框架内很难实际运用。因此，近年来，在国际海事组织框架内另外形成了特别敏感海域认定制度，该制度为沿海国在其专属经济区内的海洋保护区域适用特别保护措施提供了更为简便的方法。1990 年，美国制定《弗罗里达礁岛群联邦海洋保护区保护法》，依据该法的规定，美国在该海洋保护区内设定了 4 个避航水域和 3 个禁止停船区域，但对船舶航行所采取的上述措施的适用对象仅限于美国国内船舶。2002 年 12 月 1 日，包括弗罗里达礁岛群联邦海洋保护区及其周边水域在内的 3000 平方海里的海上区域被国际海事组织认定为特别敏感海域，成为该组织认定的第五个特别敏感海域。作为该海域内的保护措施，长度超过 50 米的船舶和油轮禁止在该海域下锚，并被完全禁止进入一些禁航水域。[4]

越来越多的国家通过向国际海事组织提出申请并获得认定的途径，在本国专属经济区内建立各类海洋保护区，并实施包括强制性船舶通报制度、国际航行线路回避海域或季节性回避海域、船舶禁止停靠水域等特别保护措施。这些措施对《公约》第 58 条中规定的他国在沿海国专属经济区内的航行和飞越自由、铺设海底电缆和管道的自由和第 88 条至第 115 条中规定的权利（如登临权和紧迫权）等

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3 帕特莎·波尼（Patricia Birnie）、埃伦·波依尔（Alan Boyle）著，那力、王彦志、王小钢译：《国际法与环境（第 2 版）》，北京：高等教育出版社 2007 年版，第 358 页。

4 Florida Keys National Marine Sanctuary Annual Report, 1 July 2002–30 June 2003, at http://floridakeys.noaa.gov/news/2003govcabreport.pdf, 2 August 2009.

的行使将可能产生影响。[5]

沿海国在专属经济区内设定的各类海洋保护区域的空间范围的扩大和各类保护措施的增强使得专属经济区制度面临挑战，并引发关于特别区域和特别敏感海域的关系、国际海事组织决议的法律效力及其和《公约》的关系等法理问题。

二、冰封区域

（一）冰封区域制度的形成背景

冰封区域的概念源于 1970 年加拿大颁布的《北极海污染防治法》。在加拿大向联合国公海海底海床和平利用特别委员会提出的最初提案中，“冰封区域”尚未成为单独的概念，而是被包括在“环境保护水域”的概念当中。在第三次联合国海洋法会议上，加拿大和澳大利亚的提案将特别区域和冰封区域作为不同的条款单独列出，两国在提案中主张沿海国对于其专属经济区内长期处于结冰状态从而对航行造成障碍或特别危险的水域可制定法律和规章，以防止、减轻和控制船只在冰封区域对海洋的污染，但法令的适用应限定于该水域处于冻结状态并由此存在前述危险情况期间；沿海国的法律、法令还可对包括外国船舶的设计、构造、人员装备和配备标准作出规定。[6]

（二）冰封区域的设定水域及设定条件

1982 年《公约》第 234 条规定了冰封区域的设定水域和设定条件，即“沿海国有权制定和执行非歧视性的法律和规章，以防止、减少和控制船只在专属经济区范围内冰封区域对海洋的污染，这种区域内的特别严寒气候和一年中大部分时候冰封的情形对航行造成障碍或特别危险，而且海洋环境污染可能对生态平衡造成重大的损害或无可挽救的扰乱。这种法律和规章应适当顾及航行和以现有最可靠的科学证据为基础对海洋环境的保护和保全。”

据此，沿海国可设定冰封区域的水域为本国的专属经济区，且冰封区域的设定必须符合以下条件：第一，该区域的气候特别严寒，且一年中大部分时候处于冰封的情形；第二，上述情形的存在对航行造成障碍或特别危险；第三，该区域一旦发生海洋环境污染可能对生态平衡造成重大的损害或无可挽救的扰乱。应该说上

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5 美国《弗罗里达礁岛群联邦海洋保护区保护法》规定，对于船舶活动的限制性规定不适用于政府公船的必要行动，包括国家的防卫、执法行动以及针对生命、财产和环境所采取的紧急行动。

6 （日）栗林忠男著：《注解联合国海洋法公约（下卷）》，东京：有斐阁 1994 年版，第 144 页。

述几个要件缺一不可。但是，从《公约》规定来看，是否符合上述要件并不需要相关国际组织的确认，而是由沿海国自行判断。

（三）沿海国在冰封区域的立法权、可采取的保护措施和执行权

在立法权方面，第 234 条规定："沿海国有权制定和执行非歧视性的法律和规章，以防止、减少和控制船只在专属经济区范围内冰封区域对海洋的污染。"值得注意的是，虽然《公约》在相关条款中分别规定，沿海国对在其领海、专属经济区、以及特别区域内的外国船舶的设计、建造、人员配备或装备标准不得要求高于一般国际规则和标准，但是，在冰封区域却没有同样的限制性规定。因此，沿海国对于在冰封区域内航行的外国船舶在设计、建造、人员配备或装备标准方面的要求可高于一般国际规则和标准。

《公约》对沿海国在冰封区域的执行权和可采取的保护措施未作明确规定，只是要求沿海国在制定和执行此种法律和规章时要受到 3 个制约：非歧视性，应适当顾及航行，应以现有最可靠的科学证据为基础对海洋环境进行保护和保全。由于《公约》涉及冰封区域的规定只有上述第 234 条中的笼统规定，相关国家在适用、解释该条款时，倾向于赋予本国在立法权、执行权、可采取的保护性措施等方面较大的裁量权，并在排放、航行乃至船舶的设计、建造、人员配备和设备标准等方面制定高于国际标准的国内法律、规章。

俄罗斯于 1995 年公布《北方航道航行指南》（以下简称"《指南》"）。俄罗斯使用的"北方航道"一词，事实上就是欧洲国家惯称的东北航道。俄罗斯主张其制定《指南》的国际法依据为《公约》第 234 条关于冰封区域的规定，目的是为了保证船舶航行的安全和防止来自船舶的污染。《指南》的适用范围既包括东北航道，也包括巴伦支海和白令海的冰封水域。[7] 也就是说，俄罗斯在 1995 年公布《指南》时，东北航道以及巴伦支海和白令海的《指南》适用水域被视为俄罗斯专属经济区内的冰封水域。然而涉及到东北航道的法律地位问题，俄罗斯的立场前后并不一致，就上述水域的法律地位问题，目前也和其他国家之间存在着分歧。前苏联从上个世纪 60 年代开始就主张东北航道为其内水，而该主张一直遭到美国等国家的反对。1995 年的《指南》虽然规定东北航道对所有国家的船舶开放，但其管理的方式极为严格，超出了《公约》第 234 条以及其他与专属经济区制度有关的条款赋予沿海国的权限范围。

俄罗斯在《指南》中规定，东北航道对所有船籍国的船舶开放，但要求船舶航行必须符合规定的条件。首先是对船长或其他责任人的人员配置要求。《指南》要

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7 A. G. Gorshkovsky, Rules to Be Followed on the Northern Sea Route, at http://www.arcop.fi/workshops/workshopl_5.pdf, 2 August 2009.

求在俄罗斯东北航道航行的船舶，其船长或其他责任人必须具备在冰海航行的经验。如果不具备此经验，则应由俄罗斯主管当局派遣引水员。其次，对船舶携带文件的要求。《指南》要求只有携带足够财政担保证明的船舶才可在东北航道航行，以保证船主承担由于船舶污染海洋环境而造成损害的民事责任。第三，关于船舶强制通告义务的要求。《指南》要求船主或船长必须就其预定的航行事先向俄罗斯主管当局提出通告，并根据《指南》中规定的方式和时间请求领航。第四，垄断船舶航行服务业务的规定。《指南》要求所有和进入东北航道有关的船舶航行服务都在和俄罗斯主管部门具有隶属关系的海洋运营总部的控制下进行。此外，俄罗斯在《指南》中以环境保护和保证船舶航行安全为由，对不同种类和吨位的船舶征收通行费;规定违反关于防止、减少和控制海洋环境污染的国内法律和规定或可适用的国际规则和标准的行为可被作为刑事惩罚的对象，这一规定和《公约》第 230 条的规定不符，即“对外国船只在领海以外所犯违反关于防止、减少和控制海洋环境污染的国内法律和规章或要适用的国际规则和标准的行为，仅可处以罚款。”

《指南》中的不少规定显然超出了《公约》赋予沿海国在专属经济区的管辖权范围，但是，如果从《公约》第 234 条关于冰封区域的规定来看，俄罗斯作为冰封区域的沿海国所作出的上述规定的合法性似应该从《公约》第 234 条中的 3 个制约去衡量，即“非歧视性，应适当顾及航行，应以现有最可靠的科学证据为基础对海洋环境进行保护和保全”。

（四）特别区域和冰封区域的区别

从第 234 条的起草过程以及最终形成的条文内容来看，冰封区域的沿海国较之特别区域的沿海国，在立法、执法以及冰封区域的划定要件等方面都有更为广泛的规范权限，并具有以下特点：

首先，《公约》第 234 条虽规定冰封区域的设定应符合规定的要件，但是否符合要件的判断权在于沿海国，而非任何国际组织。其次，第 234 条未限制冰封区域的沿海国对冰封区域制定和执行高于国际规则和标准的法律、规章，也未限制沿海国对冰封区域内船舶的设计、建造、人员配备或装备标准的要求高于国际规则和标准。第三，第 234 条未要求冰封区域必须是一个明确划定的区域。第四，第 234 条未要求冰封区域的法律、规章的制定和执行以及特别强制性措施的实施需要相关国际组织的同意或与相关国家进行协商。第五，第 234 条要求冰封区域的沿海国制定和执行非歧视性的法律和规章，此类法律、规章应不加歧视地适用于各国的各类船舶;而特别区域的法律、规章的制定和执行则未要求非歧视性，因此，对于特别区域内不同性质的船舶，沿海国可就排放、航行办法等适用不同的规则。第六，冰封区域的沿海国有权制定和执行非歧视性的法律和规章，以防止、减少和控制船只在专属经济区范围内冰封区域对海洋的污染，但应适当顾及航行。

该规定一方面说明船舶在冰封区域的航行权要受冰封区域沿海国法律、规章的制约，另一方面也显示在该区域内的船舶航行权只是受到了限制而非禁止。因此，沿海国似不应采取禁止航行的强制性措施。而《公约》对于在特别区域内航行的外国船舶的航行权是否可以被禁止的问题未作具体规定，这使得特别区域的沿海国在制定和实施针对船舶航行的强制性措施方面具有一定的自由裁量权，然而法律空白的存在也为国际争端的产生埋下伏笔。

三、特别敏感海域

近年来，国际海事组织在其组织框架内认定了一些国家的海洋保护区域为“特别敏感海域”。由于《公约》中没有“特别敏感海域”的概念和相关法律制度，因此，对于“特别敏感海域”的认定主体和法律依据、认定标准和程序、适用的对象水域、该水域和《公约》中的特别区域和冰封区域的关系等，都有必要进行研究。

（一）特别敏感海域概念的起源

国际海事组织作为负责国际航行安全和防止船舶污染海洋领域的主管国际组织，在其框架内逐渐形成了两个海洋保护区体系：一是依据 1973/78 年《国际防止船舶造成污染公约》及其议定书而设定的特别海域，另一个是依据国际海事组织决议（即《特别敏感海域的认定与指定指南》，以下简称“《认定与指定指南》”）而设定的特别敏感海域。前者所指的特别海域事实上特指地中海、波罗的海、黑海、红海、科孚海峡等条约适用水域，不存在沿海国自主设定海洋保护区的问题，且上述水域也包括部分公海海域在内，因此，此“特别海域”不同于《公约》第 211 条规定的沿海国专属经济区内的“特别区域”。而特别敏感海域的设定依据是国际海事组织的决议。由于其设定没有任何条约依据，因此，产生了国际海事组织认定特别敏感海域的权限和依据、认定标准和程序、适用水域、可实施的强制性措施及其和《公约》的关系等问题。

特别敏感海域的概念起源于 1978 年关于油轮安全及防止污染国际联席会议上通过的第 9 号决议。之后，关于特别敏感海域认定制度的讨论在国际海事组织框架内持续多年。1991 年的国际海事组织大会决议通过了《认定与指定指南》。但是由于该指南内容冗长、复杂，难以具体适用，因此，该指南通过之后，只有古巴的撒巴那—卡玛居埃群岛在 1997 年被指定为特别敏感海域。1997 年国际海事组织第 40 届海洋环境保护委员会会议上，成立了改订 1991 年国际海事组织《认定与指定指南》联络小组。2001 年 11 月 29 日，国际海事组织通过了改订后的新指南。

（二）2001 年《特别敏感海域的认定与指定修订指南》中关于特别敏感海域的认定标准和程序

2001 年《特别敏感海域的认定与指定修订指南》（以下简称“《修订指南》”）[8]中规定，特别敏感海域是指那些“因公认的生态学的或社会经济的或科学的理由、及其易受来自于国际海运活动的损害的影响，因而需要国际海事组织采取特别保护行动的区域。”[9]

关于认定、指定以及决定采取相关保护措施的主体，《修订指南》规定特别敏感海域的认定、指定以及决定采取相关保护措施的唯一有权机构为国际海事组织海洋环境保护委员会。

《修订指南》规定，认定特别敏感海域和决定采取相关保护措施时须考虑以下三个要素：特定区域的特别环境条件，该区域对来自国际海运活动的损害具有的脆弱性，在国际海事组织的权限范围内实施相关保护措施的可能性。

关于特别敏感海域的认定标准，《修订指南》规定特别敏感海域的认定须至少符合以下要件之一：生态学的标准，社会的、文化的以及经济的标准，科学的以及教育的标准。且上述标准只应适用于易受来自于国际海运活动损害影响的区域。

（三）在特别敏感海域可采取的相关保护措施及其法律依据

《认定与指定指南》中明确规定了沿海国在特别敏感海域可采取的具体保护措施包括以下三类：对在特别敏感海域内航行的船舶实施特别的排放规定；根据《国际海上人命公约》和有关航路指定的规则和船舶通报制度的标准，对特别敏感海域内及其周边的船舶适用指定航路和船舶通报制度；强制性船舶引水制度及与船舶航行管理制度有关的其他措施。

在国际海事组织机构内，认定、指定特别敏感海域的机构为国际海事组织的海洋环境保护委员会，但沿海国提出的保护措施中涉及船舶通航措施的提案，如强制性船舶通报制度、强制性船舶引水制度、国际航行线路避航区域或季节性避航区域的设定、禁止船舶停泊区域的设定等措施则需要在国际海事组织的航行安全小组委员会上获得通过。

沿海国在向国际海事组织提交特别敏感海域申请时，应附有相关保护措施的

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8 Resolution A. 982(24) Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSAs).

9 A Particularly Sensitive Sea Area is an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities.

提案，并注明每一措施的法律根据。这些保护措施的法律依据可以是：（a）现有海事组织文书采取的任何措施，（b）目前尚未有、但在修正或拟订一项海事组织文书后可以采取的任何措施，（c）根据《公约》第 211 条第 6 款通过的任何措施。[10]

但是，关于国际海事组织决议是否可以成为沿海国在特别敏感海域实施保护措施的国际法律依据问题，事实上国际海事组织成员国之间目前尚未达成完全的一致。如国际海事组织海洋环境保护委员会通过的第 133（53）号决议指定托雷斯海峡为大堡礁特别敏感海域的延伸部分。该决议承认澳大利亚设立的双向航道措施，建议各国政府认识到有效保护大堡礁和托雷斯海峡地区的必要性，并通知悬挂本国国旗的船舶遵守澳大利亚对长度 70 米以上的商船，以及油船、化学船、液化气运载船所规定的强制领航制度。但这一决议在国际海事组织会议上引起激烈争论，一些国家的代表团在会议上指出，海洋环境保护委员会的上述决议不能作为对通过用于国际航行的托雷斯海峡或任何其他海峡的船舶实行强制性领航安排的国际法律依据。[11] 2006 年 10 月 6 日，澳大利亚政府以该决议为依据发布了 8/2006 号航行通告，决定在托雷斯海峡实施强制引航。澳大利亚开始在托雷斯海峡实施强制引航制度后，遭到美国、新加坡等国的反对。[12]“在国际海事组织海洋环境保护委员会第 55 届会议上，新加坡代表在发言中指出：海洋环境保护委员会第 133（53）号决议为建议性内容，不应作为澳大利亚政府在托雷斯海峡实施强制引航的法律基础，而且强制性引航也动摇了《公约》所规定的船舶在国际海峡航行的权利，将会给国际航运的法律基础带来严重的负面影响。中国、美国、英国、塞浦路斯、希腊、挪威等国家也都发言反对澳大利亚的强制引航措施。最后，委员会明确海洋环境保护委员会第 133（53）号决议为建议性内容，不能作为强制性引航的法律基础。澳大利亚代表团表示同意委员会的观点，但否认 8/2006 号航行通告妨害了《公约》规定的船舶航行权，同时表示将向国内主管部门报告会议讨论情况和委员会的结论”。[13]

国际海事组织作为海运领域的国际组织，其在组织框架内通过的决议一方面只应对该组织的成员有一定的拘束力，同时，由于决议的效力不同于条约或国际习惯，即使对于国际海事组织成员国也并不具有法律拘束力。

目前，已经由国际海事组织海洋环境保护委员会指定的特别敏感海域及相关

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10 参见联合国秘书长 2005 年 8 月 15 日在第 60 届会议上所做的“海洋和海洋法”的报告。A/60/63/Add.2., at http://china-isa.jm.china-embassy.org/chn/hyfzl/gjhy/lhghyxgzl/P020051216283964534955.pdf, 3 August 2009.

11 国际海事组织文件 MEPC 53/24，海保会第五十三届会议报告，第 8.5 ～ 8.7 段。

12 Compulsory Pilotage in the Tortes Strait, *Newsletter of the Sea Power Centre- Australia*, Issue 7, April 2007, at http://www.navy.gov.au/spe/semaphore/issue7_2007.html, 3 August 2009.

13 出席国际海事组织海洋环境保护委员会第 55 届会议的报告，下载于 http://www.simic.net.cn/news/detail.jsp?id=22556，2009 年 8 月 2 日。

保护措施包括：[14]

1	澳大利亚的大堡礁（1990 年认定为特别敏感海域）：强制领航、国际海事组织建议航道、强制通报制度
2	古巴的撒巴那—卡玛居埃群岛（1997 年认定为特别敏感海域）：分道通航方式、避航水域、禁止排放水域
3	哥伦比亚的马尔佩洛岛（2002 年认定为特别敏感海域）：避航水域
4	美国的弗罗里达礁岛群周边海域（2002 年认定为特别敏感海域）：四个避航水域、三个禁止下锚水域
5	丹麦、德国、冰岛的瓦登海（2002 年认定为特别敏感海域）：强制通报制度、制定航道、《国际防止船舶造成污染公约》中的特别海域
6	秘鲁的帕拉卡斯国家保护区（2003 年认定为特别敏感海域）：避航水域
7	西欧水域（2004 年认定为特别敏感海域）：运输重油燃料的单壳油轮的强制通报义务
8	目前大堡礁特别敏感海域的延伸地区，包括托雷斯海峡（2005 年认定为特别敏感海域）：强制引航制度
9	西班牙的加纳利群岛（2005 年认定为特别敏感海域）：分道通行办法、禁航区和强制性船舶通告措施
10	厄瓜多尔的加拉帕尔斯群岛（2005 年认定为特别敏感海域）：禁航区
11	波罗的海地区、丹麦、爱沙尼亚、芬兰、德国、拉脱维亚、立陶宛、波兰和瑞典（2005 年认定为特别敏感海域）：分道通航、建议深水航道以及禁航区
12	美国夏威夷帕帕哈那姆克阿基亚国家海洋遗址（2007 年认定为特别敏感海域）：船舶通告制度、禁止航行水域

（四）国际海事组织认定的特别敏感海域和《公约》第 211 条特别区域的关系

国际海事组织认为，“《公约》第 211 条规定的特别区域的确定标准和国际海事组织特别敏感海域的认定标准不是相互排斥的，在很多情况下，有可能在特别区域内认定一个特别敏感海域，反之亦然”。[15]

然而，事实上，特别区域和特别敏感海域之间虽存在着某些共同点，但两个制度在设定水域、设定依据和主体、设定应符合的要件、设定的程序等方面都存在不少差异。

14 At http://www.imo.org/Environment/mainframe.asp?topic_id=1357#list, 3 August 2009.
15 At http://www.imo.org/Environment/mainframe.asp?topic_id=1357#list, 3 August 2009.

首先，在设定水域方面，《公约》第 211 条的特别区域可设定水域仅限于沿海国的专属经济区，而特别敏感海域的设定水域并没有限定在沿海国专属经济区内。相反，国际海事组织的《认定与指定指南》中规定可考虑在特别敏感海域周边设定缓冲地带，这意味着特别敏感海域的设定水域及相关保护措施的适用水域有可能包括公海海域。

其次，在设定依据方面，特别区域的依据在于《公约》，而特别敏感海域的设定依据为国际海事组织的决议。由于国际海事组织决议不是条约，对于国际海事组织的各成员国也并不具有法律拘束力（目前，国际海事组织共有 169 个成员国），对于非成员国来说，则更加如此。

第三，在设定程序方面，沿海国设定特别区域的行为本身并不需要获得相关国际组织的同意或认可，只有当沿海国意图对一个有明确范围的特别区域制定和执行高于国际规则和标准的法律、规章时，才需要在符合《公约》规定要件的前提下，和相关国家进行妥善协商，并获得国际组织的认可。而特别敏感海域必须获得国际海事组织的认定，沿海国在特别敏感海域实施的特别保护措施也必须在国际海事组织航行安全小组委员会上获得通过。

从表面上看，特别区域的设定程序似乎比特别敏感海域的设定程序更为简便，事实上很多国家也是通过国内法设立了各种保护目的的海洋保护区。但是，根据国内法设立的特别区域（或其他名称的海洋保护区）通常不伴随强制性保护措施，因而被称为“纸上海洋保护区”。或者，即使有相关的保护措施，其适用的对象也限于本国船舶。因此，从这个意义上来说，此类海洋保护区域的设定不会对国际海洋法律秩序产生实质性的影响。而《公约》第 211 条在涉及高于国际规则和标准的特别强制性保护措施的执行方面规定了非常严格的要件和程序，从而排除了沿海国在其海洋保护区域内滥用强制性保护措施、侵害他国在专属经济区内权益的可能性。

另一方面，特别敏感海域的认定、指定和相关保护措施的适用也必须获得主管国际组织即国际海事组织的认可，在防止沿海国滥用保护措施方面似乎和特别区域制度具有共通之处。但是，从上述美国的弗罗里达礁岛群及其周边水域被国际海事组织认定为特别敏感海域的过程来看，本来只适用于美国国内船舶的保护措施，因国际海事组织的认定而适用于在美国专属经济区内的外国船舶。上述保护措施显然超出了《公约》第 56 条关于专属经济区沿海国的权限范围。对于这样的措施，他国在国际法上是否有遵守的义务;在拒绝遵守的情形之下，美国执法机构是否可以行使执行权以及该执行权是否应该在《公约》第十二部分相关条款的限制下行使等都是存在疑义的。

在对违反船舶的执行权问题上，一些国家对《公约》第十二部分对于沿海国在海洋环境污染方面的执行权所受到的限制感到不满，欧盟、法国、加拿大通过修改国内立法，对于因故意、过失而导致的船舶污染海洋事件的船长和船员适用刑

法。[16] 2005 年欧洲委员会议会大会通过的第 1439（2005）号决议反映了一些国家意图加强在海洋环境保护领域的执行权的意向。“该决议邀请成员国建立或发展海岸警卫队伍，负责海上安全和港口保安以及海洋环境的保护；发展监控排放油污和冲洗压载舱行为的办法；规定有效、相称和劝阻性的刑罚，以惩治任何海上污染行为的责任人，包括可以对故意造成污染的人判处徒刑；成为《国际海上运输有害有毒物质损害责任和赔偿公约》和欧洲委员会的《通过刑法保护环境公约》的缔约方；制定海事组织条例，允许船舶污染受害国在确定所受损害是船旗国没有对有关船舶行使适当监督所致的情况下，向船旗国提出赔偿要求；对国际油污赔偿基金进行改革，使海难受害人可以迅速获得满意的赔偿。”[17]

2008 年 5 月 1 日，美国开始在国际海事组织认定为特别敏感海域的夏威夷（帕帕哈那姆克阿基亚）国家海洋遗迹所在水域内开始实施船舶通告制度。对于违反船舶通告制度的外国船舶，美国表示“将依据《联合国海洋法公约》中的国际习惯法规则，对违反的外国船舶采取适当的措施，包括和船旗国采取共同行动”。[18]

四、我国的海洋保护区立法和实践以及存在的问题

我国从 1990 年起，共陆续设立了 20 个国家级海洋自然保护区，保护对象包括海洋动植物、岛屿与海洋生态系统、珊瑚礁、海洋自然遗迹等。

国家级海洋自然保护区一览表

保护区名称	所在地区	面积（km^2）	主要保护对象	主管部门
蛇岛—老铁山自然保护区	辽宁旅顺口	17000	蝮蛇、候鸟及其生态环境	国家环保总局
鸭绿江口滨海湿地自然保护区	辽宁东港市	112180	沿海滩涂、湿地生态环境及水禽、候鸟	国家环保总局
昌黎黄金海岸自然保护区	河北昌黎	30000	自然景观及其邻近海域	国家海洋局
江苏盐城国家级珍禽自然保护区	江苏盐城市	453000	丹顶鹤等珍禽及滩涂湿地	国家环保总局
南麂列岛海洋自然保护区	浙江平阳县	20106	岛屿及海域生态系统、贝藻类	国家海洋局

16 （日）吉田晶子著：《国際海事条約における外国船舶に対する管轄権枠組の変遷に關する研究》，东京：国土交通省国土交通政策研究所 2007 年版，下载于 http://www.mlit.go.jp/pri/houkoku/gaiyou/pdf/kkk77.pdf，2009 年 8 月 3 日。

17 UN doc. A/60/63/Add.2, para. 64, at http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm, 3 August 2009.

18 参见夏威夷（帕帕哈纳姆克阿基亚）国家海洋遗迹的网页，下载于 http://hawaiireef.noaa.gov/news/welcome.html，2009 年 8 月 13 日。

（续表）

保护区名称	所在地区	面积（km^2）	主要保护对象	主管部门
北深沪湾海底古森林遗迹自然保护区	福建晋江市	3400	海底古森林、牡蛎礁遗迹	国家海洋局
惠东港口海龟自然保护区	广东惠东县	800	海龟及其产卵繁殖地	农业部
珠江口中华白海豚保护区	广东省	460	中华白海豚	广东省
内伶仃福田自然保护区	广东深圳市	858	猕猴、鸟类和红树林	国家林业局
广东湛江红树林自然保护区	广东廉江县	11927	红树林生态系统	国家林业局
山口红树林生态自然保护区	广西合浦县	8000	红树林生态系统	国家海洋局
北仑河口红树林自然保护区	广西防城	2680	红树林生态系统	国家海洋局
合浦儒艮自然保护区	广西合浦县	86400	儒艮、海龟、海豚、红树林等	国家环保总局
东寨港红树林保护区	海南琼山市	3337	红树林及其生态环境	国家林业局
大洲岛海洋生态自然保护区	海南万宁县	7000	岛屿及海洋生态系统、金丝燕及生境	国家海洋局
三亚珊瑚礁自然保护区	海南三亚市	8500	珊瑚礁及其生态系统	国家海洋局
天津古海岸与湿地自然保护区	天津市	21180	贝壳堤、牡蛎滩古海岸遗迹及湿地生态系	国家海洋局
黄河三角洲	山东东营市	153000	原生性湿地生态系统及珍禽	国家林业局
厦门文昌鱼自然保护区	福建厦门	6300	文昌鱼及生态系统	厦门市海洋管理处
辽宁双台河口国家级自然保护区	辽宁盘锦市	80000	丹顶鹤、白鹤、天鹅等珍禽	国家林业局

我国关于海洋保护区的立法工作相对滞后，尚未制定专门的海洋保护区法。2008 年 5 月，国家海洋局发布的《海洋特别保护区管理暂行办法》是该领域唯一的部门法规。关于执行权的主体，暂行办法中只规定了中国海监的职责。第 38 条规定“沿海县级以上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》和《中华人民共和国海域使用管理法》等相关法律法规，负责海洋特别保护区内的监督检查，依法查处违法行为”。而国家林业局、国家环保总局、国家海洋局、广东省等其他主管部门负责管理的国家级海洋保护区内的执行权行使主体则是不明确的。

专属经济区内海洋保护区的执法事项涉及污染海洋环境、非法开发利用资源、违反有关船舶航行的规定等各类行为，需要一支统一的、具备综合执法能力的海上执法力量。如果按照我国目前在海洋执法领域多部门、交叉执法的模式，势必会在法律适用、执法依据、执法手段等方面引起混乱。

在保护措施方面，我国现有的国内立法倾向于对资源的开发和利用规定禁止性或限制性条款，未采取国际海事组织通常认定的禁止航行水域、船舶通告制度、禁止下锚水域、强制引航等限制船舶航行和其他活动的保护措施。

在设定海域方面，目前我国的海洋保护区主要集中于沿岸近海。如果在专属经济区内设定海洋保护区并采取限制船舶航行等特别保护措施，我国须考虑向国际海事组织申请获得认定，才能适用于外国船舶。

我国未来在海洋保护区方面的立法、特别是涉及到专属经济区内的海洋保护区的设立以及保护措施的国内立法，应考虑到海洋环境保护领域国际法的发展并参照主要国家的实践。

综上所述，海洋环境保护领域正在发生国家管辖权逐渐增强的趋势，另一方面，《公约》对于沿海国在海洋环境保护领域的执行权有严格的限制。国际海事组织在防止、控制和减少来自船舶的污染方面发挥着越来越大的作用，是认定特别海域和特别敏感海域以及相关保护措施方面唯一有权的国际机构。但是，沿海国在国际海事组织认定的特别敏感海域内对于违反特别保护措施的外国船舶的执行权是否应在《公约》第十二部分的框架内行使、以及国际海事组织认定特别敏感海域的国际法律依据等问题并没有得到清晰的解答，国际社会在此问题上尚未达成共识。

沿海国在其专属经济区内的管辖权、特别是执行管辖权的扩大，对于国际航运以及《公约》第 58 条（其他国家在专属经济区内的权利和义务）允许的其他人类活动的影响不言自明。由于国际海事组织在该问题上的决定性作用，如何在该组织内更多的参与相关机制的形成，这对于航运能力已经位居世界前列的我国来说是非常重要的课题。

另一方面，我们也应注意到国际社会在对待海洋利用和环境保护的关系方面，后者正在受到越来越多的关注。目前，在《生物多样性条约》的框架下，在公海和国际海底区域等国家管辖海域之外设立海洋保护区的主张即是这一趋势的最新体现。欧盟等地区和国家拟对船舶污染海洋案件的船长和船员适用刑法的动向也值得密切关注。如何在海洋的利用和保护之间找到一个平衡点，新的法律机制正处于形成阶段，其结果必然会对《公约》中涉及海洋环境保护的执行权的法律机制产生影响。

Research on Jurisdiction in Exclusive Economic Zone: Particular Areas, Ice-covered Areas and Particularly Sensitive Sea Areas

GONG Yingchun

With the increasing trend of coastal State jurisdiction in the field of maritime environmental protection, it is not uncommon to see a great deal of states establish marine protected areas, particularly sensitive sea areas (PSSAs) and so forth with the excuses of zoology protection. Besides, the compulsory legislations set up by the states as well as some relevant measures exert great influence on littoral situations. This article will look into the Particular Areas System, the Ice-covered Areas System and the PSSA System through the comparison of the background, basis in international law, the criteria and procedures, together with the power of legislation and enforcement.

As mentioned above, the jurisdiction, especially the enforcement power, is expanding; meanwhile, the United Nations Convention on the Law of the Sea (UNCLOS) puts strict limitations on the power of enforcement of coastal States in the aspect of maritime environmental protection. As the unique authorized international organization, International Maritime Organization (IMO) is playing an important role on the prevention, control and reduction of pollution. However, the debate is whether or not coastal States should execute their domestic legislations in the PSSAs within Part XII of UNCLOS. Moreover, the IMO has not provided a clear answer to what the international legal foundation of the PSSAs is.

Under the framework of the Convention on Biological Diversity, the claim on building marine protection zones beyond the limits of national jurisdiction is on the top of agenda. No matter what the result is, a new trade-off which affects the marine utilization and protection will attract more and more concern.

Having witnessed the great progress in recent years, in global maritime development and as a great responsible power, China will participate more in the IMO with a view to have a decisive effect.

冲之鸟礁是否应有大陆架?

——200 海里以外大陆架划界案中无居民岛礁的对比研究

丘 君* 柳文华**

内容摘要: 日本提交了 200 海里以外大陆架划界案,并以冲之鸟礁为基点主张专属经济区和 200 海里以外大陆架。部分国家和国际社会质疑日本此举的合法性,认为冲之鸟礁属《联合国海洋法公约》第 121 条第 3 款定义的岩礁,不应拥有专属经济区和大陆架,不应主张 200 海里以外大陆架。冲之鸟礁的案例引起国际社会对有关岛礁划定 200 海里以外大陆架的权利基础问题的关注和讨论。目前已提交的 51 个划界案中涉及多个利用无居民岛礁主张大陆架的案例,除冲之鸟礁以外,还包括澳大利亚的毕晓普和克莱克岛、麦克唐纳群岛,新西兰的邦蒂群岛,所罗门群岛的法图塔卡岛以及塞舌尔的鸟岛等。本文将对比分析这些无居民岛礁本身的基本情况,大陆架界限委员会审议这部分划界案的情况,以及其他国家和国际社会对沿海国利用这些岛礁主张 200 海里以外大陆架的反应,以判断冲之鸟礁可否主张 200 海里以外大陆架。

关键词: 冲之鸟礁 大陆架 划界案 无居民岛礁

根据 1982 年《联合国海洋法公约》(以下简称"《公约》")第六部分大陆架及其附件二的规定,如果沿海国陆地领土的自然延伸超过自领海基线量起200海里,则该沿海国可以主张 200 海里以外的大陆架。若划定 200 海里以外大陆架的外部界限,沿海国必须将确定外部界限的相关数据资料(以下简称"划界案")提交大陆架界限委员会(以下简称"委员会")审议,在委员会建议的基础上划定的界限才具有确定性和拘束力。

《公约》第 76 条规定了大陆架的定义和确定大陆架外部界限的原则。200 海里以外大陆架外部界限的确定是一个科学与法律交汇的复杂过程。为指导沿海国确定大陆架外部界限并编制划界案,委员会编制了《大陆架界限委员会科学与技术准则》(CLCS/11),其中要求沿海国必须先证明其"划定大陆架外部界限的合

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法权利”，方能运用第 76 条的规定划定其大陆架外部界限，[1] 这一程序即“从属权利检验”。“划定大陆架外部界限的合法权利”包括两种情形，“以其陆地领土向大陆边外缘的全部自然延伸为界限”或“在大陆边外缘距离不到 200 海里的情况，以离该基线 200 海里为界限”。这两种情形均是在一个关键前提下才发生的，即沿海国的陆地领土拥有向海洋自然延伸的大陆架。《公约》第 121 条第 3 款规定，不能维持人类居住或其本身的经济生活的岩礁不能有大陆架。[2] 也就是说，此类岩礁不具备“划定大陆架外部界限的合法权利”，不能运用第 76 条的规定划定其大陆架外部界限。

2008 年 11 月，日本向委员会提交了划界案，其中包括以冲之鸟礁为基点而主张的距离领海基线宽达 550 海里、面积近 50 万平方千米的大陆架。中国政府和韩国政府先后发表照会质疑日本此举的合法性，认为冲之鸟礁属《公约》第 121 条第 3 款定义的岩礁，不应拥有专属经济区和大陆架，更不应拥有 200 海里以外大陆架。中国政府还要求委员会不对日本划界案中涉及冲之鸟礁的部分采取任何行动。[3] 大陆架界限委员会认为“其在涉及《公约》第 121 条法律解释的事项上无法发挥作用”，“决定指示小组委员会着手审议日本的整个划界案。但委员会决定不对小组委员会撰写的涉及上述中韩照会中提到的地区的那部分建议采取行动，直至委员会决定这样做。”[4]

冲之鸟礁划界案引起国际社会对有关岛礁划定 200 海里以外大陆架的权利基础问题的关注和讨论。《公约》第 121 条第 3 款只给出了岩礁的原则性定义，并没有给出区分岛屿和岩礁的具体标准。很多学者就此问题开展了研究，然而直至目前还没有形成一致认可的界定标准，[5] 因而无法套用标准去界定冲之鸟礁的法律地位。鉴于此，本文将对划界案所涉及且起关键作用的无居民岛礁的情况进行对

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1 《大陆架界限委员会科学与技术准则》，CLCS/11，第 2.2 部分：从属权利检验，2.2.1 划定扩展大陆架外部界限的权利和适用于划定这一界限的方法包含在第 76 条之中。不过，很明显，如第 76 条第 4 款 (a) 项所规定，首先必须证明前者，才能执行后者：“为本公约的目的，在大陆边从测算领海宽度的基线量起超过 200 海里的任何情形下，沿海国应以下列两种方式之一划定大陆边的外缘……”。2.2.2 委员会将“从属权利检验”界定为验证这一规定的程序。从属权利检验的目的是确定沿海国划定大陆架外部界限的合法权利，即以其陆地领土向大陆边外缘的全部自然延伸为界限，或在大陆边外缘距离不到 200 海里的情况，以离该基线 200 海里为界限。

2 《公约》第 121 条第 3 款：“不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区或大陆架。”

3 《中国常驻联合国代表团致联合国秘书长的照会》，CML/2/2009。

4 大陆架界限委员会文件《大陆架界限委员会主席关于委员会工作进展情况的说明》，CLCS/64，第 7 页，第 26 段，2009。

5 Barbara Kwiatkowska and Alfred H. A. Soons, Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, *Netherlands Yearbook of International Law*, Vol. 21, 1990, pp. 139~181.

比分析，以期从一个侧面判断冲之鸟礁可否主张专属经济区和 200 海里以外大陆架。

一、划界案中主张大陆架的无居民岛礁概况

根据《公约》附件二和《公约》缔约国大会第 72 号决议、183 号决议，《公约》在 1999 年 5 月 13 日以前开始对其生效的缔约国，应在 2009 年 5 月 13 日以前，向委员会递交划界案或者初步信息。[6] [7] 截至 2009 年 12 月 31 日，委员会共收到 51 份划界案和 44 份初步信息。委员会公布的划界案执行摘要或初步信息表明，多数沿海国均涉及以岛屿为基点主张 200 海里以外大陆架，其中部分岛屿是无居民岛屿，比较典型的是下列 5 个划界案中的 6 组岛礁。

（一）澳大利亚划界案

根据《澳大利亚划界案执行摘要》，澳大利亚为毕晓普和克莱克岛、麦克唐纳群岛两组无居民岛屿主张了 200 海里以外大陆架。毕晓普和克莱克岛位于麦夸尔岛以南 37 千米处（图 1），面积约 0.6 平方千米，最高海拔小于 50 米，[8] 有植被覆盖，是重要的鸟类栖息地。该岛无人居住。作为麦夸尔岛附属岛屿，1997 年被联合国教科文组织评定为世界自然遗产。

麦克唐纳群岛是澳大利亚最西边的领土，位于赫德岛以西 43.5 千米（图 2），陆地总面积约 1 平方千米，最高海拔约 230 米，有植被覆盖，是重要的鸟类栖息地。群岛中面积最大的是麦克唐纳岛，该岛是一个火山岛，无人居住，麦克唐纳岛周围还有若干小岩礁，如平岛和梅耶礁等。[9]

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6 参见《联合国海洋法公约》缔约国大会决议，《关于联合国海洋法公约附件二第 4 条所订向大陆架界限委员会提交资料的十年期间的起算日期的决定》，SPLOS/72，2001；以及《关于大陆架界限委员会工作量以及各国、特别是发展中国家履行〈联合国海洋法公约〉附件二第 4 条和 SPLOS/72 号文件 (a) 段所载决定的能力的决定》，SPLOS/ 183，2008。

7 根据《公约》缔约国大会第 183 号决议，初步信息是“载有有关 200 海里以外大陆架外部界限的指示性资料，并说明根据《公约》第 76 条的要求以及《大陆架界限委员会议事规则》和《大陆架界限委员会科学和技术准则》编制划界案情况和打算提交划界案的日期”的初步资料。

8 Patricia M. Selkirk, Rod D. Seppelt and David R. Selkirk, *Subantarctic Macquarie Island: Environment and Biology*, Cambridge: Cambridge University Press, 1990.

9 Heard Island and McDonald Islands Marine Reserve, at http://www.environment.gov.au/coasts/mpa/heard/index.html, 2 November 2009.

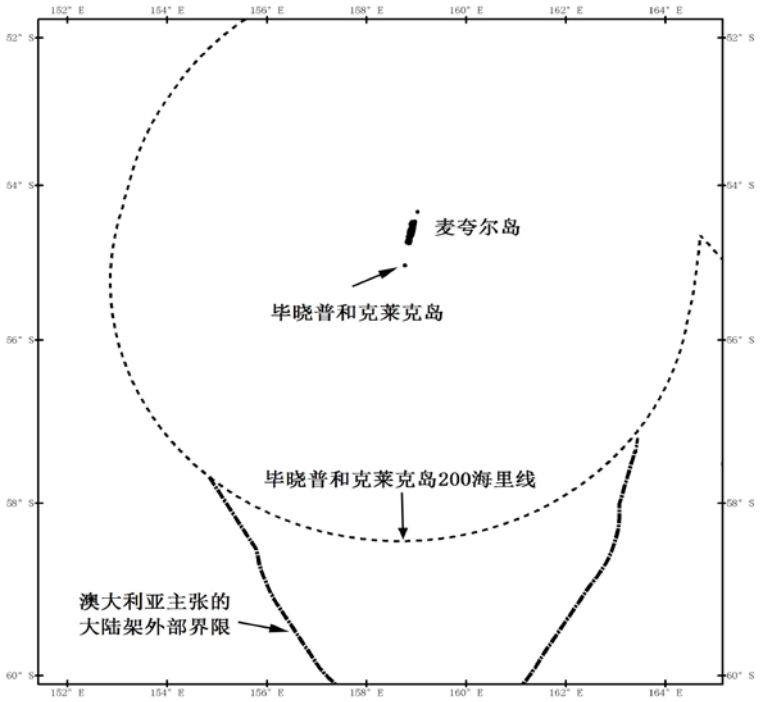

图 1　毕晓普和克莱克岛位置及其 200 海里范围示意图

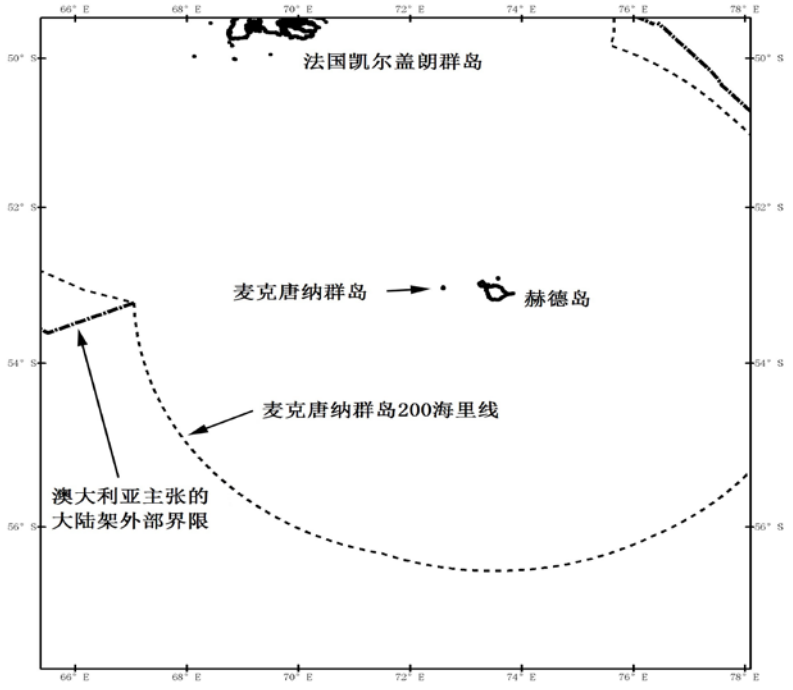

图 2　麦克唐纳群岛位置及其 200 海里范围示意图

（二）新西兰划界案

根据《新西兰划界案执行摘要》，新西兰主张了邦蒂群岛的 200 海里以外大陆架。邦蒂群岛位于新西兰西南部（图 3），是由散布在方圆 5 千米海域的 3 组礁石组成的群岛，该群岛陆地总面积约 1.35 平方千米，最高海拔为 73 米，有稀疏的植被。邦蒂群岛是无居民海岛，生活着大量新西兰软毛海豹，现已建成为著名的海豹保护区。[10]

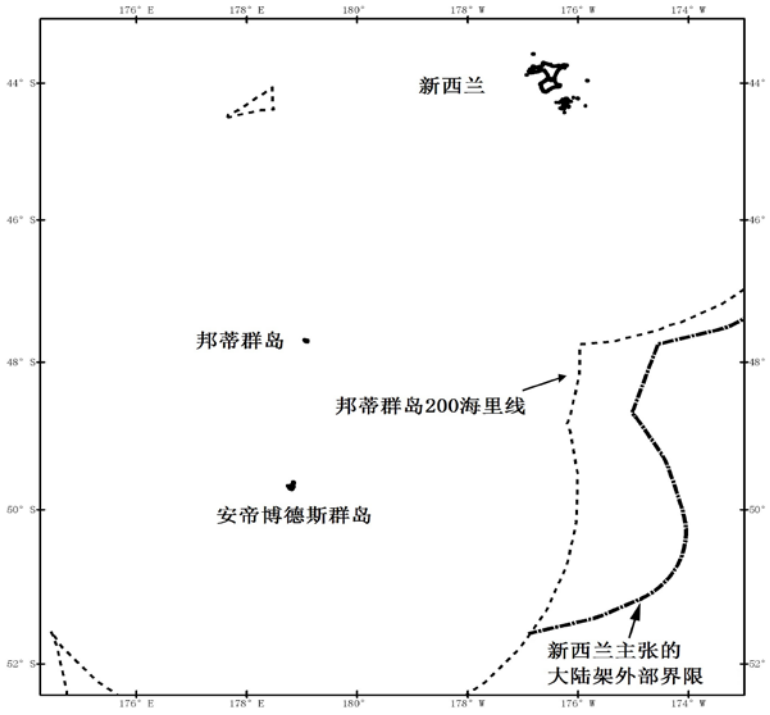

图 3　邦蒂群岛位置及其 200 海里范围示意图

（三）日本划界案

根据《日本划界案执行摘要》，日本主张了冲之鸟礁的专属经济区和 200 海里以外大陆架。

冲之鸟礁位于菲律宾海的九州—帛琉海脊上，日本将其作为最南端的领土（图 4）。根据美国海军 1974 年的记载，冲之鸟礁的主体是珊瑚礁包围而成的泻湖以及泻湖内 5 块高潮时能出露水面的礁石。泻湖东西长约 4.5 千米，南北宽约 1.7 千米，呈东宽西

10　The Government of New Zealand, *Nomination of the New Zealand Subantarctic Islands by the Government of New Zealand for Inclusion in the World Heritage List*, 1997, pp. 12~15.

窄的梨形，面积约 5 平方千米，泻湖内水深约 3~4.6 米。泻湖西南角有宽约 15 米，深约 6 米的通道可供船只进出。由于受海浪侵蚀，到 1987 年日本开始在冲之鸟修筑人工构造物之时，只剩下 3 块礁石在高潮时出露水面，3 块礁石均分布在泻湖西部。这 3 块礁石的基本情况是：位于西侧的北礁石高约 1 米，面积约 7.86 平方米；位于东侧的东礁石高约 0.9 米，面积约 1.5 平方米；[11] 位于南侧的南礁石在高潮时几乎不可见。[12]

为防止冲之鸟礁因风化和海水侵蚀而消失，日本自 1987 年开始耗巨资在 3 块礁石四周构筑堤防设施，形成 3 个直径约 50 米的圆形钢筋混凝土人工构造平台。日本还在礁石东南侧建设了一个科学研究平台。2006 年，日本开始在礁石周围展开人工培育珊瑚造礁的实验。根据《公约》第 121 条，“岛屿是四面环水并在高潮时高于水面的自然形成的陆地区域”，由于在冲之鸟礁周围的人工构造物并非自然形成，因此不能看作是岛屿本身的陆地区域。

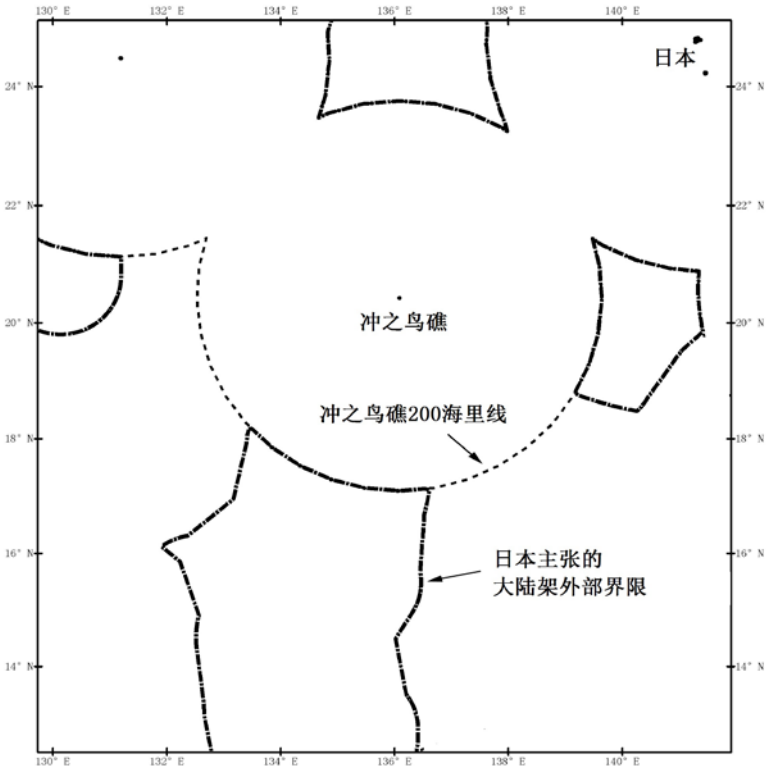

图 4 冲之鸟礁位置及其 200 海里范围示意图

11 冲之鸟礁介绍，下载于 http://www.okinotorishima.or.jp/gaiyo.html，2009 年 10 月 27 日。

12 冲之鸟礁介绍，下载于 http://www.ktr.mlit.go.jp/keihin/okinotori_island/index.htm，2009 年 11 月 21 日。

（四）所罗门群岛划界案

根据《密克罗尼西亚、帕劳、所罗门群岛联合划界案执行摘要》，所罗门群岛主张了法图塔卡岛的专属经济区和 200 海里以外大陆架。法图塔卡岛是所罗门群岛最东边的岛屿（图 5），其西北方向约 60 千米是阿奴塔岛（所罗门群岛中较大的岛屿）。该岛是火山岛，陆地面积约 1.6 平方千米，最高海拔约 122 米，有植被覆盖。历史上曾有阿奴塔岛的居民到该岛耕种，目前岛上无人居住，偶尔有游客前往该岛捡拾鸟蛋。[13]

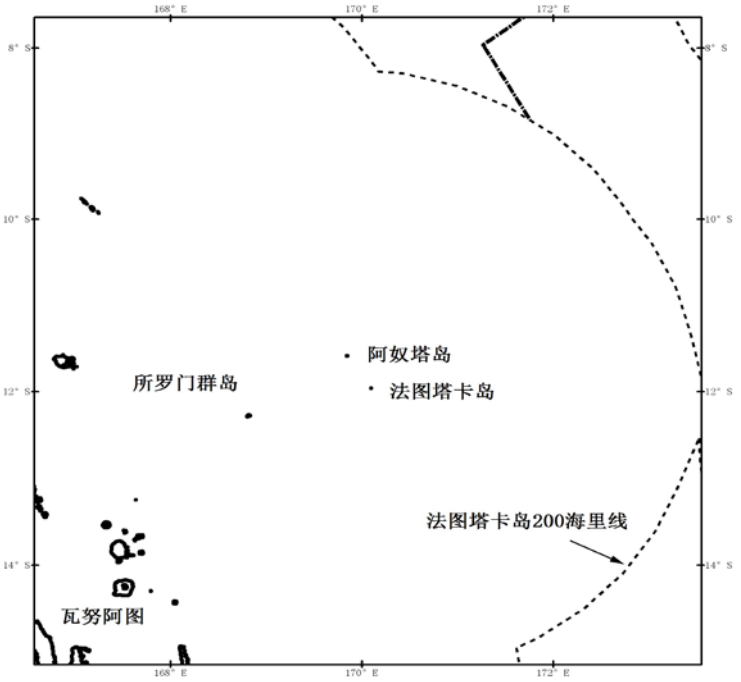

图 5　法图塔卡岛位置及其 200 海里范围示意图

（五）塞舌尔北部海域划界案

根据《塞舌尔北部海域划界案执行摘要》，塞舌尔以其最北部的岛屿——鸟岛为基点主张专属经济区和 200 海里以外大陆架（图 6）。鸟岛是一个珊瑚岛，面积约 0.7 平方千米。该岛是著名的海鸟栖息地，现已被开发成为旅游胜地。岛上建有码头、道路、

13　参见所罗门群岛介绍，下载于 http://antbase. org/ants/africa/personal/solomons/sols12.html，2009 年 11 月 17 日；关于法图塔卡岛的简介，下载于 http://www.typhoon2000.ph/garyp_mgtcs/dec02.txt，2009 年 11 月 17 日。

宾馆等旅游服务设施。除游客和服务人员以外，鸟岛无其他常驻居民。[14]

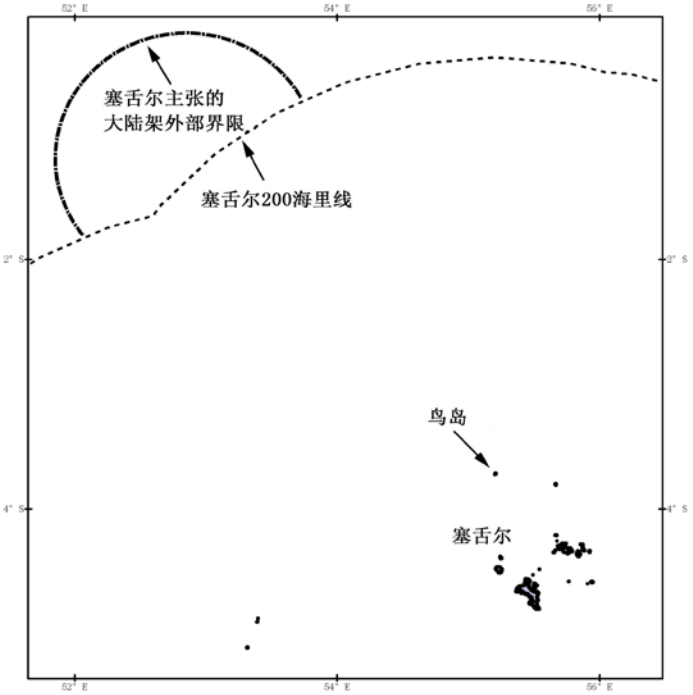

图 6　鸟岛位置及其 200 海里范围示意图

二、委员会审议和国际社会的反应

委员会已经完成了对澳大利亚和新西兰划界案的审议，并且通过了上述两国划界案所涉及的 3 组无居民岛礁主张的 200 海里以外大陆架。从两个划界案提交至今为止，其他国家和国际社会均未对这 3 组岛礁主张大陆架权利的合法性提出质疑，也就是说世界各国和国际社会普遍认可这3组岛礁属岛屿，可以拥有大陆架。

2009 年的委员会第 24 次会议决定成立小组委员会审议日本划界案，考虑到中国和韩国等的照会，委员会决定对冲之鸟礁相关部分给予特殊处理，即委员会决定不对小组委员会撰写的涉及冲之鸟礁的那部分建议采取行动，直至委员会决定这样做。[15] 除中韩两国提交的反对照会外，在国际海底管理局第 14 届会议、《公约》缔约国大会第 19 次会议等场合都曾对冲之鸟礁主张专属经济区和大陆架的合

14　参见鸟岛网站，下载于 http://www.birdislandseychelles.com/bird_island_seychelles.html, 2009 年 10 月 25 日。

15　大陆架界限委员会文件《大陆架界限委员会主席关于委员会工作进展情况的说明》，CLCS/64，第 7 页，第 26 段， 2009。

法性进行讨论。

《密克罗尼西亚、帕劳、所罗门群岛联合划界案》预计到 2019 年才能得到审议，《塞舌尔北部海域划界案》则需至 2024 年才能得到审议。[16] 目前尚未有其他国家就这两个划界案中相关无居民岛礁主张大陆架的合法性提出质疑。

上述情况至少说明，除冲之鸟礁外，以其他 5 组无居民岛礁为基点主张 200 海里以外大陆架的行为均得到世界各国和国际社会的普遍认可。进一步对比这 6 组无居民岛礁自然状况和开发情况（表 1），可以发现以下方面的显著差异：（1）其他 5 组岛礁在规模上均远远超过冲之鸟礁，前者面积至少超出后者 5 个数量级；（2）其他 5 组岛礁均有植被覆盖，而冲之鸟礁是光秃的岩石；（3）其他 5 组岛礁上均有常年定居的动物，后者无定居动物；（4）其他 5 组岛礁的开发或保护历史较长，后者仅有建造人工构筑物的过程。这 4 个方面的显著差异足以解释为何前者的岛屿地位得到世界各国和国际社会的普遍认可，而冲之鸟礁的岛屿地位却无法得到认可。

表 1　划界案中 6 组主张大陆架的无居民岛礁自然状况和开发情况对比

岛礁名称	面积 (km^2)	海拔 (m)	植被	定居动物	开发利用活动	成因
毕晓普和克莱克岛	0.6	50	有	鸟类	保护区、科研	火山岛
麦克唐纳群岛	1	230	有	鸟类	保护区、科研	火山岛
邦蒂群岛	1.35	73	有	海豹	保护区、科研	火山岛
法图塔卡岛	1.6	122	有	鸟类	耕种、旅游	火山岛
鸟岛	0.7	小于 20	有	鸟类	保护区、旅游	珊瑚岛
冲之鸟礁	不足 0.00001	不足 1	无	无	科研	珊瑚礁

三、从划界案看冲之鸟礁和罗科尔礁的法律地位

罗科尔礁是位于大西洋爱尔兰大陆西北方约 430 千米的孤立出露海面的花岗岩，为火山的残迹。该礁石不适合人类居住，但该礁石是著名的海鸟栖息地。英国、爱尔兰、冰岛和丹麦（通过法罗群岛）都曾宣称拥有该礁的主权或礁岛周围大陆架主权权利。

16　参见大陆架界限委员会委员 Yong Ahn Park 在 2009 年 10 月 29 日“200 海里以外大陆架法律问题和实践韩中研讨会”上的报告《The Workload of the CLCS/UNCLOS, Presentation in Seminar on the law of the Sea》。

（一）周边国家关于罗科尔礁法律地位的主张

1831 年，英国皇家海军第一次把罗科尔礁标识在海图上。1955 年 9 月 18 日，英国政府在罗科尔礁上设立主权碑，主张对该岛的主权。[17] 英国政府颁布的《1972 罗科尔法案》正式宣布把罗科尔礁归为苏格兰因弗内斯县管辖。[18] 英国曾主张罗科尔礁的 200 海里专属经济区，但遭其他周边国家的反对，该主张也从未得到其他国家和国际社会的认可。[19] 1997 年，英国修改其主张的渔区范围，明确放弃了对罗科尔礁 200 海里专属经济区的主张。[20] 2009 年 3 月 31 日，英国提交了包括哈顿—罗科尔地区在内的划界案，划界案未以罗科尔礁为基点主张 200 海里专属经济区或大陆架。这再次表明英国接受罗科尔礁属于《公约》第 121 条第 3 款规定的岩礁，不能拥有专属经济区和大陆架的事实。

爱尔兰未对罗科尔礁本身提出正式的主权主张，但也从未正式声明放弃对该岛的主权要求，爱尔兰认为罗科尔礁的归属是英国和爱尔兰两国之间仍需解决的问题。[21] 2003 年 6 月 11 日，爱尔兰交通、海洋和自然资源部部长曾声明：“爱尔兰主张超过 500 海里的大陆架，尤其是在哈顿—罗科尔地区。” [22] 2009 年 3 月 31 日，爱尔兰提交了包括哈顿—罗科尔地区在内的划界案，与英国划界案相同，其并未以罗科尔礁为基点主张 200 海里专属经济区或大陆架。这表明爱尔兰也接受罗科尔礁属于《公约》第 121 条第 3 款规定的岩礁，不能拥有专属经济区和大陆架的事实。

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17 1955 年 9 月 18 日，英国海军德斯蒙德中尉等人在罗科尔礁上设立主权碑，主权碑书：“By authority of Her Majesty Queen Elizabeth II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of her other realms and territories Queen, Head of the Commonwealth, Defender of the Faith etc, etc., etc., and in accordance with Her Majesty’s instructions dated the 14th day of September, 1955, a landing was effected this day upon this island of Rockall from HMS Vidal. The Union flag was hoisted and possession of the island was taken in the name of Her Majesty. R H Connell, Captain, HMS Vidal, 18th September, 1955.”

18 “Island of Rockall Act 1972” 全文如下：”As from the date of the passing of this Act， the Island of Rockall（of which possession was formally taken in the name of Her Majesty on 18th September 1955 in pursuance of a Royal Warrant dated 14th September 1955 addressed to the Captain of Her Majesty’s Ship Vidal）shall be incorporated into that part of the United Kingdom known as Scotland and shall form part of the District of Harris in the County of Inverness， and the law of Scotland shall apply accordingly.”

19 Clive R. Symmons, Ireland and the Rockall Dispute: An Analysis of Recent Developments, *International Boundaries Research Unit Boundary and Security Bulletin*, Vol. 6, No. 1, 1998, p. 78.

20 The Fishery Limits Order, Statutory Instruments, 1997 No. 1750.

21 The Fishery Limits Order, Statutory Instruments, 1997 No. 1750.

22 爱尔兰交通、海洋和自然资源部部长在答复中声明：“Ireland claims an extended continental shelf up to more than 500 nautical miles， particularly in the Hatton-Rockall area.” 载于《爱尔兰议会答复记录》第 568 卷，2003 年 6 月 11 日。

冰岛和丹麦（法罗群岛）未主张罗科尔礁本身的主权，而是主张罗科尔礁周围大陆架的主权权利。[23] 冰岛和丹麦（法罗群岛）同样接受罗科尔礁应为岩礁，不应有专属经济区和大陆架的事实。

（二）罗科尔礁和冲之鸟礁的对比

罗科尔礁和冲之鸟礁均是远离大陆的小岩礁，两者有一些相似之处（表 2）。就面积、生存条件、开发历史等关键条件而言，罗科尔礁的条件均明显优于冲之鸟礁，或者说罗科尔礁比冲之鸟礁更加具备获得岛屿地位的各项条件。

英国和爱尔兰均提交了罗科尔礁所在海区的 200 海里以外大陆架划界案，但两国均未在其划界案中主张该礁的专属经济区和大陆架；与此形成鲜明对比的是，日本在其划界案中主张冲之鸟礁的专属经济区和 200 海里以外大陆架，但该礁各项“维持人类居住或其本身的经济生活”的必要条件均远远不如罗科尔礁。综合对比两个礁石的自然条件，并考虑到罗科尔礁的岛屿地位未能获得国际社会认可的事实，冲之鸟礁也不应拥有岛屿地位。[24] 日本该主张违背了《公约》相关规定和国际社会的普遍认识，是非法和无效的。

表 2　罗科尔礁和冲之鸟礁自然条件对比

名称	礁石大小 / 面积	出露海面高度	居民	植被	定居动物	开发活动	成因
罗科尔礁	南北长 25 m，东西宽 22 m [25]/ 面积大于 400 m^2	19.2 m	无	无	海鸟	无	花岗岩体 / 火山成因
冲之鸟礁	北礁石面积 7. 86 m^2	1 m	无	无	无	无	珊瑚礁，经人工加固
	东礁石面积 1.5 m^2	0.9 m	无	无	无	无	珊瑚礁，经人工加固

23　Clive R. Symmons, Ireland and the Rockall Dispute: An Analysis of Recent Developments, *International Boundaries Research Unit Boundary and Security Bulletin*, 1998, pp. 78~93.

24　著名的海洋法教授 Jon Van Dyke 有类似的看法，参见 Martin Fackler, A Reef or a Rock? Question Puts Japan In a Hard Place to Claim Disputed Waters, Charity Tries to Find Use For Okinotori Reef, *Wall Street Journal*, 16 February 2005, p. A1.

25　参见罗科尔礁网站，下载于 http://www.rockall2011.com/About_Rockall.html，2009 年 10 月 25 日。

四、结论

现已提交委员会的 51 个划界案中，多数沿海国均涉及以岛屿为基点主张 200 海里以外大陆架，其中部分岛屿是无居民岛礁，比较典型的有 6 组，分别是澳大利亚的毕晓普和克莱克岛、麦克唐纳群岛，新西兰的邦蒂群岛，所罗门群岛的法图塔卡岛，塞舌尔的鸟岛以及日本的冲之鸟礁。对比 6 组岛礁的自然状况和开发情况可发现，前 5 组岛礁无论是在规模，还是在维持人类生活或其自身经济活动的自然条件，或者是开发利用历史和现状都远远比冲之鸟礁优越，前者的岛屿地位能得到世界各国和国际社会的认可是情理之中的，相反，冲之鸟礁不应获得岛屿地位也是合理的。

罗科尔礁和冲之鸟礁均是远离大陆的小岩礁。就规模、维持人类生活或其自身经济活动的自然条件、开发历史等情况而言，罗科尔礁比冲之鸟礁更加具备获得岛屿地位的条件。过去英国关于罗科尔礁专属经济区的主张并没有得到世界各国和国际社会的认可。目前，英国和爱尔兰都已接受罗科尔礁属于《公约》第 121 条第 3 款规定的岩礁，不能拥有专属经济区和大陆架。考虑到罗科尔礁况且未能获得岛屿地位的国际实践，冲之鸟礁更不应该获得岛屿地位。

综上所述，冲之鸟礁应属于《公约》第 121 条第 3 款规定的岩礁，不能拥有专属经济区和大陆架，日本在其划界案中关于冲之鸟礁的专属经济区和 200 海里以外大陆架的主张违背了《公约》相关规定和国际社会的普遍认识，是非法和无效的。

（国家海洋局海洋发展战略研究所张海文研究员对本论文给予了大力指导，特此致谢！）

Should the Okinotori Reef Be Entitled to a Continental Shelf?: A Comparative Study on Uninhabited Islands in Extended Continental Shelf Submissions

QIU Jun LIU Wenhua

Japan submitted a claim to the Commission on the Limits of the Continental Shelf (CLCS) to entitle the Okinotori Reef to have an extended continental shelf with a prolongation of 500 nautical miles measured from the island. Both China and Korea presented notes to the CLCS and challenged the Japanese claim. They stated that the Okinotori Reef should be considered as a rock under article 121(3) of UNCLOS. It should not have any exclusive economic zone (EEZ) or continental shelf and it should not be entitled to any continental shelf beyond 200 nm. This case has attracted international attention on the discussion of the determination of the outer limit of continental shelf of uninhabited islands.

Till now, the CLCS has received 51 submissions claiming the rights of some uninhabited islands to continental shelf extending to or beyond 200 nm. Besides the Okinotori Reef, there are five archipelagos, namely, the Bishop and Clerk Islets and the McDonald Islands of Australia, the Bounty Islands of New Zealand, Fatutaka Island of the Solomon Islands, and Birds Island of Seychelles. Entitling continental shelf to other islands, except the Okinotori Reef, has been approved internationally and also universally by the coastal counties. Comparing with the Okinotori Reef, other islands have more favorable natural conditions of sustaining human habitation or economic life; ever more, some of them have been developed for a long period of time, and some of them have been created as protected area of wildlife. Therefore, it is logical and reasonable to define them as islands under article 121. On the other hand, it is logical and reasonable to take the Okinotori Reef as a rock under article 121(3), because of its barrenness and extremely small size of less than 10 square meters.

Rockall that lies near England and Ireland is a big and uninhabited rock. It is generally considered according to common sense as a rock under article 121(3) and is not

entitled to any EEZ or continental shelf. With respect to the conditions of sustaining human habitation or economic life, Rockall is obviously more advantageous than the Okinotori Reef to be an island if it was. Since Rockall has been considered as a rock without continental shelf, the Okinotori Reef should also be considered as a rock without continental shelf.

2009 年罗马尼亚诉乌克兰黑海划界案评析

张卫彬 *

内容摘要： 2009 年 2 月 3 日，国际法院对罗马尼亚诉乌克兰一案作出了判决。在该案中，国际法院确认了“衡平原则及有关情况规则”，并采取了等距离的方法划界。同时，国际法院坚持认为，虽然等距离方法作为划界的首要临时步骤，但并不表明其具有自动的优先性，如果存在令人信服的理由，将不适用。对于蛇岛在划界中的效力问题，国际法院将其界定为礁石，而非岛屿，这反映了海洋划界的发展趋势。不过，国际法院的判决引起了乌克兰的不满，从而说明这种趋势仍存在一定问题。

关键词： 黑海 蛇岛 海洋划界 衡平原则及有关情况规则

长期以来，乌克兰和罗马尼亚在黑海海域边界划分问题上存在严重分歧。2004 年 9 月 16 日，罗马尼亚向国际法院提起诉讼，要求对两国黑海大陆架和专属经济区进行划分。2009 年 2 月 3 日，国际法院 15 名法官作出一致终局裁决。按照该判决，双方存在争议的区域大约有 80% 的部分归罗马尼亚所有，同时界定蛇岛（乌克兰称为兹梅伊内岛）是礁石而非岛屿，不享有大陆架和专属经济区。从本案的判决结果来看，它反映了海洋划界新的发展趋势，但仍存在一些需要厘定的问题。

一、双方诉讼的初步法律问题

（一）争议的事项

黑海是一个封闭海，大陆架蕴藏丰富的石油和天然气资源，其海域面积大约 43.2 万平方千米，位于北纬 40°56'—46°33' 和东经 27°27'—41°42'，通过达达尼

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尔海峡、马尔马拉海和博斯普鲁斯海峡与地中海相连。本案的划界海域位于黑海的西北部。其中，蛇岛位于多瑙河三角洲以东大约 20 海里，其陆地区域面积大约 0.17 平方千米，周长约 2000 米。根据 1948 年罗马尼亚和苏联所缔结的一项协定，蛇岛被并入苏联。双方的争议涉及到两国在黑海上建立一条单一边界线划分大陆架和专属经济区问题。

罗马尼亚在诉请书中解释，“经过复杂的谈判”，乌克兰和罗马尼亚 1997 年 6 月 2 日签署《睦邻友好与合作关系条约》，并以两国外交部长换文的形式缔结了一份《补充协议》。两份文书均于 1997 年 10 月 22 日生效。根据这些协议，“两国有义务就其国家边界制度缔结一项条约，并签署一项划定两国在黑海大陆架和专属经济区界限的协议”。同时，按照《补充协议》第 4 条 g 款要求，两国应当在《睦邻友好与合作关系条约》生效之日起 3 个月内尽可能开始展开谈判以达成海上划界协议。但是，从 1998 年 1 月至 2004 年 9 月，两国共举行了 24 轮谈判和 10 次专家级磋商会议，没有取得任何实质进展。在这种情况下，罗马尼亚请求国际法院依照国际法，尤其根据《补充协议》第 4 条规定的标准，在黑海上确定单一海洋边界，从而划定两国的大陆架和专属经济区界限。[1]

（二）法院的管辖权与范围

罗马尼亚援引《国际法院规约》第 36 条第 1 款和《补充协议》第 4 条 h 款作为法院管辖权的依据。[2] 其中，第 4 条 h 款规定，如果通过谈判不能在合理时间内（最迟不超过 2 年）缔结关于黑海大陆架和专属经济区划界协议，则罗马尼亚和乌克兰两国政府同意此问题可依国际法院应任何一方的请求加以解决，其前提条件是有关两国间边界制度的条约已经生效。然而，如果国际法院认为关于国家边界制度的条约推迟生效是另一方的过错所致，法院可在该条约生效以前审议有关大陆架和专属经济区划界案的请求。罗马尼亚称，《补充协议》第 4 条 h 款规定的两项条件均已得到满足，因为谈判至今已经超过 2 年，并且两国间边界制度的条约已于 2004 年 5 月 27 日生效。[3]

罗马尼亚在诉请书中提出，乌克兰领海环蛇岛周围的 F 点和 X 点分隔了罗马尼亚专属经济区和大陆架，且该边界的起始段部分已经通过两国 2003 年《国家边界制度条约》（以下简称“《2003 年边界条约》”）所确定。按照罗马尼亚的诉求，国际法院的主要任务是确认这两点之间的边界，然后决定在两国其他没有建立边

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1 Case Concerning Maritime Delimitation in the Black Sea between Romania and Ukraine, Judgment of 3 February 2009 (hereinafter Romania v. Ukraine case), paras. 18~19.

2 第 36 条第 1 款规定，法院之管辖包括各当事国提交之一切案件，及联合国宪章或现行条约及协约中所特定之一切事件。

3 Romania v. Ukraine case, para. 21.

界线的部分进行划界。对此，乌克兰认为，国际法院管辖范围应严格限制在当事方的专属经济区和大陆架区域;法院对归属于任何一方的其他海域没有管辖权，特别是关于它们各自的领海部分。法院认为，根据国际法，作为一个原则问题，乌克兰不可能主张有一条划界线将一国的领海部分从另一国的专属经济区和大陆架区域加以区分。实际上，国际法院在 2007 年尼加拉瓜诉洪都拉斯关于加勒比海领海和海上边界争议案中，已经就涉及领海的边界线作出了判决。不过，由于《2003 年边界条约》的第 1 款所确定的边界线已经包括了它们领海界线的划分，因此，国际法院的管辖权仅限于大陆架和专属经济区的划分。[4]

（三）适用的法律

罗马尼亚在诉请书中概述了解决争端的适用法律，援引了 1997 年《补充协议》的一些条款、罗马尼亚和乌克兰均为缔约国的 1982 年蒙特哥湾《联合国海洋法公约》（以下简称“《公约》”），以及对两国有约束力的其他相关文书。具体而言，首先，《公约》第 74 条和第 83 条各自与专属经济区和大陆架划界有关。两个条款的内容大体是一致的，都强调在海岸相向或相邻的国家间专属经济区或大陆架的界限，“应在国际法院规约第三十八条所指国际法的基础上以协议划定，以便得到公平解决”。乌克兰表示认同，并主张还应考虑国际法院在司法实践中所形成的一些具体规则。[5]

其次，鉴于《公约》条款的框架性，罗马尼亚主张，在 1997 年《补充协议》第 4 款列举的原则不仅适用于两国的外交谈判，而且对于法院最终解决边界争议也是适用的。这些原则包括:①《公约》第 121 条关于岛屿制度的规定在国家实践和国际司法判例中确立的原则，②两国海岸相邻的等距离原则和相向的中间线原则，③在国家实践和国际法院司法判例中确立的公平原则和成比例方法，④任何一方都不能对所提交的海域划界部分在没有确定边界以前主张主权的原则，⑤考虑有关情况的原则。[6] 然而，乌克兰认为，《补充协议》所确立的谈判原则不应适用于随后的司法程序。不过，乌克兰承认，其中的部分原则与国际法院所适用的一些国际法规则是相关的，而并非作为这些双边协议的一部分形式存在。国际法院指出，由于《补充协议》所包含的原则是国际法有关规则的一部分，在某种程度上法院可以适用。[7]

此外，罗马尼亚认为，1949、1963 和 1974 年两国缔结的有关《纪要》的内容对各方具有法律约束力，在划界时应予以考虑。尤其，根据 1997 年缔结的《睦邻

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4 Romania v. Ukraine case, paras. 24~30.
5 Romania v. Ukraine case, paras. 36~39.
6 Romania v. Ukraine case, para. 33.
7 Romania v. Ukraine case, para. 41.

友好与合作关系条约》和《补充协议》，罗马尼亚已经确认蛇岛属于乌克兰；同时，乌克兰接受了其在签署和批准《公约》时的声明以及《补充协议》所确立的衡平划界原则，以及根据《公约》第 121 条第 3 款规定，“不能维持人类居住或其本身的经济生活” 的蛇岛在大陆架和专属经济区划界中没有任何效力。[8]

针对罗马尼亚的观点，乌克兰认为，上述协议并没有提及《公约》第 74 条第 4 款和第 83 条第 4 款的规定，[9] 因为它们并不是划分专属经济区和大陆架的协议。至于罗马尼亚在签署和批准《公约》时所作出的声明和 1997 年《补充协议》涉及《公约》第 121 条第 3 款部分，乌克兰指出，一方面声明与保留不同，并不会改变条约的效力以及要求其他缔约方作出回应，因此，法院不应考虑这个声明。关于罗马尼亚的声明，国际法院强调，根据《公约》第 301 条规定，任何一个国家在签署、批准和加入《公约》时，只要不是意在排除或修改《公约》有关条款的效力，有权作出声明。但是，法院在适用《公约》有关条款过程中，将根据 1969 年《维也纳条约法公约》第 31 条规定对其解释，罗马尼亚的声明对法院的解释没有效力。[10]

二、国际法院的判决

（一）既往条约的效力

国际法院指出，各方的分歧主要在于是否存在一条以蛇岛周围作为全部划界目的而商定的海上边界。因此，在这种情况下，它们不会同意法院将其作为划界的起始点。为了厘清这些问题，国际法院必须界定以下两个事项：一则，已经由当事方所确定的，作为划界功能的陆地边界和领海边界的起点；二则，是否存在一个在蛇岛周围商定的海洋边界及其性质如何，且它是否将乌克兰领海与罗马尼亚的大陆架和专属经济区分开。[11]

其实，这两个事项与 1949、1963 和 1974 年罗马尼亚和苏联缔结的有关《纪要》，1949 年、1961 年罗马尼亚和苏联缔结的条约，以及《2003 年边界条约》所涉及的协议效力问题。国际法院在审查以上条约后认为，1949 年的《纪要》已经同意将代表罗马尼亚与苏联边界线的第 1439 号标记点位于蛇岛周围 12 海里圆弧上，但

8 Romania v. Ukraine case, para. 35.

9 《公约》第 74 条第 4 款规定，如果有关国家间存在现行有效的协议，关于划定专属经济区界限的问题，应按照该协议的规定加以决定。同样，第 83 条第 4 款规定，如果有关国家间存在现行有效的协议，关于划定大陆架界限的问题，应按照该协议的规定加以决定。

10 Romania v. Ukraine case, paras. 40~42.

11 Romania v. Ukraine case, para. 43.

没有详述任何终点。根据《2003 年边界条约》第 1 条规定，罗马尼亚与乌克兰之间的边界终点被固定在两国领海边界线的交叉点上。随后，法院将该点确定为两国划界的“1 点”。[12]

关于是否存在一条两国已经同意的区分乌克兰领海与罗马尼亚大陆架和专属经济区边界线的问题，国际法院强调，1949 年的《纪要》涉及的仅是罗马尼亚与苏联之间关于蛇岛享有 12 海里边界限制的问题，作为前苏联继承国的乌克兰并没有丧失在其他海域主张超过领海 12 海里的权利。因此，两国并没有一条划定大陆架与专属经济区的有效协议。[13]

（二）相关海岸

相关海岸在划定大陆架和专属经济区中的作用，可能有两种不同但密切相关的法律问题：第一，为了在具体的划界案中确定双方主张的权利重叠区域，必须考虑当事国的相关海岸；第二，在第三和最后阶段的划界过程中，为了校验划界结果的公平，需要确定是否有任何与当事国的相关海岸长度不成比例的情况。按照罗马尼亚的观点，其整个海岸都是相关的，长度是 269.67 千米，基线长度为 204.90 千米。然而，乌克兰认为，根据较普通的方法测算的罗马尼亚海岸长度为 185 千米，如果考虑到罗马尼亚海岸的曲折性，其总长度是 258 千米，基线长度为 204 千米。国际法院指出，罗马尼亚海岸的第一部分，从与乌克兰界河的最后一点到赛克林半岛，对于乌克兰来说有双重作用。因为，其北面与乌克兰的海岸相邻，与之相对的海岸是克里米亚半岛。经过国际法院测算，罗马尼亚相关海岸长度大约为 248 千米。[14]

关于乌克兰相关海岸长度，双方的观点各异。罗马尼亚认为，乌克兰相关海岸长度为 388.14 千米，基线长度是 292.63 千米。而乌克兰测算的其相关海岸线长度达 1058 千米，基线长度为 664 千米。不过，国际法院指出，乌克兰将卡尔基尼茨卡海湾、雅霍伊茨卡海湾和第聂伯河峡湾作为相关海岸线是不适当的。同时，蛇岛的海岸线是如此之短，也不能作为乌克兰相关海岸的一部分。按照国际法院的观点，乌克兰相关海岸长度是 705 千米，它与罗马尼亚的相关海岸长度之比大约是 1:2.8。[15] 但是，法院在最后判决中，将其调整为 1:2.1。

（三）划界的方法和基点的确定

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12 Romania v. Ukraine case, para. 66.
13 Romania v. Ukraine case, para. 76.
14 Romania v. Ukraine case, paras. 87~88.
15 Romania v. Ukraine case, paras. 101~104.

国际法院认为，在划界的第一阶段，不考虑任何相关情况，在两国相邻或相向海岸分别建立临时等距离线和中间线。同时，法院强调，在特殊情况下如果存在令人信服的理由，临时等距离线或中间线将不能首先适用。[16] 随后，在第二阶段为了达到衡平结果的目的，将考虑是否存在有关因素调整或修改临时等距离线或中间线。法院特别清楚表明，当所划之线涉及几个管辖区域，所谓“衡平原则及有关情况方法”可以有效地适用，而且该方法也适宜于取得一个衡平结果。[17] 最后，即作为划界的第三阶段，法院将在考虑一切有关情况的基础之上，确定一条海上边界线。同时，适用比例方法校验是否存在因两国相关海岸显著不成比例而导致不衡平结果的情况。[18] 但是，法院强调，这并不说明这些各自所属的海域应当与它们相关海岸线成比例。正如国际法院在 1993 年格陵兰 / 扬马延案中所认为，“海域的分配是划界的结果，而不是其相反”。[19]

对于划界基点的确定问题，双方争议焦点主要在于：罗马尼亚海岸的赛克林半岛、马苏若湾和苏林纳堤坝与乌克兰海岸的库班斯基岛屿、塔克罕库特海角、赫尔松海角以及蛇岛等能否作为领海基点。国际法院在经过分析后认为，赛克林半岛和马苏若湾作为基点是合适的。至于苏林纳堤坝，由于法院认为，虽然一方面并没有令人满意的证据证明其符合《公约》第 11 条规定的“外部永久海港工程”；但是，另一方面，考虑到苏林纳堤坝向陆的末端与罗马尼亚大陆相连接，因此可以作为基点。[20]

在与罗马尼亚相邻的海岸，国际法院指出，提斯干卡岛可以作为划界基点，但位于库班斯基岛屿上的基点与现在划界目的无关。在相向海岸，法院认为，塔克罕库特海角和赫尔松海角等可以作为基点。由于蛇岛属于“不能维持人类居住或其本身的经济生活”的岩礁，符合《公约》第 121 条第 3 款的条件，因而不是岛屿，不能作为划界的基点。[21]

（四）有关情况

1. 海岸长度的不成比例。乌克兰援引两国海岸长度的不成比例，要求调整临时等距离线。而罗马尼亚承认，尽管事实如此，但在以往的海域划界案中几乎没

16 Romania v. Ukraine case, para. 116.
17 Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (hereinafter Nicaragua v. Honduras case), Judgment of 8 October 2007, para. 271.
18 Romania v. Ukraine case, para. 122.
19 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports, 1993, p. 67, para. 64.
20 Romania v. Ukraine case, paras. 138~141.
21 Romania v. Ukraine case, para. 149.

有将其作为相关情况加以考虑。而且，在本案中两国相关海岸并没有明显的不对称性。无论如何，比例只有在适用“衡平原则及有关情况方法”确定划界线以后才能涉及，不应将其作为一个有关情况考虑。国际法院指出，本案两国相关海岸并没有显著不成比例，因此，没有必要调整临时等距离线。[22]

2. 黑海的封闭性和该区域已经生效的划界。罗马尼亚认为，黑海的封闭性以及该地区生效的 1978 年土耳其与苏联签署的大陆架划界协议和 1997 年土耳其与保加利亚签署的有关划界协议，应当作为有关情况予以考虑。乌克兰则持不同看法：一方面，黑海的封闭性本身不能作为与划界目的有关的情况；另一方面，双边协议不影响第三方的权利，在黑海存在的划界协议不影响目前的争议。[23] 最后，国际法院在判决中赞成乌克兰的意见。

3. 任何切断的效果。在该案初步意见中，乌克兰曾指出，罗马尼亚建议的等距离线方案从两个方面削弱了该国的海上权利，并且要求调整临时等距离线。一则，蛇岛能够维持人类自身经济生活的需要，而且岛上存在建筑提供个人居住，有蔬菜和足够的新鲜饮用水，因此它应当属于岛屿，但没有被赋予大陆架和专属经济区。二则，侵犯了乌克兰南方大陆沿海大陆架的自然延伸和专属经济区主权权利。不过，国际法院指出，蛇岛的存在并不需要调整临时等距离线，其在黑海大陆架和专属经济区划界中没有任何效力。与此同时，在本案中并没有显著的地质因素需要调整临时等距离线。[24]

4. 各方的行为（石油和天然气开发、捕鱼活动和海军巡逻）。乌克兰认为，国家在相关区域的活动可以作为一个有关情况加以考虑。例如，在 1993 年、2001 年和 2003 年在其所主张的大陆架和专属经济区颁发有关石油和天然气的开发许可，罗马尼亚在 2001 年前并未表示任何反对。但是，罗马尼亚认为，作为一项法律原则，有效性和国家活动并不构成划界考虑的因素。而且，三份许可证之中有两个是在 1997 年《补充协议》签署的关键日以后颁发的，罗马尼亚对此不断地表示反对。因此，双方并不存在一种默契，乌克兰所提到的有效性并不能否定一条“事实上存在的线”。至于乌克兰报告的渔业活动和海军巡逻，同样是在 1997 年关键日期以后作出的，这些均应与划界目的无关。[25] 对于两国的这些争执，总体上，国际法院支持罗马尼亚的主张，并不将其作为划界所需要考虑的有关情况。

5. 安全利益。罗马尼亚声称，并没有证据显示其所提出的建议方案危及乌克兰的安全利益，而且，蛇岛被赋予了 12 海里的领海。相反，乌克兰的不合理划界主张，由于靠近罗马尼亚的海岸，因而侵犯了其安全利益。国际法院将安全利益的考量限制在两个方面：一方面，有关各方的正当安全利益考虑将对最终确定划界

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22 Romania v. Ukraine case, para. 168.
23 Romania v. Ukraine case, paras. 172~173.
24 Romania v. Ukraine case, paras. 199~201.
25 Romania v. Ukraine case, paras. 193~196.

线具有重要作用；另一方面，就本案而言，法院所确定的临时等距离线完全能够尊重各方的关切，没有必要对其调整。[26]

三、黑海划界案评述

国际法院对黑海划界案判决以后，罗马尼亚和乌克兰态度迥异。前者认为这是双赢的结果，而后者则表达了自己的不满。而且，宣称国际法院在作出裁决时采用的是最普通的等距离方法，根本没有考虑相关情况，该裁决更多地反映了罗马尼亚的利益。从上述国际法院的判决情况来看，这种质疑具有一定的合理性，但也存在误解。

（一）从原则到具体规则衡平原则及有关情况规则成为一般习惯法

长期以来，由于衡平原则没有规定可预期的划界规则，一直是反对者批评的焦点；同时，由于国际法院在划界过程中一度所表现的过度灵活性更是提高了各方面批评的声音。但实际上，国际法院一直强调衡平原则是一般国际法，并努力使衡平原则向着确定性方向发展。从 1969 年北海大陆架案中国际法院认为，海洋划界应建立在国际法基础之上，按照衡平原则并考虑一切有关情况，通过协议解决，到 1982 年突尼斯／利比亚大陆架案、1985 年利比亚／马耳他大陆架案和 1993 年格陵兰／扬马延案等司法案例，国际法院不断地对衡平原则的具体内涵进行进一步阐释。尤其在 2001 年卡塔尔诉巴林案中，国际法院正式提出了衡平原则及有关情况规则。[27] 随后，在 2002 年喀麦隆诉尼日利亚案、[28] 2007 年尼加拉瓜诉洪都拉斯划界案，[29] 以及在黑海划界案中又相继确认了这一具体规则和方法。显然，衡平原则经历了由原则到具体规则的嬗变，而且，其一般习惯法的地位正日益得到国际社会的普遍确认。概括而言，衡平原则及有关情况规则所具有的确定性规范主要体现在以下几个方面：以衡平原则为出发点、遵循衡平程序、采取衡平划界方法及确保结果衡平等。

但值得注意的是，虽然国际法院在 1969 年的北海大陆架案中否认了等距离

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26 Romania v. Ukraine case, para. 204.

27 Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (hereinafter Qatar v. Bahrain case) Judgment of 16 March 2001, para. 231.

28 Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, Judgment of 10 October 2001, para. 288.

29 Nicaragua v. Honduras case, para. 271.

及特殊情况规则作为习惯法的地位;同时强调,在具体的划界案中必须在以衡平原则为出发点,考虑一切有关情况的基础上确定划界方法。然而,由于这种划界方法过于灵活,使得衡平原则的适用存在争议。不过,自 1985 年利比亚 / 马耳他大陆架案开始,国际法院的态度发生了一定的变化,即重新采用等距离线作为划界的临时起点,然后考虑有关情况予以调整。特别在新近的几个划界案中,国际法院指出,在划界程序上首先应决定临时等距离线作为划界初始步骤。这在一定程度上似乎改变了先前的划界模式,使得等距离方法具有优先性。而且,国际法院在 2007 年尼加拉瓜诉洪都拉斯划界案中,特别重申了"衡平原则 / 有关情况规则与等距离 / 特殊情况规则的划界程序相似,即都是首先划一条中间线,然后考虑有关情况予以调整"。[30] 因此,有的学者认为,衡平原则及有关情况规则已经消失,等距离及特殊情况规则取得了胜利。[31]

但是,随后国际法院说明了其调整的原因主要在于:这种模式可以使得适用衡平原则划界更具有科学性和便利性,然而这并不能说明等距离方法自动优先于其他划界方法。在特殊情况下,有的因素可以使得等距离方法的适用并非是适当的。[32] 实际上,在尼加拉瓜诉洪都拉斯划界案中,鉴于该区域特定的地理情形,法院并没有适用等距离方法,而是划出一条等分线,其方位角度数为 70°14'41. 25"。[33] 然后,再根据有关情况调整此线的轨迹。

如前文所述,在黑海划界案中国际法院再次强调,在特殊情况下如果存在令人信服的理由,临时等距离线将不能首先适用。其实,这说明了虽然在 2001 年卡塔尔诉巴林一案中国际法院认为适用于大陆架和专属经济区的衡平原则及有关情况规则与适用于领海划界的等距离及特殊情况规则密切相关,[34] 两者出现了一定的融合趋势;但是,这两种适用不同划界海域的具体规则,与其适用等距离线的前提有着本质的区别。

(二)岛屿在划界中的效力

一般来说,无论在双边的划界协议抑或国际法院司法判例中,通常有选择地将一部分不重要的岛屿不予顾及。如 1958 年巴林与沙特阿拉伯的划界协议中,在决定边界线的端点或转折点等情况下,一些小岛的划界效力被忽略不计。在本案中,乌克兰的蛇岛也属于这种情况。这个问题在第三次联合国海洋法会议期间也

30 Nicaragua v. Honduras case, para. 271.
31 Robert Kolb, *Case Law Equitable Maritime Delimitation: Digest and Commentaries*, The Hague: Martinus Nijhoff Publishers, 2003, pp. 536~537.
32 Nicaragua v. Honduras case, paras. 271~272.
33 Romania v. Ukraine case, para. 298.
34 Qatar v. Bahrain case, para. 231.

曾引起代表间的争论。争论的焦点在于，倘若一块面积很小的无法维持人类居住的岩石享有大面积海域，是否会造成不衡平结果的情况。最后，妥协的结果就是，《公约》第 121 条第 3 款所作的限制性规定，即不能维持人类居住或自身经济生活的岩礁不应有专属经济区或大陆架。[35] 但是，对于岛屿在海洋划界中的具体效力，《公约》则没有规定。

根据国家实践和国际司法判例，岛屿在划界中具有的全效力、部分效力、或零效力， 一般均视其位置和性质而定。那些位于一国领海之内、靠近一国大陆的岛屿， 双方条件相类似的岛屿，群岛国家的岛屿，面积大、人口多、地理位置重要的岛屿，通常在划界中都可能获得全效力，如日韩之间的对马岛。有时一国基于政治、经济和发展两国关系的考虑， 也会给岛屿以全效力。对于一些不重要的岛屿，如缅因湾案中加拿大的海豹岛被赋予一半效力;或远离其本土大陆而接近于两国间的假定中间线时， 划界双方通常给予其部分效力，或不将岛屿作为划界基点，仅允许其享有适当海域。当岛屿远离其本土大陆而接近于他国领土时， 常常给予其部分效力或全无效力，如英法大陆架案中英属海峡岛等。而对于主权有争议或面积很小、对本国不重要且远离本土大陆的岛屿来说， 一般给予其零效力。

但不可否认，由于目前国际法规则的缺失，出现一些国家将远离海岸的岛屿确定为领海基点而划出直线基线的情况。例如，越南将距海岸 161.8 海里的小岛作为基点划定直线基线;甚至，朝鲜划出的世界上最长的直线基线长达 245 海里。这些确定领海基线的标准的不统一，无疑将加大划界问题解决的难度。不过，无论是 1958 年《领海与毗连区公约》，还是 1982 年《公约》都没有对沿海国直线基线长度作出专门的规定（仅在第 7 条第 3、6 款作出了要求或原则），[36] 国际法院和仲裁法庭至今对此也没有作出具体的说明，从而使得各沿海国根据各自的理解和从自身利益出发而追求最大的海洋管辖区域。因此，国际社会应在《公约》有关规定的基础上，进一步就此做出明确的规制，以利于划界问题的衡平解决。

（三）未经批准的条约和瑕疵法律行为宪法性功能

在本案中，罗马尼亚诉讼代表奥瑞斯库指出，在 1948 年以前面积仅有 0.17 平方公里的蛇岛为罗马尼亚的一部分，但在此后，苏联通过协议强迫其移交给当时属苏联加盟共和国的乌克兰，而这一移交当时并没有得到罗马尼亚和苏联立法机构的批准。1991 年苏联解体后，乌克兰实际控制了蛇岛，罗马尼亚一直表示抗议，要求重新讨论该岛的主权问题。虽然两国于 2003 年签署边界条约，确认蛇岛属于

35 Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia*, The Hague: Martinus Nijhoff Publishers, 2004, pp. 199~200.

36 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, New York: Thomson / West, 2004, pp. 30~31.

乌克兰，不过，罗马尼亚要求国际法院在勘定边界时应将有关历史因素考量其中。[37]

其实，国际法院在以往的判例中存在以未经批准的条约作为依托进行判案的例证。在 1982 年利比亚和突尼斯案中，国际法院就赋予了法国和意大利间所谓默许的临时协议以法律价值，当时它们分别统治突尼斯和利比亚。法院认为，在相当长一段时期内，由于两国缺乏明确一致的海上界限，而且任何一方对临时协议都没有提出正式的异议，因此遵守该协议可以确保为两国间大陆架划界方式的选择作为历史性理由而被接受。[38] 又如在 2001 年卡塔尔诉巴林案中，国际法院在判决卡塔尔对祖巴拉拥有领土所有权时认为，条约已经签署，虽未经批准，仍构成当事方在签署时明确的意思表示；并且，卡塔尔酋长当年在祖巴拉的行为可以视为其在自己的领域内权力的行使。[39]

显然，由于对未经批准的条约效力的认定，法院才有可能避免一个棘手的问题，即在《联合国宪章》生效以前，以武力方式占有领土所引发的国际法上的领土所有权。由此可见，国际法院在有关个案中，赋予未经批准的条约或瑕疵法律行为以法律效力，其意在涉及领土主权的至关重要的因素是稳定原则，从而不去破坏长期以来当事国所形成的领土的处置格局。这在实际占领地的保有权法律中也得到了具体体现。[40] 然而，这种判案的依据是难以令人信服的，这使得国际法院的权威受到一定的质疑。

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37 李洋：《国际法院就罗马尼亚乌克兰黑海边界争端举行听证》，下载于 http://www.chinanews.com.cn/gj/gjzj/news/2008/09-03/1369063.shtml，2009 年 4 月 7 日。

38 Case concerning the continental shelf (Tunisia/Libya Arab Jamahiriya), Judgment of 24 February 1982, para. 71.

39 Qatar v. Bahrain case, paras. 89~96.

40 在国际法中，它是指新成立的国家应当与它们独立前的边界保持一致。See Bryan A. Garner, *Black's Law Dictionary*, New York: Thomson / West, 1999, p. 1544.

A Review Concerning 2009 Maritime Delimitation in the Black Sea

ZHANG Weibin

For a long time, Ukraine and Romania had great disparity in maritime boundary delimiting the continental shelf and exclusive economic zones in the Black Sea. On 16 September 2004, Romania filed an Application instituting proceedings against Ukraine in respect of a dispute concerning the establishment of a single maritime boundary between the two States in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones appertaining to them.

On 3 February 2009, the International Court of Justice (ICJ) delivered its Judgment in the case concerning Maritime Delimitation in the Black Sea, and 15 judges were unanimously in favor of the Judgment, which was final, binding and without appeal. According to the Judgment, a disputed area of approximately 80% belonged to Romania. The ICJ concluded that Serpents' Island (Ukraine: Zmiinyi Island) is a rock, rather than an island, and has no exclusive economic zone or continental shelf. The Judgment reflected a new tendency towards maritime delimitation, but there were still questions to be further solved.

The ICJ's Judgment concerned the following issues: (1) The effectiveness of past treaties. As to the question whether there existed an agreed line which divided the territorial sea of Ukraine from the continental shelf and the exclusive economic zone of Romania, the Court concluded that there was no agreement in force between Romania and Ukraine delimiting the exclusive economic zone and the continental shelf between them. (2) Relevant coasts. After measurement, the Court determined the relevant coast of Romania was approximately 248 km. With regard to the issue of the Ukrainian relevant coast for the purpose of delimitation, the Court noted that it could not accept Ukraine's contention that the coasts of Karkinits'ka Gulf, Yahorlyts'ka Gulf and Dnieper Firth formed part of the relevant coast. Moreover, the coast of Serpents' Island was so short that it made no real difference to the overall length of the relevant coasts of the Parties. (3) Delimitation methodology and selection of base points. The Court considered that so far as delimitation between

adjacent coasts was concerned, an equidistance line would be drawn unless there were compelling reasons that made this unfeasible in the particular case. The Court would at the second stage considered whether there were factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. (4) Relevant circumstances: (a) Disproportion between lengths of coasts. The Court saw no such particularly marked disparities between the relevant coasts of Ukraine and Romania that would require it to adjust the provisional equidistance line at this juncture. (b) The enclosed nature of the Black Sea and the delimitations already effected in the region. The Court supported Ukraine's view that the existing maritime delimitation agreements in the Black Sea could not influence the present dispute. (c) Any cutting off effect. The Court concluded that the presence of Serpents' Island did not call for any adjustment of the provisional equidistance line, and it should have no effect on the delimitation in this case. At the same time, in this case, no significant geographical factors had made it necessary to adjust the provisional equidistance line. (d) The conduct of the Parties (oil and gas development, fishing activities and naval patrols). In general, for these disputes, the Court supported Romania's claims, and did not regard them as relevant circumstances. (e) The security considerations of the Parties. As for the dispute, the Court confined itself to two observations. First, the legitimate security considerations of the Parties might play a role in determining the final delimitation line. Second, in the present case, the provisional equidistance line determined by the Court fully respected the legitimate security interests of either Party. Therefore, there was no need to adjust the line on the basis of this consideration.

After the ICJ delivered the Judgment of the *Romania v. Ukraine* case, Romania and Ukraine held totally different attitude. In the light of the Judgment, this claim has a rational side, but there were some misunderstandings.

First, in the *Romania v. Ukraine* case, the ICJ noted that an equidistance line would be drawn unless there were compelling reasons that made this unfeasible in the particular case. As a matter of fact, though the ICJ considered in the 2001 *Qatar v. Bahrain* case that the equitable principles/relevant circumstances rule applicable to the delimitation of the continental shelf and the exclusive economic zone is very closely interrelated with the equidistance/special circumstances method applicable in the delimitation of territorial sea. The two rules are fundamentally different.

Second, in general, both in bilateral delimitation agreements or judicial judgments, the ICJ selectively pays no attention to some unimportant islands. As the agreement of demarcation between Bahrain and Saudi Arabia in 1958, the two parties

neglected the effectiveness of a number of small islands in determining the endpoints or turning points of the boundary line in such case. In the present case, Serpents' Island in Ukraine is the same. Undeniably, due to the lack of rules of international law, a lot of countries have regarded islands away from coasts as base points so as to determine to draw straight lines of their territorial sea. Therefore, the international community should further strive to make clear regulation on the basis of the relevant provisions of UNCLOS in order to achieve an equitable solution of maritime delimitation.

Third, in fact, the ICJ had similar cases in the past, which delimited the boundaries in the light of unratified treaties. The crucial factor was the principle of stability relating to unratified treaties and defective legal acts. Moreover, the ICJ also did not undermine the long-term pattern of disposal of the territory formed by the parties. This is the so-called *uti possidetis juris*. However, it is not convincing. The ICJ's authority is challenged to some extent.

Takings Clause Analysis on the Fishery Closure Case in the Palmyra Atoll

Owen Tang*

Abstract: Commercial fishery requires heavy financial investments, and stakeholders' benefits can be negatively affected by subsequent government regulations on closure of commercial fishery. In 2001, the US Department of the Interior issued a regulation on closure of commercial fishery in the Palmyra Atoll, and the investor sued the federal government based on the Fifth Amendment Takings Clause under the US Constitution. The Interior Department won the case in the US Court of Appeals. The author conducts a review on the legal principles about the Takings Clause, with particular emphasis on cases related to fishery operation. The author concludes that the 2009 Palmyra Atoll case provides a chilling message to those considering major investment in commercial fishing facilities.

Key Words: The Palmyra Atoll; Exclusive economic zone; Fifth Amendment Takings Clause under the US Constitution; Regulatory taking; Investment in commercial fishery

I. Introduction

The US Supreme Court has held that both the federal and state governments have the power to take private property for "public use" (Power of eminent domain). In order to bar the government from forcing some people alone to bear public burdens,[1] the Takings Clause of the Fifth Amendment to the US Constitution prohibits the federal and state governments from taking private property for public use

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1 The purpose of this prohibition is to prevent "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."Armstrong v. United States, 364 U. S. 40, 1960, p. 49.

without just compensation. The exercise of eminent domain may be constitutionally limited.[2] The government's power of eminent domain is subject to the following constitutional limits:[3]

(1) the property acquired must be taken for a "public use";

(2) the state must pay "just compensation" in exchange for the property; and

(3) no person shall be deprived of his or her property without due process of law.

There are two categories of government action that are treated as *per se* takings within the meaning of the Fifth Amendment Takings Clause: (1) a physical invasion of an owner's property is a taking, no matter how minute the intrusion and no matter how weighty the public purpose behind it; and (2) a regulation that denies all economically beneficial and productive uses of a property is a compensable taking.[4] The Supreme Court has recognized that the government may "take" private property either by physical invasion or by regulation. This article focuses on regulatory takings. A regulatory taking may occur when a government action does not occupy the private property; but in effect, it limits the use of the private property to such an extent that a taking occurs.[5]

The 2009 case of *Palmyra Pacific Seafoods v. US* [6] from the US Court of Appeals investigated the issue on whether a government regulation that prohibits commercial fishing in a wildlife refugee deems a violation of the takings clause under the US Constitution. The lower court concluded that the plaintiff's property was not taken, and it held that the plaintiff's license was simply frustrated because of the governmental regulation in closure of the waters to commercial fishing.[7] The US Court of Appeals affirmed with the lower court's decision and concluded that the government action did not appropriate the contractual right of the *Palmyra* plaintiff.[8]

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2 Laura Dietz, Eminent Domain § 6, 26, in *American Jurisprudence*, 2ed edition, New York: Lawyers Cooperative Publishing, 2009.

3 Township of West Orange v. 769 Associates, LLC, 172 N. J. 564 (2002).

4 Barefoot v. City of Wilmington, 306 F. 3d 113 (4th Cir. 2002), cert. denied, 537 U. S. 1019 (2002).

5 Palazzolo v. Rhode Island, 533 U. S. 606, p. 617 (2001).

6 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361 (C. A. Fed., 2009).

7 Palmyra Pacific Seafoods, LLC v. United States, 80 Fed. Cl. 228 (Fed. Cl. 2008).

8 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361 (C. A. Fed., 2009).

The *Omnia* decision[9] was referred to as guidance, a case decided 86 years ago. The Court of Appeals agreed with the lower court's interpretation of the *Omnia* decision that if a contract is taken for public use, the government is liable; but if the contract is injured or destroyed by lawful action, without a taking, the government would not be liable.[10] The decision from the US Court of Appeals may present a chilling message to those considering major investment in commercial fishing facilities.

The purpose of this article is to present a review on the legal principles and reasoning process applied in the *Palmyra Pacific Seafoods* case.

II. Procedural Facts of the Palmyra Pacific Seafoods Case

Palmyra Pacific Seafoods, the plaintiff, is a company which held a license to run a commercial fishing facility on the Palymra Atoll. Geographically speaking, the Palmyra Atoll is a tiny island in an empty portion of the Pacific Ocean.[11] The Palmyra Atoll is approximately 4.6 square miles in area. It is located about 1,000 miles south of Hawaii and 1,400 miles north of Samoa. There is almost nothing else in between.[12]

During World War II, the US established a naval base and constructed an airstrip, a base camp, and a pier in the Palymra Atoll. After the war, the US started a legal action to claim title to the Palmyra Atoll, but the Fullard-Leo family won the case in the US Supreme Court and obtained fee simple title to the island.[13]

In 2000, the *Palmyra* plaintiff acquired a license granted by the Fullard-Leo family. With the license, the *Palmyra* plaintiff could use the Palmyra Atoll as a commercial fishing facility.[14] The *Palmyra* plaintiff subsequently invested millions of dollars to improve the property as a commercial fishing facility.

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9 Omnia Commercial Co. v. United States, 261 U. S. 502 (1923).
10 Omnia Commercial Co. v. United States, 261 U. S. 510 (1923).
11 The Palmyra Atoll is a group of coral covered atoll of about fifty islets, some with trees, and extends-reefs, intervening water. The observation spot for the map in the case is Latitude 5°52′18″ N, Longitude 162°05′55″ W.
12 The Supreme Court aptly put it in United States v. Fullard-Leo, "It is hard to conceive of a more isolated piece of land than Palmyra." See United States v. Fullard-Leo, 331 U. S. 256, p. 280 (1947).
13 United States v. Fullard-Leo, 331 U. S. 256 (1947).
14 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1363 (C. A. Fed., 2009).

In the same year of 2000, the Nature Conservancy, a nonprofit entity, purchased much of the emergent land on Palmyra from the Fullard-Leo family. During the mid-2000, the US federal government[15] began to work with the Nature Conservancy in establishing a nature preserve and eco-tourism camp at Palmyra.[16] The Navy also transffered the custody of nearby Kingman Reef and other surrounding reefs to the Department of the Interior.

On 18 January 2001, the Department of the Interior issued an order to design the tidal lands, submerged lands, and waters of a 12-nautical-mile distance surrounding the Palmyra Atoll as a National Wildlife Refuge. Six days later, the Department of the Interior issued a new regulation to close the Palmyra Atoll from commercial fishing.[17]

In 2003, the *Palmyra* plaintiff brought a takings claim in the federal court contending that the designation of the Palmyra Atoll as a National Wildlife Refuge and those related regulations that prohibited commercial fishing have rendered its property interests to commercial fishing worthless.[18]

III. Principles Governing Takings Analysis

Takings analysis involves a three-step approach to determine whether a taking has in fact occurred.

(1) Whether the claimant has established a property interest for purposes of the

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15 The Fish and Wildlife Service of the Department of the Interior.

16 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1363 (C. A.Fed., 2009).

17 See *Federal Register*, Vol. 66, No. 16, 24 January 2001, pp. 7660~7661. The regulation states, in pertinent part: "We will close the refuge to commercial fishing but will permit a low level of compatible recreational fishing for bonefishing and deep water sportfishing under programs that we will carefully manage to ensure compatibility with refuge purposes…Management actions will include protection of the refuge waters and wildlife from commercial fishing activities."

18 Palmyra Pacific Seafoods asserted that the right to establish a commercial fishing operation is valuable because Palmyra is surrounded by a 200-nautical-mile exclusive economic zone (EEZ), therefore, foreign vessels will be excluded from fishing there. Palmyra is the only place within the EEZ where it is practical to locate a commercial fishing operation. Palmyra Pacific Seafoods further argued that the exclusive use of the island affords a material competitive advantage over any competing fishing enterprises that might operate in the region. See Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1363 (C. A. Fed., 2009).

Fifth Amendment.[19] If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end;

(2) Whether the government action amount to a compensable taking of that property interest; and

(3) Whether the alleged taking is "categorical" or not. If all economically viable use, i. e., all economic value, has been taken by the regulatory imposition, then a categorical taking has occurred. A categorical taking is distinct from a taking "that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use." When the taking is categorical, the analysis does not require an inquiry into whether the plaintiff has reasonable investment-backed expectations that are defeated by the regulatory measure.[20] On the other hand, when a taking is non-categorical, the court will undertake the fact-based inquiry to evaluate on three factors: [21]

(a) the character of the government action,

(b) the economic impact of the government action on the claimant, and

(c) the extent to which the government action interferes with the claimant's reasonable investment-backed expectations.

The guiding principle on whether a contract could be a property interest recognizable under the takings clause protection can be found in the *Lynch* decision.

A. Whether a Contract Is a Property Subject to the Protection of the Takings Clause

In *Lynch v. US*,[22] the US Supreme Court ruled that contract rights can be the subject of a takings action. The *Lynch* decision flatly holds that contracts are property that the government may not take without compensation.

In *Lynch*, the US Congress, during the Depression era of the 1930s, enacted law to repeal insurance coverage that was provided earlier for war veterans based on the war risk insurance.

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19 "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation."Almota Farmers Elevator Warehouse Co. v. United States, 409 U. S. 470, pp. 473~474 (1973).

20 Palm Beach Isles Assocs. v. United States, 231 F. 3d 1354, p. 1357 (Fed. Cir. 2000).

21 Transp. Co. v. City of New York, 438 U. S. 104, p. 124 (1978).

22 See Lynch v. United States, 292 U. S. 571 (1934).

The Congress argued that the war risk insurance could find similar gratuities nature as pensions, compensation allowances and privileges. They involve no agreement of parties and the benefits conferred by gratuities may be withdrawn at any time in the discretion of Congress.[23] Justice Brandeis began the Court's analysis by finding that the insurance policies constituted contracts, which were supported by separate consideration in the form of monthly premiums. Although these insurance coverage contracts were not entered into by the United States for a business purpose, they represented legal obligations of the same dignity as other contracts of the United States. Accordingly, the Court allowed the policies holders to sue the government because the US Congress deprived the value of their contracts without due process.

Andrea L. Peterson from Boalt Hall School of Law (University of California, Berkeley) commented the *Lynch* decision that when the federal government issued renewable term insurance policies under the War Risk Insurance Act, it created "vested rights" to the policies holders.[24] His analysis focused on the fact that the government was a party to the contract, and this critical fact made the *Lynch* case analysis similar to that on a suit for breach of contract. Accordingly, such rights were not "gratuities that could be withdrawn at any time in the discretion of Congress." [25] The Court's decision in *Lynch* showed that a taking occurs when the government takes back a vested right that it has given to a party. In other words, the takings clause does not rest on the proposition that what the government gives, the government may take away.[26]

There exists one major factual difference when one applies the *Lynch* decision to the *Palmyra Atoll* case. The *Palmyra* plaintiff acquired the license in 2000, and the license was conveyed not by the US government, but by the Fullard-Leo family. Therefore, unlike the war risk insurance policies holders in *Lynch* who got their vested rights from the government, the *Palmyra* plaintiff acquired the license from

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23 See Lynch v. United States, 292 U. S. 571, pp. 576~577 (1934).

24 Andrea L. Peterson, The Takings Clause: in Search of Underlying Principles Part II Takings as Intentional Deprivations of Property without Moral Justification, *California Law Review*, Vol. 78, 1990, p. 69.

25 Andrea L. Peterson, The Takings Clause: in Search of Underlying Principles Part II Takings as Intentional Deprivations of Property without Moral Justification, *California Law Review*, Vol. 78, 1990, p. 69.

26 Andrea L. Peterson, The Takings Clause: in Search of Underlying Principles Part II Takings as Intentional Deprivations of Property without Moral Justification, *California Law Review*, Vol. 78, 1990, p. 69.

a private party; nonetheless, both the lower court and the Court of Appeals allowed the *Palmyra* plaintiff to rely on the *Lynch* decision.

B. Whether the "Right to Fish" in Exclusive Economic Zone Is Subject to the Protection of the Takings Clause

The court decision of *American Pelagic Fishing Co. v. US*[27] in 2004 established the legal principle that a plaintiff could no longer assert a compensable "right to fish" in the exclusive economic zone (EEZ).[28]

The *American Pelagic* decision presents a chilling message to investors in commercial fishing facilities. In *American Pelagic*, an investor purchased a large, US flagged hull with the intent of transforming it into a commercial fishing vessel in early 1997. The investor contracted with a Norwegian shipyard to convert the hull into a freezer commercial fishing vessel with the capacity to catch all of its own fish, freeze them on board, and offload them for shipping to their final destination. The vessel was 369 feet long, displacing 6,900 gross tons, and having a total of 13,400 horsepower, and it was outfitted with the most sophisticated technology for locating, sorting, and freezing fish year-round. The total investment in the vessel approached $ 40 million. To a certain extent, the investor's decision relied on the following information:

(1) Throughout the 1990s, the National Marine Fisheries Service (NMFS), an agency within the Department of Commerce, reported that mackerel and herring stocks in the Atlantic Ocean were at record highs and were substantially under fished.

(2) In 1993, the US International Trade Commission concluded in a report that only larger ships could improve the competitive position of the US Atlantic mackerel industry with respect to European competitors.[29]

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27 American Pelagic Fishing Co. v. United States, 379 F. 3d 1363(Fed. Cir. 2004).

28 The EEZ consists of the waters two hundred nautical miles from the coastal boundary of each state. See 16 U. S. C. § 1811 (2000).

29 US International Trade Commission, Mackerel: Competitiveness of the U. S. Industry in Domestic and Foreign Markets: Investigation, *USITC Publication*, Vol. 2649, No. 332~333, 1993.

(3) In 1994, the Mid-Atlantic Fishery Management Council (MAFMC)[30] recommended the NMFS to rescind its controls over access to the Atlantic mackerel fishery for the reason that the stocks of mackerel were "extremely high" and harvesting was low.[31]

In the US, the law requires a fishing vessel to carry on board a valid Atlantic mackerel permit to fish Atlantic mackerel in or from the EEZ.[32] While the vessel was being outfitted, the investor started to apply for the necessary permits and authorizations. The investor obtained the required federal fisheries permits in April 1997.

As the investor prepared for commercial operation, opposition from environmental groups began to develop. In response to the environmental concerns, the US House of Representatives established a moratorium on any fishing vessel, in the Atlantic mackerel and herring industries, equal to or greater than 165 feet in length, with an engine of more than 3,000 horsepower. Congress passed a rider to an appropriations act that effectively canceled the investor's existing permits and authorization letters, and at the same time prevented any further permits from being issued to the vessel. As a result, the vessel was unable to receive a permit to fish in any US fishery within the EEZ. The investor pointed out that no other vessel was affected by the legislation.[33]

The investor brought suit in the Court of Federal Claims, alleging that the Appropriations Acts revoked its permits and barred it from receiving future permits, which was in effect a taking of the vessel. The investor claimed that it had a property right in its fishery permits, and such property right was taken by the legislation.

The Court of Federal Claims decided that the investor did suffer a taking in violation of the Fifth Amendment to the US Constitution. The court awarded

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30 The MAFMC is one of eight regional fishery councils charged with developing fishery management plans for fisheries within the EEZ in accordance with the standards set forth in the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act). The Magnuson Act, Public Law No. 94-265, 90 Stat. 331 (1976) is codified at 16 U. S. C. §§ 1801~1883, which confers federal management authority over marine fishery resources upon the Secretary of Commerce.

31 Department of Commerce, Atlantic Mackerel, Squid, and Butterfish Fisheries, Federal Register, Vol. 59, No. 186, 27 September 1994.

32 50 C. F. R. § 648.4 (a)(5) (1996).

33 American Pelagic I, 49 Fed. Cl. 36, p. 44 (2001). The fact that no other vessel was affected by the legislation can be used as an evidence to show that the government's regulation was targeted at the plaintiff.

damages in the amount of $ 37,275,952.67 to the investor. The US government made an appeal to the US Court of Appeals.

After reviewing the history of the pertinent legislation, the Court of Appeals concluded that there was no "historical common law right to use vessels to fish in the EEZ".[34] The court held the investor "did not and could not possess a property interest in its fishery permits."[35] Accordingly, the Court of Appeals reversed the lower court decision and vacated the award of damages.

Legal implications of the *American Pelagic* decision.

After *American Pelagic*, a plaintiff could no longer assert a compensable "right to fish" in the EEZ. In order to bypass the *American Pelagic* decision, the plaintiff in a fishery takings claim must show to the court that the claim was not based on a right to fish in the EEZ. For example, in *Palmyra*, the plaintiff asserted that its right to operate a commercial fishing operation on Palmyra (not a right to fish in Palmyra) was violated by the government regulation.

In *Palmyra*, the plaintiff repeatedly claimed that it did not claim any property interest in the "right to fish". The plaintiff stressed the benefit of the exclusive contract it signed with the Fullard-Leo family. The plaintiff argued that, but for the government actions, it would enjoy a valuable competitive advantage over all other fishing enterprises. What the plaintiff did in *Palmyra* was to adopt a broad definition of the word "fishing". The plaintiff tried to convince the court that "fishing" includes not only the actual "catching, taking, or harvesting of fish", but also "any other related activities, such as loading fishing equipment and supplies onto ships at the dock, and steaming from the dock through the refuge water en route to fishing." The plaintiff pointed to the language used in the regulation that it intends to protect the waters from all "commercial fishing activity", which precludes the plaintiff's vessels from doing anything related to commercial fishing in any waters within 12 nautical miles of Palmyra, including the waters at the dock and harbor – thereby prevents the plaintiff from making any use of its commercial fishing base.

C. Whether Closure of a Commercial Fishery Operation Is in the Nature of Contract Frustration or Contract Appropriation

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34 American Pelagic Fishing Co. v. United States, 379 F. 3d 1363, p. 1380 (Fed. Cir.2004).
35 American Pelagic Fishing Co. v. United States, 379 F. 3d 1363, p. 1374 (Fed. Cir.2004).

The guiding principles were established in the 1923 case of *Omnia Commercial Co. v. US*,[36] which was decided 86 years ago. The case held that if the government engages in a lawful action, and that lawful action affects the value of a party's contract rights, no taking occurs.

In *Omnia*, the federal government requisitioned all of the steel produced by the Allegheny Steel Company during World War I. Omnia had a contract to purchase steel from Allegheny; and as a consequence of the government requisition, Allegheny was unable to perform the contract with Omnia for delivering steel at a favorable price. Omnia brought a takings claim against the government, claiming that the government had taken its contract, and sued for its value. The Supreme Court held that there was no taking.[37]

William K. Jones, professor of law from Columbia University commented on the *Omnia* case that the Supreme Court's reasoning process involved a subtle legal exercise on distinguishing whether a government taking is of the subject matter of a contract or the contract itself. He commented that the Supreme Court rejected the claim because the Court reasoned that the contract had been destroyed, not taken. Professor Jones stressed that frustration and appropriation are essentially different things.[38]

In *Palmyra Pacific Seafoods v. US*, the US Court of Appeals explained what constitute an appropriation. The Court referred to the 1924 case of *Brooks-Scanlon Corp. v. US*.[39] In *Brooks*, the US Supreme Court considered whether a Presidential order (based on Emergency Shipping Act) would appropriate a contract to build a ship, and the Court concluded that a governmental taking occurred upon the claimant's contract because of the following facts presented in the *Brooks* case:

(1) The presidential orders issued to the ship builder showed the governmental intent to expropriate the claimant's contract. By its orders, the government put itself in the shoes of claimant and took from claimant all the rights and advantages that an assignee of the contract would have had.[40]

(2) As a result of the presidential orders, the payment of $ 419,500 made by claimant to the ship builder, was taken.[41]

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36 Omnia Commercial Co. v. United States, 261 U. S. 502(1923).
37 Omnia Commercial Co. v. United States, 261 U. S. 502, p. 511 (1923).
38 William K. Jones, Confiscation: A Rationale of the law of Takings, *Hofstra Law Review*, Vol. 24, No. 1, 1995, p. 26.
39 Brooks-Scanlon Corp. v. United States, 265 U. S. 106 (1924).
40 Brooks-Scanlon Corp. v. United States, 265 U. S. 106, p. 120 (1924).
41 Brooks-Scanlon Corp. v. United States, 265 U. S. 106, p. 120 (1924).

(3) The use of the plans and specifications for the construction of the ship was taken over.[42]

(4) The contract was not terminated. The direct result of the presidential order was to take from claimant its contract and its rights.[43]

The critical criterion is whether the government action terminates the contract. In the 2008 decision of *Huntleigh USA Corp. v. US*,[44] a service provider (Huntleigh USA Corp.) had contracts to provide baggage and passenger screening in US airports. When the US Congress federalized the screening functions in 2002, the service provider brought a takings claim against the US government. The statute creating the Transportation Security Administration had the effect of terminating all the screening service contracts of the service provider at US airports. The court denied the service provider's request for compensation because the court concluded that the government did not "take" the contractual rights of the service provider. It was simply because of the regulatory activity, the service provider's contract rights become valueless. The government did not assume the service provider's contracts, and for that reason the court held that no takings claim could be predicated.[45] The 2008 *Huntleigh* decision was consistent with the 1923 *Omnia* decision, both cases focused on seeing the issue of whether the government acquires the contractual obligations as the critical factor to consider.[46]

Professor Jones commented the legal reasoning from an economic perspective. In analyzing the *Omnia* case, he looked to the fact that the government in *Omnia* was conducting a war. Disruptions of peacetime arrangements are inevitable outcomes of a war. But the war also generates opportunities. While complete symmetry cannot be assured, it seems likely that parties losing the benefits of favorable peacetime contracts as a result of war measures will find opportunities for profitable production in other war measures. On balance, the incentives associated with economic progress are unlikely to be diminished. In addition, it is obviously impracticable, in the context of a war, to provide compensation for all disruptions in contract expectations. The scope of the war effort is too vast and the repercussions of war measure-

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42 Brooks-Scanlon Corp. v. United States, 265 U. S. 106, p. 120 (1924).
43 Brooks-Scanlon Corp. v. United States, 265 U. S. 106, p. 120 (1924).
44 Huntleigh USA Corp. v. United States, 525 F. 3d 1370 (Fed. Cir. 2008).
45 Huntleigh USA Corp. v. United States, 525 F. 3d 1370, p. 1379 (Fed. Cir. 2008).
46 In the *Omnia* case, the US Supreme Court explained, when there has been an "acquisition of the obligation or the right to enforce it" by the government, the government's action would qualify as a taking of contract rights. Omnia Commercial Co. v. United States, 261 U. S. 502, p. 511 (1923).

s are too numerous and dispersed. The government actions in *Omnia* were fiscally responsible; it had no other practicable course of action.[47]

Other legal scholars analyzed the *Omnia* case from the perspective of contract law theories, and came to a similar conclusion. They saw all contracts are subject to the defense of impossibility or frustration.[48] For frustration stemming from adverse government actions, no taking occurs because contracting parties are presumed to be aware of these doctrines. The contractual parties proceed with forewarning that contractual expectations may be disappointed under possible government interventions.[49] Accordingly, there is no need to provide insurance against a risk that all contracting parties necessarily assume in the very first place.

D. Whether Closure of a Commercial Fishery Operation in Federal Water Can Be Analogous to Federal Land Takings Analysis

The 2006 *Colvin Cattle* decision[50] addressed a claim related to closure analysis in federal land. On arguing the closure of a commercial fishery operation in the Palmyra Atoll was not a violation of the takings clause, the US government conducted an analysis by analogy with the *Colvin Cattle* decision.

In *Colvin Cattle*, a ranch owner leased grazing privileges on an adjacent parcel of federal land upon which he independently held water rights. When the ranch owner failed to make the payments required under the grazing lease, the government terminated the grazing privileges, but allowed the ranch owner to continue to exercise his independent water rights. The ranch owner filed suit against the government by claiming that the termination of grazing privileges effected a taking of his ranch and water rights.

The US Court of Federal Claims dismissed the ranch owner's complaint. The

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47 William K. Jones, Confiscation: A Rationale of the law of Takings, *Hofstra Law Review*, Vol. 24, No.1, 1995, p. 26.

48 E. Allan Farnsworth, *Contracts*, 2nd ed., New York: Aspen Publishers, Inc.,1990, pp. 700~737.

49 See 767 Third Ave. Assocs. v. United States, 48 F. 3d 1575, pp. 1580~1582 (Fed. Cir.1995) (There is no taking when United States terminated leases of foreign entities in United States); Chang v. United States, 859 F. 2d 893, p. 897 (Fed. Cir. 1988) (There is no taking when US government terminated employment contracts between US persons and Libyan entities). In each instance, claimants had contracted against the background of US control over foreign policy.

50 Colvin Cattle Co. v. United States, 468 F. 3d 803 (Fed. Cir. 2006).

ranch owner appealed. The Court of Appeals held that:

(1) Interference with grazing on public land was not a taking of water rights;

(2) The loss of value to ranch did not result in taking of ranch;

(3) The wild horses could not constitute an instrumentality of the government capable of giving rise to a taking of the landowner's water rights.

In *Colvin Cattle*, a ranch owner argued that the government's refusal to allow grazing on the federal land near the ranch had reduced the value of the ranch and thus constituted a taking of the ranch.[51] The court rejected that claim because the ranch owner had no property right to graze cattle on the federal land. Therefore, the government's prohibition on grazing did not constitute a taking of the ranch owner's property. The same analysis could be applied to a government's prohibition on commercial fishing in the federal waters. The ban on fishing may have reduced the value of the license to operate fishery operation, but that reduction in value, as in *Colvin Cattle*, was not the result of a compensable taking of any cognizable property interest. The wild horses in the federal land, similar to the fish in the Palmyra Atoll, could not constitute an instrumentality of the government capable of giving rise to a taking. Indeed, the courts believed that it is pure fantasy to talk of "owning" wild fish or animals. The government has no title to these creatures until they are reduced to possession by skillful capture.[52]

During the reasoning process of analysis by analogy, the Court seemed to downplay the following aspects:

(1) It did not consider the loss of its commercial advantage suffered by the *Palmyra* plaintiff on the exclusive use of Palmyra as an operational base and transshipment point.[53] The Court downplayed the geographical facts that:

① The atoll sits in the equatorial waters of the Pacific Ocean, 1,000 miles south of Hawaii – an area richly stocked with highly valuable fish.

② The atoll is surrounded by a US EEZ, which has the practical effect of excluding foreign-flagged vessels from fishing within 200 nautical miles. The Palmyra Atoll is the only location within the EEZ upon which it is practical to establish a commercial fishing base with a base camp, dock, harbor and an airstrip.

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51 Colvin Cattle Co. v. United States, 468 F. 3d 803, p. 808 (Fed. Cir. 2006).

52 Kleppe v. New Mexico, 426 U. S. 529, pp. 535~538 (1976).

53 In the *Palmyra Atoll* case, the Court concluded that the adverse effect towards the fishing related activities on shore created by the closure regulation on the waters would not constitute a sufficient legal ground to constitute a compensable taking. Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1366 (C. A. Fed., 2009).

(2) The *Palmyra* court, in making its reasoning, did not focus on the investment the plaintiff put in transforming the desolate and overgrown atoll into a modern, active, and sophisticated commercial fishing base. In *Palmyra*, the plaintiff invested millions of dollars and thousands of man-hours in developing a fully operational base camp, deep-water harbor, and airstrip on the atoll for the purpose of commercial fishing operation.

(3) In *Colvin Cattle*, the loss in value of the ranch resulted from the ranch owner's own failure to pay for the grazing rights in the very first place. By contrast, in the *Palmyra Atoll* case, the plaintiff did not voluntarily forfeit its contractual rights to use Palmyra as a commercial fishing base and transshipment point.

IV. Conclusion

The Court in *Palmyra* conducted standard takings clause analysis by first looking at whether the claimant has established a property interest for purposes of the Fifth Amendment.

The critical challenge the *Palmyra* court faced was the disconnection between the claimed property interest and the alleged regulation of that interest: The *Palmyra* plaintiff claimed that relevant property right was its contractual right to use its leased land in the Palmyra Atoll for commercial fishing operations; while the regulation maker asserted that the regulation merely prohibits commercial fishing activity in the surrounding waters.

In commenting the decision approach on the *Palmyra Atoll* case, Gajarsa, Circuit Judge from the US Court of Appeals, opined that the *Palmyra* court recharacterized the relevant property interest based on the nature of the government action asserted.[54] Once adopting a regulation perspective, the *Palmyra* court came to the conclusion that "the Interior Department's regulation does not prohibit commercial fishing operations on Palmyra, it merely prohibits commercial fishing activity in the surrounding waters."[55]

The *Palmyra Atoll* decision may well be hailed as a victory for the Interior Department. In the final analysis, however, the victory was a pyrrhic one from economic consideration. The government victory was offset by staggering economic losses because:

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54 Schooner Harbor Ventures, Inc. v. United States, 569 F. 3d 1359 (C. A. Fed.,2009).
55 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1366 (C. A. Fed., 2009).

(1) The *Palmyra Atoll* decision presents a chilling message to those considering major investment to improve the US commercial fishing position.

The *Palmyra Atoll* decision forced the plaintiff to give up a substantial economic advantage over other oversea fishing competitors. The oversea competitors fishing in the Palmyra EEZ would need to transit 1,000 miles of open ocean to Hawaii to get their fish to market, while the *Palmyra* plaintiff could offload fish on the atoll, process them to add value and reduce shipping costs (for example, by filleting whole fish and cutting them into more valuable steaks and loins), and then airship the fish to market directly.

In terms of economic competitive advantage, the *Palmyra* plaintiff could avoid the expenditure of time and resources its competitors would make crossing the ocean to get fish to market and traveling back from Hawaii to the Palmyra EEZ to resume fishing.

In terms of quality competitive advantage, with the exclusive contractual right to use the atoll as a transportation base, it enabled the *Palmyra* plaintiff to deliver a fresher and more valuable – and hence more profitable – product directly to market.

(2) It does not help to improve the environment. The very purpose of the ecotourism camp is not for marine fish conservation. The Nature Conservancy which purchased the atoll was subject to the license of the *Palmyra* plaintiff. The Nature Conservancy has a commercial agenda to establish an incompatible commercial enterprise on the atoll, and the officials from the Interior Department had been working collaboratively with the Nature Conservancy in hopes of creating an exclusive and very expensive "ecotourism camp" for "Washington politicians and prominent Fortune 500 business owners."[56] The Nature Conservancy's "on scene manager" for the Palmyra "operation," Mr. Steve Barclay, had been "previously employed by Fish and Wildlife," a division of the Interior Department.

In light of these facts, it is no wonder that when the editorial staff reviewed the *Palmyra* case during the trial level, it ended with the following comment: "watch out, the rules can change quickly."[57]

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56 E-mail from Murakami to McDermott (25 July 2000). The email was attached as evidence in the Appellate Brief dated 15 August 2008, 2008 WL 5009092 (C. A. Fed.) (Appellate Brief).

57 A Review of Recent Developments in Ocean and Coastal Law, *Ocean and Coastal Law Journal*, Vol. 13, No. 2, 2008, p. 395.

论海洋环境污染索赔案件中国家行政机关原告地位的判定

王炳蔚* 高 蕾**

内容摘要: 如何确认适格的国家行政机关在海洋环境污染索赔案件中担任原告是一个既存有争议又欠缺明确规定的问题。本文以海洋环境污染的类型化为出发点，结合国家行政机关的职能划分和现行法律对它们在海洋环境监管权上的规定，指出不同类型海洋环境污染索赔案件中如何确定适格的国家行政机关原告。同时针对现行法律的不足指出海洋环境污染索赔案件中国家行政机关任原告时存在的问题并提出适当建议。

关键词: 海洋环境污染 国家行政机关 原告 索赔

在陆上资源日益枯竭的今天，海洋这一宝藏正向人们提供着取之不尽的财富。“然而由于人们忽视海洋环保，关于海洋的坏消息却接二连三地传来：金枪鱼体内汞含量过高，海洋里没有氧气的死亡地带数量持续增长，海洋再一次向人类告急。”[1] 如此日益严重的海洋环境污染，必然引发海洋环境污染损害索赔的增多。《中华人民共和国海洋环境保护法》（以下简称“《海环法》”）第 90 条第 2 款规定：“对破坏海洋生态、海洋水产资源、海洋保护区，给国家造成重大损失的，由依照本法规定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。”这一规定无疑确认了国家行政机关作为国有海域受托监管人的原告资格，然而由哪类国家机关进行索赔？各个不同国家机关针对海洋污染的监管范围是什么？索赔方应针对哪类污染进行索赔？却是一个十分有必要予以探究的问题。

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1 许光玉、龙玉兰：《从油污角度剖析人与海洋环境的和谐》，下载于 http://www.china56ec.com/New_view.asp?id=431592&nPagc=0，2010 年 3 月 7 日。

一、海洋环境污染的类型化

为确定海洋环境污染的适格索赔机关，首先有必要针对海洋环境污染的特点对其予以分类，以利确定诉权;因为不同类型的海洋环境污染源发于不同类型的地域，有不同的致害、侵害特点，这必然会导致行政管辖上归属于不同的机关，进而影响索赔机关的选择。笔者以我国现行 6 部主要海洋环境治理规范为基础，[2] 从污染源的角度，可将海洋环境污染划分为如下类型：

(1)陆源污染物所致的海洋环境污染

“指从陆地向海洋排放的各种污染物对海洋环境造成的污染破坏”。[3] 污染表现在海上，却来源于陆地，如近海海岸的生活、工业、农用废水、废物污染事件。

(2)海岸工程建设项目[4]所致的海洋环境污染

指位于海岸线或与海岸线连接，工程主体位于海岸线向陆一侧的工程项目在施工过程中对海洋环境造成的污染破坏。

(3)海洋工程建设项目所致的海洋环境污染

指以开发、利用、保护、恢复海洋资源为目的，工程主体位于海岸线向海一侧的新、改、扩建工程建设过程中对海洋环境造成的污染破坏。如填海、海上堤坝工程，跨海桥梁、海底隧道工程、海洋石油或天然气资源的勘探开发等。[5]

(4)海洋倾倒所致的海洋环境污染

指利用船舶、航空器、平台及其他载运工具，向海洋处置废弃物和其他物质;向海洋弃置船舶、航空器、平台或其他海上人工构造物;以及向海洋处置与海底矿物资源的勘探开发相关的海上加工废弃物和其他物质的行为所造成的对海洋环境的污染破坏。[6]

(5)船舶所致的海洋环境污染

指船舶在航行或作业过程中不当操作违规排放、倾倒油类、污水或其他物质对海洋环境造成的污染破坏，或由船舶载运的石油、燃油、化学、放射性等污染物

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2 这些规范分别是《中华人民共和国环境保护法》、《中华人民共和国海洋环境保护法》、《中华人民共和国防治海岸工程建设项目污染损害海洋环境条例》、《防治海洋工程建设项目污染损害海洋环境管理条例》、《中华人民共和国海洋倾废管理条例》和《防止拆船污染环境管理条例》。

3 史学瀛、董丽娟、李增强：《环渤海区域海洋污染案件的处理与海洋生态保护》，载于《第二届环渤海区域法制论坛论文集》，第 99 页。

4 海岸工程建设项目的定义见《中华人民共和国防治海岸工程建设项目污染损害海洋环境条例》第 2 条。

5 海洋工程建设项目的具体种类和定义可见《防治海洋工程建设项目污染损害海洋环境管理条例》。

6 海洋倾倒的定义可见《中华人民共和国海洋倾废管理条例》第 2 条。

质泄漏对海洋环境造成的污染破坏。

（6）拆船作业所致的海洋环境污染

指在岸边或水上拆船作业活动过程中对海洋环境造成的污染破坏。[7]

上述基于源发地的不同所作的 6 种海洋环境污染类型划分基本上涵盖了实践中所见到的污染类型，同时这种划分以现行海洋环境治理规范为依据对确定适格的索赔机关有重要作用。

二、国家行政机关在海洋环境损害索赔案件中原告地位之判定

长期以来，我国在民事诉讼领域采取“直接利害关系当事人说”。如果说在海洋资源管理规范和海洋环境治理规范欠缺的过去，对国家行政机关是否是海洋环境损害的直接受害者和能否提起诉讼存在争议，那么在今天法律法规已经明确国家行政机关有权作为国家海域所有权的代表行使者或海洋环境权益的受托监管人的情况下，由它们作为海洋环境污染索赔案件的原告，已经具备了法理基础，符合我国法律规定和公众利益，同时也是国际立法趋势。[8]

然而在不同类型的海洋环境污染案件中，由何种国家机关行使《海环法》第 90 条所称的监管权从而充当原告，却在规定上不尽明确。笔者对可行使诉权的国家行政机关列举如下，并就各自能对哪类海洋环境污染行使索赔权加以分析。

（一）国家环境保护行政机关

虽然国家环保行政机关是本辖区内环保工作的综合协调、监管部门，[9] 但在对海洋环境污染的直接监管权上它主要对源于岸上的海洋环境污染实施监管。《海环法》第 5 条第 1 款规定：“国务院环境保护行政主管部门作为对全国环境保护工作统一监督管理的部门，对全国海洋环境保护工作实施指导、协调和监督，并负责全国防治陆源污染物和海岸工程建设项目对海洋污染损害的环境保护工作。”该条第 6 款规定：“沿海县级以上地方人民政府行使海洋环境监管部门的职责，由省、自治区、直辖市人民政府根据本法及国务院有关规定确定。”《中华人民共和国防治陆源污染物污染海洋条例》第 4 条和《中华人民共和国防治海岸工程建设项目污染损害海洋环境条例》第 5 条也均规定县级以上环保部门主管辖区内的陆源污

7 拆船的定义和种类划分可见《防止拆船污染环境管理条例》第 3、4 条。

8 这类规定可见《1992 年船舶油污损害民事责任公约》第 1 条第 2 款及《国际海事委员会油污指南》第三部分 10.3）4）。

9 《中华人民共和国环境保护法》第 7 条。

染物和海岸工程建设项目对海洋污染损害的环保工作。此外，《防止拆船污染环境管理条例》第 4 条第 1 款还规定："县级以上人民政府环境保护部门负责组织协调、监督检查拆船作业的环境保护工作，并主管港区水域外的岸边拆船环境保护工作。"

从上述规定可见国家环保行政机关对其辖区内下列海洋环境污染案行使索赔权：

（1）海岸工程建设项目污染海洋环境案；

（2）陆源污染物污染海洋环境案；

（3）港区水域外岸边拆船作业污染海洋环境案。

（二）国家海洋行政机关

在分析海洋行政部门的诉权之前，首先有必要对其职能加以明确。国务院办公厅所发《国家海洋局职能配置、内设机构和人员编制规定》[10] 从总体上将国家海洋局定位为"国家海洋局是国土资源部管理的监督管理海域使用和海洋环境保护、依法维护海洋权益、组织海洋科技研究的行政机关。"因而可以认定海洋行政部门是海洋资源和海洋环境的综合管理机构，这种认定在现有法律未明指明某种海洋环境污染的特别监管机构时具有重要意义。

就海洋行政部门具体的诉权而言，《海环法》第 5 条第 2 款规定，"国家海洋行政主管部门负责海洋环境的监督管理，组织海洋环境的调查、监测、监视、评价和科学研究，负责全国防治海洋工程建设项目和海洋倾倒废弃物对海洋污染损害的环境保护工作。"此条规定明确了海洋行政部门对海洋工程建设项目和海洋倾倒废弃物污染海洋环境的诉权。

实践中，存在较多争议的是非军事船舶不当操作或泄漏原油、燃油、有毒、有害等危险物质损害海洋环境案件中，海洋行政机关与海事行政机关以谁作为原告的问题。一种观点认为，"海事机关所辖港区水域内非军事船舶和港区水域外非渔业、非军事船舶对海洋环境造成污染损害的，由国家海事行政主管部门提出索赔要求，国家海事行政部门是索赔主体；"[11] 另一种观点认为，凡非军事船舶包括渔业船舶发生的漏油或类似事件，有权代表国家行使损害赔偿请求权的适格主体通常是国家海洋行政主管部门。第一种观点的理由是《海环法》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。"因而，

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10 见国办发 [1998]44 号文。

11 李盛泉：《论海洋环境污染损害赔偿中的索赔主体》，载于《山东航海》2007 年第 11 月刊，第 144 页。

只要是符合本款规定的船舶污染案件皆由海事行政部门行使监管权，充当原告。另一种观点的依据是《海环法》第 5 条第 2 款，认为国家海洋行政主管部门是海洋环境污染的综合监管机构，非军事船舶包括渔业船舶在内污染海洋的都应由它代表国家索赔。笔者认为对此应根据海洋和海事机关的部门分工，结合职权按照污染源发地的不同确定索赔主体，而不可对《海环法》第 5 条第 2 款或第 3 款片面理解。海事部门的职责在《国务院办公厅关于印发交通部直属海事机构设置方案的通知》中描述为“负责辖区内水上安全管理、海上航标管理、水上安全通信管理、防止船舶污染及其他有关管理工作;按照授权，管理船舶和海上设施检验、港口航道测绘工作;负责船舶登记、船舶法定配备的操作性手册与文书审批、船舶所有人安全管理体系审核与监督和船员培训、考试发证、船员证件管理工作;负责辖区内水上搜寻救助、污染事故应急处理和重大水上交通事故的调查、处理工作”。[12] 由此可见，海事部门的职权以监控海上载运工具和海上航行设施，实现交通安全为主，它的主要管辖区域在港口、航道和锚地。虽然有管理船舶污染事故的职能，但主要在于防止、惩治污染肇事船舶及进行污染发生后的清污与采取措施防止进一步损害。由此可推断非军事船舶在海事机关所辖港区内（这里的港区扩大至由海事部门管理的锚地、航道）污染海洋环境造成的损害应由海事部门作为原告，即使污染扩散至港区水域外。而所辖港区外的非军事船舶污染损害只要不是在渔政部门管辖的渔港或军事部门管辖的军港水域则应由海洋行政部门进行索赔。

为进一步说明海事行政机关不宜对所辖港区外的船舶污染海洋环境案件提出索赔，我们可以对以往的某些案例加以回顾：1983 年“东方大使”轮案中代表国家索赔的是环保和水产部门;[13] 1997 年“海成”轮案中代表国家索赔的是渔政部门;[14] 1999 年“闽燃供 2 号”案中代表国家索赔的是渔政部门。[15] 上述案件中海事行政机关均未以原告身分出现，这表明在以往的审判实践中，人们对海事机关源于所辖港区外的污染索赔地位采取不认可态度。上述案例中虽然海洋行政机关也未以原告身份出现，但这主要是由于当时《海环法》尚未实施，海洋行政机关的监管权限不明确。2000 年 4 月 1 日《海环法》实施后的 2002 年“塔斯曼海”轮案发生，满载原油的马耳他籍油轮“塔斯曼海”轮与中国大连“顺凯一号”轮在天津大沽锚地东部海域 23 海里处发生碰撞，导致原油泄漏，海洋环境受到严重破坏。该案被称为我国海洋环境涉外索赔第一案，这不仅因为案件索赔数额巨大达 1.7 亿人民币，“同时也是我国海洋行政管理部门在法律框架内提出污染海洋生态环境涉外

12 见国办发 [1999]90 号文件。
13 张姗姗：《行政主管机关提起海洋污染损害诉讼之主体资格》，载于天津海事法院编：《第十一届全国海事审判研讨会论文集》（2002 年），第 29 页。
14 司玉琢著：《海商法学案例教程》，北京：知识出版社 2003 年版，第 275 页。
15 司玉琢著：《海商法学案例教程》，北京：知识出版社 2003 年版，第 275 页。

索赔第一案，此举开创了维护我国海洋生态权益的先例”。[16] 可以说，该案的发生在实践中践行了《海环法》的权威，确立了海洋行政机关而非海事行政机关对港区外船舶污染海洋案件的诉权。

从上述分析可以得出海洋行政机关可在下述海洋污染案件中充当原告：

（1）海洋工程建设项目和海洋倾倒废弃物污染海洋环境案；

（2）海事、渔政、军事机关所辖港区外的非军事船舶污染海洋环境案；

（3）法律、行政法规没有规定主管机关的海洋环境污染案，如海上焚烧行为所致的海洋污染，港区水域以外的水上拆船作业所致海洋污染。

（三）国家海事行政机关

上文已对国家海事部门有权针对所辖港区内非军事船舶污染海洋充当原告进行了论述，此处不再赘述。除此外，对于拆船作业所致污染，《防止拆船污染环境管理条例》第 4 条第 2 款规定“中华人民共和国港务监督（含港航监督，下同）主管水上拆船和综合港[17] 港区水域拆船的环保工作，并协助环境保护部门监督港区水域外的岸边拆船环境保护工作”。根据该条，对非渔港、非军港港区水域内水上、岸边拆船所致海洋污染由海事部门提出索赔。至于港区外水上拆船的环保主管部门，笔者认为应为国家海洋行政机关。虽然这种理解可能与《防止拆船污染环境管理条例》第 4 条第 2 款相悖，因为此款规定所有水上拆船作业的环境污染都应由海事部门监管，但此款规定的法律效力颇存可质疑之处，因为在效力更高的《海环法》第 5 条第 2 款中已赋予了海洋行政机关包括水上拆船在内的综合监管海洋环境的权利，而《海环法》第 5 条第 3 款并未对海事部门水上拆船的环境监管权予以特别规定；且《防止拆船污染环境管理条例》颁布日期为 1988 年，早于《海环法》实施的 2000 年，从时间和层级效力上看也不能优于《海环法》，因而对《防止拆船污染环境管理条例》第 4 条第 2 款应作限制解释，港区外的水上拆船所致海洋污染应由海洋行政机关监管。

因此，海事行政机关在以下两类案件中，可以原告身份起诉：

（1）所辖港区（含锚地、航道）内非军事船舶污染海洋环境案；

（2）所辖港区水域内水上、岸边拆船污染海洋环境案。

（四）国家渔业行政机关

16 《要案评说：天津：污染海洋生态环境涉外索赔第一案》，下载于 http://www.51zy.cn/165616452.html，2010 年 3 月 7 日。

17 指具备多种货物吞吐能力和靠泊不同类型船舶（包括渔船在内）的港口。

渔业部门在海洋环境上的监管权于《海环法》第 5 条第 4 款规定为：“国家渔业行政主管部门负责渔港水域内非军事船舶和渔港水域外渔业船舶污染海洋环境的监督管理，负责保护渔业水域生态环境工作，并调查处理前款规定的污染事故以外的渔业污染事故”。笔者认为对此条的理解应结合渔业部门的职能定位，结合《海环法》第 5 条其它条款综合分析。

在中央，国家最高渔业行政主管部门为农业部，[18] 农业部又将渔业行政管理职能赋予其下设的农业部渔业局（国家渔政渔港监督管理局）。农业部渔业局的职能设置包括“拟定保护和合理开发利用渔业资源、保护渔业水域生态环境和水生野生动植物的政策措施及规划，并组织实施；代表国家行使渔政、渔港和渔船检验监督管理权；负责渔政渔港监督管理和渔业电信工作，监督渔业法规的执行，提出全国渔业行政执法队伍建设规划和措施并指导实施，处理重大的涉外渔事纠纷”。[19] 在地方，县级以上渔业行政主管部门和其设置的渔政监督管理部门，在辖区内行使与农业部渔业局类似的职能。[20] 虽在《海环法》第 5 条第 4 款中规定了渔业部门有对渔港水域外渔业船舶污染海洋环境的监管权，但这一款与该条第 2 款国家海洋行政主管部门行使海洋环境的综合监督管理权有所重合，而《海环法》第 90 条又规定“由依照本法规定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”。因而，对渔港内及渔港外渔业船舶污染海洋环境是否都应以渔业部门为原告提起诉讼存在争议。笔者认为，对此应紧密结合渔业部门的行政职权严格界定，渔业部门的职能集中于对渔船、渔港和海洋捕捞的行政管理，因此对源于渔港水域（含专用渔船锚地、航道）的非军事船舶所致海港环境污染应以渔业部门为有原告资格的监管机构，而对渔港水域外的渔业船舶所致海洋环境污染，鉴于其在渔业监管的渔港水域外发生，则更宜由海洋行政机关为有原告资格的监管部门。

在拆船作业方面，《防止拆船污染环境管理条例》第 4 条第 3 款还规定：“国家渔政渔港监督管理部门主管渔港水域拆船的环境保护工作，负责监督拆船活动对沿岸渔业水域的影响，发现污染损害事故后，会同环境保护部门调查处理。”这一规定赋予了渔业行政机关针对渔港水域水上、岸边拆船污染海洋的监管权。

关于渔业资源损失是否应由渔业部门索赔的问题，观点并不一致，赵劲松教授认为，“在渔业资源恶化（如遭受油污）时，渔业行政主管部门没有责任对海洋环境采取诸如改善水质、补充鱼苗等生态措施；因而，在油污案件中判决以渔政部

18 《中华人民共和国农业法》第 2 条、第 9 条。

19 《渔业局的职责任务》，下载于 http://finance. sina. comn.cn/roll/20040419/1854726037. shtml，2010 年 3 月 7 日。

20 《中华人民共和国渔业法》第 6 条。

门作为原告应获得赔偿的案件是错案。”[21] 笔者认为这种观点并不正确。因为依照渔业法的规定国家渔业行政主管部门为渔业海域的管理机构，受国家委托行使海洋渔业资源所有者的权利。虽《海环法》第 5 条第 4 款仅规定渔业部门“负责保护渔业水域生态环境工作”，但从托管人的角度出发，就渔业资源损失其当然有权以原告身份提起诉讼，实践中这种做法已被认可。[22] 至于渔业水域中的其它资源（生态）损失，笔者认为不宜由渔业部门索赔而应以海洋环境的综合监管者，即海洋行政部门作为原告。

因此，渔业部门对如下案件具有诉权：

（1）渔港水域内（含渔船专用锚地、航道）非军事船舶污染海洋案；

（2）污染案件所致的渔业资源损失；

（3）所辖渔港水域内水上、岸边拆船作业污染海洋环境案。

（五）军队环保部门

严格讲军队环保部门不是国家行政机关，但为便于归类和说明，特将其一并列举于此。军港和军事船舶在国家安全中具有特殊地位，且涉及国家主权豁免问题，因此依我国《海环法》第 5 条第 4 款的精神，凡有关军事船舶拆解、军事船舶污染海洋及源于军港水域的海洋污染索赔不宜由其他部门而应由军队环保部门监管并对此类海洋环境污染以原告起诉。

三、海洋环境污染索赔案件中国家行政机关作原告时存在的问题与建议

虽然《海环法》第 90 条第 2 款规定：“由依照本法规定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。”但在《海环法》第 5 条中却赋予了多个部门对海洋环境的监管权，特别是在某些事项上几个部门存在“监管权”的重叠，并且《海环法》对监管机关的确认与有关行政法规的规定也存有差异，这就为在具体的海洋环境污染案件中谁有权代表国家诉讼带来了不确定性。此外，当环境污染波及相邻的多个区域时，是由源发地有管辖权的机关还是这几个不同区域内有管辖权的机关分别起诉，规定亦不明确。

笔者认为在当前对海洋环境索赔中国家行政机关原告资格确认的法律规范不

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21 赵劲松、赵鹿学：《船舶油污损害赔偿中的诉讼主体地位问题》，载于《中国海商法年刊》2004 年刊，第 301 页。

22 见前述“海成”、“闽燃供 2 号”案，“塔斯曼海”案中“天津市渔政渔港监督管理处”就渔业损失的另案起诉也被受理。

尽完善的情况下，最高人民法院可出台司法解释以解决诉讼中遇到的问题，具体建议如下：

（1）明确国家海洋行政机关是代表国家进行海洋环境索赔的主要部门；国家海事行政机关对源于所辖港区（含港口、锚地、锚地至港口间的进出港航道）的非军事船舶污染海洋享有监管权，可以原告身份提起诉讼；渔业行政机关对所辖渔港区域内渔业船舶及非军事船舶污染海洋案件可以原告身份提起诉讼；其它非军事船舶在海上污染海洋环境造成损失的案件，由国家海洋行政部门以原告身份提起诉讼。

（2）对位于所辖港区内的水上拆船及岸边拆船作业所致污染，由有管辖权的国家海事部门提起诉讼；渔港港区内的水上拆船及岸边拆船所致环境污染由有管辖权的国家渔政渔港监督部门提起诉讼；军港港区内的水上拆船及岸边拆船作业所致海洋环境污染，由军队环保部门提起诉讼。对前述及依《防止拆船污染环境管理条例》由环保部门管辖的港区外岸边拆船以外的其他形式的拆船作业所致海洋环境污染，由国家海洋行政机关提起诉讼。

（3）海洋环境污染所造成的渔业资源损失，由国家渔业行政主管部门统一行使诉权，以原告身份提起诉讼；渔业区域的非陆源污染所致海洋生态损失由国家海洋行政部门提起诉讼。

（4）当不同国家行政机关间就海洋环境索赔的原告资格发生争议时，可由共同上级部门指定监管机构或共同委托辖区内有管辖权的国家海洋行政部门以原告身份起诉。

（5）当海洋环境污染波及多个行政区域、存在多个管辖机关的情况下，由污染源发地有管辖权的国家行政机关统一提起诉讼。

（6）关于清污费用问题，由组织清污作业及有义务采取继续清污措施的国家机关就已发生的和将要发生的基于合理清污措施所造成的花费以原告身份提起诉讼。

四、结语

正确确立海洋污染案件的国家索赔机关是维护海洋环境权益的重要方面，笔者认为：各不同国家行政机关在代表国家行使索赔权时其原告地位的确定应以各不同机关的职能划分为基础，以《海环法》为指导，同时结合《中华人民共和国渔业法》《中华人民共和国防治海岸工程建设项目污染损害海洋环境条例》《防治海洋工程建设项目污染损害海洋环境管理条例》《中华人民共和国海洋倾废管理条例》《防止拆船污染环境管理条例》等法律、法规对各国家机关在海洋环境监管权方面的分配，确定由谁来充任海洋环境污染索赔案的原告，代表国家进行索赔。

Comments on How to Fix Administrative Authority as Plaintiff in Marine Environmental Pollution Claiming Cases

WANG Bingwei GAO Lei

Ascertaining the proper state authority plaintiff to prosecute marine pollution cases is an important aspect of upholding marine environmental rights. We submit that the different functions of the state administrative agencies in monitoring the marine environment should serve as the basis for determining who should serve as the plaintiff in any given marine environmental pollution case to prosecute the state's claim for damages. The division of these agencies' roles should be guided by the Marine Environment Protection Law of the People's Republic of China, in conjunction with laws and regulations including the Fisheries Law of the People's Republic of China, the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Offshore Construction Projects, the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Coastal Construction Projects, the Regulations of the People's Republic of China on the Control over Dumping Wastes into the Sea Waters, and the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking. The analysis in this paper clarifies the parameters of prosecuting authority as among the various state agencies as follows:

1. State Environmental Protection Administration

The state environmental protection administration should serve as prosecuting plaintiffs in the following marine environmental pollution cases:

(1) Cases involving marine environmental pollution from coastal construction projects;

(2) Cases involving marine environmental pollution from land-based pollutions; and

(3) Cases involving marine environmental pollution from coastal shipbreaking

operations beyond port waters.

2. State Oceanic Administrative Authorities

The state oceanic administrative authorities may serve as prosecuting plaintiffs in the following marine environmental pollution cases:

(1) Cases involving marine environmental pollution from marine construction projects and ocean dumping;

(2) Cases involving marine environmental pollution from non-military vessels outside of the jurisdiction of maritime, fisheries, or military authorities; and

(3) Cases involving marine environmental pollution from acts not governed by specific authorities, such as marine incineration behavior or on-water shipbreaking operations beyond port waters.

3. State Maritime Safety Administration

The state maritime safety administration may serve as prosecuting plaintiffs in the following marine environmental pollution cases:

(1) Cases involving marine environmental pollution from non-military vessels within its port waters (including anchorages and navigational channels); and

(2) Cases involving on-water or shoreside shipbreaking operations within its port waters.

4. State Fishery Administrative Authorities

The state fishery administrative authorities may serve as prosecuting plaintiffs in the following marine environmental pollution cases:

(1) Cases involving marine environmental pollution from non-military vessels within its fishing port waters (including anchorages and navigational channels designated for fishing vessels);

(2) Cases involving loss of fisheries resources resulting from marine environmental pollution; and

(3) Cases involving on-water or shoreside shipbreaking operations within its fishing port waters.

5. Military Environmental Protection Administration

Military environmental protection administration alone should serve as prosecuting plaintiffs in all marine environmental pollution cases involving the demolition of military vessels, pollution from military vessels, or pollution originating from naval port waters. These cases should not be prosecuted by any other agency.

In addition, in light of the lack of clarity in laws and regulations governing the determination of state agency plaintiffs in marine environmental pollution cases, this article proposes that the Supreme Court issue judicial interpretations to resolve

these litigation issues. Specially, I suggest the following:

1. The Supreme Court should clarify that the state oceanic agencies are the main representatives of the state in seeking damages in marine environmental pollution cases. State maritime agencies govern marine environmental pollution originating from non-military vessels in the port waters under its jurisdiction (including harbor, anchorage, and navigational channels between the harbor and the anchorage), and may sue as plaintiffs in such cases. Fisheries authorities may sue as plaintiffs in cases involving marine environmental pollution by fishing or other non-military vessels within its fishing port waters. State oceanic agencies may sue as plaintiffs in all other marine environmental pollution cases involving non-military vessels.

2. Suits involving pollution caused by offshore and coastal ship breaking operations within its port waters shall be brought by the relevant state maritime agency. Suits involving pollution caused by offshore and coastal ship breaking operations within its fishing port waters shall be brought by the relevant state fisheries and/or fishing port authorities. Suits involving pollution caused by offshore and coastal ship breaking operations within its naval port waters shall be brought by the relevant military environmental protection authorities. All other ship breaking pollution actions-except coastal ship breaking outside of port waters which, pursuant to the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking, falls under the jurisdiction of environmental protection agencies-shall be brought by state oceanic agencies.

3. National fisheries agencies should uniformly serve as plaintiffs to bring suits involving loss of fisheries resources from marine environmental pollution. On the other hand, cases involving damage to the marine environment caused by non-land-based pollutants within fishing zones shall be prosecuted by state oceanic agencies.

4. When a conflict arises among the various state agencies as to who should serve as the plaintiff is seeking damages for marine environmental pollution, their common supervisory body may appoint a prosecuting agency or, at the agencies' joint request, the relevant state oceanic agency may bring suit.

5. When marine environmental pollution affects more than one administrative zone and is under the jurisdiction of multiple agencies, the relevant state oceanic agency overseeing the origin of the pollution shall bring suit.

6. As for clean-up costs, the state agency organizing the clean-up operation and responsible for continuing clean-up strategies shall bring suit to seek reasonable clean-up costs it already incurred and/or expects to incur.

美国环境法协会发布《扩大海洋生态系统管理在〈海岸带管理法〉中的作用》白皮书

Adam Schempp, Kathryn Mengerink and Jay Austin

桂 静 编译 *

译者按： 2009 年 1 月美国环境法协会发布《扩大海洋生态系统管理在海岸带管理法中的作用》，主要反映了美国环境法协会对修订现有《海岸带管理法》的建议，主要在重新界定相关概念、生态评估机制、海岸带管理规划、特殊区域管理计划、沿海州际间合作机制以及海洋和海岸利用活动冲突解决机制方面融入了海洋生态系统管理的理念。

关键词： 海洋 生态系统管理 海岸带管理法

随着自然资源的逐渐消耗以及人们对生态系统科学认识的发展，生态系统管理已经成为许多政府部门、公众及私人资源管理机构的明确目标，成为关注可持续发展的新方法。美国在海洋方面一直走在世界前列，从海权论到大陆架政策，再到国家海洋政策的概念、海洋综合管理问题，直到目前美国提出的在 21 世纪使海洋成为“清洁、健康和多产的”海洋政策目标，其每一次新理念的提出都引领着世界海洋发展的趋势。因此，密切关注美国在生态系统管理方面的态度及动向将是非常必要的。

目前，基于生态系统的管理理念已经融入到美国海洋管理立法与政策中。[1] 美国的《海岸带管理法》被认为是关于海洋与海岸资源管理最有影响的联邦法律，但

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1 2002 年美国海洋政策委员会提出以生态系统为基础，改善区域海洋管理的政策理念，这标志着海岸带综合管理进入了以生态系统管理为特点的区域海洋管理阶段。2005 年美国海洋政策委员会发布海洋生态系统管理声明，要求美国政府按照海洋生态系统原则对海洋进行管理。

是其中反映基于生态系统管理的规定不多。2009 年 1 月美国环境法协会发布《扩大海洋生态系统管理在〈海岸带管理法〉中的作用》的白皮书(以下简称“白皮书”)。基于生态系统的管理源于考虑到生态系统内部及其与人类活动间的相互关系，美国环境法协会建议从六个方面改进《海岸带管理法》的内容，确认该法中需要采用基于生态系统管理的部分，以及建议可以加入《海岸带管理法》的语言表述，以此来加强基于生态系统的海洋管理原则。美国环境法协会认为，重新修订的《海岸带管理法》将能够为实施基于生态系统的海洋和海岸带管理提供法律框架;作为实现海洋与海岸基于生态系统管理的核心法律工具，会对国家海洋和海岸区域的健康发展产生深远影响。现将有关内容翻译并整理如下，仅供参考。

一、生态系统评估机制中的体现

许多学者和管理者认识到有效的基于生态系统的管理需要对生态系统结构、健康状况以及功能有基本的理解，并依此作出全面的管理决策。为了促进基于正确生态系统科学的海岸带管理规划，《海岸带管理法》可以作出以下两方面的变化：[2]

作为规划批准的条件，要求建立构成州海岸带管理计划基础的生态系统评估;

通过支持“国家海洋与大气管理局海岸服务中心”来发展海岸带科学。

1．要求建立适合更大范围的生态系统评估，即建立大海洋生态系评估。沿海州应当与国家海洋与大气管理局或其他州协作实施州海岸地区的生态评估，此类评估必须每五年更新一次。强调评估中对累积效应的考虑，要求州：“……(4) 评估项目及效应相互影响的可能性；(5) 确认可能伴随项目产生的其他活动，以及此类活动可以改变生态学过程的方式；(6) 考虑所有由于行为的地点和性质

2 为了在《海岸带管理法》中融入此类生态评估，建议修订第 306(d) 节“在批准沿海州提交的管理计划之前，秘书处应当确认具有下列：……（3）州已经…… (c) 与国家海洋与大气管理局合作，或者与其他州合作实施了州海岸地区的生态评估，区域的生态系统评估覆盖大海洋生态系，此类评估必须每五年更新一次。”为了支持州加入区域生态系统评估，联邦政府将通过加强海岸带的资助提供资金支撑。为此节之目的，309 节 (a) 将修订为：“为了此节的目的，用语‘海岸带加强目标’是指任何下列目标…… （10）限于生态系统范围的和由客观的科学组织实施的涉及多个州区域的生态系统评估。”

而易受影响的资源。”[3] 另外，“批准一项由沿岸州提交的管理规划之前，部长须确认：……（17）管理规划充分考虑了任何一个活动对海岸资源的累积效应”。(306节（d）)

2. 通过国家海洋与大气管理局海岸服务中心来加强最新资料的收集和分析的作用。由于国家海洋与大气管理局海岸服务中心具有资料收集和分析的专门知识，因此由它负责海洋生态系统评估，致力于提出实用的解决方法，并且使其达到国家海洋与大气管理局渔业科学研究中心在渔业管理中类似的作用。此评估无论国家一级还是地方一级，应当包括基于现有的物理的、生物的以及社会资料的分析，并且确认空缺的信息，帮助管理者理解该评估的可靠性，还可以利用GIS提供数字空间资料。同时，为科学组织客观进行的地区评估提供联邦技术和财政支持。如果扩大该规划国家海洋与大气管理局海岸服务中心将指导评估。

二、基于生态系统管理在重新界定相关法律定义中的体现

修改海岸带内陆边界的定义（海岸带管理法第304节（1）），使其以生态系统评估为基础或以美国地质调查局水文单位定义的分水岭为基础，或国家海洋与大气管理局海岸评估框架中的海岸部分为基础。

修改“陆地利用”和“水利用”（304节（10）和（18））的定义，明确地将保护措施作为可接受的“利用”。

1. 利用《海岸带管理法》，实施以生态系统为基础的管理的关键是该法实施的地理界限。按照原法的规定，沿海州可以不同方式确定其内陆界线，这种标准的不统一导致跨越州界线的生态系统管理的极大可变性。因此环境法协会建议修订“海岸带”的定义，以确保基于生态系统的合理的界限划定。[4]

为了基于生态系统管理的目的，有关的问题是向陆一侧的界线是否包括对海洋环境有重大影响的区域。确定界线的最好方法是确定生态系统评估过程中直接

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3 这些因素源于美国环境保护局，审查国家环境政策法有关文件中累积影响的考虑(1999)，见《扩大海洋生态系统管理在〈海岸带管理法〉中的作用》第11页注释44。

4 建议考虑所有对生态系统的影响，将309节（a）的“海岸带”定义为：“邻接若干沿岸州海岸线和彼此间有强烈影响的沿岸水域（包括水中及水下的陆地）及毗邻的滨海陆地（包括陆上水域及地下水），包括岛屿、过渡区和潮间带、盐沼、湿地和海滩。在大湖区，这一地带向海延伸至……州的外部界限……向内陆，这一地带从海岸线仅延伸到管理滨海陆地所需达到的范围，意即滨海陆地的利用对沿岸水域有直接或重大的影响所及的范围，以及控制那些有可能受到海平面上升影响或对其敏感的地理区域所需达到的范围。但不包括那种按法律规定完全听凭联邦政府及其官员和下属机构使用，或由联邦政府及其官员和下属机构托管使用的滨陆。”

和重大影响的来源。通过生态系统评估确定向陆的界线将为州提供灵活性，正如通用的定义那样，但是它要求利用现代制图和分析工具重新分析直接和重大的影响。为此目的，《海岸带管理法》向陆一侧的海岸界限将通过增加以下内容进行修订："……这一地带仅从海岸线向陆延伸到控制滨陆所需的范围，亦即滨陆的利用是由生态系统评估予以确定的对沿岸水域直接和重大影响所及的范围，以及管理那些有可能受到海平面上升的影响或敏感地理区域所及的范围……"确定海岸带向陆界线的一个备选方法是利用现有水文单位确定界线。两个方案各有利弊。美国海洋政策委员会在其 2004 年报告中推荐州海岸管理计划的内陆界限应当至少在"海岸分水岭"上。[5] 该委员会的报告将"海岸带"定义为"包括潮汐影响的逆流区域的分水岭的一部分。在大湖区，（它）包括泄入任一湖泊的全部地理区域"。委员会引用的这一定义出自 1992 年国家海洋与大气管理局的文件，其中规定得更详细。

2. 《海岸带管理法》专注于海岸带的保护与利用的协调。什么活动构成"利用活动"对于该法的实施是重要的。在制订一个规划、确定优先利用活动以及在有竞争的或有冲突的海洋和海岸利用之间做出决策时，什么衡量标准是必须予以考虑的。对于待批准的州管理计划，他们必须对可容许的陆地和水域利用作出界定，并且确定实施控制的方式。《海岸带管理法》通过界定"陆地利用"和"水域利用"对这一要求作出了一些初步规定。[6] 保护措施作为一种"利用活动"经常被忽视。为了在海岸带决策过程中对这些活动给予重视，保护措施应当在州计划中归于可容许的"利用活动"之类。鼓励的途径之一是对海岸带管理法中陆地和水域的利用活动作出进一步定义。"陆地利用"将会定义为，"在海岸带的滨陆内或其上进行的保护、开发或其他活动。"同样的，"水域利用"将会定义为，"在海岸带的水域内或其上保护、开发或其他活动。"

三、海岸带管理规划中的体现

美国环境法协会建议要求以充分的生态系统科学为基础的海岸带规划，认为《海岸带管理法》可以做出以下的变化：

作为规划批准的条件，要求州制定以生态系统评估为基础的长期管理计划。

根据现在的规定，《海岸带管理法》仅要求州制定计划而不是海洋与海岸生

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5 美国海洋政策委员会编:《21 世纪海洋蓝图》，2004 年，见《扩大海洋生态系统管理在〈海岸带管理法〉中的作用》第 8 页注释 22。

6 该法认为"陆地利用"是"在海岸带的滨陆内或其上进行的活动。"同样的，"水域利用"定义为"一种在海岸带的水域中或其上进行的利用、活动或工程。"这两个定义都非常广泛，使大量的"利用活动"都有资格进行，但是对应该包括什么却给出很少的指导。

态系统可持续的长期规划。如果《海岸带管理法》支持建立一致的海岸带管理，通过在州规划中使用叙述性的或完美的可量化的目标以及实现目标的确定的方法，那么《海岸带管理法》将是基于生态系统的更好的方法。该规划应当包括管理目标、达到此目标的可衡量的目标、时间、预算、指定的领导机构以及实现目标的法定职权。这将为州计划列出的管理机构提供方向和目标，并且促进依《海岸带管理法》的州行动的有效性和可说明性。该规划应当通过上述所讨论的生态系统评估获悉。

为了要求州建立长期规划，国会将其列入批准的必要要素。例如，306 节（d）将修订为："批准沿海州提交的管理计划前，部长应确认具有下列：……(2) 管理计划包括下列每一项要素：……（B）以最近的生态系统评估为基础的带有定量或定性目标的海岸带保全、保护和开发规划。该规划应当包括但不限于管理目的、达到目的的可测量的目标、期限、预算、指定的领导机构，以及执行该规划的战略和法定职权。"

四、沿海州际间合作机制中的体现

《海岸带管理法》的一个局限是它将每个州的管理范围限定在该州界线内，而使邻近州（或联邦水域）发生的问题有些孤立。因此美国环境法协会建议修订《海岸带管理法》时通过增加海岸带现有的批准条件以促进基于生态系统管理的实施。《海岸带管理法》可以做出以下变化：

作为规划批准的条件之一，要求州承诺以生态系统评估为基础的共享生态系统的州际间更大力度的合作。

修订后的《海岸带管理法》将会要求共享生态系统的州与州之间更大的协调。可以将 306 节 (d) (3) (A) 改写为："(3) 州—（A）将其计划与地方的、区域的、较小区域和州际规划以及其他沿岸州的规划和计划相协调，而其他州的这些规划和计划适用于涉及该州海岸带的地理区域……并且（ii）已经由地方政府、较小区域机构、地区机构、州政府或州际机构制订。"这一方式的有利之处在于其重点考虑到其他州的规划和计划；但仍只是时间上的预期要求而缺乏实质性操作。

也可以采取另外一种访求，即将 306 节 (d) (3) (B) 改写为："306 节 (d) (3) 州—（B）在（6）段指定的管理机构与该海岸带内的当地政府、相邻州政府、州际机构、地区机构和区域机构之间建立有效的磋商协调机制，以确保这些政府机构的充分参与……"这样表述的优点是适当地规定了共享海岸生态系统的州之间的长期合作；但仍是缺乏实质性操作的规划中的要求。

第三个方案是产生一个正式的州际间的一致性规定，类似于现行的联邦一致性审查。《海岸带管理法》将要求州的行动与相邻州关于区域性或跨界的生态系统评估确认的强制性政策相一致。为确保本规定提出的问题是恰当的且并未超越其

权限，跨界生态系统问题应当在生态系评估中明确确定。

五、《海岸带管理法》考虑累积影响中的体现

有效的基于生态系管理的另一个特征是，考虑到因长期的不同使用活动和不同地区对海洋和海岸带的累积影响并使这种累积影响最小化。因此，美国环境法协会建议《海岸带管理法》可以做出以下的变化：

作为规划批准的条件之一，要求州评价累积影响并在规划评估和许可评估时采取预防方法。

累积影响的考虑已经在美国联邦环境法令中有所规定、实施。例如，国家环境政策法规定，联邦机构考虑累积影响，将其定义为，确定环境影响综述的范围时："过去的、现在的和合理的可预见的未来行动的[建议的]附加的影响。"[7] 这种情况下，法院承认在累积影响分析时资料的实用性是一个限制因素。但是，他们要求不论资料的可用性与否，一个机构应至少在适当的时候做出应付累积影响的努力。[8]

美国环境法协会建议国会将要求州具备适当的机制进行海岸带内严重累积影响的评估："(1) 选择一自然或生态学上可持续的环境作为比照；(2) 包括科学的可防御的和实际的退化临界值；(3) 无论地区，识别什么项目在时间上和距离上是最近需要的；(4) 评估项目及影响相互作用的可能性；(5) 确认可能伴随项目产生的其他活动，以及此类活动可以改变生态过程的方式；(6) 考虑所有由于活动的地点和性质而易受影响的资源。"[9]

另外，修订《海岸带管理法》第 306 节 (d) 关于州规划得到批准的条件的规定，将其重新表述为："批准一项由沿岸州提交的管理规划之前，部长须确认：……(17) 管理规划对于任何一个海岸资源利用行为的累积影响的考虑是充足的……"

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7 美国联邦法典标题 40-1508.7，"添加到过去的、现在的和可预见的合理的未来行动中的[建议的]行为增加的影响。"见《扩大海洋生态系统管理在海岸带管理法中的作用》第 11 页注释 41。

8 Michael D. Smith：《累积影响判例法最近趋势》，参加第 8 届国家环境专家协会年度大会（2005 年 4 月 16-19 日）。例如，第九巡回上诉法院已作过否决，认为机构对于此问题经常是以对过去、现在与可预见的合理的未来活动或分析时使用的资料和基本原理的不充分的分析为基础。见《扩大海洋生态系统管理在〈海岸带管理法〉中的作用》第 11 页注释 43。

9 这些因素源于美国环境保护局：《审查国家政策法文件中累积影响的考虑》，1999 年，见《扩大海洋生态系统管理在海岸带管理法中的作用》第 11 页注释 44。

六、海洋和海岸利用活动冲突解决机制中的体现

现行《海岸带管理法》仅规定参与的州通过其机构有权解决有竞争的利用活动之间的冲突，[10] 但是没有要求州建立如何解决冲突的机制或政策基础。

作为规划批准的条件之一，要求州建立明确的评估、建议机制，并且在不同的部门和有竞争的利用者之间作出权衡。

《加州海岸带法》规定“重要的海岸带资源应采取最有效的保护方式”的原则。美国环境法协会认为，类似性质的方法适用于所有的州，因此国会将在《海岸带管理法》中增加一项新规定，确定一个或多个平衡机制来解决利用活动的冲突，或者如同加州的作法，或者部长“批准州提交的管理规划之前，应确认：……（17）规划……(A) 以整个生态系统需要的方式解决利用活动之间矛盾冲突的机制；……”(306 节 (d))

为了使不同的海洋利用活动之间得以平衡，《海岸带管理法》要求州在其海岸带规划中规定不同区域的优先海洋利用活动。可以列出一些区域优先作为海洋和海岸产业利用，而其它区域优先作为娱乐或保护的利用。因此，基于制定该规划的州机构之间的协调一致，制定“生态系统利用规划”指定优先利用活动，并且《海岸带管理法》将要求州机构遵守该规划，否则需要提供一个明确合理的解释。规划实施过程中有可能在利益相关者之间产生冲突。因此要求有一个争端解决机制作为支撑。利益相关者之间的协调与折衷应先于州的冲突解决方案。

七、特殊区域管理计划中的体现

特殊区域管理计划通常是州规划的补充，规定特殊海岸区域特殊管理目标。利用特殊区域管理规划使基于生态系统的管理成为可能。美国环境法协会建议《海岸带管理法》作出以下方面的变化：

重新表述定义“特殊区域管理规划”（第 304 节（17)），以体现基于生态系统管理的要素；

作为规划批准的条件之一，要求州规划建立机制使特殊区域管理规划能够在地方一级或州一级制定；

特殊区域管理规划应用到《海岸带管理法》的其他部分。

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10 美国联邦法典标题 16:1455(d)(10)(A)，见《扩大海洋生态系统管理在〈海岸带管理法〉中的作用》第 12 页注释 46。

1.《海岸带管理法》中的特殊区域管理计划的定义范围广泛，足以包括基于生态系统管理的许多特点，为了明确地鼓励或命令采用基于生态系统管理方式，美国环境法协会建议国会在《海岸带管理法》中增加基于生态系统管理的相关术语以进一步增加每个特殊区域管理计划的基于生态系统管理因素。可以修订《海岸带管理法》第304节的定义为:“术语‘特殊区域管理计划’是指一项综合的计划，由重要公众和私人相关方与决策机构建立，提供自然资源的保护与依赖海岸带的合理的经济增长，包含一个详细综合的包括强制力和非强制力政策的声明;指导公众和私人使用陆地和水域的规范和标准;在海岸带特殊地理区域适时执行机制以及将充分考虑相关问题的地理界限。”国家海洋与大气管理局已经制定了特殊区域管理计划的有效特征列表，其中许多体现了基于生态系统管理的原则。其中确认并包括规划过程的重要参与者，尽可能早地确认和明确特殊计划的目的，并指定领导或领导机构。[11]

2. 由于特殊区域管理计划包含了基于生态系统管理的大多数特征，如果国会修订此法，规定州海岸管理计划包括特殊区域管理计划，那么《海岸带管理法》将会更好地反映基于生态系统的管理。目前特殊区域管理计划是可选的，除开展此类项目的联邦财政鼓励外，许多沿岸州仍然不会使用它作为其海岸管理的一部分。但是成功的特殊区域管理计划显示，当它是由基层而不是由更高权力机构强制建立起来时更为有效，因此要求州制定特殊区域管理计划可能不是最好的方法。取而代之，《海岸带管理法》应当规定特殊区域管理计划作为海岸管理成套方法中一个可用工具，换句话说在所有批准的州计划中它是一个可行的选项。为此，国会将修订《海岸带管理法》第306节 (d) 为:“批准由沿岸州提交的管理计划前，部长应当确认：……(2) 该管理计划包括下列所需每一条件：……(J) 特殊区域管理计划的准备与实施。”

3. 当大多覆盖较小区域的特殊区域管理计划完成时，它们为州和地区规划提供了潜在机制。目前，罗德岛海岸资源管理委员会正在制定一个覆盖，如果不是所有的也会是绝大部分州海洋水域以及岛海岸外联邦水域的“海洋特殊区域管理计划”。这个案例中，特殊区域管理计划提供了州和联邦机构合作进行海洋规划的方式，以期加快批准程序和所有当事方长期执行规划。特殊区域管理计划也用作建立基于生态系统管理的分区。每个特殊区域管理计划将在更大范围的综合性海岸管理战略中发挥作用。

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11 国家海洋与大气管理局:《深入理解特殊区域管理计划》下载于 http://coastalmanagement.noaa.gov/issues/special_indepth.htm，2009年11月16日。见《扩大海洋生态系统管理在海岸带管理法中的作用》第13页注释55。

八、保持联邦一致性中的体现

州广泛参与《海岸带管理法》的一个主要原因是每个州已经得到有限的授权以确保联邦政府遵守该计划的执行。这种“联邦一致性”涵盖了大多数可能影响州海岸带的各种联邦行为。[12] 但是州当局只能在其州计划强制性政策的范围内规定联邦活动。指导方针和其他非约束性规定不适用于联邦一致性实施。美国环境法协会建议:

鼓励更广泛地使用联邦一致性规定(第307节(c)),并简化州强制政策的程序。

如果州海岸带计划不能对联邦、州或者地方造成的海岸影响产生作用,那么它是不成功的。因此,州已经通过扩大其强制性政策的数量和范围来加大其对联邦活动的影响。

但是这并不妨碍联邦政府将基于生态系统的管理进一步融入《海岸带管理法》的联邦一致性规定中。2003 年,国家海洋与大气管理局改变了一些联邦一致性的规定来努力促进资料共享和程序上的效率。[13] 这些变化包括更高层次的联邦许可或允许活动的信息特征,明确“联邦许可或允许”的范围以及机构的“职责”。国会在重新批准《海岸带管理法》过程中有机会达到类似的目标。例如,国会可以规定由州审查联邦活动的一套标准,通过阐明必须对每个实例中这些具体活动进行审查来简化联邦一致性审查过程。另外,国会将建立提高州使用联邦一致性审查作为实施计划的途径的机制。[14]

九、结论

目前的《海岸带管理法》中包括许多基于生态系统管理的基本概念。但是通过采取目前可选的强制性海岸管理方法并加入一些新的条件,《海岸带管理法》可能会沿着基于生态系统管理的法律框架发展。本白皮书总结了《海岸带管理法》

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12 这种“联邦一致性”涵盖了联邦资助进行的联邦机构、州或地方政府的活动,以及依联邦许可或允许任何“影响陆地或水域利用或海岸带自然资源”的活动。它也涵盖了由内务部部长提交的“依外大陆架法已经许可的任何区域”的勘探或开发或者由此产生的任何计划。

13 国家海洋与大气管理局:《公众交流信息:建议制定规则一海岸带管理法联邦一致性法规 1》,2003 年 6 月 11 日。见《扩大海洋生态系统管理在〈海岸带管理法〉中的作用》第 15 页注释 63。

14 原文注释[66]:国家海洋与大气管理局与沿海州组织:《海岸管理的未来构想:促进海岸带管理法 11(2007)的原则》。见《扩大海洋生态系统管理在海岸带管理法中的作用》第 15 页注释 66。

中扩充基于生态系统管理概念的六个潜在方法：

1. 规定生态系统评估和支撑其完成的方法；

2. 规定基于生态系统评估的州海岸带计划的改进；

3.更新法定定义，考虑内陆海岸带生态界限，并明确地将保护作为一种“利用；”

4. 规定通过州际协调与一致更加综合的管理方式，累积作用的评估，以及建立竞争的或冲突的利用活动的平衡机制；

5. 进一步改进特殊区域管理计划，融入基于生态系统管理的原则并且广泛使用；

6. 保持联邦一致性和鼓励州更大程度地使用。

中国海岸带管理法的完善思路：以美国为借鉴

姜玉环 * 方珑杰 **

内容摘要：中美两国都是海洋大国，对海岸带的合理开发和有效管理已成为中美两国海洋管理面临的共同现实问题。美国在海岸带综合管理理念上一直走在世界前列，依靠其制度的不断变革和创新，逐步迈向海岸带可持续发展的方向。中国海岸带资源开发与生态环境的可持续发展需要海岸带管理体制和政策、法律的不断完善，美国海岸带管理的实践经验和不断发展为中国提供了重要借鉴，本文重点讨论完善中国海岸带管理法律制度的对策，并提出建议。

关键词：海岸带综合管理 美国海岸带管理法 基于生态系统管理

海岸带是陆海相互作用的敏感区域，自然条件承载力较差。海岸带大力发展的同时也带来了严重的负面效应，海岸带水域、大气和生境受到了严重危害，致使海洋污染加剧、湿地减少、渔业资源退化和自然灾害频发。对海岸带的合理开发和综合管理，已成为各国海洋可持续发展面临的共同现实问题。

海岸带管理法指的是特定区域（海岸带范畴内）的国土法。[1] 美国早在 1972 年就制定了《海岸带管理法》，依靠政策、法律、经济等手段，加强对海岸带资源和生态、环境的规划和保护，成效显著；同时借助不断创新的海洋法律与政策，强化对海岸带的可持续发展与保护。而中国的海岸带开发保护政策与相关法律具有明显的滞后性，与海岸带开发利用的发展要求不相符合。因此，中国有必要借鉴美国经验，结合国情促进中国海岸带综合管理政策和法律的不断健全，切实为中国海岸带经济、社会和生态环境的可持续发展保驾护航。[2]

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1 海洋大辞典编辑委员会编：《海洋大辞典》，沈阳：辽宁人民出版社 1998 年版，第 214 页。
2 倪国江、鲍洪彤：《美、中海岸带开发与综合管理比较研究》，载于《中国海洋大学学报（社会科学版）》2009 年第 2 期，第 13 ～ 17 页。

一、中美海岸带管理法律与政策的概况

(一)中国

自20世纪80年代开始,我国关于海洋管理的法规由原本的单行法规向行业性法律法规转变。这一时期关于海岸带管理的法律法规,除关于海洋权益的法律(如《领海和毗连区法》等)以外,主要是以部门管理的行业性法律为主。相关法律法规主要包括如下几类:(1)海洋环境保护管理,如《海洋环境保护法》、《防止船舶污染海域管理条例》、《海洋倾废条例》、《防治陆源污染物污染损害海洋环境管理条例》等;(2)海上交通运输安全管理,如《海上交通安全法》、《航道管理条例》等;(3)海洋资源管理,如《渔业法》、《渔业法实施细则》、《对外合作开采海洋石油资源条例》等;(4)海洋科研管理,如《涉外海洋科学研究管理规定》等;(5)海域使用管理,如《海域使用管理法》等;(6)此外,海岸带管理法还包括一些与海岸带管理密切相关的法律法规,如《土地管理法》、《港口法》、《城市规划法》、《矿产资源法》、《盐业管理条例》等。以上法律法规,共同构成了我国海岸带管理的基本法律体系。

目前我国尚没有一部综合性海岸带管理法,已经制定并实施的法律法规大多是专项性的行业法,配套性和系统性不强;同时,海上执法多部门参与,职责不明确,缺乏有效协调机制。而且,由于中国的海岸带管理实践尚处于起步阶段,存在很多深层次的问题,如管理体制分散,部门、机构之间,海域使用人之间,行政管辖区域之间由于利益关系各自为政、冲突频繁,难以协调和整合,形成政府部门依据单项法律法规进行"条块式"管理的格局。[3] 这种格局延续至今,实际上是陆上行业管理向海的延伸,未考虑海岸带区域的特殊性和管理形式的要求,导致针对性不强和管理效率不高等问题。

(二)美国

美国是海洋管理理念的倡导者和践行者,很早就开始了海洋综合管理的实践。20世纪70年代,伴随资源开发和环境保护的冲突日益严峻,使得美国原本奉行的海岸带部门行业管理体系在管理效率及其效果上出现重大问题,因此美国海岸带管理立法形式由单向部门管理向综合立法管理转变,并以追求海岸带资源、环境

3 倪国江、鲍洪彤:《美、中海岸带开发与综合管理比较研究》,载于《中国海洋大学学报(社会科学版)》2009年第2期,第13～17页。

的协调发展为目标。在海岸带管理中不仅由各级政府直接管理，更重视公众和社区的共同参与;并充分考虑各州各地区的不同特点，做到因地制宜和统筹兼顾。从 70 年代开始，美国通过不断完善海洋基本政策，海洋立法、规范和协调管理等手段，加强对海岸带区域的管理和保护。

1. 建立完备的海岸带管理法律体系

美国是较早进行海岸带活动立法工作的国家之一，1967 年，美国时任副总统汉弗莱提出了“海岸带管理”的概念。1972 年参众两院一致通过了联邦政府的《海岸带管理法》，在美国国家海洋和大气局指导下统一实施，这是世界上第一部综合性海岸带管理法，由此开始了海岸带管理立法在立法形式上由单项的部门立法向综合管理立法的发展。美国的《海岸带管理法》于 1976 年、1981 年和 1990 年多次进行修订。目前，美国 35 个沿岸州和地区中，绝大多数沿岸州和地区都颁布了海岸带管理的法律。[4]

美国在实施《海岸带管理法》之后，相继修订了《大陆架土地法》和《海洋保护、研究和自然保护区法》，制定了《国家环境政策法》、《国家海洋污染规划法》、《渔业保护和管理法》、《深水港法》等法律，形成了比较完备的海岸带综合管理法律体系，对有效控制海岸带过度开发和环境持续恶化起到显著的积极作用。[5]

2. 明确海岸带管理的范围和边界

美国的海岸带系指邻接若干沿岸州的海岸线和彼此间有强烈影响的沿岸水域（包括水中的及水下的土地）及毗邻的滨海陆地（包括陆上水域和地下水）。这一地带包括岛屿、过渡区与潮间带、盐沼、湿地和海滩。在五大湖区延伸到美国和加拿大的国界线;向海方向延伸至美国领海的外部界限;向内陆则从海岸线延伸到管理滨陆所需达到的范围，亦即滨陆利用对沿岸水域直接影响所及的范围。[6]

3. 规范海岸带管理和协调体制

美国《海岸带管理法》确立的是分级、分散的管理体制，即联邦、沿岸各州和地方政府都具有海岸带管理的职责，但以州为主。联邦和各州（及州以下的县、镇等）都颁布了关于海岸带管理方面的法规。联邦设有专门的主管机构——海洋及海岸带资源管理办公室负责进行综合管理的协调工作，隶属于国家海洋和大气局。联邦主要是向州提供财政援助，制定沿岸各州海岸带管理规划的指导方针，从而建立起联邦、州和地方政府以及其他利益集团之间相互协调与合作的关系。各州、市、县、镇都设立海岸带管理机构，有些地方还设立了跨地区的协调机构。

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4 恽才兴、蒋兴伟著:《海岸带可持续发展与综合管理》，北京:海洋出版社 2002 年版，第 14 页。

5 恽才兴、蒋兴伟著:《海岸带可持续发展与综合管理》，北京:海洋出版社 2002 年版，第 14 页。

6 国家海洋局海域管理司编:《国外海洋管理法规选编》，北京:海洋出版社 2001 年版，第 578 ～ 579 页。

4. 海岸带管理法的新发展

随着自然资源的逐渐消耗以及人们对生态系统科学认识的发展，基于生态系统的管理源于考虑到生态系统内部及其与人类活动间的相互关系，已经成为许多政府部门、公众及私人资源管理机构的明确目标，并逐渐融人到美国海洋管理立法与政策中，成为促进海岸带综合管理与可持续发展的新方法。但是美国的《海岸带管理法》中反映基于生态系统管理的规定并不多。2009 年 1 月美国环境法协会发布《扩大基于生态系统管理在〈海岸带管理法〉中的作用》的白皮书，建议从以下 6 个方面改进《海岸带管理法》的内容，以此来加强基于生态系统的海岸带管理：

（1）要求建立构成州海岸带管理计划基础的生态系统评估，通过美国国家海洋和大气局海岸服务中心加强最新资料的收集和分析来支撑其完成，并且帮助管理者理解该评估的可靠性。

（2）要求州制定以最新的生态系统评估为基础的长期海岸带管理计划，包括管理目的、为达到目的设置的可测目标、期限、预算、指定的领导机构，以及执行该规划的战略和法定部门等改进方法。

（3）更新法定定义，以生态系统评估为基础进行合理的界限划定，考虑内陆海岸带生态界限，赋予州划定内陆一侧界限的灵活性;对《海岸带管理法》中陆地和水域的利用活动做出进一步定义，并明确地将“保护”作为一种“利用活动”。

（4）通过州际间以生态系统评估为基础的共享生态系统促进协调、合作的综合管理方式，并建立竞争的或冲突的利用活动的平衡机制;注重长期的不同使用活动和不同地区对海洋和海岸带累积作用的评估，并采取预防性措施。

（5）进一步改进特殊区域管理计划，融入基于生态系统管理的因素和原则，并且使之在更大范围的综合性海岸带管理战略中发挥作用。

（6）联邦政府将基于生态系统管理进一步融入《海岸带管理法》的联邦一致性规定中，建立机制以促进州更大程度地利用联邦一致性审查作为实施计划的途径。

二、完善中国海岸带管理法的思路和建议

美国从政策、法律体系和管理与协调机制的建设等方面对海岸带管理体制的不断完善，以及加强基于生态系统的海洋管理原则在《海岸带管理法》中的作用所体现的海岸带开发与管理政策的新发展，为中国完善海岸带管理法提供了新思路。笔者建议主要从以下几个方面考虑，并将科学的理念融入相关法律制度的进一步完善之中。

（一）以法律形式明确海岸带管理的边界划定

海岸带（海岸地区）是陆地与海洋相互作用的地区，海陆之间相互作用的复杂生态过程把海洋和陆地连接成为一个整体。基于生态系统的海岸带综合管理，其主要价值便在于对海陆一体化的认识。

我国 1985 年开展的全国海岸带和滩涂资源综合调查规定：海岸带的宽度为离海岸线向陆地延伸 10 千米，向海延伸到 15 米等深线处。现实中对有关海岸带综合管理中的边界问题一直是含糊不清的，多根据行政区划或地理区域为界进行海洋综合管理，这种划分方法粗糙、笼统，科学依据不充分、可操作性不强，严重制约了海岸带综合管理的有效开展。因此，必须区划出包括海域和陆域范围在内的地理单元，以法律的形式加以确定；同时也应有一定的灵活性，对其进行整体性（多个政府部门和多个产业经济部门间的协作）和综合性（实现开发控制和资源管理目标的综合）的管理。

海岸带的边界划定应以生态系统评估为基础，以海洋基本物理、化学和生物等生态学特征作为依据，同时考虑人类活动干扰等因素。合理划定海岸带管理区域，一般认为应该包括一定范围的近海陆地和通常延伸到陆架边缘或到近海环流系统边缘的区域。如，管理区应包含关键海岸带生境、关键生态过程和重要物种的生活区域，重视对关键生境的保护，如河口区、红树林、珊瑚礁和湿地等；还应考虑岸段的地形地质，如在基岩和砂质岸段，由于沿岸陆地地势较高，受海洋影响的范围较小，向陆一侧的范围可以窄一些；在粉沙淤泥质海岸段，由于海岸陆地平坦，容易受风、浪、潮侵蚀，其范围可以宽一些。[7]

另外，边界划定应注意外部影响，将海岸地区的主要污染点纳入管理范围。同时，边界划定也要与当地的海域功能区划相统一。

（二）确定科学的海岸带管理规划

基于生态系统的海岸带管理要求根据生态系统的评估认识到生态系统随时间的变化性及管理效果的滞后效应，从而制定长期管理规划，把法定的管理内容与目标融于具体的行动中，为管理机构的具体管理活动提供方向和目标，奠定保护和协调管理的基础。[8]

海岸带管理的规划应该体现明确、综合和可持续的特点。管理的目标不能过于笼统，除了“实现可持续发展”这种长远目标外，还需要制定能相互衔接的、具

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7 陈宝红、杨圣云、周秋麟：《试论我国海岸带综合管理中的边界问题》，载于《海洋管理》2001 年 5 月，第 27 ～ 32 页。

8 张灵杰：《美国海岸海洋管理的法律体系与实践》，载于《海洋地质动态》2002 年第 3 期，第 28 ～ 33 页。

体的、阶段性发展目标。而且管理目标应当具有可说明性，包括达到此目标的可衡量的具体目标、方法和预算，以及执行机关的法定职权等。规划过程要运用科学的方法和模型进行严密的论证、预测和评估，而且在规划批准实施后，所有的开发活动都必须严格的按规划执行，才能保证对海岸带的有序开发。

由于我国海洋管理体制上的“条块”分割，科学管理规划的制定应在不同层次上体现管理目标的一致性，包括国家层面的长远统筹规划，地方政府层面的具体实施规划，都要经过科学的论证和审核，并且重视对规划执行的有效监测与适应性评估，在反复实践中不断改进管理计划，以满足海岸带生态系统的可持续发展要求。[9]

（三）加强中央和地方部门、机构间的统一与协调

我国现行的海岸带管理是以海洋、渔政、环保、海事、边防等部门为主的分散型行业管理体制，该体制缺乏有效的协调和凝聚力，同时有多个部门共同参与海洋管理，地区和部门间的协调与合作障碍重重。主要体现在上下级之间缺乏有效的沟通和反馈渠道;不同区域机构之间，尤其是相邻地区涉及跨区域性问题时缺少统筹协调机制，使得海岸带管理过程中的矛盾和利益冲突不断。中央和地方部门、机构间的合作协调问题如果没有解决好，海岸带管理工作难有大的进展。

为适应海岸带综合管理的要求，应适时优化机构组合，完善中央到地方的职能配置，强化部门间的合作机制，调整地方的海岸带管理具体规划，使其与国家授权和相关政策法规相一致、与相邻区域管理规划相衔接。在机构设置上，应考虑尽快成立诸如国家海洋事务管理委员会之类的国家层面海洋综合管理领导和协调机构，各沿海省市成立地方性海洋综合管理领导协调机构，形成从国家到地方的综合性、系统性海岸带管理领导和协调系统，强化地方海岸带管理职能;确立明确的平衡机制，解决不同部门、机构和利益相关者之间的冲突，从而加强对海岸带事务的统一协调和管理。[10]

（四）建立科学的生态评估和预警机制

有效的基于生态系统的管理需要对海洋生态系统结构、状况以及功能有基本的了解，依此做出全面、科学的管理决策。由于人类活动的影响，海洋生态系统变化迅速而且复杂，使海洋生态系统评估工作变得十分急迫。

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9 丘君、赵景柱、邓红兵、李明杰:《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 74 ～ 78 页。

10 倪国江、鲍洪彤 :《美、中海岸带开发与综合管理比较研究》，载于《中国海洋大学学报（社会科学版）》2009 年第 2 期，第 13 ～ 17 页。

一方面，应尽快建立基于大海洋生态系统的生态系统评估方法，并充分考虑任何一项活动的累积效应。通过建立和健全海洋生态系统监测和评价系统，将监测和评价范围从近海扩展到远岸海域，对海洋生态系统的动态进行长期监测。比如，海洋生物多样性变化、海洋经济鱼类的生产能力，包括某些重要海洋生态系统的结构和生态过程的变化等，都应该列入监测和评估范围，使得基于生态系统的评估为海岸带管理法律法规的制定和实施提供技术支持，为政策制定提供科学依据。[11]

另一方面，复杂的地质特征、生态地理过程和人类活动决定了海岸带面临极大的不确定性，也由于人类认识的局限性，往往在对海洋管理问题的决策中出现失误。实施基于生态系统的管理要考虑生态系统本身的特点及其不确定性，在预见能力有限的地区应用预警原则。预警原则是维护生态系统健康和生态安全的重要原则，要求即使缺乏科学、充分、确实的证据，只要假设某些人为活动有可能对生命资源产生严重或不可逆转损害的威胁，就应采取符合成本效益的技术或措施减缓或直至取消这些影响。[12] 因此，预防的措施和方法应该涵括到海岸带使用的管理活动范围，并被纳入到海岸带管理法的规范体系，以满足综合管理的需要。

三、结语

美国的海岸带管理已经走在世界前列，中国有着 300 多万平方千米的管辖海域，在世界海洋强国相继制定了相关海洋法律与政策以推进海洋经济及海洋事业发展的时代背景下，中国应该顺应时代潮流，借鉴先进国家经验，对管辖海域进行科学综合管理。而一个健全的海洋综合管理体制应具备完善的海洋综合性法律法规体系，我国正在加强法制建设，要求依法治国、依法行政，没有强有力的海洋法律法规体系支撑，要有效进行海洋综合管理是很困难的，所以我们应该尽快制定一部科学的、综合的《海岸带管理法》，完善海洋法律体系，加强海岸带地区的综合管理，实现海岸带地区的可持续发展。

（厦门大学法学院朱晓勤教授对本文写作给予了大力指导，作者谨此致谢！）

11 丘君、赵景柱、邓红兵、李明杰：《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 74 ～ 78 页。

12 崔胜辉、洪华生、张珞平、黄云凤、薛雄志：《全球变化下的海岸带生态安全问题与管理原则》，载于《厦门大学学报（自然科学版）》2004 年增刊，第 173 ～ 178 页。

New Ideas for Improving China's Coastal Zone Management Legislation: Drawing on the Experiences of the United States

JIANG Yuhuan FANG Longjie

A coastal zone is the interface of human and marine ecosystem, and is currently the most concentrated area of human activities in the world. Coastal zones play a pivotal role in the sustainable development system of global ecological, economic and social development. As coastal zones are sensitive areas of land-sea interactions, coastal development boom has also brought serious adverse effects to the poor environmental bearing capacity, thus the integrated coastal zone management has extremely important social and economic significance. It provides an important guarantee for sustainable development in these areas, and also acts as an important part of the marine industry.

Both China and the U.S. are major maritime powers, facing very prominent resources, environmental and ecological issues, and China is even more serious. Rational development of coastal zones and the effective management according to law have become a common reality of ocean management for China and the U.S. As early as 1970s, the United States has implemented integrated coastal zone management measures, relying on ways of policies and legal, economic and other means to enhance coastal resources and the ecological, environmental planning and protection. Entering into the 21st century, the U.S. is relying more on its ongoing institutional reform and innovation for a new ocean policy, and integration of the advanced concept into ocean management to further improve the legal system, which strengthen the sustainable development and protection of the coastal zones.

There is strong need of policy innovation for China's coastal zone management to promote coordinated and sustainable development in coastal zone development and resource utilization, and ecological environmental protection. Experiences

and practices from the U.S. provide new ideas for China to improve its coastal zone management law systems and institutions, like the policy making, legal system, management and coordination mechanisms, strengthening of marine ecosyslem-based management principles, and other areas, including: (l) defining the boundaries of coastal zone management based on scientific understanding of the ecosystem process of coastal zones; (2) determing definite, integrated and sustainable coastal zone management planning and conduct effective monitoring and adaptability assessment on the planning and implementation; (3) establishing a specific mechanism for the harmonization and balance of the relationship between agencies, departments and the different stakeholders; (4) providing legal guarantee and support in order to establish scientific ecological assessments and precautionary mechanisms and so on. These initiatives will contribute effectively to build and improve China's integrated ocean management laws and regulations, to strengthen the integrated coastal zone management and finally to promote the sustainable development of coastal zones.

马六甲海峡海盗和武装抢劫防治机制研究

林 菁*

内容摘要：本文以海盗和武装抢劫船舶频发的水域——马六甲海峡为研究起点，以与海盗和武装抢劫有关的双边、三边和区域内的多边防治机制为研究内容，认为目前的防治机制效果明显。在不久的将来，随着马六甲海峡海盗和武装抢劫船舶的防治机制在深度和广度上的进一步发展，防治效果会更加突出。

关键词：海盗 武装抢劫船舶 马六甲海峡 防治机制

一、国际法上关于“海盗”和“武装抢劫船舶”的规定

国际法上的海盗在不同的历史时期性质和内涵均不同，马六甲海峡内的海盗定义和通常国际法意义上的海盗范围也略有区别，本节将对海盗和武装抢劫船舶的定义以及两者的异同点作初步分析。

（一）国际法上“海盗”的概念

虽然海盗行为自古有之，但是一直到19世纪，许多国家都不认为海盗行为是犯罪行为。直到20世纪30年代，“海盗”才被列入国际犯罪之内，使之成为国际社会最早认同的典型的国际犯罪。[1] 1958年第一次联合国海洋法会议通过的《公海公约》第8条明确规定了海盗罪。

海盗行为的内涵随着时间推移也不断得到发展。1937年9月14日由英国、法国、苏联、保加利亚、希腊、埃及、罗马尼亚、土耳其和南斯拉夫签订的《尼翁协议》规定海盗行为的主体为国家，行为客体为他国的商船，行为发生地为公海。[2]

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1 《保护地中海安全的尼翁协定签字》，下载于 http://www.godist.Cn/History/8714.shtml，2008年10月14日。
2 《保护地中海安全的尼翁协定签字》，下载于 http://www.godist.Cn/History/8714.shtml，2008年10月14日。

和 1937 年的《尼翁协议》相比，1958 年的《公海公约》对海盗罪除了行为地点仍限于公海外，其它方面都作了较大调整：海盗行为的主体仅限于个人（不包括国家）；行为客体得到很大扩展，不仅包括私人商船，还包括军舰等公用船舶；此外，还包括另一飞机和另一船舶或飞机上的人或财物。1982 年的《联合国海洋法公约》（以下简称“《公约》”）再次确认了 1958 年《公海公约》对海盗罪的定义。近年来，一些区域性条约针对本地区特殊状况对本区域内海盗的定义进行限制。例如针对马六甲海峡及其附近区域的海盗犯罪分子尚未具备对飞越该海域的飞机实施海盗行为的能力，海盗袭击大多针对船舶的特殊情况，[3] 在 2006 年生效的《亚洲打击海盗及武装抢劫船只的地区合作协定》（以下简称“《合作协定》”）中将飞机排除在海盗犯罪的行为客体外，[4] 该协定中指的海盗是在公海上对另一船舶上的人或财产或在任何国家管辖范围外的地方对船舶、人或财物实施的任何非法的暴力或扣留行为，或任何掠夺行为。[5] 由于本文是针对马六甲海峡的海盗问题进行探讨，因此，海盗的定义以《合作协定》中的规定为准，海盗罪的行为客体不包括《公约》中提到的飞机。

除此以外，由于《公约》大大缩小了公海的范围，使得绝大部分海域划入沿岸国的领海或专属经济区内，而这些地点恰恰是近年来“海盗行为”的多发地，仅凭一国的力量不能对其有效打击，然而，此类区域又关涉一国主权，不能简单地适用《公约》有关海盗罪的规定。因此，针对此类地点发生的暴力或扣留行为，或任何掠夺行为，国际社会将其纳入武装抢劫船舶的范围，下文将对此予以具体阐述。

（二）国际法上“武装抢劫船舶”的概念

国际法上有关“武装抢劫船舶”的规定主要体现在国际海事组织的《调查海盗和武装抢劫船舶罪行实用规则》和《合作协定》中。《调查海盗和武装抢劫船舶罪行实用规则》定义的“武装抢劫船舶”是指在国家对违法行为拥有管辖权的地方，为私人的目的直接针对船舶，或针对船舶上的人员或财产所进行的任何非法的暴

3 杨翠柏：《〈亚洲打击海盗及武装抢劫船只的地区合作协定〉评价》，载于《南洋问题研究》2006 年第 4 期，第 30 页。

4 杨翠柏：《〈亚洲打击海盗及武装抢劫船只的地区合作协定〉评价》，载于《南洋问题研究》2006 年第 4 期，第 30 页。

5 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), Art. 1(1).

力行为、扣押行为或掠夺行为，或要实施以上行为。[6] 而在《合作协定》中“武装抢劫船舶”是指在缔约国对这些违法行为拥有管辖权的地方，为私人的目的针对船舶，或船舶上的人员或财产所进行的任何非法的暴力行为或扣押行为，或任何掠夺行为。[7]

由此可见，区域性条约《合作协定》对“武装抢劫船舶”的定义范围比较狭窄，它只包括实际实施的非法暴力行为、扣押行为或掠夺行为，而国际海事组织除了实际实施的上述行为外，还包括要实施上述行为的“威胁”。由于在实际生活中“威胁”的判断标准较难统一，主观臆断性大，而且国际海事组织的《调查海盗和武装抢劫船舶罪行实用规则》只是示范法，对各成员方不具法律约束力，而《合作协定》是国际条约，对其缔约国具有法律约束力，因此，笔者认为，武装抢劫船舶的定义应以《合作协定》中的相关规定为准。

海盗和武装抢劫船舶的异同点如下。1. 两者的共同点在于：（1）犯罪目的和主观要件相同，犯罪目的均为私人目的，犯罪的主观要件为故意；（2）犯罪客观要件相同，都包括在海上针对船舶，或船舶上的人员或财产所进行的任何非法的暴力行为或扣押行为，或任何掠夺行为。2. 两者的主要区别在于：（1）犯罪地点不同，这是两者最大的不同，海盗罪的犯罪地点是在公海上和国家管辖权以外的地区，武装抢劫船舶的犯罪地点在国家拥有管辖权的地区，包括领海；（2）犯罪主体不同，海盗罪的犯罪主体限于私人船舶或私人飞机的船员、机组成员或乘客，武装抢劫船舶的犯罪主体则无此限制；（3）犯罪客体不同，海盗罪的犯罪客体限于另一船舶或飞机，武装抢劫船舶的犯罪客体包括罪犯自身所在的船舶和另一船舶。

二、马六甲海峡的法律地位

马六甲海峡位于马来半岛与苏门答腊岛之间，呈东南—西北走向。它的西北端通印度洋的安达曼海，东南端连接南（中国）海。海峡全长约 1080 公里，西北部最宽达 370 公里，东南部最窄处只有 37 公里，其中在新加坡附近的一段，宽度仅为 2 公里。水深 25~150 米，是沟通太平洋与印度洋的国际水道，也是亚洲与大洋洲的十字路口。[8] 目前，每年大约有 5 万艘船只过往马六甲海峡，它承载着全世界 1/3 的贸易货物运输和 1/2 的原油运输，其中包括日本 90% 的石油需求、我国

6 Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, Art. 2(2).
7 ReCAAP, Art. 1(2).
8 百度词典：《马六甲海峡》，下载于 http：//baike.baidu.com/view/15939.htm，2008 年 10 月 14 日。

60% 的石油需求和韩国 75% 的石油需求。[9]

马六甲海峡优良的地理位置对海峡沿岸国和海峡利用国是福音，而其复杂的地理环境和承载大量财富的来往商船使它成为两岸海盗和武装抢劫船舶犯罪分子的“天堂”。马六甲海峡间数百座无人居住的红树岛星罗棋布，此外，还有数不清的浅滩和暗礁，这使得海盗和武装抢劫船舶的犯罪分子极易逃窜。[10] 海盗的猖獗对海上运输和沿岸安全造成巨大威胁。海峡利用国和海峡沿岸国之间的权利和义务如何？马六甲海峡的海盗和武装抢劫船舶问题究竟归海峡利用国还是海峡沿岸国管辖？

马六甲海峡的法律地位在《公约》制定前后并不一样，在此之前，马六甲海峡实行公海自由制度和无害通过制度，在此之后，主要实行过境通行制度。过境通行制度由海峡利用国所享有的过境通行权利和遵守海峡沿岸国制定的过境通行方面的法律和规章的义务两部分构成：（1）过境通行权主要是指专为在公海或专属经济区的一个部分和公海或专属经济区的另一部分之间的海峡继续不停和迅速过境的目的而行使航行和飞越自由。[11] 和无害通过权相比，过境通行权最大的区别在于除船舶可行使航行自由外，飞机也可以行使飞越自由，而行使无害通过权的主体只有船舶。（2）过境通行方面的法律法规是指行使过境通行权的飞机和船舶具有“毫不迟延通过的义务”和“不对海峡沿岸国的主权、领土完整或政治独立进行任何武力威胁或使用武力”的义务。此外，海峡利用国船舶，应当遵守关于海上安全的国际规范、程序和惯例以及海峡沿岸国制定的有关航行安全和海上交通管理方面的法律法规，防止在海峡内排放油类、油污废物和其他有毒物质的国际规章、程序和惯例以及海峡沿岸国制定的有关这方面问题的法律法规。[12] 而海峡利用国的飞机应遵守国际民航组织制定的“航空规则”和随时监听空中交通管制机构所分配的无线电频率或有关国际呼救的无线电频率。[13] 把行使过境通行权的船舶同行使无害通过权的船舶承担的义务进行比较，两者几乎完全一致。

在国际通行的海峡——马六甲海峡内，除了行使过境通行的活动外，其他活动也要受《公约》的相关规制，[14] 因此海盗和武装抢劫船舶的问题自然应依据《公约》处理。如上文所分析，《公约》未对武装抢劫船舶问题予以规定，显然在沿岸国的领海范围内的武装抢劫船舶活动由各国管辖，海峡沿岸国可以对领海内武装抢

9 哈桑·瓦西迪、吴康、李春梅《亚太地区原油供需贸易展望》，载于《中国能源》2003 年第 5 期，第 29 页。

10 Peter Gwin, Dark Passage, at http://ngm.nationalgeographic.com/2007/10/malacca-strait-pirates/pirates-text, 1 September 2008.

11 《联合国海洋法公约》第 38 条第 2 款。

12 《联合国海洋法公约》第 42 条。

13 《联合国海洋法公约》第 39 条。

14 《联合国海洋法公约》第 38 条第 3 款。

劫船舶的快艇予以拿捕、行使紧迫权等。鉴于马六甲海峡较为狭窄，几乎不存在公海的区域，而在沿岸国专属经济区范围内的海上劫掠行为究竟是属于“武装抢劫船舶”的活动还是“国际法上的海盗”活动应依据专属经济区的法律地位而定。然而，各国和国际法学界对于专属经济区的管辖权问题有争议，可归纳为两种观点：第一种观点认为专属经济区不是一国的领海，在一国的主权范围外，属于公海的范围，沿岸国只能在专属经济区内行使自然资源开发的主权权利和海洋科学研究、人工岛屿建设等方面的管辖权；[15] 另一种观点则认为，专属经济区虽然并不属于一国领海，但是沿岸国可以在专属经济区内行使除《公约》第 56 条所列举的事项外的其他事项的管辖权。换言之，《公约》第 56 条所列举的事项不是“穷尽式”列举，也可以做扩大解释。就专属经济区内海上劫掠行为的法律性质而言，前者认为属于国际法上的海盗行为，各国可对此行为行使普遍管辖权，后者认为属于武装抢劫船舶问题，只有沿岸国能够行使管辖权。

虽然对专属经济区内海上掠夺行为的管辖权问题不明，但马六甲海峡的沿岸国并不愿意海峡利用国的军舰在本国专属经济区内对“海盗”行使管辖权。2004 年 4 月 4 日，马来西亚副总理兼国防部长纳吉布·拉扎克说，维护马六甲海峡安全是马来西亚等沿岸国家的共同责任，美国未经许可不能在海峡部署军队。马来西亚外交部长赛义德·哈米德 4 月 5 日对新闻界发表谈话说，马来西亚不需要美国派海军来维护马六甲海峡的安全。[16] 印尼在这方面与马来西亚是一致的，印尼人对海上主权问题极其敏感，即使是不会直接损害主权的合作行动，也会被警惕地认为这种活动可能导致渐进的侵占。[17]

总而言之，在马六甲海峡专属经济区内的海上劫掠行为不论是归于海盗行为还是武装抢劫船舶的行为，都需要防治。虽然目前其主要由沿岸国管辖，但是此问题的顺利解决不仅需要沿岸国的积极作为，也需要国际间的积极合作。近年来，防治马六甲海峡海盗和武装抢劫船舶的国际合作机制有了长足进展，本文第 3 节将对此予以详述。

三、马六甲海峡海盗和武装抢劫的防治机制

由于海峡沿岸国受殖民统治的历史较长，独立后对主权问题十分重视，因此马六甲海峡海盗问题的防治长期依赖海峡沿岸国各自的力量。然而，随着马六甲海峡海盗和武装抢劫船舶的活动日益猖獗，沿岸国逐步认识到要有效防治海盗和武装抢劫船舶问题必须和海峡利用国展开合作，尤其是和周边国家的合作。本节

15 《联合国海洋法公约》第 56 条。
16 蒋晗晖著：《马六甲航道安全与中国的政策选择》，北京：外交学院 2006 年版，第 31 页。
17 李金明：《马六甲海峡与东南亚地区安全》，载于《东南亚研究》2007 年第 6 期，第 4 页。

将从沿岸国的单边防治机制以及双边、三边和区域内多边防治机制两方面对此问题进行分析。

（一）沿岸国的单边防治机制（20 世纪 60 年代—20 世纪 90 年代）

20 世纪 60、70 年代至 20 世纪 90 年代，马六甲海峡的海盗和武装抢劫船舶犯罪以沿岸国的各自管理为主。沿岸国的防治机制分为两部分：（1）海上防治机制，海军或海上警卫队负责海上巡逻、登临检查嫌疑船只和追击、抓捕海盗；（2）岸上防治机制，海事局监视过往商船，处理商船的报警信息。在国内的刑法或海盗法规中明确规定海盗和武装抢劫船舶的犯罪构成要件、刑罚、提起公诉的管辖权、引渡等。值得注意的是，国内法对海盗的定义范围可能大于或小于 1958 年《公海公约》或 1982 年《公约》的定义范围。由于资料所限，并没有找到沿岸国国内法的相关规定，因此，只能泛泛而谈。总而言之，一国可以将国际法上的武装抢劫船舶纳入国内法的海盗罪范围，也可以将武装叛乱船只视为海盗船，但是，当一国的海盗案件涉及两国或多国时，则应当适用国际法上海盗和武装抢劫船舶的规定。[18] 假设印尼在马来西亚的专属经济区内行使海盗罪的管辖权，这时海盗的定义应符合《公约》的规定或两国签订的相关双边协议，若是在印尼的专属经济区内行使海盗罪的管辖权，则需符合印尼国内法中“海盗罪”的定义。

各自为政的局面并不利于有效打击海峡内的海盗和武装抢劫船舶。因为马六甲海峡内岛屿众多，印尼和马来西亚两国对这些岛屿的归属颇有争议。与此同时，两国对主权问题又十分敏感。印尼拥有 19784 英里长的海岸线，是东南亚的海洋大国，[19] 其并不愿意马来西亚和新加坡在本国专属经济区内和有争议的海域内对海盗问题行使管辖权。与印尼隔海峡相望的马来西亚曾是英属殖民地，由于担心印尼在马六甲海峡借打击海盗之名建立海上霸权，威胁本国安全，也不愿意其在争议水域内行使管辖权。而新加坡是一个面积只有 648 平方公里的岛国，[20] 1965 年才取得独立，在相当长的一段时间内，它对此问题也无能为力。这就导致了争议地区成为海盗的避难所，一旦海盗进入争议区，追捕的国家就必须停止追捕。

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18 詹宁斯·瓦茨（Jennings Watts）著，王铁崖等译：《奥本海国际法（第一卷第二分册）》，北京：中国大百科全书出版社 1998 年版，第 181 页。

19 高伟浓：《东南亚国家的海洋法实践之一》，载于《东南亚研究》1996 年第 2 期，第 31 页。

20 Michael Leifer, *Singapore Foreign Policy*, NewYork: Routledge, 2000, p.121.

（二）双边、三边合作和区域内多边防治机制（20 世纪 90 年代—至今）

在这段时期，马六甲海峡的海盗犯罪组织形式有了新变化，出现了国际海盗辛迪加，即带有黑社会背景，组织规模通常在 10 人以上，以大型油轮为抢劫对象的海盗。在黑社会的巨额投资下，这些海盗集团拥有先进的自动化武器和高科技设备，下设分支机构，在东南亚各国港口都安插了内线。这些海盗在行动前一般都有详细的计划，拥有熟练的驾驶者、牢固的基地和可靠的情报。在作案时，海盗们或是伪装成地方政府执法船只，以例行检查为名强行登船，或是在黑夜发动突袭，而后由专门的黑市进行销赃。[21]

国际海盗辛迪加的出现，使沿岸国意识到马六甲海峡的海盗已开展双边或三边“合作”，海峡内的犯罪不再是以往的一国海盗在多国水域实施跨国犯罪，而是多国海盗在多国水域犯罪，还出现了专业化分工，例如，印尼的海盗可能专门负责在印尼专属经济区内抢劫油轮，新加坡的海盗负责将赃物在本国销赃。这使得双边、三边合作和多边合作打击海盗和武装抢劫船舶成为不可阻挡的趋势。

1. 双边和三边防治机制

1992 年，印尼和新加坡共同组织了一支海岸巡防队，以打击两国共同海域内的海盗。[22] 同年，印尼和马来西亚协议建立了海上协调规划组，就信息、资源共享事宜达成协议，并决定两国每 3 个月就共同巡逻一次。

1992 年，马来西亚、印尼和新加坡除了双边协议外，还达成了三边协议——《联合防治海盗对策协议》，该协议内容主要涉及 3 国间的巡逻和信息共享事宜。为履行协议，1993 年，马来西亚成立了专门打击海盗的海上警卫队，以加强海上巡逻;新加坡将海上警察局改建为海岸警卫队，担负起在境内水域巡逻的职责。

协作巡逻有效弥补了单边防治机制的缺陷，协作巡逻中，3 国各派军舰在本身所属的海域内巡逻，[23] 一旦有海盗跨越边境，就马上通过 24 小时巡防电话联系，把追踪任务交给对方，这样可以使罪犯受到连续不间断的追击。双边和三边合作打击海盗和武装抢劫船舶的方式取得了较好的效果，1991 年，马六甲海峡的海盗案件为 32 起，1992 年锐减为 7 起，1993 年则减至 5 起。[24] 成功的经验鼓舞着沿岸 3 国，此后，沿岸 3 国每年就海盗防治问题召开会议进行讨论，3 国海警部门还就

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21 王健、戴轶尘:《东南亚海盗问题及其治理》，载于《当代亚太》2006 年第 7 期，第 26 页。

22 蔡维心著:《东南亚航道安全合作之研究》，高雄:国立中山大学政治学研究所 2006 年版，第 71 页。

23 蒋晗晖著:《马六甲航道安全与中国的政策选择》，北京:外交学院 2006 年版，第 34 页。

24 王冠雄、戴宗翰:《由区域合作之观点探讨防治海盗行为》，载于《航运季刊》2002 年第 4 期，第 63 ～ 87 页。

信息共享、联合监视、联合演习等事宜开展合作。

所谓“事物的发展是螺旋式上升的，中间会出现反复，甚至倒退”，1998 年亚洲金融风暴对马来西亚和印尼的经济造成严重打击，国内增加了大量贫困人口和失业人口，不少人迫于生计从事走私、卖淫、海盗等跨国犯罪，加上印尼的军力主要用于打击亚齐的民族分裂势力，使得马六甲海峡的海盗袭击和武装抢劫船舶案件又呈多发态势，这无疑也促使 3 国间的双边合作和多边合作进一步深入。2001 年 2 月，新加坡和印度尼西亚达成协议，允许对方在己方海域内追捕海盗，新加坡还允许印尼海员到新加坡注册船舶上工作，以减少印尼海员迫于贫困而从事海盗活动的可能性。2003 年，印尼和马来西亚将共同巡逻的次数由每 3 个月 1 次增至每 10 天 1 次。2004 年 7 月，印尼、马来西亚和新加坡签署《共同防卫马六甲海峡协议》，正式启动了 3 国间的海上协作巡逻行动，以确保这一国际海运通道的安全。其中印度尼西亚派出 7 艘军舰，新加坡与马来西亚各派出 5 艘军舰，同时 3 国开展 24 小时电话协作巡防。2005 年沿岸 3 国和美国达成了有关空中协作巡逻的协议，2007 年马来西亚为进一步打击马六甲海峡的海盗和武装抢劫船舶案件，呼吁沿岸国开展进一步的联合巡逻。[25] 联合巡逻是一个更高层面的国际合作，它是指多国组成的舰队在多国海域间的巡逻，涉及舰队领导权、运作经费、舰队管理等方面的联合。[26] 和协作巡逻相比，它能有效协调马六甲海峡打击力量的部署。印尼在马六甲海峡占有相当部分的海域，但是印尼的海军力量相对薄弱。印尼目前拥有的舰艇中真正能服役的比例不高，而且大多数船舰已达到使用年限，装备又落后。在目前印尼政府国防经费严重不足的情况下，靠印尼自身是无法武装起一支装备先进的快速海上巡逻队伍进而有效打击犯罪，而采取联合巡逻的方式则可以利用马来西亚和新加坡的海军力量和先进的设备 [27] 进行快速有效的打击。

2. 区域内多边合作防治机制

正如上文所述，东南亚海域的海盗和武装抢劫船舶犯罪出现了辛迪加类型，即跨国组织犯罪团伙，这类犯罪团伙除抢劫大型油轮外，还走私贩卖武器（抢劫船舶时经常使用的犯罪工具）、贿赂海警，他们逃匿时可能会逃往我国香港等地，因此在单边、双边和三边防治机制加强的同时，东南亚乃至亚洲区域内也自上世纪 90 年代始，开展了区域范围的海盗防治合作，合作场所主要为东南亚国家联盟（以下简称“东盟”）和根据《合作协定》确立的信息分享中心。

（1）东盟的防治机制

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25 Malaysia Open to Joint Patrol in Malacca Strait- It Calls for New Ideas to Make the Strait Very Secure, *Business Times*, 18 April 2007.

26 杨仁飞：《从协作巡逻、联合巡逻之区别看马六甲海峡航道安全合作机制》，载于《东南亚纵横》2005 年第 7 期，第 53 页。

27 杨仁飞：《从协作巡逻、联合巡逻之区别看马六甲海峡航道安全合作机制》，载于《东南亚纵横》2005 年第 7 期，第 53 页。

东盟成立于1967年，原始成员国为马六甲海峡沿岸3国以及菲律宾和泰国，现扩展为10国，包括文莱、柬埔寨、老挝、缅甸和越南。起初该组织的目的为“通过互助加快区域内经济增长、社会进步和文化发展”，此后东盟的目的也包括“在尊重公正和法治的条件下促进区域内的安全与稳定”。但是，由于该组织的成员对政治安全方面的合作较为敏感，所以该组织以“不干涉内政”为合作原则之一，其政治合作的内容以规范性和原则性为主，并未涉及实质方案。[28] 而就政治与安全合作本身而言，则以防治跨国犯罪为主。

东盟内就跨国犯罪进行合作的组织主要为跨国犯罪部长级会议和资深官员有关跨国犯罪的会议，前者的级别高于后者，后者通常在前者举行前举行，就前者会议会涉及的相关事项进行初步协调，此外，还有促进跨国犯罪部长级会议的协议得以执行的非正式机构——打击跨国犯罪中心。

如上文所言，进入上世纪90年代，马六甲海峡的海盗才呈现跨国联合的趋势，因此，将海盗问题纳入东盟的跨国犯罪打击范围也是上世纪90年代的事，早前主要指走私、贩毒等。1998年的东盟第31届外交部长会议将其正式纳入跨国犯罪的范围。[29] 虽然海盗问题被纳入较晚，但是以此为平台，此后的近10年间，[30] 东盟各国在东盟部长级会议、跨国犯罪部长级会议、资深官员有关跨国犯罪的会议上就马六甲海峡海盗问题在信息共享、司法协助、人员培训等方面开展协助。[31]

（2）《合作协定》—信息分享中心的防治机制

信息分享中心是根据《合作协定》建立的亚洲地区专门防治海盗和武装抢劫船舶的政府间国际组织，也是目前世界上第一个专门打击海盗和武装抢劫船舶犯罪的国际组织。下文将对它的成立背景、机构和职能进行阐述。

①信息分享中心的成立背景

如上文所述，1998年亚洲金融风暴对马来西亚和印尼国内造成的经济动荡使得马六甲海峡的海盗袭击和武装抢劫船舶案件又呈多发态势，这引起了诸多海峡利用国的关注，以马六甲海峡为“海上生命线”的日本对此更是十分担忧。2000年4月27日，在日本的提议下，在东京举行了打击海盗和武装抢劫船舶的地区合作大会，共有来自东南亚的16个国家和地区代表（包括中国香港）参加了大会。大会通过了两个重要决议：东京合作计划和行动计划。这两个文件为形成专门打

28 蔡维心著：《东南亚航道安全合作之研究》，高雄：国立中山大学政治学研究所2006年版，第117页。

29 Joint Communique of the 31st ASEAN Ministerial Meeting (AMM), at http://www.aseanseC.org/3661.htm, 14 October 2008.

30 The 32nd and the 36th AMM, the 2nd, the 3rd AMMTC, etc.

31 OngKeng Yong, ASEAN Contribution to Regional Efforts in Counter-Terrorism, at http://www.aseanseC.org/17274.htm, 21 February 2005.

击海盗和武装抢劫船舶的多边机制打下基础。[32] 2001 年 10 月 4 日，日本政府又组织召开了亚洲打击海盗合作大会，会议同意就打击海盗建立区域合作机制。在同年 11 月的东盟 +3（中、日、韩）峰会上，日本正式将建立区域合作机制问题提出讨论。2004 年 11 月 4 日，《合作协定》最终获得通过。2006 年 9 月 4 日，《合作协定》正式生效。《合作协定》成员国为 16 个亚洲国家，除马六甲海峡沿岸 3 国外，还包括孟加拉、文莱、柬埔寨、中国、印度、日本、韩国、老挝、缅甸、菲律宾、斯里兰卡、泰国和越南。《合作协定》的合作内容由 3 部分构成：信息共享、海事人员技能培训和促成其它方面合作事务的发展。[33] 其中最主要的合作内容是信息共享，为此，各成员国根据《合作协定》成立了专门负责区域内海盗和武装抢劫船舶信息共享的国际组织——信息分享中心。

和东盟的防治机制相比，《合作协定》的防治机制更具专业性：东盟的职能包括促进区域内经济文化发展和政治安全合作，东盟部长级会议、跨国犯罪部长级会议、资深官员有关跨国犯罪的会议每年开会的次数有限，而在有限的几次会议上，除了要解决海盗和武装抢劫船舶的问题外，还要解决走私等问题。与其相比，作为专门打击海盗和武装抢劫船舶的常设机构——信息分享中心无疑更能有效促进该领域在防治问题上的合作。《合作协定》的防治机制也更具规模性，信息分享中心的成员国为 16 国，除了东盟 10 国外，还包括邻近马六甲海峡的印度、斯里兰卡、中国等，其合作国家的范围大于东盟。

②信息分享中心的机构组成和经费保障

信息分享中心成立于 2006 年 11 月 29 日，总部设在新加坡，它的机构较简单，仅由管理委员会和秘书处组成。管理委员会由每一缔约国各派一名代表组成，定期召开会议。秘书处由秘书长及工作人员组成。秘书长由管理委员会选举产生，负责中心的行政、日常及财务事务，执行管理委员会制定的政策及《合作协定》的规定和管理委员会决定的其他事务。[34]

③信息分享中心的职能

信息分享中心的职能主要有两部分：通报遇险信息和研究犯罪状况。

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32 Speech by Mr. Yoshiaki Ito (ED) of ReCAAP ISC during the 6th IMB Tri-Annual Conference on Piracy and Armed Robbery, at http://www.ReCAAP.org/news/news.html, 14 October 2008.

33 The ReCAAP ISC Working with Industry to Combat Piracy and Armed Robbery Against Ships in Asia, the 10th MPA Maritime Forum, at http://www.ReCAAP.org/index_home.html, 14 October 2008.

34 杨翠柏：《〈亚洲打击海盗及武装抢劫船只的地区合作协定〉评价》，载于《南洋问题研究》2006 年第 4 期，第 33 页。

A. 通报遇险信息

信息分享中心和各成员国根据《合作协定》在本国国内建立的信息中心[35]在《合作协定》的框架下共同处理区域内有关海盗和武装抢劫船舶的信息。其运行过程如下：遇到海盗袭击或武装抢劫的船舶将会通过船上的警报将险情告知沿岸国或船籍国的信息中心，信息中心应立即通过网络将信息告知信息分享中心的值班人员，信息分享中心马上将收到的警报通知各成员国的信息中心，各成员国信息中心马上将险情告知本国遇险区域内的船舶。[36]此外，各成员国在案发后可以通过信息分享中心要求其它成员国协助调查案件、救助遇害船舶等，[37]被要求的成员国必须尽力协助并且将协助的情况告知信息分享中心。[38]

B. 研究犯罪状况

信息分享中心将区域内近期和每个月发生的袭击案件在网站上公布；对半年内的案件进行收集、整理和分析，形成报告，在网站上予以公布；并对相关危险区域内的成员国提出警示。[39]

此外，信息分享中心还和非官方组织——国际海事局在信息共享方面进行合作，[40]信息分享中心和国际海事组织已在机构能力构建方面签署了合作协议，[41]信息分享中心已经成为国际海事组织的观察员。[42]

与双边和三边防治机制相比，区域内的合作机制联合了海峡利用国力量，在更广的范围内打击海盗和武装抢劫船舶，有利于马六甲海峡海盗和武装抢劫船舶的防治，一定程度上缓解了海峡沿岸国所承受的来自海峡利用国的压力，对海峡利用国和海峡沿岸国而言，这是互利共赢的结果。

四、结论

马六甲海峡海盗和武装抢劫船舶防治机制的合作方式主要集中在信息共享、法律协助、执法事务、海事人员培训和机构能力构建几方面，[43]其中马六甲海峡沿

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35 ReCAAP Art. 9(1).
36 ReCAAP Art. 9(5)(6).
37 ReCAAP Art. 10(1)(2)(3).
38 ReCAAP Art. 11(1)(2).
39 ReCAAP Art. 7.
40 Lloyd List, Agencies deny rift over piracy reporting, at http://www.ReCAAP.org/news/news.html, 14 October 2008.
41 IMO-ISC Cooperative Arrangement, at http://www. RcCAAP.org/news/news.html, 14 October 2008.
42 ReCAAP becomes IMO observer, at http://www. ReCAAP.org/news/news.html, 14 October 2008.
43 Kuala Lumpur, Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime, at http://www.aseanseC.org/5616.htm, 17 May 2002.

岸 3 国的双边和三边防治机制在信息共享和执法事务方面取得了重大进展，马六甲海峡的区域性合作机制在信息共享方面取得了重大进展，这些防治机制的共同运作取得了良好效果。2006 年，马六甲海峡的海盗和武装抢劫船舶案件为 20 起，其中既遂案件 15 起，未遂 5 起；2007 年同期案件 16 起，其中既遂案件 12 起，未遂案件 4 起；[44] 2008 年 1 月—6 月发生案件 4 起，其中既遂案件仅为 1 起。[45]

随着马六甲海峡沿岸国联合巡逻的进一步开展，随着《合作协定》的成员国不断提高信息共享的合作水平，并就法律协助、执法事务、海事人员培训和机构能力构建进行进一步合作，马六甲海峡海盗和武装抢劫船舶的防治将会有更大进展。

44 ICC, piracy report 2006–2007, at http://www.iCC-CCs.org/prC/overview.php, 14 October 2008.

45 ReCAAP Half Yearly Report lst JAN 2008–30th JUNE 2008, at http://www. reCaap.org/index_home.html, 14 October 2008.

Mechanisms for Combating Piracy and Armed Robbery against Ships in the Strait of Malacca

LIN Jing

This article analyzes the cooperative mechanisms operating in the Strait of Malacca in three parts. Part 1 introduces the definitions of "piracy" and "armed robbery against ships" under international law and points out the differences between them. Specifically, the term "piracy," as opposed to "armed robbery against ships," means: (a) illegal acts of violence, detention, or depredation, (b) against another vessel or aircraft (c) committed for private ends (d) by crewmembers or passengers of a private vessel or aircraft (e) on the high seas or outside the jurisdiction of any state.

Part 2 presents an analysis of the legal status of the Strait of Malacca under the United Nations Convention on the Law of the Sea (UNCLOS) and the two competing schools of thought regarding acts of depredation in these waters. One theory sees exclusive economic zones (EEZs) as a part of the high seas; therefore, acts of depredation within this zone are considered "piracy" under international law, subject to the universal jurisdiction of all states. The other theory recognizes the jurisdiction of the coastal State(s) within the EEZ under article 56 of UNCLOS; under this theory, acts of depredation within this zone are "armed robberies against ships," which fall under the exclusive jurisdiction of the coastal State(s).

Part 3 looks at the unilateral, bilateral, trilateral and multilateral cooperative mechanisms undertaken by the coastal States throughout the years to combat piracy and armed robbery against ships in the Strait of Malacca. These include collaborations among the three coastal States, such as the Maritime Operation Planning Team and Joint Anti-piracy Patrols and Information Sharing System, both established in 1992, and regional multilateral mechanisms such as the Association of Southeast Asian Nations (ASEAN), which formally began to combat piracy as an international crime after its 1998 Ministerial Meeting on Transitional Crime. In the early 2000, the coastal States and user States of the Strait of Malacca, led by Japan, held a series of summits to discuss cooperative mechanisms to combat piracy and armed robbery against ships in the re-

gion. In 2004, sixteen countries signed the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), the first intergovernmental agreement of its kind. The Information Sharing Center (ISC) was created under the ReCAAP, the background, organization, and functions of which are discussed in this part.

This article concludes by suggesting that stakeholders should further collaborate in areas such as legal matters, law enforcement, and institutional capacity-building, in order to sustain the momentum of cooperation on combating piracy and armed robbery against ships in the Strait of Malacca.

《港口国措施协定》评析

唐建业 *

内容摘要: 国际生物资源养护的严峻形势，促进了港口国管辖在此领域的发展。2009 年 8 月，在联合国粮农组织框架下，《关于预防、制止和消除非法、未报告和未加管制捕捞的港口国措施协定》（以下简称“《港口国措施协定》”）文本的谈判已经完成，并于同年 11 月由联合国粮农组织大会批准通过。《港口国措施协定》作为最低国际标准，既为发展中港口国规定了最低要求，也为发达港口国制定更严格的制度保留余地。相对于现有相关国际条约，《港口国措施协定》扩大了适用范围，明确了《港口国措施协定》与国际法的关系、港口国的权利与义务、船旗国的作用、发展中国家的特殊需求、争端解决、临时适用等内容。鉴于目前已有的国家实践以及临时适用条款，不论《港口国措施协定》是否生效，它都将会对国际生物资源养护与管理产生积极的作用。对我国而言，它将强化我国作为国际生物资源利用国的国际义务，值得我国政府及相关企业的重视。

关键词: 港口国管辖 联合国海洋法公约 区域渔业管理组织 联合国鱼类种群协定

2009 年 8 月，在联合国粮农组织协调下，91 个成员国经过 5 轮磋商，就制定一份具有法律约束力的《关于预防、制止和消除非法、未报告和未加管制捕捞的港口国措施协定》（以下简称“《港口国措施协定》”）文本达成一致。[1] 2009 年 9 月经联合国粮农组织章程及法律事务委员会会议审议后，于 2009 年 11 月 25 日由联合国粮农组织大会批准通过。11 个联合国粮农组织成员当场签署了该协定；[2]《港口国措施协定》将在联合国粮农组织总干事收到第 25 份批准书后的 30 天生效。可以预计，该文件的出台将会促进和协调各国的港口措施，加强对全球范围内非法、不报告和不管制捕捞（以下简称“IUU 捕捞”）的控制，规范渔业生产，特别是

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1 《港口国措施协定》原文可参见本刊本期的“新发展与新文献”部分。

2 当场签署了《港口国措施协定》的 11 个成员是：安哥拉、巴西、智利、欧共体、印度尼西亚、冰岛、挪威、萨摩亚、塞拉里昂、美国和乌拉圭。

公海渔业。本文对照2008年6月份文本以及各国在磋商过程中提出的修改意见等，[3]对联合国粮农组织大会最终通过的文本进行分析；[4]结合《联合国海洋法公约》（以下简称“《公约》”）、《执行 1982 年 12 月 10 日〈联合国海洋法公约〉有关养护和管理跨界鱼类种群和高度洄游鱼类种群规定的协定》（以下简称“《联合国鱼类种群协定》”）等相关条约以及国家实践，对《港口国措施协定》的相关内容进行评价。

一、背景

鉴于 IUU 捕捞对渔业资源的有效养护与可持续利用、海洋生境的保护、发展中国家的粮食供应安全等问题的严重影响，日益受到国际社会的高度关注；它不仅成为一个渔业问题，也逐渐成为一个生态问题和政治问题。[5]据估计，全球因 IUU 捕捞导致每年的经济损失在 90 亿至 240 亿美元，渔获量在 1100 万吨至 2600 万吨之间；发展中国家受其影响最大，其中非洲西部沿海的 IUU 捕捞产量占合法报告产量的 40%。[6]据野生动物贸易监测网络的统计分析，每年非洲国家会因此损失 10 亿美元，并造成海洋渔业资源衰退和生态系统破坏，导致一些非洲沿海国家失去发展渔业经济的基础和粮食危机的进一步恶化。[7]

2001 年联合国粮农组织第 24 届渔业委员会会议通过的《关于预防、制止和消除非法、未报告和未加管制捕捞的国际行动计划》（以下简称“《行动计划》”），[8]提出“各国应使用依据国际法的港口国管理渔船措施，以预防、制止和消除 IUU 捕捞”，但必须“以公正、透明和无歧视性的方式执行”。[9]在此基础上，2005 年，联合国粮农组织第 26 届渔业委员会支持《港口国措施示范计划》（以下简称“《示

3 2008 年 6 月份文本以及相关国家提出的修改意见，下载于 http://www.fao.org/fishery/nems/39031/en，2009 年 11 月 25 日。

4 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, C 2009/LIM/11-Rev. 1, November 2009 [hereinafter Agreement on Port State Measures].

5 See UNGA Resolutions on Ocean and the Law of the Sea (55/8, 56/13, 57/142, 57/143, 58/14, 59/25, 60/31, 61/105, 63/112); UNGA Resolutions on Sustainable Fisheries (55/7, 56/12, 57/141, 58/240, 59/24, 60/30).

6 MRAG and DFID, Illegal, Unreported and Unregulated Fishing, Policy Brief 8, p. 1.

7 TRAFFIC, Southern African States Move to Eradicate Pirate Fishing, at http://www.traffic.org/home/2008/7/11/southern-african-states-move-to-eradicate-pirate-fishing.html, 10 September 2008.

8 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by FAO Committee on Fisheries (COFI) on 2 March 2001 and endorsed by the FAO Council on 23 June 2001 [hereinafter IPOA-IUU].

9 IPOA-IUU, para. 52.

范计划》”）；[10] 该计划是一个非法律约束性文件，作为一个指南，供那些想制定港口管理制度的国家参考。2007 年，联合国粮农组织第 27 届渔业委员会会议确认有必要制定一个综合性的港口国措施国际协定；[11] 同年 9 月 4—8 日在美国华盛顿特区召开了关于起草一份具有法律约束力的港口国措施文书的联合国粮农组织专家磋商会。[12] 在 2008 年召开 2 次、2009 年召开 3 次技术磋商会后，在 2009 年 8 月完成磋商。

二、《港口国措施协定》性质与适用范围

（一）基本性质

《港口国措施协定》共 10 个部分，37 条，另有 5 个附录。它是联合国粮农组织章程第 14 条下具有法律约束力的国际协定；[13] 其规定内容是国际最低标准，不影响其他成员方制定更为严格的港口国管理措施。这为相关港口国的单方行为提供余地，如 2008 年欧盟《关于建立防止、制止和消除非法、未报告和未加管制捕捞的共同体制度的条例》（以下简称“《欧盟 IUU 条例》”）。[14] 这种制度设计，虽然有利于各方在协定谈判过程中达成一致意见，使协定早日出台，但可能导致日后争端发生。

（二）适用范围

《港口国措施协定》的适用范围可以从相关用语定义，如“鱼”、“渔业船舶”、“港口”等，以及对其他地区适用等几个方面得以体现。

1.“鱼类”

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10 FAO, Report of the Twenty-Sixth Session of the Committee on Fisheries, 7~11 March 2005, FAO Fisheries Report No. 780, Rome: FAO, 2005, para. 25.

11 FAO, Report of the Twenty-Seventh Session of the Committee on Fisheries, 5~9 March 2007, FAO Fisheries Report No. 830, Rome: FAO, 2007, para. 68.

12 FAO, Report of the Expert Consultation to Draft a Legally-binding Instrument on Port State Measures, Washington D.C., United States of America, 4~8 September 2007, FAO Fisheries Report No. 846, Rome: FAO, 2007.

13 在联合国粮农组织章程第 14 条框架下的国际渔业协定有：1993 年《促进公海渔船遵守国际养护和管理措施的协定》，该协定不需要签字、批准，只有加入（第 12 条），且修改须经联合国粮农组织大会同意（第 13 条）；1993 年《建立印度洋金枪鱼委员会的协定》；1999 年《建立区域渔业委员会协定》。

14 Council Regulation (EC) No 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2009 O.J. (L 286) 1 (effective 1 January 2010) [hereinafter EU-IUU Regulation].

2001年联合国粮农组织的《行动计划》中没有对“捕捞”或“鱼”进行明确规定；1995年《联合国鱼类种群协定》曾在第1条规定，“鱼类”包括软体动物和甲壳动物，但不包括定居种。《港口国措施协定》对“鱼类”的定义相当笼统，指“所有海洋生物资源，不论是否经过加工”。[15]

但“海洋生物资源”的定义在各条约中并不统一。根据《公约》第63~68条的规定，“海洋生物资源”，可能指鱼类资源（跨界、高度洄游、溯河洄游、降海洄游、公海）、海洋哺乳动物、定居种等；根据《公约》附件一所列高度洄游鱼类的清单，鲸类也属于高度洄游鱼类。[16]在《南极生物资源养护管理公约》中，“南极生物资源”除有鳍鱼类、软件动物、甲壳动物外，还包括出现在南极幅合圈内的海鸟等生物；[17]但不包括海豹和鲸类。[18]《关于未来在东北大西洋渔业方面进行多边合作公约》将“鱼类资源”限定为除列入《公约》附件一中的高度洄游鱼类和溯河洄游鱼类外的所有鱼类，但包括定居种；“海洋生物资源”则指构成海洋生态系统的所有生物。[19]

鉴于《港口国措施协定》第1条（e）直接借用了《行动计划》关于“IUU捕捞”的定义，以及它们之间的特殊关系，对《行动计划》的分析可能有助于对“鱼类”定义的理解。考虑到《行动计划》是为了解决全球范围的商业性IUU捕捞，即为了追求经济利益而逃避管制的生产行为，[20]结合其所提供的各种政策工具的内容看，其“捕捞”对象应不包括海洋哺乳动物。但《港口国措施协定》在第1条中就提出“鱼类”的定义，并指所有生物资源，从某种意思上，它并不排除扩大《行动计划》原来的适用范围的可能性。因此，《港口国措施协定》是否包括海洋哺乳动物，如鲸类，并不明确，有待将来实践的检验。

2.“渔业船舶”

根据《港口国措施协定》第1条（d）和（j）规定，“渔业船舶”除捕捞生产渔船外，还将涉及冷藏运输船、补给船、油船等各种与捕捞活动相关的渔船。对于集装箱船，即使装有渔获物或水产品，只要这些货物已经过港口转载，而不是在海上转载的，则不在适用范围之列。

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15 Agreement on Port State Measures, Art. 1(b).

16 王翰灵：《跨界和高度洄游鱼类渔业争端的解决机制》，载于中国国际法学会编：《中国国际法年刊（2008年）》，北京：世界知识出版社2009年版，第240页。

17 Convention on the Conservation of Antarctic Marine Living Resources, Art. I (2).

18 Convention on the Conservation of Antarctic Marine Living Resources, Art. VI.

19 The Convention on the Future Multilateral Cooperation in North-East Atlantic Fisheries, Art. 1.

20 FAO Fisheries Department, Implementation of the International Plan of Action to Prevent. Deter and Eliminate Illegal, Unreported and Unregulated Fishing, FAO Technical Guidelines for Responsible Fisheries. No. 9, Rome: FAO, 2002; OECD, Why Fish Piracy Persists: the Economics of Illegal, Unreported and Unregulated Fishing, Paris: OECD, 2005.

与其他条约相比，“渔业船舶”的范围也有所扩展。《促进公海渔船遵守国际养护和管理措施的协定》尽管在序言部分关注船旗国对悬挂其旗帜的所有渔船（包括运输渔船）的管理，但第 1 条（a）和第 2 条仅将“渔业船舶”限定于船长在 24 米以上的“母船”和“其他直接从事捕捞生产的渔船”。在 1995 年《联合国鱼类种群协定》中，没有专门对“渔业船舶”进行定义；第 18 条，虽然将所有在公海从事捕捞生产的渔船全部纳入其适用范围，即包括 24 米以下的渔船，并明确这些渔业船舶必须随船携带捕捞许可证等证件，但在表述上没有涉及辅助渔船。[21]

韩国在 2009 年 1 月对 2008 年草案提出的第 2 次修改意见中认为，既然所谈判的协定是一种最低标准，那“渔业船舶”的定义仅应限定于从事渔业生产及直接帮助渔获物上岸、运输、加工等的船舶。但这个意见并没有得到采纳。

为了加强对渔船的管理，联合国粮农组织也同时讨论建立一个全球性渔船、冷藏运输船和补给船的全面记录。[22] 因此，根据《港口国措施协定》，其他船舶，即服务性船舶，为了避免受到其服务的生产渔船可能的 IUU 捕捞活动的影响，它们将负有甄别其服务渔船是否属于 IUU 渔船的义务。[23]

3.“港口”

《港口国措施协定》第 1 条（g）规定，“港口”包括近岸码头或其他用于渔获物上岸、转运、包装、加工、加油、补给等的设施。对照《公约》，《港口国措施协定》中所涉及的港口设施可能不仅包括处于一国内水的港口设施（如第 11 条）；也可能包括位于领海的设施（如第 12 条），或者位于专属经济区内或大陆架上的设施（如第 60 条（2）和第 80 条）。

与内水和领海属于国家主权范围不同，在专属经济区内或大陆架上，沿海国仅享有针对这些设施的管辖权，因此在理论上，应对位于不同区域的设施进行区别对待。马来西亚曾对此提出建议，要求明确对位于专属经济区内的设施是否也实施同等的检查水平，[24] 但没有在后来的草案中得到回应。[25]

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21 《联合国鱼类种群协定》第 18 条。

22 See FAO, The report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, FAO Fisheries Reports, R. 865, Rome: FAO, 2008; Combating Illegal, Unreported and Unregulated Fishing, including Through a Legally Binding Instrument on Port State Measures and the Establishment of a Global Record of Fishing Vessels, COFI/2009/6, Twenty-eighth Session of Committee of Fisheries, Rome, Italy, 2-6 March 2009.

23 Agreement on Port State Measures, Art. 11(1)(e)(ii).

24 Comments from Malaysia Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, submitted 16 September 2008, p. 2.

25 Agreement on Port State Measures, Art. 12(1); Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, TC-PSM/2008/2, April 2008, Art. 11(1) [hereinafter 2008 Draft Agreement].

因此，从最后协定的条文看，各国应对在《港口国措施协定》规定的所有“港口”设施内的外国渔业船舶实施同等水平的管理措施，包括进出港口、港口检查及检查后续措施等。

4. 地理范围

为了有效控制、消除 IUU 捕捞及其相关活动，《港口国措施协定》第 3 条(5)规定，旨在适用于全球范围的所有港口。但鉴于它是一个在联合国粮农组织章程框架下的多边条约，仅对联合国粮农组织章程第 14 条规定下的国际法主体开放；对于其他一些实体，特别是《联合国鱼类种群协定》下的“捕鱼实体”，则不能成为其成员。因此《港口国措施协定》鼓励此类“实体”采取与《港口国措施协定》一致的管理措施;而且这些“实体”也可以表达他们将与协定保持一致的意愿，尽管他们不能成为《港口国措施协定》成员。

三、《港口国措施协定》的主要内容

除上述基本性质与适用范围外，《港口国措施协定》规定了它与国际法的关系、港口国的权利与义务、船旗国的作用、发展国家的特殊需求、争端解决、临时适用以及生效、修正等内容。

(一)与国际法的关系

《港口国措施协定》第 4 条规定了它与国际法和其他国际文件的关系。在一定程度上，这反映了参加谈判的各国对于 1995 年《联合国鱼类种群协定》的态度，并可能影响《港口国措施协定》的适用范围，以及对于“IUU 捕捞”的界定。

1.《港口国措施协定》与港口国既有权利与义务

《港口国措施协定》第 4 条(1)明确，协定不影响港口国根据国际法享有的权利与义务。鉴于港口的特殊地理位置以及《港口国措施协定》最低国际标准的性质，它意味着并不影响各方制定更为严格的港口国管辖措施，包括根据区域渔业管理组织的决定而制定的港口国措施。这为一些国家制定和实施更为严格的港口国管辖提供便利，特别是一些已经制定的港口措施，如《欧盟 IUU 条例》，不致因国内法与国际法的不一致而引起国际争端。

但采取更严格的相关国内立法措施并不是没有限制，它必须受到“诚意”标准的限制，不能构成“滥用权利”。[26] 从另一层面看，《港口国措施协定》在某种意义上可以看作是为发展中港口国制定的最低国际标准。

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26 Agreement on Port State Measures, Art. 4(5).

在此方面，《港口国措施协定》与《公约》关于港口国管辖在内容上略有不同。为了保护环境，同时保证航行自由，《公约》第 218 条规定，港口国实施“可适用的国际规则和标准”；也就是，“可适用的国际规则和标准”在此方面应是最高标准。据此规定，如果港口国实施更严格的国内标准，将会引起国际争端，于航行自由不利。这也反映在由于美国和欧盟分别在 1989 年“瓦尔德斯”号、2001 年“威望号”油污事件单方面采取了更严格的国内立法而引起的争议上。[27] 这种差异也反映了国际社会对于航行自由和生物资源养护两个方面的不同态度；或者也可以说是，船旗国与港口国在两个领域达成了不同的管辖权妥协。

2.《港口国措施协定》与区域渔业管理组织

《港口国措施协定》第 4 条（2）规定，如果一个成员方没有加入某区域渔业管理组织，则他不因适用《港口国措施协定》而接受该组织的管理措施或决定的约束，或承认其管理措施或决定。这可以理解为，《港口国措施协定》与区域渔业管理组织之间不存在直接援引的关系。

与此相反，这种直接援引关系在《公约》和《联合国鱼类种群协定》中十分普遍。《公约》中一些条款直接援引国际海事组织、[28] 联合国粮农组织、[29] 国际民航组织[30] 等国际组织的规则或标准，因此《公约》也被称为“伞状公约”或“框架公约”。《联合国鱼类种群协定》则更是将区域渔业管理组织作为其国际合作机制的基石，如第 8 条。由于对《联合国鱼类种群协定》一些条款的不同意见，[31] 使很多发展中国家选择不加入，影响到了其全球范围的普遍适用。[32]

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27 Alan Boyle, EU Unilateralism and the Law of the Sea, *The International Journal of Marine and Coastal Law*, Vol. 21, 2006, pp. 15~31.

28 《联合国海洋法公约》，第 1 条（5）、第 22 条、第 21 条（4）、第 39 条（2）（a）、第 53 条（8）、第 65 条、第 87 条、第 94 条、第 98 条、第 116 条、第 120 条、第 210 条、第 216 条、第 262 条等。

29 《联合国海洋法公约》，附件八，第 2 条（2）。

30 《联合国海洋法公约》，第 39 条（3）和第 54 条。

31 有争议条款如第 3 条、第 7 条、第 8 条、第 11 条、第 17 条、第 22 条、第 23 条等。

32 截至 2009 年 11 月，仅有 77 个国家批准或加入《联合国鱼类种群协定》；与此相对应的是，已有 159 个国家批准或加入了《联合国海洋法公约》。2009 年 3 月，在联合国总部召开的第 8 次非正式成员方磋商会议（ICSP）上，着重讨论了如何使更多的发展中国家批准或加入《联合国鱼类种群协定》，以使其得到普遍适用。See Report of the eighth round of Informal Consultations of States Parties to the 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, ICSP8/UNFSA/REP/INF.6, 16–19 March 2009; Earth Negotiations Bulletin, Vol. 7, No. 64, 21 March 2009.

考虑到《港口国措施协定》是建立在《行动计划》的基础上，[33] 因此第 4 条（2）也可以解释为目前一些发展中国家对于《联合国鱼类种群协定》的态度，而且这种意见也体现于其他条款中。如第 4 条（3）提出，如果区域渔业管理组织的管理措施或决定与国际法不一致，则没有遵守的义务；第 4 条（4），对于《港口国措施协定》的解释，也仅要求符合国际法，并考虑“可适用的国际规则和标准”，包括由国际海事组织制定的规则和标准以及其他国际文件；[34] 第 6 条，在成员方合作和信息交换时，《港口国措施协定》没有要求一定通过区域渔业管理组织，仅规定“在可行的情况下通过联合国粮农组织或区域渔业管理组织或安排”；[35] 类似的规定也出现在关于对发展中国家的支持条款中。[36]

上述条款的规定也反映了目前实际现状，即一方面现有区域渔业管理组织不愿意接纳新成员；[37] 另一方面，个别沿海国拒绝加入《联合国鱼类种群协定》进而不承认一些区域渔业管理组织，[38] 或即使加入一些区域渔业管理组织也不批准或加入《联合国鱼类种群协定》。[39]

因此，《港口国措施协定》与区域渔业管理组织的这种关系，可以理解为是相关国家在联合国粮农组织层面对《联合国鱼类种群协定》与《公约》之间关系的新解释，而且这种解释与现行一些学者对两个条约间关系的解读有所区别。在此之前，尽管《联合国鱼类种群协定》第 4 条明确它与《公约》之间相互独立的关系，

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33 在《行动计划》中，对于《联合国鱼类种群协定》的援引，明确提出仅适用于双方都是《联合国鱼类种群协定》的成员方之间，而对《联合国海洋法公约》共 8 次的援引中，则没有类似的限制表述。See William Edeson, Soft and Hard Law Aspects of Fisheries Issues:Some Recent Global and Regional Approaches, in Myron H. Nordquist, john Norton Moore and Said Mahmoudi eds., *The Stockholm Declaration and Law of the Marine Environment*, The Hague: Martinus Nijhoff Publishers, 2003, pp. 165~182.

34 值得注意的是，此款一定程度上弱化了其他组织制定的“可适用的国际规则和标准”的作用，仅用“考虑”。在《联合国海洋法公约》中，第 119 条（1）（a）仅要求“考虑”（taking into account）；与此形成对比的是，《联合国鱼类种群协定》第 10 条（b）强调必须“采取和适用”（adopt and apply）相关国际最低标准。

35 Agreement on Port State Measures, Art. 6(2)~6(3).

36 Agreement on Port State Measures, Art. 21(1).

37 由于资源状况原因，或因为“真正利益”（real interest）的限制，很多区域渔业管理组织并不对后来者开放。See E. J. Molenaar, The Concept of “Real Interest” and Other Aspect of Cooperation through Regional Fisheries Management Mechanism, *The International Journal of Marine and Coastal Law*, Vol. 15, 2000, pp. 475~531; Tore Henriken, Geir Hnneland, and Are Sydnes, *Law and Polities in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regime*, The Hague: Martinus Nijhoff Publisher, 2006.

38 阿根廷在 2007 年第 26 届南极生物资源养护委员会的年会上阻止该委员会认可西北大西洋渔业委员会、东北大西洋渔业委员会及东南大西洋渔业委员会制定的 IUU 名单。See CCAMRL, Report of the 26th Meeting of the Commission, 2007.

39 截至 2008 年 4 月，至少有 47 个国家是区域渔业管理组织的成员，但没有批准或加入《联合国鱼类种群协定》。See Earth Negotiation Bulletin, Vol. 7, No. 63, Saturday, 15 March 2008, p. 4.

但一些学者认为，根据《维也纳条约法公约》第 31 条（3），《公约》中关于“跨界鱼类”和“高度洄游鱼类”条款的解释应参照《联合国鱼类种群协定》。[40] 这种关系也反过来会影响 IUU 捕捞的界定，即《港口国措施协定》第 1 条（e）；为此，美国曾提出需要根据《行动计划》重新定义适用于《港口国措施协定》的“IUU 捕捞”法律定义，但没有得到采纳。[41]

（二）港口国的权利与义务

1. 港口国管辖的性质

根据《港口国措施协定》，港口国必须实施相关的措施（第 3 条（1）和（3）），即实施港口国管辖既是一种权利也是一种义务。鉴于《港口国措施协定》是为了通过加强港口国管辖以达到海洋生物资源和海洋生态的长期养护与可持续利用（第 2 条），以及目前世界范围海洋生物资源状况持续得不到改善，因此，履行港口国管辖更多的是一种义务。

就其权利而言，主要包括进港申报（第 8 条和附件 A）、许可或拒绝进港（第 9 条）、允许或拒绝港口使用（第 11 条）、港口检查（第 13 条）并采取相关措施（第 18 条）等；就义务而言，包括指定港口（第 7 条）、配备合格的检查人员（第 13 条（2）、第 17 条和附件 E）、通报相关信息（其制定的管理措施、拒绝进港或港口使用的决定，或者修改其拒绝的决定等）（第 6 条、第 11 条、第 15 条、第 16 条和第 18 条）、检查程序规范（第 13 条（1））、最低检查水平（第 12 条）与防止“方便港”（第 20 条（3） ）、防止“滥用权利”（第 3 条（4）和第 9 条（4））、提供本地救济、合作等。本文着重讨论港口服务的使用和港口国管辖不当所带来的损失赔偿两个方面。

2. 港口服务使用

原则上，港口国应不允许从事了 IUU 捕捞及相关活动的渔船进入港口；对于

40 See Tore Henriksen, Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations, *Ocean Development & International Law*, Vol. 40, 2009, p. 81.

41 U.S. Drafting Suggestions on “Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing as of June 2008”, submitted on 25 September 2008. 美国认为《行动计划》是一个自愿性的、无法律约束力的国际文件，不应当直接将其关于“IUU 捕捞”的定义移植至谈判中的《港口国措施协定》作为一个法律定义，需要从法律角度重新制定。

进入港口的渔船，也应拒绝提供港口报务，包括加油、补给、维修保养等。[42] 即使渔船在不可抗力或为了实施人道主义援救等情况下，[43] 港口国也仅负有不可拒绝其进港的义务，但不负有提供港口服务的义务。

根据此规定，如果渔船是被非船旗国根据《联合国鱼类种群协定》第 21 条(8)押入港口，也不能使用港口服务。在此情况下，港口国仅负有以下义务：保证其采取的拒绝使用港口服务的措施不会影响渔船及海员安全；这些措施的使用必须符合国际法，如世界贸易组织规则、不构成“歧视”或“滥用权利”等。

3. 损失赔偿

对于港口国不当措施造成渔船损失时，根据《港口国措施协定》第 19 条，港口国仅需公布其国内司法救济途径，并在应书面要求的情况下将此类信息告知渔船船长、渔船船东、渔船运营者等。换而言之，港口国并不当然承担国家赔偿责任。

与此相比，2008 年草案曾规定了两个步骤。首先是第 18 条，规定港口国应保证渔船的船东、运营者或代表有权就其受到管制，并在受到不当延迟而遭受损失或损害时进行申诉；其次是第 19 条，规定港口国应确保渔船船东或运营者有权为此获得赔偿。

针对 2008 年草案中第 18 条和第 19 条，欧盟认为，将“国家责任”纳入规定并不当然可以使渔船船东或运营者将港口国上诉到港口国国内法院，可以参照《公约》和《联合国鱼类种群协定》的相关规定，即《公约》第 106 条、第 110 条(3)、第 111 条(8)和第 232 条以及《联合国鱼类种群协定》第 21 条(18)。[44]

与此相反，加拿大认为应删除 2008 年草案中的第 18 条和第 19 条，理由是港口国对其港口拥有主权，允许或拒绝外国渔船使用其港口是其主权的自由裁量。如果保留这两个条款，则等于损害了港口国的主权。因为这两个条款将赋予渔船的船东、运营者或代表一种对抗主权国家的权利，国际法并不支持这种权利；同时，

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42 在 2008 年的草案中，“拒绝渔获物上岸、转载、加工等”与“拒绝港口加油、补给等”是分成两个独立的段落，位于原第 17 条第 1 段和第 2 段。这种安排被一些国家或组织认为在事实上将它们划分成两个不同性质的处理措施，削弱了港口措施的效力，因此建议将这两种措施合并。See 2008 Draft Agreement, Art. 17 (1)~17(2); Pew Environmental Group, Position Paper on the Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing: Proposed Amendments to Artieles 11 to 38, submitted 15 September 2008, p. 1; Canada's Proposed Changes to Draft Text (Articles 11~25), submitted on l October 2008, p. 4.

43 2008 年草案并没有提及人道主义援救，参见 2008 Draft Agreement, Art. 20。韩国在 2009 年 1 月的意见书中提出应增加人道主义援救内容，因为在《负责任渔业守则》、《行动计划》及《港口国示范计划》(第 9 段)中都有此规定。Korea's 2nd Comments on the Legally Binding Instrument on Port State Measures to Prevent, Deter and Eliminate IUU Fishing, submitted in January 2009, p. 15.

44 EC suggestions on some provisions of the future agreement on port State measures against IUU fishing in view of the second round of the FAO Technical Consultation, 23 January 2009, p. 9.

它们也给港口国设定了告知义务。加拿大认为根据现行国际法，如果港口国对外国渔船实行了国际不法行为，渔船的船旗国或相关国家可以实施外交保护。[45]

总体来看，《港口国措施协定》第 19 条既没有采取欧盟的意见，明确港口国的损害或损失责任；也没有采纳加拿大的意见，删除相关规定，而是采取折衷办法。该条规定一方面弱化了港口国的责任，促使港口国能够采取积极措施；另一方面，强化了渔船在养护生物资源方面的义务。因此，可以认为，养护生物资源的紧迫性及为取得港口国特别是诸多发展中港口国的支持是其主要原因。

在这些权利和义务中，值得注意的是，存在诸多具有法律约束力的已经确定的和需要进一步确定的“最低标准或水平”，涉及进港信息通报、港口检查程序、检查报告、人员培训、港口检查水平等方面。这些最低标准或水平，是实施《港口国措施协定》不可缺少的法律组成部分，它保证了协定的实施水平、国家间的协同合作，防止方便港口的出现，体现了《港口国措施协定》最低标准的性质。从国际法与国内法的关系看，这些标准或水平实际上限制了港口国的主权。

（三）临时适用

根据《港口国措施协定》第 32 条（1）规定，任何国家或区域经济一体化组织如果已经书面通过保管机关其同意临时适用《港口国措施协定》，则这些国家或区域经济一体化组织应自保护管理机关收到其通知书之日起临时适用《港口国措施协定》。

条约的临时适用，主要是因为一方面条约需要经批准方可生效，另一方面条约急需付之执行，[46] 或促进条约早日生效。[47]《港口国措施协定》的临时适用可以理解为国际社会期望通过港口国措施的实施，打击 IUU 捕捞，而且在实践中一些区域渔业管理组织已经制定、实施港口国管辖，如东北大西洋渔业委员会、南极生物资源养护委员会、西北大西洋渔业委员会等。[48] 在欧洲，欧盟也制定 IUU 条例。因此，可以预见，一些积极推动港口国管辖的国家，特别是水产品进口国家（美国、欧盟）、太平洋岛国等，可能会临时适用《港口国措施协定》。

临时适用的法律后果，尽管理论上仅是在同意临时适用的国家之间准用《港

45 Canada’s Proposed Changes to Draft Text (Articles 11~25), submitted on 1 October 2008, p. 6.

46 李浩培著：《条约法概论》，北京：法律出版社 2003 年第 2 版，第 178 页。

47 ［英］安托尼·奥斯特（Anthony Aust）著，江国青译：《现代条约法与实践》，北京：中国人民大学出版社 2005 年版，第 137 页。

48 UN Secretary-General Report on Sustainable Fisheries, A/62/260, 15 August 2007, para. 117.

口国措施协定》，[49] 但鉴于港口的特殊位置，而且《港口国措施协定》主要针对外国渔船，因此部分国家临时适用《港口国措施协定》将不可避免地对其他国家渔船产生实际影响。

但是，值得注意的是，如果一个国家同意临时适用《港口国措施协定》，那应是适用《港口国措施协定》的全部，而不是部分，即需要受到相关条款的限制，不应构成“滥用权利”，或者构成形式上或事实上的“歧视”。因此，从这个意义上讲，单方同意临时适用《港口国措施协定》即产生相应的国际法律效果。[50]

（四）船旗国的作用

尽管《港口国措施协定》主要关注港口国管辖，但不论是在海洋环境保护领域，还是国际生物资源养护领域，港口国管辖的出现都与船旗国责任或义务履行不足有密切的关系。因此，《港口国措施协定》第 20 条从 6 个方面对船旗国在港口国管辖过程中的作用进行了详细规定。具体包括两个方面。

首先，协定鼓励船旗国主动加强对渔船的管理，要求渔船合作、不使用“方便港”或主动请求港口国进行检查；其次，在港口国报告悬挂其国旗的渔船从事了相关违法行为时，应迅速采取有效处罚措施，并通报实施检查的港口国及其他相关国家、国际组织和粮农组织。

总体上，该条基本上还是遵循了船旗国管辖为主、港口国管辖为辅的原则；港口国仅是在船旗国管辖不足的情况下作为补充。

（五）发展中国家的特殊需要

《港口国措施协定》第 21 条主要是考虑发展中国家在实施《港口国措施协定》过程中的实际困难，如法制、执法、责任负担等，以及因其实施《港口国措施协定》而带来的经济损失，如港口服务的减少等。因此，要求通过粮农组织、联合国专门机构或其他国际组织加强对发展中国家的支持，内容包括：加强法制建设、协助他们参加相关国际组织（如区域性渔业管理组织，但没有明确）和提供技术帮助，提高执法能力。

除此之外，成员国应进行合作，建立适当的基金机制（双边的、多边的），以资助发展中国家：制定国家和国际港口管理措施，发展和加强执法能力（监测、控

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49 《维也纳条约法公约》第 30 条。

50 Alfred P. Rubin, The International Legal Effects of Unilateral Declarations, *The American journal of International Law*, Vol. 71, 1977, pp. 1~30; Nuclear Tests Cases (Australia v. France; New Zealand v. France), Judgment of 20 December 1974 (I. C. J.).

制和监督网络，人员培训，执法）、技术装备，参加可能的争端解决程序等。同时，还应建立专门工作组对资金机制进行定期分析报告，并提出相关建议。为此，该工作组除了定期向基金的捐助者报告捐款的方案、资金的运作、指导实施的标准及程序以外，还应该考虑发展中国家的需求、可能的资金及其支出、资金筹集及管理机制的透明度、接受资金国家的信用度等因素。[51]

（六）争端解决

根据《港口国措施协定》第 22 条，不强制适用第三方解决程序，仅强调磋商；如果争端双方同意，则可以将争端交由第三方具有法律约束力的程序，如国际法院、国际海洋法法庭、国际仲裁法院等。

与此相反，2008 年草案第 23 条第 3 款曾规定，争端双方在无法自行解决时，应提交国际海洋法法庭或仲裁法院。对此争端程序，美国曾提出修改意见，主张同等地适用《公约》第十五部分的规定。[52]

从法律角度看，鉴于《港口国措施协定》规定的港口国管辖措施主要是拒绝港口进入或港口服务，这些可以认为是港口国基于属地原则而实施的管辖。但是，《港口国措施协定》仅是一种最低标准，港口国如果在此基础上采取更严格的措施，如没收渔获、渔具等，[53] 此时港口国实施的管辖，除适用属地管辖原则外，还需要考虑域外管辖原则，平衡港口国与船旗国间的管辖权冲突，否则会引起其管辖合法性的争议。在此情况下，对于发生在港口国管辖海域外的 IUU 捕捞，[54] 根据《公约》第十五部分的规定，仍应适用强制第三方解决程序。

从政策角度看，如果采纳美国的建议，则港口国在管理过程中将会承担更大的风险，特别是发展中港口国。由此会造成《港口国措施协定》执行不力或不彻底，达不到养护资源和海洋生态的目标。因此，《港口国措施协定》第 22 条的争端解决程序，将更大的风险转嫁至渔船或船旗国。尽管这会损抑船旗国管辖权，但可促使渔船合法生产，加强船旗国对其渔船的管理，达到《港口国措施协定》的目标。

但根据第 4 条（1），《港口国措施协定》并不影响成员国依国际法所享有的权利、管辖权和义务。因此，从这个角度看，第 22 条的规定并不当然排除《公约》

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51 Agreement on Port State Measures, Art. 21(6).

52 U.S. Drafting Suggestions on the “Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing as of June 2008”, submitted on 25 September 2008, pp. 6~7.

53 EU-IUU Regulation, Arts. 37, 43, 45.

54 对于发生在其他沿海国管辖范围内的非法捕捞，根据《港口国措施协定》第 11 条（1）（c），港口国可以拒绝该渔船入港或使用港口服务；对于其他措施，参考《联合国海洋法公约》第 218 条（2）的规定，仅可在该沿海国或船旗国等相关国家的要求下，方可采取。

第十五部分在未来可能的争端中的适用。

四、可能对我国的影响

我国大陆远洋渔业自 1985 年起步以后，规模、结构、生产区域等都有了长足的进步，成为一个重要远洋渔业国家。2006 年，首次实现我国大陆大洋性渔业产量和产值超过过洋性渔业。[55] 目前，大洋性渔业方面，捕捞对象也由以前的北太平洋鳕鱼、鱿鱼、金枪鱼，扩展至竹篓鱼、印度洋鸢乌贼、东南太平洋茎柔鱼、秋刀鱼、犬牙鱼等。就作业区域而言，由以前的大西洋扩展至印度洋、太平洋，并形成目前以太平洋为主的格局。2008 年，中国共产党第十七届中央委员会第三次全体会议通过的《中共中央关于推进农村改革发展若干重大问题的决定》和《中共中央国务院关于 2009 年促进农业稳定发展农民持续增收的若干意见》，分别把“扶持和壮大远洋渔业”作为“推进农业结构战略性调整”和“稳定发展农业生产”的内容之一。

鉴于《港口国措施协定》是针对外国渔船在港口国管辖范围外的行为，所以对于我国过洋性渔业，理论上不在其适用范围之内。对于大洋性渔业，《港口国措施协定》可能的影响体现在协定的临时适用、最低标准、渔船在外国港口的检查及救济、港口检查重点等方面。

因此，我国远洋渔业的发展除需要政府优惠政策的支持外，更需要政府、企业加强对渔船的监管和控制，特别是在出现个别渔船被发现有违规生产行为时，需要政府采取及时、有效的惩罚措施，以防止我国渔船出现在一些 IUU 名单上，保护其他合法生产渔船的利益和维护我国形象。[56]

五、结论

国际生物资源养护的严峻形势，促进了港口国管辖在此领域的发展。2009 年 11 月联合国粮农组织大会通过的《港口国措施协定》是一个联合国粮农组织框架内的具有法律约束力的多边条约，具有最低国际标准性质。港口国负有拒绝从事 IUU 捕捞渔船进入其港口，或禁止其渔获物上岸、使用港口服务等义务。同时，各国可视情况，在与相关国际法规定不违背的情况下，采取更严格的国内措施。目

55 农业部渔业局：《中国渔业年鉴（2007）》，北京：中国农业出版社 2008 年，第 7 ～ 8 页。

56 根据 2009 年 10 月中西太平洋渔业委员会下属技术与执行委员会第 5 次会议的报告，在其起草的 IUU 捕捞名单中，我国大陆地区有 6 艘渔船，约占总数 13 艘的一半。这需要引起我国相关政府部门的重视。See Technical and Compliance Committee, Draft IUU Vessel List and Current WCPFC IUU Vessel List, WCPFC-TCC5-2009/15, 1–6 October 2009.

前《港口国措施协定》中一些最低标准还没有制定，还有待进一步发展。它在全球的实施，依赖于港口国的支持，特别是发展中港口国的支持;港口国是否可以从中获得较好利益，不管是长期还是短期，将决定着他们对《港口国措施协定》的态度。

The Agreement on Port State Measures: A Commentary

TANG Jianye

In November 2009, faced with the critical situation of marine living resources conservation caused by persistent illegal fishing practices, the international community passed a new international instrument – the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The Agreement is the first legally binding international treaty specifically addressing the problem of illegal, unreported and unregulated (IUU) fishing, and will enter into force upon ratification by 25 States. Given its provisional application provision and the existing state practices, the Agreement on Port State Measures will have a positive impact on the conservation and management of marine living resources worldwide.

The Agreement expands its reach beyond that of existing international and regional treaties on this topic, employing broader definitions of terms such "fish," "fishing vessels," and "ports," and requiring compulsory port inspection, to ensure that all port States act in concert. In addition, article 4 of the Agreement clarifies its relationship with international law and other international instruments. It can be argued that this provision reflects disagreement among the different States regarding the 1995 United Nations Fish Stocks Agreement and other regional fisheries management conventions.

The Agreement balances the needs of both developing and developed port States. On the one hand, it establishes minimum standards for developing port States; on the other hand, it allows developed port States to adopt more stringent measures, such as the European Union's Council regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. In addition, the Agreement requires that the member States cooperate to establish appropriate funding mechanisms to assist the developing States.

The Agreement addresses the roles of both port States and flag States. The

main port State measures provided in the Agreement is the denial of port entry by vessels engaged in IUU fishing, based on the principle of territorial jurisdiction. As for flag States, they shall require vessels flying their flags to cooperate with port States and take prompt measures against vessels reported to have engaged in IUU fishing. In the case of any loss or damage suffered by vessels as a consequence of alleged unlawful inspection, port States are only under the obligation to provide information on the availability of legal recourse, and will not necessarily incur any liability thereby.

In the event of a dispute in its interpretation or application, the Agreement does not provide for compulsory judicial procedures; rather, it encourages consultation. As a matter of policy, this allocates more risk to flag states or vessels, in order to ease the burden on the port States, thereby encouraging them to perform inspections and take follow-up actions. If disputes cannot be resolved in accordance with this Agreement, the United Nations Fish Stocks Agreement or United Nations Convention on the Law of the Sea may apply.

From China's perspective, the Agreement on Port State Measures presents great challenges both for the Chinese government and for China's distant-water fishery, especially in light of its provisions on minimum standards, provisional application, inspection priorities, and local remedies. As a flag State, China faces great pressure to amend its relevant domestic laws and regulations and to take immediate and effective punitive action against IUU fishing. As an emerging fishery State, China's fishing industry will see production costs increase in the foreseeable future. Further expansion of the industry will depend on establishing a clear definition of "IUU fishing."

2006 年毒污泥倾废案案件报告

周瑶 *

内容摘要: 2006 年, 在非洲科特迪瓦的阿比让市, 发生了震惊全球的荷兰托克公司废物倾倒案, 导致近 20 人死亡, 十万多人受到不同程度的伤害。案件历时三年, 在 2009 年 9 月, 英国高等法院批准了这一起有史以来最大的有关人身伤害集体诉讼案件的和解协议。近年来, 一些发达国家通过船只运输油污等废物, 以发展中国家作为主要输入国, 对这些地区的环境和人类的健康造成了极大威胁。该案件再次引起世界各国的广泛关注与重视, 突显了控制船只运输倾倒废物的紧迫性。

关键词: 废物倾倒 危险废物 托克公司 Probo Koala 号

一、案件事实

2006 年 8 月 19 日, 由荷兰托克公司包租的一艘悬挂巴拿马国旗的 Probo Koala 号船只, 在非洲科特迪瓦的阿比让市倾倒了 530 多吨废物。

根据资料显示, 大约在 2006 年 7 月 2 日, Probo Koala 号船只停泊在荷兰阿姆斯特丹港, 并试图倾倒废物。然而, 阿姆斯特丹废物处理公司 APS 在对废物进行分析后, 拒绝处理。于是, 该船承租人将废物重新运载上 Probo Koala 号。在到达科特迪瓦之前, 该船经过了爱沙尼亚和尼日利亚等国。

根据联合国报告, 荷兰托克公司最后雇用了阿比让当地的承包商 Tommy 公司将污泥等废物倾倒在阿比让至少 8 个地方的 18 个倾倒点, 并经过分析, 确定倾倒在阿比让市周围的废物是“强大的初步证据”。据官方估算, 该事件造成了 15 人死亡, 69 人住院, 另有 108000 多人寻求医治。

在案件发生后两周, 政府实地调查委员会将案件披露, 紧接着夏尔·科南·班尼总理解散了内阁。该委员会认为, 政府某些官员因故意或疏忽而允许倾倒废料在其监视下发生, 是腐败造成了该事件。作为立即采取补救措施的一部分, 政府设立了流动医疗中心, 增加了提供免费咨询和药品的健康工作者, 并查明了受**污**

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染的地点。同时，政府逮捕和拘留了 2 名托克公司的高级官员，并指控他们违反有毒废物法。

二、存在的法律问题

1. 案件中所倾倒油污等废物是否属于污染物，或者危险废物；
2. 废物的出口国及进口国是否遵守了国际公约及法律的规定；
3. 案件所涉及的当事国及主体应该承担的法律责任及赔偿等问题。

三、国际公约及法律规定

案件依据的主要法律是 1973 年《国际防止船舶造成污染公约》1978 年修正议定书和《控制危险废物越境转移及其处置巴塞尔公约》修正案。

前者规定了来自船舶运作的废物，而后者规定了有害废物的产生、交易和处置。该案件涉及的究竟是危险废物的转移还是船舶正常运作所产生的废物，决定了应该适用何种公约法律。

四、案件争论

受害者向托克公司提起诉讼，指控倾倒的废料释放出硫化氢等有毒气体令他们患上不同病症，要求赔偿。在民事和刑事诉讼程序中，法院将就废料所含化学物质、责任及赔偿等问题作出裁决，这是英国法院处理的最大一起有关人身伤害的集体诉讼案件。

另一方面，三年来托克公司一直否认其法律责任，并称有关废料是非洲当地承包商倾倒的，且不会造成疾病或导致严重伤害。但媒体指出，托克公司早已知道所倾倒的废料有毒，对人体有极大危险，而且在欧洲是被禁止的。可公司一直坚称船上运载的是普通垃圾，没有伤害性，并称绝对没有危险性。该公司律师还多次威胁试图调查这起案件的各国媒体。英国广播公司率先报道这一新闻时，该公司告其诽谤;美国《时代》周刊报道后，被勒令更正;英国《卫报》则被要求直接删除报道;挪威和荷兰记者更是遭遇封口威胁。

五、判决/和解

2009 年 9 月，大约 31000 人声称倾倒在科特迪瓦的有毒废物造成他们患病，在英国高等法院，托克公司与代表这些人的英国 Leigh Day & Co. 律师事务所达成了和解协议。

根据协议，托克公司将支付每位患者相当于约 1500 美元的赔偿，但不接受 Probo Koala 号船只关于倾倒有毒废料的义务或责任。

托克公司在 2007 年 2 月签署了另一份协议。该公司同意支付科特迪瓦政府相当于约 1.98 亿美元的赔偿。为此，科特迪瓦政府同意取消对该公司和其附属公司及管理人员的所有指控，还承诺不寻求进一步执行任何针对托克公司的索赔。

通过协议和解，托克公司不用承担责任，避免了长时间和昂贵的法律诉讼，同时也避免了原本定在伦敦开审的这次集体诉讼案。

六、案件分析

关于该案件涉及的当事国及主体所应尽的责任，联合国特别报告员[1]指出，对于荷兰，政府应避免类似事件再次发生，鼓励公共当局确保进行严格的检查，并在必要时扣留 Probo Koala 号这样的船只。同时，应该对科特迪瓦政府提供支持，使之能够有效地监督和处理案件对人类健康和环境的长期影响。

对于荷兰托克公司，应资助并支持科特迪瓦完成补救行动，还应该在其全部业务活动中确保就其各种活动及其产生的废料的性质和成份及时公布可靠的资料，说明其活动对环境、健康和安全可能产生的影响，并系统地确保以对环境无害的方式处理废料，包括严格评估适当的港口接收设施，平衡好商业利益和环境等各方利益。

对于进口国科特迪瓦，应监管在卸载和倾倒废料过程中 Probo Koala 号所采取的程序，并强调该国政府在案件发生后采取的补救行动，及时解决并消除污染、保健和赔偿问题，进一步采取行动保护所有受害者及其家人的各项权利。相信这一案件最终结果和救济方式，将对我国面临类似案件具有重要的借鉴作用。

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1 Report of the Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Okechukwu Ibeanu: Addendum: Mission to Côte d'Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008), United Nation, 2009.

2006 Slop Case Report

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Abstract: In 2006, toxic waste of a magnitude that shocked the world was dumped in the city of Abidjan in African Côte d'Ivoire by Trafigura Beheer BV (Trafigura), killing nearly twenty people and injuring more than one hundred thousand. The case took three years to litigate. In September 2009, the U.K. High Court in London approved a settlement agreement arising from the largest personal injury class action in its history. In recent years, some developed nations use ships to export slops and other waste to developing nations, causing devastation to the environment and posing threat to human health. This case has once again raised widespread concerns and attention in nations worldwide, highlighting the urgency of regulating the transporting and dumping of waste by ship.

Key Words: Slop dumping; Hazardous wastes; Trafigura; *Probo Koala*

I. Facts

On August 19, 2006, the vessel *Probo Koala*, flying Panamanian flag and chartered by Trafigura, discharged more than 530 metric tons of waste in the city of Abidjan in Côte d'Ivoire.

According to available information, on or around July 2, 2006, the *Probo Koala* called at the port of Amsterdam and sought to discharge the waste there; However, the Amsterdam waste disposal company APS turned it away after analyzing the waste. Hence, the charterer of the vessel reloaded the waste onto the *Probo Koala* and set sail. Before reaching Côte d'Ivoire, the vessel transited through Estonia and Nigeria.

According to a report released by the United Nations, Trafigura ultimately engaged a local Compagnie Tommy to dispose of the waste, which it did at 18 du-

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mping sites scattered over eight locations in Abidjan, and analysis revealed "strong *prima facie* evidence" that the waste dumped in Abidjan was related to the alleged injuries. According to official estimates, 15 people died, 69 were hospitalized and more than 108, 000 sought medical treatment as a result of the incident.

Two weeks after the incident, the Prime Minister of Côte d'Ivoire Charles Konan Banny dissolved his cabinet on the heels of disclosures made by a fact-finding committee set up by the government to investigate the incident. The committee attributed the incident to the corruption of certain officials of the government who willfully or negligently permitted the dumping to happen under their watch. As part of the immediate remedial measures, the government established mobile treatment centers, increased the number of health workers offering free consultations and medicines, and identified polluted sites. The government also arrested and detained two senior officers of Trafigura and charged them with violation of toxic waste laws.

II. Issues

1. Are the slops and other waste dumped in Côte d'Ivoire pollutants or hazardous wastes as defined by the law?

2. Did the exporting and importing nations of the waste comply with the provisions of international conventions and laws?

3. Questions with respect to the liabilities of the relevant parties and the compensation of damages.

III. Applicable Laws

The two main laws applicable to this case are the International Convention for the Prevention of Pollution by Ships (MARPOL 73) as modified by the subsequent 1978 MARPOL Protocol (MARPOL 73/78), and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal as modified by the Basel Ban amendment (Basel Convention).

MARPOL 73/78 regulates wastes arising from onboard operations of ships. The Basel Convention regulates the generation, trade and disposal of hazardous wastes. Whether this case concerns the transport of hazardous wastes or the generation of wastes as part of the normal operation of a ship determines which law applies.

IV. Arguments

The victims sued Trafigura alleging that toxic gases emitted by the dumped waste, such as hydrogen sulfide, caused them to suffer various illnesses, and sought damages. In the civil and criminal proceedings, the court would adjudicate issues in respect of the chemical composition of the waste, liability and compensation of damages. This was the largest personal injury class action in the U.K. court history.

On the other hand, for three years Trafigura refused to admit liability, alleging that the waste in question was dumped by the local, African contractor and that the waste could not cause illnesses or serious harm. Nevertheless, the media revealed that Trafigura had always known that the waste in question was toxic, posing extreme danger to the human body, and the disposal thereof was prohibited in Europe. This is in stark contrast to Trafigura's insistence that the waste transported by the vessel was ordinary garbage, innocuous, and absolutely not hazardous. The lawyers for Trafigura also repeatedly threatened media organizations worldwide who attempted to expose contradictory findings. When BBC first came out with contradictory findings, Trafigura filed a libel lawsuit against it. When Times magazine published a report on the case, it was ordered by the court to make a correction. The Guardian was banned from publishing certain articles. Journalists in the Netherlands and Norway were threatened with gag orders.

V. Judgement / Settlement

In September 2009, Trafigura reached a settlement with the approximately 31,000 people who claimed they had fallen ill from toxic waste dumped around the city of Abidjan, represented by the British law firm of Leigh Day & Co., before the U.K. High Court in London.

Pursuant to the settlement agreement, Trafigura would pay each of the claimants the equivalent of approximately US $1500, without accepting liability or responsibility for the dumping of the toxic waste by the *Probo Koala*.

Trafigura entered into another settlement agreement in February 2007. There Trafigura agreed to pay the equivalent of approximately US $198 million to the government of Côte d'Ivoire. In return, the government of Côte d'Ivoire agreed to drop all charges against the company, its affiliated companies and executives. The government further undertook not to pursue any further financial claims against Trafigura.

Through those settlement agreements, Trafigura bore no liability, avoided protracted and expensive litigation, and dodged the hearing to be held in London for the class action lawsuit.

VI. Analysis

With regard to the responsibilities of the relevant parties, the United Nations Special Reporter[1] has the following recommendations. He recommends that the Dutch government should take improved measures to prevent the recurrence of similar incidents in the Netherlands. He encourages public authorities to ensure rigorous inspection and, where necessary, to detain ships posing potential danger, such as the *Probo Koala*. The Netherlands should also continue to provide support to the government of Côte d'Ivoire to allow the latter to monitor and address effectively the long-term effect of the incident on human health and the environment.

With regard to Trafigura, he recommends that it continue to fund and support the remedial work in Côte d'Ivoire. In terms of its overall business operations, Trafigura should also ensure that timely and reliable information is disclosed regarding its activities and the nature and composition of the waste that these activities generate, as well as the potential impact its activities have on the environment, health and safety, and that waste is systematically treated in an environmentally sound manner, including through rigorous assessment of appropriate port reception facilities and balancing commercial interests with environmental considerations.

As to Côte d'Ivoire as a waste importer, the UN Special Reporter recommends supervision of the procedure for offloading and dumping of the waste, such as that followed by the *Probo Koala*. He also emphasized the importance of the remedial actions taken by the government after the incident, placing urgency on timely decontamination, health care and damage compensation, and further action to protect the rights and interests of the victims and their families. The final outcome and remedies of this case will be a valuable lesson for us in confronting similar situations.

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防治船舶污染海洋环境管理条例

（国务院第 79 次常务会议通过，中华人民共和国国务院第 561 号令）

第一章　总则

第一条　为了防治船舶及其有关作业活动污染海洋环境，根据《中华人民共和国海洋环境保护法》，制定本条例。

第二条　防治船舶及其有关作业活动污染中华人民共和国管辖海域适用本条例。

第三条　防治船舶及其有关作业活动污染海洋环境，实行预防为主、防治结合的原则。

第四条　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。

第五条　国务院交通运输主管部门应当根据防治船舶及其有关作业活动污染海洋环境的需要，组织编制防治船舶及其有关作业活动污染海洋环境应急能力建设规划，报国务院批准后公布实施。

沿海设区的市级以上地方人民政府应当按照国务院批准的防治船舶及其有关作业活动污染海洋环境应急能力建设规划，并根据本地区的实际情况，组织编制相应的防治船舶及其有关作业活动污染海洋环境应急能力建设规划。

第六条　国务院交通运输主管部门、沿海设区的市级以上地方人民政府应当建立健全防治船舶及其有关作业活动污染海洋环境应急反应机制，并制定防治船舶及其有关作业活动污染海洋环境应急预案。

第七条　海事管理机构应当根据防治船舶及其有关作业活动污染海洋环境的需要，会同海洋主管部门建立健全船舶及其有关作业活动污染海洋环境的监测、监视机制，加强对船舶及其有关作业活动污染海洋环境的监测、监视。

第八条　国务院交通运输主管部门、沿海设区的市级以上地方人民政府应当

按照防治船舶及其有关作业活动污染海洋环境应急能力建设规划，建立专业应急队伍和应急设备库，配备专用的设施、设备和器材。

第九条 任何单位和个人发现船舶及其有关作业活动造成或者可能造成海洋环境污染的，应当立即就近向海事管理机构报告。

第二章 防治船舶及其有关作业活动污染海洋环境的一般规定

第十条 船舶的结构、设备、器材应当符合国家有关防治船舶污染海洋环境的技术规范以及中华人民共和国缔结或者参加的国际条约的要求。

船舶应当依照法律、行政法规、国务院交通运输主管部门的规定以及中华人民共和国缔结或者参加的国际条约的要求，取得并随船携带相应的防治船舶污染海洋环境的证书、文书。

第十一条 中国籍船舶的所有人、经营人或者管理人应当按照国务院交通运输主管部门的规定，建立健全安全营运和防治船舶污染管理体系。

海事管理机构应当对安全营运和防治船舶污染管理体系进行审核，审核合格的，发给符合证明和相应的船舶安全管理证书。

第十二条 港口、码头、装卸站以及从事船舶修造的单位应当配备与其装卸货物种类和吞吐能力或者修造船舶能力相适应的污染监视设施和污染物接收设施，并使其处于良好状态。

第十三条 港口、码头、装卸站以及从事船舶修造、打捞、拆解等作业活动的单位应当制定有关安全营运和防治污染的管理制度，按照国家有关防治船舶及其有关作业活动污染海洋环境的规范和标准，配备相应的防治污染设备和器材，并通过海事管理机构的专项验收。

港口、码头、装卸站以及从事船舶修造、打捞、拆解等作业活动的单位，应当定期检查、维护配备的防治污染设备和器材，确保防治污染设备和器材符合防治船舶及其有关作业活动污染海洋环境的要求。

第十四条 船舶所有人、经营人或者管理人以及有关作业单位应当制定防治船舶及其有关作业活动污染海洋环境的应急预案，并报海事管理机构批准。

港口、码头、装卸站的经营人应当制定防治船舶及其有关作业活动污染海洋环境的应急预案，并报海事管理机构备案。

船舶、港口、码头、装卸站以及其他有关作业单位应当按照应急预案，定期组织演练，并做好相应记录。

第三章　船舶污染物的排放和接收

第十五条　船舶在中华人民共和国管辖海域向海洋排放的船舶垃圾、生活污水、含油污水、含有毒有害物质污水、废气等污染物以及压载水，应当符合法律、行政法规、中华人民共和国缔结或者参加的国际条约以及相关标准的要求。

船舶应当将不符合前款规定的排放要求的污染物排入港口接收设施或者由船舶污染物接收单位接收。

船舶不得向依法划定的海洋自然保护区、海滨风景名胜区、重要渔业水域以及其他需要特别保护的海域排放船舶污染物。

第十六条　船舶处置污染物，应当在相应的记录簿内如实记录。

船舶应当将使用完毕的船舶垃圾记录簿在船舶上保留 2 年;将使用完毕的含油污水、含有毒有害物质污水记录簿在船舶上保留 3 年。

第十七条　船舶污染物接收单位从事船舶垃圾、残油、含油污水、含有毒有害物质污水接收作业，应当依法经海事管理机构批准。

第十八条　船舶污染物接收单位接收船舶污染物，应当向船舶出具污染物接收单证，并由船长签字确认。

船舶凭污染物接收单证向海事管理机构办理污染物接收证明，并将污染物接收证明保存在相应的记录簿中。

第十九条　船舶污染物接收单位应当按照国家有关污染物处理的规定处理接收的船舶污染物，并每月将船舶污染物的接收和处理情况报海事管理机构备案。

第四章　船舶有关作业活动的污染防治

第二十条　从事船舶清舱、洗舱、油料供受、装卸、过驳、修造、打捞、拆解，污染危害性货物装箱、充罐，污染清除作业以及利用船舶进行水上水下施工等作业活动的，应当遵守相关操作规程，并采取必要的安全和防治污染的措施。

从事前款规定的作业活动的人员，应当具备相关安全和防治污染的专业知识和技能。

第二十一条　船舶不符合污染危害性货物适载要求的，不得载运污染危害性货物，码头、装卸站不得为其进行装载作业。

污染危害性货物的名录由国家海事管理机构公布。

第二十二条　载运污染危害性货物进出港口的船舶，其承运人、货物所有人或者代理人，应当向海事管理机构提出申请，经批准方可进出港口、过境停留或者

进行装卸作业。

第二十三条 载运污染危害性货物的船舶，应当在海事管理机构公布的具有相应安全装卸和污染物处理能力的码头、装卸站进行装卸作业。

第二十四条 货物所有人或者代理人交付船舶载运污染危害性货物，应当确保货物的包装与标志等符合有关安全和防治污染的规定，并在运输单证上准确注明货物的技术名称、编号、类别（性质）、数量、注意事项和应急措施等内容。

货物所有人或者代理人交付船舶载运污染危害性不明的货物，应当由国家海事管理机构认定的评估机构进行危害性评估，明确货物的危害性质以及有关安全和防治污染要求，方可交付船舶载运。

第二十五条 海事管理机构认为交付船舶载运的污染危害性货物应当申报而未申报，或者申报的内容不符合实际情况的，可以按照国务院交通运输主管部门的规定采取开箱等方式查验。

海事管理机构查验污染危害性货物，货物所有人或者代理人应当到场，并负责搬移货物，开拆和重封货物的包装。海事管理机构认为必要的，可以径行查验、复验或者提取货样，有关单位和个人应当配合。

第二十六条 进行散装液体污染危害性货物过驳作业的船舶，其承运人、货物所有人或者代理人应当向海事管理机构提出申请，告知作业地点，并附送过驳作业方案、作业程序、防治污染措施等材料。

海事管理机构应当自受理申请之日起2个工作日内作出许可或者不予许可的决定。2个工作日内无法作出决定的，经海事管理机构负责人批准，可以延长5个工作日。

第二十七条 依法获得船舶油料供受作业资质的单位，应当向海事管理机构备案。海事管理机构应当对船舶油料供受作业进行监督检查，发现不符合安全和防治污染要求的，应当予以制止。

第二十八条 船舶燃油供给单位应当如实填写燃油供受单证，并向船舶提供船舶燃油供受单证和燃油样品。

船舶和船舶燃油供给单位应当将燃油供受单证保存3年，并将燃油样品妥善保存1年。

第二十九条 船舶修造、水上拆解的地点应当符合环境功能区划和海洋功能区划，并由海事管理机构征求当地环境保护主管部门和海洋主管部门意见后确定并公布。

第三十条 从事船舶拆解的单位在船舶拆解作业前，应当对船舶上的残余物和废弃物进行处置，将油舱（柜）中的存油驳出，进行船舶清舱、洗舱、测爆等工作，并经海事管理机构检查合格，方可进行船舶拆解作业。

从事船舶拆解的单位应当及时清理船舶拆解现场，并按照国家有关规定处理船舶拆解产生的污染物。

禁止采取冲滩方式进行船舶拆解作业。

第三十一条 禁止船舶经过中华人民共和国内水、领海转移危险废物。

经过中华人民共和国管辖的其他海域转移危险废物的，应当事先取得国务院环境保护主管部门的书面同意，并按照海事管理机构指定的航线航行，定时报告船舶所处的位置。

第三十二条 使用船舶向海洋倾倒废弃物的，应当向驶出港所在地的海事管理机构提交海洋主管部门的批准文件，经核实方可办理船舶出港签证。

船舶向海洋倾倒废弃物，应当如实记录倾倒情况。返港后，应当向驶出港所在地的海事管理机构提交书面报告。

第三十三条 载运散装液体污染危害性货物的船舶和1万总吨以上的其他船舶，其经营人应当在作业前或者进出港口前与取得污染清除作业资质的单位签订污染清除作业协议，明确双方在发生船舶污染事故后污染清除的权利和义务。

与船舶经营人签订污染清除作业协议的污染清除作业单位应当在发生船舶污染事故后，按照污染清除作业协议及时进行污染清除作业。

第三十四条 申请取得污染清除作业资质的单位应当向海事管理机构提出书面申请，并提交其符合下列条件的材料：

（一）配备的污染清除设施、设备、器材和作业人员符合国务院交通运输主管部门的规定；

（二）制定的污染清除作业方案符合防治船舶及其有关作业活动污染海洋环境的要求；

（三）污染物处理方案符合国家有关防治污染的规定。

海事管理机构应当自受理申请之日起30个工作日内完成审查，并对符合条件的单位颁发资质证书；对不符合条件的，书面通知申请单位并说明理由。

第五章 船舶污染事故应急处置

第三十五条 本条例所称船舶污染事故，是指船舶及其有关作业活动发生油类、油性混合物和其他有毒有害物质泄漏造成的海洋环境污染事故。

第三十六条 船舶污染事故分为以下等级：

（一）特别重大船舶污染事故，是指船舶溢油1000吨以上，或者造成直接经济损失2亿元以上的船舶污染事故；

（二）重大船舶污染事故，是指船舶溢油500吨以上不足1000吨，或者造成直接经济损失1亿元以上不足2亿元的船舶污染事故；

（三）较大船舶污染事故，是指船舶溢油100吨以上不足500吨，或者造成直接经济损失5000万元以上不足1亿元的船舶污染事故；

（四）一般船舶污染事故，是指船舶溢油不足 100 吨，或者造成直接经济损失不足 5000 万元的船舶污染事故。

第三十七条 船舶在中华人民共和国管辖海域发生污染事故，或者在中华人民共和国管辖海域外发生污染事故造成或者可能造成中华人民共和国管辖海域污染的，应当立即启动相应的应急预案，采取措施控制和消除污染，并就近向有关海事管理机构报告。

发现船舶及其有关作业活动可能对海洋环境造成污染的，船舶、码头、装卸站应当立即采取相应的应急处置措施，并就近向有关海事管理机构报告。

接到报告的海事管理机构应当立即核实有关情况，并向上级海事管理机构或者国务院交通运输主管部门报告，同时报告有关沿海设区的市级以上地方人民政府。

第三十八条 船舶污染事故报告应当包括下列内容：

（一）船舶的名称、国籍、呼号或者编号；

（二）船舶所有人、经营人或者管理人的名称、地址；

（三）发生事故的时间、地点以及相关气象和水文情况；

（四）事故原因或者事故原因的初步判断；

（五）船舶上污染物的种类、数量、装载位置等概况；

（六）污染程度；

（七）已经采取或者准备采取的污染控制、清除措施和污染控制情况以及救助要求；

（八）国务院交通运输主管部门规定应当报告的其他事项。

作出船舶污染事故报告后出现新情况的，船舶、有关单位应当及时补报。

第三十九条 发生特别重大船舶污染事故，国务院或者国务院授权国务院交通运输主管部门成立事故应急指挥机构。

发生重大船舶污染事故，有关省、自治区、直辖市人民政府应当会同海事管理机构成立事故应急指挥机构。

发生较大船舶污染事故和一般船舶污染事故，有关设区的市级人民政府应当会同海事管理机构成立事故应急指挥机构。

有关部门、单位应当在事故应急指挥机构统一组织和指挥下，按照应急预案的分工，开展相应的应急处置工作。

第四十条 船舶发生事故有沉没危险，船员离船前，应当尽可能关闭所有货舱（柜）、油舱（柜）管系的阀门，堵塞货舱（柜）、油舱（柜）通气孔。

船舶沉没的，船舶所有人、经营人或者管理人应当及时向海事管理机构报告船舶燃油、污染危害性货物以及其他污染物的性质、数量、种类、装载位置等情况，并及时采取措施予以清除。

第四十一条 发生船舶污染事故或者船舶沉没，可能造成中华人民共和国管

辖海域污染的，有关沿海设区的市级以上地方人民政府、海事管理机构根据应急处置的需要，可以征用有关单位或者个人的船舶和防治污染设施、设备、器材以及其他物资，有关单位和个人应当予以配合。

被征用的船舶和防治污染设施、设备、器材以及其他物资使用完毕或者应急处置工作结束，应当及时返还。船舶和防治污染设施、设备、器材以及其他物资被征用或者征用后毁损、灭失的，应当给予补偿。

第四十二条 发生船舶污染事故，海事管理机构可以采取清除、打捞、拖航、引航、过驳等必要措施，减轻污染损害。相关费用由造成海洋环境污染的船舶、有关作业单位承担。

需要承担前款规定费用的船舶，应当在开航前缴清相关费用或者提供相应的财务担保。

第四十三条 处置船舶污染事故使用的消油剂，应当符合国家有关标准。

海事管理机构应当及时将符合国家有关标准的消油剂名录向社会公布。

船舶、有关单位使用消油剂处置船舶污染事故的，应当依照《中华人民共和国海洋环境保护法》有关规定执行。

第六章 船舶污染事故调查处理

第四十四条 船舶污染事故的调查处理依照下列规定进行：

（一）特别重大船舶污染事故由国务院或者国务院授权国务院交通运输主管部门等部门组织事故调查处理；

（二）重大船舶污染事故由国家海事管理机构组织事故调查处理；

（三）较大船舶污染事故和一般船舶污染事故由事故发生地的海事管理机构组织事故调查处理。

船舶污染事故给渔业造成损害的，应当吸收渔业主管部门参与调查处理；给军事港口水域造成损害的，应当吸收军队有关主管部门参与调查处理。

第四十五条 发生船舶污染事故，组织事故调查处理的机关或者海事管理机构应当及时、客观、公正地开展事故调查，勘验事故现场，检查相关船舶，询问相关人员，收集证据，查明事故原因。

第四十六条 组织事故调查处理的机关或者海事管理机构根据事故调查处理的需要，可以暂扣相应的证书、文书、资料；必要时，可以禁止船舶驶离港口或者责令停航、改航、停止作业直至暂扣船舶。

第四十七条 事故调查处理需要委托有关机构进行技术鉴定或者检验、检测的，应当委托国务院交通运输主管部门认定的机构进行。

第四十八条 组织事故调查处理的机关或者海事管理机构开展事故调查时，

船舶污染事故的当事人和其他有关人员应当如实反映情况和提供资料，不得伪造、隐匿、毁灭证据或者以其他方式妨碍调查取证。

第四十九条 组织事故调查处理的机关或者海事管理机构应当自事故调查结束之日起 20 个工作日内制作事故认定书，并送达当事人。

事故认定书应当载明事故基本情况、事故原因和事故责任。

第七章 船舶污染事故损害赔偿

第五十条 造成海洋环境污染损害的责任者，应当排除危害，并赔偿损失；完全由于第三者的故意或者过失，造成海洋环境污染损害的，由第三者排除危害，并承担赔偿责任。

第五十一条 完全属于下列情形之一，经过及时采取合理措施，仍然不能避免对海洋环境造成污染损害的，免予承担责任：

（一）战争；

（二）不可抗拒的自然灾害；

（三）负责灯塔或者其他助航设备的主管部门，在执行职责时的疏忽，或者其他过失行为。

第五十二条 船舶污染事故的赔偿限额依照《中华人民共和国海商法》关于海事赔偿责任限制的规定执行。但是，船舶载运的散装持久性油类物质造成中华人民共和国管辖海域污染的，赔偿限额依照中华人民共和国缔结或者参加的有关国际条约的规定执行。

前款所称持久性油类物质，是指任何持久性烃类矿物油。

第五十三条 在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》、中华人民共和国缔结或者参加的有关国际条约规定的油污赔偿限额。

承担船舶油污损害民事责任保险的商业性保险机构和互助性保险机构，由国家海事管理机构征求国务院保险监督管理机构意见后确定并公布。

第五十四条 已依照本条例第五十三条的规定投保船舶油污损害民事责任保险或者取得财务担保的中国籍船舶，其所有人应当持船舶国籍证书、船舶油污损害民事责任保险合同或者财务担保证明，向船籍港的海事管理机构申请办理船舶油污损害民事责任保险证书或者财务保证证书。

第五十五条 发生船舶油污事故，国家组织有关单位进行应急处置、清除污

染所发生的必要费用，应当在船舶油污损害赔偿中优先受偿。

第五十六条 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。

船舶油污损害赔偿基金征收、使用和管理的具体办法由国务院财政部门会同国务院交通运输主管部门制定。

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。

第五十七条 对船舶污染事故损害赔偿的争议，当事人可以请求海事管理机构调解，也可以向仲裁机构申请仲裁或者向人民法院提起民事诉讼。

第八章 法律责任

第五十八条 船舶、有关作业单位违反本条例规定的，海事管理机构应当责令改正；拒不改正的，海事管理机构可以责令停止作业、强制卸载，禁止船舶进出港口、靠泊、过境停留，或者责令停航、改航、离境、驶向指定地点。

第五十九条 违反本条例的规定，船舶的结构不符合国家有关防治船舶污染海洋环境的技术规范或者有关国际条约要求的，由海事管理机构处 10 万元以上 30 万元以下的罚款。

第六十条 违反本条例的规定，有下列情形之一的，由海事管理机构依照《中华人民共和国海洋环境保护法》有关规定予以处罚：

（一）船舶未取得并随船携带防治船舶污染海洋环境的证书、文书的；

（二）船舶、港口、码头、装卸站未配备防治污染设备、器材的；

（三）船舶向海域排放本条例禁止排放的污染物的；

（四）船舶未如实记录污染物处置情况的；

（五）船舶超过标准向海域排放污染物的；

（六）从事船舶水上拆解作业，造成海洋环境污染损害的。

第六十一条 违反本条例的规定，船舶未按照规定在船舶上留存船舶污染物处置记录，或者船舶污染物处置记录与船舶运行过程中产生的污染物数量不符合的，由海事管理机构处 2 万元以上 10 万元以下的罚款。

第六十二条 违反本条例的规定，船舶污染物接收单位未经海事管理机构批准，擅自从事船舶垃圾、残油、含油污水、含有毒有害物质污水接收作业的，由海事管理机构处 1 万元以上 5 万元以下的罚款；造成海洋环境污染的，处 5 万元以上 25 万元以下的罚款。

第六十三条 违反本条例的规定，船舶未按照规定办理污染物接收证明，或

者船舶污染物接收单位未按照规定将船舶污染物的接收和处理情况报海事管理机构备案的，由海事管理机构处2万元以下的罚款。

第六十四条 违反本条例的规定，有下列情形之一的，由海事管理机构处2000元以上1万元以下的罚款：

（一）船舶未按照规定保存污染物接收证明的；

（二）船舶燃油供给单位未如实填写燃油供受单证的；

（三）船舶燃油供给单位未按照规定向船舶提供燃油供受单证和燃油样品的；

（四）船舶和船舶燃油供给单位未按照规定保存燃油供受单证和燃油样品的。

第六十五条 违反本条例的规定，有下列情形之一的，由海事管理机构处2万元以上10万元以下的罚款：

（一）载运污染危害性货物的船舶不符合污染危害性货物适载要求的；

（二）载运污染危害性货物的船舶未在具有相应安全装卸和污染物处理能力的码头、装卸站进行装卸作业的；

（三）货物所有人或者代理人未按照规定对污染危害性不明的货物进行危害性评估的。

第六十六条 违反本条例的规定，未经海事管理机构批准，船舶载运污染危害性货物进出港口、过境停留、进行装卸或者过驳作业的，由海事管理机构处1万元以上5万元以下的罚款。

第六十七条 违反本条例的规定，有下列情形之一的，由海事管理机构处2万元以上10万元以下的罚款：

（一）船舶发生事故沉没，船舶所有人或者经营人未及时向海事管理机构报告船舶燃油、污染危害性货物以及其他污染物的性质、数量、种类、装载位置等情况的；

（二）船舶发生事故沉没，船舶所有人或者经营人未及时采取措施清除船舶燃油、污染危害性货物以及其他污染物的。

第六十八条 违反本条例的规定，有下列情形之一的，由海事管理机构处1万元以上5万元以下的罚款：

（一）载运散装液体污染危害性货物的船舶和1万总吨以上的其他船舶，其经营人未按照规定签订污染清除作业协议的；

（二）未取得污染清除作业资质的单位擅自签订污染清除作业协议并从事污染清除作业的。

第六十九条 违反本条例的规定，发生船舶污染事故，船舶、有关作业单位未立即启动应急预案的，对船舶、有关作业单位，由海事管理机构处2万元以上10万元以下的罚款；对直接负责的主管人员和其他直接责任人员，由海事管理机构处1万元以上2万元以下的罚款。直接负责的主管人员和其他直接责任人员属于船员的，并处给予暂扣适任证书或者其他有关证件1个月至3个月的处罚。

第七十条 违反本条例的规定，发生船舶污染事故，船舶、有关作业单位迟报、漏报事故的，对船舶、有关作业单位，由海事管理机构处5万元以上25万元以下的罚款；对直接负责的主管人员和其他直接责任人员，由海事管理机构处1万元以上5万元以下的罚款。直接负责的主管人员和其他直接责任人员属于船员的，并处给予暂扣适任证书或者其他有关证件3个月至6个月的处罚。瞒报、谎报事故的，对船舶、有关作业单位，由海事管理机构处25万元以上50万元以下的罚款；对直接负责的主管人员和其他直接责任人员，由海事管理机构处5万元以上10万元以下的罚款。直接负责的主管人员和其他直接责任人员属于船员的，并处给予吊销适任证书或者其他有关证件的处罚。

第七十一条 违反本条例的规定，未经海事管理机构批准使用消油剂的，由海事管理机构对船舶或者使用单位处1万元以上5万元以下的罚款。

第七十二条 违反本条例的规定，船舶污染事故的当事人和其他有关人员，未如实向组织事故调查处理的机关或者海事管理机构反映情况和提供资料，伪造、隐匿、毁灭证据或者以其他方式妨碍调查取证的，由海事管理机构处1万元以上5万元以下的罚款。

第七十三条 违反本条例的规定，船舶所有人有下列情形之一的，由海事管理机构责令改正，可以处5万元以下的罚款；拒不改正的，处5万元以上25万元以下的罚款：

（一）在中华人民共和国管辖海域内航行的船舶，其所有人未按照规定投保船舶油污损害民事责任保险或者取得相应的财务担保的；

（二）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低于《中华人民共和国海商法》、中华人民共和国缔结或者参加的有关国际条约规定的油污赔偿限额的。

第七十四条 违反本条例的规定，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，未按照规定缴纳船舶油污损害赔偿基金的，由海事管理机构责令改正；拒不改正的，可以停止其接收的持久性油类物质货物在中华人民共和国管辖水域进行装卸、过驳作业。

货物所有人或者代理人逾期未缴纳船舶油污损害赔偿基金的，应当自应缴之日起按日加缴未缴额的万分之五的滞纳金。

第九章 附则

第七十五条 中华人民共和国缔结或者参加的国际条约对防治船舶及其有关作业活动污染海洋环境有规定的，适用国际条约的规定。但是，中华人民共和国声明保留的条款除外。

第七十六条 县级以上人民政府渔业主管部门负责渔港水域内非军事船舶和渔港水域外渔业船舶污染海洋环境的监督管理，负责保护渔业水域生态环境工作，负责调查处理《中华人民共和国海洋环境保护法》第五条第四款规定的渔业污染事故。

第七十七条 军队环境保护部门负责军事船舶污染海洋环境的监督管理及污染事故的调查处理。

第七十八条 本条例自2010年3月1日起施行。1983年12月29日国务院发布的《中华人民共和国防止船舶污染海域管理条例》同时废止。

港口经营管理规定

（交通运输部令2009年第13号令，2009年10月29日经第10次部务会议通过）

第一章　总则

第一条　为规范港口经营行为，维护港口经营秩序，依据《中华人民共和国港口法》和其他有关法律、法规，制定本规定。

第二条　本规定适用于港口经营及相关活动。

第三条　本规定下列用语的含义是：

（一）港口经营，是指港口经营人在港口区域内为船舶、旅客和货物提供港口设施或者服务的活动，主要包括下列各项：

1. 为船舶提供码头、过驳锚地、浮筒等设施；

2. 为旅客提供候船和上下船舶设施和服务；

3. 为委托人提供货物装卸（含过驳）、仓储、港内驳运、集装箱堆放、拆拼箱以及对货物及其包装进行简单加工处理等；

4. 为船舶进出港、靠离码头、移泊提供顶推、拖带等服务；

5. 为委托人提供货物交接过程中的点数和检查货物表面状况的理货服务；

6. 为船舶提供岸电、燃物料、生活品供应、船员接送及船舶污染物（含油污水、残油、洗舱水、生活污水及垃圾）接收、围油栏供应服务等船舶港口服务；

7. 从事港口设施、设备和港口机械的租赁、维修业务。

（二）港口经营人，是指依法取得经营资格从事港口经营活动的组织和个人。

（三）港口设施，是指为从事港口经营而建造和设置的建（构）筑物。

第四条　交通运输部负责全国港口经营行政管理工作。

省、自治区、直辖市人民政府交通运输（港口）主管部门负责本行政区域内的港口经营行政管理工作。

省、自治区、直辖市人民政府、港口所在地设区的市（地）、县人民政府确定的具体实施港口行政管理的部门负责该港口的港口经营行政管理工作。本款上

述部门统称港口行政管理部门。

第五条 国家鼓励港口经营性业务实行多家经营、公平竞争。港口经营人不得实施垄断行为。任何组织和部门不得以任何形式实施地区保护和部门保护。

第二章 资质管理

第六条 从事港口经营，应当申请取得港口经营许可。

实施港口经营许可，应当遵循公平、公正和公开透明的原则，不得收取费用，并应当接受社会监督。

第七条 从事港口经营（港口理货、船舶污染物接收除外），应当具备下列条件：

（一）有固定的经营场所；

（二）有与经营范围、规模相适应的港口设施、设备，其中：

1. 码头、客运站、库场、储罐、污水处理设施等固定设施应当符合港口总体规划和法律、法规及有关技术标准的要求；

2. 为旅客提供上、下船服务的，应当具备至少能遮蔽风、雨、雪的候船和上、下船设施；

3. 为国际航线船舶服务的码头（包括过驳锚地、浮筒），应当具备对外开放资格；

4. 为船舶提供码头、过驳锚地、浮筒等设施的，应当有相应的船舶污染物、废弃物接收能力和相应污染应急处理能力，包括必要的设施、设备和器材；

（三）有与经营规模、范围相适应的专业技术人员、管理人员；

（四）有健全的经营管理制度和安全管理制度以及生产安全事故应急预案。

第八条 从事港口理货，应当具备下列条件：

（一）与经营范围、规模相适应的组织机构和管理人员、理货员；

（二）有固定的办公场所和经营设施；

（三）有业务章程和管理制度。

第九条 从事船舶污染物接收经营，应当具备下列条件：

（一）有固定的经营场所；

（二）配备海务、机务、环境工程专职管理人员至少各一名，专职管理人员应当具有三年以上相关专业从业资历；

（三）有健全的经营管理制度和安全管理制度以及生产安全事故应急预案；

（四）使用船舶从事船舶污染物接收的，应当拥有至少一艘不低于 300 总吨的适应船舶污染物接收的中国籍船舶；使用港口接收设施从事船舶污染物接收的，港口接收设施应处于良好状态；使用车辆从事船舶污染物接收的，应当拥有至少

一辆垃圾接收、清运专用车辆。

第十条 从事港口装卸和仓储业务的经营人不得兼营理货业务。理货业务经营人不得兼营港口货物装卸经营业务和仓储经营业务。

第十一条 申请从事港口经营，应当提交下列相应文件和资料：

（一）港口经营业务申请书；

（二）经营管理机构的组成及其办公用房的所有权或者使用权证明；

（三）港口码头、库场、储罐、污水处理等固定设施符合国家有关规定的竣工验收证（明）书及港口岸线使用批准文件；

（四）使用港作船舶的，港作船舶的船舶证书；

（五）负责安全生产的主要管理人员通过安全生产法律法规要求的培训证明材料；

（六）证明符合第七条规定条件的其他文件和资料。

从事港口理货业务的，应当提供上述（一）、（二）项规定的材料和理货人员名录以及表明其理货员身份的相应证明材料。

从事船舶污染物接收经营的，应当提供上述（一）、（二）项规定的材料和证明符合第九条规定条件的其他文件和材料。

第十二条 申请从事港口经营（申请从事港口理货除外），申请人应当向港口行政管理部门提出书面申请和第十一条第一款、第三款规定的相关文件资料。港口行政管理部门应当自受理申请之日起三十个工作日内作出许可或者不许可的决定。符合资质条件的，由港口行政管理部门发给《港口经营许可证》，并在因特网或者报纸上公布；不符合条件的，不予行政许可，并应当将不予许可的决定及理由书面通知申请人。《港口经营许可证》应当明确港口经营人的名称与办公地址、法定代表人、经营项目、经营地域、主要设施设备、发证日期、许可证有效期和证书编号。

《港口经营许可证》的有效期为三年。

第十三条 申请从事港口理货，应当向交通运输部提出书面申请和第十一条第二款规定的相关文件资料。交通运输部在收到申请和相关材料后，可根据需要征求地方交通运输（港口）主管部门和相关港口行政管理部门意见。上述部门应当在七个工作日内提出反馈意见。交通运输部应当在受理申请人的申请之日起二十个工作日内作出许可或者不许可的决定。予以许可的，核发《港口经营许可证》，并在交通运输部网站或者报纸上公布；不予许可的，应当将不予许可的决定及理由书面通知申请人。交通运输部在作出许可决定的同时，应当将许可情况通知相关港口的港口行政管理部门。

第十四条 交通运输部和港口行政管理部门对申请人提出的港口经营许可申请，应当根据下列情况分别做出处理：

（一）申请事项依法不需要取得行政许可的，应当即时告知申请人不受理；

（二）申请事项依法不属于交通运输部或者港口行政管理部门职权范围的，应当即时告知申请人向有关行政机关申请；

（三）申请材料存在可以当场更正的错误的，应当允许申请人当场更正；

（四）申请材料不齐全或者不符合法定形式的，应当当场或者在五日内一次告知申请人需要补正的全部内容，逾期不告知的，自收到申请材料之日起即为受理；

（五）申请事项属于交通运输部或者港口行政管理部门职权范围，申请材料齐全、符合法定形式，或者申请人按照要求提交全部补正申请材料的，应当受理经营业务许可申请。

受理或者不受理经营业务许可申请，应当出具加盖许可机关专用印章和注明日期的书面凭证。

第十五条 申请人凭港口行政管理部门或者交通运输部核发的《港口经营许可证》到工商管理部门办理工商登记，取得营业执照后方可从事港口业务。

第十六条 港口经营人应当按照港口行政管理部门许可的经营范围从事港口经营活动。

第十七条 港口经营人变更经营范围的，应当就变更事项按照本规定第十二条或者第十三条规定办理许可手续，并到工商部门办理相应的变更登记手续。

港口经营人变更企业法定代表人或者办公地址的，应当向港口行政管理部门备案并换发《港口经营许可证》。

第十八条 港口经营人应当在《港口经营许可证》有效期届满之日 30 日以前，向《港口经营许可证》发证机关申请办理延续手续。

申请办理《港口经营许可证》延续手续，应当提交下列材料：

（一）《港口经营许可证》延续申请；

（二）除本规定第十一条第一款第（一）、（二）项之外的其他证明材料。

第十九条 港口经营人停业或者歇业，应当提前三十个工作日告知原许可机关。原许可机关应当收回并注销其《港口经营许可证》，并以适当方式向社会公布。

第三章 经营管理

第二十条 港口行政管理部门及相关部门应当保证港口公用基础设施的完好、畅通。

港口经营人应当按照核定的功能使用和维护港口经营设施、设备，并使其保持正常状态。

第二十一条 港口经营人变更或者改造码头、堆场、仓库、储罐和污水垃圾处理设施等固定经营设施，应当依照有关法律、法规和规章的规定履行相应手续。

依照有关规定无需经港口行政管理部门审批的，港口经营人应当向港口行政管理部门备案。

第二十二条 从事港口旅客运输服务的经营人，应当采取必要措施保证旅客运输的安全、快捷、便利，保证旅客基本生活用品的供应，保持良好的候船条件和环境。

第二十三条 港口经营人应当优先安排抢险、救灾和国防建设急需物资的港口作业。

政府在紧急情况下征用港口设施，港口经营人应当服从指挥。港口经营人因此而产生费用或者遭受损失的，下达征用任务的机关应当依法给予相应的经济补偿。

第二十四条 在旅客严重滞留或者货物严重积压阻塞港口的紧急情况下，港口行政管理部门应当采取措施进行疏港。港口所在地的市、县人民政府认为必要时，可以直接采取措施，进行疏港。港口内的单位、个人及船舶、车辆应当服从疏港指挥。

第二十五条 港口行政管理部门应当依法制定可能危及社会公共利益的港口危险货物事故应急预案、重大生产安全事故的旅客紧急疏散和救援预案以及预防自然灾害预案，建立健全港口重大生产安全事故的应急救援体系。

港口行政管理部门按照前款规定制定的各项预案应当予以公布，并报送交通运输部和上级交通运输（港口）主管部门备案。

第二十六条 港口经营人应当依照有关法律、法规和交通运输部有关港口安全作业的规定，加强安全生产管理，完善安全生产条件，建立健全安全生产责任制等规章制度，确保安全生产。

港口经营人应当依法制定本单位的危险货物事故应急预案、重大生产安全事故的旅客紧急疏散和救援预案以及预防自然灾害预案，并保障组织实施。

港口经营人按照前款规定制定的各项预案应当报送港口行政管理部门和港口所在地海事管理机构备案。

第二十七条 港口经营人从事港口经营业务，应当遵守有关法律、法规和规章的规定，依法履行合同约定的义务，为客户提供公平、良好的服务。

第二十八条 港口经营人应当遵守国家有关港口经营价格和收费的规定，应当在其经营场所公布经营服务收费项目和收费标准，使用国家规定的港口经营票据。

第二十九条 港口经营人不得采取不正当手段，排挤竞争对手，限制或者妨碍公平竞争；不得对具有同等条件的服务对象实行歧视；不得以任何手段强迫他人接受其提供的港口服务。

第三十条 港口经营人应当按照有关规定及时足额交纳港口行政性收费。

港口经营人的合法权益受法律保护。任何单位和个人不得向港口经营人摊派

或者违法收取费用。

港口经营人有权拒绝违反规定收取或者摊派的各种费用。

第三十一条 港口行政管理部门应当依法做好港口行政性收费的征管工作，保证港口行政性收费征收到位，并及时足额解缴。

港口行政性收费实行专户管理，专款专用。

第三十二条 港口经营人应当按照国家有关规定，及时向港口行政管理部门如实提供港口统计资料及有关信息。

各级交通运输（港口）主管部门和港口行政管理部门应当按照有关规定向交通运输部和上级交通运输（港口）主管部门报送港口统计资料和相关信息，并结合本地区的实际建设港口管理信息系统。

上述部门的工作人员应当为港口经营人保守商业秘密。

第四章 监督检查

第三十三条 港口行政管理部门应当依法对港口安全生产情况和本规定执行情况实施监督检查，并将检查的结果向社会公布。港口行政管理部门应当对旅客集中、货物装卸量较大或者特殊用途的码头进行重点巡查。检查中发现安全隐患的，应当责令被检查人立即排除或者限期排除。

各级交通运输（港口）主管部门应当加强对港口行政管理部门实施《中华人民共和国港口法》和本规定的监督管理，切实落实法律规定的各项制度，及时纠正行政执法中的违法行为。

第三十四条 港口行政管理部门的监督检查人员依法实施监督检查时，有权向被检查单位和有关人员了解情况，并可查阅、复制有关资料。

监督检查人员应当对检查中知悉的商业秘密保密。

监督检查人员实施监督检查，应当两个人以上，并出示执法证件。

第三十五条 监督检查人员应当将监督检查的时间、地点、内容、发现的问题及处理情况作出书面记录，并由监督检查人员和被检查单位的负责人签字；被检查单位的负责人拒绝签字的，监督检查人员应当将情况记录在案，并向港口行政管理部门报告。

第三十六条 被检查单位和有关人员应当接受港口行政管理部门依法实施的监督检查，如实提供有关情况和资料，不得拒绝检查或者隐匿、谎报有关情况和资料。

第五章 法律责任

第三十七条 有下列行为之一的，由港口行政管理部门责令停止违法经营，没收违法所得；违法所得十万元以上的，并处违法所得二倍以上五倍以下罚款；违法所得不足十万元的，处五万元以上二十万元以下罚款：

（一）未依法取得港口经营许可证，从事港口经营的；

（二）未经依法许可，经营港口理货业务的；

（三）港口理货业务经营人兼营货物装卸经营业务、仓储经营业务的。

有前款第（三）项行为，情节严重的，由交通运输部吊销港口理货业务经营许可证，并以适当方式向社会公布。

第三十八条 经检查或者调查证实，港口经营人在取得经营许可后又不符合本规定第七、八、九条规定一项或者几项条件的，由港口行政管理部门责令其停止经营，限期改正；逾期不改正的，由作出行政许可决定的行政机关吊销《港口经营许可证》，并以适当方式向社会公布。

第三十九条 港口经营人不优先安排抢险物资、救灾物资、国防建设急需物资的作业的，由港口行政管理部门责令改正；造成严重后果的，吊销《港口经营许可证》，并以适当方式向社会公布。

第四十条 港口经营人违反本规定第二十六条关于安全生产规定的，由港口行政管理部门或者其他依法负有安全生产监督管理职责的部门依法给予处罚；情节严重的，由港口行政管理部门吊销《港口经营许可证》；构成犯罪的，依法追究刑事责任。

第四十一条 港口经营人违反本规定第二十七条、第二十八条规定，港口行政管理部门应当进行调查，并协助相关部门进行处理。

第四十二条 港口经营人违反本规定第三十二条规定不及时和不如实向港口行政管理部门提供港口统计资料及有关信息的，由港口行政管理部门按照有关法律、法规的规定予以处罚。

第四十三条 港口行政管理部门不依法履行职责，有下列行为之一的，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；构成犯罪的，依法追究刑事责任：

（一）对不符合法定条件的申请人给予港口经营许可的；

（二）发现取得经营许可的港口经营人不再具备法定许可条件而不及时吊销许可证的；

（三）不依法履行监督检查职责，对未经依法许可从事港口经营的行为，不遵守安全生产管理规定的行为，危及港口作业安全的行为，以及其他违反本法规定的行为，不依法予以查处的。

第四十四条 港口行政管理部门违法干预港口经营人的经营自主权的，由其上级行政机关或者监察机关责令改正。向港口经营人摊派财物或者违法收取费用的，责令退回；情节严重的，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。

第六章 附则

第四十五条 《港口经营许可证》的式样由交通运输部统一规定，由省级交通运输（港口）主管部门负责印制。

第四十六条 港口行政管理部门按照《中华人民共和国港口法》制定的港口章程应当在公布的同时送上级交通运输（港口）主管部门和交通运输部备案。

第四十七条 港口引航适用《船舶引航管理规定》（交通部令 2001 年第 10 号）。从事危险货物港口作业的，应当同时遵守《港口危险货物管理规定》（交通部令 2003 年第 9 号）。

第四十八条 本规定由交通运输部负责解释。

第四十九条 本规定自 2010 年 3 月 1 日起施行。2003 年 12 月 26 日交通部发布的《港口经营管理规定》（交通部令 2004 年第 4 号）同时废止。

哥本哈根协议文件

各国领导人、政府首脑、官员以及其他出席本次在哥本哈根举行的联合国 2009 年气候变化会议的代表：

为最终达成本协议第二款所述的会议目标，在会议原则和愿景的指引下，考虑到两个特别工作组的工作成果，我们同意特别工作组关于长期合作行动的 x/CP.15 号决议，以及继续按照特别工作组 x/CMP.5 号决议要求，履行附录 I 根据京都议定书列出的各方义务。

我们同意此哥本哈根协议，并立即开始执行。

一、我们强调，气候变化是我们当今面临的最重大挑战之一。我们强调对抗气候变化的强烈政治意愿，以及“共同但区别的责任”原则。为最终达成最终的会议目标，稳定温室气体在大气中的浓度以及防止全球气候继续恶化，我们必须在认识到全球气候升幅不应超过 2 摄氏度的科学观点后，在公正和可持续发展的基础上，加强长期合作以对抗气候变化。我们认识到气候变化的重大影响，以及对一些受害尤其严重的国家的应对措施的潜在影响，并强调建立一个全面的应对计划并争取国际支持的重要性。

二、我们同意，从科学角度出发，必须大幅度减少全球碳排放，并应当依照 IPCC 第四次评估报告所述愿景，将全球气温升幅控制在 2 摄氏度以下，并在公平的基础上行动起来以达成上述基于科学研究的目标。我们应该合作起来以尽快实现全球和各国碳排放峰值，我们认识到发展中国家碳排放达到峰值的时间框架可能较长，并且认为社会和经济发展以及消除贫困对于发展中国家来说仍然是首要的以及更为重要的目标，不过低碳排放的发展战略对可持续发展而言是必不可少的。

三、所有国家均面临气候变化的负面影响，为此应当支持并实行旨在降低发展中国家受害程度并加强其应对能力的行动，尤其是最不发达国家和位于小岛屿的发展中国家以及非洲国家，我们认为发达国家应当提供充足的、可预测的和持续的资金资源、技术以及经验，以支持发展中国家实行对抗气候变化举措。

四、附录 I 各缔约方将在 2010 年 1 月 31 日之前向秘书处提交经济层面量化的 2020 年排放目标，并承诺单独或者联合执行这些目标。这些目标的格式如附录 I 所示。附录 I 国家中，属于《京都议定书》缔约方的都将进一步加强该议定书提出的碳减排。碳减排和发达国家的资金援助的衡量、报告和核实工作，都将根据现存的或者缔约方大会所采纳的任何进一步的方针进行，并将确保这些目标

和融资的计算是严格、健全、透明的。

五、附录 I 非缔约方将根据第四条第一款和第四条第七款、在可持续发展的情况下实行延缓气候变化举措，包括在 2010 年 1 月 31 日之前按照附录 II 所列格式向秘书处递交的举措。最不发达国家及小岛屿发展中国家可以在得到扶持的情况下，自愿采取行动。

附录 I 非缔约方采取的和计划采取的减排措施应根据第十二条第一款 (b)，以缔约方大会采纳的方针为前提，每两年通过国家间沟通来交流。这些通过国家间沟通或者向秘书处报告的减排措施将被添加进附录 II 的列表中。

附录 I 非缔约方采取的减排措施将需要对每两年通过国家间沟通进行报告结果在国内进行衡量、报告和审核。附录 I 非缔约方将根据那些将确保国家主权得到的尊重的、明确界定的方针，通过国家间沟通，交流各国减排措施实施的相关信息，为国际会议和分析做好准备。寻求国际支持的合适的国家减排措施将与相关的技术和能力扶持一起登记在案。那些获得扶持的措施将被添加进附录 II 的列表中。

这些得到扶持的合适的国家减排措施将有待根据缔约方大会采纳的方针进行国际衡量、报告和审核。

六、我们认识到，减少滥伐森林和森林退化引起的碳排放是至关重要的，我们需要提高森林对温室气体的清除量，我们认为有必要通过立即建立包括 REDD+ 在内的机制，为这类举措提供正面激励，促进发达国家提供的援助资金的流动。

七、我们决定采取各种方法，包括使用碳交易市场的机会，来提高减排措施的成本效益，促进减排措施的实行；应该给发展中国家提供激励，以促使发展中国家实行低排放发展战略。

八、在符合大会相关规定的前提下，应向发展中国家提供更多的、新的、额外的以及可预测的和充足的资金，并且令发展中国家更容易获取资金，以支持发展中国家采取延缓气候变化的举措，包括提供大量资金以减少滥砍滥伐和森林退化产生的碳排放 (REDD+)、支持技术开发和转让、提高减排能力等，从而提高该协定的执行力。

发达国家所作出的广泛承诺将向发展中国家提供新的额外资金，包括通过国际机构进行的林业保护和投资、在 2010 年至 2012 年期间提供 300 亿美元。对于那些最容易受到冲击的发展中国家如最不发达国家、小岛屿发展中国家以及非洲国家而言，为该协定的采用提供融资支持将是最优先的任务。

在实际延缓气候变化举措和实行减排措施透明的背景下，发达国家承诺在 2020 年以前每年筹集 1000 亿美元资金用于解决发展中国家的减排需求。这些资金将有多种来源，包括政府资金和私人资金、双边和多边筹资，以及另类资金来源。多边资金的发放将通过实际和高效的资金安排，以及为发达国家和发展中国

家提供平等代表权的治理架构来实现。此类资金中的很大一部分将通过哥本哈根绿色气候基金（Copenhagen Green Climate Fund）来发放。

九、最后，为达成这一目标，一个高水准的工作小组将在缔约方会议的指导下建立并对会议负责，以研究潜在资金资源的贡献度，包括另类资金来源。

十、我们决定，应该建立哥本哈根气候基金，并将该基金作为缔约方协议的金融机制的运作实体，以支持发展中国家包括 REDD+、适应性行动、产能建设以及技术研发和转让等用于延缓气候变化的方案、项目、政策及其他活动。

十一、为了促进技术开发与转让，我们决定建立技术机制（Technology Mechanism），以加快技术研发和转让，支持适应和延缓气候变化的行动。这些行动将由各国主动实行，并基于各国国情确定优先顺序。

十二、我们呼吁，在 2015 年结束以前完成对该协议及其执行情况的评估，包括该协议的最终目标。这一评估还应包括加强长期目标，比如将全球平均气温升幅控制在 1.5 摄氏度以内等。

IMO 在吉布提通过关于打击海盗及海上武装抢劫行为守则

2009 年 1 月 26 日，针对索马里及亚丁湾海域的海盗和海上武装抢劫行为，IMO 召集来自西印度洋，亚丁湾以及红海地区的 17 个国家在吉布提举行高层领导会议。会上通过了一项关于打击西印度洋及亚丁湾地区海盗和海上武装抢劫行为的守则（即“行动守则”）。

守则认识到此区域海盗及海上武装抢劫行为的严重程度，所有签署国声明将依据国际法之要求进行全面合作，通过国家联络点和信息中心系统分享和报告相关信息；阻截疑似从事海盗或海上武装抢劫行为的船只；确保逮捕并起诉所有进行或打算进行海盗或海上武装抢劫行为的人员：对遭遇以上事件（特别是暴力事件）的海员、渔民及船上其他人员和乘客进行适当照顾、治疗并护送回国。所有参与国应进行全面合作，以对海盗或有理由认为已有海盗行为嫌疑的人员进行逮捕、调查和起诉；扣留可疑船只及船上财物：营救被劫船舶、人员和财产。当然，此类行动应依据国际法之规定施行。

守则还规定了共同行动之责任，例如指派执法人员或授权官员登上其他签署国的巡逻船或飞机。守则进一步要求设立打击海盗和海上武装抢劫的国家联络点、分享所报事件的相关信息。签署国意欲利用分别设在肯尼亚、坦桑尼亚和也门共和国的信息交换中心，设在蒙巴萨的地区海上救援协调中心，设在达累斯萨拉姆的次区域合作协调中心，以及正在萨那建立的区域海上信息中心进行沟通并获得相关信息。

会议还建议根据守则，通过一项决议，建立地区性培训中心；并感谢吉布提提议承担此项任务。每个签署国应审查其国家立法，确保具备相关法律以惩处海盗和海上武装抢劫行为，并制定适当指南以指导对犯罪嫌疑人行使管辖、进行调查和起诉。

守则欢迎该区域内的 21 个国家签署，其中吉布提、埃塞俄比亚、肯尼亚、马达加斯加、马尔代夫、塞舌尔、索马里、坦桑尼亚联合共和国和也门 9 个国家在会议闭幕时已经签署。至此，协议于 2009 年 1 月 29 日生效。

IMO 批准 HNS 协定书草案以推动 1996HNS 公约生效

IMO 法律委员会第 95 次会议于 2009 年 3 月 30 日至 4 月 3 日在 IMO 伦敦总部召开。会上通过了 1996HNS 公约，即《国际海上危险品和有毒物质运输责任和损害赔偿公约》（Hazardous and noxious substances）的协定书草案。

协定书草案是为解决妨碍各国批准原公约的实际问题出台的，尽管公约于 1996 年通过，但至今只有 13 个国家批准，与生效条件还有相当距离。

根据 1996HNS 公约规定，在满足下述条件的 18 个月之后，公约生效：

•12 个国家批准接受公约，其中 4 个国家的总吨位不少于 200 万总吨。

• 缔约国中负责向总账户捐款人在前一年已接受了总量不少于 4000 万吨的摊款货。

国际海洋法法庭修改法庭规则

国际海洋法法庭于 2009 年 3 月 17 日修正了法庭规则的第 113 条第 3 款、第 114 条第 1 款、第 3 款。通过修改这些条款，国际海洋法法庭可以在迅速释放船舶和船员的案件中决定保证书或其他财务担保向法庭书记官长或者扣押国提供。在规则修改之前，其规定保证书和其他财务担保必须是向扣押国提供，除非两国另有协议。此举是为了便于法庭裁决在迅速释放程序中的执行。修改后的条款如下：

Article 113，paragraph 3：

“Unless the parties agree otherwise, the Tribunal shall determine whether the bond or other financial security shall be posted with the Registrar or with the detaining State.”

Article 114，paragraph 1：

“If the bond or other financial security has been posted with the Registrar，the detaining State shall be promptly notified thereof.”

Article 114，paragraph 3：

“The bond or other financial security shall be endorsed or transmitted，to the extent that it is not required to satisfy the final judgment，award or decision, to the party at whose request the bond or other financial security is issued.

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

PREAMBLE

The Parties to this Agreement,

Deeply concerned about the continuation of illegal, unreported and unregulated fishing and its detrimental effect upon fish stock, smarine ecosystems and the livelihoods of legitimate fishers, and the increasing need for food security on a global basis,

Conscious of the role of the port State in the adoption of effective measures to promote the sustainable use and the long-term conservation of living marine resources,

Recognizing that measures to combat illegal, unreported and unregulated fishing should build on the primary responsibility of flag States and use all available jurisdiction in accordance with international law, including port State measures, coastal State measures, market related measures and measures to ensure that nationals do not support or engage in illegal, unreported and unregulated fishing,

Recognizing that port State measures provide a powerful and cost-effective means of preventing, deterring and eliminating illegal, unreported and unregulated fishing,

Aware of the need for increasing coordination at the regional and interregional levels to combat illegal, unreported and unregulated fishing through port State measures,

Acknowledging the rapidly developing communications technology, databases, networks and global records that support port State measures,

Recognizing the need for assistance to developing countries to adopt and implement port State measures,

Taking note of the calls by the international community through the United Nations System, including the United Nations General Assembly and the Committ-

ee on Fisheries of the Food and Agriculture Organization of the United Nations, hereinafter referred to as'FAO', for a binding international instrument on minimum standards for port State measures, based on the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing,

Bearing in mind that，in the exercise of their sovereignty over ports located in their territory, States may adopt more stringent measures, in accordance with international law,

Recalling the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, hereinafter referred to as the 'Convention',

Recalling the 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 of 4 December 1995, the Agreement to Promote Compli-ance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 and the 1995 FAO Code of Conduct for Responsible Fisheries,

Recognizing the need to conclude an international agreement within the framework of FAO, under Article XIV of the FAO Constitution,

Have agreed as follows:

PART 1 GENERAL PROVISIONS

Article 1 Use of terms

For the purposes of this Agreement:

(a) "conservation and management measures" means measures to conserve and manage living marine resources that are adopted and applied consistently with the relevant rules of international law including those reflected in the Convention;

(b) "fish" means all species of living marine resources, whether processed or not;

(c) "fishing" means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish;

(d) "fishing related activities" means any operation in support of, or in prepar-

ation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea;

(e) "illegal, unreported and unregulated fishing" refers to the activities setout in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, hereinafter referred to as 'IUU fishing';

(f) "Party" means a State or regional economic integration organization that has consented to be bound by this Agreement and for which this Agreement is in force;

(g) "port" includes offshore terminals and other installations for landing, transshipping, packaging, processing, refuelling or resupplying;

(h) "regional economic integration organization" means a regional economic integration organization to which its member States have transferred competence over matters covered by this Agreement, including the authority to make decisions binding on its member States in respect of those matters;

(i) "regional fisheries management organization" means an intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures; and

(j) "vessel" means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related ac-tivities.

Article 2 Objective

The objective of this Agreement is to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.

Article 3 Application

1. Each Party shall, in its capacity as a port State, apply this Agreement in respect of vessels not entitled to fly its flag that are seeking entry to its ports or are in one of its ports, except for:

(a) vessels of a neighbouring State that are engaged in artisanal fishing for subsistence, provided that the port State and the flag State cooperate to ensure that such vessels do not engage in IUU fishing or fishing related activities in support of such fishing; and

(b) container vessels that are not carrying fish or, if carrying fish, only fish that have been previously landed, provided that there are no clear grounds for suspectin-

g that such vessels have engaged in fishing related activities in support of IUU fishing.

2. A Party may, in its capacity as a port State, decide not to apply this Agreement to vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority therein. Such vessels shall be subject to measures by the Party which are as effective as measures applied in relation to vessels entitled to fly its flag.

3. This Agreement shall apply to fishing conducted in marine areas that is illegal, unreported or unregulated, as defined in Article I(e) of this Agreement, and to fishing related activities in support of such fishing.

4. This Agreement shall be applied in a fair, transparent and non-discriminatory manner, consistent with international law.

5. As this Agreement is global in scope and applies to all ports, the Parties shall encourage all other entities to apply measures consistent with its provisions. Those that may not otherwise become Parties to this Agreement may express their commitment to act consistently with its provisions.

Article 4 Relationship with international law and other international instruments

1. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of Parties under international law. In particular, nothing in this Agreement shall be construed to affect:

(a) the sovereignty of Parties over their internal, archipelagic and territorial waters or their sovereign rights over their continental shelf and in their exclusive economic zones;

(b) the exercise by Parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny entry thereto as well as to adopt more stringent port State measures than those provided forin this Agreement, including such measures adopted pursuant to a decision of a regional fisheries management organization.

2. In applying this Agreement, a Party does not thereby become bound by measures or decisions of, or recognize, any regional fisheries management organization of which it is not a member.

3. In no case is a Party obliged under this Agreement to give effect to measures or decisions of a regional fisheries management organization if those measures or decisions have not been adopted in conformity with international law.

4.This Agreement shall be interpreted and applied in conformity with internati-

onal law taking into account applicable international rules and standards, including those established through the International Maritime Organization, as well as other international instruments.

5. Parties shall fulfil in good faith the obligations assumed pursuant to this Agreement and shall exercise the rights recognized herein in a manner that would not constitute an abuse of right.

Article 5 Integration and coordination at the national level

Each Party shall, to the greatest extent possible:

(a) integrate or coordinate fisheries related port State measures with the broader system of port State controls;

(b) integrate port State measures with other measures to prevent, deter and eliminate IUU fishing and fishing related activities in support of such fishing, taking into account as appropriate the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing; and

(c) take measures to exchange information among relevant national agencies and to coordinate the activities of such agencies in the implementation of this Agreement.

Article 6 Cooperation and exchange of information

1. In order to promote the effective implementation of this Agreement and with due regard to appropriate confidentiality requirements, Parties shall cooperate and exchange information with relevant States, FAO, other internationalorganizations and regional fisheries management organizations, including onthe measures adopted by such regional fisheries management organizations in relation to the objective of this Agreement.

2. Each Party shall, to the greatest extent possible, take measures in support of conservation and management measures adopted by other States and other relevant international organizations.

3. Parties shall cooperate, at the subregional, regional and global levels, in the effective implementation of this Agreement including, where appropriate, through FAO or regional fisheries management organizations and arrange-ments.

PART 2 ENTRY INTO PORT

Article 7 Designation of ports

1. Each Party shall designate and publicize the ports to which vessels may req-

uest entry pursuant to this Agreement. Each Party shall provide a list of its designated ports to FAO, which shall give it due publicity.

2. Each Party shall, to the greatest extent possible, ensure that every port designated and publicized in accordance with paragraph 1 of this Article has sufficient capacity to conduct inspections pursuant to this Agreement.

Article 8 Advance request for port entry

1. Each Party shall require, as a minimum standard, the information requested in Annex A to be provided before granting entry to a vessel to its port.

2. Each Party shall require the information referred to in paragraph 1 of this Article to be provided sufficiently in advance to allow adequate time for the port State to examine such information.

Article 9 Port entry, authorization or denial

1. After receiving the relevant information required pursuant to Article 8, as well as such other information as it may require to determine whether the vessel requesting entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, each Party shall decide whether to authorize or deny the entry of the vessel into its port and shall communicate this decision to the vessel or to its representative.

2. In the case of authorization of entry, the master of the vessel or the vessel's representative shall be required to present the authorization for entry to the competent authorities of the Party upon the vessel's arrival at port.

3. In the case of denial of entry, each Party shall communicate its decision taken pursuant to paragraph I of this Article to the flag State of the vessel and, as appropriate and to the extent possible, relevant coastal States, regional fisheries management organizations and other international organizations.

4. Without prejudice to paragraph 1 of this Article, when a Party has sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, in particular the inclusion of a vessel on a list of vessels having engaged in such fishing or fishing related activities adopted by a relevant regional fisheries management organization in accordance with the rules and procedures of such organization and inconformity with international law, the Party shall deny that vessel entry into its ports, taking into due account paragraphs 2 and 3 of Article 4.

5. Notwithstanding paragraphs 3 and 4 of this Article, a Party may allow entry into its ports of a vessel referred to in those paragraphs exclusively forthe purpose of inspecting it and taking other appropriate actions in conformity with international

law which are at least as effective as denial of port entry in preventing, deterring and eliminating IUU fishing and fishing related activities in support of such fishing.

6. Where a vessel referred to in paragraph 4 or 5 of this Article is in port for any reason, a Party shall deny such vessel the use of its ports for landing, transshipping, packaging, and processing of fish and for other port services including, inter alia, refuelling and resupplying, maintenance and drydocking.Paragraphs 2 and 3 of Article 11 apply mutatis mutandis in such cases. Denial of such use of ports shall be in conformity with international law.

Article 10 Force majeure or distress

Nothing in this Agreement affects the entry of vessels to port in accordance with international law for reasons of force majeure or distress, or prevents a port State from permitting entry into port to a vessel exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

PART 3 USE OF PORTS

Article 11 Use of ports

1. Where a vessel has entered one of its ports, a Party shall deny, pursuant to its laws and regulations and consistent with international law, including this Agreement, that vessel the use of the port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, inter alia, refuelling and resupplying, maintenance and drydocking, if:

(a) the Party finds that the vessel does not have a valid and applicable authorization to engage in fishing or fishing related activities required by its flag State;

(b) the Party finds that the vessel does not have a valid and applicable authorization to engage in fishing or fishing related activities required by a coastal State in respect of areas under the national jurisdiction of that State;

(c) the Party receives clear evidence that the fish on board was taken in contravention of applicable requirements of a coastal State in respect of areas under the national jurisdiction of that State;

(d) the flag State does not confirm within a reasonable period of time, on the request of the port State, that the fish on board was taken in accordance with applicable requirements of a relevant regional fisheries management or-ganization taking into due account paragraphs 2 and 3 of Article 4; or

(e) the Party has reasonable grounds to believe that the vessel was otherwise

engaged in IUU fishing or fishing related activities in support of such fishing, including in support of a vessel referred to in paragraph 4 of Article 9, unless the vessel can establish：

(i) that it was acting in a manner consistent with relevant conservation and management measures; or

(ii) in the case of provision of personnel, fuel, gear and other supplies at sea, that the vessel that was provisioned was not, at the time of provisioning, a vessel referred to in paragraph 4 of Article 9.

2. Notwithstanding paragraph 1 of this Article, a Party shall not deny a vessel referred to in that paragraph the use of port services;

(a) essential to the safety or health of the crew or the safety of the vessel, provided these needs are duly proven, or

(b) where appropriate, for the scrapping of the vessel.

3. Where a Party has denied the use of its port in accordance with this Article, it shall promptly notify the flag State and, as appropriate, relevant coastal States, regional fisheries management organizations and other relevant international organizations of its decision.

4. A Party shall withdraw its denial of the use of its port pursuant to paragraph 1 of this Article in respect of a vessel only if there is sufficient proof that the grounds on which use was denied were inadequate or erroneous or that such grounds no longer apply.

5. Where a Party has withdrawn its denial pursuant to paragraph 4 of this Article, it shall promptly notify those to whom a notification was issued pursuant to paragraph 3 of this Article.

PART 4 INSPECTIONS AND FOLLOW-UP ACTIONS

Article 12 Levels and priorities for inspection

1. Each Party shall inspect the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of this Agreement.

2. Parties shall seek to agree on the minimum levels for inspection of vessels through, as appropriate, regional fisheries management organizations, FAO or otherwise.

3. In determining which vessels to inspect，a Party shall give priority to：

(a) vessels that have been denied entry or use of a port in accordance withthis

Agreement;

(b) requests from other relevant Parties, States or regional fisheries managemement organizations that particular vessels be inspected, particularly where such requests are supported by evidence of IUU fishing or fishing related activities in support of such fishing by the vessel in question; and

(c) other vessels for which there are clear grounds for suspecting that they have engaged in IUU fishing or fishing related activities in support of such fishing.

Article 13 Conduct of inspections

1. Each Party shall ensure that its inspectors carry out the functions set forth in Annex B as a minimum standard.

2. Each Party shall, in carrying out inspections in its ports:

(a) ensure that inspections are carried out by properly qualified inspectors authorized for that purpose, having regard in particular to Article 17;

(b) ensure that, prior to an inspection, inspectors are required to present to the master of the vessel an appropriate document identifying the inspectors as such;

(c) ensure that inspectors examine all relevant areas of the vessel, the fish on board, the nets and any other gear, equipment, and any document or record on board that is relevant to verifying compliance with relevant conservation and management measures;

(d) require the master of the vessel to give inspectors all necessary assistance and information, and to present relevant material and documents as maybe required, or certified copies thereof;

(e) in case of appropriate arrangements with the flag State of the vessel, invite that State to participate in the inspection;

(f) make all possible efforts to avoid unduly delaying the vessel to minimize interference and inconvenience, including any unnecessary presence of in-spectors on board, and to avoid action that would adversely affect the quality of the fish on board;

(g) make all possible efforts to facilitate communication with the master or senior crew members of the vessel, including where possible and where needed that the inspector is accompanied by an interpreter;

(h) ensure that inspections are conducted in a fair, transparent and nondiscriminatory manner and would not constitute harassment of any vessel; and

(i) not interfere with the master's ability, in conformity with international law, to communicate with the authorities of the flag State.

Article 14 Results of inspections

Each Party shall，as a minimum standard，include the information set out in Annex C in the written report of the results of each inspection.

Article 15 Transmittal of inspection results

Each Party shall transmit the results of each inspection to the flag State of the inspected vessel and, as appropriate, to:

(a) relevant Parties and States, including：

(i) those States for which there is evidence through inspection that the vessel has engaged in IUU fishing or fishing related activities in support of such fishing within waters under their national jurisdiction; and

(ii) the State of which the vessel's master is a national; (b) relevant regional fisheries management organizations; and (c) FAO and other relevant international organizations.

Article 16 Electronic exchange of information

1. To facilitate implementation of this Agreement, each Party shall, where possible, establish a communication mechanism that allows for direct electronic exchange of information, with due regard to appropriate confidentiality re-quirements.

2. To the extent possible and with due regard to appropriate confidentiality requirements, Parties should cooperate to establish an information sharing mechanism, preferably coordinated by FAO, in conjunction with other relevantmultilateral and intergovernmental initiatives, and to facilitate the exchange of information with existing databases relevant to this Agreement.

3. Each Party shall designate an authority that shall act as a contact point for the exchange of information under this Agreement. Each Party shall notify the pertinent designation to FAO.

4. Each Party shall handle information to be transmitted through any mechanism established under paragraph 1 of this Article consistent with Annex D.

5. FAO shall request relevant regional fisheries management organizations to provide information concerning the measures or decisions they have adopted and implemented which relate to this Agreement for their integration, to the extent possible and taking due account of the appropriate confidentiality requirements, into the information sharing mechanism referred to in paragraph 2 of this Article.

Article 17 Training of inspectors

Each Party shall ensure that its inspectors are properly trained taking into account the guidelines for the training of inspectors in Annex E. Parties shall seek to cooperate in this regard.

Article 18 Port State actions following inspection

1. Where, following an inspection, there are clear grounds for believing that a vessel has engaged in IUU fishing or fishing related activities in support of such fishing, the inspecting Party shall：

(a) promptly notify the flag State and, as appropriate, relevant coastal States, r-egional fisheries management organizations and other international organizations，and the State of which the vessel's master is a national of its findings; and

(b) deny the vessel the use of its port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, inter alia, refuelling and resupplying, maintenance and drydocking, if these actions have not already been taken in respect of the vessel, in a manner consistent with this Agreement, including Article 4.

2. Notwithstanding paragraph 1 of this Article, a Party shall not deny a vessel referred to in that paragraph the use of port services essential for the safety or healt-h of the crew or the safety of the vessel.

3. Nothing in this Agreement prevents a Party from taking measures that are in conformity with international law in addition to those specified in paragraphs 1 and 2 of this Article, including such measures as the flag State of the vessel has expressly requested or to which it has consented.

Article 19 Information on recourse in the port State

1. A Party shall maintain the relevant information available to the public and provide such information, upon written request, to the owner, operator,master or representative of a vessel with regard to any recourse established in accordance with its national laws and regulations concerning port State measures taken by that Party pursuant to Articles 9, 11, 13 or 18, including infor-mation pertaining to the public services or judicial institutions available for this purpose, as well as information on whether there is any right to seek compensation in accordance with its national laws and regulations in the event of any loss or damage suffered as a consequence of any alleged unlawful action by the Party.

2. The Party shall inform the flag State, the owner, operator, master or representative, as appropriate, of the outcome of any such recourse. Where other Parties, States or international organizations have been informed of the prior decision pursuant to Articles 9, 11, 13 or 18, the Party shall inform them of any change in its decision.

PART 5 ROLE OF FLAG STATES

Article 20 Role of flag States

1. Each Party shall require the vessels entitled to fly its flag to cooperate with the port State in inspections carried out pursuant to this Agreement.

2. When a Party has clear grounds to believe that a vessel entitled to fly itsflag has engaged in IUU fishing or fishing related activities in support of such fishing and is seeking entry to or is in the port of another State, it shall, as appropriate, request that State to inspect the vessel or to take other measures consistent with this Agreement.

3. Each Party shall encourage vessels entitled to fly its flag to land, trans-ship, package and process fish，and use other port services, in ports of States that are acting in accordance with, or in a manner consistent with this Agreement. Parties are encouraged to develop, including through regional fisheries management organizations and FAO, fair, transparent and nondiscriminatory procedures for identifying any State that may not be acting in accordance with，or in a manner consistent with，this Agreement.

4. Where, following port State inspection, a flag State Party receives an inspection report indicating that there are clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or fishing related activities in support of such fishing, it shall immediately and fully investigate the matter and shall, upon sufficient evidence, take enforcement action without delay in accordance with its laws and regulations.

5. Each Party shall, in its capacity as a flag State, report to other Parties, relevant port States and, as appropriate, other relevant States, regional fisheries management organizations and FAO on actions it has taken in respect of vessels entitled to fly its flag that, as a result of port State measures taken pursuant to this Agreement, have been determined to have engaged in IUU fishing or fishing related activities in support of such fishing.

6. Each Party shall ensure that measures applied to vessels entitled to fly its flag are at least as effective in preventing, deterring, and eliminating IUU fishing and fishing related activities in support of such fishing as measures applied to vessels referred on in paragraph 1 of Article 3.

PART 6 REQUIREMENTS OF DEVELOPING STATFS

Article 21 Requirements of developing States

1. Parties shall give full recognition to the special requirements of developing States Parties in relation to the implementation of port State measures consistent with this Agreement. To this end, Parties shall, either directly or through FAO, other specialized agencies of the United Nations or other appropriate international organizations and bodies, including regional fisheries management organizations, provide assistance to developing States Parties in order to, inter alia:

(a) enhance their ability, in particular the least-developed among them and small island developing States, to develop a legal basis and capacity for the implementation of effective port State measures;

(b) facilitate their participation in any international organizations that promote the effective development and implementation of port State measures; and

(c) facilitate technical assistance to strengthen the development and implementation of port State measures by them, in coordination with relevant international mechanisms.

2. Parties shall give due regard to the special requirements of developing port States Parties, in particular the least-developed among them and small island developing States, to ensure that a disproportionate burden resulting from the implementation of this Agreement is not transferred directly or indirectly to them. In cases where the transfer of a disproportionate burden has been demonstrated, Parties shall cooperate to facilitate the implementation by the relevant developing States Parties of specific obligations under this Agreement.

3. Parties shall, either directly or through FAO, assess the special requirements of developing States Parties concerning the implementation of this Agreement.

4. Parties shall cooperate to establish appropriate funding mechanisms to assist developing States in the implementation of this Agreement. These mechanisms shall, inter alia, be directed specifically towards:

(a) developing national and international port State measures;

(b) developing and enhancing capacity, including for monitoring, control and surveillance and for training at the national and regional levels of port managers, inspectors, and entorcement and legal personnel;

(c) monitoring, control, surveillance and compliance activities relevant to port

State measures, including access to technology and equipment; and

(d) assisting developing States Parties with the costs involved in any proceedings for the settlement of disputes that result from actions they have taken pursuant to this Agreement.

5. Cooperation with and among developing States Parties for the purposes set out in this Article may include the provision of technical and financial assistance through bilateral, multilateral and regional channels, including South-South cooperation.

6. Parties shall establish an *ad hoc* working group to periodically report and make recommendations to the Parties on the establishment of funding mechanisms including a scheme for contributions, identification and mobilization of funds, the development of criteria and procedures to guide implementation, and progress in the implementation of the funding mechanisms. In addition to the considerations provided in this Article, the *ad hoc* working group shall take into account, inter alia:

(a) the assessment of the needs of developing States Parties, in particular the least- developed among them and small island developing States;

(b) the availability and timely disbursement of funds;

(c) transparency of decision-making and management processes concerning fund raising and allocations; and

(d) accountability of the recipient developing States Parties in the agreed use of funds. Parties shall take into account the reports and any recommendations of the *ad hoc* working group and take appropriate action.

PART 7 DISPUTE SETTLEMENT

Article 22 Peaceful settlement of disputes

1. Any Party may seek consultations with any other Party or Parties on any dispute with regard to the interpretation or application of the provisions of this Ageement with a view to reaching a mutually satisfactory solution as soon as possible.

2. In the event that the dispute is not resolved through these consultations within a reasonable period of timethe Parties in question shall consult among themselves as soon as possible with a view to having the dispute settled by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

3. Any dispute of this character not so resolved shall, with the consent of all Parties to the dispute, be referred for settlement to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration. In the case of failure to reach agreement on referral to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration, the Parties shall continue to consult and cooperate with a view to reaching settlement of the dispute in accordance with the rules of international law relating to the conservation of living marine resources.

PART 8 NON-PARTIES

Article 23 Non-Parties to this Agreement

1. Parties shall encourage non-Parties to this Agreement to become Parties thereto and/or to adopt laws and regulations and implement measures consistent with its provisions.

2. Parties shall take fair, non-discriminatory and transparent measures consistent with this Agreement and other applicable international law to deter the activities of non-Parties which undermine the effective implementation of this Agreement.

PART 9 MONITORING, REVIEW AND ASSESSMent

Article 24 Monitoring, review and assessment

1. Parties shall, within the framework of FAO and its relevant bodies, ensure the regular and systematic monitoring and review of the implementation of this Agreement as well as the assessment of progress made towards achieving its objective.

2. Four years after the entry into force of this Agreement, FAO shall convene a meeting of the Parties to review and assess the effectiveness of this Agreement in achieving its objective. The Parties shall decide on further such meetings as necessary.

PART 10 FINAL PROVISIONS

Article 25 Signature

This Agreement shall be open for signature at * * from * * until * *, by all States and regional economic integration organizations.

Article 26 Ratification, acceptance or approval

1. This Agreement shall be subject to ratification, acceptance or approval by the signatories.

2. Instruments of ratification. acceptance or approval shall be deposited with the Depositary.

Article 27 Accession

1. After the period in which this Agreement is open for signature, it shall be open for accession by any State or regional economic integration organization.

2. Instruments of accession shall be deposited with the Depositary.

Article 28 Participation by Regional Economic Integration Organizations

1. In cases where a regional economic integration organization that is an international organization referred to in Annex IX, Article I, of the Convention does not have competence over all the matters governed by this Agreement, Annex IX to the Convention shall apply mutatis mutandis to participation by such regional economic integration organization in this Agreement, except that the following provisions of that Annex shall not apply:

(a) Article 2, first sentence; and

(b) Article 3, paragraph 1.

2. In cases where a regional economic integration organization that is an international organization referred to in Annex IX, Article I, of the Convention has competence over all the matters governed by this Agreement, the following provisions shall apply to participation by the regional economic integration organization in this Agreement:

(a)at the time of signature or accession, such organization shall make a declaration stating:

(i) that it has competence over all the matters governed by this Agreement;

(ii) that, for this reason, its member States shall not become States Parties, except in respect of their territories for which the organization has no responsibility; and

(iii) that it accepts the rights and obligations of States under this Agreement;

(b) participation of such an organization shall in no case confer any rights under this Agreement on member States of the organization;

(c) in the event of a conflict between the obligations of such organization

under this Agreement and its obligations under the Agreement establishing the organization or any acts relating to it, the obligations under this Agreement shall prevail.

Article 29 Entry into force

1. This Agreement shall enter into force thirty days after the date of deposit with the Depositary of the twenty-fifth instrument of ratification, acceptance, approval or accession in accordance with Article 26 or 27.

2. For each signatory which ratifies, accepts or approves this Agreement after its entry into force, this Agreement shall enter into force thirty days after the date of the deposit of its instrument of ratification, acceptance or approval.

3. For each State or regional economic integration organization which accedes to this Agreement after its entry into force, this Agreement shall enter into force thirty days after the date of the deposit of its instrument of accession.

4. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by its Member States.

Article 30 Reservations and exceptions

No reservations or exceptions may be made to this Agreement.

Article 31 Declarations and statements

Article 30 does not preclude a State or regional economic integration organization, when signing, ratifying, accepting, approving or acceding to this Agreement, from making a declaration or statement, however phrased or named, with a view to, inter alia, the harmonization of its laws and regulations with the provisions of this Agreement, provided that such declaration or statement does not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that State or regional economic integration organization.

Article 32 Provisional application

1. This Agreement shall be applied provisionally by States or regional economic integration organizations which consent to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.

2. Provisional application by a State or regional economic integration organization shall terminate upon the entry into force of this Agreement for that State or regional economic integration organization or upon notification by that State or regional economic integration organization to the Depositary in writing of its intention to terminate provisional application.

Article 33 Amendments

1. Any Party may propose amendments to this Agreement after the expiry of a period of two years from the date of entry into force of this Agreement.

2. Any proposed amendment to this Agreement shall be transmitted by written communication to the Depositary along with a request for the conven-ing of a meeting of the Parties to consider it. The Depositary shall circulate to all Parties such communication as well as all replies to the request received from Parties. Unless within six months from the date of circulation of the communication one half of the Parties object to the request，the Depositary shall convene a meeting of the Parties to consider the proposed amendment.

3. Subject to Article 34, any amendment to this Agreement shall only be ado-pted by consensus of the Parties present at the meeting at which it is proposed for adoption.

4. Subject to Article 34，any amendment adopted by the meeting of the Parties shall come into force among the Parties having ratified, accepted or approved it on the ninetieth day after the deposit of instruments of ratification,acceptance or approval by two-thirds of the Parties to this Agreement based onthe number of Parties on the date of adoption of the amendment. Thereafter the amendment shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification，acceptance or approval of the amendment.

5. For the purposes of this Article, an instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by its Member States.

Article 34 Annexes

1. The Annexes form an integral part of this Agreement and a reference to this Agreement shall constitute a reference to the Annexes.

2. An amendment to an Annex to this Agreement may be adopted by two-thirds of the Parties to this Agreement present at a meeting where the pro-posed amendment to the Annex is considered. Every effort shall however be made to reach agreement on any amendment to an Annex by way of consensus.An amendment to an Annex shall be incorporated in this Agreement and enterin to force for those Parties that have expressed their acceptance from the date on which the Depositary receives notification of acceptance from one-third ofthe Parties to this Agreement，based on the number of Parties on the date of a-doption of the amendment. The amendment shall thereafter enter into force for each remaining Party upon receipt by the Depositary of its acceptance.

Article 35 Withdrawal

Any Party may withdraw from this Agreement at any time after the expiry of one year from the date upon which the Agreement entered into force with respect to that Party, by giving written notice of such withdrawal to the Depositary. Withdrawal shall become effective one year after receipt of the notice of withdrawal by the Depositary.

Article 36 The Depositary

The Director-General of FAO shall be the Depositary of this Agreement. The Depositary shall:

(a) transmit certified copies of this Agreement to each signatory and Party;

(b) register this Agreement, upon its entry into force, with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations;

(c) promptly inform each signatory and Party to this Agreement of all:

(i) signatures and instruments of ratification, acceptance, approval and accession deposited under Articles 25, 26 and 27;

(ii) the date of entry into force of this Agreement in accordance with Article 29;

(iii) proposals for amendment to this Agreement and their adoption and entry into force in accordance with Article 33;

(iv) proposals for amendment to the Annexes and their adoption and entry into force in accordance with Article 34; and

(v) withdrawals from this Agreement in accordance with Article 35.

Article 37 Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized，have signed this Agreement.

DONE in Rome on this Twenty-second day of November, 2009.

日本《处罚与应对海盗行为法》（中译本）
（2009 年 6 月 24 日法律第 55 号）

庄玉友* 译

第一条 目的

本法的目的是：鉴于确保海上运输用的船舶及其他海上航行的船舶的航行安全，对于四面环海、大部分主要资源依赖进口、外贸依存度较高的我国经济社会及国民生活极其重要，同时考虑到《联合国海洋法公约》要求所有国家在可能的范围内最大限度抑止公海等海盗行为，通过规定对海盗行为进行处罚以及我国适当、有效地应对海盗行为的必要事项，力图维持海上的公共安全与秩序。

第二条 定义

本法中所称的“海盗行为”，是指船舶（军舰及各国政府所有或运营的船舶除外）上的船员或乘客为私人目的在公海（包含《联合国海洋法公约》规定的专属经济区）或我国领海、内水实施的以下各项任一行为。

（1）采取暴力、胁迫方式或其他方法，使人处于不能抵抗的状态，强行劫持航行中的其他船舶或任意支配其航行的行为。

（2）采取暴力、胁迫方式或其他方法，使人陷于不能抵抗的状态，强行取得航行中其他船舶内的财物，获得或让他人获得财产上不法利益的行为。

（3）为了要求第三人交付财物、实施其他无义务的行为或放弃权利，而劫持航行中其他船舶内的某些人员作为人质的行为。

（4）强行劫持或恣意将其所控制的航行中其他船舶内的某些人员或航行中其他船舶内被劫持者作为人质，要求第三者交付财物及实施其他无义务的行为或放弃权利的行为。

（5）以实施上述各项中的任一海盗行为为目的，侵入或损坏航行中其他船舶的行为。

（6）以实施第（1）项至第（4）项中的任一海盗行为为目的，使船舶航行、显著接近航行中其他船舶、纠缠或其他妨碍其航行的行为。

（7）以实施第（1）项至第（4）项中的任一海盗行为为目的，准备凶器使船舶航行的行为。

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* 庄玉友，聊城大学法学院讲师、法学博士。

第三条 关于海盗行为的罪行

1. 对实施前条第(1)项至第(4)项中任一海盗行为者，处以无期或五年以上徒刑。

2. 前款的犯罪(与前条第(4)项有关的海盗行为部分除外)未遂时，仍然处罚。

3. 对实施前条第(5)项或第(6)项有关的海盗行为者，处五年以下徒刑。

4. 对实施前条第(7)项有关的海盗行为者，处三年以下徒刑。但是，对着手实施第1款或前款的犯罪之前自首者，减轻或免除刑罚。

第四条

1. 犯前条第1款或第2款之罪者，使人负伤时对其处以无期或六年以上徒刑，致人死亡时对其处以死刑或无期徒刑。

2. 前款的犯罪未遂时，仍然处罚。

第五条 海上保安厅对海盗行为的应对

1. 根据本法、《海上保安厅法》(1948年法律第28号)及其他法令的规定，海上保安厅应采取必要的措施来应对海盗行为。

2. 前款的规定不能理解为有碍《海上保安厅法》第五条第十七项规定的警察行政厅根据相关法令的规定对海盗行为采取必要措施之权限。

第六条 除根据《海上保安厅法》第二十条第一款中准用《警察官职务执行法》(1948年法律第136号)第七条的规定使用武器的情况之外，海上保安官或海上保安官辅在制止当前正在实施的、属于第三条第三款的犯罪的海盗行为(限于第二条第(6)项相关者)时，海盗行为实施者不服从其制止措施，仍旧使船舶航行、欲继续实施海盗行为的情况下，如果有充分的理由相信其他手段无法使该船舶停止航行，在根据其事态合理地认为必要的限度内，可以使用武器。

第七条 海盗应对行动

1. 防卫大臣在需要特别应对海盗行为的情况下，经内阁总理大臣同意，可以命令自卫队在海上采取必要的行动以应对海盗行为。在此情况下，《自卫队法》(1954年法律第165号)第八十二条的规定不适用。

2. 防卫大臣欲取得前款的同意时，应与有关行政机关的长官协商，就下列事项制定既定的应对要点，并向内阁总理大臣提交。但是，需要紧急应对当前正在实施的海盗行为时，只要向内阁总理大臣通知必要行动的概要即可。

(1)采取前款的行动(以下称“海盗应对行动”)的必要性；

(2)采取海盗应对行动的海上区域；

(3)受命采取海盗应对行动的自卫队的规模、构成、装备及期间；

(4)其他有关海盗应对行动的重要事项。

3. 在下列各项情况下，内阁总理大臣应及时向国会报告各项规定的事项。

(1)取得第1款的同意时其要旨及前款各项所列的事项；

(2)海盗应对行动结束时其结果。

第八条 采取海盗应对行动时自卫队的权限

1.《海上保安厅法》第十六条、第十七条第一项及第十八条的规定准用于受命采取海盗应对行动的海上自卫队三等海曹以上自卫官职务的执行。

2. 《警察官职务执行法》第七条的规定及第六条的规定准用于受命采取海盗应对行动的自卫队自卫官职务的执行。在此情况下，同条中的“《海上保安厅法》第二十条第一项”替换为“第八条第二项”。

3.《自卫队法》第八十九条第二项的规定对自卫官根据前款中准用《警察官职务执行法》第七条及同款中准用第六条的规定使用武器的情况予以准用。

第九条 我国法令的适用

对于我国公务员根据第五条至前条的规定在日本国外应对海盗行为相关的职务执行及妨碍其职务执行的行为，适用我国的法令（包含罚则）。

第十条 相关行政机关的合作

为达成第一条的目的，相关行政机关的长官应与海上保安厅长官及防卫大臣通力合作应对海盗行为。

第十一条 国家等的责任与义务

1. 为了防止因海盗行为而蒙受损害，国家应尽可能收集、整理、分析和提供必要的信息。

2.《海上运送法》（1949 年法律第 187 号）第二十三条之三第二项规定的船舶航运事业者及其他船舶航运相关者在自己努力防止因海盗行为而受害的同时，应尽可能向国家提供与海盗行为有关的信息。

第十二条 诚实地履行国际义务等

本法实施时，应注意不要妨碍诚实地履行我国缔结的条约及其他国际义务，同时要遵守已生效的国际法。

第十三条 政令委任

除本法规定外，有关本法实施的程序及其他与本法施行有关的必要事项由政令规定。

附则（摘录）

第一条 施行日期

本法自公布之日起，经过三十日后开始施行。但是，附则第六条的规定，自《为应对犯罪国际化、组织化及信息处理的高度化而部分修改刑法等的法律》施行之日或本法施行之日两者中较迟日期开始施行。

第二条 过渡措施

若《为应对犯罪国际化、组织化及信息处理的高度化而部分修改刑法等的法

律》的施行日期在本法施行日期之后，自本法施行日期之后至《为应对犯罪国际化、组织化及信息处理的高度化而部分修改刑法等的法律》施行日期的前一日之间，对于《有组织犯罪的处罚及犯罪收益的规制等相关法律》（2009 年法律第 136 号）规定的适用，第三条第 1 款及第四条的犯罪（限于第二条第（4）项规定的海盗行为相关者）视为同法第十三条第二项规定的犯罪，第三条第 1 款至第 3 款及第四条的犯罪视为同法别表所列之犯罪。

第三条 第三条第 4 款但书的规定对本法施行后自首者在其施行前所实施的行为也适用。

第四条 对于本法施行时正依《自卫队法》第八十二条规定受命行动的自卫队的该项行动，不适用第七条第 1 款后段的规定。

海賊行为岛の处罚及ひ海賊行为への对处に関するる法律

（平成二十一年六月二十四日法律第五十五号）

（目的）

第一条 この法律は、海に囲まゎかつ、主要な資源の大部分を輸入に依存するるなと外国貿易の重要度か高ぃ我が国の経済社会及ひ国民生活にとつて、海上輸送の用に供するる船舶その他の海上を航行するる船舶の航行の安全の確保が極めて重要てぁること、並ひに海洋法に関するる国隙連合条約にぉぃてすへての国か最大限に可能な 範囲て公海等にゎけるる海賊行为の抑止に協力するるとさゎてぃること にかんかみ、海賊行为の处罚につぃて规定するるとともに、我か国か海賊行为に適切かつ効果的に对她するたぁに必要な事项を定ぁ、もつて海上にゎけるる公共の安全と秩序の維持を因ること目的とするる．

（定義）

第二条 この法律にぉぃて厂海賊行为とは、船舶（军艦及ひ各国政府か所有し又は連航するる船舶を除く。）に乗り組み又は乘船した者か、私的目的で、公海（海洋法に関するる国隙連合条豹に规定するる排他的経済水域を含む。）又は我が国の領海若しくは内水にぉぃて行ぅ次の各号のいずれかの行为をいぅ。

一 暴行若しくは脅迫を用ぃ、又はその他の方法にょり人を抵抗不能の状態に陥ゎて、航行中の他の船舶を強取し、又はほしいままにその連航を支配するる行为

二 暴行若しくは脅迫を用ぃ、又はその他の方法にょり人を抵抗不能の状態に陥れて、航行中の他の船舶内にぁるる財物を強取し、又は財产上不法の利益を得、若しくは他人にこれを得させるる行为

三 第三者に对して財物の交付その他義務のなぃ行为するること又は権利を行ゎないことを要求するるたぁの人質にするる目的で、航行中の他の船舶内にぁるる者を略取するる行为

四 強取され若しくはほしいままにその運航が支配された航行中の他の船舶内にぁるる者又は航行中の他の船舶内にぉ、、て略取さゎた者を人質にして、第三者に对し、財物の交付その他義務のなぃ行乌をするること又は権利を行ゎなぃこと要求するる行岛

五 前各号のぃすゎ力、に係るる海賊行岛をするる目的で、航行中の他の船舶

に侵入し、又はこれを損壊する行为

六　第一号から第四号までのぃすぁ力、に係る海賊行高をする目的で、船舶を航行させて、航行中の他の船舶に著しく接近し、若しくはつさまとい、又はその進行を妨げる行为

七　第一号から第四号までのぃすぁ力、に係る海賊行乌をする目的ご、凶器を準借して船舶を航行させる行为

（海賊行为に関する罪）

第三条　前条第一号から第四号までのいずれかに係る海賊行为をした者は、无期又は五年以上の懲役に処する。

2前项の罪（前条第四号に係る海賊行为に係るものを除く。の未遂は、罚する。

3 前条第五号又は第六号に係る海賊行高をした者は、五年以下の懲役に処する。

4 前条第七号に係る海賊行岛をした者は、三年以下の懲役に処する。たたし、第一项又は前项の罪の実行に着手する前に自首した者は、その刑を减軽し、又は免除する。

第四条　前条第一项又は第二项の罪を犯した者力‘、人を负伤させたとさは 9 期又は六年以上の懲役に处し、死亡させたと引才死刑又は无期懲役に处する。

2 前项の罪の未遂は、罚する。

（海上保安厅にょる海賊行为への对处）

第五条　海賊行为への对处は、この法律、海上保安厅法（昭和二十三年法律第二十八号）その他の法令の定ぁるところにょり、海上保安厅かこぁに必要な措置を実施するものとする。

2 前项の规定は、海上保安厅法第五条第十七号に规定する警察行政厅が関係法令の规定にょり海賊行为への对处に必要な措置を実施する権限を妨げるものと解してはならない。

第六条　海上保安官又は海上保安官補は、海上保安序法第二十条第一项にぉぃて準用する警察官職務孰行法（昭和二十三年法律第百三十六号）第七条の规定により武器を使用する場合のほか、现に行ゎゎてぃる第三条第三项の罪に当たる海賊行高（第二条第六号に係るものに限る。）の制止に当たり、当該海賊行高を行つている者か、他の制止の措置に従ゎす、なぉ船舶を航行させて当該海賊行为を継続しょぅとする場合にぉぃて、当該船舶の進行を停止させるために他に手段かな‘、と信ずるに足りる相当な理由のぁるときには、その事態に応じ合理的に必要と判断される限度にぉぃて、武器を使用することかてさる。

（海賊对处行勤）

第七条　防衡大臣は、海賊行为に对处するたぁ特别の必要がぁる場合に

は、内閣総理大臣の承忍を得て、自衡隊の部隊に海上において海賊行為に対処するため必要な行勤をとることを命すること力ちてさる。この場合にぉぃては、自街隊法（昭和二十九年法律第百六十五号）第八十二条の規定は、適用しない。

2 防衡大臣は、前項の承认を受けよぅとするときは、関係行政機関の是と協して、次に掲げる事項につぃて定ぁた対処要項を作成し、内閣総理大臣に提出しなければならない。ただし、現に行ゎゎてぃる海賊行高に対処するために急を要するとさは、必要しなる行勤の概要を内閣総理大臣に通知すれば足りる。

一　前項の行勤（以下「海賊対処行勤といぅ。）の必要性

二　海賊対処行勤を行ぅ海上の区域

三　海賊対她行勤を命する自衡隊の部隊の規模及び成並びに装満並びに期間

四　その他海賊対処行勤に関する重要事項

3 内閣総理大臣は、次の各号に掲げる場合には、当該各号に定める事項を、遅滞なく、国会に报告しなければならない。

一　第一項の承认をしたときその旨及び前項各号に掲げる事項

二　海賊対処行勤か終了したときその結果

（海賊対处行勤峙の自衡隊の権限）

第八条　海上保安庁法第十六条、第十七条第一項及び第十八条の規定は、海賊対処行勤を命ぜられた海上自衡隊の三等海曹以上の自街官の職務の孰行につぃて準用する。

2 警察官職務执行法第七条の規定及び第六条の規定は、海賊対处行勤を命せぅゎた自衡隊の自衡官の職務の轨行につぃて準用する。この場合にぉぃて、同条中「海上保安庁法第二十条第一項とぁるのは、「第八条第二項」と読み替ぇるものとする。

3 自衡隊法第八十九条第二项の規定は、前項にいぉて準用する警察官職務执行法第七条及び同項にぉぃて準用する第六条の規定にょり自衡官が武器を使用する場合につぃて準用する。

（我が国の法令の適用）

第九条　第五条から前条までに定めるところによる海賊行为への対処に関する日本国外における我が国の公務员の職務の執行及ひこゎを妨げる行舄については、我が国の法令（罚则を含む。）を適用する。

（関係行政機関の協力）

第十条　関係行政機関の是は、第一条の目的を達成するため、海賊行岛への対処に関し、海上保安庁长官及び防街大臣に協力するものとする。

（国等の责務）

第十一条　国は、海賊行为にょる被害の防止を因るたぁに必要となる情报

の収集、整理、分析及び提供に努めなければならない。

海上運送法（昭和二十四年法律第百八十七号）第二十三条の三第二項に規定する船舶運航事巣者その他船舶の運航に関係する者は、海賊行為によぶ被害の防止に自ら努めるとともに、海賊行葛に係る情报を国に適切に提供するょぅ努めなければならない。

（国隙約束の诚実な履行等）

第十二条　この法律の施行に当たつては、我が国が締結した条豹その他の国隙約束刃誠実な履行を妨げることがないょぅ留意するとともに、確立さゎた国隙法规を遵守しなければならない。

（政令への委任）

第十三条　この法律に定めがぁるもののほか、この法律の実施のための手続その他この法律の施行に関し必要な事項は、政令で定める。

附則抄

（施行期日）

第一条　この法律は、公布の日から起算して三十日を経過した日力、ぅ施行する。たたし、附則第六条の规定は、犯罪の国隙化及び組織化並ひに情报処理の高度化に対処するための刑法等の一部を改正する法律（平成二十一年法律第号）の施行の日又はこの法律の施行の日のぃずれか遅い日から施行する。

（经過措置）

第二条　犯罪の国隙化及び組織化並びに情报処理の高度化に対処するための刑法等の一部を改正する法律の施行の日がこの法律の施行の日後でぁる場合にぉけるこの法律の施行の日から犯罪の国隙化及び組織化並びに情报処理の高度化に対処するための刑法等の一部を改正する法律の施行の日の前日までの間にぉける組織的な犯罪の処罚及び犯罪収益の规制等に関する法律（平成十一年法律第百三十六号）の规定の適用につぃては、第三条第一項及び第四条の罪（第二条第四号に係る海賊行为に係るものに限る。）は同法第十三条第二項に规定する罪と、第三条第一項かぅ第三项まで及び第四条の罪は同法别表に掲げる罪とみなす。

第三条　第三条第四項たたし書の规定は、この法律の施行後に自首した者力‘その施行前にした行岛につぃても、適用する。

第四条　この法律の施行の隙現に自衡隊法第八十二条の规定にょり行勤を命せちゎている自隊の部隊の当該行勤につぃては、第七条第一項後段の规定は、適用しない。

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*，以下简称《评论》) 是全国性的海洋法领域优秀学术著述的汇辑，着重研究与海洋相关的法律与政策，秉承“海纳百川，有容乃大”的精神，力求吸取国内外该领域的一切先进成果。同时在现有法学学科划分的基础上，打破学科藩篱，将视野拓展到一切关于海洋的法学理论、司法实践以及法律运作实务。本刊对于理论探索与实证究并重，以期推动海洋相关法律科学的发展，为各位专家学者提供学术研究和交流的平台。

本《评论》自 2009 年第二期开始扩大编制，改由上海交通大学凯原法学院海洋法律与政策研究中心、台湾中山大学海洋事务研究所、香港理工大学董浩云国际海事研究中心以及厦门大学海洋政策与法律研究中心两岸三地四校联合主办，仍有由（香港）中国评论文化有限公司出版，每年两期。热忱欢迎各位学界同仁及实务界人士不吝赐稿，并立稿约如下：

一、特别鼓励英文著述。同一学术水准稿件，英文著述将优先录用。若确无法全英文写作，仍鼓励在中文文章后附上较为详细的英文概述（Summary），长度约为文章一半左右为合适。本刊编辑有权进行文字修改。

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四、来稿须严格遵守学术规范，来稿格式参见后附《〈中国海洋法学评论〉书写技术规范》。若文中引征网上文献资料，应将该页面另存为独立文档，发送至编辑部邮箱或者打印后寄送《评论》编辑部，以备查阅。

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《中国海洋法学评论》编辑部 敬启

China Oceans Law Review Call for Papers

China Oceans Law Review (COLR) is the repertoire of the current best academic writings on Oceans Law across China. Focusing on the research of ocean-related laws and policies, the COLR is designed to gather outstanding achievements from home and abroad as much as possible. Without limitations to the current disciplinary divisions of Law, our vision is extending to all the ocean-related legal theories, judicial practice and law enforcement. Emphasizing the significance of both theoretical exploration an empirical research, the COLR is supposed to promote the development of Chinese Oceans Law and provide a professional platform for specialists in this area.

Shanghai Jiao Tong University Center for Oceans Law and Policy (SJTU-COLP), which was founded ceremoniously in October 2009, is the substantial brace of COLR. Base on the inherited spirit and advantages from the former version of COLR, and cooperating with three prestigious universities across the Straits, the newly founded COLP endeavors toward a brand new China Oceans Law Review and its internationalization as the priority. For this reason, the new COLR will gradually enhance the extent of English writing in order to earn a place in the circle of superior international academic journal.

The new COLR is jointly hosted by Shanghai Jiao Tong University Center for Oceans Law and Policy, Taiwan Sun Yat-sen University, Hong Kong Polytechnic University and Xiamen University, and is published by the China Review Culture (Hong Kong) Co., Ltd semi-annually. Papers from all academic colleagues and practical professionals are faithfully respected and welcomed. The agreements for all writers are as follows:

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are all accepted. We are sorry that papers previously published in any other medias are not accepted.

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Editorial Office of China Oceans Law Review

《中国海洋法学评论》书写技术规范

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1．来稿由题目（中英文）、作者姓名及简介、内容摘要、关键词和正文构成。

2．来稿正文各层次标示顺序按一、（一）、1、（1）、①、A、a 等编排。

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（2）魏敏主编：《海洋法》（高等学校法学教材），法律出版社 1987 年版，第 24 页。——教材应列明为何种教材。

（3）国家海洋局政策法规办公室编：《中华人民共和国海洋法规选编》，海洋出版社 2001 年第 3 版，第 56 页。——不是初版的著作应注明“修订版”或“第 2 版”等。

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（2）联合国新闻部编，高之国译：《〈联合国海洋法公约〉评介》，海洋出版社 1986 年版，第 67 页。

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《海商法年刊》1999 年卷，大连海事大学出版社 2000 年版，第 5 页。

（3）傅崐成：《联合国教科文组织 2001 年〈水下文化遗产保护公约〉评析》，载于厦门大学海洋法律研究中心编：《纪念〈联合国海洋法公约〉签署 20 周年学术研讨会论文集》（2002 年），第 58 页。——载于论文集中的论文。

（4）褚晓琳、傅崐成：《两岸合作开发南海渔业资源规划研究》，载于《中国海洋法学评论》2012 年第 2 期，第 7 页。

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（2）Connie Peck and Yoy S. Lee ed., Increasing the Effectiveness of the International Court of Justice, Hague: Martinus Nijhoff Publishers, 1997, pp. 109~110. ——编著应以"ed."标出。

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（2）John Hare, Maritime Law Update South Africa 2002, at http://www.ports.co.za/legalnews/article_0732.html, 14 May 2004.

9．引用报纸的注解格式为：

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10．引用法条的注解格式为：

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3. 表示数值范围的起讫用“～”表示，如第10 ～ 15页;表示时间的起讫用“—”表示，如1980年— 1982年，1990年7月— 8月。

四、图表

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《中国海洋法学评论》编辑部编订

Research on Jurisdiction in Exclusive Economic Zone: Particular Areas, Ice-covered Areas and Particularly Sensitive Sea Areas

GONG Yingchun*

Abstract: Based on the provisions of the United Nations Convention on the Law of the Sea (UNCLOS), a coastal State may exercise jurisdiction in its exclusive economic zone in the following three aspects: maritime scientific research, the protection and preservation of the marine environment, and the establishment, management and use of artificial islands, installations and structures. The above jurisdiction actually includes legislative jurisdiction and jurisdiction to enforce; while the coastal State's exercise of jurisdiction in law enforcement with respect to the protection and preservation of the marine environment is subject to rigid restrictions in the UNCLOS, so as to balance the coastal State's interests with those of other countries such as navigational rights. However, in recent years, many countries have been establishing marine protected zones within their exclusive economic zones with various names, such as marine protected areas, particularly sensitive sea areas, or marine nature parks, and for diverse purposes such as protecting marine life, special navigational conditions, or vulnerable marine ecological environment, while taking protective measures and exercising enforcement jurisdiction to restrict navigation and other human activities in these areas. These measures have exerted an impact on the delicate balance of UNCLOS-based rights and obligations between the coastal States and other States. Also, there arises the issue of legal bases in international law with respect to jurisdiction to enforce law against foreign vessels and these protective measures *per se*. Therefore, it is imperative to make

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comparative research on the backgrounds, bases in international law, requirements and procedures for establishment, limits of the coastal State's powers of legislation and enforcement, with respect to particular areas, ice-covered zones and particularly sensitive sea areas; and to discuss China's current legislation in this field as well as existing problems.

Key Words: Exclusive economic zone; Particular areas; Ice-covered zones; Particularly sensitive sea areas; Jurisdiction to enforce

In recent years, many countries have been establishing marine protected zones in their exclusive economic zones with various names, such as marine protected areas, particularly sensitive sea areas, or marine nature parks, and for diverse purposes such as protecting marine life, special navigational conditions, or vulnerable marine ecological environment, while taking protective measures to restrict navigation and other human activities in these areas, such as mandatory ship reporting systems, areas to be avoided or seasonal areas to be avoided for international ships routing, no-anchoring areas. These measures mirror the changes in State practices and conceptions with respect to marine environmental protection. The measures have exerted an impact on the delicate balance of rights and obligations based on the United States Convention on the Law of the Sea (UNCLOS), articles 56 and 58 between the coastal States and other States. Also, there arises the issue of legal bases in international law with respect to powers of enforcement against foreign vessels and the protective measures *per se*. The paper is aimed to conduct comparative research on the backgrounds, bases in international law, requirements and procedures for establishment, coastal States' powers of legislation and enforcement, with respect to particular areas, ice-covered zones and particularly sensitive sea areas.

I. Particular Areas

A. Background for the Establishment of Particular Areas

A coastal State's establishment of particular areas within its exclusive economic zone is based on article 211 of UNCLOS. The article aims to prevent pollution from vessels.

The regime of particular areas has been evolved from a series of international

conventions on preventing pollution from vessels. Subject to the International Convention for the Prevention of Pollution of the Sea by Oil adopted in the International Conference on Pollution of the Sea by Oil held in 1954, the discharge of oil or of oily mixture from any tanker shall be prohibited in the sea areas within 50 nautical miles from land. In 1962, the Inter-Governmental Maritime Consultative Organization (predecessor of International Maritime Organization) held the International Conference for the Prevention of Pollution of the Sea by Oil in London and made amendments to the 1954 Convention, which widened the limits of prohibited zones. As a result, the prohibited zones of North Sea, Baltic Sea, Mediterranean Sea, Adriatic Sea, Black Sea, Sea of Azov, Red Sea etc. extended for a distance of 100 nautical miles from the nearest land. In 1973, the Inter-Governmental Maritime Consultative Organization adopted the International Convention for the Prevention of Pollution from Ships and made amendments thereto in 1978, which changed the name of "Prohibited Zones" in the 1954 Convention into "Particular Areas".[1]

UNCLOS adopts the concept of particular areas, in which article 211 sets rigid provisions on the requirements and procedures for the coastal State's establishment of particulars areas, the limits of powers of legislation and enforcement etc.

B. The Defined Sea Area, and Requirements & Procedures for the Establishment of Particular Areas

According to article 211 of UNCLOS, the defined sea areas of particular areas are located within the exclusive economic zones. Particular areas shall have clearly defined limits. In other words, the legal status of particular areas under article 211 of UNCLOS is exclusive economic zone.

In terms of the requirements for the establishment of particular areas, article 211(6)(a) of UNCLOS provides: "Where the international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological

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1 Zhang Haiwen ed., *Interpretations to United Nations Convention on the Law of the Sea (UNCLOS)*, Beijing: China Ocean Press, 2006, pp. 407~408. (in Chinese)

conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal States, after appropriate consultations through the competent international organization with any other States concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities."

As indicated by the above provision, the establishment of the particular areas in the exclusive economic zone shall meet two requirements: first, the sea area to be established is an area where the adoption of special protective measures is required, with the special circumstances such as recognized technical reasons in relation to its oceanographical and ecological conditions, its utilization or the protection of its resources and the particular character of its traffic; second, the rules and standards referred to in article 211(1) [2] are inadequate to meet special circumstances of the area.

As to the establishment of particular areas or other marine protected areas in exclusive economic zones, coastal States generally are not required to obtain approval from the competent international organization or make consultations with any other States concerned. However, if coastal States intend to adopt and enforce domestic laws and regulations higher than the international rules and standards referred to in article 211(1), and to take special mandatory measures on the ships, then the procedures for the establishment shall be taken in the following four steps under article 211(6): firstly, submitting scientific and technical evidence in support to the competent international organization; secondly, appropriate consultations through the competent international organization with any other States concerned; thirdly, within 12 months after receiving such a communication, the organization shall determine whether the conditions in that area correspond to the requirements set out above. If the organization so determines, the coastal States may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels; fourthly, these laws and regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organizat-

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2 States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.

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The foregoing steps are indispensable and inseparable. The competent international organization has the final say in determining whether the scientific and technical evidence submitted by the coastal States conforms to the provisions of UNCLOS; if coastal States intend to adopt domestic laws, regulations and special mandatory measures higher than the international rules and standards, they shall obtain approval from the competent international organization. The "competent international organization" herein refers to the International Maritime Organization (IMO), which is responsible for measures to improve the safety and security of international shipping. It is not sure whether "any other States concerned" herein refer to the States to utilize the sea area, IMO member states or States parties to UNCLOS. Some scholars believe that "any other States concerned" are not limited to any country within a specific geographic area. Since it is required to make appropriate consultations with any other States concerned through the competent international organization, such consultations should be undertaken within the IMO framework. UNCLOS does not make clear how a UNCLOS State party which is not an IMO member state, could make appropriate consultations with coastal States or propose objections, or whether the objections could prevent IMO from granting any approval.

C. Coastal States' Powers of Legislation and Enforcement in Particular Areas

In terms of powers of legislation, according to article 211(5) of UNCLOS, the laws and regulations of coastal States, first and foremost, should conform to and give effect to generally accepted international rules and standards for the prevention, reduction and control of pollution from vessels. Generally accepted international rules and standards refer to the International Convention for the Prevention of Pollution from Ships and the rules and standards provided in other international conventions. Where the international rules and standards are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required, the coastal States may for that area adopt domestic laws, regulations and special mandatory measures higher than international rules and standards only after submitting scientific and technical evidence in support and ma-

king appropriate consultations with any other States concerned, and being endorsed by the IMO that the relevant requirements have been met. Besides, the coastal States may adopt additional laws and regulations related to discharges or navigational practices, but those additional laws and regulations shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards."

Coastal States' powers of legislation and enforcement in their exclusive economic zones are issues at two different levels. While their powers of legislation in particular areas are superior to those in other parts of their exclusive economic zones, they are not granted with more powers on enforcement in particular areas and shall exercise the powers of enforcement within the context of article 220 of UNCLOS. In accordance with the article 220 of UNCLOS, as to any foreign vessel in violation of applicable international rules and standards or its laws and regulations for the prevention, reduction and control of pollution from vessels, the coastal States may take different measures of enforcement based on the extents and consequences of the violation: (1) To require the vessel to give relevant information. Where there are clear grounds for believing that a foreign vessel navigating in the territorial sea or the exclusive economic zone of a coastal State has, in the exclusive economic zone, committed a violation of applicable international rules and standards or applicable laws and regulations of that State, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred; (2) To undertake physical inspection of the vessel. Since physical inspection of a foreign vessel may affect its navigational right in the exclusive economic zone, UNCLOS has confined coastal States' powers on physical inspection to the following circumstances: when a foreign vessel has committed a violation of applicable laws and regulations of the State resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection; (3) To institute proceedings, including detention of the vessel. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation as mentioned above resulting in a discharge causing major damage or threat of major damage to the coastline or related

interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7 of Part XII, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

Coastal States shall exercise the powers of enforcement with respect to pollution from vessels, pursuant to article 220, and more specifically, subject to the following restrictions: (1) Restrictions on the subjects exercising the powers of enforcement. The powers of enforcement against foreign vessels for the purpose of protection and preservation of the marine environment may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect; (2) Duty to avoid adverse consequences in the exercise of the powers of enforcement. In the exercise of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk; (3) Avoidance of unnecessary physical inspection. States shall cooperate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination and only when: there are clear grounds for believing that major discrepancy exists between the conditions of the vessel or its equipment and the particulars of those documents; the contents of such documents are not sufficient to confirm or verify a suspected violation; or the vessel is not carrying valid certificates and records; (4) Non-discrimination with respect to foreign vessels. In exercising their rights and performing their duties, States shall not discriminate in form or in fact against vessels of any other State; (5) Restrictions on delaying a foreign vessel. States shall not delay a foreign vessel longer than is necessary for purposes of the investigations provided for in articles 216, 218 and 220. If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security. The release of a vessel may, whenever it presents a significant threat of damaging the marine environment, be refused or made conditional upon proceeding to the nearest appropriate

repair yard. Where release has been refused or made conditional, the flag State of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV (Settlement of Disputes); (6) Restrictions on coastal States to institute proceedings. Although article 220 of UNCLOS stipulates that coastal States may institute proceedings on foreign vessels under certain circumstances, UNCLOS also provides that irrespective of prior proceedings by another State, the flag State has the right to take any measures, including proceedings to impose penalties, according to its laws. As a matter of fact, when flag States' powers of enforcement conflict with those of coastal States in this aspect, "proceedings shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State with six months of the date on which proceedings were first instituted, unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels;" (7) Criminal penalties are not applicable. Under the provision of article 230(1), monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

To sum up, in accordance with article 56 of UNCLOS, the coastal State has jurisdiction over the protection and preservation of the marine environment in its exclusive economic zone. But the coastal State's powers of enforcement in the prevention, reduction and control of pollution from vessels shall be subject to the rigid restrictions in Part XII (Protection and Preservation of the Marine Environment) of UNCLOS, so is its law enforcement in particular areas. Although the coastal State, in conformity with provisions of UNCLOS, may adopt domestic laws and regulations higher than international rules and standards in the particular areas within its exclusive economic zone, it shall exercise its powers of enforcement on violating foreign vessels within the context of article 220 (Enforcement by Coastal States) and Section 7 (Safeguards) of Part XII of UNCLOS.

D. The Special Protective Measures for the Coastal States to Undertake in Particular Areas

UNCLOS has not made provisions on what special protective measures the coastal States may undertake in their particular areas within their exclusive econo-

mic zones. In fact, up to now, there is no coastal State that has established a particular area in accordance with article 211(6)(a) of UNCLOS.

However, it is beyond doubt that a coastal State shall obtain "approval" from the competent international organization, namely the IMO, if the coastal State intends to undertake special mandatory measures in its particular areas according to its laws. Viewed from its course of formation, the regime of exclusive economic zone has been built on the delicate balance in allocating rights and jurisdiction among the coastal States and other States. The coastal States, for the purpose of prevention, reduction and control of pollution from vessels, are not entitled to special discretion in adopting special mandatory measures. As indicated by some scholars, article 211(6) of UNCLOS provides that "even under special circumstances, the coastal States shall obtain approval from the IMO for adopting rigid laws and regulations on prevention, reduction and control of pollution, and submit scientific and technical evidence in support. Therefore, UNCLOS does not grant additional discretion to coastal States for unilaterally preventing pollution in their exclusive economic zones. The adoption of mandatory reporting system or mandatory routeing system in exclusive economic zones shall be approved by the IMO."[3] It would be safe to say that UNCLOS's regime of particular areas only sets a framework; the discretion of such specific issues as procedures for establishing particular areas, special mandatory measures for coastal States to undertake in particular areas has been granted to the IMO according to UNCLOS.

As is mentioned above, however, the regime of particular areas is mostly aimed to prevent coastal States from willfully expanding their powers of legislation and enforcement for the prevention, reduction and control of pollution from vessels in their exclusive economic zones; therefore, the regime sets rigid requirements and complicated procedures for establishment, so that it is hard to apply the regime within the framework of the IMO. In recent years, the regime of particularly sensitive sea areas (PSSAs) has been created within the IMO framework, offering a more simple and convenient way for coastal States to adopt special protective measures in marine protected areas within their exclusive economic zones. In 1990, the United States enacted the Florida Keys National Marine Sanctuary and Protection Act, under which four Areas to be Avoided and three Mandatory No-anchoring

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3 Patricia Birnie and Alan Boyle, *International Law and the Environment*, 2nd ed., translated by Na Li, Wang Yanzhi and Wang Xiaogang, Beijing: China Higher Education Press, 2007, p. 358. (in Chinese)

Areas were established, but the measures taken on shipping only applied to U.S. domestic ships. On December 1, 2002, Florida Keys National Marine Sanctuary and its surrounding marine areas, extending 3000 square nautical miles, were identified by the IMO as the fifth PSSA. Thereby, a tank vessel or a vessel greater than 50 meters in length was prohibited to anchor in the sea area, and was completely denied access into some Areas to Be Avoided.[4]

More and more States have been establishing various marine protected areas and adopting special protective measures such as Mandatory Ship Reporting System, Areas to be Avoided or Seasonal Areas to be Avoided for international ships' routing or Mandatory No-anchoring Areas, by submitting applications to and obtaining approval from the IMO. These measures would pose some effects on other States' exercise of the freedoms of navigation and overflight and of the laying of submarine cables and pipelines referred to in article 58, and the rights provided for from article 88 to article 115 (such as right of visit and right of hot pursuit) of UNCLOS.[5]

Due to coastal States' expansion of the spatial scope of marine protected areas within their exclusive economic zones and their intensified efforts in adopting protective measures, the regime of exclusive economic zones is faced with many challenges, giving rise to legal issues such as the relationship between particular areas and PSSAs, the legal effects of IMO resolutions, and the relationship between IMO resolutions and UNCLOS.

II. Ice-covered Areas

A. Background for the Development of the Regime of Ice-covered Areas

The concept of ice-covered areas originated from the Arctic Waters Pollution Act promulgated by Canada in 1970. In the initial proposal submitted by Canada to

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4 Florida Keys National Marine Sanctuary Annual Report, July 1, 2002–June 30, 2003, at http://floridakeys.noaa.gov/news/2003govcabreport.pdf, 2 August 2009.

5 According to provisions of the Florida Keys National Marine Sanctuary and Protection Act, the prohibition on shipping activities shall not apply to necessary operations of public vessels. Necessary operations of public vessels shall include operations essential for national defense, law enforcement, and responses to emergencies that threaten life, property, or the environment.

the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, "ice-covered areas" was not an independent concept, but was incorporated into the idea of "environmental protection zones". In the Third UN Conference on the Law of the Sea, the proposals of Canada and Australia included particular areas and ice-covered areas respectively in separate articles and suggested that coastal States adopt laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where the presence of ice covering such areas over a long period of time creates obstructions or exceptional hazards to navigation; the application of relevant laws and regulations shall be confined to the period when ice covers such areas and the foregoing obstructions or hazards may be caused thereby. Coastal States may adopt provisions on the design, construction, manning or equipment standards for foreign vessels. [6]

B. Defined Sea Areas and Requirements for the Establishment of Ice-covered Areas

Article 234 of UNCLOS in 1982 stipulates the defined sea areas, and requirements for the establishment of ice-covered areas: "coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."

Thereby, the waters may be defined as ice-covered areas within exclusive economic zones, and the establishment of ice-covered areas shall meet the following requirements: first, the areas have particularly severe climatic conditions and ice covers such areas for most of the year; second, particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstruct-

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6 Tadao Kuribayashi, *Notes on UNCLOS (Volume II)*, Tokyo: Yuhikaku Publishing Co., Ltd., 1994, p. 144. (in Japanese)

ions or exceptional hazards to navigation; third, pollution of the marine environment in the areas could cause major harm to or irreversible disturbance of the ecological balance. In general, all of the above conditions are indispensable; according to the provisions of UNCLOS, however, whether the above conditions have been met is not subject to the confirmation by the competent international organization, but to the coastal States' own discretion.

C. Coastal States' Legislative Power, Permitted Protective Measures and Power to Enforce in Ice-covered Areas

In terms of legislation, article 234 stipulates: "Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone." It is noteworthy that, although relevant articles of UNCLOS provide that coastal States shall not require foreign vessels in their territorial seas, exclusive economic zones and particular areas to observe design, construction, manning or equipment standards higher than generally accepted international rules and standards, there is no such restriction on ice-covered areas. Therefore, coastal States may require foreign vessels navigating in their ice-covered areas to observe design, construction, manning or equipment standards higher than generally accepted international rules and standards.

Instead of making clear provisions on coastal States' powers of enforcement and adoption of protective measures in their ice-covered areas, UNCLOS only confines coastal States to three requirements in adopting and enforcing relevant laws and regulations in these areas, namely non-discrimination, due regard to navigation, and the protection and preservation of the marine environment based on the best available scientific evidence. Despite the general provision of article 234 concerning ice-covered areas, any States concerned, when adopting and interpreting the article, are inclined to have more discretion in terms of powers of legislation and enforcement and adoption of protective measures, and adopt domestic laws and regulations higher than international rules and standards on emission, navigation, and design, construction, manning and equipment standards of vessels.

In 1995, Russia publicized Guide to Navigation through the Northern Sea Route (Guide to Navigation). "Northern Sea Route (NSR)" used by Russia is actually the Northeast Passage (NEP) customarily used by European countries.

Russia claimed that the legal basis in international law for Guide to Navigation was article 234 of UNCLOS; the adoption of Guide to Navigation was aimed to ensure the safety and security of shipping and to prevent pollution from vessels. The limits of Guide to Navigation include the NEP, and the ice-covered areas of the Barents Sea and the Bering Sea.[7] That is to say, when Russia issued Guide to Navigation in 1995, the applicable waters of the NEP, the Barents Sea and the Bering Sea were deemed as ice-covered areas within Russia's exclusive economic zone. However, Russia's position has not been consistent with respect to the legal status of NEP and now it still disagrees with other States concerning the legal status of the above sea areas. Since the 1960s, the former Soviet Union claimed the NEP as its internal waters, which has been opposed by the U.S. and other countries. Guide to Navigation in 1995, though opening the NEP to all the States, made stringent management on the Passage, which exceeded the limits posed by article 234 and other provisions related to the regime of exclusive economic zone.

As is provided in Guide to Navigation, the NEP is open to all the vessels from countries of registration, but the vessels intending to navigate the Passage shall satisfy special requirements: first of all, requirement on the master or the commanding personnel of the ship. They shall have experience in steering vessels under ice conditions. If these persons do not have the required experience, the Northern Sea Route Administration (Marine Operations Headquarters) may assign a pilot to the vessel. Second, requirement on vessels to have aboard relevant documentation. According to Guide to Navigation, only vessels that have aboard a certificate of due financial security may be permitted to navigate the NEP to ensure that the shipowners bear civil liability for any vessel-sourced damage to the marine environment. Third, requirement on the obligation of compulsory notification. Guide to Navigation requires that the owner or master of a vessel intending to navigate through the NEP shall submit to the NSR Administration (Marine Operations Headquarters) a notification, and a request for piloting in compliance with the manner and time indicated in Guide to Navigation. Fourth, provisions on navigational services. According to Guide to Navigation, the navigational services for vessels through the NEP shall be organized and controlled by the Marine Operations Headquarters affiliated to the Russian NSR Administration. Besides, Guide to Navigation allows Russia to collect tolls for vessels of different types and tonnages, under the name

7 A. G. Gorshkovsky, Rules to Be Followed on the Northern Sea Route, at http://www.arcop.fi/workshops/workshopl_5.pdf, 2 August 2009.

of environmental protection and ensuring the safety of ships. Criminal punishment may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment. This provision is at variance with UNCLOS article 230, which provides that: "Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea."

Quite a few provisions of Guide to Navigation obviously exceed the limits of jurisdiction that UNCLOS has granted to coastal States in exclusive economic zones. But the validity of such provisions on ice-covered areas made by Russia as a coastal State, may be assessed from the three requirements of UNCLOS article 234, namely "non-discriminatory, due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."

D. Differences between Particular Areas and Ice-covered Areas

Viewed from the drafting process and final text of article 234, coastal States of ice-covered areas, compared with those of particular areas, have wider normative power in terms of legislation and enforcement and conditions for the establishment of such areas, with the following characteristics:

Firstly, though article 234 provides for the requirements for the establishment of ice-covered areas, the discretion of determining whether the requirements are met, resides with coastal States instead of any international organization. Secondly, article 234 does not prohibit coastal States from adopting and enforcing in ice-covered areas laws or regulations higher than international rules and standards, or from requiring vessels within the ice-covered areas to observe design, construction, manning or equipment standards higher than generally accepted international rules and standards. Thirdly, article 234 does not provide that ice-covered areas shall be clearly defined areas. Fourthly, article 234 does not require that the adoption and enforcement of laws and regulations, and special mandatory measures for ice-covered areas shall be undertaken after approval by competent international organizations or appropriate consultations with any other States concerned. Fifthly, article 234 provides that coastal States shall adopt and enforce non-discriminatory laws

and regulations in ice-covered areas, and apply these laws and regulations to all the vessels on a non-discriminatory basis. In contrast, the adoption and enforcement of laws and regulations in particular areas are not required to be undertaken on a non-discriminatory basis. Therefore, as to different vessels in particular areas, coastal States may adopt different rules on emission and navigational method, etc. Sixthly, coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, but such laws and regulations shall have due regard to navigation. The provision indicates that on one hand, the vessels' navigational rights in ice-covered areas shall be subject to coastal States' laws and regulations, and on the other hand, their navigational rights are only restricted instead of being prohibited in these areas. Therefore, it seems that coastal States should not adopt mandatory measures to prohibit navigation in ice-covered areas. But UNCLOS does not make specific provisions on whether foreign vessels' navigational rights in particular areas may be prohibited, which grants certain extent of discretion to coastal States for adopting and enforcing mandatory measures on navigation in particular areas. However, the gap in legislation leaves room for international disputes.

III. Particularly Sensitive Sea Areas

In recent years, the IMO has identified a few marine protected areas of some countries as "PSSA" within its organizational framework. Since the concept of "PSSA" and the relevant legal regime are absent in UNCLOS, it is imperative to conduct research on the approval authority and legal bases of PSSA, standards and procedures for the approval of PSSA, applicable waters, and the relationship between such areas and particular areas and ice-covered areas in UNCLOS.

A. The Origin of the Concept of PSSA

The IMO is the competent international organization responsible for measures to improve the safety and security of international shipping and to prevent marine pollution from vessels. Within its framework, two systems of marine protected areas have come into being: Special Sea Areas, established in accordance with the 1973/78 International Convention for the Prevention of Pollution from Ships and the protocol to the Convention; and PSSA, established on the basis of an IMO reso-

lution – Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSA Guidelines). Special Sea Areas refer to applicable waters of the Mediterranean Sea, the Baltic Sea, the Black Sea, the Red Sea, and the Straits of Corfu etc., which do not need to be established as marine protected areas by coastal States independently. These applicable waters also cover certain parts of high seas. Therefore, "Special Sea Areas" differ from "Particular Areas" within coastal States' exclusive economic zones according to article 211 of UNCLOS. The basis for establishing PSSAs is the IMO resolution. Since the establishment of PSSAs is not based on any treaties or conventions, there arise such issues as limits & bases and standards & procedures for IMO's identification of PSSAs, the applicable waters, enforceable mandatory measures and the relationship with UNCLOS.

The concept of PSSA originated from No. 9 Resolution adopted by the International Conference on Tanker Safety and Pollution Prevention of 1978. Discussions over the identification of PSSA were carried on for many years thereafter. In 1991, the IMO Assembly adopted the PSSA Guidelines by its resolution. But the tedious and complex text of the Guidelines hindered their practical application. So after their adoption, only Cuba's Sabana-Camagüey Archipelago was designated as a PSSA in 1997. At the 40th Session of the IMO Maritime Environment Protection Committee (MEPC) held in 1997, a liaison group was set up to revise the 1991 IMO PSSA Guidelines. On November 29, 2001, IMO adopted the revised PSSA Guidelines.

B. Standards and Procedures for the Identification of PSSAs in 2001 PSSA Guidelines

As is provided in the PSSA Guidelines[8] in 2001, a PSSA is "an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific reasons and because it may be vulnerable to damage by international shipping activities."

In accordance with the 2001 PSSA Guidelines, the IMO–MEPC is the only international body responsible for identifying and designating areas as PSSAs and adopting associated protective measures.

The 2001 PSSA Guidelines provide that the identification and designation of

8 Resolution A. 982(24) Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSAs).

any PSSA and the adoption of associated protective measures require consideration of three integral components: the particular attributes of the proposed area, the vulnerability of such an area to damage by international shipping activities, and the availability of associated protective measures within the competence of IMO.

In order to be identified as a PSSA, the area should meet at least one of the criteria listed below and should be at risk from international shipping activities: ecological criteria; social, cultural and economic criteria; scientific and educational criteria.

C. Associated Protective Measures for PSSAs and Their Legal Bases

The PSSA Guidelines make specific provisions on the options of protective measures that coastal States could take in a PSSA: special emission control on vessels navigating in PSSA; ships' routeing and reporting systems near or in a PSSA, under the International Convention for the Safety of Life at Sea (SOLAS) and in accordance with the General Provisions on Ships' Routeing and the Guidelines and Criteria for Ship Reporting Systems; mandatory pilotage system and other measures relevant to administration of navigation.

Within the IMO organizational framework, the MEPC is responsible for identifying and designating areas as PSSAs. But proposals concerning the protective measures for ships' navigation, such as mandatory ship reporting system, mandatory pilotage system, the establishment of areas to be avoided or seasonal areas to be avoided for international ships' routeing, the establishment of no-anchoring areas, should be subject to adoption by the IMO Sub-committee on Safety of Navigation.

PSSA applications to IMO should be accompanied by a proposal for the associated protective measures, with the legal basis for each measure identified. The legal bases for such measures may be: (a) any measure that is already available under an existing IMO instrument; (b) any measure that does not yet exist but could become available after the amendment or development of an IMO instrument; or (c) any measure adopted pursuant to article 211(6) of UNCLOS.[9]

As a matter of fact, IMO member states have not reached consensus on wheth-

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9 Report of the Secretary-General on "Oceans and the law of the sea" at the 60th session on UN General Assembly on August 15, 2005. A/60/63/Add.2., at http://china-isa.jm.china-embassy.org/chn/hyfzl/gjhy/lhghyxgzl/P020051216283964534955.pdf, 2 August 2013.

er IMO resolutions would be the bases in international law for coastal States' adoption of protective measures in PSSAs. Resolution MEPC.133(53) designated the Torres Strait as an extension of the Great Barrier Reef PSSA and recognized the establishment of a two-way route through the Torres Strait by Australia. The resolution recommended that Governments recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flags that they should act in accordance with Australia's system of pilotage for merchant ships 70 m in length and over or oil tankers, chemical tankers, and gas carriers. The resolution aroused hot debate in IMO Assembly and some delegations claimed that such resolution should not be the basis in international law for mandatory pilotage system with respect to ships navigating the Torres Strait or any other strait used for international navigation.[10] On October 6, 2006, the Australian Government issued Marine Notice 8/2006 and started to adopt mandatory pilotage in the Torres Strait, which was opposed by the U.S., Singapore etc.[11] "At the 55th Session of IMO MEPC, the Singaporean delegates said that Resolution MEPC.133(53) should function as recommendations instead of the legal basis for the Australian Government to adopt mandatory pilotage in the Torres Strait; the mandatory pilotage has also weakened the UNCLOS–based rights for vessels to navigate in international straits and would pose severe adverse effects on the legal bases for international shipping. China, the U.S., the U.K., Cyprus, Greece, and Norway, among other countries, also spoke against Australia's mandatory pilotage. In the end, the Committee concluded that Resolution MEPC.133(53) should function as recommendations instead of the legal basis for the adoption of mandatory pilotage. The Australian delegation agreed to the Committee's opinion, but denied that Marine Notice 8/2006 hindered UNCLOS–based navigational rights for vessels, and said that they would report the discussions at this session and the Committee's conclusions to the competent departments of Australia." [12]

The resolutions adopted within the organizational framework of IMO as a global marine shipping organization, only have certain binding force on IMO member-

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10 IMO document MEPC 53/24, Report at the 53rd Session of MEPC Assembly, paras. 8.5~8.7.

11 Compulsory Pilotage in the Tortes Strait, *Newsletter of the Sea Power Centre- Australia*, Issue 7, April 2007, at http://www.navy.gov.au/spe/semaphore/issue7_2007.html, 3 August 2009.

12 Report on IMO MEPC 55th Session, at http://www.simic.net.cn/news/detail.jsp?id=22556, 3 August 2009. (in Chinese)

s. Meanwhile, resolutions, whose validity differs from treaties or internationally-accepted practices, may not be legally binding even on IMO member states.

Up to now, the following PSSAs and associated protective measures have been designated by the IMO MEPC:[13]

1	The Great Barrier Reef, Australia (designated a PSSA in 1990): Mandatory Pilotage System, IMO Recommended Routes, and Mandatory Reporting System
2	The Sabana-Camagüey Archipelago in Cuba (1997): Traffic Separation Scheme, Areas to be Avoided, and No-discharge Areas
3	Malpelo Island, Colombia (2002): Areas to be Avoided
4	The sea around the Florida Keys, United States (2002): four Areas to be Avoided, and three Mandatory No-anchoring Areas
5	The Wadden Sea, Denmark, Germany, Netherlands (2002): Mandatory Reporting Systems, Ships' Routeing, and Special Sea Areas referred to in MARPOL
6	Paracas National Reserve, Peru (2003): Areas to be Avoided
7	Western European Waters (2004): mandatory reporting obligations for single-hull tankers carrying heavy fuel oil
8	Extension of the existing Great Barrier Reef PSSA to include the Torres Strait (proposed by Australia and Papua New Guinea) (2005): Mandatory Pilotage System
9	Canary Islands, Spain (2005): Traffic Separation Scheme, Areas to be Avoided, and Mandatory Ship Reporting Systems
10	The Galapagos Archipelago, Ecuador (2005): Areas to be Avoided
11	The Baltic Sea area, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden (2005): Traffic Separation Scheme, Recommended Deep-water Routes, and Areas to be Avoided
12	The Papahānaumokuākea Marine National Monument, United States (2007): Ship Reporting Systems, and Areas to be Avoided

D. The Relationship between IMO-designated PSSAs and Particular Areas under Article 211 of UNCLOS

13 At http://www.imo.org/Environment/mainframe.asp?topic_id=1357#list, 2 August 2013.

According to IMO, "the criteria for the identification of particularly sensitive sea areas and the criteria for the designation of special areas are not mutually exclusive. In many cases a Particularly Sensitive Sea Area may be identified within a Special Area and vice versa". [14]

However, in reality, though particular areas and PSSAs have something in common, they differ substantially in terms of defined sea areas, bases for designation and the designating body, requirements and procedures for establishment etc.

Firstly, while the defined sea areas of particular areas in article 211 of UNCLOS are limited to coastal States' exclusive economic zones, a PSSA's defined sea area is not so confined; in contrast, IMO's PSSA Guidelines allow a buffer zone around each PSSA, which means that a PSSA's defined sea area and the applicable waters of associated protective measures may cover high seas.

Secondly, while the basis for the establishment of particular areas is UNCLOS, the establishment of PSSAs is based on IMO resolutions. And IMO resolutions, instead of treaties, are not legally binding on IMO member states (up to now, IMO has 169 member states), not to mention non-member states.

Thirdly, in terms of the procedures for establishment, the coastal State is not required to obtain consent or approval from the competent international organization for establishing particular areas *per se*; only when it intends to adopt and enforce laws and regulations higher than international rules and standards within a clearly defined particular area does it have to conduct appropriate consultations with the States concerned and obtain the approval from competent international organization under the condition that the requirements provided by UNCLOS are met. The establishment of PSSAs shall be approved by IMO and the associated protective measures the coastal State intends to undertake in a PSSA shall be adopted by the IMO Sub-committee on Safety of Navigation.

Seemingly, the procedures for the establishment of particular areas are simpler than the procedures for establishing PSSAs. And many States have established marine protected areas with various protective purposes through their domestic laws. Particular areas (or marine protected zones with other names) are established under domestic laws, generally without any associated protective measures, and therefore are called "marine protected areas in empty talk". Even if there are

14 At http://www.imo.org/Environment/mainframe.asp?topic_id=1357#list, 2 August 2013.

associated protective measures, such measures are merely applied to domestic vessels. Hence, the establishment of particular areas would not have substantial impact on the order of international maritime laws. Article 211 of UNCLOS sets rigid provisions on the requirements and procedures for enforcing special mandatory protective measures higher than international rules and standards, thereby ruling out the possibility for coastal States to abuse mandatory protective measures in their respective marine protected zones or to infringe upon other States' rights and benefits within exclusive economic zones.

The identification and designation of PSSAs and the adoption of associated protective measures shall be subject to the approval by the competent international organization, namely IMO, so it seems that PSSAs have something in common with particular areas in preventing coastal States' abuse of protective measures. However, a review of the process of the IMO's approval of the Florida Keys National Marine Sanctuary and its surrounding marine areas as PSSA can find that the protective measures, originally applied to U.S. domestic ships only, are also adopted and enforced with respect to foreign vessels within the U.S. exclusive economic zone due to IMO's approval. And these measures have obviously exceeded the competence that article 56 of UNCLOS has granted to coastal States in their exclusive economic zones. And it is still doubtful whether other States concerned are obligated to conform to such measures according to international law, whether U.S. law enforcement departments may exercise the powers of enforcement when other States concerned refuse to abide by such measures, and whether such powers of enforcement shall be exercised subject to relevant articles in Part XII of UNCLOS.

In terms of powers of enforcement against violating ships, some States are dissatisfied with the limits that Part XII of UNCLOS has set on coastal States' powers of enforcement with respect to marine environmental pollution. The European Union, France and Canada have, by revising their respective domestic legislation, applied criminal laws to the masters and crewmen whose intentional act or negligence led to marine pollution from ships.[15] Resolution 1439 (2005) adopted by the Parliamentary Assembly of the Council of Europe was a reflection of some

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15 Yoshida Akiko, *Transition of Jurisdictional Framework over Foreign Ships in International Maritime Conventions*, Tokyo: National Institute for Policies on Land, Infrastructure, Transport and Tourism, Ministry of Land, Infrastructure, Transport and Tourism, 2007, at http://www.mlit.go.jp/pri/houkoku/gaiyou/pdf/kkk77.pdf, 2 August 2013. (in Japanese)

countries' intention to reinforce their powers of enforcement in marine environmental protection. "The resolution invites the member States to introduce or develop coastguard services for maritime safety and port security and for the protection of the marine environment; to develop surveillance systems for discharges of oil waste and flushing of ballast tanks; to provide for effective, proportionate and dissuasive penalties for those responsible for any sea pollution, including the possibility of prison sentences in cases of deliberate pollution; to become party to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea and the Council of Europe Convention on the Protection of the Environment through Criminal Law; to introduce regulations in IMO which would enable a State that has suffered damage from ship-based pollution to demand reparation from the flag State, where it is established that the damage is linked to the flag State's failure to exercise appropriate control of the vessel concerned; and to reform the International Oil Pollution Compensation Funds so that victims of maritime disasters receive rapid and satisfactory compensation."[16]

On May 1, 2008, the U.S. started to carry out the ship reporting system in the sea areas of Papahānaumokuākea Marine National Monument approved by IMO as a PSSA. As to foreign vessels violating the ship reporting system, the U.S. stated that "appropriate measures would be taken against violating foreign vessels, including concerted action with flag States, pursuant to the rules of customary international law in UNCLOS." [17]

IV. China's Legislation and Practices in Marine Protected Areas and the Existing Problems

Since the year 1990, China has established twenty national marine protected areas, for the protection of marine animals, sea plants, islands and marine ecosystems, coral reefs, marine natural relics, among others.

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16 UN doc. A/60/63/Add.2, para. 64, at http://www.un.org/Depts/los/gcneral_asscmbly/general_assembly_reports.htm, 2 August 2013.

17 The website of Papahaiummokuakca Marine National Monument, at http://hawaiireef.noaa.gov/news/welcome.html, 3 August 2013.

Table List of National Marine Nature Reserves

Name of reserves	Location	Area (km^2)	Major objects of protection	Competent department
Shedao–Laotieshan National Nature Reserve	Lvshunkou, Liaoning Province	17,000	Pallas pit vipers, migratory birds and their ecosystem	State Environmental Protection Administration
Yalujiangkou Coastal Marsh National Nature Reserve	Donggang City, Liaoning Province	112,180	Mudflat, marsh ecosystem and water fowl, migratory birds	State Environmental Protection Administration
Changli Gold Coast National Nature Reserve	Changli, Hebei Province	30,000	Natural landscape and neighboring sea areas	State Oceanic Administration
Yancheng Coastal Mudflat and Precious Fowl National Nature Reserve	Yancheng City, Jiangsu	453,000	Rare birds such as red-crowned cranes and mudflat	State Environmental Protection Administration
Nanji Isles Marine National Nature Reserve	Pingyang County, Zhejiang Province	20,106	Islands and marine ecosystem, shell fish and algae	State Oceanic Administration
North Shenhuwan Ancient Submarine Forest Relic National Nature Reserve	Jinjiang City, Fujian Province	3,400	Relics of ancient submarine forest and oyster reefs	State Oceanic Administration
Gangkou Sea Turtle National Nature Reserve in Huidong	Huidong County, Guangdong Province	800	Sea turtles and their breeding grounds	Ministry of Agriculture
Zhujiangkou Chinese White Dolphin National Nature Reserve	Guangdong Province	460	Chinese white dolphins	Guangdong Province
Neilingdingda-oFutian National Nature Reserve	Shenzhen City, Guangdong Province	858	Macaques, birds and mangrove	State Forestry Administration

(Continued from the previous page)

Name of reserves	Location	Area (km^2)	Major objects of protection	Competent department
Zhanjiang Mangrove Forest National Nature Reserve	Lianjiang County, Guangdong Province	11,927	Mangrove ecosystem	State Forestry Administration
Shankou Mangrove Ecosystem National Nature Reserve	Hepu County, Guangxi	8,000	Mangrove ecosystem	State Oceanic Administration
Beilun Estuary Mangrove Forest National Nature Reserve	Fangcheng, Guangxi	2,680	Mangrove ecosystem	State Oceanic Administration
Dugong National Nature Reserve between Yingpan Port-Yingluo Port of Hepu	Hepu County, Guangxi	86,400	Dugong, sea turtles, dolphins, mangrove etc.	State Environmental Protection Administration
Dongzhaigang Mangrove Forest National Nature Reserve	Qiongshan City, Hainan	3,337	Mangrove and its ecosystem	State Forestry Administration
Dazhoudao Marine Ecosystem National Nature Reserve	Wanning County, Hainan	7,000	Islands and marine ecosystem, esculent swifts and habitat	State Oceanic Administration
Sanya Coral Reef National Nature Reserve	Sanya City, Hainan	8,500	Coral reef and its ecosystem	State Oceanic Administration
Palaeocoast and Wetland National Nature Reserve	Tianjin	21,180	Palaeocoast of shell dike and oyster bank, and wetland ecosystem	State Oceanic Administration
Yellow River Delta	Dongying City, Shandong Province	153, 000	Natural wetland ecosystem and rare birds	State Forestry Administration

(Continued from the previous page)

Name of reserves	Location	Area (km^2)	Major objects of protection	Competent department
Xiamen Amphioxus Nature Reserve	Xiamen City, Fujian Province	6,300	Amphioxus and ecosystem	Xiamen Marine Administration
Shuangtai Estuary National Nature Reserve	Panjin City, Liaoning Province	80,000	Rare birds such as red-crowned cranes, white cranes, and swans	State Forestry Administration

Relatively speaking, China lags behind in the legislation of marine protected areas as can be seen from the lack of a special law for these areas. In May of 2008, the State Oceanic Administration of China issued the Interim Measures for the Administration of Special Marine Reserves, which is by far the only departmental regulation for marine protected areas. With regard to the bodies exercising the powers of enforcement in these areas, these Measures only provide for the responsibilities of the China Marine Surveillance. Article 38 stipulates that "the competent Marine Administration and the Marine Surveillance at and above county-level on the coastal areas, shall be responsible for the surveillance and supervision within the special marine reserves and for the investigation and punishment of illegal acts based on the Marine Environment Protection Law of the People's Republic of China and the Law of the People's Republic of China on the Administration of the Use of Sea Areas." But the bodies exercising the powers of enforcement are not clearly defined for the national marine protected areas under the management of the State Forestry Administration, the State Environmental Protection Administration, the State Oceanic Administration, and Guangdong Province, etc.

Law enforcement in the marine protected areas within exclusive economic zones involves marine environment pollution, illegal exploitation and utilization of resources, violation of relevant provisions on ships' navigation etc., which calls for a centralized force with all-round competencies in maritime law enforcement. Confusions would definitely occur in application of laws, bases and means of enforcement etc. should China's current mode of overlapping enforcement by different departments be continued.

China's existing legislation tends to make prohibitive or restrictive provisions on the exploitation and utilization of resources, instead of adopting the protective measures generally approved by IMO to restrict ships' navigation and other activiti-

es, such as Areas to be Avoided, ship reporting systems, No-anchoring Areas, Mandatory Pilotage System etc.

Currently, China's marine protected areas are mainly located on coastal waters. If China intends to establish marine protected areas within exclusive economic zones and take special protective measures such as restrictions on ships' navigation, it shall submit an application to IMO for approval, before such measures are applied to foreign vessels.

The developments of international law in marine environmental protection and the practices of major States in this field should be taken into consideration for China's future legislation for marine protected areas, especially the legislation concerning the establishment of these areas and the adoption of protective measures within exclusive economic zones.

To sum up, States are reinforcing their jurisdiction in marine environmental protection while UNCLOS sets rigid limits on coastal States' powers of enforcement in this field. IMO is playing an increasingly important role in preventing, controlling and reducing the pollution from vessels, and is the only international body responsible for designating areas as Special Sea Areas and PSSAs and adopting associated protective measures. There are still no clear answers to such issues, such as the bases in international law for IMO's approval of PSSAs, and whether coastal States' powers of enforcement against foreign vessels violating special protective measures in IMO-approved PSSAs should be exercised within the context of Part XII of UNCLOS, since the international community has not reached consensus on these issues.

It is self-evident that the expansion of coastal States' jurisdiction within their exclusive economic zones, especially their jurisdiction to enforce, would exert effects on international shipping as well as other human activities permitted by article 58 of UNCLOS (Rights and duties of other States in the exclusive economic zone). Considering the decisive role of IMO on this issue, it would be a significant topic for China, whose shipping capacities rank at the forefront of the world, to research on how to get more involved in the development of relevant mechanisms within the organization.

Besides, it should be noted that the international community is paying more attention to marine environmental protection than marine utilization. The latest development of this trend is the claim to establish marine protected areas beyond the limits of national jurisdiction in high seas and international seabed areas etc. under the framework of the Convention on Biological Diversity. It also claims our

close attention that some countries and regions such as the EU intend to impose criminal law on masters and crewmen involved in vessel-sourced marine pollution. A new legal mechanism is at its formative stage for keeping a balance between marine utilization and marine environmental protection, which would have an impact on UNCLOS legal regimes concerning powers of enforcement with respect to marine environmental protection.

(Translator: YE Lin)

Should the Okinotori Reef Be Entitled to a Continental Shelf?: A Comparative Study on Uninhabited Islands in Extended Continental Shelf Submissions

QIU Jun* LIU Wenhua**

Abstract: In November 2008, Japan submitted information on the limits of its continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (Commission); the application included a claim to establish the Okinotori Reef as a base point which would be entitled to an exclusive economic zone (EEZ) and a continental shelf extending beyond 200 nautical miles. Japan's actions were challenged by members of the international community, which think that the Okinotori Reef should be considered a rock under article 121(3) of United Nations Convention on the Law of the Sea, and therefore should not be entitled to any EEZ, continental shelf or continental shelf beyond 200 nm. This case has drawn international attention and given rise to discussions on the determination of the outer limits of the continental shelf of uninhabited islands. Of the 51 submissions that the Commission has received thus far, several involve uninhabited islets, which include, besides the Okinotori Reef, the Bishop and Clerk Islets and the McDonald Islands of Australia, the Bounty Islands of New Zealand, Fatutaka Island of the Solomon Islands, and Bird Island of Seychelles. This article will compare the basic conditions of these uninhabited islets, the Commission's consideration of these submissions, and the responses of other countries and the international community to the use of these islets by coastal States to make claims for a continental shelf beyond 200 nm, in an attempt to judge whether the Okinotori Reef may make such a claim.

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Key Words: Okinotori Reef; Continental shelf; Submission; Uninhabited islands

According to Part VI and Annex II of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), if the natural prolongation of the land territory of a coastal State extends to a distance beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, the State can claim the rights over the continental shelf beyond 200 nautical miles. To establish the outer limits of the continental shelf beyond 200 nautical miles, a coastal State must submit the data and other materials concerning the outer limits of the continental shelf (Submission) to the Commission on the Limits of the Continental Shelf (Commission) for review, on the basis of whose recommendations the delimitation shall be final and binding.

Article 76 of UNCLOS defines the continental shelf and sets the criteria for establishing its outer limits. The establishment of the outer limits of the continental shelf beyond 200 nautical miles is a complicated scientific and legal process. To help coastal States establish the outer limits of the continental shelf and to prepare Submissions, the Commission has prepared the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf (CLCS/11), which requires positive proof of "the legal entitlement of a coastal State to delineate the outer limits of the continental shelf" before the application of article 76 to delineate the outer limits of the continental shelf.[1] This process is termed the "Test of Appurtenance". "The legal entitlement of a coastal State to delineate the outer limits of the continental shelf" covers either "the natural prolongation of its land territory to the outer edge of the continental margin" or "a distance of 200 nautical miles from the

1 Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf (CLCS/11), 2.2 Test of appurtenance, 2.2.1. Both the basis for entitlement to delineate the outer limits of an extended continental shelf and the methods to be applied in this delineation are embedded in article 76. However, it is clear that the positive proof of the former precedes the implementation of the latter, as stated in article 76, paragraph 4 (a): "For the purpose of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of territorial sea is measured …". 2.2.2. The Commission defines the term "test of appurtenance" as the process by means of which the above provision is examined. The test of appurtenance is designed to determine the legal entitlement of a coastal State to delineate the outer limits of the continental shelf 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.

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". Both situations are based on the key premise that the land territory of the coastal State has a continental shelf which is the natural prolongation of the land mass extending to the sea. As stated in article 121(3) of UNCLOS, "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf";[2] in other words, such rocks do not possess the "entitlement to delineate the outer limits of an extended continental shelf", and article 76 should not be applied thereon to delineate the outer limits of the continental shelf.

In November 2008, Japan made a Submission to the Commission, including a claim to entitle the Okinotori Reef as a base point to a continental shelf extending about 550 nautical miles from the territorial sea baseline and covering a sea area of nearly 500,000 km^2. The Chinese government, followed by the South Korean government, presented a note verbale to the Commission, questioning the legality of Japan's act and arguing that the Okinotori Reef should be regarded as a rock defined in article 121(3) of UNCLOS, and therefore should have neither exclusive economic zone and continental shelf, nor continental shelf beyond 200 nautical miles. The Chinese government also requested the Commission not to take any action upon the Okinotori Reef section of Japan's Submission.[3] The Commission believed that "it had no role to play on matters relating to the legal interpretation of article 121" of UNCLOS, and "decided to instruct the Subcommission to proceed with the consideration of the full submission of Japan". "The Commission decided, however, that it will not take action on the part of the recommendations prepared by the Subcommission in relation to the area referred to in the notes verbales mentioned above, until the Commission decides to do so".[4]

The Submission by Japan raised international concerns and discussions over the legal basis for claiming rights over a continental shelf beyond 200 nautical miles. Article 121(3) of UNCLOS gives a principled definition to rocks but does not provide a specific criterion for distinguishing between islands and rocks. Although many scholars have conducted research into this issue, a consensus on

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2 Article 121 (3) of UNCLOS: Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

3 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations CML/2/2009.

4 Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/64, 2009, Paragraph 26, p. 7.

the criteria which would otherwise be applied to the definition of the legal status of the Okinotori Reef has not yet been reached.[5] Therefore, this paper will carry out a comparative analysis of uninhabited islands which have been entitled to an exclusive economic zone and continental shelf through their submissions and, from this perspective, make a judgment on whether the Okinotori Reef should be entitled to an exclusive economic zone and continental shelf beyond 200 nautical miles.

I. An Overview of the Submission Claims for Extending the Continental Shelves of Uninhabited Islands

According to Annex II, SPLOS/72 and SPLOS/183, a State Party for which UNCLOS entered into force before 13 May 1999 shall make submissions or submit preliminary information to the Commission.[6] [7] As of 31 December 2009, the Commission had received 51 submissions and 44 pieces of preliminary information. According to the executive summaries of the submissions and preliminary information made public by the Commission, most coastal States claimed islands as base points from which to claim the continental shelf beyond 200 nautical miles. These claims included some uninhabited islands, of which particularly representative are the following 6 groups of islands included in 5 submissions.

A. The Submission by Australia

According to the Executive Summary of Continental Shelf Submission for Austra-

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5 Barbara Kwiatkowska and Alfred H. A. Soons, Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, *Netherlands Yearbook of International Law*, Vol. 21, 1990, pp. 139~181.

6 Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea, SPLOS/72, 2001; and Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfill the requirements of article 4 of Annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a), SPLOS/183, 2008.

7 According to SPLOS/183, preliminary information is "indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission in accordance with the requirements of article 76 of UNCLOS and with the Rules of Procedure and the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf."

lia, Australia claimed a continental shelf beyond 200 nautical miles for two groups of islands, namely the Bishop and Clerk Islets as well as the McDonald Islands. The Bishop and Clerk Islets are 37 km to the south of Macquarie Island (Fig. 1), having a land area of 0.6 km^2 and highest elevation lower than 50 m above sea level.[8] Covered by vegetation, the islets are important habitats for birds. There is no human habitation on the islets. Along with Macquarie Island, the Bishop and Clerk Islets were listed as a World Natural Heritage Site by UNESCO in 1997.

The McDonald Islands are the westernmost territory of Australia. The Islands are 43.5 km to the west of Heard Island (Fig. 2), with a land area of approximately 1 km^2 and highest elevation 230 m above sea level. The islands are also important habitats for birds and are covered by vegetation. Among these islands, McDonald Island is the largest, which is a volcanic island with no human habitation. There are some islets surrounding McDonald Island, such as Flat Island and Meyer Rock among others.[9]

8 Patricia M. Selkirk, Rod D. Seppelt and David R. Selkirk, *Subantarctic Macquarie Island: Environment and Biology*, Cambridge: Cambridge University Press, 1990.

9 Heard Island and McDonald Islands Marine Reserve, at http://www.environment.gov.au/coasts/mpa/heard/index.html, 2 November 2009.

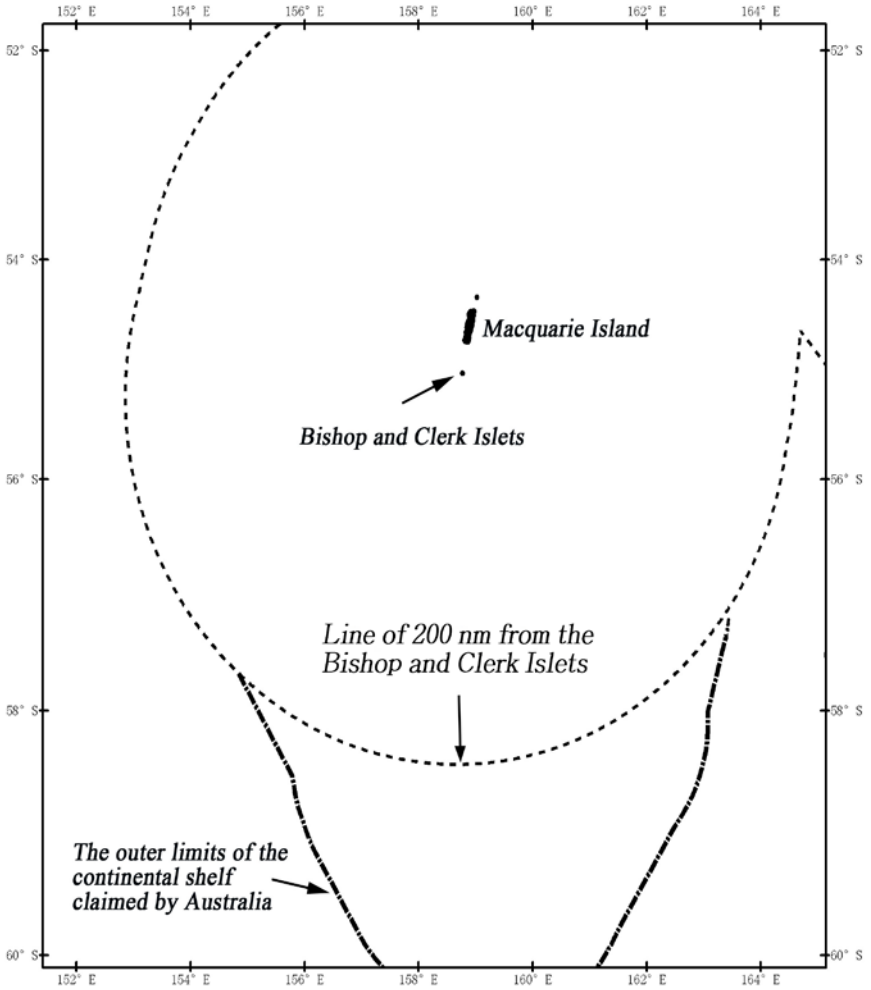

Fig. 1 Location of the Bishop and Clerk Islets and Their 200-nautical-mile

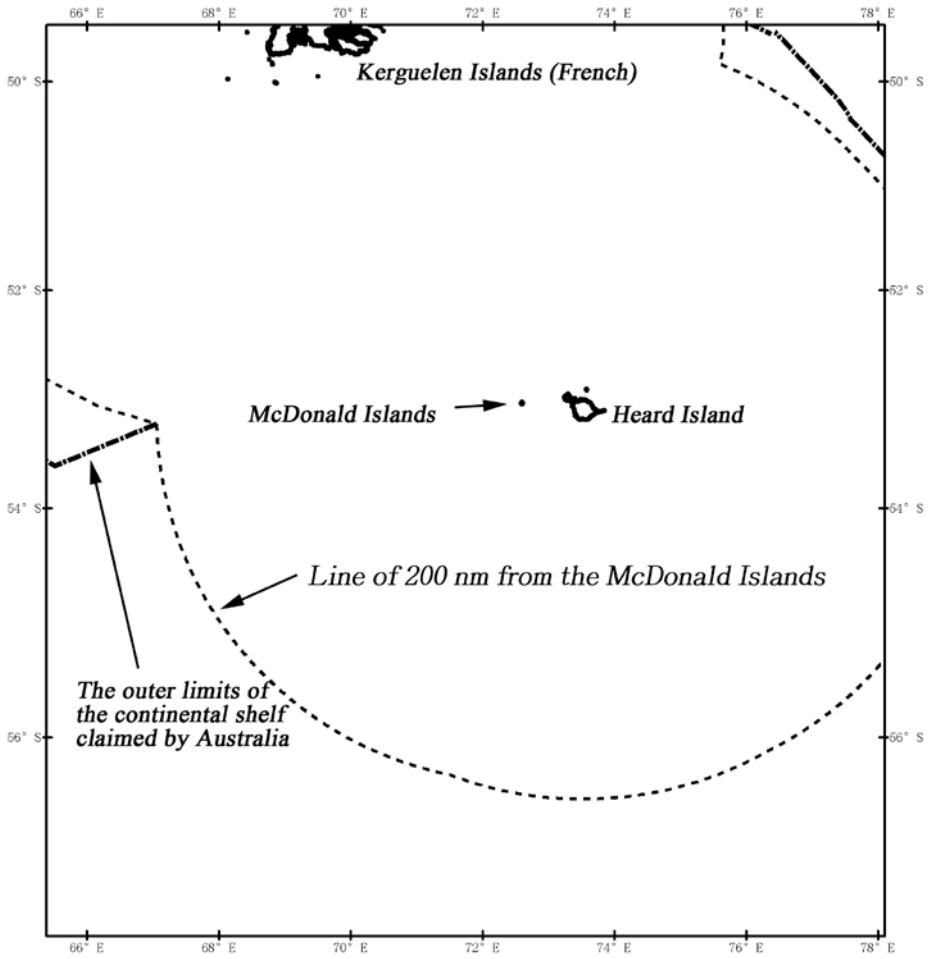

Fig. 2 Location of the McDonald Islands and Their 200-nautical-mile Line

B. Submission by New Zealand

According to the Executive Summary of the New Zealand Submission, New Zealand claimed a continental shelf beyond 200 nautical miles coming from the Bounty Islands. The Bounty Islands are located at the southwest of New Zealand (Fig. 3), comprising 3 groups of rocks within 5 km of each other. The total land area of the Islands is nearly 1.35 km^2, highest elevation being 73 m above sea level. Sparsely covered by vegetation, the islands have no human habitation. A large number of New Zealand fur seals inhabit the islands. Furthermore, a famous protected

area for seals has been established there.[10]

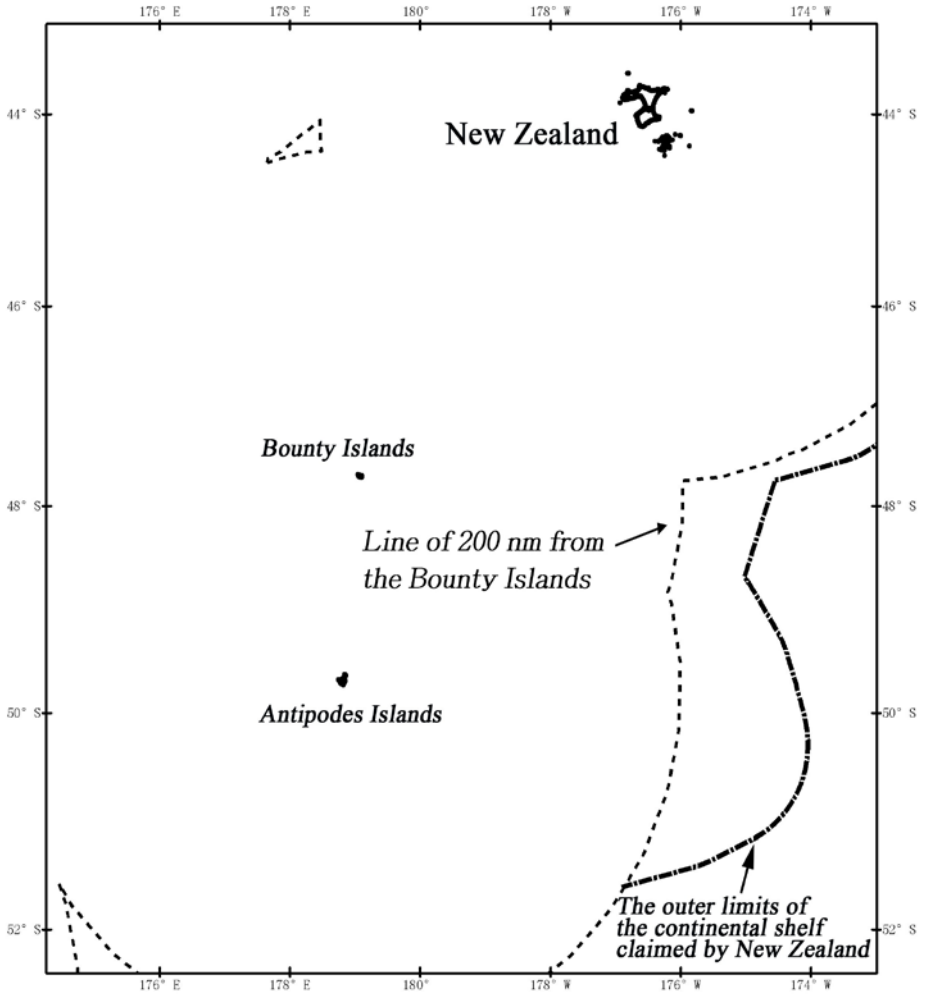

Fig. 3 Location of the Bounty Islands and Their 200-nautical-mile Line

C. Submission by Japan

According to the Executive Summary of the Japanese Submission, Japan claimed Okinotori Reef's exclusive economic zone and continental shelf beyond 200 nautical miles.

Located on the Kyushu-Palau Ridge, the Okinotori Reef is regarded by Japan

10 The Government of New Zealand, *Nomination of the New Zealand Subantarctic Islands by the Government of New Zealand for Inclusion in the World Heritage List*, 1997, pp. 12~15.

as the southern limit of its territory (Fig. 4). According to 1974 US Navy records, the main body of the Okinotori Reef was a lagoon surrounded by coral reefs. There were 5 rocks inside the lagoon which were above the sea surface during high tide. The lagoon was pear shaped, 4.5 km long, 1.7 km wide, covering 5 km^2, with a depth of 3~4.6 m. There was a channel at the southwestern corner, 15 m in width and 6 m in depth, for ships sailing in and out of the lagoon. Overtime the rocks were eroded by the waves; there were only 3 rocks above sea level during high tide when Japan began building an artificial structure on the Okinotori Reef in 1987. The 3 rocks were all scattered at the western part of the lagoon. The northwestern rock was 1 m in height, covering a total area of 7.86 m^2; the eastern rock was 0.9 m in height covering a total area of 1.5 m^2;[11] but the southern rock could hardly be seen when the tide was high.[12]

To protect the Okinotori Reef from weathering and erosion, Japan began to build steel breakwaters and concrete walls surrounding the 3 rocks in 1987; it also erected 3 round concrete platforms 50 m in diameter at this time. Japan also established a research platform at the southeastern corner of the lagoon. In 2006, Japan began cultivating reef-building corals in the sea area surrounding the rocks. According to article 121 of UNCLOS, “an island is a naturally formed area of land, surrounded by water, which is above water at high tide”. Since the artificial structures are not naturally formed, they cannot be seen as a part of the island’s land area.

11 Information about the Okinotori Reef, at http://www.okinotoriReef.or.jp/gaiyo.html, 27 October 2009.

12 Information about the Okinotori Reef, at http://www.ktr.mlit.go.jp/keihin/okinotori_island/index.htm, 21 November 2009.

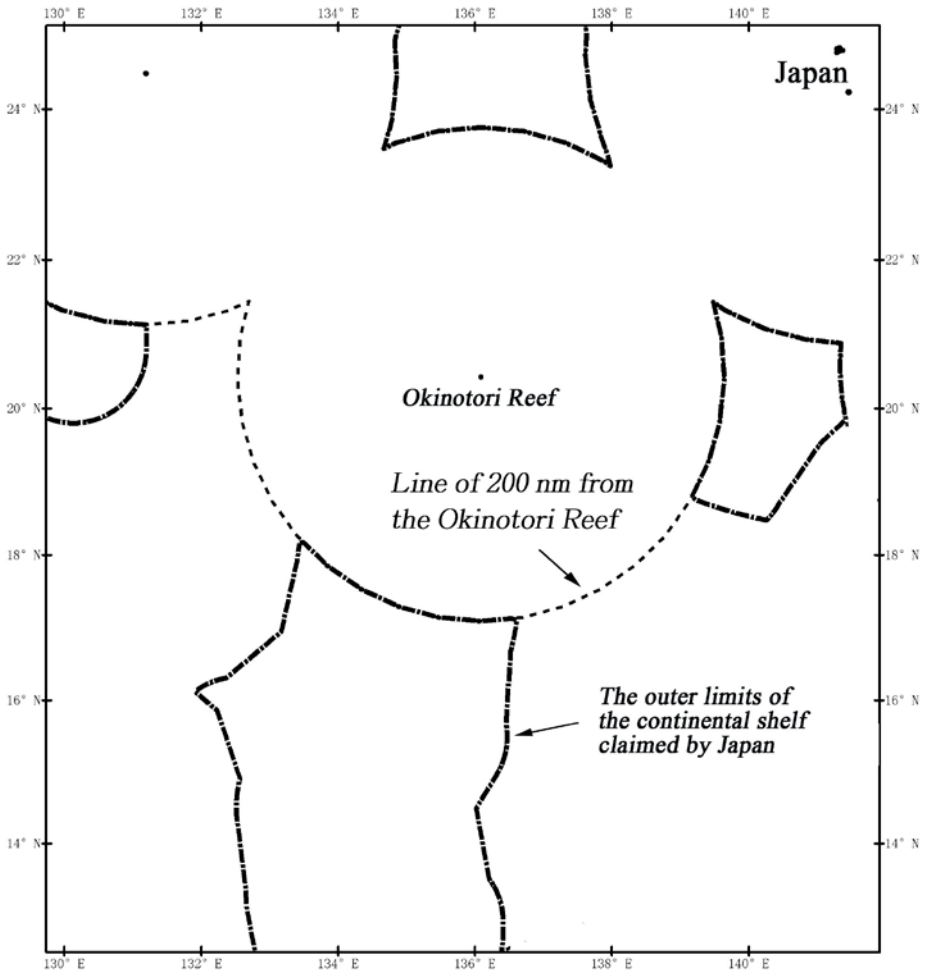

Fig. 4 Location of the Okinotori Reef and Its 200-nautical-mile Line

D. Submission by the Solomon Islands

According to the Executive Summary of Joint Submission by the Federated States of Micronesia, Papua New Guinea and the Solomon Islands, the Solomon Islands claimed an exclusive economic zone and continental shelf beyond 200 nautical miles stemming from Fatutaka Island. Fatutaka is the easternmost island of the Solomon Islands (Fig. 5). Anuta Island, a larger constituent island of the Solomon Islands, is located to the northwest of Fatutaka. Fatutaka is a volcanic island with vegetation covering a land area of 1.6 km^2, with its highest point 122 m above sea level. Residents from Anuta Island once farmed Fatutaka. Other than visiting

tourists who come to collect bird eggs, there is currently no permanent human habitation on Fatutaka Island.[13]

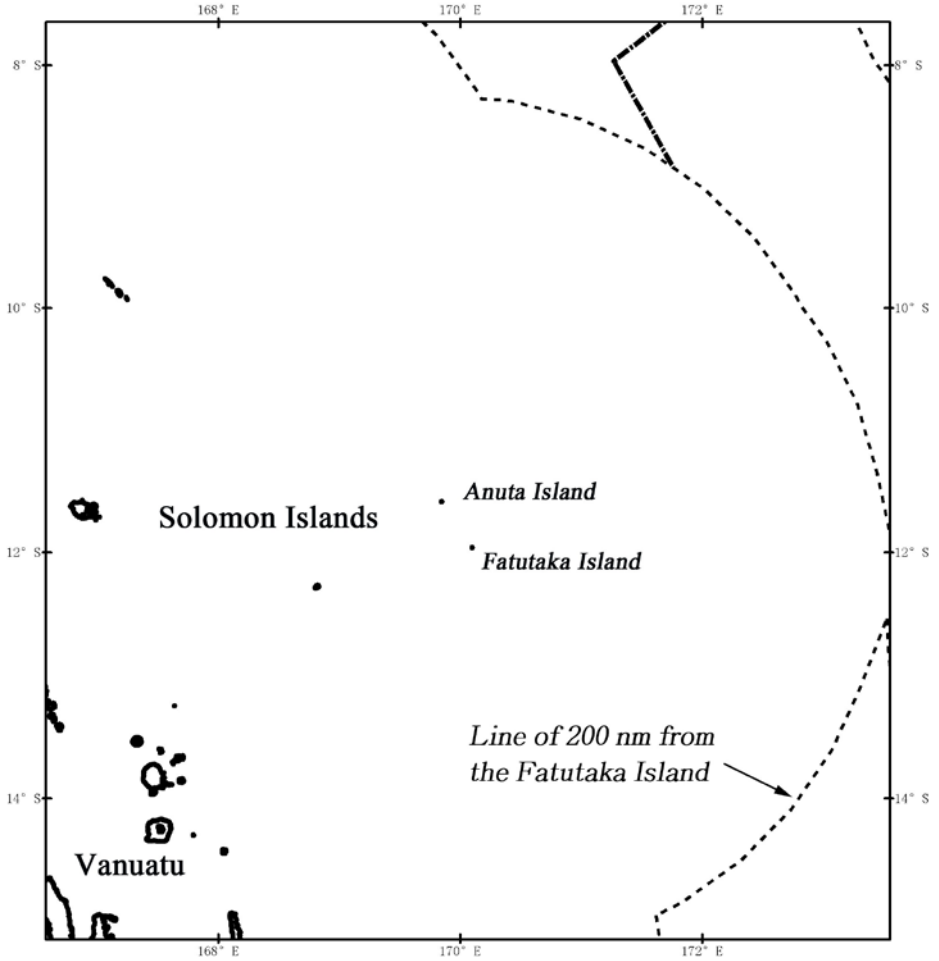

Fig. 5 Location of Fatutaka Island and Its 200-nautical-mile Line

E. Submission by Seychelles Concerning the Northern Plateau Region

According to the Executive Summary of Seychelles' Submission concerning the Northern Plateau Region, Seychelles claimed an exclusive economic zone and continental shelf beyond 200 nautical miles stemming from its northernmost territo-

13 Information about the Solomon Islands, at http://antbase.org/ants/africa/personal/solomons/sols12.html, 17 November 2009; Information about Fatutaka Island, at http://www.typhoon2000.ph/garyp_mgtcs/dec02.txt, 17 November 2009.

ry Bird Island (Fig. 6), which is a coral reef island covering a land area of 0.7 km^2. The island is a famous habitat for sea birds, and has developed into a tourist resort equipped with docks, highways and hotels for tourists. Apart from tourists and island staff, there are no other permanent residents on Bird Island.[14]

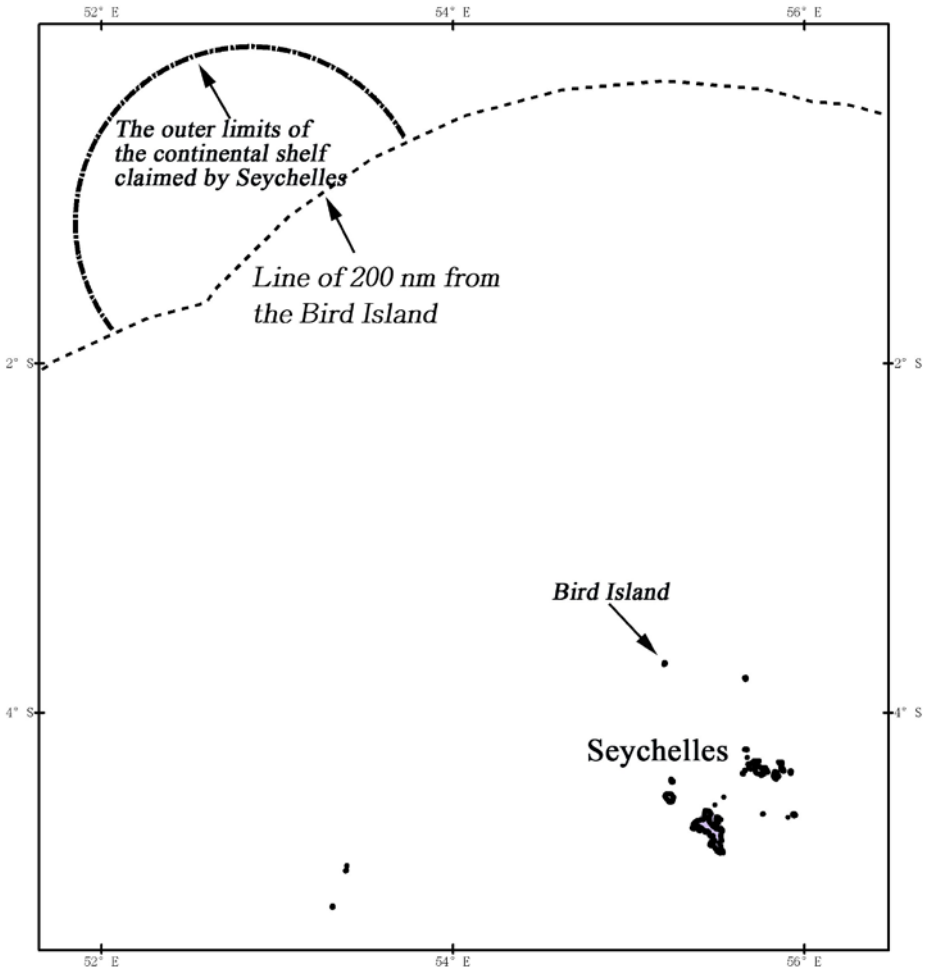

Fig. 6 Location of Bird Island and Its 200-nautical-mile Line

II. The Commission's Review and the Reaction of the International Community

14 Information about Bird Island, at http://www.birdislandseychelles.com/bird_island_seychelles.html, 25 October 2009.

The Commission has finished the review of the Submissions made by Australia and New Zealand, and has accepted the two States' entitlement to the continental shelves beyond 200 nautical miles stemming from the 3 groups of islands stated in the submissions. Since these submissions were made public, other States and the international community have not questioned the legality of claiming rights over the continental shelf stemming from the 3 groups of islands; in other words, there is an international consensus that the 3 groups of islands have continental shelves.

The 24th session of the Commission in 2009 decided to establish a Subcommission to examine Japan's Submission. Considering the notes submitted by China and South Korea, the Commission decided to give special treatment to the Okinotori Reef section of Japan's Submission, namely the Commission would not take action on the part of the recommendations prepared by the Subcommission in relation to the Okinotori Reef, until the Commission made a decision.[15] In addition to the notes of objection from China and South Korea, the 14th Session of the International Seabed Authority and the 19th Meeting of the States Parties to UNCLOS also raised concerns over the legality of Japan's claims that Okinotori had exclusive economic zone and continental shelf rights.

The Joint Submission by the Federated States of Micronesia, Papua New Guinea and the Solomon Islands is expected to be reviewed by the Commission in 2019 and the Submission by Seychelles concerning the Northern Plateau Region in 2024.[16] So far, no State has raised any question over the legality of the uninhabited islands' continental shelf rights in these two Submissions.

The above analysis shows that while there is an international consensus on the other 5 groups of uninhabited islands claims to a continental shelf beyond 200 nautical miles, Okinotori Reef's claims are quite contentious. Further comparison of the natural environment and human activities on these 6 groups of uninhabited islands and rocks (Table 1) presents marked differences as follows: (1) the other islands are much larger in size than the Okinotori Reef by at least 5 orders of magnitude; (2) the other five are covered by vegetation, while there are just bare rocks on the Okinotori Reef; (3) the other five are inhabited by animals, while the Okinotori Reef is not; (4) the other five have a long history of development or protection,

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15 Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/64, 2009, Paragraph 26, p. 7.

16 Yong Ahn Park, *The Workload of the CLCS/UNCLOS, Presentation in Seminar on the law of the Sea*, China-Korea Workshop on Legal Issues and Practices concerning Continental Shelf beyond 200 Nautical Miles, 29 October 2009.

while the Okinotori Reef only contains recently built artificial structures. These four points adequately explain why the legal status of the other five is recognized by the international community but Okinotori Reef's status is not.

Table 1 Comparison of the Natural Environment and Development Status on the 6 Groups of Islands with Claims for a Continental Shelf

Islands	Size (km^2)	Altitude (m)	Vegetation	Inhabited Animal	Developmet Activities	Origin
Bishop and Clerk Islets	0.6	50	Yes	Birds	Protected Area and Scientific Research	Volcanic
McDonald Islands	1	230	Yes	Birds	Protected Area and Scientific Research	Volcanic
Bounty Islands	1.35	73	Yes	Seals	Protected Area and Scientific Research	Volcanic
Fatutaka Island	1.6	122	Yes	Birds	Farming and Tourism	Volcanic
Bird Island	0.7	Less than 20	Yes	Birds	Protected Area and Tourism	Coral Island
Okinotori Reef	Less than 0.00001	Less than 1	No	No	Scientific Research	Coral Reef

III. A Comparison of the Legal Status of the Okinotori Reef and Rockall Rock

Rockall Rock is an isolated remnant of a volcano located 430 km to the north-west of Irish Mainland in the Atlantic Ocean. Even though it is a famous habitat for sea birds, this rock is unfit for human habitation. Great Britain, Ireland, Iceland and Denmark all used to claim sovereignty over this islet and sovereign rights over its continental shelf.

A. Claims Concerning the Legal Status of Rockall Rock by the Neighboring States

In 1831, the British Royal Navy first marked the rock on sea charts. On 18

September 1955, the British government erected a sovereign stone on Rockall Rock, claiming sovereignty over it.[17] The Island of Rockall Act 1972 made the Rock officially part of the Scottish county of Inverness-shire.[18] The United Kingdom once claimed a 200-nautical-mile exclusive economic zone based on Rockall Rock, but this claim was opposed by other neighboring States. Furthermore, the claim was not supported by the international community.[19] In 1997, the United Kingdom revised the fishing area it had claimed, and explicitly abandoned the claim over the 200-nautical-mile exclusive economic zone based on Rockall.[20] On 31 March 2009, the United Kingdom made a Submission inclusive of the Hatton-Rockall area to the Commission, which did not attempt to establish Rockall Rock as a base point to claim a 200-nautical-mile exclusive economic zone. The Submission, again, indicated the fact that the United Kingdom regards Rockall as a rock, defined in article 121(3) of UNCLOS, which shall have no exclusive economic zone or continental shelf.

Ireland has not yet formally claimed sovereignty over Rockall Rock, but at the same time it has not formally renounced its claim over the rock either. Ireland holds that the sovereignty over Rockall shall remain an issue to be solved between the United Kingdom and Ireland.[21] On 11 June 2003, the Irish Minister for Communications, Marine and Natural Resources stated that "Ireland claims an extended continental shelf … up to more than 500 nautical miles (926 km), particularly in the Hatto-

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17 On 18 September 1955 two Royal Marines and a civilian naturalist, led by Royal Navy officer Lieutenant Commander Desmond Scott, cemented a plaque into the rock, claiming sovereignty over the Rockall Rock. The plaque reads: "By authority of Her Majesty Queen Elizabeth II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of her other realms and territories Queen, Head of the Commonwealth, Defender of the Faith etc, etc., etc., and in accordance with Her Majesty's instructions dated the 14th day of September, 1955, a landing was effected this day upon this island of Rockall from HMS Vidal. The Union flag was hoisted and possession of the island was taken in the name of Her Majesty. R. H. Connell, Captain, HMS Vidal, 18th September, 1955."

18 The full text of "Island of Rockall Act 1972" states: "As from the date of the passing of this Act, the Island of Rockall (of which possession was formally taken in the name of Her Majesty on 18th September 1955 in pursuance of a Royal Warrant dated 14th September 1955 addressed to the Captain of Her Majesty's Ship Vidal) shall be incorporated into that part of the United Kingdom known as Scotland and shall form part of the District of Harris in the County of Inverness, and the law of Scotland shall apply accordingly."

19 Clive R. Symmons, Ireland and the Rockall Dispute: An Analysis of Recent Developments, *International Boundaries Research Unit Boundary and Security Bulletin*, Vol. 6, No. 1, 1998, p. 78.

20 The Fishery Limits Order, Statutory Instruments, 1997 No. 1750.

21 The Fishery Limits Order, Statutory Instruments, 1997 No. 1750.

n-Rockall area." [22] On 31 March 2009, Ireland made a Submission to the Commission, also including the Hatton-Rock area. Like the British Submission, the Irish Suubmission did not attempt to establish Rockall as a base point to claim a 200-nautical-mile exclusive economic zone or continental shelf, which also indicates that Ireland regards Rockall as a rock defined in article 121(3) of UNCLOS, which has no exclusive economic zone or continental shelf.

Iceland and Denmark (Faroe Islands) have not yet claimed sovereignty over Rockall Rock, but instead have claimed the neighboring continental shelf.[23] Both Iceland and Denmark (Faroe Islands) accept the fact that Rockalll shall be regarded as a rock which has no exclusive economic zone or continental shelf.

B. Comparison between Rockall Rock and the Okinotori Reef

Both Rockall Rock and the Okinotori Reef are small isolated rocks far away from the mainland. They have several aspects in common (Table 2). In terms of size, prospects for life and development history, Rockall is obviously superior to Okinotori. Based on the key aspects mentioned above, Rockall is a more appropriate candidate for island status than Okinotori.

Both the United Kingdom and Ireland made Submissions concerning the continental shelf beyond 200 nautical miles within the sea area where Rockall Rock is located, but neither claimed an exclusive economic zone or continental shelf stemming from Rockall. In sharp contrast to the Submissions made by the United Kingdom and Ireland, Japan's Submission claimed an exclusive economic zone and continental shelf for Okinotori, even though it lacks the conditions to "sustain human habitation or economic life." Based on a comprehensive comparison of natural conditions between Rockall and Okinotori, and in light of the fact that Rockall has not been recognized by the international community as possessing the legal

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22 On 11 June 2003, the Irish Minister for Communications, Marine and Natural Resources gave a Written Parliamentary Answer, stating "Ireland claims an extended continental shelf up to more than 500 nautical miles, particularly in the Hatton–Rockall area."

23 Clive R. Symmons, Ireland and the Rockall Dispute: An Analysis of Recent Developments, *International Boundaries Research Unit Boundary and Security Bulletin*, Vol. 6, No. 1, 1998, pp. 78~93.

status of an island, Okinotori should not have the legal status of an island.[24] Japan's claim goes against related articles of UNCLOS and the general recognition of the international community, thus it should be rendered illegal and invalid.

Table 2 Comparison between Rockall and Okinotori in Terms of Natural Conditions

Name	Size	Height above the sea surface	Res-ident	Vege-tation	Inhabited Animal	Develop-ment Activites	Origin
Rockall Rock	Measured 25 m long from south to north side, and 22 m wide from east to west side[24]/more than 400 m^2	19.2 m	No	No	Sea Birds	No	Granite/ Volcanic Origin
Okinot-ori Reef	Northern Rock measured 7.86 m^2	1 m	No	No	No	No	Coral reef reinforced by artificial efforts
	Eastern Rock measured 1.5 m^2	0.9 m	No	No	No	No	Coral reef reinforced by artificial efforts

IV. Conclusion

In the 51 submissions made to the Commission so far, most coastal States have taken an island as a base point and tried to claim the continental shelf beyond 200 nautical miles, with some of the base points being uninhabited islands. This is particularly the case in the following examples, the Bishop and Clerk Islets and the McDonald Islands of Australia, the Bounty Islands of New Zealand, Fatutaka

24 Professor Jon Van Dyke, a renowned professor of marine law, expressed similar opinion, see Martin Fackler, A Reef or a Rock? Question Puts Japan In a Hard Place To Claim Disputed Waters, Charity Tries to Find Use For Okinotori Reef, *Wall Street Journal*, 16 February 2005, p. A1.

25 Information about Rockall Rock, at http://www.rockall2011.com/About_Rockall.html, 25 October 2009.

Island of the Solomon Islands, Bird Island of Seychelles and the Okinotori Reef of Japan. This comparative study of the natural conditions and development status on the 6 groups of islands shows that the Okinotori Reef is inferior to the other five in terms of size, and natural conditions for human habitation and economic life. Okinotori also has a much shorter history of development. Thus it is reasonable that while the other five are recognized by the international community as islands, the Okinotori Reef is not.

Both Rockall Rock and the Okinotori Reef are small isolated rocks far away from the mainland. In terms of size, natural conditions for human habitation or economic life, and development history, Rockall is a more appropriate candidate to be elevated to the legal status of being an island than the Okinotori Reef. The United Kingdom's claim over Rockall's exclusive economic zone was denied by the international community. At present, both the United Kingdom and Ireland have agreed that Rockall shall be recognized as a rock defined by article 121(3) of UNCLOS which shall have no exclusive economic zone or continental shelf. Considering that even Rockall has not been internationally recognized as an island, the Okinotori Reef should not be entitled to the legal status of an island.

To conclude, the Okinotori Reef should be recognized as a rock defined in article 121(3) of UNCLOS, and should have no exclusive economic zone or continental shelf. Japan's claim over Okinotori's exclusive economic zone and continental shelf beyond 200 nautical miles in its Submission to the Commission goes against related articles of UNCLOS and the general consensus of the international community, and therefore should be rendered illegal and invalid.

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A Review Concerning 2009 Maritime Delimitation in the Black Sea

ZHANG Weibin*

Abstract: On 3 February 2009, the International Court of Justice (ICJ) rendered a Judgment on the *Romania v. Ukraine* case. In this case, the ICJ confirmed the "equitable principles and relevant circumstances approach" and applied the equidistance method to delimitation. Meanwhile, the ICJ insisted that although the equidistance method should be a primary provisional step for delimitation, it did not demonstrate that the method shall take priority automatically, and that the method shall not apply if there were compelling reasons. As for the *effectivités* of Serpents' Island in the delimitation, the ICJ defined Serpents' Island as a rock rather than an island, which reflected the recent tendency in maritime delimitation. However, Ukraine was not satisfied with the ICJ Judgment, which demonstrated that there were still some problems with this tendency.

Key Words: Black sea; Serpents' Island; Maritime delimitation; Equitable principles and relevant circumstances approach

A serious dispute had existed for a long time between Ukraine and Romania over the delimitation of their maritime boundary in the Black Sea. On 16 September 2004, Romania lodged a lawsuit before the International Court of Justice (ICJ) and requested the delimitation of the continental shelves and the exclusive economic zones between Ukraine and Romania in the Black Sea. On 3 February 2009, 15 judges of the ICJ rendered a final Judgment unanimously. In accordance with the Judgment, about 80% of the areas where both parties had a dispute shall belong to Romania. Meanwhile, Serpents' Island was defined as a rock rather than an island, and therefore had no exclusive economic zone or continental shelf. The Judgment

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of this case reflected a new tendency in maritime delimitation. However, there are still some issues that need to be clarified.

I. Preliminary Legal Issues

A. Subject-matter of the Dispute

The Black Sea, an enclosed sea containing rich oil and natural gas resources on its continental shelf, is situated between 40º56' and 46º33' N and between 27º27' and 41º42' E, with a surface area of some 432,000 sq km. It is connected with the Mediterranean Sea by the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus. The sea area delimited in this case is situated in the Northwestern Black Sea. Serpents' Island, approximately 20 nm to the east of the Danube delta, has a l-and area of about 0.17 sq km and a circumference of approximately 2,000 m. Serpents' Island was incorporated into the USSR in accordance with a protocol between Romania and the USSR in 1948. The dispute between Romania and Ukraine concerned the establishment of a single maritime boundary delimiting the continental shelf and exclusive economic zones between the two States in the Black Sea.

In its Appeal, Romania interpreted that, "following a complex process of negotiations," Romania and Ukraine signed the Treaty on Relations of Co-operation and Good Neighbourliness (Treaty on Good Neighbourliness and Co-operation) between Romania and Ukraine on 2 June 1997 and an Additional Agreement, concluded by exchange of letters of the Ministers of Foreign Affairs of the two States. Both entered into force on 22 October 1997. By these agreements, "the two States assumed the obligation to conclude a Treaty on the State Border Régime between Romania and Ukraine, as well as an Agreement for the delimitation of the continental shelf and the exclusive economic zones of the two countries in the Black Sea." At the same time, paragraph 4(g) of the Additional Agreement requires that negotiations for the conclusion of such Agreement were to start as soon as possible, during a period of three months from the date of the entering into force of the Treaty on Good Neighbourliness and Co-operation. Between January 1998 and September 2004, 24 rounds of negotiations were held on the subject of the establishment of the maritime boundary, as well as 10 rounds at an expert level. However, no result was obtained. Under these circumstances, Romania requested the ICJ to establish a single maritime boundary delimiting the continental shelf and exclusive economic zones between the two States in the Black Sea in accordance with international law,

especially the standards set forth in paragraph 4 of the Additional Agreement.[1]

B. Jurisdiction of the ICJ and Its Scope

Romania invoked as a basis for the ICJ's jurisdiction article 36(1) of the Statute of the ICJ and paragraph 4(h) of the Additional Agreement,[2] the latter of which provides, "if these negotiations shall not determine the conclusion of the agreement for the delimitation of the continental shelf and the exclusive economic zones in the Black Sea in a reasonable period of time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the United Nations International Court of Justice, at the request of any of the parties, provided that the Treaty on the regime of the State border between the two countries has entered into force. However, should the ICJ consider that the delay of the entering into force of the Treaty on the regime of the State border is the result of the other Party's fault, it may examine the request concerning the delimitation of the continental shelf and the exclusive economic zones before the entry into force of this Treaty." Romania argued that both the two conditions set forth in paragraph 4(h) of the Additional Agreement had been met because the negotiation had lasted for more than 2 years and the Treaty between Romania and Ukraine on the Romanian – Ukrainian State Border Régime, Collaboration and Mutual Assistance on Border Matters (hereinafter the "2003 State Border Régime Treaty") entered into force on 27 May 2004.[3]

In the Appeal, Romania held that "the initial segment of the boundary separating the Romanian exclusive economic zone and continental shelf from the Ukrainian territorial waters around Serpents' Island between Point F and Point X was established by the 2003 State Border Régime Treaty." In the view of Romania, the primary mission for the ICJ to conduct the delimitation was to confirm the boundary between these two points and then to proceed to the determination of the delimitation line in the other segments where the line had not yet been established by the two States.

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1 Case Concerning Maritime Delimitation in the Black Sea between Romania and Ukraine, Judgment of 3 February 2009 (hereinafter Romania v. Ukraine case), paras. 18~19.

2 Article 36(1) provides that "The jurisdiction of the ICJ comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

3 Romania v. Ukraine case, para. 21.

Ukraine on the contrary argued that the jurisdiction of the ICJ should be "restricted to the delimitation of the areas of continental shelf and the exclusive economic zones of the Parties." In its view, the ICJ had no jurisdiction to delimit other maritime zones pertaining to either of the Parties and in particular their respective territorial seas. The ICJ observed that Ukraine could not contend under international law, as a matter of principle, a delimitation line separating the territorial sea of one State from the exclusive economic zone and the continental shelf of another State. In fact, such a line was determined by the ICJ in its latest Judgment on the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*) in 2007. However, because the 2003 State Border Régime Treaty, in its article 1, describes the boundary line between the two Parties not only on land but also the line separating their territorial seas, the ICJ's jurisdiction covered only the delimitation of their continental shelf and exclusive economic zones.[4]

C. Applicable Law

In the Appeal, Romania summarized the laws applicable to settlement of the dispute and invoked some provisions in the 1997 Additional Agreement, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) signed in the Montego Bay to which both Romania and Ukraine are parties, as well as other relevant instruments binding on both parties. Specifically speaking, articles 74 and 83 of UNCLOS are relevant to the delimitation of the exclusive economic zone and the continental shelf, respectively. The two articles are consistent in content on the whole, both stressing that the delimitation of the exclusive economic zone or continental shelf between States with opposite or adjacent coasts "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". Ukraine agreed with the view and argued that certain specific rules which have become well established in the jurisprudence of the ICJ shall also be taken into account.[5]

What's more, in light of UNCLOS being a framework convention, Romania argued that the principles listed in paragraph 4 of the 1997 Additional Agreement were applicable both to the diplomatic negotiations between the two States and for

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4 Romania v. Ukraine case, paras. 24~30.
5 Romania v. Ukraine case, paras. 36~39.

the purposes of any eventual settlement of the dispute by the ICJ. These principles included: (a) the principle stated in article 121 (Regime of Islands) of UNCLOS as applied in the practice of states and in international case jurisprudence; (b) the principle of the equidistance line in areas submitted to delimitation where the coasts are adjacent and the principle of the median line in areas where the coasts are opposite; (c) the principle of equity and the method of proportionality, as they are applied in the practice of states and in international case jurisprudence; (d) the principle according to which neither of the Contracting Parties shall contest the sovereignty of the other Contracting Party over any part of its territory adjacent to the zone submitted to delimitation; (e) the principle of taking into consideration the special circumstances.[6] According to Ukraine, however, the principles enunciated in the 1997 Additional Agreement should not be applied to the subsequent judicial proceedings. At the same time Ukraine acknowledged that some of these principles might be relevant as part of the established rules of international law which the ICJ would apply but not as part of any bilateral agreement. The ICJ noted that the principles listed in the Additional Agreement might apply to the extent that they were part of the relevant rules of international law.[7]

Romania further argued that the content of the 1949, 1963 and 1974 Procès-Verbaux between the two countries shall be legally binding on both parties and be taken into account in the delimitation. In particular, according to the Treaty on Good Neighbourliness and Co-operation and the Additional Agreement in 1997, in exchange for the fact that Romania formally confirmed that Serpents' Island belonged to Ukraine, Ukraine accepted the principles for reaching an equitable solution to the delimitation laid down by the Additional Agreement and the declaration when Romania signed and ratified UNCLOS, as well as article 121(3) of UNCLOS, Serpents' Island "cannot sustain human habitation or economic life of their own" and therefore has no *effectivités* in delimitating the continental shelf and the exclusive economic zones.[8]

With regard to the views of Romania, Ukraine argued that the above agreeme-

6 Romania v. Ukraine case, para. 33.
7 Romania v. Ukraine ease, para. 41.
8 Romania v. Ukraine case, para. 35.

nts did not constitute provisions mentioned in articles 74(4) and 83(4) of UNCLOS[9] because they were not agreements delimiting the continental shelf and exclusive economic zones. With regard to the declaration made by Romania with respect to article 121(3) upon the signature and ratification of UNCLOS and the reference to article 121(3) of UNCLOS in the Additional Agreement of 1997, Ukraine pointed out the difference between a reservation and a declaration which did not modify the legal effect of the treaty and did not call for any response from the other Contracting Parties. Thus, the ICJ did not have to take into consideration Romania's declaration. Regarding Romania's declaration, the ICJ emphasized that under article 310 of UNCLOS, a State had the right to make declarations and statements when signing, ratifying or acceding to the Convention, provided these did not purport to exclude or modify the legal effect of the provisions of UNCLOS. However, the ICJ would apply the relevant provisions of UNCLOS as interpreted in accordance with article 31 of the Vienna Convention on the Law of Treaties of 1969. Romania's declaration as such had no effectiveness on the ICJ's interpretation.[10]

II. Judgment of the ICJ

A. Effect of the Past Treaties

The ICJ noted that the disagreement of the Parties mainly consisted in whether there already existed an agreed maritime boundary around Serpents' Island for all delimitation purposes. They therefore disagreed also on the starting-point of the delimitation to be effected by the ICJ under this circumstance. To clarify the issues, the ICJ must distinguish between the following two matters: firstly, the starting-point of the delimitation as a function of the land boundary and territorial sea boundary as already determined by the Parties; and secondly, whether there existed an agreed maritime boundary around Serpents' Island and what was the nature of such a boundary, and whether it separated the territorial sea of Ukraine from the contine-

9 Article 74(4) of UNCLOS provides that "where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement." Similarly, article 83(4) of UNCLOS stipulates that "where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement."

10 Romania v. Ukraine case, paras. 40~42.

ntal shelf and the exclusive economic zone of Romania.[11]

In fact, these two matters involved the effect of the Procès-Verbaux of 1949, 1963 and 1974, as well as the 1949 and 1961 Treaties between Romania and the USSR and the 2003 State Border Régim Treaty between Romania and Ukraine. After examining the above treaties, the ICJ concluded that in the 1949 Procès-Verbaux it was agreed that from the point represented by border sign 1439 the boundary between Romania and the USSR would follow the 12-nautical-mile arc around Serpents' Island, without any endpoint being specified. Under article 1 of the 2003 State Border Régime Treaty the endpoint of the State border between Romania and Ukraine was fixed at the point of the intersection where the territorial sea boundary of Romania meets that of Ukraine. Then the ICJ referred to this point as "Point 1" of the delimitation of the two States.[12]

With respect to the question whether there existed an agreed maritime boundary around Serpents' Island that separated the territorial sea of Ukraine from the continental shelf and the exclusive economic zone of Romania, the ICJ stressed that the 1949 Procès-Verbaux related only to the matters of following the 12-nautical-mile border limit around Serpents' Island between Romania and the USSR. Ukraine, as one of the successor States of the USSR, did not lose the right to claim beyond 12-nautical-mile in other water. Consequently, there was no agreement in force delimiting the exclusive economic zone and the continental shelf between Romania and Ukraine.[13]

B. Relevant Coasts

The effect of relevant coasts can have two different though closely related legal aspects in relation to the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to consider the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check the fair demarcation results, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State Party. In Romania's view, the whole Romanian coast was relevant with the

11 Romania v. Ukraine case, para. 43.
12 Romania v. Ukraine case, para. 66.
13 Romania v. Ukraine case, para. 76.

total length being 269.67 km (baselines 204.90 km). However, the total length of Romania's coast, according to Ukraine, was 185 km if measured more generally and was 258 km if taking into account the sinuosities along that coast (baselines 204 km). The ICJ noted that the first segment of the Romanian coast, from the last point of the river boundary with Ukraine to the Sacalin Peninsula, had a dual function in relation to Ukraine, because it was an adjacent coast to the Ukrainian coast lying to the north, and it was an opposite coast to the coast of the Crimean Peninsula. Measured by the ICJ, the length of the relevant coast of Romania was approximately 248 km.[14]

As to the Ukrainian relevant coast, the Parties took different views on it. The length of the relevant Ukrainian coast, as perceived by Romania, was 388.14 km (baselines 292.63 km), while Ukraine concluded that the total length of its relevant coast was 1,058 km (baselines 664 km). However, the ICJ pointed out that it was inappropriate for Ukraine to extend the coastline of Karkinits'ka Gulf, Yahorlyts'ka Gulf and Dnieper Firth as its relevant coast. Meanwhile, the coast of Serpents' Island was so short that it could not be included in the calculation of the length of the Ukrainian relevant coast. According to the ICJ's view, the length of the relevant coast of Ukraine was approximately 705 km and the ratio for the coastal lengths between Romania and Ukraine was approximately 1:2.8.[15] However, the ICJ adjusted the ratio to 1:2.1 in the final Judgment.

C. Delimitation Methodology and Selection of Base Points

The ICJ considers establishing a provisional equidistance line between adjacent coasts and median line between opposite coasts of the two States concerned without consideration of any relevant circumstances in the first stage of the delimitation process. Meanwhile, the ICJ also notes that an equidistance line or median line will be drawn unless there are compelling reasons that makes this unfeasible in the particular case.[16] The ICJ will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line or median line in order to achieve an equitable result. The ICJ has also made clear that

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14 Romania v. Ukraine case, paras. 87~88.
15 Romania v. Ukraine case, paras. 101~104.
16 Romania v. Ukraine case, para. 116.

when the line to be drawn
covers several jurisdictions, the so-called "equitable principles/relevant circumstances method" may usefully be applied, and that this method is also suited to achieving an equitable result.[17] Finally, at a third stage, the ICJ will determine a maritime border by taking into account all the relevant circumstances, as well as a final check for an equitable outcome which entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of relevant coastal lengths.[18] However, the ICJ emphasizes that this does not mean these respective sea areas should be proportionate to coastal lengths – as the ICJ has said "the sharing out of the area is therefore the consequence of the delimitation, not vice versa" in the case concerning the Maritime Delimitation in the Area between Greenland and Jan Mayen *(Denmark v. Norway)* in 1993.[19]

With respect to the base points, the focus of dispute between the two Parties lied in: whether the Sacalin Peninsula, the Musura Bay and the Sulina dyke on the Romanian coast, along with the island of Kubansky, Cape Tarkhankut, Cape Khersones and Serpents' Island on the Ukrainian coast, could be taken into account as the base points. After analysis, the ICJ considered it appropriate to use base points on the Sacalin Peninsula and the Musura Bay. As to the Sulina dyke, the ICJ noted, on the one hand, no convincing evidence existed to prove that it complied with the requirement of "the outermost permanent harbor works" provided in article 11 of UNCLOS; while on the other hand, the landward end of the Sulina dyke, as it joined the Romanian mainland, should be used as a base point.[20]

On the coasts adjacent to Romania, the ICJ pointed out that it would use Tsyganka Island as a base point for delimitation, but the base point situated on the island of Kubansky was to be regarded as irrelevant for the purposes of the present delimitation. On the opposite coasts, the ICJ concluded that it would use Cape Tarkhankut and Cape Khersones as base points. Serpents' Island, however, cannot be regarded as an island as it meets the conditions of article 121(3) of UNCLOS and should be regarded as a rock which "cannot sustain human habitation or economic life of their own," and the ICJ therefore considered it inappropriate to use the rock as a base

17 Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (hereinafter Nicaragua v. Honduras case), Judgment of 8 October 2007, para. 271.
18 Romania v. Ukraine case, para. 122.
19 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I. C. J. Reports 1993, p. 67, para. 64.
20 Romania v. Ukraine case, paras. 138~141.

point.[21]

D. Relevant Circumstances

1. Disproportion between Lengths of Coasts. Ukraine invoked the circumstance of disproportion between the lengths of the Parties' coasts to claim the adjustment of the provisional equidistance line. Romania noted, despite the acknowledgment of the above fact, that in a maritime delimitation it was rare for the disparities between the Parties' coasts to feature as a relevant circumstance. Moreover, in the present case, there was no manifest disparity in the respective coastal lengths of the two States. In any event, proportionality should be dealt with only after having identified the line resulting from the application of the "equitable principles and relevant circumstances approach", and therefore should not be considered as relevant circumstances. The ICJ observed that there were no marked disparities between the relevant coasts of the two States that would require it to adjust the provisional equidistance line.[22]

2. The Enclosed Nature of the Black Sea and the Delimitations Already Effected in the Region. Romania noted that the enclosed nature of the Black Sea should be taken into account as relevant circumstances, as well as the Agreement concerning the Delimitation of the Continental Shelf in the Black Sea between Turkey and the USSR in 1978 and the Agreement between Turkey and Bulgaria on the determination of the boundary in 1997, which had effect in this area. Ukraine held different views: on the one hand, the enclosed character of the Black Sea was not by itself a circumstance which ought to be regarded as relevant for delimitation purposes; on the other hand, the bilateral agreements could not affect the rights of third parties and therefore the existing maritime delimitation agreement in the Black sea could not influence the present dispute.[23] Finally, the ICJ agreed with Ukraine's suggestion in its ruling.

3. Any Cutting Off Effect. In the preliminary observations of the case, Ukraine once pointed out that Romania's equidistance line resulted in a two-fold cut-off of Ukraine's maritime entitlements and asked for adjustment of the provisional equidistance line. First, Serpents' Island could sustain an economic life of its own,

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21 Romania v. Ukraine case, para. 149.
22 Romania v. Ukraine case, para. 168.
23 Romania v. Ukraine ease, paras. 172~173.

with vegetation, sufficient supply of fresh water and appropriate buildings and accommodation for an active population. Therefore it should be regarded as an island, yet its maritime entitlements were dramatically truncated by allocating no continental shelf and no exclusive economic zone to it. Second, Romania's equidistance line represented a fundamental encroachment on natural prolongation of continental shelf and sovereign rights in exclusive economic zones of Ukraine's south-facing mainland coast. However, the ICJ saw no reason to adjust the provisional equidistance line, and pointed out that Serpents' Island had no *effectivités* in delimitating the continental shelf and exclusive economic zones. Meanwhile, in this case, no geographical factors had made it necessary to adjust the provisional equidistance line.[24]

4. The Conduct of the Parties (Oil and Gas Development, Fishing Activities and Naval Patrols). Ukraine argued that State activities in the relevant area constituted a relevant circumstance which needed to be considered. For example, in 1993, 2001 and 2003 Ukraine licensed activities relating to the exploration of oil and gas within the continental shelf and exclusive economic zone area and prior to 2011, Romania never protested. However, Romania did not consider that *effectivités* or State activities, as a matter of legal principle, could constitute relevant circumstances to be taken into account for the purposes of maritime delimitation. Moreover, two of the three licences were issued after the critical date of the signature of the 1997 Addition Agreement, to which Romania consistently objected. Thus, the two Parties did not reflect a tacit agreement, so that the *effectivités* presented by Ukraine could not deny the existence of a "*de facto* line". In addition, the fishing activities and naval patrols reported by Ukraine were also subsequent to the critical date of 1997 and as such were irrelevant to delimitation purposes.[25] With respect to the dispute between the two countries, on the whole, the ICJ supported the views of Romania and did not take account of the above-mentioned circumstances in the delimitation.

5. The Security Considerations of the Parties. Romania asserted that there was no evidence to suggest that the delimitation advanced by it would adversely affect Ukraine's security interests, including Serpents' Island, which has a territorial sea of 12 nautical miles. In contrast, Ukraine's delimitation line ran unreasonably close to the Romanian coast and thus encroached on the security interests of Romania. The ICJ confined the consideration of security interests to two aspects: on the

24 Romania v. Ukraine case, paras. 199~201.
25 Romania v. Ukraine case, paras. 193~196.

one hand, the legitimate security considerations of the Parties concerned might play an important role in determining the final delimitation line; on the other hand, the provisional equidistance line determined by the ICJ fully respected the legitimate security interests of either Party and thus there was no need to adjust the line on the basis of this consideration.[26]

III. Review of the Delimitation Case in the Black Sea

Romania and Ukraine showed quite different attitudes towards the Judgment of the ICJ on the delimitation case in the Black Sea. The former believed that this was a win-win result, while the latter expressed its dissatisfaction. Moreover, Ukraine asserted that the most common method of equidistance was applied when the ICJ made the Judgment, but the relevant circumstances had not been taken into account, and that the Judgment reflected more interests of Romania. Based on the above-mentioned Judgment of the ICJ, this doubt is rational to some degree, but there are also some misunderstandings in it.

A. From Principles to Specific Rules: the "Equitable Principles and Relevant Circumstances Approach" Has Become a General Customary Law

The equitable principles, due to their failure to provide any predictable rules for delimitation, have been subject to criticisms for a long time by their opponents, and the criticisms become fiercer because the ICJ has once been too flexible in the delimitating process. However, in fact, the ICJ has always stressed that the equitable principles should be the general international law and has made efforts to make these principles more established. From the 1969 *North Sea Continental Shelf* Case (in this case, the ICJ argued that maritime delimitation shall be settled based on international law and agreements in accordance with the equitable principles, with all the relevant circumstances taken into account) to the 1982 *Tunisia / Libya Continental Shelf* Case, the 1985 *Libya / Malta Continental Shelf* Case and the 1993 *Greenland / Jan Mayen* Case and other judicial cases, the ICJ has been enunciating

26 Romania v. Ukraine case, para. 204.

the specific connotation of the equitable principles constantly. Especially in the 2001 *Qatar v. Bahrain* Case, the ICJ formally proposed the equitable principles/relevant circumstances rule.[27] Subsequently, this specific rule and method was confirmed successively in the 2002 *Cameroon v. Nigeria* Case[28], the 2007 *Nicaragua v. Honduras Delimitation* Case[29] and the *Black Sea Delimitation* Case. Obviously, the equitable principles have evolved from principles to specific rules and their status as a general customary law has been increasingly recognized by the international community. Broadly speaking, the equitable principles and the relevant circumstance approach have become more established, which are mainly reflected in the following aspects: to start from the equitable principles; to follow equitable procedures; to apply equitable delimitation methods and to ensure equitable delimitation results, etc.

But it is worth noting that, although the ICJ denied the status of the equidistance and special circumstances approach as a customary law in the *North Sea Continental Shelf* Case in 1969 and stressed that it shall start from the equitable principles and determine the delimitation method based on all the relevant circumstances when dealing with specific delimitation cases. However, because this delimitation method was too flexible, there were some disputes over the applicability of the equitable principles. However, since the 1985 *Libya / Malta Continental Shelf* Case, the attitude of the ICJ had undergone some changes, that is, it re-used the equidistance line as the provisional starting point of the delimitation and then made some adjustment based on the relevant circumstances. Especially in several recent delimitation cases, the ICJ noted that the provisional equidistance line shall be determined first in the delimitation. To some degree, this seemed to have changed the previous delimitation mode and given priority to the equidistance method. Moreover, in the 2007 *Nicaragua v. Honduras Delimitation* Case, the ICJ reiterated in particular that "[t]his method [meaning the equitable principles/relevant circumstances method], which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for

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27 Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (hereinafter Qatar v. Bahrain case), Judgment of 16 March 2001, para. 231.

28 Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, Judgment of 10 October 2001, para. 288.

29 Nicaragua v. Honduras case, para. 271.

the adjustment or shifting of that line in order to achieve an 'equitable result'."[30] Therefore, some scholars argued that the equitable principles and relevant circumstances approach has disappeared while the equidistance and special circumstances rule has prevailed.[31]

However, the ICJ explained the reasons for the adjustment mainly as follows: the equidistance method has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. However, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.[32] In fact, in the *Nicaragua v. Honduras Delimitation* Case, in view of the specific geographical situation of the region, the ICJ did not apply the equidistance method, but drew a bisector. The azimuth angle was 70°14'41.25" degrees.[33] Then, the ICJ adjusted the trajectory of the line based on relevant circumstances.

As mentioned before, in the *Black Sea Delimitation* Case, the ICJ re-stressed that the provisional equidistance line shall not apply first if there were compelling reasons in special circumstances. In fact, although the ICJ argued that the equitable principles/relevant circumstances rule with regard to the delimitation of the continental shelf and the exclusive economic zone is closely related to the equidistance/special circumstances rule which is applicable to the delimitation of the territorial sea[34] in the 2001 *Qatar v. Bahrain* Case and the two rules tended to be integrated to some degree; however, the two specific rules that are applicable to delimitating different maritime areas are essentially different from the premise on which the ICJ applies equidistance lines.

B. The Effectivités of Islands in Delimitation

In general, some unimportant islands will not be taken into account, whether in bilateral delimitation agreements or in some judicial judgments of the ICJ. For example, in the 1958 Bahrain and Saudi Arabia Delimitation Agreement, when the

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30 Nicaragua v. Honduras case, para. 271.
31 Robert Kolb, *Case Law Equitable Maritime Delimitation: Digest and Commentaries*, The Hague: Martinus Nijhoff Publishers, 2003, pp. 536~537.
32 Nicaragua v. Honduras case, paras. 271~272.
33 Romania v. Ukraine case, para. 298.
34 Qatar v. Bahrain case, para. 231.

endpoints or turning points of the boundary line and some other factors were determined, the *effectivités* of some small islands was neglected. In this case, Serpents' Island of Ukraine is of the same nature. This issue had also caused controversy among the representatives during the Third United Nations Conference on the Law of the Sea. The controversy focused on whether it would give rise to inequitable situations if some rocks that are small in area and could not sustain human habitation were entitled to large areas of maritime space. Finally, the representatives made a compromise resulting in the restrictive provisions in article 121(3) of UNCLOS, that is, "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[35] However, there were no provisions in UNCLOS concerning the specific *effectivités* of islands in maritime delimitation.

In accordance with state practices and international judicial judgments, an island may have full *effectivités*, partial *effectivités* or no *effectivités*, which shall be determined based on its location and nature. Those islands located within the territorial sea of a State, or close to the mainland of a country, those to which both relevant States enjoy similar conditions, those belonging to an archipelagic State, or those important in location, large in size or heavily populated will usually have full *effectivités* in delimitation, such as Tsushima between Japan and South Korea. Sometimes, a country may confer full *effectivités* on some islands based on politics, economics and the development of bilateral relations between two countries. Some unimportant islands are often endowed with half *effectivités*, such as Seal Island of Canada in the *Gulf of Maine* Case; some islands that are far away from their mainland and close to the assumed median line between two countries are often conferred with partial *effectivités* by both parties, or do not serve as the base points in delimitation, but can enjoy only appropriate territorial sea. When an island is far away from its mainland and close to the territory of another country, it is often conferred with partial *effectivités* or no *effectivités*, such as the British Channel Islands in the *Britain v. French Continental Shelf* Case. Furthermore, some islands are generally conferred with no *effectivités* if they are small and far away from the mainland, and are not important to the country, or if their sovereignty is disputed.

However, undeniably, due to the lack of rules of international law at present, some countries have established some islands far away from coasts as base points

35 Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia*, The Hague: Martinus Nijhoff Publishers, 2004, pp. 199~200.

of their territorial sea based on which straight baselines have been drawn. For example, Vietnam has drawn a straight baseline using a small island 161.8 nautical miles off the coast as a base point. North Korea has even drawn the world's longest straight baseline, which is up to 245 nautical miles long. Obviously, these standards for determining the baselines of territorial sea are not unified, which will undoubtedly increase the difficulty in solving delimitation problems. However, neither the Convention on the Territorial Sea and the Contiguous Zone (1958) nor the UNCLOS (1982) specifies the length of the straight baselines of coastal States (only some requirements or principles are provided in article 7(3) and 7(6) of UNCLOS).[36] As the ICJ and arbitral tribunals have so far, given no specific instructions on this issue, coastal States pursue the largest maritime jurisdiction based on their own understanding and their own interests. Therefore, the international community should further specify the rules on this issue based on the relevant provisions of UNCLOS, so as to facilitate equitable settlement of delimitation problems.

C. Unapproved Treaties and Legal Flaws: Constitution Functionality

In this case, Romanian representative Bogdan Aurescu pointed out that Serpents' Island, which covered an area of only 0.17 sq km, was part of Romania prior to 1948. However, subsequently, through a treaty, the USSR forced Romania to transfer the island to Ukraine, which was then a part of the USSR. However, the transfer was not approved by Romania or the legislative body of the USSR at that time. After the disintegration of the USSR in 1991, Ukraine took actual control of Serpents' Island. Romania had been protesting against such control all the time, requesting that the sovereignty of the island be reconsidered. Although the two countries signed a boundary treaty in 2003 and confirmed that Serpents' Island shall belong to Ukraine, Romania requested that the ICJ should take some relevant historical factors into account when delimitating the boundary.[37]

In fact, the ICJ had rendered Judgments on some cases based on unapproved treaties in the past. In the 1982 *Libya v. Tunisia* Case, the ICJ endowed the so-called

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36 Thomas J. Schoenbaum, *Admiralty Maritime Law*, New York: Thomson / West, 2004, pp. 30~31.

37 Li Yang, The International Court of Justice Held a Hearing on the Dispute over the Boundary in the Black Sea between Romania and Ukraine, at http://www.chinanews.com.cn/gj/gjzj/news/2008/09-03/1369063.shtml, 7 April 2009.

interim agreement between Italy and France with legal value (at that time, Libya and Tunisia were under the control of France and Italy respectively). The ICJ noted that because there was no clear and consistent maritime boundary between the two countries for quite a long period of time and neither party had objected to the interim agreement formally, this agreement could be accepted when delimitating the continental shelf between the two countries due to historical reasons.[38] In the 2001 *Qatar v. Bahrain* Case, the ICJ observed that Qatar shall have an entitlement to the territory of Zubarah on the account that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature; what's more, the actions of the Sheikh of Qatar in Zubarah in that year could be deemed as his exercise of authority on his territory.[39]

Obviously, it was based on the recognition of the *effectivités* of unratified treaties that the ICJ was able to avoid a thorny issue, namely the territorial entitlement in international law arising from occupation of territories by force before the UN Charter took effect. In that vein, the legal *effectivités* endowed by the ICJ in some unratified treaties or defective legal actions in some cases was intended to follow the stability principle, a critical principle in issues concerning territorial sovereignty, so as to leave intact the territorial pattern formed among the countries concerned over a long period of time. Such practice has also been embodied in *uti possidetis juris*.[40] However, such basis for Judgments is not compelling and will, to some extent, challenge the authority of the ICJ.

(Translator: LI Cun'an)

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38 Case concerning the continental shelf (Tunisia/Libya Arab Jamahiriya), Judgment of 24 February 1982, para. 71.

39 Qatar v. Bahrain case, paras. 89~96.

40 In international law, it means that the boundary of a newly established country should be consistent with the one before the country becomes independent. See Bryan A. Garner, *Black's Law Dictionary*, New York: Thomson / West, 1999, p. 1544.

巴尔米拉环礁禁渔案：基于征收条款的分析

Owen Tang*

内容摘要：商业捕鱼需要大量的金融投资，且利益相关者的收益可能受到后续政府禁止商业捕鱼法规的负面影响。2001 年，美国内政部颁布了禁止在巴尔米拉环礁商业捕鱼的法规，投资者基于美国宪法第五修正案的征收条款起诉联邦政府，内政部在美国上诉法院赢得了该项诉讼。本文作者回顾了征收条款的法律原则，特别强调了有关渔业经营的案例，得出的结论认为，2009 年的巴尔米拉环礁案为考虑大规模投资商业捕鱼设施的人们带来了令人胆寒的信号。

关键词：巴尔米拉环礁　专属经济区　美国宪法第五修正案的征收条款　管制征收　商业捕鱼投资

一、引言

美国最高法院认为联邦和州政府都有权征收私有财产以作“公用”（征用权）。为了禁止政府迫使一些民众独自承担公共负担，[1] 美国宪法第五修正案的征收条款禁止联邦和州政府未经合理补偿而征收私有财产以作公用，征用权的行使可以受到宪法的制约。[2] 政府的征用权受限于以下宪法限制：[3]

（1）所得财产必须作为“公用”；

（2）国家必须支付“合理补偿”以换取财产；

（3）未经正当法律程序，没有人可以被剥夺其财产。

有两种政府行为被视为是第五修正案征收条款意义下的征收：（1）物理性侵占一个所有者的财产是一种征收，不管侵占的财产多微小或其背后的公共目的多

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1 这一禁令的目的是防止“政府迫使一些民众独自承担在公平和正义的前提下应当由公众整体所承担的公共负担”。Armstrong v. United States, 364 U. S. 40, 1960, p. 49.

2 Laura Dietz, Eminent Domain § 6, 26, in *American Jurisprudence*, 2nd edition, New York: Lawyers Cooperative Publishing, 2009.

3 Township of West Orange v. 769 Associates, LLC, 172 N. J. 564 (2002).

重要；（2）一项法规，用以否定所有对财产在经济上的有益、高效利用，这是一种应予以补偿的征收。[4] 最高法院已经认识到政府可能通过物理性侵占或法规来“征收”私有财产。本文主要讨论管制征收，当政府行为本身不占有私有财产，但实际上限制了该私有财产的使用，且已达到征收的程度，就可能发生管制征收。[5]

上诉法院在2009年巴尔米拉太平洋海产品有限责任公司诉美国一案[6]中探究了政府禁止在野生动物保护区进行商业捕鱼的法规是否被认为是违反美国宪法征收条款的问题。下级法院认为原告的财产没有被征收，只不过由于政府规定禁止在该水域进行商业捕鱼，所以原告的许可证失去用途。[7] 上诉法院肯定了下级法院的判决，并认为政府行为没有侵犯原告的合同权利。[8]

法院提及86年前欧迷雅案的判决[9]作为本案指导。上诉法院同意下级法院对欧迷雅判决的解释，即如果一项合同被征收为公用，政府应负责任，但如果该项合同是被合法行为破坏或销毁，而不是被征收，政府将不负有责任。[10] 上诉法院的判决对那些考虑大规模投资商业捕鱼设施的人们来说是一个令人胆寒的信号。

本文的目的是检视在巴尔米拉案中适用的法律原则和推理过程。

二、巴尔米拉环礁案的程序性事实

原告巴尔米拉太平洋海产品有限责任公司持有在巴尔米拉环礁运营商业捕鱼设施的许可证。从地理上而言，巴尔米拉环礁是太平洋空白部分中的一个小岛，[11] 面积约4.6平方英里，在夏威夷以南约1000英里，萨摩亚群岛以北约1400英里，其间几无其他岛屿。[12]

第二次世界大战期间，美国在巴尔米拉环礁建立了一个海军基地，并修建了一条飞机跑道、一个营地和一个码头。战争结束后，美国采取法律行动来主张对巴尔米拉环礁的权利，但富勒·利奥家族在美国最高法院赢得胜诉，并获得该岛

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4 Barefoot v. City of Wilmington, 306 F. 3d 113 (4th Cir. 2002), cert. denied, 537 U. S. 1019 (2002).

5 Palazzolo v. Rhode Island, 533 U. S. 606, p. 617 (2001).

6 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361 (C. A. Fed., 2009).

7 Palmyra Pacific Seafoods, LLCv. United States, 80 Fed. Cl. 228 (Fed. Cl. 2008).

8 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361 (C. A. Fed., 2009).

9 Omnia Commercial Co. v. United States, 261 U. S. 502 (1923).

10 Omnia Commercial Co. v. United States, 261 U. S. 510 (1923).

11 巴尔米拉环礁是由大约50个小岛（其中一些小岛还有树木）和扩展礁所组成的一群珊瑚覆盖的环礁，其间有水。本案中的地图观测点是北纬5°52′18″，东经162°05′55″。

12 最高法院在美国诉富勒·利奥一案中恰当地指出“很难想象比巴尔米拉环礁更孤立的一块土地了”。See United States v. Fullard-Leo, 331 U. S. 256, p. 280 (1947).

的永久产权。[13]

2000 年，该案的原告取得由富勒·利奥家族授予的许可证。有了这张许可证，原告就可以将巴尔米拉环礁作为商业捕鱼设施。[14] 原告随后投入数百万美元开发此地，用作商业捕鱼设施。

同一年，非盈利组织大自然保护协会从富勒·利奥家族手中收购了很多巴尔米拉环礁中露出水面的土地。该年年中，美国联邦政府[15] 开始与大自然保护协会合作在巴尔米拉建立自然保护区和生态旅游营地。[16] 美国海军也将附近的金曼礁和其他周边珊瑚礁移交给内政部监管。

2001 年 1 月 18 日，内政部颁布了一项法令，将巴尔米拉环礁周围 12 海里的潮间地、下沉陆地和水域划定为国家野生动物保护区。6 天之后，内政部又颁布了一项新法规，禁止在巴尔米拉环礁进行商业捕鱼。[17]

2003 年，该案的原告向联邦法院提出征收索赔，声称将巴尔米拉环礁划定为国家野生动物保护区以及相关禁止商业捕鱼的法规已使其在商业捕鱼方面的财产利益毫无价值。[18]

三、征收分析的原则

征收分析包括一种三个步骤的方法，以确定一项征收是否实际发生。

（1）申索人是否已拥有（为援引第五修正案所需的）财产利益，[19] 如果申索人无法证明存在合法可辨识的财产利益，法院将不予审理；

（2）政府行为是否相当于对该财产利益进行了应予以补偿的征收；以及

（3）所谓的征收是否是“绝对的”。如果所有的利用权，即所有的经济价值，都被管制征收，则产生了绝对征收。绝对征收与由于“禁止或限制产权人的某些

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13 United States v. Fullard-Leo, 331 U. S. 256 (1947).

14 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1363 (C. A. Fed., 2009).

15 内政部渔业与野生动物局。

16 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1363 (C. A.Fed., 2009).

17 See *Federal Register*, Vol. 66, No. 16, 24 January 2001, pp. 7660~7661. 该项法规在相关部分指出：“我们将关闭保护区，不对商业捕鱼开放，但允许少量可容纳的休闲渔业：北梭鱼垂钓和深海垂钓，这种渔业将包含在我们认真管理的项目中，以确保其符合保护目的……管理措施将包括保障保护区的水域和野生动物免受商业捕鱼活动的侵害。”

18 巴尔米拉太平洋海产品有限责任公司声称，建立商业渔捞作业的权利是有价值的，因为巴尔米拉有 200 海里的专属经济区，因此外国船只将无法在此捕鱼。巴尔米拉是在该专属经济区内建立商业渔捞作业的唯一可行的地方。该公司进一步指出，岛屿的专用权为其在与可能于该地区作业的任何渔业企业的竞争中提供了重要的竞争优势。Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1363 (C. A. Fed., 2009).

19 “显而易见，在征用时，只有拥有正当财产利益的人才有权获得赔偿。”Almota Farmers Elevator Warehouse Co. v. UnitedStates, 409 U. S. 470, pp. 473~474 (1973).

使用，但是给其留下大量可行的经济使用而产生的管制征收”不同。对绝对征收的分析不需要调查原告是否有合理的投资回报预期（但这种预期因为管制措施而落空）；[20] 另一方面，当征收不绝对时，法院将进行基于事实的调查，来评估以下三个因素：[21]

①政府行为的特点，

②政府行为对申索人的经济影响，和

③政府行为妨碍申索人合理投资回报预期的程度。

合同是否是受征收条款保护的财产利益，这一点的指导原则可以在林奇判决中找到。

（一）合同是否是受征收条款保护的财产

在林奇诉美国一案中，[22] 美国最高法院裁决合同权利可以是征收行为的对象。林奇判决断然认为合同是财产，政府无法不予补偿地征收。

林奇案中，美国国会在 1930 年代大萧条时期颁布法律，撤消了之前为战争退伍军人制定的战争险承保范围。

国会声称战争险有与养老金、补偿津贴和特权类似的赠予性质，不涉及当事人之间的任何协议，且通过这种赠予所获得的利益可以在任何时候由国会判定撤销。[23] 布兰代斯法官的分析指出，保单构成合同，以月付保费形式的分付对价所支持。尽管美国不是出于商业目的订立这些保险合同，但这些合同与美国的其他合同一样体现法律义务。因此，法院允许保单持有者控告政府，因为美国国会未经正当程序而剥夺了他们的合同价值。

来自美国加州大学伯克利分校博尔特霍尔法学院的安德里亚·L· 彼得森对林奇判决的评论是，当联邦政府根据《战争险法案》发行可更新的定期人寿保险保单时，就为保单持有者创造了“既得权利”。[24] 他的分析集中在政府是合同一方这个事实上，而该关键事实使得对林奇案的分析类似于对违反合同的诉讼的分析。因此，这种权利不是“可以在任何时候由国会判定撤销的赠品”。[25] 法院对林奇一案的判决显示出，当政府收回已经给予一方的既得权利时，征收就发生了。换句话说，

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20 Palm Beach Isles Assocs. v. United States, 231 F. 3d 1354, p. 1357 (Fed. Cir. 2000).

21 Transp. Co. v. City of New York, 438 U. S. 104, p. 124 (1978).

22 See Lynch v. United States, 292 U. S. 571 (1934).

23 See Lynch v. United States, 292 U. S. 571, pp. 576~577 (1934).

24 Andrea L. Peterson, The Takings Clause: in Search of Underlying Principles Part II Takings as Intentional Deprivations of Property without Moral Justification, *California Law Review*, Vol. 78, 1990, p. 69.

25 Andrea L. Peterson, The Takings Clause: in Search of Underlying Principles Part II Takings as Intentional Deprivations of Property without Moral Justification, *California Law Review*, Vol. 78, 1990, p. 69.

征收条款并非有赖于政府可以拿走其给予的（权利）这一命题。[26]

将林奇判决适用于巴尔米拉环礁案时有一个主要的事实性差异，巴尔米拉案中的原告是在 2000 年获得由富勒·利奥家族而不是美国政府颁予的许可证，因此，与林奇案中从政府获得既得权利的战争险保单持有者不同，巴尔米拉案的原告是从私人一方获得许可证；但是，下级法院和上诉法院都允许巴尔米拉案的原告援引林奇判决。

（二）专属经济区的“捕鱼权”是否受征收条款的保护

法院对 2004 年美国远洋渔业公司诉美国一案[27]的裁决确立了一项法律原则——原告再也不能主张专属经济区内应予以补偿的“捕鱼权”。[28]

该案的判决向商业捕鱼设施的投资者显示出一个令人胆寒的信号。该案中，一名投资者在 1997 年初购买了一艘悬挂美国船旗的大型船体，意图将其转换成商业渔船。该投资者与一家挪威船厂签订合同，将船体转换成冷冻商业渔船，使其可以承载自身的所有渔获、在船上进行冷冻以及卸载渔获，让其运输到最终目的地。该船有 369 英尺长，排水量 6900 吨，马力 13400 匹，配备有最精湛的全年对鱼进行定位、分拣、冷冻的技术。该船的总投资将近 4000 万美元。在某种程度上，投资者的决定有赖于以下信息：

（1）20 世纪 90 年代，美国商务部的国家海洋渔业局报道称，大西洋鲭鱼和鲱鱼种群数量处在破纪录的高点，而且有待大量捕捞。

（2）1993 年，美国国际贸易委员会在一份报告中得出结论认为，只有更大的船舶才可以改善美国的大西洋鲭鱼产业在与欧洲竞争者竞争中的地位。[29]

（3）1994 年，中大西洋渔业管理委员会[30]建议国家海洋渔业局撤销对从事大西洋鲭鱼产业的限制，原因是鲭鱼种群数量“极高”，但渔获却很少。[31]

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26 Andrea L. Peterson, The Takings Clause: in Search of Underlying Principles Part II Takings as Intentional Deprivations of Property without Moral Justification, *California Law Review*, Vol. 78, 1990, p. 69.

27 American Pelagic Fishing Co. v. United States, 379 F. 3d 1363 (Fed. Cir. 2004).

28 专属经济区是从每个国家的沿海边界量起的 200 海里水域范围。See 16 U. S. C. § 1811 (2000).

29 US International Trade Commission, Mackerel: Competitiveness of the U. S. Industry in Domestic and Foreign Markets: Investigation, *USITC Publication*, Vol. 2649, No. 332~333, 1993.

30 中大西洋渔业管理委员会是根据《马格努森—史蒂文斯渔业保护和管理法案》制定的标准所设立的 8 个负责专属经济区开发渔业管理计划的区域渔业委员会之一。The Magnuson Act, Public Law No. 94-265, 90 Stat. 331 (1976) is codified at 16 U. S. C. §§ 1801~1883. 该法案授予商务部长在海洋渔业资源方面的联邦管理权。

31 Department of Commerce, Atlantic Mackerel, Squid, and Butterfish Fisheries, Federal Register, Vol. 59, No. 186, 27 September 1994.

在美国，法律要求一艘渔船只有在船上持有有效的大西洋鲭鱼许可证才能在专属经济区捕捞大西洋鲭鱼。[32] 当船舶拥有全套装备时，该案的投资者开始申请必要的许可证和授权，并在 1997 年 4 月获得了需要的联邦渔业许可证。

当投资者准备投入商业运营时，来自环保团体的反对声渐起。在应对环保问题时，美国众议院确立了禁止等于或长于 165 英尺、超过 3000 马力的渔船从事大西洋鲭鱼和鲱鱼产业的禁令。国会通过了一项拨款法案的附文，有效地取消了该名投资者现有的许可证和授权书，同时禁止再向该船发放许可证。因此，该船无法获得在美国专属经济区从事任何渔业的捕鱼许可证。投资者指出，没有其他船舶受到这项立法的影响。[33]

投资者向联邦索赔法院提起诉讼，声称拨款法案取消了其许可证，并禁止其再获得许可证，这实际上是对其船舶的征收。投资者声称其拥有（已获得的）渔业许可证的财产权利，但却被立法所剥夺。

联邦索赔法院裁决投资者确实遭到违反美国宪法第五修正案的征收，法院判给投资者的损害赔偿是 37275952.67 美元。美国政府向上诉法院提出上诉。

在回顾相关立法的历史后，上诉法院认为，“历史上普通法没有规定在专属经济区用船舶进行捕鱼的权利”。[34] 法院认为投资者“没有也并不能具有其渔业许可证的财产利益”。[35] 因此，上诉法院推翻了下级法院的裁决，并撤销了损害赔偿。

美国远洋渔业公司案判决的法律启示：

美国远洋渔业公司案之后，原告再也不能主张专属经济区内应予以补偿的“捕鱼权”。为了绕开美国远洋渔业案的判决，渔业征收赔偿案中的原告必须向法院展示，其索赔主张不是基于在专属经济区内的捕鱼权。例如，巴尔米拉案中，原告声称政府法规侵犯了其在巴尔米拉运营商业渔捞作业的权利（而不是在巴尔米拉的捕鱼权）。

在巴尔米拉案中，原告一再声称其没有索赔任何“捕鱼权”的财产利益，而是强调其与富勒·利奥家族签订的独家经销合同的利益。原告声称，要不是政府行为，其相比于所有其他渔业企业会享有宝贵的竞争优势。原告在该案中所做的是对“捕鱼”采用一个更广泛的定义，其试图说服法院“捕鱼”不仅包含实际的“抓、捕捉、捕获鱼”，还包括“任何其他相关活动，如装载捕鱼工具和在码头供给船舶，以及从码头出发穿越保护区水域去捕鱼”。原告指出法规中使用的语言是意图保护水域免受一切“商业捕鱼活动”的影响，这将阻止原告的船舶在巴尔米拉 12 海里范围的水域中（包括码头和港口的水域）从事任何与商业捕鱼相关的事情，从而阻止

32 50 C. F. R. § 648.4 (a)(5) (1996).

33 American Pelagic I, 49 Fed. Cl. 36, p. 44 (2001). 没有其他船舶受到该项立法影响的事实可以用来证明政府的法规是针对原告的。

34 American Pelagic Fishing Co. v. United States, 379 F. 3d 1363, p. 1380 (Fed. Cir.2004).

35 American Pelagic Fishing Co. v. United States, 379 F. 3d 1363, p. 1374 (Fed. Cir.2004).

原告对其商业捕鱼基地进行任何使用。

（三）禁止商业渔业操作属合同失效还是合同占用性质

巴尔米拉案的指导原则是在 86 年前，即 1923 年欧迷雅贸易公司诉美国一案[36] 中确立的。该案认为如果政府从事的是合法行为，且该合法行为影响了当事人合同权利的价值，则不存在征收。

在欧迷雅案中，联邦政府在第一次世界大战期间向阿勒格尼钢铁公司征用其生产的所有钢材，欧迷雅贸易公司与阿勒格尼钢铁公司已存在购买钢材的合同，由于政府的征用，阿勒格尼钢铁公司无法再履行与欧迷雅以优惠价格交付货物的合同。欧迷雅公司向政府提出征收索赔，声称政府征收了其合同，并提出诉讼，要求赔偿其价值。最高法院裁定不存在征收。[37]

来自哥伦比亚大学的法学教授威廉·K· 琼斯在评论欧迷雅案时认为，最高法院的推理过程涉及到一种微妙的法律执行，即区分一项政府征收是合同标的物还是合同本身。他认为最高法院驳回诉讼请求是因为法院推断合同已经被销毁，而不是被征收。琼斯教授强调，合同失效和合同占用在本质上是不同的。[38]

在巴尔米拉太平洋海产品有限责任公司诉美国一案中，美国上诉法庭解释了合同占用的构成。法院提及 1924 年布鲁克斯—斯坎伦公司诉美国一案，[39] 在该案中，美国最高法院需要考虑一项（基于《紧急航运法》的）总统令是否占用了一项建造船舶的合同，法院认为政府征收了原告的合同，因为在该案中出现了以下事实：

（1）颁布给造船公司的总统令显示出政府剥夺原告合同的意图。根据法令，政府接替原告执行合同，并从原告处剥夺合同受让人可以拥有的所有权利和优势。[40]

（2）因为总统令，原告支付造船公司的 419500 美元被征用。[41]

（3）船舶建造使用的计划和技术参数被接管。[42]

（4）合同没有终止。总统令的直接后果是剥夺了原告的合同及其权利。[43]

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36 Omnia Commercial Co. v. United States, 261 U. S. 502 (1923).
37 Omnia Commercial Co. v. United States, 261 U. S. 502, p. 511 (1923).
38 William K. Jones, Confiscation: A Rationale of the law of Takings, *Hofstra Law Review*, Vol. 24, No. 1, 1995, p. 26.
39 Brooks-Scanlon Corp. v. United States, 265 U. S. 106 (1924).
40 Brooks-Scanlon Corp. v. United States, 265 U. S. 106, p. 120 (1924).
41 Brooks-Scanlon Corp. v. United States, 265 U. S. 106, p. 120 (1924).
42 Brooks-Scanlon Corp. v. United States, 265 U. S. 106, p. 120 (1924).
43 Brooks-Scanlon Corp. v. United States, 265 U. S. 106, p. 120 (1924).

关键判据是政府行为是否终止了合同。在2008年亨特利美国公司诉美国案[44]的判决中，服务提供商（亨特利美国公司）已有在美国机场提供行李和乘客检查服务的合同。当美国国会在2002年将检查功能联邦化后，服务提供商向美国政府提出了征收索赔，创立美国交通安全管理局的法规有终止美国机场所有服务提供商的检查服务合同的效果。法院驳回了服务提供商的赔偿请求，因为法院认为政府没有“征收”服务提供商的合同权利，只是因为监管活动，服务提供商的合同权利才失去价值。政府没有承担服务提供商的合同，因此法院认为不能提出征收索赔。[45] 2008年的亨特利判决与1923年的欧迷雅判决相一致，两个案例都关注于政府是否取得合同义务，并将这个问题作为关键因素加以考虑。[46]

琼斯教授从经济角度评论了法律推理过程。在分析欧迷雅案时，他注意到当时的政府正处于战争之中，破坏和平时期的安排是战争的必然结果，但战争也带来了机遇。虽然不能保证完全对称，但由于战争措施失去和平时期有利合同利益的各方，很可能将在其他战争措施中找到有利可图的生产机会。总的来说，与经济发展相关的激励机制是不太可能被削弱的。此外，在战争背景下，为所有合同预期的中断提供赔偿显然不可行。战争涉及的范围太广泛，战争措施的影响不胜枚举、十分分散。欧迷雅案中的政府行为在财政上是负责任的，政府没有其他可行的做法。[47]

其他法学家从合同法理论的角度分析欧迷雅案，得出了类似的结论。他们认为所有合同都可能需要进行不能履约或者失效的抗辩。[48] 对于源于政府不利行为的失效，并不产生征收，因为合同缔约方应该知道这些原则，即合同缔约方在缔约之初就有所预警，合同预期可能会因为政府干预而不能实现。[49] 因此，没有必要为这种所有合同缔约方最初都会想到的风险提供保护措施。

（四）在联邦水域禁止商业渔业操作是否类同于联邦土地征收的分析

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44 Huntleigh USA Corp. v. United States, 525 F. 3d 1370 (Fed. Cir. 2008).

45 Huntleigh USA Corp. v. United States, 525 F. 3d 1370, p. 1379 (Fed. Cir. 2008).

46 在欧迷雅案中，美国最高法院解释道，当政府已经“获得义务或执行权”，政府行为将被视作为对合同权利的征收。Omnia Commercial Co. v. United States, 261 U. S. 502, p. 511 (1923).

47 William K. Jones, Confiscation: A Rationale of the law of Takings, *Hofstra Law Review*, Vol. 24, No.1, 1995, p. 26.

48 E. Allan Farnsworth, *Contracts*, 2nd ed., New York: Aspen Publishers, Inc.,1990, pp. 700~737.

49 See 767 Third Ave. Assocs. v. United States, 48 F. 3d 1575, pp. 1580~1582 (Fed. Cir.1995) (当美国终止外国实体在美国的租约时不存在征收); Chang v. United States, 859 F. 2d 893, p. 897 (Fed. Cir. 1988) (当美国政府终止美国人和利比亚实体的雇佣合同时不存在征收)。在每个实例中，申索人都是在美国对外交政策控制的背景下签订合同的。

2006 年科尔文牛案判决[50]是有关禁止使用联邦土地的索赔分析。在讨论禁止在巴尔米拉环礁进行商业渔业操作并没有违反征收条款时，美国政府通过与科尔文牛案判决的类推来进行分析。

科尔文牛案中，牧场主租用了相邻的一片联邦土地上的放牧特权，且享有独立的用水权。当牧场主未能支付放牧租赁要求的款项时，政府终止了其放牧特权，但允许牧场主继续行使其独立的用水权。牧场主对政府提起诉讼，声称放牧特权的终止造成了对其牧场和用水权的征收。

联邦索赔法院驳回了牧场主的投诉，牧场主提出上诉，上诉法院认为：

（1）干涉在公共土地上放牧不是对用水权的征收，

（2）牧场主的价值损失并没有导致对牧场的征收，

（3）野马并不构成政府征收土地拥有者用水权的一种手段。

科尔文牛案中，牧场主声称政府拒绝允许其在毗邻牧场的联邦土地上放牧，这已经降低了牧场的价值，也因此构成了对牧场的征收。[51]法院驳回了这一说法，因为牧场主没有在联邦土地上牧牛的财产权利，因此政府禁止放牧并不构成对农场主财产的征收。同样的分析也适用于政府禁止在联邦水域进行商业捕鱼，捕鱼禁令可能已经减少渔业经营许可证的价值，但是这种如同科尔文牛案中的价值缩减并不是对任何可辨识的财产利益的补偿性征收所造成的结果。在联邦土地上的野马，如同巴尔米拉环礁中的鱼，并不构成政府征收的一种手段。事实上，法院认为，声称“拥有”野生的鱼或动物根本是无稽之谈。在这些生物通过人们熟练的抓捕技术变成财产之前，政府对这些生物并没有所有权。[52]

在类推分析过程中，法院似乎在淡化以下几个方面：

（1）不考虑巴尔米拉案原告将巴尔米拉专用为运营基地和转运点的商业利益损失。[53]法院淡化了以下地理事实：

①环礁位于太平洋的赤道水域，在夏威夷以南 1000 英里，是拥有丰富高价值鱼类的区域。

②环礁四周是美国的专属经济区，有排除悬挂外国船旗的船舶在 200 海里内捕鱼的实际效果。巴尔米拉环礁是专属经济区内唯一可以建立大本营、码头、港口和机场跑道的商业捕鱼基地的地方。

（2）裁决巴尔米拉案的法院在推理过程中并没有关注原告将荒芜的、蔓生的环礁改造成一个现代的、活跃的、先进的商业捕鱼基地所投入的资金。该案中，原

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50 Colvin Cattle Co. v. United States, 468 F. 3d 803 (Fed. Cir. 2006).

51 Colvin Cattle Co. v. United States, 468 F. 3d 803, p. 808 (Fed. Cir. 2006).

52 Kleppe v. New Mexico, 426 U. S. 529, pp. 535~538 (1976).

53 在巴尔米拉环礁案中，法院认为海上禁渔法规对岸上渔业相关活动的不利影响不构成足够的法律依据来声称补偿性征收。Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1366 (C. A. Fed., 2009).

告投入了数百万美金和数千工时在环礁上开发了为商业捕鱼操作目的而全面运营的大本营、深水港和机场跑道。

（3）在科尔文牛案中，牧场的价值损失首先是由于牧场主自身未能支付放牧权的款项。相反，在巴尔米拉环礁案中，原告没有自愿放弃其将巴尔米拉作为商业捕鱼基地和转运点的合同权利。

四、结论

裁决巴尔米拉案的法院首先通过考虑申索人是否已经为第五修正案的目的建立了财产利益来进行标准征收条款的分析。

裁决巴尔米拉案的法院面对的重要挑战是声称的财产利益与所谓的对这种利益的管制之间的脱节：巴尔米拉案的原告声称相关财产权利是其租用巴尔米拉环礁土地用来运营商业捕鱼的合同权利，但法规制定者声称法规仅仅是禁止周边水域的商业捕鱼活动。

在评论巴尔米拉环礁案的判决方法时，美国上诉法院的巡回法官伽嘉萨认为，该案的法院在政府行为性质的基础上重新定性了相关财产利益。[54] 一旦从法规的角度来看，该案的法院即得出结论，“内政部的法规没有禁止在巴尔米拉的商业捕鱼操作，而仅仅是禁止了在周边水域的商业捕鱼活动”。[55]

巴尔米拉环礁判决可能被誉为是内政部的胜利。然而，归根结底，从经济上考虑，这种胜利得不偿失，政府的胜利被巨大的经济损失所抵消，因为：

（1）巴尔米拉环礁案的判决为那些考虑大规模投资发展美国商业捕鱼地位的投资者显示出一个令人胆寒的信号。

巴尔米拉环礁案的判决迫使原告放弃与海外渔业竞争者相比所拥有的巨大经济优势。海外竞争者在巴尔米拉专属经济区的渔获必须在公海上运输 1000 英里至夏威夷才能投入市场，而该案的原告可以在环礁卸鱼、进行加工，以提高其价值、减少运输成本（例如，将整条鱼切片成更有价值的鱼排和腰肉），然后直接用飞艇运往市场。

在经济竞争优势方面，该案原告可以避免其竞争对手所花费的时间和资源，这些竞争对手需要跨越海洋将鱼投入市场，还要从夏威夷返回到巴尔米拉专属经济区再继续捕鱼。

在质量竞争优势方面，使用环礁作为运输基地的独家合同权利，使得该案原告可以直接向市场提供更新鲜和更有价值（也因此更有利可图）的产品。

（2）巴尔米拉环礁案的判决并不能帮助改善环境。生态旅游营地的根本目

54 Schooner Harbor Ventures, Inc. v. United States, 569 F. 3d 1359 (C. A. Fed.,2009).
55 Palmyra Pacific Seafoods, LLC v. United States, 561 F. 3d 1361, p. 1366 (C. A. Fed., 2009).

的不是为了养护海洋鱼类。购买环礁的美国大自然保护协会受制于该案原告的许可证。大自然保护协会有在环礁上建立一个不兼容的商业企业的商业计划，内政部的官员已经与大自然保护协会合作，希望为“华盛顿政客和著名的财富 500 强企业老板”建立一个独家、昂贵的“生态旅游营地”。[56] 大自然保护协会“运营”巴尔米拉的“现场经理”史蒂夫·巴克利先生“之前受聘于内政部渔业与野生动物局”。

鉴于这些事实，也难怪当编辑人员在巴尔米拉案初审期间评论该案时以“小心，规则变化很快”的注释作为结束了。[57]

（中译：赵菊芬）

56 E-mail from Murakami to McDermott (25 July 2000). The email was attached as evidence in the Appellate Brief dated 15 August 2008, 2008 WL 5009092 (C. A. Fed.) (Appellate Brief).

57 A Review of Recent Developments in Ocean and Coastal Law, *Ocean and Coastal Law Journal*, Vol. 13, No. 2, 2008, p. 395.

Comments on How to Fix Administrative Authority as Plaintiff in Marine Environmental Pollution Claiming Cases

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Abstract: How to determine whether a state administrative authority is qualified as the plaintiff in claims against marine environmental pollution is an issue that is not only controversial but also not clearly provided for. Starting by classifying the different types of marine environmental pollution, this article, based on the functional division of state administrative authorities and the provisions of current law concerning their marine environment supervision power, points out how to fix an administrative authority as the proper plaintiff in claims against these types of pollution. The article concludes by exposing the problems that could arise out of the insufficiencies of current law when an administrative authority appears as plaintiff in claims against marine environmental pollution, and providing appropriate suggestions accordingly.

Key Words: Marine environmental pollution; Administrative authority; Plaintiff; Claims

The sea has now become a reservoir of wealth for mankind as land resources are depleting at an increasingly faster pace. "But bad tidings related to the sea come one after another due to people's neglect of marine environmental protection: tunas contain too much mercury, the number of oxygen-free dead zones continues to increase in the ocean, and the sea cries emergency time and again to the human race."[1]

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1 Xu Guangyu and Long Yulan, Analysis on the Harmony between Mankind and Marine Environment from the Perspective of Oil Contamination, at http://www.china56ec.com/New_view.asp?id=431592&nPagc=0, 7 March 2010. (in Chinese)

Such serious marine environmental pollution will inevitably result in the rise of the number of claims against relevant damages. Article 90, paragraph 2 of the Marine Environment Protection Law of the People's Republic of China (MEPL) provides: "For damages to marine ecosystems, marine fishery resources and marine protected areas which caused heavy losses to the State, the department invested with power by the provisions of this law to conduct marine environment supervision and administration shall, on behalf of the State, put forward compensation demand to those held responsible for the damages." Undoubtedly, this provision establishes the status of plaintiff for state administrative authorities as the entrusted guardian of the State's sea areas, but questions like which kind of state authorities should be lodging such claims, what is the scope of supervision regarding marine pollution for each different state authority and against which kind of pollution should the claimant lodge a claim are still demanding exploration.

I. Different Types of Marine Environmental Pollution

To fix the competent administrative authority in a claim against marine environmental pollution, it is necessary to first classify such pollution into different types according to its features in order to make sure it is a just claim; considering that different types of marine environmental pollution originate from different sources, thus possessing varying damaging and invasive characteristics, they will certainly be subject to the administration of different authorities, which in turn affects the choice of the competent claimant authority for each type. Based on the six current laws and regulations governing marine environmental pollution of our nation,[2] we divide marine environmental pollution into the following types in terms of pollution sources.

1. Marine Environmental Pollution Sourced from Land

"This type refers to the pollution damage on the marine environment as a resu-

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2 These standards respectively are the Environmental Protection Law of the People's Republic of China, the Marine Environment Protection Law of the People's Republic of China, the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Coastal Construction Projects, the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Marine Construction Projects, the Regulations of the People's Republic of China on the Control over Dumping Wastes into the Sea Waters, the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking.

lt of discharge of various pollutants from land to the sea."[3] This kind of pollution occurs on the sea while being sourced from land, such as offshore pollution incidents triggered by domestic, industrial and agricultural sewage and waste.

2. Marine Environmental Pollution Sourced from Coastal Construction[4]

This type of pollution damage takes place during the construction process of projects which are either located at or adjacent to the coast, and whose body engineering works lie on the landward side of the coastline.

3. Marine Environmental Pollution Sourced from Offshore Construction

This type means those pollution incidents occurring during the new construction, reconstruction and expansion processes of projects which are intended for the development, utilization, protection and restoration of marine resources, and whose main parts are situated on the seaward side of the coastline. Such projects include filling in the sea, construction of sea dams, cross-sea bridges, seabed tunnels, and exploration and development of offshore oil or natural gas resources, etc.[5]

4. Marine Environmental Pollution Sourced from Dumping of Wastes into the Sea

This type refers to the pollution damage caused on the marine environment by such behaviors as the dumping of wastes and other substances into the sea using vessels, aircraft, platforms and other vehicles, the disposal of vessels, aircraft, platforms or other offshore artificial constructions at sea, as well as the disposal at sea of wastes and other materials arising from, or related to the exploration and exploitation of sea-bed mineral resources and offshore processing related thereto.[6]

5. Marine Environmental Pollution Sourced from Vessels

This means pollution damage incurred due to improper operation and illegal emitting or dumping of oil, sewage and other substances by vessels on sailing or

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3 Shi Xueying, Dong Lijuan and Li Zengqiang, The Handling of Marine Pollution Incidents and the Protection of Marine Ecology in Circum-Bohai-sea Region, *Proceedings of the Second Circum-Bohai-sea Region Law Forum*, p. 99. (in Chinese)

4 For the definition of coastal construction projects, see Article 2 of the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Coastal Construction Projects.

5 See the specific types and definitions of marine construction projects in the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Marine Construction Projects.

6 See the definition of disposal at sea of wastes in Article 2 of the Regulations of the People's Republic of China on the Control over Dumping Wastes into the Sea Waters.

operation, or as a result of the leakage of petroleum, fuel, chemical pollutants and radioactive contaminants etc. carried by vessels.

6. Marine Environmental Pollution Sourced from Shipbreaking Work

This type of pollution damage is caused by coastal shipbreaking and on-water shipbreaking operations.[7]

The above 6 types classified according to pollution sources basically cover all marine environmental pollution found in reality, and in the meantime, this kind of classification, being based on the current norms of marine environment governance, plays a significant role in fixing the proper claimant authority.

II. The Determination of Administrative Authority's Status as Plaintiff in Claims against Marine Environmental Damage

China has been applying the "immediate/direct interests theory" in the field of civil litigation for a long time. In the past when the country lacked standards for marine resource management and norms on marine environment governance, there might well be controversies over whether administrative authorities were the direct victims of marine environment damage and if they were eligible to file a lawsuit, but nowadays with laws and regulations providing in clear terms that administrative authorities are authorized to represent the State in exercising the ownership of national sea space or to be the entrusted guardian of marine environmental rights and interests, the legal justice is already in place whereupon they become entitled to the status of plaintiff in claims against marine environmental pollution, which is in conformity with China's laws, in the interest of the public and in consistence with the trend of international legislation as well.[8]

However, no regulation clearly specifies which kind of administrative authority shall exercise the supervising rights as mentioned in article 90 of the MEPL and thereupon be the plaintiff in various kinds of claims against marine environmental

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7 See articles 3 and 4 of the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking for the definition and classification of shipbreaking.

8 See such regulations in article 1, paragraph 2 of the Convention on Civil Liability for Oil Pollution Damage from Ships in 1992 and article 10.3) 4) in Part III of the Comité Maritime International's Guidelines on Oil Pollution Damage.

pollution. We list the administrative authorities capable of exercising the suing right as the following, and try to analyze the kinds of marine environmental pollution over which each of them can exercise the claiming right.

A. State Environmental Protection Administration

Despite of being the authority for overall coordination and supervision on environmental protection work in their respective jurisdictional area,[9] administrative authorities for environmental protection mainly monitor and control land-sourced pollution as far as their direct supervision power over the marine environment is concerned. Article 5, paragraph 1 of the MEPL provides: "The administrative competent department in charge of environment protection under the State Council, as a department to exercise unified supervision and administration over nation-wide marine environment protection work, shall render guidance, co-ordination and supervision and be responsible for nation-wide environment protection work to prevent and control marine pollution damages caused by land-based pollutants and coastal construction projects." Paragraph 6 of this article provides that "[t]he functions and responsibilities of the departments invested by the law with power to conduct marine environment supervision and administration of the coastal local People's Governments above the county level shall be determined by the People's Governments of the Provinces, Autonomous Regions and Municipalities directly under the Central Government in accordance with this law and the relevant regulations of the State Council." Article 4 of the Regulations of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Land-Sourced Pollutants and article 5 of the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Coastal Construction Projects stipulate that environmental protection departments at or above the county level are responsible for such environmental work as dealing with marine pollution damage created in areas under their jurisdiction by land-sourced pollutants and coastal construction projects. Moreover, article 4, paragraph 1 of the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking also provides: "The organization, coordination and inspecting of environmental protection during shipbreaking, as well as environmental protection during shoreside shipbreaking outsi-

9 Article 7 of the Environment Protection Law of the People's Republic of China.

de the waters of port area, shall be under the responsibility of environmental protection department at or above county level."

In light of the above provisions, state administrative authorities for environmental protection can lodge claims against the following marine environmental pollution occurring in areas under their jurisdiction:

1) That caused by coastal construction projects;

2) That caused by land-sourced pollutants;

3) That caused by shoreside shipbreaking work outside the waters of port area.

B. State Oceanic Administrative Authorities

Before we proceed to analyze the suing right of oceanic administrative authorities, it is necessary to clarify their functionalities. The State Oceanic Administration is generally defined in the Regulations on the Functional Divisions, Internal Organizations and Staffing of the State Oceanic Administration[10] issued by the General Office of the State Council as "an administrative authority under the Ministry of Land and Resources, which supervises and manages the use of sea territory and the protection of marine environment, safeguards marine rights and interests by law, and organizes marine scientific research as well." Oceanic administrative authorities can therefore be defined as integrated management bodies of marine resources and marine environment. Such a definition is of great significance in that no existing law clearly designates the specific supervising body for each given type of marine environmental pollution.

Regarding the specific suing right of oceanic administrative authorities, article 5, paragraph 2 of the MEPL provides that "the competent State oceanic administrative department in charge of marine affairs shall be responsible for the supervision and administration of the marine environment, organize survey, surveillance, supervision, assessment and scientific research of the marine environment and be responsible for nation-wide environment protection work to prevent and control marine pollution damages caused by marine construction projects and dumping of wastes in the sea." This provision establishes clearly for the oceanic administrative authority the suing right against pollution damage on the marine environment caused by marine construction projects and dumping of wastes into the sea.

In practice, a more controversial issue is: of the two, viz. oceanic administrati-

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10 See File No. 44 published by the General Office of the State Council in 1998.

ve authority and maritime administrative authority, which one should be the plaintiff in claims against marine environmental damage attributable to mis-operations of non-military vessels or leakage of crude oil, fuel, hazardous substances that are toxic and harmful. One opinion is that "in cases where marine environmental pollution damage is incurred by non-military vessels inside port waters controlled by maritim e safety administration and by non-fishery, non-military vessels outside such waters, the administrative authority in charge of maritime affairs shall be the claimant to lodge a claim for compensation;"[11] another holds that in incidents such as oil spills or the like, as long as they are caused by non-military ships, including fishery vessels, usually the oceanic administrative authority should be the proper subject acting on behalf of the State in claiming against pollution damage. The reason behind the first opinion is that article 5, paragraph 3 of the MEPL provides: "The competent State administrative department in charge of maritime affairs shall be responsible for the supervision and administration of marine environment pollution caused by non-military vessels inside the port waters and non-fishery vessels and non-military vessels outside the port waters under its jurisdiction, and be responsible for the investigation and handling of the pollution accidents." Therefore, maritime administrative authorities shall exercise the regulatory power over and be the plaintiff for any vessel-sourced pollution case that matches the provision of this paragraph. The second opinion derives from article 5, paragraph 2 of the MEPL which specifies the State oceanic administrative department as the comprehensive regulatory authority over marine environmental pollution, meaning that it shall represent the State in claims for compensation in all marine pollution incidents caused by non-military vessels including fishery vessels. As the authors of this paper, we think that the proper claimant should be fixed based on the departmental division of labor for marine and maritime safety administrations, their respective duties and rights, and in light of different sources of pollution, instead of only relying on the one-sided understanding of paragraphs 2 or 3 of article 5 of the MEPL. The duties of the maritime safety administration are described in the Notice of the General Office of the State Council on the Printing and Distribution of the Setup Scheme for Maritime Institutions Directly Subordinate to the Ministry of Communications as "the management of water safety, marine navigation aids and safety communications on water in

11 Li Shengquan, Discussion on the Power of Claim for Damage Compensation due to Pollution Incident of Sea, *Journal of Shandong Navigation*, November Issue, 2007, p. 144. (in Chinese)

areas under its jurisdiction, the prevention of vessel-sourced pollution and other relevant management work; the administering of inspection of vessels and offshore installation, port fairway surveying and mapping based on authorization; the registration of vessels, the examination and approval of operation manuals and documents required of vessels by law, the review and monitoring of the safety management system of the whole crew of vessels, the training, examination and certification of mariners, the management of certifications of mariners; the search and relief work on water, the emergency management of pollution incidents and the investigation and handling of major maritime traffic accidents in areas under its jurisdiction."[12] Thus it can be seen that the maritime safety administration's functional authority is mainly to supervise and control maritime carrier vehicles and maritime navigational facilities, so as to ensure traffic safety; its jurisdiction largely concentrates on port, fairway and anchorage area; its function, though covering the management of vessel-sourced pollution incidents, is mainly about the prevention, punishment of offending vessels, pollution cleaning up and the adoption of measures to avoid further damage. It can thus be inferred that in cases where pollution damage is caused on the marine environment by non-military vessels in port areas (here extended to cover the anchorage area and fairway managed by the maritime authority) under the jurisdiction of the maritime authority, the maritime authority shall be the proper plaintiff, even if the pollution spills over to waters outside the port area. But for pollution damage outside the jurisdictional area of maritime authorities which is caused by non-military ships, as long as it is not in the waters of fishing ports governed by the fishery administrative authority or in the waters of military ports governed by the military authority, the oceanic administrative authority shall be the claimant for compensation.

In order to further explain that the maritime administrative authority is not the proper claimant for vessels-triggered marine environmental pollution outside the area of its jurisdiction, we can look back into certain cases in the past: in the case of the *Feoso Ambassador* Oil Pollution Accident in 1983, it was the authorities in charge of environmental protection and aquaculture that acted on behalf of the State to claim for compensation;[13] in the *Haicheng* case in 1997 it was the fishery admi-

12 See File No. 90 published by the General Office of the State Council in 1999.

13 Zhang Shanshan, The Qualification of Administrative Authority-in-charge as the Subject to Initiate Legal Proceedings against Marine Pollution Damage, in Tianjin Maritime Court ed., *The Collection of Papers from the Eleventh National Seminar on Maritime Trial*, 2002, p. 29. (in Chinese)

nistrative authority;[14] and in the *Minrangong II* case in 1999 it was the fishery administrative authority.[15] In the cases mentioned above, maritime administrative authorities did not appear as the plaintiff, which shows that in the past trial practices people did not approve of maritime authorities claiming against pollution occurring outside port areas under their jurisdiction. Although oceanic administrative authorities did not appear as the plaintiff in any of the above cases, it was mainly because the MEPL had not yet been put into force and the supervising power of oceanic administrative authorities had not been ascertained. After the MEPL came into force on April 1, 2000, the *MV Tasman Sea* oil spill case took place in 2002, wherein the Malta registered oil tanker *Tasman Sea* fully loaded with crude oil collided with the Chinese ship *Kaishun I* of Dalian in the waters 23 nautical miles to the east of Tianjin Dagu anchorage area, leading to massive oil spill and serious damage to the marine environment. This case was labeled as China's first claim against marine environmental pollution involving a foreign party, not only because the claimed amount was as tremendous as RMB 170 million, but also in that "it was the first case raised within legal framework by China's oceanic administrative authority to claim against a foreign party for marine ecological environmental pollution and that it set a precedent for China to safeguard its marine ecological rights and interests."[16] This case, so to speak, testified to the authority of the MEPL in practice and established for oceanic administrative authorities rather than maritime authorities the suing right against vessel-sourced marine pollution occurring outside port areas.

Conclusions can be made from the above analysis that the oceanic administrative authority can appear as the plaintiff in cases raised against the following marine environmental pollution:

1) That created by marine construction projects and dumping of wastes into the sea;

2) That created by non-military vessels outside port areas under the jurisdiction of the maritime authorities, fishery administrative authorities and military authorities;

3) That for which no competent authority-in-charge is designated by law or

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14 Si Yuzhuo, *Cases and Course of Study on the Science of Maritime Law*, Beijing: Knowledge Press, 2003, p. 275. (in Chinese)

15 Si Yuzhuo, *Cases and Course of Study on the Science of Maritime Law*, Beijing: Knowledge Press, 2003, p. 275. (in Chinese)

16 Comment on Major Cases: Tianjin: the First Case Claiming against a Foreign Party for Marine Ecological Environmental Pollution, at http://www.51zy.cn/165616452. html, 7 March 2010. (in Chinese)

administrative regulation, such as that created by marine incineration behavior or by on-water shipbreaking operations going on outside the waters of port areas.

C. State Maritime Safety Administration

The state maritime authority's competency as the plaintiff in cases of marine pollution caused by non-military vessels in port areas under its jurisdiction has already been discussed earlier in this article, so no further description is needed here in this regard. Besides, article 4, paragraph 2 of the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking provides, with respect to pollution from shipbreaking work, that "the harbour superintendency administration of the People's Republic of China (including harbour navigation superintendency administration, similarly hereinafter) is responsible for the environmental protection work concerned with on-water shipbreaking and shipbreaking in waters of the port area of comprehensive ports,[17] and shall assist the department of environmental protection in supervising and controlling the environmental protection work concerned with shoreside shipbreaking outside the waters of the port area." Based on this provision, for marine pollution from on-water or shoreside shipbreaking in the port area of non-fishery ports and non-military ports, the maritime safety administration shall be the claimant for compensation. As for the authority in charge of the environmental protection work concerned with on-water shipbreaking outside port areas, we think it should be a State oceanic administrative authority. Although this kind of thinking might run contrary to article 4, paragraph 2 of the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking in that it provides environmental pollution caused by all on-water shipbreaking work shall be monitored and managed by the maritime safety administration, yet the legal effect of this provision is quite questionable because article 5, paragraph 2 of the MEPL is legally more effective and has already vested oceanic administrative authorities with a comprehensive marine environment supervising power including the supervising power over on-water shipbreaking, whereas article 5, paragraph 3 of this law has not specifically set down the maritime safety administration's environment supervising power concerning on-water shipbreaking; besides, the Regulations of the People's Republic of China

17 Referring to a port that possesses a handling capacity for various cargoes and is capable of providing berth for different types of ships, including fishing vessels.

on the Prevention of Environmental Pollution from Shipbreaking, promulgated in 1988, is by no means, in terms of effectiveness by timing and level, superior to the MEPL enacted in 2000, so article 4, paragraph 2 of the former should be interpreted conditionally, and marine pollution caused by on-water shipbreaking work outside port areas should be supervised and controlled by oceanic administrative authorities.

Therefore, maritime safety administrative authorities can initiate legal proceedings as plaintiff in the following 2 kinds of cases:

1) Marine environmental pollution cases triggered by non-military vessels in the port areas (including anchorage area and fairway) under their jurisdiction;

2) Marine environmental pollution cases triggered by on-water and shoreside shipbreaking work in the port areas under their jurisdiction.

D. State Fishery Administrative Authorities

Regarding the fishery authority, article 5, paragraph 4 of the MEPL specifies: "The competent State administrative department in charge of fisheries shall be responsible for the supervision and administration of marine environment pollution caused by non-military vessels inside the fishing port waters and the fishing vessels outside the fishing port waters, and be responsible for the protection of ecological environment in the fishing zones, and examine and handle fishery pollution cases beyond the pollution accidents mentioned in the previous clause." To understand this provision, we think a comprehensive analysis should be carried out taking into account the functions of the fishery authority and other paragraphs of article 5 of the MEPL.

At the central government level, the state supreme fishery administration is the Ministry of Agriculture,[18] which then delegates the administrative function to the subordinate Fishery Bureau of the Ministry of Agriculture (the former State Supervision Bureau of Fishery Administration and Fishing Port). The functions of the Fishery Bureau of the Ministry of Agriculture include "to draw up policies and plans on the preservation, the rational exploitation of fishery resources, and on the protection of the ecological environment of fishery waters and aquatic wildlife, to organize the implementation of these policies and plans as well; to exercise the power of inspection, supervision and management over fishery administration, fishing

18 Articles 2 and 9 of the Agriculture Law of the People's Republic of China.

port and fishing vessels on behalf of the state; to be responsible for the supervision and control of fishery administration, fishing port and fishery telecommunication work, to oversee the implementation of fishery regulations, propose plans and measures on building a national team of fishery administration and law enforcement and guide their implementation, deal with significant foreign-related fishery disputes."[19] At the local level, the fishery administrative authority at or above county level and the fishery administration and supervision departments it sets up perform, in their jurisdictional areas, functions similar to those of the Fishery Bureau of the Ministry of Agriculture.[20] Although article 5, paragraph 4 of the MEPL establishes the fishery authority's power to monitor and manage marine environmental pollution caused by fishery vessels outside the waters of fishing ports, yet this provision overlaps with paragraph 2 under the same article which provides that the State oceanic administrative authority is the overall supervising authority over the marine environment, and article 90 of the MEPL again specifies "the department invested with power by the provisions of this law to conduct marine environment supervision and administration shall, on behalf of the State, put forward compensation against those held responsible for the damages." As a result, controversy arises over whether it should be the fishery authority to sue as plaintiff in marine environmental pollution incidents triggered both inside and outside fishing ports by fishery vessels. We think the proper plaintiff shall be clearly pinned down in earnest scrutiny of the fishery authority's administrative functions and powers, which concentrate on the administration of fishery vessels, fishing ports and marine fishing, thus for marine environmental pollution originating in the waters (including anchorage areas and shipping lanes dedicated to fishing vessels) of fishing ports attributable to non-military ships, the fishery authority should be the supervising and controlling body qualified to be the plaintiff, whereas for marine environmental pollution produced by fishery vessels outside the waters of fishing ports, it is more appropriate for oceanic administrative authorities to be the plaintiff, considering the pollution takes place outside the waters of the fishing ports under the supervision of the fishery authority.

Regarding shipbreaking work, article 4, paragraph 3 of the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking also provides: "The state administration of fishery and fishing ports

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19 The Duties and Tasks of the Fishery Bureau, at http://finance.sina.com.cn/roll/20040419/1854726037.shtml, 7 March 2010.

20 Article 6 of the Fisheries Law of the People's Republic of China.

shall be in charge of the environmental protection work concerned with shipbreaking in the waters of fishing ports, responsible for monitoring the impact of shipbreaking on fishery waters along the coast, and conduct investigations and take measures in cooperation with the administration of environmental protection after the discovery of any pollution accident." This provision gives fishery administrative authorities the right to monitor and control marine pollution attributable to on-water and shoreside shipbreaking work in the waters of fishing ports.

On the issue whether it shall be the fishery authority to claim for compensation against fishery resource damage, opinions are divided. Professor Zhao Jinsong holds the view that "when confronted with fishery resource deterioration (like suffering from oil pollution), the administrative authority in charge of fishery is not obligated to take such ecological measures as improving water quality and replenishing fish fries to protect the marine environment, so it will be wrong for the court to rule in an oil pollution case that the fishery administrative authority shall get compensation as the plaintiff."[21] We think this kind of view is mistaken. Because based on the provisions of the fisheries law, the administrative authority in charge of fishery is the regulatory agency of fishery sea areas, and is commissioned by the State to exercise the ownership right over marine fishery resources. Though article 5, paragraph 4 of the MEPL only specifies that the fishery authority is "responsible for the protection of ecological environment in the fishing zones," yet from the perspective of the trustee, the fishing authority is certainly entitled to the status of plaintiff to initiate legal proceedings against fishery resource damage, which is also a practice that has already been recognized in reality.[22] With respect to other resource (ecological) loss in fishing zones we think, the oceanic administrative authority as the body carrying out overall supervision on the marine environment, rather than the fishery authority, should be the plaintiff to raise a claim for compensation.

Hereon conclusions can be made that the fishery authority has suing right in the following cases:

1) Cases built on marine environmental pollution produced in the waters (including anchorage areas and shipping lanes dedicated to fishing vessels) of fishing

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21 Zhao Jinsong and Zhao Luxue, Parties to Sue in Ship Pollution Cases under Chinese Law, *Annual of China Maritime Law*, Vol. 15, No. 1, 2004, p. 301. (in Chinese)

22 See the above-mentioned *Haicheng* case, *Minrangong II* case and *Tasman Sea* case wherein the separate cases built on fishery damage claims filed by "the Supervision and Management Office of Fishery Administration and Fishing Port of Tianjin City" were also accepted and heard.

ports by non-military vessels;

2) Cases built on fishery resource damage due to pollution;

3) Marine environmental pollution cases triggered by on-water and shoreside shipbreaking work in waters of the fishing ports under its jurisdiction.

E. Military Environmental Protection Administration

Strictly speaking, the military environmental protection administration is not a state administrative authority, but we specifically list it here for the sake of convenience in classification and explanation. Military ports and vessels play a special role in national security, and concern the issue of state sovereign immunity, so in the sense of article 5, paragraph 4 of the MEPL, all military ship breaking, marine pollution triggered by military vessels or sourced from the waters of military harbors should not be regulated by any authority other than the military environmental protection administration, which should litigate against this kind of marine environmental pollution as the plaintiff.

III. Issues and Suggestions Regarding State Administrative Authority's Status of Plaintiff in Claims against Marine Environmental Pollution

Despite the provision in article 90, paragraph 2 of the MEPL states that "the department invested with power by the provisions of this law to conduct marine environment supervision and administration shall, on behalf of the State, put forward compensation to those held responsible for the damages," article 5 of the same law vests multiple authorities with the power to regulate the marine environment, and particularly, "supervising power" on certain affairs among several departments, and the MEPL is at variance with the provisions of relevant administrative regulations in terms of the determination of the supervising body, which brings about uncertainties over which authority is entitled to take legal actions on behalf of the State against specific marine environmental pollution. Moreover, in the case that environmental pollution spills over to many adjacent regions, whether it shall be the authority located in the originating place of the pollution with jurisdiction to initiate a litigation or it shall be the authorities that have jurisdiction in these differ-

ent regions to do so respectively is a question not clearly defined.

Currently as the legal norms on identifying state administrative authorities' qualification for being the plaintiff in marine environmental pollution cases are not all sound, we think the supreme people's court can provide judicial interpretation to solve the problems encountered during litigation process, and the following are our specific suggestions:

(1) To fix that the State oceanic administration is the main authority acting on behalf of the State to claim for compensation against marine environmental pollution, while the state maritime safety administration has the power to supervise and control marine pollution caused by non-military vessels within its jurisdictional harbor area (including port, anchorage and channel connecting anchorage with port), thus qualified to litigate as plaintiff; fishery administrative authorities can litigate as plaintiff against marine pollution caused by fishery vessels and non-military vessels in fishing port areas under their jurisdiction; as for other marine environmental pollution cases wherein damage is produced on the sea by non-military ships, the state oceanic administration should be the one to litigate as plaintiff.

(2) The state maritime safety administration shall prosecute marine pollution caused by on-water and shoreside shipbreaking work within the port area under its jurisdiction. The state fishery administration should prosecute pollution caused by on-water and shoreside shipbreaking work within the port area of fishing ports. The military environmental protection administration shall prosecute marine environmental pollution caused by on-water and shoreside shipbreaking work within the port area of military ports. To other pollution by shipbreaking not included in the above said and pollution by shipbreaking outside harbor area not under the jurisdiction of the environmental protection administration, the state oceanic administration may act as plaintiff and place a lawsuit.

(3) The administrative authority in charge of fishery shall exercise the suing right and litigate as plaintiff against all fishery damages produced by marine environmental pollution; the state oceanic administration shall litigate against marine ecological losses in fishery areas incurred non-land-based pollutants.

(4) Under the circumstance where controversy arises among different state administrative authorities over the qualification for being the plaintiff in marine environmental pollution cases, either the joint superior of these departments designates a supervising body or a state oceanic administrative authority in the area under their jurisdiction may be jointly commissioned by these departments to initiate the litigation as plaintiff.

(5) In the case that marine environmental pollution spreads to multiple jurisdictional areas and therefore multiple jurisdictional authorities are involved, it shall always be the state administrative authority with jurisdiction located in the source area of the pollution that shall initiate the litigation.

(6) Concerning the cost of pollution cleaning up, the government authority organizing the cleanup work and obligated to carry out continual cleaning up shall, based on the cost already incurred and to be incurred associated with reasonable cleanup measures, initiate relevant legal proceedings as plaintiff.

IV. Conclusion

To correctly identify the proper government authority as the claimant in marine pollution cases is of great importance to safeguarding marine environmental rights and interests, so we come to the following conclusions: the status of plaintiff for each different state administrative authority in its claim for compensation on behalf of the State shall be established according to its function division, and which authority shall be the one to claim for compensation on behalf of the State in marine environmental pollution cases shall be determined under the guidance of the MEPL and based on the distribution of marine environment supervising power for each state department in such laws and regulations as the Fisheries Law of the People's Republic of China, the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Offshore Construction Projects, the Administrative Regulation of the People's Republic of China on the Prevention and Control of Pollution Damage to Marine Environment from Coastal Construction Projects, the Regulations of the People's Republic of China on the Control over Dumping Wastes into the Sea Waters and the Regulations of the People's Republic of China on the Prevention of Environmental Pollution from Shipbreaking.

(Translator: DENG Guangchao)

New Ideas for Improving China's Coastal Zone Management Legislation: Drawing on the Experiences of the United States

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Abstract: As maritime powers, both the United States and China are facing the common issue of rational development and effective management of coastal zones. The United States, who has always been leading the world with its innovative concept of integrated coastal zone management, and relying on its ongoing institutional reform and innovation, is now gradually moving towards sustainable coastal zone development. China has yet to improve its coastal zone management system as well as relevant policies and laws in order to achieve sustainable development in coastal zone resource exploitation and ecological environment, while the United States' practical experience and continuous development of coastal zone management provide an important reference to China. This article focuses on measures to improve China's legal system for coastal zone management and attempts to make relevant suggestions.

Key Words: Integrated coastal zone management; U.S. Coastal Zone Management Act; Ecosystem-based management

A coastal zone, as a sensitive area of land-ocean interaction, has poor carrying capacity of natural conditions. The vigorous development of coastal zones has also brought about severe negative impacts. The coastal zone waters, atmosphere and habitats have suffered serious harm, causing intensified marine pollution, wetlands reduction, fisheries resource degradation, and frequent natural disasters. Therefore, the rational development and integrated management of coastal zones have become a com-

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mon practical issue for the whole world in order to achieve sustainable marine development.

The coastal zone management law is a law of national land for specific areas (within coastal zones).[1] The United States enacted the Coastal Zone Management Act (CZMA) as early as 1972, and has strengthened the planning and protection of the resources, ecosystems as well as the environment in its coastal zones by ways of policies and legal and economic means, with remarkable results. In the meanwhile, the sustainable development and conservation of coastal zones have been strengthened by means of its continuous innovation of laws and policies. In contrast, China is obviously lagging behind in respect of policies and laws for coastal zone development and conservation, and the requirements for coastal zone development and utilization have yet to be met. Therefore, it is imperative for China to draw on the United States' experiences for the improvement of its policies and laws on integrated coastal zone management according to actual conditions, so as to effectively escort China's economic, social and ecological sustainability of the coastal zones.[2]

I. Introduction to China's and the United States' Laws and Policies on Coastal Zone Management

A. China

Since the 1980s, China's laws and regulations on ocean management have been changed from separate regulations to those governing the entire industry. In this period, the laws and regulations concerning coastal zone management are mainly industrial-based regulations made by various authorities, except the laws on maritime rights and interests (such as the Law on the Territorial Sea and the Contiguous Zone). The relevant laws and regulations mainly include the following categories: (1) marine environmental protection management, e.g., the Marine Environmental Protection Law, the Regulations on the Prevention of Vessel-induced Sea Pollution,

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1 Editorial Committee for the Dictionary of Marine Science ed., *Dictionary of Marine Science*, Shenyang: Liaoning People's Publishing House, 1988, p. 214. (in Chinese)

2 Ni Guojiang and Bao Hongtong, A Comparative Study on China's and the United States' Integrated Coastal Zone Management, *Journal of Ocean University of China (Social Sciences)*, No. 2, 2009, pp. 13~17. (in Chinese)

the Regulations on Control over Dumping of Wastes in the Ocean, the Regulations on the Prevention and Control of Pollution Damage to the Marine Environment by Land-sourced Pollutants, etc.; (2) maritime traffic safety management, e.g., the Maritime Traffic Safety Law, the Regulations on the Administration of Navigable Waterways, etc.; (3) marine resources management, e.g., the Fishery Law, the Implementation Guidelines to Fishery Law, the Regulations on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, etc.; (4) marine scientific research management, e.g., the Regulations on the Administration of Foreign-related Maritime Scientific Research, etc.; (5) sea area use management, e.g., the Sea Area Use Management Law, etc.; and (6) other laws and regulations pertaining to coastal zone management, e.g., the Land Management Law, the Port Law, the City Planning Law, the Mineral Resources Law, and the Regulations on the Salt Industry, etc. These laws and regulations together constitute China's basic legal system of coastal zone management.

By now, China has not formulated a law specifically addressing integrated coastal zone management, while most of the laws and regulations enacted and implemented are specific industrial laws which are not comprehensive and systematic. Meanwhile, maritime law enforcement involves multi-sectoral participation, but without clear definition for roles and responsibilities of each sector, lacking an effective coordination mechanism. Moreover, since China's coastal zone management practice is still in its infancy, there are many deep-seated problems. For instance, management mechanism is decentralized, conflicts are frequent, coordination and integration are lacking among relevant sectors, bodies, maritime space users and administrative regions because of respective interests, causing a "compartmentalized style" management pattern by various governmental departments based on their own single law or regulation governing respective industry.[3] This pattern continues to today. In fact it is a seaward extension of the onshore industries management, not taking into account the specificities of the coastal zones as well as management requirements and thus resulting in lack of pertinence, inadequate management efficiency, and other issues.

B. The United States

3 Ni Guojiang and Bao Hongtong, A Comparative Study on China's and the United States' Integrated Coastal Zone Management, *Journal of Ocean University of China (Social Sciences)*, No. 2, 2009, pp. 13~17. (in Chinese)

As both advocator and practitioner of the marine management concepts, the United States started integrated marine management very early. In the 1970s, with the increasingly severe conflicts between resource development and environmental protection, serious problems in management efficiency and effectiveness arose in the sectoral management system for the coastal zones that the country had pursued. Therefore, the United States' legislative model for coastal zone management began to transit from separated sectoral management to integrated legislative management for the goal of coordinated development of resources and environment in the coastal zone. The management not only involves direct engagement of the governments at all levels, but also puts more emphasis on public and community participation, giving full consideration to the different characteristics of each state and each region so as to suit local circumstances and keep balanced. Ever since the 1970s, the United States has been strengthening the management and protection of coastal zones by continuously improving its basic oceans policies and legislation and through regulations and coordinated management.

1. Establishing a Complete Legal System of Coastal Zone Management

The United States is one of the earlier nations that started legislation on coastal zone activities. The concept of "Coastal Zone Management" was proposed by the then Vice President Humphrey in 1967. The federal government's CZMA was unanimously adopted by the Senate and the House of Representatives in 1972 and later implemented over the country under the guidance of the National Oceanic and Atmospheric Administration (NOAA). The CZMA, the world's first integrated coastal zone management act, ushered in the transition of legislation model on coastal zone management from single sectoral legislation to integrated legislation. The CZMA was amended successively in 1976, 1981 and 1990. Currently, most of the 35 coastal states/regions have already enacted pertinent laws on coastal zone management.[4]

Following the implementation of the CZMA was the successive amendment of the Outer Continental Shelf Lands Act and the Marine Conservation, Research and Nature Conservation Act as well as the promulgation of a series of laws, including the National Environmental Policy Act, the National Ocean Pollution Planning Act, the Fishery Conservation and Management Act, and the Deepwater Port Act. These

4 Yun Caixing and Jiang Xingwei, *Sustainable Development and Integrated Management of Coastal Zones*, Beijing: China Ocean Press, 2002, p. 14. (in Chinese)

laws and regulations have constituted a relatively comprehensive legal system for integrated coastal zone management and play a significant positive role in controlling over-development and environmental deterioration in the coastal zones. [5]

2. Defining the Scope and Boundaries of Coastal Zone Management

The United States defines the coastal zone as the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the U.S. territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise.[6]

3. Regulating the Coastal Zone Management and the Coordination System

The CZMA has established a multi-tiered decentralized management system, namely the federal/state/local governments all have the responsibility of coastal zone management, while the state governments bear the main responsibility. Laws and regulations on coastal zone management have been promulgated by the Federal Government as well as each town/county/state. The specialized authority – Office of Ocean and Coastal Zone Resource Management, affiliated to NOAA, is responsible for integrated management coordination. The Federal Government is mainly responsible for providing financial assistance to each state and for formulating guidelines on coastal zone management planning for the coastal states, so as to establish a coordinating and cooperative relationship among the federal, state and local governments and other interest groups. All states, cities, counties and towns have established their respective coastal zone management agencies; some regions have established inter-regional coordinating agencies.

4. Recent Developments of the CZMA

Along with the gradual depletion of natural resources and development of hu-

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5 Yun Caixing and Jiang Xingwei, *Sustainable Development and Integrated Management of Coastal Zones*, Beijing: China Ocean Press, 2002, p. 14. (in Chinese)

6 Marine Management Division of the State Oceanic Administration ed., *Selected Documents of Domestic and Foreign Laws and Regulations for Marine Management*, Beijing: China Ocean Press, 2001, pp. 578~579. (in Chinese)

mans' scientific understanding of ecosystems, the ecosystem-based management (EBM), taking into account the interaction within the ecosystem as well as the relationship between the ecosystem and human activities, has become a clear objective of various governmental departments and public/private resources management organizations, and thus has gradually incorporated into the US legislation and policies of ocean management, providing a new method to promote integrated coastal zone management and sustainable development. However, the provisions in the CZMA which reflect EBM are insufficient. In January 2009, the Environmental Law Association (ELI) issued a white paper on Expanding the Use of Ecosystem-based Management in the Coastal Zone Management Act, which suggests the CZMA be amended from the following six aspects in order to strengthen the ecosystem-based coastal zone management:

(1) Require development of ecosystem assessments that would form the basis for state coastal zone management plans, and improve lastest data collection and analyses by the NOAA Coastal Services Center to support the completion of assessments and to help managers understand the reliability of the assessment.

(2) Require states to develop a long-term coastal zone management plan based on the latest ecosystem assessment. The plan shall include, but is not limited to, management targets, measurable objectives to achieve the targets, a timeline, a budget, a designated lead agency, and a strategy and legal authority for implementing the plan.

(3) Update its statutory definition and reasonably delimit the coastal zones in line with the ecosystem assessment, which requires giving due consideration to the ecological boundaries of inland coastal zones and empower states the flexibility in delimiting the inland boundary; further define land and waters uses in the CZMA and classify "preservation" as a sort of "use";

(4) Promote an integrated management method of coordination and cooperation through interstate shared ecosystem based on ecosystem assessment, and establish a balanced mechanism for competing or conflicting uses; pay attention to the assessment of the cumulative impacts of diverse long-term uses and different areas on the ocean and coastal zones, and take proper precautionary measures;

(5) Further improve the special area management plan to incorporate EBM factors and principles and expand its use in the integrated coastal zone management strategies;

(6) The Federal Government will further incorporate EBM into the provisions on federal consistency under the CZMA and establish a proper mechanism in order

to encourage greater use of federal consistency review as a means to implement the plan.

II. Ideas and Suggestions for Improving the Coastal Zone Management Law of China

By ways of policies, legal systems, and the construction of management and coordination mechanisms, the United States has been improving its coastal zone management system and strengthening EBM principles in the CZMA, which reflects the new trend in the coastal zone development and management policies and provides new ideas for China to improve coastal zone management. The authors suggest considerations be taken mainly in the following aspects and scientific ideas be incorporated into the improvement of relevant legal systems:

A. Defining Boundaries for Coastal Zone Management by Legal Measures

The coastal zone (or coastal area) is the area where land and ocean interact. The complex ecological processes between such interaction have connected land and ocean as a whole. The main value of ecosystem-based integrated coastal zone management lies in its recognition of land-ocean integration.

According to the nationwide comprehensive survey of coastal zones and tidal resources in 1985, the width of the coastal zone extends landward from the coastline by 10 km and extends seaward to 15 m isobaths. In reality, the boundaries in integrated coastal zone management have always been ambiguous, and the definition is usually based on administrative divisions or geographic regions, which is rough, general, lacking feasibility and scientific evidences, and thus has severely restricted the effective development of integrated coastal zone management. Therefore, it is necessary to divide geographical units (including the sea area and the land) and confirm them by legal measures; meanwhile, there should be flexibility to the overall (multi-government departments and multi-industrial sectors collaboration) and integrated (realizing the integration of development control and resource management objectives) management.

The definition of the boundary of a coastal zone shall be based on ecosystem assessment and in line with the basic physical, chemical, biological, and other ecological characteristics of the ocean, while taking into account factors such as human

activities. Generally speaking, the rational definition of the coastal zone management area should include a certain area of coastal land and the part that usually extends to the shelf margin or to the periphery of the offshore circulation system. For example, a management area should include key coastal habitats, key ecosystem processes, and the habitats of key species, with special attention to the conservation of key habitats, such as estuaries, mangroves, coral reefs and wetlands. Attention should also be paid to the topography and geology of the coast. For example, in the rocky and sandy coast, the landward area may be narrower because smaller areas of the land would be subject to the impact of the ocean due to the higher-lying coastal land; while in the silty mud coast, the landward area may be wider because the coastal land is flat, vulnerable to the erosion by wind, wave and tide.[7]

In addition, consideration should be given to external impacts, and the main polluted sites in the coastal area should be included in the scope of management. Meanwhile, the definition of boundaries should also be in line with local ocean functional zoning.

B. Determining a Scientific Coastal Zone Management Planning

The ecosystem-based coastal zone management requires that the lag effect of management and the fact that ecosystem's change over time be recognized by ecological assessments to develop a long-term management plan, incorporating the statutory management and its objectives into specific actions, so as to provide guidance and objectives for the management agency and to lay a solid foundation for the conservation and coordination management.[8]

The coastal zone management planning shall be clear, comprehensive and sustainable. The management objectives should not be too general; instead they should include not only long-term objectives such as "sustainable development" but also consistent, specific and phased development objectives. Meanwhile, management objectives should be clearly defined, including specific measurable objectives, methods and budget as well as the statutory power of legal authority to achieve these

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7 Chen Baohong, Yang Shengyun and Zhou Qiulin, A Tentative Discussion on the Issues Related to China's Boundaries for Integrated Coastal Zone Management, *Ocean Development and Management*, No. 5, 2001, pp. 27~32. (in Chinese)

8 Zhang Lingjie, Coastal Ocean Management of the United States: Legal System and Practices, *Marine Geology Letters*, No. 3, 2002, pp. 28~33. (in Chinese)

objectives, among others. During the planning process, scientific methods and models should be applied to conduct rigorous demonstration, prediction and assessment, and upon approval, all the development activities should be executed strictly to the plan so to ensure orderly development of the coast.

Considering the compartmentalized style of China's marine management system, the scientific management planning should reflect the consistency of objectives at different levels (including the long-term overall planning at the national level and the specific implementation planning at the local government level) and should go through scientific demonstration and review. Emphasis should be laid on effective monitoring on implementation as well as adaptability assessment, and on constant improvement of the management plans in practices so as to meet the requirements of sustainable ecosystem development in the coastal zones.[9]

C. Strengthening the Coherence and Coordination among Central and Local Authorities and Agencies

The existing coastal zone management in China is a decentralized sectoral management system that mainly covers sectors such as oceanic administration, fishery administration, environmental protection, maritime affairs and frontier defense. This mannagement system involves multi-sectoral participation in marine management, but lacks effective coordination and cohesion, resulting in many obstacles to inter-regional and inter-sectoral coordination and cooperation, which are mainly reflected in the lack of effective communication and feedback channels between the upper and lower authorities; the absence of an overall coordination mechanism to balance different regions, especially the adjacent regions involving cross-regional issues, resulting in recurring conflicts in the process of coastal zone management. Without satisfactory solution of the problems regarding cooperation and coordination between central and local authorities and agencies, it would be difficult to make significant progress in coastal zone management.

In order to meet the requirements of integrated coastal zone management, it is required to optimize agency combination timely, improve function deployment from the central to the local, strengthen the inter-departmental cooperation mechan-

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9 Qiu Jun, Zhao Jingzhu, Deng Hongbing and Li Mingjie, Ecosystem-based Marine Management: Principles, Practices and Suggestions, *Marine Geology Frontiers*, No. 1, 2008, pp. 74~78. (in Chinese)

ism, and adjust local specific coastal zone management plans so that they are not only in line with the national authorization and relevant policies, laws and regulations but also are consistent with the management plans of adjacent regions. Considerations should also be given to establish proper bodies to provide guidance and coordination for integrated marine management at the national level (such as a national administration for marine affairs) and at province/city level in coastal provinces and cities, which are expected to form a comprehensive and systematic coastal zone management leadership and coordination system and to strengthen local coastal zone management. It is recommended to establish an explicit balancing mechanism to resolve the conflicts among different sectors, agencies, and stakeholders so as to strengthen the coordination and managemet of coastal zone affairs.[10]

D. Establishing a Scientific Ecological Assessment and Precautionary Mechanism

Effective EBM requires a basic understanding of the structure, condition and function of the maritime ecosystem before comprehensive and scientific management decisions may be made. Due to the impacts of human activities, the marine ecosystem is evolving rapidly in a complex way, which makes marine ecosystem assessment a pressing task.

On the one hand, it is required to develop an ecosystem assessment method based on the large marine ecosystem as soon as possible, taking the cumulative impacts of any activity into account. Through establishing and improving a marine ecosystem monitoring and assessment system, the monitoring and assessment scope will be extended from the coastal waters to the far shore waters. This system will enable long-term monitoring on the dynamics of marine ecosystems. For example, the changes in marine biodiversity, the production capacity of ocean commercial fishes and other indicators, including the structure and ecological processes of certain critical marine ecosystems, shall all be included in the scope of monitoring and assessment, so that ecosystem-based assessment can not only provide technical support to the formulation and implementation of relevant laws and regulations on

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10 Ni Guojiang and Bao Hongtong, A Comparative Study on China's and the United States' Integrated Coastal Zone Management, *Journal of Ocean University of China (Social Sciences)*, No. 2, 2009, pp. 13~17. (in Chinese)

coastal zone management, but also provide a scientific basis for policy making.[11]

On the other hand, the complexity of geological features, ecogeographic processes and human activities renders great uncertainty to the coastal zones, and mistakes have been reoccurring in decision-making of marine management due to the limitation of human understanding. In implementing EBM, due consideration should be given to the characteristics of the ecosystems *per se* and the uncertainties thereof, and in any region(s) of which the forecasting capability is limited, the precautionary principle should be applied. The precautionary principle is an important principle for maintaining ecosystem health and ecological safety which requires the adoption of cost-effective technologies or measures to mitigate or eliminate the impacts where certain human activities might cause severe or irreversible damages to living resources, even in the absence of scientific, sufficient and conclusive evidences.[12] Therefore, preventive measures and methods should be included in the scope of coastal zone management and be incorporated into the regulatory system of the coastal zone management law in order to meet the needs of integrated management.

III. Conclusion

The United States is leading the world in coastal zone management. China has a maritime space as vast as more than three million km^2 under its jurisdiction. With the promulgation of relevant maritime laws and policies by many maritime powers to develop their marine economy as well as marine programs, China should follow the trend of the times, learn from advanced countries' experiences, and manage the sea areas under its jurisdiction in a scientific and integrated way. A sound marine management system should be based on a comprehensive system of oceans laws and regulations. China is strengthening its legislative work, which requires running the State by rule of law, administrating the State according to law. It is very difficult to achieve effective integrated marine management without the support of a strong marine legal system; therefore, China should enact a scientific and comprehensive

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11 Qiu Jun, Zhao Jingzhu, Deng Hongbing and Li Mingjie, Ecosystem-based Marine Management: Principles, Practices and Suggestions, *Marine Environmental Science*, No. 1, 2008, pp. 74~78. (in Chinese)

12 Cui Shenghui, Hong Huasheng, Zhang Luoping, Huang Yunfeng and Xue Xiongzhi, The Coastal Ecological Security Problems Caused by Global Change and the Governace Principles, *Journal of Xiamen University (Natural Science)*, Vol. 43, Sup., 2004, pp. 173~178. (in Chinese)

coastal zone management law as soon as possible, improve the marine legal system, and strengthen integrated coastal zone management, so as to achieve the sustainable development of coastal zones.

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Mechanisms for Combating Piracy and Armed Robbery against Ships in the Strait of Malacca

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Abstract: Using the Strait of Malacca – waters plagued by piracy and armed robbery against ships – as a starting point, this article discusses the related bilateral, trilateral, and multilateral prevention and control mechanisms against piracy and armed robbery in the region. The article concludes that the existing mechanisms have been effective and, with the development in the breadth and depth of these mechanisms in the Strait of Malacca, they will have an even greater impact in the near future.

Key Words: Piracy; Armed robbery against ships; Strait of Malacca; Control mechanism

I. Provisions on "Piracy" and "Armed Robbery against Ships" in International Law

The nature and connotations of piracy under international law have changed through time. Piracy in the Strait of Malacca is also defined slightly differently from what is customary under international law. This part gives a preliminary analysis of the definitions of piracy and armed robbery against ships, as well as the similarities and differences between the two.

A. Concept of "Piracy" in International Law

Although piracy has existed since ancient times, it was not considered a crimi-

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nal offense by many countries as recently as the 19th century. It was not until the 1930s that piracy was considered an international crime and became the typical international crime recognized the earliest by the international community.[1] Article 8 of the Convention on the High Seas, adopted by the First UN Conference on the Law of the Sea in 1958, clearly defines the crime of piracy.

The substantive connotations of piracy have developed through time as well. The Nyon Agreement signed by Britain, France, the Soviet Union, Bulgaria, Greece, Egypt, Romania, Turkey and Yugoslavia on September 14, 1937 prescribed that a country was the actor in an act of piracy, the merchant ship of another country was its object, and its locality was the high seas.[2] Compared to the 1937 Nyon Agreement, the 1958 Convention on the High Seas substantially alters the definitions related to the crime of piracy except for the limit on the locality of the act to the high seas. The actor in an act of piracy is limited to individuals and excludes countries. The class of possible objects of the act is greatly expanded, including not only private merchant ships but also warships, other public vessels, and the people or properties on another aircraft or ship as well as the ship or aircraft itself.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) reaffirms the definition of the crime of piracy in the 1958 Convention on the High Sea. In recent years, some regional treaties have restricted the definition of piracy within the region based on the region's special conditions. For example, taking into account the special situation in the Strait of Malacca and its environs where pirates do not yet have the capability to commit piracy against aircraft flying over the area and only attack ships in most cases,[3] the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) that took effect in 2006 excludes aircraft from being an object of piracy.[4] Piracy, as defined in this agreement, refers to illegal acts of violence, detention or depredation committed against the people or property on another ship on the high seas, or such acts against

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1 Signing of Nyon Agreement for Protection of the Safety of the Mediterranean, at http://www.godist.Cn/History/8714.shtml, 14 October 2008. (in Chinese)

2 Signing of Nyon Agreement for Protection of the Safety of the Mediterranean, at http://www.godist.Cn/History/8714.shtml, 14 October 2008. (in Chinese)

3 Yang Cuibai, Comment on the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, *Southeast Asian Affairs*, No. 4, 2006, p. 30. (in Chinese)

4 Yang Cuibai, Comment on the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, *Southeast Asian Affairs*, No. 4, 2006, p. 30. (in Chinese)

the ships, people, or property in places beyond the jurisdiction of any country.[5] Because this article discusses piracy specifically in the Strait of Malacca, it adopts the definition of piracy in the ReCAAP, i.e., the object of piracy does not include aircraft as referenced in the UNCLOS.

In addition, the UNCLOS has greatly reduced the area of the high seas. As a result, most of the seas are included in the territorial seas or the exclusive economic zones (EEZs) of the coastal States, and these places are exactly where piracy has been a frequent occurrence in recent years. Therefore, no single country can crack down on piracy effectively. At the same time, these areas implicate national sovereignty, and the relevant provisions of the UNCLOS on piracy cannot be applied directly. Therefore, the international community has included acts of violence, detention, or depredation occurring in these places in the definition of armed robbery against ships, which will be described in detail in the following section.

B. The Concept of "Armed Robbery against Ships" in International Law

The provisions of international law on "armed robbery against ships" are mainly reflected in the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships (Code of Practice) of the International Maritime Organization (IMO) and the ReCAAP. "Armed robbery against ships," as defined in the Code of Practice, refers to illegal acts of violence, detention, or depredation directed against ships, or the people or property on the ships for private purposes; or threatening to commit the above acts, in a location where a country has jurisdiction over the illegal acts.[6] In the ReCAAP, however, "armed robbery against ships" refers to any illegal acts of violence, detention, or depredation committed against ships, or people or property on the ships for private purposes in locations where contracting States have jurisdiction over such offenses.[7]

The ReCAAP, a regional treaty, clearly has a narrower definition of "armed robbery against ships": it only includes actual illegal acts of violence, detention, or depredation. The IMO not only includes the actually committed acts described above, but also the "threat" of committing the above acts. In actual experience, it is dif-

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5 ReCAAP, Art. 1(1).
6 Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, Art. 2(2).
7 ReCAAP, Art. 1(2).

ficult to judge whether an act is a "threat," which is very subjective. In addition, the Code of Practice is only a model law and is not legally binding on the IMO's members. The ReCAAP, however, is an international treaty and is binding on its contracting states. Therefore, in the opinion of the author, the definition of "armed robbery against ships" in the ReCAAP should prevail as far as Asia is concerned.

The similarities and differences of piracy and armed robbery against ships are the following. The similarities are: (1) The purpose and *mens rea* of the two are the same. The purpose of the crime is for private ends, and the act must have been intentional; (2) The *actus reus* of the two are the same. Both definitions include any illegal acts of violence, detention, or depredation committed against ships, or people or property on the ships for private purposes on the seas. The main differences are: (1) The locations of the crime are different. This is the biggest difference between the two. For piracy, the location of the crime is the high seas and the regions beyond the jurisdiction of any country. For armed robbery against ships, the location of the crime is the regions over which a country has jurisdiction, including the territorial seas; (2) The actors of the crime are different. The actors in piracy are limited to the sailors, crew, or passengers of private ships or private aircraft. No such limitation exists on the definition of the actors for armed robbery against ships; (3) The objects of the crime are different. The object of piracy is limited to another ship or aircraft, while the object of the crime of armed robbery against ships includes the victim ship as well as the ship where the criminal is located.

II. Legal Status of the Strait of Malacca

The Strait of Malacca is located between Malaya and Sumatra and runs southeast-northwest. Its northwest end leads into the Andaman Sea of the Indian Ocean, and the southeast end connects with the South China Sea. The strait is about 1080 kilometers long in total, with the widest point at 370 kilometers in the northwest and 37 kilometers at its narrowest in the southeast. At one point near Singapore, the strait is only 2 kilometers wide. The water is between 25 and 150 meters deep. It is an international waterway that connects the Pacific and the Indian Oceans and lies at the crossroads of Asia and Oceania.[8] With about 50,000 ships crossing through it every year, the Strait of Malacca sees 1/3 of the trade goods transport traffic and

8 Baidu Encyclopedia, Strait of Malacca, at http://baike.baidu.com/view/15939.htm, 14 October 2008.

1/2 of the crude oil transport traffic of the world, including 90% of the oil demand of Japan, 60% of the oil demand of China, and 75% of that of South Korea. [9]

The excellent location of the Strait of Malacca is an advantage for the coastal States and the user States of the strait, but its complex geography and the large number of merchant ships that cross it while carrying enormous wealth have made it a "paradise" for the criminals on both the Sumatran and the Malayan shores who commit piracy and armed robbery against ships. Several hundred uninhabited mangrove islands are scattered all over the Strait of Malacca, and the numerous shoals and reefs provide easy escapes.[10] The rampant piracy poses a great threat to marine transport and safety along the coast. What are the rights and duties of the coastal States and the user States of the strait? Are the issues of piracy and armed robbery against ships in the Strait of Malacca governed by the user States or the coastal States?

The legal status of the Strait of Malacca changed when the UNCLOS was formulated. Before, the Strait of Malacca operated on the principles of freedom of the high seas and innocent passage. Afterward, it has mainly operated on the transit passage regime. The transit passage regime consists of two parts: the transit passage rights enjoyed by the user States of the strait, and the user States' obligation to comply with the laws and regulations established by the coastal States concerning transit passage. The right of transit passage refers mainly to the exercise of "the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an EEZ and another part of the high seas or an EEZ."[11] The biggest difference between innocent passage and transit passage is that the latter allows both ships to navigate and aircraft to fly over the particular territory freely, while the former right is only exercised by ships. The laws and regulations on transit passage provide that the aircraft and ships that exercise the right of transit passage have the obligation to "transit without delay" and to "avoid any threat of force or use of force against the sovereignty, territorial integrity, or political independence of the coastal States." In addition, the ships of the user States should comply with the international norms, procedures and practices on maritime safety and the laws and regulations established by the coastal States on navi-

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9 Hassan Vahidi, Wu Kang and Li Chunmei, Outlook for Crude Oil Demand, Supply and Trade in the Asia-Pacific Region, *Energy of China*, No. 5, 2003, p. 29. (in Chinese)

10 Peter Gwin, Dark Passage, at http://ngm.nationalgeographic.com/2007/10/malacca-strait-pirates/pirates-text, 1 September 2008.

11 United Nations Convention on the Law of the Sea, Art. 38(2).

gation safety and marine traffic control, as well as the international regulations, procedures and practices on preventing the discharge of oil, oil sludge waste, and other toxic substances in the strait and the laws and regulations established by the coastal States in this regard.[12] The aircraft of the user States should comply with the Rules of the Air formulated by the International Civil Aviation Organization and constantly monitor the radio frequency assigned by the air traffic control authority or the international distress radio frequency.[13] The responsibilities of ships associated with transit passage and innocent passage are almost identical.

In the Strait of Malacca, a strait open to international transit, the UNCLOS not only governs the activities that take place based on transit passage, but on other activities as well.[14] Therefore, the UNCLOS should also govern piracy and armed robbery against ships. As explained above, however, the UNCLOS does not regulate armed robbery against ships. Obviously, coastal States may seize or exercise the right of hot pursuit against speedboats used for armed robbery against ships within their territorial waters. The Strait of Malacca is very narrow and there are hardly any areas that are considered international waters. Whether maritime robbery within the EEZ of a coastal State is within the definition of "armed robbery against ships" or "piracy under international law" should depend on the legal status of the EEZ. However, various countries and the international legal community hold divergent views about jurisdiction in the EEZ. There are two main views. The first holds that the EEZ is not the territorial sea of a particular country, is beyond the sovereignty of a country, and is considered the high seas. Coastal States can only exercise sovereign right over the exploitation of natural resources and jurisdiction over marine research and artificial island construction, etc. within the EEZ.[15] The other view holds that although the EEZ is not the territorial sea of a particular State, the coastal State may exercise jurisdiction over matters other than those listed in article 56 of UNCLOS within the EEZ. In other words, the matters listed in article 56 of UNCLOS are not exhaustive, and may be broadly interpreted. In terms of the legal nature of the maritime depredation acts within the EEZ, the former holds that it is within the realm of piracy in international law and each country may exercise universal jurisdiction over such acts, while the latter holds that it pertains to armed robbery against ships and only the coastal States may exercise jurisdiction.

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12 United Nations Convention on the Law of the Sea, Art. 42.
13 United Nations Convention on the Law of the Sea, Art. 39.
14 United Nations Convention on the Law of the Sea, Art. 38(3).
15 United Nations Convention on the Law of the Sea, Art. 56.

Jurisdiction over maritime depredation within the EEZs is not clearly defined, but the coastal States along the Strait of Malacca do not want to see warships of the user States exercise jurisdiction over the "piracy" within their EEZs. On April 4, 2004, Najib Razak, then-deputy prime minister and secretary of defense of Malaysia, said that safeguarding the Strait of Malacca was the joint responsibility of Malaysia and other coastal States, and that the U.S. could not station troops in the strait without permission. Syed Hamid, the foreign minister of Malaysia, said to the press on April 5 that Malaysia did not need the U.S. navy to safeguard the Strait of Malacca.[16] Indonesia is in line with Malaysia in this regard. Indonesians are extremely sensitive to the issue of maritime sovereignty. Even cooperative actions that do not directly encroach on their sovereignty are carefully watched for signs of a creeping invasion.[17]

In short, maritime depredation in the EEZs in the Strait of Malacca – whether defined as piracy or armed robbery against ships – must be prevented and controlled. Although this issue is mainly handled by the coastal States at present, a successful solution requires not only active intervention from the coastal States but also active international cooperation. In recent years, substantial progress has been made in the international cooperation mechanisms that prevent and control piracy and armed robbery against ships in the Strait of Malacca. Part 3 of this article discusses this in detail.

III. Prevention and Control Mechanisms against Piracy and Armed Robbery in the Strait of Malacca

Because the coastal States along the strait have been subjected to a relatively long history of colonization, they have attached great importance to their sovereignty after gaining independence. Therefore, the prevention and control of piracy in the region have long relied on the respective forces of the coastal States. However, with piracy and armed robbery against ships becoming increasingly rampant, the coastal States have realized that they must cooperate with the user States of the str-

16 Jiang Hanhui, *The Channel Safety of Malacca and China's Policy Choice*, Beijing: China Foreign Affairs University, 2006, p. 31. (in Chinese)

17 Li Jinming, The Strait of Malacca and the Security in Southeast Asia, *Southeast Asian Studies*, No. 6, 2007, p. 4. (in Chinese)

ait, especially the surrounding States, in order to effectively prevent and control piracy and armed robbery against ships. This part analyzes this issue from two aspects: the unilateral prevention and control mechanisms of coastal States, and the bilateral, trilateral, and intra-regional multilateral prevention and control mechanisms.

A. Unilateral Prevention and Control Mechanisms of the Coastal States (1960s – 1990s)

From the 1960s and 1970s to the 1990s, piracy and armed robbery against ships in the Strait of Malacca were mainly dealt with by the individual coastal States. The prevention and control mechanisms of the coastal States consist of two parts: (1) Marine: the navy or coast guard is responsible for patrolling the seas, going on board to check suspicious vessels, and pursuing and arresting pirates; (2) Onshore: maritime enforcement agencies monitor passing merchant ships and handle distress signals sent from the ships. Domestic criminal laws or piracy laws and regulations clearly prescribe the constitutive elements of the crimes of piracy and armed robbery against ships, penalties, jurisdiction over prosecutions, extradition, etc. It should be noted that the definition of piracy in the domestic laws may be broader or narrower than that in the 1958 Convention on the High Seas or the 1982 UNCLOS. Due to limited data, relevant provisions in the domestic laws of the coastal States cannot be found. Therefore, the author can only discuss this issue generally. In short, a country may include armed robbery against ships, as defined in international law, into its own definition of piracy in domestic law, and may also regard armed mutiny ships as pirate ships. However, when a country's piracy case involves two or more countries, the provisions of international law concerning piracy and armed robbery against ships should be applied.[18] Suppose Indonesia exercises jurisdiction over piracy within Malaysia's EEZ. The definition of piracy in this case should conform to the provisions of the UNCLOS or relevant bilateral agreements between the two countries. If Indonesia exercises jurisdiction over piracy in its own EEZ, then the definition of "piracy" should conform to that of the domestic laws of Indonesia.

This situation, where each country did things its own way, was not conducive to combating piracy and armed robbery against ships in the strait. There are many islands in the Strait of Malacca, and Indonesia and Malaysia had many disputes ov-

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18 Jennings Watts, translated by Wang Tieya, et al, *Oppenheim's International Law (Book 2,Volume 1)*, Beijing: Encyclopedia of China Publishing House, 1998, p. 181. (in Chinese)

er the sovereignty of these islands. At the same time, both countries were very sensitive to the sovereignty issue. Indonesia's coastline is 19,784 miles long and is a maritime superpower in Southeast Asia.[19] It was not willing to see Malaysia and Singapore exercise jurisdiction over piracy within its EEZ and the disputed sea areas. Malaysia, which is located at the opposite side of the strait, used to be a British colony. It was worried that Indonesia would take combating piracy as a chance to establish its supremacy in the Strait of Malacca and thus threaten Malaysia's security. Malaysia was also unwilling to have Indonesia exercise jurisdiction over the disputed sea areas. Singapore is an island country with an area of only 648 square kilometers.[20] Having become independent only in 1965, it had been powerless with respect to this issue for a long time. As a result, the disputed areas had become shelters for the pirates. Once the pirates entered these disputed areas, the pursuing country had to end the pursuit.

B. Bilateral, Trilateral, and Intra-regional Multilateral Prevention and Control Mechanisms (1990s – present)

During this period, changes took place in the criminal organization of piracy in the Strait of Malacca with the rise of the international piracy syndicate, i.e., pirates with a gang background, who usually work in groups of more than 10 people, and who target large oil tankers. With the huge investment from the gangs, these piracy groups possess advanced automatic weapons and high-tech equipment, set up subsidiaries, and station informants at the ports of each Southeast Asian country. These pirates normally have detailed plans before they take action, skillful navigators, secure home bases, and reliable information. When committing the crime, the pirates either pretend to be law enforcement ships of the local government and force themselves on board under the pretense of a routine inspection, or launch the raid at night. Then they dispose of their loot in special black markets.[21]

With the emergence of the international piracy syndicate, the coastal States realized that the pirates in the Strait of Malacca had engaged in bilateral or trilateral "cooperation." The crime was no longer committed by pirates from one country in

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19 Gao Weinong, Part 1 of Practice of Maritime Laws in Southeast Asian Countries, *Southeast Asian Studies*, No. 2, 1996, p. 31. (in Chinese)

20 Michael Leifer, *Singapore Foreign Policy*, NewYork: Routledge, 2000, p.121.

21 Wang Jian and Dai Yichen, How to Harness the Curse of Pirates in Southeast Asia, *Contemporary Asia-Pacific Studies*, No. 7, 2006, p. 26. (in Chinese)

the water areas of multiple countries. Instead, pirates from multiple countries committed the crime in the water areas of multiple countries. The professional division of labor also appeared. For example, Indonesian pirates might be in charge of robbing oil tankers in the EEZs of Indonesia, and Singaporean pirates might take care of the disposal of the loot in their own country. This made the bilateral, trilateral, and multilateral cooperation in combating piracy and armed robbery against ships an inevitable trend.

1. Bilateral and Trilateral Prevention and Control Mechanisms

In 1992, Indonesia and Singapore jointly established a coast guard to combat the pirates in the two countries' common sea areas.[22] In the same year, Indonesia and Malaysia set up a Maritime Operation Planning Team, came to an agreement on the sharing of information and resources, and decided that the two countries would conduct a joint patrol exercise once every three months.

In addition to the bilateral agreements, Malaysia, Indonesia, and Singapore came to a trilateral agreement in 1992 on joint anti-piracy patrols and information sharing. To fulfill the agreement and step up its marine patrol, Malaysia set up a coast guard whose sole mission was to combat piracy in 1993. Singapore rebuilt its Marine Police into the Police Coast Guard, which became responsible for patrolling its domestic water areas.

The collaborative patrols effectively addressed the deficiencies in the unilateral prevention and control mechanisms. When collaborative patrol was in place, each of the three countries sent its warships to patrol its respective sea areas.[23] If any pirates crossed the border, one country's patrol immediately contacted the other via the 24-hour patrol hotline and handed over the pursuit to its counterpart. The pursuit of criminals would be uninterrupted. Bilateral and trilateral cooperation in combating piracy and armed robbery against ships achieved good results. In 1991, there were 32 cases of piracy. In 1992, this number decreased sharply to 7 and, in 1993, to 5.[24] This experience of success encouraged the three coastal States. Subsequently, the three countries met every year to discuss the prevention and control of piracy, and the three marine police departments cooperated in areas such as information sharin-

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22 Cai Weixin, *The Research on the Safety of Seaway in the Southeast Asia*, Gaoxiong: NSYSU Institute of Political Science, 2006, p. 71. (in Chinese)

23 Jiang Hanhui, *The Channel Safety of Malacca and China's Policy Choice*, Beijing: China Foreign Affairs University, 2006 , p. 34. (in Chinese)

24 Wang Guanxiong and Dai Zonghan, Tackling Piracy from the Perspective of Regional Cooperation, *Maritime Quarterly*, No. 4, 2002, pp. 63~87. (in Chinese)

g, joint surveillance, and joint exercises.

But progress is often made in fits and starts, with fluctuations or even regressions in the process. The 1998 Asian financial crisis dealt a severe blow to the economies of Malaysia and Indonesia. Large segments of the population became poor and unemployed. A lot of people resorted to smuggling, prostitution, piracy, and other transnational crime to survive. In addition, the Indonesian military were mainly focused on cracking down on ethnic separatist forces in Aceh. As a result, the number of cases of piracy and armed robbery against ships in the Strait of Malacca began to increase, which undoubtedly also spurred further bilateral and multilateral cooperation among the three countries. In February 2001, Singapore and Indonesia agreed to allow each to hunt down pirates in the other's sea areas. Singapore also allowed Indonesian sailors to work on Singapore-registered ships to minimize the possibility that Indonesian sailors would be forced into piracy by poverty. In 2003, Indonesia and Malaysia increased the number of collaborative patrols from once every three months to once every 10 days. In July 2004, Indonesia, Malaysia, and Singapore signed the Agreement on Common Defense in the Strait of Malacca, which officially launched collaborative marine patrols among the three countries to ensure the security of this international sea transport channel. Specifically, Indonesia contributed 7 warships while Singapore and Malaysia each contributed 5, and a 24-hour collaborative patrol hotline was set up.

In 2005, the three coastal States reached an agreement with the United States on collaborative air patrol. In 2007, Malaysia called for stepped-up joint patrols among coastal States in order to further crack down on piracy and armed robbery against ships in the Strait of Malacca.[25] Joint patrols are international cooperation at a higher level, referring to patrols carried out by a fleet made up of forces of multiple countries in the sea areas of multiple countries. They involve joint efforts in terms of leadership, operation funds, fleet management, etc.[26] Compared to collaborative patrols, joint patrols can more effectively coordinate the deployment of combat forces in the Strait of Malacca. Indonesia possesses a considerable portion of the sea areas in the Strait of Malacca, but its navy force is relatively weak. Of the naval ships currently owned by Indonesia, only a small number of them can be actually put into service. A majority of the naval ships have reached the limit of their service

25 Malaysia Open to Joint Patrol in Malacca Strait- It Calls for New Ideas to Make the Strait Very Secure, *Business Times*, 18 April 2007.

26 Yang Renfei, Collaborative Patrol or Joint Patrol: Cooperative Mechanism of Waterway Security in Malacca Straits, *Around Southeast Asia*, No. 7, 2005, p. 53. (in Chinese)

life and have outdated equipment. With Indonesia's severe shortage of defense funding at present, it is impossible for Indonesia itself to set up an armed quick patrol team with advanced equipment that combats crime effectively. In the joint patrols, however, Indonesia can utilize the Malaysian and Singaporean navy forces and advanced equipment[27] to combat criminals quickly and effectively.

2. Intra-regional and Multilateral Cooperative Prevention and Control Mechanisms

As described above, the syndicate variety of piracy and armed robbery against ships, i.e., in the form of international criminal organizations, has appeared in the sea areas of Southeast Asia. These criminal organizations not only raid large crude oil carriers, but also smuggle weapons (often used in the raids) and bribe marine police. They may flee to Hong Kong and other regions. Therefore, while the unilateral, bilateral and trilateral prevention and control mechanisms were being enhanced, intra-regional cooperation on the prevention and control of piracy was starting up in Southeast Asia and the rest of Asia in the 1990s. The forums of cooperation were mainly the Association of Southeast Asian Nations (ASEAN) and the Information Sharing Centre (ISC) that was established based on the ReCAAP.

a. ASEAN's Prevention and Control Mechanisms

ASEAN was founded in 1967, with the three coastal States along the Strait of Malacca as well as the Philippines and Thailand as its founding members. Now it has expanded to 10 countries that also include Brunei, Cambodia, Laos, Burma, and Vietnam. Initially, the purpose of this organization was "to accelerate economic growth, social progress and cultural development within the region by mutual assistance". Later, the purpose of ASEAN also included "to promote security and stability in the region on condition that justice and the rule of law are respected." However, the members of the organization are sensitive to cooperation in the area of political security. Therefore, "non-interference in internal affairs" is one of the organization's principles of cooperation, and the substance of its political cooperation focuses on norms and principles without touching on any concrete plans.[28] In terms of political and security cooperation itself, the focus is on the prevention and control of transnational crimes.

The main organizations within ASEAN that cooperate in the area of transnatio-

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27 Yang Renfei, Collaborative Patrol or Joint Patrol: Cooperative Mechanism of Waterway Security in Malacca Straits, *Around Southeast Asia*, No. 7, 2005, p. 53. (in Chinese)

28 Cai Weixin, *The Research on the Safety of Seaway in the Southeast Asia*, Gaoxiong: NSYSU Institute of Political Science, 2006, p. 117. (in Chinese)

nal crime are the Asian Ministerial Meeting on Transnational Crime (AMMTC) and the Senior Officials Meeting on Transnational Crime (SOMTC). The former ranks higher than the latter, and the latter is usually held before the former to conduct preliminary coordination regarding the relevant issues that will be touched upon at the former. In addition, there is also the Centre for Combating Transnational Crime (A-CTC), an informal organization that facilitates the execution of the AMMTC's agreements.

As described above, transnational alliances among pirates in the Strait of Malacca became a trend only in the 1990s. Therefore, it was also in the 1990s that piracy was included in ASEAN's campaign against transnational crime. Previously, transnational crime mainly referred to smuggling and drug trafficking. The 31st ASEAN Foreign Ministerial Meeting (AFMM), held in 1998, officially included piracy in the scope of transnational crime.[29] Although the issue of piracy was included relatively late, but with this as a platform, in the 10 years or so that followed[30] the ASEAN countries have provided assistance to each other in information sharing, legal matters, and training at the ASEAN Ministerial Meeting (AMM), AMMTC, and SOMTC concerning the issue of piracy in the Strait of Malacca.[31]

b. The ReCAAP-ISC's Prevention and Control Mechanisms

The ISC is an intergovernmental international organization established based on the ReCAAP for the sole purpose of the prevention and control of piracy and armed robbery against ships in Asia, and is also the first international organization that specifically combats piracy and armed robbery against ships in the world at present. The background of its establishment, organization structure, and functions will be described below.

a. The Background Surrounding the Establishment of the ISC

As described above, the economic turmoil in Malaysia and Indonesia that resulted from the 1998 Asian financial crisis led to an increase of pirate attacks and armed robberies against ships in the Strait of Malacca, and the strait's user States became concerned. Japan, a country that considered the Strait of Malacca as its "lifeline on the sea", was especially worried about this situation. On April 27, 2000, a regional cooperation conference on combating piracy and armed robbery against

29 Joint Communique of the 31st ASEAN Ministerial Meeting (AMM), at http://www.aseanseC.org/3661.htm, 14 October 2008.

30 The 32nd and the 36th AMM, the 2nd, the 3rd AMMTC, etc.

31 OngKeng Yong, ASEAN Contribution to Regional Efforts in Counter-Terrorism, at http://www.aseanseC.org/17274.htm, 21 February 2005.

ships was held in Tokyo on Japan's initiative. Representatives from a total of 16 countries and regions from Southeast Asia (including Hong Kong, China) attended. The conference adopted two important resolutions: the Tokyo Appeal and the Model Action Plan. These two documents laid a foundation for establishing multilateral mechanisms that specifically aimed to combat piracy and armed robbery against ships.[32] On October 4, 2001, the Japanese government organized and held another pan-Asian anti-piracy cooperation conference, which agreed to establish regional cooperation mechanisms to combat piracy. At the ASEAN +3 (China, Japan and South Korea) summit held in November of the same year, Japan officially proposed the establishment of regional cooperation mechanisms as an issue for discussion. On November 4, 2004, the ReCAAP was finally adopted, and it officially took effect on September 4, 2006. The members of the ReCAAP include 16 Asian countries: the three coastal countries along the Strait of Malacca, Bangladesh, Brunei, Cambodia, China, India, Japan, South Korea, Laos, Burma, Philippines, Sri Lanka, Thailand, and Vietnam. The ReCAAP's substantive cooperation includes three components: information sharing, capacity building, and co-operative agreement.[33] The most important part of the cooperation is information sharing. For this purpose, the member countries set up an international organization, the ISC, based on the ReCAAP to specifically take charge of sharing information about piracy and armed robbery against ships in the region.

Compared to the prevention and control mechanisms of ASEAN, those of the ReCAAP are more professional. ASEAN's functions include promoting the economic and cultural development and cooperation on political security in the region. The AMM, AMMTC, and SOMTC hold a limited number of meetings every year, and the meetings have to address not only piracy and armed robbery against ships but also smuggling, etc. By contrast the ISC, as a standing institution that specifically combats piracy and armed robbery against ships, is undoubtedly more effective in facilitating cooperation in their prevention and control. The ReCAAP's prevention and control mechanisms are also on a larger scale. The ISC has 16 member countries: besides the ten ASEAN countries, it also includes countries such as India,

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32 Speech by Mr. Yoshiaki Ito (ED) of ReCAAP ISC during the 6th IMB Tri-Annual Conference on Piracy and Armed Robbery, at http://www.ReCAAP.org/news/news.html, 14 October 2008.

33 The ReCAAP ISC Working with Industry to Combat Piracy and Armed Robbery Against Ships in Asia, the 10th MPA Maritime Forum, at http://www.ReCAAP.org/index_home.html, 14 October 2008.

Sri Lanka and China that are close to the Strait of Malacca. The area covered by its cooperating countries is larger than that of ASEAN.

b. The ISC's Organizational Structure and the Security of Its Budget

The ISC was founded on November 29, 2006, and its headquarters are in Singapore. It has a simple organizational structure that consists only of the management committee and the secretariat. The management committee is made up of one representative from each contracting state and holds meetings periodically. The secretariat is made up of the secretary general and the secretariat staff. The secretary general is elected by the management committee, who is in charge of the routine administrative and financial affairs of the center and implements the policies established by the management committee and the provisions of the ReCAAP, as well as other matters decided by the management committee. [34]

c. Functions of the ISC

The ISC has two main functions: communicating distress messages and researching the status of the crimes.

a) Communicating Distress Messages. Based on the local Focal Points established by the ReCAAP in each country, the ISC and the member countries[35] jointly handle information related to piracy and armed robbery against ships in the region within ReCAAP's framework. The operational process is as follows. The ship encountering piracy or armed robbery sends a distress message via the on-board alarm to the focal point of the coastal country or country of the ship's registration. The focal point should immediately inform the staff on duty at the ISC via its network. The ISC then immediately sends the alarm received to the focal points of each member country, and each focal point immediately sends the distress message to the ships of that country that are in the distress region.[36] In addition, after the incident occurs, each member country may ask other member countries to assist with investigating the case and rescuing the attacked ship, etc.[37] The member country that has been asked to help must do its best to contribute and inform ISC of its efforts.[38]

b) Researching the Status of the Crimes. ISC publicizes recent cases of attack and those that occur every month in the region on its website. It also collects,

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34 Yang Cuibai, Comment on Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, *Southeast Asian Affairs*, No. 4, 2006, p. 33. (in Chinese)

35 ReCAAP Art. 9(1).

36 ReCAAP Art. 9(5)(6).

37 ReCAAP Art. 10(1)(2)(3).

38 ReCAAP Art. 11(1)(2).

organizes, and analyzes cases that occurred in the previous six months and publishes a report of its findings on its website, and issues warnings to the member countries in the associated dangerous regions.[39]

In addition, the ISC cooperates with the International Maritime Bureau (IMB), a non-governmental organization, in information sharing.[40] The ISC has signed a cooperation agreement with the IMO with regards to institutional capacity building[41] and has become an IMO observer.[42]

Compared to the bilateral and trilateral prevention and control mechanisms, the intra-regional cooperation mechanisms have incorporated the clout of the strait's user States and expanded the scope of the campaign against piracy and armed robbery against ships. This has had a favorable effect on the prevention and control of piracy and armed robbery against ships in the Strait of Malacca, and relieved, to a certain extent, the pressure exerted by the user States on the coastal States of the strait. For both the user States and the coastal States, this is a win-win result.

IV. Conclusion

Cooperative prevention and control mechanisms against piracy and armed robbery against ships in the Strait of Malacca focus on the following aspects: information exchange, legal matters, law enforcement, training, and institutional capacity-building.[43] In particular, bilateral and trilateral prevention and control mechanisms among the three coastal States along the Strait of Malacca have made significant progress in terms of information exchange and law enforcement, and regional cooperation mechanisms in the Strait of Malacca have made important progress in the exchange of information as well. The joint operation of these mechanisms have brought about good results. In 2006, there were 20 cases of piracy and armed robbery against ships in the Strait of Malacca, which included 15 completed cases and 5 attempted cases. In the same period

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39 ReCAAP Art. 7.

40 Lloyd List, Agencies deny rift over piracy reporting, at http://www.ReCAAP.org/news/news.html, 14 October 2008.

41 IMO-ISC Cooperative Arrangement, at http://www. RcCAAP.org/news/news.html, 14 October 2008.

42 ReCAAP becomes IMO observer, at http://www. ReCAAP.org/news/news.html, 14 October 2008.

43 Kuala Lumpur, Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime, at http://www.aseanseC.org/5616.htm, 17 May 2002.

in 2007, there were 16 cases, including 12 completed cases and 4 attempts.[44] From January to June 2008, there were 4 cases, including only one that was successfully carried out. [45]

With further joint patrols by the coastal States, enhanced cooperation among the ReCAAP member countries in information sharing, and further cooperation in legal matters, law enforcement, training, and institutional capacity-building, still greater progress will be made in the prevention and control of piracy and armed robbery against ships in the Strait of Malacca.

(Translator: ZHANG Chao
English editor: Sherra Wong)

44 ICC, piracy report 2006–2007, at http://www.iCC-CCs.org/prC/overview.php, 14 October 2008.

45 ReCAAP Half Yearly Report lst JAN 2008–30th JUNE 2008, at http://www. reCaap.org/index_home.html, 14 October 2008.

The Agreement on Port State Measures: A Commentary

TANG Jianye*

Abstract: The grave situation confronting the conservation of international living resources has urged the development of port State control in this regard. In August 2009, the negotiation on the text of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Agreement on Port State Measures) was already completed under the framework of the Food and Agriculture Organization of the United Nations (FAO), and the text was approved by the FAO Conference in November the same year. As a minimum international standard, the Agreement on Port State Measures not only specifies the minimum requirements for developing port States, but also leaves room for developed port States to establish more stringent measures. It is more widely applicable as compared to other relevant existing international agreements, and clearly defines such aspects as its relation with international law, rights and obligations of port States, roles of flag States, special requirements of developing States, dispute settlement and provisional application etc. In view of the current existing State practices and the terms of provisional application, the Agreement on Port State Measures will have positive effects on the conservation and management of international living resources, irrespective of whether it comes into force or not. As for China, a utilizing country of international living resources, its international obligations are to be increased as a result of this agreement, which demands attention from the government as well as related enterprises.

Key Words: Port State control; UNCLOS; Regional fisheries management organizations; United Nations Fish Stocks Agreement

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In August 2009, under the coordination of the Food and Agriculture Organization of the United Nations (FAO), 91 of its member States agreed on drafting a legally binding document entitled the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter referred to as the Agreement on Port State Measures) after 5 rounds of negotiations,[1] and after being reviewed by the session of the Committee on Constitutional and Legal Matters in September 2009, this Agreement was approved and adopted by the FAO Conference on 25 November the same year. 11 of FAO's member States signed the Agreement on the spot;[2] the Agreement will enter into force 30 days after the director-general of FAO receives the 25th instrument of ratification. It is predictable that the publication of this document will serve to boost and coordinate the port measures of each State, strengthen control over illegal, unreported and unregulated fishing (hereinafter referred to as IUU fishing) around the globe and regulate fishery production, especially high seas fishery production. This paper aims to analyze, in comparison to the June 2008 version and the amendment suggestions each State proposed during the negotiations,[3] the final text of the Agreement adopted by the FAO Conference,[4] and tries to make an assessment on the relevant contents of the Agreement based on such pacts as the United Nations Convention on the Law of the Sea (UNCLOS), the 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 (hereinafter referred to as the United Nations Fish Stocks Agreement) etc., as well as State practices.

I. Background

IUU fishing has been receiving more and more attention from the international

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1 The original text of the Agreement on Port State Measures can be found in the "Recent Developments and Documents" of the current issue of this Journal.

2 Members that signed the Agreement on the spot are: Angola, Brazil, Chile, the European Economic Community, Indonesia, Iceland, Norway, Samoa, Sierra Leone, the United States and Uruguay.

3 For the June 2008 version and the amendment suggestions proposed by relevant countries, please consult FAO website, at http://www.fao.org/fishery/nems/39031/en, 25 November 2009.

4 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, C 2009/LIM/11-Rev. 1, November 2009 [hereinafter Agreement on Port State Measures].

community for its serious impact on the effective conservation and sustainable use of fishery resources, the protection of marine habitats and the safety of food supply for developing countries; it not only is a fishery malady, but has gradually become an ecological and political issue.[5] It is estimated that the loss incurred globally due to IUU fishing stands between 9 billion and 24 billion US dollars per year, and the IUU fish catch between 11 million and 26 million tons; developing countries are the most affected, and the IUU fishing catch along the west coast of Africa is 40% of the reported legal yield.[6] According to the statistical analysis of the Wildlife Trade Monitoring Network (TRAFFIC), IUU fishing causes 1 billion US dollars worth of loss to African countries every year, and results in the degradation of marine fishery resources and the damage of ecological systems, destroying the foundation of some African coastal States for fisheries development and further aggravating the food crisis.[7]

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)[8] adopted 2001 in the 24th Session of the FAO Committee on Fisheries proposed that "States should use measures, in accordance with international law, for port State control of fishing vessels in order to prevent, deter and eliminate IUU fishing", only that these measures "should be implemented in a fair, transparent and non-discriminatory manner".[9] Based on this, the 26th Session of FAO Committee on Fisheries in 2005 supported the Model Scheme on Port State Measures to Combat IUU Fishing (hereinafter referred to as the Model Scheme);[10] it is a non-legally binding document and serves as a guideline to provide reference for those countries that want to establish port management regulations. In 2007, the 27th Session of FAO Committee on Fisheries determined it necessary to develop a comprehensive international agreement on port State measu-

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5 See UNGA Resolutions on Ocean and the Law of the Sea (55/8, 56/13, 57/142, 57/143, 58/14, 59/25, 60/31, 61/105, 63/112); UNGA Resolutions on Sustainable Fisheries (55/7, 56/12, 57/141, 58/240, 59/24 and 60/30).

6 MRAG and DFID, Illegal, Unreported and Unregulated Fishing, Policy Brief 8, p. 1.

7 TRAFFIC, Southern African States Move to Eradicate Pirate Fishing, at http://www.traffic.org/home/2008/7/11/southern-african-states-move-to-eradicate-pirate-fishing.html, 10 September 2008.

8 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by FAO Committee on Fisheries (COFI) on 2 March 2001 and endorsed by the FAO Council on 23 June 2001 [hereinafter IPOA-IUU].

9 IPOA-IUU, p. 15, para. 52.

10 FAO, Report of the Twenty-Sixth Session of the Committee on Fisheries, 7~11 March 2005, FAO Fisheries Report No. 780, Rome: FAO, 2005, para. 25.

res;[11] from 4 to 8 September in the same year, an expert consultation was organized in Washington D.C., the United States to draft a legally-binding instrument on port State measures.[12] The consultation was finished in August 2009 after 2 rounds in 2008 and 3 rounds in 2009 of technical consultation meetings.

II. The Nature and Scope of Application of the Agreement on Port State Measures

A. Nature

The Agreement on Port State Measures is divided into 10 parts, with 37 articles plus 5 annexes. It is a legally binding international agreement under article 14 of the FAO Constitution;[13] its provisions are international minimum standards which do not prevent other member parties from establishing port State control measures that are more stringent. This offers leeway for relevant port States to take unilateral actions such as the EU's adoption in 2008 of the Regulation for Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter referred to as the EU-IUU Regulation).[14] This kind of regulatory design, notwithstanding its helpfulness in securing consensus from parties during the negotiation process and facilitating the conclusion of the Agreement, may as well lead to future disputes.

B. Scope of Application

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11 FAO, Report of the Twenty-Seventh Session of the Committee on Fisheries, 5~9 March 2007, FAO Fisheries Report No. 830, Rome: FAO, 2007, para. 68.

12 FAO, Report of the Expert Consultation to Draft a Legally-binding Instrument on Port State Measures, Washington D.C., United States of America, 4~8 September 2007, FAO Fisheries Report No. 846, Rome: FAO, 2007.

13 The international fishery agreements under the framework of Article 14 of the FAO Constitution include: the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, approved in 1993, requiring no signature and ratification, only accession (Article 12), and its amendment is subject to the approval of the FAO Conference (Article 13); the Agreement for the Establishment of the Indian Ocean Tuna Commission, approved in 1993; the Agreement for the Establishment of Regional Committee on Fisheries (RECOFI), approved in 1999.

14 Council Regulation (EC) No 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2009 O.J. (L 286) 1 (effective 1 January 2010) [hereinafter EU-IUU Regulation].

The scope of application for the Agreement on Port State Measures can be reflected in several aspects, such as the definition of relevant terminologies including "fish", "fishing vessel", "port", and its applicability in other regions.

1. Fish

FAO's IPOA-IUU in 2001 offers no clear definition for "fishing" or "fish"; article 1 of the United Nations Fish Stocks Agreement in 1995 provides that "fish" includes mollusks and crustaceans but excludes sedentary species. The Agreement on Port State Measures defines "fish" in very general terms, referring it to "all species of living marine resources, whether processed or not".[15]

But the definition of "living marine resources" varies in different treaties. According to the provisions in articles 63~68 of UNCLOS, "living marine resources" can refer to fish resources (straddling, highly migratory, anadromous, catadromous, high seas), marine mammals, sedentary species etc.; according to the highly migratory fish list in Annex I of UNCLOS, cetaceans also belong to this category.[16] By the definition of the Convention on the Conservation of Antarctic Marine Living Resources, "Antarctic living resources" refers not only to finfishs, mollusks and crustaceans but also to such creatures as seabirds that appear in the Antarctic Convergence;[17] however, seals and cetaceans are not included.[18] The Convention on the Future Multilateral Cooperation in North-East Atlantic Fisheries limits "fish resources" to all other fishes than those highly migratory and anadromous listed in Annex I of UNCLOS, sedentary species included however, while using "marine living resources" to indicate all biotic resources which constitute marine ecosystems.[19]

An analysis on the IPOA-IUU might well help with the understanding of the concept of "fish" considering the Agreement on Port State Measures, in article 1(e), borrows directly from the IPOA-IUU the definition of "IUU fishing", and the special relation between the two agreements. Given the purpose of the IPOA-IUU, that being to deal with commercial IUU fishing globally, i.e. to deal with production

15 Agreement on Port State Measures, Art. 1 (b).

16 Wang Hanling, Fishery Dispute Settlement Mechanism in Relation to Straddling and Highly Migratory Fishes, in Chinese Society of International Law ed., *Chinese Yearbook of International Law (2008)*, Beijing: World Knowledge Press, 2009, p. 240. (in Chinese)

17 Convention on the Conservation of Antarctic Marine Living Resources, Art. I(2).

18 Convention on the Conservation of Antarctic Marine Living Resources, Art. VI.

19 The Convention on the Future Multilateral Cooperation in North-East Atlantic Fisheries, Art. 1.

behaviors evading control in pursuit of economic benefits,[20] and the various policy instruments it offers, the fishing targets the IPOA-IUU addresses shall not include marine mammals. In the Agreement on Port State Measures, however, the term "fish" is defined in its article 1, which refers to all living resources, retaining, in some sense, the possibility of extending the IPOA-IUU's original scope of application. Therefore, whether or not the Agreement on Port State Measures covers marine mammals such as cetacean is unclear and subject to the test of future practice.

2. Fishing Vessels

According to article 1(d) and (j) of the Agreement on Port State Measures, "fishing vessels", besides those engaged in fishing production, also involve vessels used in fishing related activities such as catch refrigerated carrier, store carrier and oil tanker. As for container vessels, the Agreement is not applicable even if they are loaded with fishing games or aquatic products, as long as the cargo has been transshipped at port instead of on sea.

Compared with other agreements, the scope of "fishing vessels" has also been extended. In the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, notwithstanding the due regard paid to the flag State's regulation on all fishing vessels (including vessels engaged in the transshipment of fish) that fly its flag in the preamble, articles 1(a) and 2 restrict "fishing vessels" only to "mother ships" longer than 24 meters and "any other ships directly engaged in fishing production". In the 1995 United Nations Fish Stocks Agreement, no definition is available specifically addressing "fishing vessels"; although article 18 puts all fishing vessels engaged in fishing production on the high seas within its scope of application, including those shorter than 24 meters, and clearly specifies that all such fishing vessels must carry certificates like fishing license on board, yet auxiliary vessels are not mentioned.[21]

South Korea, in its second amendment opinion in January 2009 for the 2008 draft, held that considering the Agreement under negotiation is a minimum international standard, the definition of "fishing vessels" should be confined to those engaged in fishing production and those offering direct assistance to the landing, transp-

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20 FAO Fisheries Department, Implementation of the International Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing, *FAO Technical Guidelines for Responsible Fisheries*, No. 9, Rome: FAO, 2002; OECD, *Why Fish Piracy Persists: the Economics of Illegal, Unreported and Unregulated Fishing*, Paris: OECD, 2005.

21 United Nations Fish Stocks Agreement, Art. 18.

ortation and processing of fishing catch. But this opinion was not adopted.

In order to strengthen the management of fishing vessels, FAO undertook at the same time to discuss the keeping of a comprehensive global record of fishing vessels, catch refrigerated carriers and store carriers.[22] Hence in the light of the Agreement on Port State Measures, other vessels, viz. service ships, will be obligated to identify whether or not the fishing vessels of their service are IUU fishing vessels in order to prevent the impact by their potential IUU fishing activities.[23]

3. Port

Article 1(g) of the Agreement on Port State Measures provides that "port" includes offshore terminals and other installations for landing, transshipping, packaging, processing, refueling or resupplying. In contrast to the UNCLOS, the port facilities mentioned in the Agreement on Port State Measures may not only include those located in a country's internal waters (as in article 11), but also facilities in its territorial sea (as in article 12), or those installations situated in its exclusive economic zone or on its continental shelf [as in articles 60(2) and 80].

Different from internal waters and territorial sea which are within the scope of national sovereignty, in the exclusive economic zone and continental shelf, the coastal State only has jurisdiction over those facilities therein; hence in theory, facilities in different areas should be dealt with discriminatorily. Malaysia once came up with proposals in this respect, demanding clarification as to whether the same level of inspection may be applied to facilities within the exclusive economic zone,[24] which, however, went unanswered in the following draft.[25]

So, viewing from the last articles of the Agreement, States should apply the same level of regulatory measures to foreign fishing vessels within all the "port" facilities prescribed in the Agreement on Port State Measures, including entry and exit of port, port inspection and follow-up actions after inspection etc.

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22 See FAO, The report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, FAO Fisheries Reports, R. 865, Rome: FAO, 2008; Combating Illegal, Unreported and Unregulated Fishing, including Through a Legally Binding Instrument on Port State Measures and the Establishment of a Global Record of Fishing Vessels, COFI/2009/6, Twenty-eighth Session of Committee of Fisheries, Rome, Italy, 2–6 March 2009.

23 Agreement on Port State Measures, Art. 11(1)(e)(ii).

24 Comments from Malaysia Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, submitted 16 September 2008, p. 2.

25 Agreement on Port State Measures, Art. 12(1); Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, TC-PSM/2008/2, April 2008, Art. 11(1) [hereinafter 2008 Draft Agreement].

4. Geographic Scope

In order to effectively control and eliminate IUU fishing and relevant activities, article 3(5) of the Agreement on Port State Measures provides that the Agreement is global in scope and applies to all ports. However, as it is a multilateral agreement under the FAO Constitution, this agreement is open only to the subjects of international law as specified under article 14 of the FAO Constitution; while other entities, especially the "fishing entities" under the United Nations Fish Stocks Agreement cannot become a member to it. So the Agreement on Port State Measures encourages such "entities" to adopt regulatory measures consistent with it; and these "entities" in turn can express their commitment to act in consistence with the Agreement, notwithstanding that they cannot become a member to it.

III. The Main Contents of the Agreement on Port State Measures

Besides the above-mentioned nature and scope of application, the contents of the Agreement on Port State Measures also include its relation with international law, rights and obligations of port States, roles of flag States, special requirements of developing States, dispute settlement, provisional application as well as the entry into force and amendment of the Agreement, etc.

A. Its Relation with International Law

Article 4 of the Agreement on Port State Measures sets its relations with international law and other international instruments. This to some extent reflects the attitude of each participant State of the negotiations towards the United Nations Fish Stocks Agreement in 1995, and could potentially affect the scope of application of the Agreement on Port State Measures as well as the definition of "IUU fishing".

1. The Agreement on Port State Measures vs. Vested Rights and Duties of Port States

Article 4(1) of the Agreement on Port State Measures states clearly that nothing in the Agreement shall prejudice the rights and duties of port States under international law. Given the particular geographical locations of ports, and the nature of the Agreement on Port State Measures being a minimum international standard, Parties to the Agreement are free to establish port State control measures that are more

stringent, including those established based on the decisions of regional fisheries management organizations. This article provides convenience for some countries to establish and enforce more stringent port State control measures; in particular, with such a provision, some port measures already established, such as the EU-IUU Regulation, will not give rise to international disputes due to any inconsistence between domestic law and international law.

However, it is not that there is no restriction for adopting relevant domestic legislative measures that are stricter, but that the adoption of such measures must abide by the "good faith" principle, and cannot constitute any "abuse of right".[26] From another perspective, the Agreement on Port State Measures in a sense could be regarded as a minimum international standard set for developing port States.

In this regard, the Agreement on Port State Measures and UNCLOS are slightly different in the contents of port State control. In order to protect the environment, and ensure freedom of navigation as well, article 218 of UNCLOS provides that port States shall implement "applicable international rules and standards"; that is to say, the "applicable international rules and standards" should be the highest standards in this respect. Given this article, if a port State implements stricter domestic standards, international disputes will arise thereof, detrimental to freedom of navigation. This is also reflected in the controversies caused over the unilateral application of stricter domestic legislations by the United States and the European Union respectively in the *Exxon Valdez* and *Prestige* oil spill incidents in 1989 and 2001.[27] These controversies also indicate the different attitudes in the international community towards freedom of navigation and conservation of living resources; or put in other words, the flag State and the port State make different compromises on jurisdiction concerning these two areas.

2. The Agreement on Port State Measures vs. Regional Fisheries Management Organizations

Article 4(2) of the Agreement on Port State Measures provides that in applying this Agreement, a party does not thereby become bound by or have to recognize the measures or decisions of any regional fisheries management organization of which it is not a member. This can be construed as that the Agreement on Port State Measures does not directly invoke the regulations of regional fisheries management org-

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26 Agreement on Port State Measures, Art. 4(5).

27 Alan Boyle, EU Unilateralism and the Law of the Sea, *The International Journal of Marine and Coastal Law*, Vol. 21, 2006, pp. 15~31.

anizations.

On the contrary, this kind of direct invoking relation is quite common in UNCLOS and the United Nations Fish Stocks Agreement. Some articles of UNCLOS directly invoke regulations or standards of international organizations such as the International Maritime Organization (IMO),[28] FAO[29] and the International Civil Aviation Organization (ICAO),[30] so UNCLOS is also called an "umbrella convention" or "framework convention". The United Nations Fish Stocks Agreement (in its article 8 for example) even treats regional fisheries management organizations as the cornerstones of its international cooperation mechanisms. Many developing States chose not to accede to the United Nations Fish Stocks Agreement due to their different opinions on some of its articles,[31] which affects its universal applicability around the globe.[32]

Considering that the Agreement on Port State Measures is based on the IPOA-IUU,[33] article 4(2) can also be interpreted as the current attitude some developing countries hold towards the United Nations Fish Stocks Agreement, and such attitude can also be found in other articles. For example, article 4(3) indicates that a party is not obligated to give effect to measures or decisions of a regional fisheries management organization if those measures or decisions are not in conformity with international law; article 4(4) also only requires that the agreement be interpreted in conformity with international law taking into account "applicable international rul-

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28 UNCLOS, Arts. 1(5), 22, 21(4), 39(2)(a), 53(8), 65, 87, 94, 98, 116, 120, 210, 216, 262 etc.

29 UNCLOS, Annex VIII, Art. 2(2).

30 UNCLOS, Arts. 39(3) and 54.

31 Controversial articles such as Arts. 3, 7, 8, 11, 17, 22, 23 etc.

32 By November 2009, only 77 countries had ratified or acceded to the United Nations Fish Stocks Agreement, while 159 had ratified or acceded to the UNCLOS. In March 2009, the 8th round of Informal Consultations of States Parties held at UN headquarters mainly discussed how to make more developing States ratify or accede to the United Nations Fish Stocks Agreement so as to make it universally applicable. See Report of the Eighth Round of Informal Consultations of States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Ses of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, ICSP8/UNFSA/REP/INF.6, 16–19 March 2009; Earth Negotiations Bulletin, Vol. 7, No. 64, 21 March 2009.

33 IPOA-IUU clearly states its adduction of the United Nations Fish Stocks Agreement only applies where both are member parties of the above-mentioned agreement, whereas with its 8 quotations of the UNCLOS, no such restrictive expression exists. See William Edeson, Soft and Hard Law Aspects of Fisheries Issues: Some Recent Global and Regional Approaches, in Myron H. Nordquist, John Norton Moore and Said Mahmoudi eds., *The Stockholm Declaration and Law of the Marine Environment*, The Hague: Martinus Nijhoff Publishers, 2003, pp. 165~182.

es and standards", including those established through IMO, as well as other international instruments;[34] article 6 does not require that parties to the Agreement must carry out their cooperation and information exchange through regional fisheries management organizations, only providing "where appropriate, through FAO or regional fisheries management organizations and arrangements";[35] similar provisions can also be found in the supportive article for developing countries.[36]

The provisions of the above-mentioned articles also reflect the current situation where on the one hand existing regional fisheries management organizations are unwilling to admit new members,[37] while on the other hand some coastal States refuse to join the United Nations Fish Stocks Agreement and thus refuse to recognize some regional fisheries management organizations,[38] or withhold their ratification of or accession to this Agreement even if they have joined some of the regional fisheries management organizations.[39]

Therefore, such relation as exists between the Agreement on Port State Measures and regional fisheries management organizations can be understood as relevant countries' new construal at FAO level of the relation between the United Nations Fish Stocks Agreement and UNCLOS, which is somewhat different from the current interpretations of certain scholars. Prior to the Agreement, although article 4 of the United Nations Fish Stocks Agreement made clear its independence from UNC-

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34 What is noteworthy is that this article to some extent weakens the effect of "applicable international rules and standards" established by other organizations, by using only such wording as "taking into account". Article 119(1)(a) of UNCLOS only requires "taking into account", in contrast to which article 10(b) of the United Nations Fish Stocks Agreement emphasizes the necessity to "adopt and apply" relevant international minimum standards.

35 Agreement on Port State Measures, Art. 6(2)~6(3).

36 Agreement onPort State Measures, Art. 21(1).

37 Due to resource status reasons, or because of the limit of "real interest", many regional fisheries management organizations don't open to later comers. See E. J. Molenaar, The Concept of "Real Interest" and Other Aspect of Cooperation through Regional Fisheries Management Mechanism, *The International Journal of Marine and Coastal Law*, Vol. 15, 2000, pp. 475~531; Tore Henriken, Geir Hnneland, and Are Sydnes, *Law and Polities in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regime*, The Hague: Martinus Nijhoff Publisher, 2006.

38 In the 26th annual conference of the Committee for the Conservation of Antarctic Marine Living Resources in 2007, Argentina tried to prevent the Committee from approving the IUU lists made by the Northwest Atlantic Fisheries Organization, the North East Atlantic Fisheries Commission and the South East Atlantic Fisheries Organization. See CCAMRL, Report of the 26th Meeting of the Commission, 2007.

39 By April 2008, there were at least 47 member States of regional fisheries management organizations who had not ratified or acceded to the United Nations Fish Stocks Agreement. See Earth Negotiation Bulletin, Vol. 7, No. 63, 15 March 2008, p. 4.

LOS, some scholars thought that according to article 31(3) of the Vienna Convention on the Law of Treaties, the interpretation of "straddling fish" and "highly migratory fish" in UNCLOS should be made with reference to the United Nations Fish Stocks Agreement.[40] This kind of relation in return could affect the definition of IUU fishing in article 1(e) of the Agreement on Port State Measures; for this reason, the United States once proposed to redefine "IUU fishing" from a legal perspective for the Agreement based on the IPOA-IUU, but the proposal was not adopted.[41]

B. Rights and Duties of Port States

1. The Nature of Port State Control

According to the Agreement on Port State Measures, port States must implement relevant measures [article 3(1) and (3)], namely it is both their right and duty to implement port State control. Since the objective of the Agreement on Port State Measures is to step up port State control so as to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems (article 2), in addition to the constant lack of improvement in the current status of living marine resources, the implementation of port State control thus is more a duty than a right.

Speaking of rights, they mainly include port entry declaration (article 8 and Annex A), authorization or denial of port entry (article 9), granting and denial of use of port (article 11), port inspection (article 13) and taking actions accordingly following inspection (article 18) etc.; as for duties, they include port designation (article 7), assigning of qualified inspector [articles 13(2), 17 and Annex E], communicating and transmitting of relevant information (regarding its decisions to establish control measures and to deny port entry or use of port, or the change of denying decisions etc.) (articles 6, 11, 15, 16 and 18), following inspection procedures [article 13(1)], practicing minimum inspection level (article 12),

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40 See Tore Henriksen, Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations, *Ocean Development & International Law*, Vol. 40, 2009, p. 81.

41 U.S. Drafting Suggestions on "Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing as of June 2008", submitted on 25 September 2008. From United States' perspective, the original IPOA-IUU is a voluntary and non-legally binding international instrument, and it is inappropriate to just borrow directly from its definition of "IUU fishing" and then transplant it as a legal term into the Agreement on Port State Measures which is right in the middle of negotiation process, instead, the term needs to be redefined from the angle of law.

preventing "port of convenience" [article 20 (3)], avoiding "abuse of right" [articles 3(4) and 9(4)], providing local relief and cooperation, etc. Concerning all these rights and duties, this paper mainly discusses two aspects, namely the use of port services and the compensation on loss caused by improper port State control.

2. Use of Port Services

In principle, the port State shall deny the entry into port by vessels that have engaged in IUU fishing and/or relevant activities, and, in case these vessels have already entered its port, deny them the use of port services, including, *inter alia*, refuelling, resupplying and maintenance.[42] Even if such vessels are under *force majeure* or for the purpose of humanitarian relief,[43] the port State's duties only extend as far as not to deny their entry into its port, but it is not obligated to offer any port services.

Based on this provision, a fishing vessel, if detained in port by a non-flag State pursuant to article 21(8) of the United Nations Fish Stocks Agreement, cannot use port services either. Under such circumstances, the port State is obligated to: ensure that its denial of the use of port services will by no means affect the safety of the fishing vessel and its crew; ensure the measures adopted must be in conformity with international law, such as WTO rules, and constitute no "discrimination" or "abuse of right".

3. Compensation on Loss

In the event of any loss caused on fishing vessels by undue measures of the port State, the port State, according to article 19 of the Agreement on Port State Measures, only needs to make publicly available the information concerning its do-

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42 In the 2008 Draft Agreement, deny fishing harvest of "landing, transshipping or processing etc." and deny "refuelling and resupplying" at port etc. are two independent paragraphs, which respectively were the 1st and 2nd paragraph of the original article 17. This kind of arrangement was considered by some countries or organizations to have actually split one measure into two parts of different natures, which diluted the effectiveness of port measures, so they proposed to combine these two measures into one. See 2008 Draft Agreement, Art. 17 (1)~17(2); Pew Environmental Group, Position Paper on the Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing: Proposed Amendments to Articles 11 to 38, submitted on 15 September 2008, p. 1; Canada's Proposed Changes to Draft Text (Articles 11~25), submitted on 1 October 2008, p. 4.

43 In the 2008 Draft Agreement there was no mention of humanitarian relief; see the 2008 Draft Agreement, Art. 20. In January 2009, South Korea proposed in its position paper that contents of humanitarian relief should be added, on account that there are such provisions in the Code of Conduct for Responsible Fisheries, IPOA-IUU and the Model Scheme (paragraph 9). Korea's 2nd Comments on the Legally Binding Instrument on Port State Measures to Prevent, Deter and Eliminate IUU Fishing, submitted in January 2009, p. 15.

mestic judicial remedy approaches, and, upon written request, provide the captain, master and operator etc. of the fishing vessels with such information. In other words, the port State does not necessarily assume state compensation liability.

The 2008 Draft Agreement, by contrast, had two articles in this regard. The first is article 18, providing that the port State shall ensure the master, operator or representative of the fishing vessel is entitled to claims in the event of loss or damage suffered as the result of control and undue delay; the second is article 19, providing that the port State shall ensure the master or operator of the fishing vessel is entitled to compensation for such loss or damage.

With respect to articles 18 and 19 of the 2008 Draft Agreement, the EU thought that incorporating "State responsibility" into the provisions did not necessarily empower the master or operator of the fishing vessel to appeal against the port State to its domestic court; relevant provisions can be found in UNCLOS and the United Nations Fish Stocks Agreement, viz. articles 106, 110(3), 111(8) and 232 of the former, and article 21(18) of the latter.[44]

Contrary to this, Canada held that articles 18 and 19 of the 2008 Draft Agreement should be deleted, on the account that the port State enjoys sovereignty over its ports which it can freely exercise at its sole discretion to either permit or refuse foreign fishing vessels to use its ports. Keeping these 2 articles would be tantamount to violating the sovereignty of the port State, because they would vest the master, operator or representative of the fishing vessel with the power, though not supported by international law, to defy the port State's sovereignty; meanwhile, they would also lay disclosure obligation on the port State. Canada thought that under the current international law if the port State took any international wrongful actions against a foreign fishing vessel, the flag State or relevant countries of the fishing vessel could resort to diplomatic protection.[45]

Generally, article 19 of the Agreement on Port State Measures has neither taken the EU's proposal to lay down the port State's responsibility for loss or damage, nor accepted Canada's suggestion to delete relevant provisions; instead, a compromise was adopted. This article on the one hand can reduce the responsibility of the port State, promoting its capacity to take active measures; on the other hand, it rein-

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44 EC suggestions on some provisions of the future agreement on port State measures against IUU fishing in view of the second round of the FAO Technical Consultation, 23 January 2009, p. 9.

45 Canada's Proposed Changes to Draft Text (Articles 11~25), submitted on 1 October 2008, p. 6.

forces fishing vessels' obligations towards living resources conservation. It is thus safe to conclude that the urgency to conserve living resources and the need to secure the support of port States, especially of many developing port States, contribute mostly to the formation of this article.

What is worth attention is that among all these rights and duties, many are already established or need to be further established as "minimum standards or levels" which are legally binding and related to such aspects as information declaration on port entry, port inspection procedures, inspection report, training of personnel and port inspection level. These minimum standards and levels are indispensable legal components essential to the implementation of the Agreement on Port State Measures, which guarantee the implementation level of the Agreement as well as collaboration among nations, prevent the appearance of port of convenience, and reflect the very nature of the Agreement as being a minimum standard. In view of the relation between international law and domestic law, these standards or levels actually constitute a restriction on the sovereignty of the port State.

C. Provisional Application

According to article 32(1) of the Agreement on Port State Measures, any State or regional economic integration organization which consents to its provisional application by so notifying the Depositary in writing shall, from the date of receipt of the notification by the Depositary, effect the provisional application of the Agreement.

The provisional application of a treaty mainly results from the fact that the treaty needs approval to take effect while its implementation is urgently required,[46] or is for the purpose of facilitating its implementation.[47] The provisional application of the Agreement on Port State Measures can be understood as resulting from the international community's wish to combat IUU fishing through the execution of port State measures. In practice, some regional fisheries management organizations such as the North East Atlantic Fisheries Commission (NEAFC), the Committee for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Northwest Atlantic Fisheries Organization (NAFO) have already established and

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46 Li Haopei, *Overview of Treaty Law*, 2nd edition, Beijing: Law Press, 2003, p. 178. (in Chinese)

47 Anthony Aust, translated by Jiang Guoqing, *Modern Treaty Law and Practice*, Beijing: China Renmin University Press, 2005, p. 137. (in Chinese)

enforced port State control.[48] In Europe, the EU has also drawn up IUU regulations. Therefore, it is foreseeable that some nations which actively push for port State control, aquatic product import States (United States, EU) and Pacific island countries in particular, might effect the provisional application of the Agreement on Port State Measures.

Although the legal consequence of provisional application is, theoretically, only that the Agreement on Port State Measures can be applied among States consenting to it,[49] some States' provisional application of the Agreement will inevitably create real impact on the fishing vessels of other foreign States, given the special location of ports and the fact that the Agreement mainly targets foreign fishing vessels.

However, it should be noted that if a State consents to provisionally apply the Agreement on Port State Measures, it must then apply the whole, instead of part of the Agreement, viz. it is subject to the restriction of relevant items, and should not constitute any "abuse of right", or any "discrimination" in form or in fact. In this sense, therefore, a country's unilateral consent to the provisional application of the Agreement produces relevant international legal effect.[50]

D. Roles of Flag States

Despite the fact that the Agreement on Port State Measures mainly focuses on port State control, the appearance of port State control, whether in the area of marine environment protection or in the area of international living resources conservation, has a great deal to do with the flag State's inadequacy in implementing its duties or obligations. Therefore, article 20 of the Agreement on Port State Measures gives specific provisions on the role of the flag State in port State control in six aspects, which may be summarized as the following two points:

First, the Agreement encourages the flag State to proactively strengthen its control on fishing vessels and require fishing vessels to cooperate, avoid using "port of convenience", or voluntarily request inspection from the port State; second, the

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48 UN Secretary-General Report on Sustainable Fisheries, A/62/260, 15 August 2007, para. 117.

49 Vienna Convention on the Law of Treaties, Art. 30.

50 Alfred P. Rubin, The International Legal Effects of Unilateral Declarations, *The American Journal of International Law*, Vol. 71, 1977, pp. 1~30; Nuclear Tests Cases (Australia v. France; New Zealand v. France), Judgment of 20 December 1974 (I. C. J.).

flag State should take effective punitive measures without delay, in the event that it receives an inspection report from the port State indicating that a vessel entitled to fly its flag has engaged in relevant illegal activities, and then report to the port State which carried out the inspection, other relevant States, international organizations and FAO.

In general, this article basically abides by the principle of supplementing flag State control with port State control; port State control serves as a supplement, only in the case that flag State control is insufficient.

E. Special Requirements of Developing States

Article 21 of the Agreement on Port State Measures mainly takes into account the practical difficulties developing States encounter in implementing the Agreement, such as legislation, law enforcement, burden of responsibility as well as the economic loss incurred, such as reduction of port services; therefore the Agreement requires the strengthening of support for developing States through FAO, specialized agencies of the United Nations or other international organizations, such as developing a legal basis, facilitating their participation in relevant international organizations (such as regional fisheries management organizations, but without specifying which ones), providing technical assistance and strengthening law enforcement.

Besides, member States should cooperate to establish funding mechanisms (bilateral, multilateral) to support developing States: establish national and international port management measures, develop and strengthen law enforcement capacity (monitoring, controlling and supervising network, personnel training, law enforcement), improve technical equipment, participate in potential dispute settlement procedures, etc. Meanwhile, an *ad hoc* working group shall be established to analyze the mechanisms periodically, as well as make reports and recommendations on them. Therefore, in addition to reporting periodically to the contributors of fund on the scheme for contributions, the mobilization of funds, the criteria and procedures guiding implementation, the *ad hoc* working group also should give consideration to such factors as the needs of developing States, potential funds and their disbursement, the transparency in fund-raising and management mechanisms, the accountability of the fund recipient States.[51]

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51 Agreement on Port State Measures, Art. 21(6).

F. Dispute Settlement

Article 22 of the Agreement on Port State Measures does not mandate the application of third party settlement, and only stresses consultation; with mutual consent of both parties, a dispute shall be referred for settlement to the legally binding procedure by a third party such as the International Court of Justice, the International Tribunal for the Law of the Sea and the International Court of Arbitration.

Contrary to this, article 23(3) of the 2008 Draft Agreement provided that a dispute that cannot be settled by the parties concerned themselves should be referred to the International Tribunal for the Law of the Sea or to arbitration tribunal. The United States once proposed amendments with respect to dispute settlement procedures and advocated the equal application of the provisions in Part XV of UNCLOS.[52]

Given that port State control measures established in the Agreement on Port State Measures are largely about denial of port entry or the use of port services, they could be seen from the perspective of law as control measures implemented by the port State based on the principle of territorial jurisdiction. However, the Agreement on Port State Measures is only a kind of minimum standard. If, on this basis, the port State adopts more stringent measures such as confiscation of fishing catch or gear,[53] it should take into account the extraterritorial jurisdiction principle besides applying the principle of territorial jurisdiction, so that the jurisdictional conflict between the port State and the flag State will be balanced; otherwise, controversy will arise concerning the legitimacy of these control measures. Under such circumstances, for IUU fishing occurring outside the sea areas under the jurisdiction of the port State,[54] third party settlement procedures still shall be applied mandatorily pursuant to the provisions in Part XV of UNCLOS.

From the policy perspective, if the proposal by the United States is adopted,

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52 U.S. Drafting Suggestions on the "Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing as of June 2008", submitted on 25 September 2008, pp. 6~7.

53 EU-IUU Regulation, Arts. 37, 43, 45.

54 The port State can deny, pursuant to article 11(1)(c) of the Agreement on Port State Measures, a fishing vessel entry into its port or the use of port services, if that vessel has engaged in illegal fishing in areas under the national jurisdiction of other coastal States; no other proceedings shall be instituted against that vessel, as prescribed in article 218(2) of UNCLOS, unless requested by relevant countries such as that coastal State or the flag State.

then port States, especially developing port States, will assume greater risks in implementing port State control. This will result in poor or incomplete implementation of the Agreement on Port State Measures, falling short of attaining the purpose of conserving living resources and marine ecosystems. Thus, the dispute settlement procedures in article 22 of the Agreement on Port State Measures transfer greater risks to fishing vessels or flag States. Despite the harm that might be imposed on the jurisdiction of flag States, this nevertheless can urge fishing vessels to carry out production in a lawful manner and step up flag States' control on their fishing vessels, thus fulfilling the objectives of the Agreement on Port State Measures.

But according to article 4(1), nothing in the Agreement on Port State Measures shall prejudice the rights, jurisdiction and duties of parties under international law. Therefore, from this perspective, article 22 does not necessarily rule out the possibility of Part XV of UNCLOS being applied in potential future disputes.

IV. Possible Impact on China

Mainland China, since 1985 when its pelagic fishery started, has been making substantial progress in the scale, structure and production areas of the industry to become a major pelagic fishery State. In 2006, the production of mainland China's high seas fishery surpassed, for the first time, that of distant-water fishery in other countries' exclusive economic zones.[55] The targets of high seas fishery have also extended from the former cod, squid and tuna of the North Pacific to the current Chile jack mackerel and the purple-back flying squid of the Indian Ocean, the giant squid, saury and toothfish of the Southeast Pacific, etc. The operation areas have been expanded from the Atlantic in the early times to the Indian Ocean and the Pacific, currently focusing on the Pacific. In 2008, the third plenary session of the 17th conference of the Communist Party of China (CPC) Central Committee passed the CPC Central Committee's Decisions on Several Significant Issues of Promoting Rural Reform and Developmentas and the CPC Central Committee and the State Council's Several Opinions on Promoting Steady Development of Agriculture and Sustained Increase of Income for Farmers in 2009, both of which set "to support and strengthen pelagic fishery" as part of the objectives of "promoting the strategic adjustment of agricultural structure" and "steadily developing agricultural

55 Fishery Bureau of the Ministry of Agriculture, *China Fisheries Yearbook (2007)*, Beijing: China Agriculture Press, 2008, pp. 7~8.

production".

Since the Agreement on Port State Measures targets only foreign fishing vessels' behaviors occurring beyond the jurisdiction of the port State, it is not applicable, in theory, to the distant-water fishery of China in other countries' exclusive economic zones. As for high seas fishery, the influence of the Agreement may be shown in such aspects as its provisional application, the minimum standard, the inspection and relief of fishing vessels in foreign ports and the priority of port inspections.

Therefore, apart from the support of government preferential policies, the development of China's pelagic fishery depends more on the government and enterprises' strengthening supervision and control on fishing vessels, and the government should take immediate and effective punitive measures especially in circumstances where individual vessels are found to engage in illegal production, so as to prevent China's fishing vessels from being included in some IUU lists, safeguard the interests of fishing vessels engaging in legal production and protect the image of China.[56]

V. Conclusion

The conservation of international living resources faces a grave situation, which has stepped up port State control in this regard. The Agreement on Port State Measures passed by the FAO Conference in November 2009 is a legally binding multilateral agreement within the FAO framework, and serves as a minimum international standard. It is incumbent upon the port State to deny vessels engaged in IUU fishing entry into its port, or landing of fishing catch, use of port services, etc. Meanwhile, all States can adopt, as appropriate and in contravention of no relevant provisions of international law, domestic measures that are more stringent. At present, some minimum standards have yet to be established in the Agreement on Port State Measures, which needs further improvement. The implementation of the Agreement on a global basis depends on the support of port States, especially the support of developing port States; whether or not port States can benefit from its implementat-

56 According to the report of the 5th meeting in October 2009 of the Technical and Executive Committee subordinate to the Western Central Pacific Fisheries Commission (WCPFC), there are 6 fishing vessels from mainland China on its IUU fishing list, almost half of the total number of 13. This deserves high attention from relevant government departments of China. See Technical and Compliance Committee, Draft IUU Vessel List and Current WCPFC IUU Vessel List, WCPFC-TCC5-2009/15, 1–6 October 2009.

ion, long-term or short-term, will determine their attitudes towards the Agreement.

(Translator: DENG Guangchao)

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