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编辑部

CHINA OCEANS LAW REVIEW

Volume 2014 Number 1

EDITORIAL BOARD

卷首语

转眼，《中国海洋法学评论》已迈入第十个年头。这十年里，我们一直希望为发展中的中国海洋法律与政策研究提供一个交流、展示的平台。很幸运地，我们得到了大家的支持与鼓励。在此，非常感谢一直以来对我们关照有加的研究机构和专家学者们。

本期《中国海洋法学评论》刊载的文章涉及的领域颇广。

首先，学者叶强就国际海洋法法庭的全庭咨询管辖权作了探讨。自从《国际海洋法法庭规则》第 138 条授予法庭全庭以咨询管辖权，该条款便面临着两方面的挑战：一是法庭在《规则》中授予自身咨询管辖权的法律依据何在；二是该条款的规定过于简化，使得条文中的不少法律概念存在巨大的解释空间，给实践带来了不确定性。而作者在此要解决的问题是：《规则》第 138 条第 1 款中“与公约目的有关的国际协议的特别规定”的具体范围；第 2 款“通过任何主体提交”所设定的对人管辖范围；包括“法律问题”在内所构成的对事管辖范围；以及源于第 1 款中措辞“可以”和第 3 款“类比适用第 130 条至第 137 条之规定”而形成的斟酌决定权。

自从 2013 年 3 月 10 日中国宣布重组国家海洋局并以中国海警局的名义整合海上执法力量、开展海上维权执法活动后，海上执法武力使用便成为必须明确和解决的问题。学者赵伟东试图在分析、借鉴美国海岸警卫队武力使用政策和国内外关于执法人员武力使用原则的基础上，针对中国海警海上执法任务现状、装备情况和海上执法特点，提出中国海警海上执法武力使用的条件、原则和武力使用渐进层级，以期为中国海警建设和海上执法行动提供参考。

东海划界随着中、日钓鱼岛问题和中、韩 2012 年分别提交的东海部分划界案而更趋复杂，一直是各方讨论的重点。东海最宽处小于 400 海里，即使中、日、韩三国各自根据《联合国海洋法公约》主张 200 海里以内的大陆架也会出现重叠区，遑论主张 200 海里以外的延伸大陆架。因此，东海大陆架的划界势必要通过三国间的相互谈判解决。学者潘军在分析了东海周边各国划界案的相关情况、中国面临的主要问题的基础上，提出了东海大陆架未来划界问题的前瞻与对策。

欧盟作为走在全球前列的海运经济体之一，拥有较为健全的海运国家

资助政策。作为欧盟竞争政策的组成部分，这些资助政策既有成文法的制度架构，又有判例法的合法性审查。我国虽是海运大国，却缺少国家层面上系统性法律和政策的支持和保障。欧盟的经验对我国构建全方位的海运扶持政策无疑具有宝贵的借鉴意义，因此，学者丁莲芝对此进行了深入的分析与探讨。

国际海事委员会第 40 届大会的主要议题之一是船舶司法出售的国际承认公约，学者范晓波、李倩对各国在会上发表的关于公约的意见和修改建议进行介绍和分析，其中以中国代表的发言为主要介绍和评论对象。

以上即是本期《中国海洋法学评论》的主要内容，还希望读者们可以细细品味，从中获得有益的心得。

编辑部 谨识

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万律 http://www.westlawchina.com/index_cn.html
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EDITOR'S NOTE

This year marks the 10th anniversary of *China Oceans Law Review*. During the 10 years, we have consistently hoped to provide a platform for researchers and scholars to exchange and display their research results in the realm of China's oceans law and policy. We are fortunate to have the consistent support and encouragement offered by research institutes, experts and scholars, and we would like to take this opportunity to extend our deep gratitude to each of them.

The articles contained in this Issue of *China Oceans Law Review* cover a wide range of areas.

This Issue begins with an article written by YE Qiang, who explores the advisory jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) as a full court. Since Article 138 of the Rules of the ITLOS grants itself an advisory jurisdiction, this article has faced two challenges: on one hand, the legal basis for the ITLOS to grant itself an advisory jurisdiction is unclear; on the other hand, the provisions of this article are over simplified so that the ITLOS has considerable discretion over the interpretation of the legal terms therein, which in turn brings uncertainty to their application. The author intends to solve the following issues: the scope of the provision of "an international agreement related to the purposes of the Convention specifically provides for" as envisaged by Article 138(1) of the Rules; the reach of *Competence Ratione Personae* prescribed by the expression of "be transmitted to the Tribunal by whatever body" in Article 138(2); the scope of *Competence Ratione Materiae*, including "legal question[s]"; and the discretion of the ITLOS in accordance with the word "may" used in Article 138(1) and the phrase "apply *mutatis mutandis* articles 130 to 137" used in Article 138(3).

On March 10, 2013, China announced that the State Oceanic Administration of China would be restructured, and that the maritime law enforcement forces would be integrated and maritime law enforcement activities would be carried out in the name of the China Maritime Police Bureau. Thereafter, the use of force in maritime law enforcement becomes an issue that has to be

clarified and resolved. In an effort to provide useful references for the organizational building of the China Coast Guard and its maritime enforcement activities, ZHAO Weidong, puts forward his own opinions on the applicable conditions, principles, and continuums on the use of force in view of the current tasks and equipment allocation of the China Coast Guard, and the particularities of maritime law enforcement activities, which will be based on an analysis of the policies of the United States Coast Guard on the use of force and the principles for use of force by law enforcement officers home and abroad.

The dispute over Diaoyu Dao between China and Japan and the partial submissions on the East China Sea made by China and South Korea in 2012, being the focus of discussion by the parties, have made the issue of the delimitation of the East China Sea even more complicated. As the East China Sea is less than 400 nautical miles at its maximum breadth, continental shelves claimed by China, Japan and South Korea will overlap even if they stay within 200 nautical miles as provided for under the United Nations Convention on the Law of the Sea, and not to mention the claims for continental shelves beyond 200 nautical miles. Therefore, the delimitation of the East China Sea continental shelf will certainly require the three countries to negotiate for a solution. After analyzing the relevant information on the submissions by the countries surrounding the East China Sea and the main challenges facing China, PAN Jun offers some proposals on the prospects and strategies for the delimitation of the East China Sea continental shelf.

As a leading maritime economy, the European Union has a relatively comprehensive governmental policy supporting the maritime transport industry. Forming a part of the competition policy of the European Union, these policies are buttressed by an institutional framework of statutes, as well as case-law-based judicial review of the legality of the policies. Although China has a sizable maritime transport industry, its maritime transport industry lacks the support and protection of systemic laws and policies at the national level. The experiences of the European Union undoubtedly contain valuable lessons for China as it develops a comprehensive policy to support its maritime transport industry. Hence, DING Lianzhi provides an in-depth analysis of and discussion on this issue.

The Instrument on the International Recognition of Foreign Judicial Sales of Ships was a main item on the agenda of the 40th meeting of the Comité Maritime International. FAN Xiaobo and LI Qian introduce and analyze

the opinions and proposals for amendment from various countries on the Instrument, focusing on the comments from the Chinese delegation.

Articles and scholarly works mentioned above are the highlights of the current Issue of *China Oceans Law Review*. We hope readers will peruse these articles and find them beneficial.

COLR Editorial

Databases:

Westlaw China http://www.westlawchina.com/index_cn.html
CNKI http://www.cnki.net/
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Appendix

咨询意见在国际海洋法法庭全庭的发表程序初探

叶 强 *

内容摘要: 国际海洋法法庭《规则》第 138 条授予法庭全庭以咨询管辖权，并对该项权能的行使作出了简要规定。然而，该条款自制定以来就面临着 2 方面的挑战:一是法庭在《规则》中授予自身咨询管辖权的法律依据何在;二是该条款的规定过于简化，使得条文中的不少法律概念存在巨大的解释空间，进而给实践中咨询意见的申请和发表带来不确定性。笔者在《国际海洋法法庭全庭咨询管辖权的法律基础研究》[1]一文中对该权能的法律依据问题进行了综述和分析，并得出了法庭制定《规则》第 138 条的法律依据。本文将对建立在该依据上的咨询管辖权的行使程序进行明确规范。这种规范过程以当前主流司法方法的综合运用为手段，以当前国际社会有效运转所依托的国际法基本原则为根据，努力在法律所追求的确定性与处理国际事务所追求的灵活性之间取得平衡。本文所要解决的问题涉及:《规则》第 138 条第 1 款中“与公约目的有关的国际协议的特别规定”的具体范围;第 2 款“通过任何主体提交”所设定的对人管辖范围;包括“法律问题”在内所构成的对事管辖范围;以及源于第 1 款中措辞“可以”和第 3 款中“类比适用第 130 条至第 137 条之规定”的斟酌决定权。本文旨在为将来法庭受理咨询案件提供有力参考。

关键词: 国际海洋法法庭　全庭　咨询意见　对人管辖权　对事管辖权

一、国际海洋法法庭咨询管辖权概述

国际法中的咨询管辖制度最先由常设国际法院确立，其后继者国际法院延续了这一管辖制度。与此同时，在二战后相继成立的国际司法机构中，有相当一部分采纳了咨询管辖制度，国际海洋法法庭（以下简称“法庭”或“海洋法法庭”）便

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1 叶强:《国际海洋法法庭全庭咨询管辖权的法律基础研究》，载于《北大国际法与比较法评论》2013 年第 10 卷，第 81~112 页。

是其中之一。法庭的咨询管辖权由 2 部分构成：海底争端分庭的咨询管辖权和全庭的咨询管辖权。前者在《联合国海洋法公约》（以下简称“《公约》”）中有明文规定，[2] 而且分庭已于 2010 年受理了一个咨询案件并于 2011 年发表了第一份咨询意见。[3] 但全庭的咨询管辖权在《公约》及其附件六《国际海洋法法庭规约》（以下简称“《规约》”）中都没有明确规定。1997 年，法庭根据《规约》采纳了《法庭规则》（以下简称“《规则》”），其中第 138 条 [4] 在实质上授予了法庭全庭以咨询管辖权，并对该项权能的行使作出了简要规定。

2013 年 3 月 28 日，法庭全庭收到了第一份咨询申请。[5] 然而就目前的情况来看，法庭全庭依据《规则》第 138 条发表咨询意见可能存在诸多不确定性，因为该条款中的不少法律概念存在巨大的解释空间。当然，法庭在发表咨询意见的过程中可以通过自身的实践将存在争议的问题确定下来。但问题在于，法庭一贯的司法政治是否会使其在某种程度上扩张其本不该具有的权能以及干涉其本不该干涉的事项。这种怀疑态度并非空穴来风。在下文中，我们可以看到多位海洋法法庭法官曾参与有关法庭咨询管辖权的争论，相当一部分观点都是值得怀疑的。因此，在法庭将之付诸实践之前，厘清与咨询程序相关的重要法律问题是十分必要的。这些重要的法律问题包括如下几个方面：一是法庭受理咨询案件的法律依据有哪些，即《规则》第 138 条第 1 款中所谓“与公约目的有关的国际协议的特别规定”的具体范围；二是法庭咨询管辖中的对人管辖范围，这一范围是由第 2 款“通过任何主体提交”这一规定所设定的；三是法庭咨询管辖中的对事管辖范围，第 2 款有关“法律问题”的规定涉及这一范围的确定，但不限于此；四是法庭咨询程序中的斟酌决定权，这一权能源于第 1 款中的措辞“可以”和第 3 款的“类比适用第 130 条至第 137 条之规定”。

二、对法庭全庭受理咨询案件的授权
——“与公约目的有关的国际协议的特别规定”

2 United Nations Convention on the Law of the Sea, Article 159(10) and Article 191.

3 List of cases: No. 17, at http://www.itlos.org, 1 May 2014.

4 Article 138: 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal. 3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

5 2013 年 3 月 25 日至 29 日，在塞内加尔首都达喀尔举行了分区域渔业委员会部长级会议第 14 次特别会议，28 日的部长级会议决议授权委员会常设秘书向国际海洋法法庭提交一份咨询申请，下载于 http://www.itlos.org/index.php?id=252，2014 年 5 月 1 日。

（一）“国际协议”

根据国际海洋法法庭《规则》第 138 条，相关主体依据“与公约目的有关的国际协议的特别规定”可以请求法庭发表咨询意见。换句话说，法庭发表咨询意见的权能来自于“与公约目的有关的国际协议的特别规定”。这一措辞具有高度的歧义性。

首先，在国际司法实践中，多种“国际协议”都可以赋予国际司法机构以管辖权，主要有以下几种形式。一是《联合国宪章》（以下简称“《宪章》”）。《国际法院规约》第 36 条第 1 款规定：“法院之管辖包括……联合国宪章……所特定之一切事件”。从最广义的角度讲，《宪章》当然包括在“国际协议”中。二是“特别协定”。这是事后特别同意的必要形式。[6] 三是条约或公约中的管辖权条款。这属于事前同意的形式。实际上，以此类“国际协议”授予司法机构管辖权的情况都出现在“诉讼管辖”的场合，而非咨询管辖。对于众多具有咨询管辖权的国际司法机构而言，该项权能都是由创设该机构的组织协定所明确赋予的，且对人、对事管辖的范围也由该协定明确限定。[7] 这样，国际海洋法法庭的咨询管辖权在设定上就出现了与众不同的情况，类似于其他国际司法机构诉讼管辖权的设定。那么，《规则》中“国际协议”的范围能否参照其他司法机构行使诉讼管辖中所依据的“国际协议”的范围来确定呢？

刘基俊认为，第 138 条的目的是为法庭将来受理可能出现的咨询请求做好准备，而发表咨询意见的权能是由协议授予法庭的。[8] 而所谓的“国际协议”指的是 1969 年《维也纳条约法公约》第 2(1)(a) 条规定范围内的“条约”。[9] 至于“国际协议”是否包括国家间或国家与国际组织间的双边协议，杰西法官认为这 2 种协议都可

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6 The Minquiers and Ecrehos case, Judgment of November 17th, *ICJ Reports*, 1953, p. 47.

7 常设国际法院根据《国际联盟盟约》第 14 条而具有咨询管辖权。国际法院以稍作修改的《国际联盟盟约》为基础继承了常设国际法院的咨询管辖权，《联合国宪章》第 96 条和《国际法院规约》第 65 条规定了国际法院发表咨询意见的职能。欧盟法院依据《欧盟运作条约》第五部分第 218 条而具有咨询管辖权；在《欧盟运作条约》生效前，《欧洲经济共同体条约》第 228 条也有类似的条款；此外，《欧洲煤钢联营条约》第 95 条、《欧洲原子能共同体条约》第 103~105 条均规定在特定条件下，欧共体法院有咨询管辖权。东南非共同市场法院依据《东南非共同市场条约》第 32 条而拥有咨询管辖权。独联体经济法院根据《独联体宪章》第 32 条和《独联体经济法院规约》第 5 条可以发表咨询意见。欧洲人权法院根据《欧洲人权公约》第二部分第 47 条、第 48 条和第 49 条拥有咨询管辖权。美洲人权法院根据《美洲人权公约》第 64 条拥有咨询管辖权。非洲人权与民族权法院依照《法院议定书》第 4 条具有咨询管辖权。

8 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 365.

9 原文“…Article 1(1)(a) of the VCLT for this purpose” 应为印刷错误。

以视为第 138 条所称的“国际协议”。[10] 但刘基俊认为这样理解会产生如下问题，即：咨询意见具有超越当事方的对世性质，如果第 138 条所指的“协议”的成员方过少，可能会导致“协议”的非成员方与咨询程序产生法律上的利害关系。为避免这种情况出现，有 2 种可能的解决方法。一是将“协议”解释为只包括多边协议，二是允许“协议”的非成员方通过能动性地适用《规则》第 130 条第 1 款参加咨询程序。[11]

可见，目前学界对“国际协议”这一措辞尚未形成一致的看法，因而不能排除众多可能性的存在。不仅如此，某些观点甚至是错误的。例如，上述观点认为“国际协议”即 1969 年《维也纳条约法公约》第 2(1)(a) 条规定范围内的“条约”，这显然是忽略了某些国际组织（如欧盟）作为《公约》缔约方的情况。1969 年《维也纳条约法公约》对“条约”的界定，排除了国际组织作为当事方的情形；直到 1986 年《国际组织与国家间条约法公约》生效，才认可国家与国际组织之间缔结的协议具有条约的效力。在当前国际组织可以作为法庭当事方的情况下，若适用 1969 年《维也纳条约法公约》，等于限制了国际组织的权利，这是违背《公约》的。

在“国际协议”这一措辞具有高度不确定性的情况下，为确定其内涵，应结合其他相关限制条件一并考虑，这也是对条约加以系统解释的必然要求。

（二）“与公约目的有关的国际协议”

“与公约目的有关的国际协议”这一措辞源于《公约》第 288 条第 2 款。一般认为，当前已签订的此类协议主要包括：1995 年《跨界鱼类种群协定》、《〈防止倾倒废物及其他物质污染海洋的公约〉1996 年议定书》、2000 年《中西部太平洋高度洄游鱼类种群养护和管理公约》、2001 年《养护和管理东南大西洋渔业资源公约》以及 2001 年《保护水下文化遗产公约》等。此外，1994 年《关于执行 1982 年 12 月 10 日联合国海洋法公约第十一部分的协定》也可以包括在内。[12]

沃尔夫鲁姆法官在第 60 届联大关于“海洋和海洋法”议题的报告中指出：

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10 José Luis Jesus, Article 138, in P. Chandrasekhara Rao and Philippe Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006; Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 394.

11 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 367.

12 高健军：《〈联合国海洋法公约〉争端解决机制研究》，北京：中国政法大学出版社 2011 年版，第 144~146 页。

法庭管辖权的依据不仅是《联合国海洋法公约》，而且是特别将管辖权委托给法庭的任何与《公约》宗旨有关的国际协定。已经缔结了七份这样的多边协定。将管辖权委托给法庭的国际协定的一个重要例子是1995 年《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的规定的协定》，该协定规定，《协定》缔约国——不论它们是否也为《公约》缔约国——之间涉及解释或应用《协定》的任何争端须诉诸《公约》第XV 部分所规定的解决争端机制……

[2001 年《水下文化遗产保护公约》] 同样将《公约》第XV 部分比照适用于其缔约方——不论它们是否为《公约》缔约方——之间的任何冲突……

一项与《公约》宗旨有关的国际协定的缔约国可以向法庭提交涉及解释或适用该协定、依此提交法庭的任何争端。

也可以在双边协定中有关因解释或应用相关协定引起的争端方面纳入一条将管辖权委托给法庭的规定。根据这样一条规定，如果该争端未在一定时期内通过外交手段解决的话，应其任何一方的请求，涉及协定的争端应提交给法庭或法庭专案分庭……

将这样的规定纳入国际协定是一个完全合乎逻辑的发展。这遵循十九世纪有关仲裁和二十世纪有关国际法院的一个定式。至于法庭，这样一个发展必将加强其在解决有关海洋法事项的冲突中所起的重要作用。在这方面，我谨提及欧洲联盟渔业和海洋事务专员约•博格先生2005 年9 月2 日访问法庭时所说的话。他说："欧洲联盟适当时也可主动在有关海洋法的协定中纳入一条规定，其与第三国达成的这条规定要求各方将任何争端的解决提交国际海洋法法庭。"[13]

在此，法庭的态度已经非常明确。在强调"与公约目的有关"的国际协议的讨论过程中，实际上"与公约目的有关"这一约束已经无关紧要。正如托马斯•A•门萨所说："考虑到公约的范围极其广泛，难以想象任何涉及海洋问题的协定会因为不满足'与公约目的有关'这一条件而被排除"。[14]

（三）"特别规定"限制下的"与公约目的有关的国际协议"

但是，这并不意味着对此种"国际协议"不作任何限制。通过分析以上几项"与

13 联合国大会文件A/60/PV.55，第24~28 页。

14 Thomas A. Mensah, The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes, in P. Chandrasekhara Rao and Rahmatullah Khan eds., *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague: Kluwer Law International, 2001, p. 30.

公约目的有关的国际协议”的相关特点及内容，可以得出以下几个结论。

首先，这些协议中都明确提及《公约》体系中的相关程序。[15] 这恰恰与《规则》中“特别规定”这一措辞相吻合。

其次，根据《公约》第288条第2款的措辞，这种“国际协议”在逻辑上必须是“事前协议”，且属于在条约中规定“管辖权条款”的情况。第288条第2款规定的是“按照与公约目的有关的国际协议提出的有关该协议解释或适用的争端”，这表明此种协议是就实体问题所缔结的国际条约，是在提出请求前业已存在有将某种管辖权授予法庭的条款的国际协议。这不是程序性协定，也就不可能包括属于事后特别同意的“特别协定”。

这样，沃尔夫鲁姆法官在上述第60届联大所作报告中涉及法庭咨询管辖权的内容，就是值得怀疑的。他认为：

> 根据法庭《规则》第138条，如果与《公约》宗旨有关的某项国际协定明确规定，需要为法庭提出此类意见提出请求，也可请求法庭提出咨询意见。
>
> 如果能够对其作广泛的解释，法庭的咨询职能是国际司法制度的一项重大创新。在这种情况下，它可以为有争议的程序提供一种潜在的替代办法，而且对于那些就某一法律问题征求非约束性意见，或是希望了解某个争端如何可以通过直接谈判来解决的当事方是一个有意思的选择。此类程序在通过谈判寻找解决办法的过程中可能特别有助于争端当事方，比如，在海洋划界案件中。不应忘记的是，《联合国宪章》第三十三条规定，谈判是解决国际争端的主要手段。
>
> 在这方面，当事方可以请法庭决定适用于某一划界争端的国际法原则和规则，并承诺以后以此为基础确定边界。当事方随时都可以在协定中明确规定将就哪些问题请法庭提出咨询意见。当然，如有必要，最终可以诉诸约束性解决程序。[16]

如果笔者理解正确的话，上述观点认为国家间可随时就任何涉及海洋法的问题“协议请求”法庭予以回答。显然，这种“协议”完全不属于《公约》和《规则》所规定的“与公约目的有关的国际协议”。

在法庭新近接收的咨询申请（法庭第21号案）中，提出咨询请求所依据的法律基础正是既存国际公约中所明确规定的一项管辖条款，即《关于在分区域渔业

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15 Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn eds., *UN Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, pp. 47~48.

16 联合国大会文件 A/60/PV.55，第27页。

委员会成员国管辖海域内最低限度利用和开发海洋资源的决议公约》第 33 条。[17]

在明确了法庭行使咨询管辖权所依据的应该是附带“咨询管辖条款”的就某项与海洋法相关的实体问题而缔结的国际条约后，判断上述条件能否满足的工作就留给了法庭。然而，有一个至关重要的环节联系着某项国际协议的履行和法庭发表咨询意见，那就是要由某个实体向法庭提交咨询请求。

三、法庭全庭咨询管辖权的对人管辖范围

哪些实体有资格向法庭提交咨询请求，在司法的层面上是法庭的对人管辖权问题。就既有的国际司法机构而言，其对人管辖权是事先明确规定的。[18] 而法庭《规则》第 138 条第 2 款却以一种间接的方式确定对人管辖范围。

在这方面，首先应该考虑第 2 款的措辞。该条款规定：“咨询意见的请求应经由协议授权或依照协议的任何主体提交至法庭”。[19] 根据国际法院的实践，《国际法院规约》第 65 条中所区分的“授权”和“依照”被认为是针对《宪章》第 96 条在请求咨询意见上区分了 2 类机构而形成的措辞，因此，“由协议授权”这样一个表述应该理解为对“请求主体”允许的范围已经超出了第 138 条第 1 款中“协议”明确规定的请求主体范围；而“依照协议”的措辞涉及的是第 1 款中“协议”所具体规定的请求主体。[20] 但问题是，第 138 条并没有列举可以请求咨询意见的主体，其第 2 款却规定经确认的“主体”可以被授权向法庭提交请求。那么，法庭的咨询管辖权是像国际法院那样只能向国际组织开放，还是可以向国际组织以外的实体开放？

对此有 2 种观点。第一种观点认为咨询管辖权可以向国际组织以外的实体开放。沃尔夫鲁姆法官认为法庭的咨询功能可能替代诉讼程序。[21] 杰西法官认为，《规则》第 138 条第 2 款规定的“主体”，可以是任何机关、实体、机构、组织或国家，

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17 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, Article 33: Submissions of matters to the International Tribunal for the Law of the Sea for Advisory Opinion: The Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion.

18 见前引注 7。

19 Rules of the ITLOS, Article 138(2): “A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement...”

20 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, pp. 365~366 .

21 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 364.

只要是相关“国际协议”规定该机构有权代表成员方利益请求咨询意见即可。因此“主体”的范围取决于“国际协议”的规定。由于上述主体仅仅是咨询请求的递交者，因此主体的性质如何似乎无关紧要。主体的合法性仅仅取决于“国际协议”的授权，而与主体的性质或其他考虑无关。[22] 然而，这一论断所依据的理由可能是有问题的。

请求国际司法机构发表咨询意见的过程可能涉及 3 类主体。一是在组织机构内部由谁提出提案，二是形成决议后的咨询申请由谁递交给司法机构，三是谁能够作为司法机构管辖对象的特定国际法主体。前两类应该由特定国际组织在其组织文件中自行决定，第三类才由建立国际司法机构的文件确定。因此，作为规范国际海洋法法庭相关权能行使的文件，《规则》第 138 条没有必要特意说明前 2 类主体应该为何。从而这里也就没有必要把“请求者”和“递交者”加以严格区分。不论此类条款的措辞如何，咨询意见的“请求主体”就是指法庭对人管辖的对象。如果认为递交咨询请求的机构不等同于咨询意见的“请求者”，即认为请求“主体”可能特指上述 3 类主体中的前 2 类，那么所谓的“请求者”就应当是咨询意见所针对的主体。在这方面，《宪章》和《国际法院规约》都没有规定，并且国际法院的立场已经很明确：咨询意见不针对国家，而是针对有权请求的国际组织；咨询意见的目的不是解决——至少不是直接解决——国家间争端，而是向请求咨询意见的国际机构提供法律意见。[23] 这一规则法庭也应同样适用。法庭在咨询意见的“请求者”方面，与国际法院一样，也没有具体规定。[24] 因此，所谓的“请求者”也不是能够与法庭咨询管辖权相提并论的问题，其应该由不同请求机构内部的程序性规则来规范。而在法庭的咨询管辖权——对人管辖层面，所谓的“递交者”就是一般意义上提出咨询请求的主体，《规则》第 138 条第 2 款的“主体”必然是这一层面的含义，而根本不可能也没必要去考虑不同请求机构内部由谁提出提案这类问题。

第二种观点，以特里维斯法官为代表，认为只能将“主体”解释为国际组织机构。这种解释基于 2 个理由。一是，第 138 条是参照《国际法院规约》第 65 条制定的，因此该条款的解释与适用也应参照第 65 条。第 65 条从未授予国家请求咨询意见的权力，因此第 138 条也应比照执行。二是，《公约》中有关于海底争端分

22 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 394.

23 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Reports*, 1996, p. 236.

24 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 366.

庭受理咨询请求的规定，明确支持只能由国际组织而非国家提出请求。[25] 请求咨询意见只能由国际组织而非国家作出的理念源于常设国际法院。《国际联盟盟约》第 14 条规定："凡有争议或问题经理事会或大会有所咨询，该法院亦可发表意见。"而按照《国际法院规约》第 65 条第 1 款的规定，"法院对于任何法律问题如经任何主体由联合国宪章授权而请求或依照联合国宪章而请求时，得发表咨询意见"，[26] 以及《宪章》第 96 条对"主体"的授权，有权请求国际法院发表咨询意见的主体是联合国大会和安理会以及其他特定国际组织。国家只能在相关组织机构的框架下向机构申请提交咨询请求。[27] 海洋法法庭《规则》第 131 条第 1 款延续了常设国际法院和国际法院长期的司法实践，不接受国家或未被授权的国际组织的咨询请求。

在上述 2 种对立观点之间还存在一种可能。如拉奥法官所言，《公约》缔约国会议可以就《公约》产生的法律问题向法庭请求咨询意见。拉奥法官认为，虽然《国际联盟盟约》没有明确授权其理事会或大会，其他国际机构也没有被明确授权可以向国际联盟请求咨询意见，国际联盟理事会却代表其他国际机构或国家向法院请求咨询意见。以这一实践为基础，只要其作出决定，缔约国会议就可以向法庭请求咨询意见。[28] 然而，不仅《公约》没有明确规定缔约国会议拥有这一权能，而且即使缔约国会议可以作为一个常设机构，其法律地位也是不明确的。

还有学者认为，《规则》第 138 条并没有禁止国家可以通过其他方式请求咨询意见。国家可以通过协议利用既存的机构间接地请求咨询意见，而无需其自身直接请求。这种做法已经在过去的实践中被接受。特里维斯法官认为法庭一直试图使第 138 条与咨询意见一贯的功能相符合。若允许那些未经第 138 条所指的协议明确授权的主体请求咨询意见，或允许国家通过协议授权自身请求咨询意见，则会进入危险的境地。[29]

笔者认为，这种争论的实质是，国际法院的传统与其他国际司法机构发表咨询意见的实践之间存在多样性矛盾。

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25 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, pp. 364~365.

26 Statute of the ICJ, Article 65: "1. The court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

27 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 378~379.

28 Tafsir Malick Ndiaye, The Advisory Function of the International Tribunal for the Law of the Sea, *Chinese Journal of International Law*, Vol. 9, No. 3, 2010, p. 583.

29 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 365.

法庭《规则》中关于咨询意见部分的规定，充分表明了其参照《常设国际法院规则》和《国际法院规则》的有关内容。[30] 例如：法庭《规则》第 130 条第 1 款等同于法庭《规约》第 40 条第 2 款，而这一条款十分类似常设国际法院 1929 年修订其规约时意图加入的一个条款；后来，这一条款反映在了《国际法院规约》第 68 条及《国际法院规则》第 102 条第 2 款。法庭《规则》第 130 条第 2 款等同于《国际法院规则》第 102 条第 3 款，这一条款也受到 1927 年安齐洛蒂法官就常设国际法院咨询职能提出的一项建议的启发。法庭《规则》第 131 条第 1 款延续了常设国际法院和国际法院长期的司法实践，不接受国家或未被授权的国际组织的咨询请求。法庭《规则》第 132 条将请求咨询意见作为紧急事项，类似 1946 年《国际法院规则》第 82 条及当前的《国际法院规则》第 103 条。此外，法庭《规则》第 133 条表面上等同于《国际法院规则》第 105 条；前者第 134 条参照后者第 106 条；第 135 条参照第 107 条；第 136 条参照第 108 条；第 137 条参照第 109 条。[31]

这种相似性也表现在法庭《规则》第 138 条第 2 款上。该条款规定：“咨询意见的请求应经由协议授权或依照协议的任何主体提交至法庭”。[32] 而《国际法院规约》第 65 条第 1 款规定：“法院对于任何法律问题如经任何主体由联合国宪章授权而请求或依照联合国宪章而请求时，得发表咨询意见”。[33] 比较这 2 个条款的英文措辞，可以发现后半段如出一辙。而相类似的这部分恰恰是对“任何主体”的修饰部分，所不同的是“联合国宪章”被“协议”所取代。由于“协议”内容的不确定性，上述 2 个条款最核心的部分可能是完全不同的。问题是，法庭在起草《规则》时到底是寻求在实质上仿效国际法院的做法，还是仅仅在形式上相近？如果是前者，可能会导致以默示的方式对当事国之间“协议”中的咨询管辖条款附加特殊条件，即将请求机关限定在类似《宪章》第 96 条所称的“国际机构”。

在众多咨询意见中，国际法院不断表明其在性质上属于联合国的主要司法机构，其发表咨询意见的行为就是在行使联合国的职能。[34] 这与《宪章》及《国际法院规约》设定的法院“对人管辖”范围所体现的目的也是一致的。一般认为，授予国际法院咨询管辖权的目的在于解决国际组织不能成为法院的诉讼当事方这一困

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30 Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 374.

31 Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 374~392.

32 Rules of the ITLOS, Article 138(2): “A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement...”

33 ICJ Statute, Article 65: “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations...”

34 *ICJ Reports*, 1950, p. 71; *ICJ Reports*, 1975, p. 24, para. 31; *ICJ Reports*, 1999(I), pp. 78~79, para. 29.

境。[35] 而之所以将咨询意见的请求权能全部赋予联合国系统内的机构而非任意的国际组织，则是法院的性质使然。然而，从这一逻辑起点出发，却并不能准确描述当前国际实践的现实。

以现有的国际司法机构为例：东南非共同市场法院的咨询管辖权是相当广泛的，东南非共同市场首脑会议、部长理事会或者任何成员国均可请求法院就对东南非共同市场有影响的、与条约规定有关的所有法律问题提供咨询意见；独联体经济法院根据《独联体宪章》的规定可以解释独联体在经济事务方面的协定和法令的任何条款。其规约规定，法院有权解释独联体机构缔结的协定和其他法令的条款，且根据该条规定，法院不仅可以在具体案件的判决中对相关规定作出解释，而且有权应独联体成员国最高立法和行政机构、独联体国家最高经济和商业法院或独联体机构的请求发表抽象意见；美洲人权法院根据《美洲人权公约》第 64 条拥有广泛的咨询管辖权，可以要求法院提供咨询意见的主体既可以是公约的缔约国，也可以是美洲国家组织的成员国，还可以是经修订的《美洲国家组织宪章》第十章所列的大会、常设理事会和美洲人权委员会等各种机构，它们均可就公约或有关美洲国家人权保护的其他条约的解释，要求法院提供咨询意见；美洲国家组织的成员国还可以就其国内法与人权保护条约等是否一致的问题要求法院提出咨询意见，这一点类似欧盟法院的咨询职能。

造成这种现象的原因是由于当前各个国际司法机构在相应国际体系中的性质是不完全相同的，甚至是完全不同的。就海洋法法庭而言，其性质也与国际法院不同。

从各个司法机构对自身管辖权的认识角度来看，路易斯•B•索恩教授在这方面说得颇为中肯：

> 当一个新的国际法庭成立后，国家往往对于是否将案件提交给这样一个尚未审理过案件的机构持怀疑态度。由于咨询意见通常具有权威性但又没有正式的拘束力，请求咨询意见就为成员国判断法庭的性质提供了一个较为稳妥的机会。所以，在 1922 年和 1923 年最初提交给海牙常设国际法院的 4 个问题中，有 3 个是国际劳工组织请求的咨询意见，另一个是国际联盟理事会请求的……
>
> 国际法院的情形也颇为类似。在最初的 3 年之中，除了依照安理会根据《联合国宪章》第 36 条第 3 款建议提交给国际法院处理，并为争端当事方所接受的科孚海峡案之外，还有 4 份由联合国大会请求的咨询意见……
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> 美洲人权法院的情形甚至更富有戏剧性……法院在 6 年的时间中发表了

35 Nicolas S. Politis, *The New Aspects of International Law*, Washington, DC: Carnegie Endowment for International Peace, 1928.

> 80 份咨询意见……这些咨询意见关系到公约各类条款的解释，帮助澄清了众多重要问题。[36]

当前，国际司法机构的咨询管辖权主要出于履行职能的必要而设定。从这个角度上讲，就无需要求法庭在咨询意见的对人管辖方面与国际法院一致。因此，沃尔夫鲁姆法官的表述是可以接受的：

> 今后的国际协定，可能是国家之间的，或者是国家与国际组织之间的，可以就诉诸法庭的咨询程序作出规定。提出咨询意见的请求将由任何有权根据有关国际协定的规定提出该请求的机构转递给法庭。“主体”一词指的是依据协定有权提出请求的任何实体、国家或组织的主管机关。[37]

一直以来，对国际法院应该扩大咨询管辖方面的对人管辖范围的呼声不断高涨。[38] 更何况，与国际法院相比，海洋法法庭在对人管辖的范围方面要宽泛得多。海洋法法庭《规约》第 20 条的作用被认为是总体性规定法庭的对人管辖范围，该条款可类比于《国际法院规约》第 35 条，但比《国际法院规约》的规定要宽泛许多；而且，这一条款甚至比《公约》第 288 条的范围宽泛，因为第 288 条适用于第 287 条所指的所有争端解决机构，而第 20 条仅适用于法庭，也就具有了较大的特殊性。[39] 因而，这一从一般意义上规定法庭对人管辖范围的条款，反映了法庭的司法政治出发点是力图扩大管辖权。在这种情况下，也就不难理解在法庭第 21 号案中，分区域渔业委员会部长级会议关于提交咨询申请的决议明确提及将第 20 条作为申请咨询意见的法律基础。[40] 其主要意图可能就在于表明分区域渔业委员会和该

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36 Louis B. Sohn, Advisory Opinions by the International Tribunal for the Law of the Sea or Its Seabed Disputes Chamber, in Myron H. Nordquist and John Norton Moore eds., *Oceans Policy: New Institutions, Challenges and Opportunities*, The Hague: Martinus Nijhoff Publishers, 1999, pp. 61~62.

37 联合国大会文件 A/60/PV.55，第 27 页。

38 Louis B. Sohn, Broadening the Advisory Jurisdiction of the International Court of Justice, *American Journal of International Law*, Vol. 77, 1983, p. 124; 联合国大会文件 A/54/PV.39、A/45/1、A/47/277-S/24111、A/55/985-S/2001/574、UN Doc. E/1732、UN Doc. A/AC. 78/L.1 and Corr.1。

39 Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn eds., *UN Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, pp. 374~375.

40 Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission on authorizing the Permanent Secretary to seek Advisory Opinion pursuant to Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf, 1 May 2014.

委员会的常设秘书（根据委员会授权）是 2 个合法的请求主体。

实际上，规定哪些实体可以向司法机构提交咨询请求并不是一件非常重要且敏感的事情。因为一项咨询请求可能带来负面效果的首要因素是请求事项的内容，即司法机构的对事管辖权。换句话说，国际组织也好，国家也罢，甚至是个人，如果请求的咨询意见只涉及自身，将不会有任何敏感性或反对可言。恰恰是因为咨询意见往往涉及较抽象——即普遍性较强——的法律问题，甚至是政治问题，才使其具有了较强的敏感性。

四、法庭全庭咨询管辖权的对事管辖范围与法庭的斟酌决定权

对海洋法法庭的对事管辖权进行一般性规范的条款是《规约》第 21 条。[41] 同第 20 条一样，该条款对管辖权的设定也极其宽泛，因此对咨询程序中的对事管辖范围很难形成实质性的约束。因此，需要寻找对咨询管辖中的对事管辖范围进行专门界定的条款并借助国际实践中形成的一般规则赋予其含义。

《国际联盟盟约》第 14 条 [42] 规定了常设国际法院能够对国际联盟理事会以及大会提交的一切争端或问题提供咨询意见。该规定在 1919 年国际联盟讨论设立委员会的会议上由英国主要倡导并被采纳。但是，当时为何要采纳这一制度，其宗旨和目的是什么，现在看来不甚明确。依据英国代表的备忘录，理事会和大会拥有向常设国际法院请求咨询的权力被认为“对解决某些争端来说必不可少”，而常设国际法院的意见“未经理事会或大会的承认就不具有拘束力”，“因此并不是要导入强制性裁判的原则”。除此之外，没有见到具体的讨论。[43] 因此，可以认为常设国际法院咨询管辖的对事管辖范围涉及国际争端的解决。国际司法机构在咨询程序中的斟酌决定权也源于常设国际法院。《常设国际法院规约》第 68 条规定，法院执行关于咨询意见之职务时，并应参照本规约关于诉讼案件各条款之规定，但以法院认为该项条款可以适用之范围为限。因此，《国际联盟盟约》第 14 条暗

41 Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn eds., *UN Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, p. 375.

42 Covenant of the League of Nations, Article 14: The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

43 [日] 杉原高岭著，王志安、易平译：《国际司法裁判制度》，北京：中国政法大学出版社 2007 年版，第 327~328 页。

含的法院咨询职能的裁量权就不仅包括法院有权决定是否发表咨询意见，还包括法院在咨询程序的任何特定阶段有权决定其遵守何种程序的广泛裁量权。对国际司法机构来说，这种斟酌决定权本质上就是适用程序的自由。

对海洋法法庭来说，其斟酌决定权与判断“国际协议”、确定对人管辖权以及对事管辖权之间都存在着密切联系，并贯穿于整个咨询程序的始终。这是由《规则》第 138 条的规定所致。一方面，该条对法庭发表咨询意见的权能和程序规范得过于笼统，法庭必须自行确定大量法律问题；另一方面，由于该条第 1 款中措辞“可以”和第 3 款“类比适用第 130 条至第 137 条之规定”，使得法庭要自行决定在多大程度上采纳海底分庭的相关规则。特别是在对事管辖方面，由于涉及法庭自行决定的内容更加庞杂，且二者结合极为紧密，在此一并论述。

（一）《规则》第 138 条对法庭行使咨询管辖权过程中对事管辖范围的约束

海洋法法庭《规则》第 138 条对法庭行使咨询管辖权中的对事管辖范围的唯一限制是提交的问题必须是“法律问题”。从国际法院的实践来看，对“法律问题”的认定可能是相当宽泛的，甚至使得这一措辞构不成任何限制。

《宪章》第 96 条第 2 款规定申请机关只能就“法律问题”向国际法院请求咨询意见。这在措辞上与常设国际法院时期对提交咨询请求的要求（“一切争端和问题”）明显不同。因此，从 1946 年起才开始对一个咨询请求是否属于法律问题进行审查。在实践中，认定何谓法律问题并不容易，因为几乎所有提交给法院的问题都可以被包装成法律问题。国际法院也没有专门就何谓法律问题进行界定，只是进行过个案的判断。

第一，国际法院认为对包括《宪章》在内的国际条约的解释都属于法律问题。

最早涉及条约解释问题的是 1948 年“接纳一国为联合国会员国的条件”案。国际法院在咨询意见中指出：

> 法院不能认为，由抽象词语写成的，以委托它对一个条约条款作解释形式，请它承担一项实质上的司法任务的一个关于咨询意见的要求，是政治性的。[44]

在 1962 年“联合国的某些经费问题”案中，国际法院指出：

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44 *ICJ Reports*, 1948, p. 61.

关于《联合国宪章》的解释或多或少都具有政治意义。究其本质而言，不可能没有政治意义。法院不能认为一份请它完成一项本质上属司法性的任务，即解释条约规定的请求具有政治性质。[45]

国际法院一直将涉及条约解释的问题视为法律问题。

第二，具有法律特征的问题都属于法律问题。

在 1975 年“西撒哈拉问题”案中，法院指出：

联合国大会所提出的问题是以法律措辞表达的并提出了国际法的问题……根据其本身的性质是可以得到以法律为基础的答复的，并且很难依据法律以外的内容给予答复。因此，法院认为，这些是具有法律特征的问题。[46]

在 1996 年“以核武器相威胁或使用核武器的合法性”案中，法院认为：

法院必须进一步证明，相关机构请求的咨询意见确实涉及《国际法院规约》与《联合国宪章》中规定的“法律问题”。法院已有机会表明，“以法律措辞表述和提出国际法问题的问题……根据其本身的性质是可以得到以法律为基础的答复的……（而且）似乎……是法律性质的问题。”。[47]

实际上，当前的国际争端中没有几个不涉及国际法问题，经过咨询请求的一番“包装”，几乎所有问题都可以向“法律问题”靠拢。而国际法院的这种立场，基本上等于宣告了对这种“包装”成法律问题的行为的支持。

第三，如考虑法律原则有助于政治问题的解决，此类问题也属于法律问题。

即使一项咨询请求的主要方面表现为政治问题，也不妨碍国际法院对其次要的或可能适用的法律方面的问题进行解答。在“世界卫生组织同埃及之间 1951 年 3 月 25 日协定的解释”案中，国际法院认为：

在政治考量很重要的情况下，一个国际组织尤其有必要从国际法院获得与适用于争议事项的法律原则有关的咨询意见……[48]

第四，法律问题的属性与政治问题、抽象问题可以兼容。政治问题与法律问

45 *ICJ Reports*, 1962, p. 155.
46 *ICJ Reports*, 1975, p. 18.
47 *ICJ Reports*, 1996, pp. 233~234.
48 *ICJ Reports*, 1980, p. 87.

题之间很难存在公认的区分标准。[49] 多数国际争端同时具有政治属性和法律属性。通过前文的论述可知，国际法院在这方面的立场一直是，如果咨询请求仅在于寻求明确争端的法律方面的内容，就可以就该问题发表咨询意见。此外，法律问题是否包括抽象问题也曾引起争议。[50] 过于抽象的问题可能使咨询意见的适用范围更加具有不确定性，例如 1996 年“一国在武装冲突中使用核武器的合法性”案，以及同年“以核武器相威胁或使用核武器的合法性”案，虽然后者被法院以请求机关超越职能范围为由拒绝发表咨询意见。这可能导致更多国家反对此类咨询意见的发表。但法院从未支持过这种反对意见。

第五，是否属于法律问题与该问题的请求目的无关。

在“隔离墙”案中，针对“请法院提出的咨询意见可能使‘路线图’中设想的谈判复杂化，因此，本法院应行使酌处权，拒绝对提出的问题作出答复”的主张，法院指出：

> 安理会第 1515(2003) 号决议核准的“路线图”是解决以巴冲突的谈判框架。然而并不清楚本法院的咨询意见可能对这些谈判产生何种影响：本程序的参与人对这个问题表达了不同的观点。法院不能把这一因素视为拒绝行使咨询管辖权的充分理由。[51]

国际法院的上述实践必然会对海洋法法庭在处理咨询案件过程中考虑“法律问题”的范畴时产生重要影响。总的来说，很难期待法庭依据“法律问题”这一限制在行使斟酌决定权时拒绝发表咨询意见。

然而，对海洋法法庭在这方面的考虑不能就此而止。对法庭来说，首先，“法律问题”应该与第 138 条中的协议本身有关。其次，如果这是一项“与公约目的有关的”国际协议，该“法律问题”自然应该“与公约目的有关”。[52] 此外，“法律问题”还包含至少 2 种暗含的限制，即：所提的问题只涉及海洋法方面，并且与海底制度无关。这是由海洋法法庭的特殊性所决定的。

对前者来说，即使认为海洋法法庭有权处理超越《公约》的事项，但至少不会超越全部海洋法事项。因此，与海洋法无关的问题，例如陆地领土主权问题，就不属于《规则》特指的“法律问题”。对后者来说，由于法庭的海底争端分庭对国际海底区域具有专属管辖权并同时具有咨询管辖权，全庭不能就涉及海底区域的问

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49 [英] 劳特派特修订，王铁崖、陈体强译：《奥本海国际法（下卷，第一分册）》，北京：商务印书馆 1989 年版，第 1~2 页。

50 Repertory of Practice of United Nations Organs (Article 96) (1945–1954), paras. 110~121.

51 联合国文件 A/ES-10/273，第 21 页，第 53 段。

52 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 394.

题发表咨询意见。

但事实可能并不会如此简单。如果一项咨询请求虽涉及陆地领土主权问题或海底区域问题，但只请求法庭就某些其有权作出决定的事项发表意见时，法庭该如何处理？按照国际法院的做法，这些不同性质的问题之间可能并不矛盾，因此法院倾向于扩张自身的管辖权。例如，法院在“隔离墙”案中认为，虽然《宪章》赋予安理会维护国际和平与安全的首要职责，但法院并不拒绝对联合国大会提交的相关问题行使管辖权。这种对特定“法律问题”的限制可能还涉及不同机构之间的权能分配。例如，《公约》赋予 4 类国际司法机构以强制性的管辖权，同时，《公约》还创设了 3 大国际机构，海洋法法庭均在其中。在当前的国际司法实践背景下，的确很难期待法庭节制行使自身的管辖权，特别是在咨询管辖方面。尽管“法律问题”这一限定不能带来多少约束，但是法庭《规则》第 138 条设定的对事管辖范围和法庭的斟酌决定权不限于此。

（二）《规则》第 130 至第 137 条对全庭发表咨询意见形成的约束

海洋法法庭《规则》第 138 条第 3 款规定：法庭应当类比适用第 130 条至第 137 条之规定。[53] 这意味着，全庭行使咨询管辖权时应适用海底争端分庭发表咨询意见时的规定，这种适用是义务性的，而非权利性的。除了第 130 条至第 137 条中的程序性规定，第 130 条和第 131 条是法庭类比适用分庭咨询程序的核心条款。其中，第 130 条第 1 款涉及再次类比适用，将在下一部分讨论；第 2 款涉及国家间悬而未决的争端在咨询程序中的特殊规定，即任命专案法官。第 131 条涉及对“请求主体职能范围内”的规定。

既然第 130 条第 2 款作了如此规定，即意味着咨询请求事项可以涉及国家间悬而未决的争端。国际司法机构的咨询意见涉及国家间争端的源头在常设国际法院。

常设国际法院在近 20 年的司法实践中，创设了 2 种咨询意见，其一是法院就“一项争端”发表咨询意见，其二是法院就“一个问题”发表咨询意见。对咨询意见进行这种划分的基础在于《国际联盟盟约》第 14 条暗示了咨询意见可以分为涉及一项争端的意见和涉及一个问题的意见。并且，常设国际法院的司法实践认为，有关国家在涉及争端的咨询案件中所处的地位不应该一律等同于它们在涉及问题

53 Rules of the ITLOS, Article 138(3):“ The Tribunal shall apply *mutatis mutandis* articles 130 to 137.”

的咨询案件中所处的地位，从而有必要相应地将咨询意见作出如上划分。[54] 对咨询意见的这种划分最终在 1936 年的《常设国际法院规则》第 83 条中加以确认。依该条款，在其咨询程序中，如果请求法院发表咨询意见的问题涉及 2 个或 2 个以上国际联盟会员国之间或非会员国之间存在的一项争端，法院应予适用《常设国际法院规约》第 31 条以及《常设国际法院规则》中有关适用该条的规定。

正因为常设国际法院的咨询意见可以涉及国家间悬而未决的争端，法院把此类咨询程序等同于诉讼程序，在咨询实践中确立了“国家同意原则”。该原则源自 1923 年的“东卡累利亚”案。在该案中，法院指出：未经一国同意，不得强制将其与他国之间的争端提交调停、仲裁或者任何其他和平解决争端的方式，这是国际法中一项早已确立的原则。法院还指出：

> 这样的同意可以一次性通过自愿承担义务的方式作出，另一方面，也可以在现存义务之外针对特定场合作出。第一种方式适用于已经接受盟约的国际联盟会员国，它们有义务依照盟约通过和平方式解决国际争端。对非国际联盟会员国的国家而言，情况则完全不同：它们不受盟约的约束。因此，非国际联盟会员国与国际联盟会员国之间的争端若被提交法院以期依照盟约规定的方式解决，其前提是前者同意如此行事。与此相反，苏联已经在多个场合明确表示其不接受国际联盟对其与芬兰之间的争端进行调停。苏联在接到咨询意见申请通知时，再次重申了其反对理事会所建议的措施。因此，法院认为不能对这类争端发表咨询意见。[55]

在 1925 年“洛桑条约的解释问题”案中，土耳其对申请常设国际法院发表咨询意见表示反对。然而，法院在其咨询意见中认为，有利害关系的各方的投票不会影响到表决所要求的一致性。表面上看，法院在某种程度上偏离了东卡累利亚案的先例，越过了国家同意原则发表咨询意见。但是，此案和前者存在一个重要区别，即土耳其已经通过条约明确授权国际联盟在解决其与英国的争端时发挥作用，并且一直参与理事会的相关程序。

“国家同意原则”的确立极大地消除了国际社会对常设国际法院咨询管辖权的担忧。该原则确立后，理事会如果想就国际联盟会员国之间的争端请求法院发表咨询意见，必须先确保得到了所涉国家的同意，或者至少要保证各争端国不反对参加咨询案件的审理。

到了联合国时期，《宪章》和《国际法院规约》均以“法律问题”的措辞代替了

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54 在前一类案件中，有关国家因为与咨询意见密切关联，因而可能需要被赋予指定专案法官的权利等。

55 PCIJ Series B, No. 5, pp. 27~28.

常设国际法院时期“争端和问题”的规定。但是，也许是借鉴其前身的经验，1946年的《国际法院规则》实际上区分了2类咨询意见，且在发表不同意见时，法院适用的程序有所不同。依1946年《国际法院规则》第83条，如果一项咨询意见是就2个或2个以上国家间实际上悬而未决的法律问题而发表，《国际法院规约》第31条[56]以及《国际法院规则》中有关适用该条的规定应予适用。[57]反之，对于不属于此类的咨询意见，《国际法院规约》第31条则不适用。这种区分在一定程度上类似于《国际联盟盟约》第14条对争端和问题所作的区分。

联合国时期的国际法院与国际联盟时期的常设国际法院存在2方面的重要区别。一是就相应的组织体系而言，联合国的性质与国际联盟有所区别，表现在会员国的广泛性和对全球事务的普遍管辖权上。因此，即使是对非联合国会员国，联合国法律文件在某些事务上也可能具有约束力。二是就司法机构的性质而言，国际法院是联合国体系内的司法机关，主要对联合国的目的和宗旨负责，行使联合国体系下相应的职能，而常设国际法院与国际联盟之间没有这种关系。

上述区别导致一项重要实践的出现，即国际法院认为，只要是联合国会员国，接受了《宪章》，就等于同意了法院就其与他国之间悬而未决的争端发表咨询意见。这实际上是与1925年“洛桑条约的解释问题”案中常设国际法院的观点一脉相承的。

在1970年“纳米比亚”案中，国际法院强调南非是联合国成员国，因此应受《宪章》第96条的约束，该条授权安理会可以就任何法律问题申请咨询意见。[58]在1975年“西撒哈拉问题”案中，法院指出，西班牙是联合国成员国，已接受《宪章》和《国际法院规约》的相关规定，因此在一般意义上，它已同意国际法院行使咨询管辖权。[59]在1989年“《联合国特权及豁免公约》第6条第22节的适用性”案中，罗马尼亚主张其接受《联合国特权与豁免公约》时对法院的咨询管辖权作出了保留，因此未经其同意法院不应发表咨询意见，对此，国际法院指出：

> 法院依照《宪章》第96条和《国际法院规约》第65条所享有的对法律问题发表咨询意见的管辖权，使得联合国机构可以为依法行使职权而从法院获

56 Statute of the ICJ, Article 31(1): Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court. 2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5. 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

57 1978年至今的《国际法院规则》中该条款为其第102条。

58 *ICJ Reports*, 1971, paras. 87~116.

59 *ICJ Reports*, 1975, pp. 23~24.

> 得指导意见。这些意见属于建议性质，没有拘束力。由于这些意见是为了指导联合国，所以国家的同意并非法院发表咨询意见权限的先决条件。[60]

可见，只要成为联合国会员国，就意味着必然概括性地接受《宪章》第 96 条和《国际法院规约》第 65 条的规定而授权法院发表咨询意见。在具体条约中的“不同意”不能对抗上述概括性的“同意”。

但是，若一国不是联合国会员国，并且不同意国际法院发表咨询意见，法院该如何处理？在 1950 年“与保加利亚、匈牙利和罗马尼亚的和约的解释”案中，非会员国未对联合国大会请求咨询意见表示同意，并且部分国家对申请机关处理相关争端的职权提出质疑。但是法院认为这些事实均不能构成发表咨询意见的障碍：

> 本案的情况与常设国际法院在东卡累利亚案中面临的情况完全不同：在东卡累利亚案中，法院之所以拒绝发表咨询意见是因为它发现提交给它的问题直接涉及一个实际上存在于 2 国之间的悬而未决的争端的主要方面，答复该问题实际上等同于就 2 国之间的争端作出裁判。与此同时，这引起了一个不听取双方申辩就不能加以阐明的事实问题。
>
> 而当前的咨询申请只涉及和约所规定的解决程序对某些争端的适用性，因此，可以合理地认为，该咨询申请在任何方面都不触及这些争端的实质方面。[61]

上述案件的特点是不涉及国家间悬而未决的争端。但是对于涉及国家间悬而未决的争端时非成员国不同意法院发表咨询意见的情况，国际法院还没有相关实践。尽管如此，似乎也可以预见一种适宜的情形，即法院应拒绝发表咨询意见。因为这种情况与东卡累利亚案的情况是相同的。

此外，还存在一种对法院发表咨询意见默示同意的情形。在 1923 年“波兰国籍的取得”案中，尽管波兰反对理事会申请咨询意见的决议，但还是出席了常设国际法院的咨询程序。

至此，可以得出初步的结论。国家同意原则在咨询案件中的适用有 4 种不同的情况：一是对于相关公约的缔约国来说，如果该公约中存在相关条款授权司法机构发表咨询意见，就等同于国家已经作出了同意的表示；二是对于非缔约国来说，仍然具有通过默示同意接受咨询管辖的机会；三是对于非缔约国涉及的悬而未决的与他国之间的争端来说，如果该国不同意司法机构发表咨询意见，则不能发表

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60 *ICJ Reports*, 1989, pp. 188~189.
61 *ICJ Reports*, 1951, p. 72.

咨询意见;四是对于非缔约国涉及的除与他国之间悬而未决的争端以外的法律问题来说，司法机构可以发表咨询意见，但这种情况只出现在国际法院的实践中，可能要结合国际法院的特点才能实现。

从而，对于海洋法法庭全庭来说，由于其咨询管辖权来自于相关“国际协议”的授权，因此，一个明显的结论是，就一项国际协议提出的咨询意见只能涉及该协议的缔约国，而不能涉及协议的非缔约国。特别是在非缔约国反对法庭发表咨询意见的情况下，法庭就不能发表咨询意见。

对于《规则》第 131 条涉及的对“请求主体职能范围内”的规定，源于第 1 款将海底争端分庭发表咨询意见的主题事项限定在海底管理局大会和理事会的活动范围内，并且要求对问题的准确表述。[62] 对请求的“问题的准确表述”这一要求源于《常设国际法院规则》，目的在于对法院咨询管辖权设定一个明确的界限，即要明确限定“请求的对象”的范围。[63] 有学者在评论对“职能范围内”这一要求时认为，第 138 条没有像《宪章》第 96 条第 2 款那样对“法律问题”进行“工作范围内的”限定，然而若按上下文进行解释的话，可能未必如此。如果认为咨询意见仅限于国际组织请求，那么，为了与《公约》第 191 条以及《宪章》第 96 条一致，对“法律问题”加上“组织活动范围内产生的”限制似乎是应该的。[64]

实际上，笔者认为，对咨询意见的请求者来说，其所请求的咨询意见在其职能范围内是一项必然要求，无论这种要求是通过法律条文明示规定的，还是默示的。

《宪章》第 96 条第 2 款所规定的“工作范围内”实际上是多余的，因为尽管第 1 款没有对大会和安理会的请求权加以限制，但它们也只能就执行职务过程中产生的法律问题申请咨询意见，只能在各自章程（即《宪章》）所构建的体制内行事，也只能行使这一体制所赋予它们的权能。

在“与保加利亚、匈牙利和罗马尼亚的和约的解释”案中，有主张认为该项咨询请求涉及国内管辖事项，大会无权管辖，咨询请求超越了大会的职权;在“对《防止及惩治灭绝种族罪公约》提出的保留”案中，同样有主张认为只有缔约国有权解释公约，大会的请求超越了职权;在“隔离墙”案中，以色列认为联合国大会的咨询请求干涉了安理会的职权。上述案件都涉及到讨论联合国大会的职权问题，即大会是否在其“职权范围内”行事。虽然国际法院未支持上述主张，但也绝没有表明对联合国大会的咨询请求不设限制。实际上，由于《宪章》几乎无所不及的宗旨，

62 Rules of the ITLOS, Article 131(1): A request for an advisory opinion on a legal question arising within the scope of the activities of the Assembly or the Council of the Authority shall contain a precise statement of the question.

63 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 379~380.

64 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 394.

以及对大会和安理会职权的广泛授予，很难想象大会和安理会无权对哪些事项加以考虑。

而对海洋法法庭来说，由于相应请求机关的职能并非无所不包，有些甚至是相当有限的，因此法庭对咨询请求的事项应予严格审查，以保证请求事项包含在请求机关的有限职能之内。

（三）海洋法法庭《规约》和《规则》中适用于诉讼案件的条款对全庭发表咨询意见形成的约束

这一约束来源于法庭《规则》第 130 条第 1 款。从逻辑上来讲，由于《规则》第 138 条第 3 款规定了类比适用其第 130 条至第 137 条，那么第 130 条第 1 款确定的“适用于诉讼案件的条款”理应对全庭发表咨询意见程序适用。但在现实中，这种适用程度如何却是不确定的。海底争端分庭的首个也是唯一一个咨询意见并未对此加以特别说明。[65] 此外，《规则》第 130 条第 1 款的措辞任意性较强，法庭在适用上具有较大的弹性。

但值得一提的是，在法庭第 17 号案咨询意见结尾，特别提到“分庭的裁判应以与缔约国最高法院判决或命令同样的方式，在缔约国领土内得到执行”。[66] 这一论述的法律依据在海洋法法庭《规约》第 39 条。但该条并非特别适用于咨询案件，因此可理解为分庭在该案中比照适用了第 39 条，赋予咨询意见以约束力。

如果全庭也比照适用这一条款，就意味着咨询意见可以通过上述方式具有约束力，从而在缔约国国内执行。而是否赋予约束力，则应是缔约国自行决定。

在海洋法法庭第 21 号案中，向法庭申请发表咨询意见的内容涉及分区域渔业委员会这一西非渔业组织成员间关于在专属经济区内非法捕鱼的船旗国责任等问题。[67] 虽然这一主题事项涉及对专属经济区制度相关条款的解释，必然会影响到一般性的国家间权利义务关系分配，但是如果用前文的所有标准来衡量，总的来看这一主题事项没有超越该组织的工作范围，也没有违背国家同意原则。

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65 List of cases: No. 17, paras. 55~56.

66 List of cases: No. 17, para. 235.

67 Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission on authorizing the Permanent Secretary to seek Advisory Opinion pursuant to Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf, 1 May 2014.

五、结论和展望

可以预见，今后国际海洋法法庭收到的咨询请求会越来越多。海洋法法庭《规则》第 138 条是对法庭行使咨询管辖权的唯一规范条款，很多可能具有争议性的问题在这一条款中的规定也是语焉不详。国际法是实践性的学问，在国际格局巨变的时期和领域更是如此。因此，法庭必须通过自身的实践形成与既有国际经验一脉相承又根据自身特点有所创新的咨询制度。

1946 年，国际法院在对《国际联盟盟约》稍作修改的基础上继承了常设国际法院的咨询管辖权。其在随后近 70 年的时间里发表了大量咨询意见，在这些意见中对众多程序性问题进行了明确。与此同时，大量国际司法机构在国际社会涌现，出现了众多与国际法院不同的咨询管辖制度。产生不同制度的根源在于不同司法机构在相应国际体系中所承担的职能不同，因此性质就有所不同。根据这样的客观现实，海洋法法庭既不能照搬国际法院在咨询管辖方面的制度，也不能在制度设计上出现任意性。沿着一条既符合历史经验、具有充分可预期性，又符合海洋法和国际司法的最新发展需要、最大限度地发挥司法机构功能的道路稳步前进，才是未来的最佳选择。

A Study on the Advisory Proceedings before the ITLOS as a Full Court

YE Qiang*

Abstract: Article 138 of the Rules of the International Tribunal for the Law of the Sea (ITLOS) grants the ITLOS an advisory jurisdiction and lays out general conditions for the exercise of such jurisdiction. However, Article 138 has faced two challenges since its adoption: on one hand, the legal basis for the ITLOS to grant itself an advisory jurisdiction is unclear; on the other hand, the provisions of this article are over simplified that the ITLOS has considerable discretion over the interpretation of the legal terms therein, which in turn brings ambiguities to the procedures of requesting and rendering advisory opinions. In another paper written by this author, On the Legal Basis of Advisory Jurisdiction of ITLOS as a Full Court,[1] this author has reviewed and analyzed the legal basis for the exercise of such jurisdiction, which sheds light on the legal basis for the adoption of Article 138 of the Rules by the ITLOS. This paper intends to clarify the rules of the advisory proceedings grounded on the legal basis described above. Employing the current mainstream judicial methods in an integrated manner, the proposed rules will rest on the basic principles of international law that support the effective functioning of the international community. This structure attempts to strike a balance between the certainty of law and the flexibility of addressing international affairs. This paper covers the following issues: the scope of the provision of "an international agreement related to the purposes of the Convention specifically provides for" as envisaged by Article 138(1); the reach of *Competence Ratione Personae* prescribed by the expression of "be transmitted to the Tribunal by whatever body" in Article 138(2); the scope of *Competence Ratione Materiae*, including "legal question[s]";

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1 Ye Qiang, On the Legal Basis of Advisory Jurisdiction of ITLOS as a Full Court, *PKU International and Comparative Law Review*, Vol. 10, 2013, pp. 81~112. (in Chinese)

and the discretion of the ITLOS in accordance with the word of "may" used in Article 138(1) and the phrase of "apply *mutatis mutandis* articles 130 to 137" used in Article 138(3). This paper aims to provide the ITLOS an enlightening reference in its hearing of advisory cases in the future.

Key Words: International Tribunal for the Law of the Sea; Full court; Advisory opinion; *Competence Ratione Personae*; *Competence Ratione Materiae*

I. An Overview of the Advisory Jurisdiction of the ITLOS

The mechanism of advisory jurisdiction in international law was first established by the Permanent Court of International Justice (PCIJ) and succeeded by its successor the International Court of Justice (ICJ). Additionally, quite a number of international judicial institutions established after World War II adopted this mechanism, among which is the International Tribunal for the Law of the Sea (hereinafter "the ITLOS" or "the Tribunal"). The Tribunal's advisory jurisdiction is composed of two aspects: the advisory jurisdiction of the Seabed Disputes Chamber and that of the full court. The former is provided for expressly in the United Nations Convention on the Law of the Sea (hereinafter "the UNCLOS" or "the Convention"),[2] and the Chamber gave its first advisory opinion in 2011 after accepting a case in 2010.[3] Despite that the advisory jurisdiction of the full court has yet to be clearly provided for either in the Convention or in its Annex VI, namely the Statute of the ITLOS (hereinafter "the Statute"), Article 138 [4] of the Rules of the ITLOS (hereinafter "the Rules") prepared by the Tribunal in accordance with the Statute in 1997, in essence, confers the Tribunal as a full court with an advisory jurisdiction and generally lays out the provisions in connection with the exercise of such jurisdiction.

On March 28, 2013, the full court received the first request for an advisory

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2 United Nations Convention on the Law of the Sea, Article 159(10) and Article 191.

3 List of cases: No. 17, at http://www.itlos.org, 1 May 2014.

4 Article 138: 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal. 3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

opinion.[5] As far as the current situation is concerned, considerable uncertainty will arise when the Tribunal as a full court gives an advisory opinion under Article 138 of the Rules, since there is huge room for the interpretation of the legal terms in this Article. Admittedly, the Tribunal may clarify the controversial issues by giving advisory opinions in practice. However, due to the judicial politics, there is a concern that the Tribunal may expand its jurisdiction and interfere with matters in which it should not be involved. Such suspicion is not baseless, as it can be seen in the following text that quite a few of the Tribunal Judges' opinions about the advisory jurisdiction of the Tribunal are dubious. Therefore, it is necessary to clarify important legal issues related to the advisory proceedings prior to the practice of the Tribunal in this aspect. These important legal issues include: first, the legal basis for the exercise of advisory jurisdiction by the Tribunal as a full court, namely the scope of the provision of "an international agreement related to the purposes of the Convention specifically provides for" as envisaged by Article 138(1); second, the reach of *Competence Ratione Personae* of the Tribunal in connection with advisory jurisdiction prescribed by the expression of "be transmitted to the Tribunal by whatever body" in Article 138(2); third, the scope of *Competence Ratione Materiae* of the Tribunal in connection with advisory jurisdiction which includes but not limited to the "legal question[s]" mentioned in Article 138(2); fourth, the discretion of the Tribunal in accordance with the word of "may" used in Article 138(1) and the phrase of "apply *mutatis mutandis* articles 130 to 137" used in Article 138(3).

II. The Authorization Conferred to the ITLOS as a Full Court to Entertain Requests for Advisory Opinions: "An International Agreement Related to the Purposes of the Convention Specifically Provides for"

A. "International Agreement"

5 During 25 to 29 March 2013, the 14th special session of the Conference of Ministers of the Subregional Fisheries Commission was held in Dakar, Senegal. On 28 March, the resolution adopted by the Conference of Ministers authorized the Permanent Secretary to submit a request to the ITLOS for an advisory opinion, at http://www.itlos.org/index.php?id=252, 1 May 2014.

Under Article 138 of the Rules, relevant bodies may make a request for an advisory opinion if "an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion." In other words, the Tribunal is authorized to give an advisory opinion by the said provision. However, the wording in this provision is decidedly ambiguous.

Firstly, in international judicial practice, a variety of international agreements may grant jurisdiction to international judicial institutions in different manners as follows: first, the Charter of the UN. Article 36(1) of the Statute of the ICJ provides that "[t]he jurisdiction of the Court comprises ... all matters specially provided for in the Charter of the United Nations..." "International agreement[s]" in a broad sense encompass the Charter. Second is a special agreement or *compromis*: it is a requisite to submit a case after a dispute arises based on consent ad hoc;[6] third, the jurisdiction clause in treaties and conventions. This is a form of consent ante hoc. In reality, the jurisdiction granted to any judicial institutions by such international agreements mostly refers to contentious jurisdiction rather than advisory jurisdiction. Generally, an international judicial institution acquires advisory jurisdiction through the provisions of the statute governing the establishing of such institution, and the *Competence Ratione Personae* as well as the *Competence Ratione Materi-*

6 The Minquiers and Ecrehos case, Judgment of November 17th, *ICJ Reports*, 1953, p. 47.

ae of the advisory jurisdiction are spelled out clearly by such a statute.[7] It can be observed that the basis for the advisory jurisdiction of the ITLOS as a full court is similar to the basis for contentious jurisdiction of other international judicial institution, and thus it is very unusual. In this connection, can the scope of the "international agreement[s]" referred to in Article 138 be determined by reference to that of the international agreements which confer contentious jurisdiction on other international judicial institution?

Ki-Jun You contends that the purpose of Article 138 of the Rules is to prepare the Tribunal to accept requests for advisory opinions that may arise in the future, and further asserts that its power to give advisory opinions derives from specific international agreements.[8] The so-called "international agreement[s]" refer to the "treaties" envisaged by Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties.[9] With regards to whether "international agreement[s]" include bilateral agreements between States or between States and international organizations, Judge Jesus holds that both categories of agreements can be regarded as within the scope

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7 Under Article 14 of the Covenant of the League of Nations, Permanent Court of International Justice (PCIJ) had advisory jurisdiction. The ICJ succeeds advisory jurisdiction from the PCIJ in accordance with Article 96 of the Charter of the United Nations and Article 65 of the Statute of the ICJ which are based on adjusted provisions of the Covenant of the League of Nations. Pursuant to Article 218 of Part Five of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union (CJEU) has advisory jurisdiction; prior to the entry of the Treaty on the Functioning of the European Union into force, the Treaty establishing the European Economic Community (EEC) provides for advisory jurisdiction in Article 228; and Article 95 of the Treaty establishing the European Coal and Steel Community (ECSC) and Articles 103~105 of the Treaty establishing the European Atomic Energy Community (Euratom) envisage that, in special cases, the Court of Justice of the European Communities has advisory jurisdiction. According to Article 32 of the Common Market for Eastern and Southern Africa Treaty (COMESA Treaty), COMESA Court of Justice has advisory jurisdiction. In accordance with Article 32 of the Charter of the Commonwealth of Independent States and Article 5 of the Statute on Economic Court of the Commonwealth of Independent States, the Economic Court of the Commonwealth of Independent States acquires advisory jurisdiction. Based on Articles 47, 48 and 49 of Section II of the European Convention on Human Rights, the European Court of Human Rights obtains advisory jurisdiction. Under Article 64 of the American Convention on Human Rights, the Inter-American Court of Human Rights has advisory jurisdiction. Pursuant to Article 4 of the Court Protocol, the African Court on Human and Peoples' Rights has advisory jurisdiction.

8 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 365.

9 Ki-Jun You writes "… Article 1(1)(a) of the VCLT for this purpose." The author considers it a typo.

of "international agreement[s]" provided for in Article 138 of the Rules.[10] However, in Ki-Jun You's view, this understanding may give rise to the following problems: the advisory opinions may have an *erga omnes* quality beyond the parties to the advisory proceeding. If the number of the contracting parties to an "international agreement" referred to in Article 138 is small, non-parties to the agreement may have a legal interest in the proceedings. To avoid this problem, there are two possible approaches: first, the "international agreement[s]" are interpreted to cover only multilateral agreements; second, non-parties to such agreements are allowed to participate in the advisory proceedings by creatively applying Article 130(1) of the Rules.[11]

Apparently, present views are divided in academia over the definition of the term "international agreement," thus entailing a variety of possible interpretations. However, some interpretations are less sound than others. For instance, the aforementioned opinion holds that "international agreement[s]" refer to "treaties" envisaged by Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties. However, this opinion ignores international organizations such as the European Union, which is also a party to the UNCLOS. The definition of "treaties" in the 1969 Vienna Convention on the Law of Treaties excludes agreements between international organizations and States or between international organizations. This was the reigning definition until the entry into force of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which recognizes the effectiveness of the agreements between international organizations and States as treaties. It follows that if applying the 1969 Convention in the event that an international organization can be a party before the Tribunal, it would restrict the rights of international organizations. This in and of itself is contrary to the UNCLOS.

In light of the uncertain interpretations of the term "international agreement", it is necessary to consider other relevant restrictions to determine its meaning, which is also dictated by a need of a systematic interpretation of treaties.

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10 José Luis Jesus, Article 138, in P. Chandrasekhara Rao and Philippe Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006; Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 394.

11 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 367.

B. "International Agreement Related to the Purposes of the Convention"

The expression of "international agreement related to the purposes of the Convention" originates from Article 288(2) of the UNCLOS. It is generally held that such international agreements currently effective consist of the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 2000 Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, the 2001 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, and the 2001 Convention on the Protection of the Underwater Cultural Heritage, etc. Additionally, the 1994 Agreement Relating to the Implementation of Part XI of the UNCLOS of 10 December 1982 can also be included.[12]

At the Sixtieth Session of the UN General Assembly, Judge Wolfrum stated in his report concerning "Oceans and the Law of the Sea":

> *The jurisdiction of the Tribunal is based not only on the United Nations Convention on the Law of the Sea, but also on any international agreement related to the purposes of the Convention which specifically confers jurisdiction on the Tribunal. Seven such multilateral agreements have already been concluded. An important example of an international agreement conferring jurisdiction on the Tribunal is the 1995 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, which provides that any dispute between States parties to the Agreement concerning the interpretation or application of the Agreement – whether or not they are also parties to the Law of the Sea Convention – is subject to the mechanism for*

12 Gao Jianjun, *A Study on Disputes Settlement Mechanisms of the UNCLOS*, Beijing: China University of Political Science and Law Press, 2011, pp. 144~146. (in Chinese)

settling disputes which is set out in Part XV of the Convention…

Similarly, [the 2001 Convention on the Protection of Underwater Cultural Heritage] applies Part XV of the Law of the Sea Convention mutatis mutandis to any dispute between parties to it, whether or not they are parties to the Law of the Sea Convention…

State parties to an international agreement related to the purposes of the Convention may submit to the Tribunal any dispute concerning the interpretation or application of that agreement which is submitted to it in accordance therewith.

A provision conferring jurisdiction on the Tribunal could also be included in bilateral agreements in respect of disputes arising out of the interpretation or application of the relevant agreement. According to such a provision, a dispute concerning the agreement should, at the request of any party to it, be submitted to the Tribunal or to an ad hoc chamber of the Tribunal if the dispute is not solved by diplomatic means within a certain period…

The inclusion of such provisions in international agreements is a fully logical development. It follows a pattern established during the nineteenth century as regards arbitration and during the twentieth century in respect of the International Court of Justice. As for the Tribunal, such a development would certainly enhance the central role it plays in the settlement of disputes regarding law of the sea matters. May I refer, in that respect, to a statement made by Mr. Joe Borg, Commissioner for Fisheries and Maritime Affairs of the European Union, on the occasion of his visit to the Tribunal on 2 September 2005. He said that "the European Union, where appropriate, could also offer to include a provision in the agreements relating to the law of the sea which it concludes with third countries binding the parties to refer the settlement of any disputes to the International Tribunal for the Law of the Sea.[13]

Here, the Tribunal's attitude is quite clear: during the discussions on the meaning of international agreements "related to the purposes of the Convention", the restriction imposed by the expression of "related to the purposes of the Convention" actually becomes unimportant. Also, as Thomas A. Mensah said, "[g]iven the very comprehensive scope of the Law of the Sea Convention, it is not easy to envisage that any agreement dealing with 'marine' issues can be excluded from the

13 Official Records of the UN General Assembly, A/60/PV.55, pp. 24~28.

Tribunal as 'not related to the purposes' of the Law of the Sea Convention."[14]

C. "International Agreement Related to the Purposes of the Convention" Restricted by the Wording of "Specifically Provides for"

Despite the insignificant role of being "related to the purposes of the Convention", other restrictions are still imposed on the scope of those "international agreement[s]". By reviewing the features and details of the international agreements "related to the purposes of the Convention" as listed above, the following conclusions can be drawn:

First, those agreements all clearly refer to the relevant procedures in the system of the UNCLOS.[15] This is in line with the wording of "specifically provides for" set out in the Rules.

Second, according to the wording of Article 288(2) of the UNCLOS such an international agreement must logically be an agreement based on "consent ante hoc", which is embodied in the jurisdiction clause in treaties. Article 288(2) states, "any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement", which shows that such an international agreement is concluded in respect of substance matters and includes provisions conferring jurisdiction on the Tribunal prior to the submission of a request. Since it is not a procedural agreement, it cannot cover a special agreement or *compromis* based on consent ad hoc.

In this connection, the statements made by Judge Wolfrum at the Sixtieth Session of the General Assembly regarding the advisory jurisdiction of the Tribunal are questionable. He contended:

> *Under article 138 of the rules of the Tribunal, the Tribunal may also be requested to give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for*

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14 Thomas A. Mensah, The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes, in P. Chandrasekhara Rao and Rahmatullah Khan eds., *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague: Kluwer Law International, 2001, p. 30.

15 Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn eds., *UN Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, pp. 47~48.

the submission of a request for such an opinion.

The advisory function of the Tribunal is a significant innovation in the international judicial system, provided it can be given a broad interpretation. In that case, it may offer a potential alternative to contentious proceedings and could be an interesting option for those seeking a non-binding opinion on a legal question or an indication of how a particular dispute may be solved through direct negotiations. Such proceedings could be of particular assistance to parties to a dispute in the process of reaching a solution by negotiation, for example in maritime delimitation cases. It should not be forgotten that Article 33 of the United Nations Charter states that negotiations are the primary means of settling international disputes.

In that respect, the parties could ask the Tribunal to determine the principles and rules of international law applicable to a delimitation dispute and undertake thereafter to establish the boundary on that basis. The parties can always specify in the agreement the questions upon which the Tribunal would be requested to render an advisory opinion. Certainly, recourse to binding settlement procedures could ultimately also be made, if necessary.[16]

In the author's understanding, Wolfrum asserted that States may request the Tribunal for an advisory opinion on any legal question in relation to the law of the sea from time to time merely by concluding a special agreement. Apparently, such a special agreement should be excluded from the "international agreement[s] related to the purposes of the Convention" envisaged by the UNCLOS or the Rules.

With regards to the request to the Tribunal for an advisory opinion (Case No. 21) that the Tribunal entertained recently, the legal basis for such a request lies in the jurisdiction clause specified in an existing international treaty, namely, Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission.[17]

After clarifying that the legal basis for the exercise of advisory jurisdiction

16 Official Records Resolution of the UN General Assembly, A/60/PV.55, p. 27.

17 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, Article 33: Submissions of matters to the International Tribunal for the Law of the Sea for Advisory Opinion: The Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion.

by the Tribunal should be an international agreement concluded in respect of a substance matter concerning the law of the sea which includes an advisory jurisdiction clause, the question whether this condition is satisfied is left to the Tribunal. Nevertheless, the body that transmits the request to the Tribunal for an advisory opinion is another crucial issue relating to the performance of an international agreement and the rendering of an advisory opinion by the Tribunal.

III. The Scope of *Competence Ratione Personae o*f the Tribunal as a Full Court in Connection with Advisory Jurisdiction

Judicially, what bodies are qualified to submit a request for an advisory opinion is an issue of the *Competence Ratione Personae* of the Tribunal. In the practice of the existing international judicial institutions, a judicial insitution's *Competence Ratione Personae* is expressively specified in advance,[18] whereas Article 138(2) of the Rules provides for the scope of the *Competence Ratione Personae* in an indirect manner.

In this regard, an inquiry should be first taken into the wording of Article 138(2) of the Rules. It reads, "[a] request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement..." According to the practice of the ICJ, Article 65 of the Statute of the ICJ distinguishes "be authorized by" from "in accordance with." Such a distinction is considered to be made on the basis of the division of the two categories of bodies requesting for advisory opinions in Article 96 of the UN Charter, a body "authorized by the agreement" thus means a body which falls beyond the scope spelled out in the agreement which is referred to in Article 138(1). Meanwhile, a body "in accordance with the agreement" means a body within the scope spelled out in such an agreement.[19] Article 138(2) of the Rules provides that a "body" which has been confirmed may be authorized to transmit a request to the Tribunal, but Article 138 fails to enumerate which bodies are entitled to request the Tribunal to give an advisory opinion. As a result, the question arises as to

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18 See *Supra* Note 7.

19 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, pp. 365~366 .

whether the advisory jurisdiction of the Tribunal is only available to international organizations, as in the case of the ICJ, or also available to other bodies?

There are two opposing views regarding this problem. The first view believes that advisory jurisdiction shall be also available to bodies besides international organizations. Judge Wolfrum stated that the advisory function of the Tribunal may offer a potential alternative to contentious proceedings.[20] Judge Jesus argued that a "body," referred to in Article 138(2) of the Rules, implied any organ, entity, institution, organization, or State that was indicated in the relevant "international agreement" as being empowered to request an advisory opinion on behalf of the members concerned. Hence, the scope of "bodies" hinges on the provisions of "international agreement." Since the aforementioned bodies are just conveyors of requests for advisory opinions, the nature of the bodies is of little relevance. The legitimacy of the bodies only rests on the authorization by the "international agreement" but not by their nature or any other considerations.[21] However, the justification of this view is open to discussion.

The proceedings where an international judicial institution is requested to render advisory opinions may involve three categories of bodies: first, what body within an institution may propose to make a request; second, what body may transmit the request for an advisory opinion to the Tribunal after the adoption of a relevant resolution (conveyor); third, who will be the particular body in international law subject to the jurisdiction of the judicial institution concerned (requester). The first two categories of bodies ought to be determined solely by an international organization in its charter, whereas the third will be decided by the instruments governing the establishing of the judicial institution. Therefore, Article 138 of the Rules which only regulates the exercise of relevant functions of the Tribunal does not need to specify the first two categories of bodies. It follows that it is unnecessary to strictly distinguish "requesters" from "conveyors". Regardless of the wording of the provisions concerned, requesters for an advisory opinion refer to the persons subject to the Tribunal's advisory jurisdiction. If it is held that a conveyor of the request is separate from a requester (i.e. the requesting body may refer to the first two categories of bodies in an institution), then the requester shall

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20 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 364.

21 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 394.

be the addressee of the advisory opinion. In this regard, no support could be found in the UN Charter or the Statute of the ICJ. Further, the stance of the ICJ on this is also unambiguous – advisory opinions are addressed merely to the international organizations qualified to transmit requests other than States; the advisory function is to offer legal advice to the organs and institutions requesting the opinion other than to settle – at least directly – disputes between States.[22] The same shall hold true for the Tribunal. Just as the ICJ Statute is silent on the addressee of its advisory opinions, the Tribunal also makes no provisions for the addressee of its advisory opinions.[23] In this connection, the identification of requesters ought not to amount to the question of the *Competence Ratione Personae* of the Tribunal. Rather, requesters shall be determined by the internal procedural rules of the requesting body and, in terms of the *Competence Ratione Personae* of the Tribunal in connection with advisory function, a conveyor shall generally refer to the body submitting a request for the opinion. The word "body" used in Article 138(2) of the Rules shall mean such a body; therefore, it is impossible and needless to consider which internal organ shall transmit the request.

The second view, represented by Judge Treves, holds that the "body" can only be interpreted as an international organization. This interpretation is based on two grounds. First, Article 138 of the Rules is devised in light of Article 65 of the Statute of the ICJ, and consequently its interpretation and application should consider the practice regarding Article 65. Article 65 never confers the power to request for an advisory opinion on States, therefore, Article 138 should be interpreted likewise. Second, the provisions in the UNCLOS in relation to the authority of the Seabed Disputes Chamber to receive requests for advisory opinions clearly support the notion that international organizations rather than States are empowered to make the request for advisory opinions.[24] The idea that only international organizations other than individual States may request an advisory opinion has been dominant since the days of PCIJ. Article 14 of the Covenant of the League of Nations states that, "[t]he Court may also give an advisory opinion upon

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22 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Reports*, 1996, p. 236.

23 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 366.

24 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, pp. 364~365.

any dispute or question referred to it by the Council or by the Assembly." However, under Article 65(1) of the Statute of the ICJ, which reads "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations" and the authority given to the "body" by Article 96 of the UN Charter, the bodies entitled to request the ICJ to give an advisory opinion are the UN General Assembly, the Security Council and some international organizations. States may only within the framework of the international organization concerned, ask the international organization to submit such a request.[25] Article 131(1) of the Rules continues the long-standing judicial practice of the PCIJ and the ICJ, which refuse to entertain the request for an advisory opinion made by States and unauthorized international organizations.

Between these opposing views above stands another possibility. Judge Rao argued that the Meeting of States Parties to the UNCLOS may request to the Tribunal for an advisory opinion on a legal question arising under the UNCLOS. He recalled that the Council of the League made the request to the PCIJ on behalf of other international agencies and States, though neither the League Covenant expressly authorized the Council or Assembly of the League to request such opinions, nor did the constitutions of others expressly authorize them to ask the League to request advisory opinions. On the basis of this practice, he contended that the Meeting of States Parties to the UNCLOS might, if it so decides, request advisory opinions of the Tribunal.[26] Nonetheless, not only does the UNCLOS not provide expressively for such function for the Meeting of States Parties, but also the legal status of the Meeting of States Parties, even if it is a standing organ, remains uncertain.

Some contend that Article 138 of the Rules does not prevent States from requesting advisory opinions by other means. States may seek advisory opinions indirectly by taking advantage of existing bodies through agreements rather than directly seeking an opinion on their own. This approach has been taken in the past. Nevertheless, as Judge Treves pointed out, the Tribunal has been making efforts to make Article 138 of the Rules consistent with the traditional functions of advisory

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25 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 378~379.

26 Tafsir Malick Ndiaye, The Advisory Function of the International Tribunal for the Law of the Sea, *Chinese Journal of International Law*, Vol. 9, No. 3, 2010, p. 583.

opinions. Should a body not specifically authorized by the Article 138 agreement be allowed to request advisory opinions, or should States be permitted to authorize themselves to request such opinions via agreements, the Tribunal would have had to tread on much unsafe ground.[27]

The author holds that this debate, in essence, reflects the conflict between the tradition of the ICJ and the diverse practice of other international judicial organs with regards to the rendering of advisory opinion.

Provisions in the Rules of the Tribunal concerning advisory opinions are evidently guided by the relevant provisions of the Rules of the PCIJ and the ICJ.[28] For instance, Article 130(1) of the Rules of the Tribunal is the same as Article 40(2) of the Statute of the Tribunal which is quite similar to an article that the PCIJ intended to add when it amended its Statute in 1929. This article is later embodied by Article 68 of the Statute of the ICJ and Article 102(2) of the Rules of the ICJ. Likewise, Article 130(2) of the Rules of the Tribunal is identical to Article 102(3) of the Rules of the ICJ, which was inspired by a suggestion made by the PCIJ Judge Anzilotti regarding the advisory function of the PCIJ in 1927. Article 131(1) of the Rules of the Tribunal continues the long-term judicial practice of the PCIJ and the ICJ – not accepting requests for advisory opinions from States or unauthorized international organizations. Under Article 132 of the Rules of the Tribunal, a request for an advisory opinion may be urgent, which is similar to Article 82 of the 1946 Rules of the ICJ as well as Article 103 of the currently effective Rules of the ICJ. In addition, Article 133 of the Rules of the Tribunal seems similar to Article 105 of the Rules of the ICJ; Article 134 of the former is modeled on Article 106 of the latter; Article 135 of the former is modeled on Article 107 of the latter; Article 136 of the former is modeled on Article 108 of the latter; and Article 137 of the former is modeled on Article 109 of the latter.[29]

Such similarity is also reflected in Article 138(2) of the Rules of the Tribunal. This article prescribes that "[a] request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the

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27 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of The Rules of the Tribunal, Revisited, *Ocean Development and International Law*, Vol. 39, Issue 4, 2008, p. 365.

28 Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 374.

29 Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 374~392.

agreement," while Article 65(1) of the Statute of the ICJ provides that "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations..." It can be seen that the latter parts of these two articles are almost identical in using the words "is authorized by or in accordance with" to modify the expression of "whatever body" except that the Article 138 refers to "the agreement" while the Article 65 refers to "the Charter of the United Nations." Nevertheless, the cores of these two articles may be entirely different by virtue of the uncertainty of the substance of "the agreement". The question is what the Tribunal sought in its formulation of the Rules: to follow the practice of the ICJ in essence or try to be similar only in form? In case of the former, it may impose a limitation on the advisory jurisdiction clause of the "agreement" between the States in a silent manner, namely the "body" is also limited to an "international organization" envisaged in Article 96 of the UN Charter.

Among a number of its advisory opinions, the ICJ has consistently expressed that it is in nature a principal judicial organ of the United Nations and giving advisory opinions is to discharge the UN functions.[30] This is in line with the purpose of setting the scope of *Competence Ratione Personae* of the Court by the UN Charter and the Statute of the ICJ. It is generally considered that the purpose of granting the ICJ an advisory jurisdiction is to overcome the international organizations' inability to appear before the Court as a contentious party.[31] It follows that the nature of the ICJ dictates the power to request an advisory opinion to be given to merely internal organs of the UN rather than any other international organizations. However, this logic is not in consistent with the current practice in the international community.

Take existing international judicial institutions as examples. The advisory jurisdiction of the COMESA (the Common Market for Eastern and Southern Africa) Court of Justice is quite broad, as the Summit of the COMESA Authority of Heads of State and Government, the Council of Ministers of COMESA or any of its Member State may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting the COMESA; under the Commonwealth of Independent States (CIS) Charter, the Economic Court

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30 *ICJ Reports*, 1950, p. 71; *ICJ Reports*, 1975, p. 24, para. 31; *ICJ Reports*, 1999(I), pp. 78~79, para. 29.

31 Nicolas S. Politis, *The New Aspects of International Law*, Washington, DC: Carnegie Endowment for International Peace, 1928.

may interpret the provisions of "agreements and other acts of the Commonwealth on economic issues." Under its Statute, the Economic Court is authorized to rule on the "interpretation" of the provisions of agreements and other acts concluded by CIS institutions. Pursuant to the said provision, interpretation may be given not only by rendering judgments in specific cases but also by issuing abstract opinions at the request of the highest legislative and executive organs of Member States, their highest economic and commercial courts, or CIS institutions; according to Article 64 of the American Convention on Human Rights, the Inter-American Court of Human Rights has a broad advisory jurisdiction – bodies qualified to request advisory opinions comprise States Parties to the Convention, Member States of the Organization of American States, as well as the organs listed in the amended Chapter X of the Charter of the Organization of American States such as the General Assembly, the Permanent Council and the Inter-American Commission on Human Rights, all of which may request the Inter-American Court of Human Rights to provide advisory opinions on the interpretation of the American Convention on Human Rights and of other human rights treaties related to American States; the Inter-American Court of Human Rights, at the request of a Member State of the Organization, may provide that State with opinions regarding the compatibility of any of its domestic laws with international instruments concerning human rights, akin to the advisory function of the European Union Court of Justice.

Such a phenomenon can be attributed to the total or partial difference in the roles of various international judicial institutions within their corresponding international systems. As regards the ITLOS, its role is distinct from that of the ICJ.

From the perspective of the understanding of their jurisdiction by various international judicial organs, Professor Louis B. Sohn's statements are of considerable pertinence:

> *When a new international tribunal is established, States hesitate to submit a case to the yet untried institution. Advisory opinions, which are usually authoritative but officially not binding, present a chance for a less dangerous test of a tribunal's quality. Thus, the first four issues presented in 1922 and 1923 to the Permanent Court of International Justice at The Hague were three requests for advisory opinions by the International Labor Organization and a request by the Council of the League of Nations …*
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> *The story of the International Court of Justice was similar. In the first three years – apart from the Corfu Channel case which was submitted to the*

Court on the recommendation of the Security Council under Article 36(3) of the Charter of the United Nations, that was accepted by the parties to the dispute – there were four requests by the General Assembly for advisory opinions ...

Even more dramatic is the story of the Inter-American Court of Human Rights ... the Court rendered eighty advisory opinions over a period of six years ... These opinions related to the interpretation of various provisions of the convention, and helped to clarify various important issues.[32]

Presently, the advisory jurisdictions of international judicial institutions are granted as necessary to fulfill their roles. In this sense, it is unnecessary to require the ITLOS to be in line with the ICJ regarding *Competence Ratione Personae* in connection with advisory opinions. As such, the statements of Judge Wolfrum are acceptable:

[F]uture international agreements, possibly between States or between States and international organizations, could provide for recourse to the Tribunal's advisory procedures. A request for an advisory opinion is to be transmitted to the Tribunal by whichever body is authorized to make the request in accordance with the provisions of the relevant international agreement. The term "body" refers to the competent organ of any entity, State or organization that is empowered under the agreement to submit the request.[33]

The contention that the ICJ's *Competence Ratione Personae* in connection with advisory jurisdiction needs to be broadened has always been rising.[34] Furthermore, the ITLOS has a much broader *Competence Ratione Personae* than the ICJ. Article 20 of the Statute of the Tribunal is deemed to prescribe the extent of the Tribunals' *Competence Ratione Personae* in a general way. Being comparable

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32 Louis B. Sohn, Advisory Opinions by the International Tribunal for the Law of the Sea or Its Seabed Disputes Chamber, in Myron H. Nordquist and John Norton Moore eds., *Oceans Policy: New Institutions, Challenges and Opportunities*, The Hague: Martinus Nijhoff Publishers, 1999, pp. 61~62.

33 Official Records of the UN General Assembly, A/60/PV.55, p. 27.

34 Louis B. Sohn, Broadening the Advisory Jurisdiction of the International Court of Justice, *American Journal of International Law*, Vol. 77, 1983, p. 124; Resolution of the UN General Assembly, A/54/PV.39; A/45/1; A/47/277-S/24111; A/55/985-S/2001/574; UN Doc. E/1732; UN Doc. A/AC. 78/L.1 and Corr.1.

to Article 35 of the Statute of the ICJ, yet the provisions of the Article 20 are more inclusive; in addition, the Article 20 is even broader than Article 288 of the UNCLOS on the ground that Article 288 applies to all the disputes resolution institutions referred to in Article 287 of the UNCLOS, whereas the Article 20 is merely applicable to the Tribunal; and thus, the Article 20 is of great particularity.[35] It follows that such a provision that generally lays out the *Competence Ratione Personae* of the Tribunal is an embodiment that its judicial politics intend to increase jurisdiction. In this case, it is not difficult to understand that in Case No. 21 of the Tribunal, the Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission on requesting an advisory opinion expressly refers to Article 20 as the legal basis for such a request.[36] Its main intention might be to demonstrate that both bodies – the Sub-Regional Fisheries Commission and the Permanent Secretary of the Commission as authorized by the Commission – are appropriate entities to make the request.

In reality, what entities are empowered to submit a request to a judicial institution for advisory opinion is not a significant or sensitive matter, for the factor most likely to cause negative impacts is the substance of such a request, namely the *Competence Ratione Materiae* of the judicial institution. In other words, if the request for an advisory opinion merely involves the requester itself, may it be an international organization, a State or an individual, no sensitivity or opposition would arise. By contrast, an advisory opinion typically involves abstract legal – and even political – questions (that is to say, causing universal effects), thus making itself quite sensitive.

IV. *Competence Ratione Materiae* of the Tribunal as a Full Court in Connection with Advisory Jurisdiction as Well as Its Discretion

35 Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn eds., *UN Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, pp. 374~375.

36 Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission on authorizing the Permanent Secretary to seek Advisory Opinion pursuant to Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf, 1 May 2014.

Article 21 of the Statute of the Tribunal provides for the *Competence Ratione Materiae* of the Tribunal in a general manner.[37] Like Article 20 of this Statute, Article 21 also confers broad jurisdiction on the Tribunal; there thus exists no essential restriction over the *Competence Ratione Materiae* of the Tribunal in advisory proceedings. In this connection, it is advisable to define the Tribunal's *Competence Ratione Materiae* by exploring the provisions specifying the range of the Tribunal's *Competence Ratione Materiae* in advisory procedures and the general rules formed in international practice in this regard.

Article 14 [38] of the Covenant of the League of Nations prescribes that the PCIJ is competent to provide an advisory opinion on any dispute or question referred to it by the Council or by the Assembly. This article was primarily advocated by the Great Britain and was adopted at the meeting regarding the establishment of a commission in the League of Nations in 1919. However, as seen from today, the reasons for adopting this system and its object and purpose were not quite clear. In light of the memorandum of the British representatives, the power to seek an advisory opinion from the PCIJ by the Council and the Assembly was deemed "indispensible for the resolution of some disputes". Opinions of the PCIJ were "not binding if not accepted by the Council or the Assembly" and "therefore it is not to introduce the principle of compulsory adjudication." Apart from this, no further discussion could be found.[39] As such, it could be drawn that the PCIJ's advisory *Competence Ratione Materiae* involves the resolution of international disputes. Likewise, the discretion of international judiciary institutions in advisory procedures derives from the PCIJ. Article 68 of the Statute of the PCIJ envisages that in the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable. It follows that the PCIJ's discretion

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37 Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn eds., *UN Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, p. 375.

38 Covenant of the League of Nations, Article 14: The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

39 Sugihara Takane, translated by Wang Zhi'an and Yi Ping, *International Adjudication System*, Beiijing: China University of Political Science and Law Press, 2007, pp. 327~328. (in Chinese)

over the requests for advisory opinions arising from Article 14 of the Covenant of the League of Nations not only empowers the PCIJ to decide whether to give an advisory opinion, but also encompasses the wide discretion over the selection of procedures in any stage of the advisory proceeding. As for international judicial organs, such discretion is in essence the freedom of choosing procedures.

In terms of the ITLOS, its discretion closely relates to its decisions concerning "international agreement", the *Competence Ratione Personae*, and the *Competence Ratione Materiae*. As a result, the Tribunal's discretion runs through the entire advisory proceeding, due to the provisions of Article 138 of the Rules. On one hand, this article is so vague regarding the advisory function and procedures that the Tribunal has to clarify many legal matters thereof; on the other hand, because of the word "may" used in Article 138(1) and the phrase "apply *mutatis mutandis* articles 130 to 137" used in Article 138(3), the Tribunal has to decide to what extent to apply the relevant rules of the Seabed Disputes Chamber at its discretion. Particularly, as regards the *Competence Ratione Materiae*, the matters within the discretion of the Tribunal are more wide-ranging. The following will discuss the Tribunal's *Competence Ratione Materiae* and discretion concerned, which are two items closely related.

A. Restriction upon the Tribunal's Competence Ratione Materiae in Exercising Its Advisory Jurisdiction Exerted by Article 138 of the Rules of the Tribunal

The only restriction that Article 138 of the Rules exerts upon the Tribunal's *Competence Ratione Materiae* in exercising its advisory jurisdiction is that the question submitted needs to be a "legal question". From the perspective of ICJ's practice, the scope of a legal question might be quite extensive; therefore, such an expression may not even constitute a restriction at all.

Article 96(2) of the UN Charter provides that the organ seeking advisory procedures can only request the ICJ to give an opinion on a "legal question". This apparently differs from the expression of "any dispute and question", which is used to describe the requirement on requesting an advisory opinion from the PCIJ. It follows that the practice of examining whether the questions in the request are legal started in 1946. In practice, it is not easy to determine if a question is legal in that almost each question submitted to the Court can be disguised as a legal question. The ICJ has not specifically clarified the meaning of a legal question but only ruled

on this in a few cases.

Firstly, the ICJ deemed that the interpretation on international treaties including the UN Charter belonged to legal questions.

The earliest case involving the question of treaty interpretation is the 1948 Advisory Opinion on *Competence of the General Assembly for the Admission of a State to the United Nations*, in which the Court stated:

> *It cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision.*[40]

In the 1962 Advisory Opinion on *Certain Expenses of the United Nations*, the Court held that:

> *It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.*[41]

The ICJ has always regarded the interpretation of a treaty provision as a legal question.

Secondly, a question of a legal character belongs to a legal question.

In the 1975 Advisory Opinion on *Western Sahara*, the Court said:

> *The questions submitted by the General Assembly have been framed in terms of law and raise problems of international law ... These questions are by their very nature susceptible of a reply based on law; indeed, they are scarcely susceptible of a reply otherwise than on the basis of law. In principal, therefore, they appear to the Court to be questions of a legal character.*[42]

In the 1996 Advisory Opinion on *Legality of the Threat or Use of Nuclear*

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40 *ICJ Reports*, 1948, p. 61.
41 *ICJ Reports*, 1962, p. 155.
42 *ICJ Reports*, 1975, p. 18.

Weapons, the Court held that:

> *The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a "legal question" within the meaning of its Statute and the United Nations Charter. The Court has already had occasion to indicate that questions "framed in terms of law and rais[ing] problems of international law ... are by their very nature susceptible of a reply based on law ... [and] appear ... to be questions of a legal character".*[43]

In fact, present international disputes seldom fail to relate to international law and almost every question involved in a request could be made up to look like a legal question. The stance of the ICJ indicated above nearly declares that it supports such "making up" of legal question.

Thirdly, where considering legal principles would contribute to the resolution of a political issue, such issue is seen as a legal question.

Even if the primary aspects of a request are of a political character, this does not prevent the Court from replying to the secondary aspects of or legal principles applicable to the question. In the 1980 Advisory Opinion on *the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court maintained:

> *Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate ...*[44]

Fourthly, the nature of a legal question is compatible with that of a political question or an abstract question, as it is difficult to set a well-recognized criterion to distinguish a political question from a legal question.[45] A majority of international disputes are of both political and legal character. As the discussion above indicates, the ICJ's position in this regard has always been that if an advisory request merely seeks to clarify the legal aspects of a dispute, the Court may give an advisory

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43 *ICJ Reports*, 1996, pp. 233~234.

44 *ICJ Reports*, 1980, p. 87.

45 Arthur Watts KCMG QC, translated by Wang Tieya and Chen Tiqiang, *Oppenheim's International Law, Volume 2*, Beijing: The Commercial Press, 1989, pp. 1~2. (in Chinese)

opinion. In addition, controversies have also arisen with regards to whether the legal question can be an abstract one.[46] An abstract question may bring more uncertainty to the applicable scope of advisory opinions, as can be seen in the 1996 Advisory Opinion on *the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* given in the same year, though the Court refused to provide an advisory opinion in the latter on the ground that the organ exceeded its competence to make the request. A corollary of this is that more States would object to the rendering of such an advisory opinion, however, the Court has never endorsed such objections.

Fifthly, the purpose behind a request has no bearing on whether it is a legal question.

In the Advisory Opinion on *The Legality of the Wall and the Legal Consequences of Its Construction*, with regards to the allegation that "the requested opinion… could complicate the negotiations envisaged in the 'Roadmap', and the Court should therefore exercise its discretion and decline to reply to the question put", the Court said:

> *The Court is conscious that the "Roadmap", which was endorsed by the Security Council in resolution 1515(2003), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.*[47]

The aforesaid practice of the ICJ would necessarily exert a significant influence on the ITLOS in contemplating the scope of the "legal question" in the process of entertaining an advisory case. Overall, the Tribunal could hardly be anticipated to decline to render an advisory opinion in its discretion when exercising its advisory jurisdiction based on the restriction of "legal questions".

However, the discussion on the ITLOS's consideration in respect of the "legal question" should not end here. As far as the Tribunal is concerned, to begin

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46 Repertory of Practice of United Nations Organs (Article 96) (1945–1954), paras. 110~121.
47 UN doc. A/ES-10/273, p. 21, para. 53.

with, the "legal question" shall relate to the Article 138 "agreement". Further, if the agreement is an international agreement "related to the purposes of the Convention", the "legal question" involved would naturally be "related to the purposes of the Convention".[48] Besides, the "legal question" involves at least another two implicit restrictions, namely, the question is only associated with the law of the sea and not with the international seabed system. This is dictated by the uniqueness of the ITLOS.

As to the former restriction, even if the Tribunal is competent in addressing matters beyond the UNCLOS, the matters cannot be entirely irrelevant with the law of the sea at least. It follows that questions unrelated to the law of the sea such as sovereignty over land territory cannot be counted as "legal question[s]" referred to in the Rules of the Tribunal. Regarding the latter restriction, since the Seabed Disputes Chamber of the ITLOS has exclusive jurisdiction, including advisory jurisdiction, over the international seabed area, the Tribunal as a full court cannot render advisory opinions to questions involving the international seabed area.

Nevertheless, reality will be complicated. In case that some aspects of a request for advisory opinion relate to sovereignty over land territory or international seabed area, but the Tribunal is requested to provide an opinion only on matters within its competence, what should the Tribunal do? According to the jurisprudence of the ICJ, the Court tends to increase its jurisdiction under these circumstances in that the questions of different nature may not conflict with each other. For instance, in the Advisory Opinion on *The Legality of the Wall and the Legal Consequences of Its Construction*, the Court said that despite the Charter conferring the principal responsibility of maintaining international peace and security on the Security Council, the Court did not decline to exercise jurisdiction on the relevant questions submitted by the General Assembly. This restriction on "legal question" may take into account the division of responsibilities between different organs. A case in point is that the UNCLOS grants compulsory jurisdiction to four categories of international judicial institutions and at the same time, establishes three international organizations. The ITLOS is one of such institutions and organizations. Against the background of current international adjudication practice, it is indeed difficult to expect the Tribunal to be temperate in exercising its jurisdiction, particularly advisory jurisdiction. Although the wording of "legal

48 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 394.

question" may not impose much restriction, the scope of the *Competence Ratione Materiae* and discretion of the Tribunal prescribed by Article 138 of the Rules will not be limited by this alone.

B. Restriction upon the Advisory Function of the Tribunal as a Full Court Exerted by Articles 130 to 137

Article 138(3) of the Rules of the Tribunal provides that, "[t]he Tribunal shall apply *mutatis mutandis* articles 130 to 137", which means that the Tribunal as a full court is obligated (rather than entitled) to apply the advisory procedures for the Seabed Disputes Chamber in exercising its advisory jurisdiction. Apart from the procedural provisions in Articles 130 to 137, Articles 130 and 131 are the core articles for the Tribunal to apply *mutatis mutandis* the Seabed Disputes Chamber's advisory proceedings. Article 130(1) refers to applying rules *mutatis mutandis* on a second level, which will be discussed in the next section; Article 130(2) refers to the special rules on the advisory proceedings in relation to a dispute pending between two or more States, namely the appointment of an ad hoc judge; Article 131 refers to the provisions regarding "the competence of the requesting body".

Pursuant to Article 130(2), the legal question in the request may relate to a dispute pending between States. The practice that an advisory opinion of an international judicial organ may have a connection to a dispute between States has existed since the days of the PCIJ.

In the approximately twenty-year practice of the PCIJ, two types of advisory opinions have been established: an advisory opinion upon a dispute and that upon a question, as such a distinction is implied by Article 14 of the Covenant of the League of Nations. Further, it is considered that the status of the States concerned in an advisory procedure in respect to a dispute should be different from that in an advisory procedure in respect to a question, thereby making such a distinction necessary.[49] Article 83 of the 1936 Rules of the PCIJ finally confirmed this distinction. Under this article, if the question upon which an advisory opinion is requested relates to an existing dispute between two or more Members of the League of Nations or States, Article 31 of the Statute of the PCIJ shall apply, as also the

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49 In cases of the first category, given that the advisory opinion would have a substantial impact on States concerned, such States may be vested with the right to appoint judges *ad hoc*, etc.

provisions of the Rules of the PCIJ concerning the application of that article.

Since the PCIJ's advisory opinion may be related to a pending dispute between States, the Court applied contentious procedures to these advisory proceedings and established "the principle of States' consent". This principle originated from the 1923 Advisory Opinion on *Status of Eastern Carelia*, in which the Court said, "it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." Further, the Court pointed out:

> *Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation. The first alternative applies to the Members of the League who, having accepted the Covenant, are under the obligation resulting from the provisions of this pact dealing with the pacific settlement of international disputes. As concerns States not members of the League, the situation is quite different; they are not bound by the Covenant. The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent. Such consent, however, has never been given by Russia. On the contrary, Russia has, on several occasions, clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland. The refusals which Russia had already opposed to the steps suggested by the Council have been renewed upon the receipt by it of the notification of the request for an advisory opinion. The Court therefore finds it impossible to give its opinion on a dispute of this kind.*[50]

In the 1925 Advisory Opinion on *Article 3, Paragraph 2, of the Treaty of Lausanne*, Turkey objected to the request of an advisory opinion from the PCIJ. Despite this, the Court in its advisory opinion held that the votes cast by representatives of the interested Parties did not affect the required unanimity. It appears that the Court, to a certain extent, had deviated from its holdings in the Advisory Opinion on *Status of Eastern Carelia* by stepping over "the principle of States' consent". However, there was an important difference between this case and

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50 PCIJ Series B, No. 5, pp. 27~28.

the *Status of Eastern Carelia* that Turkey had authorized the League of Nations by a treaty to intervene in the settlement of its dispute with England and had actively taken part in the relevant proceedings in the Council.

The establishment of "the principle of States' consent" greatly reduced the international community's concern about the advisory jurisdiction of the PCIJ. Thereafter, whenever the Council sought an advisory opinion from the Permanent Court in relation to an existing dispute between Members of the League, the Council had to ensure all States concerned consented to the request, or that at least parties in the dispute would not oppose participation in the advisory procedure.

In the UN era, the provisions of the UN Charter and the Statute of the ICJ replaced the wording of "any dispute or question" with "legal question". However, the 1946 Rules of the ICJ separated two kinds of advisory opinions and the Court shall apply different procedures to them respectively – probably a result of the succession of the experience of the PCIJ. According to Article 83 of the 1946 Rules of the ICJ, if an advisory opinion is given on a legal question actually pending between two or more States, Article 31 of the Statute of the ICJ[51] as well as the provisions of the Rules of the ICJ concerning the application of that article shall apply.[52] By contrast, as regards advisory opinions not of this sort, Article 31 of the Statute of the ICJ shall not be applied. This distinction, to some extent, is similar to that implied by Article 14 of the Covenant of the League separating "dispute" from "question".

Two crucial differences exist between the ICJ in the United Nations era and the PCIJ in the League of Nations era. On one hand, with regard to the organizational system, the nature of the UN is distinct from that of the League, as reflected in the broad membership of the UN and its universal influence over global affairs. By virtue of this, a non-member State of the UN may be bound by the UN instruments concerning certain issues. On the other hand, as concerns the nature of the two world courts, the ICJ is the principal judicial organ within the system of the UN in charge of carrying out the goals and purposes of the UN and fulfilling the functions

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51 Statute of the ICJ, Article 31(1): Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court. 2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5. 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

52 In the 1978 Rules of the ICJ, effective to date, the Article 83 is turned into Article 102.

within the system, whereas there was no such relation between the PCIJ and the League of Nations.

The distinction above gives rise to an important practice of the ICJ wherein, whenever a Member State accedes to the UN Charter, the State is regarded as having agreed to the rendering of an advisory opinion by the ICJ on a pending dispute between the State and another State. This is, in fact, in line with the holdings of the 1925 Advisory Opinion on *Article 3, Paragraph 2, of the Treaty of Lausanne* by the PCIJ.

In the 1970 Advisory Opinion on *Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court emphasized that South Africa was a Member State of the UN and thereby, was bound by Article 96 of the UN Charter, which authorized the Security Council to request an advisory opinion on any legal question.[53] In the 1975 Advisory Opinion on *Western Sahara*, the Court said, Spain was a member of the United Nations and had accepted the provisions of the UN Charter and Statute of the ICJ; it had thereby given its general consent to the Court's advisory jurisdiction.[54] In the 1989 Advisory Opinion on *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, with respect to the Romanian claim that, because of the reservation made by it concerning the ICJ's advisory jurisdiction when it endorsed the Convention on the Privileges and Immunities of the United Nations, the ICJ cannot, without Romania's consent, give a relevant advisory opinion. As the ICJ observed:

> *The jurisdiction of the Court under Article 96 of the Charter and Article 65 of the Statute, to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law. These opinions are advisory, not binding. As the opinions are intended for the guidance of the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them.*[55]

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53 *ICJ Reports*, 1971, paras. 87~116.
54 *ICJ Reports*, 1975, pp. 23~24.
55 *ICJ Reports*, 1989, pp. 188~189.

Under this premise, once a State becomes a member of the UN, it means that it has generally accepted Article 96 of the UN Charter and Article 65 of the Statute of the ICJ and thereby has authorized the Court to give advisory opinions. "Objection" expressed in a specific treaty cannot affect such "consent" in general.

However, where a State is not a member of the UN and objects to the giving of advisory opinions by the ICJ, what should the Court do? In the 1950 Advisory Opinion on *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*, when non-member States of the UN had not consented to the submission of a request for advisory opinions by the UN General Assembly, and some States questioned the competence of the organ making the request in dealing with relevant disputes, the Court considered that these facts did not constitute obstacles to the advisory procedure:

> *[T]he circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case, when that Court declined to give an Opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.*
>
> *As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it is no way touches the merits of those disputes.*[56]

The feature of the above case is that it did not relate to a dispute pending between States. Nonetheless, the Court is yet to encounter a circumstance where a non-member State does not consent to the request for an advisory opinion on a question related to a pending dispute with another State. Notwithstanding the lack of practice in this regard, it appears that the Court is likely to decline such a request in that this situation is the same as that before the Permanent Court in the Advisory Opinion on *Eastern Carelia*.

Furthermore, there is another situation where a State implicitly consents to the

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56 *ICJ Reports*, 1951, p. 72.

Court's giving of an advisory opinion. In the 1923 Advisory Opinion on *Acquisition of Polish Nationality*, though Poland objected to the resolution adopted by the Council of the League seeking an advisory opinion from the PCIJ, it still attended the relevant proceedings of the Permanent Court.

In sum, preliminary conclusions can be drawn that "the principle of States' consent" may apply differently in four situations: first, concerning a State party to a treaty, if relevant provisions of the treaty authorize judicial organs to give advisory opinions, it amounts to the State consenting to the organs' advisory jurisdiction; second, concerning a non-party State to a treaty, it can accept advisory jurisdiction by implied consent; third, in the event that a non-party State to a treaty does not consent to the initiation of advisory proceedings by certain judicial organ regarding a pending dispute between that State and another State, the judicial organ shall not give its advisory opinion; fourth, concerning other legal questions which relate to a non-party State to a treaty except those regarding a pending dispute between that State and another State, the judicial organ may provide an advisory opinion, which merely occurred in the practice of the ICJ. Probably, a judicial organ may exercise advisory jurisdiction in this situation, provided that it acquires similar features as the ICJ.

As to the ITLOS as a full court, since its advisory jurisdiction derives from the authorization by the relevant "international agreement", it can be clearly concluded that its advisory opinions concerning the interpretation and application of an "international agreement" can only be given to a member of the treaty other than non-members. Particularly, whenever a non-member of the treaty protests the Tribunal's rendering of an advisory opinion, the Tribunal shall not provide such an opinion.

"Within the competence of the requesting body" specified in Article 131 of the Rules of the Tribunal derives from its Article 131(1), which requires that the subject of the legal question in the request should be limited within the scope of the activities of the Assembly or the Council of the Authority, and the request should state the question precisely.[57] The requirement of "a precise statement of the question" comes from the Rules of the PCIJ for the purpose of laying down the contour of the Permanent Court's advisory jurisdiction, namely clearly limiting

57 Rules of the ITLOS, Article 131(1): A request for an advisory opinion on a legal question arising within the scope of the activities of the Assembly or the Council of the Authority shall contain a precise statement of the question.

the sphere of "the subject of a request".[58] It is contended that Article 138 of the Rules of the Tribunal does not require the "legal question" to be within "the scope of the activities", as required by Article 96(2) of the UN Charter. Nonetheless, such a contention may not be justified when we interpret it under its context. If advisory opinions can only be requested by international organizations, in order to be consistent with Article 191 of the UNCLOS and Article 96 of the UN Charter, it seems desirable to add the condition precedent "within the scope of the activities" to the "legal question".[59]

The author deems that the subject of the request within the scope of the activities of the body seeking the advisory opinion is a necessary demand, whether established by provisions explicitly or implicitly.

In fact, the term of "within the scope of their activities" referred to in Article 96(2) of the UN Charter is redundant. Though Article 96(1) sets no restriction upon the UN General Assembly and the Security Council in requesting for an advisory opinion, their request is limited to legal questions arising from discharging their authorized responsibilities within the framework established by their statutes (i.e. provisions of the UN Charter).

In the Advisory Opinion on *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*, it was argued that the request for an advisory opinion related to a matter within the domestic jurisdiction of the States where the General Assembly had no competence and thus, the General Assembly acted *ultra vires* when requesting an advisory opinion; in the Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, likewise, there was objection against the General Assembly to request an opinion as it was alleged only States which are parties to the Genocide Convention are entitled to interpret the Convention or seek an interpretation of it; in the Advisory Opinion on *The Legality of the Wall and the Legal Consequences of Its Construction*, Israel alleged that the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the ground that it interfered with the functions of the Security Council. All these cases discussed the competence of the General Assembly, namely whether it acted *ultra vires*. Notwithstanding the failure of these

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58 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 379~380.

59 P. Chandrasekhara Rao and Ph. Gautier eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 394.

allegations, the ICJ has never indicated that there is no restriction upon the power of the General Assembly to request an advisory opinion. However, due to the general character of the purpose of the UN Charter as well as the broad authority conferred on the General Assembly and the Security Council, it is hard to imagine what matters they are incompetent to consider.

Nevertheless, in terms of the ITLOS, as the competence of the body requesting an advisory opinion from it is limited and even quite narrow, the Tribunal shall strictly examine the subject of the request in order to guarantee the questions are within the limited competence of the body.

C. Constraints Set on the Advisory Function of the Tribunal as a Full Court by the Provisions of the Statute and the Rules of the Tribunal Applicable in Contentious Cases

The provisions containing constraints on the advisory function of the Tribunal as a full court in the Statute and the Rules mainly refer to Article 130(1). Logically, given Article 138(3) provides "the Tribunal shall apply *mutatis mutandis* articles 130 to 137", "the provisions … applicable in contentious cases" specified in Article 130(1) shall be applicable to the advisory proceedings of the Tribunal as a full court. However, to what extent such provisions are applicable to the said advisory proceedings in practice is uncertain. The first and sole advisory opinion given by the Seabed Disputes Chamber did not particularly spell out this issue.[60] Besides, Article 130(1) of the Rules is quite vague in its wording, leaving much flexibility to the Tribunal in applying these provisions.

It should be noted that at the end of the No. 17 Advisory Opinion of the Tribunal, it specifically stated, "[t]he decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought."[61] The legal basis for this statement is set out in Article 39 of the Statute of the Tribunal. However, given that this article is not specifically applicable to advisory opinions, presumably, the Seabed Disputes Chamber has applied Article 39 *mutatis mutandis*, giving binding effect to the advisory opinion.

If the Tribunal as a full court applies this article *mutatis mutandis*, it means

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60 List of cases: No. 17, paras. 55~56.
61 List of cases: No. 17, para. 235.

that its advisory opinion can become binding through the above approach, and therefore be enforced in the territories of States Parties. Nevertheless, it should be left to the State Party to decide whether to be bound by the advisory opinion.

In the No. 21 Advisory Opinion, the Tribunal was requested to give an advisory opinion regarding the obligations of the flag State for illegal fishing activities conducted within the exclusive economic zones of third party States among the Member States of the Sub-Regional Fisheries Commission, a West African fisheries organization.[62] Though this subject related to the interpretation of the relevant provisions on the regime of exclusive economic zones and would inevitably affect the obligations and rights of States generally, measured by the aforesaid criteria, it did not exceed the scope of the activities of this organization nor violated "the principle of States' consent" overall.

V. Conclusions and Forecasts

Predictably, the requests to the ITLOS for advisory opinions would grow in the future. Article 138 of the Rules of the Tribunal is the only article that addresses the advisory function of the ITLOS, while many controversial issues have not been set out in this article. International law is a knowledge of practice, especially in the era when and the areas where the international situation witnesses dramatic changes. As such, the Tribunal needs to establish an advisory system which conforms with existing international practice and is also innovative enough to adapt its own features through its practice.

In 1946, the ICJ succeeded the advisory jurisdiction of the PCIJ after making a few alterations to the Covenant of the League of Nations. In the seventy years afterward, the ICJ gave a raft of advisory opinions which elucidated many procedural issues. Meanwhile, numerous international judicial organs emerged across the world with their own advisory jurisdiction regimes differing from that of the ICJ. The fundamental factor accounting for this phenomenon is that different international judicial organs exercise different functions within their own

62 Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission on authorizing the Permanent Secretary to seek Advisory Opinion pursuant to Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf, 1 May 2014.

organizational systems, thereby having different natures. In light of this reality, the ITLOS can neither imitate the advisory jurisdiction regime of the ICJ nor devise its own regime freely. While satisfying the demands of the latest development of the law of the sea and international adjudication, the optimal path is to develop the Tribunal's advisory function in a way that is adequately foreseeable, consistent with historical experience and can bring the role of the judiciary into full play.

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关于中国海警海上执法武力使用相关问题的思考

赵伟东 *

内容摘要: 海上执法武力使用是中国海上执法力量整合后必须予以明确和解决的问题，尤其是关于武力使用的适用条件、原则和武力使用的渐进层级。本文试图在分析、借鉴美国海岸警卫队武力使用政策和国内外关于执法人员武力使用原则的基础上，针对中国海警海上执法任务现状、装备情况和海上执法特点，提出中国海警海上执法武力使用的条件、原则和武力使用渐进层级，以期为中国海警建设和海上执法行动提供参考。

关键词: 中国海警　海上执法　武力使用　原则　层级

一、引　言

2009 年 2 月 15 日，一艘中国货轮在日本海遭到俄罗斯边防军炮击沉没，[1] 此后，有关俄罗斯边防军海上执法是否过度使用武力的问题引起人们的广泛讨论。2012 年，随着钓鱼岛问题的不断升温以及中国在钓鱼岛维权巡航的常态化，海上执法武力使用问题再次引起争论。郁志荣研究员在 2012 年 12 月 10 日提出了“专属经济区不同于领海，不可以在专属经济区使用武力”[2] 的观点；同年 12 月 14 日，中国人民解放军海军少将罗援发表文章认为，武装执法必不可少，只有“组建国家海岸警备队”，才能“整合战略资源，形成拳头力量，使中国在领海的执法维权斗争中有更大回旋余地和有为空间，同时也与国际接轨”。[3] 2013 年 3 月 10 日，中国公布国务院机构改革和职能转变方案，中国将据此重新组建国家海洋局并以中

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1 俄罗斯 09 年击沉中国船只新星号事件全程回顾，下载于 http://news.ccvic.com/guoneixw/shizheng/2012/0718/a305970.shtml，2012 年 7 月 18 日。
2 专家：决不能模仿美日韩等国建立海岸警备队，下载于 http://mil.huanqiu.com/observation/2012-12/3361406.html，2012 年 12 月 10 日。
3 组建国家海岸警备队刻不容缓，下载于 http://opinion.huanqiu.com/opinion_world/2012-12/3378809.html，2012 年 12 月 14 日。

国海警局的名义开展海上维权执法活动，以推进海上统一执法，加强海上维权力量。[4] 与此同时，有关人士也建议，国家海洋局在整合力量后，不排除将参照国际经验，以对等原则，加强海上巡逻舰艇武力装备的可能。[5] 鉴于海上执法武力使用一直存在使用原则与条件不够明确、程序不够严谨和科学、审查方式及后果审查不完善等一系列问题，[6] 为使重组后的海上执法力量最大限度发挥海上维权执法职能，本文在分析借鉴美国海岸警卫队武力使用政策和其他相关研究成果的基础上，对海上执法武力使用的条件、原则和武力使用渐进层级问题作了详细探讨。

二、海上执法武力使用的条件和原则

新的国家海上执法力量（中国海警）将实现原国家海洋局及其中国海监、公安部边防海警、农业部中国渔政、海关总署海上缉私警察的队伍和职能的整合。[7] 其中，原中国海监、中国渔政具有行政执法权，边防海警、海上缉私警察具有刑事执法权。截至本文撰写时，虽然还没有从法律的角度明确新组建国家海洋局的执法权限，[8] 但既然是队伍和职能的整合，整合后的中国海警兼具行政执法权和刑事执法权也是情理之中的事情，整合后的队伍自然也满足国际公认的关于“执法人员”的认定，[9] 因而也就具有在绝对必要时使用武力的权利。[10]

（一）海上执法武力使用的条件

对海上执法武力使用的条件作出规定，目的是在保障执法有效性的同时，避免因滥用武力而导致法律责任。

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4 王峰：《重组国家海洋局，整合海上执法力量》，下载于 http://news.xinhuanet.com/2013lh/2013-03/11/c_124442355.htm，2014 年 6 月 1 日。

5 《新媒：中国组建海洋局重在整合，不等同于提升军事力量》，下载于 http://news.ifeng.com/mainland/special/2013lianghui/content-2/detail_2013_03/12/23014184_0.shtml?_from_ralated，2014 年 6 月 1 日。

6 孙岩：《现阶段警察执法中武力使用等级探究》，载于《大观周刊》2012 年第 14 期，第 49 页。

7 《将重组国家海洋局，整合海上执法力量维护国家海洋权益》，下载于 http://lianghui.people.com.cn/2013npc/n/2013/0310/c358679-20737911.html，2014 年 6 月 1 日。

8 《海警局是否有刑事执法权尚需明确》，下载于 http://www.law-lib.com/fzdt/2013032108 49-47.htm，2014 年 6 月 1 日。

9 “执法人员”一词包括行使警察权力、特别是行使逮捕或拘禁权力的所有司法人员，无论是指派的还是选举的。参见联合国大会 1979 年 12 月 17 日第 34/169 号决议，《执法人员行为守则》第 1 条。

10 联合国大会 1979 年 12 月 17 日第 34/169 号决议，《执法人员行为守则》第 3 条，“执法人员只有在绝对必要时才能使用武力，而且不得超出执行职务所必需的范围。”

1. 海上执法人员资质要求

由于武力使用关乎作为基本人权的生命权，因此在执法中使用武力被认为是一种极端措施，[11] 作为武力使用主体的海上执法人员必须满足经法律授权、有武力使用资格这 2 项条件。

首先，必须要有法律授权。在这一点上，海上执法目前既有国内法规作为依据，又有国际法条 [12] 作为支撑，这种双重法律依据是其一大特点。就国内法规来说，虽然已有《中华人民共和国人民警察法》、[13]《中华人民共和国人民警察使用警械和武器条例》[14]（以下简称“《条例》”）、《海关工作人员使用武器和警械的规定》、[15]《公安机关海上执法工作规定》[16] 等法律、部门规章的授权和规制，但就队伍和职能整合后的海上执法力量来说已显不足，需要对其中的部分条款进行整合或修订。就国际法条来说，已有《执法人员使用武力和火器的基本原则》、《执法人员行为守则》和适用于海上武装冲突的国际法《圣雷莫交战规则手册》等作为参考。虽然这些国际法条不禁止执法人员在执法过程中使用武力，但却对武力使用的条件（如上文提到的“在绝对必要时”）进行了严格限制。[17]

其次，海上执法武力使用人员必须经过严格培训。这些人员的选定是以能够有效完成执法任务所需要的良好道德、心理和身体素质为前提，他们的上岗资质是以所有人员都经过严格训练和考核为标准。[18] 对于该项条件的落实可参考一些外警 [19] 的成熟做法。

美国海岸警卫队（以下简称“美国海警”）规定，携带枪支的执法人员都要进行高强度的 M9 手枪、M16 自动步枪武器使用培训。参加海上行动的所有人员都要参加每 6 个月一次的携载武器资格认证。此外，所有人员还要接受散弹枪、化学制剂武器、击打武器等器械的使用训练。所有在任务中可能使用武器的人员每 6 个月都要进行一次有关如何判断“是否开火”的课程培训，单位指挥官 / 负责

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11 红十字国际委员会：《暴力与使用武力》，第 41 页，下载于 http://www.icrc.org/chi/assets/files/other/icrc_006_0943.pdf，2014 年 6 月 1 日。

12 焦淑燕著：《我国海上执法模式研究》（硕士学位论文），大连：大连海事大学 2010 年版。

13 中华人民共和国人民警察法（主席令第 40 号），下载于 http://www.mps.gov.cn/n16/n1282/n3493/n3763/n4138/427625.html，2014 年 6 月 1 日。

14 中华人民共和国人民警察使用警械和武器条例，下载于 http://baike.baidu.com/view/437049.htm，2014 年 6 月 1 日。

15 海关工作人员使用武器和警械的规定，下载于 http://www.gov.cn/gongbao/content/2011/content_1860760.htm，2014 年 6 月 1 日。

16 公安机关海上执法工作规定，下载于 http://www.gov.cn/flfg/2007-09/28/content_763859.htm，2014 年 6 月 1 日。

17 高健军：《海上执法过程中的武力使用问题研究——基于国际实践的考察》，载于《法商研究》2009 年第 4 期，第 26 页。

18 《执法人员使用武力和火器的基本原则》第 18、19 条，下载于 http://www.ohchr.org/CH/Issues/Documents/other_instruments/45.PDF，2014 年 6 月 1 日。

19 赵伟东、徐赞斌著：《美国海岸警卫队业务基础》，北京：国防大学出版社 2012 年版，第 105~110 页。

人根据考核结果作出哪些人员能够携带武器的最终决定。[20] 登船官培训开设了 14 门课程的课堂教学 [21]（5 周共 24 个训练日）和实训 [22]（2 周共 11 个训练日），圆满完成训练和考核的人员才被授予海上执法登船官资格，培训内容中就包括“武力使用”的教学和训练。登船队员需参加 2 周共 11 个训练日的培训，包括有关武力使用和登船程序等培训，经考核合格才能返回部队在登船官监督下行使登船队员的职责。[23] 承担特战任务的美国海警可部署行动大队（包括海事安全响应队、直接行动队、海事安保队、海上执法部队防护队、战术执法队和执法特遣队等）队员通常需要进行为期 40 天的培训，而这些队员入学的前提条件之一是经过武器使用的培训和资格认证。[24]

享有“亚洲最佳”警队美誉的香港警队为保证警务人员熟练掌握武器警械的使用，建立了完善的强制性训练制度，其中包括有关武器使用的岗前训练，在岗期间的每年例行培训、机动部队培训以及专门培训。此外，正式警员在岗期间每年都需参加 3 次警察总部枪械训练科组织的强制性培训，培训合格者才可配枪执勤；工作 1 年以上的警员，需轮流到机动部队接受 16 个星期的防暴训练。[25] [26]

2. 使用武力的条件要求

《条例》第三章第 9 条规定了“可以使用武器”的数种条件，第 10 条规定了“不可以使用武器”的数种条件，其中多有“判明”、“警告”、“来不及警告”等不够明确的用语。[27] 从武力使用条件的具体实践及效果看，这些条款既没有考虑到海上执法的特殊性，又确有宏观上“过松”和微观上“过紧”的问题，以至于出现海上执法武力使用名存实亡的现象。[28]

国际条约就海上执法武力使用条件所作出的规定可归纳为 3 条：（1）在一般情况下应避免使用武力，（2）只有在条约所规定的特定情形下才能使用武力，（3）

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20 赵伟东、徐赞斌著：《美国海岸警卫队队员手册》，北京：海潮出版社 2012 年版，第 268 页。

21 Boarding Officer Course, at http://www.uscg.mil/mlea/courses/boc.asp, 16 January 2013.

22 Boarding Officer Practical Course, at http://www.uscg.mil/mlea/courses/bopc.asp, 16 January 2013.

23 Boarding Team Member Course, at http://www.uscg.mil/mlea/courses/btm.asp, 17 January 2013.

24 Basic Tactical Operations Course (BTOC), at http://www.uscg.mil/smtc/Training_USCG_BTOC.asp, 2 August 2012.

25 谢邪：《香港警察的教育训练》，下载于 http://www.douban.com/group/topic/2512298/，2013 年 5 月 20 日。

26 泽清：《警用枪支管理如何保证程序正当》，下载于 http://view.163.com/12/0927/11/8CDHA7K000012Q9L.html，2013 年 5 月 20 日。

27 徐速：《我国警察武器使用权的立法规制》，下载于 http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=70623，2014 年 6 月 1 日。

28 王珂：《公安海警武器使用的现状与对策》，载于《海洋开发与管理》2011 年第 3 期，第 41 页。

必须使用武力时也应以必要程度为限。[29] 其中，第（3）条是对武力使用的界限限定。对于第（2）条所指的“特定情形”，《条例》分别按“警械的使用”和“武器的使用”进行了区分。《条例》中界定的“警械”和“武器”的内涵和外延与国际上通用的“非致命性武力 / 非致命性武器”和“致命性武力 / 致命性武器”的界定基本相符。美国海警也对一般性武力（或称非致命性武力）和致命性武力加以区分，只不过使用的条件约束更适合海上执法的特殊性，因此也更具有参考意义。

美国海警对非致命性武力使用条件的规定是：（1）自卫或保护他人；（2）强制执行授权美国海警的法令；（3）阻止联邦犯罪，或授权美国海警处置的危急状态或其他犯罪；（4）执行司法逮捕，或防止触犯联邦法律的犯罪嫌疑人逃跑；（5）阻止授权美国海警保护的财产遭到偷窃、故意损毁或破坏。[30]

美国海警对致命性武力使用条件的规定更加详细。第一种条件是可能使用致命性武力的情况：（1）对威胁使用致命性武力不会对他人造成不应有的危险，（2）当前官员已经被犯罪嫌疑人确认为执法官，或（3）已经发出了切实可行的终止危险行为的命令。第二种是可能必须使用致命性武力的情况：（1）用于个人自卫，但仅限于有充足的理由相信会对执法官或他人构成死亡或严重身体伤害的紧迫威胁；（2）执行司法逮捕，或防止逃跑：①有充足的理由判定犯罪嫌疑人犯有使用或威胁使用致命性武力的重罪；或②犯罪嫌疑人携带武器，或虽没携带武器但却对他人构成死亡或严重身体伤害的紧迫威胁；或③犯罪嫌疑人未能服从终止行为的命令，而该命令切实可行并且不会对其或他人构成危险。第三种是对仅用于保护财产免遭偷窃、故意损毁或破坏的情况，一般不授权执法人员使用致命性武力，但是在某些情况下，美国海警司令可授权执法人员使用致命性武力以保护涉及国家安全或危险物质（如核材料、爆炸物、武器、弹药等）的财产。[31]

针对海上执法的特定要求，美国海警将嫌疑船 [32] 区分为不服从命令的船只和构成紧迫威胁态势的船只，明确了使用武力的条件并对警告射击、失能火力等特殊射击方式做出了规定。船载武力的使用条件有 2 条：（1）用于强制执行要求停船的合法命令；（2）用于自卫（包括人员或部队单位）。警告射击这种射击方式，

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29 高健军：《海上执法过程中的武力使用问题研究——基于国际实践的考察》，载于《法商研究》2009 年第 4 期，第 26 页。

30 迈伦•诺德奎斯特（Myron Nordquist）著，卢佳译：《海上执法》，载于《中国海洋法学评论》2005 年第 1 期，第 202 页。

31 Rules of Engagement and Use of Force Policies: The USCG Model, at https://www.diils.org/resource/14-031-roe-and-use-force-uscgdoc-1, 1 June 2014.

32 嫌疑船是国内通行说法，美国海警将其分别定义为不服从命令的船只和构成紧迫威胁态势的船只，2 种类型的船只定义不同。不服从命令的船只是指接收到合法命令而拒绝停船接受检查的船只；构成紧迫威胁态势的船只是指其行动对任何人员构成了死亡或严重身体伤害威胁的船只。At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

原是海军专用的军事术语，[33] 美国海警现将其用于向嫌疑船只的船首前方一定距离发射枪（炮）弹，以示警告并逼迫嫌疑船停船受检，因此可以理解为是一种警告性拦阻射击方式。[34] 一般认为，警告射击并非严格意义上的武力使用。实施警告射击，意味着之后可能使用更加严厉的对抗措施。失能火力是向嫌疑船只的船桥或舵机射击，以使嫌疑船失去动力而被迫停止航行。警告射击和失能火力一样，都不是以致人或船于死地为目标，而是迫使嫌疑船停船受检，也都可以船或直升机为发射平台组织实施。关于这 2 种特殊射击方式，美国海警有如下规定：（1）必须遵循特定的程序和标准；（2）最终决策权归高级指挥官；（3）对嫌疑船的司法权力必须得到确认；（4）必须使用了终止嫌疑船航行的其他办法；（5）对已经停止航行的嫌疑船限制使用。[35]

实际上，美国海警制定的船载武力使用政策和程序对于不服从命令的船只和构成紧迫威胁态势的船只是有区别的。首先，对于不服从命令的船只，如果是在自卫条件下使用武力，无需遵守武力使用层级的规制。但是，对于构成紧迫威胁态势的船只，必须遵守武力使用层级的规制。其次，如果船只的行动对执法人员构成了死亡或严重身体伤害威胁，或其他情况（个人自卫），可适用美国海警武力使用原则。第三，如果船只威胁到海警执法平台或附近的美军（部队自卫），可适用一般交战规则原则。第四，在自卫中使用武力，无论是适用美国海警武力使用原则还是一般交战规则原则，都需遵循适用于自卫使用武力的相同原则。

对于中国海警海上执法武力使用的条件要求，可根据海上执法的特点并依据《条例》之规定作出武力使用上限的详细说明，尤其是致命性武力的使用。致命性武力一般应用于打击海上走私、贩毒、贩枪、抢劫和海上恐怖活动等危害海上治安和生产安全的严重暴力犯罪行为。

（二）海上执法武力使用的原则

陈万平等在研究军舰打击海盗及武装劫船行为中如何使用武力问题时，提出武力使用的 3 个原则：合法性原则、比例原则、最小伤害原则。[36] 徐速对警察执法

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33 警告射击用航海术语通常称为“掠过船首射击”。在 18 世纪，警告射击可以向任何已确认国籍的船只实施。Warning shot, at http://en.wikipedia.org/wiki/Warning_shot, 1 June 2014.

34 赵伟东：《14.5 mm 机枪对海射击射表诸元解析逼近研究》，载于《公安海警高等专科学校学报》2007 年第 2 期，第 1 页。

35 Jonathan Edwards, Maritime Law Enforcement, at http://pfpconsortium.org, 1 June 2014.

36 陈万平、朱孔胜：《打击海盗中的武力使用研究——以索马里海盗为例》，载于《哈尔滨学院学报》2010 年第 9 期。

使用武器提出了 2 个原则：合法性原则、紧迫威胁原则。[37] 黄淑娥在分析公安机关人民警察使用武器的原则时提出了 6 个原则：保障人权原则、确需原则、限度原则、依法原则、比例原则和效率原则。[38] 闫如恩在对贵州省安顺关岭“1·12”枪击事件的评述中提出人民警察在使用武力时应坚持 4 个原则：依法使用武力的原则、最低程度使用武力的原则、保护公民合法权益与保护自身安全并重原则。[39]《执法人员行为守则》第 3 条规定：“执法人员只有在绝对必要时才能使用武力，而且不能超出执行职务所必须的范围。”综合以上所述，本文提出海上执法武力使用 3 原则：合法性原则、必要性原则和最小伤害原则。这 3 项原则与《条例》第 4 条所规定的“人民警察使用警械和武器，应当以制止违法犯罪行为，尽量减少人员伤亡、财产损失为原则”基本吻合，并对执法人员的执法工作具有一定的指导意义。

1. 合法性原则

合法性原则就是依法执法原则、依法行政原则。海上执法武力使用必须由经法律授权的执法机关实施，且必须是在法定职权范围内按合法程序进行执法，而且执法行为的内容和形式必须符合有关法律规定。[40] 这是在保证武力使用效果的同时，避免侵权行为发生的必要前提和保障。

2. 必要性原则

必要性是对海上执法人员使用武力的第二项原则要求。按照对《执法人员行为守则》第 3 条的解释，必要性包含 3 方面的含义：（1）在一般情况下要避免使用武力。这就意味着“只有在为实现合法目标的所有其他手段均告失败”[41] 时方可使用武力，武力的使用只是例外情况而非执法中的常态，并且即使在可以使用武力的例外情况下，武力使用也必须作为最后不得已才采取的手段。（2）只有在规定的特殊情况下才能使用武力。所谓“规定的特殊情况”也就是上文中提到的关于“使用武力的条件要求”。(3)在必须使用武力时也应以必要程度为限。也就是说，当武力使用不可避免时，所使用的武力也不应超出根据情况为必要的最低限度。超过这一限度的武力就是不合理的，其必要性也就不成立，从而也是非法的。[42]

3. 最小伤害原则

最小伤害原则，是指在不得不使用武力制止违法犯罪行为的情况下，也应本

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37 徐速：《我国警察武器使用权的立法规制》，下载于 http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=70623，2014 年 6 月 1 日。

38 黄淑娥：《论公安机关人民警察使用武器的原则》，载于《法制与社会》2008 年第 19 期。

39 闫如恩：《人民警察使用武力的法定原则》，下载于 http://www.gmw.cn/01gmrb/2010-01/28/content_1045611.htm，2014 年 6 月 1 日。

40 吕建华：《论法制化海洋行政管理》，下载于 http://www.zclw.net/article/sort015/sort022/info-75488_2.html，2014 年 6 月 1 日。

41 红十字国际委员会：《暴力与使用武力》，第 41 页，下载于 http://www.icrc.org/chi/assets/files/other/icrc_006_0943.pdf，2014 年 6 月 1 日。

42 高健军：《海上执法过程中的武力使用问题研究——基于国际实践的考察》，载于《法商研究》2009 年第 4 期，第 26~27 页。

着尊重生命权的本意，将有可能造成的伤害减低到最小程度，并尽一切努力保证生命不受伤害。

以上合法性原则、必要性原则和最小伤害原则 3 原则中，合法性原则是依法使用武力的基础，必要性原则是满足“确需”、“紧迫威胁”等武力使用条件的前提，而最小伤害原则是武力使用适当并达成执法目的的最终目标。从前往后，3 个原则互为基础，具有强相关的渗透关系，并组合成为指导海上执法武力使用的基本原则。

三、海上执法武力使用的渐进层级

武力使用的渐进层级政策，是规范执法人员据情使用武力制服抵抗执法行为的标准化、指导性程序。[43] 这种渐进式政策，是具体落实武力使用原则、规制执法人员执法行为的需要，其主要目的就是争取行动的时间和空间，以避免在行动中不得不升级到最高一级的武力。在海上执法行动中，环境往往复杂险恶、现场态势瞬息万变，武力使用层级的决策，经常需要现场指挥官视情、迅速作出判断，而即使是非致命性武器的使用，如果使用不当，也可造成极为严重的后果。[44] 因此，有必要对海上执法武力使用的渐进层级进行研究和规范。

（一）影响武力使用渐进层级的主要因素

海上执法武力使用层级除了要受到武力使用的条件、原则支配外，还与实施武力的装备种类、携载平台有关。

武力装备种类按是否“致命”可分为 2 类：致命性武力和非致命性武力。致命性武力是指企图或可能造成死亡或造成会导致死亡的严重伤害的武力，而不管其是否实际造成了死亡或严重伤害。[45] 致命性武力通常与舰炮、机枪、轻武器等武器的使用相对应。非致命性武力是指不企图或不可能造成死亡或会导致死亡的严重伤害的武力，[46] 也可以定义为除致命性武力之外的其他武力。[47] 非致命性武力通常

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43 Use of force continuum, at http://en.wikipedia.org/wiki/Use_of_force_continuum, 18 March 2013.

44 韩国海警执法致一中国渔民死亡，下载于 http://news.sina.com/c/2012-10-17/070925374348.shtml，2012 年 10 月 17 日。

45 《圣雷莫交战规则手册》，第 91 页，下载于 http://www.iihl.org/iihl/Documents/Sanremo%20ROE%20Handbook%20(Chinese).pdf，2014 年 6 月 1 日。

46 《圣雷莫交战规则手册》，第 88 页，下载于 http://www.iihl.org/iihl/Documents/Sanremo%20ROE%20Handbook%20(Chinese).pdf，2014 年 6 月 1 日。

47 Rules of Engagement and Use of Force Policies: The USCG Model, at https://www.diils.org/resource/14-031-roe-and-use-force-uscgdoc-1, 1 June 2014.

与警棍、催泪弹、高压水枪 / 水炮、特种防暴枪、手铐、警绳等警用器械的使用相对应。

如果按携载平台进行区分，海上执法时的武力可分为单人、船载和机载，分别对应单人使用的警械和轻武器、执法船载致命武器和非致命武器以及直升机载致命武器和非致命武器。

（二）武力使用渐进层级的制定

1. 登船执法队员武力使用渐进层级

登船执法队员的武力使用属于单人携载武力使用。美国海警登船执法队员配用的非致命性武器包括手铐、化学刺激物质、非致命性弹药（12 号口径尖头子弹、12 号口径鱼鳍状橡皮子弹等）、可伸缩警棍等，[48] 致命性武器有手枪、制式步枪、雷明顿 M870 型散弹枪等。他们将登船执法队员的武力使用定义为 6 个渐进层次，并同时指出：在理想状态下，海警指挥官应从第一级开始使用并逐级提高，直到合法指令得到执行。但是特殊情况下，也可以直接使用更高层次。这 6 个层级分别是：[49]

第一级：警官出现，即用手势、语言或信号劝说自愿服从。

第二级：口头命令，即口头命令疑犯执行某种行动。

第三级：技术约束，即采取对身体伤害尽可能小的技术手段或行动。这些技术手段包括约束性器械和疼痛型、力量型措施的适度使用。

第四级：攻击性响应措施，即使用能造成身体严重不适，但又不危及生命、使身体受伤，可使皮肤、眼睛、粘膜等造成刺激效果的措施或行动。该措施包括使用化学刺激物。

第五级：中级武器，即采取很可能造成身体严重伤害的措施或行动。这些措施包括规定的非致命性弹药的适度使用，如 12 号口径非致命弹药。

第六级：致命武力，即采取可造成死亡或身体严重伤害的措施或行动。这些措施包括武装部队单兵配用的标准武器的使用。

以上 6 个层级的渐进区分，与美国海警登船执法队员的配用装备紧密相关，适合携载标准单人装备的登船执法队员对嫌疑船上人员的执法行动。

中国海警登船执法队员武力使用渐进层级也要与其单人标准配用装备相适

48 傅崐成、徐鹏：《海上执法与武力使用——如何适用比例原则》，载于《武大国际法评论》2011 年第 2 期，第 24 页。

49 At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

应。参考《公安单警装备配备标准》[50] 和公安边防工作实际，公安边防管理局已于 2010 年制定了《公安边防单兵执勤装备编配标准》，[51] 但并未公开发布。由以上资料和部分公开资料 [52] [53] 推知，中国海警可能配用的主要单兵装备包括：自动步枪、手枪等致命性武器以及警棍、警绳、手铐、催泪喷射器、防暴枪等非致命性武器。考虑到以上装备情况，参考美国海警武力使用政策和国内警察执法武力使用层级，[54] [55] 本文提出中国登船执法队员武力使用渐进层级如下：

第一级：警官出现、语言引导，即警官表明身份，并适时使用语言进行引导，以便有效预防抵抗执法行为的发生。

第二级：口头警告，即使用语气强硬的警告、命令，通过警告威慑，控制行为人的抵抗行为。

第三级：徒手控制，即使用对人体伤害尽可能小的拳、拿、踢或倒地等徒手强制控制措施制服行为人。

第四级：低级攻击控制，即使用可对人体造成严重不适的催泪喷射器对不服从命令但未使用武力对抗的行为人实施低强度攻击，制止其抵抗行为。

第五级：中级攻击控制，即使用可对人体造成中等程度伤害或重度伤害的警棍等警械对使用武力对抗执法的行为人身体关键部位（非致命部位）进行击打，使其短时间内失去抵抗能力。

第六级：高级攻击控制，即使用可造成重度伤害、甚至死亡的防暴枪等武器发射非致命性弹药，制止剧烈抗拒执法的行为。

第七级：致命武力使用，即使用可造成死亡或严重伤害的自动步枪、手枪等致命性武器击毙行为人。

以上渐进层级比美国海警的武力使用政策略更加细致，有利于执法队员在执法中遇到抵抗行为时，即便错误地选用了相对高一级别的武力手段，也不会对行为人的权利造成很大的侵害，因此可以在一定程度上减少执法时出现武力使用不当的现象。但设置的层级过多，也可能导致武力手段选择决策难的情况出现。这

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50 公安单警装备配备标准，下载于 http://www.mps.gov.cn/n16/n1957124/n1957171/n1957428/2863724.html，2014 年 6 月 1 日。

51 《公安边防单兵执勤装备编配标准》（未见公开发布的资料）。严波：《执法规范化建设中的军械装备工作》，下载于 http://www.chinagabf.com/theory/hqbz/30325.html，2014 年 6 月 1 日。

52 《江苏海警开展处突演练，守护两节安全》，下载于 http://news.hexun.com/2011-12-31/136879110.html，2014 年 6 月 1 日。

53 《广西海警第一支队开展冬季海上大练兵》，下载于 http://bf.people.com.cn/GB/16686537.html，2014 年 6 月 1 日。

54 孙岩：《现阶段警察执法中武力使用等级探究》，载于《大观周刊》2012 年第 14 期，第 49 页。

55 许飞：《香港和大陆警察武力使用级别对比分析》，载于《江西公安专科学校学报》2010 年第 4 期，第 17 页。

就要求对执法队员进行必要、严格的培训，使其能够熟练掌握武力使用层级的选择和使用。

2. 船载武力使用渐进层级

美国海警大型执法船艇一般装备船载中、小口径舰炮和重机枪等重武器，小型执法船艇一般装备船载轻机枪等轻武器。在实际海上执法行动中，登船执法的前提一般是嫌疑船停船或处于便于登船的在航状态。因此，美国海警对嫌疑船的船载武力[56]使用渐进层级和战术方法另有规定，分为4级：[57]

第一级：发出命令，即采用一切可能的措施（无线通信、扩音器、蓝色警示灯、信号旗、探照灯、信息公告板、船笛/号）令其停船，机动接近至嫌疑船并始终保持可见，增加现场执法人数，暴露、准备、操纵武器并使之可见（但不能将武器瞄准嫌疑船）。

第二级：低级战术，即从上风处使用缆绳、网或缠绕物堵截违规帆船，割断其油管，向帆或机舱喷射水柱，机动地碰撞堵截船只。

第三级：较高级战术，即由高级警官授权，向嫌疑船操纵人员发射非致命性弹药。当决定使用较高级战术时，需审慎考虑船只失控风险及其后果。

第四级，失能性火力，[58]即当现场态势可能危及附近其他船只时可进行警告射击（即警告性拦阻射击），该项措施需要高级警官授权。如果警告射击无效，而且可以实施失能性火力，可对高速快艇发射失能性火力。警告射击严禁使用手枪。在多数情况下，应首先选用失能性火力，而警告射击并非必须。可发射失能性火力的武器有：制式步枪、雷明顿M870型散弹枪、船载舰炮和机枪。

中国台湾地区“海巡署”在其发布的“署巡法字第0940018766号《海岸巡防机关海域执法作业规范》”[59]第10条规定，“海巡人员依法执行职务遇反抗或攻击，必要时，得采下列措施：（一）舰、艇、船长或带队官应即下达并完成警戒部署，注意维护人员及装备安全；（二）应与被检船舶保持距离以雷达监控，同时全程录像照相存证，并依规定通报反应；（三）对于反抗或攻击行为，应以视听音响设备实施警告制止，必要时得使用船上消防泵以强力水柱或对空鸣枪示警，制止继续反抗或攻击行为；（四）采取前款措施仍无法压制时，可使用适当必要武力及申请后援，适法执行。”从中可知，中国台湾地区“海巡署”对抗拒执法的嫌疑船的武力

56 美国海警称之为“Vessel on Vessel Use of Force”。At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

57 美国海警称之为“Vessel on Vessel Use of Force”。At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

58 失能性火力，是指以船只失去动力为意图的火力应用形式，而且船只损毁和人员伤害可能为最小。失能性火力不是致命性武力的组成部队，仅限于使目标船停船。At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

59 海岸巡防机关海域执法作业规范，下载于 http://www.lawtime.cn/info/minshi/fagui/2011040421956.html，2014年6月1日。

使用虽然没有明确分级，但也有先后 3 个层次的规定：首先进行视听音响警告，其次实施水柱攻击或对空鸣枪示警，第三是使用适当必要武力。

按目前公安海警所属执法船艇的装备及未来可能发展，中国海警执法船艇将配用小口径舰炮、大口径机枪等致命性武器和消防水炮、防暴弹发射器等非致命性武器。[60] 参考中国海警针对嫌疑船的一般海上执法程序，[61] 船载武力使用渐进层级可分为以下 5 级：

第一级：发出命令，即视情使用警笛、信息公告板等设备向嫌疑船发出停船受检视讯信号；使用扩音器、无线通信等设备发布口头命令，令嫌疑船停船受检；同时机动接近至嫌疑船始终可见的位置。

第二级：水柱冲击、战术堵截，即由现场最高指挥官授权，使执法船占领有利阵位，视情使用消防水炮实施水柱冲击；或快速机动地运用挤压、碰撞战术堵截嫌疑船。

第三级：震爆威慑，即由现场最高指挥官授权，使执法船占领有利阵位，使用防暴弹发射器向嫌疑船发射非致命性弹药，实施震爆威慑火力运用。

第四级：警告拦阻，即由上级最高指挥官授权（紧急时可以是现场最高指挥官授权，事后上报），使用舰炮、机枪等船载武器，视情进行飞掠船首射击，达成警告性拦阻射击火力运用。

第五级：失能射击，即使用舰载精确射击武器或反器材步枪对嫌疑船发射失能性火力，直到嫌疑船停船受检。该层级需要岸基最高指挥官授权（紧急时可以是现场最高指挥官授权，事后上报）。

同时还应明确，一般情况下，海警指挥官应从第一级开始使用并逐级提高，直到合法命令得到执行。但是特殊情况下，也可以直接使用更高层次。此外，但凡发射实弹的执法行动，均应在事后上报武力使用详情并提供现场视频证据，以待审查评估。

3. 机载武力使用渐进层级

由于直升机在海上执法行动中拥有高速机动的绝对优势，所以直升机载武力使用已成为国际海上执法武力使用的常规形式。美国海警的直升机载武力，由直升机拦截战术中队负责实施，直升机上配有反器材步枪、轻机枪等武备。直升机载武力的主要目标是毒品走私高速快艇，直升机载武力使用的前提是巡逻飞机发现嫌疑船并通知附近的美国缉私船开展执法行动。[62] 船载直升机飞临嫌疑目标上空，首先进行目标识别和确认，如果确认是嫌疑船，即进入机载武力使用环节：

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60 中国海警，下载于 http://baike.baidu.com/view/2395328.htm，2014 年 6 月 1 日。

61 公安部边防管理局著：《海警业务管理指挥教程》，北京：群众出版社 2006 年版。

62 Craig Neubecker, Coast Guard Helicopter Interdiction Tactical Squadron (HITRON-Jacksonville), p. 5, at http://www.uscg.mil/history/webaircraft/USCG_HITRON_History_Neubecker.pdf, 1 June 2014.

第一级：直升机出现，即使用可视信号和口头警告劝说停船（包括使用警报器、扩音器和无线电通信）。

第二级：警告射击，即占领目标船舷侧有利位置，向嫌疑船船首前方进行射击，逼迫其停船。

第三级：失能性火力，即使用配备激光瞄具的 12.7 毫米反器材步枪射击嫌疑船的发动机，直到其被迫停船。

如果以上任一层级的武力使用有效（即嫌疑船停船），即转入缉私船登船队员的登船执法环节。

未来中国海警船载直升机的配备和使用已成定局，但武备的配备尚无定论。如果未来中国海警船载直升机需要配用武备，本文建议可参考中国海军在索马里反海盗行动中所用直升机的武备配用经验，在后舱门附近安装一座反器材步枪[63]并配用轻机枪和防暴弹发射器，以便使直升机能实施警告射击并运用失能性火力。机载武力使用渐进层级可按如下分为 4 级：

第一级：直升机出现，即使用警报器、扩音器和无线电通信等设备，向嫌疑船发出视讯信号和口头警告，令其停船。

第二级：震爆威慑，即使用防暴弹发射器发射非致命弹药，对嫌疑船形成有效威慑，迫使嫌疑船停船。

第三级：警告射击，即使用轻机枪实施飞掠船首射击，运用警告性拦阻射击火力，逼迫嫌疑船停船。

第四级：失能性火力，即使用反器材步枪瞄准嫌疑船的发动机实施精准射击，直到嫌疑船失去动力。

以上任一层级的武力使用如果有效，即进入登船执法环节。其中“第二级：震爆威慑”层级的设计，可实现防暴弹发射器等非致命性武器的使用，以便在达成登船执法目的的同时，尽可能降低武力使用层级的级别。当然，如果能有“船只陷阱”[64]等其他技术控制装置的发明和使用，还可在第一级和第二级之间再增加一级“技术控制”，这样可以加大非致命性武器的使用力度。

四、结　论

未来中国海上执法力量将符合国际公认的关于“执法人员”的认定标准并拥

63 《中国海军反海盗“与时俱进”：直升机配上重机枪》，下载于 http://bbs.voc.com.cn/topic-1864140-1-1.html，2014 年 6 月 1 日。

64 Linda M. Johnson, Research and Development Center Develops Cutting-Edge Applications to Help Coast Guard Achieve Missions, at http://www.uscg.mil/acquisition/newsroom/pdf/cg9newsletterjan09.pdf, 1 June 2014.

有行政执法权和刑事执法权，因而在海上执法行动中就具有在绝对必要时使用武力的权利。在此前提下，海上执法人员必须经过严格的武力使用培训和考核才能取得武力使用资格；武力也必须在规定的条件下使用并遵循合法性、必要性和比例原则，才能满足在为实现合法目标的所有其他手段均告失败、同时根据要实现之合法目标的重要性而恰当使用武力的一般准则要求。

为落实海上执法武力使用原则、规制执法人员的执法行为，避免在行动中使用不必要的更高层级的武力，需要针对海上执法行动特点，分别对船载执法队员武力使用、船载武力使用和直升机载武力使用的渐进层级进行规范。而规范的制定，既要满足海上执法武力使用的条件和原则要求，又要与武力使用的携载平台类型和武器装备类型相适应。这是相关国际法关于执法人员武力使用的一般要求，也是国内相关法规的基本要求。

A Discourse on the Use of Force by China Coast Guard in Maritime Law Enforcement

ZHAO Weidong*

Abstract: The use of force in maritime law enforcement is an issue that has to be clarified and resolved after the integration of Chinese maritime law enforcement forces. Issues related to this question include the applicable conditions, principles, and continuums on the use of force. In an effort to provide useful references for the organizational building of the China Coast Guard (CCG), this article puts forward its own opinions on the aforementioned issues in view of the current tasks and equipment allocation of the CCG, and the particularities of maritime law enforcement activities, which are based on an analysis of the policies of the United States Coast Guard on the use of force and the principles for use of force by law enforcement officers home and abroad.

Key Words: China Coast Guard; Maritime law enforcement; Use of force; Principles; Continuum

I. Introduction

On February 15, 2009, a Chinese cargo ship sank in the Sea of Japan after a shelling attack by Russian Border Guard,[1] inciting wide discussions on whether the Russian Border Guard had been intemperate in its enforcement of Maritime Law. In 2012, the debate on the use of force in maritime law enforcement was reopened as the Diaoyu Islands issue continued to heat up and China normalized its patrol activities around the Diaoyu Islands to safeguard its sovereignty. On December 10, 2012, Yu Zhirong, a Chinese researcher, published an article asserting that

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1 Russia Sank Chinese Vessel in 2009: An Entire Review of the *New Star* Incident, at http://news.ccvic.com/guoneixw/shizheng/2012/0718/a305970.shtml, 18 July 2012. (in Chinese)

"the use of force is prohibited in the exclusive economic zone, and in that regard should be handled differently since it is indeed different from the territorial sea".[2] On December 14 of the same year, Luo Yuan, holding the rank of Major General in the People's Liberation Army Navy, expressed in an article that since an armed law enforcement is essential, it is only by "forming a national coast guard", can "strategic resources be expected to be integrated into a powerful force to allow more room for China to maneuver and gain achievement in its struggle to enforce its laws in and safeguard the sovereignty over its territorial waters. In the meanwhile, it is also part of China's efforts to conform to international practices".[3] On March 10, 2013, China issued the Institutional Reform and Functional Transformation Scheme of the State Council, according to which the State Oceanic Administration of China is to be restructured and maritime law enforcement activities are to be carried out in the name of the China Maritime Police Bureau, in an effort to promote a unified maritime law enforcement that will reinforce China's strength for safeguarding its maritime rights and interests.[4] Additionally, it was also suggested that after the integration of the forces, the restructured State Oceanic Administration should not exclude the possibility of increasing the arms strength of maritime patrol ships in application of the principle of reciprocity according to international practice.[5] Since there exists a series of problems on the use of force in maritime law enforcement, such as unclear principles and conditions of use, less rigorous and unscientific procedures, and inefficient review methods and consequence review,[6] this article, based on an analysis of the policies on the use of force by the United States Coast Guard and other relevant research findings, will make a detailed discussion on the conditions, principles, and continuums on the use of force in maritime law enforcement, so as to help bring into full play the function and role of the restruc-

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2 Expert Opinion: China Can Not Establish Its Coast Guard Following the Examples of the US, Japan or South Korean, at http://mil.huanqiu.com/observation/2012-12/3361406.html, 10 December 2012. (in Chinese)

3 No Delay in Forming the National Coast Guard, at http://opinion.huanqiu.com/opinion_world/2012-12/3378809.html, 14 December 2012. (in Chinese)

4 Wang Feng, Integrate Maritime Law Enforcement Force by Restructuring the State Oceanic Administration of China, at http://news.xinhuanet.com/2013lh/2013-03/11/c_124442355.htm, 1 June 2014. (in Chinese)

5 Singapore Media: the Restructuring of the State Oceanic Administration Does Not Amount to the Improvement of Military Power, at http://news.ifeng.com/mainland/special/2013lianghui/content-2/detail_2013_03/12/23014184_0.shtml?_from_ralated, 1 June 2014. (in Chinese)

6 Sun Yan, A Study on the Use-of-Force Continuum for Police Law Enforcement in the Current Stage, *Daguan Weekly*, No. 14, 2012, p. 49. (in Chinese)

tured maritime law enforcement forces to safeguard the maritime rights and interests of China.

II. Conditions and Principles of the Use of Force in Maritime Law Enforcement

The restructured maritime law enforcement force, China Maritime Police, is an integration of the relevant forces and functions of China State Oceanic Administration and its affiliate China Marine Surveillance, China Coast Guard (CCG) of the Ministry of Public Security of China, China Fisheries Law Enforcement Command of the Ministry of Agriculture of China, and Maritime Anti-Smuggling Police of the China General Administration of Customs.[7] Among these institutions, the China Marine Surveillance and the China Fisheries Law Enforcement Command have the right to administrative law enforcement while the CCG and the Maritime Anti-Smuggling Police have the right to criminal law enforcement. As at the time of this paper, there is no clarification from a legal perspective on the right to law enforcement enjoyed by the restructured China State Oceanic Administration.[8] However, since the China Maritime Police integrates the relevant forces and functions of the above organs, it is logical that it is entitled to the rights of administrative and criminal law enforcement, and that its integrated forces certainly meet the internationally recognized standards for "law enforcement officials".[9] Therefore, the China Maritime Police is entitled to the right to use force when strictly necessary.[10]

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7 The State Oceanic Administration to Be Restructured to Integrate Maritime Law Enforcement Forces and Safeguard the National Maritime Rights and Interests, at http://lianghui.people.com.cn/2013npc/n/2013/0310/c358679-20737911.html, 1 June 2014. (in Chinese)

8 It Remains to Be Clarified Whether Maritime Police Bureau Has the Right to Criminal Law Enforcement, at http://www.law-lib.com/fzdt/20130321084947.htm, 1 June 2014. (in Chinese)

9 The term "law enforcement officials", includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. See Article 1 of the Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979.

10 Article 3 of the Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979: "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty."

A. The Conditions for Use of Force in Maritime Law Enforcement

The stipulation on the conditions for use of force in maritime law enforcement is aimed at avoiding legal liabilities that will be incurred as a result of excessive use of force while equally ensuring the effectiveness of law enforcement.

1. Qualifications for Maritime Law Enforcement Officials

The use of force concerns the right to life, which is one of the fundamental human rights, thus, the use of force in law enforcement is considered an extreme measure.[11] For this reason, maritime law enforcement officials, as subject of the use of force, should meet the following two qualifications: to be legally authorized to use force, and qualified to use force.

Firstly, maritime law enforcement officials should be legally authorized to exercise force. In this connection, the use of force in maritime law enforcement is mainly featured by a dual legal basis, supported by both domestic laws and regulations and international laws.[12] With regards to the domestic laws and regulations, there are already multiple laws and departmental rules in place in China, including the People's Police Law of the People's Republic of China,[13] the Regulations of the People's Republic of China on Use of Police Implements and Arms by the People's Police (hereinafter "the Regulations"),[14] the Rules on the Use of Weapons and Police Implements by Customs Officers,[15] the Working Rules on the Maritime Law Enforcement by Public Security Organs,[16] etc. These laws and rules authorize the officials to use force and also regulate their use of force. Nevertheless, after the integration of the forces and functions of maritime law enforcement forces, some of the provisions under these laws and rules have exhibited some flaws and deficiencies that require consolidation or revision. In the case of international law, we can use as references the Basic Principles on the Use

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11 International Committee of the Red Cross, *Violence and the Use of Force*, p. 41, at http://www.icrc.org/chi/assets/files/other/icrc_006_0943.pdf, 1 June 2014. (in Chinese)

12 Jiao Shuyan, *Research on the Mode of China's Marine Law Enforcement* (master's degree thesis), Dalian: Dalian Maritime University, 2010. (in Chinese)

13 People's Police Law of the People's Republic of China (Order No. 40 of the President of China), at http://www.mps.gov.cn/n16/n1282/n3493/n3763/n4138/427625.html, 1 June 2014. (in Chinese)

14 Regulations of the People's Republic of China on Use of Police Implements and Arms by the People's Police, at http://baike.baidu.com/view/437049.htm, 1 June 2014. (in Chinese)

15 Rules on the Use of Weapons and Police Instruments by Customs Officers, at http://www.gov.cn/gongbao/content/2011/content_1860760.htm, 1 June 2014. (in Chinese)

16 Working Rules on the Maritime Law Enforcement by Public Security Organs, at http://www.gov.cn/flfg/2007-09/28/content_763859.htm, 1 June 2014. (in Chinese)

of Force and Firearms by Law Enforcement Officials, the Code of Conduct for Law Enforcement Officials, and the San Remo Manual on International Law Applicable to Armed Conflicts at Sea as well as other laws. Although these international legal codes have not prohibited the use of force by law enforcement officials in law enforcement, they have put a stringent constraint on the conditions for the use of force (e.g., the aforementioned "when strictly necessary").[17]

Secondly, maritime law enforcement officials should undergo rigorous training. The selected officials should possess the appropriate moral, psychological and physical qualities needed by the effective performance of law enforcement tasks, and must also undergo rigorous training and assessment before obtaining the qualification for the post.[18] As far as actual implementation is concerned, we can use as reference the shrewd measures taken by the maritime police of other countries.[19]

The following are some of the regulations of the United States Coast Guard (USCG): law enforcement personnel authorized to handle firearms should undergo high-intensity training on the use of M9 pistol and M16 rifle; all personnel involved in operations at sea should obtain a qualification certificate for carrying weapons once every six months; all personnel should receive trainings on the use of shotguns, chemical agents and impact weapons; all personnel that are likely to use weapons in a task shall attend a training course on determining "whether to fire or not" every six months, and it is up to the commander or head of the unit to make the final decision as to who can carry weapons depending on the training and assessment results.[20] A USCG member must satisfactorily complete a five-week's (24 days') Boarding Officer Course[21] (comprising 14 courses) and two-week's (11 days') Boarding Officer Practical Course[22] (including a course on "Use

17 Gao Jianjun, A Study on the Use of Force in Maritime Law Enforcement – An Investigation Based on the International Practice, *Studies in Law and Business*, No. 4, 2009, p. 26. (in Chinese)

18 Articles 18 & 19 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, at http://www.ohchr.org/CH/Issues/Documents/other_instruments/45.PDF, 1 June 2014. (in Chinese)

19 Zhao Weidong and Xu Zanbin, *Fundamentals of the Business of the United States Coast Guard*, Beijing: National Defense University Press, 2012, pp. 105~110. (in Chinese)

20 Zhao Weidong and Xu Zanbin, *A Handbook for Coast Guards of the United States Coast Guard*, Beijing: Haichao Press, 2012, p. 268. (in Chinese)

21 Boarding Officer Course, at http://www.uscg.mil/mlea/courses/boc.asp, 16 January 2013.

22 Boarding Officer Practical Course, at http://www.uscg.mil/mlea/courses/bopc.asp, 16 January 2013.

of Force") and must successfully pass all relevant examinations before obtaining the boarding officer qualification. Boarding team members should undergo a two week's (11 days') training on various topics including the use of force and boarding procedures and must succeed in graduating from this course before they can return to their units to perform the duties of a boarding team member under the supervision of a Boarding Officer.[23] Members of the Deployable Operations Group of the USCG who undertake high risk response mission operations shall undergo a 40 days' training program, prior to which, these members shall be trained and qualified for the use of weapons.[24] The aforesaid Deployable Operations Group consists of several units, including the Maritime Security Response Team (MSRT), Direct Action Team, Maritime Safety & Security Team (MSST), Maritime Law Enforcement and Force Protection Team (MLE/FP), Tactical Law Enforcement Team (TACLET), and Law Enforcement Detachment (LED).

In order to ensure the proficiency of police officers with weapons, the Hong Kong Police Force, crowned the best police force in Asia, implements a well-established system of mandatory training on the use of weapons, including preservice training and annual in-service trainings such as routine trainings, Police Tactical Unit (PTU) trainings, and specialized trainings. Furthermore, on-post regular police officers must attend mandatory trainings organized by the Weapon Training Division of Hong Kong Police Headquarters three times annually, and must be qualified in the training before performing their duties with guns. Police officers who have been in service for over one year must take turns at receiving a sixteen-week anti-riot training in PTU.[25] [26]

2. Conditions for Use of Force

Article 9, Chapter III of the Regulations stipulates the conditions in which the "use of weapons is allowed," and Article 10 of the same chapter lays down the conditions in which "use of weapons is prohibited". However, these two articles are ambiguous in their wordings such as "ascertain", "warning", and "it is too

23 Boarding Team Member Course, at http://www.uscg.mil/mlea/courses/btm.asp, 17 January 2013.

24 Basic Tactical Operations Course (BTOC), at http://www.uscg.mil/smtc/Training_USCG_BTOC.asp, 2 August 2012.

25 Xie Xie, The Training of Hong Kong Police, at http://www.douban.com/group/topic/25122-98/, 20 May 2013. (in Chinese)

26 Ze Qing, How to Ensure the Legitimacy of the Procedures for Police Gun Management, at http://view.163.com/12/0927/11/8CDHA7K000012Q9L.html, 20 May 2013. (in Chinese)

late to sound a warning".[27] Besides, viewed from the actual practice and effect of complying with the conditions for the use of force, these articles not only fail to take into consideration the particularities of maritime law enforcement, but also reveal the problem of "being too loose" at the macro level while "being too rigid" at the micro level, which lead to the phenomenon that regulations on the conditions for use of force in maritime law enforcement are not effectively executed in practice.[28]

The conditions for the use of force in maritime law enforcement specified in international law can be summarized as follows: (1) the use of force should be avoided on ordinary occasions; (2) only under specific circumstances as stipulated under international law can the use of force be allowed; (3) the use of force, even when inevitable, should not exceed the limits of necessity.[29] The third condition has set a reasonable restriction on the use of force. The "specific circumstances" mentioned in the second condition have been set out in the Regulations under the sections of "the use of police implements" and "the use of weapons" respectively, for the purpose of distinguishing the "police implements" from the "weapons". The intension and extension of the two concepts "police implements" and "weapon" defined in the Regulations basically correspond to the internationally recognized definitions for "non-deadly force/non-deadly weapons" and "deadly force/deadly weapon". The USCG has also made a distinction between the general force (or non-deadly force) and deadly force. This distinction can be used as a more useful reference, for its conditions better suit the particularities of maritime law enforcement.

The conditions provided by the USCG on the use of non-deadly force are: (1) to defend oneself or protect others; (2) to execute the decree that the USCG has the authority to enforce; (3) to stop federal crimes, or handle emergent situations or other crimes the USCG has the authority to handle; (4) to execute lawful arrests or prevent anyone who is suspected of violating federal laws from escaping; (5) to prevent the theft of, intentional damage to, or destruction of property that the

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27 Xu Su, Legislative Regulations on the Right of People's Police to Use Weapons in China, at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=70623, 1 June 2014. (in Chinese)

28 Wang Ke, Current Situation of and Solutions to the Use of Weapons by Maritime Police, *Ocean Development and Management*, No. 3, 2011, p. 41. (in Chinese)

29 Gao Jianjun, A Study on the Use of Force in Maritime Law Enforcement – An Investigation Based on the International Practice, *Studies in Law and Business*, No. 4, 2009, p. 26. (in Chinese)

USCG is authorized to protect.[30]

The USCG lays out a more specific stipulation on the conditions for the use of deadly force in the following three aspects. First, the circumstances under which law enforcement officials may use deadly force: (1) the use of deadly force against a threat will not pose an undue risk to others; (2) the identities of the law enforcement officials have been confirmed by the suspect; (3) a practical command has been given to the suspect to terminate his/her dangerous activity. Second, the circumstances where law enforcement officials may have to use deadly force: (1) to defend themselves only when they have probable cause to believe that the suspect poses an imminent threat of death or serious bodily harm to them or to others; (2) to make an arrest or to prevent the escape from custody of a person whom: a. they reasonably believe has committed or attempted to commit a felony involving the use or threatened use of deadly force; b. carries weapons or does not carry weapons but poses an imminent threat of death or serious bodily harm to others; or c. fails to obey their orders to terminate the dangerous activity, which is practical and poses no threat to the person concerned or others. Third, deadly force is not normally authorized solely for the purpose of protecting property from theft, sabotage or destruction. Nonetheless, in certain cases, the USCG Commander may authorize the law enforcement officials to use deadly force for the protection of property which is either vital to national security or inherently dangerous to others (e.g., nuclear material, explosives, weapons, munitions).[31]

In line with particular requirements for maritime law enforcement, the USCG distinguishes the Chinese concept of "suspected vessel"[32] into Non-Compliant Vessel (NCV) and Vessel Posing Imminent Threat (VPIT), clarifies the conditions for use of force, and makes some specifications on such special shots as disabling fire and warning shot. Conditions for the use of shipborne force include: (1) to enforce legal orders to stop a ship; (2) to defend oneself (including the personnel or

30 Myron Nordquist, translated by Lu Jia, Maritime Law enforcement, *China Oceans Law Review*, No. 1, 2005, p. 202. (in Chinese)

31 Rules of Engagement and Use of Force Policies: The USCG Model, at https://www.diils.org/resource/14-031-roe-and-use-force-uscgdoc-1, 1 June 2014.

32 The prevalent concept of suspected vessel in China is distinguished into Non-Compliant Vessel (NCV) and Vessel Posing Imminent Threat (VPIT) by the USCG. The pair of concept has no difference from each other except in definition, with the former referring to a vessel subject to examination that refuses to heave to after being legally ordered to do so and the latter any vessel whose actions pose an imminent threat of death or serious physical injury to any person. At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

military unit). A warning shot, originally a naval term,[33] is an intentionally harmless artillery shot or gunshot across the bow of a suspected vessel to signal a warning or an order to stop and accept inspections. Hence, it can be deemed as a warning signal for a vessel to stop.[34] Though it is generally recognized that a warning shot is not a proper way of applying force, the firing of a warning shot implies that a more severe confrontation may follow. Disabling fire refers to the firing of ordnance at the steering or propulsion system of a suspected vessel with the intent to stop it. A warning shot and a disabling shot both do not constitute the use of deadly force, and are used only to stop a suspected vessel for inspections rather than to cause death to the personnel or damage to the vessel. Both methods can equally be applied by ships or aircrafts. The USCG makes the following provisions on the use of these two special kinds of shots: (1) specific procedures and standards should be complied with; (2) senior commanders have authority to make the final decision; (3) judicial power over the suspected vessel should be confirmed; (4) other ways to stop the suspected ship have been exhausted; (5) law enforcement officials shall make restricted use of both methods on suspected vessels which have stopped.[35]

Actually, the USCG developes two different sets of policies and procedures for the use of force on NCV and VPIT. Firstly, the use of force on NCV for self-defense is not constrained by use-of-force continuum while it is the other way around for VPIT. Secondly, the principles of the USCG on the use of force should be applied under circumstances where the actions of suspected vessels have posed threat of death or serious bodily injury to law enforcement officials or under other circumstances (personal self-defense). Thirdly, the general principles under rules of engagement shall be applied under circumstances where the actions of suspected vessels have posed threat only to law enforcement platforms and nearby US armies (army self-defense). Fourthly, the use of force in self-defense, whether its applicable principles are the principles of the USCG on the use of force or the general principles under rules of engagement, is still required to follow the same principles applied to the use of force in self-defense

To further specify the conditions on the use of force by CCG, a detailed

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33 In nautical terms, a warning shot is often called a "shot across the bow". During the 18th century, a warning shot could be fired towards any ship whose "colors" (nationality) had to be ascertained. See Warning shot, at http://en.wikipedia.org/wiki/Warning_shot, 1 June 2014.

34 Zhao Weidong, A Study of the Analytical Approximate Data in Firing Table of 14.5 mm Machine Guns Firing at Sea, *Journal of Public Security Marine Police Academy*, No. 2, 2007, p. 1. (in Chinese)

35 Jonathan Edwards, Maritime Law Enforcement, at http://pfpconsortium.org, 1 June 2014.

stipulation can be made on the upper limit to the use of force in accordance with the Regulations and the features of maritime law enforcement, particularly to the use of deadly force. Deadly force is generally used to combat against serious violent crimes such as maritime smuggling, drug trafficking, gun trafficking, robbery and terrorist activities, etc.

B. The Principles for Use of Force in Maritime Law Enforcement

Chen Wanping et al. proposed the principles of legality, proportionality, and minimum damage in a study on how naval vessels can use force to combat acts of piracy and armed robbery against ships.[36] Xu Su put forward the principles of legality and imminent threat on the use of weapons and firearms by police in law enforcement activities.[37] Huang Shu'e suggested that the principles of human rights protection, absolute necessity, minimum use of force, compliance with law, proportionality, and efficiency shall be followed when the police use weapons and firearms.[38] Yan Ru'en, in her comments on the January 12 shooting incident happened in Guanling County, Anshun City, Guizhou Province, insisted that the principles of compliance with law, minimum use of force, protecting the legitimate rights and interests of citizens and safeguarding one's own safety shall be maintained when the police use force.[39] Moreover, Article 3 of the Code of Conduct for Law Enforcement Officials states that, "[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." In view of the assertions above, this article contends that the principles of legality, necessity, and minimum damage shall be followed when using force in maritime law enforcement. The three principles are basically consistent with Article 4 of the Regulations, which provides that "the use of weapons and firearms by police should be kept in compliance with the principles of deterring criminal acts and minimizing casualties and property loss." Such principles are instructive

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36 Chen Wanping and Zhu Kongsheng, A Study on the Use of Force in Combating against Pirates – A Case Study of Somali Pirates, *Journal of Harbin University*, No. 9, 2010. (in Chinese)

37 Xu Su, Legislative Regulation on the Right of Chinese Police to Use Weapon, at http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=70623, 1 June 2014. (in Chinese)

38 Huang Shu'e, On the Principles of Use of Weapons and Firearms by People's Police, *Legal System and Society*, No. 19, 2008. (in Chinese)

39 Yan Ru'en, The Legal Principles on the Use of Force by People's Police, at http://www.gmw.cn/01gmrb/2010-01/28/content_1045611.htm, 1 June 2014. (in Chinese)

for the law enforcement officials in operation.

1. The Principle of Legality

The principle of legality requires that law enforcement and administrative activities be carried out in compliance with laws. The use of force in maritime law enforcement should be exercised by law enforcement agencies authorized by law within the legal purview thereof following legal procedures, and both the contents and forms of the law enforcement acts should be in compliance with relevant regulations and laws.[40] This is the prerequisite for and the guarantee of ensuring the effect of use of force while avoiding the infringement of human rights.

2. The Principle of Necessity

The principle of necessity is the second principle that maritime law enforcement officials shall obey when using force. According to Article 3 of the Code of Conduct for Law Enforcement Officials, "necessity" has the following three meanings. Firstly, the use of force should generally be avoided. To put it more specifically, force may be used "only when all other means of achieving a legitimate objective have failed",[41] in other words, the use of force by law enforcement officials should be only under exceptional circumstances instead of being applied on normal basis; and even under exceptional circumstances where it is allowed, it should be adopted as the last resort. Secondly, it is only under the exceptional circumstances prescribed by laws can the use of force be allowed. The "exceptional circumstances" mentioned herein refer to the "conditions for use of force" as listed above. Thirdly, whenever the use of force is unavoidable, such force shall be kept within reasonable limits. In other words, even when the use of force is inevitable, the law enforcement officials may use force when strictly necessary and to the extent required for the performance of their duty. Any excessive use of force is unreasonable and therefore fails to comply with the principle of necessity, and thus is illegal.[42]

3. The Principle of Minimum Damage

The principle of minimum damage requires that under circumstances where use of force is the last resort to stop criminal offences, potential damage should

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40 Lyu Jianhua, On Instituionalized Maritime Administrative Managment, at http://www.zclw.net/article/sort015/sort022/info-75488_2.html, 1 June 2014. (in Chinese)

41 International Committee of the Red Cross, *Violence and the Use of Force*, p. 41, at http://www.icrc.org/chi/assets/files/other/icrc_006_0943.pdf, 1 June 2014. (in Chinese)

42 Gao Jianjun, A Study on the Use of Force in Maritime Law Enforcement – An Investigation Based on the International Practice, *Studies in Law and Business*, No. 4, 2009, pp. 26~27. (in Chinese)

be reduced to the minimum extent, and every effort should be made to protect life from being harmed with the aim of conforming to the original intention of respecting the right to life.

Among the three principles, the principle of legality is the basis for the use of force in compliance with law, the principle of necessity is the prerequisite for satisfying the conditions termed by "when strictly necessary" and "posing imminent threat", and the principle of minimum damage is the ultimate goal for the proper use of force and the achievement of the purpose of law enforcement. The three principles, the first being the basis for the second and the second for the third, strongly correlate and combine with each other, constituting the basic principles for the use of force in maritime law enforcement.

III. Use-of-Force Continuums for Maritime Law Enforcement

The policy on use-of-force continuum is a standard that provides law enforcement officials with guidelines as to how much force may be used against a resisting subject in a given situation.[43] The continuum policy is made to meet the need of implementing the principles for the use of force and regulating the operations of law enforcement officials, aimed mainly at deriving more time and space for action and avoiding the situation where the highest level of force has to be used in action. As it is the norm to encounter complicated and dangerous conditions and unpredictable situations on the scene in maritime law enforcement activities, it is often necessary for on-scene commanders to make a prompt judgment on the level of force to use as appropriate in a given situation. However, even the inappropriate use of non-deadly force may equally lead to serious consequences.[44] Therefore, it is essential to study and regulate the use-of-force continuums for maritime law enforcement.

A. Main Factors Influencing the Use-of-Force Continuums

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43 Use of force continuum, at http://en.wikipedia.org/wiki/Use_of_force_continuum, 18 March 2013.

44 South Korean Police Kills a Chinese Fisherman in Law Enforcement, at http://news.sina.com/c/2012-10-17/070925374348.shtml, 17 October 2012. (in Chinese)

Apart from the conditions and principles for the use of force, the use-of-force continuums in maritime law enforcement are also influenced by different kinds of equipment and different force-carrying-platforms.

In terms of being "deadly or non-deadly", equipment can be divided into two categories: deadly force and non-deadly force. The former refers to the kind of force which is intended or likely to cause either death or serious bodily injury resulting in death, regardless of whether it has actually led to death or only a serious injury.[45] The use of deadly force usually corresponds to the use of shipboard artilleries, machine guns, and light weapons, etc. The latter refers to the kind of force which is not intended or likely to cause either death or serious bodily injury resulting in death.[46] It can also be defined as all kinds of force excluding deadly force.[47] The use of non-deadly force usually corresponds to the use of police implements such as batons, tear-gas grenades, water blast guns/water cannons, special anti-riot guns, handcuffs, and binding ropes, etc.

In terms of force-carrying-platforms, the force used in maritime law enforcement can be divided into three forms: individual force, shipborne force, and airborne force, which are corresponding to individual carrying police implements and light weapons, deadly and non-deadly weapons on law enforcement vessels, and deadly and non-deadly weapons on helicopters respectively.

B. Formulation of Use-of-Force Continuums

1. Use-of-Force Continuums for Law Enforcement Boarding Officers

The use of force by law enforcement boarding officers is the use of individual carrying weapons and firearms. The USCG law enforcement boarding officers are armed with non-deadly weapons such as handcuffs, stimulating chemical agents, non-deadly ammunitions (e.g., 12-gauge pointed bullet and 12-gauge fin stabilized

45 Sanremo Handbook on Rules of Engagement, p. 91, at http://www.iihl.org/iihl/Documents/Sanremo%20ROE%20Handbook%20(Chinese).pdf, 1 June 2014. (in Chinese)

46 Sanremo Handbook on Rules of Engagement, p. 88, at http://www.iihl.org/iihl/Documents/Sanremo%20ROE%20Handbook%20(Chinese).pdf, 1 June 2014. (in Chinese)

47 Rules of Engagement and Use of Force Policies: The USCG Model, at https://www.diils.org/resource/14-031-roe-and-use-force-uscgdoc-1, 1 June 2014.

rubber munitions) and expandable baton,[48] and deadly weapons including pistols, service rifles and Remington M870 shotguns. The use of force by law enforcement boarding officers is defined as a series of actions (continuums) composed of six escalating levels. Officers should start from level 1 and gradually move to higher levels until the legal instructions are executed under ideal conditions; however, in special cases, they may start directly from a higher level of force as required by the situation at hand. The six levels of the use-of-force continuums are as follow:[49]

Level 1 Officer Presence: to gain voluntary compliance by persuading through signals, gestures, or languages.

Level 2 Verbal Commands: form of task directions with consequences aimed at the subject.

Level 3 Control Techniques: to take techniques or actions which may cause as less physical injury as possible, such as the appropriate use of binding instruments, pain-causing measures, and measures involving the use of physical strength.

Level 4 Aggressive Response Techniques: to take measures or actions such as the use of chemical irritants which can cause serious bodily discomfort and irritation to skin, eyes or mucus membranes yet does not bring any threat to life or injury to the body.

Level 5 Intermediate Weapons: to take measures or actions which have high probability of causing serious bodily injury, including the appropriate use of non-deadly ammunitions like the 12-gauge sting-ball ammunitions.

Level 6 Deadly Force: to take measures or actions which may cause death or serious bodily injury, including the use of standard individual weapons for the armed forces.

The classification of the six escalating levels is closely related to the equipment carried by the USCG law enforcement boarding officers, which is suitable for such officers carrying standard individual equipment to act against persons on a suspected vessel.

The use-of-force continuums for the CCG law enforcement boarding officers should also be adjusted to their standard individual equipment. The Border Control Department of Ministry of Public Security, by referring to the Individual

48 Kuen-chen FU and Xu Peng, Maritime Law Enforcement and Use of Force – the Application of the Principle of Proportion, *Wuhan University International Law Review*, No. 2, 2011, p. 24. (in Chinese)

49 At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

Equipment Standard for the Public Security Police[50] and by taking into account the actual need for border control, formulated the Individual Equipment Standard for On-duty Border Control Police of Ministry of Public Security[51] in 2010, which has not yet been publicly released. It can be inferred from the above information and some publicly available data[52 53] that the main equipment for the CCG may include deadly weapons such as automatic rifles and pistols, and non-deadly ones such as batons, ropes, handcuffs, tear injectors, and anti-riot guns. Considering the main instruments that the CCG is equipped with and with reference to the USCG policy on use of force and the use-of-force continuums for the CCG,[54 55] this article holds that the following use-of-force continuums will be applicable for Chinese law enforcement boarding officers:

Level 1 Officer Presence and Verbal Instruction: officers identify themselves and give timely verbal instructions to effectively prevent acts of resistance.

Level 2 Oral Warning: officers have acts of resistance under control through deterrence by means of giving warnings and orders in harsh tones.

Level 3 Empty-Hand Control: officers use empty hands, including punches, grabs, kicks or tumbles, which may cause as little bodily harm as possible to control a subject.

Level 4 Control through Low-Intensity Attack: as for non-compliant subjects who do not use force, officers can stop their acts of resistance through making such low intensity attacks as the use of tear injectors which can cause serious bodily discomfort.

Level 5 Control through Intermediate-Intensity Attack: with regards to non-compliant subjects who use force, officers can make them temporarily unable to resist by striking them on their key body parts (non-vital body parts) with

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50 Individual Equipment Standard for the Public Security Police, at http://www.mps.gov.cn/n16/n1957124/n1957171/n1957428/2863724.html, 1 June 2014. (in Chinese)

51 Individual Equipment Standard for On-duty Border Control Police of Ministry of Public Security (information not publicly available); Yan Bo, Ordnance Equipment Management in the Course of Law Enforcement Standardization, at http://www.chinagabf.com/theory/hqbz/30325.html, 1 June 2014. (in Chinese)

52 Jiangsu Coast Guard Conducts Training for Peace during the Festivals, at http://news.hexun.com/2011-12-31/136879110.html, 1 June 2014. (in Chinese)

53 Team 1 of Guangxi Coast Guard Starts Winter Maritime Drill, at http://bf.people.com.cn/GB/16686537.html, 1 June 2014. (in Chinese)

54 Sun Yan, A Study on the Use-of-Force Continuums for Police Law Enforcement in the Current Stage, *Daguan Weekly*, No. 14, 2012, p. 49. (in Chinese)

55 Xu Fei, A Comparative Analysis of Use-of-Force Continuums between Hongkong and Mainland Police, *Journal of Jiangxi Police Institute*, No. 4, 2010, p. 17. (in Chinese)

equipment such as batons, which may cause moderate or severe bodily injury.

Level 6 Control through High-Intensity Attack: officers may stop fierce resistances by firing non-deadly ammunitions with such weapons as anti-riot guns which may cause severe damage or even death.

Level 7 Deadly Force: officers can shoot the subject dead by using lethal weapons like automatic rifles and pistols, which may cause death or severe damage.

Compared with that of the USCG, the above continuums are more specific and can reduce to some extent the inappropriate use of force against acts of resistance in law enforcement, for even when the wrongly used force is one level higher than necessary it is unlikely that the subject's rights will be severely prejudiced. On the other hand, however, setting too many levels may also lead to difficulties in deciding upon the most appropriate level. Therefore, it is required that law enforcement officers undergo necessary and rigorous training to ensure their proficiency in choosing the right level in the use-of-force continuums.

2. The Continuums for Use of Shipborne Force

Large law enforcement vessels of the USCG are usually equipped with heavy weapons such as medium and/or small caliber naval guns and heavy machine guns, and small vessels with light weapons like shipboard light machine guns. In actual maritime law enforcement operations, on-board law enforcement is conducted provided that the suspect ship has stopped or been in a state of navigation where it is easy to board. Therefore, the USCG has separately devised a set of continuums and tactics for use of shipborne force against suspect vessels,[56] which is divided into 4 levels:[57]

Level 1 Command Presence: communicating to the vessel an order to stop, with the use of all available means (radio communications, loudhailer, blue light, flag hoist, search lights, message block, and ship's whistle/siren), maneuvering close to the non-compliant vessel and remaining clearly visible at all times, increasing the number of law enforcement officials on scene, visibly uncovering, readying, and manning weapons (but not pointing weapons at the vessel).

Level 2 Low Level Tactics: blocking the wind from a non-compliant sailing vessel by using lines, nets, or entanglers, severing fuel lines, delivering fire-fighting water to blow out the sails or flood the engine, physically blocking, and performing

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56 It is called "Vessel on Vessel Use of Force" by the USCG. At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

57 It is called "Vessel on Vessel Use of Force" by the USCG. At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

shouldering maneuver.

Level 3 Higher Level Tactics: non-deadly ammunitions are authorized by Senior Naval Officer to be used against the operator of the suspected boat. This tactic also considers the possible consequence of the operator losing control of the vessel and engendering further complications.

Level 4 Disabling Fire:[58] warning shots (shot as a warning signal to stop) may be employed when the prevailing situation is likely to have adverse effects on other surrounding vessels within the area. This activity may require a Senior Naval Officer flag. They should be used against go-fast vessels, and only if the on-scene assets have the capability of delivering disabling fire if the warning shots are ignored. Warning shots using pistols are prohibited. For the most part, disabling fire is the preferred method and warning shots are not necessary. The appropriate weapons for disabling fire include: service rifles, Remington M870, mounted automatic weapons (MAW), and deck guns.

Article 10 of the Codes for Coastal Patrol Authorities on Maritime Law Enforcement Operations[59] (Shu Xun Fa Zi No. 0940018766) issued by the "Coast Guard Administration" of China Taiwan stipulates that "coast guard officers, in case of encountering resistance or attack during legitimate law enforcement, are obliged to take the following measures when necessary: (1) the captain or leading officer must immediately give command and complete security deployment, and protect the relevant persons and equipment; (2) must monitor the inspected ship from a distance, with the use of a radar, videotape and photograph the whole process, and report the same according to the relevant regulations; (3) must give suspected vessels warning to stop acts of resistances and attacks through audio and visual equipment, and when necessary attack them by shooting high-velocity stream of water at it with a firewater pump or give warnings by shooting into the air; (4) if the above-mentioned measures are ineffective, the officers may use appropriate and necessary force and apply for support in line with the law." One can conclude from these provisions that although the "Coast Guard Administration" of China Taiwan fails to make a definite continuum for the use of force against suspected vessels,

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58 "Disabling fire" refers to the use of force for the purpose of disabling a vessel while causing the least damage to the vessel and people on board. It does not constitute a lethal force, but only used to stop the target ship. At http://www.boatswainsmate.net/BM/task08bc.doc, 1 June 2014.

59 Codes for Coastal Patrol Authorities for Maritime Law Enforcement Operations, at http://www.lawtime.cn/info/minshi/fagui/2011040421956.html, 1 June 2014. (in Chinese)

these specifications can still be divided into three hierarchical levels: first, issuing of warning through audio and visual equipment; second, impacting of the suspected vessel by spraying high-velocity stream of water at it or shooting into the air as a warning; and third, using appropriate and necessary force.

In view of the current equipment mounting on the law enforcement vessels owned by the police coast guard and their foreseeable future development, the CCG law enforcement vessels will be equipped with deadly weapons such as minor caliber naval guns and large caliber machine guns, and non-deadly weapons such as fire water monitors and anti-riot grenade launchers.[60] Based on the above considerations and the general procedures of the CCG on maritime law enforcement,[61] the continuums for use of shipborne force can be divided into the following five levels:

Level 1 Issuance of Command: giving the suspected vessel nonverbal signals as an order to stop for inspection by using all available means such as the ship's whistle/siren and bulletin board, as appropriate; issuing oral commands to the suspected vessel to stop for inspection using wireless communication, loudspeaker and etc.; maneuvering close to the suspected vessel and remaining clearly visible at all times.

Level 2 Water Cannon Impact and Tactical Interception: as authorized by the on-scene supreme officer, the law enforcement vessel occupies an advantageous position and as appropriate, sprays powerful water streams at the suspected vessel with a fire water monitor, or maneuvers quickly and tactically intercept the suspected vessel through extrusion and collision.

Level 3 Blast Deterrence: take the advantageous position, as directed by the supreme on-scene commander, and deter the suspected ship, through firing of non-deadly ammunitions with the anti-riot grenade launcher.

Level 4 Warning Shot: with the authorization from the supreme commander (the commander in chief on-scene can take charge in urgent situations but the action must be reported later to the supreme commander), the law enforcement officers may shoot across the bow of a suspected vessel with naval guns, machine guns and other ship mounted weapons to signal a warning or an order to stop.

Level 5, Disabling Shot: firing disabling ammunitions at the suspected vessel

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60 China Coast Guard, at http://baike.baidu.com/view/2395328.htm, 1 June 2014. (in Chinese)

61 The Border Control Department of Ministry of Public Security, *Operation Management and Command Course for Coast Guard*, Beijing: Qunzhong Publishing House, 2006. (in Chinese)

through shipborne precision shooting arms or anti-material rifle until it stops to receive inspection. A disabling shot shall be authorized by the shore-based supreme commander only, yet the highest on-scene commander may grant such authorization under urgent circumstances but the relevant action must be reported later to the supreme commander.

It should be made clear that in general the use of force must start with Level 1 and move gradually to higher levels until the legal orders have been obeyed; nonetheless, in some special cases, the higher levels can be directly employed as the situation requires. Besides, details of all the actions where live ammunition is fired have to be reported and video evidences of the whole action should be provided for review and inspection.

3. The Continuums for Use of Airborne Force

Thanks to the absolute advantages of high speed and mobility of helicopters, helicopter-borne force has become a common form of force used in maritime law enforcement around the world. The helicopter-borne force of the USCG is executed and managed by the Helicopter Interdiction Tactical Squadron, and the helicopters of the USCG are equipped with anti-material rifles, light machine guns and other weapons. The major target of helicopter-borne force is the high-speed smuggling boats. Such force is employed only when a patrol plane has noticed a suspected vessel and informed the nearby anti-smuggling patrol vessels to take action.[62] Then, the shipboard helicopter flies above the suspected target to confirm the identity thereof and, if the target has been confirmed as the suspected vessel, the shipboard helicopter then proceeds to apply different levels of force mounted on it:

Level 1 Helicopter Presence: the officers on the helicopter persuade the suspected vessel to stop and receive inspection by sending visual signals and making oral warnings (including the use of siren, loudspeaker, and radio communication).

Level 2 Warning Shot: the helicopter occupies the advantageous position above either side of the suspected vessel and shoots across the bow of the vessel, as a warning signal beckoning the suspected vessel to stop sailing.

Level 3 Disabling Shot: the helicopter shoots at the engine of the suspected ship with a 12.7 mm anti-material laser sight rifle until the vessel stops.

Officers will board the suspected vessel if any one of the abovementioned

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62 Craig Neubecker, Coast Guard Helicopter Interdiction Tactical Squadron (HITRON-Jacksonville), p. 5, at http://www.uscg.mil/history/webaircraft/USCG_HITRON_History_Neubecker.pdf, 1 June 2014.

levels of use of force proves to be effective (that is, the suspected vessel stops), and then initiate the on-board law enforcement procedures.

While it is certain that the CCG will be equipped with shipboard helicopter in the future, it remains uncertain as to the weapons with which it will be equipped. As to that question, this article suggests that the weapons equipped the helicopter which served in the anti-piracy action by the Chinese Navy in Somalia should be employed as examples: the helicopter may be equipped, for the purpose of firing warning shots and disabling shots, with an anti-material rifle[63] near the rear door as well as a light machine gun and an anti-riot grenade launcher. The continuums for use of airborne force can be divided into the following four levels:

Level 1 Helicopter Presence: visual signals and oral warnings are sent from the helicopter to the suspected vessel using equipment including siren, loudspeaker, and radio communication to command the ship to stop.

Level 2 Blast Deterrence: the helicopter deters the suspected ship from sailing by firing non-deadly ammunitions with an anti-riot grenade launcher.

Level 3 Warning Shot: the helicopter fires a gunshot across the bow of the suspected vessel with a light machine gun as a warning signal or an order to stop sailing.

Level 4 Disabling Fire: the helicopter shoots precisely at the engine of the suspected vessel with an anti-material rifle until the vessel loses power and stops sailing.

Officers will board the suspected vessel to initiate the law enforcement procedures should any one of the abovementioned levels of use of force proves to be effective. Among all these levels, Level 2 Blast Deterrence is designed to achieve the goal of on-board law enforcement by using anti-riot grenade launchers and other non-deadly firearms, and also to reduce the level of force to be used to the lowest one. Surely, a level named "Control Techniques" may be inserted between Level 1 and Level 2 when "boat trap"[64] and other technical control devices are invented and applied. As such, the use of non-deadly firearms will be intensified.

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63 China Navy Advances with Times: Helicopter Equipped with Heavy Machine Guns Puts into Use in Anti-piracy Action, at http://bbs.voc.com.cn/topic-1864140-1-1.html, I June 2014. (in Chinese)

64 Linda M. Johnson, Research and Development Center Develops Cutting-Edge Applications to Help Coast Guard Achieve Missions, at http://www.uscg.mil/acquisition/newsroom/pdf/cg9newsletterjan09.pdf, 1 June 2014.

IV. Conclusion

The future Chinese maritime law enforcement force will conform to the internationally recognized standard for "law enforcement officials" and be entitled to the right to both administrative and criminal law enforcement and therefore has the right to use force when it is strictly necessary. Law enforcement officials shall undergo rigorous training and assessment on the use of force before obtaining the qualification for use of force. Also, in order to meet the general guidelines on the appropriate use of force for the achievement of important legitimate objective only when other means remain ineffective, the force shall be used under conditions provided by the law, based on the principles of legality, necessity and proportion.

In order to implement the principles on the use of force in maritime law enforcement, regulate the operations of law enforcement officers, and avoid the use of a higher level of force than is necessary, it is essential to specify the continuums for the use of force by law enforcement boarding officers, the use of shipborne force, and the use of airborne force in view of the particularities of maritime law enforcement. Such specifications should be made, after taking into account of the different vehicles mounting the force and the different weapons and equipment, in compliance with the conditions and principles for the use of force in maritime law enforcement. This is the general requirement imposed by the relevant international laws and the basic requirement made by relevant domestic laws and regulations on the use of force.

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东海 200 海里以外大陆架划界问题研究

潘 军*

内容摘要: 东海陆架位于中国、日本、韩国三国之间，是中国大陆领土的自然延伸。东海最宽处小于 400 海里的事实表明，即使三国各自根据《联合国海洋法公约》主张 200 海里以内的大陆架也会出现重叠区，如果主张 200 海里以外的大陆架，就会出现大面积重叠区，大陆架的划界势必通过三国间的相互谈判解决。三国目前都在寻求不同的国际法理来支持各自的主张。中国一贯主张自然延伸原则和公平原则;韩国在黄海及东海西部主张等距离方法，而在东海东部主张自然延伸原则;日本则倾向于等距离方法。中、日间钓鱼岛主权的争端将直接影响中、日在东海南部的大陆架划界。中、韩于 2012 年分别提交的东海部分划界案使三国在东海的大陆架划界争端升级到一个新阶段。

关键词: 东海 200 海里以外大陆架 冲绳海槽 钓鱼岛 划界案 大陆架界限委员会 自然延伸原则 等距离方法 公平原则

一、前 言

大陆架最初是源于海洋地质学和地貌学意义上的一个自然概念，指环绕大陆的浅海地带，即大陆沿岸土地在海面下向海洋的延伸，直至海底坡度显著增加的大陆坡折处为止，也可以说是被海水覆盖的大陆。随着人类对海洋认识的不断加深、对海洋资源的不断渴求、对国家管辖海域欲望的不断增强以及对海洋开发能力的不断提高，法律大陆架这一概念应运而生。[1] 伴随海洋法的不断发展和演化，法律大陆架历经了 1945 年《美国关于大陆架的底土和海床的天然资源的政策》（也

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1 贾宇：《试论中日东海共同开发与中国 200 海里以外大陆架的关系》，载于《中国海洋法学评论》2009 年第 1 期，第 12~27 页。

称《杜鲁门公告》)、[2] 1958 年《大陆架公约》[3] 和 1982 年《联合国海洋法公约》[4]（以下简称“《公约》”）三个时期。《公约》重新界定了法律大陆架的概念，使得沿海国在向联合国大陆架界限委员会（以下简称“委员会”）[5] 提交划界案并获认可之后，有权且有可能将其法律大陆架扩展至其领海基线 200 海里以外。从 2001 年 12 月 20 日俄罗斯提交第一项划界案起，委员会截至目前共收到 70 项正式划界案[6] 以及 46 项申请国表明从测算领海基线量起 200 海里以外大陆架（以下简称“200 海里以外大陆架”）大致范围的初步信息。[7] 目前有条件的沿海国（尤其是岛国）都希望利用《公约》的相关条款（如“洋脊”条款等）来尽量扩展其 200 海里以外大陆架。[8]

中华人民共和国、日本国和大韩民国在东海的海洋权益方面存在着深刻的冲突，这些冲突表现在岛礁主权、海域划界以及资源开发等相互交织的各个方面。随着中国和韩国于 2012 年年底先后向委员会提交了东海 200 海里以外大陆架部分划界案，中、日、韩三国在东海的矛盾上升到了一个新的层面，各国都想依据国际法最大限度伸张自己的海洋权益，利益冲突将更加尖锐、白热化，这使得本已错综复杂的东海局势更加难以控制。本文结合国内外的最新研究动态，对东海 200 海里以外大陆架划界涉及的主要问题做一简要分析。

二、东海概况

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2 150 - Proclamation 2667 - Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945, at http://www.presidency.ucsb.edu/ws/?pid=12332, 1 March 2014.

3 Convention on the Continental Shelf, signed in Geneva on 29 April 1958, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21&lang=en, 1 March 2014.

4 United Nations Convention on the Law of the Sea (1833U.N.T.S.3), adopted on 10 December 1982 and went into effect on 16 November 1994, at https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en, 1 March 2014.

5 大陆架界限委员会是联合国系统的一个专门委员会，设立于 1997 年，专司 200 海里以外大陆架外部界限事项，其具体职能是审议沿海国提交的 200 海里以外大陆架划界案并提出建议以及应沿海国要求对其编制划界案提供技术咨询，每届任期 5 年，迄今已历 4 届（1997、2002、2007、2012）。委员会按“公平地区代表制”由 21 名海洋地质、地球物理及海道测量等领域的专家组成，专家由缔约国从其国民中选出，以个人身份在委员会任职。《公约》希望通过委员会的设立，能够把沿海国在确定 200 海里以外大陆架外部界限问题上可能遇到的困难减少到最低限度。

6 Submissions to the CLCS, at http://www.un.org/Depts/los/clcs_new/commission_Submission.htm, 1 March 2014.

7 Preliminary Information to the CLCS, at http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm, 1 March 2014.

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

东海是西太平洋的边缘海之一，大致位于北纬 23.0°~33.2°，东经 117.2°~131.0° 之间，为韩国、日本、中国台湾和中国大陆所环抱。[9] 东海以长江口北角与韩国济州岛南端的连线为界北临黄海，隔日本九州岛和琉球群岛东临太平洋，南接台湾海峡与南海相通，西为中国大陆，面积约 77 万平方公里，平均水深 350 米，其中陆架面积约 46 万平方公里，平均水深 72 米。

东海海底地势与中国大陆一致，由西北向东南倾斜，由东海陆架、东海陆坡、冲绳海槽、[10] 硫球西侧岛坡及岛架几大地貌单元组成。东海陆架是中国大陆向海的自然延伸，地形平坦，北宽南窄，宽度一般为 400 公里，最大宽度 601 公里，最小宽度 310 公里，至陆架坡折带后水深急剧加大，形成东海陆坡。东海陆坡呈弧形的北北东—南南西向扇状分布，也是北宽南窄，宽度一般为 40~50 公里，最宽处约 70 公里，最窄处约 28 公里，坡度北部缓、南部陡，地势呈阶梯状下降，陆坡上存在众多深切海底峡谷，并在坡底峡谷外侧形成浊流沉积，使陆基和陆坡坡底区域地形复杂。冲绳海槽为一向东南方突出的舟状长条形洼地，纵向约 1200 公里，横向 100~150 公里，水深由东北向西南逐渐变深，最大水深 2716 米，[11] 槽底微地貌复杂。

东海在地质构造上处于欧亚板块和太平洋板块之间，新近纪以来东海陆缘发生强烈张裂，冲绳海槽逐步拉张形成。东海在区域构造总体表现为“东西分带”的特征，自西向东依次为浙闽隆褶区、东海陆架盆地、钓鱼岛隆褶带、冲绳海槽盆地和琉球隆褶区等 5 个一级构造单元，构造年代也是自西向东逐渐变新。浙闽隆褶区包括中国大陆外侧的一系列岛屿和水下暗礁，总体上呈北东向延伸。东海陆架盆地由一系列北北东至北东向的凹陷组成，新生代沉积厚度发育明显。

冲绳海槽以西的东海陆架具备大陆的基本特征：与中国大陆有共同的古老陆核和相同的地壳结构，有与沿海陆地相连的地质构造与矿产，有承袭性的地形，并且广泛分布着以陆源物为主的沉积物，因此与中国东部大陆同属一个整体，为稳定的大陆地壳。而冲绳海槽以东的琉球隆褶区则不具备东海陆架的这些特征。冲绳海槽由于上地幔的抬升和地壳的急剧减薄，地壳性质已由减薄陆壳向过渡性地壳转变，在南段轴部的中央裂谷带形成了新生洋壳。因此，东海陆架、东海陆坡和冲绳海槽构成了被动型大陆边缘。[12] 另外，大西洋型陆架一般通过陆坡与洋盆直接相接，而西太平洋海底发育着海沟、岛弧和边缘海盆，这种构造格局的大陆架一

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9 East China Sea, at http://en.wikipedia.org/wiki/East_China_Sea, 1 March 2014.

10 冲绳海槽西部是东海大陆架，东部是琉球岛弧。海槽的位置、规模及深度可以说是东海海底最显著的地球物理特征。参见秦云山著：《中国东海的地质》，北京：科学出版社 1996 年版，第 1 页。

11 Okinawa Trough, at http://en.wikipedia.org/wiki/Okinawa_Trough, 1 March 2014.

12 中华人民共和国东海部分海域二百海里以外大陆架外部界限划界案执行摘要，第 2~4 页，下载于 http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/executive%20summary_CH.pdf，2014 年 3 月 1 日。

般终止于边缘海盆，由岛弧与大洋盆地相接。东海陆架正是这种西太平洋型陆架，自然终止于冲绳海槽（边缘海盆的雏形），由琉球岛弧与太平洋海盆相接。

三、东海周边各国划界案的相关情况分析

《公约》对中、日、韩三国均在 1999 年之前生效，[13] 根据划界案提交期限的要求，三国均于 2009 年 5 月 13 日之前完成了提交划界案的相关法律手续，日本于 2008 年 11 月提交了部分划界案，中、韩于 2009 年 5 月分别提交了初步信息。中、韩又于 2012 年 12 月分别提交了东海的部分划界案，日本虽未提交东海划界案，但对东海大陆架划界的立场已基本明确。沿海国 200 海里以外大陆架外部界限的建立属于沿海国的专属权利，尽管委员会的建议不对划界案提交国产生当然的法律拘束力，但从《公约》第 76 条第 8 款和目前的国家实践来看，委员会建议的实际约束力是毫无疑问的，[14] 中、日、韩三国对此也极为重视，三国均极力在《公约》的框架下有所行动。

（一）中国

1. 中国概况及其国内法对海洋权益的主张

中国位于亚洲东部、太平洋西岸，陆地面积约 960 万平方公里，海岸线约 1.8 万公里，内海和所主张的边海面积共约 470 万平方公里，同 14 个陆地邻国接壤，与 8 个海上邻国毗连或相向。

新中国成立后，中国政府先后颁布了一系列涉及国家管辖海域的国内法，如：

- 1958 年 9 月 4 日《中华人民共和国政府关于领海的声明》[15]
- 1992 年 2 月 25 日《中华人民共和国领海及毗连区法》[16]
- 1996 年 5 月 15 日《中华人民共和国政府关于中华人民共和国领海基线的

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13 中国、日本、韩国向联合国交存《公约》批准书和加入书的时间分别为 1996 年 6 月 7 日、1996 年 6 月 20 日、1996 年 1 月 29 日。根据《公约》第 308 条第 2 款，对于在第 60 份批准书和加入书交存以后批准或加入《公约》的每一国家，在第 1 款限制下，《公约》应在该国将批准书或加入书交存后第 30 天起生效。下载于 http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea，2014 年 3 月 1 日。

14 范云鹏：《论大陆架界限委员会的法律地位》，载于《中国海洋法学评论》2007 年第 1 期，第 151~161 页。

15 《中华人民共和国政府关于领海的声明》，1958 年 9 月 4 日，下载于 http://www.soa.gov.cn/zwgk/fwjgwywj/shfl/201211/t20121105_5205.html，2014 年 3 月 1 日。

16 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, 25 February 1992, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf, 1 March 2014.

声明》[17]

• 1998 年 6 月 26 日《中华人民共和国专属经济区和大陆架法》[18]

• 2002 年 1 月 1 日《中华人民共和国海域使用管理法》[19]

• 2010 年 3 月 1 日《中华人民共和国海岛保护法》[20]

• 2012 年 9 月 10 日《中华人民共和国政府关于钓鱼岛及其附属岛屿领海基线的声明》[21]

这些法律的颁布，为逐步在《公约》框架下划定所有中国管辖海域做了有效的准备。同时，中国政府于 1982 年 12 月 10 日签署《公约》，于 1996 年 5 月 15 日批准《公约》，《公约》于 1996 年 7 月 7 日对中国生效。

2. 中国 2009 年东海 200 海里以外大陆架初步信息

中国国家海洋局自 1996 年开始先后组织进行了三次大陆架专项勘测、调查，收集了东海陆架和冲绳海槽大量的地貌、地质构造和沉积物方面的数据。根据《公约》第 76 条第 8 款、《公约》附件二第 4 条、《大陆架界限委员会议事规则》（以下简称“《议事规则》”）附件一第 3 条以及《公约》缔约国大会第 72 号决议和第 183 号决议的有关决定，中国常驻联合国代表团于 2009 年 5 月 11 日向联合国秘书长（以下简称“秘书长”）正式提交了《中华人民共和国关于确定 200 海里以外大陆架外部界限的初步信息》（以下简称“中国初步信息”），涉及中国东海部分海域 200 海里以外大陆架的外部界限。该初步信息共 17 页，包括 12 条、8 个附图及 4 个附表。

中国初步信息指出，基于《公约》第 76 条第 4、5 款和《大陆架界限委员会科学和技术准则》（以下简称“《准则》”）第 2.2.8 段的相关规定，中国利用全球水深数据和中国实测水深资料，编制了东海大陆架及其周边海域的海底地形图，以中国政府公布的第 14 号（两兄弟屿）、15 号（渔山列岛）和 17 号（台州列岛—2）基

17 Declaration of the Government of the People’s Republic of China on the Baselines of the Territorial Sea, 15 May 1996, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf, 1 March 2014.

18 Exclusive Economic Zone and Continental Shelf Act, 26 June 1998, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf, 1 March 2014.

19 《中华人民共和国海域使用管理法》，2002 年 1 月 1 日，下载于 http://www.soa.gov.cn/zwgk/fwjgwywj/shfl/201211/t20121105_5210.html，2014 年 3 月 1 日。

20 《中华人民共和国海岛保护法》，2010 年 3 月 1 日，下载于 http://www.soa.gov.cn/zwgk/fwjgwywj/shfl/201211/t20121105_5206.html，2014 年 3 月 1 日。

21 Statement of the Government of the People’s Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands, 10 September 2012, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf, 1 March 2014.

点为量算起点选取了4组海底地形剖面，[22] 利用 Caris Lots 软件确定了大陆坡脚（所有剖面图中的 C 点，参见图 1），[23] 大陆坡脚位于冲绳海槽西坡，并得到大陆坡脚外 60 海里的点（所有剖面图中的 E 点，参见图 1），证明了中国在东海的大陆架自然延伸超过 200 海里，而且坡脚外 60 海里的定点均未超过 350 海里。[24] 中国选取最大水深点（所有剖面图中的 D 点，参见图 1）作为中国在东海的 200 海里以外大陆架的外部界限点，这些点距大陆坡脚的距离均不超过 60 海里，以此确定上述外部界限位于冲绳海槽轴部。

22 其中第 14 号（两兄弟屿）基点在剖面 1 和剖面 2 中沿不同方向使用了两次。每条剖面线包括 6 个定点：剖面线起始点 A、剖面线与 200 海里界限的交点 B、大陆坡坡度变动最大点 C、冲绳海槽内的最大水深点 D、大陆坡脚沿剖面线外推 60 海里定点 E、剖面线末端点 F。4 条剖面线的主要目的是用于《准则》要求的“从属权利检验”，即证明中国在东海从中国领海基线量起 200 海里界限以外存在大陆架区域。

23 CARIS, Maximize Your Territorial Claims, at http://www.caris.com/products/lots/index.cfm, 1 March 2014.

24 东海海底属于海底洋脊，根据《公约》第 76 条第 6 款，可以主张从测算领海宽度的基线量起最远 350 海里的大陆架。

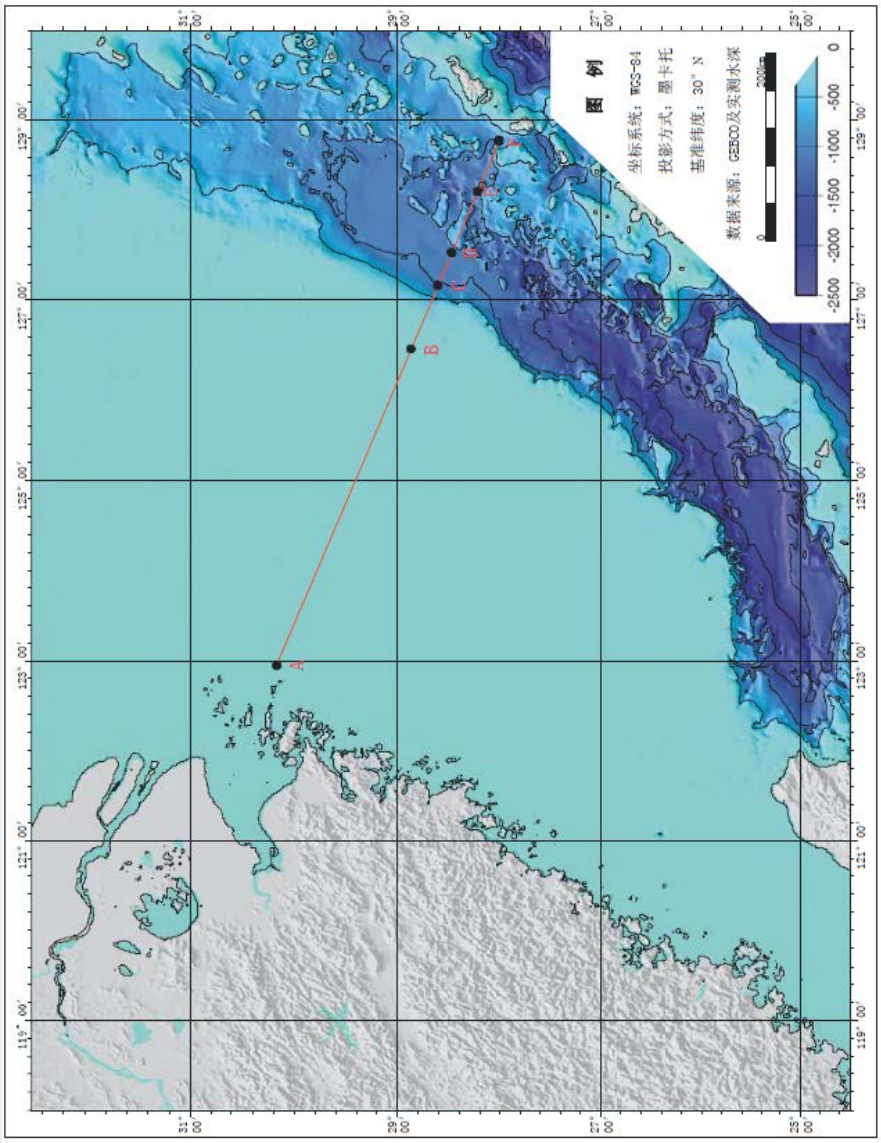

图 1　中国 2009 年初步信息剖面 1 位置示意图[25]

25　中华人民共和国关于确定二百海里以外大陆架外部界限的初步信息，第 6 页，下载于 http://www.un.org/Depts/los/clcs_new/Submission_files/preliminary/chn2009preliminary-information_chinese.pdf，2014 年 3 月 1 日。

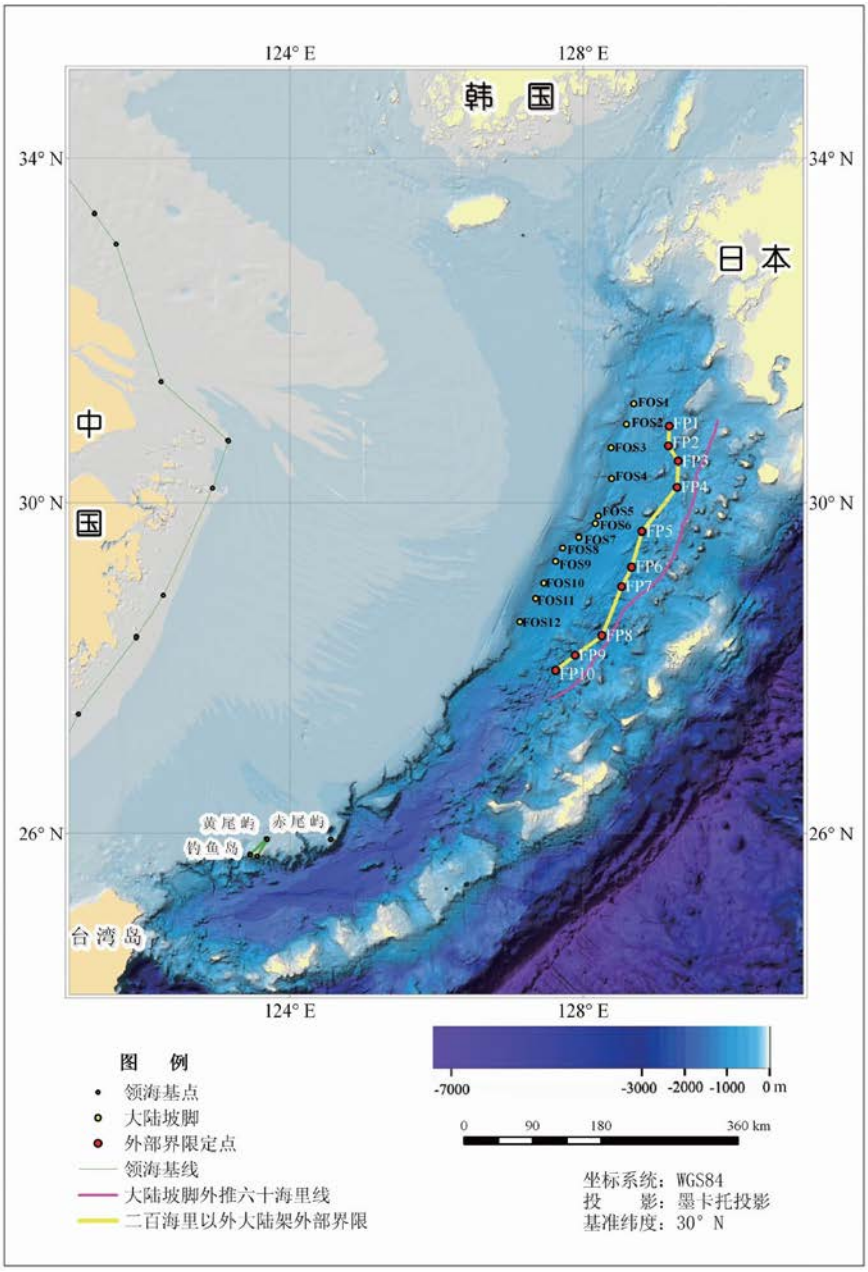

图 2 中国 2012 年划界案外部界限位置示意图 [26]

26 中华人民共和国东海部分海域二百海里以外大陆架外部界限划界案执行摘要，第 5 页，下载于 http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/executive%20summary_CH.pdf，2014 年 3 月 1 日。

3. 中国 2012 年东海部分海域 200 海里以外大陆架外部界限划界案

（1）划界案的提交和受理

2009 年 5 月 12 日提交初步信息以后，中国政府对提交东海划界案的工作进行了最后的评估和审查，2012 年 9 月 16 日宣布东海大陆架划界案的相关技术准备工作已经完成并拟提交划界案，2012 年 12 月 14 日向秘书长正式提交了《中华人民共和国东海部分海域 200 海里以外大陆架外部界限划界案》（以下简称“中国划界案”）。[27] 委员会官方网站同日发布了表示收到中国划界案的第 63 份大陆架公告，[28] 对中国划界案的审议被列入委员会于 2013 年 7 月 15 日至 8 月 30 日在纽约举行的第 32 届会议的临时议程中。

（2）中国划界案执行摘要的概要

中国划界案的执行摘要指出：地貌与地质特征表明东海大陆架是中国陆地领土的自然延伸，冲绳海槽是具有显著隔断特征的重要地理单元，是中国东海大陆架延伸的终止；中国东海大陆架宽度从测算中国领海宽度的基线量起超过 200 海里；划界案中确定的划定 200 海里以外大陆架的外部界限由 10 个定点定义（图 2）；划界案是东海部分海域 200 海里以外大陆架划界案，中国政府提交本划界案不妨害中国以后在东海或其他海域提交其他划界案；中国国家海洋局与中国地质调查局、中国科学院等部门合作完成了划界案的编制，委员会现任中国籍委员吕文正 [29] 对划界案的编制提供了技术咨询和协助；中国与日本、韩国在划界案涉及的海域尚未完成大陆架划界，并保证该划界案不会妨害今后中国与相关国家之间的大陆架划界。

（3）大陆坡脚、最大水深点和大陆架外部界限的形成过程

根据《公约》第 76 条第 4(b) 款和《准则》第 5.1.3、5.4.5 段，划界案中大陆坡坡底区域被确定为陡峭的东海陆坡下部与相对平坦的冲绳海槽陆基上部之间的地形突变带。基于 200 米 ×200 米网格的多波束水深数据和海底地形特征及走势，自陆坡向冲绳海槽选择一系列地形剖面，在坡底区域确定了 12 个坡度变化最大之点作为大陆坡脚。以 12 个坡脚为基点向东外推 60 海里生成外部包络线，证明中国在东海的大陆架自然延伸到冲绳海槽轴部。根据地质构造、地壳结构、岩石学和地貌特征，确定了冲绳海槽的轴部区域，利用 1996 至 2002 年间中国在相关海域调查获得的实测多波束水深资料以及全球水深数据 30"×30" 水深数据，选择

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27 Submission by the People’s Republic of China, 14 December 2012, at http://www.un.org/Depts/los/clcs_new/Submission_files/submission_chn_63_2012.htm, 1 March 2014.

28 Receipt of the Submission Made by the People’s Republic of China to the Commission on the Limits of the Continental Shelf, CLCS.63.2012 (Continental Shelf Notification), at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/clcs_63_2012.pdf, 1 March 2014.

29 Lu Wenzheng, Curriculum Vitae, at http://www.un.org/Depts/los/clcs_new/members_curriculumvitae/LuCV.pdf, 1 March 2014.

一系列垂直于冲绳海槽走向的地形剖面，在冲绳海槽张裂的中心区域选取了 10 个最大水深点（FP1~FP10）作为确定东海部分海域大陆架外部界限的定点，各定点的连线即为该次划界案大陆架的外部界限，且定点间的连线不超过 60 海里。[30] 该外部界限未超过大陆坡脚外 60 海里的包络线，亦未超过从测算领海宽度的基线量起 350 海里的范围。

（二）韩国

1. 韩国概况及其国内法对海洋权益的主张

韩国位于朝鲜半岛南部，北隔朝韩非军事区与朝鲜民主主义人民共和国（朝鲜）相邻，三面环海，东为日本海（韩国称“东海”），东南为朝鲜海峡（韩国称“大韩海峡”），西南濒临黄海（韩国称“西海”），面积约 9.9 万平方公里，海岸线全长约 1.7 万公里。[31]

韩国对大陆架权利的主张始于 1970 年 1 月 1 日通过的第 2184 号《海底矿产资源开发法》和 1970 年 5 月 30 日的第 5020 号《总统令》。[32] 基于上述国内法，韩国宣布拥有其海岸外海床和底土上自然沉积物的勘探和开采的主权权利。随后，韩国先后达成、制定了如下涉海法律：

- 1974 年 1 月 30 日《日本和大韩民国关于确定邻接两国的北部大陆架边界协定》[33]
- 1974 年 1 月 30 日《日本和大韩民国关于共同开发邻接两国的南部大陆架协定》[34]

（上述两个协定以下简称“1974 年协定”[35]）

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30 中华人民共和国东海部分海域二百海里以外大陆架外部界限划界案执行摘要，第 6 页，下载于 http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/executive%20summary_CH.pdf，2014 年 3 月 1 日。

31 The Republic of Korea, at http://en.wikipedia.org/wiki/South_Korea, 1 March 2014.

32 Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia*, Leiden: Martinus Nijhoff Publishers, 2004, p. 175.

33 Agreement between Japan and the Republic of Korea concerning the Establishment of Boundary in the Northern Part of the Continental Shelf adjacent to the Two Countries, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/jap-kor1974north.pdf, 1 March 2014.

34 Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf adjacent to the Two Countries, at http://www.un.org/Depts/los/LEGISLATIONAND-TREATIES/PDFFILES/TREATIES/jap-kor1974south.pdf, 1 March 2014.

35 上述两个协定为日、韩单方协定，日、韩私自划定约 8 万余平方公里的所谓“日韩共同开发区”。中国于 1974 年 2 月 4 日发表抗议声明，指出这是侵犯中国主权的行为而未予承认。

- 1977 年 12 月 31 日《领海法》[36]
- 《领海法实施令》，即 1978 年 9 月 20 日第 9162 号《总统令》[37]
- 经 1995 年 12 月 6 日第 4986 号《法案》修订的《领海及毗连区法》[38]
- 1996 年 8 月 8 日《专属经济区法》[39]
- 经 1991 年 9 月 7 日第 13463 号、1996 年 7 月 31 日第 15133 号《总统令》修订的《领海及毗连区法案实施令》[40]
- 经 1991 年 9 月 7 日第 13463 号、1996 年 7 月 31 日第 15133 号和 2002 年 12 月 18 日第 178033 号《总统令》修订的《领海及毗连区法案实施令》[41]

韩国于 1983 年 3 月 14 日签署《公约》，于 1996 年 1 月 29 日批准《公约》。《公约》于 1996 年 2 月 28 日对韩国生效后，韩国对大陆架权利的主张逐步明晰，转向立足于《公约》最大限度地主张领海基线 200 海里以外的法律大陆架。

2. 韩国 2009 年东海 200 海里以外大陆架初步信息

按照《公约》第 76 条第 8 款和《公约》缔约国大会的第 183 号决议，为满足《公约》附件二第 4 条和《公约》缔约国大会的第 72 号决议规定的期限，韩国 2009 年 5 月 11 日向秘书长提交了表明其在东海 200 海里以外大陆架外部界限的初步信息（以下简称“韩国初步信息”）。韩国初步信息指出，从测算领海宽度的基线量起韩国在东海的 200 海里以外大陆架的外部界限位于冲绳海槽，但此次提交的初步信息仅限于根据 1974 年协定建立的日韩共同开发区内 200 海里以外大陆架的

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36 Territorial Sea Act, Law No. 3037 of 31 December 1977, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1977_Law.pdf, 1 March 2014.

37 Enforcement Decree of the Territorial Seas Act, promulgated by Presidential Decree No. 9162, 20 September 1978, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1978_Decree.pdf, 1 March 2014.

38 Territorial Sea and Contiguous Zone Act, Law No. 3037, promulgated on 31 December 1977, amended by Law No. 4986, which was promulgated on 6 December 1995, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1995_Law.pdf, 1 March 2014.

39 Exclusive Economic Zone Act, No. 5151, promulgated on 8 August 1996, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1996_EEZAct.pdf, 1 March 2014.

40 Enforcement Decree of Territorial Sea and Contiguous Zone Act, promulgated by Presidential Decree No. 9162, 20 September 1978, amended by Presidential Decree No. 13463, 7 September 1991 and by Presidential Decree No. 15133, 31 July 1996, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1996_Decree.pdf, 1 March 2014.

41 Enforcement Decree of Territorial Sea and Contiguous Zone Act, Presidential Decree No. 9162, 20 September 1978, amended by Presidential Decree No. 13463, 7 September 1991, by Presidential Decree No.15133, 31 July 1996, and by Presidential Decree No. 17803, 18 December 2002, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_2002_Decree.pdf, 1 March 2014.

外部界限。

韩国初步信息还指出：定义大陆坡脚的 4 个定点（FOS-1~FOS-4）由《公约》第 76 条第 4(b) 款确定；定义 200 海里以外大陆架外部界限的 4 个定点（KOR-1~KOR-4）与 1974 年协定建立的定义日韩共同开发区南部界限的 4 个定点相同；外部界限的其它两个定点（KOR-5 和 KOR-6）分别是韩国 200 海里界限与日韩共同开发区东部和西部界限的交点（图 3）。各定点相关数据的列表和相关区域的海图分别包含在该初步信息的 2 个附件中。该初步信息中海图显示的韩国所主张的 200 海里以外大陆架区域约 1.9 万平方公里，与中国和日本主张的大陆架区域存在重叠。

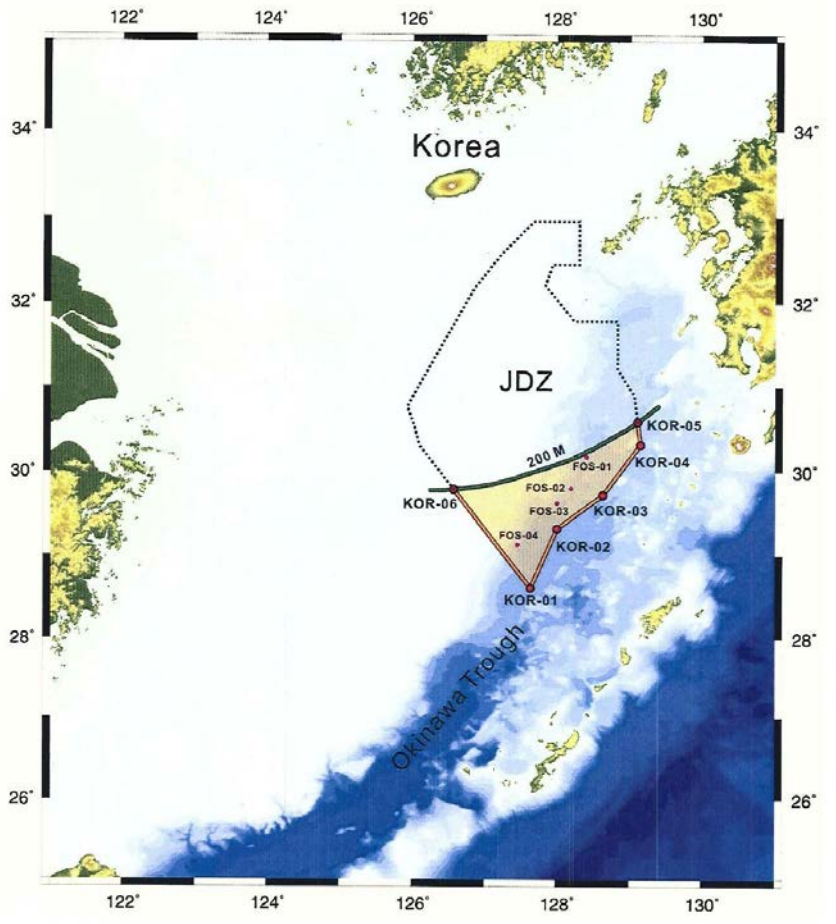

图 3　韩国 2009 年初步信息外部界限位置示意图 [42]

42　Preliminary Information regarding the Outer Limits of the Continental Shelf, the Republic of Korea, 11 May 2009, p. 7, at http://www.un.org/Depts/los/clcs_new/Submission_files/preliminary/kor_2009preliminaryinformation.pdf, 1 March 2014.

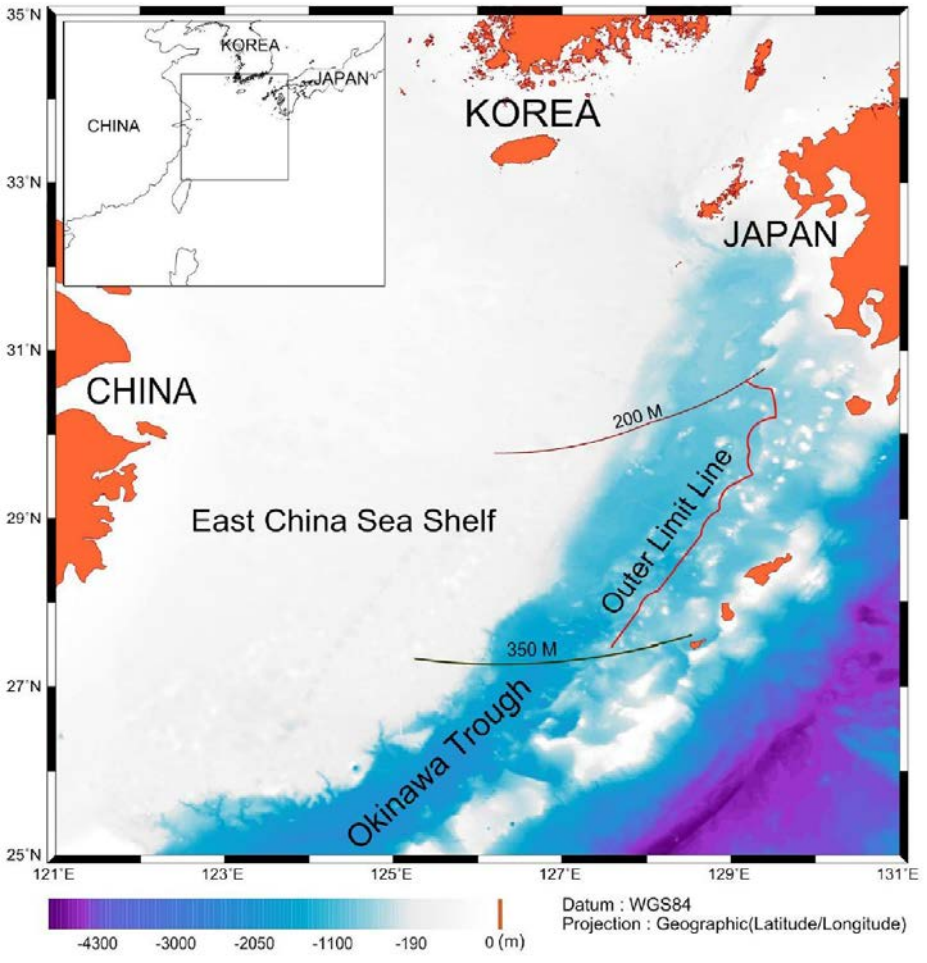

图 4　韩国 2012 年划界案外部界限位置示意图 [43]

3. 韩国 2012 年东海部分海域 200 海里以外大陆架外部界限划界案

2009 年 5 月 11 日提交初步信息后，韩国对相关区域的科学数据进行了彻底的评估和审查，并完成了东海划界案的编制，于 2012 年 12 月 26 日向秘书长提交了正式划界案（以下称为“韩国划界案”）。[44] 委员会官方网站 2012 年 12 月 28 日

43 Executive Summary of Partial Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea, the Republic of Korea, December 2012, p. 9, at http://www.un.org/Depts/los/clcs_new/Submission_files/kor65_12/executive_summary.pdf, 1 March 2014.

44 Submission by the Republic of Korea, at http://www.un.org/Depts/los/clcs_new/Submission_files/submission_kor_65_2012.htm, 1 March 2014.

发布了表示收到韩国划界案的第 65 份大陆架公告，[45] 对韩国划界案的审议也被列入了委员会于 2013 年 7 月 15 日至 8 月 30 日在纽约举行的第 32 届会议的临时议程中。

韩国划界案的执行摘要指出：划界案按照《公约》第 76 条第 4(b) 款和《准则》第 5.1.3 段选取了大陆坡坡度变化最大的 6 个定点来确定大陆坡脚的位置，大陆边的外缘由《公约》第 76 条第 4(a)(ii) 款（海登堡公式 [46]）确定；划界案中最终定义外部界限的 85 个定点的位置由大陆坡脚外推 60 海里后稍作调整（85 个定点的地理坐标列表见执行摘要中的表 1），以至不影响日本在东海的领海；划界案中所有定点均不超过从测算领海宽度的基线量起 350 海里，且定点间连线的长度不超过 60 海里（图 4）；划界案涵盖的区域目前尚未在韩国和其它相关沿海国之间明确划界，韩国已作出真诚努力向委员会和相关邻国保证，划界案不会妨害东海的大陆架划界问题，也不会妨害相关邻国在划界问题上的立场；韩国外交和贸易部，韩国国土、运输和海洋事务部，韩国知识经济部，韩国地球科学与矿产资源研究院以及韩国水文和海洋局合作完成划界案所有文件、海图、图表以及数据库的准备和编制工作；委员会现任韩国籍委员朴永安[47]对划界案的编制提供了技术咨询和援助；划界案只涉及韩国在东海 200 海里以外大陆架的一部分，不妨害韩国未来提交的有关其他海域的任何划界案。

4、韩国划界案的特点

（1）自 2009 年提交初步信息以来进行了充分的准备

韩国在 2009 年 5 月 11 日提交初步信息之后的 3 年半内，除了对相关区域的科学数据进行了彻底的评估和审查外，还对划界案的编制进行了精心准备，编制了 800 页左右的正式文件，划界案执行摘要的页数比初步信息增加了近一倍（由 8 页增加到 13 页），确定外部界限的定点的数量也大幅度增加（由 6 个增加到 85 个），确定定点的方法也更加科学、更加符合《公约》的要求（由直接援用 1974 年协定中的日韩共同开发区界限上的点，转为使用《公约》第 76 条第 4(a)(ii) 款的海登堡公式）。

（2）大陆架划界采用自然延伸原则

在此次提交的划界案中，韩国在确定大陆架外部界限的原则上也采用了自然延伸原则，与中国类似，韩国主张存在 200 海里以外的大陆架并自然延伸至冲绳

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45 Receipt of the Submission Made by the Republic of Korea to the Commission on the Limits of the Continental Shelf, CLCS.65.2012 (Continental Shelf Notification), 28 December 2012, at http://www.un.org/Depts/los/clcs_new/Submission_files/kor65_12/kor_clcs65_2012_en_fr.pdf, 1 March 2014.

46 该公式由参加第三次联合国海洋法会议的美国地质学家 H. D. Hedberg 提出，故按“海登堡公式”命名。

47 Yong Ahn Park, Curriculum Vitae, at http://www.un.org/Depts/los/clcs_new/members_curriculumvitae/ParkCV.pdf, 1 March 2014.

海槽。但在处理最终外部界限的位置上，韩国与中国的做法有所不同，中国是选取冲绳海槽相关位置的 10 个最大水深点作为 200 海里以外大陆架的最终界限，而韩国则走得更远，仅将依据大陆坡脚外推 60 海里得到的包络线略加调整后即作为最终外部界限，该界限超越了冲绳海槽内的最大水深点，局部已距日本 12 海里领海界限非常近，这无疑会更加激怒日本，且容易给委员会留下“非常过分”的印象，无益于划界案的审议。相反，中国以最大水深点作为自然分界线的做法似乎更加合乎客观实际和情理。

（3）主张的权利范围较提交初步信息时明显扩张

韩国在 2009 年提交初步信息时为了不招致日本更多的抗议，一方面直接选用了 1974 年协定中的日韩共同开发区界限点作为外部界限，但另一方面又在初步信息中声明其最终的外部界限在冲绳海槽，可以说为其 2012 年提交正式划界案埋下伏笔。在 2012 年正式提交的划界案中，韩国的真实主张表露无疑，不再继续使用 1974 年协定中的日韩共同开发区界限点，所涉及的 200 海里以外大陆架面积比 2009 年的 1.9 万平方公里翻了一番，拟定的外部界限虽然还属于冲绳海槽范围，但却越过了冲绳海槽的最大水深点，向东南方向更靠近日本 38~125 公里，同时也超越了中国在冲绳海槽主张的外部界限，局部距日本 12 海里领海界限的最近处只有约 17 海里。

（4）定义大陆架外部界限时选用了经济实惠的公式线

与中国划界案类似，韩国划界案在用“无反证”方式（第 76 条第 4(b) 款）确定了大陆坡脚之后，也毫无例外地选用成本相对低廉的海登堡公式（大陆坡脚外推 60 海里公式）来定义 200 海里以外大陆架最终外部界限的参照线。这种做法在委员会已收到的 70 项划界案中相当普遍，因为另一个可选项——爱尔兰公式[48]（1% 沉积岩厚度公式）的技术要求相对较高，勘测受设备、所处海域的气候以及海底地貌、地质环境的制约较大。因此，理论上虽然存在适用爱尔兰公式比适用海登堡公式能得到更远界限的可能性，但实际上只有极少数发达的沿海国在划界案中选用爱尔兰公式来定义少部分界限，例如澳大利亚 2004 年划界案 10 个区块中只有 2 号区块（澳大利亚南极领地区块）中定义外部界限的 157 个定点中的 60 个由爱尔兰公式定义，其它 9 个区块中只有极个别的定点选用爱尔兰公式来定义。[49]这一事实再次证明，建立 200 海里以外大陆架的外部界限是一项对科学性要求极高的高难度工作，对发展中国家尤为如此。

随着中、韩 2012 年相继向委员会正式提交东海部分划界案，中、日、韩三国在东海围绕大陆架划界的海洋争端将日趋激化，近期没有任何迹象显示三国在此

48 该公式由参加第三次联合国海洋法会议的爱尔兰地质学家 P. R. R. Gardiner 提出，故按“爱尔兰公式”命名。

49 薛桂芳、王冠钰：《澳大利亚外大陆架划界初探》，载于《中国海洋大学学报（社会科学版）》2009 年第 6 期，第 23~26 页。

海域的冲突会趋于缓和。

（三）日本

1. 日本概况及其国内法对海洋权益的主张

日本是位于亚欧大陆以东、太平洋西北部的一个岛国，陆地面积约 37.8 万平方公里，由北海道、本州、四国、九州 4 个大岛和其他 6800 多个小岛组成。东部和南部濒临太平洋，在北、西北、西、西南方向分别隔鄂霍次克海、日本海、朝鲜海峡、东海、菲律宾海与俄罗斯、朝鲜、韩国、中国大陆、中国台湾和菲律宾相望。日本的海岸线十分曲折、复杂，西部日本海一侧多悬崖峭壁，港口稀少，东部太平洋一侧多入海口，形成许多天然良港。在地质构造上，日本属于西太平洋岛弧—海岸山脉—海沟组合的一部分，位于欧亚板块、菲律宾板块、太平洋板块和北美板块的交界地带，同时还处于环太平洋造山带、火山带、地震带之上，火山、地震频繁，全球有 1/10 的火山位于日本，1/5 的地震发生在日本。[50]

日本四周被海洋包围，国土面积狭小，资源贫乏，99.7% 的对外贸易依赖海上运输，为此，日本一直高度重视海洋问题，尤其在制定海洋法律与政策方面倾注了全部力量，把海洋政策作为基本国策，以期实现使日本从岛国发展为海洋大国的海洋立国理念，并且在行政管理上设置了海洋政策大臣和综合海洋政策会议机构，以推进国家综合海洋政策。几十年来，日本先后达成、制定了如下涉海法律：

- 1974 年 1 月 30 日《日本和大韩民国关于确定邻接两国的北部大陆架边界协定》
- 1974 年 1 月 30 日《日本和大韩民国关于共同开发邻接两国的南部大陆架协定》
- 1977 年 5 月 2 日《领海法》[51]
- 1996 年《领海和毗连区法》[52]（修订 1977 年 5 月 2 日《领海法》）
- 1996 年《专属经济区和大陆架法》[53]

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50 日本概况，下载于 http://news.xinhuanet.com/ziliao/2002-04/01/content_329931.htm，2014 年 3 月 1 日。

51 Law on the Territorial Sea (Law No. 30 of 2 May 1977), at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1977_Law.pdf, 1 March 2014.

52 Law on the Territorial Sea and the Contiguous Zone (Law No. 30 of 1977, as amended by Law No. 73 of 1996), at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law.pdf, 1 March 2014.

53 Law on the Exclusive Economic Zone and the Continental Shelf (Law No. 74 of 1996), *Law of the Sea Bulletin*, No. 35, p. 94, at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE35.pdf, 1 March 2014.

• 2001 年《领海和毗连区法实施令》[54]（1977 年第 210 号《内阁令》，后经 1993 年第 383 号、1996 年第 206 号和 2001 年第 434 号《内阁令》修改）

• 2007 年 7 月 20 日《海洋构筑物安全水域设定法》[55]

• 2007 年 7 月 20 日《海洋基本法》[56]

日本 2007 年《海洋基本法》的颁布标志着日本形成了综合规范海洋事务的国内法。该法第 29 条规定在内阁设置综合推进海洋政策实施的“综合海洋政策本部”，由内阁总理大臣亲自担任本部长，次长由内阁官房长官和海洋政策大臣担任，权限之大、规格之高在世界各国中绝无仅有。继《海洋基本法》之后，日本 2008 年 3 月 18 日又出台了《海洋基本计划》，该计划成为指导日本海洋事务行动指针的 5 年规划。[57]

2. 日本对中、韩两国东海大陆架初步信息和划界案的反应

在东海大陆架划界的问题上，由于日本与中、韩的主张有着深刻的利益冲突，因此反应是最敏感，也是最直接的。在中、韩于 2009 年 5 月 11 日同日提交东海 200 海里以外大陆架的初步信息后，日本于 2009 年 7 月 23 日分别向秘书长提交了两份针对中、[58] 韩 [59] 的措辞几乎完全相同的抗议照会。日本在其照会中指出，中、韩初步信息中涉及的日本与中、韩相向海岸间的距离小于 400 海里，相关国家间不足 400 海里时不能根据《公约》的规定建立 200 海里以外大陆架的外部界限，该区域大陆架的界限应按照《公约》第 83 条由日中和日韩协议划定。

中、韩于 2012 年正式提交了东海部分划界案之后，日本又分别于 2012 年 12

54 Enforcement Order of the Law on the Territorial Sea and the Contiguous Zone (Cabinet Order No. 210 of 1977, as amended by Cabinet Order No. 383 of 1993, Cabinet Order No. 206 of 1996 and Cabinet Order No. 434 of 2001), *Law of the Sea Bulletin*, No. 66, p. 71, at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin66e.pdf, 1 March 2014.

55 金永明译：《日本〈海洋构筑物安全水域设定法〉》（中译本），《中国海洋法学评论》2008 年第 2 期，第 161~163 页。

56 Basic Act on Ocean Policy, at http://www.kantei.go.jp/jp/singi/kaiyou/kihonkeikaku/080318kihonkeikaku_E.pdf, 1 March 2014.

57 金永明：《日本外大陆架划界申请案内涵与中国的立场》，载于《中国海洋法学评论》，2009 年，第 1 期，第 28~39 页。

58 23 July 2009 Letter of the Permanent Mission of Japan to UN’s Secretary-General, SC/09/246, at http://www.un.org/Depts/los/clcs_new/Submission_files/preliminary/jpn_re_chn2009e.pdf, 1 March 2014.

59 23 July 2009 Letter of the Permanent Mission of Japan to UN’s Secretary-General, SC/09/248, at http://www.un.org/Depts/los/clcs_new/Submission_files/preliminary/jpn_re_kor2009e.pdf, 1 March 2014.

月 18 日和 2013 年 1 月 11 日向秘书长提交了两份措辞相似的针对中、[60] 韩 [61] 正式划界案的抗议照会。日本在这两份照会中重申了其在 2009 年抗议照会中的立场，即相向海岸间距离小于 400 海里的沿海国不能单方面建立 200 海里以外大陆架的外部界限；同时援引了《议事规则》附件一第 5(a) 款规定，认为中、韩在东海的划界案涉及的区域属于争端区域，郑重要求委员会不审议中、韩两国的划界案。

3. 日本未来对东海大陆架可能采取的方案

尽管日本 2008 年的划界案没有直接涉及东海，但并不等于日本会放弃对东海的争夺。相反，由于与中、韩存在严重的岛屿主权和海域划界争端，日本在东海的策略显得更为谨慎，至今尚未表明其在东海究竟主张何种海洋权益、范围如何。从日本对中、韩初步信息和划界案的反应可以看出，日本是想基于与中、韩间的等距离线或其自身的 200 海里界限与中、韩进行划界谈判。对于钓鱼岛，由于有美国的支持以及 1951 年《美利坚合众国与日本国之间安全保障条约》（也称《美日安保条约》）[62] 和 1960 年《美利坚合众国与日本国之间互相合作与安全保障条约》（也称《新美日安保条约》），[63] 日本近年来在钓鱼岛主权问题上的立场愈加强硬和明晰，即不惜一切代价也要争夺钓鱼岛的主权。既然对冲之鸟礁这种明显不符合《公约》第 121 条岛屿制度规定的岩礁，日本都不惜冒天下之大不韪倾举国之力去“扩充”其划界效力，[64] 那么，以钓鱼岛为基点主张 200 海里专属经济区和大陆架的方案也就很可能会成为日本综合海洋政策本部的一个预案。

四、中国与韩、日在东海大陆架划界面临的主要问题

由于东海最大宽度小于 400 海里，因此，即使根据《公约》主张 200 海里以内的大陆架，中、日、韩三国的主张也会出现重叠，如果主张 200 海里以外的大陆架，就会出现更大面积的重叠。另外，钓鱼岛主权争端的结果也会影响中、日两国在东海南部的大陆架划界。

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60 28 December 2012 Letter of the Permanent Mission of Japan to UN’s Secretary-General, SC/12/372, at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/jpn_re_chn_28_12_2012.pdf, 1 March 2014.

61 11 January 2013 Letter of the Permanent Mission of Japan to UN’s Secretary-General, SC/13/019, at http://www.un.org/Depts/los/clcs_new/Submission_files/kor65_12/jpn_re_kor_11_01_2013.pdf, 1 March 2014.

62 Security Treaty between Japan and the United States of America, at http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19510908.T2E.html, 1 March 2014.

63 Treaty of Mutual Cooperation and Security between Japan and the United States of America, at http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html, 1 March 2014.

64 丘君、柳文华：《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》，载于《中国海洋法学评论》2009 年第 2 期，第 19~30 页。

（一）中、韩间未来的大陆架划界

在大陆架的划界原则上，韩国采用的是双重标准，一方面主张在东海东部按自然延伸原则以冲绳海槽为界，另一方面又主张在东海西部和黄海按等距离方法划界。这种在同一性质的事情上按相互矛盾的标准来处理的做法，其用意昭然若揭，就是不惜采用相互矛盾的手段获取最大利益，这种“聪明过头”的做法很难被周边国家和国际社会接受，往往授人以“柄”并起到适得其反的效果。

黄海为西太平洋边缘海之一，位于中国大陆与朝鲜半岛之间，面积约 38 万平方公里，海底区域构成一个平缓的单一连续陆架，平均深度 44 米。[65] 西北以蓬莱田横山至大连老铁山连线与渤海分界并通过渤海海峡与渤海相连，东部由济州海峡经朝鲜海峡、对马海峡与日本海相通，南以长江口北岸启东角至济州岛西南角连线与东海分界。黄海西部坡度较缓，约占黄海的三分之二，海底由长江和黄河排放的粘土冲积而成；东部的三分之一（朝鲜半岛一侧）坡度陡峭，海底发源于朝鲜半岛山脉的沙地。在大陆架划界问题上，等距离方法仅仅是为达成公平的解决方案而采用的技术方法之一，[66] 并不能等同或替代公平原则。黄海大陆架的主体是中国陆块向东的自然延伸，而不是朝鲜半岛向西的自然延伸，因此适用等距离方法划分中、韩在黄海的大陆架有失公允，以大陆自然延伸程度划分大陆架较为公平。

韩国此次正式提交的东海部分划界案中 200 海里以外大陆架的外部界限大致位于北纬 27.5°~30.6°、东经 127.6°~129.5°之间，[67] 而中国的东海划界案中 200 海里以外大陆架的外部界限大致位于北纬 28.0°~30.9°、东经 127.6°~129.2°之间。[68] 比较上述两组数据我们可以清晰地看到，中、韩两国在此次分别提交的东海部分划界案中所主张的大陆架在冲绳海槽内有相当大的重叠区。为了避免与韩国存在潜在重叠区域，中国此次提交的东海划界案已尽量限制了北部的范围（实际上，中国还可以向北再选取更多的最大水深点来加大外部界限线的长度），但是韩国方面在此次提交的东海部分划界案中却无所顾忌地尽量将其外部界限向南延伸。韩国的这种做法不外乎是想为日后与中国就重叠区域进行的划界谈判捞取更多的筹

65 Yellow Sea, at http://en.wikipedia.org/wiki/Yellow_Sea, 1 March 2014.

66 Kuen-chen Fu, *Equitable Ocean Boundary Delimitation: On Equitable Principles and Ocean Boundary Delimitation*, Taipei: 123 Information Company, 1989, p. 305.

67 Executive Summary of the Partial Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea, the Republic of Korea, p. 9, at http://www.un.org/Depts/los/clcs_new/Submission_files/kor65_12/executive_summary.pdf, 1 March 2014.

68 中华人民共和国东海部分海域二百海里以外大陆架外部界限划界案执行摘要，第 5 页，下载于 http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/executive%20summary_CH.pdf，2014 年 3 月 1 日。

码，其结果必将加大中、韩间潜在谈判的难度。

（二）中、日间未来的大陆架划界

1. 中、日围绕大陆架划界原则的冲突

中、日在东海的大陆架划界涉及一种罕见的情况，即两国间海域最大宽度不足 400 海里，但海底的地形却是：按照《公约》第 76 条第 4~7 款的规定，中国拥有从测量领海宽度的基线量起 200 海里以外的大陆架，而日本一侧的状况是日方在此的大陆架宽度远小于 200 海里，世界上属于这种情况的仅有两例，即澳大利亚与东帝汶之间的帝汶海及东海。[69] 由于国际法在海洋划界方面的原则相对含糊，因此不能提供明确的规范，导致中、日在国际法上都可以找到一些支持其自身主张的初步证据。中、日双方在东海划界问题上的根本分歧在于：中国认为东海海底的地质、地貌结构决定了中国的大陆架自然延伸到冲绳海槽，根据自然延伸原则，冲绳海槽轴部应是双方大陆架的天然分界线；日本则主张日中共大陆架，应按等距离方法与中国划分东海大陆架，不承认冲绳海槽是由中国大陆延伸的东海大陆架的边缘。

（1）大陆架划界原则的演化

关于大陆架的划界原则，在国际法上并没有普适性的明确规则，而且海岸相向或相邻国家间大陆架划界的实践在半个世纪以来，随着《公约》的诞生和生效发生了很大变化。1958 年《大陆架公约》第 6 条提出了“等距离 / 特殊情况”方法，1969 年北海大陆架案 [70] 则确立了陆地控制海洋的“自然延伸”原则，而 1985 年利比亚 / 马耳他大陆架案 [71] 改变了自然延伸原则的适用条件（对 200 海里以内的大陆架不再赋予地质或地球物理因素任何作用），海岸长度的“比例性”原则通过一系列海洋划界案（如 1993 年格陵兰 / 扬马延划界案、[72] 2009 年罗马尼亚 / 乌克兰

69 V. Prescott and C. Schofield, *The Maritime Political Boundaries of the World*, 2nd ed., Leiden and Boston: Martinus Nijhoff, 2005, pp. 185~211.

70 North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, at http://www.icj-cij.org/docket/files/51/5535.pdf, 1 March 2014.

71 Continental Shelf (Libyan Arab Jamahiriya v. Malta), *I.C.J. Reports*, 1985, p. 13, at http://www.icj-cij.org/docket/files/68/6415.pdf, 1 March 2014.

72 Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, at http://www.icj-cij.org/docket/index.php?sum=401&code=gjm&p1=3&p2=3&case=78&k=e0&p3=5, 1 March 2014.

黑海划界案[73]等）成为具体划界实践中所考虑的重要地理因素之一……[74]

《公约》第 83 条第 1 款规定：

> 海岸相向或相邻国家间大陆架的界限，应在国际法院规约第 38 条所指国际法的基础上以协议划定，以便得到公平解决。

该条所体现的“公平原则”，在实践上得到了许多国家的接受，已成为一条形成中的习惯规则，不仅由许多国际文件所确定，而且也得到一些重要的国际海洋划界案例的肯定。这项原则的基本前提是强调公平，并拒绝任何强制方法（包括等距离方法）。在划界中最重要的是实现结果公平，而不是划界方法的选择。用公平原则调整不公平现象的作法，已成为目前大陆架划界的倾向性作法。

（2）日本的主张及其国际法依据

在东海大陆架划界的问题上日本主要主张以下观点：

- 适用等距离原则划分日中间在东海的大陆架
- 相向海岸间距离小于 400 海里时不能存在 200 海里以外的法律大陆架
- 200 海里内的法律大陆架权利不应考虑海底的任何地质或地球物理因素
- 冲绳海槽是东海连续大陆架（日中共架）上在划界时应被忽略的偶然凹陷而非物理边界
- 未放弃等距离以外（冲绳海槽以西）的 200 海里大陆架的权利

从日本的上述观点可以看出，日本在东海大陆架划界的问题上主要是依据 1958 年《大陆架公约》第 6 条、《公约》第 76 条以及 1985 年利比亚 / 马耳他大陆架案的判决。利比亚 / 马耳他大陆架案是继 1969 年北海大陆架案等一系列大陆架划界案之后，自然延伸原则和等距离方法的一次重大交锋，自然延伸原则被相当程度地削弱了。国际法院对自然延伸原则的态度从 1969 年将其作为大陆架的唯一权利基础，转变为 1985 年的由距离标准代替自然延伸成为确定 200 海里以内大陆架的首选方法。[75] 此案作为先前判例，对地理特征相似的东海大陆架的划界具有比较大的负面影响。

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73 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Summary of the Judgment of 3 February 2009, paras. 115~122, at http://www.icj-cij.org/docket/files/132/14989.pdf, 1 March 2014.

74 张卫彬：《2009 年罗马尼亚诉乌克兰黑海划界案评析》，载于《中国海洋法学评论》2009 年第 2 期，第 33~43 页。

75 张新军：《日本国际法学界大陆架划界问题的文献和观点初探》，载于《中国海洋法学评论》2005 年第 2 期，第 31~41 页。

（3）中国的主张及其国际法依据

在东海大陆架划界的问题上，中国主要主张以下观点：

- 冲绳海槽是具有显著隔断特征的重要地理单元
- 中国的东海大陆架按基于地质或地球物理因素的自然延伸原则延伸至冲绳海槽轴部
- 等距离作为一种划界方法不是国际法或习惯国际法的原则
- 与海岸相邻或者相向国家间在国际法的基础上按公平原则协议划定重叠大陆架
- 海岸地理（尤其是海岸线长度的比例性）是公平划界的一个重要因素

从中国的上述观点可以看出，中国在东海大陆架划界的问题上主要是依据了《公约》第 76、83 条，1969 年北海大陆架案等一系列海洋划界的判例。1969 年北海大陆架案是通过国际司法程序解决的第一个大陆架划界争端案例，其判决对大陆架划界国际法的发展产生了重要的影响，因为其首次较科学、较权威地提出了符合一般大陆架地理地质状况、同时也符合大多数沿海国利益的按照自然延伸原则和公平原则划界的主张，否定了以等距离方法作为强制性习惯国际法规则的主张。中国认为等距离方法仅仅是 1958 年《大陆架公约》第 6 条第 1 款确立的一种划界方法，而且只应在等距离方法与公平原则一致时方可适用，远远未具备与公平原则同等的规范性地位。面对国际判例对自然延伸原则的日益侵蚀，中国一直不懈努力，以维持 1969 年北海大陆架案中所确立的大陆架划界原则。

另外，一般来说，影响沿海国主张大陆架的其它地理、地貌因素主要有：主体陆地的海岸线长度、主体陆地海岸的形状特征、海岸在大洋和半闭海中的位置、拥有的岛屿、与相邻国家的距离以及大陆边的宽度等等。[76] 除此之外，历史性权利、当事国社会经济（包括人口）等因素目前也越来越进入划界考量的视野。[77] 从 1969 年北海大陆架案到 1982 年突尼斯 / 利比亚大陆架案、[78] 1984 年美国 / 加拿大缅因湾案、[79] 1985 年利比亚 / 马耳他案、1993 年格陵兰 / 扬马延海域划界案以及 2009 年罗马尼亚 / 乌克兰黑海海洋划界案，海岸长度的比例性已成为公平解决

76 Peter Cook and Chris M. Carleton, *Continental Shelf Limits – The Scientific and Legal Interface*, New York: Oxford University Press, 2000, p. 67.

77 傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 180 页。

78 Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment of 24 February 1982, at http://www.sovereigngeographic.com/maritime_pdf/1982-tunisia-libya-english.pdf, 1 March 2014.

79 Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment of 12 October 1984, at http://www.icj-cij.org/docket/index.php?sum=346&code=cigm&p1=3&p2=3&case=67&k=6f&p3=5, 1 March 2014.

划界应考虑的重要海岸地理因素。中国在东海西部连续的海岸线长达 3000 多公里，日本在东海东部零散岛屿的断续海岸线仅为中国相应海岸线长度的 1/3 左右且岛间距离较大，如果适用等距离方法划分大陆架显然有悖于公平原则。

（4）未来可能的划界状况

尽管自然延伸原则的重要性在国家大陆架划界实践中已被削弱，而且 200 海里距离标准已被《公约》采纳，并得到 1985 年利比亚 / 马耳他大陆架案的大力支持，但自然延伸原则仍是确定大陆架外部界限的有效标准，200 海里距离标准不应对 200 海里以外大陆架的权利基础产生任何影响。《公约》第 76 条不存在日本提出的所谓“400 海里规则”，即不能用《公约》第 76 条第 1 款中的 200 海里距离标准，来否定同样存在于该款中的构成 200 海里以外大陆架重要权利基础的自然延伸标准。日本所谓“400 海里规则”的实质就是，用可预见的权利重叠来否认权利存在的基础，这是一种经不起事实考验的荒谬的逻辑。联合国国际海洋法法庭首例海域划界案——2012 年孟加拉国 / 缅甸海域划界案的判决指出，自然延伸的概念与第 76 条第 1、4 款所指的大陆边密切相关且指的是同一个区域，沿海国在确定 200 海里以外大陆架权利时不能将其作为分离和独立的标准；相反，大陆边外缘的概念是确定大陆架范围的一个重要因素；因此，200 海里以外大陆架权利的确定应参考第 76 条第 4 款所界定的大陆边外缘。[80] 由此可见，2012 年孟加拉国 / 缅甸海域划界案是对 1985 年利比亚 / 马耳他大陆架案的一次重要修正，由地质和地球物理因素决定的大陆边外缘，无论如何都是确定 200 海里以外大陆架权利的重要考虑因素，而不取决于相向海岸间的宽度是否达到 400 海里。

澳大利亚和东帝汶在帝汶海的划界争端与中国和日本在东海的划界争端有相似之处，[81] 帝汶海沟和冲绳海槽都不在海岸相向两国的等距离处，中国和澳大利亚均主张按自然延伸原则在海沟或海槽附近或轴部划界，而东帝汶和日本则坚持按等距离方法中间划界。[82] 澳大利亚在其 2004 年划界案中并未列入帝汶海区域应该说是有所考虑的，一是避免因纳入这一争端区域而造成对划界案审议不利的局面，二是日后对这个赤道附近的赤贫小国实施用金钱换主权的措施相对容易些，所以澳大利亚并不急于解决帝汶海沟的问题。在这一点上中国没有效仿澳大利

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80 Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, paras. 434~437, at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf, 1 March 2014.

81 Andrew Serdy, Is There a 400-Mile Rule in UNCLOS Article 76(8)?, at http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session1-Paper2-Serdy.pdf, and http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf5/Presentations/Session1-Presentation2-Serdy.pdf, 1 March 2014.

82 贾宇：《中国东海二百海里外大陆架法律问题初探》，载于《中国海洋法学评论》，2006 年第 1 期，第 64~72 页。

亚，而是将冲绳海槽纳入了 2012 年的东海划界案，这是一项非常重要和及时的举措，因为日本绝非东帝汶，中国在原则问题上的稍稍松动，极可能被日本利用，认为“中国已放弃自然延伸原则”，从而铸成大错。[83]

目前，中国已在 2012 年东海划界案中提出中国的东海大陆架终止于冲绳海槽的主张。虽然日本国内的主流观点是以两国海岸间的等距离线划界，但根据《公约》第 76 条的规定，日本仍然可以根据 200 海里标准将其大陆架扩展到 200 海里的距离，对冲绳海槽以西（包括等距离线以西）的部分海底主张权利，而且这种观点在日本国内呈上升趋势。因此在未来中、日的划界谈判中，日本提出这两条线的可能性都是存在的，那么就会形成这两条线中的一条与中国主张的冲绳海槽线之间的潜在权利重叠区，中、日间在东海大陆架的最终划界线很有可能位于这个重叠区中的某个位置，这个位置可能是基于重叠区等距离线的一个调整。如果情况按上述趋势发展，中国应基于公平原则和海岸线长度的比例性等重要考量因素对上述可能的划界线进行合理调整，以确保国家的海洋权益不受损失。总而言之，中国还是要在坚持自然延伸原则的既定策略下，不断挖掘海岸相向国家的划界实践中对中方有益的考量因素，在国际法理和地理、地质数据上下功夫。

2. 钓鱼岛对中、日东海大陆架划界的影响

影响中、日在东海大陆架划界的另一个严重问题是双方关于钓鱼岛的领土主权争端。[84] 钓鱼岛及其附属岛屿大致位于东海南部的北纬 25.7°~26.0°、东经 123.0°~124.6°，由钓鱼岛、黄尾屿、赤尾屿、南小岛、北小岛、南屿、北屿、飞屿等 8 个无人岛礁组成，总面积约 6.344 平方公里，距中国台湾东偏北约 120 海里，中国大陆以东约 200 海里，冲绳岛以西约 200 海里，隔冲绳海槽与琉球群岛相望。[85]

钓鱼岛在中日甲午战争之前一直由中国控制，由于 1895 年 4 月 17 日的《马关条约》[86] 而被日本占据。1943 年 12 月 1 日的《开罗宣言》[87] 和 1945 年 7 月 26 日的《波茨坦公告》[88] 规定日本将二战期间所窃取的中国领土归还中国，《开罗宣言》和《波茨坦公告》确定的日本领土范围明确不包括钓鱼岛。美、日 1951 年 9

83 潘军：《一次卓有成效的国家实践——200 海里外大陆架法律制度下澳大利亚划界案的实证分析》，载于《太平洋学报》2012 年第 20 卷第 8 期，第 66~79 页。

84 王可菊：《钓鱼岛及其在东海划界中的地位》，载于《中国海洋法学评论》，2006 年第 1 期，第 39~49 页。

85 日本称为“尖阁群岛”，台湾称为“钓鱼台列屿”，下载于 http://en.wikipedia.org/wiki/Senkaku_Islands，2014 年 3 月 1 日。

86 Treaty of Shimonoseki, at http://www.taiwandocuments.org/shimonoseki01.htm, 1 March 2014.

87 Cairo Communiqué, at http://www.ndl.go.jp/constitution/e/shiryo/01/002_46/002_46tx.html, 1 March 2014.

88 Potsdam Declaration, at http://www.ndl.go.jp/constitution/e/etc/c06.html, 1 March 2014.

月 8 日私下达成的《对日本和平条约》（也称《旧金山和约》）[89] 将北纬 29° 以南的琉球群岛等交由美国托管，美国琉球民政管理局 1953 年 12 月 25 日发布的《琉球列岛的地理境界》[90] 单方面将钓鱼岛挟带其中，美、日 1971 年 6 月 17 日签订的《美利坚合众国和日本国之间关于琉球诸岛和大东诸岛的协定》[91]（即《美日归还冲绳协定》）又将钓鱼岛（行政管辖权）划入归还区域。日本政府据此对钓鱼岛主张领土主权，并认为钓鱼岛周围海底区域的石油储量超过 945 亿桶。[92]

中国 1992 年《领海和毗连区法》（第 2 条）和 1996 年批准《公约》的声明明确重申了中国对钓鱼岛的主权。中国于 2012 年 9 月 10 日宣布了钓鱼岛及其附属岛屿的领海基线，并向联合国交存了相关的地理坐标表和海图。日本随后在 2012 年 9 月 24 日[93] 和 2012 年 12 月 28 日提交的抗议照会中反复指出，尖阁群岛（日本对钓鱼岛的称谓）是日本领土固有的一部分，尖阁群岛处于日本政府的有效控制之下，关于尖阁群岛不存在需要解决的领土主权问题。对于日本的上述反应，中国 2013 年 1 月 7 日再次向联合国提交照会并强调，[94] 钓鱼岛及其附属岛屿自古以来就是中国的固有领土，中国对钓鱼岛及其附属岛屿的主权有着充分的历史、地理和法理依据。日本对钓鱼岛的窃取和立场是非法的、无效的，不能改变钓鱼岛属于中国的事实。

因此，从某种程度上说，解决钓鱼岛主权争端构成了中、日在东海大陆架划界的先决条件。如果日本取得钓鱼岛的主权，就可将其作为一个划界基点根据《公约》在东海主张数十万平方公里的专属经济区和大陆架，造成与中国的主张存在

89 Treaty of Peace with Japan, at http://www.taiwandocuments.org/sanfrancisco01.htm, 1 March 2014.

90 Geographical Boundaries of the Ryukyu Islands (琉球列島の地理的な境界), Civil Administration Proclamation No. 27, United States Civil Administration of the Ryukyu Islands, at http://www.niraikanai.wwma.net/pages/archive/caproc27.html, 1 March 2014.

91 Agreement between the United States of America and Japan Concerning the Ryukyu Islands and the Daito Islands, at http://www.niraikanai.wwma.net/pages/archive/rev71.html, 1 March 2014.

92 Selig S. Harrison ed., *Seabed Petroleum in Northeast Asia: Conflict or Cooperation?*, Washington D.C.: Woodrow Wilson International Center for Scholars, 2005, pp. 5~6, at http://wilsoncenter.org/sites/default/files/Asia_petroleum.pdf, 1 March 2014.

93 24 September 2012 Letter of the Permanent Mission of Japan to UN's Secretary-General, PM/12/303, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn89_2012_jpn.pdf, 1 March 2014.

94 7 January 2013 Letter of the Permanent Mission of the People's Republic of China to UN's Secretary-General, CML/001/2013, at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/chn_re_jpn07_01_2013e.pdf, 1 March 2014.

大面积重叠，[95] 由此再提出以等距离方法划分重叠区域。对此，中国不可能与日本达成一致。

（三）国际司法、仲裁机构介入的可能性

在上述的岛礁主权及划界原则等关键问题旷日持久，三方无法就此达成一致的情况下，并不能排除日韩想通过国际司法、仲裁机构的强制争端解决程序尽快解决东海大陆架划界争端的可能性。那么，日韩是否可以将上述争端单方面提交给《公约》第 15 部分（争端的解决）第 2 节（导致有拘束力裁判的强制程序）第 286、287 条 [96] 所指的强制性程序来迫使中国接受强制划界？答案是否定的。

中国在加入《公约》后的 2006 年 8 月 25 日曾发表正式声明：[97]

> 中国人民共和国政府不接受《联合国海洋法公约》第 15 部分第 2 节对于《联合国海洋法公约》第 298 条第 1 款第 (a)、(b) 和 (c) 项下所列所有争

95 Mark J. Valencia, The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions, *Asian Perspective*, Vol. 31, No. 1, 2007, pp. 127~167, at http://mrxijinping.com/english/uotsurishima/biblioteca/THE%20EAST%20CHINA%20SEA%20DISPUTE%20CONTEXT_CLAIMS_%20ISSUES_AND_POSSIBLE_SOLUTIONS.pdf, 1 March 2014.

96 《公约》第 286 条（本节规定的程序的适用）规定：“在第 3 节限制下，有关本公约的解释或适用的任何争端，如已诉诸第 1 节而仍未得到解决，经争端任何一方请求，应提交根据本节具有管辖权的法院或法庭。”《公约》第 287 条（程序的选择）第 1 款规定：“一国在签署、批准或加入本公约时，或在其后任何时间，应有自由用书面声明的方式选择下列一个或一个以上方法，以解决有关本公约的解释或适用的争端：（a）按照附件六设立的国际海洋法法庭；（b）国际法院；（c）按照附件七组成的仲裁法庭；（d）按照附件八组成的处理其中所列的一类或一类以上争端的特别仲裁法庭。”

97 Declarations and Statements, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China, 1 March 2014.

端的任何强制性程序。[98]

除非中国撤回保留，否则东海周边国家无法利用这种机制迫使中国接受强制性管辖。[99] 中国对东海的立场是明确和一贯的，始终主张根据公认的国际法，通过当事国之间的直接谈判解决东海争端。因此，韩、日想把中国拖入强制争端解决程序的思路是不切合实际和徒劳的。

五、东海大陆架未来划界的前瞻与对策

（一）中、韩划界案的审议前景

虽然中、韩均在 2012 年提交了划界案，但划界案的审议前景并不乐观。根据委员会的《议事规则》，一国向委员会提交划界案后，须经过 3 个月的公示期，相关国家可在此期间就此提交是否同意委员会审议该划界案的外交照会。经过公示期后，提交划界案的沿海国就划界案相关的科学技术问题及有关照会在委员会届会上进行陈述和说明。然后委员会要对沿海国提交的划界案进行初步审议，重点是审查该划界案是否涉及相关争议，其他国家是否提出明确反对的意见，进而做出是否进一步审议该划界案的决议。如果该划界案不涉及争议或未遭到其他国家的反对，则委员会将会成立相关的审议小组并依照提交时间顺序逐个进行实质性审议。

《议事规则》附件一第 5(a) 款规定：

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98 《公约》第 298 条（适用第 2 节的任择性例外）第 1 款规定：“一国在签署、批准或加入本公约时，或在其后任何时间，在不妨害根据第 1 节所产生的义务的情形下，可以书面声明对于下列各类争端的一类或一类以上，不接受第 2 节规定的一种或一种以上的程序：（a）（1）关于划定海洋边界的第 15、第 74 和第 83 条在解释或适用上的争端，或涉及历史性海湾或所有权的争端，但如这种争端发生于本公约生效之后，经争端各方谈判仍未能在合理期间内达成协议，则作此声明的国家，经争端任何一方请求，应同意将该事项提交附件五第二节所规定的调解；此外，任何争端如果必然涉及同时审议与大陆或岛屿陆地领土的主权或其他权利有关的任何尚未解决的争端，则不应提交这一程序；（2）在调解委员会提出其中说明所根据的理由的报告后，争端各方应根据该报告以谈判达成协议；如果谈判未能达成协议，经彼此同意，争端各方应将问题提交第二节所规定的程序之一，除非争端各方另有协议；（3）本项不适用于争端各方已以一项安排确定解决的任何海洋边界争端，也不适用于按照对争端各方有拘束力的双边或多边协议加以解决的任何争端；（b）关于军事活动，包括从事非商业服务的政府船只和飞机的军事活动的争端，以及根据第 297 条第 2 和第 3 款不属法院或法庭管辖的关于行使主权权利或管辖权的法律执行活动的争端；（c）正由联合国安全理事会执行‘联合国宪章’所赋予的职务的争端，但安全理事会决定将该事项从其议程删除或要求争端各方用本公约规定的方法解决该争端者除外。”

99 古俊峰：《中国根据〈联合国海洋法公约〉第 298 条发表排除性声明的法律效果分析》，载于《中国海洋法学评论》2007 年第 2 期，第 11~39 页。

如果已存在陆地或海洋争端，委员会不应审议和认定争端任一当事国提出的划界案。但在争端所有当事国事前表示同意的情况下，委员会可以审议争端区域内的一项或多项划界案。

因此，在委员会举行届会要求沿海国代表就划界案进行相应陈述时，会审议与划界案有关的争端的资料，并根据《议事规则》第 46 条和附件一决定是否对划界案进行审议。

如前所述，中、韩 2012 年提交的划界案已明显进入日本领海基线外 200 海里的范围，日本就此问题已先后 4 次向秘书长提交了反对照会。因此，中、韩的东海划界案明显存在海洋争端，但争端的具体性质还有待于进一步厘清（例如是领土主权争端，还是划界原则争端，抑或对《公约》相关条款解释的争端等等）。虽然中、韩的划界案已被列入委员会 2013 年 7 月会议的临时议程而被初步审议，但后续是否进行实质性审议，取决于初步审议对所涉争端性质的具体裁决，且很大程度上取决于委员会对日本的抗议的考量。委员会以往对涉及争端的划界案一直较为谨慎，在中、韩划界案之前已有多项划界案被无限期推迟审议（如越南划界案、马来西亚和越南联合划界案等）。中、韩的东海划界案也未能突破这种瓶颈，委员会第 32 届会议结束后发表的主席声明显示，中、韩划界案因涉及《议事规则》附件一第 5(a) 款的类似原因而被推迟审议。[100]

由是观之，中、韩划界案将来得到实质性审议的前景并不乐观，只要日本的反对立场不改变，委员会便不会轻易推翻就此作出的决定。而日本作为自然资源极度贫乏的岛国，其强烈的危机和对外扩张的意识是显而易见的，加上日本 2008 年划界案在冲之鸟礁问题上严重受挫，日本决不会轻易放弃对东海利益的争夺，因为全球的国家管辖海域即将被全部划定，对日本而言东海是有限的、极其珍贵的海底资源争夺地。除争夺资源外，东海对日本的军事战略意义也举足轻重，所以日本在东海与中、韩的较量会一直持续下去，除非有突发性事件导致这一海域局势的突变。

（二）东海大陆架未来划界的对策

1. 始终坚持以国际法为基础的公平、协议划界原则

中国 1998 年的《专属经济区和大陆架法》第 2 条规定：

中华人民共和国与海岸相邻或者相向国家关于专属经济区和大陆架的

100 CLCS/80, at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/485/26/PDF/N1348526.pdf?OpenElement, 1 March 2014.

主张重叠的，在国际法的基础上按照公平原则以协议划定界限。

中国 2009 年初步信息的第 11 段也指出：

> 中国将按照其一贯立场，与海岸相邻或相向国家在国际法基础上，按照公平原则，通过和平谈判以协议划定大陆架界限。

由是观之，中国在解决海岸相向或相邻国家间大陆架的划界具有稳定的延续性立场，即以国际法和公平原则为基础的协议方式。为了获得有利于经济快速发展的稳定的周边国际环境，在解决包括东海在内的周边海域内大陆架划界的问题上，中国应一如既往地坚持上述原则。但任何原则都有适用的条件和环境，若周边的政治局势发生突变，中国的上述原则也应作相应调整。

2. 通过营造国际学术氛围、与相关国际权威机构沟通来缓解政治对抗

海岸相向或相邻的沿海国间的大陆架划界虽然是一个棘手的政治问题，但是辅助性的、良好的国际学术氛围对于增进当事国相关领域专家间的沟通、缓解当事国间的政治对抗是十分有益的。由中国国家海洋局和中国大洋矿产资源研究开发协会共同资助、国家海洋局第二海洋研究所和国家海洋局海洋发展战略研究所共同主办的“大陆架和国际海底区域制度科学与法律问题国际研讨会”，自 2010 年以来已经成功举办了 4 届。每届会议均有联合国海洋事务和海洋法司、国际海底管理局、大陆架界限委员会、国际海洋法庭的高级别官员以及数十个国家的 100 多位世界顶级海洋法律专家与科学家欣然赴会，参与国际交流，会议论文的高质量和发言交流的深入性受到了普遍赞赏和高度认可。参会代表中不乏日、韩专家学者，某种程度上他们又是两国海洋政策方面重要的智囊成员，通过国际学术交流的形式与之达成一定的沟通和谅解，势必会对未来中国与日、韩间的大陆架划界谈判有一定的作用。此外，中国积极举办相关领域类似的高层次国际研讨会，也必定有助于提高国内专家在相关领域的理论和学术水平，并在未来的东海大陆架划界进程中发挥更有效的智囊作用。

3. 军事对策的必要性

如前所述，虽然在国际法基础上的公平、协议划界是中国解决海域划界争端的总原则，但必须以国家领土主权不受侵害为前提。因此《公约》的框架并非是解决东海大陆架划界争端的唯一途径。自威斯特伐利亚时代起确立的现代国际法的基石——国家主权原则，仍是国际社会得以相对稳定的根基。东海南部未来的大陆架划界与钓鱼岛的主权争端休戚相关，钓鱼岛主权争端解决之前东海南部不可能出现令中日双方都满意的大陆架划界结果。而且从目前的形势看，日本国内的岛国危机意识还在增强，为摆脱在 2008 年划界案中冲之鸟礁问题上的窘境以及在东海中北部与中、韩在大陆架划界问题上旷日持久的对峙，日方今后在东海

利益诉求的重点会转向寻求以钓鱼岛为基点的海洋权益（包括专属经济区和大陆架）。为此，中国的海、空力量亟待加强，特别是远洋综合作战和补给能力。目前，中国正在为解决包括东海、南海在内的周边海域的争端而进行策略和战略上的调整。另外，东海大陆架划界并非完全取决于争端各当事国本身，适用《公约》第 76 条时的某些不确定因素（例如对各种洋脊的界定）以及超级大国的背后介入仍会带来极大的不确定性，[101] 中国应尽早制定并不断调整各种预案。

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101 桂静：《外大陆架划界中的不确定因素及其在北极的国际实践》，载于《中国海洋法学评论》2010 年第 1 期，第 89~100 页。

The Delimitation of the Continental Shelf beyond 200 Nautical Miles in the East China Sea

PAN Jun *

Abstract: The East China Sea continental shelf, situated between China, Japan and the Republic of Korea (hereinafter "Korea"), is a natural prolongation of the land territory of China. It is obvious that, because the East China Sea is less than 400 nautical miles at its maximum breadth, areas claimed by each country will overlap even if their claimed continental shelves stay within 200 nautical miles as provided under the United Nations Convention on the Law of the Sea. Claims for continental shelves beyond 200 nautical miles will result in large overlapping areas. The delimitation of the East China Sea continental shelf will certainly require the three countries to negotiate for a solution. The three have relied on different principles from international law to support their respective claims. China has consistently asserted principles of natural prolongation and equity; Korea advocates the equidistance method for the Yellow Sea and the western East China Sea, and the natural prolongation principle for the eastern East China Sea; and Japan favors the median line method. The sovereignty dispute over Diaoyu Dao between China and Japan will directly influence the delimitation of the continental shelf in the southern East China Sea. The partial submissions on the East China Sea by China and Korea in 2012 have escalated the disputes on the delimitation of the East China Sea continental shelf among the three countries to a new level.

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Key Words: East China Sea; Continental shelf beyond 200 nautical miles; Okinawa Trough; Diaoyu Dao; Submission; Commission on the Limits of the Continental Shelf; Natural prolongation principle; Equidistance method; Equitable principle

I. Introduction

The continental shelf, a concept originally derived from marine geology and geomorphology, refers to the shallow seas around the mainland: namely, the underwater and seaward prolongation of the mainland up to the slope-break where a significant increase in slope occurs. It can also be thought of as the part of the mainland that is covered by the sea. With humanity's deepened understanding of the oceans, constant appetite for marine resources, enhanced desire for jurisdiction over the waters, and increased ability to explore and develop the oceans, the legal concept of the continental shelf emerged.[1] During the continuous evolution of the law of the sea, the legal continental shelf has undergone the following three periods of change: the 1945 Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (Truman Proclamation),[2] the 1958 Convention on the Continental Shelf,[3] and the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[4] The legal concept of the continental shelf, as redefined by the UNCLOS, gives coastal countries the possibility and the right to extend their legal continental shelves beyond 200 nautical miles (nm) from the baseline of their territorial seas after the approval of their submissions by the Commission on the Limits of the Continental Shelf

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1 Jia Yu, Sino-Japan Joint Development in the East China Sea and the Outer Continental Shelf of China, *China Oceans Law Review*, No. 1, 2009, pp. 12~17. (in Chinese)

2 150 - Proclamation 2667 - Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945, at http://www.presidency.ucsb.edu/ws/?pid=12332, 1 March 2014.

3 Convention on the Continental Shelf, signed in Geneva on 29 April 1958, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21&lang=en, 1 March 2014.

4 United Nations Convention on the Law of the Sea (1833U.N.T.S.3), adopted on 10 December 1982 and went into effect on 16 November 1994, at https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en, 1 March 2014.

(CLCS).[5] Since the first submission by Russia on 20 December 2001, the CLCS has received to date 70 formal submissions[6] and 46 preliminary information files[7] showing the approximate areas of continental shelves beyond 200 nm from the baseline of the applicants' territorial seas (hereinafter "continental shelves beyond 200 nm"). Currently, all coastal States that meet the requirements, especially island countries, are hoping to take advantage of the relevant provisions in the UNCLOS (such as those on "oceanic ridges") to extend their continental shelves as far as possible beyond 200 nm.[8]

There are serious conflicts in maritime rights and interests between the People's Republic of China, Japan, and the Republic of Korea (hereinafter "Korea") in the East China Sea. These conflicts manifest themselves in the intertwined issues of sovereignty over islands and rocks, the delimitation of sea areas, and the exploitation of resources. After China and Korea made their respective partial submissions on their East China Sea continental shelves beyond 200 nm to the CLCS at the end of 2012, the conflicts among China, Japan, and Korea in the East China Sea have escalated to a new level. Each country wants to claim maximum maritime rights and interests under international law. The conflicts of interests are all but certain to intensify and head for a confrontation, making the already delicate situation in the East China Sea even more difficult to control. This article will present a brief analysis of the main problems in the delimitation of the continental shelf beyond 200 nm in the East China Sea and incorporate the latest research from

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5 The Commission on the Limits of the Continental Shelf (CLCS), a special commission of the UN, was established in 1997 and dedicates itself solely to matters concerning the outer limits of the continental shelf beyond 200 nautical miles. Its specific functions include considering submissions on the outer limits of the continental shelf beyond 200 nm made by coastal States, making recommendations on the submissions, and providing scientific and technical advice if requested by coastal States during their preparations. Each term of the CLCS lasts 5 years, and it has gone through 4 terms (1997, 2002, 2007 and 2012). The CLCS consists of 21 experts in the fields of geology, geophysics, hydrography, and others, having due regard to the need to ensure equitable geographical representation. All experts are elected by States Parties to the UNCLOS from their nationals, but the experts serve in their personal capacities. Through establishing the CLCS, it was the UNCLOS's intent to keep the potential difficulties encountered in determining the outer limits of the continental shelf beyond 200 nm to a minimum.

6 Submissions to the CLCS, at http://www.un.org/Depts/los/clcs_new/commission_Submission.htm, 1 March 2014.

7 Preliminary Information to the CLCS, at http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm, 1 March 2014.

8 Fang Yinxia and Zhou Jianping, Legal Theories in the UNCLOS on the Continental Shelf and the Conditions for Their Application, *China Oceans Law Review*, No. 1, 2006, pp. 73~84. (in Chinese)

China and abroad.

II. An Overview of the Situation in the East China Sea

The East China Sea is a marginal sea of the western Pacific Ocean. It is located roughly at 23.0°~33.2° N and 117.2°~131.0° E, and surrounded by Korea, Japan, China Taiwan, and China Mainland.[9] The East China Sea is bounded by the Yellow Sea to the north at the line connecting the northern tip of the mouth of the Yangtze River and the southern tip of Jeju Island; faces the Pacific to the east through Japan's Kyushu Island and the Ryukyu Islands; reaches the South China Sea through the Taiwan Strait in the south; and adjacent to China Mainland in the west. Its area measures about 770,000 km^2, with an average depth of 350 m, in which the continental shelf occupies about 460,000 km^2 with an average depth of 72 m.

The topography of the East China Sea seabed is consistent with that of the mainland of China. It slopes from the northwest to the southeast, and consists of the following geomorphologic units: the East China Sea continental shelf, the East China Sea continental slope, the Okinawa Trough,[10] and the insular slope and shelf on the west side of the Ryukyu Islands. The East China Sea continental shelf, wide in the north, narrow in the south and flat overall, is a natural seaward prolongation of the mainland of China. Its breadth ranges between 310 and 601 km, with a general breadth of 400 km. The water depth increases sharply at the shelf break where the East China Sea continental slope begins. The East China Sea continental slope spreads in the shape of a curved fan along the NNE–SSW direction. Also wider in the north than the south, the breadth of the continental slope generally ranges from 40 to 50 km with the outer limits at 28 and 70 km. The gradient is gentle in the north and steep in the south, and the topography resembles descending steps. The slope is corroded numerous seafloor canyons. Sediments caused by turbidity currents are formed in the foot region of the slope outboard of the canyons, forming a complex geography at the base and in the foot region of the

9 East China Sea, at http://en.wikipedia.org/wiki/East_China_Sea, 1 March 2014.

10 Part of the East China Sea continental shelf is located west of the Okinawa Trough, while the Ryukyu Island Arc stands east of the trough. The location, size, and depth of the trough have the most significant geophysical characteristics among the formations under the East China Sea. Qin Yunshan, *Geology of the East China Sea*, Beijing: Science Press, 1996, p. 1. (in Chinese)

slope. The Okinawa Trough is a boat-shaped, elongated depression protruding to the southeast. It measures about 1,200 km from north to south and 100 to 150 km from east to west. The water depth of the trough gradually increases from northeast to southwest with its maximum water depth at about 2,716 m.[11] The microrelief on its surface is also complex.

In terms of geological structure, the East China Sea is somewhere between the Eurasian Plate and the Pacific Plate. Since the Neogene period, significant rifts had occurred at the continental margins of the East China Sea and gradually stretched the land into the Okinawa Trough. The East China Sea's structural regions go from west to east in strips of five first-grade tectonic units: the Fujian–Zhejiang rise zone, the East China Sea shelf basin, the Diaoyu Dao upfold zone, the Okinawa Trough basin, and the Ryukyu rise zone. Their geologic ages also decrease from west to east. The Fujian–Zhejiang rise zone includes a series of islands and submerged reefs off the shore of the mainland of China and as a whole orients itself to the northeast. The East China Sea shelf basin is formed by a series of NNE-NE-trending depressions, which has obvious Cenozoic deposits.

The East China Sea continental shelf to the west of the Okinawa Trough has the basic features of a continent: the same ancient continental core and crust structure as the mainland of China, geological structures and minerals that appear to be extensions of those of the mainland, a terrain with features inherited from the mainland, and widely distributed terrigenous sediments with origins in the mainland of China. Thus, the continental shelf is a stable continental crust that is part of the same whole as the eastern part of the mainland of China. On the other hand, the Ryukyu rise zone to the east of the Okinawa Trough does not share these features with the East China Sea continental shelf. Due to upwelling of its upper mantle and the sharp thinning of the continental crust, the crust of the Okinawa Trough has passed from being a thinned continental crust to a transitional crust, and a nascent oceanic crust has formed in the central rifted zone of the axis in the southern Okinawa Trough. Therefore, the East China Sea continental shelf, the East China Sea continental slope, and the Okinawa Trough form a passive continental margin.[12] In addition, Atlantic-type continental shelves generally connect directly

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11 Okinawa Trough, at http://en.wikipedia.org/wiki/Okinawa_Trough, 1 March 2014.

12 Executive Summary of the Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, pp. 2~4, at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/executive%20summary_CH.pdf, 1 March 2014. (in Chinese)

to the ocean basin via a continental slope. By contrast, trenches, island arcs, and marginal basins have formed in the western Pacific. A continental shelf with this kind of tectonic framework usually terminates at the edge basin and connects to the ocean basins through an island arc. The East China Sea continental shelf is precisely a western-Pacific-type continental shelf, and naturally terminates at the Okinawa Trough (a nascent marginal basin) and connects to the Pacific basin through the Ryukyu island arc.

III. An Analysis of the Submissions by Countries around the East China Sea

The UNCLOS went into effect for China, Japan, and Korea before 1999.[13] In accordance with the submission deadline, all the three countries completed their legal processes for a submission before May 13, 2009. Japan made a partial submission in November 2008, and China and Korea each submitted their preliminary information in May 2009. China and Korea each made a formal partial submission on the East China Sea in December 2012. Although Japan has not made a submission on the East China Sea, its stance on the delimitation of the East China Sea continental shelf is basically clear. The right to establish the outer limits of the continental shelf beyond 200 nm is exclusive to coastal countries. Although it is not given that the recommendations by the CLCS are legally binding, the practical authority of the recommendations – from reading Article 76(8) of the UNCLOS and observing international practice to date – is beyond doubt.[14] China, Japan, and Korea also give great weight to the recommendations, and all of them have striven to act within the UNCLOS framework.

A. China

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13 The respective dates on which China, Japan, and Korea deposited their instruments of accession and ratification of the UNCLOS were 7 June 1996, 20 June 1996 and 29 January 1996. According to Article 308(2) of the UNCLOS, "[f]or each State ratifying or acceding to this Convention after the deposit of the sixtieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession, subject to paragraph 1," at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea, 1 March 2014.

14 Fan Yunpeng, On the Legal Status of the Commission on the Limits of the Continental Shelf, *China Oceans Law Review*, No. 1, 2007, pp. 151~161. (in Chinese)

1. An Overview of China and Its Domestic Laws on Maritime Rights and Interests

China is located in East Asia and on the western coast of the Pacific. It has about 9.6 million km^2 of land, 18,000 km of coastline, 4.7 million km^2 of claimed inland seas and coastal seas, and borders 14 countries by land and adjoins or faces 8 countries at sea.

After the founding of the People's Republic of China, China's government has issued a series of domestic laws concerning the seas under its jurisdiction, such as:

- Statement on the Territorial Sea by the Government of the People's Republic of China,[15] September 4, 1958
- Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China,[16] February 25, 1992
- Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea,[17] May 15, 1996
- Exclusive Economic Zone and Continental Shelf Act of the People's Republic of China,[18] June 26, 1998
- Law of the People's Republic of China on the Administration of the Use of Sea Areas,[19] January 1, 2002
- Law on the Protection of Islands of the People's Republic of China,[20] March 1, 2010

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15 Statement on the Territorial Sea by the Government of the People's Republic of China, 4 September 1958, at http://www.soa.gov.cn/zwgk/fwjgwywj/shfl/201211/t20121105_5205.html, 1 March 2014. (in Chinese)

16 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, 25 February 1992, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf, 1 March 2014.

17 Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, 15 May 1996, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf, 1 March 2014.

18 Exclusive Economic Zone and Continental Shelf Act, 26 June 1998, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf, 1 March 2014.

19 Law of the People's Republic of China on the Administration of the Use of Sea Areas, 1 January 2002, at http://www.soa.gov.cn/zwgk/fwjgwywj/shfl/201211/t20121105_5210.html, 1 March 2014. (in Chinese)

20 Law on the Protection of Islands of the People's Republic of China, 1 March 2010, at http://www.soa.gov.cn/zwgk/fwjgwywj/shfl/201211/t20121105_5206.html, 1 March 2014. (in Chinese)

• Statement of the Government of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands,[21] September 10, 2012

These laws have effectively and gradually prepared for the delimitation of all sea areas under Chinese jurisdiction within the framework of the UNCLOS. Meanwhile, the Chinese government signed the UNCLOS on December 10, 1982 and ratified it on May 15, 1996. The UNCLOS came into effect for China on July 7, 1996.

2. China's 2009 Preliminary Information on the East China Sea Continental Shelf beyond 200 nm

Since 1996, China's State Oceanic Administration has conducted three special surveys of the continental shelf, collecting a large amount of data on the topography and geological formations of, and sediment in the East China Sea and the Okinawa Trough. On May 11, 2009, pursuant to the provisions of Article 76(8) of the UNCLOS, Article 4 of Annex II to the UNCLOS, Article 3 of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf (hereinafter "the Rules of Procedure"), and the decisions in SPLOS/72 and SPLOS/183, China submitted to the UN Secretary-General the Preliminary Information Indicative of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles of the People's Republic of China (hereinafter "Preliminary Information"), involving the outer limits of the continental shelf beyond 200 nm in parts of the East China Sea. It includes 12 paragraphs, 8 figures, and 4 tables in 17 pages.

China's Preliminary Information made the following assertions. Submarine topographic maps of the East China Sea continental shelf and surrounding waters were charted based on the relevant provisions of Article 76(4)~(5) of the UNCLOS and paragraph 2.2.8 of the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf (hereinafter "the Guidelines"), and with the use of the General Bathymetric Chart of the Oceans (GEBCO) and China's measured water-depth data. Four profiles were selected, with the base points at Liangxiongdiyu (base point No. 14), Yushanliedao (base point No. 15), and Taizhouliedao (2) (base point No. 17), as announced by the Chinese government

21 Statement of the Government of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands, 10 September 2012, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf, 1 March 2014.

as the starting points.[22] The foot of the continental slope (hereinafter "the FOS") (Point C in each profile, see Fig. 1) was determined with the Caris Lots software.[23] These points were located on the western slope of the Okinawa Trough, and points at a distance of 60 nm from the FOS (Point E in each profile, see Fig. 1) were also identified. This proved that the natural prolongation of China's East China Sea continental shelf extended beyond 200 nm and that the outer limits delineated by reference to a distance of 60 nm from the FOS did not exceed 350 nm.[24] China identified the points at the maximum water-depth (Point D in each profile, see Fig. 1) as the fixed points that formed the outer limits of the East China Sea continental shelf beyond 200 nm. These points were not more than 60 nm from the FOS. This established that the outer limits of China's East China Sea continental shelf beyond 200 nm were at the axis of the Okinawa Trough.

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22 Base point No.14 (Liangxiongdiyu) was used in both Sections 1 and 2 in different directions. Each sectional line has 6 fixed points: A, the starting point of the sectional line; B, the intersection of the sectional line and the 200-nm-line; C, the point of the maximum gradient of the continental slope; D, the point of maximum depth in the Okinawa Trough; E, the fixed point at 60 nm from the FOS along the sectional line; and F, the ending point of the sectional line. The main purpose of the 4 sectional lines is to adhere to the "Test of Appurtenance" required by the Guidelines, i.e., to prove the existence of China's continental shelf beyond 200 nm in the East China Sea as measured from the baselines of China's territorial sea.

23 CARIS, Maximize Your Territorial Claims, at http://www.caris.com/products/lots/index.cfm, 1 March 2014.

24 The East China Sea seabed is a submarine ridge. According to Article 76(6) of the UNCLOS, a claim can be made on a continental shelf as far as 350 nm from the baseline used to measure the breadth of the territorial sea.

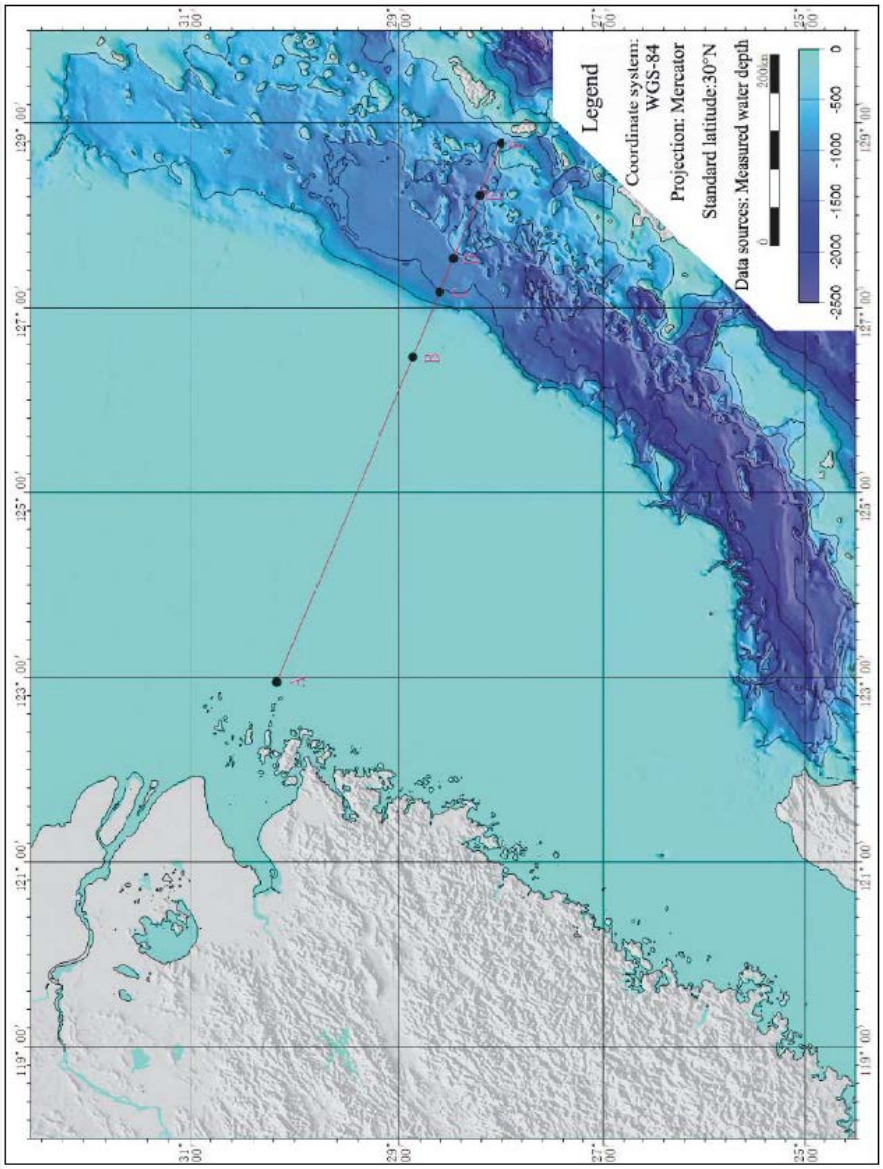

Fig. 1 Schematic Position of Profile 1 in China's 2009 Preliminary Information[25]

25 Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China, p. 6, at http://www.un.org/Depts/los/clcs_new/Submission_files/preliminary/chn2009preliminaryinformation_chinese.pdf, 1 March 2014. (in Chinese)

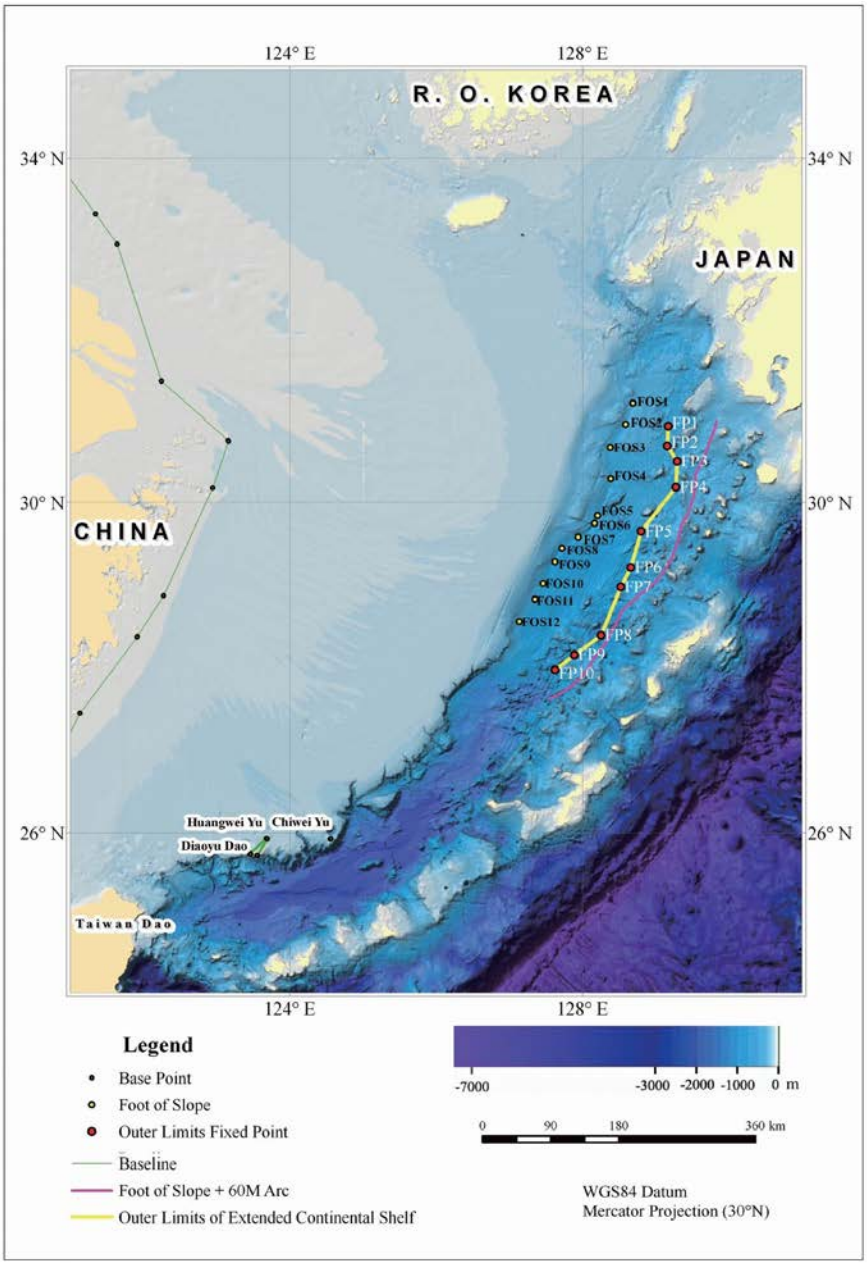

Fig. 2 Schematic Position of the Outer Limits in China's 2012 Submission [26]

26 Executive Summary of the Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, p. 5, at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/executive%20summary_CH.pdf, 1 March 2014. (in Chinese)

3. China's 2012 Partial Submission on the Outer Limits of the Continental Shelf beyond 200 nm in the East China Sea

a. The Submission's Receipt

After it submitted its Preliminary Information on May 12, 2009, the Chinese government completed the final assessments and review of its submission on the East China Sea. On September 16, 2012, it announced that the technical preparations on a submission on the East China Sea continental shelf were completed and that it intended to make a submission. The Submission by the People's Republic of China concerning the Outer Limits of the Continental Shelf beyond 200 NM in Part of the East China Sea (hereinafter "China's submission") was formally made to the Secretary-General on December 14, 2012.[27] On the same day, the official website of the CLCS released Continental Shelf Notification No. 63, which marked its receipt of China's submission.[28] The consideration of China's submission was incorporated into the provisional agenda of the 32nd session of meetings of the CLCS, to be held in New York from July 15 to August 30, 2013.

b. An Outline of the Executive Summary of China's Submission

The executive summary of China's submission pointed out the following. The geomorphologic and geological features showed that the East China Sea continental shelf was the natural prolongation of China's land territory. The Okinawa Trough, an important geomorphologic unit with significant cutoff characteristics, was the end point of China's continental shelf in the East China Sea. The breadth of China's continental shelf in the East China Sea, measured from the baseline from which the breadth of China's territorial sea was measured, exceeded 200 nm. Ten fixed points (Fig. 2) defining the outer limits of the continental shelf beyond 200 nm were identified in the submission. The submission concerned the outer limits of the continental shelf beyond 200 nm in a part of the East China Sea. This submission by the Chinese government would not prejudice any future submission by China on delimitation of the outer limits of the continental shelf in the East China Sea or other seas. The submission was prepared by the State Oceanic Administration of China, the China Geological Survey, the Chinese Academy of

27 Submission by the People's Republic of China, 14 December 2012, at http://www.un.org/Depts/los/clcs_new/Submission_files/submission_chn_63_2012.htm, 1 March 2014.

28 Receipt of the Submission Made by the People's Republic of China to the Commission on the Limits of the Continental Shelf, CLCS.63.2012 (Continental Shelf Notification), at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/clcs_63_2012.pdf, 1 March 2014.

Sciences and other departments. Prof. Lu Wenzheng,[29] a current Chinese member of the CLCS, provided technical assistance and advice for the preparation of the submission. China, Korea, and Japan had not yet completed the delimitation of the continental shelf in the area involved in the submission, and China promised that the submission would not adversely affect the future delimitation of the continental shelf between China and other relevant States.

c. The Formation Process of the FOS, Points of Maximum Water Depth, and Outer Limits of the Continental Shelf

In accordance with Article 76(4)(b) of the UNCLOS and paragraphs 5.1.3 and 5.4.5 of the Guidelines, the base region of the continental slope referred to in the submission was defined as the area of sudden topographical change between the base of the steep slope of the East China Sea and the relatively smooth upper rise of the Okinawa Trough. Based on multi-beam bathymetric data at a grid of 200 m × 200 m and the geomorphologic features and trends of the seafloor, a series of profiles were selected from the continental slope to the Okinawa Trough and 12 points of maximum change in gradient at the base of the slope were selected as the FOS. The outer envelope of 60 nm from the FOS was formed based on the 12 points, thus confirming that China's continental shelf in the East China Sea extended naturally to the axis of the Okinawa Trough. The axial area of Okinawa Trough was determined based on the regional geological structure, crustal structure, petrologic characteristics, and the topographical and geomorphological features of the sea floor. Based on multi-beam bathymetric data of the relevant sea area that China obtained in 1996 – 2002 and the GEBCO 30″×30″ bathymetric data, a series of morphological profiles perpendicular to the trending of the Okinawa Trough's axis were chosen. Ten points of maximum water depth (FP1~FP10) were selected in the central area of the rift in the Okinawa Trough as the fixed points for determining the outer limits of the continental shelf beyond 200 nm in part of the East China Sea. The lines connecting these points formed the outer limits of China's continental shelf beyond 200 nm in the East China Sea.[30] The lines connecting the fixed points did not exceed 60 nm. The outer limits exceeded neither

29 Lu Wenzheng, Curriculum Vitae, at http://www.un.org/Depts/los/clcs_new/members_curriculumvitae/LuCV.pdf, 1 March 2014.

30 Executive Summary of the Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, p. 6, at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/executive%20summary_CH.pdf, 1 March 2014. (in Chinese)

the outer envelope of 60 nm from the FOS, nor 350 nm from the baseline from which the breadth of the territorial sea was measured.

B. Korea

1. An Overview of Korea and Its Domestic Laws on Maritime Rights and Interests

Korea is located in the southern Korean Peninsula. It is separated from the Democratic People's Republic of Korea (hereinafter "North Korea") in the north by the Korean Demilitarized Zone and surrounded by water on three sides: the Sea of Japan to the east, the Korean Strait (referred to by Korea as the "Strait of the Republic of Korea") to the southeast, and the Yellow Sea (referred to by Korea as the "West Sea") to the southwest. It has a land area of about 99,000 km^2 and a total of 17,000 km of coastline.[31]

Korea asserted its rights to the continental shelf with its Submarine Mineral Resource Development Act (No. 2184), passed on January 1, 1970, and Presidential Decree No. 5020 of May 30, 1970.[32] Based on the above domestic laws, Korea announced that it had the sovereign right to explore and exploit the natural deposits in the seabed and the subsoil off its coast. Subsequently, the following maritime laws and agreements have come into effect for Korea:

- Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries,[33] January 30, 1974
- Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries,[34] January 30, 1974

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31 The Republic of Korea, at http://en.wikipedia.org/wiki/South_Korea, 1 March 2014.

32 Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia*, Leiden: Martinus Nijhoff Publishers, 2004, p. 175.

33 Agreement between Japan and the Republic of Korea concerning the Establishment of Boundary in the Northern Part of the Continental Shelf adjacent to the Two Countries, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/jap-kor1974north.pdf, 1 March 2014.

34 Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf adjacent to the Two Countries, at http://www.un.org/Depts/los/LEGISLATIONAND-TREATIES/PDFFILES/TREATIES/jap-kor1974south.pdf, 1 March 2014.

(The two agreements above will be collectively referred to as the "1974 Agreement"[35])

• Territorial Sea Act,[36] December 31, 1977

• Enforcement Decree of the Territorial Seas Act,[37] promulgated by Presidential Decree No. 9162, September 20, 1978

• Territorial Sea and Contiguous Zone Act,[38] amended by Law No. 4986, December 6, 1995

• Exclusive Economic Zone Act,[39] August 8, 1996

• Enforcement Decree of Territorial Sea and Contiguous Zone Act,[40] amended by Presidential Decree No. 13463, September 7, 1991 and by Presidential Decree No. 15133, July 31, 1996

• Enforcement Decree of Territorial Sea and Contiguous Zone Act,[41] amended by Presidential Decree No. 13463, September 7, 1991, by Presidential Decree No.15133, July 31, 1996, and by Presidential Decree No. 17803, December 18, 2002

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35 The above two agreements are agreements reached privately between Japan and Korea. They had by themselves designated a so-called "Japan–Korea Joint Development Zone" ("JDZ") with an area of approximately 80,000 km^2. China issued a statement of protest on 4 February 1974, calling it a violation of Chinese sovereignty and refusing to recognize the JDZ.

36 Territorial Sea Act, Law No. 3037 of 31 December 1977, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1977_Law.pdf, 1 March 2014.

37 Enforcement Decree of the Territorial Seas Act, promulgated by Presidential Decree No. 9162, 20 September 1978, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1978_Decree.pdf, 1 March 2014.

38 Territorial Sea and Contiguous Zone Act, Law No. 3037, promulgated on 31 December 1977, amended by Law No. 4986, which was promulgated on 6 December 1995, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1995_Law.pdf, 1 March 2014.

39 Exclusive Economic Zone Act, No. 5151, promulgated on 8 August 1996, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1996_EEZAct.pdf, 1 March 2014.

40 Enforcement Decree of Territorial Sea and Contiguous Zone Act, promulgated by Presidential Decree No. 9162, 20 September 1978, amended by Presidential Decree No. 13463, 7 September 1991 and by Presidential Decree No. 15133, 31 July 1996, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_1996_Decree.pdf, 1 March 2014.

41 Enforcement Decree of Territorial Sea and Contiguous Zone Act, Presidential Decree No. 9162, 20 September 1978, amended by Presidential Decree No. 13463, 7 September 1991, by Presidential Decree No.15133, 31 July 1996, and by Presidential Decree No. 17803, 18 December 2002, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_2002_Decree.pdf, 1 March 2014.

Korea signed the UNCLOS on March 14, 1983, and ratified it on January 29, 1996. After the UNCLOS went into effect for Korea on February 28, 1996, Korea's claims to a right to the continental shelf have clarified: based on the UNCLOS, it intends to claim the maximum legal continental shelf beyond 200 nm from the baseline of its territorial sea.

2. Korea's 2009 Preliminary Information on the Continental Shelf beyond 200 nm in the East China Sea

On May 11, 2009, Korea submitted to the Secretary-General its preliminary information indicative of the outer limits of the continental shelf that extends beyond 200 nm in the East China Sea, in accordance with Article 76(8) of the UNCLOS and SPLOS/183, and to satisfy the time requirements in Article 4 of Annex II to the UNCLOS and SPLOS/72. Korea's preliminary information indicated that the outer limits of its continental shelf in the East China Sea beyond 200 nm from the baseline from which the breadth of its territorial sea was measured were located in the Okinawa Trough. However, the preliminary information submitted at this time was confined to the outer limits of the East China Sea continental shelf beyond 200 nm within the JDZ established under the 1974 Agreement.

Korea's preliminary information also stated that the four fixed points (FOS-1 to FOS-4) defining the FOS were determined in accordance with Article 76(4)(b) of the UNCLOS; the four fixed points (KOR-1 to KOR-4) that defined the outer limits of the continental shelf beyond 200 nm were identical to those established in the 1974 Agreement to define the southern limits of the JDZ; the other two fixed points (KOR-5 and KOR-6) on the outer limits of the continental shelf beyond 200 nm were the points where Korea's 200-nm-line crossed the eastern and western limits of the JDZ (Fig. 3). The list of fixed points and their data and a map of the sea areas involved were included in two attachments to the preliminary information. The continental shelf beyond 200 nm claimed by Korea, depicted in the map in its preliminary information, was about 19,000 km^2 and overlapped with the continental shelves claimed by China and Japan.

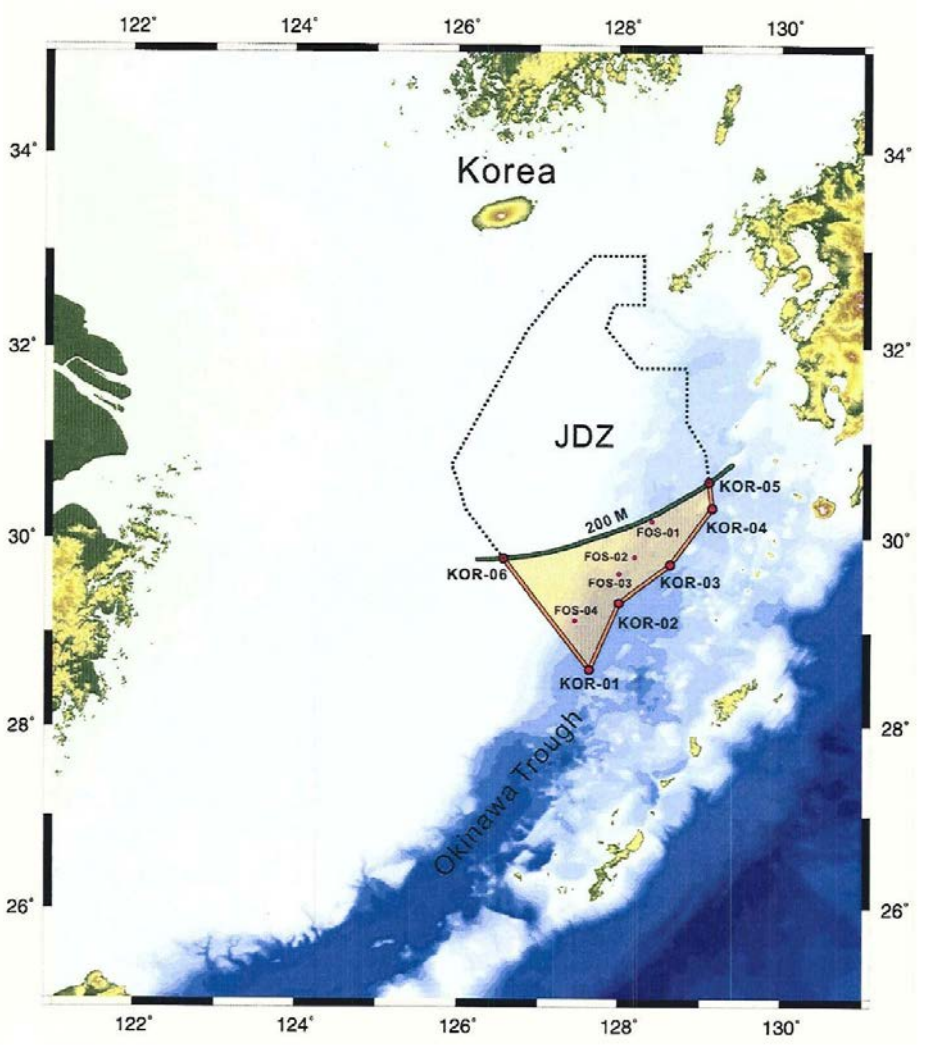

Fig. 3 Schematic Position of Outer Limits in Korea's 2009 Preliminary Information [42]

42 Preliminary Information regarding the Outer Limits of the Continental Shelf, the Republic of Korea, 11 May 2009, p. 7, at http://www.un.org/Depts/los/clcs_new/Submission_files/preliminary/kor_2009preliminaryinformation.pdf, 1 March 2014.

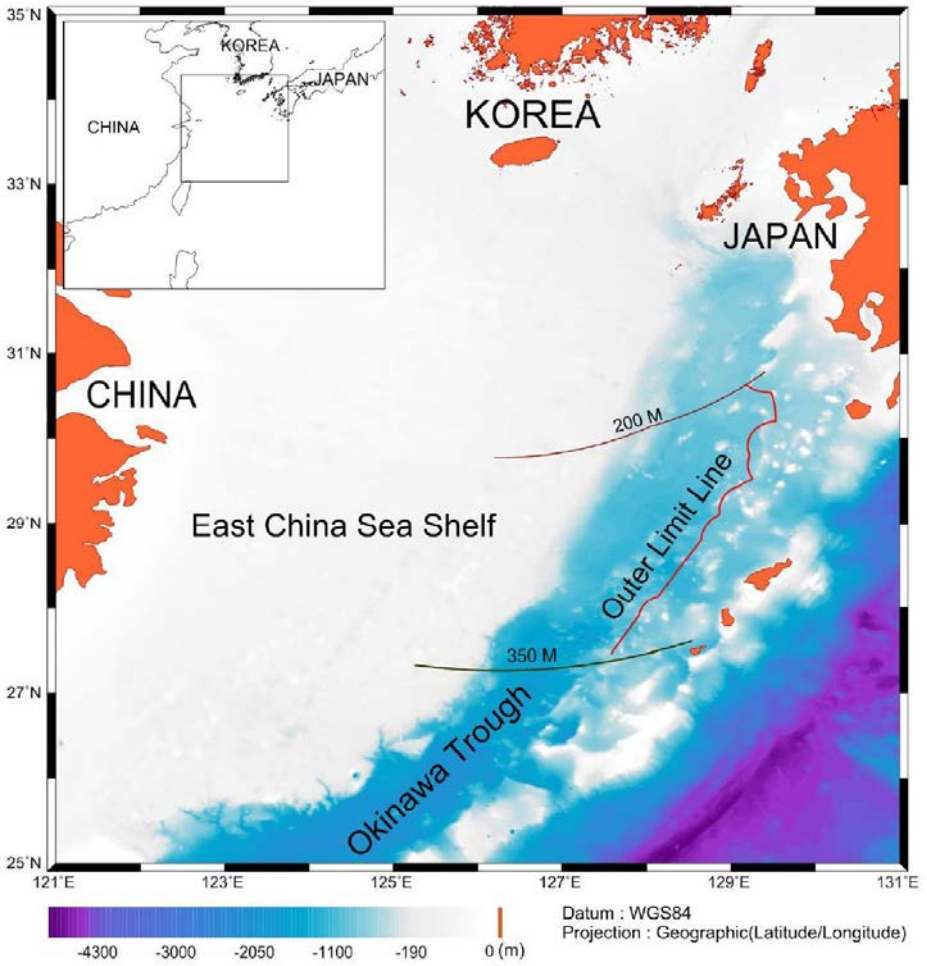

Fig. 4 Schematic Position of Outer Limits in Korea's 2012 Submission [43]

3. Korea's 2012 Submission Concerning the Outer Limits of the Continental Shelf beyond 200 nm in the East China Sea

After it submitted its preliminary information on May 11, 2009, the Korean government proceeded to complete the thorough assessment and review of the scientific data about the relevant area in the submission. It formally made its submission concerning the outer limits of the continental shelf beyond 200 nm in the East

43 Executive Summary of Partial Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea, the Republic of Korea, December 2012, p. 9, at http://www.un.org/Depts/los/clcs_new/Submission_files/kor65_12/executive_summary.pdf, 1 March 2014.

China Sea to the Secretary-General on December 26, 2012.[44] Two days later, the official website of the CLCS released Continental Shelf Notification No. 65, which marked the receipt of the submission.[45] The consideration of Korea's submission was also incorporated into the provisional agenda of the 32nd session of the CLCS, to be held in New York from July 15 to August 30, 2013.

The executive summary of Korea's submission highlighted the following. Six points of maximum change of gradient at the base of the slope were chosen to determine the location of the FOS in the submission, in accordance with Article 76(4)(b) of the UNCLOS and paragraph 5.1.3 of the Guidelines. The outer edge of the continental margin was determined based on Article 76(4)(a)(ii) of the UNCLOS (the Hedberg Formula[46]). The position of the 85 fixed points (see their geographical coordinates in table 1 of its executive summary) defining the outer limits was derived from the outer envelopes of 60 nm from the FOS, but was adjusted somewhat so as not to impinge on Japan's territorial sea in the East China Sea. No fixed point on the outer limits of the continental shelf in the submission exceeded 350 nm from the baseline from which the breadth of its territorial sea was measured, and no line connecting the fixed points exceeded 60 nm in length (Fig. 4). Although the area covered by the submission had not been definitively delimited between Korea and other coastal countries, Korea assured its neighbors and the CLCS in good faith that its submission would prejudice neither the delimitation of the continental shelf in the East China Sea, nor the positions of its neighbors on delimitation. The documents, maps, charts, and databases used in the submission were prepared with the cooperation of the Ministry of Foreign Affairs and Trade, the Ministry of Land, Transport and Maritime Affairs, the Ministry of Knowledge Economy, the Korea Institute of Geoscience and Mineral Resources, and the Korea Hydrographic and Oceanographic Administration. Dr. Yong Ahn Park,[47] a current Korean member of the CLCS, provided technical assistance and advice to Korea

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44 Submission by the Republic of Korea, at http://www.un.org/Depts/los/clcs_new/Submission_files/submission_kor_65_2012.htm, 1 March 2014.

45 Receipt of the Submission Made by the Republic of Korea to the Commission on the Limits of the Continental Shelf, CLCS.65.2012 (Continental Shelf Notification), 28 December 2012, at http://www.un.org/Depts/los/clcs_new/Submission_files/kor65_12/kor_clcs65_2012_en_fr.pdf, 1 March 2014.

46 The Hedberg Formula was named after the American geologist H. D. Hedberg, who participated in the third United Nations Conference on the Law of the Sea.

47 Yong Ahn Park, Curriculum Vitae, at http://www.un.org/Depts/los/clcs_new/members_curriculumvitae/ParkCV.pdf, 1 March 2014.

in the preparation of the submission. The submission covered only a portion of the continental shelf beyond 200 nm from Korea's territorial sea baseline in the East China Sea, and did not prejudice any future submission by Korea on the outer limits of its continental shelf in other sea areas.

4. Features of Korea's Submission

a. Extensive Preparations after Its 2009 Preliminary Information

In the three and a half years since Korea submitted its preliminary information on May 11, 2009, it not only thoroughly assessed and reviewed the scientific data about the relevant area, but also prepared extensively for its submission. It compiled about 800 pages of official documents. The number of pages in the executive summary almost doubled the number in its preliminary information (from 8 to 13 pages). The number of fixed points used to determine the outer limits increased significantly from 6 to 85, and better scientific methods that were more in line with the requirements of the UNCLOS were used (going from invoking the points on the boundary of the JDZ set by the 1974 Agreement directly, to applying Article 76(4)(a)(ii) of the UNCLOS, i.e., the Hedberg Formula).

b. Application of the Natural Prolongation Principle to the Delimitation of the Continental Shelf

In its submission, Korea also applied the natural prolongation principle in determining the outer limits of its continental shelf. Like China, it asserted that a continental shelf beyond 200 nm existed and that its natural prolongation ended at the Okinawa Trough. However, Korea differed from China in the way it determined the final position of the outer limits. China selected 10 points of maximum water depth at certain positions in the Okinawa Trough as the ultimate limits of its continental shelf beyond 200 nm. Korea went further by only adjusting the envelope line of 60 nm from the FOS slightly and calling it the final outer limit. This limit went beyond the maximum water depth of the Okinawa Trough and came very close to Japan's 12-nm territorial sea limit. This assertion would undoubtedly infuriate Japan, give the CLCS an impression of overreaching, and would not help the consideration of its submission. In contrast, China's approach of taking the point of maximum water depth as a natural boundary seems to be more in line with the facts and common sense.

c. Significant Expansion of the Scope of Claims from that in the Preliminary Information

When it submitted its 2009 preliminary information, Korea directly employed the boundary points of the JDZ set by the 1974 Agreement to define the outer limits

so as not to provoke further protests from Japan. At the same time, it declared its final outer limits to be in the Okinawa Trough, which could be said to have paved the way for its 2012 formal submission. Korea's 2012 formal submission revealed its true intentions, abandoning the boundary points of the JDZ specified in the 1974 Agreement and doubling the area in its claim for a continental shelf beyond 200 nm from the 19,000 km^2 in 2009. Although the proposed outer limits were still within the Okinawa Trough, they crossed the point of its maximum water depth and beyond the outer limits claimed by China in the Okinawa Trough, closing its distance to Japan by 38~125 km toward the southeast. At its closest, the distance between the outer limits and Japan's 12-nm territorial sea limit was a mere 17 nm.

d. Choice of an Affordable Formula Line to Define the Outer Limits of the Continental Shelf

Like China in its submission and conforming to general practice, Korea used the relatively inexpensive Hedberg Formula (i.e., the FOS + 60 nm formula) to define the reference line of the outer limits of the continental shelf beyond 200 nm in its submission, after having determined the FOS "in the absence of evidence to the contrary" (UNCLOS Article 76(4)(b)). This has been a common practice among the 70 submissions received by the CLCS; the other option, the Irish Formula[48] (i.e., the 1% sediment thickness formula), has relatively demanding technical requirements, and the survey is highly subject to restrictions imposed by the equipment, the climate in the sea area, and the submarine geomorgraphy and geology. For this reason, although in theory the Irish Formula can possibly push the limits farther than the Hedberg Formula, only a few developed coastal countries have actually used the Irish Formula to define small sections of the limits in their submissions. For example, in Australia's 2004 submission, the Irish Formula was applied only in Region Two (the Australian Antarctic Territory, AAT) out of the ten regions included in the submission to define 60 fixed points out of the 157 used to determine the outer limits. In the other nine regions, very few fixed points were defined with this formula.[49] This was another example of the fact that establishing the outer limits of the continental shelf beyond 200 nm is a very difficult, technically-demanding task, especially for developing countries.

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48 The Irish Formula was named after the Irish geologist P. R. R. Gardiner, who participated in the third United Nations Conference on the Law of the Sea.

49 Xue Guifang and Wang Guanyu, A Study of Australia's Outer Continental Shelf Delimitation, *Journal of the Ocean University of China (Social Science Edition)*, No. 6, 2009, pp. 23~26. (in Chinese)

With China's and Korea's 2012 partial submissions on the East China Sea made to the CLCS, the disputes involving the delimitation of the East China Sea continental shelf among China, Japan, and Korea are certain to escalate. As of now, there has been no sign that the conflicts among the three countries in this area will subside.

C. Japan

1. An Overview of Japan and Its Domestic Law on Maritime Rights and Interests

Japan is an island nation located to the east of Eurasia and in the northwestern Pacific Ocean, consisting of four large islands (Hokkaido, Honshu, Shikoku and Kyushu) and other over 6800 islands. It has an area of about 378,000 km^2. It is adjacent to the Pacific at the east and the south, and is separated from Russia, North Korea, Korea, China Mainland, China Taiwan, and the Philippines respectively at the north, northwest, west, and southwest by the Sea of Okhotsk, the Sea of Japan, the Korea Strait, the East China Sea, and the Philippine Sea. It has a very tortuous and complicated coastline, in the western side of which next to Sea of Japan many cliffs are distributed with few and far between harbors, while in the eastern side next to the Pacific Ocean Japan enjoys a number of estuaries, thus forming lots of natural harbors. In terms of geological structure, Japan is part of the western Pacific island arc – coastal mountains – trench group, and is located at the convergence of the Eurasian Plate, the Philippine Plate, the Pacific Plate, and the North American Plate. Finally, it is situated on the orogenic, volcanic, and earthquake belt in the Pacific Rim. Volcanic eruptions and earthquakes are frequent: 10% of the earth's volcanoes and 20% of the earthquakes are located in Japan.[50]

Japan is completely surrounded by the sea. Its land area is small and it is resource-poor. 99.7% of its foreign trade depends on maritime transport. Therefore, Japan has always attached great importance to maritime issues. In particular, it has devoted itself to devising maritime laws and policies and given maritime policy a fundamental place on its national agenda. These efforts are directed to achieving its goal of developing from simply an island country to a great maritime power. In terms of administration and management, Japan has established the position

50 Introduction of Japan, at http://news.xinhuanet.com/ziliao/2002-04/01/content_329931.htm, 1 March 2004. (in Chinese)

of Minister for Ocean Policy and the Councilors' Meeting of the Headquarters for Ocean Policy to promote a comprehensive national ocean policy. In the past decades, Japan adopted the following agreements and laws related to the sea:

- Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries, January 30, 1974
- Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, January 30, 1974
- Law on the Territorial Sea,[51] May 2, 1977
- Law on the Territorial Sea and the Contiguous Zone,[52] 1996 (an amendment to Law on the Territorial Sea, May 2, 1977)
- Law on the Exclusive Economic Zone and the Continental Shelf,[53] 1996
- Enforcement Order of the Law on the Territorial Sea and the Contiguous Zone, 2001[54] (Cabinet Order No. 210 of 1977, as amended by Cabinet Order No. 383 of 1993, Cabinet Order No. 206 of 1996, and Cabinet Order No. 434 of 2001)
- Act on the Establishment of Safety Zones around Marine Structures,[55] July 20, 2007
- Basic Act on Ocean Policy,[56] July 20, 2007

The promulgation of the 2007 Basic Act on Ocean Policy marked the creation

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51 Law on the Territorial Sea (Law No. 30 of 2 May 1977), at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1977_Law.pdf, 1 March 2014.

52 Law on the Territorial Sea and the Contiguous Zone (Law No. 30 of 1977, as amended by Law No. 73 of 1996), at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law.pdf, 1 March 2014.

53 Law on the Exclusive Economic Zone and the Continental Shelf (Law No. 74 of 1996), *Law of the Sea Bulletin*, No. 35, p. 94, at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE35.pdf, 1 March 2014.

54 Enforcement Order of the Law on the Territorial Sea and the Contiguous Zone (Cabinet Order No. 210 of 1977, as amended by Cabinet Order No. 383 of 1993, Cabinet Order No. 206 of 1996 and Cabinet Order No. 434 of 2001), *Law of the Sea Bulletin*, No. 66, p. 71, at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin66e.pdf, 1 March 2014.

55 Jin Yongming trans., Japan's Act on the Establishment of Safety Zones around Marine Structures, *China Oceans Law Review*, No. 2, 2008, pp. 161~163. (in Chinese)

56 Basic Act on Ocean Policy, at http://www.kantei.go.jp/jp/singi/kaiyou/kihonkeikaku/080318kihonkeikaku_E.pdf, 1 March 2014.

of a comprehensive national law on ocean affairs for Japan. Article 29 of the Act established the Headquarters for Comprehensive Ocean Policy in the Cabinet to promote the implementation of Japan's ocean policy. The Prime Minister himself would act as its director, and deputy directors would be the Chief Cabinet Secretary and the Minister of Ocean Policy. Its authority and high status in the government are unique in the world. After the Basic Act on Ocean Policy, the Basic Plan on Ocean Policy followed on March 18, 2008 as the five-year plan that would guide Japan's actions in maritime affairs.[57]

2. Japan's Reaction to China's and Korea's Preliminary Information and Submissions on the East China Sea Continental Shelf

Because of Japan's serious conflicts of interest with China's and Korea's claims, edginess and directness marked Japan's response to the issue of the delimitation of the East China Sea continental shelf. After China and Korea both submitted their respective preliminary information on the East China Sea continental shelf beyond 200 nm on May 11, 2009, Japan submitted two nearly identical notes of protest directed at China and Korea to the Secretary-General on July 23, 2009. In the notes, Japan pointed out that the distances between Japan and China[58] and between Japan and Korea[59] in the above-described preliminary information were less than 400 nm; it was impossible for the outer limits of the continental shelf beyond 200 nm to be established under the UNCLOS between countries when they were less than 400 nm apart. Instead, the limits of the continental shelf in this area should be determined by agreement between Japan and China and between Japan and Korea in accordance with Article 83 of the UNCLOS.

After China and Korea made their formal partial submissions on the East China Sea continental shelf in 2012, Japan again submitted two similar notes of

57 Jin Yongming, The Contents of Japan's Submission on the Extended Continental Shelf and China's Position, *China Oceans Law Review*, No. 1, 2009, pp. 28~39. (in Chinese)

58 23 July 2009 Letter of the Permanent Mission of Japan to UN's Secretary-General, SC/09/246, at http://www.un.org/Depts/los/clcs_new/Submission_files/preliminary/jpn_re_chn2009e.pdf, 1 March 2014.

59 23 July 2009 Letter of the Permanent Mission of Japan to UN's Secretary-General, SC/09/248, at http://www.un.org/Depts/los/clcs_new/Submission_files/preliminary/jpn_re_kor2009e.pdf, 1 March 2014.

protest against China's[60] and Korea's[61] submissions respectively on December 18, 2012 and January 11, 2013 to the Secretary-General. Japan reiterated its stance in the 2009 notes of protest, i.e., coastal States could not unilaterally establish the outer limits of the continental shelf beyond 200 nm when the distance between the opposite coasts was less than 400 nm. Meanwhile, invoking paragraph 5(a) in Annex I to the Rules of Procedure, Japan asserted that the areas involved in China's and Korea's submissions were disputed, and strongly requested that the CLCS consider neither China's nor Korea's submission.

3. Japan's Possible Future Plans on the East China Sea Continental Shelf

Although its 2008 submission did not directly involve the East China Sea, Japan by no means plans to give up competition for the East China Sea. On the contrary, due to its serious disputes with China and Korea on the sovereignty of islands and the delimitation of sea areas, Japan's strategy in the East China Sea has appeared more cautious. It has yet to indicate the types and extent of its claims on the East China Sea. From Japan's reaction to China's and Korea's preliminary information and submissions, one can see that Japan intends to base the delimitation negotiations with China and Korea on the equidistance line between itself and China and between itself and Korea or its own 200-nm limits. With regards to Diaoyu Dao, because of support from the United States, as well as the 1951 Security Treaty between Japan and the United States of America[62] and the 1960 Treaty of Mutual Cooperation and Security between Japan and the United States of America,[63] Japan's stance on sovereignty over Diaoyu Dao has toughened and clarified in recent years: to fight for sovereignty over Diaoyu Dao at any cost. With Japan having poured its resources into "expanding" Okinotorishima for delimitation purposes – obviously inconsistent with Article 121 (Regime of Islands)

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60 28 December 2012 Letter of the Permanent Mission of Japan to UN's Secretary-General, SC/12/372, at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/jpn_re_chn_28_12_2012.pdf, 1 March 2014.

61 11 January 2013 Letter of the Permanent Mission of Japan to UN's Secretary-General, SC/13/019, at http://www.un.org/Depts/los/clcs_new/Submission_files/kor65_12/jpn_re_kor_11_01_2013.pdf, 1 March 2014.

62 Security Treaty between Japan and the United States of America, at http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19510908.T2E.html, 1 March 2014.

63 Treaty of Mutual Cooperation and Security between Japan and the United States of America, at http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html, 1 March 2014.

of the UNCLOS, and even at the risk of worldwide disapproval[64] – it is likely that the Headquarters for Comprehensive Ocean Policy plans to use Diaoyu Dao as a base point to claim an exclusive economic zone and a continental shelf up to 200 nm.

IV. The Major Issues in the Delimitation of the East China Sea Continental Shelf between China, Korea, and Japan

Since the maximum breadth of the East China Sea is less than 400 nm, the continental shelves claimed by China, Japan, and Korea would overlap even if they remained within the 200-nm limit provided in the UNCLOS. Claims for continental shelves beyond 200 nm can result in even larger overlapping areas. In addition, the sovereignty dispute over Diaoyu Dao between China and Japan will influence the process of delimiting the continental shelves in the southern East China Sea.

A. Future Delimitation of Continental Shelves between China and Korea

Korea practices double standards for delimiting the continental shelf. On one hand, it wants to extend its claim up to the Okinawa Trough in the eastern East China Sea by relying on the natural prolongation principle. On the other hand, it advocates the application of the equidistance method to delimit the western East China Sea and the Yellow Sea. By taking contradictory approaches in matters of the same nature, it has made its intentions abundantly clear: to maximize benefits even at the cost of contradicting itself. This brazenness is unlikely to be accepted by its neighbors and the international community, is often counterproductive, and can be used against itself.

The Yellow Sea, a marginal sea of the Western Pacific, is located between the mainland of China and the Korean Peninsula. It has an area of about 380,000 km^2. Its sea floor is a relatively flat, single and continuous continental shelf with

64 Qiu Jun and Liu Wenhua, Should Okinotori Reef Be Entitled to a Continental Shelf?: A Comparative Study on Uninhabited Islands in the Extended Continental Shelf Submissions, *China Oceans Law Review*, No. 2, 2009, pp. 19~30. (in Chinese)

an average depth of 44 m.[65] It borders the Bohai Sea in the northwest by a line connecting Tian Hengshan in Penglai and Laotieshan in Dalian, and is connected to the Bohai Sea by the Bohai Strait. It is connected to the Sea of Japan in the east by the Cheju Strait, the Korea Strait, and the Tsushima Strait. It faces the East China Sea to the south by a line connecting the cape of Qidong, on the north side of the Yangtze River estuary, to the southwest corner of Jeju. The Yellow Sea's gentle western slope forms about two-thirds of the sea floor, and is made of alluvial clay from the Yangtze River and the Yellow River. The steep eastern one-third of the sea floor (on the side of the Korean Peninsula) originates from the sand from the mountains on the Korean Peninsula. On the issue of delimiting the continental shelf, the equidistance method is merely one of the technical methods applied to reach an equitable solution,[66] and cannot substitute for the principle of equity. The main body of the Yellow Sea continental shelf is a natural eastward prolongation of the Chinese land mass rather than a natural westward prolongation of the Korean Peninsula. Therefore, it is unfair to apply the equidistance method to delimit the Yellow Sea continental shelf between China and Korea; dividing it by the extent of the natural prolongation is more equitable.

In Korea's submission, the outer limits of the continental shelf beyond 200 nm are roughly located at 27.5°~30.6° N and 127.6°~129.5° E,[67] while those in China's submission are roughly at 28.0°~30.9° N and 127.6°~129.2° E.[68] In comparing the two sets of data, one can clearly see that there is a considerable overlap in the Okinawa Trough of the continental shelves claimed by China and Korea. In order to avoid having potential overlapping areas with Korea, China tried its best to limit the area claimed in the north (in fact, China could have lengthened its outer limits to the north by selecting more points of maximum water depth). In contrast, Korea had no misgivings about extending its outer limits as far south as possible in its submission. Korea's actions were obviously intended for gaining leverage in future

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65 Yellow Sea, at http://en.wikipedia.org/wiki/Yellow_Sea, 1 March 2014.

66 Kuen-chen Fu, *Equitable Ocean Boundary Delimitation: On Equitable Principles and Ocean Boundary Delimitation*, Taipei: 123 Information Company, 1989, p. 305.

67 Executive Summary of the Partial Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea, the Republic of Korea, p. 9, at http://www.un.org/Depts/los/clcs_new/Submission_files/kor65_12/executive_summary.pdf, 1 March 2014.

68 Executive Summary of Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, p. 5, at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/executive%20summary_CH.pdf, 1 March 2014. (in Chinese)

negotiations with China in delimitating the overlapping areas, and will inevitably add to the obstacles in the potential negotiations between the two countries.

B. Future Delimitation of the Continental Shelves between China and Japan

1. Conflict of Principles on the Delimitation of the Continental Shelves between China and Japan

The delimitation of the East China Sea continental shelf between China and Japan involves a rare situation where the maximum breadth of the waters between the two countries is less than 400 nm. But from looking at the seabed topography, China is in a position to claim the continental shelf beyond 200 nm measured from the baseline of its territorial sea in accordance with Article 76(4)~76(7) of the UNCLOS, while the breadth of the continental shelf that Japan can claim is far less than 200 nm. There are only two cases of this kind in the world: the East China Sea and the Timor Sea between Australia and East Timor.[69] Since the international legal principles with respect to maritime delimitation are relatively vague, both China and Japan can identify some preliminary evidence in international law to support their respective claims. The fundamental disagreement is the following: China believes that geological and geomorphological structure of the East China Sea seabed shows that the Chinese continental shelf extends naturally to the Okinawa Trough. Based on the natural prolongation principle, the Okinawa Trough axis is the natural boundary dividing the continental shelves of the two countries. Japan asserts that Japan shares the East China Sea continental shelf with China and that the equidistance method should be used to divide the continental shelf. It does not recognize that the Okinawa Trough is the frontier of the East China Sea continental shelf extending from the mainland of China.

a. Evolution of the Principles on the Delimitation of Continental Shelves

In international law, there are no clear, universally-applicable principles on the delimitation of continental shelves. With the passage and entry into force of the UNCLOS, State practices related to the delimitation of the continental shelf between countries with opposite or adjacent coasts have transformed in the past

69 V. Prescott and C. Schofield, *The Maritime Political Boundaries of the World*, 2nd ed., Leiden and Boston: Martinus Nijhoff, 2005, pp. 185~211.

half-century. Article 6 of the 1958 Convention on the Continental Shelf proposed an equidistance/special circumstances rule. The 1969 *North Sea Continental Shelf Cases*[70] established the natural prolongation principle based on the idea that the land dominates the sea. The 1985 *Libya v. Malta Continental Shelf Case*[71] changed the conditions for the application of the natural prolongation principle, no longer giving any weight to geological or geophysical factors of the continental shelf within 200 nm. The proportionality principle for the length of the coastline has become an important geographical factor considered in actual delimitation practice through a series of maritime delimitation cases, such as the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (1993)[72], *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (2009)[73], etc.[74]

Article 83(1) of the UNCLOS states:

> *The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.*

In practice, the equity principle embodied in Article 83 has been accepted by many countries and become an emerging customary rule. Not only has it been endorsed by a number of international documents, but it has also been affirmed by important international maritime delimitation cases. This principle emphasizes equity and rejects mandatory methods, including the equidistance method. An equitable outcome, rather than the choice of method, is the most important issue

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70 North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, at http://www.icj-cij.org/docket/files/51/5535.pdf, 1 March 2014.

71 Continental Shelf (Libyan Arab Jamahiriya v. Malta), *I.C.J. Reports*, 1985, p. 13, at http://www.icj-cij.org/docket/files/68/6415.pdf, 1 March 2014.

72 Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, at http://www.icj-cij.org/docket/index.php?sum=401&code=gjm&p1=3&p2=3&case=78&k=e0&p3=5, 1 March 2014.

73 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Summary of the Judgment of 3 February 2009, paras. 115~122, at http://www.icj-cij.org/docket/files/132/14989.pdf, 1 March 2014.

74 Zhang Weibin, A Review concerning 2009 Maritime Delimitation in the Black Sea, *China Oceans Law Review*, No. 2, 2009, pp. 33~43. (in Chinese)

in the delimitation. Correcting an inequitable situation through applying the equity principle has by now become the trend in the practice of delimiting continental shelves.

b. Japan's Claims and Their Basis in International Law

Japan made the following major assertions with regards to the delimitation of the East China Sea continental shelf:

- The equidistance method should be applied to divide the East China Sea continental shelf between Japan and China
- A legal continental shelf beyond 200 nm cannot exist when the distance between opposite coasts is less than 400 nm
- With respect to the rights to a legal continental shelf within 200 nm, no geological or geophysical factors of the seabed should be considered
- The Okinawa Trough is merely an accidental cavity that should be ignored when delimiting the continuous continental shelf (shared by Japan and China), and is not a physical boundary
- Japan has not given up the rights to the continental shelf outside the equidistance line but within 200 nm (west of the Okinawa Trough)

From the above, it can be surmised that Japan mainly relied on the following: Article 6 of the Convention on the Continental Shelf (1958), Article 76 of the UNCLOS, and the verdict of the *Libya v. Malta Continental Shelf Case* (1985). After the 1969 *North Sea Continental Shelf Cases* and a series of other continental shelf delimitation cases, the 1985 *Libya v. Malta Continental Shelf Case* was a major confrontation between the natural prolongation principle and the equidistance method. In the verdict, the position of the natural prolongation principle was considerably weakened. The International Court of Justice's attitude to the natural prolongation principle changed from regarding it as the only basis for a right to the continental shelf in 1969, to replacing it with the distance criterion as the preferred method of defining the continental shelf within 200 nm in 1985.[75] In addition, this case involved a seabed with similar geographical characteristics as the East China Sea, and has serious negative precedential effects on the delimitation of the East

75 Zhang Xinjun, A First Foray into the Literature and Perspectives of Japanese Scholars of International Law on Maritime Delimitation, *China Oceans Law Review*, No. 2, 2005, pp. 31~41. (in Chinese)

China Sea continental shelf.

c. China's Claims and Their Basis in International Law

China makes the following main assertions with regards to the delimitation of the East China Sea continental shelf:

- The Okinawa Trough is an important geographical unit with prominent cutoff characteristics
- China's continental shelf in the East China Sea extends to the axis of the Okinawa Trough according to the natural prolongation principle which relies on geological/geophysical factors
- As a delimitation method, the equidistance method is not a principle in international law or customary international law
- Overlapping continental shelves for countries with opposite or adjacent coasts should be delimited by agreement on the basis of international law and the equity principle
- Coastal geography (especially the proportionality of the length of the coastlines) is an important factor in an equitable delimitation

The above reflects China's reliance on Articles 76 and 83 of the UNCLOS and a series of maritime delimitation cases that include the 1969 *North Sea Continental Shelf Cases*. The 1969 *North Sea Continental Shelf Cases* was the first continental shelf delimitation case resolved through the international judicial process, and the judgment in the case had a significant impact on the development of the international law on the delimitation of continental shelves. For the first time in history, the judgment proposed in a scientific and authoritative manner the natural prolongation principle and the equity principle, whose application was well-suited to the geography and geology of most continental shelves and the interests of most coastal countries. The equidistance method was denied a mandatory status in customary international law. China believes that the equidistance method is merely one approach to delimitation established in Article 6(1) of the 1958 Convention on the Continental Shelf, and should only be applied when it is consistent with the equity principle. It is nowhere close to having the same normative status as the principle of equity. With the gradual erosion of the natural prolongation principle in international jurisprudence, China has striven to defend the principles on the delimitation of continental shelves established in the 1969 *North Sea Continental Shelf Cases*.

In addition, other geographical and geomorphological factors affecting the claims of coastal countries on a continental shelf include the length and the shape of the main territorial coast, the location of the coast relative to the ocean and the semi-enclosed seas, the affiliated islands, the distance to adjacent countries, and the breadth of the continental margins, etc.[76] Other factors like historic rights and socio-economic factors (including the demographics) of the country involved have been increasingly taken into account during the delimitation process.[77] From the 1969 *North Sea Continental Shelf Cases* to the 1982 *Tunisia v. Libya Continental Shelf Case*,[78] the 1984 *United States v. Canada Gulf of Maine Case*,[79] the 1985 *Libya v. Malta Continental Shelf Case*, the 1993 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, and the 2009 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, the proportionality of the length of the coastlines has become an important coastal geographical factor for reaching an equitable solution in delimitation. China has a continuous coastline of more than 3,000 km in the western East China Sea, while Japan's discontinuous coastline in the eastern East China Sea – which includes the coastlines of its scattered islands – is just about a third of relevant Chinese coastlines. The distances between such islands are also larger. If the equidistance method is used to divide the continental shelf, it would clearly be contrary to the equity principle.

d. The Possible Future Delimitation Situation

Although the importance of the natural prolongation principle has been diminished in practice, and the 200-nm distance criteria has been adopted by the UNCLOS as well as endorsed by the 1985 *Libya v. Malta Continental Shelf Case*, the natural prolongation principle is still a valid criterion for determining the outer limits of the continental shelf. The 200-nm distance criterion should not affect the basis for rights to a continental shelf beyond 200 nm. The so-called "400-nm rule" proposed by Japan does not exist in Article 76 of the UNCLOS, i.e., one cannot use

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76 Peter Cook and Chris M. Carleton, *Continental Shelf Limits – The Scientific and Legal Interface*, New York: Oxford University Press, 2000, p. 67.

77 Kuen-chen Fu, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 180. (in Chinese)

78 Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment of 24 February 1982, at http://www.sovereigngeographic.com/maritime_pdf/1982-tunisia-libya-english.pdf, 1 March 2014.

79 Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment of 12 October 1984, at http://www.icj-cij.org/docket/index.php?sum=346&code=cigm&p1=3&p2=3&case=67&k=6f&p3=5, 1 March 2014.

the 200-nm distance criterion in Article 76(1) of the UNCLOS to deny the natural prolongation principle in the same article, which constitutes an important basis for the right to a continental shelf beyond 200 nm. The essence of Japan's so-called "400-nm rule" is to deny the basis for a right by using the predictable overlap in rights. This absurd logic cannot withstand the test of reality. The 2012 *Bangladesh v. Myanmar Maritime Delimitation Case*, the first maritime delimitation case from the UN's International Tribunal for the Law of the Sea, pointed out that natural prolongation is closely related to the continental margin mentioned in paragraphs 1 and 4 in Article 76 and refers to the same area, and a coastal State cannot use it as a separate and independent criterion when determining the rights to a continental shelf beyond 200 nm. By contrast, the outer edge of the continental margin is an important factor in determining the area of the continental shelf. Therefore, in determining the rights to the continental shelf beyond 200 nm, the outer edge of the continental margin as defined by Article 76(4) should be referenced.[80] One can see that the 2012 *Bangladesh v. Myanmar Maritime Delimitation Case* was an important correction of the 1985 *Libya v. Malta Continental Shelf Case*. The outer edge of the continental margin, defined by geological and geophysical factors, should always be an important consideration in determining the rights to the continental shelf beyond 200 nm. Whether the distance between opposite coasts reaches 400 nm is not a decisive factor.

The delimitation disputes between Australia and East Timor in the Timor Sea have aspects that are quite similar to those between China and Japan in the East China Sea.[81] Neither the Timor Trough nor the Okinawa Trough lies at the equidistance line between the two countries with opposite coasts. Both China and Australia assert that delimitation should occur near these troughs or at their axes according to the natural prolongation principle, while East Timor and Japan insist that it should occur in the middle based on the equidistance method.[82] In 2004,

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80 Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, paras. 434~437, at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf, 1 March 2014.

81 Andrew Serdy, Is There a 400-Mile Rule in UNCLOS Article 76(8)?, at http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session1-Paper2-Serdy.pdf, and http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf5/Presentations/Session1-Presentation2-Serdy.pdf, 1 March 2014.

82 Jia Yu, A First Foray into the Legal Issues on Continental Shelves beyond 200 Nautical Miles Limits in the East China Sea, *China Oceans Law Review*, No. 1, 2006, pp. 64~72. (in Chinese)

Australia had probably deliberately excluded the Timor Sea from its submission. First, it avoided creating possibly unfavorable conditions for the consideration of its submission by including a disputed area. Second, it could be easier to adopt a money-for-sovereignty strategy in the future with this small impoverished country near the equator. For these reasons, Australia did not rush to resolve the Timor Trough issue. In this respect, China did not follow Australia's example but included the Okinawa Trough in its 2012 submission. This was a very important and timely decision. Japan is definitely not East Timor. If China backs off even slightly on questions of principle, Japan would likely use the perceived concession to say that China had abandoned the natural prolongation principle. It would be a grave mistake.[83]

At present, China has put forward its stance in its 2012 submission that its continental shelf in the East China Sea ends at the Okinawa Trough. Although mainstream opinion in Japan is in favour of delimiting the continental shelf with the equidistant line between the coasts of the two countries, Japan can still extend its continental shelf up to 200 nm in accordance with the 200-nm criterion in Article 76 of the UNCLOS and claim part of the seabed to the west of the Okinawa Trough (including the area west of the equidistant line). This point of view is gaining popularity in Japan. Therefore, it is possible that Japan will propose either of these lines in future delimitation negotiations. In that case, the proposed line may form an overlapping zone with the line claimed by China in the Okinawa Trough. The final delimitation line is likely to be located in the overlapping zone, and the position of this line may be an adjustment based on the equidistant line of the overlapping zone. If the situation proceeds down this path, China should reasonably adjust the above-described possible delimitation line based on important considerations such as the equity principle and the proportionality of the length of the coastline to protect its maritime rights and interests. In sum, China should adhere to the natural prolongation principle as an established strategy, continually tap advantageous factors in its favor in the delimitation practice of countries with opposite coasts, and concentrate its efforts in international jurisprudence and obtaining and perfecting its geographical and geological data.

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83 Pan Jun, A Highly Effective State-Level Practice – A Demonstrative Analysis of the Australian Delimitation Case under the Legal System of Continental Shelves beyond 200 NM, *Pacific Journal*, Vol. 20, No. 8, 2012, pp. 66~79. (in Chinese)

2. The Impact of Diaoyu Dao on the Delimitation of the East China Sea Continental Shelf between China and Japan

Another serious problem that influences the delimitation of the East China Sea continental shelf between China and Japan is the territorial sovereignty dispute over Diaoyu Dao.[84] Diaoyu Dao and its affiliated islands are located in the southern East China Sea at roughly 25.7°~26.0°N and 123.0°~124.6°E. It consists of 8 uninhabited islands and rocks: Diaoyu Dao, Huangwei Yu, Chiwei Yu, Nanxiao Dao, Beixiao Dao, Nan Yu, Bei Yu and Fei Yu. Its total area is about 6.344 km^2. It is about 120 nm northeast of China Taiwan, about 200 nm east of China Mainland, and about 200 nm west of Okinawa. It faces the Ryukyu Islands through the Okinawa Trough.[85]

Before the First Sino-Japanese War, China had always controlled Diaoyu Dao. The April 17, 1895 Treaty of Shimonoseki[86] resulted in its occupation by Japan. The December 1, 1943 Cairo Declaration[87] and the July 26, 1945 Potsdam Proclamation[88] stated that the Chinese territory taken by Japan during World War II were to be returned to China. Both the Cairo Declaration and the Potsdam Proclamation excluded Diaoyu Dao expressly from Japanese territory. The Treaty of Peace with Japan (or the Treaty of San Francisco), reached between the United States and Japan in private on September 8, 1951, entrusted the Ryukyu Islands and other places south of 29°N to the United States.[89] The Geographical Boundaries of Ryukyu Islands document,[90] issued by the U.S. Civil Administration of the Ryukyu Islands on December 25, 1953, unilaterally included Diaoyu Dao. Diaoyu Dao (administrative jurisdiction) was once again included in the area returned to Japan in the June 17, 1971 Agreement between the United States of America and Japan

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84 Wang Keju, The Diaoyudao Islands and Their Position in the Delimitation of the East China Sea, *China Oceans Law Review*, No. 1, 2006, pp. 39~49. (in Chinese)

85 Japan calls the islands the "Senkaku Islands", while China Taiwan calls them the "Diaoyu-tai," at http://en.wikipedia.org/wiki/Senkaku_Islands, 1 March 2014.

86 Treaty of Shimonoseki, at http://www.taiwandocuments.org/shimonoseki01.htm, 1 March 2014.

87 Cairo Communiqué, at http://www.ndl.go.jp/constitution/e/shiryo/01/002_46/002_46tx.html, 1 March 2014.

88 Potsdam Declaration, at http://www.ndl.go.jp/constitution/e/etc/c06.html, 1 March 2014.

89 Treaty of Peace with Japan, at http://www.taiwandocuments.org/sanfrancisco01.htm, 1 March 2014.

90 Geographical Boundaries of the Ryukyu Islands (琉球列島の地理的な境界), Civil Administration Proclamation No. 27, United States Civil Administration of the Ryukyu Islands, at http://www.niraikanai.wwma.net/pages/archive/caproc27.html, 1 March 2014.

Concerning the Ryukyu Islands and the Daito Islands[91] (i.e., the Okinawa Reversion Agreement). The Japanese government has claimed territorial sovereignty over Diaoyu Dao based on the above, and believes that the oil reserves in the seabed around Diaoyu Dao amount to more than 94.5 billion barrels.[92]

In the 1992 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China (Article 2) and its declarations made upon ratification of the UNCLOS in 1996, China clearly reiterated its claim of sovereignty over Diaoyu Dao. On September 10, 2012, China announced the baseline of the territorial sea of Diaoyu Dao and its affiliated islands and submitted the relevant geographical coordinate tables and charts to the UN. In its September 24, 2012[93] and December 28, 2012 notes of protest, Japan repeatedly contended that there was no doubt that the Senkaku Islands (the Japanese name for Diaoyu Dao) were an integral part of Japanese territory; the Senkaku Islands were under the valid control of Japan; and there was no unresolved territorial sovereignty issue with respect to the Senkaku Islands. After the Japanese reaction, China submitted another note to the UN on January 7, 2013 and stressed again[94] that Diaoyu Dao and its affiliated islands had been the integral territory of China since time immemorial; Chinese sovereignty over Diaoyu Dao and its affiliated islands had sufficient historical, geographical and legal bases; and Japan's occupation of and stance with respect to Diaoyu Dao were illegal and invalid, and could not change the fact that Diaoyu Dao belonged to China.

So to some extent, resolving the sovereignty dispute over Diaoyu Dao is a prerequisite for the delimitation of the East China Sea continental shelf between China and Japan. If the sovereignty over Diaoyu Dao is found to be belonging to Japan, these tiny islands could be used as base points under the UNCLOS to claim an exclusive economic zone and a continental shelf within 200 nm measuring

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91 Agreement between the United States of America and Japan Concerning the Ryukyu Islands and the Daito Islands, at http://www.niraikanai.wwma.net/pages/archive/rev71.html, 1 March 2014.

92 Selig S. Harrison ed., *Seabed Petroleum in Northeast Asia: Conflict or Cooperation?*, Washington D.C.: Woodrow Wilson International Center for Scholars, 2005, pp. 5~6, at http://wilsoncenter.org/sites/default/files/Asia_petroleum.pdf, 1 March 2014.

93 24 September 2012 Letter of the Permanent Mission of Japan to UN's Secretary-General, PM/12/303, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn89_2012_jpn.pdf, 1 March 2014.

94 7 January 2013 Letter of the Permanent Mission of the People's Republic of China to UN's Secretary-General, CML/001/2013, at http://www.un.org/Depts/los/clcs_new/Submission_files/chn63_12/chn_re_jpn07_01_2013e.pdf, 1 March 2014.

hundreds of thousands of square kilometers in the East China Sea,[95] creating a large area that overlaps with Chinese claims. Japan could thereby propose the equidistance method to divide this overlapping area. It is not possible for China and Japan to reach an agreement on this issue.

C. Possible Involvement by International Judicial and Arbitral Institutions

In a situation where key issues such as the above-described island sovereignty and delimitation principle issues remain unresolved for a long time, it is not inconceivable that Japan and Korea will intend to resort to the compulsory dispute settlement procedures of international judicial or arbitration institutions to resolve the disputes on the delimitation of the East China Sea continental shelf as soon as possible. Then can Japan and Korea unilaterally submit the above disputes to the compulsory procedures in Articles 286 and 287,[96] Section 2 (Compulsory Procedures Entailing Binding Decisions), Part XV (Settlement of Disputes) of the UNCLOS to force China to accept mandatory delimitation? The answer is no.

China made the following official declaration on August 25, 2006, after it had signed the UNCLOS:[97]

> *The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2, Part XV of the Convention with respect*

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95 Mark J. Valencia, The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions, *Asian Perspective*, Vol. 31, No. 1, 2007, pp. 127~167, at http://mrxijinping.com/english/uotsurishima/biblioteca/THE%20EAST%20CHINA%20SEA%20DISPUTE%20CONTEXT_CLAIMS_%20ISSUES_AND_POSSIBLE_SOLUTIONS.pdf, 1 March 2014.

96 Article 286 (Application of procedures under this section) of the UNCLOS states: "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." Article 287(1) (Choice of procedure) states: "When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein."

97 Declarations and Statements, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China, 1 March 2014.

to all categories of disputes referred to in paragraph 1(a), (b), and (c) of Article 298 of the Convention.[98]

Unless China withdraws the above reservation, neighboring countries around the East China Sea cannot use this mechanism to force China to accept compulsory jurisdiction.[99] China's stance on the East China Sea has been clear and consistent: to resolve the disputes through direct negotiation among the parties involved in accordance with recognized international law. Therefore, it would be impractical and futile for Korea and Japan to drag China into mandatory dispute-resolution procedures.

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98 Article 298(1) (Optional exceptions to applicability of section 2) of the UNCLOS states: "When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a)(i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission; (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree; (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties; (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3; (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention."

99 Gu Junfeng, An Analysis of the Legal Effects of China's Exclusionary Declaration Based on Article 298 of the UNCLOS, *China Oceans Law Review*, No. 2, 2007, pp. 11~39. (in Chinese)

V. The Prospects and Strategies for the Delimitation of the East China Sea Continental Shelf

A. Prospect for China's and Korea's Submissions

Although China and Korea made their respective submissions in 2012, prospects for these submissions are not good. According to the CLCS's Rules of Procedure, a submission is open to public comment during a three-month period after its receipt of the submission, and interested countries may submit diplomatic notes during this period on whether they agree to the consideration of the submission. After the public comment period, the coastal State making the submission may present a statement and narrative on the scientific and technical issues in the submission and on the notes submitted by other countries at the CLCS's sessions. Next, the CLCS will proceed to a preliminary review on the submission, focusing on whether the submission involves disputes and whether other countries have put forward clearly opposing views. It will then pass a resolution on whether to take the consideration to the next step. If the submission does not involve a dispute or is not opposed by other countries, the CLCS will set up a subcommission to consider it substantively in the order that the submission is received.

Paragraph 5(a) in Annex I to the Rules of Procedure provides:

> *In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.*

Therefore, when the representatives of a coastal State make statements on its submission during a session of the CLCS, the CLCS will consider information on the disputes related to the submission and decide whether the submission should be considered based on Article 46 and Annex I of the Rules of Procedure.

As described above, the submissions made by China and Korea in 2012 clearly entered into the 200-nm limits measured from Japan's baseline, and Japan has submitted four notes of protest on the issue to the Secretary-General. Therefore, the China's and Korea's submissions clearly involve maritime disputes, though the specific nature of the disputes needs to be further clarified (e.g.,

territorial sovereignty dispute, dispute on delimitation principles, or dispute on the interpretation of provisions in the UNCLOS, etc.). Although the submissions made by China and Korea had been included in the CLCS's provisional agenda for the July 2013 session and would receive preliminary consideration, whether they would go on to receive substantive consideration depended on the specific judgments on the nature of the disputes involved during the preliminary consideration and especially on the CLCS's consideration on Japan's protests. In the past, the CLCS has been fairly cautious in submissions that involved disputes, with the consideration of a number of submissions being indefinitely postponed (e.g., Vietnam's submission and the joint submission by Malaysia and Vietnam). The submissions made by China and Korea also failed to break this bottleneck: the statement issued by the chairman after the 32nd Session of the CLCS showed that the consideration of the submissions were postponed for reasons resembling those specified in paragraph 5(a) of Annex I to the Rules of Procedure.[100]

From this perspective, the prospects for China's and Korea's submissions to be considered substantively in the future are not good. As long as Japan does not change its stance of opposition, the CLCS would not easily reverse the decision it had made on the matter. As an extremely resource-poor island country, Japan's deep-seated insecurity and desire for expansion are obvious. In addition, Japan suffered a serious setback on Okinotorishima in its 2008 submission. It will not easily give up on the competition for the East China Sea: national jurisdiction over all the waters around the globe is about to be defined, and the East China Sea represents a limited and extremely valuable seabed resource for which Japan remains in contention. Besides the competition for resources, the East China Sea also holds important military strategic significance for Japan. Therefore, Japan will wrestle with China and Korea in the East China Sea for a long time, unless unexpected events lead to a sudden shift.

B. Strategies for the Future Delimitation of the East China Sea Continental Shelf

1. Consistent Adherence to the Principles of Equity and Negotiated Delimitation Based on International Law

100 CLCS/80, at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/485/26/PDF/N1348526.pdf?OpenElement, 1 March 2014.

Article 2 of China's 1998 Exclusive Economic Zone and Continental Shelf Act states:

> *Conflicting claims regarding the exclusive economic zone and the continental shelf by the People's Republic of China and States with opposite or adjacent coasts shall be settled, on the basis of international law and in accordance with the principle of equity, by an agreement delimiting the areas so claimed.*

Paragraph 11 of China's 2009 Preliminary Information also states:

> *Following its consistent position, China will, through peaceful negotiation, delimit the continental shelf with States with opposite or adjacent coasts by agreement on the basis of the international law and the equity principle.*

From this perspective, China has maintained a stable and consistent stance in the delimitation of the continental shelf with countries with opposite or adjacent coasts: namely, by agreement based on international law and the principle of equity. To build a stable international environment conducive to rapid economic development, China should continue to adhere to the above principles in settling the disputes on the delimitation of the continental shelves in its surrounding waters, including the East China Sea. However, the application of any principle has its own environment and conditions. The principles that China applies should also be adjusted in accordance with changes in the political situation in its environs.

2. Alleviation of Political Tensions through Creation of an International Academic Atmosphere and Communication with International Authorities

Although the delimitation of a continental shelf between coastal States with opposite or adjacent coasts is a thorny political issue, a good and supportive international academic atmosphere would improve communication among the experts of the States involved and alleviate political tensions among the States. Since 2010, four sessions of the International Symposium on Scientific and Legal Aspects of the Regimes of the Continental Shelf and the Area, jointly organized by the China Institute for Marine Affairs (CIMA) and Second Institute of Oceanography (SIO) and sponsored by the State Oceanic Administration of China (SOA) and the China Ocean Mineral Resources Research and Development Association (COMRA), have been successfully held. Each session was warmly

welcomed and well-attended by high-ranking officials from the UN's Division for Ocean Affairs and the Law of the Sea, the International Seabed Authority, the CLCS, the International Tribunal for the Law of the Sea as well as more than 100 eminent legal experts and marine scientists from dozens of countries who engaged in an international exchange of views. The high quality of the conference presentations and the depth of the communication at the symposia were widely appreciated and highly recognized. There were more than a few experts and scholars from Japan and Korea among the delegates, who were also to a certain extent important members of ocean policy think tanks in both countries. The communication and understanding achieved through international academic exchange will definitely influence the future negotiations on the delimitation of the continental shelf between China, Japan, and Korea. In addition, China's active organization of similar high-level international seminars in the field will increase Chinese experts' theoretical and academic capacities and make them more effective advisers in the future continental shelf delimitation process in the East China Sea.

3. The Necessity of a Military Strategy

As discussed above, although China's general approach to disputes over maritime delimitation is to reach an equitable and agreed solution based on international law, the precondition is that its sovereignty over national territory cannot be violated. Therefore, the UNCLOS framework is not the only way to resolve the disputes over the delimitation of the East China Sea continental shelf. The principle of national sovereignty, established since the Peace of Westphalia as a cornerstone of modern international law, is the foundation of the relative stability enjoyed by the international community. The sovereignty dispute over Diaoyu Dao is intimately connected to the future delimitation of the continental shelf in the southern East China Sea; before the Diaoyu Dao dispute is resolved, it is impossible to reach a result on the delimitation of the continental shelf in the southern East China Sea that satisfies both China and Japan. The current situation is reinforcing Japan's insecurity that originates from its status as an island country. To break away from the Okinotorishima dilemma in Japan's 2008 submission and the protracted confrontation with China and Korea on the delimitation of the north central part of the East China Sea continental shelf, Japan will focus on Diaoyu Dao as a basis for its claims in the East China Sea (including an exclusive economic zone and continental shelf) in the future. To this end, China's naval and air forces should be strengthened, especially in their comprehensive offshore combat and supply capacities. At present, China is adjusting its strategies and military tactics

towards resolving the disputes in its surrounding waters, including the East China Sea and the South China Sea. In addition, the delimitation of the East China Sea continental shelf does not entirely depend on the countries involved in the disputes. Considerable uncertainty can emerge with the indeterminate factors generated by the application of Article 76 of the UNCLOS (such as the definitions of various ridges) as well as behind-the-scenes involvement by superpowers.[101] China should determine, and continually adjust, its plans in response to various scenarios as soon as possible.

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欧盟海运国家资助政策及其借鉴意义

丁莲芝 *

内容摘要：海运业作为资金密集和高风险产业，关乎国计民生，海运国家都将航运业发展置于极其重要的地位并予以政策扶持。我国是海运大国，无论是从产业政策出发还是从军事意义上讲，海运业对我国都有特殊意义，但却缺少国家层面的系统性法律和政策支持和保障。而欧盟作为走在全球前列的海运经济体之一，拥有较为健全的海运国家资助政策。作为竞争政策的组成部分，这些资助政策既有成文法的制度架构，又有判例法的合法性审查。这无疑对我国构建全方位的海运扶持政策具有宝贵的借鉴意义，尤其体现在我国未来船舶登记制度、培养海事人才等的法律和资助政策方面。

关键词：海运业　国家资助　船舶登记

一、引　言

海运业在欧盟占有重要地位。欧盟对外货物贸易中约有 90% 是通过海上运输，短途海运约占欧盟内部运输吨公里总量的 40%。[1] 为了应对经济结构转型及经济全球化趋势，欧盟海运业在面临巨大压力（如压港、全球气候变暖、海盗等）的同时，从上世纪 80 年代末以来，逐渐形成了具有自身特色的国家资助政策。海运业在我国具有举足轻重的地位，我国也面临着与欧盟类似的问题和困难，需要出台一定的政策和法律来扶持海运业发展。但我国的海运资助政策不仅缺乏制度性保障，运行过程中也存在诸多不完善之处，因此有必要向欧盟学习，取长补短。

本文第二部分主要对欧盟海运国家资助政策现行有效的 3 大具体规则作评述；第三和第四部分分别介绍欧盟鼓励船舶悬挂欧盟旗和吸引从事海员职业的资助政策；第五部分从判例法的角度列举了欧盟成员国在具体实施资助政策过程中面临的合法性问题；文章最后紧密结合我国海运业的具体情形，提出要加强建立健

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1 The European Commission, Maritime Law: What Do We Want to Achieve?, at http://ec.europa.eu/transport/maritime/index_en.htm, 10 October 2013.

全海运业国家资助的保障性机制，实施广泛、具体的国家资助政策。

二、欧盟海运国家资助政策的成文法体系

国家资助属于欧盟竞争法的组成部分，但并没有成文法对其下定义，仅在《建立欧洲共同体条约》（以下简称“《欧共体条约》”）第 87 条第 1 款规定国家资助适用于通过成员国或任何国家资源实施的任何形式的帮助，[2] 不过欧盟通过一系列判例法表明，国家资助是国家实施的干预，或者国家通过国家资源使自身承受经济负担，并因此使企业获得优势，或者减少预算的费用。[3] 海运国家资助是国家资助政策在海运业的实施和体现，欧盟按其对经济的影响力将其分为 3 大类：1）提高悬挂欧盟国船旗比率，亦即船舶登记制度中的海运国家资助政策；2）提升欧盟海员职业吸引力的海运国家资助政策；3）扶持除造船业和修船业外的航运相关产业政策。[4] 这 3 类既包括给予海运经营者的直接现金补贴（营运补贴），也包括减免船员应缴纳的社会福利保障金、船舶税收和航运公司登记税收等税收减免优惠，还包括其他间接扶持海运的补贴，如对海运人才教育方面的投入等等。本部分主要评述欧盟成文法立法体系中海运国家资助政策存在的意义和目标，以及具体指导海运业的国家资助法律体系。

（一）海运业采取国家资助政策的原因及目标

欧盟海运业之所以采取资助政策，直接原因在于欧洲船公司的船队占全球船队吨位的 41%，但在欧盟区域登记的船舶仅占世界船舶量的 12%。所以即使在奉行自由竞争的市场环境下，欧盟委员会（以下简称“欧委会”）也允许国家进行补贴，不过欧委会主张补贴的方式应该是个别的、暂时的，并应该逐渐减少。但 2008—2009 年由美国引发的全球性经济危机也使欧盟的海运业遭受重创，所以以往一直采用的海运资助政策更是被各当局大量运用。有学者指出，虽然这样（指政府干预）会导致潜在的贸易限制，但还是有必要对海运部门进行监管干预，尤其在安保和环境方面。国际习惯法并不要求各国将所有海运服务提供商置于同等地

2 《欧共体条约》，亦即现在的《欧盟职能条约》，这两部条约是欧盟基本法的不同版本，只是在结构上有变化，对欧盟竞争法相关规定没有影响。

3 Conor Quigley, *European State Aid Law and Policy*, 2nd edition, Oxford: Hart Publishing, 2009, p. 3.

4 此为欧盟委员会下属能源与运输总司资助的海运协调平台对海运国家资助进行的分类，该平台旨在为能源与运输总司提供咨询建议、决策参与等。See Amrie Michael Lloyd, Study on Effects of State Aid to Maritime Transport: Terms of Reference, at http://www.maritime-transport.net/mtso/downloads/Public_Information/MTCP_ToR_State_Aid.pdf, 8 October 2013.

位。[5]

欧盟在海运业的国家资助政策是为了服务其整个海运政策——“使在欧共体优先登记的船舶能更安全、更环保地自由出入国际航运市场”。[6] 从长远来看，该政策是为了提高欧盟共同市场民众的福利，建设高质量的航运业，最终成为世界航运业的领导者；从短期来看，欧盟所作的种种努力是为了实现高质量航运，增强欧盟海运业的竞争力，并确保欧盟的海运部门在经济衰退时仍具有恢复力。从根本上来说，适当的国家资助政策有助于欧洲保持核心人力资源优势和海运技术秘密优势，以便今后航运业营运的可持续发展和竞争力的提高，从而推进欧盟和欧盟各国形成安全、可靠和高效的国际海运体系，保持欧盟海运与全球海运的长远竞争关系，使海上运输系统适应 21 世纪的挑战。

（二）海运国家资助政策的主要实践指导规则

国家资助政策作为影响欧盟有效竞争的考量因素，属于欧盟竞争法范畴，其政策一级立法可以追溯到《欧共体条约》第 87 条至 89 条，[7] 这 3 条处于该制度法律依据的核心地位。具体实施过程中，更多体现海运业国家资助政策的是除一级立法外的规则、通报等。

1.《2004 年欧共体关于海运业国家资助指导规则的通报》（以下简称“《2004 规则》”）[8]

一方面，为了应对来自非欧盟旗船的激烈竞争，早在 1989 年欧委会就第一次

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5 Benjamin Parameswaran, *The Liberalization of Maritime Transport Services, with Special Reference to the WTO/GATS Framework*, Vol. 1, Berlin/Heidelberg: Springer, 2004, quoted in Book Review, *International Journal of Marine and Coastal Law*, Vol. 23, Issue 2, 2008, pp. 377~382.

6 Conor Quigley, *European State Aid Law and Policy*, 2nd edition, Oxford: Hart Publishing, 2009, p. 331.

7 《欧共体条约》第 87 条第 1 款：除本条约另有规定外，国家给予或者利用国家资源给予的资助，不论方式如何，凡优待某些企业或者某些产品的生产，以致破坏或即将破坏竞争，从而对成员国间的贸易产生不利影响时，得被视为与共同市场相抵触。第 87 条第 2 款：以下是与共同市场兼容的国家资助：a) 具有社会性的、无歧视且只与产品原产地相关的、提供给个体消费者的资助；b) 弥补由自然灾害或意外事件造成的损害；c) 因弥补德国分裂所造成的经济劣势而对原东德的特定地区给予的国家资助。第 87 条第 3 款：可被认为与共同市场不相抵触的国家资助：a) 为推动生活水平特别低或就业严重不足地区的经济发展而提供的国家资助；b) 为推动具有欧洲共同利益的重要规划或者为补救成员国经济生活中的严重混乱而提供的国家资助；c) 在不对贸易条件造成负面影响以至于影响共同利益的前提下，为推动某些经济活动或者经济区域的发展而提供的国家资助；d) 在不对贸易条件和竞争造成负面影响以至于影响共同利益的前提下，为推动文化遗产保护而提供的国家资助；e) 理事会根据委员会的提议经特定多数同意的其他国家资助。

8 Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (2004/C 13/03).

提出了协调各成员国国家资助行动的指导规则，但由于成效并不显著，1997 年又对其进行了修改，并发布了《1997 年海运业国家资助指导规则》（以下简称“《1997 规则》”）。《2004 规则》肯定了《1997 规则》的效果，并沿用了《1997 规则》的精神和原则，对海运业作了一个总结性的规定。另一方面，根据各成员国的 2002 年中期报告，1989—2001 年，欧盟的回籍船舶吨位有所增长，但成员国悬挂欧盟旗船占世界船队的比重在下降，并且挂第三国家旗的增长率要大于挂欧盟旗的增长率。

在这两大背景下出台的《2004 规则》主要介绍了该规则的目的、调整范围、修改背景，评估了《1997 规则》的实施效果，然后分别对以下内容作了规定：1）提高竞争力的财政和社会性措施，包括船公司的财政待遇和船员成本两方面；2）船员补助；3) 投资资助；4）《欧共体条约》第 87 条第 3 款 (a) 和 (c) 项下的地区资助；5) 船员培训；6）重组资助；7）公共服务义务和合同；8）近海运输资助；9）对海运资助的限制；10）对成员国的效力及 7 年的有效期等。

欧盟《2004 规则》适用于“成员国之间及成员国和第三国之间的海运业”，[9] 充分展现了海运资助在欧盟国家资助架构里的合法性，也体现了海运资助是欧盟在其一直宣称的无歧视和透明原则基础上所推行的政策。然而遗憾的是，我国目前正是缺少这样提纲挈领、总揽大局的海运资助政策。为了进一步补充规定《2004 规则》，欧委会之后又发布了两份通报，分别如下。

2.《关于国家资助中推行海上高速公路计划共同体基金的补充指导规定的委员会通报》（以下简称“《海上高速公路补充规定》”）[10]

就《海上高速公路补充规定》而言，海上高速公路这一概念出自 2001 年海运政策白皮书，至少包含了 2 个及以上成员国的基础设施设备和服务。为了减少陆上交通拥堵情况和对环境的负面影响，欧盟通过实施这份通报，把运输方式从陆上交通转变到海上交通。该补充规定的出台是由于马可•波罗项目 [11] 下所能提供的国家资助的条件与《2004 规则》第 10部分的规定不一样，前者所能得到的资助条件较为宽松，利益也更丰厚，所以才专门出台相关规定。

3.《针对船舶管理公司的国家资助规定的欧委会通报》（以下简称“《船舶

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9 具体适用范围可进一步参考：Article 4 of Council Regulation (EEC) No. 4055/86 of 22 December 1986 Applying the Principle of Freedom to Provide Services to Maritime Transport between Member States and between Member States and Third Countries (OJ L 378, 31.12.1986, pp. 1~3).

10 Communication from the Commission Providing Guidance on State Aid Complementary to Community Funding for the Launching of the Motorways of the Sea (2008/C 317/08).

11 马可•波罗项目是欧盟的基金资助项目，设立该项目的目的是减少路上交通的负荷、提高货运速度，将货物通过陆地运输转向海上运输、铁路运输和内陆水上运输，减少交通拥堵和环境污染。See The European Commission, Marco Polo: New Ways to a Green Horizon, at http://ec.europa.eu/eaci/mp_en.htm, 8 October 2013.

管理公司规定》”）[12]

《船舶管理公司规定》的通报则主要是为实施《2004 规则》第 3 部分关于扣减公司税或船舶吨税而明确船舶管理公司的适格性问题。通报中就何种类型的船舶管理公司才能享有资助提出了“整体管理”的概念，即对同一艘船的技术和船员共同管理的船舶管理公司才能享受税收等方面的优惠。而另外一种类型的船舶管理公司，即只涉及商务方面（买卖船舶、租船订舱、代理委托等事宜）的船舶管理公司，则不在该通报调整范围内，也就是说不能享受资助政策。原因是涉及技术管理和船员管理的整体管理行为相当于船东的行为，理应受到与船东一样的待遇，但是商务管理所涉及的买卖船舶等行为，欧委会对此所知甚少，故而未被纳入该通报调整范围。

（三）小结

欧盟国家资助政策的法律体系综合性强，并且被包含在竞争法框架中，既有《欧共体条约》第 87 条的基础性规则，又有行业性具体规则。上述 3 份通报实际上构成了海上资助制度中的具体行为指导规则。

三、船舶登记制度中的海运国家资助政策

在船舶登记制度中采纳国家资助政策，主要目的在于吸引本国居民建造或购买的船舶悬挂本国旗，防止船舶移籍。据欧盟称，新交船在 1997 至 2005 年间持续增长，从每年的 350 万吨增至 1490 万吨，悬挂欧盟旗的新交船平均为 53%，其中 2006 年抵达 1760 万吨的高峰，2008 年跌到 1270 万吨的谷底，2009 年又出现 2440 万吨的小高峰，与此同时，欧盟新船登记却下降至 44%。[13] 得益于 15 个新欧盟国家的积极财政优惠，1997 至 2005 年间，悬挂欧盟旗的船积极回流到这些国家。但随着船旗登记国之间的竞争加剧，从 2006 年起，为巴拿马和马绍尔的优惠财税政策吸引，一些原来新造时悬挂欧盟成员国船旗的船舶随后将船旗易为巴拿马等

12 Communication from the Commission Providing Guidance on State Aid to Ship Management Companies (2009/C 132/06).

13 Optimar: Benchmarking Strategic Options for European Shipping and for the European Maritime Transport System in the Horizon 2008–2018 (2010 UPDATE), p. 39, at http://ec.europa.eu/transport/modes/maritime/studies/doc/2010_optimar_study.pdf, 8 October 2013.

方便旗国船旗。[14] 无论如何，欧盟已经意识到悬挂欧盟成员国船旗的船队易旗等问题，并且从新成员推行积极财政优惠政策可以看出，欧盟是鼓励推行船舶登记制度的。

当然，船舶登记资助制度并非任由成员国推行。欧盟也有自身的一套框架体系，除了以前面提到的《欧共体条约》第 87 至 89 条为一级立法，还有具有一定法律指导意义的二级立法，如《2004 规则》就是欧委会根据欧共体国家资助规则，为了使海运业国家资助措施获得批准而设置的标准。[15]

船舶登记制度中涉及到的主要航运扶持政策有：国际船舶登记制度、以船舶吨税制为代表的税收政策和防止船舶移籍的其他政策措施。

在船舶登记制度中，世界上很多航运国家采取的征税方案都是比较优惠简单的“船舶吨税制”，吨税制度是以船舶吨位为基准而非根据公司的实际经营利润征税，其税率一般低于通常企业所得税。荷兰、英国、挪威、德国等在 1996 年就引入吨税制，印度、韩国、日本等亚洲国家也相继研究实施，吨税制已成为国际船舶运输税制的一个标准。[16]

其实，船舶吨税制度不仅可以解决进口船舶关税的问题，同时也能增加悬挂本国旗船舶吨位的数量。在吨税制下，航运公司缴纳的税金是根据船队的总吨位数而非公司的经营利润，这可以大大降低航运企业的税负，增强航运企业竞争力，带动与航运关联的造船、修船、物流等一系列产业的发展，方便旗现象也会随之有较大的改善。[17]

以芬兰的船舶登记税收优惠政策为例。2006 年 5 月，芬兰推动了 2 项现存的关于国际船舶登记制度的国家资助方案，即为并非芬兰船东拥有但为芬兰船舶经营者管理的船舶退还社会保障税和船员的收入所得税。该举措并未遭到欧盟的反对。欧委会认为芬兰的这 2 项举措并未违反《2004 规则》，并与内部市场兼容。此外，芬兰还修改了正在讨论中的方案以适应《2004 规则》，特别是规定只有在公海上承担海运活动超过 50% 总运营时间的拖轮和疏浚船才有资格获得上述资助。[18] 另

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14 Optimar: Benchmarking Strategic Options for European Shipping and for the European Maritime Transport System in the Horizon 2008–2018 (2010 Update), p. 39, at http://ec.europa.eu/transport/modes/maritime/studies/doc/2010_optimar_study.pdf, 8 October 2013.

15 Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (2004/C 13/03).

16 车太山：《中国实施“第二船籍”制度相关问题》，载于《世界海运》2010 年第 7 期，第 56~59 页。

17 车太山：《中国实施“第二船籍”制度相关问题》，载于《世界海运》2010 年第 7 期，第 56~59 页。

18 Gerencia del Sector Naval, Commission Accepts Changes to Two State Aid Schemes for Maritime Transport in Finland Brussels, at http://www.gernaval.org/Noticias/IP-06-629_EN%5B1%5D.pdf, 8 October 2013.

外，丹麦目前的航运国家资助政策有二，其一为吨税制度，另一为免除丹麦船东为船员支付收入税和社会保障费的“DIS 体系”。丹麦给予海运业以低于公司税的吨税制度，使海运业相对受益。由于这些补贴可能会扭曲欧盟共同市场竞争，影响成员国间贸易，为使吨税制度与欧盟共同市场兼容，欧盟配套出台了应对措施。

但是欧委会认为，根据《欧共体条约》第 87 条第 3 款（c）项，丹麦通告的措施可能损害欧共体利益，认为丹麦吨税制度与前述条款不一致。根据丹麦吨税制度缴纳税款的船东，丹麦免除其向丹麦财政当局提供所有与外国子公司进行商业交易的商业信息的义务，欧盟认为此举与共同市场不兼容，因此不得执行。[19]

其实，对航运企业采取税收优惠政策是国家向本国船队提供补贴的通用方式，如冲销税金、延期纳税、减免税和加速折旧等，其中减免税直接增加了航运公司的利润。而减免船员个人所得税和社保费用，实际上也是间接节省航运公司的人力成本。如德国对航运公司的非营利性收入减税，芬兰航运企业免交流转税，希腊允许在本国经营船舶业务的外国船公司或代理机构免交营业所得税、进口税和其他捐税。由此可见为提高欧盟船舶吨位数，欧盟允许各成员国采取的国家资助政策种类之多、力度之大。

四、提升欧盟海员职业吸引力的海运国家资助政策

21 世纪各国注定以人力资源作为有效的竞争手段之一，无论是科技创新还是建设海运强国，人始终是知识的载体。海运业也是如此，没有充足的高素质海员，就难以驾驭新型船舶，推行低碳环保的船只也势必受影响。另一方面，航海业本身独特的风险性（如海盗风险）和海上工作的艰巨性，使现代人特别是发达国家的公民愿意从事这种高风险行业的积极性降低。

为了提升欧盟海员海上就业的积极性，欧盟也出台了一系列吸引海员从事船上工作的措施。《2004 规则》的出台凸显了欧盟有意提高船员待遇，也是其意欲建设强大综合运输体系的有力证明。在欧盟旗船上的船员从 1996 年的 18.8 万人下降到 2001 年的 18 万人，2004 年欧盟旗上的船员大约是 12 万人，要比 1985 年下降 40%，但同时第三国的船员从 1983 年的 2.9 万人上升到 2004 年的 6 万人。[20] 而另一方面，船舶产出率却在上升，在 1997—2001 年间更新换代，需要较少的但素质更高的船员，这也导致欧盟更关注船员的利益。

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19 Commission Decision of 17 June 2009 on State Aid C 5/07(ex N 469/05) as Regards Alleviation of Information Obligations Imposed on Maritime Companies Entered into the Danish Tonnage Tax Regime (notified under document C(2009)4522) (2009/868/EC).

20 Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (2004/C 13/03), p. 2.

2007 年，欧盟就发布了《重估为欧盟海员创造更多更好工作的社会监管框架》的通报。《到 2018 年欧盟海运政策战略目标和建议》[21] 再次强调，最近几年，海上运输部门直接或间接地创造了诸多岗位。其中约 70％是知识密集型和高质量的陆上工作。海事专才、高级海员的日渐缺失使得欧盟海运业赖以保持竞争力的人力资源状况处于临界点的风险。

首先，免除社会保障费用和减免海员个人所得税。一方面减轻了航运企业的负担，另一方面也提高了企业雇用欧盟船员 [22] 的积极性。这在国家为帮助企业履行就业法令或与工会签订的集体合同中的义务而对企业提供利益补偿时更是如此；减轻船员的个人所得税，更是直接增加了船员的收入，是一种直接补贴，对吸引欧盟船员有一定的作用。例如，2009 年 1 月，欧盟关于推动丹麦海运公司疏浚和铺设电缆时无需缴纳营业税和海员社会缴费的决定。[23] 当然，为了防止成员国实施这些税收优惠政策时违背相关立法和政策，这些税收优惠也要经过欧盟审查。例如 2008 年 4 月，欧盟就对冰岛根据监管和法院协议实行的以吨位税和船员资金返还为形式的海运国家资助发起审查程序。[24]

其次，为海员提供良好的就业环境，增加海员培训国家补贴。欧共体缺乏训练有素的海员，不少措施——诸如提供更为良好的工作条件和更为丰厚的薪水——已经实施，以便增加船员招聘数量。就海员培训而言，2001/25 号指令废除了早先的立法，使欧共体法与国际海事组织最低标准一致，还有其他指令也作了相关规定。这不仅使欧盟标准与国际标准接轨，也使欧共体成员国国旗船所用的船员的待遇将有可能高于国际通行标准。[25]《2004 规则》也明确将“海员培训”作为欧盟认为的一种正当国家资助政策。

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21 Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategic Goals and Recommendations for the EU’s Maritime Transport Policy Until 2018 [COM(2009) 008 final], at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0008:FIN:EN:DOC, 5 December 2013.

22 关于“欧盟船员”的定义，参见 Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (2004/C 13/03), para. 3.2. Labour-Related Costs.

23 Commission Decision of 13 January 2009 on State Aid C 22/07(ex N 43/07) as Regards the Extension to Dredging and Cable-Laying Activities of the Regime Exempting Maritime Transport Companies from the Payment of the Income Tax and Social Contributions of Seafarers in Denmark.

24 Invitation to Submit Comments Pursuant to Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement on State Aid with Regard to State Aid to Maritime Transport in the Form of a Tonnage Tax and a Refund Scheme for Seafarers (2008/C 96/07).

25 Rosa Greaves, European Community Law, *International and Compara-tive Law Quarterly*, Vol. 51, Issue 1, 2002, pp. 177~185.

另外，欧盟也鼓励成员国加入《海事劳工公约》，[26] 该公约旨在提高海员的生活和工作条件，并确保船东之间公平竞争。截至 2013 年 8 月 28 日，该公约已经或者将在 2014 年对欧盟 16 个成员国生效。这与欧盟鼓励成员国批准该公约是分不开的。

五、海运国家资助体系的判例法发展路径

欧盟规定成员国政府对于海运的资助须由欧委会批准 , 在没有履行及时通知义务及让其他成员国能提出意见之前 , 有关成员国不得修改或进行资助。这能够有效协调各成员国国内法修改和实施程序。除此之外，欧盟法院也对各成员国的海运国家资助措施进行司法审查，以保障海运资助政策的统一性和合法性。[27] 以下笔者列举几个关于海运服务合同中国家资助政策合法与否的案例。

（一）公共服务合同中国家补贴是否合法

西班牙弗雷德•奥尔森股份有限公司诉欧委会案（原审案件号 T-17/02，上诉审案件号C-320/05P）[28] 是原告要求欧盟法院宣告西班牙国家补贴决定无效的案例。该案从 2005 年到 2008 年，历经上诉，最终被欧盟法院驳回。

该案件情况大致如下：出于国有利益考虑，1978 年，西班牙当局与跨地中海轮船运输公司订立了一份 20 年期的海运服务合同（以下简称“1978 年合同”，该合同于 1995 年提前 2 年终止），政府当局则为该公司提供 2 项补贴，以解决该公司的财政赤字、合同权利和义务以及公司人员重组等问题。弗雷德•奥尔森股份有限公司（西班牙海运公司，与跨地中海轮船运输公司有业务竞争关系）就该份 1978 年合同——特别是其中的 2 项补贴——向欧委会提出申诉，认为 1997 补贴、

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26 该公约已经于 2013 年 8 月 20 日在达到 30 个成员国批准后生效。公约将于 2014 年起对法国、芬兰和希腊等成员国生效。加入《海事劳工公约》的国家详细名单，下载于 http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO::P11300_INSTRUMENT_ID:312331，2013 年 8 月 28 日。

27 司法审查可以分为 2 种。第一种是欧盟成员国或成员国的公民或法人，针对欧委会在有关国家资助事项上的行为向欧盟法院或初审法院提起的诉讼，这可分为以下 3 种：一是根据《欧共体条约》第 230 条针对委员会的不作为而提起的诉讼，二是根据《欧共体条约》第 230 条向法院提起的无效之诉，三是根据《欧共体条约》第 235 和第 288 条对欧委会的不当作为所造成的损失提起的诉讼；第二种诉讼是当欧盟有关成员国在规定的期限内不遵守欧委会的决定时，欧委会或者其他欧盟成员国所提起的诉讼。参见孔少飞：《欧盟的国家资助制度及其借鉴》，载于《欧洲研究》2006 年第 3 期，第 88~102 页。

28 Judgment of 15.6.2005 – CASE T-17/02, See Judgment of the Court of First Instance (Second Chamber, Extended Composition) June 15, 2005.

安置补助费等不合法，构成新的资助。欧委会认为，西班牙当局的上述资助是“原有补贴”，不大可能构成新的资助，也不在《欧共体条约》第 87 条第 2、3 款的豁免范围内，但还是提出西班牙应采取“适当的措施”，以与欧盟立法相符。弗雷德•奥尔森股份有限公司不满欧委会决定，遂向欧盟一审法院提起告诉，要求判决欧委会 2001 年 7 月 25 日关于国家资助的决定[29]无效。2005 年 6 月，法院判决原告弗雷德•奥尔森股份有限公司败诉。该案后又经上诉，2008 年再次被法院驳回。

该案涉及了有关沿海运输权的 3577/92 规则、判断国家资助政策是否与欧盟共同市场兼容的 659/1999 规则和指导海运国家资助的《2004 规则》以及一系列西班牙相关国内法。其焦点问题是公共服务合同下对航运企业的补贴是否构成欧盟层面上能够得到豁免的国家资助。原告认为西班牙对跨地中海轮船运输公司的补贴是新的补贴而非原有补贴，相当于是西班牙政府对 1978 年合同的行政干预，这就与《欧共体条约》第 87 条第 1 款不一致。但法院与此观点相左，认为西班牙政府对跨地中海轮船运输公司的补贴符合《欧共体条约》第 87 第 1 款规定、与欧共体共同市场相容，也符合公共服务合同的相关规定，并且在西班牙政府接受《2004 规则》前就产生了前述补贴行为，并不构成《2004 规则》下的新的国家资助。本案多次援引《欧共体条约》中关于国家资助的相关规定，可见其在判断国家资助是否与共同市场兼容问题上的重要地位，同时本案也是有关公共服务合同中国家资助是否合法的一个判例。

（二）驳船运输业中国家补贴是否合法

意大利共和国诉欧委会案（案件号：C-400/99）。该案虽然涉及驳船业中国家资助的问题，但本质上还是与上述案例有类似之处，即通过《欧共体条约》来判断补贴行为是否会扭曲或威胁欧盟共同市场的公平竞争，并以此判断补贴合法与否。

本案基本情况是：1999 年，欧委会质询意大利政府擅自给予其国内驳船企业蒂雷尼亚集团航运公司国家资助优惠，后又怀疑该资助措施与欧盟共同市场不兼容，遂根据相关规定（《欧共体条约》第 88 条第 2 款）提起相应程序。作为结论的一部分，要求意大利政府暂停支付超出提供普遍经济利益服务所需的额外成本净额的资助款项。2005 年 5 月，法院宣告欧盟部分“决定”[30]无效，暂停意大利驳船企业蒂雷尼亚集团航运公司接受供油方面的税收优惠政策，其他诉请驳回。

上述 2 案都要求国内海运资助不能扭曲共同体市场竞争，都提到了“一般经

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29 Commission Decision of 25 July 2001 Relating to State Aid File NN 48/2001–Spain–Aid for the Transmediterránea Shipping Company (OJ 2002 C 96, p. 4)。

30 Commission Decision No. 2005/163/EC of 16 March 2004 concerning State Aid Granted by Italy to the Shipping Companies Adriatica, Caremar, Siremar, Saremar and Toremar (Gruppo Tirrenia) (OJ 2005 L 53, p. 29).

济利益”原则，海运业国家资助既要符合《欧共体条约》，也要符合“一般经济利益”原则。[31]

总之，沿海公共服务合同中的国家资助政策是比较容易引起争议的。尽管在程序上均报经欧盟委员会备案、邀请利益相关方进行评论，但是由于所牵涉利益之广、持续时间之长，资助政策往往还是会对市场竞争主体产生重大影响。像欧委会 2008 年 7 月 18 日对法国给予科西嘉地中海国营海运公司国家资助的决定、2009 年 10 月 18 日对大不列颠和北爱尔兰联合王国给予高美渡轮和北连轮船公司在苏格兰海运服务的补贴的决定，都是经过欧盟委员会根据欧盟国家资助法充分论证说明而发布的。

在范围的调整上，还明确了拖航、疏浚行为是否构成海上运输行为。例如，针对拖船并不使用但享受国家资助的情况，规定只有在某年度内有效实施 50% 以上的拖航行为才构成《2004 规则》下的海上运输。

欧委会就像是主管国家资助的行政许可主体，当利益相关方认为欧盟的行政许可行为有违欧盟法时，可向欧盟法院提起诉讼程序。某种意义上，这与主权国家中司法权对行政权的约束和监督有着异曲同工之效。

（三）小结

一方面，欧盟认为欧盟旗船仍面临第三船舶登记国家的激烈竞争，外国竞争者往往在政府支持、廉价资本获取、大量劳动力和国际约定准则的灵活实施方面具有显著优势，欧盟各国应采取诸多与欧盟海运业资助方针一致的措施，以保住欧盟旗船队，同时为欧洲海员创造更多的就业机会。[32] 另一方面，欧盟在有关文件中明确提出：欧盟清晰的、富有竞争力的包括吨税、收入税和国家资助在内的制度框架应当保持，并在海运业国家资助指导方针下适度改进。该框架应采用积极措施，以支持发展绿色航运、技术创新以及海运职业和专业技能。同时，应当检验海

31 “一般经济利益”的相关情况参见欧盟通报：Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Reform of the EU State Aid Rules on Services of General Economic Interest, [COM(2011) 146 final].

32 Commission of European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategic Goals and Recommendations for the EU’s Maritime Transport Policy Until 2018, [COM(2009) 008 final], para. 2, European Shipping in Globalised Markets, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0008:FIN:EN:DOC, 5 December 2013.

运业雇佣制度和资助之间内在联系的灵活性。[33] 这足以显示欧盟十分青睐运用全方位的国家资助政策来扶持海运业。

欧盟各国的资助行动应该在《欧共体条约》关于国家资助的核心规定（如第 87 条）和以《2004 规则》为基础的 3 大海运资助通报下进行，以免因缺乏统一行动扭曲成员国之间的竞争。而我国却没有关于海运国家资助的专门规定，虽然存在行政审查和行政诉讼制度，但实践中怎样发挥作用却有待在健全实体性资助规定时一并考虑。

六、我国海运国家资助立法不足及建议

从前述可以看出，在宏观上，欧盟海运国家资助政策的法律体系建立在竞争法框架内，并出台了 3 大具体规则，同时又有欧盟司法介入审查各国海运资助政策的合法性，这在体制上是比较健全且有保障的。微观上而言，欧盟在船舶登记制度方面、提升海员职业吸引力及培养海事人才方面均有广泛而具体的国家资助政策，不一而足。反观我国，只有散落的个别规章、条例有相关规定，或者若干地区有一定具体方面的优惠，既缺乏体系性，又缺乏足够的资助力度和广度。总体来看有 2 大问题：一是制度缺失，立法、司法和执法之间缺乏有效互动机制；二是规定空白或不周，无法可依，影响政策效果发挥。具体的问题和建议分别如下所述。

（一）鼓励中资船舶悬挂五星红旗

与欧盟相似，我国中资船舶悬挂非五星红旗问题突出。有些国家以税收优惠等手段吸引他国船舶悬挂本国旗，导致当今航运业方便旗船现象盛行，许多国家都面临本国船队悬挂外国旗的问题。这样的后果是：对国家而言，减少了财政收入，不利于船队和船员管理，对军事和国防更有潜在的危害；对世界贸易而言，更是增加诸多不稳定因素，如海洋环境污染威胁、贸易诈骗等。所以欧盟《2004 规则》的明确目的之一就是要增加欧盟旗船舶吨位和增加船舶回归欧盟旗的数量。

为吸引中资方便旗船回国登记，扩大五星红旗船队保有量、加强安全监管、维护我国船员权益，我国自 2007 年 7 月 1 日起实施“特案免税”政策。随后又借鉴

33 Commission of European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategic Goals and Recommendations for the EU’s Maritime Transport Policy Until 2018 [COM(2009) 008 final], para. 2, European Shipping in Globalised Markets, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0008:FIN:EN:DOC, 5 December 2013.

欧盟某些成员国的做法，于 2009 年在上海试点“第二船籍登记制度”，[34] 但实施的效果并不理想。[35] 接着，以上海、天津为代表的航运前沿城市又出台了几项吸引船舶挂五星红旗的措施：2012 年 3 月，上海洋山港“保税船舶登记”正式启动，洋山保税港区成为全国第一个可以开展保税船舶登记的区域；2013 年《天津东疆保税港区国际船舶登记制度创新试点方案》正式获交通运输部批复同意，天津将在全国率先实施国际船舶登记制度，[36] 至于该制度能否实现中资船舶回籍，我们将拭目以待。上述措施的有效发挥都依赖信贷、法律、税收等其他各个方面的配套措施，而不仅仅依靠税收减免。欧盟海运业的国家资助表现形式不拘一格，中国在借鉴之时，应从税收开始延展到其他环节，最终构建成综合立体式的海运扶持框架，以进一步增加五星红旗船队吨位数量。

（二）减免中资海运类企业税负

首先，可以推行船舶吨税制度。[37] 如前文所述，船舶吨税制度不以企业营业收入为税收基准，而代之以船舶吨位为计量，具有稳定性，可以减少公司税收负担，是欧盟成员国扶持航运业的常用措施之一。船舶吨税还可以与船舶国籍相关联，可以针对船舶国旗的不同而给与不同的税率，不仅有利于扩大本国船队规模，也有利于各国之间海运协定的落实，而且还能避免因目前交通运输类企业“营改增”[38] 而出现内外资交通运输企业矛盾。

其次，可以设立专项补偿资金，专款专用。落实类似 2009 年交通运输部颁布

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34 “第二船籍登记制度”是在不改变原有的传统船舶登记制度的前提下，主要面向本国船东、与方便旗制度类似的船籍登记制度，亦即在保证本国登记的基本条件基础上，享受诸多优惠政策，并与传统船舶登记制度并行不悖。因船舶登记注册地的不同可分为离岸船舶登记制度和国际船舶登记制度，英国在 1978 年开始以马恩岛为境外登记处，是最早设立离岸登记制度的国家，挪威则是最早设立国际船舶登记制度的国家（1987 年）。更多关于这 2 种登记制度的介绍参见陈继红、真虹、宗蓓华：《中国“第二船籍登记制度”及其配套政策研究》，载于《航海技术》2009 年第 2 期，第 78~80 页。

35 陈继红、韩玲冰：《改善上海国际航运中心船舶登记服务的对策研究》，载于《科学发展》2012 年第 10 期，第 86 页。

36 《天津将在全国率先实施国际船舶登记制度》，下载于 http://world.people.com.cn/n/2013/0528/c57507-21649509.html，2013 年 10 月 8 日。

37 正如前文所提到的，此处所指的船舶吨税制度是国家税收体系中的税收种类之一，可以减轻企业营运负担，是对企业所得税等的一种替代。而中国目前的航运公司，以船公司为例，需缴纳以运费收入为税基的营业税等多种税收。所以以一种数额比较固定的征税方式来替代企业所得税、营业税等，无疑会使企业得到更多的实惠。另外，这与中国等国以发放国际船舶吨税证书的形式来实施的吨税完全不是一个概念，前者是税种之一，后者属于港口费用里的费用明细项目之一。笔者注。

38 2013 年 8 月 1 日，“营改增”试点扩大到交通运输业，外资航运公司不满中资企业零增值税率而自己需要缴纳 6.8% 税率的待遇。《欧盟商会海运业吐槽营改增，内外竞争不公平》，下载于 http://www.topcfo.net/index.php/News/index/id/32008.html，2013 年 10 月 8 日。

的《关于进一步促进公路水路交通运输业平稳较快发展的指导意见》等一系列政策，切实出台促进行业发展的相应措施；落实长江船型标准化中央补偿资金；制定国内航运企业购买“弃船”投入国内营运的市场准入管理政策，发布《关于国内航运企业购买弃船投入国内营运市场准入管理的公告》。[39]

另外，还有其他税收措施。如积极落实启运港退税政策，研究完善出口货物国内中转的监管制度和有效防止骗退税的措施。在吨税制度尚未出台的情况下，依然要采纳营业税优惠政策，如洋山保税港区的营业税优惠政策，对注册在洋山保税港区内的航运企业从事国际航运业务取得的收入以及仓储和物流等服务企业从事运输、仓储、装卸搬运业务取得的收入，免征营业税。[40]

（三）培养和吸引海员及海事人才

就海员和海事人才而言，我国的扶持政策无论是宏观还是微观的都不多。2007 年修订出台的《中华人民共和国船员条例》[41] 为五星红旗船雇佣外籍高级船员打开了口子。但这并没有通过治本的方式增加海事职业的吸引力，也不利于我国海运业的可持续发展。而在吸引和培养海事人才方面，除了上海在外省市人才落户政策上有稍许考虑之外，还未听闻有何重大措施出台。近年随着物价上涨、通货膨胀加剧，航运业的人力成本也水涨船高，但是人才吸引政策方面的配套措施却明显不足。

这一方面，我国远远没有欧盟那样重视海员、海事人才，即使在行业困难时期，我国航运企业无法负担额外的人才工资福利等成本，但从长远看，还是需要制度性保障的。

无论是实行“特案免税”政策，还是选择吨位税制度，必然会在实践操作中碰到一些问题，这也是难免的。而且中国的政策存在连续性、稳定性和透明度等方面的问题，还需要通过政策法令化来解决。无论哪项税收优惠政策，在时机成熟时都要及时法律化。

（四）将海运国家资助政策纳入竞争法范畴，规范各种国家资助措施

39 中华人民共和国交通运输部：《中国航运发展报告（2009）》，北京：人民交通出版社 2010 年版，第 9 页。

40 上海国际航运研究中心编：《上海国际航运中心建设年度报告（2009）》，上海：上海国际航运研究中心 2010 年版，第 57 页。

41 第 12 条规定：“中国籍船舶的船长和高级船员应当由中国籍船员担任；确需外国籍船员担任高级船员的，应当报国家海事管理机构批准。”

我国海运业的国家资助制度散乱、效力级别不高、经常变化、操作程序冗繁，为了提高法律政策的稳定性、连续性和透明度，建设海运强国，避免海运国家资助无法可依的局面，笔者建议专门制定中国的“海运资助法”。不拘泥于形式，由于国家资助法是竞争法的组成部分，将来可以在《反垄断法》配套实施条例中规定，也可以在《航运法》中专设章节。违背法律明文规定和立法目的的资助政策即为非法，需要司法审查机制的干预，反之，则应当鼓励和发展各种资助政策，维护市场的公平竞争。

再者，有些措施之间的关系并不清晰。如“特案免税”政策与“第二船籍登记制度”的内容有交叉，后者包含的内容有可能含有国家资助——亦即财税优惠政策方面——的内容，但主要还是从放松对配备船员、船员国籍的要求来考虑，所以我国设立第二船籍登记制度的内涵有待明确，其和“特案免税”的关系也应该厘清，酝酿制度整体架构时应该更充分和周全。

总之，要从我国的国情出发，充分考虑航运市场的现状和发展趋势对于法律的需要，同时也要借鉴发达国家的先进立法经验，确实做到有法可依，只有法律的明确规定才能成为国家资助政策是否合法的唯一判断标准。只有这样才能保障航运市场的统一、有序、高效和可持续发展，维护行业内部和国内外航运企业之间的公平竞争，加速从航运大国向航运强国转变。

七、结　语

作为具有周期风险性和资金密集性的运输产业，海运业关乎国计民生，因此主要海运国家都将海运业置于战略地位并予以政策扶持。我国是航运大国但不是强国，海运业没有体系化和全国性的国家资助制度，这势必不利于我国海运业充分发挥战略性作用。欧盟在此方面有较为成熟的做法和经验。他山之石，可以攻玉，我国可以充分汲取欧盟近 20 多年航运资助政策的得失成败经验，针对海运企业出台一定国家资助政策，吸引海事人才，引导中资外籍船回归；在时机较为成熟时，利用司法或行政审查手段的制衡机制，陆续将海运国家资助政策法律化、制度化。以此建立一支具有军事战略意义、质量过硬的五星红旗商船队伍，抓住本世纪海洋战略地位的主导权。

Government Support for the Maritime Transport Industry in the European Union and Its Lessons

DING Lianzhi*

Abstract: The maritime transport industry is highly risky, capital-intensive, and vital to the national economy as well as individual livelihoods. Countries with maritime shipping industries have made them strategic priorities and supported them with government policies. China has a sizable maritime transport industry. For China, the maritime transport industry is significant in the realms of both industrial policy and military importance. However, the Chinese maritime transport industry lacks the support and protection from systemic laws and policies at the national level. As a leading maritime economy, the European Union has a relatively comprehensive governmental policy supporting the transport industry, which forms part of its competition policy. These policies are buttressed by an institutional framework of statutes, as well as case-law-based judicial review of the legality of the policies. They undoubtedly contain valuable lessons for China as it develops a comprehensive policy to support its maritime transport industry, especially the laws and aid policies for a future vessel registration system, the education of maritime professionals, and other areas.

Key Words: Shipping industry; State aid; Vessel registration

I. Introduction

The maritime transport industry has an important place in the European Union. Almost 90% of the EU's external freight trade is by sea, and short-distance maritime shipping represents 40% (by ton-kilometers) of all shipping within the

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EU.[1] In response to structural changes and globalization in the economy and in the face of great pressures from port congestion, global warming, piracy, and other factors, government policies with EU-specific characteristics have gradually developed to support the maritime shipping industry since the late 1980s. Likewise, the maritime shipping industry plays a key role in China's economy. China also faces challenges similar to those of the EU and needs to develop certain laws and policies to support the industry's growth. But China's policies supporting the maritime shipping industry are hampered not only by inadequate institutional protection, but also by a variety of operational defects. Therefore, the EU's experience may be instructive.

Section II of this article comments on three current major rules in the EU's policies supporting the maritime shipping industry. Sections III and IV respectively introduce the EU's policies for encouraging the flying of EU flags and enhancing the appeal of maritime careers. Section V surveys the legal issues encountered by members of the EU in implementing the support policies through the lens of case law. Finally, based on the actual situation of the Chinese shipping industry, the article advocates the strengthening of the governmental mechanisms to support the maritime shipping industry and the implementation of specific governmental support policies.

II. The Statutory Framework for the EU's Policies on Governmental Support for the Maritime Shipping Industry

Government subsidy ("State aid" in EU parlance) is part of the EU's Competition Law. But it has not been defined by statute except for a mention in the Treaty Establishing the European Economic Community (TEEC), Art. 87(1), which provides that State aid applies to any aid in any form offered by Member States or through the use of national resources.[2] However, the EU has indicated, through

1 Maritime: What Do We Want to Achieve?, at http://ec.europa.eu/transport/maritime/index_en.htm, 8 October 2013.

2 Treaty Establishing the European Economic Community (29.12.2006 EN Official Journal of the European Union C 321 E/1), which is the current Treaty on the Functioning of the European Union (TFEU). These are different versions of the basic law of the European Union. The only differences lie in their structures, and do not affect the relevant provisions in the EU's Competition Law.

case law, that State aid means the intervention by a State or a State's shouldering of an economic burden through the use of national resources to give businesses an advantage or to reduce the amounts of the items included in their budgets.[3] State aid for the maritime shipping industry implements and embodies the State aid policy for the industry. The EU divides State aid into three categories based on their respective economic impacts: those that (a) increase the proportion of EU-flagged vessels (namely, State aid in the ship registration system); (b) enhance the appeal of seafaring careers in the EU; and (c) support industries, other than shipbuilding and ship repair, that relate to the shipping industry.[4] These three categories cover not only direct cash subsidies (operating subsidies) given to shipping operators, but also tax relief and preferences (such as social welfare contributions from sailors, vessel-related taxes, registration taxes for shipping companies, etc.) and other indirect subsidies such as investment in education for maritime professionals. This section surveys the significance and goals of the policies on State aid for the maritime shipping industry in EU statutory law, as well as the State aid law that specifically governs the shipping industry.

A. Origins and Objectives of State Aid Policy for the Maritime Transport Industry

The direct reason for the EU's adoption of an aid policy for the maritime transport industry is this: 41% of the global fleet tonnage pertain to European shipping lines, but only 12% of the ships in the world are registered in the EU. Therefore, even in a market environment based on free competition, the European Commission has allowed State aid. But the European Commission has also emphasized that the aid should be individual and temporary, and should gradually decrease. But the EU's maritime shipping industry suffered enormous losses in the 2008–2009 global economic crisis that began in the United States, and governments have since then freely deployed their longstanding aid policies for the mari-

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3 Conor Quigley, *European State Aid Law and Policy*, 2nd edition, Oxford: Hart Publishing, 2009, p. 3.

4 This is the classification of State aid to maritime transport made by the Maritime Transport Coordination Platform, which is a research platform funded by the Directorate-General for Energy and Transport of the European Commission to provide relevant advisory opinions and decision references. See Amire Michael Lloyd, Study on Effects of State Aid to Maritime Transport: Terms of Reference, at http://www.maritime-transport.net/mtso/downloads/Public_Information/MTCP_ToR_State_Aid.pdf, 8 October 2013.

time shipping industry. Some scholars point out that although such government intervention may lead to potential trade restrictions, it is still necessary to regulate the shipping sectors, especially in the areas of security and environment protection. International customary law does not require countries to place all maritime transport service providers on an equal footing.[5]

The EU's State aid policy for the maritime shipping industry aims to serve its entire maritime shipping policy, so that "the vessels preferentially registered in the EC may enjoy more safe and free access to the international shipping market in a more environmentally-friendly manner."[6] In the long run, the policy pursues the improvement in the welfare of the people in the EU's common market, the development of a first-class maritime shipping industry, and eventually a leading position in the world shipping industry. In the short term, these efforts by the EU are directed to building a high-quality and more competitive maritime shipping industry and ensuring its resilience during an economic recession. At a fundamental level, an appropriate State aid policy helps Europe maintain its advantages in core human resources and confidential maritime technologies, and thereby keep up its sustainable development and competitiveness in the operation of shipping industry. As a result, the EU and its Member States may build a safe, reliable, and efficient international maritime transport system, maintain a long-term competitive edge in the global shipping industry, and enable the system to adapt to the challenges of the 21st century.

B. The Major Guidelines for Implementing State Aid Policies for Maritime Shipping

As a factor in considering the effectiveness of the EU's competitiveness, State aid policy comes within the scope of the EU's Competition Law. The primary

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5 Benjamin Parameswaran, *The Liberalization of Maritime Transport Services, with Special Reference to the WTO/GATS Framework*, Vol. 1, Berlin/Heidelberg: Springer, 2004, quoted in Book Review, *International Journal of Marine and Coastal Law*, Vol. 23, Issue 2, 2008, pp. 377~382.

6 Conor Quigley, *European State Aid Law and Policy*, 2nd edition, Oxford: Hart Publishing, 2009, p. 331.

legislation on the policy can be traced back to Art. 87~89 of the TEEC.[7] These articles form the core of the legal basis for the system. During actual implementation, rules, notices, and documents other than the primary legislation express the State aid policy for maritime shipping in more detail.

1. Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (Hereinafter "the 2004 Community Guidelines")[8]

As early as 1989, in the face of fierce competition from non-EU-flagged ships, the European Commission proposed guidelines to coordinate its Member States' State aid policies for the first time. But because results proved disappointing, the European Commission amended the guidelines in 1997 and issued the Guidelines on State Aid to Maritime Transport (1997) (hereinafter "the 1997 Guidelines"). The 2004 Community Guidelines endorsed the outcomes of the 1997 Guidelines and wrote the summary provisions on the maritime shipping industry based on the 1997 Guidelines' spirit and principles. In the meantime, according to the 2002 interim report from the EU's Member States, the ships reflagging back to the EU increased from 1989 to 2001 in terms of tonnage. But the portion of EU-flagged ships was declining among global shipping lines, and the number of ships flying the flags of

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7 Treaty Establishing the European Economic Community, Art. 87(1): "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market." Art. 87(2): "The following shall be compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division." Art. 87(3): "The following may be considered to be compatible with the common market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission."

8 Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (2004/C 13/03).

third countries was growing at a faster rate than the number of EU-flagged ships.

Issued under these circumstances, the 2004 Community Guidelines introduced the purpose, scope of adjustment, and the background for the amendments in this particular communication, as well as an evaluation of implementation outcomes of the 1997 Guidelines. The 2004 Community Guidelines then included provisions in the following areas: (1) financial and social policies to enhance competitiveness, including the financial treatment and personnel costs of shipping companies; (2) crew subsidies; (3) investment subsidies; (4) regional aid as provided in the TEEC's Art. 87(3)(a) and (c); (5) crew training; (6) aid restructuring; (7) public service obligations and contracts; (8) offshore transport aid; (9) restrictions on maritime transport aid; and (10) the guidelines' validity for Member States and the 7-year effective period.

The 2004 Community Guidelines apply to the "maritime transport between Member States and between Member States and third countries."[9] They fully demonstrate that maritime transport aid is legal under the EU's framework for State aid and that it has been promoted based on the EU's oft-asserted principles of indiscrimination and transparency. But unfortunately, China lacks a similar overarching structural maritime transport aid policy at present. Two communications were issued to supplement the 2004 Community Guidelines and are discussed below.

2. Communication from the Commission Providing Guidance on State Aid Complementary to Community Funding for the Launching of the Motorways of the Sea (Hereinafter "the Motorways of the Sea Guidance")[10]

The Motorways of the Sea Guidance borrowed the concept of motorways of the sea from a 2001 white paper on maritime transport policies. The concept includes the infrastructure and services of at least two Member States. By implementing this Guidance, the EU hoped to alleviate land traffic congestion and reduce negative effects on the environment by shifting traffic from land to the sea. The Guidance was issued because the requirements for providing State aid under

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9 For further information on the scope of application, see Article 4 of Council Regulation (EEC) No. 4055/86 of 22 December 1986 Applying the Principle of Freedom to Provide Services to Maritime Transport between Member States and between Member States and Third Countries (OJ L 378, 31.12.1986, pp. 1~3).

10 Communication from the Commission Providing Guidance on State Aid Complementary to Community Funding for the Launching of the Motorways of the Sea (2008/C 317/08).

the Marco Polo program[11] differ from the provisions in Section 10 of the 2004 Community Guidelines. The requirements for receiving aid under Marco Polo are more relaxed, and the amounts given are more generous. Therefore, special provisions were issued.

3. Communication from the Commission Providing Guidance on State Aid to Ship Management Companies (Hereinafter "the Ship Management Company Guidance")[12]

The main purpose of the Ship Management Company Guidance is to implement Section 3 of the 2004 Community Guidelines. It details the eligibility requirements for ship management companies to qualify for business or tonnage tax relief. The communication proposed the concept of "full management" as a test for the type of ship management companies that may receive aid: eligibility for tax and other preferential treatment is limited to ship management companies that manage both the technical aspects and the crew of the same ship. A ship management company that is only involved in shipping's commercial aspects (buying and selling of ships, chartering, booking, working on a commission or an agency agreement, etc.) is not covered by the communication's scope of amendment, *i.e.,* it may not enjoy the benefits of the aid policy. The reason is that full management that involves technical and crew management is no different from the activities of a shipowner's and should be treated in the same manner. However, the Commission knew very little about commercial management and the activities involved, such as the buying and selling of ships, and hence did not include commercial management in the scope of amendment of the communication.

C. Summary

The legal system supporting the EU's State aid policies is very comprehensive and forms part of the framework under the Competition Law. There are both the fundamental provisions under Art. 87 of the TEEC and specific industry rules in the system. The three communications discussed above are the specific behavior

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11 Marco Polo is a grant program of the European Union whose purpose is to reduce road traffic and the time of cargo in transit, shift freight transport from the roads to the sea, railways, and inland waterways, and control pollution and traffic congestion. See The European Commission, Marco Polo: New Ways to a Green Horizon, at http://ec.europa.eu/eaci/mp_en.htm, 8 October 2013.

12 Communication from the Commission Providing Guidance on State Aid to Ship Management Companies (2009/C 132/06).

guidelines for the maritime aid system.

III. Maritime Transport State Aid Policies in the Ship Registration System

The main purpose of including State aid policies in the ship registration system is to encourage the vessels bought or built by a country's residents to fly the flag of their home country and discourage changes in their flags. According to the EU, newly-delivered ships rose continuously between 1997 and 2005 from 3.5 million gt to 14.9 million gt per year. On average, 53% of newly-delivered ships flew EU flags, peaking in 2006 at 17.6 million gt and hitting a low of 12.7 million gt in 2008. 2009 saw another peak at 24.4 million gt. At the same time, new ship registrations in the EU fell to 44%.[13] Because of the aggressive financial preferences offered by 15 new EU countries, EU-flagged ships returned en masse to these countries between 1997 and 2005. But with the escalating competition for flag registration among States and the financial incentives from Panama and the Marshall Islands, some ships that flew a flag of an EU Member State when they were first built began to change their flags to the Panamanian flag and other flags of convenience in 2006.[14] Regardless, the EU has recognized the problem. The new members' aggressive promotion of financial incentives shows that the EU encourages the ship registration system.

Of course, Member States may not implement a State aid policy in their ship registration systems however they like. The EU has its own system, including the primary legislation in Arts. 87~89 of the TEEC and secondary legislation that serves as legal guidance. For example, the 2004 Community Guidelines were developed by the European Commission as standards for approving State aid by States with a maritime shipping industry based on the State aid rules of the EC.[15]

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13 Optimar: Benchmarking Strategic Options for European Shipping and for the European Maritime Transport System in the Horizon 2008–2018 (2010 Update), p. 39, at http://ec.europa.eu/transport/modes/maritime/studies/doc/2010_optimar_study.pdf, 8 October 2013.

14 Optimar: Benchmarking Strategic Options for European Shipping and for the European Maritime Transport System in the Horizon 2008–2018 (2010 Update), p. 39, at http://ec.europa.eu/transport/modes/maritime/studies/doc/2010_optimar_study.pdf, 8 October 2013.

15 Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (2004/C 13/03).

The major policies supporting maritime transport in the vessel registration system include the international vessel registration system, tax policies (with the tonnage tax system as the representative policy), and other policies that are meant to discourage the changing of flags.

Within the vessel registration system, the relatively simple tonnage tax system is the system of choice for many countries. It is also favorable to the shipping industry. Based on tonnage rather than a company's actual profit from operations, this system usually offers lower tax rates than ordinary corporate income tax. In 1996, the Netherlands, the UK, Norway, Germany, and other countries adopted the system. India, South Korea, Japan, and other Asian countries then explored and implemented it as well. The tonnage tax has already become an international standard as a shipping tax.[16]

In fact, the tonnage tax system not only addresses the issue of custom duties on ships, but can also increase the tonnage of the ships that fly the flag of a given country. With the shipping companies' taxes calculated based on the total tonnage of their fleets and not operating profits, their tax burden will be reduced, and they will be more competitive. In addition, the growth of a series of related industries such as ship building, ship repair, and logistics will be stimulated. Flags of convenience will be less attractive.[17]

An example can be found in Finland's ship registration preferential tax policy. In May 2006, Finland implemented two existing State aid schemes related to the international ship registration system: namely, the reimbursement of social security contributions and the seafarers' income tax for ships whose owners were not Finnish but which were managed by Finnish operators. The European Commission did not object, believing that these two schemes complied with the 2004 Community Guidelines and that they were compatible with the internal market. In addition, Finland also amended the schemes under discussion to comply with the 2004 Community Guidelines, especially by stating that only tugs and dredgers that spent over 50% of their operating hours carrying out maritime transport activities on the high seas were eligible for these types of aid.[18] Denmark also has two current

16 Che Taishan, Issues in the Implementation of a Secondary Nationality System for Ships in China, *World Shipping*, No. 7, 2010, pp. 56~59. (in Chinese)

17 Che Taishan, Isuses in the Implementation of a Secondary Nationality System for Ships in China, *World Shipping*, No. 7, 2010, pp. 56~59. (in Chinese)

18 Gerencia del Sector Naval, Commission Accepts Changes to Two State Aid Schemes for Maritime Transport in Finland Brussels, at http://www.gernaval.org/Noticias/IP-06-629_EN%5B1%5D.pdf, 8 October 2013.

State aid policies for the shipping industry: the tonnage tax scheme and the Danish International Ship (DIS) Register, which exempts Danish shipowners from paying income tax and social security contributions for their crew. Although the tonnage tax benefits the shipping industry by imposing a lower tax than the business tax, it may also interfere with competition in the EU's common market and affect trade among Member States. Therefore, the EU introduced responsive measures to ensure the compatibility of the tonnage tax system with the requirements of the EU common market.

But the European Commission believed that, according to Art. 87(3)(c) of the TEEC, the measures that Denmark communicated might harm the interests of the EC and that the Danish tonnage tax was incompatible with this provision. Denmark's exemption of shipowners that paid tax in accordance with the Danish tonnage tax system from the obligation to provide information about their commercial transactions with foreign subsidiaries to the Danish fiscal authorities was considered incompatible with the requirements of the common market. The EU believed the policy should not be implemented.[19]

In fact, preferential tax treatment for maritime shipping companies is a common way to subsidize domestic fleets. These preferences include deductions, tax deferrals, credits, and accelerated depreciation. Among these, tax credits directly increase a shipping company's profits. If the income tax and the social security contributions for sailors are reduced, the shipping company's personnel costs are reduced as well. For example, Germany reduced the tax on a shipping company's non-operating income, Finland exempted maritime shipping companies from the turnover tax, and Greece exempted foreign shipping companies or management agencies that operated within the country from tax on import duties, operating income, and other taxes. In order to increase the tonnage of the EU-flagged ships, the EU has allowed a great number and diversity of State aid policies by its Member States.

IV. State Aid Policies to Enhance the Appeal of Shipping Careers in the EU

19 Commission Decision of 17 June 2009 on State Aid C 5/07(ex N 469/05) as Regards Alleviation of Information Obligations Imposed on Maritime Companies Entered into the Danish Tonnage Tax Regime (notified under document C(2009)4522) (2009/868/EC).

Talent will be critical for every country to remain competitive in the 21st century. Regardless of whether the goal is scientific and technological innovation or the building of a maritime power, people always remain the vessels of knowledge. The maritime shipping industry is no exception: if sailors are not sufficiently qualified, they would not be able to manage new types of ships, and the application of environmental friendly ships would also be inevitably affected by the caliber of the sailors. Besides, the unique risks (*e.g.*, piracy) and hardships involved in the maritime shipping industry have reduced the enthusiasm of modern people, especially those in developed countries, for such work.

To pique EU sailors' interest in working on the seas, the EU has come up with several policies. A highlight of the 2004 Community Guidelines was better wages and benefits for sailors, and the issuance of the Guidelines was a solid proof of the EU's commitment to building a powerful and comprehensive transport system. The number of sailors on EU-flagged ships fell from 188,000 in 1996 to 180,000 in 2001. In 2004, the number of sailors on ships flying EU flags was about 120,000, which was 40% lower than the number in 1985. Meanwhile, the number of nationals from third countries increased from 29,000 in 1983 to 60,000 in 2004.[20] On the other hand, the number of newly-built ships increased, and significant innovations in ships between 1997 and 2001 required smaller but more highly qualified crews. This also led the EU to pay more attention to sailors' interests.

As early as 2007, the EU issued a communication entitled Reassessing the Regulatory Social Framework for More and Better Seafaring Jobs in the EU. And another communication entitled Strategic Goals and Recommendations for the EU's Maritime Transport Policy Until 2018 [21] emphasized once again that in recent years, the maritime transport industries had directly and indirectly created many jobs, of which some 70% were knowledge-intensive and high-quality jobs on shore. The growing shortage of maritime professionals and experienced sailors, which was heading to a critical point, put the competitiveness of the European maritime transport industries at risk.

The first suggestions included the reimbursement of social security contribu-

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20 Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (2004/C 13/03), p. 2.

21 Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategic Goals and Recommendations for the EU's Maritime Transport Policy Until 2018 [COM(2009) 008 final], at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0008:FIN:EN:DOC, 5 December 2013.

tions and the reduction of individual income tax paid by sailors. On one hand, the financial burden on maritime transport companies would lessen, and on the other hand it would encourage these companies to hire EU sailors.[22] It was especially true when a State that reimbursed and supported companies help these companies perform their obligations under employment laws and collective bargaining contracts with labor unions. The reduction in individual income tax for sailors would directly increase sailors' income and act as a direct subsidy, and would hold a definite appeal for EU sailors. One example was the European Commission's January 2009 decision on Denmark's exemption of maritime transport companies from business income tax and social contributions for sailors when they were engaged in dredging and cable-laying activities.[23] Of course, these preferential tax strategies are subject to the EU's review to prevent Member States from violating relevant legislation and policy. For example, in April 2008, the EU initiated a review process for Iceland's State aid to maritime transport in the form of a tonnage tax and a refund proposal for sailors under the surveillance and court agreement.[24]

The second suggestion was to provide sailors with a favorable employment environment and more government subsidies for training. To address the shortage of qualified sailors, the EC has already implemented a variety of measures, including improving working conditions and offering higher salaries. In terms of training for sailors, Directive 2001/25 abolished previous legislation and made EC law consistent with the minimum standards of the International Maritime Organization (IMO). Other directives included similar provisions. This has not only helped the EU standards integrate with its international counterparts, but may also raise the pay of sailors on EC-flagged ships above the international standard.[25] The 2004 Community Guidelines also explicitly include the training of seafarers as an area to which State aid should be directed.

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22 For the definition of "Community seafarers," see Commission Communication C(2004)43 – Community Guidelines on State Aid to Maritime Transport (2004/C 13/03), para. 3.2. Labour-Related Costs.

23 Commission Decision of 13 January 2009 on State Aid C 22/07(ex N 43/07) as Regards the Extension to Dredging and Cable-Laying Activities of the Regime Exempting Maritime Transport Companies from the Payment of the Income Tax and Social Contributions of Seafarers in Denmark.

24 Invitation to Submit Comments Pursuant to Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement on State Aid with Regard to State Aid to Maritime Transport in the Form of a Tonnage Tax and a Refund Scheme for Seafarers (2008/C 96/07).

25 Rosa Greaves, European Community Law, *International and Comparative Law Quarterly*, Vol. 51, Issue 1, 2002, pp. 177~185.

Finally, the EU also encourages Member States to enter into the Maritime Labor Convention (MLC),[26] which aims to improve the living and working conditions of sailors and ensuring fair competition among shipowners. As of August 28, 2013, it has taken effect or is poised to take effect in 2014 in 16 EU Member States. This is largely the result of the EU's encouragement.

V. Evolution of the Case Law on Maritime Transport State Aid

According to the EU's rules, aid from Member States for maritime transport is subject to the European Commission's review and approval. A Member State may not give or modify any aid until it has given other Member States timely notice and a chance to comment. This can effectively coordinate the modification and implementation procedures of domestic law in the Member States. In addition, the EU's Court of Justice also subjects maritime shipping State aid to judicial review to ensure their consistency and legality.[27] The following are a few cases on the legality of State aid policies in maritime transport service contracts.

A. Legality of State Subsidies in Public Service Contracts

In *Fred Olsen SA v. Commission of the European Communities*, Case T-17/02

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26 The Convention went into effect on August 20, 2013, after 30 Member States had ratified it. It will take effect in 2014 in France, Finland, Greece, and other Member States. For the list of countries that have entered into the Convention, at http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO::P11300_INSTRUMENT_ID:312331, 28 August 2013.

27 Judicial review includes two categories. The first category consists of judicial proceedings initiated at the Court of Justice of the European Union or the Court of First Instance by EU Member States, citizens or legal persons in EU Member States with regards to the European Commission's State aid activities. This category can be further divided into three subcategories: (i) proceedings against the Commission's omission based on Art. 230 of the TEEC; (ii) proceedings for a declaration of invalidity based on the TEEC; and (iii) proceedings against losses that resulted from the Commission's improper actions, based on Arts. 235 and 288 of the TEEC. The second category consists of judicial proceedings initiated by the Commission or a Member State against another Member State's failure to observe a Commission decision within the time period prescribed in the decision. See Kong Shaofei, EU's State Aid System and Its Referential Significance, *European Studies*, No. 3, 2006, pp. 88~102. (in Chinese)

(Appeal Case C-320/05P),[28] which spanned from 2005 to 2008, the plaintiff requested the Court of Justice to declare Spanish subsidies invalid. The Court of Justice decided against the plaintiff on appeal.

For reasons of the national interest, Spain entered into a 20-year maritime shipping contract with the Transmediterránea shipping company in 1978 (hereinafter "the 1978 Contract"; the contract was terminated in 1995, two years before the scheduled date). The Spanish authorities would grant two subsidies to the company to address the issues with regards to its financial deficit, contractual rights and obligations, personnel restructuring, and other areas. Fred Olsen S.A. (a Spanish shipping company in competition with Transmediterránea) petitioned the European Commission with regards to the 1978 Contract, calling a 1997 subsidy and settlement subsidy illegal and that they were new aids. According to the Commission, the Spanish aids were existing aids and were unlikely to be new ones. Neither were they covered by the exemptions in paras. 2 and 3 of the TEEC's Art. 87. However, the Commission suggested that Spain should take "appropriate measures" to ensure consistency with EU legislation. Fred Olsen S.A. was dissatisfied with the Commission's decision and appealed to the Court of First Instance, asking that the Court set aside the Commission's July 25, 2001 judgment on State aid.[29] Fred Olsen S.A. lost the case in June 2005. After another appeal, the court issued another judgment against Fred Olsen S.A. in 2008.

The case involved Regulation (EEC) No. 3577/92 (on the rights in offshore transportation), Regulation (EC) No. 659/1999 (which determines the compatibility between State aid policies and the EU common market), the 2004 Community Guidelines, and Spanish domestic law. The main issue was whether the subsidy to a shipping company under a public service contract can be a State aid that can be exempted by the EU. According to the plaintiff, the subsidies that Spain gave to Transmediterránea were new aids rather than existing aids, and were therefore an executive interference with the 1978 Contract by the Spanish government. As a result, it was inconsistent with Art. 87(1) of the TEEC. But the court disagreed. The court held that the subsidies were consistent with paragraph 1 and the relevant rules under the public service contract, and were also compatible with the common market. Further, the subsidies had been given before Spanish government accepted

28 Judgment of 15.6.2005 – CASE T-17/02, See Judgment of the Court of First Instance (Second Chamber, Extended Composition) June 15, 2005.

29 Commission Decision of 25 July 2001 Relating to State Aid File NN 48/2001–Spain–Aid for the Transmediterránea Shipping Company (OJ 2002 C 96, p. 4).

the 2004 Community Guidelines and thus were not new State aids under the Guidelines. The opinion cited the relevant provisions on State aid under the TEEC several times, demonstrating the TEEC's significance in determining whether a State aid is compatible with the common market. This case is also a judicial precedent on the issue of the legality of State aid in public service contracts.

B. Legality of State Aid to Barge Transport

Even though it involves State aid to barge transport, *Italian Republic v. Commission of the European Communities*, Case C-400/99, is similar to the case discussed above in that both rely on the TEEC to determine the legality of a subsidy by examining whether the subsidy will interfere with or threaten fair competition in the EU common market.

In 1999, the European Commission officials questioned the Italian government as to whether it was giving unauthorized State aid to Gruppo Tirrenia di Navigazione, a domestic barge transportation company. Later, based on doubts about the compatibility between the aid and the EU common market, the Commission initiated a responsive process in accordance with Art. 88(2) of the TEEC and made it part of the decision: the Commission asked the Italian authorities to suspend payment of any aid in excess of the net additional cost of providing services of general economic interest. In May 2005, the court invalidated part of the EU's "decision"[30] and suspended the preferential tax treatment for Gruppo Tirrenia with regards to the supply of fuel and lubricating oil. The remaining requests for relief were dismissed.

The opinions in both cases required domestic aid to maritime transport not to interfere with competition in the common market and invoked the principle of the "general economic interest": maritime shipping aid should abide by the TEEC as well as the "general economic interest" principle.[31]

In general, State aid given under a coastal public service contract tends to be more contentious. Even if a country notifies the Commission and invites

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30 Commission Decision No. 2005/163/EC of 16 March 2004 concerning State Aid Granted by Italy to the Shipping Companies Adriatica, Caremar, Siremar, Saremar and Toremar (Gruppo Tirrenia) (OJ 2005 L 53, p. 29).

31 For a description of "general economic interest," see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Reform of the EU State Aid Rules on Services of General Economic Interest, [COM(2011) 146 final].

stakeholders to comment, the vast entanglement of interests and the long duration of the aid often have a major impact on market competitors. For this reason, the Commission closely examines proposed State aid under EU law on State aid, considering evidence and argument, before it goes into effect. These include its July 18, 2008 decision on State aid from France to Société Nationale Maritime Corse Méditerranée (SNCM) and the October 18, 2009 decision on State aid from Britain to CalMac and Northlink to provide maritime shipping services in Scotland.

In terms of scope, the question of whether towage and dredging constitute maritime shipping activities has been clarified. For example, tugs that receive State aid but which are not used can be considered maritime transport under the 2004 Community Guidelines only if at least 50% of its towing activity is effective during the year.

The Commission is similar to an administrative licensor of State aid. When a stakeholder believes that the EU's administrative licensing activity has violated EU law, it may bring proceedings before the Court of Justice of the European Union. In a sense, this process achieves the same end as in sovereign countries, where the judicial process checks and restricts executive power.

C. Summary

On one hand, the EU believes that EU-flagged ships continue to face fierce competition from ships registers in third countries. Foreign competitors often have significant advantages in terms of government support, access to cheap capital, abundant labor, and the flexible enforcement of international standards. The EU encourages its Member States to adopt policies that are in line with Community Guidelines for State aids for maritime shipping to keep EU-flagged ships competitive and to generate more jobs for European sailors.[32] On the other hand, the EU has made the following proposals explicit: the EU should maintain a well-defined and competitive structural framework that includes the tonnage tax, the income tax, and State aid, and, where appropriate, improve the framework in

32 Commission of European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategic Goals and Recommendations for the EU's Maritime Transport Policy Until 2018, [COM(2009) 008 final], para. 2, European Shipping in Globalised Markets, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0008:FIN:EN:DOC, 5 December 2013.

accordance with the maritime shipping State aid guidelines. The framework should adopt positive measures to support the development of environmentally-friendly shipping, technological innovation, maritime careers, and professional skills. It should also examine the flexibility of the internal relationships between maritime industry employment and aid.[33] It is evident that the EU is very much in favor of a comprehensive State aid policy to support maritime shipping.

Each country is supposed to base its aid on the pertinent core provisions of the TEEC (*e.g.*, Art. 87) and the three communications on State aid with the 2004 Community Guidelines as the core to avoid inconsistent actions that may lead to interference with competition among Member States. However, China does not have rules that specifically address State aid for maritime shipping. Although there are administrative review and litigation processes, their actual impact has to be evaluated at a time when substantive rules on aid are perfected.

VI. Deficiencies in Chinese Legislation on Maritime Shipping Aid and Proposals for Improvement

At the macro level, the EU's legal system for State aid for maritime shipping is established within the framework of the Competition Law and supported by three specific rules. In addition, the judiciary scrutinizes the legitimacy of State aid offered by the EU's Member States. These features provide relatively robust systemic guarantees. At the micro level, the EU also has a wide range of specific State aid policies that take the form of the promotion of seafaring careers, the vessel registration system, and professional training. In contrast, China only has scattered, discrete regulations or specific regional preferential policies. They are not adequately systematic, supportive, or inclusive. Generally speaking, there are two major issues: (1) institutional deficiency in the form of ineffective interaction between the legislative, judicial, and executive branches; and (2) the absence or inadequacy of rules, which results in a legal vacuum and limits policy implementation. The following subsections will analyze the issues and propose

33 Commission of European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategic Goals and Recommendations for the EU's Maritime Transport Policy Until 2018 [COM(2009) 008 final], para. 2, European Shipping in Globalised Markets, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0008:FIN:EN:DOC, 5 December 2013.

several solutions.

A. Encouraging Chinese-Funded Ships to Fly the Chinese Flag

Like the EU, China also has a serious problem of Chinese-owned ships flying non-Chinese flags. Some countries offer tax incentives and other preferential policies to encourage ships from other countries to fly their flags, resulting in the prevalence of the flag-of-convenience phenomenon in the shipping industry. Many countries face this problem. For governments, revenues are reduced, ship and seafarer management become more difficult, and potential harm may even arise to threaten the military and national defense. For world trade, the situation introduces more uncertainties, such as the threat of pollution in the marine environment, trade fraud, etc. Therefore, one of the explicit goals of the 2004 Community Guidelines was to increase EU-flagged tonnage and to promote a return to EU flags.

To encourage the return of Chinese-owned ships to the Chinese flag, increase the number of Chinese-flagged ships, strengthen the enforcement of safety standards, and protect the rights and interests of Chinese seafarers, China has given tax exemptions on a case-by-case basis since July 1, 2007. Later in 2009, drawing on the experience of a few EU Member States, China piloted a system of secondary ship registry in Shanghai,[34] but the results were less than satisfactory.[35] Coastal cities, with Shanghai and Tianjin at the forefront, then started several programs to encourage ships to fly the Chinese flag. In March 2012, bonded ship registration was formally kicked off in the Yangshan Free Port Area, Shanghai, the first of its kind in China. In 2013, the Ministry of Transport approved the Tianjin Dongjiang Free Port International Ship Registry System Innovation Pilot Program, and Tianjin

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34 The secondary ship registry system is a vessel registration system that is similar to the flag-of-convenience system, but which is mainly aimed at domestic shipowners. It does not change the original conventional vessel registration system, which means that it provides a series of preferential policies based on the basic requirements of domestic registration without any inconsistencies with the conventional vessel registration system. It can be divided into two categories by the place of vessel registration: the offshore vessel registration system and the international vessel registration systems. In 1978, the United Kingdom established the earliest offshore registry on the Isle of Man. In 1987, Norway became the first country to establish an international vessel registration system. For more information on these two registration systems, see Chen Jihong, Zhen Hong and Zong Beihua, A Study of China's Secondary Ship Registry System and Supporting Policies, *Marine Technology*, No. 2, 2009, pp. 78~80. (in Chinese)

35 Chen Jihong and Han Lingbing, Improving the Vessel Registration Services at the Shanghai International Shipping Center, *Scientific Development*, No. 10, 2012, p. 86. (in Chinese)

will be the first to implement the international vessel registration system in China.[36] Whether the system can attract the return of Chinese-owned ships remains to be seen. The effectiveness of the above approaches depends on other complementing measures involving credit, law, tax, etc., and it cannot merely rely on tax relief. EU State aid to maritime shipping takes many forms. When China borrows from the EU's experience, it should also expand from tax to other policies and eventually build a comprehensive and integrated shipping supporting framework to further increase Chinese-flagged tonnage.

B. Tax Relief for Chinese-Owned Maritime Shipping Companies

First, the tonnage tax should be implemented.[37] As discussed above, the tonnage tax is one of the most common approaches used by EU Member States for supporting maritime shipping: because the tax is based on tonnage rather than operating income, it is stable and imposes less tax on companies. A ship's tonnage tax can even be pegged to its nationality, and different tax rates can be offered based on the flag of the ship. Not only will this approach increase the number of domestic ships and implement the shipping agreements between countries, but can also prevent conflicts between domestic and foreign-owned shipping companies that may arise from the replacement of the business tax with the value-added tax.[38]

Secondly, special compensation funds can be set up for certain purposes. The government should implement policies similar to the Guiding Opinion on the

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36 Tianjin Leads the Way in Implementing the International Vessel Registration System in China, at http://world.people.com.cn/n/2013/0528/c57507-21649509.html, 8 October 2013. (in Chinese)

37 As discussed above, the tonnage tax is a tax within the domestic tax system that may reduce a company's operating costs and is a substitute for the income tax on businesses. Chinese maritime shipping companies have to pay a variety of business and other taxes based on their freight revenue. These companies will definitely benefit more from a system of taxation that results in more predictable amounts of tax than the business income tax, operating tax, etc. In addition, the tonnage tax is a completely different concept from tonnage dues, which are charged by China and other countries through the issuance of international tonnage tax certificates. The former is a type of tax, while the latter is an expense item in the port disbursement account. (Author's note)

38 On August 1, 2013, the pilot program to replace the business tax with the value-added tax was extended to the transport sector. Foreign-owned transport companies were dissatisfied with their 6.8% tax rate, as Chinese-owned companies were exempt from the tax. EU Chamber of Commerce Complains about Unfair Competition between Domestic and Foreign-Owned Companies as Business Tax Was Replaced with VAT, at http://www.topcfo.net/index.php/News/index/id/32008.html, 8 October 2013. (in Chinese)

Promotion of Steady and Rapid Development of Road and Waterway Transport, issued by the Ministry of Transport in 2009, and develop complementary measures to support industrial growth; decide on the Yangtze River vessel standardization central compensation fund; and issue market access management policies for Chinese maritime shipping companies that buy abandoned ships and put them into domestic operation, including the Notice on Market Access Management for Chinese Maritime Shipping Companies That Buy and Put Abandoned Vessels into Domestic Operation.[39]

Finally, China can consider other tax policies. It should aggressively implement the tax refund policy for ports of shipment, explore improvements in the regulatory system for the domestic transit of goods for export, and prevent tax refund fraud effectively. As long as the tonnage tax does not go into effect, business tax preferences should be maintained. For example, international maritime shipping income and income from the transportation, storage, and loading and unloading of shipping companies that are registered in the Yangshan Free Port Area should be exempt from the business tax.[40]

C. Training and Attracting Seafarers and Maritime Professionals

Policies aimed at nurturing seafarers and maritime professionals are still inadequate in China at both the macro and micro levels. The Regulation on Seafarers of the People's Republic of China,[41] revised and issued in 2007, was the first law addressing the employment of experienced foreign seafarers on Chinese-flagged vessels. However, it did not attack the core of the problem to enhance the appeal of maritime careers or help promote the sustainable development of maritime transport in China. There have been no major measures for attracting and training maritime professionals, except for some consideration given to the household registration policy for non-natives in Shanghai. Rising prices and infla-

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39 Ministry of Transport of the PRC, *Report on Developments in the Chinese Shipping Industry (2009)*, Beijing: China Communications Press, 2010, p. 9. (in Chinese)

40 Shanghai International Shipping Institute ed., *2009 Annual Progress Report of Shanghai International Shipping Center*, Shanghai: Shanghai International Shipping Institute, 2010, p. 57. (in Chinese)

41 Article 12 provides that "the posts of master and officer of a ship of Chinese nationality shall be assumed by Chinese sailors; if it is necessary to have a foreign sailor assume the post of officer, the matter shall be submitted to the State maritime administrative agency for approval."

tion in recent years have added to the labor costs in maritime transport; however, complementary policies for attracting talent are sorely lacking.

China pays far less attention to the training and development of seafarers and maritime professionals than the EU. Although the Chinese shipping industry may not be able to afford additional wages, benefits, and other labor costs in difficult times, institutional guarantees are necessary in the long run.

In practice, both case-by-case tax relief and the tonnage tax system will inevitably face some challenges. In addition, Chinese policies have continuity, stability and transparency issues, which have to be addressed by turning them into laws. All preferential tax policies should be made into law at the appropriate time.

D. Incorporate State Aid to Maritime Transport into Competition Law and Standardize Different Types of State Aid

China's State aid system for the shipping industry is chaotic, inconsistent, unpredictable, and mired in red tape. To enhance the stability, continuity, and transparency of legal policies, strengthen China as a great maritime power, and prevent a legal vacuum in the implementation of State aid to maritime transport, the author proposes the development of a State Aid Law for Maritime Transport of China. The form of the law can be flexible. Because it is part of the Competition Law, it may be contained in the complementary enforcement regulations in the Antitrust Law or take the form of special sections in the Shipping Law. State aid that violates the explicit provisions or legislative purposes of the law should be illegal and subject to judicial review. At the same time, the law should encourage and develop various types of aid policies and protect fair market competition.

Further, the relationships between some policies are not well defined. For example, the contents of case-by-case tax relief and the secondary ship registry system overlap to some extent. The latter may provide State aid in the form of tax preferences, but the emphasis is on relaxing the requirements on the nationalities of the staff and seafarers. So the contents of the secondary ship registration system as well as its relationship with the case-by-case tax relief should be clarified. The overall institutional framework should be more comprehensive.

In sum, we should take China's specific circumstances as a starting point, fully consider the legal demands of the current and future shipping market, and learn from the legislative experience of developed countries to ensure the availability of a legal basis. The law should be the sole standard for determining the legality of a

State aid. Only in this way can we guarantee the consistency, order, efficiency, and sustainability of the shipping market, ensure fair competition within the industry and between domestic and international shipping companies, and accelerate the arrival of a truly great maritime power.

VII. Conclusion

Maritime transport, a capital-intensive industry vulnerable to cyclical risks, is vital to national economies and livelihoods. Many countries have made the industry a strategic priority and given it policy support. China is a country with a large shipping industry, but it is not a maritime power. It lacks an efficient nationwide State aid system, which certainly limits the strategic role of maritime transport. The EU is relatively experienced and has had a lot of practice in this regard. Others' lessons may help us tackle our own issues. China can learn from the EU's successes and failures in the area of State aid over the past two decades to come up with a State aid policy for maritime transport, attract maritime professionals, and encourage Chinese-owned ships to once again fly the Chinese flag; and, at an opportune time, gradually legalize and institutionalize State aid policies with the aid of judicial and administrative review. These approaches will help build a powerful and strategically-significant Chinese-flagged commercial fleet that will dominate the seas in the 21st century.

Translator: TAN Shuangpeng
Editor (English): Sherra Wong

各国对《船舶司法出售国际承认公约草案二稿》的评论

范晓波* 李 倩**

内容摘要：国际海事委员会第 40 届大会的主要议题之一是船舶司法出售的国际承认公约，本文对各国在会上发表的关于公约的意见和修改建议进行介绍和分析，其中以中国代表的发言为主要介绍和评论对象。从各国的意见和修改建议中我们可以看到，要通过这样一个公约还有许多障碍，草案的许多细节之处需要进一步斟酌和讨论。

关键词：基本原则 船舶司法出售 司法出售的承认 保护买船人利益

2012 年 10 月，国际海事委员会第 40 届大会在北京举行，这是成立于 1897 年的国际海事委员会首次来中国举行国际会议。这次大会的主要议题之一是船舶司法出售的国际承认公约。船舶司法出售是一个涉及众多利益的复杂问题，由于缺乏统一、专门、有效的国际立法，国际航运界已经遇到了很多问题，最突出的莫过于船舶司法出售的国际承认问题。在 2008 年 10 月雅典[1]召开的第 39 届国际海事委员会国际会议上，这一问题被正式列入会议讨论的议题。在 2011 年 9 月 2 日形成了《船舶司法出售国际承认公约草案一稿》，[2]一稿对船舶司法出售涉及的一系列程序问题做了规定，草案在随后经修改完善，形成了草案第二稿，本文即是将在第 40 届国际海事委员会国际会议上各国对公约二稿的意见和修改建议作为介绍和讨论对象，并且以中国的建议为主来讨论公约被各国接受并批准通过的可能性。

一、制定《船舶司法出售国际承认公约》的必要性

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1 李海：《国际海事委员会船舶司法出售国际承认课题进展情况简介》，下载于 http://www.cmla.org.cn/article/article.do?father_category_id=1941&id=369&method=viewDetail，2013 年 10 月 30 日。
2 Draft Instrument on Recognition of Foreign Judicial Sales of Ships.

在制定《船舶司法出售国际承认公约》前，船舶司法出售问题的国际工作组在调查研究的基础上，遵循国际海事委员会的惯常做法，起草了一个有关船舶司法出售国际承认问题的“问题单”[3]供各国海商法协会提供意见。问题单包括5个问题，其中一个是关于制定专门国际公约的必要性与可行性问题。[4] 对于这个问题，就“问题单”回复而言，各国似乎并没有形成一致的意见。各国针对这个问题，具体的回复[5]如下：德国没有明确表示是否支持该公约的制定，只回复说不支持用《1993年船舶优先权和抵押权国际公约》来解决船舶司法出售的问题；委内瑞拉、南非、新加坡、法国、多米尼加共和国、丹麦、中国、加拿大明确回复说有必要单独制定公约；意大利则表明需要根据工作组的进一步报告来决定是否有必要单独制定公约；美国声称还在审议中；马耳他、尼日利亚、挪威、西班牙、阿根廷、巴西明确说没有必要制定这样一个公约；瑞典没有给予回复。从已有的答复来看，大约有一半的国家认为有必要制定一个专门的国际公约来统一各国有关船舶司法出售国际承认问题的法律规则；但也有大约一半的国家认为，没有这样的必要，理由是现在国际上已经有涉及船舶司法出售承认的规定。

笔者看来，现存有关于船舶司法出售的几大公约并不能妥善解决司法出售承认的问题，有必要专门针对船舶司法出售制定一个公约。国际上最早的关于船舶司法拍卖程序正当性要求的国际规定是《1926年关于统一船舶优先权及船舶抵押权若干法律规定的国际公约》，截至目前为止，批准和加入该公约的国家仍然不多，且英、美、日、德等主要的航运国家均未参加。虽然《1967年关于统一船舶优先权与船舶抵押权若干法律规定的国际公约》对于船舶司法拍卖正当程序的规定比1926年公约更明确和具体，但依然未得到海运大国的批准和参加。《1993年船舶优先权和抵押权国际公约》，在船舶司法拍卖通知的对象、内容及形式、拍卖价款分配、拍卖程序效力等方面加以完善和细化。但它并不是一个关于船舶司法出售的专门公约，不能妥善解决现存船舶司法出售的国际承认问题。并且，这个公约的缔约国有限，即便该公约将来成为被普遍接受的国际公约，该公约也不能被适用于解决为执行法院判决或仲裁裁决而实施的船舶司法出售问题以及为保全海事请求而实施的船舶司法出售问题。所以笔者认为，有必要制定一个专门针对船舶司法出售承认问题的国际公约。

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3 国际海事委员会最终发出的关于船舶司法出售国际承认的“问题单”共有5组问题，这5组问题的标题分别为：船舶司法出售的概念、船舶司法出售的主要程序步骤、船舶司法出售的效力、外国法院船舶司法出售效力的承认、制定船舶司法出售国际承认问题的国际公约的必要性与可行性。

4 Paper No. 5 Andrew Robinson Paper Attachment, at http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html, 30 October 2013.

5 Paper No. 5 Andrew Robinson Paper Attachment, at http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html, 30 October 2013.

二、公约制定过程中应遵循的基本原则

国际海事委员会船舶司法出售问题的国际工作组发布的《船舶司法出售国际承认公约二稿评注》[6] 中总结性评论的第 2、3、6 条分别指出：各国的发言普遍提到在进行公约草案的制定和修改时要遵循以下几个原则，一是确保合法的司法出售得到有效承认，二是确保合法的司法出售给买船人提供充分的保护，三是确保合法的司法出售保障利害关系人的权利。在国际海事委员会工作组发布的《各国对公约二稿评论的简明摘要》中的第二部分第一段即指出各国普遍认为公约的目的就是要给司法出售中的买船人提供必要的、充分的保护。[7] 中国代表在第 40 届大会上也提出公约应遵循三个原则：一是促进国际的协调性和公约的统一化，二是保护善意买船人的利益，三是保护利害关系人的利益。中方还从四个方面对善意买船人的利益保护进行了论述。中方认为对买船人进行充分保护应当成为公约的首要原则；对买船人的保护涉及到司法出售程序的各个部分，包括船舶登记与注销登记，船舶司法出售的效力，司法出售的效力承认，利害关系人的诉讼等等；而其中对买船人的保护主要集中于给予买船人清洁物权。

从上述我们可以看到，各国公认的一条原则就是充分保护买船人的利益。笔者同意《船舶司法出售国际承认公约二稿的评注》中所提出的三点原则。原则一“确保合法的司法出售得到有效承认”体现了公约制定的目的以及制定的必要性，即目前国际上不存在专门针对船舶司法出售且得到公认的公约，而现实中船舶的司法出售国际承认问题又普遍存在；原则二给买船人提供充分的保护也是在目前司法出售很难在他国得到承认，继而导致买船人的合法权利得不到保护的情况下提出的。至于原则三保障利害关系人的权利，是为了平衡在船舶司法出售中的三方主体权利的结果，船舶司法出售中主要涉及的三方主体分别为原船舶所有权人，买船人，抵押权人、留置权人、海事优先权人等。根据公约草案第 1 条第 6 款，除了买船人以外的其他主体统称为利害关系人。在强调对买船人利益保护的同时，也要恰当的保护好利害关系人的利益。

三、公约草案的具体条款

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6 Commentary on the 2nd Draft of the Instrument，该文件是国际海事委员会船舶司法出售国际工作组发布的关于二稿对一稿修订的具体情况和原因。

7 Concise Summary of Various Commentaries Received Relating to the 2nd Draft Instrument，在该文件中，工作组总结了各国对公约草案二稿的评论。

（一）定义

《船舶司法出售国际承认公约草案二稿》总共包括 9 条，草案的第 1 条是相关的定义。从拟定草案一稿开始，就有代表提出没有必要针对定义做出规定。他们认为这些定义应当遵循司法出售适用的法律或国际公约的规定，对定义做出规定只会引起各国的不同意见进而导致公约难以通过，而且可能会导致法律本想要调整的事项因为与有关定义并不完全相符而不能得到适用。在中国看来，定义的规定是很有必要的，但中方在大会上并没有说明存在这种必要性的原因。我们认为，草案中的定义很有必要，国际海事委员会工作组草拟草案前的调查显示，目前各国法律都没有司法出售这个概念，只有一些与司法出售类似概念的规定，在这种情况下，对“司法出售”作出统一规定有利于公约通过后的普遍适用。如果我们要在国际上通过一个船舶司法出售的国际承认公约，但是我们连承认的对象（司法出售）[8] 是什么都不清楚，即使公约通过了，想必它的适用也会存在很多问题。

下面我们将针对某些争议比较大的定义进行介绍。

关于“证书”[9] 的定义，中国指出在该项定义中，“证书”包括“经核证的副本”，即证书正本之“经核证的副本”，但是公约草案第 6 条第 1 款、[10] 第 3 款 [11] 以及第 7 条第 2 款、[12] 第 4 款 [13] 却把“证书”和“经核证的副本”的概念并列，并没有将“经核证的副本”的概念包含到“证书”中，导致了公约中的概念前后不一致。法律应当具有严谨性，很明显，从这一点看来，此草案不符合此种标准。

关于“船舶司法出售”的定义，草案规定：“船舶司法出售”或“司法出售”或“出售”是指在一国法院控制下的船舶出售，这种出售是通过公开拍卖、私人协议或者按照出售国法律明确规定的其他适当方式，将船舶的清洁物权给予买方，而且，债权人可以通过该种出售获得自己的利益。英国指出公约中的这个定义不仅

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8 李守芹著：《海事诉讼与海事（商）法》，北京：人民法院出版社 2007 年版。

9 In the Second Draft, Art. 1(1), “Certificate” is defined as “the original duly authorized certificate, or a certified copy thereof, provided in terms of Article 5.”

10 Second Draft, Art. 6(1) (“…upon production by a Purchaser of a Certificate provided for in Article 5 of this Instrument or a copy thereof duly certified in accordance with the law of the State…”).

11 Second Draft, Art. 6(3) (“The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.”).

12 Second Draft, Art. 7(2) (“…upon production by the Purchaser or Subsequent Purchaser of a Certificate as provided for in Article 5 of this Instrument or a duly certified copy thereof…”).

13 Second Draft, Art. 7(4) (“…upon production by the Purchaser or Subsequent Purchaser of a Certificate which is provided for in Article 5 of this Instrument or a duly certified copy thereof…”).

包含了对物诉讼的强制措施，[14] 而且包括任何其他要求出售船舶的诉讼，即一些对人诉讼，不论这些对人诉讼是否跟船舶有关。但这与英国的国内法不相符合，所以英国代表建议将船舶司法出售限制在对物诉讼中。笔者看来，英国在船舶司法出售中所指的对物诉讼无非是强调公约中的船舶司法出售只能限于因为船舶本身而产生的请求权进行的出售，不能是基于债权人与船舶本身无关的请求权而产生的出售，即因一般的非与船舶有关的请求权诉讼而进行的船舶司法出售不能适用公约。英国的此种建议从实质上来说是对公约的适用对象的限制。在大陆法系国家，例如中国，是不存在对物诉讼的。对该条的修改可能会有一定障碍，而一旦公约不对该条进行修改即仍然包括对人诉讼且又不允许缔约国对本条约做出保留的话，英国批准该公约的可能性非常小。作为海运大国的英国如果坚持将公约适用于对物诉讼继而不签署通过该公约，那么《船舶司法出售国际承认公约》被通过的可能性很小，即使被通过，公约也不能得到普遍适用。另有代表指出，船舶司法出售应当具有明确性，不能同时用“船舶司法出售”、“司法出售”或“出售”几个词来表示同一个概念。很明显，这是公约草案的一大形式缺陷。“船舶司法出售”明显不等于“司法出售”，前者把出售限定在了针对“船舶”的范围内，对于其他物体的出售显然不能包括在前面的含义中。“司法出售”也不能等于“出售”，前者明显从“司法”一词上表明了一定公权力的介入，这与后者的出售的意思显然就不同了。如果工作组草拟该款的意思是想将该种概念限制在本条约之下适用，即“船舶司法出售”、“司法出售”和“出售”只是在本条约下具有相同意义，该条所存在的形式问题可能还可以理解。但是，基于公约的目的和原则，公约的制定即是要为船舶司法出售承认提供统一可以适用的法律，而公约把这三个概念等同视之，导致概念不清晰、不明确，公约在国际上的适用就会存在不确定性，减损公约在国际上的适用和效力。中国指出定义中司法出售的效力应当删除，因为司法出售效力的取得是有条件的，进行了司法出售不等于就获得了司法出售的效力。笔者同意中国的观点，如果按照公约草案的规定，司法出售一定会产生法律规定的效力，那么一个国家对另一国的司法出售进行审查和承认就没有必要了。公约这款关于效力的规定实在有画蛇添足之嫌。

关于“海事优先权”[15] 的定义，草案规定海事优先权[16] 是指任何依照司法出售地国的国际私法规则被识别为船舶优先权的请求权。中国和英国代表都指出：该条存在法律冲突的可能性，依照现行的国际私法规则，属于船舶优先权的事项应

14 田涛：《强制拍卖与任意拍卖结合操作中的若干问题》，载于《法治论丛》2004 年第 5 期，第 52~60 页。

15 In the Second Draft, Art. 1(8), “maritime lien” is defined as “any claim recognized as a maritime lien on a ship by the law applicable in accordance with the private international law rules of the State in which the ship is sold by way of Judicial Sale.”

16 威廉•泰特雷（William Tetley）著，王立志、李志文译：《论船舶优先权法律冲突》，载于《比较法研究》2009 年第 1 期，第 144~160 页。

适用法院地法。依照司法出售地国的国际私法规则被识别为船舶优先权的请求权可能与依据法院地法的不一样。笔者也认为公约如此规定容易引起法律冲突，进而会导致公约难以通过。而且把一个需要引用冲突规范定义的概念放到公约这样一个实体法律中进行规范存在问题。公约关于“抵押权”的定义也存在同样的问题。

草案规定，“船舶所有权人”是指在船舶登记国的船舶登记薄上登记为船主的人。中国认为从适用范围上来看，有必要考虑条约是否应当适用于尚未进行船舶所有权登记的情况;有必要考虑条约是否适用于国家作为所有权人的进行商业活动的船舶的司法出售。中方提出应借鉴 1992 年《国际油污损害民事责任公约》中的规定，即“当国家是船舶所有权人，并由一个公司进行运作时且该公司被登记为该船舶的经营人时，所有权人是指该公司。”笔者赞同中方的观点，进行司法出售的船舶很有可能尚未进行登记，按照公约的规定，尚未进行登记的船舶是无法适用本公约的。依据《国际油污损害民事责任公约》的规定，“对于国家是船舶所有权人时，将所有权人视为该公司”的情况进行规范，可以避免将国家作为利害关系人而给司法出售承认带来不便，又可以扩大公约的适用范围，将公约扩大适用于国家作为真正船舶所有权人的情况。

草案规定，“登记国”[17] 是指船舶司法出售时的永久登记地国。该定义中的“永久”一词引起了极大争议，公约草案一稿中没有“永久”一词。英国指出船舶在尚未登记的情况下，登记地国到底是指哪个国家呢？马耳他代表也提出疑问说对于临时悬挂他国国旗的船舶，它的登记国是哪个国家？还有代表指出船舶的国籍很少是永久登记，该条的规定与现实不太相符。中国指出在实践中可能出现船舶在没有进行永久登记时，船舶在光船租赁人所在地进行了登记，那么，公约中的登记国是哪个国家呢？对于各国针对该概念提出的疑问，笔者基本赞同。草案一稿没有“永久”一词，二稿中加进来以后，引起了如此大的争议，我们不禁要问二稿为什么要将它加进来。从工作组的相关文件来看，工作组考虑到一稿中没有对存在临时登记或光船租赁登记下船舶的登记国作出规定，所以将一稿中登记国的定义修改，这样就导致了在登记国的定义中加入了“永久”一词。在笔者看来，要解决一稿中没有规定临时登记、光船租赁登记的状况，同时又不要像二稿那样引起极大争议的话，最好的办法就是在原有一稿对登记国的定义下加入一款对船舶存在临时登记和光船租赁时登记国的确定，即单独对光船租赁进行规定。即可以改成“登记国是指在司法出售时该船舶的永久登记地国，光船租赁的登记地与永久登记地不一致时，登记地是指永久登记地。”

（二）适用范围

17 Second Draft, Art. 1(15) defines “State of registration” as “the State in whose register of ships a ship is permanently registered at the time of its Judicial Sale.”

公约第 2 条是关于适用范围的规定，即本公约适用于在任何国家[18]进行的司法出售的承认。各国普遍认为适用范围太广，建议公约限制适用于缔约国，但同时允许缔约国选择一个更广的适用范围。国际海事委员会工作组回应说公约第 9 条解决了公约适用范围过广的问题。公约第 9 条规定：签署、批准或者加入本公约时，任何国家可以宣布公约仅适用于承认在一缔约国领土上进行的司法出售并且船旗国也为缔约国；也可以宣布在互惠的基础上将公约适用于在非缔约国领土上进行的司法出售。笔者对工作组的回应持怀疑态度，在笔者看来，第 2 条的标题是适用范围，第 9 条的标题是限制承认，虽然第 9 条事实上起到了限制公约适用范围的作用，但是适用范围与限制承认是两个问题。对公约的适用范围的限制就应该严格放在第 2 条来规定，如果第 9 条的作用是为了限制公约的适用，那么完全没有必要设置第 9 条，因为只需要在第 2 条中限制公约的适用即可。其次，就算我们认可工作组的这种回答，认为第 9 条是对第 2 条适用范围的限制，但是我们仔细考察法条后会发现第 2 条说的是公约的适用范围，公约的内容包括船舶注销登记、重新登记、异议诉讼、法院对司法出售的承认等一系列问题，但是公约第 9 条却只是关于司法出售承认问题限制的适用，后者的范围明显小于前者。[19]

（三）关于船舶司法出售的通知

公约草案二稿规定的应当通知的对象包括 (a) 已登记的船舶所有人，(b) 已登记的船舶抵押权人、“质权”或担保物权的所有拥有人，(c) 船舶优先权人，但以进行司法出售的法院收到申索通知为条件，(d) 登记国负责管理船舶登记的机关。对于该条，挪威认为船东应当有义务通知未进行登记的优先权的权利人，因为挪威和英国的法律都认可未进行登记的优先权权利人的权利。笔者看来，挪威提出的建议不大可能被公约采纳，从目前的各国法律来看，未登记的权利一般都当作普通债权，不享有优先权。如果要通知所有普通债权的债权人，法院进行通知的难度会大大增加。甚至是没办法通知到债权人，将来在司法出售承认的时候，很可能因为未通知所有的债权人而遭到拒绝承认。这会大大降低司法出售承认的可能性。同时，爱尔兰也认为登记所有人应该改为船舶所有权人，因为存在尚未登记的情况。爱尔兰提出的这个观点实质上是针对“船舶所有权人”的定义提出的。船舶所有权人应该既包括登记的所有权人也包括未登记的所有权人。中国认为通

18 根据《船舶司法出售国际承认公约》的规定，这里的国家是指联合国会员国。

19 James Zhengliang Hu, Comments and Amendment Proposals on the Second Working Draft of Instrument on Recognition of Foreign Judicial Sales of Ships, at http://www.comitemaritime.org/Uploads/Judicial%20Sales/Paper%20of%20James%20Zhengliang%20Hu%20(1).pdf, 30 Octobber 2013.

知的对象应当包括船长。对于中国提出的观点，笔者认为可以采纳，船长相对于其他被通知对象来说更容易被通知，因为它与船舶的关系紧密，船长的地址容易找到，虽然船长不是船舶司法出售的利害关系人，但是一旦船长收到通知，船舶所有权人很容易就能通过船长获取船舶出售的信息。同时，克罗地亚和中国都指出当司法出售的是外国船舶且船旗国在司法出售地设有外交或领事馆时，通知应当发送到该外交或领事馆，因为法院很容易就能通过外交或领事馆通知船旗国。其实，在公约草案一稿中通知的对象就包括了外交或领事馆，国际海事委员会船舶司法出售工作组公布说之所以删掉了通知外交或领事馆这项内容，是基于船舶司法出售承认的效率考虑的。但笔者认为，这种过于注重效率而有碍公平的做法不可取。在船舶司法出售国没有住所的当事人很难收到有关船舶司法出售的信息，通过通知外交或领事馆而使利害关系人获悉船舶被出售的消息相对容易，保障了利害关系人权利。

除了上述提到的各国的建议以外，笔者认为，该条还有以下几点需要改进，首先应该把第3条的名称改为"司法出售的通知与公告"，为什么要加入公告二字呢？原因一：第 3 条第 3 款规定"通知应在进行强制出售的国家报刊上公布，如果进行强制出售的当局认为适当，也应在其他出版物上公布。"这样看来，第 3 款很明显是对公众的公告，而不只是局限于通知。另外，司法出售的公告非常重要，一是法院在作出船舶司法拍卖的裁定后向不特定的社会公众公告拍卖事宜，让社会公众知晓被拍卖船舶的详细情况，吸引更多的人参与竞买，以充分实现船舶的价值；二是法院向特定的与船舶有利害关系的人（包括船舶登记所有权人和对船舶享有债权的债权人）发出通知，尤其是通知船舶优先权人、留置权人、抵押权人拍卖信息，以有利于其毫不迟延地主张权利，并告知普通债权人进行债权登记，公平参与受偿，以维护其合法权益，保证经司法拍卖后船舶的买受人可以获得"清洁所有权"。如果仅告知船舶的利害关系人，而不向公众公告，不利于吸引有实力的买受人参与竞拍。对于通知的内容，笔者认为也需要进行相应修改，而这种修改可以借鉴我国 1999 年《中华人民共和国海事诉讼特别程序法》[20] 的规定，其第 32 条和第 33 条分别对公告和通知的内容进行了规定，特别是针对公告的内容进行了详细的列举。

（四）船舶司法出售的效力

公约规定了产生司法出售效力的条件：[21]（1）在出售时，船舶在出售国管辖

20 王泽鉴：《强制拍卖非属债务人财产与拍定人之地位》，载于《民法学说与判例研究①》北京：中国政法大学出版社 1998 年版。

21 Second Draft, Art. 4.

范围内；（2）司法出售须符合该国的法律及本公约的规定。中国代表针对这两个条件的举证主体提出疑问，即这两个条件到底应由谁来证明，是由买船人证明还是由利害关系人证明？中国代表认为依照公约应遵循的首要原则，即给善意买船人提供必要、充分的保护，司法出售完成后即推定司法出售的效力存在，而当利害关系人对司法出售的效力提出质疑时，该种举证责任由利害关系人承担。在笔者看来，中方针对该条提出的观点能很好地保护买船人的利益，从而符合公约应遵循的基本原则。

（五）司法出售证书的签发

公约第 5 条规定了司法出售证书的内容，即如果一船被司法出售，并且符合出售国和公约要求的条件，进行司法出售的法院或法院官员应当按照买船人的要求签发证书，该证书中应标明司法出售的日期，并记载（1）船舶司法出售是根据该国的法律及本公约的规定完成，出售前附于该船舶之上的抵押权、质权、担保物权、船舶优先权或任何性质的债权（买船人承认的除外）均不再附于该船舶之上；（2）出售前存在的所有附于船舶的权益已灭失。[22]

针对这条，各国普遍在会议上提出签发的证书还应当反映船舶所有权已经转移给买船人，即买船人已经获得了船舶所有权。美国代表提出司法出售判决书正本或经核证的判决书副本能够发挥司法出售证书的作用，因此没有必要签发司法出售证书，继而第 5 条也没有存在的必要性。但是笔者认为美国提出的这种观点有失偏颇，船舶司法出售承认公约的制定就是鉴于各国关于法院司法出售的判决或裁定难以得到其他国家的承认，而专门制定这样一个公约来提高司法出售的承认率，按照美国的说法，如果去掉这一条，要求买船人持司法出售的判决或裁定书去他国进行登记的话，那本公约的意义何在？克罗地亚还建议将司法出售证书的格式作为附件附在公约后，以达到统一的目的。笔者认为克罗地亚的这项建议有一定道理，制定统一的格式可以减少司法出售证书上内容的歧义，有利于买船人持司法出售证书进行注销和重新登记，但是从公约草案目前的状况来看，公约的正文已经引起很多争议，在此情形下再去制定这样一个统一的格式将使公约更加

22 “When a ship is sold by way of Judicial Sale and the conditions required by the law of the State where the Sale is made and by this Instrument have been met, the Court or court officer conducting the Sale shall, at the request of the Purchaser, issue a Certificate to the Purchaser containing the date of the Judicial Sale and recording that (1) the ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Instrument free of all mortgages, “hypothèques” or charges, except those assumed by the Purchaser, of all maritime and other liens and of all encumbrances of whatsoever nature, and (2) all rights and interests existing in the ship prior to its Judicial Sale are extinguished.” Second Draft, Art. 5(1).

难产，公约通过的时间将更加漫长。

（六）登记与注销登记[23]

公约草案规定，当买船人出示前述第 5 条规定的证书时，司法出售前船舶登记国的船舶登记机关应当注销所有船舶抵押权、质权或担保物权的登记（买船人承认的除外），并且应当将船舶登记在买船人的名下或者向其签发为重新登记所需要的登记注销证书。

该条引起了极大争议，首先是对于公约规定的申请注销主体的争议。公约规定由买船人进行注销登记，但是买船人能成为申请注销登记的合格主体吗？从中国的国内法来看，依据《中华人民共和国船舶登记条例》的规定，船舶的申请登记和注销登记均由原船舶所有人进行。但笔者认为，如果草案规定注销登记人是原船舶所有人，会导致原船舶所有人无理地拖延注销登记，不进行注销登记的后果即是买船人不能进行重新登记，那么买船人就不能以所有权人的身份对抗第三人来行使对船舶的权利。所以，笔者认为只要买船人持有合法有效的船舶司法出售证书就可以申请注销登记。

中国认为公约把注销主体的申请人规定为买船人加重了买船人的负担，应当将申请人改为原船舶所有权人，且应当规定注销登记是原船舶所有权人的义务并限制其在规定的时间内进行注销登记。在笔者看来，该条确实没有周全的保护买船人的利益。当买船人的居住地与船舶的原登记地不是同一个国家，司法出售地也不是船舶原登记地时，买船人要进行注销登记是非常困难的。所以，笔者认为，为了更好的保障买船人的利益，原船舶所有权人和买船人都可以成为注销登记的申请人。但是注销登记是原船舶所有权人的义务，并且限制在一定的时间内进行，注销登记是买船人的权利。这样一来，当原船舶所有权人怠于行使其注销义务，买船人可以自己申请注销登记。且应当规定原船舶所有权人不履行该项义务时的惩罚措施。

美国提出该条规定与其国内法相冲突，美国目前禁止通过买卖或其他方式转移美国国籍的船舶给非美国公民，除非美国海事部门事先同意。所以该条在美国国内的执行会产生困难。克罗地亚认为草案二稿应当保留草案一稿第 6 条第 4 款的规定。草案一稿规定，如果利害关系人提起反对或撤销司法出售的诉讼请求最终被法院驳回，则登记机关可重新自由受理船舶注销登记或登记申请，或者恢复并继续完成已暂停的船舶注销登记或登记程序；如果利害关系人提起反对或撤销司法出售的诉讼请求最终获得法院支持，则登记机关不应受理买船人要求对船舶注销登记或重新登记的申请或视情况终止已暂停的船舶注销登记或登记程序。不

23 Second Draft, Art. 6.

知道海事委员会工作组是出于何种原因删除了这段内容，也许是基于公约简略的需要，但是这种为了求得条约的简略而忽视条约明确性和完整性的做法是不可取的。

针对第 4 款，中国也提出建议，为了避免利害关系人恶意损害买船人利益，草案宜规定在利害关系人提出反对或撤销司法出售的诉讼请求时，应当提供担保。笔者比较赞同中国所提出的观点，为了防止利害关系人在没有相关证据情况下恶意损害买船人利益，滥用诉讼权利，妨碍买船人进行注销登记或重新登记，公约应当规定利害关系人只有在提供一定担保的情况下，登记机关才能做出中止登记的决定。

（七）司法出售的承认

草案第 7 条第 4 款规定，如遇利害关系人向管辖法院提起针对买船人、下家买船人或者船舶反对司法出售的诉讼，一经买船人、下家买船人出示司法出售证书，法院应当拒绝受理有关的诉讼或者驳回有关的诉讼请求，除非利害关系人提出证据证明存在本公约第 8 条规定的情形。

中国认为上述第 4 款的规定损害了买船人的权利，因为根据民法中善意取得的理论，当买船人为善意且支付了相应价款时，他的所有权可以对抗第三人；而且即使利害关系人在反对诉讼中获胜，他的相关法律救济也只是从司法出售收益中获取赔偿，除非他能证明买船人非善意，从而推翻司法出售的决定。在笔者看来，从表面来看，中方所提出的观点有理，但是细察，我们可以发现以下问题。首先，这里的买船人的善意、非善意如何区分？其次，利害关系人包括原船舶所有权人，如果是原船舶所有权人提出的诉讼，他的利益怎么可能只限于从司法出售获取经济利益呢。所以笔者认为，中方提出的观点存在一定问题，中方的观点导致过度保障了买船人利益，而忽视了利害关系人的利益保护。

（八）拒绝司法出售

公约规定“应利害关系人请求，缔约国法院可以拒绝对司法出售予以承认，只要该利害关系人向法院提供证据证明：[24] (a) 在司法出售时，有关的船舶并没有位于签发司法出售证书的法院所在国的管辖范围之内，(b) 向第 7 条第 3 款规定的管辖法院提起反对司法出售的诉讼未决。”

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24 Second Draft, Art. 8(1): Recognition of a Judicial Sale may be refused by a Court of the State Party, at the request of an Interested Person, only if that Interested Person furnishes to the Court proof.

中方代表认为应当删除 (a) 项，因为司法出售在大部分情况下都是基于船舶扣押。船舶扣押的条件是船舶扣押时船舶处于进行司法出售地的法院管辖权范围内，而在司法出售时，有关的船舶并没有位于签发司法出售证书的法院的管辖范围之内的可能性很小，由此该项应删除。而笔者认为，(a) 项中涉及的情况存在可能性，因为公约中关于司法出售的定义包括通过公开拍卖、私人协议或者出售国法律明确规定的其他适当方式进行的出售，其中在私人协议和其他适当方式中完全有可能出现船舶并未在司法出售地管辖范围内的情况。所以，笔者认为中国的这种考虑是不合理的。

中方还提出公约第 8 条第 1 款 (b) 项[25] 的规定是不合理的，可能会损害买船人的利益。中国认为在这种情况下，应该中止对司法出售的承认而不是终止。笔者也同意此种观点，在相关案件未作出判决的情况下武断地拒绝承认司法出售，会严重损害买船人的正当利益。

笔者看来，第 8 条应该增加一款：司法出售没有遵循司法出售地法律或者没有遵守本条约的规定。在这种违反法律的情况下，肯定是不能对船舶司法出售进行承认的，公约没有规定此项不可不说是一个很大的漏洞。

针对该条，日本提出外国的判决还没有得到承认或者执行时，日本不会自动承认在国外发生的司法出售。日本同时提出，在未审查司法出售的程序以及利害关系人请求的性质前，日本不大可能承认一个外国的司法出售。按照日本的意思，有关司法出售的判决要先得到承认才有可能承认外国的司法出售，这相当于是否定了本公约的作用，否定了本公约存在的必要性。从这可以看出，日本签署和通过本公约的可能性极小。

（九）限制承认

对于第 9 条，我们在分析第 2 条公约的适用范围时已经讨论过，此处不再赘述。

四、小结

从各国对“问题单”第 5 个问题即“制定船舶司法出售国际承认问题的国际公约的必要性与可行性”的回复来看，大约有一半的国家支持该公约的制定，有一半不支持；另外从这次大会上各国的发言来看，即使是对公约的制定持支持态度的国家对公约的草案内容也提出了很多修改建议和不同意见，特别是中国。由此看来，

25 公约第 8 条第 1 款 (b) 项：“向第 7 条第 3 款规定的管辖法院提起反对司法出售的诉讼未决。”

船舶司法出售国际承认公约还有很多值得商榷和讨论的地方，公约的通过还存在着许多障碍，有必要对草案二稿进行进一步修订。从如何进行修改来看，针对公约形式上的问题，应避免再次出现。针对实质问题，应遵循促进法律的协调和统一以及有利于公约通过的宗旨，在尊重各国现有法律的条件下进行协调。只有这样，公约草案才有望获得通过。

Comments from the International Community on the Second Working Draft of the Instrument on Recognition of Foreign Judicial Sales of Ships

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Abstract: The Instrument on the International Recognition of Foreign Judicial Sales of Ships was the main item on the agenda of the 40th meeting of the Comité Maritime International. This article introduces and analyzes the opinions and proposals for amendment from various countries on the Second Working Draft of the Instrument on Recognition of Foreign Judicial Sales of Ships, focusing on the comments from the Chinese delegation. From these opinions and proposals for amendment, this article concludes that there are still many obstacles to the adoption of the instrument and that many details of the draft instrument still require further consideration and discussion.

Key Words: Basic principles; Judicial sales of ships; Recognition of judicial sales; Protecting the interests of ship purchasers

The 40th meeting of the Comité Maritime International was held in Beijing in October 2012. This was the first meeting held by the Comité Maritime International in China since its establishment in 1897. One main item on the agenda was the Instrument on Recognition of Foreign Judicial Sales of Ships (hereinafter "the Instrument"), a complicated issue involving the interests of many countries. Due to the lack of standard, specialized, and effective international legislation, the interna-

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tional shipping industry has encountered many problems, the chief of which is the recognition of foreign judicial sales of ships. This issue was officially included on the agenda of the 39th meeting of the Comité Maritime International held in October 2008 in Athens.[1] On September 2, 2011, the Draft Instrument on Recognition of Foreign Judicial Sales of Ships (hereinafter "the First Draft") was presented,[2] touching on a series of procedural issues on the judicial sales of ships. Subsequent amendments and revisions to the First Draft led to the Second Draft of the Instrument on Recognition of Foreign Sales of Ships (hereinafter "the Second Draft"). This article introduces and analyzes the comments and proposals for amendment from various countries on the Second Draft at the 40th meeting of the Comité Maritime International and evaluates whether the Instrument is likely to be accepted and adopted by the States members, with a focus on the comments from the Chinese delegation.

I. The Necessity for the Instrument

Before preparing the Instrument and in accordance with the Comité Maritime International's usual practice, the International Working Group of the Comité Maritime International on the Judicial Sales of Ships (hereinafter "the International Working Group") circulated a questionnaire[3] on the issue for collecting suggestions from various national maritime law associations on an investigative basis. The questionnaire includes five issues, one of which is the necessity and feasibility of a specialized international instrument.[4] From the responses, it appears that

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1 Li hai, A Brief Introduction of the Progress of the Research Program of Recognition of Foreign Judicial Sales of Ships at Comité Maritime International, at http://www.cmla.org.cn/article/article.do?father_category_id=1941&id=369&method=viewDetail, 10 October 2013. (in Chinese)

2 Draft Instrument on Recognition of Foreign Judicial Sales of Ships.

3 The five issues identified in the Questionnaire drafted by the International Working Group on the recognition of foreign judicial sales of ships are entitled as follows: the concept of judicial sales of ships, the key procedural elements of judicial sales of ships, the effects of judicial sales of ships, recognition of legal effects of foreign judicial sales of ships, and the necessity and feasibility to have an international instrument on recognition of foreign judicial sales of ships.

4 Paper No. 5 Andrew Robinson Attachment, at http://www.comitemari-time.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html, 30 October 2013.

the countries are divided on this issue. Some specific responses are as follows.[5] Germany did not agree that the 1993 International Convention on Maritime Liens and Mortgages (hereinafter "the 1993 Convention") should be applied to the foreign judicial sales of ships, but neither did it commit to supporting the drafting of another instrument. Venezuela, South Africa, Singapore, France, the Dominican Republic, Denmark, China, and Canada were clear that they believed a separate instrument to be necessary. Italy indicated that it needed further information from the International Working Group to decide. The United States stated that the issue was still under consideration. Malta, Nigeria, Norway, Spain, Argentina, and Brazil were unequivocal in their opinions that there was no need for such an instrument. Sweden did not reply. Among the countries that replied, about half thought a specialized international instrument was necessary to standardize the legal rules on the international recognition of foreign judicial sales of ships, but about half also disagreed due to the fact that such rules already existed.

The authors believe that a specialized instrument is necessary because existing instruments on judicial sales of ships provide inadequate solutions to the issue. The 1926 International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages was the first international instrument on the procedural validity of the judicial sales of ships. To date, few countries have approved and joined the Convention, and major shipping countries such as Great Britain, the United States, Japan, and Germany have not signed on. Although the 1967 International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages included clearer and more specific provisions on the procedures for judicial sales of ships, the major shipping countries are still holding back their approval and participation. The 1993 Convention improved on and added detail to the 1967 Convention in respect of the addresses, particulars, form and effect of auction as well as the distribution of proceeds from the auction, but it is not a specialized instrument that can solve the current issue of the international recognition of the judicial sales of ships. Besides, few countries have signed on the 1993 Convention. Even if it becomes universally accepted in the future, it cannot be applied to resolve problems in those judicial sales of ships conducted to enforce judgments or arbitration awards, or to protect maritime claims. Therefore, the authors believe that a specialized international instrument on

5 Paper No. 5 Andrew Robinson Attachment, at http://www.comitemari-time.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html, 30 October 2013.

the recognition of foreign judicial sales of ships is necessary.

II. Basic Principles for the Preparation of the Instrument

In paragraphs 2, 3, and 6 of the General Comments in the Commentary on the 2nd Draft of the Instrument on International Recognition of Foreign Judicial Sales of Ships,[6] the International Working Group pointed out that countries generally identified the following three principles that should be followed in the preparation and amendment of the First Draft: (a) the effective recognition of legal judicial sales; (b) sufficient protection for the purchasers; and (c) protection for interested persons. As stated in paragraph 2.1 of the Concise Summary of Various Commentaries Received Relating to the 2nd Draft Instrument, "it is clear from the comments made that those making the submissions understood, and generally supported, the purpose of the Draft Instrument: namely, to grant ship purchasers necessary and sufficient protection where they purchase a ship via a judicial sale."[7] In the 40th meeting of the Comité Maritime International, the Chinese delegation also proposed three principles for the preparation of the Instrument: (a) improve coordination within the international community and standardize the instrument; (b) protect the interests of *bona fide* ship purchasers; (c) protect the rights of interested persons. Further, the Chinese delegation elaborated on four aspects of protecting the interests of *bona fide* ship purchasers. According to the Chinese, providing sufficient protection for ship purchasers should be the overriding principle. Protection for ship purchasers involves attention to every step of the judicial sale process, including the registration and deregistration of ships, the effects of the judicial sales, the recognition of the sales, and actions brought by interested persons, etc. The protection of ship purchasers should focus on giving them clear title.

From the above, we can see that the provision of sufficient protection for ship purchasers is a universally-accepted principle in the international community. The authors agree with the three principles proposed in the Commentary on the 2nd

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6 Commentary on the 2nd Draft of the Instrument. This is a document released by the International Working Group that includes details and reasons of amendment for the 1st Draft.

7 Concise Summary of Various Commentaries Received Relating to the 2nd Draft Instrument, a summary by the International Working Group of commentaries of various member States on the 2nd Draft of the Instrument.

Draft of the Instrument. The first principle, guaranteeing the effective recognition of legitimate judicial sales, embodies the purpose for and the necessity of the preparation of the instrument: *i.e.,* there is currently no specialized, universally-acknowledged international instrument on the judicial sales of ships, but the international recognition of judicial sales of ships is a commonly-encountered problem in practice. The second principle, providing sufficient protection to ship purchasers, is proposed in view of the difficulties in the international recognition of foreign judicial sales and the resulting failure to protect the legal rights of ship purchasers. The third principle, protecting the rights of interested persons, intends to balance the interests of the three main parties involved in the judicial sales: the original ship owner, the ship purchaser, and third parties such as mortgage holders, lien holders, maritime lien holders, etc. In Article 1(6) of the Second Draft, all parties other than the ship purchaser are collectively referred to as interested persons. While the protection of the interests of ship purchasers ought to be emphasized, the rights of interested persons should also receive proper attention.

III. Specific Provisions of the Second Draft Instrument

A. Definitions

There are nine articles in the Second Draft. Article 1 includes the relevant definitions. Since the beginning of the drafting process for the First Draft, some delegations have asserted that definitions are unnecessary and proposed the adoption of definitions in existing laws or international instruments applicable to judicial sales. They feared that new definitions may lead to disagreements among countries and impede the adoption of the instrument, and that inconsistencies between new and existing definitions may make the laws inapplicable to the matters that these laws were meant to regulate. From China's perspective, new definitions are necessary, but the Chinese delegation did not elaborate on the reasons for the necessity during the meeting. We also believe that definitions are necessary. According to a survey conducted by the International Working Group before the Draft Instrument was prepared, there is no such concept as a "judicial sale" in the current laws of the member States, but only provisions on similar concepts. Therefore, a single definition of "judicial sale" will encourage the instrument's universal applicability after its adoption. If we pass an instrument on the international recognition of the judicial sales of ships, but leave unclear what

the instrument will recognize (*i.e.,* judicial sales),[8] then we will certainly encounter many problems in its application even if it is passed.

The following are more controversial definitions:

"Certificate":[9] China noted that the definition of "certificate" in Article 1(1) of the Second Draft included "a certified copy" of the original certificate. However, according to Articles 6(1),[10] 6(3),[11] 7(2),[12] and 7(4),[13] "certificate" and "a duly certified copy" of the original certificate are treated as separate concepts; "certificate" does not include "a certified copy of the certificate." Laws should be precise, and this inconsistency in the Second Draft falls short of the requirement of precision.

"Judicial Sale of a Ship": Article 1(7) of the Second Draft states that the "'judicial sale of a ship' or 'judicial sale' or 'sale' means any sale of a ship accomplished by or under the control of a Court in a State by way of public auction or private treaty or any other appropriate ways provided for by the law of the State where the sale by which clean title to the ship is given to the Purchaser and the proceeds of sale are made available to the creditors takes place." Great Britain pointed out that the definition not only included the enforcement of an *in rem* claim against the ship,[14] but also any other legal proceeding that required the sale of a ship; *i.e.,* the definition included some *in personam* actions that could have no connection with ships whatsoever. This does not conform to British law, and so the British delegation proposed that judicial sales of ships be limited to *in rem* actions. From the authors' perspective, the "*in rem* actions" that Britain referred to simply mean this: judicial sales of ships under the instrument should be restricted

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8 Li Shouqin, *Maritime Litigation and Admiralty Law*, Beijing: People's Court Press, 2007. (in Chinese)

9 In the Second Draft, Art. 1(1), "Certificate" is defined as "the original duly authorized certificate, or a certified copy thereof, provided in terms of Article 5."

10 Second Draft, Art. 6(1) ("…upon production by a Purchaser of a Certificate provided for in Article 5 of this Instrument or a copy thereof duly certified in accordance with the law of the State…").

11 Second Draft, Art. 6(3) ("The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.").

12 Second Draft, Art. 7(2) ("…upon production by the Purchaser or Subsequent Purchaser of a Certificate as provided for in Article 5 of this Instrument or a duly certified copy thereof…").

13 Second Draft, Art. 7(4) ("…upon production by the Purchaser or Subsequent Purchaser of a Certificate which is provided for in Article 5 of this Instrument or a duly certified copy thereof…").

14 Tian Tao, Issues in Combining Forced Sales and Voluntary Sales, *The Rule of Law Forum*, No. 5, 2004, pp. 52~60. (in Chinese)

to sales to enforce claims that arise from the ship itself, and should exclude sales based on creditors' claims that have nothing to do with the ship. In the latter case, the instrument should not apply. The British proposal in essence restricts the scope of the instrument's application. However, in civil law countries such as China, *in rem* actions do not exist. Therefore, it may not be easy to revise this definition. If the definition is not revised and contracting States are not allowed to make a reservation with regards to this provision, Great Britain is unlikely to ratify the instrument. If Great Britain, a major shipping power, refuses to sign this instrument, the instrument is unlikely to pass. Even if the instrument manages to pass, it will not be universally applied. Meanwhile, some delegations pointed out that the definition of "judicial sale of a ship" should be precise, and three different terms – "judicial sale of a ship," "judicial sale," and "sale" – should not be used to express the same concept. Obviously, this is a major formal defect in the Second Draft. It is apparent that the "judicial sale of a ship" is not the same as "judicial sale," as the former is limited to only the sale of ships and excludes the sale of anything else. Neither does "judicial sale" equal "sale": "judicial" indicates the intervention of a certain public authority, thus making the former concept apparently different from the latter. If the International Working Group intended to restrict the concept's scope of application only to the instrument – that is, the three terms mean the same thing only in the context of this instrument, then the inconsistency of this provision in form may be understandable. But the idea of the instrument is to provide a standard applicable law for the recognition of the judicial sales of ships. Keeping in mind this purpose and principle, if the instrument considers the three terms to be the same, the concept's imprecision and ambiguity would diminish the scope of its application and its validity in the international community. China thought that language on the validity of a judicial sale should be deleted from the definition because there are conditions to the validity of a judicial sale, and the completion of a judicial sale does not necessarily mean that it is valid. We agree with the Chinese view: if the completion of a judicial sale were all that was required for a sale to be legally valid, it would not be necessary for one country to review or recognize the judicial sales of ships that took place under the law of or in other countries. The language on the validity of a judicial sale in this definition is redundant.

"Maritime Lien":[15] in the 2nd Draft of the Instrument, a maritime lien[16] is any claim recognized as a maritime lien on a ship by the private international law of the State in which the ship is sold by way of Judicial Sale. Both the Chinese and the British delegations believed that this definition was likely to cause conflicts of laws. Under existing rules of private international law, the *lex fori* should be applied to issues of maritime liens. There may be differences between the rulings affecting maritime liens under the private international law of the State in which the ship is sold by judicial sale and the rulings under the *lex fori*. The authors agree that this provision would lead to conflicts of laws and so make the approval of the instrument difficult. It is problematic to define this concept, which should have been defined in compliance with conflict rules, in the context of a substantive law such as this instrument. The same problem can also be found in the definition of "mortgage" in the Second Draft.

"Owner" or "Shipowner": in Article 1(10) of the Second Draft, "'Owner' or 'Shipowner' means any person registered in the register of ships of the State of Registration as the owner of the ship." China believed that, from the perspective of the scope of application, it was necessary to consider whether the instrument applied where the ownership of a ship had not been registered, as well as where a State-owned ship used for commercial activities was sold in a judicial sale. China suggested borrowing the provision in the 1992 International Convention on Civil Liability for Oil Pollution Damage: "…in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, 'owner' shall mean such a company." We share this view. There is a significant possibility that a ship in a judicial sale is not registered. According to the Second Draft, the instrument would not apply to such a ship. If the provision in the 1992 International Convention on Civil Liability for Oil Pollution Damage is introduced into the Second Draft to regulate the said case where "a ship is owned by a State", it would not only prevent the inconvenience of having to treat the State as an interested person in the judicial sale recognition process, but would also expand the scope of cases to which the Second Draft can apply (to include the case where a State is the true owner of the ship).

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15 In the Second Draft, Art. 1(8), "maritime lien" is defined as "any claim recognized as a maritime lien on a ship by the law applicable in accordance with the private international law rules of the State in which the ship is sold by way of Judicial Sale."

16 William Tetley, Wang Lizhi and Li Zhiwen trans., Maritime Liens in the Conflict of Laws, *Journal of Comparative Law*, No. 1, 2009, pp. 144~160. (in Chinese)

"State of Registration": the Second Draft defines the "State of registration" as "the State in whose register of ships a ship is permanently registered at the time of its Judicial Sale."[17] The word "permanently" has stirred up a storm of controversy. "Permanently" did not appear in the definition in the First Draft. Britain raised the question of how the "State of registration" of an unregistered ship would be determined. Malta speculated on which would be a ship's "State of registration" when it flew the flag of another country on a temporary basis. Still other delegations pointed out that it was rare for a ship to be permanently registered in a State and the definition did not conform to reality. The Chinese delegation proposed the question on which would be a ship's "State of registration" when it was temporarily registered at the place of the bareboat charterer though not permanently registered. We basically agree with the questions raised by these countries. The word "permanently" originally did not exist in the First Draft, but was later added to the Second Draft. Since it has caused so much controversy, we should examine the reason for the addition. Based on the International Working Group's documents, the International Working Group was thinking of the fact that there was no definition of a "State of registration" that applied to a ship under provisional registration or a bareboat charter registration. The authors propose that the definition of a State of registration should be revised as "the State in whose register of ships a ship is permanently registered at the time of its Judicial Sale. In the case where the place of a bareboat charter registration fails to coincide with that of its permanent registration, the place of registration means the place of permanent registration," *i.e.,* by adding provisions for provisional registrations and bareboat charter registrations to the original definition in the First Draft. In this way, provisional registrations and bareboat charter registrations are provided for, and controversy can be avoided.

B. Scope of Application

Article 2 of the Second Draft pertains to the scope of its application: "This Instrument shall apply to the recognition of a Judicial Sale taking place in the territory of any State."[18] Most countries thought that the scope was too broad.

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17 Second Draft, Art. 1(15) defines "State of registration" as "the State in whose register of ships a ship is permanently registered at the time of its Judicial Sale."

18 According to the Instrument on Recognition of Foreign Judicial Sales of Ships, "State" here refers to a member State of the United Nations.

They suggested that the instrument should only apply to contracting States, but should also allow contracting States to choose a broader scope of application. The International Working Group responded that Article 9 of the Second Draft has solved the problem. According to Article 9, "[w]hen signing, ratifying or acceding to this Instrument, any State may declare that it will only apply the Instrument to the recognition of a Judicial Sale made in the territory of a State Party and the Ship is flying the flag of a State Party. It may also declare that it will apply this Instrument to Judicial Sale made in the territory of a non-Party State on the basis of reciprocity." The authors have doubts about the International Working Group's response. Article 2 is entitled "Scope of Application," and Article 9 is entitled "Restricted Recognition." Although Article 9 has the effect of restricting the application of the instrument, the scope of application and restricted recognition are two different issues. Restrictions on the instrument's scope of application should be defined in Article 2. In addition, if the purpose of Article 9 is to restrict the scope of the instrument's application, then Article 9 is completely unnecessary because the issue can simply be addressed in Article 2. Further, even if we accept the International Working Group's response that Article 9 is a restriction of Article 2, a closer look reveals that Article 9 only addresses the application of restricted recognition of judicial sales, while Article 2 involves a much broader range of issues, including the registration, deregistration and re-registration of ships, the recognition of judicial sales, the settlement of disputes, etc.[19]

C. Notices of Judicial Sale of a Ship

According to Article 3 of the Second Draft, notice of a sale should be given to (a) the registered owner of the ship; (b) all holders of all registered mortgages, "hypothèques," or charges; (c) all holders of maritime liens, but only if the court conducting the judicial sale has received notice of their claims; and (d) the authority in charge of the ship's register in the State of registration. With respect to Article 3, Norway contended that the shipowner should be obligated to inform lienholders with unregistered interests in the ship because their interests were recognized under both Norwegian and British law. In our opinion, Norway's suggestion is unlikely

19 James Zhengliang Hu, Comments and Amendment Proposals on the Second Working Draft of Instrument on Recognition of Foreign Judicial Sales of Ships, at http://www.comitemaritime.org/Uploads/Judicial%20Sales/Paper%20of%20James%20Zhengliang%20Hu%20(1).pdf, 30 Octobber 2013.

to be adopted. Unregistered interests are generally considered non-priority claims, and not liens, under the law of most countries. If all holders of non-priority claims have to be notified, it would be much more difficult for the court to complete the process of notification. It may even be impossible to notify some creditors, and the eventual judicial sale may not be recognized due to the failure to notify all creditors. As a result, the judicial sale will be much less likely to be recognized. Ireland proposed that the "registered owner of the ship" be replaced with "owner of the ship" to include cases with "unregistered owners." Ireland's proposal is in essence a challenge to the definition of "Owner or Shipowner," which Ireland believed should include both registered and unregistered owners. China suggested that the captain should also be notified. We believe that China's proposal should be adopted. Compared with other parties that had to be notified, the captain is much easier to track down. The captain has a close relationship with the ship, and his address is easy to find. Although the captain is not an interested person in the judicial sale of a ship, the owner or shipowner can easily obtain information about the judicial sale through the captain once he or she has been notified. Finally, both Croatia and China pointed out that where a foreign ship is to be sold in a judicial sale and there is an embassy or consulate of the ship's flag State in the place where the judicial sale will take place, notice should be sent to that embassy or consulate because the court can easily notify the flag State via its embassy or consulate. In fact, Article 3(e) of the First Draft had stated that the court shall also notify "the Embassy or Consulate of the ship's Flag State", but the International Working Group deleted this provision to make the recognition of judicial sales of ships more efficient. This paper disapproves of this practice, which places efficiency above fairness. Interested persons with no fixed residence in the State of the judicial sale cannot easily receive the notice of the sale. By notifying the ship's embassy or consulate in the State where the judicial sale will take place, the court can easily make the interested persons aware of the sale and thereby protect their interests.

In addition to the proposals discussed above, we also believe that the following provisions should be revised. First, the word "Announcement" should be inserted into the title of Article 3 so that it reads as "Notice and Announcement of Judicial Sale." The reason can be found in Article 3(3) of the Second Draft: "the notice shall be given by press announcement in the State in which the Judicial Sale is conducted and if deemed appropriate by the Court conducting the Judicial Sale, in other publication." Thus, it is obvious that the "notice" in Article 3(3) actually refers to a public announcement and is not limited to "notice" to specific individuals. In

addition, announcements of judicial sales are very important. First, after a court has decreed the judicial sale of a ship, an announcement to the public about the details of the ship will attract more bids and the ship can be sold at as high a price as possible. Second, by notifying to the persons with an interest in the ship (including the registered owner and creditors with rights with respect to the ship) of the judicial sale, especially maritime lien holders, other lienholders, and mortgagees, the court can help them claim their rights without delay; and by inviting non-priority creditors to register their claims, these creditors can also be paid their fair share and their legitimate rights can be protected. As a result, the purchaser will be guaranteed clean title of the ship after the judicial sale. If only persons with interests in the ships, but not the public, are notified, fewer competitive purchasers will participate in the sales. The authors also believe that the contents of the notice or announcement should be modified accordingly. In our opinion, the modifications can use the provisions in the Special Maritime Procedure Law of the People's Republic of China as a reference.[20] Articles 32 and 33 of this law describe the respective requirements of a notice and an announcement. In particular, Article 32 includes a detailed list of all the information that should be in an announcement.

D. Effect of Judicial Sale of a Ship

Article 4 of the Second Draft lists the requirements for a valid judicial sale:[21] (a) at the time of the Sale, the ship is in the area of the jurisdiction of the State in which the Sale is accomplished, and (b) the Sale has been conducted in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument. The Chinese delegation raised the question of whether the purchaser or the interested persons should bear the burden of proof for both requirements. In the Chinese delegation's opinion, a judicial sale should be presumed valid upon its completion, based on the instrument's overriding principle of providing necessary and sufficient protection for the *bona fide* ship purchaser. If an interested person challenges the effect of the judicial sale, the challenger should bear the burden of proof. We believe that the Chinese proposal can provide sound protection for the interests of ship purchasers and thus is consistent with the

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20 Wang Zejian, Forced Sales of Property not Belonging to the Debtor and the Status of Successful Bidders, in *Civil Law Theory and Case Study*, Beijing: China University of Political Science and Law Press, 1998. (in Chinese)

21 Second Draft, Art. 4.

instrument's basic principles.

E. Issuance of a Certificate of Judicial Sale

Article 5 of the Second Draft states, "[w]hen a ship is sold by way of Judicial Sale and the conditions required by the law of the State where the Sale is made and by this Instrument have been met, the Court or court officer conducting the Sale shall, at the request of the Purchaser, issue a Certificate to the Purchaser containing the date of the Judicial Sale and recording that (1) the ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Instrument free of all mortgages, 'hypothèques' or charges, except those assumed by the Purchaser, of all maritime and other liens and of all encumbrances of whatsoever nature, and (2) all rights and interests existing in the ship prior to its Judicial Sale are extinguished."

With respect to this article, most countries felt that the issued certificate should clearly state that ownership had been transferred to the ship purchaser; that is, the ship purchaser had acquired ownership of the ship. The American delegation suggested that it was unnecessary to issue a certificate because, in many countries, an original or certified copy of the judgment and order of the judicial sale was sufficient, even indicating that this article might be redundant. But the authors believe that the American suggestion is somewhat unreasonable. The reason for a specialized instrument is to maximize the recognition of judicial sales in view of the difficulties encountered in obtaining recognition from other countries. If – according to the Americans' suggestions – this article is deleted and purchasers have to register on the basis of such judgments in other countries, then there would be no reason for an instrument. Croatia suggested that a sample certificate should be attached as an appendix to the instrument for standardization purposes. We think that Croatia's proposal is quite sensible. Standardizing the certificate would help reduce its ambiguities and facilitate the re-registration and deregistration of ships. But there is already a great amount of controversy over the instrument's main text. Under these circumstances, attempting to come up with a standard form of the certificate would extend the time for the instrument's passage even further.

F. Deregistration and Registration of the Ship[22]

Article 6(1) of the Second Draft states: "... upon production by a Purchaser of a Certificate provided for in Article 5 of this Instrument ... the Registrar of Registry where the ship was registered prior to its Judicial Sale shall be bound to delete all registered mortgages, 'hypothèques' or charges except those assumed by the Purchaser, and either to register the Ship in the name of the Purchaser or ... to issue a certificate of deregistration for the purpose of new registration..."

This article has generated great controversy, especially over the issue of who should be allowed to deregister a ship under the Instrument. According to the article, the purchaser is the one who applies for deregistration. But can the purchaser be a qualified applicant for deregistration? For example, under the Regulations of the People's Republic of China Governing the Registration of Ships, the previous owner is the person who registers and deregisters the ship. But in our opinion, the previous owner may unreasonably delay deregistration if the previous owner is designated as the person who must deregister the ship. Without deregistration, the ship purchaser would not be able to re-register the ship and cannot protect the shipowner's rights against third parties. So we believe that the purchaser should be allowed to apply for deregistration as long as he or she can produce a legal and valid certificate of judicial sale.

China thought that the previous owner, and not the purchaser, should be responsible for deregistration because deregistration would increase the purchaser's burden. In addition, the previous owner should be obligated to deregister within a certain period of time. From our point of view, this article in fact does not provide sufficient protection for the purchaser's interests. It is very difficult for the purchaser to deregister the ship when the purchaser's place of residence is different from the country of registration and the place of registration is different from the locale of the judicial sale. Therefore, in our opinion, both the previous owner and the purchaser can be applicants for deregistration in order to better protect the purchaser's interests. While deregistration within a certain period of time is the previous owner's responsibility, deregistration is also the purchaser's right. In this way, if the previous owner procrastinates in carrying out the responsibility to deregister, the purchaser can apply for deregistration on his or her own. In addition, the instrument should prescribe punitive measures for the previous owner who fails

22 Second Draft, Art. 6.

to deregister the ship.

The United States pointed out that this article conflicted with its domestic law. At present, the United States prohibits the transfer, by sale or otherwise, of any U.S.-registered vessels to non-U.S. citizens without the prior approval of its Maritime Administration. As a result, Article 6 will be difficult to enforce within the United States. Croatia believed that the Second Draft should retain Article 6(4) of the First Draft. According to Article 6(4) of the First Draft, "(a) where the legal action by the Interested Person challenging or nullifying the Judicial Sale is finally rejected by the Court, the registrar shall again be free to entertain the request for or be bound to resume and complete the suspended process of deregistration or registration of the ship; or (b) where the legal action challenging or nullifying the Judicial Sale is finally upheld by the Court, the registrar shall not entertain any request for deregistration or subsequent registration of the ship by the Purchaser or cancel the suspended deregistration or registration process, as the case may be." It is unclear why the International Working Group deleted Article 6(4); perhaps it was seeking to condense the instrument. But it is inadvisable to place succinctness above precision and completeness.

With respect to Article 6(4), China also proposed that an interested person should be required to provide sufficient security when it intends to file a legal action challenging or nullifying the Judicial Sale, so that the interested person can be prevented from initiating a suit in bad faith to damage the rights and interests of ship purchasers. We second China's proposal. In order to prevent an interested person from acting against the purchaser's rights without relevant evidence, abusing his or her right to take legal action, and making it difficult for the purchaser to deregister or re-register the ship, the registrar should only suspend registration when the interested person provides sufficient security.

G. Recognition of Judicial Sale

Article 7(4) of the Second Draft states, "[w]here an action challenging a Judicial Sale is taken by an Interested Person against a Purchaser or a Subsequent Purchaser or a Ship before a competent court, the court shall dismiss the action or reject the relevant claim upon production by the Purchaser or Subsequent Purchaser of a Certificate which is provided for in Article 5 of this Instrument ... unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument."

China believed Article 7(4) to be detrimental to the purchaser's rights. According to the *bona fide* acquisition concept in civil law, the purchaser's right of ownership is valid against the rights of a third party when the purchaser is *bona fide* and has paid the corresponding price. Even if an interested person successfully challenges a judicial sale, the only remedy available is the proceeds from the judicial sale. Only if the ship purchaser is proven to not be a *bona fide* purchaser can the order of judicial sale be reversed. In our opinion, although the Chinese view seems reasonable on the surface, the following problems emerge upon a closer look. First, what separates a *bona fide* purchaser from one who is not? Second, the previous owner is also an interested person. If the previous owner initiates a suit, how is it possible that his or her remedy is limited to the right to the proceeds from the judicial sale? So China's view is somewhat problematic in its overprotection of the purchaser at the expense of the interested persons.

H. Refusing Recognition

Article 8(1) of the Second Draft states, "[r]ecognition of a Judicial Sale may be refused by a Court of the State Party, at the request of an Interested Person, only if that Interested Person furnishes to the Court proof that: (a) at the time of the Sale, the Ship was not physically in the area of the jurisdiction of the State in which the Court issuing the Certificate provided for in Article 5 is located; or (b) an action challenging the Judicial Sale is pending before a competent court as provided for by paragraph 3 of Article 7."

The Chinese delegation suggested that item (a) should be deleted because, in most cases, judicial sales were based on the ship's arrest. A requirement of arrest is that the ship be within the jurisdiction of the court where the judicial sale of a ship is to take place, and there is little possibility that ship is not within the jurisdiction of the court issuing the certificate at the time of the judicial sale. Therefore, this item should be deleted. However, we think that cases described in item (a) are possible. According to Article 1(7) of the Second Draft, "judicial sale of a ship," "judicial sale," or "sale" means any sale of a ship accomplished by or under the control of a Court in a State by way of public auction or private treaty or any other appropriate ways provided for by the law of the State in which the sale is to take place. In a sale by "private treaty or any other appropriate ways," it is entirely possible that the ship is not within the jurisdiction of the court overseeing the judicial sale. So we think that the Chinese view is unreasonable.

China also pointed out that paragraph 1(b)[23] of Article 8 was unreasonable and could harm the purchaser's interests; and that under the circumstances described in paragraph 1(b), the process of granting recognition of the judicial sale should be suspended instead of terminated. We agree: the arbitrary refusal of recognition of a judicial sale, while a relevant action is still pending, would seriously injure the purchaser's legitimate interests.

In our opinion, another paragraph should also be inserted in Article 8: the sale has not been conducted in accordance with the laws of the place of the sale or the provisions of the Instrument. Since a judicial sale should definitely not be recognized when it violates the law, the failure to provide for this scenario is a huge loophole in the Instrument.

With respect to this article, Japan announced that it would not automatically recognize a foreign judicial sale before the foreign judgment was recognized and enforced, and that it was unlikely for Japan to recognize a foreign judicial sale without a review of the sale's procedure and the nature of an interested person's claim. In its view, a foreign judicial sale was not going to be recognized without the prior recognition of the judgment ordering the sale. As Japan's view amounts to a denial of the function and necessity of the Instrument, we can conclude that Japan is unlikely to sign and ratify it.

I. Restricted Recognition

An analysis of Article 9 of the Second Draft can be found in the discussion of Article 2 above; we will not repeat it here.

IV. Conclusion

The responses to the 5th question in the Questionnaire – "the necessity and feasibility to have an international instrument on recognition of foreign judicial sales of ships" – show that about half of the countries are in favor of formulating the instrument, and half are not. And from the speeches of member States at the Comité Maritime International's 40th meeting, it seems that even those States in favor of the Instrument, especially China, have a number of proposals for

23 "[A]n action challenging the Judicial Sale is pending before a competent court as provided for by paragraph 3 of Article 7." Second Draft, Art. 8(1)(b).

amending the Instrument and harbor many disagreements. Therefore, the details of the Instrument have to be further discussed and revised, and obstacles remain to be overcome. The Second Draft should be further amended. Formal defects should be avoided in the amendments. Substantive matters should be resolved in accordance with the principles of coordinating and standardizing laws, as well as encouraging the Instrument's adoption. Further, coordination should be conducted on the basis of respect for existing domestic laws. Only so will the adoption of the instrument be possible.

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海洋可再生能源发展纲要（2013–2016 年）

（国家海洋局　2013 年 12 月）

海洋可再生能源（以下简称“海洋能”）是指海洋中所蕴藏的潮汐能、潮流能（海流能）、波浪能、温差能、盐差能等，具有总蕴藏量大、可永续利用、绿色清洁等特点。我国海洋能资源丰富，具有很好的开发利用前景。为全面落实中央关于建设海洋强国战略部署，指导和推动今后一段时期我国海洋能发展和海洋可再生能源专项资金项目实施，依据《国家海洋事业发展“十二五”规划》、《可再生能源发展“十二五”规划》，特制订《海洋可再生能源发展纲要（2013—2016 年）》。

一、现状与需求

（一）发展现状

受石油价格上涨和全球气候变化的影响，英、美、加拿大等沿海发达国家高度重视海洋能在未来能源领域的战略地位，发布海洋能战略计划，制定海洋能发展路线图，引导私有资本投入海洋能领域，推动海洋能技术研发，促进海洋能产业的发展。目前，国外潮汐发电技术已较为成熟，潮汐电站进入商业化发展阶段，世界上有多座潮汐电站正在商业运行，其中装机规模最大的韩国始华湖潮汐电站已于 2011 年正式发电，装机容量达 25.4 万千瓦。潮流能发电技术发展迅猛，英国建设的试验电站有的已成功并网发电。波浪能发电技术呈现多样化，部分技术已经进入商业化阶段。同时，以欧美为代表的沿海发达国家，还建设了海洋能海上试验场，为海洋能转换装置的研发提供试验、测试和评价系列服务，为实验室工程样机走向商业化应用奠定基础条件。温差能、盐差能技术尚处于技术研发阶段。

近年来，我国高度重视海洋能开发利用。《可再生能源法》明确将海洋能纳入可再生能源范畴。国务院印发的《“十二五”国家战略性新兴产业发展规划》明确了包括海洋能在内的新能源产业的发展目标和重点方向，提出积极推进技术基本成熟、开发潜力大的海洋能等可再生能源利用的产业化，并实施新能源集成利用示范重大工程。财政部设立了海洋可再生能源专项资金，全面推进海洋能开发利

用技术的研究、应用和示范工作，为海洋能产业化培育及发展奠定了坚实的基础。

我国发展海洋能已有一定的技术基础。潮汐能利用技术基本成熟，达到国际先进水平。波浪能、潮流能等技术研发和小型示范应用取得进展，开发利用工作尚处于起步阶段，但已有较好的技术储备，未来有较大的发展潜力。独立研建了装机容量为 3900 千瓦的江厦潮汐试验电站，具备设计和制造单机容量为 2.6 万千瓦低水头大功率潮汐发电机组能力。先后建设了 70 千瓦漂浮式、40 千瓦坐底式两座垂直轴的潮流实验电站和 100 千瓦振荡水柱式、30 千瓦摆式波浪能发电试验电站。启动了 500 千瓦至兆瓦级的波浪能独立电力系统和并网电力系统示范工程建设。近海波浪能和潮流能试验场一期工程已经列入计划并启动了相关建设工作。温差能技术完成了实验室原理试验研究，正在进行温差发电的基础性试验研究。

但是，与沿海发达国家相比，我国海洋能开发利用在技术上虽然具备了一定的研究基础，但目前技术积累明显不足，开发利用海洋能的技术经济性相比风电、太阳能等其他新能源还有较大差距，距离产业化发展还需经过较长的一段时间。当前还存在着许多制约下一步发展的重要问题。

技术创新体系尚不健全。我国海洋能研究虽然起步较早，但与国际先进水平相比，技术研发投入较少，研发力量比较分散，缺乏系统的技术开发体系，没有建立起人才培养机制，整体技术水平较低，有关设备制造能力和生产能力存在较大差距，技术创新的后劲不足。

产业服务体系尚未建立。我国海洋能利用技术的应用仍局限于小型示范项目和试验电站，产业服务体系尚未形成。海洋能资源调查、技术标准、产品检测和认证体系不完善，没有形成今后能够支撑海洋能发展的产业服务体系。

激励政策措施不完善。海洋能源开发利用投入高、风险大、技术工艺复杂，缺乏市场竞争力，尚处于起步阶段，需要政策扶持和经济激励。目前，我国支持海洋能开发利用的扶持政策较弱，经济激励措施不够明确，相关政策之间缺乏协调等，尚没有形成支持海洋能开发利用发展的有效机制。

（二）发展需求

发展海洋能是确保国家能源安全、实施节能减排的客观要求。海洋能是可再生的而且储量丰富的清洁能源，海洋能的开发利用可以实现能源供给的海陆互补，减轻沿海经济发达、能耗密集地区的常规化石能源供给压力。多种能源共同维护和保障我国能源安全和经济社会可持续发展，亦将有利于发展低碳经济和实现节能减排目标。

发展海洋能是提升国际竞争力的重要举措。随着海洋能战略地位的日益凸显，海洋能源开发利用受到世界各国高度重视，相继制定了鼓励海洋能开发利用的法规、政策，推进海洋能开发利用快速发展。沿海发达国家加强海洋能开发利

用技术研究，为大规模开发利用海洋能进行技术储备。加快海洋能开发利用技术的研发，抢占海洋能开发利用技术领域的制高点，掌握核心技术，有利于提升我国海洋科技的国际竞争力。

发展海洋能是解决我国沿海和海岛能源短缺的主要途径。我国沿海地区人口集中，资产密集，社会经济发达。沿海岛屿是正在开发或已开发的新的社会经济体或国防前哨。电力缺乏已经成为制约我国沿海特别是海岛社会经济发展的关键因素。因地制宜在沿海和海岛建设适用的海洋能发电系统，是补充沿海电力短缺和解决海岛居民及驻军用电问题的主要途径之一。

发展海洋能是培育我国海洋新兴产业的现实需要。海洋可再生能源业是海洋新兴产业，具有较长的产业链。它的发展将促进和带动设备制造、安装、材料、海洋工程及设计等一批产业和技术的进步，拉动经济发展，增加就业岗位。大力发展海洋能，对于促进我国经济发展方式转变，实现可持续发展具有重要的推动作用。

二、指导思想、基本原则和发展目标

（一）指导思想

以邓小平理论和“三个代表”重要思想为指导，深入贯彻落实科学发展观，大力实施海洋强国战略，把开发利用海洋能作为增加可再生能源供应、优化能源结构、发展海洋经济，缓解沿海及海岛地区用电紧张状况的战略举措。推进科技进步，创新体制机制，健全产业体系，完善支持政策，推动海洋能规模化、产业化发展，培育可再生能源新兴产业。

（二）基本原则

统筹兼顾、远近结合。根据沿海经济社会发展需要，统筹兼顾各种用海需求，协调好各方利益关系，科学开发利用海洋能。近期优先发展技术相对成熟的潮汐能、波浪能、潮流能发电。做好温差能、盐差能等技术储备，为远期开发打好基础。

科技进步、示范推动。大力推动科技进步，提高海洋能开发利用核心技术和关键装备的技术水平。通过建设潮汐能、潮流能、波浪能示范电站和海岛独立供电系统示范工程，加快科技成果应用转化，促进技术成熟，实现海洋能利用的商业化。

政府扶持、企业主导。加强政府引导和扶持，健全完善政策体系。以企业、科研单位和高等院校为创新主体，鼓励科技创新，加大技术研发力度，提高研发成果

转化应用水平。积极引导企业投资，推动海洋能相关装备工程的技术研发和科技创新，加快培育和发展海洋能产业。

多方参与、完善体系。充分发挥相关部门、有关地方、企事业单位、科研院所等的优势，积极鼓励多方参与，贡献力量。建立健全海洋能技术、设计、监测、认证和建设标准体系，重点支持公共研发测试平台建设，建立人才培养、信息和咨询服务体系。

（三）发展目标

总体目标：进一步提高海洋能技术水平，形成一批具有自主知识产权的核心装备。建成一批产业化示范项目，形成若干海岛独立电力系统示范电站，启动 1~2 个万千瓦级潮汐能发电站建设。构建海洋能开发利用政策、法规、技术标准体系，建设海洋能开发利用公共支撑服务平台，形成基本完整的产业支持服务体系，并初步建立适应产业发展的管理体制和政策体系。到 2016 年，分别建成具有公共试验测试泊位的波浪能、潮流能示范电站以及国家级海上试验场，为我国海洋能的产业化发展奠定坚实的技术基础和支撑保障。

三、重点任务

（一）突破关键技术

重点支持具有原始创新的潮汐能、波浪能、潮流能、温差能、盐差能利用的新技术、新方法以及综合开发利用技术研究与试验，攻克关键技术，为海洋能开发利用储备技术。

1. 潮汐能技术

突破潮汐能电站工程建设和新型发电机组研制等关键技术、关键工艺，解决电站建设过程中产生的环境问题，研究新型可适应低水头、大流量、复杂工况的潮汐能利用技术装置。

2. 波浪能技术

针对我国海域波浪周期短、能流密度低且台风易发的特点，开展适合我国波浪能资源特点，具有高系统转换效率、良好的可维护性和较低的维护成本，易于安装布放和回收的波浪能利用技术的研究。

3. 潮流能技术

针对我国海域潮流高流速时间短、平均流速较低的特点，开展适合我国潮流能资源特点，具有高系统转换效率、良好的可维护性和较低的维护成本，适应我国

近海海域开发活动密集特点的潮流能利用技术的研究。

4. 温差能技术

支持开展温差能技术试验样机研究，突破关键技术、关键工艺，力争在提高能量转换效率、提高运行可靠性方面有所突破，为温差能开发利用奠定技术基础。

5. 盐差能技术

支持开展温差能技术原理试验研究，通过提高盐差转化效率，降低过程能量损耗，突破盐差能利用关键技术，为盐差能综合开发利用化奠定技术基础。

（二）提升装备水平

采取技术引进与自主研制相结合，形成一批具有自主知识产权的关键技术和核心装备。重点开展发电装置产品化设计及制造，优先支持较成熟的海洋能发电技术开展设计定型，推动我国海洋能发电技术向装备转化。

1. 潮汐能装备

通过提高技术水平，重点解决潮汐电站低成本建造、综合利用、提高效益和降低成本等问题。开展新型低水头、大流量、环境友好型潮汐能发电机组研制工作，为未来万千瓦级潮汐能示范电站建设提供装备支持。

2. 波浪能装备

提高百千瓦级新型波浪能发电装置转换效率，突破波能装置海上生存能力技术。开展适合我国主要波浪能富集区资源状况的模块化波浪能液压转换与控制装置，以及适合我国波浪特点的发电机研制工作，形成一批适合我国波浪能资源特点的技术装备。同时，遴选技术较成熟的波浪能工程样机开展设计定型，通过优化各部分功能及技术指标，建造定型样机，固化技术状态，完成产品化设计与制造，为未来波浪能示范工程建设提供装备支持。

3. 潮流能装备

开展兆瓦级潮流发电机组研究工作，突破发电机组水下密封、低流速启动、模块设计与制造等关键技术。开展适合我国潮流能资源特点的水平轴高效转换叶片，高可靠齿轮箱，高可靠变桨调节装置，以及低速潮流发电机研制工作，形成一批适合我国潮流能资源特点的技术装备。同时，遴选技术较成熟的潮流能工程样机开展设计定型，通过优化各部分功能及技术指标，建造定型样机，固化技术状态，完成产品化设计与制造，为未来潮流能示范工程建设提供装备支持。

（三）示范项目建设

1. 建设海洋能电力系统示范工程

紧紧围绕推进海洋能规模化应用，促进产业化发展的总体目标，在广东、浙

江地区选择合适的海岛，优选前阶段示范工程执行较好和有实力的单位，集中资金发展规模化海洋能示范。采用分步实施的原则，逐步开展工程勘察与选化、工程总体设计、工程及配套设施建设等工作。到 2016 年，在广东万山、浙江舟山地区分别完成具有公共测试功能的百千瓦级波浪能、兆瓦级潮流能示范工程设施建设、安装调试、运行维护等工作，实现示范运行，培育海洋能产业向纵深发展。

2. 建设近岸万千瓦级潮汐能示范电站

优先支持八尺门、健跳、马銮湾、乳山口、温州瓯飞等站址的潮汐能开发，建设万千瓦级大型潮汐电站。重点开展库区综合利用、电站方案设计及优化、万千瓦级水轮发电机组设计与制造、潮汐能环境影响评价及预测、电站运行管理等关键技术研究以及潮汐电站建设的前期相关论证工作，推动我国大型潮汐能电站建设。到 2016 年，在浙江、福建等沿海地区，启动 1~2 个万千瓦级潮汐能电站建设。

（四）健全产业服务体系

建立健全标准规范体系，制定海洋能资源勘查、评价、装备制造、检验评估、工程设计、施工、运行维护、接入电网等标准与规范，形成较为完备的海洋能技术标准规范体系。初步建立海洋能公共技术研究试验测试平台。依托专业技术机构，建设海上试验场和海洋动力环境模拟试验测试平台。开展海洋能资源信息收集、更新、发布等工作，建设海洋能开发利用信息服务平台，提高海洋能信息服务水平。

（五）资源调查与选划

在前期海洋能资源调查基础上，重点开展南海海域海洋能资源调查及选划，摸清调查区域的海洋能资源储量及其时空分布状况，选划出海洋能优先开发利用区，为我国南海海洋能资源的开发利用规划提供依据。

四、区域布局

海洋能开发必须因地制宜，根据能源资源分布特点和能源需求状况，科学布局海洋能的发展。

（一）广东波浪能示范区

广东地区拥有丰富的波浪能资源，以及长期开展波浪能开发利用技术积累和示范经验。珠海万山地区已开展多项波浪能技术示范工程建设，具有一定装机规

模。以万山波浪能示范工程为核心，依托当地波浪能开发利用技术研发能力，建成集波浪能技术研发、装备制造、海上测试以及工程示范为一体的波浪能示范基地。

（二）浙江潮流能示范区

以浙江地区丰富的潮流能资源优势以及舟山地区雄厚的造船等装备制造能力为基础，以舟山潮流能示范工程为核心，依托当地潮流能开发利用技术研发能力，建成集潮流能技术研发、装备制造、海上测试以及工程示范为一体的潮流能示范基地。

（三）山东海洋能研究试验区

山东是海洋科研力量的聚集地，也是海洋能研发的主力军。以山东强大的海洋科研力量为基础，以国家级海洋能海上试验场建设为核心，完善海洋能公共服务体系建设，建设海洋能技术研究试验基地。整合研发力量，提高自主创新能力，为海洋能产业发展提供技术支撑与保障。

五、保障措施

1. 优化海洋能激励政策环境

加大对海洋能开发利用的财政投入，支持示范项目建设。国家海洋行政主管部门会同有关部门研究制定海洋能发电电价政策，提出扶持海洋能发展的财政、金融、税收等方面政策建议，引导、鼓励民间资本投入。扶持海洋能发电工程设计、材料、设备、系统、施工等相关产业发展。

2. 健全海洋能技术创新体系

建立健全多层次技术创新体系，建立和完善国家级海洋能研发试验平台，鼓励企业建设海洋能发电技术研发机构，整合相关科研院所、高等院校的技术力量，开展海洋能基础理论、前沿技术、核心技术、适用技术研究。健全海洋能人才培养和引进机制，重点培训海洋能发电领域高端科技人才和管理人才。

3. 加强海洋能开发利用管理

确立海洋能开发利用在我国近海及海岛地区的优先开发地位，统筹协调海洋能开发利用与其他领域用海的关系。国家海洋行政主管部门会同有关部门完善政策体系，研究制定海洋能发展产业政策。加强海洋能项目管理，促进海洋能开发利用有序协调进行。

4. 建立海洋能技术管理体系

加强海洋能发展规划、项目前期、项目核准、竣工验收、运行监督等环节的技术归口管理，建立海洋能技术和工程规范，加强技术监督以及工程质量管理。支持海洋能利用技术研发和试验示范。积极推动技术服务体系建设，加强技术指导、工程咨询、信息服务等中介机构能力建设。

5. 形成国内外合作交流促进机制

充分利用国外海洋能开发科技资源，加速我国海洋能开发利用的进程。参与国际海洋能领域重大科学计划，与发达海洋国家开展海洋能开发利用技术、设备、管理、工程等方面技术合作，充分发挥中国海洋可再生能源发展年会交流平台作用，形成内外结合、相互促进的发展机制。

SOLAS and MARPOL Amendments

A number of amendments to the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL) and the 1988 Load Lines Protocol entered into force or took effect from **1 January 2014.**

The amendments cover passenger ship safety (in relation to safe return to port after a flooding casualty); the testing of free-fall lifeboats; minimum safe manning levels; prohibition of blending onboard; the revised MARPOL Annex III; the United States Caribbean Sea Emission Control Area; and the Winter Seasonal Zone off the southern tip of Africa.

2012 May SOLAS Amendments

The SOLAS amendments which entered into force on 1 January 2014 include the following:

– amendment to SOLAS regulation II-1/8-1, to introduce a mandatory requirement for new passenger ships for either onboard stability computers or shore-based support, for the purpose of providing operational information to the Master for safe return to port after a flooding casualty;

– amendment to SOLAS regulation III/20.11.2 regarding the testing of free-fall lifeboats, to require that the operational testing of free-fall lifeboat release systems shall be performed either by free-fall launch with only the operating crew on board or by a simulated launching;

– amendment to SOLAS chapter V to add a new regulation V/14 on ships' manning, to require Administrations, for every ship, to establish appropriate minimum safe manning levels following a transparent procedure, taking into account the guidance adopted by IMO (Assembly resolution A.1047(27) on Principles of minimum safe manning); and issue an appropriate minimum safe manning document or equivalent as evidence of the minimum safe manning considered necessary;

– amendment to SOLAS chapter VI to add a new regulation VI/5-2, to prohibit the blending of bulk liquid cargoes during the sea voyage and to prohibit production processes on board ships.

– amendment to SOLAS chapter VII to replace regulation 4 on documents, covering transport information relating to the carriage of dangerous goods in packaged form and the container/vehicle packing certificate; and

– amendment to SOLAS regulation XI-1/2 on enhanced surveys, to make mandatory the International Code on the Enhanced Programme of Inspections during Surveys of Bulk Carriers and Oil Tankers, 2011 (2011 ESP Code, resolution A.1049(27)).

2010 October MARPOL Amendments

The amendments which entered into force on 1 January 2014 include a revised MARPOL Annex III Regulations for the prevention of pollution by harmful substances carried by sea in packaged form, to include changes to the Annex to coincide with the next update of the mandatory International Maritime Dangerous Goods (IMDG) Code, specifying that goods should be shipped in accordance with relevant provisions.

United States Caribbean ECA Now Effective

The United States Caribbean Sea Emission Control Area (SOx, NOx and PM) came into effect, under MARPOL Annex VI, on 1 January 2014, bringing in stricter controls on emissions of sulphur oxide (SOx), nitrogen oxide (NOx) and particulate matter for ships trading in certain waters adjacent to the coasts of Puerto Rico and the United States Virgin Islands.

The ECA was designated under MARPOL amendments adopted in July 2011. There are now four three designated ECAs in effect globally: the United States Caribbean Sea ECA and the North American ECA; and the sulphur oxide ECAs in the Baltic Sea area and the North Sea area. (See: MARPOL Annex VI regulation 14)

Coordinates for the Caribbean Sea ECA can be found in Resolution MEPC.202(62).

Winter Seasonal Zone Moved South under Amendments to LL Protocol

Amendments to regulation 47 of the 1988 Protocol to the International

Convention on Load Lines (LL), 1966 to shift the Winter Seasonal Zone off the southern tip of Africa further southward by 50 miles, came into effect on 1 January 2014.

Nairobi International Convention on the Removal of Wrecks

The Nairobi International Convention on the Removal of Wrecks will enter into force on **14 April 2015** following the deposit, on 14 April 2014, of an instrument of ratification by Denmark, with the International Maritime Organization (IMO).

Among several provisions, the Convention will place financial responsibility for the removal of certain hazardous wrecks on shipowners, making insurance, or some other form of financial security, compulsory.

Denmark became the 10th country to ratify the convention, thereby triggering its entry into force exactly 12 months later.

The Convention will fill a gap in the existing international legal framework by providing the first set of uniform international rules aimed at ensuring the prompt and effective removal of wrecks located beyond a country's territorial sea. The Convention also contains a clause that enables States Parties to 'opt in' to apply certain provisions to their territory, including their territorial sea.

The Convention will provide a sound legal basis for States to remove, or have removed, shipwrecks that may have the potential to affect adversely the safety of lives, goods and property at sea, as well as the marine and coastal environment. It will make shipowners financially liable and require them to take out insurance or provide other financial security to cover the costs of wreck removal. It will also provide States with a right of direct action against insurers.

2007 NAIROBI INTERNATIONAL CONVENTION ON THE REMOVAL OF WRECKS

(Adopted in Nairobi on May 2007)

PREAMBLE

THE STATES PARTIES TO THE PRESENT CONVENTION,

CONSCIOUS of the fact that wrecks, if not removed, may pose a hazard to

navigation or the marine environment,

CONVINCED of the need to adopt uniform international rules and procedures to ensure the prompt and effective removal of wrecks and payment of compensation for the costs therein involved,

NOTING that many wrecks may be located in States' territory, including the territorial sea,

RECOGNIZING the benefits to be gained through uniformity in legal regimes governing responsibility and liability for removal of hazardous wrecks,

BEARING IN MIND the importance of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982, and of the customary international law of the sea, and the consequent need to implement the present Convention in accordance with such provisions,

HAVE AGREED as follows:

ARTICLE 1 DEFINITIONS

For the purposes of this Convention:

1. "Convention area" means the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

2. "Ship" means a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources.

3. "Maritime casualty" means a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo.

4. "Wreck", following upon a maritime casualty, means:

(a) a sunken or stranded ship; or

(b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or

(c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or

(d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

5. "Hazard" means any condition or threat that:

(a) poses a danger or impediment to navigation; or

(b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

6. "Related interests" mean the interests of a coastal State directly affected or threatened by a wreck, such as:

(a) maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;

(b) tourist attractions and other economic interests of the area concerned;

(c) the health of the coastal population and the wellbeing of the area concerned, including conservation of marine living resources and of wildlife; and

(d) offshore and underwater infrastructure.

7. "Removal" means any form of prevention, mitigation or elimination of the hazard created by a wreck. "Remove", "removed" and "removing" shall be construed accordingly.

8. "Registered owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the operator of the ship, "registered owner" shall mean such company.

9. "Operator of the ship" means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended

10. "Affected State" means the State in whose Convention area the wreck is located.

11. "State of the ship's registry" means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly.

12. "Organization" means the International Maritime Organization.

13. "Secretary-General" means the Secretary-General of the Organization.

ARTICLE 2 OBJECTIVES AND GENERAL PRINCIPLES

1. A State Party may take measures in accordance with this Convention in relation to the removal of a wreck which poses a hazard in the Convention area.

2. Measures taken by the Affected State in accordance with paragraph 1 shall be proportionate to the hazard.

3. Such measures shall not go beyond what is reasonably necessary to remove a wreck which poses a hazard and shall cease as soon as the wreck has been removed; they shall not unnecessarily interfere with the rights and interests of other States including the State of the ship's registry, and of any person, physical or corporate, concerned.

4. The application of this Convention within the Convention area shall not entitle a State Party to claim or exercise sovereignty or sovereign rights over any part of the high seas.

5. States Parties shall endeavour to co-operate when the effects of a maritime casualty resulting in a wreck involve a State other than the Affected State.

ARTICLE 3 SCOPE OF APPLICATION

1. Except as otherwise provided in this Convention, this Convention shall apply to wrecks in the Convention area.

2. A State Party may extend the application of this Convention to wrecks located within its territory, including the territorial sea, subject to article 4, paragraph 4. In that case, it shall notify the Secretary-General accordingly, at the time of expressing its consent to be bound by this Convention or at any time thereafter. When a State Party has made a notification to apply this Convention to wrecks located within its territory, including the territorial sea, this is without prejudice to the rights and obligations of that State to take measures in relation to wrecks located in its territory, including the territorial sea, other than locating, marking and removing them in accordance with this Convention. The provisions of articles 10, 11 and 12 of this Convention shall not apply to any measures so taken other than those referred to in articles 7, 8 and 9 of this Convention.

3. When a State Party has made a notification under paragraph 2, the "Convention area" of the Affected State shall include the territory, including the territorial sea, of that State Party.

4. A notification made under paragraph 2 above shall take effect for that State Party, if made before entry into force of this Convention for that State Party, upon entry into force. If notification is made after entry into force of this Convention for that State Party, it shall take effect six months after its receipt by the Secretary-General.

5. A State Party that has made a notification under paragraph 2 may withdraw it at any time by means of a notification of withdrawal to the Secretary-General. Such notification of withdrawal shall take effect six months after its receipt by the Secretary-General, unless the notification specifies a later date.

ARTICLE 4 EXCLUSIONS

1. This Convention shall not apply to measures taken under the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, as amended, or the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, as amended.

2. This Convention shall not apply to any warship or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless that State decides otherwise.

3. Where a State Party decides to apply this Convention to its warships or other ships as described in paragraph 2, it shall notify the Secretary-General, thereof, specifying the terms and conditions of such application.

4. (a) When a State Party has made a notification under article 3, paragraph 2, the following provisions of this Convention shall not apply in its territory, including the territorial sea:

(i) Article 2, paragraph 4;

(ii) Article 9, paragraphs 1, 5, 7, 8, 9 and 10; and

(iii) Article 15.

(b) Article 9, paragraph 4, insofar as it applies to the territory, including the territorial sea of a State Party, shall read: Subject to the national law of the Affected State, the registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the owner. Before such removal commences, the Affected State may lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment.

ARTICLE 5 REPORTING WRECKS

1. A State Party shall require the master and the operator of a ship flying its flag to report to the Affected State without delay when that ship has been involved in a maritime casualty resulting in a wreck. To the extent that the reporting obligation under this article has been fulfilled either by the master or the operator of the ship, the other shall not be obliged to report.

2. Such reports shall provide the name and the principal place of business of the registered owner and all the relevant information necessary for the Affected State to determine whether the wreck poses a hazard in accordance with article 6, including:

(a) The precise location of the wreck;

(b) The type, size and construction of the wreck;

(c) The nature of the damage to, and the condition of, the wreck;

(d) The nature and quantity of the cargo, in particular any hazardous and noxious substances; and

(e) The amount and types of oil, including bunker oil and lubricating oil, on board.

ARTICLE 6 DETERMINATION OF HAZARD

When determining whether a wreck poses a hazard, the following criteria should be taken into account by the Affected State:

(a)The type, size and construction of the wreck;

(b) depth of the water in the area;

(c) Tidal range and currents in the area;

(d) particularly sensitive sea areas identified and, as appropriate, designated in accordance with guidelines adopted by the Organization, or a clearly defined area of the exclusive economic zone where special mandatory measures have been adopted pursuant to article 211, paragraph 6, of the United Nations Convention on the Law of the Sea, 1982;

(e) Proximity of shipping routes or established traffic lanes;

(f) traffic density and frequency;

(g) Type of traffic;

(h) nature and quantity of the wreck's cargo, the amount and types of oil (such

as bunker oil an d lubricating oil) on board the wreck and, in particular, the damage likely to result should the cargo or oil be released into the marine environment;

(i) Vulnerability of port facilities;

(j) Prevailing meteorological and hydrographical conditions;

(k) submarine topography of the area;

(l) Height of the wreck above or below the surface of the water at lowest astronomical tide;

(m) acoustic and magnetic profiles of the wreck;

(n) Proximity of offshore installations, pipelines, telecommunications cables and similar structures; and

(o) Any other circumstances that might necessitate the removal of the wreck.

ARTICLE 7 LOCATING WRECKS

1. Upon becoming aware of a wreck, the Affected State shall use all practicable means, including the good offices of States and organizations, to warn mariners and the States concerned of the nature and location of the wreck as a matter of urgency.

2. If the Affected State has reason to believe that a wreck poses a hazard, it shall ensure that all practicable steps are taken to establish the precise location of the wreck.

ARTICLE 8 MARKING OF WRECKS

1. If the Affected State determines that a wreck constitutes a hazard, that State shall ensure that all reasonable steps are taken to mark the wreck.

2. In marking the wreck, all practicable steps shall be taken to ensure that the markings conform to the internationally accepted system of buoyage in use in the area where the wreck is located.

3. The Affected State shall promulgate the particulars of the marking of the wreck by use of all appropriate means, including the appropriate nautical publications.

ARTICLE 9 MEASURES TO FACILITATE THE REMOVAL OF WRECKS

1. If the Affected State determines that a wreck constitutes a hazard, that State shall immediately:

(a) inform the State of the ship's registry and the registered owner; and

(b) proceed to consult the State of the ship's registry and other States affected by the wreck regarding measures to be taken in relation to the wreck.

2. The registered owner shall remove a wreck determined to constitute a hazard.

3. When a wreck has been determined to constitute a hazard, the registered owner, or other interested party, shall provide the competent authority of the Affected State with evidence of insurance or other financial security as required by article 12.

4. The registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the owner. Before such removal commences, the Affected State may lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment.

5. When the removal referred to in paragraphs 2 and 4 has commenced, the Affected State may intervene in the removal only to the extent necessary to ensure that the removal proceeds effectively in a manner that is consistent with considerations of safety and protection of the marine environment.

6. The Affected State shall:

(a) Set a reasonable deadline within which the registered owner must remove the wreck, taking into account the nature of the hazard determined in accordance with article 6;

(b) Inform the registered owner in writing of the deadline it has set and specify that, if the registered owner does not remove the wreck within that deadline, it may remove the wreck at the registered owner's expense; and

(c) Inform the registered owner in writing that it intends to intervene immediately in circumstances where the hazard becomes particularly severe.

7. If the registered owner does not remove the wreck within the deadline set in accordance with paragraph 6(a), or the registered owner cannot be contacted, the Affected State may remove the wreck by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment.

8. In circumstances where immediate action is required and the Affected State has informed the State of the ship's registry and the registered owner accordingly, it may remove the wreck by the most practical and expeditious means available,

consistent with considerations of safety and protection of the marine environment.

9. States Parties shall take appropriate measures under their national law to ensure that their registered owners comply with paragraphs 2 and 3.

10. States Parties give their consent to the Affected State to act under paragraphs 4 to 8, where required.

11. The information referred to in this article shall be provided by the Affected State to the registered owner identified in the reports referred to in article 5, paragraph 2.

ARTICLE 10 LIABILITY OF THE OWNER

1. Subject to article 11, the registered owner shall be liable for the costs of locating, marking and removing the wreck under articles 7, 8 and 9, respectively, unless the registered owner proves that the maritime casualty that caused the wreck:

(a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;

(b) was wholly caused by an act or omission done with intent to cause damage by a third party; or

(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

2. Nothing in this Convention shall affect the right of the registered owner to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

3. No claim for the costs referred to in paragraph 1 may be made against the registered owner otherwise than in accordance with the provisions of this Convention. This is without prejudice to the rights and obligations of a State Party that has made a notification under article 3, paragraph 2 in relation to wrecks located in its territory, including the territorial sea, other than locating, marking and removing in accordance with this Convention.

4. Nothing in this article shall prejudice any right of recourse against third parties.

ARTICLE 11 EXCEPTIONS TO LIABILITY

1. The registered owner shall not be liable under this Convention for the costs

mentioned in article 10, paragraph 1 if, and to the extent that, liability for such costs would be in conflict with:

(a) The International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended;

(b) the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended;

(c) the Convention on Third Party Liability in the Field of Nuclear Energy, 1960, as amended, or the Vienna Convention on Civil Liability for Nuclear Damage, 1963, as amended; or national law governing or prohibiting limitation of liability for nuclear damage; or

(d) the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, as amended; provided that the relevant convention is applicable and in force.

2. To the extent that measures under this Convention are considered to be salvage under applicable national law or an international convention, such law or convention shall apply to questions of the remuneration or compensation payable to salvors to the exclusion of the rules of this Convention.

ARTICLE 12 COMPULSORY INSURANCE OR OTHER FINANCIAL SECURITY

1. The registered owner of a ship of 300 gross tonnage and above and flying the flag of a State Party shall be required to maintain insurance or other financial security, such as a guarantee of a bank or similar institution, to cover liability under this Convention in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases not exceeding an amount calculated in accordance with article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

2. A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship of 300 gross tonnage and above by the appropriate authority of the State of the ship's registry after determining that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party, such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by

the appropriate authority of any State Party. This compulsory insurance certificate shall be in the form of the model set out in the annex to this Convention, and shall contain the following particulars:

(a) Name of the ship, distinctive number or letters and port of registry;

(b) Gross tonnage of the ship;

(c) Name and principal place of business of the registered owner;

(d) IMO ship identification number;

(e) Type and duration of security;

(f) Name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and

(g) Period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

3. (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or Organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

(b) A State Party shall notify the Secretary-General of:

(i) The specific responsibilities and conditions of the authority delegated to an institution or organization recognized by it;

(ii) The withdrawal of such authority; and

(iii) The date from which such authority or withdrawal of such authority takes effect. An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

(c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

4. The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language(s) of the State may be omitted.

5. The certificate shall be carried on board the ship and a copy shall be

deposited with the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authorities issuing or certifying the certificate.

6. An insurance or other financial security shall not satisfy the requirements of this article if it can cease for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under paragraph 2 before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 5 unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification, which results in the insurance or security no longer satisfying the requirements of this article.

7. The State of the ship's registry shall, subject to the provisions of this article and having regard to any guidelines adopted by the Organization on the financial responsibility of the registered owners, determine the conditions of issue and validity of the certificate.

8. Nothing in this Convention shall be construed as preventing a State Party from relying on information obtained from other States or the Organization or other international organizations relating to the financial standing of providers of insurance or financial security for the purposes of this Convention. In such cases, the State Party relying on such information is not relieved of its responsibility as a State issuing the certificate required by paragraph 2.

9. Certificates issued and certified under the authority of a State Party shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties as having the same force as certificates issued or certified by them, even if issued or certified in respect of a ship not registered in a State Party. A State Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the certificate is not financially capable of meeting the obligations imposed by this Convention.

10. Any claim for costs arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner's liability. In such a case the defendant may invoke the defences (other than the bankruptcy or winding up of the registered owner) that the registered owner would have been entitled to invoke, including limitation of liability under any applicable national or international regime. Furthermore, even if the registered

owner is not entitled to limit liability, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the maritime casualty was caused by the willful misconduct of the registered owner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the registered owner against the defendant. The defendant shall in any event have the right to require the registered owner to be joined in the proceedings.

11. A State Party shall not permit any ship entitled to fly its flag to which this article applies to operate at any time unless a certificate has been issued under paragraphs 2 or 14.

12. Subject to the provisions of this article, each State Party shall ensure, under its national law, that insurance or other security to the extent required by paragraph 1 is in force in respect of any ship of 300 gross tonnage and above, wherever registered, entering or leaving a port in its territory, or arriving at or leaving from an offshore facility in its territorial sea.

13. Notwithstanding the provisions of paragraph 5, a State Party may notify the Secretary-General that, for the purposes of paragraph 12, ships are not required to carry on board or to produce the certificate required by paragraph 2, when entering or leaving a port in its territory, or arriving at or leaving from an offshore facility in its territorial sea, provided that the State Party which issues the certificate required by paragraph 2 has notified the Secretary-General that it maintains records in an electronic format, accessible to all States Parties, attesting the existence of the certificate and enabling States Parties to discharge their obligations under paragraph 12.

14. If insurance or other financial security is not maintained in respect of a ship owned by a State Party, the provisions of this article relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authority of the State of registry, stating that it is owned by that State and that the ship's liability is covered within the limits prescribed in paragraph 1. Such a certificate shall follow as closely as possible the model prescribed by paragraph 2.

ARTICLE 13 TIME LIMITS

Rights to recover costs under this Convention shall be extinguished unless an

action is brought hereunder within three years from the date when the hazard has been determined in accordance with this Convention. However, in no case shall an action be brought after six years from the date of the maritime casualty that resulted in the wreck. Where the maritime casualty consists of a series of occurrences, the six-year period shall run from the date of the first occurrence.

ARTICLE 14 AMENDMENT PROVISIONS

1. At the request of not less than one-third of States Parties, a conference shall be convened by the Organization for the purpose of revising or amending this Convention.

2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to this Convention, as amended.

ARTICLE 15 SETTLEMENT OF DISPUTES

1. Where a dispute arises between two or more States Parties regarding the interpretation or application of this Convention, they shall seek to resolve their dispute, in the first instance, through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.

2. If no settlement is possible within a reasonable period of time not exceeding twelve months after one State Party has notified another that a dispute exists between them, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea, 1982, shall apply mutatis mutandis, whether or not the States party to the dispute are also States Parties to the United Nations Convention on the Law of the Sea, 1982.

3. Any procedure chosen by a State Party to this Convention and to the United Nations Convention on the Law of the Sea, 1982, pursuant to Article 287 of the latter, shall apply to the settlement of disputes under this article, unless that State Party, when ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, chooses another procedure pursuant to Article 287 for the purpose of the settlement of disputes arising out of this Convention.

4. A State Party to this Convention which is not a Party to the United Nations Convention on the Law of the Sea, 1982, when ratifying, accepting, approving or

acceding to this Convention or at any time thereafter shall be free to choose, by means of a written declaration, one or more of the means set out in Article 287, paragraph 1, of the United Nations Convention on the Law of the Sea, 1982, for the purpose of settlement of disputes under this Article. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is party, which is not covered by a declaration in force. For the purpose of conciliation and arbitration, in accordance with Annexes V and VII of the United Nations Convention on the Law of the Sea, 1982, such State shall be entitled to nominate conciliators and arbitrators to be included in the lists referred to in Annex V, Article 2, and Annex VII, Article 2, for the settlement of disputes arising out of this Convention.

5. A declaration made under paragraphs 3 and 4 shall be deposited with the Secretary-General, who shall transmit copies thereof to the States Parties.

ARTICLE 16 RELATIONSHIP TO OTHER CONVENTIONS AND INTERNATIONAL AGREEMENTS

Nothing in this Convention shall prejudice the rights and obligations of any State under the United Nations Convention on the Law of the Sea, 1982, and under the customary international law of the sea.

ARTICLE 17 SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be open for signature at the Headquarters of the Organization from 19 November 2007 until 18 November 2008 and shall thereafter remain open for accession.

(a) States may express their consent to be bound by this Convention by:

(i) Signature without reservation as to ratification, acceptance or approval; or

(ii) Signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(iii) Accession.

(b) Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

ARTICLE 18 ENTRY INTO FORCE

1. This Convention shall enter into force twelve months following the date on which ten States have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.

2. For any State which ratifies, accepts, approves or accedes to this Convention after the conditions in paragraph 1 for entry into force have been met, this Convention shall enter into force three months following the date of deposit by such State of the appropriate instrument, but not before this Convention has entered into force in accordance with paragraph 1.

ARTICLE 19 DENUNCIATION

1. This Convention may be denounced by a State Party at any time after the expiry of one year following the date on which this Convention comes into force for that State.

2. Denunciation shall be effected by the deposit of an instrument to that effect with the Secretary-General.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, following its receipt by the Secretary-General.

ARTICLE 20 DEPOSITARY

1. This Convention shall be deposited with the Secretary General.

2. The Secretary-General shall:

(a) Inform all States which have signed or acceded to this Convention of:

(i) Each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) The date of entry into force of this Convention;

(iii) The deposit of any instrument of denunciation of this Convention, together with the date of the deposit and the date on which the denunciation takes effect; and

(iv) Other declarations and notifications received pursuant to this Convention;

(b) Transmit certified true copies of this Convention to all States that have signed or acceded to this Convention.

3. As soon as this Convention enters into force, a certified true copy of the text shall be transmitted by the Secretary-General to the Secretary-General of the

United Nations, for registration and publication in accordance with Article 102 of the Charter of the United Nations.

ARTICLE 21 LANGUAGES

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE IN NAIROBI this eighteenth day of May two thousand and seven.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose have signed this Convention.

Athens Convention relating to the Carriage of Passengers and their Luggage by Sea

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002, which substantially raises the limits of liability for the death of, or personal injury to, a passenger on a ship, enters into force on **23 April 2014**.

The higher limits of liability will apply to ships registered in the following States which have ratified the 2002 treaty: Albania, Belgium, Belize, Bulgaria, Croatia, Denmark, Greece, Latvia, Malta, the Netherlands, Norway, Palau, Panama, Saint Kitts and Nevis, Serbia, Syrian Arab Republic and the United Kingdom. Additionally, the Convention is mandatory for European Union Member States (including those that have not ratified the Athens Protocol regime yet as individual States) to the extent that the European Union has competence over matters governed by the Protocol, as the European Union has ratified the treaty under a novel article in the Protocol which allows for a Regional Economic Integration Organization, which is constituted by sovereign States that have transferred competence over certain matters governed by this Protocol to that Organization, to sign, ratify, accept, approve or accede to the Protocol.

Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974

The States Parties to this Protocol,

CONSIDERING that it is desirable to revise the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, done at Athens on 13 December 1974, to provide for enhanced compensation, to introduce strict liability, to establish a simplified procedure for updating the limitation amounts, and to ensure compulsory insurance for the benefit of passengers,

RECALLING that the 1976 Protocol to the Convention introduces the Special Drawing Right as the Unit of Account in place of the gold franc,

HAVING NOTED that the 1990 Protocol to the Convention, which provides for enhanced compensation and a simplified procedure for updating the limitation

amounts, has not entered into force,

HAVE AGREED as follows:

Article 1

For the purposes of this Protocol:

1. "Convention" means the text of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

2. "Organization" means the International Maritime Organization.

3. "Secretary-General" means the Secretary-General of the Organization.

Article 2

Article 1, paragraph 1 of the Convention is replaced by the following text:

1. a) "carrier" means a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by that person or by a performing carrier;

b) "performing carrier" means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage; and

c) "carrier who actually performs the whole or a part of the carriage" means the performing carrier, or, in so far as the carrier actually performs the carriage, the carrier.

Article 3

1. Article 1, paragraph 10 of the Convention is replaced by the following: 10. "Organization" means the International Maritime Organization.

2. The following text is added as Article 1, paragraph 11, of the Convention: 11 "Secretary-General" means the Secretary-General of the Organization.

Article 4 Liability of the carrier

Article 3 of the Convention is replaced by the following text:

Article 3 Liability of the carrier

1. For the loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident, the carrier shall be liable to the extent that such loss in respect of that passenger on each distinct occasion does not exceed 250,000 units of account, unless the carrier proves that the incident:

a) resulted from an act of war, hostilities, civil war, insurrection or a natural

phenomenon of an exceptional, inevitable and irresistible character; or

b) was wholly caused by an act or omission done with the intent to cause the incident by a third party. If and to the extent that the loss exceeds the above limit, the carrier shall be further liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

2. For the loss suffered as a result of the death of or personal injury to a passenger not caused by a shipping incident, the carrier shall be liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect shall lie with the claimant.

3. For the loss suffered as a result of the loss of or damage to cabin luggage, the carrier shall be liable if the incident which caused the loss was due to the fault or neglect of the carrier. The fault or neglect of the carrier shall be presumed for loss caused by a shipping incident.

4. For the loss suffered as a result of the loss of or damage to luggage other than cabin luggage, the carrier shall be liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

5. For the purposes of this Article:

a) “shipping incident” means shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship;

b) fault or neglect of the carrier” includes the fault or neglect of the servants of the carrier, acting within the scope of their employment;

c) “defect in the ship” means any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers; or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding; or when used for the launching of life saving appliances; and

d) “loss” shall not include punitive or exemplary damages.

6. The liability of the carrier under this Article only relates to loss arising from incidents that occurred in the course of the carriage. The burden of proving that the incident which caused the loss occurred in the course of the carriage, and the extent of the loss, shall lie with the claimant.

7. Nothing in this Convention shall prejudice any right of recourse of the carrier against any third party, or the defence of contributory negligence under Article 6 of this Convention. Nothing in this Article shall prejudice any right of limitation under Articles 7 or 8 of this Convention.

8. Presumptions of fault or neglect of a party or the allocation of the burden of proof to a party shall not prevent evidence in favour of that party from being considered.

Article 5

The following text is added as Article 4bis of the Convention:

Article 4bis

Compulsory insurance

1. When passengers are carried on board a ship registered in a State Party that is licensed to carry more than twelve passengers, and this Convention applies, any carrier who actually performs the whole or a part of the carriage shall maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under this Convention in respect of the death of and personal injury to passengers. The limit of the compulsory insurance or other financial security shall not be less than 250,000 units of account per passenger on each distinct occasion.

2. A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party, such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This certificate shall be in the form of the model set out in the annex to this Convention and shall contain the following particulars:

a) name of ship, distinctive number or letters and port of registry;

b) name and principal place of business of the carrier who actually performs the whole or a part of the carriage;

c) IMO ship identification number;

d) type and duration of security;

e) name and principal place of business of insurer or other person providing financial security and, where appropriate, place of business where the insurance or other financial security is established; and

f) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other financial security.

3. a) A State Party may authorize an institution or an Organization recognised by it to issue the certificate. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued, and shall undertake to ensure the necessary arrangements to satisfy this obligation.

b) A State Party shall notify the Secretary-General of:

i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognised by it;

ii) the withdrawal of such authority; and

iii) the date from which such authority or withdrawal of such authority takes effect. An authority delegated shall not take effect prior to three months from the date from which notification to that effect was given to the Secretary-General.

c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not complied with. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

4. The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages, and, where the State so decides, the official language of the State may be omitted.

5. The certificate shall be carried on board the ship, and a copy shall be deposited with the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authority of the State issuing or certifying the certificate.

6. An insurance or other financial security shall not satisfy the requirements of this Article if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate, before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 5, unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification which results in the insurance or other financial security no longer satisfying the requirements of this Article.

7. The State of the ship's registry shall, subject to the provisions of this Article, determine the conditions of issue and validity of the certificate.

8. Nothing in this Convention shall be construed as preventing a State Party from relying on information obtained from other States or the Organization or other international organizations relating to the financial standing of providers of insurance or other financial security for the purposes of this Convention. In such cases, the State Party relying on such information is not relieved of its responsibility as a State issuing the certificate.

9. Certificates issued or certified under the authority of a State Party shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties as having the same force as certificates issued or certified by them, even if issued or certified in respect of a ship not registered in a State Party. A State Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the insurance certificate is not financially capable of meeting the obligations imposed by this Convention.

10. Any claim for compensation covered by insurance or other financial security pursuant to this Article may be brought directly against the insurer or other person providing financial security. In such case, the amount set out in paragraph 1 applies as the limit of liability of the insurer or other person providing financial security, even if the carrier or the performing carrier is not entitled to limitation of liability. The defendant may further invoke the defences (other than the bankruptcy or winding up) which the carrier referred to in paragraph 1 would have been entitled to invoke in accordance with this Convention.

Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the assured, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the assured against the defendant. The defendant shall in any event have the right to require the carrier and the performing carrier to be joined in the proceedings.

11. Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 shall be available exclusively for the satisfaction of claims under this Convention, and any payments made of such sums shall discharge any liability arising under this Convention to the extent of the amounts paid.

12. A State Party shall not permit a ship under its flag to which this Article applies to operate at any time unless a certificate has been issued under paragraphs 2 or 15.

13. Subject to the provisions of this Article, each State Party shall ensure,

under its national law, that insurance or other financial security, to the extent specified in paragraph 1, is in force in respect of any ship that is licensed to carry more than twelve passengers, wherever registered, entering or leaving a port in its territory in so far as this Convention applies.

14. Notwithstanding the provisions of paragraph 5, a State Party may notify the Secretary-General that, for the purposes of paragraph 13, ships are not required to carry on board or to produce the certificate required by paragraph 2 when entering or leaving ports in its territory, provided that the State Party which issues the certificate has notified the Secretary-General that it maintains records in an electronic format, accessible to all States Parties, attesting the existence of the certificate and enabling States Parties to discharge their obligations under paragraph 13.

15. If insurance or other financial security is not maintained in respect of a ship owned by a State Party, the provisions of this Article relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authorities of the State of the ship's registry, stating that the ship is owned by that State and that the liability is covered within the amount prescribed in accordance with paragraph 1. Such a certificate shall follow as closely as possible the model prescribed by paragraph 2.

Article 6 Limit of liability for death and personal injury

Article 7 of the Convention is replaced by the following text:

Article 7 Limit of liability for death and personal injury

1. The liability of the carrier for the death of or personal injury to a passenger under Article 3 shall in no case exceed 400,000 units of account per passenger on each distinct occasion. Where, in accordance with the law of the court seized of the case, damages are awarded in the form of periodical income payments, the equivalent capital value of those payments shall not exceed the said limit.

2. A State Party may regulate by specific provisions of national law the limit of liability prescribed in paragraph 1, provided that the national limit of liability, if any, is not lower than that prescribed in paragraph 1. A State Party, which makes use of the option provided for in this paragraph, shall inform the Secretary-General of the limit of liability adopted or of the fact that there is none.

Article 7 Limit of liability for loss of or damage to luggage and vehicles

Article 8 of the Convention is replaced by the following text:

Article 8 Limit of liability for loss of or damage to luggage and vehicles

1. The liability of the carrier for the loss of or damage to cabin luggage shall in no case exceed 2,250 units of account per passenger, per carriage.

2. The liability of the carrier for the loss of or damage to vehicles including all luggage carried in or on the vehicle shall in no case exceed 12,700 units of account per vehicle, per carriage.

3. The liability of the carrier for the loss of or damage to luggage other than that mentioned in paragraphs 1 and 2 shall in no case exceed 3,375 units of account per passenger, per carriage.

4. The carrier and the passenger may agree that the liability of the carrier shall be subject to a deductible not exceeding 330 units of account in the case of damage to a vehicle and not exceeding 149 units of account per passenger in the case of loss of or damage to other luggage, such sum to be deducted from the loss or damage.

Article 8 Unit of Account and conversion

Article 9 of the Convention is replaced by the following text:

Article 9 Unit of Account and conversion

1. The Unit of Account mentioned in this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Article 3, paragraph 1, Article 4bis, paragraph 1, Article 7, paragraph l, and Article 8 shall be converted into the national currency of the State of the court seized of the case on the basis of the value of that currency by reference to the Special Drawing Right on the date of the judgment or the date agreed upon by the parties. The value of the national currency, in terms of the Special Drawing Right, of a State Party which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect on the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State Party which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State Party.

2. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 may, at the time of ratification, acceptance, approval of or accession to this Convention or at any time thereafter, declare that the Unit of Account referred to in paragraph 1 shall be equal to 15 gold francs. The gold franc referred to in this paragraph corresponds to sixty-five and a half milligrams of gold of millesimal

fineness nine hundred. The conversion of the gold franc into the national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1, and the conversion mentioned in paragraph 2 shall be made in such a manner as to express in the national currency of the States Parties, as far as possible, the same real value for the amounts in Article 3, paragraph 1, Article 4bis, paragraph 1, Article 7, paragraph 1, and Article 8 as would result from the application of the first three sentences of paragraph 1. States shall communicate to the Secretary-General the manner of calculation pursuant to paragraph 1, or the result of the conversion in paragraph 2, as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

Article 9

Article 16, paragraph 3, of the Convention is replaced by the following text:

3. The law of the Court seized of the case shall govern the grounds for suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of any one of the following periods of time:

a) A period of five years beginning with the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later; or, if earlier

b) a period of three years beginning with the date when the claimant knew or ought reasonably to have known of the injury, loss or damage caused by the incident.

Article 10 Competent jurisdiction

Article 17 of the Convention is replaced by the following text:

Article 17 Competent jurisdiction

1. An action arising under Articles 3 and 4 of this Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention, and subject to the domestic law of each State Party governing proper venue within those States with multiple possible forums: a) the court of the State of permanent residence or principal place of business of the defendant, or b) the court of the State of departure or that of the destination according to the contract of carriage, or c) the court of

the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or d) the court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

2. Actions under Article 4bis of this Convention shall, at the option of the claimant, be brought before one of the courts where action could be brought against the carrier or performing carrier according to paragraph 1.

3. After the occurrence of the incident which has caused the damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration.

Article 11 Recognition and enforcement

The following text is added as Article 17bis of the Convention:

Article 17bis Recognition and enforcement

1. Any judgment given by a court with jurisdiction in accordance with Article 17 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except (a) where the judgment was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present the case.

2. A judgment recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

3. A State Party to this Protocol may apply other rules for the recognition and enforcement of judgments, provided that their effect is to ensure that judgments are recognised and enforced at least to the same extent as under paragraphs 1 and 2.

Article 12 Invalidity of contractual provisions

Article 18 of the Convention is replaced by the following text:

Article 18 Invalidity of contractual provisions

Any contractual provision concluded before the occurrence of the incident which has caused the death of or personal injury to a passenger or the loss of or damage to the passenger's luggage, purporting to relieve any person liable under this Convention of liability towards the passenger or to prescribe a lower limit of liability than that fixed in this Convention except as provided in Article 8, paragraph 4, and any such provision purporting to shift the burden of proof which rests on the carrier or performing carrier, or having the effect of restricting the

options specified in Article 17, paragraphs 1 or 2, shall be null and void, but the nullity of that provision shall not render void the contract of carriage which shall remain subject to the provisions of this Convention.

Article 13 Nuclear damage

Article 20 of the Convention is replaced by the following text:

Article 20 Nuclear damage

No liability shall arise under this Convention for damage caused by a nuclear incident: a) if the operator of a nuclear installation is liable for such damage under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by its Additional Protocol of 28 January 1964, or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or any amendment or Protocol thereto which is in force; or b) if the operator of a nuclear installation is liable for such damage by virtue of a national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or the Vienna Conventions or any amendment or Protocol thereto which is in force.

Article 14 Model certificate

1. The model certificate set out in the annex to this Protocol shall be incorporated as an annex to the Convention.

2. The following text is added as Article 1bis of the Convention:

Article 1bis

Annex

The annex to this Convention shall constitute an integral part of the Convention.

Article 15 Interpretation and application

1. The Convention and this Protocol shall, as between the Parties to this Protocol, be read and interpreted together as one single instrument.

2. The Convention as revised by this Protocol shall apply only to claims arising out of occurrences which take place after the entry into force for each State of this Protocol.

3. Articles 1 to 22 of the Convention, as revised by this Protocol, together with Articles 17 to 25 of this Protocol and the annex thereto, shall constitute and be called the Athens Convention relating to the Carriage of Passengers and their

Luggage by Sea, 2002.

Article 16 Final clauses of the Convention

The following text is added as Article 22bis of the Convention.

Article 22bis Final clauses of the Convention

The final clauses of this Convention shall be Articles 17 to 25 of the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974. References in this Convention to States Parties shall be taken to mean references to States Parties to that Protocol.

Final clauses

Article 17 Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open for signature at the Headquarters of the Organization from 1 May 2003 until 30 April 2004 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Protocol by:

a) signature without reservation as to ratification, acceptance or approval; or b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or

c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

4. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Protocol with respect to all existing States Parties, or after the completion of all measures required for the entry into force of the amendment with respect to those States Parties shall be deemed to apply to this Protocol as modified by the amendment.

5. A State shall not express its consent to be bound by this Protocol unless, if Party thereto, it denounces:

a) the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, done at Athens on 13 December 1974;

b) the Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, done at London on 19 November 1976; and

c) the Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, done at London on 29 March 1990, with effect from the time that this Protocol will enter into force for that State

in accordance with Article 20.

Article 18 States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Protocol, it may at the time of signature, ratification, acceptance, approval or accession declare that this Protocol shall extend to all its territorial units or only to one or more of them, and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Secretary-General and shall state expressly the territorial units to which this Protocol applies.

3. In relation to a State Party which has made such a declaration:

a) references to the State of a ship's registry and, in relation to a compulsory insurance certificate, to the issuing or certifying State, shall be construed as referring to the territorial unit respectively in which the ship is registered and which issues or certifies the certificate;

b) references to the requirements of national law, national limit of liability and national currency shall be construed respectively as references to the requirements of the law, the limit of liability and the currency of the relevant territorial unit; and

c) references to courts, and to judgments which must be recognised in States Parties, shall be construed as references respectively to courts of, and to judgments which must be recognised in, the relevant territorial unit.

Article 19 Regional Economic Integration Organizations

1. A Regional Economic Integration Organization, which is constituted by sovereign States that have transferred competence over certain matters governed by this Protocol to that Organization, may sign, ratify, accept, approve or accede to this Protocol. A Regional Economic Integration Organization which is a Party to this Protocol shall have the rights and obligations of a State Party, to the extent that the Regional Economic Integration Organization has competence over matters governed by this Protocol.

2. Where a Regional Economic Integration Organization exercises its right of vote in matters over which it has competence, it shall have a number of votes equal to the number of its Member States which are Parties to this Protocol and which have transferred competence to it over the matter in question. A Regional Economic Integration Organization shall not exercise its right to vote if its Member States exercise theirs, and vice versa.

3. Where the number of States Parties is relevant in this Protocol, including but not limited to Articles 20 and 23 of this Protocol, the Regional Economic Integration Organization shall not count as a State Party in addition to its Member States which are States Parties.

4. At the time of signature, ratification, acceptance, approval or accession the Regional Economic Integration Organization shall make a declaration to the Secretary-General specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organization by its Member States which are signatories or Parties to this Protocol and any other relevant restrictions as to the scope of that competence. The Regional Economic Integration Organization shall promptly notify the Secretary-General of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph. Any such declarations shall be made available by the Secretary-General pursuant to Article 24 of this Protocol.

5. States Parties which are Member States of a Regional Economic Integration Organization which is a Party to this Protocol shall be presumed to have competence over all matters governed by this Protocol in respect of which transfers of competence to the Organization have not been specifically declared or notified under paragraph 4.

Article 20 Entry into force

1. This Protocol shall enter into force twelve months following the date on which 10 States have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.

2. For any State which ratifies, accepts, approves or accedes to this Protocol after the conditions in paragraph 1 for entry into force have been met, this Protocol shall enter into force three months after the date of deposit by such State of the appropriate instrument, but not before this Protocol has entered into force in agreement with paragraph 1.

Article 21 Denunciation

1. This Protocol may be denounced by any State Party at any time after the date on which this Protocol comes into force for that State.

2. Denunciation shall be effected by the deposit of an instrument to that effect with the Secretary-General.

3. A denunciation shall take effect twelve months, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General.

4. As between the States Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 25 thereof shall not be construed in any way as a denunciation of the Convention as revised by this Protocol.

Article 22 Revision and Amendment

1. A Conference for the purpose of revising or amending this Protocol may be convened by the Organization.

2. The Organization shall convene a Conference of States Parties to this Protocol for revising or amending this Protocol at the request of not less than one-third of the States Parties.

Article 23 Amendment of limits

1. Without prejudice to the provisions of Article 22, the special procedure in this Article shall apply solely for the purposes of amending the limits set out in Article 3, paragraph 1, Article 4bis, paragraph 1, Article 7, paragraph 1 and Article 8 of the Convention as revised by this Protocol.

2. Upon the request of at least one half, but in no case less than six, of the States Parties to this Protocol, any proposal to amend the limits, including the deductibles, specified in Article 3, paragraph 1, Article 4bis, paragraph 1, Article 7, paragraph 1, and Article 8 of the Convention as revised by this Protocol shall be circulated by the Secretary-General to all Members of the Organization and to all States Parties.

3. Any amendment proposed and circulated as above shall be submitted to the Legal Committee of the Organization (hereinafter referred to as "the Legal Committee") for consideration at a date at least six months after the date of its circulation.

4. All States Parties to the Convention as revised by this Protocol, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Legal Committee for the consideration and adoption of amendments.

5. Amendments shall be adopted by a two-thirds majority of the States Parties to the Convention as revised by this Protocol present and voting in the Legal Committee expanded as provided for in paragraph 4, on condition that at least one half of the States Parties to the Convention as revised by this Protocol shall be

present at the time of voting.

6. When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.

7. a) No amendment of the limits under this Article may be considered less than five years from the date on which this Protocol was opened for signature nor less than five years from the date of entry into force of a previous amendment under this Article.

b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in the Convention as revised by this Protocol increased by six per cent per year calculated on a compound basis from the date on which this Protocol was opened for signature.

c) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in the Convention as revised by this Protocol multiplied by three.

8. Any amendment adopted in accordance with paragraph 5 shall be notified by the Organization to all States Parties. The amendment shall be deemed to have been accepted at the end of a period of eighteen months after the date of notification, unless within that period not less than one fourth of the States that were States Parties at the time of the adoption of the amendment have communicated to the Secretary-General that they do not accept the amendment, in which case the amendment is rejected and shall have no effect.

9. An amendment deemed to have been accepted in accordance with paragraph 8 shall enter into force eighteen months after its acceptance.

10. All States Parties shall be bound by the amendment, unless they denounce this Protocol in accordance with Article 21, paragraphs 1 and 2 at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

11. When an amendment has been adopted but the eighteen-month period for its acceptance has not yet expired, a State which becomes a State Party during that period shall be bound by the amendment if it enters into force. A State which becomes a State Party after that period shall be bound by an amendment which has been accepted in accordance with paragraph 8. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Protocol enters into force for that State, if later.

Article 24 Depositary

1. This Protocol and any amendments adopted under Article 23 shall be deposited with the Secretary-General.

2. The Secretary-General shall:

a) inform all States which have signed or acceded to this Protocol of:

i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof;

ii) each declaration and communication under Article 9, paragraphs 2 and 3, Article 18, paragraph 1 and Article 19, paragraph 4 of the Convention as revised by this Protocol; iii) the date of entry into force of this Protocol;

iv) any proposal to amend the limits which has been made in accordance with Article 23, paragraph 2 of this Protocol;

v) any amendment which has been adopted in accordance with Article 23, paragraph 5 of this Protocol;

vi) any amendment deemed to have been accepted under Article 23, paragraph 8 of this Protocol, together with the date on which that amendment shall enter into force in accordance with paragraphs 9 and 10 of that Article;

vii) the deposit of any instrument of denunciation of this Protocol together with the date of the deposit and the date on which it takes effect;

viii) any communication called for by any Article of this Protocol;

b) transmit certified true copies of this protocol to all States which have signed or acceded to this Protocol.

3. As soon as this Protocol comes into force, the text shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article 25 Languages

This Protocol is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT LONDON this first day of November two thousand and two.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments for that purpose, have signed this Protocol.

南极考察活动行政许可管理规定

（国家海洋局 2014 年 5 月 30 日）

第一章 总 则

第一条 为规范我国南极考察活动行政许可行为，履行南极条约体系规定的权利和义务，保障南极考察活动有序开展，根据《中华人民共和国行政许可法》、国务院第 412 号令和南极条约体系的要求，制定本规定。

第二条 本规定所称南极考察活动是指以科学研究为目的，在南纬 60 度以南的地区，包括该地区的所有冰架开展的相关活动。

第三条 公民、法人或者其他组织开展涉及以下所列事项的南极考察活动时，应当向国家海洋行政主管部门提出申请。

（一）进入南极时携带非南极本土的动物、植物和微生物等有机生物，食物除外；

（二）猎捕哺乳动物、鸟类及无脊椎动物，采摘和采集植物以及其他可能干扰动植物的活动；

（三）采集南极陨石；

（四）进入南极特别保护区的活动；

（五）在南极建立人工建造物的活动；

（六）其他可能损伤南极环境和生态系统的活动。

第四条 开展本规定第三条所列考察活动的申请、受理、审查、批准和监督管理等工作适用本规定。

第五条 对本规定第三条所列考察活动的审批，应当遵循公开、公平、公正、便民、高效的原则。

第六条 遵循科学性、可行性、可持续性、环境友好、生态平衡等原则，对本规定第三条所列考察活动实施总量控制。

第七条 公民、法人或者其他组织对本规定第三条所列考察活动的行政许可享有陈述权、申辩权；有权依法申请行政复议或者提起行政诉讼。

第八条 任何单位和个人对违反本规定的行为有权进行举报，主管部门应当及时核实、处理。

第二章 申请与受理

第九条 国家海洋行政主管部门负责本规定第三条所列考察活动的审批，国家海洋局极地考察办公室承担具体工作。

第十条 国家海洋行政主管部门应当在部门政府网站公示下列与办理本规定第三条所列考察活动相关的行政许可内容：

（一）南极考察活动的行政许可事项、依据和程序；

（二）申请者需要提交的全部材料目录；

（三）受理南极考察活动审批的部门、通信地址、联系电话和监督电话。

国家海洋行政主管部门应当根据申请者的要求，对公示的内容予以说明和解释。

第十一条 公民、法人或者其他组织赴南极开展本规定第三条所列考察活动前，应当向国家海洋行政主管部门提交申请书，并对内容的真实性负责，承担相应的法律责任。申请书包括以下内容：

1. 活动名称；

2. 申请者的信息；

3. 活动方案（包括活动目的、活动周期、活动路线、活动区域、活动内容、交通工具和南极现场后勤支撑能力等）；

4. 带入物品清单；

5. 活动可能产生的环境影响评估；

6. 突发事件应急预案；

7. 南极考察人员名单及身份证明材料；

8. 南极考察人员身体健康证明材料；

9. 自营船舶或航空器开展南极考察活动的，需提供船舶或航空器证书及相应保险合同复印件；租用船舶或航空器开展南极考察活动的，需提供承租方合同或者承诺证明。

第十二条 环境影响评估应包括以下内容：

（一）在南极的活动时间、区域、路线、活动概况等；

（二）活动的替代方案及影响；

（三）活动对南极环境或被采集的动植物生态可能产生的直接和累积影响；

（四）预防和减缓措施及技术论证；

（五）结论。

第十三条 当活动可能对南极环境和生态系统产生轻微或短暂影响时，应当提交初步环境影响评估报告书，由国家海洋行政主管部门审查。

当活动可能对南极环境和生态系统产生大于轻微或短暂影响时，应当提交全面环境影响评估报告书。全面环境影响评估报告书需要提交南极条约协商会议审议。

第十四条 申请者应当在每年 4 月 1 日至 30 日之间提交当年 6 月 1 日至下年度 5 月 31 日之间赴南极开展本规定第三条所列考察活动的申请。

第十五条 国家海洋行政主管部门对申请者提出的本规定第三条所列考察活动的申请，应当根据下列情况分别做出处理：

（一）申请事项依本规定不需要审批的，应当即时告知申请者不予受理；

（二）申请事项依法不属于国家海洋行政主管部门职权范围的，应当即时做出不予受理的决定，并告知申请者向国家有关行政主管部门提交申请；

（三）申请材料存在可以当场更正错误的，应当允许申请者当场更正并重新提交，但申请材料中涉及技术性的实质内容除外；

（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 5 日内一次告知申请者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；补正的申请材料应当在告知之后 5 日内补交，仍然不符合有关要求的，国家海洋行政主管部门可以要求继续补正；

（五）申请材料齐全、符合法定形式，或者申请者按照要求提交全部补正申请材料的，应当受理行政许可申请。

第十六条 国家海洋行政主管部门受理或者不予受理本规定第三条所列考察活动申请的，应当出具加盖国家海洋行政主管部门专用印章和注明日期的书面凭证。

第十七条 本规定第三条所列考察活动申请受理之后至行政许可决定做出前，申请者书面要求撤回申请的，可以撤回；对撤回申请的，国家海洋行政主管部门终止办理，并通知申请者。

第十八条 变更下列内容之一的，申请者应当在前往南极前向国家海洋行政主管部门提交变更申请：

（一）活动的起止时间；

（二）活动人员的名单及基本情况；

（三）搭乘的交通工具等；

（四）带入物品的清单。

第十九条 有下列情况之一的，应当重新申请：

（一）改变活动的目的、内容及预期目标；

（二）改变在南极的活动路线；

（三）超过批准的有效期限进行活动的；

（四）其他重大事项的改变。

第三章 审查与决定

第二十条 国家海洋行政主管部门在审查申请时，涉及专业知识或者技术问题需要评审、评价或者检测并依法需要根据评审、评价建议或者检测报告做出审批决定的，可以委托专业机构或者专家进行评审、评价或者检测，并由专业机构或者专家出具评审、评价建议或者检测报告。

第二十一条 国家海洋行政主管部门在受理申请后，视情况组织专家对申请项目进行综合评估论证，并做出行政许可决定。

第二十二条 批准本规定第三条所列考察活动的，应当颁发许可证；不予批准的，应当以书面形式将理由告知申请者。

第二十三条 许可证应当载明下列内容：

（一）活动人员信息；

（二）准许活动的区域；

（三）准许活动的内容；

（四）应履行的义务；

（五）有效期限；

（六）批准机关、批准日期和批准编号。

开展本规定第三条所列考察活动时，应携带许可证。

第二十四条 有下列情形之一的，国家海洋行政主管部门应当做出不予批准的决定：

（一）申请者为无民事行为能力人、限制民事行为能力人，或者由无民事行为能力人、限制民事行为能力人担任法定代表人的法人或者其他组织；

（二）拟开展的南极考察活动违反南极条约体系规定的；

（三）对南极环境或生态系统可能造成重大损伤的；

（四）因违反南极条约体系有关规定，依法被限制再次开展南极考察活动的；

（五）有其他法律、法规禁止的情形的。

第四章 监督管理

第二十五条 本规定第三条所列考察活动结束后，公民、法人或者其他组织的负责人应当填写报告书，并在 30 日内提交国家海洋行政主管部门。

报告书应当包括以下内容：

（一）活动概况；

（二）如开展本规定第三条第一款的活动，说明物品处理情况；

（三）如开展本规定第三条第二、三、四、五款的活动，说明执行情况；

（四）对环境产生的影响和减缓措施；

（五）其他应说明的情况。

第二十六条 在南极发生以下紧急情况时，活动人员可以不经批准而采取必要的应急措施，如有涉及本规定第三条所列考察活动的，应当尽可能将其对南极环境和生态系统的损伤降到最低，并及时向国家海洋行政主管部门或者监督检查人员报告：

（一）人员、船舶和航空器遇险需要紧急救助；

（二）重要装备、设备和设施受到安全威胁；

（三）发生南极环境紧急情况。

活动人员应当在应急措施完成后的 30 日内向国家海洋行政主管部门提供有关情况的详细报告书。

第二十七条 国家海洋行政主管部门应当建立健全行政许可管理制度，对本规定第三条所列考察活动和被许可人实施监督检查。

第二十八条 国家海洋行政主管部门发现本部门工作人员违反规定准予本规定第三条所列考察活动行政许可的，应当立即予以纠正。

第二十九条 国家海洋行政主管部门在南极现场履行监督检查职责时，可采取以下措施：

（一）对在南极取得的样品进行检查；

（二）对在南极使用的设施、装备、车辆、船舶、航空器、保存的记录以及与南极环境和生态系统保护相关的事项进行检查；

（三）要求被检查者出示许可证；

（四）要求被检查者就执行本规定的情况做出说明；

（五）要求被检查者停止违反本规定的行为，履行法定义务。

第三十条 南极考察活动监督检查人员履行职责时，应当出示有效工作证件，并将检查情况和处理结果予以记录，签字后归档。

被检查者应当配合监督检查工作。

第三十一条 申请者以欺骗、贿赂等不正当手段取得本规定第三条所列考察活动许可证的，国家海洋行政主管部门应当给予警告，并撤销其许可证；已经在南极开展活动的，应当责令其立即停止活动，并限期离开南极。

第五章 附 则

第三十二条 本规定所指日期均为工作日，不含法定节假日。

第三十三条 本规定由国家海洋行政主管部门负责解释，自颁布之日起实施。

《中国海洋法学评论》稿约

《中国海洋法学评论》（*China Oceans Law Review*），ISSN：1813-7350，是由厦门大学海洋政策与法律中心、上海交通大学海洋法律与政策研究中心、香港理工大学董浩云国际海事研究中心、台湾中山大学海洋事务研究所以及澳门大学高级法律研究所两岸四地五校联合主办，（香港）中国评论文化有限公司出版的海洋法领域中英双语对照的优秀国际学术期刊。《中国海洋法学评论》秉承“海纳百川，有容乃大”的精神，力求刊发海内外与海洋法律、海洋政策相关的一切研究成果，热忱欢迎专家学者不吝赐稿，兹立稿约如下：

一、鼓励英文著述，同一学术水准稿件，英文著述将优先录用。

二、来稿形式不限，学术专论、评论、判解研究、译作等均可，篇幅长短不拘，不考虑稿件作者的身份和以往学术经历，只有学术水准和学术规范的要求。关于引证规范，请具体参见尾页所附之引证体例。

三、来稿须同一语言下未曾在任何纸质和电子媒介上发表。稿件请附中英文注明作者姓名、学位、工作单位及职务、职称、研究领域和通讯方式等。来稿必复，编辑部在收到来稿两个月内将安排匿名审稿。届时未接到录用通知者，作者可自做他用。来稿一律不退，请作者自留底稿。

四、译作请附寄原文，并附作者或出版者的翻译书面授权许可。译者需保证该译本未侵犯作者或出版者的任何权利，并在可能的损害产生时自行承担损害赔偿责任。《中国海洋法学评论》编辑部及其任何成员不承担由此产生的任何责任。

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六、为扩大本刊及作者知识信息交流渠道，本刊已加入 Westlaw China、北大法宝、台湾华艺、维普、中国知网、超星法源、Heinonline 等中外相关数据库，除非作者在来稿时声明保留，否则即视为同意《中国海洋法学评论》拥有以非专有方式向第三人授予已刊作品电子出版权、信息网络传播权和数字化汇编、复制权；和向《中国社会科学文摘》、《高等学校文科学术文摘》和中国人民大学书报复印资料等文摘类刊物推荐转载已刊作品的权利。

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八、凡向《中国海洋法学评论》编辑部投稿，即视为接受本稿约。来稿请寄电子邮箱：colp@sjtu.edu.cn 或 colr@xmu.edu.cn。为了实现办公信息化，要求作者必须以电子邮件方式投稿，本刊不再接受纸质投稿。

《中国海洋法学评论》编辑部

China Oceans Law Review Call For Papers

China Oceans Law Review (COLR – ISSN：1813-7350) is a compilation of research focusing on ocean-related laws and policies. This Chinese-English bilingual journal is jointly hosted by Shanghai Jiao Tong University Center for Oceans Law and Policy, Xiamen University, Hong Kong Polytechnic University, University of Macau Institute for Advanced Legal Studies and（Taiwan）Sun Yat-sen University and is published semi-annually. Beginning from Spring 2011，COLR is indexed by *Westlaw China*, *Lawinfochina.com, Airiti, Cqvip and Heinonline.*

Papers from all academics and industry practitioners are faithfully respected and welcomed. The agreements for all contributors are as follows:

1. There are no restrictions on the style, idea, perspective or length of the paper.

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3. Please strictly follow the format for academic writings which can be referred to in the "China Oceans Law Review Writing Format" in the appendix of COLR.

4. If your paper is a translation from other professionals, please attach the original paper and literary authority license from the original publisher.

5. Authors are responsible for the text of their contribution, unless declared otherwise. The editorial office reserves the discretion to edit the textual detail.

6. Submissions are subject to double-blind peer review within two months of submission. Authors of selected papers will be paid in a lump-sum. Two free copies of sample books will be offered to the author.

7. Submission of an article implies that the authors have read, understood and agreed to the above statements.

Please include an electronic copy with your submission, either by CD or e-mail (colp@sjtu.edu.cn or colr@xmu.edu.cn).

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短期访问学者招聘

上海交通大学凯原法学院 CMT 国际海事研究中心设立研究课题，面向境内外公开招聘短期访问学者。

一、应聘条件

访问学者应具有海洋、海事专业背景。

二、聘期要求

1. 聘期二至四周；

2. 聘期内撰写一篇 8000 字以上的论文，题目须经双方书面协议，作者须保证无著作权问题，并愿发表于《中国海洋法学评论》；

3. 工作地点为上海交通大学凯原法学院 CMT 国际海事研究中心。

三、工作条件及待遇

1. 中心为访问学者提供必要的办公空间；

2. 中心为访问学者提供一定的经费支持，具体数额另议；

3. 访问学者在沪期间生活自理，中心可提供部分协助。

四、申请材料

1. 个人简历；

2. 拟研究的题目；

3. 详细的联络方式。

联系人：田明、谢月红

电话：021-34204740

电子邮箱：tianmingeve@163.com

联系地址：上海市闵行区东川路 800 号上海交通大学凯原法学院 503 室

Short-term Visiting Scholar Recruitment

The CMT Center for International Maritime Research of KoGuan Law School of Shanghai Jiao Tong University has set up a research project, which is now recruiting short-term visiting scholars from both home and abroad.

I. Qualification for application

The visiting scholar shall have professional background of ocean and maritime affairs.

II. Requirements for the employment duration

1. The employment duration will last two to four weeks;

2. During the employment, the scholar is required to finish a paper of 8,000 words, the topic of which is to be decided through a written agreement between the two parties. The paper should be free from any copyright issue and might be published in *China Oceans Law Review*;

3. The work place will be at the CMT Center for International Maritime Research of KoGuan Law School of Shanghai Jiao Tong University.

III. Working conditions and compensation.

1. The Center will provide the visiting scholar with a necessary office space;

2. The Center will provide the visiting scholar with some financial support, the amount to be arranged;

3. The visiting scholar's living expenses during stay in Shanghai will be borne by himself/herself, and the Center may provide some assistance.

IV. Application materials

1. Curriculum Vitae;
2. The topic proposed for research;
3. Detailed contact information.

Contacts: TIAN Ming and XIE Yuehong
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Email: tianmingeve@163.com
Address: Room 503, KoGuan Law School, Shanghai Jiao Tong University
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中国海洋法学评论

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