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卷首语

中国是一个海洋地理相对不利的国家，因此格外需要加强对于海洋的研究。

中国的渤海是一片内水。黄海、东海和南海也都被邻国所主张的专属经济区所包围，无法延伸向开阔的大洋。虽然中国拥有大陆岸线 1.8 万多公里，以及面积在 500 平方米以上的海岛 5000 多个，岛屿岸线 1.4 万多公里；中国海域已经开发的渔场面积已达 81.8 万平方海里；中国海域还有 30 多个沉积盆地，面积近 70 万平方公里，石油资源量约 250 亿吨，天然气资源量约 8.4 万亿立方米。这些数字看起来似乎都很庞大，但是，一旦用 13 亿人口相除，人均数字却都显得很小。更何况，按照《联合国海洋法公约》的规定，沿海国家可以对于其海岸陆地领土超出 200 海里外的海底自然延伸的部分，主张拥有广阔的“外大陆架”上的丰富天然资源，而中国显然也没有开阔的外大陆架。

这种情况一如中国在陆地上的情况：虽然中国拥有 960 万平方公里的陆地国土，居世界第三位，但 13 亿人口的人均陆地面积仅有 0.007 平方公里，远低于世界人均 0.3 平方公里的水平；就生活必须的水资源来看，全中国近年来的平均淡水资源总量为 2.8 万亿立方米，居世界第 6 位，但是人均占有量也不到世界平均水平的四分之一。

厦门大学素以海洋研究著称。在此基础上，厦门大学法学院近年来积极加强有关海洋法学的教学、研究工作。《中国海洋法学评论》就是厦门大学法学院以及厦门大学海洋政策与法律中心，经过长时间的安排策划，在香港特区出版的一份刊物，希望凝聚国内外海洋法学专家学者们的智慧，不断提升有关的研究水平，藉此对于中国海洋建设的伟大事业，贡献一份实际的力量。

长久以来，“海洋法”一词被用来指海洋公法；而“海商法”被用来指海洋私法。相关的研究也一直泾渭分明地被隔离开来。这就使得海洋相关的法律与政策研究，受到了不必要的制约。事实上，越来越多的学者专家们发现，其实公法与私法的实践或研究，密不可分。一旦落实到海洋政策上，就必然需要两者之间的跨领域研究。为了推展跨领域的研究，更好地保护海洋环境，养护

海洋资源，避免和解决海洋上发生的各种各样的纠纷，“海洋法学”作为一个比较富弹性的名词，应该可以同时包容公法与私法的内涵，妥善地标志出相关研究工作的性质。这是我们为什么将这份刊物定名为《中国海洋法学评论》的缘故。

在《中国海洋法学评论》的首卷中，我们很幸运地邀集到了多位知名学者专家以及几位优秀年轻学者们的大作。其中一部分是有关国际海洋法法庭的研究；一部分是有关于海洋渔业和生物资源管理的研究；一部分是有关于海上运送与海上执法的研究。另外，对于我国海域使用管理的方法、海洋环境的保护，以及国际社会上特别关注的有关美国对《联合国海洋法公约》立场的演变问题，都有值得一读的专文。此外，本刊编辑对于国际海洋法学相关的判例、海洋法学相关活动与发展的动态，以及国内外相关法令条约的介绍，也都选择了若干有意义的文件，提供读者们参考。

我们诚恳地邀请国内外海洋法学的专家学者们，今后不断地惠赐大作，将您的研究心得发表在《中国海洋法学评论》，并且经常提供有建设性的指导意见给我们。让我们一同携手，为中国海洋事业的发展，共同努力。

编辑部　谨识

EDITOR'S NOTE

China, as a geographically disadvantaged country, needs to enhance its maritime research in particular.

The Bohai Sea is the internal water of China. The Yellow Sea, the East China Sea and the South China Sea are all surrounded by the exclusive economic zones claimed by other States. Therefore, it is difficult for China to extend its exclusive economic zones to the oceans. China has 18,000 kilometers of coastline along the mainland, more than 5,000 islands with each over 500 square meters and over 14,000 kilometers coastline along its islands. The fishing ground that has been exploited in China's waters covers 818,000 square kilometers. The sea area of China contains more than 30 sedimentary basins with their areas amounting to nearly 700,000 kilometers. And the oil reserves and natural gas reserves in Chinese sea waters are approximately 25 billion tons and 8.4 trillion cubic meters respectively. The numbers seem to be large. However, if they are divided among the 1.3 billion Chinese, the numbers in per capita terms become small. Moreover, according to the provisions of the United Nations Convention on the Law of the Sea, a coastal State is entitled to claim the continental shelf which constitutes the natural prolongation of its land territory beyond 200 nautical miles and the abundant natural resources on the outer continental shelf. However, it is evident that China does not have a broad outer continental shelf.

This situation is exactly the same as what happens on the land. Despite that China has a land territory of 9.6 million square kilometers, the land area per capita in China is only 0.007 square kilometers, which is far less than the world average level of 0.3 square kilometers per capita. As for water resources, a necessity for life, the average total fresh water resources in the past few years of China is 2.8 trillion cubic meters, which ranks sixth in the world. But the per capita availability of water is less than a quarter of the average number of the world.

Xiamen University is famous for its maritime research. Additionally, Xiamen University Law School has enhanced its teaching and research of the oceans law actively in the past years. One of the results of their long-term efforts is the China

Oceans Law Review, a Journal published in the Hong Kong Special Administrative Region by Xiamen University Law School and Center for Oceans Law and Policy. We wish to assemble all the wit and learning of domestic and foreign scholars and experts on the law of the sea and improve the status quo of relevant research in China. It is hoped that the Journal will duly contribute to the marine programs of China.

The "law of the sea" has long been referred to as the public law of the sea and "maritime law" as the private law of the sea. Relevant researches in these two fields were separated in the past, which has brought unnecessary limitations to research on ocean law and policy. As a matter of fact, more and more scholars and experts have realized that the practice and research of public and private laws are interrelated. In this connection, interdisciplinary research method is required in the study on maritime policies. In order to promote interdisciplinary research, protect marine environment, preserve marine resources and prevent and settle various maritime disputes, "oceans law" should be defined flexibly to cover the connotation of both public and private laws. By doing so, the nature of relevant research work will be clarified in an appropriate way. This is precisely why we name the current Journal "China Oceans Law Review".

In the first Issue, we have the honor to receive articles from several well-known scholars and experts and also from a number of outstanding younger scholars. These articles cover the research on the International Tribunal for the Law of the Sea, the management of maritime fishing and biological resources, maritime transport and maritime law enforcement, the management approach of sea area usage of China, maritime environment protection and the evolution of the position of the United States with respect to the United Nations Convention on the Law of the Sea. Among them, the last one is a frequently discussed topic in the international community. Besides, our editors also select some meaningful oceans-law related cases, activities and updates, and some domestic and foreign legislations and treaties for our readers' reference.

We sincerely welcome domestic and foreign experts and scholars to contribute their articles and provide suggestions to us, as the development of Chinese marine programs needs our joint efforts.

COLR Editorial

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论国际海洋法法庭的管辖权

周忠海 *

内容摘要: 联合国承认根据公约及其所附《国际海洋法法庭规约》的有关条款规定，国际法庭为一个具有管辖权的独立国际司法机构，法庭只是《联合国海洋法公约》规定的导致有拘束力裁判的众多强制程序之一。缔约国可在任何时间以书面方式选择法庭或《联合国海洋法公约》规定的其他争端解决程序，如国际法院、仲裁法庭等解决争端。但是，俄罗斯提出 200 海里以外大陆架划界第一案标志着沿海国向国际海底区域延伸其管辖的开始，引起美国、加拿大、丹麦和日本四国的强烈反应，对国际海洋法制度将带来深刻影响。特别是日本借此发难，将手伸向我东海大陆架，挑起事端。因此，对于国际海洋法法庭的管辖权、国际法院与国际海洋法法庭的冲突、大陆架界限委员会的职权、WTO 争端解决机制与海洋法法庭管辖权和法律规则的适用的冲突，以及中国立场和对策成为讨论的热点。

关键词: 国际海洋法法庭　联合国海洋法公约　国际法院　管辖权　冲突

自从联合国成立以来，全球性、区域性多边和双边的条约迅速增加，而且多数条约包含有关于条约解释和适用争端解决的规定，但是只有其中的部分条款规定了强制管辖权。20 世纪试图对国家间所有法律争端设置为世界各国所接受之强制管辖权的努力没有成功，至少是没有完全成功或尚未成功。[1] 但是，这方面的重要趋势是通过多边条约建立特殊的争端解决机制，如 WTO 中的争端解决机制。国际法的不成系统性，缺乏中央立法机构和最高司法机构导致国际法规则之冲突和管辖权的冲突。第 52 届联合国大会审议并通过了《联合国和国际海洋法法庭的合作和关系协定》，[2] 注意到国际法庭在和平解决有关利用海洋及其资源方面的争端的作用，还注意到国际法庭的职能符合《联合国宪章》第 2 条第 3 项关于应以和平方式解决争端的规定，联合国承认根据公约及其所附《国际海洋法法庭规约》的有关条款规定，国际海洋法法庭为一个具有管辖权的独立国际司法机构，联合国与国际法庭承诺尊重彼此的地位和职权，并根据本协定规定建立合作工作关系。

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* 周忠海，中国政法大学法学教授、国际法专业博士生导师、中国海洋法学会副会长。

1 Bernard H. Oxman, Complementary Agreements and Compulsory Jurisdiction, *AJIL*, Vol. 95, p. 277.

2 A/52/968，附件。

而《联合国海洋法公约》适用于地球 2/3 的区域，它比其他任何条约的适用范围都更为广泛。公约内容包括有防卫和国际安全、科学研究、文化遗产的保护及人权；它还被称为“迄今为止或未来一段时间内最全面的环境保护条约”，是一部海洋宪章。[3] 公约明确规定了国际海洋法法庭的强制管辖权。目前为止，海洋法法庭受理的案件中绝大多数案件是根据公约第 290 条和 292 条受理的。

外大陆架问题涉及一国大陆架的延伸范围及主权权利，涉及沿海国大陆架与国际海底区域的划分。俄罗斯申请外大陆架的调查标志着沿海国向国际海底区域延伸其管辖的开始，对国际海洋法制度将带来深刻影响。日本为了其周边海底资源的开采权，以海上保安厅为中心的外大陆架调查将正式列入国家级项目。计划将于 2009 年 5 月之前完成有关海底地形及地质的精密调查，以证实这些海底与日本国陆地的相连性，并将调查分析数据提交联合国大陆架委员会。日本政府又突然决定，在 7 月上旬派出海洋调查船前往东海海域开展海底石油天然气资源调查，并企图单方面开采这一带海域海底资源。日本借此鱼目混珠，将我国领土钓鱼岛夹带其中，大模大样地对东海大陆架展开调查。这完全是非法的，是我国绝对不能接受的。此外，“南太平洋蓝鳍金枪鱼”案 [4] 和“海龟案” [5] 都是首次涉及国际海洋法法庭管辖权和国际法规则间的冲突问题。这是一个涉及补充性协定和强制管辖权的问题，是关系到联合国海洋法公约规定的强制管辖权与国际法院管辖权冲突的问题，是国际安全、环境、资源和可持续贸易与海洋空间开发密切相关的法律问题和实际问题。为此，笔者于 2004 年 6 月到德国汉堡访问了国际海洋法法庭，就国际海洋法法庭的管辖权、大陆架界限委员会的职权及国际法院（以下简称“法院”）与国际海洋法法庭（以下简称“法庭”）的关系等问题和法庭的书记官长、法律事务部主任交换了意见。

一、国际海洋法法庭的管辖权

国际海洋法法庭于 1996 年 10 月宣告成立，总部设在德国的汉堡。根据《公约》规定，法庭由 21 名独立法官组成。他们应具有以下条件：1. 享有公平和正直的最高声誉，并在海洋法领域内具有公认资格；2. 不得执行任何政治或行政职务，也不

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3 Bernard H. Oxman, Complementary Agreements and Compulsory Jurisdiction, *AJIL*, Vol. 95, p. 277.

4 Southern Bluefin Tuna Case (Austl. & N. Z. v. Japan), Jurisdiction and Admissibility, *ILM*, Vol. 39, 2000, p. 1359, at http://www.oceanlaw.net/cases/tuna2a.htm, 14 January 2005. See case notes by Barbara Kwiatkowska, Case Report: Southern Bluefin Tuna (Australia and New Zealand v. Japan), *AJIL*, Vol. 95, 2001, p. 162, and by Philippe Weckel & Eddin Helali, *Revue Generale de Droit International Public*, Vol. 104, 2000, p. 1037.

5 WTO/TBT 案例分析海龟案，下载于 http://www.Translaws.com, 2005 年 1 月 14 日。

能对与“勘探和开发海洋或海底资源”或“与海洋或海底的其他商业用途有关”的任何企业的任何业务有“积极联系”或“有财务利益”。法庭作为一个整体，还必须能代表世界各主要法系和公平地区分配。现任庭长为格林纳达籍法官内尔森，中国籍法官许光建 2002 年竞选连任，任期至 2011 年。1997 年 10 月 28 日完成并通过了法庭程序规则，并于 1997 年 11 月 13 日受理了第一起案件。自法庭成立 8 年来，共受理案件 12 起，作出 8 项判决，发出 26 项命令，涉及 17 个当事国。法庭迄今已审理的 12 宗案件中，主要是关于船只、船员迅速释放和临时措施等案件。2003 年 9 至 10 月，法庭审理了其成立后第 12 宗案件，即马来西亚诉新加坡围海造地案（请求临时措施）。[6] [编者按：关于该案内容，请参见本刊本期的专文介绍。]

国际海洋法法庭是《联合国海洋法公约》（以下简称“《公约》”）规定的有关《公约》解释和适用的争端的司法解决程序之一。联合国承认国际海洋法法庭为一个具有管辖权的独立国际司法机构，是《公约》规定的导致有拘束力裁判的众多强制程序之一。[7] 缔约国可在任何时间以书面方式选择国际海洋法法庭或《公约》规定的其他争端解决程序，如国际法院、仲裁法庭和特别仲裁法庭、调解和强制调解、具有拘束力的商业仲裁等十几种途径解决争端。[8] 其中，调解、特别仲裁庭、特别分庭和海底分庭的管辖是强制性的。根据《公约》规定，法庭的管辖权及于下列案件：1. 对于按照本部分向其提出的有关本公约的解释或适用的任何争端；2. 对于按照与本公约的目的有关的国际协定向其提出的有关该协定的解释或适用的任何争端；为解决与公约第十一部分规定的解释和适用的任何争端提供特别程序，大部分是强制程序。这也是海底分庭的职能。海底分庭可以对海底管理局的大会和理事会活动范围内引起的法律问题提供咨询意见。3. 如果同《公约》主题事项有关的现行有效条约或公约的所有缔约国同意，有关这种条约或公约的解释或适用的争端，也可提交法庭。[9] 法庭作为一种剩余和强制机制可以迅速解决某些公约确定的相关争端，如迅速释放被扣船舶和船员，或在案件作出最终判决之前采取临时措施等。法庭也可以处理依据其他海上协定所引起的争端，如果该协定有此规定。

同时，《公约》也对适用争端强制解决程序设定了一些限制或例外。例如，关于行使主权权利或管辖权的法律执行活动方面的争端；有关划定海洋边界的《公约》条款的解释或适用的争端；关于军事活动的争端；以及有关联合国安理会执行

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6 ITLOS Press Release No. 90, at http://www.itlos.org and http://www.tidm.org, 14 January 2005.

7 52/251.《联合国和国际海洋法法庭的合作和关系协定》第 1 条第 1 款。

8 周忠海著：《国际海洋法》，北京：中国政法大学出版社 1987 年版，第 284 页。《国际海洋法法庭简介》，下载于 http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/wjzdtyflgz/zgzhyflydgz/t146192.htm，2005 年 1 月 14 日。

9 《国际海洋法法庭简介》，下载于 http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/wjzdtyflgz/zgzhyflydgz/t146192.htm，2005 年 1 月 14 日。

《联合国宪章》所赋予的职务的争端等。对于上类争端，缔约国可在任何时候作出书面声明，表示不接受《公约》规定的强制解决程序。

（一）法庭对于公约缔约国的管辖权

《联合国海洋法公约》规定各缔约国应按照《联合国宪章》第 2 条第 3 款以和平方法解决它们之间有关本公约的解释或适用的任何争端，并应为此目的以《宪章》第 33 条第 1 项所指的方法求得解决。本公约的规定均不损害缔约国于任何时候已协议自行选择任何和平方法解决它们之间有关本公约的解释或适用争端的权利。[10] 同时明确规定一国在签署、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：1. 按照附件 VI 设立的国际海洋法法庭；2. 国际法院；3. 按照附件 VII 组成的仲裁法院；4. 按照附件 VIII 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。各缔约国有义务作出选择。缔约国如为有效声明所未包括的争端的一方，应视为已接受附件 VII 所规定的仲裁。[11] 一国如选择接受法庭的管辖，那么，法庭则成为公约规定的导致具有法律拘束力判决的强制程序，是解决争端的法庭。可见，法庭的管辖权扩展至根据公约第 287 条接受法庭管辖的缔约国之间涉及公约条文的解释或适用，和经缔约国的请求而提交法庭的争端。法庭受理案件的范围在公约第 297 条中作出具体规定。此类争端主要包括：1. 据指控，沿海国在行使第 58 条规定的关于航行、飞越或铺设海底电缆和管道的自由和权利，或关于海洋的其他国际合法用途方面，有违反本公约的规定的行为；[12] 2. 据指控，一国在行使上述自由、权利或用途时，有违反本公约或沿海国按照本公约和其他与本公约不相抵触的国际法规则制定的法律或规章的行为；或 3. 据指控，沿海国有违反适用于该沿海国、并由本公约所制订或通过主管国际组织或外交会议按照本公约制定的关于保护和保全海洋环境的特定国际规则和标准的行为。沿海国违反了公约有关航行自由、飞越自由或铺设海底电缆和管道自由的规定，或违反了公约第 58 条具体规定的其他有关海洋的国际合法用途的行为。[13]

（二）法庭依据公约第十五部分所享有的管辖权

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10 《联合国海洋法公约》第 279 条用和平方法解决争端的义务；第 280 条用争端各方选择的任何和平方法解决争端。

11 《联合国海洋法公约》第 287 条第 3 款。

12 《联合国海洋法公约》第 58 条关于航行、飞越和铺设海底电缆和管道的权利和自由，及其他有关这些自由，如那些与船舶、航空器和海底电缆和管道活动有关的符合公约的自由的国际合法用途。

13 《联合国海洋法公约》第 297 条第 1 款。

公约第十五部分第二节确立了导致有拘束力判决的强制程序。第286条规定，在第三节限制下，有关本公约的解释或适用的任何争端，如已诉诸第一节而仍未得到解决，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。而第282条则规定，作为有关本公约的解释或适用的争端各方的缔约各国如已通过一般性、区域性或双边协定或以其他方式协议，经争端任何一方请求，应将这种争端提交导致有拘束力裁判的程序，该程序应代替本部分规定的程序而适用，除非争端各方另有协议。它说明第286条规定的强制原则和拘束第三方的解决是没有例外的。法庭的选择由双方作出。强制力和确定性是基本的，而法庭的选择是第二位的。[14] 公约第281条规定，争端各方在争端未得到解决时所适用的程序为：1. 作为有关本公约的解释或适用的争端各方，如已协议用自行选择的和平方法来谋求解决争端，则只有在诉诸这种方法而仍未得到解决以及争端各方间的协议并不排除任何其他程序的情形下，才适用本部分所规定的程序。2. 争端各方如已就时限达成协议，则只有在该时限届满时才适用第1款。如“南太平洋蓝鳍金枪鱼案”中，澳大利亚和新西兰控诉日本在公海捕获南太平洋蓝鳍金枪鱼违反了其承担的养护和管理的公约义务。双方未能按照第一节规定通过谈判和其他方式解决争端而提交仲裁。仲裁庭则认为缺乏管辖权予以驳回。

（三）根据公约第十一部分规定海底分庭的管辖权

1. 海底分庭的管辖权

海底分庭对以下各类有关“区域”内活动的争端应有管辖权，即关于国家管辖之外的深海洋底和海床勘探、开发海底资源的活动所引发的争端有管辖权：

（1）缔约国之间关于本部分及其有关附件的解释或适用的争端；

（2）缔约国与管理局之间关于下列事项的争端：①管理局或缔约国的行为或不行为据指控违反本部分或其有关附件或按其制定的规则、规章或程序；或②管理局的行为据指控逾越其管辖权或滥用权力；

（3）第153条第2款（b）项内所指的，作为合同当事各方的缔约国、管理局或企业部、国有企业以及自然人或法人之间关于下列事项的争端：①对有关合同或工作计划的解释或适用；或②合同当事一方在“区域”内活动方面针对另一方或直接影响其合法利益的行为或不行为；

（4）管理局同按照第153条第2款（b）项由国家担保且已妥为履行附件三第4条第6款和第13条第2款所指条件的未来承包者之间关于订立合同的拒绝，或谈判合同时发生的法律问题的争端；

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14 Bernard H. Oxman, Complementary Agreements and Compulsory Jurisdiction, *AJIL*, Vol. 95, p. 280.

（5）管理局同缔约国、国有企业或按照第 153 条第 2 款（b）项由缔约国担保的自然人或法人之间关于指控管理局应依附件三第 22 条的规定负担赔偿责任的争端；

（6）本公约具体规定由分庭管辖的任何争端。

作为合同当事各方可以是缔约国、管理局或企业部、国有企业以及自然人或法人，因此，海底分庭的管辖权可以扩大至国家、国际组织和参与海底开发活动的企业、法人或私人商业公司，甚至于个人。这是国际争端解决机制的一个突破和进步。

2. 海底分庭权限的限制

海底争端分庭对管理局按照本部分规定行使斟酌决定权应无管辖权；在任何情形下，均不应以其斟酌决定权代替管理局的斟酌决定权。在不妨害第 191 条的情形下，海底争端分庭依据第 187 条行使其管辖权时，不应对管理局的任何规则、规章和程序是否符合本公约的问题表示意见，也不应宣布任何此种规则、规章和程序为无效。分庭在这方面的管辖权应限于就管理局的任何规则、规章和程序适用于个别案件将同争端各方的合同上义务或其在本公约下的义务相抵触的主张，就逾越管辖权或滥用权力的主张，以及就一方未履行其合同上义务或其在本公约下的义务而应给予有关另一方损害赔偿或其他补救的要求作出决定。[15]

3. 海底分庭采取临时措施的权限

争端根据本节正向其提交的仲裁法庭组成以前，经争端各方协议的任何法院或法庭，如在请求规定临时措施之日起两周内不能达成这种协定，则为国际海洋法庭，或在关于“区域”内活动时的海底争端分庭，如果根据初步证明认为将予组成的法庭具有管辖权，而且认为情况紧急有此必要，可按照本条规定、修改或撤销临时措施。受理争端的法庭一旦组成，即可依照第 1 款至第 4 款行事，对这种临时措施予以修改、撤销或确认。

4. 分庭的咨询管辖权

海底争端分庭经大会或理事会请求，应对它们活动范围内发生的法律问题提出咨询意见。这种咨询意见应作为紧急事项提出。[16]

（四）对于特殊争端的管辖权

法庭作为依据公约迅速处理某些争端中具有强制管辖权的机构，主要有两类争端须迅速处理：其一，是关于迅速释放被逮捕的船舶及其船员；其二，是在案件作出最后决定前请求采取临时措施。

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15 《联合国海洋法公约》第 189 条。
16 《联合国海洋法公约》第 191 条。

1. 迅速释放船舶和船员

公约规定沿海国可以逮捕不遵守有关国际法规则和本国依照公约制定的法律和规章的船舶。但是，被捕的船舶及其船员，在提出适当的保证书或其他担保后，沿海国应迅速释放被捕的船舶及其船员。[17] 如果缔约国当局扣留一艘悬挂另一缔约国旗帜的船只，而且据指控，扣留国在合理的保证书或其他财政担保经提供后仍然没有遵从本公约的规定，将该船只或其船员迅速释放，释放问题可向争端各方协议的任何法院或法庭提出，如从扣留时起 10 日内不能达成这种协议，则除争端各方另有协议外，可向国际海洋法法庭提出。这种释放的申请，仅可由船旗国或以该国名义提出。法庭应不迟延地处理关于释放的申请，并且应仅处理释放问题，而不影响在主管的国内法庭对该船只、其船主或船员的任何案件的是非曲直。扣留国当局应仍有权随时释放该船只或其船员。[18] 在法庭裁定的保证书或其他财政担保经提供后，扣留国当局应迅速遵从法庭关于释放船只或其船员的裁定。

2. 采取临时措施

法庭有权在最后判决前，根据情况采取其认为适当的任何临时措施。临时措施所根据的情况一旦改变或不复存在，即可修改或撤销。临时措施仅在争端一方提出请求并使争端各方有陈述意见的机会后，才可根据本条予以规定、修改或撤销。法院或法庭应将临时措施的规定、修改或撤销迅速通知争端各方及其认为适当的其他缔约国。提请法庭采取临时措施是公约第 287 条规定处理争端的一种选择。但是，法庭则有特别权利采取临时措施。这就是说法庭的管辖权是“有条件的和剩余的权力”。[19] 即在争端根据本节正向其提交的仲裁法庭组成以前，经争端各方协议的任何法院或法庭，如在请求规定临时措施之日起两周内不能达成这种协议，则为国际海洋法法庭，或在关于“区域”内活动时的海底争端分庭，如果根据初步证明认为将予组成的法庭具有管辖权，而且认为情况紧急有此必要，可按照本条规定、修改或撤销临时措施。受理争端的法庭一旦组成，即可依照第 1 款至第 4 款行事，对这种临时措施予以修改、撤销或确认。[20]

（五）法庭在《海洋法公约》规定之外的管辖权

法庭的第三项主要作用是处理《公约》直接范围外的一般海洋争端。也就是说法庭的管辖权并不限于公约的解释和适用。法庭规约中规定，法庭的管辖权包

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17 《联合国海洋法公约》第 73 条。

18 《联合国海洋法公约》第 292 条船只和船员的迅速释放。

19 Thomas A. Mensah, The International Tribunal for the Law of the Sea, ITLOS FOCUS, *LJIL*, Vol. 11, 1998, p. 537. (Thomas A. Mensah: President, International Tribunal for the Law of the Sea, Hamburg, Federal Republic of Germany)

20 《联合国海洋法公约》第 290 条。

括按照本公约向其提交的一切争端和申请，和将管辖权授予法庭的任何其他国际协定中具体规定的一切申请。[21] 公约第 288 条又将法庭的管辖权扩大至“对于按照与本公约的目的有关的国际协定向其提出的有关该协定的解释或适用的任何争端”。这就意味着海洋法法庭对于公约之外的其他非缔约国关于与其他条约或协定有关的争端具有管辖权。这种管辖权的行使限于此种条约或协定赋予海洋法法庭这种管辖权。

另外，法庭与国际法院不同，它的管辖权不限于国家之间的争端。而且根据法庭规约第 20 条规定，对于第六部分明文规定的任何案件，或按照案件当事所有各方接受的将管辖权授予法庭的任何其他协定提交的任何案件有管辖权。法庭应对缔约国以外的实体开放。因此，依照有关协定当事方的意愿，法庭有权处理由有关公约之外的相关海上协定引起的争端。另外，依协定的条款规定，法庭有权处理部分或全部当事方可能是非国家实体，如私人商业公司、政府间组织，甚至是个人之间的争端。

（六）法庭管辖权的限制和例外

法庭的管辖权有一些限制和例外。同时，《公约》也对适用争端强制解决程序设定了一些限制或例外。例如，关于行使主权权利或管辖权的法律执行活动方面的争端；有关划定海洋边界的《公约》条款的解释或适用的争端；关于军事活动的争端；以及正由联合国安理会执行《联合国宪章》所赋予的职务的争端等。对于上类争端，缔约国可在任何时候作出书面声明，表示不接受《公约》规定的强制解决程序。这些限制和例外在公约第十五部分第三节有明确规定。对于法庭管辖的第 1 项一般限制如下：[22]

1. 本公约关于海洋科学研究的规定在解释或适用上的争端，应按照第二节解决，但对于下列情形所引起的任何争端，沿海国并无义务同意将其提交这种解决程序：（1）沿海国按照第 246 条行使权利或斟酌决定权；（2）沿海国按照第 253 条决定命令暂停或停止一项研究计划；

2. 因进行研究国家指控沿海国对某一特定计划行使第 246 条和第 253 条所规定权利的方式不符合本公约而起的争端，经任何一方请求，应按照附件 V 第二节提交调解程序，但调解委员会对沿海国行使斟酌决定权指定第 246 条第 6 款所指特定区域，或按照第 246 条第 5 款行使斟酌的决定权拒不同意，不应提出疑问。

3. 对本公约关于渔业的规定在解释或适用上的争端，应按照第二节解决，但沿海国并无义务同意将任何有关其对专属经济区内生物资源的主权权利或此项权

21 附件 VI，《国际海洋法法庭规约》第 21 条。
22 《联合国海洋法公约》第 297 条第 2 款。

利的行使的争端，包括关于其对决定可捕量、其捕捞能力、分配剩余量给其他国家、其关于养护和管理这种资源的法律和规章中所制订的条款和条件的斟酌决定权的争端，提交这种解决程序。

4. 据指控有下列情事时，如已诉诸第一节而仍未得到解决，经争端任何一方请求，应将争端提交附件 V 第二节所规定的调解程序：（1）一个沿海国明显地没有履行其义务，通过适当的养护和管理措施，以确保专属经济区内生物资源的维持不致受到严重危害；（2）一个沿海国，经另一国请求，对该另一国有意捕捞的种群，专断地拒绝决定可捕量及沿海国捕捞生物资源的能力；（3）一个沿海国专断地拒绝根据第 62 条、第 69 条、第 70 条以及该沿海国所制订的符合本公约的条款和条件，将其已宣布存在的剩余量的全部或一部分分配给任何国家。

5. 在任何情形下，调解委员会不得以其斟酌决定权代替沿海国的斟酌决定权。

6. 调解委员会的报告应送交有关的国际组织。

7. 各缔约国在依据第 69 条和第 70 条谈判协定时，除另有协议外，应列入一个条款，规定各缔约国为了尽量减少对协议解释或适用发生争议的可能性所采取的措施，并规定如果仍然发生争议，各缔约国应采取何种步骤。

（七）法庭裁决的终局性与拘束力

法庭管辖权的重要特征是其裁决的终局性和拘束力。像公约第十五部分第二节规定的其他司法机构的判决一样，海洋法庭的裁决是终局的，对争端各方都具有法律拘束力。有关各方有义务执行。公约第 296 条明确规定，法庭对争端所作出的任何裁判应有确定性，争端所有各方均应遵从。这种裁判仅在争端各方间和对特定争端具有拘束力。

二、国际法院与国际海洋法法庭管辖权的冲突与合作

国际法院和法庭数目的骤增必然引起这些法院和法庭之间的协调和冲突问题。因为法院和法庭在没有统一司法机构的国际法中的数目增加，这些问题便日益尖锐起来。前南国际刑庭上诉法庭在判决中曾经指出，“在国际法中，每一个法庭都是一种‘自足制度’（另有规定者除外）。”当然这里不存在解决协调和冲突的一般规则。这些问题只有在这种“自足制度”内加以解决，换句话说，即在受理案件的国际法院和法庭内加以解决。有时，有关文件中为此设立特殊的法院或法庭。但是，这些问题便常常使用受案法院或法庭的准据法予以解决。如果法律文件规定法院或法庭没有直接预见到这种问题，那么，它便是一个解释问题。法院和法庭之间可能存在的冲突问题则成为我们要讨论的主要问题。

这种冲突可分为 2 类：管辖权冲突和法理冲突。无论是海洋法问题，还是国际法的一般问题，在法理上法院和法庭的意见可能完全不同。国际法不成体系会带来风险，但是也不宜夸大此种风险。各种不同的、未必一致的声音可以促进国际法的发展和争端的解决。但是，本文主要讨论法院和法庭之间管辖权的冲突。

（一）法院和法庭之间管辖权的一般冲突

毫无疑问，法院和法庭对于有关本公约的解释或适用的任何争端都具有管辖权。[23] 这种冲突与其说是实践冲突，不如说是理论上的冲突，但是，同一案件既可提交法院也可提交法庭则是不现实的。如果通过特别协定提交案件，争端当事方则要通知法院或法庭。拒不受理案件的司法机构的管辖权则无须讨论。但是，从当事方的观点看，这与有权判决的司法机关的选择是相关的。在特别协定的谈判中，法院的选择使用新的标准，从而走出在仲裁和法院之间选择的困境。这种新的标准是在两个具有不同特征的常设司法机构间作出的选择：一个是古老的，早已设立的具有一般管辖权的司法机构；另一个则是新的特别设立的司法机构。

如果提交申请，可以想象“法院选择”的可能性，在某种意义上，具有主动权的争端一方，像选择法院和法庭一样，享有选择其喜欢之法院的优先权。但是，在实践中却并非如此。公约第 282 条的规定是一种可以有效排除法院选择和重复诉讼的问题，即争端各方可以作出冲突选择的问题。本条规定，作为有关本公约的解释或适用的争端各方的缔约各国如已通过一般性、区域性或双边协定或以其他方式协议，经争端任何一方请求，应将这种争端提交导致有拘束力裁判的程序，该程序应代替本部分规定的程序而适用，除非争端各方另有协议。[24] 本条以法庭和依据公约第 286 条和第 287 条规定具有强制管辖权的其他争端解决机构为代价，支持任何可导致对争端各方具有拘束力的争端解决机制。如果争端各方已通过协议赋予特定争端解决机构管辖权，那么，任何一方都可以根据依据公约第 286 条和第 287 条享有管辖权的法院和法庭而具有管辖权，接受该机构的管辖。

在法院和法庭之间的关系方面，第 282 条中最有意思的是争端各方接受法院的强制管辖权，依据法院规约第 36 条第 2 款可以被认为是第 282 条所指的“协定”。作为正常的条款可能会发生争议，但是作为同意确实存在，所以说争端各方“另有协议”是合理的。按照第 282 条规定，无论何时争端各方已接受“选择条款”，受理案件的法庭应宣布其没有管辖权。相反法院受理案件后，应驳回被告的请求，

23 《联合国海洋法公约》第 279 条、第 286 条。
24 《联合国海洋法公约》第 282 条。

因为争端各方已根据第 282 条选择了法庭，法院缺乏管辖权。[25]

根据第 282 条规定，在已接受选择条款的缔约国之间，法院对于法庭来说享有优先管辖权，而且适用于公约第十五部分规定的法庭强制管辖的所有案件。当然，第 282 条不适用于法庭海底分庭的强制管辖权，因为这种管辖权是公约第 187 条的规定，属于第十一部分，而不是第十五部分。此种影响相应地比较小，因为它仅涉及国家之间。第 187 条规定的其他争端，涉及非国家当事方，在法院管辖之外。

但是，仍会引起真正的冲突。理论上在涉及公约第十一部分的解释争端中，一国根据法院规约第 36 条第 2 款选择法院管辖，而另一国根据公约第 187 条选择海底争端分庭管辖则是完全可能的。

（二）保留接受法院强制管辖权的影响

第 282 条规定的优先权只有在争端各方的强制管辖权协定有效的情况下才会发挥作用。如任何一方将争端排除在其协定之外，优先权则不适用。对接受法院强制管辖权声明保留是达到这种排除的一种方式。这些保留对于海洋法事项具有一般或特殊的功能。如一般保留可以排除任何一方在提交申请之前 12 个月内接受法院强制管辖权的争端（诸如新西兰，菲律宾和英国的保留），或者排除各国未承认作出保留之国家间的争端（如印度的声明）。保留中所指海洋法可能涉及面很广（如印度、马耳他的保留声明中，便排除了在其主权和管辖范围的所有争端，包括这些区域的划界），或可能集中于特殊的问题（如新西兰和菲律宾的保留，只涉及专属经济区内渔业，和相应的群岛水域海床和大陆架的自然资源的争端）。[26]

从这些保留中可以发现，各缔约国已排除法院对于争端的强制管辖权，但是它们不能排除法院或法庭根据公约所享有的强制管辖权。最近西班牙和加拿大之间的渔业案件便是一起有趣的案例，因为此案件发生时，两国都不是公约的缔约国。[27] 本案涉及加拿大的巡逻艇依据北大西洋渔业组织的加拿大沿海渔业保护法，在公海上登临西班牙船舶的问题。加拿大主张它接受法院的强制管辖权并不适用于本案，因为这一争端在加拿大的保留之内，故排除了“加拿大对于在北大西洋

25 Tullio Treves, Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice, *International Law And Politics*, Vol. 31, p. 812.

26 Tullio Treves, Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice, *International Law And Politics*, Vol. 31, p. 813.

27 见“渔业管辖权案”，1998 I. C. J. (Dec.4), at http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment(s)/iec_ ijudgment_981204_frame.htm, 6 July 1999.

规定区域捕鱼船和执行此种措施所采取的养护和管理措施或由此引起的争端。”[28] 在 1998 年 12 月 4 日的判决中，法院认为法院对此案无管辖权。如果西班牙和加拿大在案件发生时都是公约缔约国，那么其结果则完全不同。公约第 297 条第 3 款排除了关于沿海国有关其对专属经济区内生物资源的主权权利或此项权利的行使的争端。其中明确规定，“沿海国并无义务同意将任何有关其对专属经济区内生物资源的主权权利或此项权利的行使的争端，包括关于其对决定可捕量、其捕捞能力、分配剩余量给其他国家、其关于养护和管理这种资源的法律和规章中所制订的条款和条件的斟酌决定权的争端，提交这种解决程序。”[29] 第 298 条可以允许发表声明排除“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 款和第 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”的强制管辖权；[30] 一旦保留排除法院对争端的强制管辖权，第 282 条便不再发生效力，公约关于强制管辖规则则应适用。

（三）法庭强制管辖权之限制和选择的关系

为了确定哪些争端可以单方面提交法院或法庭，考察一下关于争端各方接受选择条款所作保留的影响是很重要的。确定对公约第 297、298 条规定的关于强制管辖规则的适用性，是否有一项或多项限制或选择例外适用是必要的。例如，争端一方已接受选择条款，但保留关于“其海洋边界的确定和划分方面的争端”，那么，将争端提交法院或法庭则取决于争端一方是否已作出声明，提出它不接受第 298 条规定的这种法院或法庭的管辖。如果已经作出此种声明，那么在争端各方间便不存在有效的强制解决争端条款，除非第 298 条规定的“强制”调解要求得以满足。如果没有此种声明，争端一方则有权引用公约义务，将争端提交有管辖权的法院或法庭。

复杂案件的有些方面属于法院的管辖，有些方面则属于法庭的管辖或公约中规定的其他有权管辖的法院或法庭。这种情况的发生可能有几种理由：1. 对接受法院规约第 36 条第 2 款任择条款保留的效力；2. 法院规约；3. 根据公约第 297 条和第 298 条的限制和例外。但是，法院和法庭同时审理相同的相关问题是不现实的，也是有风险的。争端各方必须灵活地将其争端集中提交一个法院或法庭审理。争端各方也可以用声明的方式巧妙地避免出现交叉管辖的情况。例如 1996 年 6

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28 See Counter-Memorial of Canada (Jurisdiction) (Spain v. Canada), 1996. I. C. J. Pleadings (Fisheries Jurisdiction Case) (Feb. 29, 1996), at http://www.icj-cij.org/icjwww/idock-et/iec/iecpleadings/iec_ipleading_860200_countermemo rialcanada.htm, 6 July 1999.

29 《联合国海洋法公约》第 297 条。

30 《联合国海洋法公约》第 298 条。

月 25 日挪威发表的修改其接受法院强制管辖的声明就是很有意思的此类声明。声明确认了这种接受和认可："但是，有关根据 1982 年 12 月 10 日《联合国海洋法公约》规定的争端解决的限制和例外和适用于任何特定时间的挪威声明，——应适用于有关海洋法的所有争端。"[31] 通过这个声明，挪威排除了所有按照公约不能归于法院或法庭的强制管辖的争端，或因为第 197 条规定的限制，或由于挪威的声明利用了第 298 条规定的选择例外。因此，关于海洋法的争端，挪威接受法院的管辖。

如果对选择条款的保留排除了法院的管辖权，在多数情况下，由于法庭优先的情况较少，仲裁即成为应适用的程序。

三、大陆架界限委员会的地位与作用

大陆架界限委员会是根据《公约》附件二成立的 200 海里以外大陆架界限委员会。委员会的职务为审议沿海国提出的关于扩展到 200 海里以外的大陆架外部界限的资料和其他材料，并就有关划定大陆架外部界限的事项向沿海国提出建议，经有关沿海国请求，在编制资料时提供科学和技术咨询意见，沿海国在这些建议的基础上划定的外大陆架外部界限应有确定性和拘束力。[32] 但是大陆架界限委员会不是裁判机构，其行动不应妨害海岸相向或相邻国家间划定界限的事项。国家主张重叠区的划界属于有关争端方自己解决的问题，大陆架界限委员会不应以任何方式影响或干预国家间陆上或海上划界争端。委员会的任何行动均不应妨害海岸相向或相邻国家间划定界限的事项，不应审理和认可争端任一当事国提出的申请；如果申请涉及已存在陆上或海上争端，申请方应通知委员会；沿海国提交的申请和委员会的建议均不妨害有关陆上或海上争端方的立场。因此很清楚，委员会在自己的工作中应严格遵循上述基本原则。2001 年大陆架界限委员会准备接受有关国家提交的情报和给出建议。附件二规定有关国家应在《公约》生效后 10 年提交情报，即在 2004 年 11 月 16 日前提交。但是，考虑到生效的过程，缔约国决定，规定的 10 年期限应从 1999 年 5 月 13 日开始计算。这样许多国家便有了更充分的时间准备情报报告。2001 年 12 月 20 日俄罗斯成为第一个向大陆架界限委员会提交报告的国家。2002 年 1 月至 2 月，加拿大、丹麦、日本和美国等国先后作出反应，对之评价颇为消极。3 月，大陆架界限委员会开始审议俄申请。外大陆架问题涉及一国大陆架的延伸范围及主权权利，涉及沿海国大陆架与国际海底区域的划分。截止到目前，大陆架委员会接到 9 份报告。

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31 Declarations Recognizing Jurisdiction: Norway, 1995~1996 Y. B. I. I. C. J. 108, 109.

32 《联合国海洋法公约》附件二"大陆架界限委员会"第 3 条。

对于超出 200 海里的大陆架，《公约》从正、反两方面就划定其外部界限作了规定。其目的就是要在沿海国管辖的大陆架与作为人类共同继承财产的国际海底区域之间划出明确的界限。《公约》第 76 条第 4 款首先从正面提出了终结大陆架的两个公式：1. 根据沉积岩厚度，其外部界限是一条每点上沉积岩厚度至少为从该点至大陆坡脚线（即陆坡与陆基的交汇处）最短距离的 1% 的连线；2. 距离大陆坡脚线以外 60 海里之处的连线。而第 76 条第 5 款则从反面对大陆架的最大宽度作了限制，即一国的大陆架，不管采取第 4 款中的哪一个公式，无论如何最远不得超过（1）350 海里；或（2）2500 米等深线以外 100 海里。此界限以外，即是由国际海底管理局负责管理和保护的国际海底区域。200 海里以外的大陆架的法律地位是一种特殊的法律地位。沿海国对外大陆架不享有主权权利和管辖权，对其非生物资源的开发，应缴纳费用或实物，但有优先开采权。200 海里以外大陆架的上覆水域和上空属于公海地位。由此可见，在距离领海基线 200 海里至 350 海里（或 2500 米等深线以外 100 海里）之间的海底，是外大陆架可能存在的区域。200 海里以外大陆架问题是国际海洋法中的一项最前沿领域，联合国高度重视这项工作。大陆架界限委员会目前已开始受理沿海国 200 海里以外大陆架的申请。各沿海国为了扩展和维护自身的海洋权益，纷纷开展 200 海里以外大陆架的调查勘察工作，并向联合国大陆架委员会提出申请。据估计，全世界将有近百个国家和地区向联合国和大陆架界限委员会提出 200 海里以外大陆架的主张。20 世纪 90 年代各沿海国以空前热情开展的大陆架调查活动皆与此有关。俄罗斯联邦通过联合国秘书长向联合国大陆架界限委员会提交了确定其 200 海里外大陆架外部界限的申请。它分别在北冰洋、白令海和鄂霍次克海三个海区申请了共 4 块外大陆架区域，总面积约 100 多万平方公里，尤以北冰洋申请的一块面积最大。这是大陆架委员会成立以来接到的第一份外大陆架划界案。俄申请标志着沿海国向国际海底区域延伸其管辖的开始，对国际海洋法制度将带来深刻影响。[33]

日本的所谓大陆架调查是继俄罗斯申请之后的外大陆架调查。日本为了其周边海底资源的开采权，以海上保安厅为中心的外大陆架调查将正式列入国家级项目。计划将于 2009 年 5 月之前完成有关海底地形及地质的精密调查，以证实这些海底与日本国土陆地的相连性，并将调查分析数据提交联合国大陆架委员会。日本政府颁布了《近期大陆架调查基本方针》，2004 年为第一阶段调查，2005 年为第二阶段调查。

众所周知，日本对俄罗斯的外大陆架调查申请反应强烈。但是，日本的关切不在于俄罗斯提出的 4 个外大陆架区块，而是对俄方标绘的俄 200 海里专属经济区和大陆架界线提出质疑，认为俄在太平洋南段的部分 200 海里线，是以日本北方四岛为基点划出的。日本声明指出，日俄就北方四岛存在主权争议，北方四岛

33 萧啸：《俄罗斯提出 200 海里以外大陆架划界第一案》，载于《调研》2002 年 4 月 3 日。

是日本固有领土，而俄方却以北方四岛为基点单方面划出了俄200海里专属经济区和大陆架界线，这是不能接受的。日本要求大陆架界限委员会的审议和建议不应影响北方四岛的主权和相关海域划界问题。那么，日本又急急忙忙将以海上保安厅为中心的外大陆架调查正式列入国家级项目，并将调查分析数据提交联合国大陆架委员会，其目的是什么呢？日本这次的大陆架调查计划将钓鱼岛夹带其中，其险恶用心，不是路人皆知了吗！日本政府又突然决定，在7月上旬派出海洋调查船前往东海海域开展海底石油天然气资源调查，并企图单方面开采这一带海域海底资源。日本调查船开赴东海油田，中日关系又添新变数。

东海大陆架是中国内地向海底的自然延伸，当然是中国的大陆架。200海里以外的东海大陆架是中国的外大陆架。日本则坚持中日共大陆架，应使用中间线划分大陆架界限。但是，东海大陆架决非是日本的外大陆架。日本眼睁睁地将中国的大陆架完全说成是日本的大陆架，且是外大陆架。日本不接受俄罗斯对外大陆架的调查申请，却又使用俄罗斯的做法，妄图将东海中中国的神圣领土“钓鱼岛”问题提起争端，将日本单方面主张使用见不得人的方式，鼠窃狗偷，强加于中国。这是我国所绝对不能接受的。沿海国是否可以拥有200海里以外大陆架则主要取决于自然科学方面的依据，故沿海国在向大陆架界限委员会提出申请之前，必须作好充分的科学、法律和外交等多方面的准备工作。日本政府借此调查计划而向西对东海大陆架的资源展开调查，欲以何为？按照《公约》有关规定，对于东海大陆架的调查日本应该事先通知中国，并须得到中国的同意和参加。因为公约规定沿海国对大陆架的权利是专属性的，任何人未经沿海国的明示同意，均不得从事这种活动。东海大陆架是中日划界问题上有争议的，特别是钓鱼岛列屿海域更是如此。否则，这种调查行为就缺乏国际法和海洋法依据。

东海尚未划界，中日在此问题上存在争议。所谓“中间线”只是日方单方面主张，中方从未承认，也不可能承认。日方这种挑衅性行为十分危险，中方坚决反对。

四、联合国和国际海洋法法庭的合作和关系协定

国际法院是根据《联合国宪章》和《法院规约》成立的国际一般司法机关。国际海洋法法庭是依据《联合国海洋法公约》和《国际海洋法法庭规约》而设立的专门性国际司法机关。两个司法机构各司其职，互不隶属。一个是在安理会的指导下负责和平解决国际争端，一个是负责处理在和平解决有关利用海洋及其资源方面的争端。但是，对于联合国来说，则必须与国际海洋法法庭这一专门法庭加强合作，以充分发挥其应有的作用。也就是在这种情况下，联合国注意到国际海洋法法庭的作用，注意到国际海洋法法庭的职能符合《联合国宪章》第2条第3项关于应以和平方式解决争端的规定。作为一个独立的国际司法机构的国际海洋法法

庭，要求联合国与其缔结一项关系协定，以加强联合国与法庭的关系与合作。

1998 年 9 月 8 日联合国第九十二次全体会议审议并通过了《联合国和国际海洋法法庭的合作和关系协定》。[34] 协定中规定，联合国承认根据公约及其所附国际海洋法法庭规约的有关条款规定，国际海洋法法庭为一个具有管辖权的独立国际司法机构；国际海洋法法庭承认联合国在宪章下的责任，特别是在国际和平与安全，经济社会文化和人道主义发展及和平解决国际争端领域的责任；联合国与国际法庭承诺尊重彼此的地位和职权，并根据本协定规定建立合作工作关系。联合国和国际法庭，为促进其目标的有效达成，并协调其活动，应在适当时就共同关心的事项进行协商和合作，并在适当时采取主动协调其活动。联合国秘书长或秘书长代表可按照国际法庭规则的适用规定出席国际法庭或其海底争端分庭的公开会议，包括口头听讯。定期向国际法庭递交有关公约发展而且与国际法庭工作有关的资料，包括秘书长作为公约保存者或任何其他授予国际法庭管辖权的协定的保存者而收到的信函；向国际法庭转递国际法院按照其规约和法院规则通知秘书长的文件或以其他方式送交联合国的文件；在符合适用的规章及联合国根据有关协定而承担的义务的情况下，根据国际法庭的请求向其提供与审理中案件有关的资料。而国际法庭书记官长应定期向联合国递交有关公约发展而且与国际法庭活动有关的资料；向联合国递交与国际法庭工作有关的资料和文件，包括有关诉状口述程序命令判决的文件及其他信函和文件，包括与根据公约第 29 条和第 292 条向国际法庭提出的申请有关的其他信函和文件；在国际法庭的同意下并按照法庭规约和规则向联合国提供任何有关国际法庭应国际法院请求进行的工作的资料。

联合国和国际法庭应尽量谋求合作，以期在收集分析出版和传播与共同关心的事项有关的资料方面避免不应有的重复。它们应努力在适当时集合力量，以求尽量加强这些资料的用处和加以利用，并且尽量减轻各国政府和其他组织因可能被要求提供这些资料而承受的负担。国际法庭应将其可能需要联合国注意的活动通知联合国。为此目的，国际法庭可以酌情通过联合国秘书长向联合国提出报告；并在国际法庭认为其工作中出现属于安全理事会职权范围的问题，特别是有关公约第 298 条第 1 款（c）项的适用问题时，将其通知联合国秘书长。

五、结　论

国际海洋法法庭是一个具有管辖权的独立的国际司法机构，只是《公约》规定的导致有拘束力裁判的众多强制程序之一。对于有关本公约的解释或适用的任何争端通过司法程序作出具有拘束力的裁决。但是，在很多情况下，法庭所能做的

34 A/52/968，附件 A/RES/52/251。

远超过这些。公约在公约外的其他领域赋予法庭以管辖权，使法庭在国际争端的解决和程序上，可以开创重要的新局面。

海洋法公约允许非国家实体成为海底分庭的当事方（在有些案件中，甚至可以成为海洋法法庭的当事方），表示出法庭欢迎和承认这些非国家实体在开发、利用和管理海洋资源这一重要领域中的法律地位。这种承认便给予非国家实体机会和权利向国际海底管理局、国家或其他以前不能进入海底活动的实体寻求救济。这也使得非国家实体在它们从事海底活动方面纳入法庭的管辖范围内。这就意味着，它们在“区域”活动中对海洋资源的利用，对海洋环境的质量和变化方面受到适当的控制和法律限制，使得它们可以像国家和其他参与者一样处于重要的地位。

调解、特别仲裁庭、特别分庭和海底分庭的管辖是强制性的。海洋法庭的强制管辖权提供了一种新的和平解决海洋争端的途径，使得争端发生后，争端当事方不能达成协议接受司法程序解决争端时，提供了某种保证和程序提出它们的诉求。这将有助于在和平解决国际争端中发展和保护国际社会的重大利益。

法庭应对缔约国以外的实体开放。依照有关协定当事方的意愿，法庭有处理有关公约之外因相关海上协定引起的争端。也就是说，依协定的条款规定，法庭有权处理部分或全部当事方可能是非国家实体，如私人商业公司，政府间组织，甚至是个人之间的争端。这就为世界海洋事务提供了一个为世界各国承认和关注的专业的、有能力的和具有国际代表性的常设的司法机构。它有助于依据未来的、现行的海洋方面的协定解决海洋争端。因此，它代表了一种新的，有望为广泛接受的机遇和和平解决国际争端的重要途径。

国际法院和法庭在没有统一司法机构的国际法中的数目增加，必然引起这些法院和法庭之间的协调和冲突问题。且这些问题日益尖锐。前南国际刑庭上诉法庭在判决中曾经指出，“在国际法中，每一个法庭都是一种‘自足制度’（另有规定者除外）。”当然这里不存在解决协调和冲突的一般规则。这些问题只有在这种“自足制度”内加以解决，换句话说，即在受理案件的国际法院和法庭内加以解决。有时，有关文件中为此设立特殊的法院或法庭。但是，这些问题便常常使用受案法院或法庭的准据法予以解决。如果法律文件规定法院或法庭没有直接预见到这种问题，那么，它便是一个解释问题。

大陆架界限委员会的职务为审议沿海国提出的关于扩展到200海里以外的大陆架外部界限的资料和其他材料，并就有关划定大陆架外部界限的事项向沿海国提出建议，沿海国在这些建议的基础上划定的外大陆架外部界限应有确定性和拘束力。其目的就是要在沿海国管辖的大陆架与作为人类共同继承财产的国际海底区域之间划出明确的界限。但是大陆架界限委员会不是裁判机构，其行动不应妨害海岸相向或相邻国家间划定界限的事项。大陆架界限委员会不应以任何方式影响或干预国家间陆上或海上划界争端。

国际法院是根据《联合国宪章》和《法院规约》成立的国际一般司法机关。国

际海洋法法庭是依据《联合国海洋法公约》和《国际海洋法法庭规约》而设立的专门性国际司法机关。两个司法机构各司其职，互不隶属。一个是在安理会的指导下负责和平解决国际争端，一个是负责处理在和平解决有关利用海洋及其资源方面的争端。但是，对于联合国来说，则必须与国际海洋法法庭这一专门法庭加强合作，以充分发挥其应有的作用。联合国承认根据公约及其所附国际海洋法法庭规约的有关条款规定，国际海洋法法庭为一个具有管辖权的独立国际司法机构；国际海洋法法庭承认联合国在宪章下的责任，特别是在国际和平与安全，经济社会文化和人道主义发展及和平解决国际争端领域的责任;联合国与国际法庭承诺尊重彼此的地位和职权，并根据本协定规定建立合作工作关系。

中国作为一个海洋大国，要向海洋进军并充分利用和养护海洋资源，维护海上和平与安全，处理好与周边国家的关系及世界各国的关系，除加强全球性和区域性合作外，也要准备利用国际海洋法法庭和国际争端解决机制，和平解决争端，促进世界和平。

国际海洋法法庭与国际法院比较研究

——以法庭在组成、管辖权、程序及判决方面的特征为中心

金永明 *

内容摘要: 根据《联合国海洋法公约》(以下简称“《公约》”)成立的国际海洋法法庭是《公约》体制内的常设性法庭,其规约和规则是在借鉴与改进《国际法院规约》及其规则的基础上制定出来的。因此,在《公约》生效十周年之际,进行国际海洋法法庭与国际法院的比较研究,是很有现实意义的。本文首先比较了《国际法院规约》及其规则与《国际海洋法法庭规约》及其规则的相关条款,指出海洋法法庭与国际法院在组成、管辖和程序及判决方面的区别和特征。最后提出必须发挥专业性海洋法法庭的作用。

关键词: 国际海洋法法庭　国际法院　区别　特征

根据 1982 年《联合国海洋法公约》(以下简称“《公约》”)成立了 3 个职责不同的机构,即大陆架界限委员会、国际海洋法法庭(以下简称“法庭”)和国际海底管理局。在《公约》生效十周年之际,对法庭的组成、管辖和程序等进行论述,确有裨益。在法庭成立之前,国际法院是唯一的国际常设司法机关;而在《公约》生效后,1996 年成立的法庭也成了具有强制性权限的常设专业性国际法庭,并且该法庭规约及其规则[1]是在借鉴和改进《国际法院规约》及其规则的基础上制定出来的,因此,研究法庭的组成、管辖和程序,并与国际法院制度相比较,尤为必要。

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1 《法庭规则》是根据《法庭规约》第 16 条的规定于 1997 年制定的,并于 2001 年进行了两次修订。第一次是对有关船只的释放程序进行修订,即:对规则第 111 条和第 112 条作了修订。主要把规则第 112 条第 3 款的法庭或庭长在不开庭时确定审讯可能的最早日期,应在收到申请书第一个工作日起 10 日内,改为 15 日内;规则第 112 条第 4 款的判决应在审讯结束后不超过 10 日内举行的公开庭期间宣读,改为不超过 14 日内;规则第 111 条第 4 款的扣留国提出的陈述,应在不迟于本规则第 112 条第 3 款提到的审讯开始前 24 小时,改为 96 小时。第二次是对有关法庭书记官长任期的规则第 32 条第 1 款的修改,由 7 年改为 5 年。此规则由序言、第一部分(用语)、第二部分(组织)和第三部分(程序)组成,共 138 条。

一、《公约》争端解决机制概述

《公约》为解决争端提供了一套详尽而灵活的机制。它不仅规定了解决争端的方法，而且建立了解决争端的程序和机构。[2] 这就克服了 1958 年日内瓦海洋法四公约中不规定争端解决机制而只在附属议定书中规定争端解决机制的弊端。《公约》成功地将争端解决程序规定在第十五部分。即：要求各国以和平方法解决争端，尊重各国协议所规定的自行选择的和平方法解决争端，并根据国家的主权平等原则，赋予了各国自由选择争端解决方法的权利。[3] 其意义重大。

1.《公约》争端解决机制的重要性

《公约》的争端解决机制在国际争端制度的发展中占有重要的地位。首先，由《公约》解释或适用而产生的争端原则上必须提交给具有拘束力的国际性法院，并适用具有强制性解决争端的程序；其次，在《公约》的争端解决制度中，不仅规定国家，而且规定将满足一定条件的自治联合体、非自治区域以及将《公约》相关事项的权限由缔约国移交给国际组织的机构在国际性法院中也具有诉讼当事者的能力；再次，对于与国际海底区域活动有关的争端，不仅仅是缔约国之间的争端，而且对于缔约国与国际海底管理局之间的争端，缔约国、国际海底管理局企业部、国有企业、自然人或法人为合同当事者之间的争端，法庭的海底争端分庭也具有管辖权，即：国家以外的主体也能向国际性法院提出申诉。[4] 这对国际法的主体问题产生了冲击，但由于这是基于各国同意而赋予的，并且其范围极其有限，因此，对国际法的主体理论不会带来很大的影响。

2. 设立法庭的必要性

在第三次联合国海洋法会议期间，对于是否应建立法庭进行了激烈的争论。反对设立法庭的发达国家，主张继续由国际法院处理海洋法争端。其主要理由是：迄今为止，国际法院在国际争端解决机制中，已发挥了重要作用，并在国际社会已确立了其作为最高司法机关的地位，也能胜任解决海洋法的争端，强调对新《公约》的解释和适用方面的争端，必须让国际法院发挥核心作用；而对于《公约》的当事方的扩大主张只要修改《国际法院规约》就可以实现了，没有必要建立法庭，或者可在国际法院中新设专门处理海洋法争端的分庭，从而强化国际法院对新的海洋

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2 John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law*, London: Oxford University Press, 2000, p. 84.

3 [日] 山本草二著：《海洋法》，东京：三省堂，1997 年，第 267~268 页；[日] 牧田幸人：《联合国海洋法公约争端解决机制法律结构（二）》，载于《国际法外交杂志》1983 年第 82 卷第 4 号，第 68~69 页；Carnegie A. R., The Law of the Sea Tribunal, *International and Comparative Law Quarterly*, Vol. 28, 1979, pp. 669~684.

4 [日] 高林秀雄著：《联合国海洋法公约的成果与课题》，东京：东信堂 1996 年版，第 202~203 页。

法争端的应对。支持设立法庭的发展中国家认为，《公约》争端具有很强的特殊性和专业性，并随着行为主体的多元化，已扩大了属人管辖的范围，即使扩大国际法院的当事方资格，还必须设置海洋法法庭以综合处理海洋法争端，并强调必须由专业性法庭对《公约》的解释和争端作出裁定，才符合《公约》的宗旨；同时，这也是发展中国家希望国际法院进行积极改革，不满意国际法院的工作实绩之故。[5] 争论的结果，发展中国家取胜，最后在《公约》体系中规定了设立法庭的条款。法庭的建立对于统一地解释《公约》和处理争端以及海洋法的特殊性活动很有必要。[6] 这对于实现《公约》目的，构建国际海洋新秩序也具有重要意义。

二、法庭和国际法院的组织（法）比较

1. 不同的地位

国际法院是联合国的主要机关之一，而且是联合国主要司法机关。[7] 而从《公约》第 287 条第 1 款[8] 和《公约》附件六第 1 条第 1 款[9] 的规定来看，法庭是按照《公约》附件六设立的。即国际法院是联合国主要的常设性司法机关，而法庭是《公约》体制内的常设性专业机构。

2. 法官的选举

国际法院由品格高尚并在本国具有最高司法职位之任命资格或公认为国际法之法学家中选举出的 15 位法官组成；法官任期 9 年，并可连任。而法庭是从享有公平和正直的最高声誉在海洋法领域内具有公认资格的人士选出的 21 名法官组成；法官任期 9 年，连选可连任。[10] 法庭的法官数增加到 21 名，是由于在其中应选出组成法庭的常设性海底争端分庭的 11 名法官之故；同时，法庭法官必须是海洋

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5 吴慧著：《国际海洋法法庭研究》，北京：海洋出版社 2002 年版，第 10~13 页；牧田幸人：《联合国海洋法公约争端解决机制法律结构（二）》，载于《国际法外交杂志》1983 年第 82 卷第 4 号，第 64~65 页。另外，有学者，在处理海洋法争端方面，极力主张必须充分发挥国际法院的应有作用，参见小田滋：《新渔业制度和争端解决——第三次联合国海洋法会议审议中的一个盲点》，载于《国际法外交杂志》1980 年第 79 卷第 4 号，第 1~8 页。

6 [日] 栗林忠男著：《注解联合国海洋法公约》（下卷），东京：有斐阁 1994 年版，第 248 页。L. Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, pp. 516~517.

7 《联合国宪章》第 7 条第 1 款、第 94 条。

8 《公约》第 287 条第 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。

9 《公约》附件六，即《国际海洋法法庭规约》第 1 条第 1 款规定，法庭应按照本公约和本规约的规定组成并执行职务。

10 《国际法院规约》第 2 条、第 3 条、第 13 条第 1 款；《法庭规约》第 2 条第 1 款、第 5 条第 1 款。

法方面的专家。另一方面，《国际法院规约》规定在选举法官时，不但应考虑被选人的必要资格，而且应考虑务使法官全体确能代表世界各大文化及各主要法系；而《法庭规约》规定法庭作为一个整体，应确保其能代表世界各主要法系和公平地区分配，并规定了构成法庭的条件是联合国所确定的每一地理区域集团应有法官至少三人。[11] 从 1996 年成立的法庭法官组成来看，体现了上述的规定。

在选举国际法院法官时，根据常设仲裁法院“各国团体”所提出的四人以下的候选人，由联合国秘书长依字母次序，编制所提人员名单，并将此提交大会及安理会，在大会及安理会的各独立的选举中获得绝对多数票者应认为当选；而在法庭法官的选举中，每一缔约国可提名二人以下的候选人，秘书长或书记官长应按字母顺序编制出被提名的人选名单，在由缔约国 2/3 以上出席的会议上以无记名投票方式，得票最多并获得出席及参加表决的缔约国 2/3 多数票的候选人应当选为法庭法官，但这种多数应包括缔约国的过半数。[12] 在选举法庭法官时，不仅是国家，《公约》第 305 条第 1 款所列举的主体，例如：自治联合体、国际组织，也能参加选举，但像欧盟那样的国际组织，为了避免其成员国在投票时重复行使代表权，欧盟不能参加投票。[13]

选举法庭法官的政治色彩比选举国际法院法官较为强烈。其理由是：在投票选举法庭候选人时，各国会考虑各缔约国直接提名的缔约国的状况；在选举国际法院法官时，安理会理事国在大会和安理会行使投票权，是一种双重投票，而在选举法庭法官时，遵守一国一票的原则。同时，在《法庭规约》中，对于如何处理同一国的国民二人以上获得必要的选举票而当选为法官的状况，以及在第一次选举时不能选出全部法官时，不存在像《国际法院规约》第 10 条第 3 款、第 12 条 [14] 那样的规定。

3. 法官的职权

国际法院法官不得行使任何政治或行政职务或执行任何其他职业性质之任务；而法庭法官不得执行任何政治或行政职务或对任何与勘探和开发海洋或海底

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11 《国际法院规约》第 9 条、《法庭规约》第 2 条第 2 款、第 3 条第 2 款。

12 《国际法院规约》第 4~10 条、《法庭规约》第 4 条。

13 《公约》附件九（国际组织的参加）第 4 条第 4 款规定：这一国际组织的参加在任何情形下均不应导致其为缔约国的成员国原应享有的代表权的增加，包括作出决定的权利在内。

14 《国际法院规约》第 10 条第 3 款规定：如同一国家之国民得大会及安全理事会之绝对多数票者不止一人时，其年事最高者应认为当选。第 12 条第 1 款规定：第三次选举会后，如仍有一席或一席以上尚待补选时，大会或安全理事会各派三人；此项联席会议就每一悬缺以绝对多数票选定一人提交大会或安全理事会分别请其接受。第 2 款规定：具有必要资格人员，即为未列入第 7 条所指之候选人名单，如经联席会议全体同意，亦得列入该会议名单。第 3 款规定：如联席会议确认选举不能有结果时，应由已选出之法官，在安全理事会所定之期间内，就曾在大会或安全理事会得有选举票之候选人中，选定若干人补足缺额。第 4 款规定：法官投票数相等时，年事最高之法官应投决定票。

资源或与海洋或海底的其他商业用途有关的任何企业的任何业务有积极联系或有财务利益，因此，法庭法官能从事不符合此条款所禁止的职业，对此的疑义应由出席法庭的其他法官以半数裁定解决，同时规定所有可以出庭的法庭法官均应出庭，法庭应确定哪些法官可以出庭组成审理某一特定争端的法庭。[15] 即法庭法官并不是专职的，这与国际法院法官的地位有本质的不同。这也可以从以下的规定中看出他们之间地位的不同。第一，国际法院法官实行年薪制，院长每年领取特别津贴；而法庭法官应领取年度津贴，并于执行职务时按日领取特别津贴，并且这种津贴在考虑法庭工作量的同时由各缔约国随时开会决定。[16] 第二，法庭法官于执行法庭职务时，应享有外交特权和豁免，此与《国际法院规约》第 19 条的规定相同，但由于国际法院受《联合国宪章》第 105 条关于联合国特权和豁免条约的保护，而法庭并不是联合国的机关，必须通过缔结新的协定以保障法庭法官的特权与豁免。[17] 此协定已于 1997 年缔结。

4. 法官国籍

《法庭规约》第 17 条第 1~3 款规定：属于争端任何一方国籍的法庭法官，应保有其作为法庭法官参与的权利；如果在受理一项争端时，法庭上有属于一方国籍的法官，争端任何他方可选派 1 人为法庭法官参与裁判；如果在审理一项争端时，法庭上没有属于当事各方国籍的法官，任何一方均可选派 1 人为法庭法官参与裁判。这些规定与《国际法院规约》第 31 条第 1~3 款的规定相同。在《国际法院规约》第 31 条第 2 款中规定：国籍法官尤以就第 4 条及第 5 条规定所提之候选人中选充为宜，即从被提名的法官候选人中选择为佳；而在《法庭规约》中并不存在此条件。国籍法官的制度也适用于海底争端分庭和特别分庭，此制度与适用于国际法院的特种案件设立的分庭和用简易程序设立分庭的规定相同。[18]

《国际法院规约》第 31 条第 4 款规定：院长应请分庭法官 1 人，或在必要时 2 人，让与属于关系当事国国籍之法官或特别选派之法官；第 26 条第 2 款规定：处理某特定案件而设立的分庭，组织此项分庭法官之人数，应由法院得当事国之同意定之。而在《法庭规约》第 17 条第 4 款规定：庭长应与当事各方协商后，要求组成分庭的法官中必要数目的法官将席位让给属于有关当事各方国籍的法官或特别

15 《国际法院规约》第 16 条第 1 款；《法庭规约》第 7 条第 1 款、第 7 条第 3 款、第 13 条第 1 款和第 2 款。

16 《国际法院规约》第 32 条第 1 款、第 2 款；《法庭规约》第 18 条第 1 款、第 5 款。

17 《法庭规约》第 10 条；《国际法院规约》第 19 条规定：法官于执行法院职务时，应享有外交特权及豁免；《联合国宪章》第 105 条第 1 款规定：本组织于每一会员国之领土内，应享受于达成其宗旨所必需之特权及豁免。第 2 款规定：联合国会员国之代表及本组织之职员，亦应同样享受于其独立行使关于本组织之职务所必需之特权及豁免。另外《联合国宪章》第 7 条规定：国际法院是联合国之主要机关；第 92 条规定：国际法院为联合国之主要司法机关。

18 《法庭规约》第 17 条第 4 款、《国际法院规约》第 31 条第 4 款。

选派的法官，并在第 15 条第 2 款规定：特别分庭的组成应由法庭在征得当事各方同意后决定。可见，在分庭的组成方面，法庭更尊重了当事方的意志。

《法庭规约》第 17 条第 5 款规定：如果当事方利害关系相同，则为以上各项规定的目的，该若干方应视为一方。此规定与《国际法院规约》第 31 条第 5 款相同。但由于分庭是由很少人数的法官所组成的，因此在适用国籍法官及特别选派法官的制度时，并不那么简单。再者，法庭向各缔约国及缔约国以外的实体开放（《法庭规约》第 20 条），尤其是在将此制度适用于海底争端分庭时，情况将更为复杂。对此，《法庭规则》第 22 条已作了具体规定。例如，该条第 1 款规定，只有在下列情况下，国家以外的实体可选择一名特别法官：（1）其他各方之一是缔约国并且在席位中有一名具有其国籍的法官，或这一方是国际组织，席位中有一名具有该国际组织成员国之一国籍的法官或该缔约国自己选择了特别法官；（2）席位中有一名具有其他方之一的担保国国籍的法官。

国籍法官制度是继承了仲裁的传统而发展起来的。让国籍法官或特别选派的法官参与诉讼，即使他们不代表当事国的利益，但从第三者的立场出发，让他们参与诉讼，审判机关也是相当不愿意的。但因为这些法官能很好地理解争端当事国的主张、参与审理的全过程、参加判决书的制作，这对提高争端当事国对法院或法庭的信赖、向国民解释判决是有帮助的。由于这种制度在国际裁判的发展过程中经证明是便利的，所以在法庭中也采用了这种制度。

5. 专家

《公约》第 289 条规定：对于涉及科学和技术问题的任何争端，根据本节行使管辖权的法院或法庭，可在争端一方请求下或自己主动，并同争端各方协商，最好从按照附件八（特别仲裁）第 2 条编制的有关名单中，推选至少两名科学或技术专家列席法院或法庭，但无表决权。而《国际法院规则》第 9 条规定：法院……决定为某一诉讼案件或咨询意见的请求委派襄审官出席法庭，但无表决权；而《法庭规约》第 15 条规定：当法庭应当事一方请求或主动决定选派专家时，应当根据法庭庭长的提议选派。在该《法庭规约》的规定中，将国际法院的襄审官变成了专家，这是由法庭的专业性决定的。

6. 特别分庭

《国际法院规约》第 26 条规定：法院得随时设立分庭，以处理特种案件和特定案件。这与《法庭规约》第 15 条第 1 款、第 2 款的规定相同。同时，《法庭规约》第 15 条第 3 款规定：法庭每年应设立迅速处理事务的简易程序分庭；并在该条第 5 款规定：分庭作出的判决应视为法庭作出的判决，此款规定与《国际法院规约》第 27 条所规定的内容相同。

三、法庭和国际法院的管辖权比较

1. 属人管辖

《国际法院规约》第 34 条第 1 款规定：在法院得为诉讼当事国者，限于国家；第 35 条第 1 款、第 2 款规定：法院受理本规约各当事国之诉讼，法院受理其他各国诉讼案件，……由安理会定之。可见，在国际法院的当事国只限于国家。而《公约》第 291 条规定：第十五部分规定的所有解决争端程序应对各缔约国开放，第十五部分规定的解决争端程序应仅依本公约具体规定对缔约国以外实体开放。《法庭规约》第 20 条规定：法庭应对各缔约国及满足一定条件的缔约国以外的实体开放。即法庭的属人管辖如下：（1）不仅包括公约的缔约国，而且也包括满足《公约》第 305 条第 1 款条件的自治联合体、非自治区域及国际组织；（2）对于第十一部分明文规定的任何案件，除缔约国外，国际海底管理局、企业部、国有企业、自然人或法人也能成为当事者（《公约》第 187 条）；（3）按照案件当事所有各方接受的将管辖权授予法庭的任何其他协定所提交的任何案件，法庭应对缔约国以外的实体开放。当然这些协定并非限于国际协定，只要案件当事所有各方接受法庭管辖，其主体范围就不受限制。[19]

2. 属事管辖

《国际法院规约》第 36 条第 1 款规定：法院之管辖包括各当事国提交之一切案件，及《联合国宪章》或现行条约及协约中所特定之一切事件。

在《公约》第 288 条规定：法院或法庭对于按照本部分向其提出的有关本公约的解释或适用的任何争端，应具有管辖权；对于按照与本公约的目的有关的国际协定向其提出的有关协定的解释或适用的任何争端，也应具有管辖权；法庭海底争端分庭和第十一部分第五节所指的任何其他分庭或仲裁法庭，对按照该节向其提出的任何事项，应具有管辖权。《法庭规约》第 21 条规定：法庭的管辖权包括按照本公约向其提交的一切争端和申请，和将管辖权授予法庭的任何其他协定中具体规定的一切申请。对于属事管辖，《国际法院规约》规定的是一切案件，而《法庭规约》规定的是与《公约》有关的一切争端和申请。可见，国际法院的管辖事项多于法庭的管辖事项。这是由法庭性质决定的。

《法庭规约》第 22 条规定：如果同本公约所包括的主题事项有关的现行有效条约或公约的所有缔约国同意，则有关这种条约或公约的解释或适用的任何争端，可按照这种协定提交法庭。即只要条约的所有缔约国同意，就能将事件提交法庭。但“现行有效的条约”以什么时间为基准并未明确，是否可以理解为是制定《公约》时有效的条约。

3. 管辖权的选择

《公约》第 287 条第 1 款规定：一国在签署、批准或加入本公约时，或在其后

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19 [日] 高林秀雄著：《联合国海洋法公约的成果与课题》，东京：东信堂 1996 年版，第 221 页。

任何时间，应由自由用书面声明的方式选择国际海洋法法庭、国际法院、仲裁法庭、特别仲裁法庭的任何一个或一个以上的方法，以解决有关本公约的解释或适用的争端。即缔约国通过事前接受解决争端的方法，就选择了法院或法庭的管辖权；在接受同一程序的争端当事国之间，只要将争端提交这种程序；没有接受同一程序时，除没有特别协议外，只能提交仲裁法庭。

《公约》缔约国根据第 287 条通过声明的方式，可以接受法院或法庭的强制管辖权，同时缔约国对于《公约》第 298 条所列举的争端也可以书面声明下列各类争端的一类或一类以上不接受自己选择的法院或法庭的强制管辖权。这种选择性的例外是：关于划定海洋边界或涉及历史性海湾或所有权的争端、军事活动以及关于行使主权权利或管辖权的法律执行活动的争端以及正由安理会执行宪章所赋予的职务的争端；同时，对于作出这种声明的缔约国，随时可撤回声明。[20]

四、法庭和国际法院的程序比较

（一）法庭和国际法院的诉讼程序

《法庭规约》第 24 条第 1 款规定：争端可根据情况以将特别协定通知书记官长或以将申请书送达书记官长的方式提交法庭，两种方式均应载明争端事由和争端各方；此规定与《国际法院规约》第 40 条第 1 款的规定相同。在程序方面，《法庭规约》中不存在相应规定的，则由《法庭规则》做出补充规定。例如：对于法庭正式文字，《法庭规则》第 43 条规定：法庭的正式文字为英语和法语；这与《国际法院规约》第 39 条相对应。《法庭规则》第 53 条规定：当事各方应由代理人代表，当事各方出庭时可以获得律师或辩护人的帮助；此内容与《国际法院规约》第 42 条第 1 款、第 2 款的规定相同。关于诉讼程序（书面程序和口头程序）的内容规定在《法庭规则》第 44 条中，这与《国际法院规约》第 43 条相对应，但在《法庭规则》中不存在《国际法院规约》第 43 条第 3 款[21] 那样的规定。关于判决复核，《法庭规则》在第 127~129 条作了规定，这与《国际法院规约》第 61 条相对应。

《法庭规约》第 26 条第 1 款规定：审讯应由庭长主持；第 27 条规定：法庭为审理案件，应发布命令，决定当事每一方必须终结辩论的方式和时间，并作出有关收受证据的一切安排。另外，关于书面程序，与《国际法院规则》第 44~53 条相同的内容，则规定在《法庭规则》的第 59~68 条中。对于缺席审判，《国际法院规约》第 53 条第 1 款规定：当事国一方不到法庭或不辩护其主张时，他方得请求法院对

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20 《公约》第 298 条第 1 款，第 2 款。

21 《国际法院规约》第 43 条第 3 款规定：此项送达应由书记官长依法院所定次序及期限为之。

自己主张为有利之裁判;而《法庭规约》第 28 条规定:当事一方不出庭或对其案件不进行辩护时,他方可请求法庭继续进行程序并作出裁决,当事一方缺席或对其案件不进行辩护,应不妨碍程序的进行。可见,法庭对于当事一方不到庭或对案件不进行辩护持中立的态度。

(二)法庭和国际法院的(附带)特别程序

1. 临时办法(临时措施)

因争端提交国际法院至作出最后裁判需要相当长的时间,为了保全各当事者的权利,防止出现不可回复的事态发生,法院能采取临时办法。对此,《国际法院规约》第 41 条规定:法院如认为情形有必要时,有权指示当事国应行遵守以促使彼此权利之临时办法。但对于临时办法是否具有法律约束力、争端当事国是否有义务遵守临时办法,《国际法院规约》并不明确。对此,《公约》则作了明确的规定。例如:《公约》第 290 条第 1 款规定:法院或法庭可在最后裁判前规定其根据情况认为适当的任何临时措施,以保全争端各方的各自权利或防止对海洋环境的严重损害;并在第 6 款规定:争端各方应迅速遵从根据本条所规定的任何临时措施。可见,《公约》对当事方遵守临时措施的义务作了明确的规定,并且法院或法庭还能为防止海洋环境的严重损害作出临时措施。

《国际法院规则》第 75 条第 1 款规定:法院能主动指示当事国所应采取或遵守的临时措施;而《公约》第 290 条第 3 款规定:临时措施仅在争端一方提出请求并使争端各方有陈述意见的机会后,才可根据本条予以规定、修改或撤消。同时,《国际法院规则》第 74 条第 1 款、第 2 款规定:指示临时措施的请求应比其他一切案件优先处理;如果在提出这项请求时法院不开庭,法院应立即开庭,作为紧急事项,对这项请求作出裁定;而《法庭规约》第 25 条第 1 款规定:按照公约第 290 条,法庭及其海底争端分庭应有权规定临时措施。《法庭规则》第 90 条第 1 款规定:依照本规则第 112 条第 1 款,临时措施的请求较法庭中其他一切程序优先。[22]《法庭规约》第 25 条第 2 款又规定:如果法庭不开庭,或没有足够数目的法官构成法定人数,临时措施应由简易分庭加以规定,并应由法庭加以审查和修订。

在《公约》的争端解决制度中,从《公约》第 287 条、290 条第 3 款的规定中可以看出,法庭在指示临时措施方面,具有优先于国际法院、仲裁法庭和特别仲裁法庭的权限。

2. 初步程序

《公约》第 294 条第 1 款规定:《公约》第 287 条所规定的法院或法庭,就第

22 《法庭规则》第 112 条第 1 款规定:当法庭要同时处理要求释放船只或船员的申请和要求指示临时措施的请求时,法庭应作出必要的决定以确保两者都不拖延地得到处理。

297 条所指争端向其提出的申请，应经一方请求决定，或可自己主动决定，该项权利主张是否构成滥用法律程序，或者根据初步证明是否有理由；法院或法庭如决定该项主张构成滥用法律程序或者根据初步证明并无理由，即不应对该案采取任何进一步行动。第 2 款规定：法院或法庭收到这种申请，应立即将这项申请通知争端他方，并应指定争端他方可请求按照第 1 款作出一项决定的合理期限。第 3 款规定：本条的任何规定不影响争端各方按照适用的程序规则提出初步反对的权利。初步程序制度是指在未明确证据之前，法院或法庭不采取任何行动，目的是为了防止申请国滥用法律程序。它与法院或法庭是否具有管辖权而产生争议的初步反对制度是不同的。

3. 初步反对

《公约》第 288 条第 4 款规定：对于法院或法庭是否具有管辖权，如果发生争端，这一问题应由该法院或法庭以裁定解决；此规定与《国际法院规约》第 36 条第 6 款规定的内容相同。《国际法院规则》第 79 条[23] 对初步反对作出了规定，这与《法庭规则》第 97 条的内容相同。

4. 参加诉讼

关于第三者参加诉讼的问题，与《国际法院规约》第 62、63 条相同的内容，在《法庭规约》第 31 条、第 32 条作了规定。《法庭规约》第 31 条第 1 款规定：一缔约国如认为任何争端的裁判可能影响该缔约国的法律性质的利益，可向法庭请求准许参加。请求参加诉讼的国家只限于争端的裁判可能影响该国的法律性质的利益，其与《国际法院规约》的规定相同，但是国际法院表述的是对“案件之判断”受影响的国家，而《法庭规约》表述的是“争端之裁判”受影响的缔约国，法庭虽在请求参加诉讼的范围方面有所扩大，但能请求的主体只限于缔约国，与国际法院的国家相比在主体方面受到了一定的限制，同时在《法庭规约》中增加了第 31

23 《国际法院规则》第 79 条第 1 款规定：被告对法院的管辖或申请的接受的任何反对主张，或对实质问题的任何下一步程序进行前要求作出的裁定的反对主张，应在为送交辩诉状所规定的期限内以书面形式提出。被告国以外的当事国提出的任何这种反对主张，应在为该当事国第一次提交书状所规定的期限内提出。第 4 款规定：初步反对意见应列举反对主张所根据的事实和法律、其诉讼主张以及可资佐证的文件的目录；并应指明当事国拟提出的任何证据。证件的副本应随文送达。第 5 款规定：在当书记官处接到初步反对主张时，关于实质问题的程序应暂时停止，法院，或在法院不开庭时，院长应确定当事国他方能提出意见和诉讼主张的书面陈述的期限；可以佐证的文件应随文送达，并应指明拟提出的任何证据。第 6 款规定：除法院另有裁定外，下一步程序应是口述程序。第 7 款规定：本条第 4 款和第 5 款所指的书状中关于事实和法律的陈述和第 6 款所规定的审讯中的陈述和证词，应限于与反对主张有关的事项。第 8 款规定：为了使法院能在程序的初步阶段确定其管辖，法院如认为必要时得要求当事国双方辩论所有与争端有关的法律和事实问题，并提出所有与争端有关的证据。第 9 款规定：法院在听取当事国双方意见后，应以判决书形式予以裁定，而通过该判决书支持该反对主张，或驳回该反对意见，或宣告该反对主张在该案情中不具有完全初步的性质。法院如果驳回反对主张或宣告该反对主张不具有完全初步的性质，应规定下一步程序的期限。

条第 3 款[24] 的内容。另外，《国际法院规约》第 63 条规定：参加诉讼的只在“协约发生解释问题”时才加以适用；而在《法庭规约》第 32 条规定：参加诉讼适用于“公约的解释或适用发生疑问”。可见，法庭扩大了适用参加诉讼的范围。

《法庭规则》（第 99~104 条）在参考《国际法院规则》（第 81~86 条）的基础上，对参加诉讼的问题作了几乎相同的规定。《法庭规则》第 100 条第 1 款规定：规约第 32 条第 1 款、第 2 款所提到的缔约国或缔约国以外的实体，希望行使规约第 32 条第 3 款所授予的参加权利，应提出这种意思的声明。因此，对于《公约》的解释，缔约国以外的国家以及国家以外的主体也能参加诉讼。

5. 船只和船员的迅速释放

船只和船员的释放制度是在《公约》中引入专属经济区制度的同时而新增加的制度。[25] 将船只和船员的迅速释放问题提交给法院或法庭后，当争端当事国之间存在协议时，并不要求争端由《公约》第 287 条所列举的国际性法院或法庭来裁定，同时由于仲裁法庭和特别仲裁法庭从接受案件到组成法庭需要时间，因此将船只和船员的迅速释放问题提交给法庭的可能性很大。从法庭的司法实践来看，也证实了这一点。《公约》第 292 条第 3 款规定：法院或法庭应毫不迟延地处理关于释放的申请。《法庭规则》第 112 条规定：要求释放船只或船员的请求比其他诉讼优先；如果请求方在申请书中要求，而且扣留国在收到申请通知 5 天内通知法庭同意该请求，则此申请应由简易程序分庭处理；法庭或庭长在不开庭时，应确定审讯可能的最早期，但应在收到申请书后第 1 个工作日起 15 天内。《公约》第 292 条第 2 款规定：释放的申请尽可由船旗国或以该国名义提出。《法庭规则》第 110 条第 2 款规定：一缔约国可在任何时候通知法庭：（1）该政府当局有权授权一些人根据公约第 292 条以该国名义提出申请，（2）任何被授权以其名义提出申请的个人姓名和地址。另外，对于释放的申请一般认为没有必要适用用尽国内救济原则。

虽然在《公约》第 292 条第 1 款规定：扣留国在合理的保证金或其他财政担保经提供后仍然没有遵从本公约的规定，将该船只或其船员迅速释放；第 3 款规定：法庭或法院应毫不迟延地处理关于释放的申请。问题是法院或法庭适用什么标准裁定合理的保证金，《公约》对此未作任何规定。而在实践中，其判断极其困难。从法庭的司法实践可以看出，法庭在决定保证金时，是在考虑船只及所装货物等的价格后决定的。《法庭规则》第 113 条第 1 款规定：法庭应在其判决中根据公约第 292 条裁定：在每一案件中，请求方指控扣留国在其支付了合理的保证金或其他财政担保后，没有遵守公约的规定立即释放船只或船员是否有理由。同时，《法庭规则》第 113 条第 2 款规定：如果法庭裁定指控有理由，法庭应决定释放船只或

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24 《法庭规约》第 31 条第 3 款规定：如果请求参加获准，法庭对该争端的裁判，应在与该缔约国参加事项有关的范围内，对参加的缔约国有拘束力。

25 [日] 青木隆：《国际海洋法法庭的五年》，载于《法学研究》2002 年第 75 卷第 2 号。

船员应支付的保证金或财政担保的数额、性质和形式。对此，一般认为，当扣留国不正当地要求高额的保证金而以请求方未提供为由拒绝释放时，应认定扣留国违反了《公约》的有关规定。

《公约》第 292 条第 4 款规定：在法院或法庭裁定的保证金或其他财政担保经提供后，扣留国当局应迅速遵从法院或法庭关于释放船只或船员的裁定；并且这种裁定有确定性，争端所有各方均应遵从，裁定（裁判）具有拘束力。[26]

五、法庭和国际法院的判决比较

《法庭规约》在第 29 条、第 30 条、第 33 条分别对判决的决定方式、判决书的内容、裁判的确定性和拘束力作了规定，其与《国际法院规约》第 55~60 条的规定相同。

对于判决的执行，《联合国宪章》第 94 条规定：联合国每一会员国为任何案件之当事国者，承诺遵行国际法院之判决；遇有一方不履行依据法院判决应负之义务时，他方得向安全理事会申诉；安全理事会如认为必要时，得作成建议或决定应采办法，以执行判决。而对有关法庭判决的执行，《公约》只在以下二处作了规定：第一，《公约》第 165 条第 2 款（j）规定，法律和技术委员会经海底争端分庭作出裁判后，就任何应采取的措置向理事会提出建议；第二，《公约》第 162 条第 2 款（V）规定，经海底争端分庭作出裁判后，法律和技术委员会将此通知大会，并就其认为应采取的适当措施提出建议。同时，《法庭规约》第 39 条规定：分庭的裁判应在该缔约国领土内执行。可见，法庭对于判决的执行缺乏国际法院所具有的后续措施。

1. 解释判决

《法庭规约》第 33 条第 3 款规定：对裁判的意义或范围发生争端时，经当事任何一方的请求，法庭应予以解释；而《国际法院规约》第 60 条规定：判词之意义或范围发生争端时，经任何当事国之请求后，法院应予解释。国际法院只将“判词”的意义或范围作为解释的对象，而法庭将“裁判”的意义或范围作为解释对象，因此，法庭的解释对象不光是“判词”，也包括“判决或命令”。在《法庭规则》第 126 条第 1 款规定：对判决之意义或范围发生争端时，任何当事方均可请求解释。在此，只将“判决”作为解释的对象。

2. 判决复核

《国际法院规约》第 61 条对判决复核做出了规定；而在《公约》、《法庭规约》

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26 《公约》第 286 条规定：在第三节限制下，有关本公约的解释或适用的任何争端，如已付诸第一节而仍未得到解决，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。

中不存在复核的条款。为此，在参考《国际法院规约》第 61 条及其规则（第 99 条和第 100 条）的基础上，在《法庭规则》中制定了复核的条款。其主要内容规定在《法庭规则》第 127 条第 1 款、第 128 条第 3 款、第 129 条。[27]

3. 上诉

《公约》第 287 条第 1 款赋予了法庭、国际法院、仲裁法庭、特别仲裁法庭平等的地位，似乎任一法院或法庭做出的判决，不能向其他的法庭或法院提出上诉，但从《公约》的条款来看，并非如此。即使在其他的国际性法院或其他国际机构已经处理的争端，此争端仍能向《公约》第 287 条规定的其他法院或法庭提起上诉。其情况如下：（1）《公约》第 281 条第 1 款[28] 以及《公约》第 286 条规定的状况；（2）《公约》第 188 条第 2 款（2）[29] 的状况；（3）附件七第 11 条和附件八第 4 条[30]，反过来说，只要争端当事国对上诉程序事前存在同意就能向其他的法院或法庭提出上诉；（4）《公约》第 298 条第 1 款（c）[31] 的状况；（5）《法庭规约》第 21 条、第 22 条，[32] 即只要存在争端当事方之间的同意，法庭就能发挥上级审的作用。另外，《国际法院规约》第 60 条规定：法院之判决系属确定，不准上诉。在此，明确地禁止了上诉。而在《法庭规约》第 33 条第 1 款中规定：法庭的裁判是有确定性的，

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27 《法庭规则》第 127 条第 1 款规定：只可在发现具有决定因素性质的事实时，才可提出复核判决的请求，而当初在做出判决时，法庭和请求复核的当事方均不知道该事实，但绝对须以此种不知情并非疏忽所致为限，上述请求须最迟在发现新事实后的 6 个月内提出，且不得在自判决之日起 10 年后提出。第 128 条第 3 款规定：法庭在对请求可否接受做出裁决前，应再次对当事各方提供就此提出意见的机会。第 129 条规定：如果所要复核或解释的判决是由法庭做出的，复核或解释的请求应由法庭处理；如果该判决是由分庭做出的，复核或解释的请求在可能的情况下，应由分庭处理；如果情况不允许时，该请求应由遵照规约或本规则相关规定组成的分庭处理；根据规约或本规则的规定，如果分庭的组成需要当事各方的同意而在法庭所定期限内无法取得此种同意，则该请求应由法庭处理。

28 《公约》第 281 条第 1 款规定：作为有关本公约的解释或适用的争端各方的缔约各国，如已协议用自行选择的和平方法来谋求解决争端，则只有在诉诸这种方法而仍未得到解决以及争端各方间的协议并不排除任何其他程序的情形下，才适用本部分所规定的程序。

29 《公约》第 188 条第 2 款（2）规定：在此种仲裁开始时或进行过程中，如果仲裁法庭经争端任何一方请求，或根据自己决定，断定其裁决须取决于海底争端分庭的裁定，则仲裁法庭应将此种问题提交海底争端分庭裁定。然后，仲裁法庭应依照海底争端分庭的裁定作出裁决。

30 《公约》附件七第 11 条规定：除争端各方事前议定某种上诉程序外，裁决应有确定性，争端各方均应遵守裁决。附件八第 4 条规定：附件七第 4 至第 13 条比照适用于按照本附件的特别仲裁程序。

31 《公约》第 298 条第 1 款（c）规定：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。

32 《法庭规约》第 21 条规定：法庭的管辖权包括按照本公约向其提交的一切争端和申请，和将管辖权授予法庭的任何其他国际协定中具体规定的一切申请。第 22 条规定：如果本公约所包括的主题事项有关的有效条约或公约的所有缔约国同意，则有关这种条约或公约的解释或适用的任何争端，可按照这种协定提交法庭。

争端所有各方均应遵行。可见，法庭并未对上诉作了禁止。但如在《公约》第 287 条中所列举的 4 个法院或法庭之间容许相互上诉的话，除在仲裁法庭、特别仲裁法庭当事方之间事前同意上诉程序以外，则会对《公约》的解释和争端的处理产生不一致的判决，引起争议，从而严重影响判决的权威性。另外，即使不承认上诉，由于这四个法院或法庭是单独作出判决的，出现判例的不统一性也是极可能的。但我们希望随着相关海洋法争端判例的积累，包括缩小判决形式的多样化和海洋法的统一发展，这些问题是会逐渐被克服的，最后会实现判例的统一的。[33] 这只能用司法实践来证明。

六、结　语

以上在与《国际法院规约》及其规则比较的同时，分析了《公约》、《法庭规约》及其规则的相关条款，阐述了法庭在组成、管辖、程序及判决方面的特征。

根据《公约》附件六设立的法庭，是解决《公约》及与《公约》的目的有关的国际协定的解释和适用有关争端的国际性常设专业法庭。虽然法庭对管辖的事项有一定的限制，但其与国际法院一样，仍是全球普遍性的司法机关。而且，国际法院至今已具有丰富的判例与经验，并已发展成了权威性的国际司法机关。而对于新成立的法庭来说，国际法院是法庭的样板，有关法庭组成和程序的规定均是在借鉴和修改《国际法院规约》及其规则的基础上制定的。为了充分地发挥专业性法庭的作用，法庭应在克服国际法院判定案件时间长、效率低的缺点，改变由少数发达国家控制国际法院等不利的状况，力争公正、迅速、合理地处理和解决争端。同时法庭的司法实践业已证明了这一点。但至今提交给法庭的案件多为船只和船员的迅速释放和请求临时措施，因此有必要加强法庭自身的地位。法庭应在公正、合理地处理案件和诉讼请求及解决争端的基础上，不断地积累司法实践经验，树立威望，增强各国对法庭的信赖，提高自身的地位，为真正实现《公约》建立法庭的目的，构建国际海洋新秩序作出应有的贡献。

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33 [日] 杉原高岭：《海洋争端解决程序的选择》，载于《海洋时报》1983 年第 29 号。

南（中国）海渔业资源区域合作护养管理研究

傅崐成 *

内容摘要：南（中国）海（以下简称“南海”）的渔业资源的养护，对其周边的 8 个国家和 1 个地区来说，是一个复杂的问题。单靠其中任何一方的努力，都不可能奏效，必须要该区域的所有有关各方共同合作。随着南海渔业资源日趋恶化和对该区域管理体制有效性要求的不断提高，有关各方进行南海渔业资源的区域合作已显得更加迫切。本文根据 1982 年的《联合国海洋法公约》及 1995 年的《跨界鱼种协定》的有关规定，以南海法律地位“三层级论”为基础，探讨了建立南海渔业资源区域性合作机制的可能途径及其合作的基本原则。

关键词：区域合作　渔业　《联合国海洋法》　跨界鱼种　南（中国）海

一、前　言

南（中国）海（以下简称“南海”）是由越南、柬埔寨、泰国、马来西亚、新加坡、印度尼西亚、菲律宾、中国（大陆和台湾地区）包围的半封闭陆缘海，总面积为 330 万平方公里。它纵跨 24 个纬度（北纬 3 度 30 分～北纬 27 度 40 分），形成了一个海洋大生态系统，其中有大量的亚生态系和栖息地，包括红树林、海草床、珊瑚礁等，渔业资源十分丰富。整个南海有记录的鱼类 1064 种，虾类 135 种，头足类 73 种，其中经济上有重要价值的鱼种大约 100 种，[1] 带鱼类、乌贼类、鲳类、金线鱼类和其他经济鱼类分布在整个南海海域。底层经济鱼类主要是蛇鳗、带鱼、金线鱼、石斑鱼等，中上层经济鱼类主要有金色小沙丁、刺鲳、蓝圆鲹等，在南海的中南部还有金枪鱼、旗鱼和其他大洋性鱼类。[2] 南海的原始渔业资源量很可观，根据学者们的有关估算，在大规模使用机动船作业的 1975 年以前，北部海域的渔

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1　LME 36: South China Sea, at http://www.gd-fishmarket.com/fishcondition.htm, 24 January 2004.

2　《中国渔业资源调查和区划》编辑委员会，《中国海洋渔业资源》，杭州：浙江科学技术出版社 1990 年版。

业资源密度达到每平方千米 1100 千克；北部湾海域的为每平方千米 2300 千克；[3] 而西沙渔场的则为 1120 千克。[4]

20 世纪 70 年代以来，随着渔业作业技术的发展，南海的渔业资源迅速衰退，环境保护和渔业资源的养护管理已成为周边国家面临的紧迫课题。由于该区域内的所有经济鱼类都是跨界种群，他们既生活在一国的经济专属区内，也游动于其他国家的经济专属区或公海内，显然只有南海周边国家共同合作，才能建立有效的区域性渔业资源的养护管理机制。然而，南海相关国家之间的主权争议是世界上最大的难题之一，不进行海域划界，任何相关的合作将无从开展，至少难以实施。幸运的是，随着本区域内的有关国家认识到问题的严重性，近年来地区政治形势已得到不断的改善，建立南海渔业资源的区域性合作机制的可能性正在不断增加。

二、南海的渔业管理现状

（一）过度捕捞使渔业资源密度和品质急剧下降，渔业资源不断衰退

南海渔业捕捞产量，1950 年为 8 万吨，1955 年上升到 42.5 万吨，1956 年到 1979 年一直在 40 万至 80 万吨徘徊，1980 年以后由于在该区域作业的机动渔船数量增长，渔业捕捞产量也直线增长，1999 年已达到 334 万吨，是 1950 年的 40 倍。[5] 据 2000 年中国专属经济区和大陆架勘测课题组的调查，中国、印尼、泰国、菲律宾、越南和马来西亚在南海的捕捞产量甚至达到了 1220 万吨，约为 1950 年的 153 倍。[6] 而南海渔业资源潜在渔获量仅为 280 万吨左右。[7] 过度捕捞已严重威胁南海渔业未来的发展。据农业部的专题调查，1999 年南海北部海域的资源密度下降到每平方千米 290 千克，比原始密度下降 280%；北部湾是该区域内最好的渔场之一，1999 年该海域资源密度为每平方千米 528 千克，比原始密度下降 4 倍多。[8] 在资源量衰退的同时，渔获物资源品质恶化。例如，在南海北部海域底拖网渔获

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3 吴壮：《休渔对南海渔业资源的影响》，载于《南海资源与两岸合作研讨会论文集》，2004 年 1 月 12 日。

4 At http://202.100.218.58/gov/thaiyang/hybl-7.htm, 28 January 2005.

5 LME 36: South China Sea, at http://www.gd-fishmarket.com/fishcondition.htm, 24 January 2004.

6 吴士存、郭文路：《南海渔业资源的区域合作与共同养护的初步研究》，载于《南海资源与两岸合作研讨会论文集》，2004 年 1 月 12 日。

7 LME 36: South China Sea, at http://www.gd-fishmarket.com/fishcondition.htm, 24 January 2004.

8 吴壮：《休渔对南海渔业资源的影响》，载于《南海资源与两岸合作研讨会论文集》，2004 年 1 月 12 日。

物中的经济鱼类的比例，90 年代比 70 年代下降 20 个百分点，且绝大多数是不满 1 周岁的幼鱼，渔获物低值化、小型化和低龄化明显。[9]

（二）海域交错重叠、渔业管辖冲突频繁，恶化了相关国家间的信任关系

20 世纪 70 年代后，南海周边国家纷纷发表声明或颁布法规，建立专属经济区或大陆架。越南在 1977 年，柬埔寨、菲律宾在 1978 年，印度尼西亚、马来西亚、泰国在 1980 年，文莱在 1982 年先后发布了专属经济区声明；[10] 中国也于 1998 年颁布实施了领海和专属经济区法。由于各国的宣布的经济专属区在南海相互交叉和重叠，使原本存在的南海领土争议更加复杂化。一方面，非法捕鱼严重；另一方面，国家之间的渔业管辖权冲突不断。仅 2003 年 10 月份一个月，“非法”入侵我国南海海域捕鱼与炸鱼的越籍渔船即多达 11 艘，起出的炸药更多达 101 公斤；2003 年 2 月到 10 月，中国台湾“海巡”人员在当地水域驱逐 22 艘越籍渔船。[11] 而在中国方面，以中国台湾为例，根据 1992~1999 年间的不完全统计，被南海周边的菲律宾和印尼两国扣押的渔船就有 104 艘。[12] 2003 年元月，本文作者访问海南省海门镇时，过去常在南沙捕鱼的当地渔民抱怨说，菲律宾军人对他们非常野蛮。中国渔民在南海的合法海域内甚至要冒“提着脑袋捕鱼作业”的巨大风险。从范围看，冲突区域几乎遍及南海的所有海域。

（三）资源状况不清，养护技术落后，生态环境濒临崩溃

南海周边的一些国家一味盲目开发、利用南海渔业资源，对科学养护所需的渔业资源的数据收集工作却缺乏兴趣。迄今为止，还没有关于南海渔业资源的可靠、完全和详细的评估数据。不同的机构公布的统计数字各不相同，差异大得惊人。以 2000 年为例，有资料统计为 500 万吨、2/3 的鱼种都已被过度捕捞，[13] 但另一项调查数据则是 1220 万吨以上。[14] 两者相差了 1 倍多。关于原始资源密度，除了

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9 吴士存、郭文路：《南海渔业资源的区域合作与共同养护的初步研究》，载于《南海资源与两岸合作研讨会论文集》，2004 年 1 月 12 日。

10 李金明：《〈联合国海洋法公约〉对南沙主权争端的影响和争端的复杂化》，载于《纪念联合国海洋法公约签署二十周年学术讨论会论文集》，2002 年 8 月。

11 华夏经纬网，下载于 http://news.sohu.com/，2003 年 11 月 3 日。

12 傅崐成：《非法捕鱼与潜在的国家管辖权冲途——台湾的观点》，载于傅崐成著：《海洋管理的法律问题》，台北：文笙书局 2003 年版，第 122 页。

13 LME 36: South China Sea, at http://www.gd-fishmarket.com/fishcondition.htm, 24 January 2004.

14 吴士存、郭文路：《南海渔业资源的区域合作与共同养护的初步研究》，载于《南海资源与两岸合作研讨会论文集》，2004 年 1 月 12 日。

对北部海域和北部湾、西沙海域有粗略的估计外，对中南部海域的原始资源密度和最大潜在可捕量基本上是一无所知。[15] 在此情况下，要决定总可捕量、最佳捕捞量、管理参考点、养护参考点或《联合国海洋法公约》（以下简称“《公约》”）要求的其他标准，几乎是不可能的。

在养护技术方面，目前周边国家主要采用的技术是投入控制法。具体表现为捕捞许可证、渔具渔法限制。中国还采用了禁渔区和禁渔期、机动船和主功率总指标控制、渔业捕捞产量“零增长”等技术。[16]

从国际渔业管理技术的发展来看，迄今已经历了三个大的发展阶段。第一阶段是采用以总可捕量为基础的投入控制管理法，主要方法是政府通过控制渔船数量和渔船的总功率等，进行捕捞能力的管理；第二阶段是按照最大可持续产量的理念，采用更合理的投入控制技术；第三阶段是采用以“预警原则管理方法”以及“生态系统管理方法”为代表的新技术。目前，国际渔业管理技术正在从第二阶段向第三阶段发展。[17] 我们目前采用的技术，即使与投入控制技术相比，也还存在相当大距离。

在南海，非生物资源开发对渔业资源养护管理的不利影响也是一个不容忽视的因素。20 世纪 70 年代以来，越南、菲律宾、马来西亚、印尼、文莱等国家开始大量开采油气资源。万安滩、礼乐滩、纳土纳岛附近海域是其中最著名的几个开发地区。这些国家采取单方面与西方石油公司签署国家许可协议的方式，进行矿产资源的勘探开发活动，完全不顾来自中国内地和中国台湾地区的要求。仅马来西亚在我国 U 形线内开采的油田就达 18 个，气田 40 个，有些油气井深入到 1947 年中国就已划定公布的 U 形线内 100 海里。[18] 这种单边行动对南海生物资源造成了严重损害，使该区域本已脆弱的生态环境更趋于恶化。

此外，运送日本九大核电厂已使用过的核燃料的运输船，对于南海的生物资源也是一个真实的重大威胁。[19] 这些高度放射性废料从日本送往欧洲的 2 家工厂，一个在英国、另一个在法国，进行再淬炼。但日本的这些运输船一向是秘密航行的。根据《公约》第 22 条规定，显然，日本的这种做法违反成文国际法。它使南海周边国家的人民和生物资源陷入非常危险的境地。

南海的渔业资源养护急需周边国家相互合作。但是，建立区域合作机制必须具备相应的政治、法律、技术等方面的条件。这些先决条件虽然在 20 世纪最后的

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15 At http://202.100.218.58/gov/thaiyang/hybl-7.htm, 28 January 2005.

16 吴士存、郭文路：《南海渔业资源的区域合作与共同养护的初步研究》，载于《南海资源与两岸合作研讨会论文集》，2004 年 1 月 12 日。

17 Stuart M. Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 44, 88.

18 吴士存：《我国的能源安全与南海争议地区的油田开发》，载于《南海资源与两岸合作研讨会论文集》，2004 年 1 月 12 日。

19 傅崐成著：《海洋管理的法律问题》，台北：文笙书店 2003 年版，第 81 页。

十年里并不具备，但目前却正在日趋成熟。

三、区域政治的新发展

20 世纪 90 年代以来，国际形势发生了深刻变化。也许是中国经济快速发展的推动，南海周边国家之间变得更加相互依赖。随着合作深度和广度的不断提高，信赖关系也不断加强。在这个大背景下，建立渔业资源的区域合作机制具备了可行性。

（一）国际社会的合作意识提高

冷战结束后，和平与发展成为时代的主题。发展经济成为世界各个国家的主要任务，世界经济一体化和全球化成为当今世界各国的目标。各国普遍意识到，任何国家和地区离开了与其他国家的交流和合作，都无法发展自己的经济。与此同时，新的问题和困难不断出现，生态环境危机、国际恐怖主义、大规模杀伤性武器和核扩散等世界性的难题都需要跨国界的合作。因此，世界范围内的合作意识空前加强。1992 年召开联合国环境与发展会议，1995 年成立世界贸易组织，1997 年世界金融危机爆发，2001 年发生“9•11”恐怖主义事件，都是这种变化发展的标志性事件。

（二）南海周边国家间信任不断提高

随着国际形势的变化，南海周边的 7 个国家之间的双边和多边关系得到了改善，友好合作不断发展。1992 年的第四次东盟国家首脑会议签署了《东盟加强经济合作协定》和《有效普惠关税协定》，以加强经济合作，相互提供更加优惠的关税。这次会议后，各国在反恐、跨国犯罪、安全和其他领域的合作更加有效的展开。2003 年的第九次东盟首脑会议上，签署了“巴厘第二协约宣言”，宣布在 2020 年成立类似于欧盟的“东盟共同体”，东盟政治、经济、安全、社会与文化合作进入了历史新阶段，并朝地区一体化迈进了一大步。在中国和东盟国家的多边和双边合作关系方面，也取得了明显的进展。中国从 1975 年正式承认东盟的存在后，1990 年以后陆续与东盟国家复交或建交，1992 年成为东盟“磋商伙伴”，1996 年上升为“对话伙伴国”。[20] 1997 年的东南亚金融危机发生后，中国坚决实行了“人

20 《中国与东盟关系大事记》，下载于 http://www.yn.xinhuanet.com/asean/chinaasean/materials/xlym_3070807.htm，2005 年 1 月 24 日。

民币不贬值”的政策，为化解金融危机做出了重大贡献。中国勇于承担义务的行为，破除了“中国威胁论”，树立起了本地区负责任大国的形象，也使东盟国家增强了信心。“10 ＋ 1”和“10 ＋ 3”合作框架就是东盟国家增强信心的结果。2002 年 11 月 4 日双方签署《中国与东盟全面经济合作框架协议》，计划在 2010 年初步建立中国—东盟自由贸易区，并从 2003 年 7 月 1 日起全面启动了这一计划。[21]

（三）周边国家对南海问题的共识不断增加，渔业合作已起步

中国于 20 世纪 80 年代初，提出解决南海争议的“主权在我，搁置争议，共同开发”的主张。1992 年的东盟外长会议期间，中国就加深合作与有关国家进行了磋商。[22] 在南海问题上，与周边国家之间的共识正不断增加。1999 年，菲律宾阐述了与中国在南海缔结渔业协议的设想，并主张将其发展成周边国家间的多边条约；该渔业协议以保护渔业资源为目的，不与主权问题挂钩。2000 年中国与越南签订了《中越北部湾划界协定》和《中越北部湾渔业合作协定》。2001 年中国和印尼签订了《中华人民共和国农业部和印度尼西亚共和国海洋事务与渔业部关于渔业合作的谅解备忘录》，在渔业领域中就捕捞、加工、教育、渔港和渔船等进行合作。[23] 在东盟国家本身之间，也已先后成立了东盟海洋与海洋环境工作组、东盟渔业协调组、东南亚渔业发展中心等合作组织。2002 年 11 月 4 日，中国和东盟各国外长或外长代表在老挝金边签署了《南海各方行为宣言》。这是中国和东盟签署的第一份有关南海问题的多边正式文件。在宣言中，各方承诺通过友好协商，以和平方式解决南海争端；在争端解决之前，保持克制，不采取使争议复杂化和扩大化的行动；本着合作和谅解精神，努力寻求在相互自愿基础上通报情况等各种途径，建立互信机制；在海洋环保、海洋科研、海上航行和交通安全、搜寻和救助等领域，开展合作。[24]

四、国际公约——建立区域合作机制的法律基础

建立区域性渔业资源养护机制，必须以下述两个国际条约作为法律基础。首

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21 胡光辉、欧阳卉然著：《中国—东盟自由竞争区与海南经济》，海口：海南出版社 2003 年版，第 30~36 页。

22 《中国与东盟关系大事记》，下载于 http://www.yn.xinhuanet.com/asean/chinaasean/materials/xlym_3070807.htm，2005 年 1 月 24 日。

23 吴士存、郭文路：《南海渔业资源的区域合作与共同养护的初步研究》，载于《南海资源与两岸合作研讨会论文集》，2004 年 1 月 12 日。

24 胡光辉、欧阳卉然著：《中国—东盟自由竞争区与海南经济》，海口：海南出版社 2003 年版，第 293~294 页。

先，1982 年签署的《公约》对这一问题做了原则性规定；其次，1995 年通过的《执行 1982 年 12 月 10 日〈联合国海洋法公约〉有关养护和管理跨界鱼类种群和高度洄游鱼类种群规定的协定》（以下简称《联合国跨界鱼种协定》），对通过国际协调和合作，养护公海跨界渔业资源，做了进一步的具体规范。

《公约》已于 1994 年 11 月 16 日生效。南海的周边国家都已加入（中国台湾地区没有加入，但在其立法中已采用了其中的大多数规则）。《联合国跨界鱼种协定》也已于 2001 年 11 月 12 日生效。菲律宾、中国和印尼已签字，但还没有一个国家正式批准这一协定。[25] 从这两个条约的下述规定中，我们可以发现渔业资源养护区域合作机制的基本规范。

（一）《公约》中的区域合作养护规定

南海属于半闭海。按《公约》第 123 条的规定，闭海或半闭海沿岸国在行使和履行本公约所规定的权利和义务时，应互相合作。为此目的，这些国家应该尽力直接或通过适当区域组织：

1. 进行海洋生物资源的管理、养护、勘探和开发；

2. 协调行使和履行其在保护和保全海洋环境方面的权利和义务；

3. 协调其科学研究政策，并在适当情形下在该地区进行联合的科学研究方案；

4. 在适当情形下，邀请其他有关国家或国际组织与其合作以推行本条的规定。

因此，未来的南海渔业资源养护合作机制应当涵盖所有的周边国家，并规定其协调的义务。在必要时，还可以设立一个国际组织来履行这种义务。

（二）《联合国跨界鱼种协定》中的区域合作养护规定

按其中第 5 条的规定，为了养护和管理跨界鱼类种群和高度洄游鱼类种群，沿海国和在公海捕鱼的国家应根据《公约》履行下列合作义务：

1. 制定措施确保跨界鱼类种群和高度洄游鱼类种群的长期可持续能力并促进最适度利用的目的；

2. 确保这些措施所根据的是可得到的最佳科学证据，目的是在包括发展中国家的特别需要在内的各种有关环境和经济因素的限制下，使种群维持在或恢复到能够产生最高持续产量的水平，并考虑到捕鱼方式、种群的相互依存及任何普遍建议的分区域、区域或全球的国际最低标准；

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25 Table Recapitulating the Status of the Convention and of Related Agreements, at http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm, 24 January 2005.

3. 根据第 6 条适用预防性做法；

4. 评估捕鱼、其他人类活动及环境因素对目标种群和属于同一生态系统的物种或与目标种群相关或依附目标种群射物种的影响；

5. 必要时对属于同一生态系统的物种或与目标种群相关或依附目标种群的物种制定养护和管理措施，以维持或恢复这些物种的数量，使其高于会严重威胁到物种繁殖的水平；

6. 采取措施，包括在切实可行的情况下，发展和使用有选择性的、对环境无害和成本效益高的渔具和捕鱼技术，以尽量减少污染、废弃物、遗弃渔具捞获物、非目标物种（包括鱼种和非鱼种）（下称非目标物种）的捕获量及对相关或依附物种特别是濒于灭绝物种的影响；

7. 保护海洋环境的生物多样性；

8. 采取措施防止或消除渔捞过度和捕鱼能力过大的问题，并确保渔获努力量不高于与渔业资源的可持续利用相称的水平；

9. 考虑到个体渔民和自给性渔民的利益；

10. 及时收集和共享完整而准确的捕鱼活动数据，包括附件一列出的船只位置、目标物种和非目标物种的捕获量和渔捞努力量，以及国家和国际研究方案所提供的资料；

11. 促进并进行科学研究和发展适当技术以支助渔业养护和管理；和

12. 进行有效的监测、管制和监督，以实施和执行养护和管理措施。

在第 6 条关于预警方法的规定中，《协定》进一步要求：

1. 各国对跨界鱼类种群和高度洄游鱼类种群的养护、管理和开发应广泛适用预防性做法，以保护海洋生物资源和保全海洋环境；

2. 各国在资料不明确、不可靠或不充足时应更为慎重。不得以科学资料不足为由而推迟或不采取养护和管理措施；

3. 各国在实施预防性做法时应：

（1）取得和共享可获得的最佳科学资料，并采用关于处理危险和不明确因素的改良技术，以改进养护和管理渔业资源的决策行动；

（2）适用附件二所列的准则并根据可获得的最佳科学资料确定特定种群的参考点，及在逾越参考点时应采取的行动；

（3）特别要考虑到关于种群大小和繁殖力的不明确情况、参考点、相对于这些参考点的种群状况、渔捞死亡率的程度和分布、捕鱼活动对非目标和相关或依附物种的影响，以及现存的和预测的海洋、环境、社会经济状况等；

（4）制定数据收集和研究方案，以评估捕鱼对非目标和相关或依附物种及其环境的影响，并制定必要计划，确保养护这些物种和保护特别关切的生境；

4. 如已接近参考点，各国应采取措施确保不致逾越参考点。如已逾越参考点，各国应立即采取第 3（b）款确定的行动以恢复种群；

5. 如目标种群或非目标或相关或依附物种的状况令人关注，各国应对这些种群和物种加强监测，以审查其状况及养护和管理措施的效力。各国应根据新的资料定期修订这些措施；

6. 就新渔业或试捕性渔业而言，各国应尽快制定审慎的养护和管理措施，其中应特别包括捕获量与努力量的极限。这些措施在有足够数据允许就该渔业对种群的长期可持续能力的影响进行评估前应始终生效，其后则应执行以这一评估为基础的养护和管理措施。后一类措施应酌情允许这些渔业逐渐发展；

7. 如某种自然现象对跨界鱼类种群或高度洄游鱼类种群的状况有重大的不利影响，各国应紧急采取养护和管理措施，确保捕鱼活动不致使这种不利影响更趋恶化。捕鱼活动对这些种群的可持续能力造成严重威胁时，各国也应紧急采取这种措施。紧急采取的措施应属临时性质，并应以可获得的最佳科学证据为根据。

第 8 条关于养护和管理合作的规定要求：

1. 沿海国和在公海捕鱼的国家应根据《公约》，直接地或通过适当的分区域或区域渔业管理组织或安排，就跨界鱼类种群和高度洄游鱼类种群进行合作，同时考虑到分区域或区域的具体特性，以确保这些种群的有效养护和管理。

2. 各国应毫不迟延地本着诚意进行协商，特别是在有证据表明有关的跨界渔业捕捞时。为此目的，经任何有关国家的请求即可开始进行协商，以期订立适当安排，确保种群的养护和管理。在就这种安排达成协议以前，各国应遵守本协议各项规定，本着诚意行事，并妥为顾及其他国家的权利、利益和义务。

3. 如没有分区域或区域渔业管理组织或安排就某种跨界鱼类种群或高度洄游鱼类种群订立养护和管理措施，有关沿海国和在分区域或区域公海捕捞此一种群的国家即应合作设立这种组织或达成其他适当安排，以确保此一种群的有效养护和管理，并应参加组织或安排的工作。

五、渔业合作技术的发展

20 世纪 90 年代以来，渔业资源养护的区域合作管理技术不断完善，相关组织或安排大量出现。这些实践所积累的经验为我们建立南海区域合作机制提供了宝贵的借鉴。

1. 联合国粮农组织是国际渔业管理新技术的最强有力的推动者，1982 年《公约》签署后，联合国粮农组织不断提出渔业资源养护管理的新理念和新方法

（1）捕鱼能力控制技术

1991 年粮农组织的渔业委员会[26]提出了“负责任渔业”的概念。1995 年联合国粮农组织的第 28 次会议通过了《负责任渔业行为守则》（以下简称《守则》），规定在渔业资源养护中要应用“总可捕量方法”，并明确了应用的方法。其后，以《守则》为指导，于 1999 年制定了《渔捕能力管理国际行动计划书》，并要求各国或区域养护组织和安排依据该计划书制定国家级的“行动方案”。

（2）预警管理技术

《守则》要求各国和分区域或区域渔业组织和安排，应根据现有的最佳科学证据，确定特定种群的目标参考点和超过该点时需要采取的行动；同时，还要确定特定种群的极限参考点和超过该点时需要采取的行动。1995 年的《联合国跨界鱼种协定》在附件二中对上述参考点的确定，规定了具体的规则和应用方法。[27]

（3）透明度作业管理技术

1993 年通过了《促进公海渔船遵守公海国际保育与管理措施协定》，确立了船旗国对悬挂其国旗的渔船行使管辖和控制的方法。在 2001 年 3 月 2 日粮农组织渔业委员会的第 24 次会议上，又通过《防止、阻断与消除非法的、未经报告的和不接受规范的渔捕行为国际计划书》，进一步完善了渔业作业的透明度管理规则。

（4）生态——社会系统管理技术

1999 年联合国粮农组织通过了《执行〈守则〉的罗马宣言》，提出了应发展更加精确的渔业养护管理的生态途径，并且要求注意与渔捕和养殖有关的贸易和环境因素。[28]

2. 在渔业资源合作养护技术和管理规则不断完善的同时，世界范围内渔业资源区域合作养护安排也不断扩展

根据不完全统计，迄今为止，通过各种形式建立的渔业资源区域性合作养护机制已有 40 个。[29]在《守则》和《联合国跨界鱼种协定》通过后，国际社会积极做出回应，通过订立新条约或修订原有条约，建立区域合作机制。从合作组织形式来划分，主要有全体成员国会议合作型和常设委员会合作型。

（1）全体成员国会议合作型：即相关两个或两个以上的国家通过谈判，就有关合作养护海洋生物资源的事宜达成协议。在协议中规定，各有关成员国定期或

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26 渔业委员会是粮农组织的一个下属单位，是由 1965 年粮农组织第 13 届大会所成立的。该委员会是目前唯一的全球性的政府间有关国际渔业和养殖业问题的论坛，委员会持续向世界各国政府、地区渔业团体、非政府组织、渔业工作者、粮农组织以及国际社会提供意见。渔业委员会也被用来作为全球渔业协定以及非拘束性协议的谈判场所。

27 傅崐成：《国际渔业管理中的预警方法或预警原则》，载于《法令月刊》2003 年第 54 卷第 9 期。

28 Stuart M.Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 264~286.

29 At http://www.fao.org/fi/body/rfb/chooserfb.htm, 28 January 2005..

不定期地举行全体会议，就数据收集、资源现状和养护措施等做出决定。各有关国家应按照决定要求，采取行动。其中又分为双边会议和多边全体会议两种形式。前者如我国和日本、韩国签署的有关渔业协定所设立的联席会议制度；后者如《关于养护和管理中白令海鳕鱼资源的协定》所设立的每年召开一次的成员国大会。采取这种形式的合作，往往更注重经济因素的考虑，其养护措施多采用设定总可捕量、配额等传统的方法。[30]

（2）常设委员会合作型：即所有有关国家通过谈判，达成合作养护海洋生物资源的多边协议。在协议中规定，成立一个由各成员国代表组成的常设委员会，以决定养护措施，进行海洋生物资源养护的合作，如《南极海洋生物资源养护协定》。采用这种形式的合作，多以生态资源的保护为主要目的，注重养护技术的提高；应用的养护技术包括预警性方法和生态经济系统管理方法来决定采取的养护措施；相应的，对数据也要求更全面和更准确。[31]

上述的分析表明，在南海建立渔业资源的区域性合作机制是非常必要的。接下来的问题是，如何建立起这种区域性合作机制。

六、南海渔业资源区域合作机制的建设方案

（一）南海海域的基本法律特征

在南海海域，周边国家在领土主权方面存在的争议，妨碍了渔业资源的开发和管理。要建立本区域的渔业资源养护合作机制，首先必须解决这些争议；即使无法找到最终的解决方案，也应采取临时解决办法。根据《公约》和《联合国跨界鱼种协定》的规定，以及足够的历史证据（本文限于篇幅，无法详述），[32] 站在中国人的立场，应特别强调南海海域的“三层级论”概念。只有坚持这一概念与其对南海的法律定性，南海的渔业资源养护区域合作机制才能合法、合理地被建立和实施。

按照这一法律定性，南海应分为三个不同层级的海域。每个不同层级的海域

30 Stuart M. Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 337~341.

31 Stuart M. Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 377~385.

32 正如一般人可以合理预期的，中国拥有足够多的历史证据，表明其在这一区域内享有重大的历史权利。过去几年间，本文作者曾实地考察了南海周边的所有国家，并得出这一结论。其他很多学者在他们的文章中，也曾表述了同样的看法。早在公元前的西汉时代和东汉时代（206 BC—220 AD），中国的军舰和民船就常常在南海海域航行。从那以后，中国留下了丰富的历史记录。详情请参见傅崐成著：《南海的法律地位》，台北：123 资讯公司 1996 年版。

内，应采用不同的合作办法和方式。[33]

第一个层级是整个南海半闭海。按照《公约》第 123 条规定，各国应在海洋科研、生物资源养护、海洋环境保护等方面进行协调、合作。中国和本区域的其他国家都应遵守《公约》的规定。

第二个层级是南海的历史性水域。在该区域内，中国并不是唯一拥有历史性水域的国家。正如中国人在 U 形线内享有优先权一样，泰国人在暹逻湾也享有同样的权利；印尼人在纳土纳岛附近海域也享有一定的优先权。事实上，印尼和菲律宾所主张的群岛水域也是一种历史性水域，不过已经获得了《公约》的特别规范而已。

第三个层级是南海诸岛礁及其 12 海里领海海域。中国对在其 U 形线内的 4 个群岛和群礁及其 12 海里内的领海，享有主权；正如印尼对纳土纳岛及其 12 海里内领海享有主权一样。任何非法侵占、窃取别国的岛礁及其领海的国家，都决不会仅仅因为时间的流逝而使其非法行为变为合法权利。

国际法从未允许以“时效”作为取得领土主权的合法根据，即使是在帕玛斯岛案和东格林兰岛案中，也没有这一认许。因为如果许可以时效来取得领土主权，整个世界必定会面临更多，而不是更少，的冲突。对于南海而言，时间的经过，现在不会，将来也不会，支持那些不尊重历史性证据就径行开发资源的国家。因为中国已经对非法开发活动反复提出了公开的抗议。更加重要的是，国际法将决不会支持以非法武力侵占他国领土的行为。

多年来，本文作者一直在南海区域宣传“南海三层级论”的概念。这一概念至少在中国内地和台湾地区已被接受，并且写入了相关的法律文件。中国内地 1998 年颁布的《中华人民共和国专属经济区和大陆架法》第 14 条规定：“本法的规定不影响中华人民共和国享有的历史性权利。”[34] 台湾当局于 1999 年公布领海基线时，也在其公布的基点地理坐标表下方，就南沙群岛的领海问题，特别作出了如下的说明：“传统 U 形线内的岛屿属于中国，其领海基线……将在以后公布。”[35]

虽然目前无法确知其他周边国家是否接受这一概念。但是，由于这是一个主权问题和未来合作的基础，作者认为本区域的其他周边国家应对此认真加以考虑。无论如何，他们心中其实都很清楚：这些南海岛礁历来就是中国的领土；《公约》的精神也一贯要求各国对于基于历史性证据取得的既得权利，给予适当的尊重。

显而易见，为达成共同合作的目的，南海沿海各国应就南海渔业资源管理，划定一个所有周边国家一致同意的共同养护区域。这个区域最好包括整个“半闭海”，即上述第一层级的海域。按照《公约》第 123 条关于渔业资源的养护规定，

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33 傅崐成著：《南海的法律地位》，台北：123 资讯公司 1995 年版，第 201~211 页。

34 国家海洋局政策法规司编：《中华人民共和国法律法规汇编》，2001 年版，第 214~215 页。

35 台湾“行政院令”第 88~ 内 05161 号，1999 年 2 月 10 日发布。

这是各个周边沿海国家的法律义务。

在这种情况下，各国必须做出一个安排，相互邀请所有周边国家参与其中，并分别正式放弃其各自在历史性水域（即第二个层级海域）的若干优先权利。

至于周边国家对其岛礁甚或低潮高地所享有的主权，应不受任何影响。对于现在被他国占领的南沙群岛中的一些岛礁，中国将以自己的方式，自主解决这一问题。所幸这些被占岛礁的面积都很小，对渔业管理影响不大，对泊锚、后勤补给和其他渔业科研工作并非必不可少。因此，南沙群岛的主权争议不会成为建立本合作养护机制的绝对障碍。

（二）合作的目标

合作的目标应包括 2 个：

1. 保持南中国海生态平衡；

2. 确保本区域的捕鱼活动不发生“非法的、未经报告的、未受规范的”渔捕行为。

（三）合作步骤

1. 第一阶段，是各国各自进行的合作准备阶段。主要任务是，用 2 年左右的时间各国改善其所属岛礁及其 12 海里领海的养护状况，同时，采用有效的措施和普遍接受的科学方法对各自海域的资源进行评估。由于只涉及南海第三层级的海域，任何措施的实施都不应侵害他国的主权。

（1）合作组织形式。无须建立特别的国际组织，各国应通过区域会议和协议，鼓励其国民的公众参与合作制度。[36] 通过公众直接参与，可以使数据收集更加全面，资源评估更加准确。而且，周边国家之间未来的合作也会得到公众更多的支持。

（2）科研方面。主要目标是弄清所属海域的渔业资源分布及捕鱼活动对南海生态系统的影响，并确定渔业资源可持续开发的平衡点。

（3）控制技术方面。通过区域会议和协定，推行“投入控制法”养护技术。周边各国应完善各自的休渔体制，把非法的、未经报告的和未接受规范的捕捞活动降低到最低程度。同时，各国还必须实施渔船总数和功率总量零增长和负增长措施。

（4）法制方面。各国应通过直接或间接的相互协助，进行区域合作，修订国内渔业法律法规，按照国际标准，修订完善捕鱼许可证、渔具渔法限制、渔业资料统计和执法等制度。

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36 Stuart M. Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 287~302.

（5）监督方面。通过与联合国粮农组织合作，各国开展信息交流，提高各自的渔业和政府制定政策的透明度。

2. 第二阶段，是区域合作的起步和发展阶段。主要是在各国历史性水域，包括实质上属于历史性水域的群岛水域内开展合作。用 5 年左右的时间，建立并实施由主张历史性水域的有关国家共同参加的多边合作安排。由于主要涉及南海第二层级海域，拥有历史性既得权利的国家，在其历史性水域（包括群岛水域）内，应主动承担渔业资源养护的主要责任。

（1）合作组织形式。初期应由拥有历史性既得利益的国家和在该水域捕鱼的国家，通过会议或协定的形式，进行双边合作。在此基础上逐步扩大范围，吸收所有在南海各个历史性水域内有渔捞活动的国家加入。

（2）科研方面。应对渔业资源及对环境的影响进行更为详细的调查研究，并普遍实施历史性水域内的船上观察系统，以便更加科学地掌握可靠的渔业资源密度、目标鱼种种群及其变化趋势等数据资料。

（3）控制技术方面。实施以总可捕量为主要内容的养护技术。根据渔业资源的最大可持续产量，确定各个历史性水域（包括群岛水域）内的最大可捕总量。当实际渔获量超过确定的总可捕量时，即全面禁止捕鱼。

（4）法制方面。参加合作的两个或两个以上在历史性水域（或群岛水域）捕鱼的国家，应相互协助，在历史性水域内可捕量指标的分配、渔业资料的交换、执法的协调、切实可行的养护措施的制定和实施等方面，实施内容一致的法律法规。

（5）监督方面。建立成员国双边或多边例会制度，定期审议各国有关养护措施和执行情况；同时，建立临时会议制度，对紧急或重大问题进行讨论并做出决定。

（6）争端解决方面。上述的双边或多边会议可以建立各自的争端解决机制，对历史性水域内产生的争端按“反向一致”规则裁决。[37] 在成员国全体会议之下，设立技术和法律专家小组，为成员国全体大会解决争端，提供技术和法律咨询意见。

3. 第三阶段，是全面合作阶段。在此阶段，合作应在整个半闭海域范围，即南海的第一层级内展开。在 5 至 6 年的时间内，建立起所有周边国家都参加的区域合作组织，实施《公约》和《联合国跨界鱼种协定》规定的养护措施。根据《公约》第 123 条的规定，所有周边国家都有义务在南海生物资源养护管理措施方面进行协调。

（1）组织形式。以“东盟＋ 1”为平台，最终设立全体成员国参加的常设机构和几个专门委员会，处理日常的养护管理事宜。

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37 《马拉喀什建立世界贸易组织协定》附件 2，以及《关于争端解决规则与程序的谅解》第 16 条。所谓的“反向一致”规则，即只要不是有权投票者全体一致对有关事项提出反对，则视为全体一致同意。该项规则避免了 1947 年《关贸总协定》“一致同意”规则的弊端。

（2）科研方面。根据下述控制措施的需要，制定并实施全区域的渔业资源和生态环境保护计划。

（3）控制技术方面。在实施总可捕量技术的同时，逐步推行“预警方法和生态经济系统方法”养护技术。按照《联合国跨界鱼种协定》及其附件的要求，确定并实施“限制（养护）参考点”和“目标（管理）参考点”，[38] 还应当根据最佳可获得科学证据和区域合作精神，确定具体鱼种的具体总可捕量及各自的捕捞配额。

（4）法制方面。为了实施区域养护协定，在捕捞总数及各国的配额、捕捞区域和捕捞时期的分配、执法的协调、渔具渔法标准、渔业信息资料的交换和共享、区域合作组织资金和劳务的分担、争端的解决等方面，所有周边国家应制定统一的法律法规。

（5）在监督方面。建立由本区域合作组织日常审查会议制度，由该组织指定的技术委员会和监督机构具体实施审查工作。在成员国认为必要时，可以根据《公约》第 123 条的规定，邀请联合国粮农组织、国际海事组织和其他国际主管组织参与审查。同时，区域合作组织还应制订紧急情况下的应急计划。

（6）在争端解决方面。借鉴世贸组织的做法，设立仲裁机构作为本区域合作组织的争端解决机构。

七、以台湾海峡两岸渔业的合作为先行机制

在探讨建立南海渔业资源合作养护机制问题时，台湾海峡两岸关系是一个应予优先考虑的问题。这不仅仅因为中国台湾是本区域内一个活跃的捕鱼实体，占据着南沙最大岛屿太平岛，更重要的是，从台湾海峡两岸关系来看，如处理不当还将引发军事冲突，对于本区域自然资源养护和环境保护所必须的和平环境，可能构成实实在在的威胁。

（一）关于先行建立两岸合作机制的可行性

在南海建立前述的渔业区域合作养护机制，是以周边所有国家具备合作的意愿为条件的。从表面上看，两岸之间建立这个合作机制似乎不具备可能性。但是，基于下述三方面的考量，我们有理由相信，在两岸先行建立合作养护机制是完全可行的。

首先，在台湾海峡两岸都加入世贸组织后，台湾实际上已向国际社会承认了其“非国家实体”的法律地位，因此，在渔业资源养护问题上，可以预期台湾将会

38 《联合国跨界鱼种协定》附件 2。

乐于参与合作，而不会坚持所谓的“国家身份”。[39]

其次，台湾目前非常依赖其与大陆的经济贸易关系。根据有关统计，2002 年底台商在大陆的直接投资总额已达 39.7064 亿美元。[40] 按照台湾前“经济部部长”林义夫的说法，中国内地已成为台湾出口产品的最大市场和进口商品的第三大来源地，以及最大的贸易顺差来源。[41]

第三，两岸在渔业方面的互补性很强。多年来，大陆和台湾私营部门在世界其他地区的渔业合作一直富有成效地进行着。在南海区域，一个海峡两岸“双赢”的安排应该是比较现实的主意。作者相信，如果中国政府给予适当的鼓励措施，南海的两岸渔业资源养护合作机制应当是比较容易先行实现的。

（二）两岸渔业合作中的重点技术问题

从技术层面看，要在南海实现两岸渔业养护合作，作者认为下列问题尤为重要：[42]

1. 在 1947 年中国政府划定的南海 U 形线历史性水域内，建立中国人实施的渔业资源评估机制，这是开展进一步合作的基础。

2. 对两岸私营部门在南海成立渔业合资企业，提供行政管理和经济上的鼓励。

3. 探索解决大陆渔工的权利保护的新方法。

4. 加强教育，提升两岸渔民的文化水平、环保意识，以完善渔获资料的收集。

5. 制定紧急搜寻救援方案，保护本区域渔民安全。

6. 建立补给基地，以便利两岸渔民作业。

7. 以“预警原则”为基础，修改两岸相关的渔业法律法规。

8. 建立更合理的、更细密的休渔制度。现行的休渔制度不仅只是单边的，对台湾渔船不能适用，而且不能长期有效。

9. 在本区域内建立一致的执法标准。

10. 建立两岸能相互协调的，有效护渔、有效执法的力量。

（三）两岸渔业合作机制的实施步骤

两岸在南海的渔业合作活动，可以通过建立南中国经济一体化实体来实施。这种实体不应是按照世贸组织和《关贸总协定》规则严格定义下的自由贸易区。

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39 中国大陆于 2001 年 12 月 11 日以国家身份加入世贸组织。中国台湾是以“独立关税区”而非“国家”的身份，于 2002 年 1 月 1 日加入世贸组织。

40 《中国统计年鉴》2003 年。

41 2003 年 10 月 27 日 13:27，中央社记者陈舜协，台北 27 日电。

42 作者从 1986 年起，迄今已担任台湾对外渔业合作协会董事兼法律委员会召集人 18 年。

可以是按照 CEPA 模式，设立一个包括整个中国内地、台湾、香港、澳门在内的渐进型一体化实体。[43] 原则上，这种合作应由私营部门在政府的支持下启动。渔业作为海峡两岸经济关系的一个组成部分，应和陆地一样进行培育和保护。一旦建立起两岸在南海合作养护机制，不仅有助于维护中国人民在南海的历史性权利，还将促进生物资源的养护，造福于整个区域的人民。

为了实施两岸在南海渔业的合作机制，应分三步推进：

第一步，从鼓励两岸渔业界成立合资企业入手。至少中国内地应对此予以支持，对私营部门在南海成立海峡两岸合资企业提供行政管理、经济优惠待遇；探索新方法，确保大陆渔工的权益；制定紧急搜寻救援计划；建立补给基地，便利两岸渔船作业。所有这些都是为了便利海峡两岸私营渔业公司设立合资企业。

第二步，除了在南海一同开展渔业合作活动外，海峡两岸政府可以进行科学研究，以便在受教育渔民的帮助下，对生物资源做出全面客观的评估。在此阶段，主要目的是为海峡两岸中国人采取可行的渔业资源养护措施奠定基础。

第三步，海峡两岸为开展渔业资源养护，修订各自的法律法规，包括签订更加合理有效的休渔制度双边协议；在中国的历史性水域内，开展更加有效的联合执法活动。

可以预期，当中国人在本区域的渔业活动富有成效地有序展开后，非法的、未经报告的和未受规范的捕鱼行为将能得到有效的禁止，周边的所有其他国家将会更加愿意与中国合作，在本区域开展渔业资源的养护管理工作。如此，在共同利益的推动下，南海渔业区域合作养护机制就可望顺利实现了。

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43 对此问题的详细讨论，参见傅崐成：《WTO 体制内的一中四席——设立南中国一体化经济区的建议》，载于《中国国际经济法学会和厦门大学国际经济法研究所联合研讨会论文汇编》，2004 年 11 月 4–5 日。

世贸组织渔业补贴议题进展与制度改革分析

刘 彬 *

内容摘要: 世界渔业严重的资源耗竭状态与各国政府巨量的渔业补贴直接相关。渔业补贴在世界贸易组织（以下简称“世贸组织”）框架下由《补贴与反补贴协议》调整。但《补贴与反补贴协议》的“交通灯”体制在渔业补贴问题上暴露出诸多缺陷，亟待改革。本文介绍了世贸组织渔业补贴议题的谈判磋商历程与进展情况，而后对《补贴与反补贴协议》的“红灯”、“黄灯”、“绿灯”三类规则的缺陷进行了具体分析，并提出了一些相应的改革设想。

关键词: 世界贸易组织 渔业 补贴改革

一、世界渔业补贴状况

（一）渔业补贴概论

世界渔业目前处于严重的资源耗竭状态，国内外渔业界有关此种情况的资料介绍甚多，无需赘述。渔业界广泛而又严重的渔捕能力过剩和过度捕捞在许多情况下与巨量的政府渔业补贴直接相关。一个显而易见的因素是，由于补贴的提供，使渔船队能够在本来无利可图的情况下继续运作，从而直接导致过度捕捞以及其他违背可持续发展原则的渔业活动。

由于种种原因，有关渔业补贴的真正精确数据往往很难获得。过去的十年里，在区域性和全球性基础上人们有过一些将渔业补贴归类并估计其数量的工作，如联合国粮农组织、经合组织、亚太经合组织等。尽管要获得有关补贴水准的精确数据有若干困难，一部分是由于补贴体制缺少透明度，部分是由于定义上的模糊，以及其他技术上的复杂性，补贴的大致规模还是比较清晰的，1993 年到 1999 年全球补贴水平保守估计在每年 100 亿到 150 亿美元之间。由于世界捕捞（野生）渔业渔获量在 700 亿到 800 亿美元之间波动，可以合理地推断，此期间全球渔业

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补贴水平在 15%~20% 之间。[1] 而据联合国有关机构统计，目前全球每年用于渔业的补贴更高达 200 亿美元，相当于捕获的鱼类总价值 800 亿美元的 1/4。[2]

渔业补贴形式多种多样，并服务于各种目标。典型者如下：

1. 低成本贷款，贷款担保，渔船建造或维修的税收刺激或渔具现代化。

2. 对鱼类和相关鱼类产品给予价格支持。

3. 为支持鱼类和相关鱼类产品的运输和处理而给予低成本贷款或其他财政利益。

4. 收入或薪金支持，或对渔民及其家庭的失业救济或其他社会救济。

5. 出口促进计划。

6. 提供打折的或免费的海上保险。

7. 政府承诺对渔船主被外国当局施加罚款和扣留给予补偿。

8. 港口设施的建造和维护。[3]

（二）渔业补贴影响简析

补贴有助于接受者降低成本和（或）增加收入，因此会在受补贴者与未受补贴者之间造成竞争和贸易扭曲。这是几乎所有补贴的共性。而渔业补贴除上述共性外，还有一些自身的特点，还会造成生产扭曲。

与其他生产领域不同的是，授予渔业业者的补贴会对其他竞争业者的生产成本造成影响，因为在渔业资源日益稀缺和单位努力产出量日趋下降的今天，接受补贴的业者能够获得超过其应有份额的产量，就意味着其他竞争业者的生产成本越来越大，包括寻鱼更加困难以及捕捞收获的相对不经济，等等。其结果是，那些未受补贴的生产者受限于较低的生产产量，在极端的种群耗竭情况下甚至可能无鱼可捕。这样受补贴者会赢得越来越多的国内外市场份额。在国际上，这种效应主要体现在一些以跨界和洄游鱼种为对象的行业，以及外国渔船队在他国（多为发展中国家）海域中活动的情形。

即使在存在有效管理的渔业行业中，不受约束的渔业补贴依然对资源构成威胁并扭曲生产与竞争，表现在以下两个方面：第一，尽管有控制措施的存在，国家具体的经济和社会需要仍然会驱使政府给予补贴，从而客观上鼓励了渔捕能力过

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1 Alice L. Mattice FN, The Fisheries Subsidies Negotiations in the World Trade Organization: A “Win-Win-Win” for Trade, the Environment and Sustainable Development, *Golden Gate University Law Review*, Vol. 34, Spring 2004, p. 576.

2 李洁：《新西兰呼吁世贸组织限制渔业补贴》，下载于 http://www.sccwto.net:7001/wto/content.jsp?id=6706，2004 年 11 月 2 日。

3 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 11, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

剩以及非可持续性的资源攫取，助长了非法的、不报告、不受管制的渔业活动，尽管政府往往是非故意的。第二，通过补贴来人为地维持渔业领域的生产和就业水平，会使渔业个体和企业形成一种坚持渔业活动的心理倾向，从而使那些建立在科学研究基础上的有关捕捞控制的建议措施因遭受到强大的政治压力而得不到有效实施。

毋庸置疑，在那些缺少有效管理的渔业中，补贴的危害就更大了。事实上，受制于资金、技术、执法手段、经济与社会需求等复杂因素，真正管理优良的渔业并不多见，因此，那种所谓改进渔业管理而不是补贴纪律改革才是解决渔业补贴消极后果的更好办法的主张，就不得不面对这样一个现实：优良的渔业管理怎样以及何时才能实现？在世贸组织有关磋商过程中，即便是那些对制定世贸组织渔业补贴新纪律的必要性持怀疑态度的代表团也无法否认，补贴加剧了原本就很低劣的管理的消极后果。

发展中国家在补贴的危害面前显得更为脆弱，其表现在：第一，多数发展中国家财力有限，无力像发达国家那样提供巨额补贴，而这样又使它们的渔船队相对于发达国家的渔船队而言其竞争力更为落后，陷入恶性循环。第二，发展中国家管辖区域内的鱼类资源更易为外国远洋渔船队所耗竭。那些接受巨额补贴的发达国家远洋船队，由于面临严重的渔捕能力过剩与资源耗竭问题，在发展中国家海域中的活动越来越活跃，从而造成对这些地区渔业资源的压力并加大发展中国家小规模的民族渔船队面临的竞争压力。尽管外国船队常常是在与发展中国家之间所谓的“准入协议”下运作，但这些协议并不能绝对保证东道国渔业资源的可持续开发与管理，或者协议的条件未必能做到使东道国收受的利益最大化。实践中，由于许多发展中国家渔业管理水准低下，对于那些接受本国政府巨额补贴的外国渔船队的非法的、不报告、不受管制的渔业活动往往是有心无力。第三，许多发展中国家在食品和就业方面严重依赖于渔业，由于以上分析的渔业补贴对全球渔业资源萎缩以及渔业竞争的种种消极影响，发展中国家无疑要遭受更加不成比例的危害。

不过，并非所有的补贴都有害，渔业补贴也是如此。世界野生动植物基金会就认为有利于资源养护和向可持续开发过渡的政府支持措施仍然是十分需要的（世贸组织磋商中所谓“绿灯”补贴就涉及这一方面，将在后文叙述）。

（三）当今主要渔业国家的渔业补贴政策取向

尽管当今世界渔业补贴总量巨大，但其分布却十分不平衡。美国、日本、欧盟、加拿大、俄罗斯、韩国等发达国家（地区）或海洋渔业大国占了所有官方报告总量的绝大部分。其他较小较弱的众多发展中国家处于这种补贴游戏之外。而政府往往有一种明显的偏好加剧了这种集中状态，即相对于规模较小的社区型运作的船

队，更多的补贴被提供给更大更先进的船队。那些大型工业化船队企业相对于小型渔民，受到的补贴往往要巨大得多。

美国在太平洋有金枪鱼围网船队，尤其活跃在太平洋中西部的金枪鱼船队是一支资本密集型船队，被全球渔业界公认为很有效率，但 90 年代后期却不能大量和持续地产生利润。美国船队利润低的主要原因似乎是由于金枪鱼灌装品级过低所致，美国政府也认为这是向远洋捕捞船队提供补贴的直接原因。美国政府向船队提供补贴，与日本、韩国等亚洲国家相比以及与向大西洋上捕捞船队提供更多补贴的欧洲国家相比，承受了更大的压力。补贴导致不公正竞争，损害着他国利益，也损害着美国本身的利益，因为这种补贴给政府带来财政资金压力。[4] 自世贸组织多哈回合以来，美国一直倡导渔业补贴谈判。据有的美国学者称，美国视这种谈判取得成功为美国贸易与环境议程的一个关键要素。[5] 然而，美国在渔业问题上的商业利益是复杂的，其在新英格兰、墨西哥湾、太平洋沿岸和远洋船队都具有不同的利益。[6]

欧盟原本在乌拉圭回合中对渔业补贴谈判态度消极，但由于其他成员方的压力加上共同渔业政策的改革动向，其立场于 2003 年发生了变化。欧盟于该年 4 月 22 日向世贸组织提交了关于禁止渔业补贴以免引起捕鱼能力过剩的建议，建议国际社会采取行动结束渔业资源被过度捕捞的现状，主张有条件地适当消除渔业补贴。

当今在渔业领域政府补贴行为最抢眼的是日本和韩国，在有关磋商中的立场也最为顽固。这与两国发达的海洋渔业及其国计民生对海洋渔业的依赖密切相关。以日本为例，日本在渔业贸易方面具有悠久的传统，而且老一代人还清楚地记得在二战后期的饥荒，因而有关该国主要动物蛋白质来源的食品保障问题仍然受到特别关注。对多数经合组织国家而言，鱼肉不过是牛肉或羊肉以外的一种选择，但在日本情况则大不相同。[7] 举例说，日本一个支持项目就是日本每年以政府贷款的形式向渔船建设提供 240 亿日元的援助。日本高级渔业官员表示，如果取消这些贷款，造船成本会迅速升高。通常渔船经营者可存储的现金很少，平均利润仅为销售额的 10%。用于帮助日本渔民的 50 亿日元也被大幅削减。日本农林水产省每 5 年进行一次渔业评估。根据 2003 年公布的报告，日本从事海洋捕鱼的企业总数为 132417 家，比 1998 年下降了 12.1%。日本渔业经营者的数量不断减少，

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4 金麟根：《试析美国政府的渔业补贴立场》，载于《中国水产》2000 年第 3 期。

5 Alice L. Mattice FN, The Fisheries Subsidies Negotiations in the World Trade Organization: A “Win-Win-Win” for Trade, the Environment and Sustainable Development, *Golden Gate University Law Review*, Vol. 34, Spring 2004, p. 574.

6 Roman Grynberg, Fisheries Subsidies: Casting a Net too Small, *Bridges*, No. 7, 2002, pp. 5~6.

7 Roman Grynberg, Fisheries Subsidies: Casting a Net too Small, *Bridges*, No. 7, 2002, pp. 5~6.

渔业产出继续下滑，已从1992 年的183 万亿日元下降到2002 年的1.14 万亿日元。即使日本在限制补贴削减方面取得成功，日本渔业的未来仍面临许多困难。[8] 因此日本对渔业补贴磋商的抵制态度也就不足为怪了。

二、世贸组织框架下渔业议题的进展情况

世贸组织是一个在补贴方面拥有专长的政府间机构，这是因为补贴问题影响世界贸易体制。所以，联合国粮农组织、世界野生动植物基金会等政府间和非政府组织都寄望于世贸组织。而且，其他组织的工作成果（如《联合国粮农组织国际行动计划》）是自愿式的，而世贸组织关于补贴的规则具有国际法的约束力，通过其争端解决谅解机制具有潜在的可执行性。

1994 年世贸组织成立后不久，世贸组织贸易与环境委员会——一个为研究贸易的环境意义而成立的非谈判性机构——开始讨论渔业领域补贴所起的作用。虽然贸易与环境委员会研究渔业补贴问题已有时日，但只是在相对较近期才取得了较实质的进展。将渔业补贴问题纳入新一轮世贸组织谈判是美国和其他想法类似的国家的重要目标。这些国家（被通俗地称为“鱼类之友”[9]）在 1999 年西雅图世贸组织第三次部长级会议即将来临之际开始非正式地一起工作。在西雅图会议之前，美国与其他“鱼类之友”一道建议，作为世贸组织新回合的一部分，各成员应鉴于渔业补贴扭曲贸易，严重损害对鱼类资源的可持续利用并阻碍可持续发展的事实，同意消除助长渔捕能力过剩的渔业补贴。

2001 年 11 月卡塔尔多哈第四次部长级会议宣言提供了渔业补贴谈判的授权，并同意该领域的世贸组织规则应得到澄清和改进。相关的谈判在规则谈判小组中进行。

2003 年 9 月墨西哥坎昆部长级会议期间关于渔业补贴的讨论情况反映在由 2003 年 7 月 7 日在日内瓦举行的贸易与环境委员会例会通过并提交给此次部长级会议的报告中。[10] 以下文字系部分翻译并摘录于该报告：

人们普遍承认对渔业领域达到可持续发展的目标的重要性。若干成员忆及，有关渔业议题谈判启动于多哈部长级会议这样一个事实大体是建立在先前贸易与

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8 《日本将在世贸组织渔业会议上反对取消渔业补贴》，下载于 http://www.china-fisherles.com/info/display.asp?id=9764，2004 年 11 月 6 日。

9 包括澳大利亚、智利、厄瓜多尔、冰岛、新西兰、秘鲁、菲律宾和美国。它们认为，补贴和反补贴措施规则首要强调的是由补贴导致的市场扭曲，这些规则并未充分地强调渔业补贴对贸易、环境和可持续性发展造成的的其他负面冲击，尤其是补贴能够在渔业行业引起的显著的生产扭曲。它们主张，要改善有关渔业补贴的世贸组织纪律。

10 A Summary of Recent Work on Subsidies in the Fishing Sector, p. 22, at http:///url?q=ftp://ftp.fao.org/fi/DOCUMENT/tc-sub/2004/inf3e.pdf, 5 November 2004.

环境委员会分析的基础上。随后，《可持续发展世界首脑会议[11]实施计划》再次确认了这样的要求，即澄清和改进世贸组织渔业补贴纪律，并考虑该领域对发展中国家的重要性。[12]

一些成员方认为，即便在表面合理的渔业管理制度存在的场合，补贴也会动摇渔业管理并阻碍减少渔捕能力过剩的目标。具有高度价值的金枪鱼鱼种是处于多国管理体制之下并且种群业已崩溃的特定渔业的一个例子。人们强调，贸易措施（补贴）造成了渔捕能力过剩，必须受到约束。贸易自由化加上可持续资源管理，能够刺激伴随更长远环境利益的更有效率的生产活动。关税形式的贸易壁垒，或其他非关税壁垒，不能替代有效的资源管理。多数成员强调，既然相关谈判是在规则谈判小组以及市场准入谈判小组中进行，那么渔业问题最好留给这些机构来处理。

所有成员一致同意，通过渔业领域的各种国际环境组织能够提供更多的自然资源养护和管理方面的技术支持。一些成员重申在渔业补贴方面更深入研究的重要性并特别提到在这方面联合国粮农组织、联合国环境规划署、经合组织的工作。[13]

多哈磋商的第一阶段中世贸组织规则磋商小组有关渔业补贴的工作致力于确认世贸组织成员在澄清和改进渔业补贴纪律方面所要处理的问题，包括确认在现行世贸组织规则中的缺陷。作为该第一阶段的一部分，8 个首要的磋商支持国（包括美国在内）于 2002 年 4 月提交了一份报告，试图以广泛的论纲确认关于为何现行世贸组织《补贴与反补贴协议》在约束渔业补贴方面不够有力的原因。

然而在此第一阶段，那些对渔业磋商不那么热情的成员（首要的是日本和韩国）继续否认在渔业补贴与贸易与资源养护方面的有害后果之间存在显著联系。这些成员似乎还质疑多哈授权本身，认为渔业补贴应该被一般性地包含在更广泛的有关补贴的磋商中，该问题的环境方面应该转移到贸易与环境委员会的例会（非磋商性的）中讨论。2002 年 10 月，美国又投了一份非正式的报告，意在通过对在关注渔业补贴的贸易和资源养护的不利影响的其他论坛中已完成的实质性工作进行评审，来回应这些异议。日本和韩国仍未被说服。

美国又于2003年3月由其驻世贸组织大使琳内特•戴利提交了一份重要报告。在该报告中美国建议，此种磋商最有益的起点是考虑对补贴与反补贴协议中现存

11 指 2002 年 8、9 月间在约翰内斯堡举行的可持续发展世界首脑会议。

12 WSSD Plan of Implementation, Paragraph 31(f).

13 A Summary of Recent Work on Subsidies in the Fishing Sector, pp. 22~23, at http:///url?q=ftp://ftp.fao.org/fi/DOCUMENT/tc-sub/2004/inf3e.pdf, 5 November 2004.

的“交通灯”体制进行修订。继美国的报告之后，其他成员方也在 2003 年 9 月墨西哥坎昆世贸组织部长级会议之前自愿提交了关于推进渔业补贴磋商的办法的建议。而此前 4 月份欧盟立场的改变壮大了这种呼声。根据欧盟的建议，所有旨在加强渔业生产能力的政府财政补贴都应被禁止，这些补贴包括对建造新船和对远洋船只进行更新的补贴、对将渔船转让或出售给第三国提供的补贴等。欧盟同时建议，那些旨在减少捕捞能力的补贴、对现有渔船进行安全和环保改造提供的补贴以及有助于对渔业产业结构进行调整的补贴不应在被禁止之列。不过，这些补贴应遵循“透明化”的原则，向世贸组织进行通报。[14]

这样，尽管渔业补贴磋商在坎昆会议的整体失败背景下沉寂了一阵子，尽管日本和韩国仍持怀疑态度，但渔业补贴磋商终究又有了新动力，并且似乎出现了一种共识（至少在磋商的发起方当中）对于“交通灯”体制应予研究。在这种压力下，2004 年 6 月 8 日，日本代表在世界贸易组织规则谈判小组会议上递交了一项有关渔业补贴的提案。与会的各方代表尽管对提案内容意见不一，但大都对日本此举表示欢迎，因为这标志着渔业补贴的最大使用国终于加入了禁止该补贴的谈判。

日本提出的有关禁止渔业补贴的建议与新西兰 4 月提出的建议截然相反。新西兰要求全面禁止“容易导致生产能力过剩、捕捞过度或其他贸易扭曲行为”的补贴，在此基础上，世贸组织成员再通过谈判决定哪些补贴有利于环境及渔业的可持续发展因而可以被排除在外。该提案得到了美国、澳大利亚、挪威、智利、阿根廷、菲律宾和泰国等成员的支持，但遭到欧盟、日本和韩国的反对。日本的提案要求重点讨论“确实成问题的”补贴，比如容易导致生产能力过剩及违法、私自或任意捕捞等行为的补贴。日本代表说，虽然日本的渔业补贴最多，但其中大部分用于基础设施建设，并说这一类补贴不会扭曲贸易。新西兰对此予以反驳，认为日本的建议忽略了价格支持、运营成本和基础建设等方面的补贴，照此做法，日本渔业补贴的 90% 都将被排除在禁令之外。

韩国和中国台北则都对日本的建议表示赞同。中国也表示了一定支持，同时呼吁今后会谈中应就给予发展中国家特殊和差别待遇展开进一步讨论。[15]

但是，事情并不会一帆风顺，注定要有曲折。据有关报道，由于重大切身利益的存在，日本仍然将顽固坚持反对取消渔业补贴的立场。[16] 加上欧盟立场与日本的实质接近以及渔业大国中国的谨慎态度，谈判何时成功仍有众多未知数。

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14 张晋：《欧盟建议 WTO 禁止渔业补贴》，下载于 http://economy.enorth.corn.cn/system/2003/04/24/000549876.shtml，2004 年 12 月 21 日。

15 李洁：《日本开始参与世贸组织禁止渔业补贴的谈判》，下载于 http://www.sccwto.net:7001/wto/content.jsp?id=7102，2004 年 11 月 5 日。

16 《日本将在世贸组织渔业会议上反对取消渔业补贴》，下载于 http://www.china-fisheries.com/info/display. asp?id=9764，2004/11/06。

三、关于世贸组织有关渔业补贴规则的讨论

目前，众所周知的是世贸组织的《补贴与反补贴协议》所指的补贴不包括农业补贴，农业补贴由农业协议规范，而渔业补贴又不在农业协议的范围之内，所以渔业补贴仍由《补贴与反补贴协议》调整。

《补贴与反补贴协议》规定，如果“在成员领土内存在由政府或任何公共机构提供的财政资助”并且这种资助满足一些特定条件，或者“存在 1994 年《关税与贸易总协定》第 16 条意义上的任何形式的收入或价格支持”，那么就存在补贴。而且，必须有利益给予。补贴若要具有违法性，它必须具有“专向性”、“禁止性”或“可诉性”并造成“不利影响”。[17]

《补贴与反补贴协议》奉行的是一种“交通灯”体制，即将补贴分为禁止性补贴（红灯）、可诉性补贴（黄灯）、不可诉补贴（绿灯）。其中“绿灯”类只是在临时的基础上从建立世贸组织协议生效起适用 5 年，现已失效。而“黄灯”类中有 4 种被指为“暗黄”，即它们被推定为会造成严重侵害，除非提供补贴的成员能够证明情况并非如此，不过此种“暗黄”条款与“绿灯”条款一样于 1999 年到期并失效。

（一）现行《补贴与反补贴协议》各类规则对于渔业补贴的适用问题

1.“红灯”规则

目前《补贴与反补贴协议》中第 3 条关于禁止性补贴的两项规定与渔业补贴问题相关度不大。首先，各国政府很少视出口实绩来给予渔业补贴，相反大多数渔业补贴是由那些作为渔业产品净进口国的国家给予的。政府意识到渔业对国计民生的重要性，其授予补贴的目的往往是通过降低成本或增加收入等手段来维持渔业业者的生产能力，而不是取决于它们的出口实绩如何。

其次，虽然渔业补贴的授予使得国内渔业企业对国内市场的供给能力增强，从而很大程度上起到了替代和防止国外进口的作用，但这并不能说明渔业补贴就一定属于《补贴与反补贴协议》第 3 条第 1 款 b 项的“进口替代”补贴。《补贴与反补贴协议》第 3 条第 1 款 b 项的表述是：“视使用国产货物而非进口货物的情况为唯一条件或多种其他条件之一而给予的补贴”，此条款的真正所指，是那些视生产者在其生产过程的投入中使用国产货物而非进口货物的情况而给予的补贴，而不是那些单单给予国内供给者的补贴。如前所述，政府给予补贴的目的往往是通

17 A Summary of Recent Work on Subsidies in the Fishing Sector, p. 22, at http:///url?q=ftp://ftp.fao.org/fi/DOCUMENT/tc-sub/2004/inf3e.pdf, 5 November 2004.

过降低成本或增加收入等手段来维持渔业业者的生产能力，而不是看他们在生产过程中的投入方面是否有进口替代行为，尽管这些补贴客观上阻碍了进口。国内渔业产品消费者得以更多地选择国内产品而非进口产品，与国内渔业生产者接受政府补贴确有客观的联系，但补贴不是给予消费者，而是给予生产者，在《补贴与反补贴协议》条文逻辑上两者是不相干的。

但值得注意的是，“红灯”规则区别于“黄灯”规则的一个重要之处在于：有关“红灯”补贴的争端中，申诉方不负首要举证责任。《补贴与反补贴协议》第 4.5 条规定，“专家组设立后，可就所涉措施是否属禁止性补贴而请求常设专家小组（本协定中称‘PGE’）予以协助。如提出请求，则 PGE 应立即审议关于所涉措施的存在和性质的证据，并向实施或维持所涉措施的成员提供证明该措施不属禁止性补贴的机会。PGE 应在专家组确定的时限内向专家组报告其结论。PGE 关于所涉措施是否属禁止性补贴问题的结论应由专家组接受而不得进行修改”。因此，“红灯”规则体现的是一种事前性的禁止，如能有效地实施于渔业补贴领域，则相对于事后性补救的“黄灯”规则，作用必更加明显。所以说，目前“红灯”规则在渔业补贴领域的落空是十分可惜的。因此有关《补贴与反补贴协议》条款的改革工作仍然要重视“红灯”手段，更重要的是要加以完善。

2.“绿灯”规则

有关不可诉补贴的“绿灯”规则在其 5 年有效期内几乎从未被世贸组织成员方正式援引。在《补贴与反补贴协议》第 8.2 条的 3 种绿色类型中，（c）项与环境保护有关，着眼于渔业企业为消除污染的设备更新，被认为是“绿中之绿”，但必须同时满足五个条件，其中（iv）目表述是“与公司计划减少废弃物和污染有直接联系且成比例由此对照前文提到的渔业补贴的各种形式”，包括那些为达到可持续生产而减少渔捕努力量的渔业补贴，如渔船回购、雇工再培训计划，以及那些为了更换渔具以保护渔业生态环境的补贴，我们会发现几乎都难以与（iv）目表述对号入座。相比之下，倒是 8.2 条（a）、（b）两项对于渔业补贴有一些潜在的适用可能。已有若干国家就它们提供的有关研究活动和落后地区的渔业补贴向世贸组织作了通知，尽管这些补贴能否满足 8.2 条（a）、（b）两项的规定仍有争议。

因此从总体来看，现行《补贴与反补贴协议》中的“绿灯”规则对于渔业补贴的实际意义也很有限。而实践中已经有不少成员包括欧盟、日本在内提出，它们所实行的一些渔业补贴是有利于经济发展和环境保护的，应该得到允许。要想让现实中一些具有积极意义的渔业补贴获得“绿色”地位，就必须对“绿灯”规则进行重建。

3.“黄灯”规则

与“红灯”规则的事前性禁止相比，“黄灯”规则体现的是一种事后性的补救，着眼于一成员授予的补贴是否给其他成员的利益带来了“不利影响”。除“暗黄”类的 4 种情形外，举证责任在申诉成员方，即申诉成员方首先必须证明他方成员

的补贴行为对自己的利益有“不利影响”，否则就会败诉。提供补贴的成员即便败诉，只要消除这种“不利影响”或对申诉成员方给予相应补偿后即不再承担责任，哪怕它继续维持此种补贴行为。而且“黄灯”规则奉行的是“不诉不理”，即授予补贴的成员只承担消除对申诉成员方的不利影响的责任，而对其他未参与申诉的成员方则无此义务。其他受害的成员方如果不直接发起申诉，那么只能以第三方身份参加，权利很有限。

由于“红灯”和“绿灯”规则在渔业补贴领域的乏力，目前绝大多数渔业补贴都属于“黄灯”补贴的范围内。但由于举证责任的沉重，许多成员对“黄灯”规则并不满意。而在渔业补贴的问题上人们的意见则更大，归结起来主要有以下几点：（1）据称，由于渔业行业性质各异且分布广泛，比起其他大多数行业，直接计算补贴造成的价格和市场份额的影响要困难得多。[18] 而且由于渔业补贴项目大多严重缺乏透明度，以及渔业产品原产地与最终处理地的查询机制的不完善，所有这些都使得举证责任更加困难。（2）如前所述，挑战“黄灯”补贴必须通过向世贸组织提起申诉，发展中国家除了缺少相应的人财物力来承担这种诉讼成本之外，还面临着这样的两难：一方面其渔业对国计民生十分重要，而另一方面渔业经济绝对规模却较小（例如相对于农业领域而言），加上发展中国家往往在经济上依赖于发达国家，所以即便胜诉，争端解决机构授权的报复方式对于它们也存在很大的政治风险，渔业行业的得利可能还不及其他领域（如两国政治关系与经济合作）的受损。在涉及跨界和高度洄游鱼种的场合，报复措施所实际牵涉的相关国家会更多，利害关系也更复杂。

由于以上问题的存在，“黄灯”规则往往不足以阻止一些危害巨大而又缺少透明度的渔业补贴逍遥法外。这不能不让人又感受到“红灯”规则的事前性禁止方式的吸引力。

4. 其他

《补贴与反补贴协议》还有关于发展中国家的特殊和差别待遇、通知与监督体制等规则。发展中国家的特殊和差别待遇是世贸组织框架体系中一个普遍性的问题，《补贴与反补贴协议》中有关这方面的条款是第 27 条，规定了一些临时性的特殊与优惠条款。许多发展中国家认为第 27 条的内容还不能满足它们的现实需求，它们还认为原“绿灯”规则更多体现的是发达国家的利益，而它们的一些有利于经济发展的补贴并未被列入其中，因此它们希望将第 27 条的一些临时性待遇加以扩展并“永久化”，同时在重建后的“绿灯”规则中更多体现发展中国家有关特殊与差别待遇的要求。前一个要求比较困难，因为发达成员坚持认为第 27 条所提供的特殊与优惠只能是临时性的，但后一个要求是得到多哈部长级会议有关文

18 Fisheries Subsidies: Limitations of Existing Subsidy Disciplines, Submission from New Zealand, 4 July 2002.

件的谈判授权的，[19] 在具体磋商角力中存在实现的可能。

特别值得一提的是，有关通知制度的规则被人们认为其实践运行是很成问题的，在渔业补贴领域显得更为失败。目前关于通知制度的内容是《补贴与反补贴协议》第 25 条。人们对第 25 条的不满集中于两个方面：（1）对第 25 条的条文要求缺少良好遵守。如前所述，大多数渔业补贴并未由有关成员方通知世贸组织，严重缺乏透明度，使得“黄灯”规则下的申诉方实现举证责任十分困难。据世界野生动植物基金会估计，未予通知的渔业补贴可能达 90% 左右。[20] 第 25 条对违反通知义务的后果缺少强力规范是一个重要原因，第 25.9、25.10 条均是“可提请委员会注意”这样的类似措辞，毫无硬性规定和惩罚措施。（2）第 25 条本身对通知的内容、细节要求不到位。例如，第 25.3 条规定“通知的内容应足够具体，以便其他成员能够评估贸易影响并了解所通知的补贴计划的运作情况”，并列举了通知应包括的 5 种内容。但是，渔业补贴的负面影响除了贸易环节外更表现在生产环节和渔业资源状况，所以仅能让其他成员评估贸易影响是不够的，还要加上生产影响和对他国渔业资源状况的影响。还有，对于补贴问卷表中“补贴给谁”这样的问题，成员方的回答往往是“生产者”、“出口者”等等，而没有具体到行业、企业、个人、船只这些层面。再次，对渔业补贴的负面影响的评估不能脱离有关渔业行业的背景状况（如现有资源、法规、各国渔捕能力和努力量以及捕捞份额等），而第 25.3 条并无此种明确的信息要求，只是在第（V）项中笼统规定“可据以评估补贴的贸易影响的统计数据”，不能满足有关评估要求。

5. 小结

就渔业补贴而言，现在可对现行《补贴与反补贴协议》的缺陷作一小结，其主要方面简要概括如下：

（1）“红灯”规则在渔业补贴领域的落空使得该领域缺少事前性禁止。

（2）对“黄灯”规则的质疑在于该原则受制于举证责任和信息透明度。

（3）对于有积极作用的渔业补贴的保护不够。

（4）通知制度的软弱导致各国渔业补贴的透明度极差。

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19 Ministerial Decision on Implementation−Related Issues and Concerns (WT/MIN(01)/17, 20 November 2001), 10.2, which reads in part: “The Ministerial Conference takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in the context of the Doha Round negotiations.”

20 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 48, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

（二）规则的改革

1. 禁止“红灯”补贴及其例外

那些危害巨大的渔业补贴行为必须受到“红灯”规则事前性禁止方式的严厉约束。它们根据《补贴与反补贴协议》第 2.3 条的规定应自动地被认为具有专向性。毫无疑问，这方面首当其冲的有两种补贴：（1）助长或人为维持渔捕能力过剩和渔捕努力量的补贴；（2）助长非法的、不报告、不受管制的渔业活动的补贴。

关于前者，不少参加渔业补贴磋商的代表团提交的文件中都加以首要关注，在这些文件中它们往往首先关注的是“渔捕能力”，但也隐含了“渔捕努力量”在内。[21] 鉴于能够助长或人为维持渔捕能力过剩和渔捕努力量增长的补贴形式多种多样，因此新规则的指向目标既要广泛，又要具体，所以最好的办法是先对其一般概念作出规定，再以诸如附件这样的形式从正反两面给出列举清单，就像《补贴与反补贴协议》对“出口补贴”的处理方法那样。

关于后者，人们对非法的、不报告、不受管制的渔业活动的危害性异议不大，诸如此种活动破坏国家和国际渔业法制、扭曲竞争、助长过度捕捞、损害发展中国家海域内的渔业资源等等。以“红灯”规则约束非法的、不报告、不受管制的渔业活动，除非有极特殊的情况，不应有任何例外。不过，要使非法的、不报告、不受管制的渔业活动受到“红灯”规则的约束，首先得确定非法的、不报告、不受管制的渔业活动的涵义。在这方面，联合国粮农组织 2001 年 2—3 月渔业委员会第 24 届会议通过的《关于预防、制止和消除非法的、不报告、不受管制的渔业活动的国际行动计划》（简称为《国家行动计划》，属《负责任渔业行为守则》的一部分）中，以列举的方式对非法、不报告、不管理渔业活动分别作出了定义，[22] 应该说这是非法的、不报告、不受管制的渔业活动定义的权威版本。但世贸组织的职能毕竟不同于联合国粮农组织以及其他诸如世界野生动植物基金会这样的环境组织，若全部照搬《国际行动计划》中的定义，就有可能逾越世贸组织的职能和权限范围。可以考虑以该《国际行动计划》的定义为基础作一定简化和概括，以适应世贸组织体制环境。

世贸组织法制是原则性和灵活性相结合的典型产物。为了规则的灵活性以适应现实需要，对于新的“红灯”规则，有必要设置一些例外。按照有关学者的建议，

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21 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 59, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

22 该文本全文可见于联合国粮农组织网站。

这种例外可以包括：短期的紧急救济与调整、给予工艺渔业的某些补贴，等等。[23] 不过这些例外仍要服从预先通知的要求。至于发展中国家在这方面的特殊与优惠待遇，可考虑另行制订。

2. 重建“绿灯”规则

在《补贴与反补贴协议》“交通灯”体制中对一些有益补贴给予例外特殊待遇的条款中，除了“红灯”规则的例外、发展中国家的特殊与优惠待遇等内容之外，就是“绿灯”规则。但“鱼类之友”国家在此问题上态度消极沉默，美国只是含糊其词地表示“一些可能有助于减少渔捕能力过剩和过度捕捞以及有助于渔业可持续发展的补贴并非有关磋商的焦点”，[24] 实际上反映出这些国家希望在渔业补贴削减方面加大力度的心态，不希望所谓“绿色”补贴成为欧盟、日本等成员的挡箭牌和拖延筹码。如前所述，欧盟、日本提出，它们所实行的一些渔业补贴有利于经济发展和环境保护，应该得到允许和保护。所谓“有利于经济发展”的补贴中，确有一些是具有积极经济和社会意义的，如下面提到的欧盟提案中的部分内容，但问题在于，“有利于经济发展”的补贴中，也有不少是助长或人为维持渔捕能力过剩和过度捕捞的，与前述“红灯”规则不可避免会发生冲突，所以将其归入“绿灯”规则应持慎重态度。而“有利于环境”的补贴在当前强调贸易、环境、可持续发展“三赢”的新世纪潮流背景下，其积极意义得到了人们的重视。

值得注意的是欧盟和中国提出的两个提案。欧盟在其提案中呼吁，有助于缩减渔捕能力和消除渔业行业重组的消极经济与社会后果的补贴应归于“绿灯”类。欧盟具体提到，这些“绿色”补贴包括：（1）支持渔业业者再培训、早退规划等的补贴；（2）以改善安全、产品质量或工作条件或促进采用更有利于环境的渔捕方式为目的的渔船现代化方面的有限补贴（但任何此种现代化不得增强渔船捕鱼的能力）；（3）对那些不得不暂时停止其渔业活动的渔民和渔船船东的补贴，这种停止是由于不可预见的情况例如自然灾害，或属于遭过度捕捞的鱼类种群的复苏计划背景下与永久性渔捕能力削减措施相联系的框架或关联方案的内容；（4）为支持建立具有重要生物意义的“禁渔区”而给予的补贴；（5）为渔船报废和渔捕能力撤除的补贴。中国则提出了一个非穷尽的“绿色”补贴清单，指出这些补贴对贸易、环境或可持续发展不具有负面影响，包括：（1）为基础设施建设而给予的补贴；（2）为预防和控制疾病而给予的补贴；（3）为科学研究和培训而给予的补贴；（4）

23 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 71, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

24 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 77, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

为支持渔民转移到其他产业而给予的补贴。[25]

总的来说，一些合情合理的补贴能够得到人们较多的认同，例如补贴之给予是基于以下需要：为开展科研活动（如研究渔业管理之改进）、为采用有利于环保或满足安全和卫生要求的渔具、渔法等等。

《补贴与反补贴协议》原“绿灯”规则规定，如果其他成员有理由认为有关“绿灯”补贴计划已对其国内产业产生严重不利的影响，例如造成难以补救的损害，仍然可请求与给予或维持该补贴的成员进行磋商，如磋商不成功，可将此事项提交补贴与反补贴措施委员会，最终有可能从委员会那里获得授权采取适当反措施。[26]这实质是一个妥协性条款。为了调和“鱼类之友”国家和日本、欧盟等成员之间的矛盾，在重建后的“绿灯”规则中继续采用此种条款不失为一种解决分歧的现实办法。

此外，“绿灯”补贴也要满足透明度要求，提供此种补贴的成员应负有向世贸组织通知相关信息的义务。

3. 对“红灯”、“绿灯”以外的补贴加以约束——“黄灯”规则

前面提到，人们对原“黄灯”规则很不满意，其实原“黄灯”规则固然需要改进，但很大程度上关键并非在于“黄灯”规则本身，而在于原“红灯”与“绿灯”规则在渔业补贴领域的乏力使得大部分重担落到了“黄灯”规则肩上，而“黄灯”规则的种种固有特点又不能胜任这一要求。在实现了以上所述对“红灯”、“绿灯”规则的有效改革后，渔业补贴可望得到强有力的规制，剩下的一些模糊地带就可以交给“黄灯”规则去处理了。例如，一些未被“红灯”规则直接禁止又未被“绿灯”规则直接保护的补贴，如果能够证明它们导致渔捕能力和努力量的增加，即可在“黄灯”规则下提起申诉。

原“黄灯”规则对“不利影响”列举了三种情况：“损害”、“利益丧失或减损”、“严重侵害”。其中，“损害”主要着眼于一成员政府的国内产业因另一成员政府提供补贴而导致的进口情况变化所蒙受的损害，可以施以国内反补贴措施；“利益丧失与减损”的典型情况是，一成员认为，作为另一成员关税约束的结果，它本应获得的改善的市场准入机会，因为另一成员给予补贴的影响而受到削弱；[27]“严重侵害”则是一个较广的概念，《补贴与反补贴协议》第 6.3 条列举了可产生严重侵害的 4 种情况。应该说渔业补贴与前两者也有联系，不过总体来看似乎“严重侵害”更能涵盖渔业补贴所产生的种种消极后果，以此为基础来构建有关渔业补贴的“黄

25 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in theWorld Trade Organization, pp. 77~78,at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

26 《补贴与反补贴协议》第 9 条。

27 世贸组织秘书处编，索必成、胡盈之译：《乌拉圭回合协议导读》，北京：法律出版社 2000 年版，第 142~143 页。

灯”规则是适当的。

不过原“黄灯”规则与《补贴与反补贴协议》其他条款一样，其侧重点在于进出口贸易所受影响，而渔业补贴不同于一般补贴的特点在于它不但影响市场销售，更直接影响生产过程。所以有关渔业补贴的新“黄灯”规则除了第 6.3 条列举的 4 点之外，还要考虑补贴行为给其他成员方渔业生产的影响，很有必要在这方面增加列举一些诸如捕捞份额不合理增加这样的因素。

至于人们对“黄灯”规则下举证责任沉重的抱怨，“暗黄”规则应继续存在。《补贴与反补贴协议》第 6.1 条列举的四种情形，应同样适用于渔业补贴。此外，由于发展中国家资金人才缺乏，技术落后，信息相对不畅，并饱受发达国家渔船队在本国海域内的困扰，对发达国家补贴行为的申诉也往往更难完成举证责任，因此“暗黄”规则还应考虑适用于发展中国家针对发达国家渔业补贴提起的“黄灯”规则下的申诉，即此种情况下推定发达国家渔业补贴存在严重侵害，由发达国家承担举证责任。这可以放在发展中国家成员特殊与差别待遇的单独规定中。目前的《补贴与反补贴协议》第 8 部分第 27.8、27.9 款仅仅是规定了发展中国家补贴行为在“黄灯”规则下所享有的特殊待遇。增加上面所述内容，能够使发展中国家享受双向的特殊待遇，更好地照顾发展中国家的弱者利益。

4. 强化通知制度

在前面关于《补贴与反补贴协议》通知制度的缺陷分析中，实际已经包含了一些针对渔业补贴的特点对通知制度应作的改革的设想，不再赘述。这里还需要谈一下违反通知义务的法律后果规则的建构。显然这方面一些硬性的惩罚措施是必要的。可以从两个方面入手，一是提高不遵守通知义务的成本。如补贴与反补贴措施委员会在经过对通知的审议后，将有关通知义务遵守的情况公之于众，或者直接对被发现不遵守通知义务的成员施以罚金，无论其补贴合法与否。不过由于补贴与反补贴措施委员会未必能够在审议中发现所有未予通知的补贴，公之于众的做法有时也会受制于“法不责众”而流于形式，而成员方倘若拒不向委员会缴纳罚金该如何处理又是个棘手问题，所以还需要下面的司法途径，即在世贸组织司法过程中加重其法律责任，如在“黄灯”规则下提起的申诉中，一旦发现有不通知的情况，则无论有关补贴是否导致不利影响，均可由专家组施以罚金，或自动推定补贴导致严重侵害，或对发现导致不利影响的补贴强制有关成员方撤销而不是仅仅消除其有害影响或给予补偿。对于未予通知而事后发现属于“红灯”类的补贴，除依照《补贴与反补贴协议》第 4.7、4.10 条由专家组建议撤销和争端解决机构授权反措施之外，可由专家组直接施以罚金，即使成员方按照专家组建议撤销了有关补贴，这种罚金仍要缴纳并在补贴撤销之前根据其持续时间按一定比例累进增

加。[28] 如成员方拒不缴纳以上罚金，则罚金价值可计入授权反措施的程度内。

违反通知义务有两种情况，一是根本不通知，二是通知的形式与内容不符合要求，显然前者违法程度更大，当然有时不符合要求的通知与不通知并无多大差别，在以上所述两方面改革措施的条文设计中，对这两种情况既要区别对待，又要注重根据具体情况决定其责任程度。

5. 其他

其他如发展中国家的特殊与差别待遇问题，在前面的内容中已有所述及。限于篇幅与学识，暂时只能叙述到此。

四、结　语

综合以上内容，我们可以看到，与普通补贴相比，渔业补贴问题存在许多特殊性。若把它完全纳入《补贴与反补贴协议》的普通框架来解决，颇为不便。比较合理的办法是像金融服务议题那样，采用某一协定下单独议定书的形式加以处理。

在具体议题的谈判中，个别重要国家的顽固态度往往会阻滞整个进程。美国在海运服务谈判中的作用就是明证。渔业补贴谈判中，尽管“鱼类之友”国家引领着一场主动攻势，但日本、韩国甚至包括欧盟在内的立场，对谈判进程的消极影响仍不可低估。

应当注意到，世贸组织磋商是“一揽子承诺”，即结果必须在磋商的所有领域中达成，并必须对所有成员适用。因此谈判各方存在跨议题的讨价还价。如果渔业补贴议题必须作为多哈回合谈判的一部分，则必然受到其他议题谈判情况的制约。《多哈宣言》列出的时间表要求已经明显不现实。根据世贸组织总理事会2004 年 8 月 1 日通过的《多哈工作计划》，多哈回合谈判起码要到 2005 年 12 月香港部长级会议才能结束。[29] 谈判究竟何时以及以怎样的结果取得成功，暂时还需要人们拭目以待。

当代世贸组织体制中，有关“贸易与……”的议题越来越时髦，如贸易与环境、贸易与投资，甚至贸易与劳工标准等等。对于这些议题，不仅是世贸组织，还有许多其他政府间和非政府组织也在热心投入，它们当中有不少拥有相关领域的专长。不同组织和机构的权限下各种问题的互动情况说明，人们不能指望通过将所有的“贸易与……”问题都塞进世贸组织这个框框中来解决，而是需要在政府机构、

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28 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, pp. 77~78, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

29 Doha Work Programme − Decision adopted by the General Council on 1 August 2004, Article 3.

专业组织、分析家之间寻求合作、协调和信息共享，通过分析与共识来推动有关的改革进程。世贸组织在自己的职能权限内实践其宗旨和目标的同时，应注意与这些组织的交流合作并建立相关合作机制。渔业补贴议题体现的是贸易与环境以及可持续发展之间三位一体的关系，这方面世贸组织应特别注意联合国粮农组织、联合国环境规划署、世界野生动植物基金会等组织的作用。此外，一些区域性组织如经合组织、亚太经合组织在渔业补贴方面也有若干工作，它们与世贸组织之间也会形成一种互动。

从“公海捕鱼自由”原则的演变看海洋渔业管理制度的发展趋势

慕亚平* 江 颖**

内容摘要:“公海捕鱼自由”原则是“公海自由”原则的主要内容，其内容和规则随着国际关系和科学技术的发展而逐渐变化。本文在阐述“公海捕鱼自由”原则的确立及其演变的基础上，重点描述了《跨界鱼类种群协定》对“公海捕鱼自由”原则及其渔业管理制度的影响，进而对海洋渔业管理制度发展趋势进行了展望。

关键词: 公海捕鱼自由 《跨界鱼类种群协定》 海洋渔业管理制度

“公海捕鱼自由”原则是古老的“公海自由”原则的内容之一，这项自由曾一度作为“绝对”的自由被主张，但随着海洋开发中新技术的应用水平不断提高以及人类对环境保护以及可持续发展战略的日益重视，其开始或多或少地受到了限制，并影响到了现代国际海洋渔业管理制度和规则。本文旨在通过对“公海捕鱼自由”原则形成、发展与演变过程的评析，揭示出海洋渔业管理制度的发展趋势以及在这一变化过程中所体现出来的法律价值。

一、“公海捕鱼自由”原则的确立及其演变

（一）“公海捕鱼自由”原则的提出

在古代和中世纪前半叶尚无领海、公海的概念，世界海洋是对所有人开放的，是人类所共有的。[1] 大约从 13 世纪开始，一些沿海国家开始对海洋某些领域提出主权要求，少数海洋大国开始争夺海上霸权，在他们所控制的海域强行征收捐税，禁止外国人捕鱼和航行，打破了原有的海洋秩序。在这种环境下，被称为“国际

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1 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（上卷，第二分册），北京：中国大百科全书出版社 1998 年版，第 153 页。

法之父”的荷兰法学家格老秀斯于 1609 年发表《海洋自由论》，提出了著名的“海洋自由”主张，他认为海洋浩瀚无边，不能为任何人所占有，它应为一切人提供航行和捕鱼之用，也就是说海洋在本质上是不受任何国家主权控制的，所有国家都可以自由地加以利用。但当时格老秀斯的主张受到了以英国的约翰塞尔登为首的许多学者的反对和攻击，塞尔登的《闭海论》直接反对格老秀斯的“海洋自由”，竭力为海洋主权的主张辩护，这种主张在 17 世纪占了上风，各国都积极推行海洋主权的政策。[2]

格老秀斯的主张虽然受到反对，但其影响是无法取消的，到了 17 世纪下半叶，实际上所有国家的船舶都可以自由航行于公海的所有部分了。[3] 但是，当时的“公海自由”概念基本上还仅仅局限于“航行自由”的范畴。法国国际法学者吉德尔认为：“公海自由所包含的基本概念，是不允许任何船只在和平期间的航行途中对其他船只进行干扰。”[4] 但同时他也承认，公海自由“不能不包括积极的结果。公海自由是指相对独占作用而言，最终必将导致‘使用平等’这一概念……”[5] 这也就是说，“公海自由”的含义绝不是仅仅是以国家或个人的“不作为”保证公海上的航行自由，它还应包括对公海的积极利用的自由。“捕鱼自由”无疑是“积极利用自由”的应有之义。

“公海捕鱼自由”的自然法依据尽管在今天看来难以成立，但在数百年以前却被认为是很好理解的：对于任何人可以无害地使用、并且也足够全人类使用的东西，大自然不给予任何人以据为己有的权利。很显然，对当时的人来说，海洋中的渔业资源就是这样一种“东西”，并从而形成了“公海捕鱼自由”的原始涵义。

17 世纪下半叶，荷兰在公海上推行航海和捕鱼自由的政策；1689 年，荷兰执政者奥林奇威廉登上英国王位之后，英国与荷兰之间的渔业纠纷平息，荷兰获得了捕鱼权；这些事例以及日后丰富的国际实践，都可以充分证明“公海捕鱼自由”这项原则作为国际习惯法的存在。[6] 而最终使“公海自由的渔业在表面上成为确定无疑”的，还是 1893 年发生在英美之间的“白令海海豹仲裁案”。[7] 在该案中，由于美国逮捕在美国领海以外的白令海上猎捕海豹的不列颠哥伦比亚的英国船舶，英美两国发生争议。最终的裁决驳回了美国认为它有权对公海上的英国船舶执行目的在于养护濒于危境的海豹品种的规则的主张。该案不仅正面肯定了“公海捕

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2 周子亚、范涌著：《公海》，北京：海洋出版社 1990 年版，第 22~25 页。
3 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（上卷，第二分册），北京：中国大百科全书出版社 1998 年版，第 155 页。
4 周子亚、范涌著：《公海》，北京：海洋出版社 1990 年版，第 29 页。
5 周子亚、范涌著：《公海》，北京：海洋出版社 1990 年版，第 29~30 页。
6 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（上卷，第二分册），北京：中国大百科全书出版社 1998 年版，第 182 页。
7 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（上卷，第二分册），北京：中国大百科全书出版社 1998 年版，第 182 页。

鱼自由”原则，而且揭示了“公海捕鱼自由”和“为实施养护规则而进行必要的限制”这样一对矛盾；[8] 这对矛盾实质上反映了在公海实施捕捞活动的国家与邻近沿海国家的利益冲突，并成为影响“公海捕鱼自由”涵义的根本原因。

（二）区域性和专门性捕鱼条约对“公海捕鱼自由”原则的限制

由“白令海海豹仲裁案”的裁决结果来看，至少在 19 世纪末和 20 世纪初，对“公海捕鱼自由”本身的理解还是倾向于一种绝对的自由，“除非有关国家由于这样或那样的理由享有公海上特定的捕鱼区域的垄断权，并且除非其他具有同样渔业的有关国家能依条约同意合适的规则，可能还互相授予对彼此的船舶执法的权力……”。[9] 在实际的公海捕鱼活动中，这种“除非”的情况的出现并不罕见。这是因为，在当时的捕鱼技术水平下，对公海中渔业资源的捕捞能力尚局限在有限的狭小范围内，在这些传统海域内的捕捞密度就很可能相对过大;因此必须保证在能力可及的范围内的鱼类数量和种类应保持稳定，这就要求必要的养护措施。

在第二次世界大战之前，对“公海捕鱼自由”的限制主要是依条约，尤其是地区性条约和专门性条约，“采用一致同意的公海渔业规则方案的一类重要条约，是自然地而且合理地倾向于在地区和地理的基础上缔结的”。这些安排的总目的是试图保证养护和发展鱼类资源，并且以良好和有活力的管理保证产量的较为公正的分配。[10] 区域性的条约，较早的有 1882 年《北海渔业公约》，该公约由英、法、德、比利时、荷兰和丹麦六国签订，其主要目的是在北海设立渔业警察，规定渔船登记、号码及船旗港、渔船文书、下锚、播网、渔具捞救等;对犯规渔船，本国保留惩罚管辖权。专门性的条约有 1931 年的《关于管理捕鲸公约》以及其后的一系列修正条约和议定书。还有更多的条约既是区域性的、又是专门性的，如 1911 年的《北太平洋保护海豹公约》，1923 年的《美加北太平洋（含白令海）鲽蝶条约》等。

（三）1958 年两公约对“公海捕鱼自由”原则的限制

1958 年联合国第一次海洋法会议上通过了《公海公约》和《捕鱼与养护公海生物资源公约》，其中出现了限制“公海捕鱼自由”的规定：

《公海公约》第 2 条明确规定了公海自由包括捕鱼自由。该公约对各国行使

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8 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（上卷，第二分册），北京：中国大百科全书出版社 1998 年版，第 182 页。

9 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（上卷，第二分册），北京：中国大百科全书出版社 1998 年版，第 183 页。

10 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（上卷，第二分册），北京 : 中国大百科全书出版社 1998 年版，第 183 页。

上述自由所进行的限制只有“应合理地照顾到其他国家行使公海自由的利益”。该条中使用的“合理照顾”的概念，被认为最早出现在 1826 年一个美国在公海扣押葡萄牙渔船的案例中。美国联邦最高法院的判决认为，任何船舶都享有为追逐自己的合法目的而在公海上行使的无可置疑的权利，但该项权利的行使不得影响到他人同等权利。[11] 通常认为，该“合理照顾”的概念的使用，在管理海洋渔业资源中的实际作用十分有限，并不能用来解决一些具体的问题，例如：当某些养护措施被证明是急迫的和必需的时候，捕鱼自由是否还被允许？在这种情况下，如果一国拒绝遵守这类措施，其对“自由”的行使是否就是“不合理”的？以及最为关键的一点，谁有权制定这类措施？ [12] 上述问题在《公海公约》中没有完整的答案。

《捕鱼与养护公海生物资源公约》第 1 条就列出了对“公海捕鱼自由”原则的 3 点限制：“所有国家均有权由其国民在公海上捕鱼，但受下列限制：（甲）其条约义务；（乙）沿海国根据本公约所享有的利益和权利；（丙）以下各条所在关于养护公海生物资源的规定”。这可以视为是《公海公约》中的“合理照顾”义务的具体化和明确化。公约的其他条文还规定了一些国家有义务主动采取的养护措施，以及因此而产生的从事捕获某一特定品种鱼类的其他国家的养护义务，因为公约要求所有缔约国或者自己实施、或者与他国合作实施这类养护措施。

上述 2 个公约明确否定了“公海捕鱼自由”原则的绝对性。虽然在此之前的一些区域性或专门性的条约安排已经对“公海捕鱼自由”原则作出了某种限制，但那些限制只是在承认“公海捕鱼自由”的宽松环境下，自愿为条约当事国的互利目的而作出的某些自我限制，并未触及该原则本身。而这 2 个公约不论是在措辞上还是具体规定上，都旨在明确地限制任意的、绝对的“公海捕鱼自由”，并且将该限制确立为一种有拘束力的行为规范。可以说，1958 年的日内瓦公约，对“公海捕鱼自由”原则由“绝对”转向“相对”具有标志性的意义。

（四）1982 年《联合国海洋法公约》对“公海捕鱼自由”原则的进一步限制

1958 年《捕鱼和养护公海生物资源公约》第 1 条（乙）中规定的“沿海国的利益和权利”，所指向的就是该公约第 6 条和第 7 条的规定。第 6 条承认，“沿海国对邻接其领海的公海的任何区域内生物资源生产力具有特殊利益”；[13] 第 7 条又规定，“为维持这类生物资源的产量，沿海国有权在邻接其领海的公海上单方面地实

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11 The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826), at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=24&invol=l, 21 December 2004.

12 M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone*, Leiden: Martinus Nijhoff, 1987, pp. 2~3.

13 《捕鱼和养护公海生物资源公约》第 6 条第 1 款。

施适当的养护措施”。[14] 公约这样规定的初衷在于限制沿海国对专属渔区的进一步要求，但事与愿违，公约遭到拉美和冰岛等主要沿海国家的抵制，最终批准该公约的国家只有 35 个，并主要是一些远洋捕捞国。并且，沿海国继续主张范围广阔的专属渔区，并要将在其中的捕鱼权专属地保留给本国国民[15]。截至 1980 年 4 月，在 136 个沿海国中近四分之三宣布 12 海里以上的渔业管辖区，近三分之二宣布 200 海里的管辖范围[16]。

1958 年的《捕鱼和养护公海生物资源公约》为沿海国普遍主张在邻接其领海的公海区域内的渔业权作了铺垫，为了满足大部分沿海国扩大国家渔业权的愿望，联合国第三次海洋法会议将“专属经济区制度”规定进了 1982 年《联合国海洋法公约》的第五部分。这就在实际上承认了前 2 次海洋法会议一直未予承认的部分沿海国家对 200 海里海域专属渔业管辖权的要求。

1.“专属经济区制度”的确立对“公海捕鱼自由”原则的影响

1982 年公约第 56 条第 1 款规定：“沿海国在专属经济区内有：（a）以勘探和开发、养护和管理海床上覆水域和海底及其底土的自然资源（不论为生物或非生物资源）为目的的主权权利……”[17] 公约又在第七部分第 86 条中规定：“本部分的规定适用于不包括在国家的专属经济区、领海或内水或群岛国的群岛水域内的全部海域。本条规定并不使各国按照第 58 条规定在专属经济区内所享有的自由受到任何减损。”[18] 这也就是说，专属经济区属沿海国主权管辖的范围，所谓“公海自由”的原则已不再能够当然地适用于该区域内。换言之，可以适用“公海捕鱼自由”的海域在地理面积上已经大大的减少了。

公约第 58 条第 1 款和第 2 款规定：“（1）在专属经济区内，所有国家，不论为沿海国或内陆国，在本公约有关规定的限制下，享有第 87 条所指的航行和飞越的自由，以及与这些自由有关的海洋其他国际合法用途，诸如同船舶和飞机的操作及海底电缆和管道的使用有关的、并符合本公约其他规定的那些用途。（2）第 88 至第 115 条以及其他国际法有关规则，只要与本部分不相抵触，均适用于专属经济区。”[19] 从中可见，在公约的专属经济区制度设置中，并非在专属经济区内就完全否定原来的“公海自由”原则，只是不当然地适用。事实上，经公约明文规定，“公海自由”中的“航行和飞越自由”、“铺设海底电缆和管道的自由”就可以适用于专属经济区，而“公海自由”中的另 2 项自由——“公海捕鱼自由”和“公海科研的自由”被排斥在外了。专属经济区制度的设立大大减损了“公海捕鱼自由”原则，

14 《捕鱼和养护公海生物资源公约》第 7 条第 1 款。
15 刘楠来等著：《国际海洋法》，北京：海洋出版社，1986 年版，第 106 页。
16 杰拉尔德 • 穆尔：《沿海国家有关外国捕捞的法律规定》，罗马：联合国粮食及农业组织 1981 年版，第 2 页。
17 《联合国海洋法公约》，北京：海洋出版社 1983 年版，第 38 页。
18 《联合国海洋法公约》，北京：海洋出版社 1983 年版，第 63 页。
19 《联合国海洋法公约》，北京：海洋出版社，1983 年版，第 39~40 页。

这是不言而喻的。因为“专属经济区”已不再是所谓的“公海”的一部分，他国公民在此区域内的“捕鱼自由”已不再是要受到某些限制的问题，而是完全被剥夺了。

2. 公海制度的新规定对“公海捕鱼自由”原则的影响

《联合国海洋法公约》第七部分“公海”的规定，除了个别措辞以外，几乎和 1958 年日内瓦 2 个公约中关于公海制度的条文相同。因为根据 20 世纪 70 年代中期整个世界的海洋渔业发展状况，当时在 200 海里之外进行的捕捞活动还很少，因此在几次的联合国海洋法会议中对这一问题几乎都没有进行多少讨论。[20] 结果，“公海捕鱼自由”被规定在 1982 年公约第 87 条中，同时还为其设置了“适当顾及”的义务；而公约第 116 至第 120 条则几乎完全是 1958 年《公海捕鱼公约》的条文。无怪乎 80 年代后期和 90 年代初，威廉伯克尖锐地分析和批评了《联合国海洋法公约》中的渔业条款，他在《新国际渔业法：1982 年海洋法公约及其他》中经过详尽的分析后得出结论：“除了第 116 条以外，公约中的其他指导原则都无所裨益；需要改变的恰恰正是‘捕鱼自由’这一沿用至今的核心原则。”[21]

的确，1982 年公约中只有第 116 条（b）项的规定与原来略有不同，即要求所有国家在公海捕鱼时，“除其他外”，还须受第 63 条第 2 款和第 64 至第 67 条规定的沿海国的权利、义务和利益的限制。这里所指的公约第 63 条第 2 款和第 64 至第 67 条主要是对跨界和高度洄游鱼类种群的养护和管理的要求，是 1982 年公约中新加入的一项内容。这一规定尽管还过于简单，但基本上是明确的。问题是对“除其他外”的范围的确定产生了模糊——该“其他”是否包括沿海国的优先权利？公约通过后，对该条款的理解分成了两大对立的立场：一些人认为它赋予了沿海国对紧靠其专属经济区附近的公海的渔业资源有一定的优先的权利；另一些人则认为根据公约第 87 条第 2 款[22] 的规定，捕捞国仅有“适当顾及”沿海国权利的义务，而第 116 条（b）不能构成沿海国试图越出专属经济区 200 海里的限制行使管辖权的基础。这一争论直到 1995 年《跨界鱼类种群协定》诞生后才有了一个相对肯定的结论。

二、《跨界鱼类种群协定》进一步完善了渔业管理制度

随着全球捕捞技术的迅速提高，在 200 海里以外的公海上进行的捕捞活动开

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20 David H. Anderson, The Straddling Stocks Agreement of 1995 – An Initial Assessment, *International and Comparative Law Quarterly*, Vol. 45, 1996, p. 464.

21 William Burke, *The New International Law and Fisheries: UNCLOS 1982 and Beyond*, Oxford: Oxford University Press 1994, p. 350.

22 1982 年《海洋法公约》第 87 条第 2 款规定：“这些自由（即公海自由）应由所有国家行使，但需要适当顾及其他国家行使公海自由的利益，并适当顾及本公约所规定的同‘区域’内活动有关的权利。”

始急剧增加。对实施远洋捕捞的国家来说，他们要考虑的是如何尽可能地利用好“公海捕鱼自由”的各项规定；而对于沿海国来说，则是如何保证他们在各自专属经济区内的渔业利益不会受到公海捕捞活动的不利影响。而且鱼类活动不受人为划定的海域界限的影响，人们不论是要在专属经济区内实施一套渔业管理制度，还是建立一套公海捕捞制度，都不能忽视整个海洋实际上是一个生态整体的客观事实。这其中矛盾的焦点就落在对跨界和高度洄游鱼类种群的养护和管理上。不同国家的专属经济区之间、专属经济区与公海之间的制度和管理如果没有很好的协调，将无法真正实现对这类鱼类资源的适度利用和有效养护。然而由于第三次海洋法会议上对 200 海里以外公海上的捕鱼活动的蓬勃发展缺乏预见，公约中对这一部分的规定显得过于简单而无法满足实际的需要。

1982 年公约第 63 条和第 64 条为解决跨界和高度洄游鱼类的养护和管理问题搭建了一个框架，即沿海国和捕捞国应通过适当的分区域或区域组织达成协议，进行合作。然而公约建构的框架所遗留的问题是：如果沿海国与捕捞国之间的协议无法达成该怎么办？[23]

除了公约在法律上遗留的问题以外，一些世界渔业的现状也引起了人们的普遍焦虑。在捕捞与养护问题上，全世界的捕捞量在 80 年代一直在上升，到 1989 年达到顶峰；1995 年世界粮农组织的报告中称有 70% 的鱼类种群处于过度开发状态，或濒临灭绝。同时在管理问题上，人们注意到以下几个现象：1. 缺乏公海捕捞量的准确统计数据；2. 一些船旗国未能有效地管理本国船舶船旗的悬挂，致使在捕捞业中出现了悬挂方便旗的现象；3. 个别沿海国担心在临近区域内的捕捞会给其专属经济区内的捕捞和养护带来不利影响，而试图延伸其管理措施的实施领域。

这一系列值得关注的问题，在 1992 年里约热内卢召开的联合国环境和发展大会上被一一提了出来。在加拿大的提议下，关于“跨界鱼类种群和高度洄游鱼类种群”的问题被列入环发大会建立的一系列会议议程之中；但同时，主要是在欧盟的坚持下，同意会议将仅在 1982 年海洋法公约的框架下运作，即不能修改现有的术语或提出新的术语，特别对专属经济区 200 海里的限制不得更改。

1995 年 8 月 4 日，联合国关于跨界鱼类种群和高度洄游鱼类种群会议的第四次大会上通过了《执行 1982 年 12 月 10 日〈联合国海洋法公约〉有关养护与管理跨界鱼类种群和高度洄游鱼类种群的规定的协定》。协定中的规定基本上是为

23 曾有一些沿岸国提议可将争端提交仲裁，但因遭远洋捕捞国的反对而被迫撤回。See Proposal by Argentina and others, A/CONF. 62/L. 114 of 15 April 1982.

200 海里区域外的公海设计的[24]。该协定是《联合国海洋法公约》的一个重要发展，它对海洋生物资源，特别是公海渔业资源的养护与管理以及国际渔业合作将产生重要的影响。协定分成 13 个部分，共 50 条，另加 2 个附件。

第一部分（第 1~4 条）是一些一般规定，规定了协定中的一些用语的含义、目标、适用范围和协定与《联合国海洋法公约》之间的关系。其中第 3 条关于“适用”的规定中有一句话特别值得注意：协定适用于国家管辖地区之外（公海），但第 6、7 条也适用于国家管辖地区内，“然须遵守《联合国海洋法公约》所规定，在国家管辖地区内和国家管辖地区外适用不同的法律制度。”该段文字被理解为对沿海国企图任意扩展其管辖领域的限制和否定。

第二部分（第 5~7 条）规定了有关缔约国在养护和管理方面的详尽义务。也只有这几条是可以适用于 200 海里国家管辖范围以内的[25]。其中第 7 条的规定是为了尽可能保证 200 海里区域内和区域外的养护措施的一致性；第 7（2）条号召各国在决定这类措施时，考虑沿海国根据公约第 61 条制定的专属经济区内的同类措施，以及相邻公海内原先已达成的协议。

第三部分（第 8~16 条）和第四部分（第 17 条）谈的是“国际合作机制”。协定的第三部分对《公约》中未作明确规定的关于跨界鱼类种群和高度洄游鱼类种群的“国际合作机制”进行了具有可操作性的规定。协议规定，沿海国和在公海捕鱼的国家应该建立区域和分区域的渔业管理组织对跨界鱼类种群和高度洄游鱼类种群进行养护和管理，只有属于这种组织的成员或安排的参与方的国家，或同意适用这种组织或安排所订立的养护和管理措施的国家，才可以捕捞适用这些措施的渔业资源。如果没有分区域或区域渔业管理组织或安排就某种跨界鱼类种群或高度洄游鱼类种群订立养护和管理措施，有关沿海国和在分区域或区域公海捕捞此一种群的国家即应合作设立这种组织或达成其他适当安排，确保此一种群的有效养护和管理，并应参加组织或安排的工作。[26] 第四部分（第 17 条）还特别指出，即使是非区域渔业管理组织的成员国和非区域协议的缔约方的国家，也不能免除这种合作的义务。

第五部分（第 18 条）专门谈了船旗国的义务。是针对船旗国未能有效地对悬挂其本国国旗的船舶在公海上的捕鱼行为进行管辖的现状，以及由于船旗国的纵

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24 参见《跨界鱼类种群协定》第 3（1）条：“除另有规定外，本规定适用于国家管辖地区外跨界鱼类种群和高度洄游鱼类种群的养护和管理，但第 6 条和第 7 条也适用于国家管辖地区内这些种群的养护和管理，……”。国家环境保护总局政策法规司编：《中国缔结和签署的国际环境条约集》，北京：学苑出版社 1999 年版，第 251 页。

25 参见《跨界鱼类种群协定》第 3（1）条：“除另有规定外，本规定适用于国家管辖地区外跨界鱼类种群和高度洄游鱼类种群的养护和管理，但第 6 条和第 7 条也适用于国家管辖地区内这些种群的养护和管理，……”。国家环境保护总局政策法规司编：《中国缔结和签署的国际环境条约集》，北京：学苑出版社 1999 年版，第 251 页。

26 《跨界鱼类种群协定》第 19 条。

容态度致使公海捕鱼中出现渔船悬挂方便旗的现象而做出的安排。协定鼓励船旗国引入许可证制度，并要求船旗国对悬挂其国旗的船只及其捕鱼活动进行检测、管制和监督。

第六部分（第 19~23 条）规定的是协议的遵守与执法。这项任务首要的是落在船旗国身上[27]；同时协定鼓励国际合作执法[28]；但规定最详尽的还是执法的分区域和区域合作。第 21 条建立了一个相对完善的区域实施机制，同时也是对公海捕鱼自由冲击最彻底的机制。它规定，一国一旦加入这类组织，就必须接受其本国船舶在公海被它国经某一区域渔业管理组织授权登临和检查的可能性。这种登临和检查，被认为是大家十分熟悉的军舰或海岸警卫船只的登临和检查权在渔业方面的“特殊适用”。海洋法公约第 110 条对登临和检查权的规定是开放式的，即允许在 A 和 B 两国间通过协议，彼此授权对悬挂另一国国旗的船舶进行登临和搜查。协定的第 21 条可以被视为性质类似于这种协定的一个授权条款，从而导致检查的权力甚至可施于其船旗国不是该区域渔业管理组织成员、但是本协定缔约国的渔船。考虑到该条款的严厉性，它只适用于协定的成员国；并且为防止该项权力被滥用，第 22 条详细规定了一系列登临和检查权行使的最基本的程序要求。

第七部分（第 24~26 条）考虑的主要是发展中国家的特殊需要、与发展中国家合作的形式及特殊援助。条约的措辞还特别传达了某些信息，包括这类帮助的对象不应包括像中国、韩国这样的主要远洋捕捞国家。[29]

第八部分（第 27~32 条）规定的是争端的和平解决机制。该协定中适用的完全是《公约》第十五部分的规定，批准了该协定的国家即被视为接受了一定形式的、具有强制性争端解决程序，包括和解、仲裁、诉诸国际法院或国际海洋法法庭。

第九、十、十一、十二部分（第 33~36 条）都各只有一个条款，分别对“非缔约方”、“诚意履行”、“赔偿责任”、“审查会议”做出规定。第十三部分为最后条款（第 37~50 条）。协定不允许作出保留或例外。

2 个附件分别是：《附件一：收集和共用数据的标准规定》、《附件二：在养护和管理跨界鱼类和高度洄游鱼类种群方面适用预防性参考点的准则》。

《跨界鱼类种群协定》虽然只是一个执行性文件，但它的影响力是不可低估的，它最重大的意义就在于为沿海国和在公海捕鱼的国家履行对跨界鱼类种群和高度洄游鱼类种群的养护和管理义务而进行国家间合作设置了一个有力的、具有可操作性的机制。该机制在某些方面甚至是强制性的，因为批准了该协定的国家即被视为接受了一定形式的、具有强制性的争端解决程序，包括和解、仲裁、诉诸国际法院或国际海洋法法庭。这是由于：首先，协定是由一个全球性的会议经全体

27 《跨界鱼类种群协定》第 19 条。
28 《跨界鱼类种群协定》第 20 条。
29 David H. Anderson, The Straddling Stocks Agreement of 1995-an Initial Assessment, *International and Comparative Law Quarterly*, Vol. 45, 1996, p. 473.

协商一致的方式通过的文件，它所体现的相对广泛的全球意志，是其他区域性或专门性的条约所无法比拟的；其次，协定进一步体现了对“公海捕鱼自由”的一般性限制，即“合理”和“适当注意”的标准，强调了“公海捕鱼自由”必须被理解为应受养护鱼类种群和为此目的进行国家间合作的义务的限制。可以说，该协定才真正从法律制度上体现了“公海捕鱼自由”是一种有限的自由。

三、对海洋渔业管理制度发展趋势的展望

1995 年《跨界鱼类种群协定》是对海洋渔业管理制度的一项重大改革，表明了有关海洋渔业管理制度的进展，海洋渔业新秩序逐步建立和完善。目前海洋渔业管理制度的主要特点和趋势是：

（一）海洋渔业进入全面管理时代

当《海洋法公约》于 1982 年正式通过时，曾经预言公海捕鱼自由时代的结束，进入渔业资源管理时代。当时主要是沿海国有权实施 200 海里专属经济区的制度，对其海洋生物资源享有勘探与开发、养护与管理的主权权利，大大缩小了公海的范围。在公海渔业管理上主要是通过国际或多边协定的渔业委员会，共同进行科学研究、资源调查、评估资源状况，提出有关养护措施的建议等，公海渔船管辖权仍属船旗国。但现在公海渔业管理方面除了上述内容外，还可派遣他国的观察员上船，甚至有关国家政府授权的公务员可登临他国的渔船检查渔具、渔获物和捕捞统计资料等，要求各捕鱼国对其从事公海生产的渔船实施授权和许可制度，遵守渔船建造、设施等标准，渔船船员应按国际标准要求进行培训，颁发国际统一的适任证书。各国应向有关国际组织申报其公海渔船基本数据等等。由此可见，就全球而言，整个海洋渔业，无论是在沿海国管辖内的专属经济区，还是在公海，都不仅是对海洋生物资源进行管理，还包括对捕鱼活动的方式和捕鱼全过程进行管理。

（二）沿海国与公海捕鱼国在渔业法律实施方面加强合作

从发展的实际看，公海捕鱼绝对自由的局面已不复存在，公海捕鱼船的船旗国将被要求承担起管理其渔船捕鱼活动的责任；在公海渔业管理活动中的国际合作将被加强，特别是在建立公海渔船作业数据收集制度方面。

当然，公海上国际渔业法律、法规的实施往往是十分困难的。但通过沿海国与公海捕鱼国的合作建立起各方均能接受的管理制度是值得各国效仿的。“中白

令海峡鳕资源养护和管理公约”所建立的联合实施制度无疑是今后公海渔业管理制度发展的一个方向。该公约规定了一系列管理制度，包括确定可捕量、实行国别配额制度、联合实施制度和船旗国责任制度等等。其中联合实施制度允许任何成员国的授权官员在公海上登临其他成员国的渔船，检查渔船、渔具、渔获量、捕捞日志和其他文件，询问船长、渔捞长和其他高级船员。

（三）区域性渔业管理不断加强，渔业管理的实体组织形成

目前，国际海洋渔业管理正向区域化发展和加强，根据国家管辖范围内和外的两种不同性质海域，海洋渔业管理区域化的趋势主要是：

1. 国家管辖范围内的海域主要是指专属经济区，有关国家对其专属经济区的渔业管理不断完善和不断加强。对外国渔船的入渔要求越来越高，管理越来越严格，并有计划地采取区域性管理措施或渔业管理区域化。

2. 国家管辖范围外的公海渔业。主要趋向是通过有关国际组织和协议，加强区域性管理或建立区域性渔业组织。建立和实施公海渔业的资源养护和捕鱼活动全过程的管理措施，以及争端的解决，都应纳入区域性渔业组织的管理范围。为此，必须密切注意有关区域性渔业组织的活动和趋势，以及其渔业管理措施和实施办法。

（四）公海渔业管理措施趋向于强制性执行，非缔约国也应承担一定责任

1993 年起实施了联合国有关在大洋公海中禁止使用大型流网作业的决议，并对不执行决议的国家，采取有关的经济制裁等措施。许多多边渔业协定中也规定了无论是缔约国，还是非缔约国都强制性地执行其有关海洋渔业管理措施。同时，授权的检查国对非成员国的渔船也可行使区域性组织和“安排”所规定的登临、检查，必要时可以予以处理。港口国也可登临其进港或码头的渔船，检查其证件、渔具和渔获物等。事实上，非缔约国并没有享有有关协定应有的权利，但强制其应承担协定规定的义务，客观上是否定了非区域性组织成员国的公海捕鱼自由的权利。

《1995 年跨界鱼类种群协定》进一步具体规定了严重违法行为的内容，为国际海洋渔业管理和处理有关违法行为提供了依据。《协定》规定，区域性渔业组织或“安排”的成员国通过其授权的检查员，认为任何一方缔约国或非缔约国的渔船具有违法行为，即可无条件地行使登临权，而且还可使用武力。尽管在讨论是否可使用武力问题时，有关国家提出反对意见，认为这样规定是不符合《联合国宪章》

的精神，[30] 但最终在《1995 年跨界鱼类种群协定》中仍保留了“避免使用武力，但为确保检查员安全和在检查员执行任务时受到阻碍而必须使用时除外”的规定。这些都是在海洋渔业管理上前所未有的规定。

从“公海捕鱼自由”原则的“兴衰史”中不难看出，无论是它的兴起还是衰落，从整个历史发展的角度看都是必然的，这其中非法律的因素起了很重要的作用。如果说“海洋自由”观念得以确立是得益于资本主义发展初期对贸易、交通自由的需要的话，那么本世纪以来“公海捕鱼自由”的衰落，在其中起很大作用的就是科学技术的发展。它的影响是双方面的：一方面带来捕鱼技术的提高，直接导致资源危机；另一方面带来人们对生态环境认识的深入，从而又有意识地去保护环境和生态平衡。从这样的角度去理解“公海捕鱼自由”原则的发展历史，国际法的价值，乃至法律的价值就能得到很好地体现。

30 郭文路、黄硕琳、曹世娟：《国际渔业法律制度的发展及其对世界海洋渔业的影响分析》，载于《海洋开发与管理》2002 年第 2 期。

紧追权的实施与我国海上执法

余民才 *

内容摘要: 紧追权是指沿海国对违反其法律、规章并从其管辖海域逃向公海的外国船舶进行追逐以拿捕的权利。本文对紧追的法律关系方、依据、开始、即时性与继续以及紧追权的终止等紧追权实施的一般问题进行了分析，同时探讨了紧追过程中的武力使用问题，并在此基础上针对我国实施紧追权存在的问题，提出完善我国紧追权实施机制的建议。

关键词: 紧追权　联合国海洋法公约　海上执法

一、紧追权实施的一般问题

（一）紧追的法律关系方

紧追涉及 2 个法律相对方：追逐者与被追逐者。追逐者即是沿海国可用之于合法行使紧追权的工具，它限于与国家的政府权力有特别联系的某类船舶和飞机。1958 年《公海公约》第 23 条第 4 款规定："紧追权只能由军舰或军用飞机行使"。该公约还进一步规定："为政府服务并经特别授权的其他船舶或飞机"也可进行紧追。1982 年《联合国海洋法公约》（以下简称"《海洋法公约》"）第 111 条第 5 款保持了军舰和军用飞机与经特别授权的船舶和飞机之间的这种区分，但还要求后者必须具有"清楚标志并可以识别"。这 2 个公约都将紧追权的行使限于国家当局给予许可的那些船舶和飞机。这种限制在于确保国家对经授权代表国家行事的那些追逐者的行为的责任。一个国家无需明白表示它与军舰和军用飞机的联系，因为这种联系是不证自明的。而其他追逐者则必须经特别授权行使紧追权，但这里的"特别授权"不是指追逐工具在特定事件中进行紧追时需要获得特别授权，而是指对行使特定职责的特殊类型的器具的一般授权，如海岸警备船、渔政船和缉私船等。[1] 除上述 2 类追逐工具外，沿海国的其他船舶或飞机不能进行紧追，如商船、

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1 See Myres S. McDougal and William T. Burke, *The Public Order of the Oceans*, 1962, pp. 919~920.

渔船。

被追逐者即是违反沿海国法律规章的外国船舶。这里的船舶定义是明确的。根据《海洋法公约》第 95 条和第 96 条，军舰和专用于政府非商业性服务的船舶在公海上享有不受船旗国以外任何其他国家管辖的完全豁免权。因此，被追逐者是除享有完全豁免权以外的其他违法外国船舶。这意味着，沿海国对本国船舶行使管辖权与紧追权无关，对享有完全豁免权的外国船舶和合法行使海洋权益的其他外国船舶也不得紧追。即使外国军舰不遵守沿海国关于通过领海的法律和规章，而且不顾沿海国向其提出遵守法律和规章的任何要求，沿海国所能采取的适当补救措施只能是要求该军舰立即离开领海。只有不享有完全豁免权的其他违法外国船舶才能成为紧追的对象，至于它们是商船、渔船还是其他船舶则是无关紧要的。

（二）紧追的依据

1. 违反沿海国法律规章

外国船舶违反沿海国法律规章是导致沿海国紧追的合理依据。《海洋法公约》第 111 条第 1 款规定，“沿海国主管当局有充分理由认为外国船舶违反该国法律和规章时，可对该外国船舶进行紧追。”这里引起紧追的合法理由是与沿海国在特定海域的立法权相联系的。由于沿海国各管辖海域的法律地位不尽相同，因而其立法权也有区别，由此引起紧追的理由也有所差别。非领土性违法的种类明显要比领土性违法的种类更加有限。在内水，沿海国具有完全立法权；在领海，沿海国的立法权仅受外国船舶无害通过权的限制；在群岛水域，则要受传统捕鱼权、无害通过权和群岛海道通过权的限制；在毗连区和其他非领土性管辖区域，沿海国的立法权更受限制。因此，只有外国船舶违反沿海国按照国际法制订的适用于其特定管辖区域的法律规章时才引起紧追，否则紧追是非法的。在 1999 年“塞加号案”中，国际海洋法法庭裁定，几内亚将其海关法适用于包括专属经济区之一部分的海关区是违反《海洋法公约》的；“塞加号”并没有违反按照《海洋法公约》可适用的几内亚法律和规章，因此几内亚行使紧追权没有法律根据。[2]

引起紧追的违法行为的范围是什么？违法行为是否存在度的要求？是否可以对试图违法行为、先前违法行为或个人违法行为进行紧追？这些在《海洋法公约》中是不清楚的。有一种观点认为，对外国船舶的轻微违法行为不应进行紧追。奥康奈尔说，因为轻微违法行为而进行紧追如果等同于限制航行自由，那将是过分

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2 See International Tribunal for the Law of the Sea, Judgment on The M/V “Saiga” (No. 2) Case (Saint Vincent and The Grenadines v. Guinea), 1999, paras. 136~149.

行使权力。他为此提出，“《公海公约》第 23 条似乎应纳入某种质的观念。”[3] 罗兰德指出，虽然国际法并没有将紧追权的行使严格地限于严重违反当地法律的行为，但根据国际礼让和善意原则，对无害的或轻微的违法行为不应行使该权利，因为这样做符合沿海国的最大利益。一个对其他国家行为不友好、无充分理由就追逐其船舶的国家很可能发现本国商船将遭受权利滥用的相同命运。[4]

上述看法是有疑问的。虽然航行自由原则适用于公海，但不适用于内水和领海。即使在专属经济区，其他国家享有的航行自由也不等同于公海自由。因此，对在沿海国管辖水域内发生的轻微违法行为进行紧追并不违反自由航行原则。国际礼让毕竟不是对国家有法律约束力的原则，一国基于礼让和善意对无害的或轻微的违法船舶的不作为只是一种期望得到同样回报的单向行为，这并不总是如其所愿。所以，是否引起紧追并不取决于违法行为的严重性，尽管它可能影响到沿海国是否行使该权利的决定和有效执法的方式（如使用武力）的决定。实际上，《海洋法公约》第 111 条第 1 款所使用的开放性措词意味着，沿海国可对违反其法律和规章的外国船舶进行紧追，无论违反行为多么不严重。不过，沿海国行使紧追权的决定可能受一些现实条件的影响，如该国发现轻微违法行为不值得紧追或犯轻微违法行为的外国船舶认为不值得冒险逃跑。麦克杜格尔和贝克评论说，注重违法行为的严重性似乎是不甚现实的，因为无害违反当地法律的嫌疑船舶是否认为值得试图逃跑是令人怀疑的。从现实上看，除非政治上的原因，沿海国在逮捕和拘留轻微违法船舶时将试图采取严厉措施也是大有疑问的。[5] 但无论如何，在法律上，对违法外国船舶是否紧追是由沿海国自行决定的，国际法并没有施加严重违法的限制条件。对无害的或轻微的违法行为决定不紧追和法律不允许对这类违法行为进行紧追是两回事。

根据《海洋法公约》第 111 条，对已经实际实施或怀疑已经实际实施违法行为的外国船舶可进行紧追。至于紧追权是否也可以适用于正试图实施违法行为的外国船舶，从《海洋法公约》有关条款和国际法委员会的准备资料来看，答案是肯定的。按照《海洋法公约》第 33 条，沿海国为防止在其领土或领海内的违法行为，可在毗连区内行使对某些特定事项的必要管制。这里所防止的违法行为显然包括正试图实施的违法行为。在筹备第一次海洋法会议时，当巴西代表向国际法委员会建议《公海公约》草案条款应该提到准备实施的违法行为时，特别报告员认为这是多余的，委员会也认为这个建议已包含在草案文本中。[6] 美国法院在 1928 年“吉

3 D. P. O’Connell, *The International Law of the Sea*, pp. 1080~1989.

4 See Robert C. Reuland, The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, p. 567.

5 See Myres S. McDougal and William T. Burke, *The Public Order of the Oceans*, p. 895.

6 See *Yearbook of International Law Commission*, Vol. 1, 1956, pp. 49~50.

拉姆诉美国案”中判决，美国有权逮捕正试图违反其法律的船舶。[7] 因此，沿海国可对实际违反和试图违反该国法律和规章的外国船舶进行紧追。

外国船舶先前的违法行为是否引起紧追，即沿海国是否可以对为免于以前的违法行为遭逮捕而逃往公海的外国船舶进行紧追？从《海洋法公约》第 111 条的有关规定来看，对这种违法行为的紧追似乎是不允许的。然而，如果不允许紧追，在外国船舶通过领海进入公海时该国就不得不停止追逐。这样的“规则”无疑问地将妨碍沿海国法律的有效实施，其可行性将大受质疑。罗兰德对这种两难局面提出了一个可能解决办法，那就是将第二次逃跑本身视为一种新的违法行为。他认为，如果一个国家可以依据先前的违法行为逮捕一艘船舶，而该船为了逃避这种合法逮捕而逃往公海，那么这种逃跑就构成一种新的违法行为，该国就可以因为新出现的违法行为而进行紧追。[8] 这种看法缺乏法律根据，逃跑本身并不构成违法行为。实际上，以这种理由来使沿海国对犯有先前违法行为的外国船舶进行紧追正当化是不必要的。因为外国船舶犯有先前违法行为以及该船舶再次出现于沿海国管辖海域这一事实本身就足可以构成该船舶正试图实施违法行为的证据。

一般地说，外国船舶上船员和乘客的违法行为不引起紧追。在紧追权下，沿海国只能对船舶本身主张管辖权，而不能对其乘客和船员主张管辖权。如果外国船舶上的乘客或船员被嫌疑违反了当地法律，沿海国可通过外交途径获得救济，如请求引渡嫌疑个人（如果可能的话），但不能追逐该船舶到公海。然而，如果乘客或船员的违法行为与船舶存在某种实际联系，则可归于船舶而成为船舶本身的违法行为，从而可对该船舶行使紧追权。比如，违法行为是那些指挥船舶的人或以船舶当局名义行事的人或在船舶当局控制下的人实施的，或知道而没有防止违法行为发生，或发生后采取措施阻止沿海国对违法者正当执行法律，或在军舰接近时逃跑。

2. 有充分理由相信外国船舶违反法律规章

沿海国紧追的理由必须是充分的。“充分理由”的标准是什么，《海洋法公约》没有具体界定。显而易见，仅仅怀疑或推测是不充分的。同样，必须实际知道违法行为也是不需要的。[9] “充分理由”要求沿海国主管当局认定外国船舶违法必须基于有力的证据。如果无正当理由行使紧追权，在领海外被命令停驶或被逮捕的船舶，对于可能因此遭受的任何损失或损害应获得赔偿。这里必须强调，引起赔偿责任的前提是“无正当理由行使紧追权”。如果沿海国有充分理由相信嫌疑船舶违反该国的法律和规章，紧追则是正当的，即使嫌疑后来经证明无正当理由，也

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7 See Thomas A. Clingan, *The Law of the Sea: Ocean Law and Policy*, 1994, p. 68.

8 See Robert C. Reuland, The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, p. 571.

9 See D. P. O’Connell, *The International Law of the Sea*, p. 1088.

无需赔偿。因此，只有对从一开始就无正当理由的紧追导致的损失或损害才需赔偿。

（三）紧追的开始

1. 外国船舶必须位于沿海国可行使管辖权的海域

由于紧追权是沿海国已经开始的管辖权在公海的继续，并且是针对有违法嫌疑的外国船舶，所以紧追必须在沿海国有权对外国船舶行使管辖权的海域开始。国际法确定了沿海国可合法开始紧追的海域。根据《海洋法公约》第 111 条第 1 款、第 2 款、第 4 款的规定，紧追只有在外国船舶或其小艇之一位于追逐国的内水、群岛水域、领海、毗连区、专属经济区或大陆架内时才可开始。而且，只有追逐船舶以可用的实际方法认定被追逐船舶实际位于上述海域内，紧追才得认为已经开始。进而言之，如果违法船舶逃到公海后才被发现，是不得开始紧追的。至于哪些是用于确定嫌疑船舶位置的“可用的实际方法”，《海洋法公约》没有进一步界定。可以想见，“可用的实际方法”这一宽泛性措词使军舰能够使用它所拥有的任何手段来确定嫌疑船舶的位置。如果军舰确信嫌疑船舶位于可开始紧追的海域内，它就可以适当地行使紧追权。不过，这种“确信”并不一定、也不应该要求军舰的认定必须准确无误。[10]

相对于被追逐船舶的位置而言，国际法对紧追船舶的位置则限制较少。只要违法外国船舶在领海或毗连区内接获停驶命令，紧追船舶并无必要也在这些区域内。

2. 在外国船舶视听范围内发出视觉或听觉停驶信号

紧追的开始不仅要求外国船舶必须实际位于沿海国管辖海域内，而且还要求在外国船舶视听所及的距离内发出视觉或听觉的停驶信号。“视听所及的距离内”在于确保停驶信号的有效传达，这就要求停驶信号必须在追逐船舶和被追逐船舶之间尽可能近的距离内发出。视听信号如鸣警笛、喊话等，但不包括无线电信号。[11]根据《海洋法公约》第 111 条第 6 款，飞机开始紧追也必须遵守发出有效视听停驶信号的条件。如果飞机仅发现船舶犯法或有犯法嫌疑，而该飞机本身或接着无间断地进行追逐的其他飞机或船舶既未命令该船停驶也未进行追逐，则不足以构成在领海以外逮捕的理由。这似乎表明，在接替紧追的情况下，不仅最初追逐的飞机需要发出信号命令船舶停驶，而且接替继续追逐的其他飞机或船舶也需发出停驶信号。因此，即使沿海国发现外国船舶有违法行为，如果未在其视听所及的范围内发出停驶信号就进行紧追，则这种追逐是无效的。在 1979 年“拉•罗萨号案”

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10 See Myres S. McDougal and William T. Burke, *The Public Order of the Oceans*, p. 917.
11 See *Yearbook of the International Law Commission*, Vol. II, 1956, p. 285.

中，美国法院判决，美国海岸警卫队逮捕“拉•罗萨号案”是非法的，因为“在 12 海里外进行第二次登临之前没有发出视觉或听觉的停驶信号”。在“塞加号案”中，国际海洋法法庭判定，几内亚的紧追不符合《海洋法公约》第 111 条行使紧追权的条件。因为几内亚提出的证据不足以支持其在紧追开始前向“塞加号”发出了必要的视觉或听觉停驶信号……无论如何，几内亚声称所发出的任何信号不能说是在所称的紧追开始时已经发出。[12]

视听停驶信号的条件是否允许例外，在有的国内判例中曾予以明确肯定。比如在 1929 年“牛顿拜号案”中，美国法院判定，没有发出信号不妨碍合法逮捕被美国海岸警卫队追逐到公海的该艘英国船舶。法院认为，所谓紧追规则并不要求必须向船舶发出停驶的明确信号，其原因有两个：第一，从实用的角度来看，通过鸣警笛或鸣枪来发出信号是无用的，因为该船舶正试图逃跑。第二，“牛顿拜”号船试图逃跑、逃避海岸警卫队逮捕的行为相当清楚地证明，该船的船长和船员知道美国官员为执行美国法律的目的在追逐他们。罗兰德因此结论说，在有些情况下，信号条件可能是不需要的。因为在嫌疑船舶明显地不想等待检查时，强加信号的条件就将成为一种无实际意义的形式。[13]

上述看法不能得到支持。第一，不能仅仅基于紧追权规则在条约法上成文之前的一个国内法院判决来界定其行使的准确条件；第二，“‘已’发出……停驶信号后，紧追才可开始”的措词非常清楚地表明，未发出停驶信号，不得认为紧追已经开始；第三，被追逐船舶无视停驶信号并不使信号条件本身没有实际意义，相反，正是由于外国船舶无视停驶信号才使沿海国可在公海对其继续追逐；第四，信号条件给予外国船舶尊重或抗拒沿海国执法权，消除或加重被嫌疑的机会。因此，视听停驶信号是紧追合法开始的一个必要条件。

（四）紧追的即时性与继续

沿海国的追逐必须是“紧迫的”，即在相信外国船舶有违法行为后应立即采取行动实施紧追；在外国船舶拒绝停船命令、向公海逃窜时，应立刻展开追逐。英国辩护律师在“北令海皮海豹仲裁案”中曾有如下著名评论：“紧追必须是紧迫的，也就是说，一个国家不能等待了数天和数星期，然后说：你于数星期前在我水域内犯了罪，我们将跟踪你数英里或数百英里并追逐你。对于这个问题，紧追必须是

12 See Judgment on The M/V “Saiga” (No. 2) Case, paras. 147, 148, 152.

13 See Robert C. Reuland, The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, pp. 583~584.

紧迫的，必须是立即的，并必须在适当的范围内。”[14] 而且，追逐还必须是“继续的”，不得中断。只有继续不停、未曾中断，才可以在领海或毗连区外继续追逐。因此，如果紧追不是即时的，发生中断，紧追就不再是紧迫的，紧追权因此而终止，追逐船舶必须放弃继续追逐。

在追逐过程中，追逐船舶或飞机因为某种原因出现追逐的暂时停止是否中断紧追的继续性？中断是否必须具有重大的性质？《海洋法公约》没有予以规定。但按照《海洋法公约》第 111 条第 6 款，在飞机进行紧追时，沿海国船舶或另一架飞机接替最初追逐的飞机进行追逐不构成紧追的中断。也就是说，船舶或另一架飞机可接替最初追逐的飞机继续追逐。另一船舶接替最初追逐的船舶是否中断紧追，这在《海洋法公约》中是不清楚的，实践中曾有国家表示了肯定的态度。在 1935 年“孤独者号案”中，加拿大曾提出，美国的紧追是非法的，因为击沉“孤独者号”的美国船并没有参与最初的追逐，而是 2 天后从一个完全相反的方向驶来，并在追逐船的枪械被堵塞时才接替它。但是，英—美仲裁庭没有讨论这个问题。从《海洋法公约》第 111 条整个条款的前后文和法理上看，船舶接替紧追是应该允许的，没有理由要求实际进行逮捕的船舶与最初追逐的船舶完全一致。国际法委员会在其对紧追权草案条款的评论中支持船舶可以接替紧追的规则，这也为国际法学者普遍赞同。[15] 因此，最初追逐的船舶为另一艘船舶接替不中断紧追的继续性。但是，需要退出紧追的船舶或飞机必须在接替者到达后才可退出，否则构成紧追的中断。

从司法判例来看，在其他情况下，中断必须具有重大的性质，追逐过程中的暂时停止不构成中断。因此，撤回追逐船舶构成紧追的明显中断；[16] 而追逐船舶在追逐过程中暂时停下来缉拿被追逐船舶放弃的小艇，或追逐船舶追上并靠近被追逐船舶而持续一段时间，或被追逐船舶暂时消失于雾中，这些都不中断紧追的继续性。[17]

如果追逐船舶在追逐过程中受到被追逐船舶的本国军舰或其他执法船舶的阻挡，这是否构成紧追的中断可能要依具体情况而定。在 1962 年“红十字军号案”中，丹麦军舰追逐英国的这艘渔船到公海后，遭遇两艘英国军舰，其中一艘横在丹麦军舰和渔船之间，致使渔船得以成功脱逃。丹麦政府向英国政府提出抗议，指责英国军舰妨碍了其军舰正当行使紧追权。两国为此成立了国际调查委员会。但该委员会没有考虑紧追是否中断的问题，不过认为英国军舰的行为是为了避免使

14 D. P. O’Connell, *The International Law of the Sea*, p. 1076.
15 See *Yearbook of the International Law Commission*, Vol. I, 1956, p. 52; R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 1983, p. 152.
16 See Judgment on The M/V “Saiga” (No. 2) Case, Para.147.
17 See D. P. O’Connell, *The International Law of the Sea*, p. 1091.

用武力和事态扩大，这是无可非议的。[18] 从这里似乎可以推断，如果阻挡成功，紧追则中断，反之则不得中断。

（五）紧追权的终止

紧追不能持续到外国领海，否则将构成对他国主权的侵犯。《海洋法公约》第111条第3款确认了紧追权在被追逐船舶进入其本国或第三国领海时终止的规则。

紧追权在其他国家领海所受到的限制不适用于领海以外的其他海洋区域。《海洋法公约》只是规定紧追权在领海外部界限处终止，没有提到其他海洋区域。因此，一个国家可以不受障碍地追逐外国船舶到其本国或第三国的专属经济区或毗连区。《奥本海国际法》明确指出，“追逐可以继续至外国的专属经济区内”[19]。奥康奈尔也说：“既然毗连区、毗连渔区和专属经济区至少从紧追的角度而言是公海，那么在理论上就没有什么理由紧追不应该继续至邻近一个外国的这些区域内。”[20]

紧追权在他国领海终止的规则是确定无疑的。但该规则是否禁止追逐船舶在他国领海以外等候，以便在被追逐船舶再次进入领海以外的海域时恢复紧追？或在特殊情况下，是否禁止在他国领海内继续追逐？这些问题在《海洋法公约》中没有明确答案。就前者而言，《海洋法公约》似乎不允许恢复紧追。而且在第一次海洋法会议上，丹麦撤回了其建议允许 6 小时等待的提案。然而，这仍未能消除理论上的分歧。一种观点不同意紧追的任何恢复。哥伦伯斯曾说：“这种恢复似乎是不适当的，因为它扩大了应该是例外性的权利。而且，作为对禁止一国干预公海上的外国船舶这一一般规则的背离，紧追权必须予以狭义解释。”[21] 罗兰德表达了类似看法。他认为，即使“禁止恢复”规则妨碍了有效执行法律，但执行法律不是唯一关注所在。紧追权在有效执行法律的需要与专属管辖规则之间达成了平衡，扩大紧追权允许恢复紧追可能破坏这一平衡，危及船旗国的主权权利。[22] 与此相反的观点则同意恢复紧追，而不管间隔时间长短。麦克杜格尔和贝克认为，“嫌疑船舶再次进入公海时就不能再次开始紧追这种看法似乎是没有正当理由的。似乎在所插入的这段间隔时间后开始对船舶的紧追和逮捕并不比在发生违法行为后立即开始的紧追和逮捕更有损于航行的基本利益。”[23] 在这两种对立观点之间的

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18 参见陈致中编著：《国际法案例》，北京：法律出版社 1998 年版，第 183~184 页。

19 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（第一卷第二分册），北京：大百科全书出版社 1995 年版，第 169 页。

20 D. P. O’Connell, *The International Law of the Sea*, p. 1090.

21 C. John Colombos, *The International Law of the Sea*, 6th edition, 1967, pp. 169~170.

22 See Robert C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, p. 581.

23 Myres S. McDougal and William T. Burke, *The Public Order of the Oceans*, p. 898.

折中观点则支持短暂的间隔时间。普兰兹亚斯评论道，同意恢复紧追的观点“忽视了紧追的终止已经导致存在于有关两艘船舶之间管辖联系的中断。实际上，在发生违法行为和立即的、持续的紧追之后出现的特殊情况并不存在。而且……《公海公约》明确规定了紧追权的终止，而不是紧追的中断。此外，如果可能的话，追逐船舶的国家可以在紧追终止后对违法者采取引渡程序”，然而他又说，“被追逐船舶进入领海的短暂停留或通过如果明显地是为了逃避法律，这并不排除紧追的恢复。”[24]

如果国际法不允许恢复紧追，他国领海就将成为洗脱被追逐船舶行为违法性的天堂。这样的“规则”无疑将危害沿海国和国际社会的利益。紧追权终止规则是禁止将紧追权延伸到他国领海，而并不必然禁止对再次进入公海的船舶恢复紧追。而且，对进入他国领海的违法者诉诸引渡程序也并非总是有效，毕竟违法行为不一定都是犯罪行为，因此双重犯罪原则较难满足。然而，不受限制的恢复紧追可能导致滥用紧追权，损害航行的基本利益。所以这个问题可能要依据每个案件的具体情况来解决。如果被追逐船舶是为逃避法律制裁进入他国领海短暂停留，这种停留不能成为在该船舶再次出现在领海之外时禁止对其恢复紧追的充分法律理由。就如紧追的中断规则所表明的那样，在他国领海的停留如果不是重大的，则不妨碍紧追的继续性。这种允许短暂间隔时间后恢复紧追的“规则”很难被滥用，因为一个国家不可能把一个轻微违法行为看得严重到有必要付出高昂代价以继续在他国领海外长久等待。

就后一问题而言，鲍威特曾认为，追逐海盗船可以在其他国家领海内继续进行，如果该国自己不进行紧追。[25] 按照这一观点，在特殊情况下，紧追不能持续到他国领海的规则是存在例外的。这一主张是合理的，因为如果没有这一例外，海盗船就可能逃往不愿或不能继续追逐的任何其他国家的领海而逃脱拿捕。然而，这种例外必须以其他国家的同意为条件。取得他国同意而在其领海内的继续追逐是不应为紧追权终止规则所禁止的。但是，其他国家同意的法律基础仍然有待澄清。因为如果其他国家对逃跑船舶没有管辖权，它是不能授予它所不享有的管辖权的。

根据《海洋法公约》第 17 条、第 19 条、第 25 条，在其他国家领海内的船舶享有无害通过权，只要这种通过不损害该国的和平、良好秩序或安全。对于非无害通过，该国有权采取必要措施。显然，这里的关键是被追逐船舶的通过是否被认为是无害的。一艘船舶无需实施任何具体行为而仅仅出现在领海的事实就足以构成非无害性。1958 年《领海与毗连区公约》第 14 条第 4 款及其他相关条款没有

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24 See Robert C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, pp. 581~582.

25 See D. W. Bowett, *Self-Defence in International Law*, 1958, p. 83.

列举外国船舶通过时引起非无害的具体行为，这明显地表明非无害性不取决于实施任何具体行为，或违反任何法律。《海洋法公约》第 19 条保留了《领海与毗连区公约》第 14 条第 4 款，并进一步列举了引起非无害的具体行为。这种列举不能视为对非无害性的一览无余的概括，而只是提供一些非无害性的最明显形式。该条款中“与通过没有直接关系的任何其他活动”的措辞就说明了这一点。丘吉尔和劳伊评论道，《海洋法公约》“以损害沿海国利益”来定义无害通过，而“无论是否由船舶的任何具体行为引起，也无论是否涉及违反沿海国法律的任何行为”。[26] 再者，无害通过权是确保从事和平事业的船舶能迅速通过而对沿海国主权的特殊限制，它从来就不是为逃避逮捕的船舶提供绿色通道而存在的。

从现实上看，即使被追逐船舶在其他国家领海内没有实施损害行为，该国也不会希望给国际社会留下其领海是违法行为庇护所的印象。而且，该国还可能担心自己的安全。比如，有污染 A 国领海嫌疑的船舶被追逐进入 B 国领海，B 国可能基于它先前的违法行为和逃跑行为而有充分理由相信该船舶对该国的安全构成威胁从而停止其通过。因此，被追逐船舶的出现足以成为其他国家认为它是非无害的并终止其通过权的理由，于是该国可以自己追逐，也可以允许追逐船舶在其领海内继续追逐。

二、紧追权实施的特定问题

紧追船舶或飞机在追逐过程中为使逮捕有效是否可以对被追逐船舶使用武力，这是与行使紧追权密切相关并在实践中时常遇到的问题。

《公海公约》和《海洋法公约》都没有对此予以明文规定。原则上，沿海国在对违法的外国船舶执法时应避免使用武力。根据《海洋法公约》序言，有关国家应以相互谅解和合作的精神来解决与海洋法有关的一切问题，海洋应成为维护和平、促进全世界人民进步的场所。《海洋法公约》凡涉及沿海国执法权的条款都没有提及可以采用武力措施。更进一步说，引起紧追的只是由于外国船舶的违法行为，而不一定是犯罪行为。违法行为并不一定严重到非使用武力加以逮捕不可的地步。然而，《海洋法公约》没有规定不等于说在一定条件和一定范围内使用武力就是被禁止的。

实际上，使用武力是为国际法允许的。《海洋法公约》第 111 条第 5 款和第 6 款允许军舰逮捕被追逐船舶。既然军舰有权逮捕船舶，它当然可使用合理的、必要的武力来行使该权力。从法理学上看，沿海国在命令停船的警告无效后可以使用武力，毕竟紧追权也是一种警察权利。在国家领土内，警察对无视警告的逃犯

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26 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, p. 67.

有权采取武力措施。丘吉尔和劳伊认为，追逐船舶可使用任何必要的和合理的武力进行逮捕，即使这导致船舶无可避免地沉没。[27]更重要的是，“必要且合理的武力”是国际习惯法所确认的一项原则。在“孤独者号案”中，仲裁庭裁定，在存在紧追权的假定下，一个国家为登临、搜索和逮捕嫌疑船舶并将它押解回港口的目的可行使必要且合理的武力。如果为此目的而行使必要且合理的武力导致船舶偶然性沉没，紧追船舶是完全不应受到责难的。但“意图击沉”明显超出了条约所容许的权限范围，因此美国的击沉行为是不合法的，美国应该就此行为向加拿大道歉并予以赔偿。在“红十字军号案”中，国际调查委员会认为，丹麦的炮击行为逾越了“合法的武力行使”范围，亦即是一种“无事先警告的实弹炮击”以及“对人命造成不必要的危险”，因此其炮击行为不能取得合法性。[28] 国际法院在 1998 年西班牙与加拿大关于“渔业管辖权案”中权威性地承认在追逐中可使用武力。最近的“塞加号案”再次宣示了“必要且合理的武力”原则。国际海洋法法庭指出，尽管《海洋法公约》没有关于逮捕船舶时使用武力的明文规定，但国际法要求使用武力必须尽可能地避免；在武力不可避免时，不得超出当时情况下合理的和必要的限度。人道主义的考虑必须适用于海洋法。这些原则一直为海上执法实务所遵从。[29]不仅如此，“必要且合理的武力”原则还为国际条约所编纂。1995 年《关于执行 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》（以下简称“《公海捕捞协定》”）第 22 条第 1 款 f 项规定，经国家适当授权的检查官员应避免使用武力，除非是为确保他们的安全所必要和他们执行职务受到妨碍。使用武力的程度不应超出当时情况下的合理要求。

“必要且合理的武力”原则的内容是什么，国际习惯法没有提出具有普遍性的定义。显而易见，如果据以逮捕嫌疑船舶的其他可用手段都已用尽，使用武力即具有必要性；如果武力措施与嫌疑船舶抗拒逮捕是成比例的、适度的，即可满足合理性的要求。然而在具体案件中，使用武力是否具有必要性和合理性仍然可能为有关当事国所争论，因此提供据以判断的参照标准对沿海国在海洋执法时使用必要且合理的武力有重要意义。“塞加号案”在此方面具有借鉴价值。国标海洋法法庭对该案中所涉武力的使用是否必要和合理裁判道：在海上停驶船舶通常做法首先是用国际公认的信号发出停驶的视觉或听觉信号。在这无效时，则可采取多种行动，包括开炮越过船首。只有在所采取的适当行动仍不见效时，紧追船舶才可以使用武力作为最后手段。即使如此，也必须向船舶发出适当警告，并尽一切努力保证人命不受危害。鉴于“塞加号”几乎满载汽油和在被靠近时航速低的事实，几内亚官员可以毫无困难地登船。尽管几内亚宣称其巡逻艇开炮是由于“塞加号”

27 See R. R. Churchill and A. V. Lowe, *The Law of the Sea*, p. 152.
28 参见魏静芬：《海上警察权的实施》，载于《辅仁法学》2000 年第 19 期。
29 See Judgment on The M/V “Saiga” (No. 2) Case, paras. 155~156.

有意图击沉它的危险，但不论情况如何，几内亚的官员未按国际法和实践的要求发出任何信号和警告就从快速巡逻艇上向船舶本身实弹射击，这是不可原谅的。几内亚官员登上“塞加号”也使用了过分的武力。其一，他们在未遭任何抵抗登船后，尽管没有船员使用武力或以武力相威胁的证据，但他们在甲板上胡乱开枪，并用炮火来使该船的机器停止运转。几内亚官员如此开炮无视船舶及其人员的安全。其二，几内亚使用武力给该船和机房的重要设备造成了巨大损失。其三，更严重的是，胡乱开枪造成船上两名船员重伤。因此，几内亚在登船前和登船后使用了过分的武力，并危及人命，这是违反国际法的。[30]

根据“塞加号案”和前述案例的判决或报告以及《公海捕捞协定》的规定，可以概括出“必要且合理的武力”应具备如下因素：（1）警告无效。这包括警告的严厉性依次递进的三个层次：被紧追船舶漠视视听停驶命令后对其予以空弹警告；没有效果后向船舶四周的水域或越过船首实弹警告；实弹警告仍然没有作用后才可对船舶本身使用武力。未事先实弹警告，不得向船体实弹射击。（2）无其他有效的拿捕手段可供选择，亦即使用武力是最后手段。（3）紧追船舶及其人员的安全受到威胁或被追逐船舶及其人员以暴力抗拒逮捕。（4）不得故意击沉船舶。（5）顾及人道原则，不得对被追逐船舶及其人员造成不必要的危险。（6）与当时情况成合理比例。

三、我国实施紧追权存在的问题

紧追权是我国海洋执法权不可缺少的重要组成部分，1992 年《领海及毗连区法》第 14 条和 1998 年《专属经济区和大陆架法》第 12 条规定了紧追权及其行使。有关紧追的法律依据、开始、继续、终止和执行主体主要规定在《领海及毗连区法》中，其措词与《海洋法公约》第 111 条基本一致。[31] 然而，该法与公约相比较，仍然存在一些欠缺，表现在如下方面：

第一，执法主体不明确。我国涉海管理的部门众多，有海洋局、军队、海关卜公安部、农业部和交通部等。每个部门都有自己的海上执法队伍，如海监、海军边防、缉私、海警、渔政和海事。虽然《领海及毗连区法》规定紧追权由“有关主管机关”决定行使，但这里的“有关主管机关”是不确定的。而且，除了军舰和军用飞机外，其他哪些船舶或飞机是经授权行使紧追权的船舶或飞机也不明确。

第二，在紧追的开始方面，作为合法紧追的一个必须构成要件没有予以规定，即“追逐只有在外国船舶视听所及的距离内发出视觉或听觉的停始信号后，才可

30 See Judgment on The M/V “Saiga” (No. 2) Case, paras. 156~159.
31 我国于 1996 年 5 月 15 日批准该公约。

开始。”

第三，缺乏对追逐船舶或飞机被接替继续追逐的规定。

第四，将我国在毗连区的管辖权扩大到“安全”事项。也就是说，按照《领海及毗连区法》，我国在毗连区内可基于安全理由对外国船舶进行紧追。而《海洋法公约》规定，在毗连区内，紧追只有在设立该区所保护的权利遭到侵犯时才可进行。根据该公约第 33 条，沿海国在毗连区内须予保护的权利并无安全事项。

第五，缩小了紧追工具的范围。《领海及毗连区法》对除军舰或军用飞机外其他经授权行使紧追权的船舶或飞机附加了“执行政府公务”限制词，而《海洋法公约》使用的术语是“为政府服务”。显然，前一概念的内涵比后一概念的内涵狭窄，这自然减损了国际法赋予我国的权利。

《专属经济区和大陆架法》第 12 条第 2 款只是提到紧追权，没有对紧追权的行使作进一步规定。不过，该法第 13 条有这样的规定：“本法未作规定的，根据国际法和中华人民共和国其他有关法律、法规行使。”这表明，根据该法，紧追权的行使可依照《海洋法公约》第 111 条和《领海及毗连区法》进行。

由此可见，我国法律对紧追权的规定笼统、分散、缺乏可操作性，这不可避免地给海上执法带来困难，影响行使紧追权的效率。执法主体不明很可能引起对特定海上事件的多头竞相管理、无人管理甚至相互推诿现象。由于《领海及毗连区法》未涉及紧追开始的视听停驶信号以及该法本身没有类似于《专属经济区和大陆架法》第 13 条那样的涉及与《海洋法公约》和我国其他有关法律法规关系的条款，因此似乎可以推定，在我国领海或毗连区开始紧追无需事先发出视听停驶信号。而根据《专属经济区和大陆架法》的相关规定，在我国专属经济区或大陆架上开始紧追必须事先发出视听停驶信号或无需此条件。同样一种海洋执法权在我国不同管辖水域要求不同的构成要件，这很可能引起实际操作的茫然。而对于毗连区的管辖权，根据两部海洋基本法同样将引起对“安全”事项行使紧追权或不得以此理由行使紧追权的冲突。至于我国有关海洋执法部门在行使紧追权时是否可以使用“必要且合理的武力”以达到执法目的，两个海洋基本法和其他适用于我国管辖水域的专门法律更无片言只句。此外，各涉海管理部门之间缺乏执法上的通报与协作机制。

四、完善我国紧追权实施机制的建议

紧追权是维护海洋权益、确保我国和平发展的重要法律手段之一。鉴于目前在海上执法方面面临的严峻形势，我国有必要按照《海洋法公约》和国际习惯法，制订一部《海上执法法》，或与《领海及毗连区法》和《专属经济区和大陆架法》相配套的实施细则，对紧追权的行使和使用武力予以统一、明确规定。具体而言，可

以以《领海及毗连区法》第 14 条为基础，对执法主体及其权限、紧追的开始、追逐船舶或飞机被接替追逐以及在追逐中使用武力的问题作出具体规定，并附一个未尽事宜条款，即“关于紧追权问题，本法未作规定的，可以参照有关国际法和中华人民共和国的其他法律法规执行。”

除了完善实体法外，在程序上建立、健全实施紧追权的机制也是极为必要的。这可以从如下方面着手：（1）建立各海上执法部门具体负责人之间的会商机制。（2）建立各海洋执法主体之间的通报与协作机制。（3）编制海上执法手册，培训执法人员。

五、结　论

紧追权是公海自由原则的例外，其行使有严格条件的限制，这些条件是累积的。[32] 为达到执法目的，沿海国在追逐过程中可使用“必要且合理的武力”。只有依照《海洋法公约》规定的条件进行追逐，并在涉及使用武力时其手段不逾越“必要且合理的”范围，紧追才是合法的。

完善我国紧追权实施机制是我国加强海上执法、确保和平发展的重要举措之一。完善的途径可从立法和执法两个方面入手。就前者而言，制订与《领海及毗连区法》和《专属经济区和大陆架法》相配套的实施细则是现实可行的法律选择。为此，应结合《海洋法公约》和国际习惯法，对紧追权的行使和使用武力予以明细规定。至于后者，鉴于目前我国尚不能统一海上执法队伍的事实，着重点应在加强各海上执法部门之间的磋商、协作与通报制度的建设。

32 See Judgment on The M/V “Saiga” (No. 2) Case, para. 146.

承运人对无单放货的抗辩事由分析
——从165份生效判决书说起

何丽新 *

内容摘要: 无单放货频频发生，导致对承运人提起的索赔案件不断发生。本文从承运人角度出发，对其所可能采取的事前防范措施和事后抗辩理由进行了一定的分析建议。

关键词: 承运人　无单放货　索赔　抗辩

一、引　言

我国《海商法》明确规定，提单是承运人保证据以交付货物的单证。[1] 航运界普遍认为，该规定是具单放货原则的法律依据，表明承运人只能向出示正本提单的提单持有人交付货物，否则，就应承担相应的法律责任。[2] 具单放货已经为各国海商法和国际公约所认同，并成为在国际海上运输及贸易实践中为各方所遵守的根本性原则。[3] 具单放货一方面有利于保证承运人交付货物的对象的正确性，另一方面也有利于保护提单持有人对货物所享有的权利，保障贸易合同的履行以及卖方权利的补救。但对于承运人具单放货是法律强制性规定还是一项合同中的保证责任，学术界仍存在不同的看法。

在航运实务中，由于船舶周转的快速与提单流转滞后的时间差，由于结汇单证不符或贸易纠纷，由于收货人资金不足而无力付款赎单，由于提单的遗失、被盗或灭失等等原因，承运人在未收回正本提单下而实际交付货物的情况大量存在，无单放货成为一种客观现实，是提单纠纷中最为常见的一种。据统计，无单放货在班轮运输中存在15%，租船运输中存在50%，在某些重要商品如油类等交易中

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1 我国《海商法》第71条。

2 也有学者认为，“承运人保证据以交付货物”是指承运人根据提单的记载内容即提单对收货人的记载交付货物，而非依据提单本身交付货物。

3 司玉琢主编：《海商法专题研究》，大连：大连海事大学出版社2002年版，第193页。

高达 100%。[4] 承运人对无单放货的藐视，亦是无单放货盛行的主要缘由之一。

无单放货是承运人在没有正本提单的情况下交付货物的行为[5]，其构成应具备一定的条件[6]：其一，承运人明知他人不持有正本提单仍向其签发提货凭证；其二，货物已向海关办理申报和清关手续；其三，非正本提单持有人完全占有货物，对货物具有控制权、处分权和使用权，从而导致承运人无法向合法的正本提单持有人实际交付货物。无单放货按照交付对象的对错，一般分为两种情况：一是按照贸易合同，承运人将货物正确地交付给贸易上真正的买家；二是承运人凭保函交付货物，但交付对象错误。无单放货导致承运人丧失责任限制和免责事项的抗辩，海上保险合同的保险人也可拒付保险金，更为严重的后果还在于承运人面临承担无单放货的法律责任。[7]

无单放货作为一种国际海运现象，在我国海事审判中也较为常见。80 年代末到 90 年代初，海事审判实践认为，只要是无单放货，承运人就必须承担法律责任。但是，现今出现一些观点认为，某些特殊的法律事实可能导致提单丧失某项功能，提单持有人所享有的权利亦受到削弱，承运人可就无单放货进行合法有效的抗辩[8]。本文总结归纳了承运人就无单放货的诸项抗辩事由，并不完全旨在解救承运人所面临无单放货索赔的困境，而更多的是通过剖析抗辩事项，使大家重新审视无单放货这棘手的法律问题。

二、承运人对无单放货的抗辩事由

（一）抗辩事由之一：原告是否是权利主体，是否有权诉请无单放货损害赔偿责任？

我国《民事诉讼法》规定，原告必须是与本案有直接利害关系的公民、法人和其他组织。原告诉请无单放货损害赔偿责任时，只有出示全套正本提单，表明其是唯一的合法权利主体，才有权主张无单放货责任。由于提单具有流通性，若原告无力提供全套正本提单，势必导致出现其他权利人主张提单项下权利的可能性。因此，即使原告出具提单复印件，法院也不能支持其主张。[9] 但原告存在客观原因导致其确实无法出具全套正本提单且对此进行充分的举证的情况下，才能免于提供。

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4 司玉琢等：《关于无单放货的理论与实践》，载于《中国海商法年刊》2000 年。

5 在卸货港，由承运人直接交付货物的情况不多见，除非船边交货。大多数是由承运人的代理人通过签发小提单（提货单）的方式交付货物。

6 孔庆德：《构成无单放货的条件》，载于《中国律师 2001 海商法研讨会论文集》。

7 目前，学术界对承运人所应承担的无单放货法律责任的性质仍存在争议，即是违约责任还是侵权责任还是违约责任和侵权责任的竞合。但最高人民法院在相关的复函意见中倾向追究承运人无单放货的违约责任。

8 1994 年华润纺织诉湛江船代等无单凭保函放货侵害其提单项下货物所有权纠纷案（又称：科达•玛珠轮案），是中国海事审判史上承运人无单放货案中胜诉的第一案。

9 陈子龙：《审理无单放货案件的若干法律问题》，载于《法律适用》2002 年第 7 期。

原告出具全套正本提单的根本意义在于表明其是合法的提单持有人。提单持有人所享有的诉权是基于其取得提单的过程是合法的，且提单是有效的。“合法性”要求提单持有人必须支付一定的对价，同时，经过提单的背书的连续性而取得提单。我国《海商法》规定，提单持有人与承运人之间的权利义务关系依据提单的规定进行确定[10]，原告只有作为合法的提单持有人，才有权诉请承运人承担无单放货的法律责任。原告通过非法手段取得提单，即使是提单持有人，也缺乏法律依据主张提单项下的任何权利。如指示提单需得到适格指示人或托运人的背书，才能作为提货的有效单证。

原告取得提单还应要求在无单放货行为之前。2002 年《联合国贸易法委员会运输法草案》就规定，提单持有人取得提单发生在无单放货行为后，且知道或应该知道货物已经交付的情况，其无权就无单放货进行索赔。此时的提单持有人应认定是恶意受让提单，无单放货行为业已发生，提单项下的权利也已丧失，提单持有人无法主张该提单项下的权利，所导致的损失与无单放货之间不再存在因果关系，索赔无单放货于法无据。

原告虽持有正本提单，但其在该提单正面托运人栏上缺乏具名，有法院判决认定此时的原告非提单关系的当事人，不享有向承运人主张交付货物或主张物权的实体权利。[11] 在 FOB 贸易术语下，国外卖方是订舱人，国内买方是交货人，依据我国《海商法》的界定，这两种人均可取得托运人的地位[12]。若承运人向卖方出具了凭托运人指示的提单，但提单载明的托运人是买方，卖方在接受提单时没有表示异议，因此推定其认可了买方的托运人地位，同意将货物所有权或货物控制权在装船后转移给买方，导致其在交货上船后即失去对货物的控制权，从而纵然此后因如结汇退回等各种原因而重新持有提单，也无权就无单放货主张权利。对于托运人的识别问题，学术界和实务界仍存在不同的观点：有学者认为，FOB 下卖方作为托运人是以在提单上托运人一栏具名为前提[13]，也有学者认为，FOB 下卖方成为托运人是法定的，不存在法外条件，只要卖方存在交付货物的事实，即使在提单托运人一栏记载非卖方，也应依法赋予其托运人的法定地位[14]。作者认为，FOB 下卖方将货物交与承运人，不过是履行其买卖合同的义务罢了，其与承运人之间的关系纯粹是提单关系，不存在海上货物运输合同关系，一切权利义务关系皆以提单的记载为准，因此，在托运人栏上没有写进其名称，其就丧失了提单合同当事人的地位。此时，原告虽持着托运人指示提单而成为所谓“提单持有人”，但其所持有的提单不是经过提单上记载的托运人的背书而合法受让的，原告与作为被告的承运人之间就没有建立提单关系，原告依法失去就承运人诉请无单放货的权利。

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10 我国《海商法》第 78 条。
11 详见天津海事法院审理的“和田轮”运输合同案。
12 我国《海商法》第 42 条第 3 款。
13 姚洪秀：《论〈海商法〉下“托运人”的认定》，载于《中国海商法年刊》1996 年。
14 郑田卫：《托运人概念的法律检讨与认识重构》，载于《中国海事审判年刊》2000 年。

（二）抗辩事由之二：无单放货诉讼中的被告主体抗辩，原告是否告错对象？

1. 承运人的代理人作为被告的情况

从海上运输合同出发，履行交付货物义务的主体应是承运人。但由于国内进口商在国际贸易中多采用 CIF 价格条款，由卖方指定承运人，承运人大多在国外，而承运人的代理人多数又是国内有实力的国有企业，履行能力强，成为较为理想的索赔对象，因此提单持有人容易以承运人的代理人为被告直接起诉其承担无单放货的法律责任。

从民法代理原则分析，代理人在代理权限内以被代理人的名义实施民事法律行为，被代理人对代理人的代理行为承担民事责任。即使没有代理权、超越代理权或者代理权终止后的行为，只要经过被代理人的追认，仍由被代理人承担民事责任。作为承运人的代理人，其与提单持有人之间既不存在海上货物运输合同关系也不存在提单关系，其交付货物即使是无单放货也是在履行其必须履行的委托合同义务。因此，承运人的代理人经承运人授权而无单放货，其法律后果应由承运人承担，将承运人的代理人直接作为被告诉请无单放货，存在被告主体不适格问题。当然，承运人的代理人超越承运人的授权范围，擅自或单独无单放货，事后又没有得到承运人追认的，该责任理应由承运人的代理人承担。

但有观点认为，无单放货是违法行为，代理人知道被代理的事项违法仍然进行代理活动，或者被代理人知道代理人的代理行为违法不表示反对的，代理人和被代理人共同承担连带责任。因此，即使承运人的代理人得到承运人的明确指示而无单放货，仍应由两者承担连带责任，不存在承运人的代理人作为被告主体上的抗辩。作者认为，违法行为必须是触犯法律所严禁的行为，《海商法》所规定的提单是承运人据以放货的凭证的功能，并不是对放货行为的禁止性、排他性的法律强制性规定，无单放货行为并不当然导致违法结果[15]。具单放货最初更多的是基于航运反复实践产生的一种惯例，各国法律和有关当事各方都有可能予以排除适用，因而无单放货尚称不上违法行为而得到严厉的制裁，民法代理归责原则仍可加以适用。

还有人认为，提单是物权凭证，由于承运人的代理人无单放货而导致其提单项下权利受到侵害，承运人的代理人虽然没有与提单持有人建立合同或提单关系，但仍构成侵权责任。作者认为，提单在不同环节不同人手中不同地点不同时间具有不同的权利效力，提单在承运人据以交付货物的运输环节中，提单持有人此时持有提单已不具有转让性，只能用以提货，不具有物权效力。承运人负有按照运输合同的约定交付货物的义务，而承运人的代理人只是履行其代理事项，若存在充分证据表明提货人是最终有权提取货物之人，无单放货就不等同于错误交

15 董辉：《船舶代理人与进口货物交付》，载于《中国海商法协会通讯》1999 年第 3 期。

货，没有侵犯到真实货主的货物所有权，因此，以承运人的代理人作为被告直接起诉承担侵权责任，是不合理的。

2. 实际承运人作为被告的情况

我国《海商法》所界定的承运人包括契约承运人和实际承运人。实际承运人是指接受承运人委托，从事货物运输或者部分运输的人，包括转委托从事此项运输的其他人[16]。由于实际承运人是基于其与承运人之间的委托关系或租船合同关系而从事运输，没有与提单持有人建立海上货物运输合同关系或提单关系，提单持有人从债的相对性出发，就无权向实际承运人主张无单放货的法律责任。同时，我国《海商法》第 60 条第 1 款也明确规定，承运人将货物运输或者部分运输委托给实际承运人履行的，承运人仍然应当按照法律规定对全部运输负责。对实际承运人承担的运输，承运人应当对实际承运人的行为或者实际承运人的受雇人、代理人在受雇或者受委托的范围内负责。因此，实际承运人根据承运人的授权而无单放货，只要没有超越委托范围，其后果应由承运人承担。提单持有人向实际承运人主张权利的，实际承运人可以就此提出抗辩。从某种意义上说，实际承运人在目的港卸下货物后，就完成了其接受承运人委托而作为本航次海上货物运输实际承运人的义务，不再负有凭正本提单向承运人的提单持有人交付货物的义务，其按照承运人的指示实施的放货行为，对提单持有人不构成违约。同时，承运人无单放货也不等同于实际承运人无单放货，只要实际承运人没有超越委托范围，实际承运人不必承担承运人的责任。

但有学者持有异议，认为：根据我国《海商法》第 61 条的规定，《海商法》第四章对承运人责任的规定，适用于实际承运人。所以，实际承运人也要承担无单放货的法律责任。作者分析，《海商法》第四章关于“承运人的责任”的规定仅限于第二节，因此，并非所有适用于承运人的责任均适用于实际承运人，关于承运人具单放货责任以及货物交付的规定，均不属于第二节内容，不属于实际承运人所要承担的责任范围。

还有人认为，《海商法》第 46 条规定集装箱货物承运人的责任一直持续到“交付货物”时止，交付货物也是实际承运人的基本义务之一，同时，实际承运人客观上也参与了交付货物，所以，实际承运人与提单持有人之间存在事实运输关系。因此，实际承运人参与无单放货的，也应承担法律责任。[17] 作者认为，接受承运人委托从事运输的实际承运人，在目的港将货物完好地交给承运人在目的港的代理人之后，就完成委托运输义务，实际承运人不存在直接向持有正本提单的收货人交付货物的义务。即使承运人签发提单（货代提单）给托运人，实际承运人签发提单（海运提单）给承运人（特别是无船承运人），从一物一权出发，也只有前者的提单是物权凭证，后者提单只是承运人与实际承运人之间的内部交接的单证，不

16　我国《海商法》第 42 条第 2 款。

17　王伟等：《论实际承运人的无单放货责任》，载于《海商法研究》2002 年第 1 辑。

可能发生转让，实际承运人根据自己签发的提单对承运人的交付是完成承运人委托的义务，而承运人根据其签发提单对收货人的交付则是完成海上货物运输合同及提单关系。因此，实际承运人除非与承运人存在特别约定[18]或对承运人在目的港的代理人无单放货或超越委托范围，只要是接受承运人委托而履行交付货物义务的，不存在向提单持有人直接承担无单放货的法律责任。

3. 货运代理人作为被告的情况

货运代理人以承运人的名义签发提单的，就此取得无船承运人的身份，除承担货运代理的风险和责任外，还依法应承担承运人在货物运输过程所应承担的法律责任，因此，无船承运人无单放货，当然就应承担相应的法律后果。但是，在货运人代理人没有签发提单的情况下，其不可能取得承运人的身份，不具有交付货物的法定义务和合同义务，只是履行与托运人所建立的货物代理合同，当托运人因各种原因重新持有提单时，无权向货运代理人主张无单放货，只能主张代理不当的法律后果。

（三）抗辩事由之三：原告诉请无单放货损害赔偿责任是否已过诉讼时效？

提单持有人诉请无单放货的诉讼时效届满，丧失胜诉权，承运人可以此进行抗辩。无单放货的时效取决案件所适用的法律。《海牙规则》和我国《海商法》均规定，就海上货物运输向承运人要求赔偿的请求，时效期间为一年，自承运人交付或者应当交付货物之日起计算。但这里的“海上货物运输”没有明确是海上运输合同之诉还是所有涉及海上运输而不论是违约之诉或侵权之诉。有的法院判决承运人无单放货应承担侵权责任，适用《民法通则》的规定即 2 年的诉讼时效。从特别法优先于普通法而言，这种判决是错误的，但对于非向承运人而是其他人如提货人提起的诉讼，仍可适用《民法通则》所规定的 2 年诉讼时效。就《海商法》本身条款的理解，违约之诉和侵权之诉的区别对无单放货的时效影响不大，只要是就海上货物运输向承运人而提起的诉讼，时效都应是一年。最高人民法院在审理“粤海”案时也认为：根据提单背面条款所适用的《海牙规则》的一年诉讼时效，提单持有人对承运人的无单放货的起诉已超过时效。在 2002 年全国涉外民商事海事审判工作座谈会上也明确这一意见：《海商法》规定的海上货物运输向承运人要求索赔的请求权，无论以何种诉因提出，时效为一年。[19]

但是，无单放货的诉讼时效从何时起算，学术界存在不同的观点：一是从承运

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18 我国《海商法》第 60 条第 2 款规定，在海上货物运输合同中明确约定合同所包括的特定部分运输由承运人以外的指定的实际承运人履行的，合同可以同时约定，货物在指定的实际承运人掌管期间发生的灭失、损坏或迟延交付，承运人不负赔偿责任。因此，若约定交付责任完全由实际承运人承担的，承运人就无须就无单放货向收货人承担责任。

19 司玉琢主编：《海商法专题研究》，大连：大连海事大学出版社 2002 年版，第 279 页。

人交付或者应当交付之日起，二是从权利人知道或者应当知道其权利受到侵害之日起。有学者认为，若从权利人即收货人知道或应当知道其权利受到侵害之日起计算，由于提单流转到收货人时间已经永远在无单放货之后，该计算方法对于收货人不公平，同时，“应当知道”的时间不容易界定。但也有学者认为，无单放货的时效应当从承运人“应当交付”之日起算，因为“应当交付”货物是法律所规定承运人的最基本义务，也是对应的收货人的基本义务即应当提取货物，以此计算方法亦可促进收货人及时提取货物。同时，“应当交付”货物的最后一日，等于提单持有人应当知道其权利受到侵害之日，因为提单持有人在应当交付货物的最后一日尚未收到货物或相关的收货通知，当然知道其权利受到侵害[20]。作者认为，若无单放货的诉讼时效从货物实际放货或实际到港之日开始计算，由于无单放货是不适当的交付，时效的起算过早，且时效完全在承运人容易控制范围之下，不利于保护收货人，且无单放货的“交付”属非法“交付”，不构成海商法上的“交付”。所以，无单放货的诉讼时效只能从“应当交付”时起算。何谓“应当交付”，对此理解不同。有的认为，海上运输货物按照正常航线运抵目的港，具备交付条件后，交付的合理日期届满之时即为“应当交付”。有的认为，提单持有人凭正本提单主张交付而承运人不能交付，为“应当交付”。有的认为，收货人持有正本提单后应及时提取货物，这是收货人的基本义务和责任。收货人按时向承运人主张提单项下的货物时，就自然知道无单放货的事实，也就知道其权利被侵害，因此，提单持有人取到正本提单的日期就是“应当交付”。因此，我们认为时效应从承运人应当交付之日起开始计算。最高人民法院提审的“浙江省土畜进出口公司诉国桥联运（中国）有限公司无单放货案”也采用此计算方法。

《海商法》关于诉讼时效的规定是一套较为完整的制度，与《民法通则》相关规定不同，尤其在诉讼时效的中断问题上。我国《海商法》第 267 条规定，时效因请求人提起诉讼、提交仲裁或者被请求人同意履行义务而中断。但是，请求人主张权利、请求人撤回起诉、撤回仲裁或者起诉被裁定驳回的，时效不中断。因此，除当事人提起诉讼或仲裁等因素外，只有债务人同意履行才导致诉讼时效中断，若债务人仅同意与债权人协商赔偿事项但未达成具体赔偿协议的，也不导致诉讼时效的中断。[21]

（四）抗辩事由之四：承运人根据指示提单的指示人的指示而无单放货，承运人是否承担无单放货的法律责任？

当承运人明白无误地得到指示提单的指示人的交货指示，无单放货给指定的提货人，是正当履行了法律规定的交付货物的义务。因为我国《海商法》第 71 条

20　王伟：《无单放货法律对策研究》，载于《国际经济法论丛》第 6 卷。
21　《2001 年全国海事法院院长座谈会纪要》。

规定："提单中载明的……按照指示人的指示交付货物……构成指示人据以交付货物的保证"因此，当指示人因某种原因未能实现结汇产生损失时，无权凭借其所持有的指示提单再向承运人要求提货或赔偿损失。[22] 提单持有人指示承运人交付货物，构成了对提单项下的货物的处分，丧失了向承运人主张交货的权利。但值得注意的是，该指示人在发出交货指示时，必须是提单的合法持有人，且有权作出该交付货物的指示。[23]

（五）抗辩事由之五：提单持有人的行为构成放弃要求承运人凭正本提单放货的权利时，承运人是否还应对无单放货承担法律责任？

如果提单持有人曾经的行为构成承运人的信赖，承运人据此无单放货，则提单持有人可能丧失对承运人的索赔权。例如，卖方作为托运人，以语言或行动告诉承运人可以无单放货，并积极配合和诱使承运人这么去做，承运人认为托运人已放弃要求其凭正本提单放货的权利，即使日后提单仍在托运人手中，其也不能要求承运人赔偿无单放货的损失。又如：贸易合同约定在目的港可不凭正本提单提货，提单持有人（开证行）有贸易合同并已经对贸易合同进行了审查，提单持有人应当知道合同中对无单放货的特殊约定，也知道该约定可能产生对其不利的法律后果，但对此未提出异议，说明同意了贸易合同的约定。在正本提单持有人同意不凭正本提单交付货物的情况下，正本提单持有人就抛弃了要求承运人凭正本提单交付货物的权利，免除了承运人凭正本提单交付货物的义务，[24] 承运人依照正本提单持有人及贸易各方的共同意思表示放货，是协议行为，并未侵犯原告的合法权益。

这种情形类似于英美法中的禁止反言原则的适用。但该原则有一定条件的限制，放弃要求承运人凭正本提单放货的权利的行为必须发生在承运人无单放货之前，且必须是明示的，对承运人无单放货起了诱导作用，此类的弃权行为才能成为承运人的抗辩事由。但在承运人无单放货后，不构成禁止反言。

（六）抗辩事由之六：无单放货后，提单持有人与提货人达成还款协议并实际得到部分履行时，承运人是否应承担无单放货的法律责任？

提单持有人与提货人之间达成还款协议，提单持有人并实际接受部分货款，

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22 雷霆：《无正本提单放货的性质及其法律责任》，载于《中国海事审判年刊》2000 年。
23 李守芹：《海运提单焦点问题透视》，载于《海商法研究》2001 年第 4 辑。
24 《中国银行湖南省分行诉广州振华船务有限公司、广州海运（集团）有限公司海上货物运输交付纠纷案》，载于《中国海事审判年刊》1999 年。

提单项下的货物所有权已经发生转移，属于贸易合同纠纷，提单丧失权利凭证效力。法律设立提单作为权利凭证的目的在于便利货主之间转移处于承运人实际占有之下的货物。当承运人在没有出具正本提单的情况下向正确的收货人交付了货物，提单据以提货的权利基于当事人的合意而终止，将贸易合同完全凌驾于运输合同之上，过分强调提单在货物交付中的形式作用，让承运人承担买卖中的货款风险，是不公平的。广州海事法院审理的“科达玛珠”轮案和天津高级人民法院审理的“兴隆”轮案也是按照上述的理论，判决承运人上述抗辩事由成立。最高人民法院在 2000 年 8 月《关于提单持有人向收货人实际取得货物后能否再向承运人主张提单项下货物物权的复函》中进一步谈到：提单担保物权人福建省东海经贸股份有限公司通过与提货人、收货人签订补充协议重新取得了提单项下货物的占有权，并从中收取了部分款项，致使提单失去了担保物权凭证的效力。故福建省东海经贸股份有限公司丧失了因无单放货向承运人索赔提单项下货款的权利。”

作者认为，承运人此项抗辩事由不能成立，因为：

1. 在承运人无单放货前，提单持有人没有任何语言或者行为表明他同意承运人无单放货，买方（提单持有人）与卖方商议货款的行为是发生在无单放货行为之后，并没有诱使无单放货行为的发生。有人认为，提单持有人此时放弃的不是要求承运人凭正本提单放货的权利，而是放弃向承运人索赔无单放货损失的权利，这也有不合理之处：卖方作为提单持有人是与买方接触，非与承运人接触，按照协议字面的合理解释，买卖双方的和解协议并没有解除承运人的责任，或放弃对承运人的索赔权，卖方也没有义务在与买方的和解协议中专门注明保留对承运人的索赔权。[25]

2. 卖方通过贸易途径商议付款条件，达成货款协议，是挽回或减少自身损失的努力，这种努力符合受损害方应当采取适当措施防止损失扩大的法律要求。我国《合同法》第 119 条规定：“当事人一方违约后，对方应当采取适当措施防止损失的扩大，没有采取适当措施致使损失扩大的，不得就扩大的损失要求赔偿。”在承运人无单放货的情况下，卖方遭受的往往是全部货款的损失，其通过贸易途径减少损失的行为若成为承运人对无单放货的抗辩理由，则会使卖方完全放弃这种努力，将承运人作为赔偿全部损失的唯一目标，结果反而加重了承运人的风险和责任。因此，该行为减轻甚至免除了承运人的责任，具有积极的法律意义。

3. 提单持有人往往既是提单关系中的权利主体，又是贸易合同中的权利主体，提单持有人就此拥有两个独立的债权，对每一个债权他都有权主张，选择起诉一方后并不必然丧失对另一方的诉权，这是不真正连带之债[26]，提单持有人既向承运人主张权利，又向买方主张货款。如果从一方得到了全额赔偿，他不能再从另一方得到重复赔偿。从提单机制看，提单赋予提单持有人对承运人的直接权利，

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25 王伟：《无单放货法律对策研究》，载于《国际经济法论丛》第 6 卷。

26 不真正连带责任是指多个债务人基于不同发生原因而产生同一内容的给付，各负全部履行的义务，并因债务人之一的履行而使全体债务归于消灭的债务。

并不是取代其在买卖合同项下对买方的权利，而是赋予其双重保护。卖方与买方就货款支付达成协议不影响其依据海上运输合同的提单向承运人索赔。

4. 提单债权关系是一种独立的法律关系，这种法律关系的主体只能是承运人和提单持有人。承运人依提单的记载对提单持有人负责，承运人承担的仍是他在签发提单时预见的到并给予承诺的义务。提单作为物权凭证功能，现今已受到不少学者的批驳。提单产生于运输环节，注销于运输环节，在运输环节中并不具有物权凭证效力，只是海上货物运输合同的证明和货物收据以及承运人据以保证交付货物的凭证。提单在提单持有人与承运人之间就是存在债的关系，[27] 提单持有人有权依据提单要求承运人交付货物。

（七）抗辩事由之七：无单放货没有造成损失或者提单持有人已得到其他法律救济时，承运人是否应承担无单放货的损害赔偿责任？

无单放货导致提单持有人经济损失的认定，通常有 3 种：一是提单、信用证、发票等结汇单证所反映的提单项下的货物的销售价值；二是贸易合同所约定的货物的销售价值；三是提单项下货物在国内的收购价格，可以结汇单证所反映的贸易合同所实际履行的价格为准；没有结汇单证的，可参考贸易合同约定的货物销售价格或报关核销单证。承运人虽无单放货，但没有造成上述损失的发生或提单持有人已得到其他救济的，如提单持有人已如数得到提货人所支付的货款的，无论是追究承运人无单放货的违约责任还是侵权责任，由于缺乏诉因，提单持有人不能因此不当得利，所以，承运人无须就此承担无单放货的损害赔偿责任。

（八）抗辩事由之八：无单放货与本案损失之间不存在因果关系，承运人是否应承担无单放货的法律责任？

损害事实与违约行为或侵权行为之间存在因果关系是追究承运人违约责任和侵权责任的构成要件之一。《2001 年全国海事法院院长座谈会纪要》也强调，承运人应承担与无单放货行为有直接因果关系的损失赔偿责任。

承运人无单放货后，提货人在报关过程中因涉嫌走私而导致货物被海关没收，承运人虽然无单放货，但由于提单项下的货物是走私货物，提单持有人购买走私货物是不受法律保护的，其损失一定会发生，与承运人之间无单放货之间不存在因果关系，货物的损失不是因为无单放货，而是海关没收和追缴。所以，承运人无须承担赔偿责任。但也有人认为，承运人无单放货的行为在先，提货人的提货行为在后，尽管提单项下的货物涉嫌走私，但由于承运人无单放货的行为已经完

27 司玉琢等：《关于无单放货的理论与实践》，载于《中国海商法年刊》2000 年。

成，所以，承运人仍应对提单持有人承担无单放货的法律责任。我们认为，从追究承运人无单放货的法律责任的构成要件分析，不论是违约责任还是侵权责任，均强调该违约行为或侵权行为与损失产生之间存在因果关系，关于无单放货行为和提货行为谁在先的问题，只是影响因果关系成立的时间因素，而非决定因素。走私货物本为法律所不容，是违法犯罪行为，从社会公平正义原则出发，应坚决予以追究，不存在免责或逃避法律责任，更不能因无单放货反而得到法律救济，而使犯罪嫌疑人如数得到走私货物的赔偿责任。

承运人在无单放货后，买卖合同双方对货物的质量产生纠纷，银行以有关单据不符点为由拒绝承兑信用证项下的货款，托运人仍成为提单持有人是否有权对承运人提起诉讼索赔货款损失。作者认为，导致银行拒付货款的根本原因是货物质量不符合买卖合同的约定，托运人不能将其在国际贸易上的过错责任，以无单放货为由转嫁给承运人。倘若将提单的物权凭证之功能完全应用到运输环节，就容易使买卖双方的商业风险转移到运输中去，使承运人承担不必要的责任，这种风险的转移对承运人是不公平的。[28] 托运人在买卖合同中未能收回货款与承运人无单放货并无直接因果关系，因此对承运人无单放货赔偿责任应予免除。天津市高级人民法院审理的“兴隆”轮案就是如此判决。

（九）抗辩事由之九：记名提单项下，承运人验明收货人身份后无单放货，是否应承担无单放货的法律责任？

我国《海商法》规定，提单中载明的向记名人交付货物，构成承运人据以交付货物的保证。[29] 同时规定，记名提单不得转让。基此，我们认为，记名提单产生以下法律后果：（1）记名提单直接将收货人记载在提单中，且不具有转让性，因此只有收货人才是有权提取货物的人。托运人和收货人都不能通过提单的转让而使承运人承担将货物交付给收货人以外其他人的法律义务；（2）《海商法》的规定并没有强制要求承运人必须向持有记名提单的人交付货物，而是规定承运人应向提单上已经载明的记名人交付货物。提货人持有正本记名提单只是承运人判断收货人的重要依据之一，作为持有记名提单的收货人不是通过出示记名提单而提取货物，而是通过证明其系记名提单上的记名人并因此有权提取货物。所以，若有其他证据能够证明收货人的真实身份，即使提货人没有出示记名提单正本，承运人查明无误后仍可向其交付货物。（3）实践中，记名提单一般只在运送展览品、个人贵重物品等特殊物品时才采用，且常用于短途运输，正本提单迟到的现象司空见惯，强制要求凭借正本记名提单交付货物是不可行的。同时，记名提单虽形式上是提单，但实质应属不可流转的收据。因此，作为承运人没有必要确认货物所有

28 郭峰：《无单放货之我见》，载于《中国海商法协会通讯》2001 年第 3 期。
29 我国《海商法》第 71 条。

权的归属，只须正确识别交付对象即可，在核实收货人的身份后，就可放货。所以，承运人无须就记名提单的无单放货承担法律责任。

但是，有人认为，尽管交货对象正确，但使提单持有人失去收回货款的保障，同时失去了对货物的控制和处分权，是造成提单持有人损失的直接原因。记名提单由于其不可转让性，无论在运输环节还是贸易环节均不可能产生物权效力，造成提单持有人无法收回货款的原因完全是基于贸易合同上的纠纷，承运人按照运输合同的约定将货物安全运到目的港并交付给正确的收货人，就已经如约完成运输合同项下的所有义务，不能将贸易合同凌驾于运输合同之上，过分强调提单在货物交付中的形式作用，让承运人承担贸易合同中的货款风险，这是不公平的。

（十）抗辩事由之十：卸货港法律或卸货港港口惯例允许无单放货的情况下，承运人是否应承担无单放货的法律责任？

1. 卸货港法律或法规允许无单放货的情况

卸货港法律或法规允许无单放货的情况下，当事人进行充分举证的，承运人可依据该法律或法规的规定而无单放货，无须就此承担法律责任。

2. 卸货港法律要求承运人直接放货给第三方的情况

卸货港法律规定货物先交给港口或海关，而后再由港口或海关将货物交付给收货人，这时的收货人无须出具提单即可提取货物。在中南美洲国家，将货物交由海关保管并由海关无单放货的现象很普遍。《汉堡规则》第 4 条规定，根据卸货港适用的法律或法规，将货物交付给必须交付的有关当局或其他第三方，属于该规则的三种交付方式之一。[30] 2002 年《联合国贸易法委员会运输法草案》中也明确规定，卸货港法律或法规要求货物交付给第三方的情况下，承运人无须承担无单放货的法律责任。广州海事法院对“江门市金益五金贸易有限公司诉以色列以星轮船有限公司无单放货案”就是依据此规定而判决承运人无须承担无单放货的法律责任。

3. 卸货港的港口习惯允许无单放货的情况

卸货港的港口习惯允许无单放货，而该习惯经反复实践而成为航运惯例，只要不违背当地法律强制性规定，且当事人约定加以适用的情况下，承运人无须就无单放货承担法律责任。但应将港口习惯与实践作法严格区分，承运人根据实践做法无单放货是不受保护的。[31]

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30 王伟：《无单放货法律对策研究》，载于《国际经济法论丛》第 6 卷。

31 杨良宜：《无提单交货》，载于《中国海商法年刊》1994 年。

对日本秘密海运
极端危险核物质的法律思考

赵亚娟 *

内容摘要: 日本长期秘密从海上运输极端危险的核物质。这类物质一旦泄漏就会对周遭环境造成长期、广泛的辐射影响，不仅给海洋中的生物资源带来毁灭性的后果，使得相关的旅游资源破坏殆尽，更会给沿岸居民的生活带来长期的恶劣影响，正因如此，沿途国家纷纷提出强烈抗议。笔者认为:这种运输违背了“不损害他国”的国际法原则，违反了各国“保护与保全海洋环境”的一般义务，有悖于预防原则及合作原则;即使以无害通过权或自由航行权为理由，也不能开脱其违法性。通过对其违法性的分析，笔者也期望能对我国采取相对应的措施提供一些有益的思考。

关键词: 极端危险的核物质预防原则　不损害他国原则　合作原则　联合国海洋法公约

日本一直以本土资源有限、必须充分利用核能为由，对核电站用过的核废料（也称“乏燃料”）进行后处理，以便从中提取可供使用的钚。为此，日本分别与法国和英国的国有核燃料后处理工厂（即法国核燃料总公司和英国核燃料有限公司）签订合同，对其核废料进行后处理。近 30 年来，已经有几百吨的核废料从日本经海路运送到欧洲进行后处理，而从中提取的钚及经固化处理后的残留废液（固化核废物）又由海路运回日本。如1984 年，有250 公斤从核废料中提取出来的钚（相当于制造30 多件核武器的用量）经海路运回到日本。1992 年，明月丸号又将约 1.7 公吨的钚从法国经好望角运回日本，[1] 从而掀起了一轮海运核物质的狂潮：1995 年 2 月，英国船舶太平洋针尾鸭号将 28 罐高放射性的固化核废物经合恩角从法国运回日本。1997 年 1 月，英国船舶太平洋水鸭号将 40 罐高放射性的固化核废物经好望角运回日本。1998 年 1 月，英国船舶太平洋天鹅号将 60 罐高放射性的

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1 “Pu Sea Shipments”, at http://www.nci.org, 23 December 2003.

固化核废物经加勒比海及巴拿马运河运回日本。1999 年 12 月，太平洋天鹅号将 104 罐（40 多吨）高放射性的固化核废物从法国经巴拿马运河运回日本。1999 年 7 月，太平洋水鸭号和太平洋针尾鸭号装载了 40 组铀—钚混合氧化燃料元件（其中含有约 446 公斤可用于制造核武器的钚）从英法两国运回日本。2000 年 12 月，太平洋天鹅号将 192 组高放射性的固化核废物（这也是运载最多的一次）从法国经好望角运回日本。几乎与此同时，太平洋水鸭号和太平洋针尾鸭号又从英法两国出发，将 28 组铀—钚混合氧化燃料元件于 2001 年 3 月运抵日本。2001 年 6 月，英国船舶太平洋鹬号将 1320 组核废料元件经巴拿马运河从日本运到英国。至此，日本已经将合同项下的全部核废料都运到了英国进行后处理。[2] 但尚有 3000 多罐高放射性的固化核废物有待从英法两国运回日本，在今后 15 年中，估计至少可能要运输 15~30 次。[3]

国际社会对这一轮运输反映强烈，抗议、谴责之声不绝于耳，因为这种运输的标的与以往的任何货物都不相同。一旦这些具有高度放射性的长寿型物质发生意外，则后果不堪设想。1986 年的切尔诺贝利核电站事故已经使得欧洲国家经历了一次惨痛教训，国际社会也对此作出了迅速反映：同年就制定并通过了《及早通报核事故公约》和《核事故或辐射紧急援助公约》，而这两个公约也都于同年生效，速度之快可谓绝无仅有。日本频繁运输高放核物质已使得沿途国家面临严重的潜在核辐射威胁。如，在 1999 年 12 月太平洋天鹅号的运输中，这 104 罐高放固化核废物中的每一罐都盛放着致命的高放核物质；这些罐子被分别安置在四个大的运输容器中，而每一个容器中仅铯的含量就相当于切尔诺贝利核电站事故中所释放出来的铯的含量。[4] 这些长寿型高放有毒物质一旦泄漏，则不但会给沿岸国的居民的生产和生活以及其海洋环境造成长期的、广泛的辐射污染，而且极难以救治：迄今为止，尚未有打捞高放物质的经验或所需的特殊设备。比如，在 1997 年 11 月，一艘悬挂巴拿马国旗的货船在运输 2 罐高放氯化铯时，在亚苏尔群岛附近遭受暴风雨袭击后最终沉没，法国核管理机构宣告没有要找回这两罐氯化铯的方案，称其仅会对人类健康产生微弱影响而作罢。[5]

正因如此，沿途国家纷纷谴责并抵制日本的行径。如 1995 年，巴西、阿根廷、智利、南非、瑙鲁和基里巴斯禁止核废物运输船进入他们的专属经济区，智利甚至出动一艘军船迫使该船舶改变航线、离开智利。1996 年，由阿根廷率领 13 个国

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2 “Pu Sea Shipments”, at http://www.nci.org, 23 December 2003.

3 Paul Leventhal and Steven Dolley, Understanding Japan’s Nuclear Transports: The Plutonium Context, Nuclear Control Institute, Presented to the Conference on Carriage of Ultrahazardous Radioactive Cargo by Sea: Implications and Responses, Maritime Institute of Malaysia, Kuala Lumpur, Malaysia, October 18, 1999, at http://www.nci.org/k-m/mmi.htm, 23 December 2003.

4 “Pu Sea Shipments”, at http://www.nci.org, 23 December 2003.

5 “Pu Sea Shipments”, at http://www.nci.org, 23 December 2003.

家在国际海事组织会议上敦促要通过一份关于海上运输放射物质行为的综合性、强制性法典。1999 年 3 月 8 日，加勒比共同体的政府首脑们重申他们“毫不动摇地反对”公然而持续不断地利用加勒比海运输高放有毒核物质，对越来越频繁、运输量越来越大的核物质运输表示“出离愤怒”，呼吁日本、英国和法国“停止对加勒比海的这种危险的滥用”。[6] 2001 年，阿根廷环境保护基金甚至对政府高官提起诉讼，起诉他们违背了阿根廷宪法第 41 条，允许“死亡之船”太平洋天鹅号进入阿根廷水域。[7]

有鉴于此种运输货物的特殊性及国际社会的强烈反映，笔者认为，中国既是日本一衣带水的邻国，又是途经国家之一，对于这种具有高度危险性的运输也不能视若无睹，因此，很有必要对日本的这种秘密运输行为进行一些思考。笔者认为，无论是依照国际法的原则，还是按照相关公约的条款，此种运输都是严重违反国际法的行为。

一、违反“不损害他国”的国际法原则

诚然，尊重国家主权原则是现代国际法的一项基本原则，国际法虽然确保各国有按照自己的环境与发展政策开发本国自然资源的主权权利，但并不意味着国际法允许一国可以在自己的管辖范围内为所欲为而丝毫不考虑别国和整个国际社会的利益。早在 1949 年的科孚海峡案中，国际法院就认为，每一国均有义务“不故意允许将其领土用于为与其他国家之权利相悖的行为”。[8] 在 Trail 冶炼厂仲裁案中，仲裁庭认为，“任何一国均无权使用或允许如此使用其领土，以致烟雾损及另一国领土或在另一国领土内造成损害”。[9] 目前，该原则已经成为一项公认的国际法原则，体现在一系列的国际法律文件中。如 1958 年《公海公约》、[10] 1972 年联合国人类环境会议上通过的《斯德哥尔摩人类环境宣言》、[11] 1974 年联合国大

6 Jon M. Van Dyke, Sea Shipment of Japanese Plutonium under International Law, *Ocean Development and International Law*, Vol. 24, 1993, p. 399; “Pu Sea Shipments”, at http://www.nci.org, 23 December 2003.

7 “Pu Sea Shipments”, at http://www.nci.org, 23 December 2003.

8 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 333.

9 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 333.

10 1958 年《公海公约》第 2 条规定：“各国行使……（公海）自由及国际法一般原则所承认之其他自由时，应适当顾及其他国家行使公海自由之利益。”

11 1972 年联合国人类环境会议上通过的《斯德哥尔摩人类环境宣言》第 21 项规定：“按照《联合国宪章》和国际法原则，各国有……责任保证在他们管辖或控制之内的活动，不致损害其他国家的或国家范围以外地区的环境。”

会通过的《各国经济权利和义务宪章》、[12] 1982 年联合国大会通过的《世界自然宪章》、[13] 1992 联合国环境与发展会议上通过的《里约环境与发展宣言》[14] 等等。

1982 年联合国海洋法公约则率先以条约的形式明确规定："各国应采取一切必要措施确保在其管辖或控制下的活动的进行，不致使其他国家及其环境遭受污染的损害，并确保在其管辖或控制范围内的事件或活动所造成的污染不致扩大到其按照本公约行使主权的区域之外。"[15] 其他一些条约也都肯定了这一原则。[16]

日本为了本国利益从海上运输极端危险的高放物质，从而使得沿途国家乃至整个国际社会都要蒙受潜在的、受放射污染的巨大风险。且整个运输途中采取的防护措施根本难以"确保"这些运输活动不会使其他国家及其环境遭受污染的损害或不使损害扩大到他国，[17] 这是对这些国家安全利益的严重损害，违背了公认的国际法原则，也违背了《联合国海洋法公约》第 194 条第 2 款的义务。

二、违反各国"保护与保全海洋环境"的一般义务

世界各国共同生活在一个地球上，生活在相互联系、相互依存又相互制约的密不可分的一个自然系统中。地球环境的恶化会危及所有国家的利益，保护全球环境是世界各国的共同任务。

一系列的国际法律文件都肯定了保护地球环境是各国共同的法律义务。[18] 海洋环境是全球环境的一个重要组成部分，联合国海洋法公约第一次在全球性公约中以显著篇幅（第十二部分，共计 46 条）规定要保护保全海洋环境：

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12 1974 年联合国大会通过的《各国经济权利和义务宪章》第 30 项规定："所有国家有责任保证，在其管辖和控制范围内的任何活动不对别国的环境或本国管辖范围以外地区的环境造成损害。"

13 1982 年联合国大会通过的《世界自然宪章》第三部分（实施）第 21(d) 项规定："各国……应确保在其管辖或控制下的活动不损害别国境内或国家管辖范围以外地区的自然系统。"

14 1992 联合国环境与发展会议上通过的《里约环境与发展宣言》第 2 项原则规定："根据《联合国宪章》和国际法原则，各国……负有确保在其管辖范围内或在其控制下的活动不致损害其他国家或在各国管辖范围以外地区的环境的责任。"

15 1982 年《联合国海洋法公约》第 194 条第 2 款。

16 1992 年《气候变化框架公约》绪言部分；1992 年《生物多样性公约》第 3 条等。

17 比如，由于很容易从新鲜的铀—钚混合氧化燃料（MOX）中提取用于制造核弹的钚（不到 8 公斤钚即可），故，在运输铀 - 钚混合氧化燃料元件时，应同运输钚一样采取最严格的物理保护措施。按照美—日协定，美国曾一度要求日本在运输钚时需要先经美国准许，并要有军船护航。1999 年美国屈从了日本的压力，没有坚持要有军船护航，但事实上没有军船护航的运输是极不安全的。另外，也有资料表明，这些核废物的包装有严重缺陷，并没有达到充分的安全标准。详情请见美国核控制机构（NCI）的网站，"Pu Sea Shipments", at http://www.nci.org under, 23 December 2002。

18 参见前述之 1972 年《斯德哥尔摩人类环境宣言》、1982 年《世界自然宪章》、1985 年《保护臭氧层维也纳公约》、1992 年《里约环境与发展宣言》、1992 年《气候变化框架公约》和《生物多样性公约》等等。

各国有保护和保全海洋环境的一般义务；

……各国应当采取一切……必要措施以防止、减少和控制任何来源的海洋环境污染……（这些）措施应当针对海洋环境的一切污染来源，并应包括旨在最大可能范围内尽量减少……来自船只污染的措施，特别是为了防止意外事件和处理紧急情况，保证海上操作安全，以及规定这些设施或装置的设计、建造、装备、操作和人员配备的措施。[19]

既然“各国应当采取一切……必要措施以防止、减少和控制任何来源的海洋环境污染”，而运输极端危险的高放核物质又会使得沿途国家面临遭受严重的潜在核污染的巨大风险，则运输方至少应当采取如下必要措施：事先进行环境检测和评估，事先通知沿途各国拟运输的航线和日程并与之协商，以便确定最佳航线，与有关国家联合制定应急措施以防患于未然，发生事故时进行迅速通报并请求援助，建立必要的责任机制和赔偿机制（比如强制保险）等。然而，日本却一贯秘密行事，既未见日本对航行海域事先进行环境检测和评估，也未见其事先通知沿途各国拟运输的航线和日程，更无与有关国家联合制定应急措施以防患于未然之举措。这已经事实上严重违反了联合国海洋法公约的义务，构成了对国际法对公然违背。

三、有悖于“预防原则”

一方面，环境污染问题给人类健康和社会经济生活造成了巨大损失，另一方面，污染治理工作花费大又收效慢，更严重的是，很多情况下都无法治理污染、无法恢复原生态环境。与其亡羊补牢，不如未雨绸缪。正因如此，预防原则成了环境保护领域的一项重要的国际法原则。在早期就有一些文件提出了要采取预防措施。[20] 1992 年《里约环境与发展宣言》第 15 条原则规定：

为了保护环境，各国应根据其能力广泛运用预防的方法。在有严重或不可挽回的损害的威胁时，缺乏充分的科学确定性不应被用来作为延迟采取防止环境恶化的有效措施的理由。

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19 《联合国海洋法公约》第 192 条及第 194 条。

20 如 1968 年由欧洲议会和部长理事会通过的《控制大气污染原则宣言》就把预防原则作为控制大气污染的立法的基础；1982 年《内罗毕宣言》第 9 项规定：“与其花费很多钱、费很多力气在环境破坏之后亡羊补牢，不如预防其破坏。预防性行动应包括对所有可能影响环境的活动进行妥善的规划”；1982 年的《世界自然宪章》也将预防生态破坏作为贯穿始终的指导思想；1984 年、1987 年及 1990 年的《保护北海国际会议部长级宣言》都肯定了预防方法，各国部长并保证继续运用预防原则。

20 世纪 90 年代以后通过的关于环境保护的国际法律文件几乎都规定了预防原则。[21]

联合国海洋法公约虽然没有明确规定预防原则，但“各国有保护和保全海洋环境的一般义务”，且“各国应在适当情形下个别或联合地采取一切符合本公约的必要措施以防止……任何来源的海洋环境污染，为此目的，按照其能力使用其所掌握的最切实可行的方法，并应在这方面尽力协调它们的政策。”[22] 据此，没有理由认为“一切符合本公约的必要措施”不包括预防措施。[23]

在笔者看来，预防原则的要义在于遇有严重或不可挽回的损害的风险时，应小心谨慎从事，未雨绸缪。因此，采取预防措施至少应包括如下几个步骤：(1) 进行环境检测和评价，(2) 事先通知可能会受影响的国家并与之进行协商，及 (3) 合作建立应急计划。

1. 海洋污染检测与评价的必要性

首先，要预防海洋污染，保护海洋环境，必须先了解海区的环境质量和环境容量，掌握污染状况和发展趋势，所以有必要先进行海洋污染检测和评价，以便估计和分析海洋环境污染的危险和影响，并确定相应的对策。《联合国海洋法公约》对此有明确规定：

> 各国应……尽力……用公认的科学方法观察、测算、估计和分析海洋环境污染的危险或影响;各国特别应不断监视其所准许或从事的任何活动的影响，以便确定这些活动是否可能污染海洋环境。
>
> 各国应发表……（上述检测）结果报告，或每隔相当期间向主管国际组织提出这种报告，各该国际组织应将上述报告提供给所有国家。
>
> 各国如有合理根据认为在其管辖或控制下的计划中的活动可能对海洋环境造成重大污染或重大和有害的变化，应在实际可行的范围内就这种活动对海洋环境的可能影响作出评价，并按……（上述公开）方式提送这些评价结果的报告。[24]

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21 如 1992 年《东北大西洋环境保护公约》第 2 条第 2 款 a 项；1992 年《保护波罗的海海洋环境公约》第 3 条第 2 款；1991 年《禁止进口危险废物和控制其在非洲越境转移的巴马科公约》第 4 条第 3 款 f 项；《21 世纪议程》。

22 《联合国海洋法公约》第 192 条、194 条第 1 款。

23 《21 世纪议程》第 17 章 22 项规定：“按照联合国海洋法公约保护与保全海洋环境的规定，各国承诺，要依照其政策、优先顺序和自然资源来防止，减少并控制海洋环境的退化，以便维持并增进其维持生命的能力和生产能力。为此目的，有必要：(a) 运用防止，预防和预期方法以避免海洋环境的恶化并降低对其造成长期的或不可逆转的不利影响的风险……”

24 《联合国海洋法公约》第 204~206 条。

海洋法公约只规定各国在形式上应制订并公布其评估报告，而未具体规定评估报告的内容。评估报告可以是完整的、充分的、与现实发展相一致的，也可以是不完整的、不充分的、过时的。笔者以为，从预防原则的要义出发，评估报告应该是完整的、充分的、与现实发展相一致的。正如国际法院在 1997 年加布奇科沃—大毛罗什项目一案中（匈牙利诉斯洛文尼亚）所指出的：

> 要评估环境风险，必须考虑现行标准……法庭注意到，由于对环境的破坏常常是难以补救的，且此种破坏的补救机制也具有内在的限制，故在环境保护领域要求警惕和预防。多少年来，人类由于经济和其他原因而一直在干预自然界。在过去，人类常常不考虑对环境的影响就干预大自然。由于有了科学的眼光，加之日益明了不经考虑、不衰退地追求此种干预对人类——当代及今后的世世代代——的风险，已经发展出了新的规则与标准。这在前二十年的诸多制度中都有阐述。各国不仅仅要在考虑新举动时必须虑及此种新规则，必须适当权衡此种新发展，在继续过去已展开的活动时，也必须如此。[25]

在加布奇科沃—大毛罗什项目案中，国际法院已经开始要求各国在从事追求经济利益的活动中应考虑到对环境的可能影响。将这种法理运用于日本秘密运输核物质的情境，再结合联合国海洋法公约的规定，不难得出结论，日本本应当依照联合国海洋法公约进行环境检测和评价并公开上述报告，其评估报告应该是充分的、完整的，还要考虑到现行的标准与实践。然而事实正相反，日本一直暗中进行运输，拒绝透露有关情报，严重背离了国际法。

2. 潜在污染国向潜在受害国的通报义务

其次，一国在计划采取或批准可能对其他国家的环境造成重大不利影响的活动时，该国应向后者通报并传送有关计划的详细资料，只要提供的情报不为国内法或国际法所禁止。[26]

在科孚海峡案（1949）中，英国军舰对位于阿尔巴尼亚的科孚海峡进行事先调查并清理航道，后航行通过该海峡，阿尔巴尼亚政府对此表示反对，认为英国军舰侵犯了其领海主权，但英国政府称其在行驶无害通过权，不影响阿尔巴尼亚领海主权。其后，当英国军舰再次通过该海峡时踩到了海峡中的地雷，遭受重大损失，于是英国政府将阿尔巴尼亚政府告到国际法院，要求赔偿。阿尔巴尼亚政府辩称，其未在领海中布雷，相反，英国军舰擅自在其领海内对其领海从事调查活动，不构

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25 Judgement of the Gabcikoko-Nagymaros Case, *International Legal Materials*, Vol. 37, No. 1, para. 140.

26 也有学者认为，“跨界关系中的通报与协商”是国家环境法的一项基本原则。亚历山大•基斯著，张若思编译：《国际环境法》，北京：法律出版社 2000 年版，第 103~105 页。

成无害通过，是对其领海主权的侵害。国际法院就认为，既然布雷活动不可能在阿尔巴尼亚政府不知晓的情况下进行，则这种知晓无可争议地导致了阿尔巴尼亚政府的义务——为一般航行的利益通知在其领水内存在雷区，警告英国舰队面临的危险。阿尔巴尼亚政府有充分的时间去警告英国舰队，但它却未试图采取任何措施来阻止灾难的发生，“这种严重的不作为导致了阿尔巴尼亚政府的国际责任”，阿尔巴尼亚政府因此对英国负有赔偿义务。[27] 换言之，一国政府有义务将其控制下的可能对他国产生不利影响的情况告知会受影响的国家，否则，即应对由此产生的后果负国际责任。

一些国际法律文件也肯定了国家的这种义务。如《里约环境与发展宣言》第 19 条原则明确指出：“各国应将可能造成重大跨界不利影响的活动提前通知可能受影响的国家，并向这些国家提供相关的资料，还应在早期与这些国家善意协商。”

一些关于防止河流、湖泊等污染的条约也规定了同样的原则。联合国海洋法公约则特别规定：

> 当一国获知海洋环境有即将遭受污染的迫切危险……时，应立即通知其认为可能受这种损害影响的其他国家以及各主管国际组织。[28]

按照此项规定，各国首先要对可能会对其他国家产生不利影响的活动的后果进行评价（以便确定哪些国家是“可能受影响的国家”），然后，必须进行通报且通报必须提前、及时。缺少这三个环节中的任何一环，通报就失去了意义。各国在通报后还应一秉诚信与这些可能受影响的国家进行善意协商。应可能受影响的国家的要求而与之协商，是对通报行为的一个必要补充，即“潜在的”污染国应同意“潜在的”受害国对其通报内容进行评论并发表意见。否则，通报就成了一个有名无实的空壳。协商应一秉善意，有关各方应对他方的权利和合法利益予以合理关注。但若潜在的受害国不同意潜在的污染国拟进行的活动或提出其他建议，该潜在的污染国是否必须停止其拟进行的活动或采纳该建议，国际法尚未对此有明确的规定。但笔者认为，从预防原则的目的——尽可能防患于未然，最大限度地防止可能的污染出发，不应以缺乏充分的科学确定性来作为延迟采取防止污染发生或恶化的有效措施的理由，即潜在的污染国如若坚持进行其活动，则有关各方至少应合作建立一套切实可行的应急计划。

3. 建立一套切实可行的应急计划的必要性

再次，建立一套切实可行的应急计划是预防原则中至关重要的一环。在发生紧急情况时，只有按照既定的应急计划迅速行动起来，才有可能有效地防止、减少

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27 梁淑英主编：《国际法案例教程》，北京：知识产权出版社 2001 年版，第 70~75 页。
28 《联合国海洋法公约》第 198 条。

或控制污染。1986 年的切尔诺贝利核电站事故使得国际社会空前地关注建立应急计划的重要性。事实上，已经产生了越来越多的双边和区域性应急计划。1990 年的《国际油污防备、反应与合作公约》则是全球性应急计划的典范。《联合国海洋法公约》更特别指出，为防止或尽量减少污染损害，“各国应共同发展和促进各种应急计划，以应付海洋环境污染的事故。”[29]

考虑到极端危险的高放核物质的特殊性质，为降低其发生意外时给海洋环境造成长期不利影响的风险，有关各方更有必要在实际运输之前就先协商建立一套应急计划，来应对诸如火灾、碰撞、搁浅、沉没等意外事项。国际海事组织的海上环境保护委员会已经拟定了一套建立船上应急计划的指南，并打算将该指南并入国际海事组织的《安全船运罐装放射性核燃料、钚和高放废物的守则》。[30] 建立一套船上应急计划固然具有重要意义，但对于沿途国家而言，协商建立一套岸上应急计划（包括救助、打捞等）则更具有现实意义。但迄今为止，由于日本一意孤行，一贯秘密运输，既不与有关国家事先通报、协商，也不联合制定应急计划，与国际法严重背离。

四、与合作原则背道而驰

各国在国际事务中进行合作，这是现代国际法的一项基本原则。由于人类只有一个地球，只有一个生态环境，所以，国际合作原则对于全球环境的保护更具有突出意义，众多的有关环境保护的决议和宣言都反复强调要进行国际合作。[31] 有关的国际法判例也都积极肯定了这一点。比如在最近的“MOX 工厂”（爱尔兰诉英国）一案中，国际海洋法法庭认为：

> 合作义务在公约第十二部分防止海洋环境污染和一般国际法上，是一项基本原则；对由此产生的权利，法庭在适当时可以考虑依据（联合国海洋法）公约第 290 条予以保全。[32]

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29 《联合国海洋法公约》第 199 条。

30 该守则由 IMO 于 1993 年 11 月 4 日第 18 次大会通过，IMO Resolution A/18/Res.748, Annex．它主要规范放射性物质的包装及运输此种物质的船舶的构造、设计及人员配备等技术性问题。国际海事组织成员方 1999 年 5 月决定将该守则并入《海上人命安全国际公约》。2001 年，该守则正式生效。

31 如 1972 年《斯德哥尔摩人类环境宣言》、1982 年《内罗毕宣言》、1985 年《保护臭氧层维也纳公约》、1992 年《里约环境与发展宣言》、1992 年《气候变化框架公约》）和《生物多样性公约》等一系列多边法律文件和区域性条约及双边条约；1989 年联合国大会专门通过了关于《环境领域中的国际合作》的第 44/229 号决议。

32 International tribunal for the law of the sea (ITLOS), The MOX Plant Case (Ireland v. United Kingdom), para. 82, *International Legal Materials*, Vol. 41, No. 2, p. 405.

联合国海洋法公约则专门用一节（第 197~201 条）规定了“全球性和区域性合作”。

笔者认为，合作的内容是广泛的。由于对环境的破坏往往是不可挽回的，不只是用金钱就可以弥补的，故，一国在进行可能影响到其他国家利益的活动时，必须一秉诚意与利害关系方进行广泛而深入的合作，并考虑到他方的利益和需求。无论是前述的事先通知、协商，建立应急制度，还是事故发生后的通报、援助和建立责任制度，无不需要有关各方一秉诚意进行合作。但日本一意孤行、置其他国家的利益于不顾，与这一国际法原则背道而驰。

五、“无害通过权”与“自由航行权”之辩称并不能为其违法性开脱

由以上分析可知，日本秘密海运极端危险核物质严重违反了国际法。而有关运输方一直以其船舶享有“无害通过权”或“自由航行权”来进行开脱。[33] 但倘若细察联合国海洋法公约的有关条文，就会发现：主张“无害通过权”或“自由航行权”丝毫不能证明其运输行为的合法性，却恰恰表明了其违法性。

首先，虽然联合国海洋法公约明确肯定了所有国家，不论是沿海国还是内陆国，其船舶都享有在领海、用于国际航行的海峡、群岛水域及特殊情况下的内水（因采用直线基线而使得原来不被认为是内水的区域被包括在内成为内水的那一部分水域）的“无害通过权”，但要受到诸多限制，其中包括：[34] 1. 通过不应损害沿海国的和平、良好秩序或安全；2. 如果外国船舶有违反公约规定的任何故意和严重的污染行为，则通过即为有害通过；3. 行使无害通过权的外国船舶应遵守沿海国依公约和其他国际法规则而制定的保全沿海国环境、防止、减少和控制该环境受污染的法律和规章；4. 沿海国可以对运载核物质的船舶特别指定海道或分道通航制，且此种船舶应持有国际协定为这种船舶所规定的证书并遵守国际协定规定的特别预防措施；5. 沿海国可以采取必要的步骤防止非无害的通过，也可以暂停或阻止无害通过。

据此，沿海国完全可以：1. 要求运输方事先进行通报和协商（这是沿海国依照公约第十二部分——海洋环境的保护与保全的规定所提出的合理要求，并不能视为“妨碍外国船舶的无害通过”）；2. 以此种运输使其蒙受巨大的潜在污染风险、有

33 H. Tani, A Notification of Radioactive Materials Shipment and the United Nations Convention on the Law of the Sea, Contributed Papers, International Conference on the Safety of Transport of Radioactive Material, 7-11 July 2003, Vienna, Austria, p. 46.

34 《联合国海洋法公约》第 19 条第 1 款、第 2 款 h 项及第 21~23 条。

损其和平、良好秩序与安全为由，拒绝其有害通过；[35] 3. 可以对其行使民事管辖权，登船临检其证书及特别防护措施，有不符者则可以拒绝其无害通过或对船舶加以执行或逮捕；[36] 4. 可以制定海道或分道通航制。

其次，虽然联合国海洋法公约授权所有国家，不论内陆国或沿海国，在专属经济区内都享有航行自由，但同时又规定，沿海国对海洋环境的保护与保全享有管辖权，有养护和管理海床上覆水域和海床及其底土的自然资源的主权权利；各国在专属经济区内行使其权利（如航行自由）时，应适当顾及沿海国的权利和义务，遵守沿海国的“按照本公约的规定和其他国际法规则所制定的与本部分不相抵触的”法律和规章（显然也包括有关环境保护的法律和规章），且要“受本公约有关规定的限制”（当然包括第十二部分环保的种种要求）。[37] 换言之，沿海国对运输核物质的船舶仍有相当的控制权：1. 可以要求运输方事先进行通报和协商（这是依据第十二部分所提出的合理要求）；2. 可以采取包括登临、检查、逮捕和进行司法程序在内的必要措施，以便防止污染并行使养护和管理专属经济区内生物资源的主权权利；[38] 3. 可以以使其蒙受巨大的潜在污染而不享有任何利益为由，宣布其违反沿海国有关环保的法律和规章，妨碍了沿海国行使养护和管理专属经济区内生物资源的主权权利，从而拒绝其进入沿海国的专属经济区。[39]

再次，公海向所有国家开放，其中，不论是沿海国还是内陆国，都享有航行自由。但这种航行自由也不是无限制的自由：虽然公海位于各国主权管辖范围之外，但各国有“保护与保全海洋环境的一般义务”，不能随意使公海遭受巨大的潜在核污染的风险，且各国在行使自己的权利或在其控制下展开计划或活动时，同样有义务保证这些计划或活动不能损害“国家管辖范围以外地区的环境”——当然包括公海环境。[40]

六、结　语

可见，日本长期从海上秘密运输极端危险的高放核物质，使得沿途国家乃至

35　国际原子能机构 1990 年通过的《放射废物的国际跨界移动行为法则》第III部分（基本原则）第 3 项规定：“禁止放射废物进入，穿过其领土的移动或从其领土移动，是各国的主权权利。”此一规定并非毫无意义。

36　《联合国海洋法公约》第 23 条及第 28 条。

37　《联合国海洋法公约》第 56 条及第 58 条。

38　《联合国海洋法公约》第 73 条。

39　如 1995 年，巴西、阿根廷、智利、南非、瑙鲁和基里巴斯禁止核废物运输船进入其专属经济区，智利甚至出动军船迫使该船改变航线，离开智利；在 2000 年底太平洋天鹅号运输高放固化核废物从法国返回日本时，布宜诺斯艾利斯底联邦上诉法院以可能对环境和公众健康造成“不可逆转”的损害为由，判令政府必须采取措施，阻止该船穿越阿根廷的专属经济区。“Pu Sea Shipments”, at http://www.nci.org, 22 December 2002.

40　见前注中有关国际法律文件的规定。

整个国际社会——它们没有从这些运输中获取任何实益——的利益都要蒙受潜在的、巨大的辐射污染风险，严重损害了他国的安全利益；对于这种高度危险货物的运输，日本既不公开其海洋污染检测与环境评估报告，又不与可能受影响的国家或地区进行国际合作（如予以事先通报，听取他们的建议并制定联合应急计划），这是对国际法的严重违反。我国同样是日本高放核物质运输船的途经国：运输船至少有一次曾经经马六甲海峡后，穿过我国的南海，绕过台湾岛返回日本。[41] 我国的南海属于《联合国海洋法公约》中所规定的“半闭海”。这类海域受其特殊的地理条件所限，自净能力差，更容易积聚污染物、遭受污染损害，可以归为“脆弱的生态系统”；而我国的台湾海峡南端较宽，约有 350 海里，北端则相对较窄，约有 135 海里，是一个用于国际航行的海峡。目前，依据中国大陆和中国台湾各自公布的相关法律和规章，[42] 两岸各自划定了领海、毗连区及 200 海里专属经济区。无论这些高放核物质运输船穿越南海，还是穿越台湾海峡，一旦发生任何意外，都会对海洋环境造成灾难性后果，甚至可能毁灭其中的生物资源，更会给台湾海峡西部沿岸居民的生产和生活带来长期的负面影响。依据前文对《联合国海洋法公约》和相关国际法原则的分析，面对这样的行为，中国应据理力争，拒绝这些“死亡之船”的穿越。两岸也应该在这一问题上加紧合作，立场一致地维护中国的切身利益。

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41 See The Sea Shipment Chart “Pu Sea Shipments”, at http://www.nci.org, 20 February 2003. 由于日本历来对其航线保密，这幅地图也未能列明每一次航程。

42 大陆地区的相关法律和规章有 1996 年 5 月公布的《中华人民共和国政府关于中华人民共和国领海基线的声明》、《领海及毗连区法》，1998 年 6 月公布的《专属经济区法》；台湾地区有 1998 年 12 月 31 日公布的第一批领海基线，1998 年 1 月公布的《领海及邻接区法》和《经济海域及大陆礁层法》等等。另请参见傅崐成：《中国人民海洋权利之主张——谈两岸领海基线之划定公布》，载于《海峡评论》第 99 期；及傅崐成：《台湾海峡水域法律定位的研究》，载于《台大法学论坛》第 24 卷第 2 期。

浅析美国对《联合国海洋法公约》的立场演变

洪　农*

内容摘要:《联合国海洋法公约》(以下简称"《公约》")自1967年开始筹备谈判，1982年通过签字，1994年生效实施。美国作为海洋大国之一，在批准《公约》的立场上反反复复：20世纪80年代以前积极参与《公约》的制定，而80、90年代却拒不接受，在2003、2004年美国两院就是否加入《公约》又举行了三次听证会。本文将通过回顾各个时期美国对批准《公约》所持的不同态度，分析其或赞成或反对的原因，并结合中美撞机谈判等几个案例，运用《公约》的内容进行初步分析，提出自己的见解。

关键词:《联合国海洋法公约》　美国　利益　国际习惯法

一、筹备与谈判——美国基本支持

1958年联合国召开《联合国海洋法公约》(以下简称"《公约》")起草大会，美国政府扮演了主导角色。在接下来的24年里，美国作为主要的谈判国家，积极参与了《公约》条文的全部起草过程。美国国防部和海军派了大量人员参与谈判，并一度认为《公约》在很大程度上保障了美国海军航运和飞行的自由，满足了美国的利益。海洋法会议结束时，即将卸任的卡特政府认为《公约》的大部分条文和规定是符合美国利益的，并准备接受包括国际海底制度在内的整个《公约》。

《公约》确立的国际海底制度基于当时的政治形势和对国际金属市场前景的预测，是各利益集团经过长期的讨价还价达成的一个妥协的产物[1]。然而，在《公约》所确立的国际海底制度基本定型之后，以1980年美国《深海海底固体矿物资源法》的出台为开端，西方一些工业化国家先后制定了与《公约》所确定的海底制度相对立的深海采矿法律。美国新政府一反前任政府的立场，在1981年第10期海洋法会议上，要求重新审查海洋法公约草案，特别是海底制度问题。至联合国

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1 《国际海底问题与〈联合国海洋法公约〉》，下载于 http://www.comra.org/gljdt/zl/020705.htm，2004年10月15日。

第三次海洋法会议临近结束时，在其他问题上各利益集团基本取得一致意见的同时，主要在国际海底制度上的分歧使得海洋法会议最终不得不放弃事先达成的“君子协定”，即在谋求一切努力协商一致之前，不应采取投票表决的方式。应美国代表团的要求，1982 年 4 月 30 日对是否通过《公约》进行了表决。表决结果以 130 对 4 票、17 票弃权的压倒性多数通过了《公约》，然而采用表决的方式本身意味着有关国家和利益集团在国际海底问题上的分歧[2]。

二、《公约》的批准和生效实施——美国拒绝签署

《公约》自 1982 年 12 月 10 日开放签字，有 159 个国家和实体签署了《公约》。1982 年 7 月 9 日，美国总统里根正式宣布，美国拒绝签署《公约》。他同时明确给出了美国拒绝签署的原因：“该公约关于深层海底矿藏开采的部分不符合美国的目标”[3]。

美国认为《公约》第十一部分及其附件三所规定的“生产限制政策”、“强制性技术转让”、海底管理局企业部的平行开发等规定，违反了美国倡导的自由竞争原则及其经济利益。因此，这部分规定基本上是不可接受的，并为此提出了修改意见：第一，取消强制性技术转让的规定；第二，删除限制生产的有关规定；第三，修改国际海底管理局的表决程序；第四，调整审查会议的相关规定[4]。

美国尤其对《公约》第十一部分关于技术转让的 144 条款耿耿于怀。曾参加美国《公约》谈判团的赖特纳提出，涉及技术转让不仅仅是海底采矿，也涉及军事应用技术。“水下绘图、海洋深测术系统、反射和折射地震学、磁侦察技术、光学图像、遥控传播手段、潜水传播器、公海海上救助、主动或被动军事声学系统、机密深测术和地理学数据、海底机器人等。这些技术将会大大增强潜在对手的水底军事行动能力，例如中国。”[5]

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2 《国际海底问题与〈联合国海洋法公约〉》，下载于 http://www.comra.org/gljdt/zl/020705.htm，2004 年 10 月 15 日。

3 马尔他驻联合国大使帕度于 1967 年向联合国大会提交了一个革命性的建议：深层海底矿藏应被联合国宣布为“人类共同遗产”，其开采利益不应由少数发达国家的公司独占，而应由联合国建立机构统筹管理，其开采利益部分用于援助发展中国家。联合国大会大致接受了帕度大使的建议，经过十多年的广泛讨论，终于在 1982 年《联合国海洋法公约》的第十一部分中建立了管理深层海底矿藏开采的制度构架。

4 高之国：《美国拒绝批准〈联合国海洋法公约〉的前因后果》，下载于 http://www.soa.gov.cn/news/200102/10123g.htm，2004 年 10 月 15 日。

5 GOP to Sneak Law of Sea Treaty, at http://news.phaseiii.org/article2726.html, 15 October 2004.

总而言之，里根政府不能容忍海洋法公约的第十一部分，尽管美国其实是很支持该《公约》的其他部分的（如规定所有国家在他国专属经济区都享有航行与飞越自由的第 58 条）。1980 年，美国通过单边立法，成立了《深海海底固体矿物资源法》，在过渡到《公约》的实施期间为美国矿主提供保障。美国认为，这种立法本应和其他发达国家的类似法案相协调配合成为正式条约，而不需要成立《公约》这样大费周折。于是，里根于 1983 年 3 月 10 日宣布，美国将接受除第十一部分之外的《公约》为“国际习惯法”。

这种单方面宣布国际公约中的为己所需部分为“国际习惯法”的做法，在法理上是难以服人的。须知，经过 10 余年艰苦谈判方提交各国签署的《公约》是一有机整体，许多发展中国家可能正是因为有了深层海底矿藏为“人类共同遗产”的规定，才同意诸如飞越自由之类其他条款的。美国单方面地将部分《公约》宣布为“国际习惯法”，自然而然地引起其他国家的反弹，限制或拒绝赋予美国《公约》中所规定的权利。

三、1994 年至今——态度摇摆未定

1994 年，当联合国在深层海底矿藏问题上向美国做出相当大让步后，克林顿总统提请参议院批准美国加入《公约》。支持克林顿动议的各方人士跃跃欲试，大声疾呼美国在海洋法问题上失去了国际社会的“道德上的领导”地位，但参议院至今仍拒绝批准，可见反对深层海底矿藏为“人类共同遗产”的势力之强大[6]。

如果说，里根政府拒绝签署《公约》的根结在于深层海底矿藏开采，那么，近年来美国参议院仍拒绝批准《公约》的理由又新增了不同声音。

1. 经济利益

美国有关方面认为，在《公约》机制下，全球 70% 的海洋将被国际海底管理局控制，将从美国及其联盟手中把海洋的控制权夺走。它认为国际海底管理局是一个自筹经费的实体，它必将在开发海洋自然资源的国家中征税以运作，这将对大幅度开发海底资源的美国产生不利影响。

曾任里根特别助理的道格班窦认为《公约》中非海底部分条款虽令美国小小获益，但许多条款却令美国利益受损，如海域划界从美国剥夺了许多资源；第十二部分“海洋环境保护”关于污染的条款限制了美国控制排放源的能力；令美国人更耿耿于怀的是，美国最终将与其他国家分享开发外大陆架油气带来的收入。[7]

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6 崔之元：《中美谈判与海洋法公约》，下载于 http://www.zaobao.com/cgi-bin/asianet/gb2big5/g2b.p1?/special/china/sino_us/pages2/crash210401e.html，2004 年 10 月 15 日。

7 Doug Bandow, The Law of the Sea Treaty: Inconsistent with American Interests, at http://www.cato.org/testimony/ct-db040408.html, 15 October 2004.

2. 国家安全

美国国家安全专家曾警告，如果《公约》得到参议院的批准，将削弱美国海军力量，从而加强包括中国在内的潜在对手的实力，使美国易于受到潜水艇巡航导弹的袭击，且有利于恐怖分子的活动。

赖特纳曾著书评《公约》："这是一个严重错误的文件，被里根总统拒绝批准，因为它包含了大量有损美国国家安全和经济安全利益的条例、义务、限制。事实上，《公约》对美国主权造成了直接的危害，对美国在世界性事务上一向扮演的霸权角色构成了威胁。""美国领导的《多国关于公海拦截和船只登陆项目》将受到《公约》的禁止，而这个项目对美国国家安全利益是重中之重"。"批准《公约》将大大摧毁我们阻止恐怖分子船只或是载运核武器的敌对国船只的能力。我们没有必要因加入一个不必要的条约而导致我们公民受到攻击"。赖特纳认为，《公约》强加了"针对我们为保护国家安全和本土国防可能采用的措施的限制。例如，航行在公海上的外国船只如果'不涉及海盗行为、未挂旗航行或是发送无线广播'，《公约》将阻止美国海军或是海岸警戒船只对其进行截止、搜查或是抓获"。[8]

美国国会研究中心的一份报告指出："有关国家对公海区域，例如领海、捕鱼区和经济区的不断主张将很大程度限制航海自由，增加因进入公海而引发国际争端的可能性"。[9]

这份报告指出，《公约》第 20 条中规定的"在领海内，潜水艇和其他潜水器，须在海面上航行并展示其旗帜"将对美国造成很大影响。例如，美国的潜水艇被迫在海面展现其位置而易受到攻击。《公约》将阻止美国舰队的发展，阻碍联合特别行动的潜水艇突击队渗透到敌对地区。在"9•11"之前制定的《公约》中使用的语言将妨碍美国进行全球反恐斗争。

美国国会研究中心的报告列举了三页纸的"未解决的问题"，例如，美参议院长期以来不愿接受的"强制性解决争端的条件"；"《公约》各部分与美国现行法律的关系尚待调查"；《公约》对海洋资源"是人类的共同遗产"的模糊定义。

反对《公约》的声音中还指责《公约》使中国伺机控制南海地区。来自美国遗产基金会亚太研究所的一份名为《布什政府如何处理中国和南中国海争端》的报告如是说："如果美国坐视北京曲解《公约》，南中国海将变成事实上的中国'内湖'，东南亚国家将屈服于北京对《公约》的曲解，美国海军将不得不经过中国允许才能在这片重要的国际水域航行。为避免这种局面发生，布什政府应向中国和其他主

8 GOP to Sneak Law of Sea Treaty, at http://news.phaseiii.org/article2726.html, 15 October 2004.

9 GOP to Sneak Law of Sea Treaty, at http://news.phaseiii.org/article2726.html, 15 October 2004.

张国声明，美国反对任何干涉或是威胁自由航行的极端主张”。[10]

针对认为批准《公约》将保障美国在公海的航行自由，《公约》的反对者反驳说，美国在亚洲和欧洲的友好国家或同盟国将保护美国航行自由。只要美国与其保持友好关系，就能通过它们间接维护美国的利益。如果那些从美国航行自由收益最大的国家在美国不加入《公约》的情况下不愿帮助美国，那么即使美国加入了《公约》它们也不可能采取任何有利于美国的行动。

美国人另外一个担忧是《公约》将否认其海军或海岸巡逻队阻止恐怖组织或敌对国家的船只的权利。美国政府旨在打击大规模扩散武器的“扩散武器安全提案”在《公约》的制约下将变为不合法。尽管《公约》的支持者称公约将提供一个论坛来促进‘提案’，但反对人士则称批准《公约》将限制美国拦截在国际法下可能合法但确实有问题的船只的能力。任何反扩散武器政策都是在主观估测基础上对各国采取不同的标准。《公约》对此没有进行区分，而且对抓获装载大规划扩散武器的船只概念模糊，采纳这样的条约不会增强美国的立场。

针对这些反对声音，美国参议院外交委员会 2003 年 10 月 14 日与 10 月 21 日就美国加入《公约》事项举行了两次听证会，美参议院资深议员、国务院等政府部门、军方代表及海洋矿业、环境、航运、渔业各界代表作了证词，所有证词都强烈支持并敦促参议院尽快批准美国加入公约。2004 年 2 月 25 日，美国参议院对外关系委员会以 15 票全数通过了《公约》，布什政府也对此持支持态度。但是，美国参议院某些议员仍以《公约》将破坏美国的主权为由，阻止美国批准《公约》。5 月 12 日，美国众议院国际关系委员会就批准《公约》进行讨论，反对者和支持者意见相持不下。美国国务院法律顾问和美国海军官员作证支持批准《公约》，坚称《公约》的批准将促进海洋稳定、美国的能动性和国家安全。反对派则以损害主权、给开采资源强加不必要的限制、潜在的国际税务及挑战美国国家安全为由反对批准《公约》。

四、案例分析——《公约》签署国与美国的外交斗争

美国至今没有批准《公约》，与他国发生海事冲突的情况下，如欲借助于《公约》中的条款为其行为辩护，从法理上站不住脚。而签署了《公约》的国家在与美国发生海事冲突时，应当充分运用国际法和《公约》，凭借自身的成员国地位，来

10 Dana Robert Killion, How the Bush Administration Should Handle China and South China Sea Maritime Territorial Dispute, at http://www.heritage.org/Research/AsiaandthePacific/BG1470.cfm,15 October 2004.

维护自己的海洋权益。

1.《公约》和中美撞机谈判

中美军机相撞事件发生后，双方均援引国际法，以期赢得国内国际舆论。由于飞机相撞在距我海南岛东南 104 公里处上空，属中国沿海专属经济区的上覆空域，故针对专属经济区问题的 1982 年《公约》第 58 条一时间成为双方的法理依据，尽管双方对该条款的解释截然相反。

美方援引第 58 条第 1 款，因它规定所有国家在他国专属经济区都享有航行与飞越自由。中方则援引第 58 条第 3 款，因它规定各国在他国专属经济区上空行使飞越自由时，“应当顾及沿海国的权利和义务，并遵守沿海国按照本公约的规定和其他国际法规则所制定的与本部分不相抵触的法律规章”。中方据此进一步指出，一国飞机在另一国专属经济区上空行使飞越自由时，必须尊重沿海国的国家主权和领土完整，不得危害沿海国的国家安全与和平秩序，任何无视沿海国上述权利的行为都是对飞越自由的滥用[11]。

有国际法学者则认为，中美上述观点，均忽略了一个重要事实，即美国至今不是 1982 年《公约》的缔约国。因此，美国在其他国家专属经济区上空的飞越自由权利，缔约国（如中国）是可以给予限制的，即要美国“顾及沿海国的权利和义务”[12]。

巴西于 1983 年立法，禁止他国在巴西专属经济区从事军事活动（包括限制军用飞机的飞越自由）[13]。虽然国际法学者对巴西的立法是否符合《公约》尚存争议，但有一点是明确的，即对《公约》的非缔约国（如美国）来说，巴西的立法是难以被质疑的。斯坦福法学院访问学者崔之元在其评论文章《中美谈判与海洋法公约》中提出，当初在中美谈判中，中国如能超越美方在撞机细节上的纠缠，把重点放在非缔约国在他国专属经济区上“飞越自由”所应受的限制上，就会更具谈判的主动权，进而使美方作出实质性让步，获得相应的利益补偿，并赢得国内国际舆论的支持。与其追究是谁违反了国际法原则，我们不如反躬自问，究竟是谁更善于运用国际法准则以立于不败之地。

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11 崔之元：《中美谈判与海洋法公约》，下载于 http://www.zaobao.com/cgi-bin/asianet/gb2big5/g2b.pl?/special/china/sino_us/pages2/crash210401e.html，2004 年 10 月 15 日。

12 崔之元：《中美谈判与海洋法公约》，下载于 http://www.zaobao.com/cgi-bin/asianet/gb2big5/g2b.pl?/special/china/sino_us/pages2/crash210401e.html，2004 年 10 月 15 日。

13 按照《联合国海洋法公约》第 301 条，一国在行使其公约下的权利时，“应不对任何国家的领土完整或政治独立进行任何武力威胁或使用武力，或以任何其他与《联合国宪章》所载国际法原则不符方式进行武力威胁或使用武力。”巴西政府认为，这一条是禁止他国在巴西专属经济区从事军事活动的国际法依据，尽管本文开头所引的《联合国海洋法公约》第 58 条并未明言航行与飞越自由不包括军事活动。迄今，秘鲁和厄瓜多尔也通过了在专属经济区禁止他国军事活动的立法。

2. 美军欲入“马六甲”

据《解放日报》报道，今年 6 月 23 日，印尼和马来西亚军方代表在巴厘岛达成协议，同意在马六甲海峡举行联合军事演习，以共同对付海盗和恐怖主义威胁，并确保经过海峡的任何外国舰队遵循海洋法公约规定的恰当的程序。印马此举是对美国正在积极推销的地区海上安全倡议[14]作出的一个实质性的反应。

面对马印两国的强烈反对，法戈上将于 2004 年 5 月 3 日在加拿大一次会议上解释说，“地区海上安全倡议将在现有国际法和国内法范围内采取行动。”但法戈在此解释中明言，需要建立海上拦截能力以对付威胁。美国防部长拉姆斯菲尔德出席 6 月初在新加坡召开的亚洲安全大会期间明确表示美应向东南亚派驻部队参与反恐。拉姆斯菲尔德谈的向东南亚派驻部队当前重点是指向马六甲海峡[15]。

按照 1982 年《公约》第 38 条，在用于国际航行的海峡，“所有船舶和飞机均享有过境通行的权利”，过境通行是指“专为在公海或专属经济区的一个部分和公海或专属经济区的另一部分之间的海峡继续不停和迅速过境的目的而行使航行和飞越自由。”《公约》第 34 条又特别规定，“本部分所规定的用于国际航行的海峡的通过制度，不应在其他方面影响构成这种海峡的水域的法律地位，或影响海峡沿岸国对这种水域及其上空、海床和底土行使其主权或管辖权。”美国的地区海上安全倡议超出了海峡过境通行权，侵犯了沿岸国主权，显然与《公约》不符[16]。

3. 美国擅闯中国专属经济区

据《环球时报》报道，2002 年 9 月间，中国的军用飞机和海军舰艇与美国在黄海水域进行勘探工作的“鲍迪奇”号不断“遭遇”，最为接近的一次，双方距离只有 60 米。中国舰艇“以驾驶台对驾驶台通信”方式数度发出信号要求美舰停止作业，离开这一海域。中国外交部向美国国务院提出外交照会，抗议美国海洋测量船“鲍迪奇”号侵入中国黄海“专属经济区海域”从事监听、侦察等“活动”。

美国《华盛顿时报》报道说，美国有国防官员指责中国的抗议“很无理”，因

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14 地区海上安全倡议是美太平洋军区总司令托马斯•法戈上将 2004 年 3 月在向国会作军区年度陈述时正式提出的，其中心意思是美要派海军陆战队和特种部队进驻马六甲海峡，搭乘高速舰艇巡逻海峡，以协助那里的反恐斗争。但是，地区海上安全倡议遭到马六甲海峡沿岸国家马来西亚和印尼的竭力反对。

15 马六甲海峡长约 800 公里，状似漏斗，其南口宽只有 35 海里，并有许多小岛，向北渐宽，最宽处达 134.5 海里，中间大部分地段宽 40 海里左右。除海峡沿岸国两岸享有 12 海里领海和海峡内小岛至少也享有 12 海里领海外，余为专属经济区水域；海峡沿岸国对海峡领海水域享有主权，对海峡专属经济区水域享有主权权利。

16 季国兴：《专家：美军若进驻马六甲不符合海洋法公约》，《解放日报》2004 年 6 月 27 日。

为“鲍迪奇”号[17]没有武装，而且是在中国北方海岸以外大约 100 公里的公海上作业。这位官员说：“一艘进行水文测量的无武装船只很难说是威胁。”他甚至说，“鲍迪奇”号还有一项没有明说的任务，那就是“宣扬美国海军在公海上的自由航行权”。

美国防部认为，“鲍迪奇”号在 12 海里领海线以外的公海活动，但事实上，根据《公约》的有关条款，这一海域仍属于中国的“专属经济区”。根据《公约》规定，外国在专属经济区内享有船舶航行、飞机飞越、铺设海底光电缆和管道的自由，但在行使此项权利时，必须遵守沿海国的有关法律和规章。专属经济区不同于公海，它是受沿海国家管辖和支配的海域，沿海国对该区域内的自然资源享有主权，并在其他一些方面享有管辖权，从而限制了其他国家在该区域内的非法活动。

此外，《公约》还规定：外国军舰、飞机在享有公约规定的航行和飞越自由的同时，要顾及到沿海国的权利，应遵守沿海国的法律和国际法规则，不得从事危害沿海国主权、安全和国家利益的活动，即只能是通常所说的“无害通过”。《中华人民共和国专属经济区和大陆架法》第 11 条明确规定，中国对专属经济区享有监视、管理、控制的权利。

美国媒体在报道中提到的“公海航行自由”原则，实际上是一项国际法惯例，通常是指国际海峡、公海海域和重要的海峡通道。但是，1982 年《公约》实行后，对公海的界定出现了一些争论。根据传统国际法，领海以外就是公海；而新的海洋法制度则在领海以外划定了毗连区、专属经济区。美国等国至今仍然维持传统的 3 海里领海制度，认为美国军舰或商船平时不用提前通报，便可通过外国领海。美国认为自己享有“在 12 海里领海外包括国际海峡在内的所有海域进行自由航行和飞越”的权力，也就是说，美国军舰可以在别国领海外的毗连区、专属经济区任意航行，航母上的战机可自由起飞和降落，导弹、火炮和鱼雷可以随便操练，当然还可进行情报侦察、军事演习和使用武力进行海上威慑等行动。

与此相反，世界大多数国家都遵守《公约》规定，一般将领海划定为 12 海里，并在领海外划定了毗连区和专属经济区。许多沿海国认为，外国军舰和飞机要在领海以内“无害通过”必须事先获准，即使是在专属经济区内航行也要尊重沿海国的管辖权。很显然，美国还是继续沿用自己不遵守国际规则的逻辑，这自然会与

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17 据调查，虽然美国军方声称“鲍迪奇”号只是一艘海洋测量船，但它实际上配备了先进的情报侦察系统。除海图测绘系统、可用于军事目的的海洋水文分析设备、水下侦察设备外，“鲍迪奇”号配备了先进的拖曳式声纳系统，可以通过水下监听获取周围海域的潜艇等水下目标活动的情报。尽管我们对该船声纳系统的详情不了解，但从美国海军声纳系统的技术水平分析，“鲍迪奇”号在距我国海岸 52 海里处活动，完全有可能获取到在我国沿海基地和近海海域活动的中国海军潜艇情报。另据美国媒体披露，一艘中国渔船毁坏了“鲍迪奇”号上的拖曳式声纳的一只水下听声器。可见，该船不仅正在从事危害中国国家安全的非法情报活动，而且也危及到中国渔船在我专属经济区内的渔业活动，严重损害了我国的安全利益和经济利益。

遵守国际规则的沿海国发生这样或那样的矛盾。

五、结　论

纵观 1958 年至今美国政府对《公约》的立场演变，可以看出，美国历届政府对《公约》的态度关键在于视《公约》条款是否满足其利益。卡特政府认为《公约》符合美国的利益并准备接受包括海底制度在内的整个《公约》；随后，里根政府以深海采矿部分不符合美国的利益为由拒不批准《公约》，并宣布接受除第十一部分之外的《公约》为“国际习惯法”；联合国在深层海底矿藏问题上向美国作出相当大让步后，克林顿政府提请参议院批准美国加入《公约》，但至今没有定论。2003 年 10 月至今年 5 月间，美国两院有关部门举行了 3 次听证会，结果表明支持《公约》的呼声增高。但是仍有不少反对声音，除了担心海洋控制权被联合国掌握、不愿与他国共享开采公海资源收入、不甘丧失海洋霸权等经济和安全利益外，还以“9•11”后反恐需要为由，指责《公约》的部分条款局限了美国的反恐能力。

通过中美撞机谈判等几个案例分析，美国至今不批准《公约》，在其与他国发生海事冲突的情况下，如欲借助于《公约》中的条款为其行为辩护，从法理上站不住脚。即便近期内美国凭借其强大的军事力量为其霸权行为诡辩而侥幸获胜，但是，当越来越多的国家已经开始运用国际法和《公约》来维护自己的海洋权益时，美国不批准《公约》的立场必将置己于不利之势。

以《公约》为法律基础的海洋秩序的构建是一个世界性潮流，美国全球战略布局的调整，必然会与其他国家发生利益冲突，挑战现行海洋法律秩序。所以，美国对公约所持的态度和立场，将会随着其国内政治和全球战略调整而变化。

海域规范管理方法论

罗曼丽 *

内容摘要: 2002 年 1 月 1 日生效的《中华人民共和国海域使用管理法》规定了海域国家所有制度和不完整的海域使用权流转制度。但是，该法的规定比较原则、可操作性差，如何真正实现该法的立法初衷是实践中急需研究解决的问题。本文通过对我国目前海域使用权一级市场确权发证、二级市场流转现状的介绍以及对两个层面上存在问题的分析，提出对海域进行规范管理的建设性意见，在此基础上概括了为实现上述目的当前必须做的配套工作，力图建构我国科学、合理的海域权属管理制度，从而为发展我国海洋经济提供制度支持。

关键词: 海域　不动产　审批　流转

一、问题的提出

随着社会经济的发展，自然资源的利用效率在经济可持续发展中的重要性日益突显。在过去的 20 年里，我国已建立了土地使用权的有效利用制度。1986 年制定了《中华人民共和国土地管理法》并于 1988 年、1998 年、2004 年进行了 3 次修订；1999 年国务院颁发了《中华人民共和国土地管理法实施条例》；2002 年国家颁布施行了《中华人民共和国农村土地承包法》。这些法律、法规与《中华人民共和国城市房地产管理法》（1994 年施行）、《中华人民共和国担保法》（1995 年施行）、《中华人民共和国民法通则》（1986 年施行）、《中华人民共和国合同法》（1999 年施行）等法律相互配合形成了我国土地利用方面的法律体系，构建了我国土地使用权流转制度，为土地资源的合理、有效的利用提供了法律保障。

但是，由于我们对海洋资源的开发利用起步较晚，对海洋资源在经济发展中的重要性认识不足，使得我们对海洋资源利用方面的立法可操作性差、内容严重滞后。表现在：

1.《中华人民共和国海域使用管理法》（以下简称“《海域法》”）第 17 条规定县级以上海洋行政主管部门负责海域使用申请的审核、县级以上人民政府负责海

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域使用申请的审批，第 16 条规定单位和个人可以向海洋行政主管部门申请使用海域。但是，由于海洋行政主管部门成立时间短，存在着人员少、职责新、任务重的问题，加上行政机关离海域较远，导致了海洋行政主管部门充分独立履行职责困难大。实践中出现了将海域使用权首先审批给农村或乡镇集体经济组织，再由集体经济组织出租给实际使用海域的单位和个人的现象。此种做法剥夺了真正使用海域的单位或个人公平竞争的权利，违背了《海域法》的立法初衷。

2. 根据《海域法》的规定，所有使用海域的单位或个人都必须缴纳海域使用金，办理海域使用权证（依法可以免缴的除外）。但对于历史上曾签过长期养殖契约（合同）的养殖海域如何确权发证却没有规定，由此造成了渔民对海域使用权证的发放存在抵制情绪，在部分养殖海域，海域使用权证发不下去。

3. 我国于 2002 年颁布施行《海域法》，该法虽明文规定海域使用权可以通过招标、拍卖的方式取得，规定海域使用权可依法转让、继承，但对招标、拍卖、转让及继承的条件及程序没有配套的规定，特别是对海域使用权是否可以出租、抵押等流转制度没有做出规定，这势必影响海域使用权人在不能有效利用其所取得海域使用权的海域时处分其海域使用权的自由，降低了海洋资源的利用效率，从某种意义上说，浪费了占国土总面积 30% 的蓝色国土资源。

因此，适应社会经济的迅速发展及市场经济的要求，规范海域使用申请审批程序、探索并完善海域使用权招标拍卖的条件和程序、合理处理历史遗留的问题、建立规范有序的海域使用权二级市场，是经济发展的需要，也是实践的需要。在目前实践中，我国海域使用权人私自转让、出租、承包其取得的海域使用权的做法相当普遍，由于这些做法没有法律的支持，海域使用权的纠纷相当普遍。因此，尽快完善海域使用管理制度，使《海域法》具有可操作性也是实践的迫切要求。笔者认为，当前一段时期内，完善海域使用管理制度的当务之急是健全海域使用权流转制度。

海域使用权流转指海域使用权在不同的权利主体之间的流动，包括海域使用权的初始取得（即海域使用权的出让），以及海域使用权的既受取得（即海域使用权的转让、出租、抵押或继承）。海域使用权的出让形成海域使用权流转的一级市场；海域使用权的转让、出租、抵押或继承形成海域使用权流转的二级市场。规范的海域使用权一级市场是海域使用权二级市场规范化运作的前提条件。发展海洋经济必须首先建立规范有序的海域使用权一级市场和海域使用权二级市场。

二、规范海域使用权流转一级市场

（一）规范海域使用权出让申请审批的条件和程序

《海域法》第 3 条规定：海域属于国家所有，国务院代表国家行使海域所有权。根据所有权与使用权分离从而充分发挥物的效用的原则，本法第 16 条规定单位和个人可以通过申请或通过招标、拍卖的方式取得海域使用权，在第 17 条规定了县级以上人民政府海洋行政主管部门是海域使用申请审核的行政主管部门、县级以上人民政府是海域使用申请审批的政府部门。根据我国的现有行政管理体制，海域使用申请审批中的主要工作由海洋行政主管部门承担，因此海洋行政主管部门承担了所辖区域内大部分海域使用申请审批中的主要工作。[1] 由于海洋行政主管部门特别是市、县（市、区）海洋行政主管部门是 90 年代中期以后才组建的新部门，甚至有的县（市）、区到目前为止还属于农业部门的一个处室，没有独立的海洋行政主管部门，因此普遍存在人员少、职责新的现象。同时由于行政机关坐落在城区，离海域距离远、直接管理海域不方便，而乡镇人民政府和村民自治组织在海洋行政主管部门管理海域过程中工作上支持不够，致使海洋行政主管部门充分履行海域管理职能难度很大，《海域法》规定的各项制度没有落到实处。综观全国各地的情况，目前还没有真正实现依法管海的新局面。

因此，在资源枯竭趋势日益明显、环境污染导致资源利用效率严重降低的情况下，我们必须总结实践经验，理清思路，按照有关法律法规的要求探索依法管海的新方法，实现海洋资源的可持续利用。

1. 2002 年 1 月 1 日后开始的新项目用海的管理现状及处理对策

两年来，各地主要采取以下两种方法对该种海域进行管理：

（1）将海域使用权证先发给乡镇集体经济组织后，由乡镇集体经济组织出租给实际使用海域的单位和个人。乡镇集体经济组织（实践中称“……公司”）的负责人（实践中称“……经理”）由乡镇政府工作人员兼任。该宗海域的管理就相应地由该乡镇人民政府管理。

（2）将海域使用权证先发给农村集体经济组织（实践中也称“……公司”），由农村集体经济组织（主要是村民委员会）出租给实际使用海域的单位和个人。该宗海域的管理相应地由该农村集体经济组织管理。

上述 2 种方法在一定程度上减轻了海洋行政主管部门和同级人民政府在海域管理工作中的难度和压力，但是这两种方法都是违反法律规定的。首先，海洋行政主管部门和同级人民政府把海域使用权证先审批给乡镇集体经济组织的本意是发挥乡镇人民政府管理海域的积极性，求得乡镇人民政府对其海域管理工作的帮助和支持，但是此集体经济组织的领导（经理）是乡镇人民政府公务员，此种做法

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1 此处意思是说海域使用申请审批过程中，海洋行政主管部门通过书面审查、实地勘察等多种形式对申请人的申请进行审查，经过审查，签署审核意见后报有批准权的人民政府批准，该级人民政府一般只做书面审查或称形式上的审查，即签署同意批准或不同意批准的意见。政府批准后，证书的办理手续由海洋行政主管部门代政府发放，所以说，海域使用申请审批工作中，海洋行政主管部门承担了实质性的主要工作。

违反了《中华人民共和国公司法》第 58 条和《国家公务员暂行条例》第 13 条第 13 款中有关国家公务员不得在经营性单位兼职的规定。

其次，乡镇人民政府公务员到集体经济组织兼职，导致了政企不分，乡镇政府既是运动员又是裁判员，剥夺了其他纯民营经济组织公平竞争的机会，创造了公务员腐败滋生的土壤。

再次，在养殖海域，按照现行法律规定，养殖者必须领取海域使用权证和养殖证两个证件。海洋行政主管部门及同级人民政府先把海域使用权证审批给乡镇集体经济组织或村集体经济组织就意味着该宗海域养殖证也必须首先审批给乡镇集体经济组织或村集体经济组织。但是《中华人民共和国渔业法》（以下简称《渔业法》）第 12 条明文规定：县级以上地方人民政府在核发养殖证时应当优先安排当地的渔业生产者。由于现实生活中的集体经济组织不是真正的渔业生产者，所以这种做法违背了《渔业法》第 12 条有关当地渔业生产者所享有优先权的规定。

最后，乡镇集体经济组织或农村集体经济组织先领取海域使用权证而不进行投资就将该宗海域出租出去的做法导致了非法炒卖海域现象，使得国家海域成为相关人员非法敛财的来源，这既损害了国家的利益也损害了真正渔民的利益。在目前有关村民委员会的法律性质不明确（指民事主体还是行政主体）以及农村集体经济组织和村民委员会在行使村集体财政权缺乏有力监督的情况下更容易使其收取的海域使用租金流入少数人的腰包。

根据《海域法》第 16 条的规定，2002 年 1 月 1 日后开始利用海域的单位和个人，均可以直接向县级以上海洋行政主管部门提出申请，符合法定条件的，均可以获得海域使用权。因此，目前海洋行政主管部门及其同级人民政府把海域使用权先审批给集体经济组织，由集体经济组织出租并进行相应海域管理的做法是违反法律规定的，是不可取的。

笔者认为，在目前海洋行政主管部门人员少、业务量大的情况下，海洋行政主管部门可以根据《中华人民共和国行政许可法》（以下简称《许可法》）第 24 条的规定将 2002 年 1 月 1 日后新发生的用海申请的审核权一部分委托给乡镇人民政府，从而减少海洋行政主管部门在海域管理工作中的难度和压力。

《许可法》第 24 条规定：行政机关在其法定职权范围内，依照法律、法规、规章的规定，可以委托其他行政机关实施行政许可。委托机关对受委托行政机关实施行政许可的行为应当负责监督，并对该行为的后果承担法律责任。受委托行政机关在委托范围内，以委托行政机关的名义实施行政许可，不得再委托其他组织或个人实施行政许可。该条规定的理论基础是代理制度理论。在法律上，代理制度是指代理人以被代理人的名义为了被代理人的利益从事法律行为，其法律后果由被代理人承担的制度。在代理法律制度中，代理事项的范围和代理期限由代理人与被代理人商定并经被代理人签发授权委托书，在代理权限和代理期限内，代理人有根据法律的规定和授权委托书上规定的范围以自己的意志从事法律行为的

权利，代理人的行为视同被代理人的行为，即一切法律后果均由被代理人承担。基于被代理人承担代理人行为的法律后果这一强制性法律规定，法律同时授予被代理人对代理人的行为行使监督的权力。

在代理期限内，如果乡镇人民政府有违反规定签署审核意见或者有其他违法行为的，海洋行政主管部门可以随时解除委托，收回审核授权，其同级人民政府也可以对该项申请做出与审核意见相反的审批或不予审批的决定。代理期限届满，代理人可以辞去代理工作，被代理人也可以终止授权，当然双方也可以续签代理协议，继续代理事项。目前在海洋行政主管部门人员少工作量大、距离海域远的情况下，采用这种制度的优点是，将一部分海域的审核权委托给乡镇人民政府，利用了乡镇人民政府在历史上管理养殖用海的经验，提高了乡镇人民政府配合县级海洋行政主管部门工作的积极性，减少了海洋行政主管部门的工作压力和难度，海洋行政主管部门可以把主要精力集中在面积大、管理难度大的项目用海审核以及海域（海洋）行政执法上。通过强有力的海洋行政执法提高海域管理的效益和力度，从而实现海域管理的法制化、海域使用的规范化。具体做法是：

（1）海洋行政主管部门向乡镇人民政府授权，签订书面代理合同明确双方的权利和义务，代理合同必须明确规定的内容包括：代理事项的范围、代理期限、双方的权利和义务。关于代理事项的范围，我们建议根据使用海域的面积（如……亩以下）、海域用途（如养殖用海）、海域管理的难易程度，将面积小、管理难度小的养殖用海授权给乡镇人民政府审核，面积较大、管理难度大的养殖用海（主要指本文第二部分、第三部分所述的养殖用海）和所有有关建设用海的申请仍由海洋行政主管部门审核。关于双方的权利和义务，我们建议在代理合同中明确规定：①授权方（被代理人）：海洋行政主管部门，被授权方（代理人）：乡镇人民政府；②海洋行政主管部门对乡镇人民政府相关人员的监督权；③乡镇人民政府有义务制定对相关审核人员的监督管理的工作制度，使责任追究落到实处；④可提前收回委托授权；⑤代理期限以及期满后的处理方法。（2）乡镇人民政府在对用海申请进行审核签署意见后将材料直接报有批准权的人民政府。（3）人民政府审批的，由该级人民政府海洋行政主管部门办理相关海域使用权证，申请人缴纳海域使用金后，由乡镇人民政府将海域使用权证交申请人，人民政府不予批准的，由乡镇人民政府将材料退回申请人。（4）该级人民政府海洋行政主管部门将审批情况进行备案登记以便进行执法检查。

乡镇人民政府在审核授权范围内新发生用海申请时必须做到：（1）严格按照法律、法规规定的条件和程序进行审核；（2）合理安排取得海域使用权的优先顺序。根据《海域法》的规定，单位和个人都可以依法取得海域使用权，而根据《渔业法》的规定，核发养殖证时应当优先考虑当地的渔业生产者。由于同一宗海域养殖证与海域使用权证规定的四址是统一的，所以乡镇人民政府按照海洋（海域）功能区划拟将与其行政区域相邻的养殖海域审批给渔业生产者时，应当按照以下优先顺

序进行：① a. 该乡镇专业渔民；b. 该乡镇兼业渔民；c. 该乡镇从事渔业生产的经济组织；②在满足上述条件下养殖海域还有剩余时，按照下列顺序进行：a. 该乡镇所在县（市）、区专业渔民；b. 该乡镇所在县（市）、区兼业渔民；c. 该乡镇所在县（市）、区从事养殖生产的经济组织；d. 该乡镇所在县（市）、区其他非渔业从业人员；e. 该乡镇所在县（市）、区其他经济组织。

为了发挥乡镇人民政府在海域管理中的积极性，实际进行了海域使用申请审批行为的各级人民政府应当根据上一年度海域使用金的缴纳情况在每年的财政预算中安排一定的比例用于相关乡镇的建设。

乡镇人民政府按照上述制度设计进行海域使用审核时，审核文件上的签章是委托授权的海洋行政主管部门，因此，由于乡镇人民政府的审核行为而导致的法律后果（包括不利法律后果）均由委托授权的海洋行政主管部门承担。

海洋行政主管部门将其职责范围内的审核事项的一部分委托给乡镇人民政府办理，是在目前情况下既符合实际又合法的一种两全其美的做法。在代理期限届满时海洋行政主管部门的人员配齐后，可根据情况撤回委托，收回被委托的审核权。

由于海域使用的审核或审批是法律赋予行政机关的行政管理权，根据行政法的一般原则，行政管理权只能由行政机关行使，除法律、行政法规授权的管理公共事务的组织外，其他组织或个人不具有行政管理权，行政机关也不得将自己的行政管理权擅自授权给其他组织或个人行使。按照《宪法》的规定，村民自治组织不是行政机关，集体经济组织也不是行政机关。因此，海洋行政主管部门不得委托村民自治组织或者村集体经济组织进行海域使用申请的审核。

通过上述措施的实施，实现了单位和个人通过申请依法同等获得海域使用权的权利，防止了非法炒卖海域的现象。

2. 关于 2002 年 1 月 1 日前已经开始用海、2002 年 1 月 1 日后继续用海并曾取得过有关部门核发的有关海域使用证件的管理现状及处理建议

20 世纪 80 年代，沿海有关乡镇曾向当地渔民或者渔业经济组织发过海域（主要是滩涂）使用权契约（合同），契约上规定海域使用权长期有效，当时海域都是无偿使用。2002 年 1 月 1 日生效的《海域法》规定海域实行有偿使用制度，养殖用海必须经批准后才能免缴海域使用金。那么对曾领过滩涂使用契约的渔民或渔业经济组织来说，如何确权发证、如何处理缴纳海域使用金问题是正确贯彻《海域法》必须解决的问题。实践中海域使用权证发不下去、海域使用金收不上来，渔民仍然在没有领取海域使用权证的情况下继续无偿使用海域，渔业经济组织在没缴海域使用金的情况下继续出租或承包海域并从中牟利。

笔者认为，行政行为合法性是行政法的基本要求，而“行政行为的合法性包括

主体合法、职权合法、内容合法和程序合法”。[2]“职权合法”指行政机关的职权必须有法律的明确规定。法律没有授权，行政机关则没有相应职权。[3] 20 世纪 80 年代在国家没有明确规定海域权属归属以及海域所有权代为行使机关的情况下，乡镇人民政府和渔民或渔业经济组织签订的滩涂使用契约没有法律依据，属于违法行政。根据《中华人民共和国合同法》（以下简称《合同法》）第 52 条第 5 款“违反法律、行政法规的强制性规定的合同（契约）无效”的规定，该契约（合同）属无效契约（合同）。无效合同（契约）自始就没有法律约束力。

对使用权契约（合同）无效这一问题的处理，笔者认为乡镇人民政府作为国家行政机关本应该知道自己的职权范围，但由于自己的过错做出了不符合法律规定的行为，所以，乡镇人民政府有过错，而渔民或渔业经济组织成员作为行政管理中的被管理者，其法律知识缺乏，特别是在当时的社会经济发展水平下，渔民或渔业经济组织成员不可能知道行政机关有没有该项行政管理权，基于对政府的信赖这一任何国家必须具备的基本条件，与政府签订了海域使用权长期有效的契约。因此，渔民或渔业经济组织在这一行为中没有过错。《合同法》第 58 条规定：“合同无效后，因该合同取得的财产，应当予以返还，不能返还或者没有必要返还的，应当予以折价补偿，有过错的一方应当赔偿对方因此所受到的损失”。根据这一规定，契约（合同）无效后，乡镇人民政府本来有要求渔民返还 20 多年来养殖收益的权利，同时有对因自己的过错给渔民造成的损失进行赔偿的义务。对渔民返还收益来说，应该属于《合同法》第 58 条规定的没有必要返还而折价补偿的情形。

所以笔者对这一问题最终的处理建议是：首先，处理这一问题涉及的优惠对象或者赔偿对象是渔民而不是渔业经济组织。

其次，对渔民 20 多年的养殖收益和因契约无效后渔民的损失分别进行评估，养殖收益的评估标准是：以县养殖海域（滩涂）单位年平均产量乘以已养殖年限；渔民在契约无效这一行为中受到的损失是：多年来形成的生活习惯造成了对该宗海域（滩涂）的依赖，没有别的求生技能，海域（滩涂）已成为他们基本的生产资料，养殖已成为他们基本的生活方式，因此渔民损失的赔偿标准是他们获得新的生活技能所需要的资金投入。

再次，收益与损失的评估数额出来后把两者相减，所得差是正数时国家放弃要求渔民上缴收益的权利，此时，渔民若想继续使用海域（滩涂）从事养殖生产必须缴纳海域使用金、办理海域使用权证；所得差是负数时的处理方法有两种方案，一种方案是对渔民继续使用海域（滩涂）进行养殖的，可以考虑通过免缴一定年限的海域使用金的方法办理海域使用权证，免缴年限到期后，养殖人若继续使用海域，必须缴纳海域使用金并办理海域使用权证；第二种方案是对渔民停止养殖生产

2 方世荣著：《行政法与行政诉讼法》，北京：中国政法大学出版社 1999 年版，第 121~123 页。
3 方世荣著：《行政法与行政诉讼法》，北京：中国政法大学出版社 1999 年版，第 121~123 页。

从事其他职业的，赔偿标准是他们获得新的生活技能所需要的资金投入数额，这种资金的投入可采用政府组织相关渔民进行免费技能培训的方式进行。2002 年后这些海域（含滩涂）的审批权限在县级以上人民政府，所以应由县级以上人民政府根据各自的审批权限进行赔偿。县级以上人民政府应当根据实际情况制定具体的赔偿方案。虽然乡镇人民政府在这一行为中存在过错，但当时国家对海域使用疏于管理、海域权属不明是造成乡镇人民政府进行无权行政行为的直接原因，而不单纯是乡镇人民政府的责任。所以对渔民进行赔偿后不应追究乡镇人民政府相关人员的法律责任。赔偿资金到位后，海域有偿使用制度必须实行，继续用海的养殖户必须根据《海域法》的规定，在海洋行政主管部门通知其办理海域使用权证规定的期限内依法办理海域使用申请审批相关手续并按规定缴纳海域使用金。对渔业经济组织来说，由于多年来渔业经济组织是在无偿利用国家海域（滩涂）资源从中牟利，所以对之不存在赔偿问题。2002 年后该种渔业经济组织若继续使用海域，必须按《海域法》的要求缴纳海域使用金、办理海域使用权证。随着经济的发展，以前我国地大物博、资源丰富、取之不竭、用之不尽的理论已经证明是非常错误的，为了保护资源，保证资源的可持续利用，以前无偿使用国家资源的做法必须改变。

3. 对历史上形成的以渔业为主要生活来源但没有办理用海契约（合同）的渔民用海的管理现状及处理方法

受历史上生产力发展水平以及居住地理位置的制约，沿海渔民以海为生。海域对于这种渔民，就像土地对于农民一样。渔民认为缴纳海域使用金、领取海域使用权证是国家剥夺了他们基本的生活资料。实践中对这种用海的确权发证也存在一定的难度。到目前为止，在全国范围内，该种用海的确权发证率极低。为了不折不扣地贯彻执行《海域法》，使所有用海的单位和个人都取得海域使用权证，笔者认为对该种用海应该分两种情况处理。一种是如果是继续用海的，必须按规定缴纳海域使用金办理海域使用权证。理由是随着经济的发展和社会的进步，资源利用从无偿向有偿使用转变是历史发展的趋势。为了发挥资源应有的经济价值，实现资源的可持续利用，必须以经济的形式约束和限制资源的低效益利用。如果是改行从事其他产业或行业的，按照渔民转产转业的政策对其进行一定补偿，这种补偿是资金赞助的性质，目的是扶助他们获得新的求生技能。补偿的前提条件是：补偿对象是传统的专业渔民。所谓传统的专业渔民是指多年来主要以海域为唯一的或主要的生活来源，没有土地。此种渔民除了从事渔业生产以外没有任何其他生产技能，转行从事其他职业对他们来说困难较大，政府应该给予一定的帮助或扶持。

4. 2002 年以前已经由农村集体经济组织或者村民委员会经营管理但没有领取过相关证件的养殖用海管理现状及处理方法

对于这种用海，其确权发证应该适用《海域法》第 22 条的规定，即符合海洋功能区划的，经当地县级人民政府核准，可以将海域使用权确定给该农村集体经

济组织或者村民委员会，由本集体经济组织成员承包，从事养殖生产。但是，相关农村集体经济组织或村民委员会应该依法领取海域使用权证，缴纳海域使用金。

其他的单位和个人在 2002 年 1 月 1 日后需要通过申请的方法使用海域的，应当按照《海域法》的规定以及上面的方法办理海域使用金缴纳手续、领取海域使用权证。

渔业用海域（含渔业经营用海域）的使用金的标准应低于建设用海域使用金的标准。渔业经营用海域（指以出租、转让为目的从中获利的情形）使用金的标准应高于直接用于渔业生产海域（指渔民个人或渔民家庭使用海域的情形）使用金的标准。

（二）探索并完善海域使用权出让的招标、拍卖程序

虽然《海域法》第 20 条规定，海域使用权可以通过招标或拍卖的方法取得，但是由于我们对海洋资源在经济发展中的重要性认识不足，导致我们对海洋资源的开发起步较晚。加上海洋独特的自然属性及地理特征决定了海洋资源的开发投入大、回报所需周期长，所以前些年对海洋资源的投资热情不高，海域使用权出让时无法形成竞争力量，现实生活中海域使用权出让很少通过招标、拍卖方法进行。《中华人民共和国招标投标法》所规定的招标、拍卖的适用对象是建设工程，《中华人民共和国拍卖法》所适用的对象是拍卖企业所进行的拍卖活动。所以海域使用权的招标或拍卖活动直接适用上述两部法律明显不妥。此种情况造成了不同地方通过招标或拍卖方法出让海域使用权的做法不统一、程序不规范。现在，随着资源开发热潮由陆地向海洋转移，海域资源日益成为投资的热点。为了体现公开、公平、公正的原则，最大可能发挥资源的利用效率，探索并完善海域使用权招标、拍卖的方式方法已经成为当务之急。

1. 海域使用权招标、拍卖的条件

（1）必须是属于海洋功能区划中开发利用型海域。根据国家、浙江省及宁波市海洋功能区划分类级别体系表，海洋功能区划类型分为五大类，即开发利用类、治理保护类、保护类、保留类、特殊功能类。五种类型中只有开发利用类允许开发利用，其他 4 种只能进行以治理保护为目的的活动而不得开发利用，因此也不得以招标或拍卖的方式出让海域使用权。

（2）招标、拍卖的海域必须是建设用海域以及除沿海渔民个人养殖需要以外的其他经营性海域。经营性海域的使用人主要是通过对海域的经营管理获得经济利益，在其他条件相同的情况下，经营的水平越高，经营者获利就越多，对资源的利用就越有效益，对国家也就更有利；建设用海域的投资人主要是通过对海域的投

资达到最大化赢利的目的。对投资人来说，投资[4]越少、赢利越多越符合自己的目的；对国家来说，同一宗海域，投资越多，对国家越有利。由于通过招标或拍卖海域，出价最高者获得海域使用权。所以，为了提高国家资源的利用效率，使经营人、投资人获利的同时国家也最大限度的获利，建设用海域或经营性海域应当以招标或拍卖的方法出让海域使用权。但是渔民个人或渔民家庭养殖用海域则不同，沿海渔民以海为生，海域（滩涂）是其基本的生活资料，由于渔民个人或渔民家庭与养殖企业相比，无论是资金还是技术，都处于弱势地位，将养殖用海域全部通过招标或拍卖的方式出让给中标人或拍得人的做法会断绝沿海养殖渔民的生活来源。因此，养殖用海域必须先通过申请审批出让海域使用权的方式在满足沿海渔民养殖需要的前提下还有剩余时才能通过招标或拍卖的方法出让海域使用权。通过申请方式取得海域使用权的渔民必须是渔民个人或者渔民家庭而不包括渔业养殖公司（含各类性质的经济组织）。

（3）必须是有 2 个以上单位或个人拟获得该宗海域使用权。招标或拍卖的结果是出价高的获胜，所以如果只有一人投标或出价，则招标或拍卖的前提不存在，招标或拍卖的方式不成立，此时应改为通过申请的方式出让海域使用权。

（4）中标人或拍得人必须按照海洋功能区划以及招标或拍卖文件上的规定使用海域，不得擅自改变海域用途。

2. 海域使用权招标、拍卖的具体程序

（1）确定可以通过招标或拍卖方式出让海域使用权的海域位置，包括可以开发利用的各类海域。对养殖用海域，海洋行政主管部门必须对养殖用海的面积、沿海养殖渔民的数量以及其养殖需要进行调查，以确定有多少养殖海域以及具体哪些养殖海域适用或不适用招标或拍卖的方法，从而确定招标或拍卖哪些海域使用权；

（2）海洋行政主管部门确定标书或拍卖最低价，最低价应不低于经批准的该类用海的最低标准；

（3）海洋行政主管部门编制招标或拍卖文件，确定参加投标或竞拍单位或个人的资格条件；

（4）发出招标或拍卖公告并在不少于 2 种媒体上公布；

（5）投标者或竞拍者领取招标文件及有关资料；

（6）投标者或竞买人向海洋行政主管部门缴纳保证金，投标者将密封标书投入标箱；

（7）海洋行政主管部门评标小组确定中标者，属于拍卖方法的，确定最高出价者为拍得人；

（8）向中标者发出中标通知书，通知未中标者领回保证金；

4　此段中投资包括对海域使用金的投资。

（9）中标者及拍得人与海洋行政主管部门签订海域使用权出让合同，并按规定缴纳海域使用金，领取海域使用权证。

以招标或拍卖的方法出让海域使用权，通过公开、公平、公正的竞标或竞买，以最高出价者获得海域使用权，最大化地实现了海域资源的经济价值。

通过上述措施的实施，海域使用权确权发证到位，实现了海域使用权一级市场规范有序管理的局面，为海域使用权二级市场的规范化运作和管理奠定了坚实的基础。

三、建立规范有序的海域使用权流转二级市场

（一）海域使用权流转的公示制度

《海域法》第 2 条规定：本法所称海域是指中华人民共和国内水、领海的水面、水体、海床和底土。本法所称内水是指中华人民共和国领海基线向陆地一侧至海岸线的海域。由此可见，《海域法》所称的“海域”是指海岸线以下领海外缘线以上的区域（具体指内水以及 12 海里的领海区域），包括该区域间的滩涂和水域。

根据传统民法关于动产与不动产的分类标准，“动产”指能在空间上移动而不会损害其经济价值的物；“不动产”指在空间上占有固定位置，按其性质不能移动或者移动后会损害其经济价值的物[5]，水域、滩涂应该是不动产。但是，由于受生产力水平的制约以及海域不同于土地的特殊性，土地的四址确定后，具体土地则固定不动而海域的四址确定后其四址之内的水是流动的。传统民法中只将土地、建筑物作为不动产，而没有明确包括海域。随着经济的发展、生产力水平的提高，资源的利用日益呈现出短缺的趋势，我们必须将国土的重要部分——海域作为重要的不动产来对待，使水域、滩涂的利用适用不动产法律制度。由于海域属于不动产范畴，因此海域使用权属于不动产物权。根据民法基本理论，为了发挥物的最大效益，物权所有人可以根据自己的判断和意志将自己所拥有的物权转让他人或出租给他人从而一次性或分批次获得物权的相应经济利益，也可以用来作为债权的担保以实现融资的目的，当继承事由发生时，物权可以继承。据此，海域使用权可以转让、出租、抵押和继承。《海域法》第 27 规定：海域使用权可以依法转让和继承，但没规定依法转让或继承的具体条件及程序而是授权国务院规定。到目前为止，国务院没有规定，由此造成了实践中转让、出租、抵押海域使用权没有履行任何手续，海域使用权纠纷不断的后果。

为了避免债务人在物权流转中一物二卖或重复设定抵押权，损害债权人的利

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5 李开国、张玉敏等著：《中国民法学教程》，北京：法律出版社 1997 年版，第 261 页。

益，民法理论中有物权公示制度。物权公示是指物权享有及变动的可取信于社会公众的外部表现形式[6]，物权公示的功能是解决物权的表面归属问题。对物的流转来说，物权公示既是债权实现的法定标志、同时也为下一程序物权的变动提供法定前提。物权公示制度的基本内容是规定物权公示的方法和物权公示的效力。物权公示的方法因不动产物权与动产物权而不同。不动产物权以登记作为权利人享有物权或变动物权的公示方法，动产以占有作为权利人享有物权的公示方法，以交付作为物权变动的条件。

关于不动产物权登记的效力，世界各国有两种立法例：一是非经登记不生效力，即当事人就物权变动达成协议后还必须到主管部门进行登记才发生物权变动的效果，否则视同未发生物权变动。二是非经登记不得对抗善意第三人，即：当事人就物权变动达成协议但未到主部门办理登记的，物权变动只在双方当事人之间发生物权变动的效果，而对于不知情的第三人不发生物权变动的效果。第三人可以以未公示为由否认物权变动的效力。不动产物权变动是采取非经登记不生效力原则还是未经登记不得对抗善意第三人原则，主要决定于一个国家的法律传统、国家对不动产物权管理的严格程度以及不动产本身的性质。当某种不动产物权是经济生活中重要的不动产、不经登记常容易发生纠纷、且纠纷的后果对当事人生活影响大，或者不经登记使主管部门难以管理且容易导致对国家资源的破坏时，常常采取不动产物权的变动非经登记不生效力的立法主义。

海域是除了土地以外的另一种重要的具有土地类似用途的自然资源（对渔民来说海域就是土地，是其生活的基本来源；对建设投资人来说，海域就像建设用土地）；海域独特的地理位置以及自然属性决定了开发利用海域投资大、回报周期长，因此一旦发生海域使用权纠纷势必对纠纷当事人的生产生活造成重大影响；同时海域的特殊性质决定了海域利用以海洋功能区划为基础，海域使用必须经过科学论证，海域使用人只能根据批准的海域用途使用海域而不能擅自改变用途使用海域。

为了减少海域使用权纠纷，降低纠纷给当事人造成的损失，确保海域使用人依据批准的用途使用海域，笔者认为海域使用权流转应当采取非经登记不生效力的立法主义，即海域使用权流转在当事人达成协议后必须由双方共同到主管部门进行登记，否则不发生流转的效力。因当事人之间擅自流转所导致的行政法上的责任，如果是财产罚则可由双方协商确定，协商不成的，由双方共同平均承担。如果是行为罚，则由实施该行为的一方承担。双方都实施了该行为的，对双方同时进行处罚；所导致的民法上的责任按照过错责任原则由有过错的一方承担责任。双方均有过错的，按照各自的过错承担责任。

6　李开国、张玉敏等著：《中国民法学教程》，北京：法律出版社 1997 年版，第 272 页。

（二）海域使用权流转的具体条件和程序

1. 通过出让方式取得海域使用权的海域使用人必须对海域投入一定的资金或使用一定的期限后方可转让或出租海域。

为了防止一部分人单纯靠资金优势剥夺其他人公平竞争的机会，杜绝一部分人将国家海域作为非法敛财的来源，不经投资就将获得的海域使用权流转的炒卖海域现象应予禁止。笔者建议借鉴《中华人民共和国土地管理法》中有关投资额的规定，即建设用及其他经营性海域使用权人必须在该宗海域上投资该项目的一定百分比的资金后才能将海域使用权连同该项目一并转让（如 25% 的资金）。对养殖用海域，建议规定使用权人在使用 1/3 期限后可以转让或出租该宗海域。禁止不经开发或不经使用直接将海域转让或出租，为了避免海域使用权与项目所有权分离后导致的海域使用权人或项目所有权人相互的不公平控制，禁止将项目或海域使用权单独转让。

2. 转让或出租不得改变原批准的海域用途。未经批准改变用途转让或出租海域的，转让或出租合同无效，海洋行政主管部门不得认可该合同并对当事人按照《海域法》第 46 条的规定处理。双方按照过错责任原则承担民事责任。

3. 转让或出租的期限为海域使用权的剩余期限。

4. 分期或分批缴纳海域使用金的，双方必须协商安排好剩余年限海域使用金的缴纳方法并到海洋行政主管部门办理登记认可。未协商或协商不成的，海洋行政主管部门不得登记认可，剩余年限的海域使用金由原海域使用权人承担，原海域使用权人与受让（或承租）海域使用权人关于海域使用金的纠纷由相关部门按照民法的有关规定处理。

5. 海域使用权抵押的，用于抵押的海域使用权的价款不得高于抵押的债权总额，已经用于抵押的同一宗海域在已抵押额内不得重复设定抵押权。当然，这里涉及海域使用权价值的评估，应该逐步健全海域使用评估机构的资质管理制度。

6. 双方当事人订立书面合同并到海洋行政主管部门办理登记认可手续。

7. 海域使用权转让、出租或抵押合同非经登记不生效力。由于合同无效导致合同自始就不发生效力，因此双方的利益自始就不受法律保护。而且，双方还应该承担行政法上的责任，例如，责令停止违法行为、没收违法所得，并处一定的罚款。

8. 当继承事由发生时，在海域使用权剩余期限内，继承人有权继承。继承人持继承事由发生的相关证明文件以及继承资格证明到海洋行政主管部门办理登记变更手续。继承人必须按照海域原用途使用海域并负责剩余年限海域使用金的缴纳。

9. 在实现海域使用权上设定的抵押权时，抵押人必须按照取得的海域原用途转让海域使用权，抵押权人必须按照抵押人取得的海域原用途使用海域，双方不

得擅自改变海域的原用途。

（三）海域使用权转让、出租、抵押、继承需提交的材料

1. 海域使用权转让、出租、抵押需提交的材料：

（1）单位营业执照复印件或双方的身份证复印件；

（2）海域使用权证书复印件；

（3）转让、出租或抵押合同原件（合同内容应包括海域使用权剩余期限、海域用途、海域面积、转让或出租费用及交付方式，属于分期、分批缴纳海域使用金的，剩余年限海域使用金的缴纳方法；属于抵押情形的，还需提交海域使用权价格评估资料、抵押担保的债权总额、违约责任等）。

2. 海域使用权发生继承事实时需提交的材料：

（1）继承人的身份证原件和复印件；

（2）被继承人死亡的证明；

（3）继承资格证明；

（4）海域使用权证书原件复印件；

（5）属于遗嘱继承的，提交书面遗嘱，是口头遗嘱的，提供 2 个无利害关系人证人。

四、当前需做的配套工作

（一）制定《海域法》的配套地方性法规，使《海域法》具有可操作性

前些年国家疏于对海域资源的管理，使得国家宝贵的海域资源被大面积无偿占用，甚至成为某些人非法敛财的工具。要扭转这种现象，我们曾寄希望于《海域法》的实施。但是由于《海域法》的规定比较原则，加上多年来历史形成的资源短缺意识的匮乏，《海域法》的真正落实受到重重阻力。在当前资源短缺日益严重、可持续发展日益成为共识的形势下，国家要么对《海域法》进行修改，要么重新制订《海域法实施细则》，使《海域法》具有可操作性。在《海域法》没有修改或《海域法实施细则》没有出台的情况下，我们非常有必要制定与《海域法》相配套的海域管理相关的地方性法规，细化《海域法》已经规定的申请审批制度、招标拍卖制度、有偿使用制度，具体规定海域使用权的转让、出租、抵押、继承等程序，并在实践中执行这些规定，为建立规范的海域使用权一、二级市场提供法律依据，使海域资源成为海洋经济良性发展的支柱。

（二）加快市际、县际海域勘界工作

《海域法》规定的海域使用的申请审批、海域使用权的招标拍卖以县为单位进行，但是水的流体性决定了海域没有自然的行政分界线，历史上也从没有对海域的行政区划进行过勘界，由此导致了相邻行政区之间海域使用权纠纷发生不断。去年全国开始了以县为单位的海域勘界工作，但是海域勘界涉及的历史问题复杂、权益争议多、举证难，最后定界难度大。

笔者认为，可以从以下几个方面加快海域勘界工作：一是对市、县（市）、区海洋行政主管部门及参与勘界的相关工作部门、相关勘界工作人员尤其是领导干部进行依法行政培训和法律宣传，强化公务员依法行政的意识、权力义务相统一意识。根据行政权力行使理论，行政机关的权力同时也是职责，不履行职责或不正确履行职责都要承担法律责任，从而倡导他们改变传统的权力决定社会地位的思想，促使他们树立起权力大、责任大的思想，使他们在权力行使的天平上加上必须承担责任的砝码。

二是在勘界过程中以历史事实和历史资料为依据，坚持实事求是、合理考虑现实情况的原则以减少纠纷，对确有争议又没有足够证据证明自己主张的，提倡互谅互让的风格、通过平等协商化解争议、解决定界问题。

三是勘界工作先易后难。对历史事实清楚、证据比较充分、归属争议不大的海域，先定界，争议大难以定界的海域后进行勘界。勘界工作领导小组应加强对历史情况复杂、归属争议大、各方证据都不太充分的情况进行协调，必要时提出定界意见后报有批准权的人民政府批准。

（三）开展海籍调查，完成海域使用管理的基础性工作，建立海域使用管理基础数据库，为海洋行政执法提供依据

海籍调查是指依据有关法定程序，查清宗海的位置、界址、权属、面积和用途等项目用海的基本情况。其目的是通过海籍调查采集到所有的项目用海信息，全面了解已批准和未批准项目用海的实际情况、掌握海域使用现状，为海域使用的申请审批和执法监督检查提供法律依据。准确有效的海籍调查能极大地减少海域使用权争议。因此，海籍调查是海域使用规范管理的基础性前提。前些年受认识程度和测量技术条件的限制，全国都没有正式开展海籍调查工作。《海域法》出台后，我们对海域的管理是掐头去尾式的、大约式的管理，而不是在规范有效的海籍管理的基础上进行的。表现在：审批过的项目用海在整个辖区海域范围内的坐标位置不清楚，其面积只是大概数而不是精确数，对其周围的用海情况不清楚，海域管理执法力度不强，其警示作用不够。为了真正实现海域的规范化管理，下一步应该在加紧海域行政勘界的同时加强海籍调查工作。具体方法是：

1. 加大政府对海籍调查工作资金的投入。海籍调查涉及资料的准备、海籍测量技术设计和标准、海籍调查中 GPS 定位系统配备、海籍在电子地图上的标示等多项专业性技术工作，需要资金支持，为了顺利完成海域管理的基础性工作，政府应加大对海籍调查工作资金的投入。

2. 海洋行政主管部门通过筛选后选定具有资质的海域测量单位承担海籍测量工作。由于海籍调查涉及海洋行政主管部门行政管理职权、涉及国家利益以及海域使用权人的切身利益，所以海籍调查结果必须准确、必须具有法律效力。为此，根据国家有关规定，海籍测量单位必须具有相应资质、必须使用国家的测量基准和坐标系统、遵循国家有关测绘和海域使用测量的技术、标准和规范，否则其测量结果不具有法定效力。

3. 健全海籍调查成果验收制度和验收资料的整理归档工作。一宗海域的海籍调查工作完成后，应由海洋行政主管部门组织相关单位或专家对海籍调查结果是否合格进行检查验收，验收的内容是对界址测量与认定、宗海草图绘制、面积测算、海籍图修编等成果的质量进行评定。严禁测量单位自己测量、自己验收，或者外行对内行的测量成果进行验收。验收工作结束后，海洋行政主管部门应当对经审查合格的海籍调查资料及时归档保存，建立海域使用管理基础数据库，以作为海域使用管理的基础性资料。

4. 加大海域使用执法力度。通过海籍调查和查看海籍地图，海洋行政主管部门对海域使用状况一目了然。对未经批准擅自使用海域或者擅自扩大经批准的海域使用范围或者有违反《海域法》规定的其他行为的，海洋行政主管部门或者其授权的海洋执法机构应当及时予以查处。

（四）向渔民进行相关法律宣传并着手进行养殖海域确权发证工作

海域使用证的发放，其中涉及的较难处理的是历史遗留的养殖用海域的使用金缴纳问题。渔民自觉遵守法律是顺利进行海域确权发证的前提条件。为了使海域使用确权发证到位，首先必须向渔民进行法律宣传，使渔民了解当前国家法律的规定。同时在海籍调查工作的基础上，对渔民及养殖用海域进行调查摸底，弄清养殖用海域的具体数量以及渔民从事养殖的具体情况，据此按照本文第二部分所述的方法对渔民的收益及损失进行评估，处理好有关养殖用海域赔偿或渔民转产从事其他行业的资金补偿问题，为海域使用权证的发放做好前期的补偿或赔偿准备。

突发性海洋环境事件处理对策的法律分析

尹年长 *

内容摘要：面对现实社会中越来越多突发性海洋环境事件的发生，我们究竟如何从法律的角度去完善我们的处理对策？建立系统的突发性海洋环境事件处理的法律预警机制、应急处理机制和法律责任机制，特别是统一和完善我国目前的油污损害赔偿民事责任的法律机制，是我国法律亟需解决的问题。

关键词：突发性事件　海洋环境事件　对策　法律分析

一、突发性海洋环境事件的定义及种类分析

应该说，我国现有的海洋法律法规对“突发性海洋环境事件”这一术语并没有明确的定义。1999 年修订的《中华人民共和国海洋环境保护法》（以下简称“《海洋环境保护法》”）第 17 条规定只是提到了“突发性事件”一词，没有定义。但这并不意味着我国所有的法律法规对这一术语都没有类似的定义。实际上，如 2003 年 5 月份国务院颁布实施的《突发公共卫生事件应急条例》第 2 条就规定“本条例所称突发公共卫生事件，是指突然发生，造成或者可能造成社会公众健康严重损害的重大传染病疫情、群体性不明原因疾病、重大食物和职业中毒以及其他严重影响公众健康的事件”，对“突发性公共卫生事件”作了一个完整的定义。2003 年 5 月 22 日黄河水利委员会发布的《黄河水量调度突发事件应急处置规定》的“一、突发事件分类”规定中亦对“黄河水量调度突发事件”作出了明确的定义。从这些类似的术语定义中我们可以得出构成“突发性事件”所具备的条件：

第一，事件是突然发生、不带有必然性的因素，这是突发性事件的内在特征。从法律角度来说，有些事件是属于不可抗力和意外事件，但有些并不排除人为原因，如爆炸、投毒、毁坏红树林、毁坏沿海滩涂等。

第二，造成或可能造成严重危害，具有一定的社会危害性或危险性，这是突发性事件的外在特征，也是引起人们对它高度重视的一个重要方面。

第三，一旦发生，会给大范围或局部地区的人民生命财产安全带来严重威胁，有时会制约国民经济的发展，给经济发展和人民生活带来不利的因素。

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因此，“突发性事件”和《合同法》所称的“不可抗力”是有一定区别的。“不可抗力”是指“不能预见、不能避免并不能克服的客观情况”，是当事人享有免责的一个法定条件；而“突发性事件”还包括一些意外事件和人为事件。根据上述分析，结合《海洋环境保护法》附则中对“海洋环境污染损害”的定义，我们不妨可以将“突发性海洋环境事件”定义为：突然发生的，对海洋环境产生规模性、灾害性影响并给人民群众生命和财产安全带来潜在的或实质性危害的重大海洋环境事件。

根据现有的海洋灾害情况来看，突发性海洋环境事件可以分为：1. 风暴潮事件；2. 赤潮事件；3. 海啸、海浪事件；4. 海冰事件；5. 油污和其他海洋污染事件；6. 破坏海洋资源导致环境恶化事件等。[1] 前四者可以定性为不可抗力事件，后两者只能属于意外事件或人为事件。

二、突发性海洋环境事件对我国经济发展的影响及海洋环境保护的法规公约

（一）突发性海洋环境事件给我国国民经济造成了严重的损失

毋庸质疑，突发性海洋环境事件对经济产生的影响是很大的。无论是天灾还是人祸，都给人民的生命财产安全带来了巨大的威胁，严重影响着国民经济特别是海洋经济的发展。2004 年岁末发生在印度洋的海啸事件已经造成了近 15 万人死亡，成百上千万人无家可归，仅泰国旅游业一项，损失就在 5.1 亿美元。而据保险业的估计，亚洲海啸灾难对全球保险业造成的损失总额可能在 50 亿至 100 亿美元之间。[2] [编者按：以上数据为作者发稿时数据，截至编稿时，海啸死亡人数已升至 16.5 万]；在我国，据统计，由海洋灾害所造成的经济损失在 20 世纪 50 年代平均每年不足 1 亿元，80 年代初期平均每年 5 亿元，到了 90 年代年均高达 100 多亿，1997 年竟高达 300 多亿。而据国家海洋局《中国海洋灾害公报》统计，2001 年全国因海洋灾害（主要是风暴潮、赤潮、海浪和海冰）造成的直接经济损失约为 100 亿元，死亡、失踪人数共计 401 人，受灾人口为 1400 万。而且这样的灾害在近十余年的统计中，只属于中等偏重的年份；2002 年属于常年偏轻年份，海洋灾害（主要是风暴潮、赤潮、海浪、海冰和油污灾害）给我国造成的直接经济损失约 66 亿元，死亡、失踪人数共计 124 人，受灾人口约 1000 万。[3] 数字是触目

1 国家海洋局：《中国海洋灾害公报》，2001/2002 年。
2 《环球资讯》，下载于 http://www.chinadaily.com.cn/english/home/index.html，2005 年 1 月 9 日。
3 国家海洋局编：《中国海洋灾害公报》，2001/2002 年。

惊心的，问题关键是如何防范和减少损失，如何在法律上建立起完善的风险防范机制，将这种损失减少到最低程度，以保障人民群众的生命财产安全，为国民经济特别是海洋经济的发展创造一个良好的法治环境。

（二）我国海洋环境保护的法律法规

有学者将新中国成立后的环境立法分为 3 个阶段，即成立初期的环境法、创业时期的环境法和经济转型时期的环境法。[4] 第一、二个时期是环境法缓慢发展和逐步兴起的时期，第三时期是环境法蓬勃发展时期，这种分法基本是符合国情的。我国海洋环境保护基本法律法规的框架结构也主要是在第三个时期确立和发展起来的，包括国内立法部分和国际公约部分，其中国内法部分主要包括：

1. 1982 年通过、1999 年修改的《海洋环境保护法》

2. 1983 年颁布的《海洋石油勘探开发环境保护管理条例》

3. 1983 年颁布的《防止船舶污染海域管理条例》

4. 1985 年颁布的《海洋倾废管理条例》

5. 1988 年颁布的《防止拆船污染环境管理条例》

6. 1990 年颁布的《防治陆源污染物污染损害海洋环境管理条例》

7. 1990 年颁布的《防治海岸工程建设项目污染损害海洋环境管理条例》

8. 1993 年国家海洋局发布的《海洋环境预报与海洋灾害预报警报发布管理规定》

9. 1995 年国家海洋局颁布的《海洋自然保护区管理办法》等 [5]

我国加入的国际公约部分包括 1982 年《联合国海洋法公约》、1969 年和 1992 年《国际油污损害民事责任公约》等海洋环境保护的相关规定。

除了上述基本的法律法规和规章之外，还有其他如民法、经济法、刑法、行政法等相关法律中对环境资源的开发、利用和保护的规定，宪法“国家保护环境和自然资源，防治污染和其他公害”的规定以及《环境保护法》的规定等都构成了海洋环境保护法律体系的重要组成部分。这些法律法规填补了我国海洋环境法的空白，构建了海洋环境法的框架结构体系，标志着我国海洋环境法体系的形成。但无法否认的事实是，这个体系仍处在不断地完善之中。

（三）海洋环境保护的相关国际公约

1954 年国际社会在英国伦敦签订了第一个国际海洋环境保护协定《国际防止

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4 蔡守秋主编：《环境资源法学教程》，武汉：武汉大学出版社 2000 年版，第 121 页。

5 国家海洋局政策法规办公室编：《中华人民共和国海洋法规选编》，北京：海洋出版社 2001 年版。

海上油污公约》，标志着国际海洋环境保护法的萌芽。从此开始一直发展到今天，国际海洋环境保护公约的订立发展经过了下列 3 个时期：

1. 第一时期：从 1954 年《国际防止海上油污公约》的订立到 1972 年“人类环境会议”前夕。这阶段订立的国际环保公约主要是在防止海洋油污方面，还没有从更多的方面考虑保护海洋整体环境，主要公约有：

（1）1954 年《国际防止海上油污公约》

（2）1969 年《国际油污损害民事责任公约》

（3）1969 年《国际遇有油污损害事故公海干预公约》

（4）1969 年《关于北海对付油污合作协定》

（5）1971 年《国际建立油污损害国际基金公约》

（6）1971 年《丹麦、芬兰、挪威、瑞典关于采取防止海洋石油污染合作措施协定》

这阶段还有一些为其他目的而订立的国际公约，对海洋国际环保产生一定影响，如 1958 年《公海渔业及生物资源养护公约》、1959 年《南极条约》、1963 年《部分禁试条约》、1971 年《禁止在海床、洋底及其底土置放核武器及其他大规模毁灭武器条约》等。

2. 第二时期：从 1972 年斯德哥尔摩《人类环境宣言》的发表到 1982 年《联合国海洋法公约》签订的前夕。这一时期订立的国际海洋环保的条约较多，主要有：

（1）1972 年斯德哥尔摩人类环境会议通过的《人类环境宣言》和《人类环境行动计划》

（2）1972 年《防止倾倒废物和其他物质污染海洋公约》（伦敦倾倒公约）

（3）1973 年《国际防止船舶造成污染公约》（船污公约）

（4）1973 年《遇有油以外的物质污染公海的干预议定书》

（5）1974 年《防止陆源污染海洋公约》

（6）1974 年《丹麦、芬兰、挪威、瑞典环境保护公约》

（7）1974 年《波罗的海区域海洋环境保护公约》

（8）1976 年《保护地中海免于污染公约》

（9）1977 年《由海床矿物资源的勘探与开发而导致的污染损害民事责任公约》

（10）1973 年《国际防止船舶污染公约的 1978 年议定书》

（11）1980 年《南极海洋生物资源保护公约》

（12）1981 年《有关对付紧急污染事故的合作议定书》

（13）1981 年《东南太平洋区域海洋及海岸环境保护公约》

（14）1981 年《有关对付东南太平洋碳氢化合物及有害物质污染的紧急事故区域合作公约》

（15）1982 年《有关对付油及有害物质污染的紧急事故区域合作议定书》

（16）1982 年《北大西洋养护沙丁鱼公约》等。

这一阶段的国际公约内容明显地趋于综合性，出现了防止多种污染源及调整多种行为关系的协定，即“伞性条约”，且一些条约已经突破传统国际法的范畴，孕育着新的国际法原则，开始在更大范围内反映国际社会各成员国的意志，为新的国际海洋环境保护法律的制订奠定了坚实的基础。

3. 第三时期：从 1982 年《联合国海洋法公约》的订立到现在，是海洋国际环保条约订立的第三个时期，也是它的快速发展时期。特别是《联合国海洋法公约》的订立，是国际社会保护海洋环境划时代意义的大事，标志着国际海洋新秩序的形成和国际保护海洋环境管理体制的初步形成，使得国际海洋环境保护法进入完善时期。这一时期主要围绕以下工作进行：

（1）对油污损害责任及基金公约的修订。1969 年公约和 1971 年基金公约以及《油轮所有人自愿承担油污责任契约》和《油轮油污责任暂行补充合同》4 个文件组成了国际海上油污损害赔偿制度。国际社会在 1976 年和 1984 年对其进行了 2 次修订，到 1992 年又对公约和基金公约进行了再次修订，大大地提高了赔偿的限额。

（2）将有关海洋防污的区域性协定扩展到全球范围。如 1983 年东南太平洋五国订立了《保护海洋免于陆源污染的基多议定书》，随后又制订了《蒙特利尔指南》，作为各国订立防止陆源污染公约的指南和参考。

（3）继续实施联合国环境规划署《海洋区域规划》。该规划是 1974 年制定的，将全球划分为 11 个区域，每个区域各国应订立保护海洋环境的综合协定，即“伞性条约”。

（4）订立新的条约。如 1982 年起，国际海事组织委员会审议并通过的《有毒和危险品海上运输的责任和赔偿公约草案》，供与会各国代表讨论。[6]

另外，这一时期国际社会对全球环境的重视程度大大地增加，人口、资源和环境已经成为全球经济增长的三大热点问题，经济可持续发展已经成为各国政府的方针战略。从 1972 年人类环境会议以来，联合国以环境与发展为主题发起组织的会议和活动就从未中断过。如 1984 年 10 月成立了“世界环境与发展委员会”；1987 年世界环境与发展委员会东京会议通过了《关于环境保护和持续发展法律原则建议》和《东京宣言》；1992 年巴西里约热内卢召开的世界环境与发展会议，会议签署了 5 个文件——《关于环境与发展的里约热内卢宣言》、《21 世纪议程》、《关于森林问题的原则声明》、《联合国气候变化框架公约》和《联合国生物多样性公约》，对继续发展中的环境保护、改善作出了长远安排，对国际环保法律的完善产生了重要的影响。

上述国内法和国际公约的介绍，足以见证海洋环境保护在现实社会中重要性。

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6 欧阳鑫、窦玉珍著：《国际海洋环境保护法》，北京：海洋出版社 1994 年版，第 7~18 页。

人类为海洋环保和海洋经济可持续发展在法律上做出了最大可能的积极努力，但“天有不测风云”，对“突发性海洋环境事件”的防范和处理仍是各国法律面临的一个重要的、亟需解决的课题，2004 年海啸事件已经给沿海各国在这方面的立法、执法提出了更高的要求。

三、建立和完善突发性海洋环境事件处理的法律预警机制

1993 年国家海洋局发布的《海洋环境预报与海洋灾害预报警报发布管理规定》第 6 条就明确规定“国家和地方各级海洋环境预报部门，按照各自分管的责任海区，公开发布海洋环境预报与海洋灾害预报警报。”1999 年修订的《海洋环境保护法》第 17 条也规定：“因发生事故或者其他突发性事件，造成或者可能造成海洋环境污染事故的单位和个人，必须立即采取有效措施，及时向可能受到危害者通报，并向依照本法规定行使海洋环境监督管理权的部门报告，接受调查处理。”对突发性事件，建立有效的法律预警机制，是防治灾害和减少损失的有效途径，也是多年来行之有效的实践经验总结。

如何针对突发性海洋环境事件建立有效的法律预警机制？这是一个很现实、很实际的问题，直接关系到问题处理的效果。现行的法律法规规章只是作出了抽象的规定，并散见在不同的文件之中。根据这些规定，结合实际的做法，我们认为，一个有效完善的法律预警机制应当包括下列内容：

1. 统一和完善的预警组织机制

应该说，我国现在的海洋环境事件预警机制已经有一整套系统的行政组织机构，它们对海洋环境事件进行监测、预报和消息的发布，对保护海洋环境、保持海洋经济可持续发展方面发挥着重要作用。《海洋环境预报与海洋灾害预报警报发布管理规定》第 3 条明确规定：“国家对公开发布海洋环境预报与海洋灾害预报警报实行统一发布制度，由国家和地方各级海洋环境预报部门负责发布。”长期以来，国家虽然实行统一管理，但由于我国海洋行政管理方面形成的“多头管海、条块分割”局面到今天仍没有改变，海洋的综合管理仍没有得到有效实施，海上执法队伍多样化，致使预警组织机制重复建设、各行业主管部门的环境监测在内部管理上是各行其是，形成整个预警监测系统难以完善的局面，而且各执法队伍中的预警组织机制之间的相互协调、相互协作也是一个难解的问题。

另外，专业人才培养的问题也是预警组织机制里应积极考虑的问题。这里由于文章的篇幅，不作阐述。

2. 积极的财政预算资金和储备基金

环境事件的预防特别是防灾和救灾需要大量的资金作为后盾。预警组织系统

的有效运转和维持发展、事前的防范工程的建设和维护、事中的人命和财产的施救和事后受灾人口的安居乐业等等无不需要大量的资金支持。这些资金必须统筹安排、事先预算拨款支持，而且必须专款专用，不得随便挪用。

3. 建立和形成一个实体性的、有效的灾害预防工程体系

预防工程体系是一个系统工程。它必须建立在预警组织机制的基础上，以科学预测、监测作依据，结合对已发生灾害处理的有效经验，统筹安排有限的人、财、物以获得最佳的防灾效果。如对已发生的灾害事件的研究，修建船舶的避风港，准备防污设备和设施、足够的救灾防灾物资及居民的日常生活用品和必需品等等。

4. 建立完善的社会保险机制及风险转移机制

在海上货物运输保险中，如 1981 年中国人民保险公司修订的《海洋运输货物保险条款》中规定保险人承保的风险包括海上发生的自然灾害和意外事故两大类。其中自然灾害就是指恶劣气候、雷电、海啸、地震、洪水以及其他人力不可抗拒的灾害等。突发性海洋环境事件有相当一部分如风暴潮等属于不可抗力，其造成的损害对象是人命和财产，都具有商业保险标的的运营价值。实际上我国此类的商业保险无论在险种和保险标的上都已在实际运作之中，但是还没有广泛地推广开来，无论是保险人，还是被保险人在这一领域的保险范围和层次都应该向前深入一步。如突发性海洋环境事件对水产品养殖的影响往往很大，但是由于这一领域的风险太大，商业保险并没有有效地发挥作用。这其中虽然还有其他原因，但无论怎样，建立起风险转移机制无论对个人还是社会都是有好处的。

除了商业保险机制外，就是社会保险机制。这是两个不同的机制，后者是国家强制性保险，是国家为了社会稳定和发展而强制实施的，反映了一个社会文明发展和经济发展的程度。在突发性海洋环境事件发生后，人们往往只想到由政府用社会救济和伤残死亡优抚等手段，去安慰和稳定灾民。但是政府的财力是有限的，受灾的人们在没有商业保险保障，也没有得到有效的损害赔偿的法律救济后，仅靠有限的政府救助是远远不够的。因此，在社会保障领域里就要有一定的储备基金，建立强制的社会保险，在风险发生后，发挥其“及时雨”的作用，对灾后重建和恢复生产有重要的作用。

上述 4 点，应该是突发性海洋环境事件发生前必须准备的应急系统措施。它们应是相互统一的、缺一不可的。只有做到这些，形成一个完善的事前防范体系，我们至少可以在突发性海洋环境事件发生后不至于忙乱和惊慌，能够从容面对。

四、建立和完善突发性海洋环境事件应急处理的法律机制

1990 年交通部发布了《海上交通事故调查处理条例》，对我国沿海水域发生

的海上交通事故的报告、调查、处理和调解、处罚等做作出了一系列规定。

农业部也曾于 1997 年发布了《渔业水域污染事故调查处理程序规定》，对渔业水域污染事故处理管辖、调查取证、处理程序等作出了明确的规定。

1999 年修订的《海洋环境保护法》里规定了防治“陆源污染物”、“海岸工程建设项目”、“海洋工程建设项目”、“倾倒废弃物”、“船舶与有关作业活动”等对海洋环境的污染损害，对“因发生事故或其他突发性事件，造成或者可能造成海洋环境污染事故的单位和个人，必须立即采取有效措施，及时向可能受到危害者通报，并向依照本法规定行使海洋环境监督管理权的部门报告，接受调查处理。沿海县级以上地方人民政府在本行政区域近岸海域的环境受到严重污染时，必须采取有效措施，解除或者减轻危害”（第 17 条）；“国家根据防止环境污染的需要，制定国家重大海上污染事故应急计划。国家海洋行政主管部门负责制定全国海洋石油勘探开发重大海上溢油应急计划，报国务院环境保护行政主管部门备案。国家海事行政主管部门负责制定全国船舶重大海上溢油污染事故应急计划，报国务院环境保护行政主管部门备案。沿海可能发生重大海洋环境污染事故的单位，应当依照国家的规定，制定污染事故应急计划，并向当地环境保护行政主管部门、海洋行政主管部门备案。沿海县级以上地方人民政府及其有关部门在发生重大海上污染事故时，必须按照应急计划解除或者减轻危害”（第 18 条）。

从以上立法现状上看，对海洋环境污染的应急处理措施的法律规定，要么比较抽象、原则，要么条块分割，没有整体的统一安排和观念。这些规定针对影响比较小或某个领域内的环境事件，可以应付处理，如果涉及比较大的事件和影响某一地区的突发性海洋环境事件就显得有些不足和紧张，因为对突发性事件的处理措施一定是全局性的、整体性的。而我们在实践中经常的做法是，在事件发生后，由政府牵头、各主管部门参加协助成立一个临时的事故调查和处理小组，全权处理。处理完毕后，这样的临时小组也就撤消了，没有一个稳定和正式的组织机构，很难起到经常性的作用。

那么如何建立和完善事件应急处理的法律机制？我们认为应包括以下几个方面：

首先，要统一海洋环境事件执法的执法权。

问题出现了，谁有权去处理？这是一个首要问题。解决了由谁去处理，也就明确了责任主体，余下的问题是依照法律的实体规定和程序规定处理问题就可以了。但这个执法权是统一由某一部门全权行使？还是维持目前海上执法的现状？这个问题非常重要，也是我国现行的法律和实务没有很好解决的问题。

其次，要建立事件预测评估和预案处理的报告制度。

这一点和前面所阐述的预警法律机制应该是衔接在一起的，不可割裂，是事件发生后在预警机制的基础上所继续实施的行为。海洋环境主管部门应建立起突发性海洋环境事件的预测评估制度，针对风暴潮、赤潮、海啸等人为不可抗力的事

件可以加强与气象部门的合作，实行事先预报研究，对它的具体情况进行周密的预测，制定出周密的预案处理，做好防治的准备。针对油污等人为的事件，应及时进行监测，评估事件的危害结果，并制订相应的应急处理方案，向主管部门和政府报告。

第三，法律赋权或政府授权，具体负责，明确分工，统筹安排，计划周密。

根据预案处理计划，处理的职权部门在法律或政府授权之下，具体负责，明确分工，统筹安排，积极稳妥地面对事件的发生及发生后的效果。在面对事件的发生时，有应急预防计划，有特别的授权，有按照程序办事的具体行动，一切均应在掌握和控制之中。事件发生以后，要减少和缩小不利的影响和危害，尽可能在最短的时间里恢复原状，保持社会的稳定和居民的安居乐业。

第四，充足的财源，有着完善的财务保障措施和生活保障系统。

处理突发性环境事件是需要时间、精力和金钱的，无法想象在突发性溢油事件发生后没有一个强有力的财务保障是一个什么样的结局。这和预警机制里的财务保障和储备金是分不开的，后者是“防患于未然”，前者是应急的“及时雨”和“雪中送炭”。

第五，成立系统的处理事件的组织机构。

在明确谁享有执法权和处理权的前提下，组织一支精干的队伍是处理问题成败的关键，也是应急措施里应首先考虑的问题。这个根据事件的大小、影响力、危害性程度、危害或可能危害的地区范围、后果等因素考虑其部门和成员组成的组织机构，应是专业机构，而不是临时性政府事务处理机构。

五、统一和完善我国油污损害赔偿民事责任的法律机制

之所以将这个问题单独地提出，足见其重要性。在突发性海洋环境事件中，海洋环境污染只是其中之一，而海洋油污染是属于重大海洋污染事件，一旦发生，对海洋的生态环境、海水养殖、通航、海岸带的保护、沿海农业、林业等都会产生一定的影响。2002 年我国沿海就发生了共 6 起海上溢油事件。

1. 2 月 19 日，河北黄骅局部海岸发现长 6~7 公里、宽 1~2 米的原油带，对渔业生产造成了一定损失；

2. 5 月 21 日大连石化码头海面，“大庆 232”轮发生溢油；

3. 10 月 6 日，广西涠洲 11-4 至 12-1 油田间的输油管线发生漏油；

4. 11 月 11 日（应是 9 月 11 日，笔者注），“宁清油 4 号”轮在广东省南澳勒门列岛海域触礁后爆炸沉没，造成直接经济损失达 460 多万元；

5. 11 月 23 日，马耳他籍油轮“塔斯曼海”号与中国籍“顺凯 1 号”轮在天津

大沽口东部海域相撞，原油泄露，造成了长 4.6 公里，宽 2.6 公里的原油漂流带；

6. 11 月 26 日，渤海绥中 36-1 油田中心平台发生溢油。[7]

由溢油引起的环境污染损害是巨大的，特别是近海岸的油污往往会影响到沿海居民的生产和生活，带来一系列社会和法律问题。现就我国油污损害赔偿的民事法律责任作分析，供各位参考。

（一）我国法律的相关立法状况

1. 国内法调整的情况

目前国内调整因船舶碰撞导致油污损害纠纷的法律主要包括《民法通则》、《海商法》和《海洋环境保护法》以及《民事诉讼法》和《海事诉讼特别程序法》的相关规定。

其中《民法通则》规定，船舶碰撞引起的油污损害事故属于特殊侵权行为，应适用严格责任制度，并实行举证责任倒置，对所造成的损失要求恢复原状和折价赔偿。

而《海商法》的规定则借鉴了 1910 年碰撞公约的规定，出于对航运事业的保护，它施行的是责任限制赔偿原则，不再是《民法通则》所确立的恢复原状、全部赔偿的原则。

《海洋环境保护法》第 66 条规定“国家完善并实施船舶油污损害赔偿责任制度；按照船舶油污损害赔偿责任由船东和货主共同承担风险的原则，建立船舶油污保险、油污损害赔偿基金制度。”本应是我国调整非平等主体之间纵向关系的行政立法，但不知是出于何种目的，它对环境污染造成的损害赔偿的民事责任分担，规定得较为具体、明确，却又和国际公约的相关规定相悖，造成了法律规定的不统一。

《民事诉讼法》和《海事诉讼特别程序法》是程序法，给受害者以程序上的司法救济，规定了权利者程序上的权利和应承担的义务。特别是《海事诉讼特别程序法》对船舶油污受害人提供了有力的保护，它规定了受害人不仅可以向肇事船舶所有人提出赔偿请求，也可直接向承担船舶所有人油污损害责任的保险人或者提供财务保证的其他人提出赔偿请求。

2. 国际公约调整的情况

目前调整因事故油轮引起的油污损害纠纷的国际公约有 4 个，分别为 1969 年和 1992 年《国际油污损害民事责任公约》、1971 年和 1992 年《设立国际油污损害赔偿基金国际公约》。我国已经于 1980 年和 2000 年分别加入了 1969 年和 1992 年《国际油污损害民事责任公约》，而没有加入后 2 个基金公约。但是无论是 1969 年公约还是 1992 年公约，调整船舶的范围都比较狭窄，仅仅指实际装运

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7 国家海洋局编：《中国海洋灾害公报》，2002 年。

散装油类货物的任何类型的海洋船舶和海上船艇。公约不适用于装运汽油或轻柴油的油轮，而且仅对载油量 2000 吨以上的油轮才要求强制保险或提供财务保证。另外，我国也加入了 1910 年的《统一船舶碰撞若干法律规定的国际公约》，其中的内容为我国《海商法》第 8 章“船舶碰撞”的规定所吸收。

（二）相关法律和公约规定的冲突和不统一

应该说，上述法律和加入的公约对规范我国油污损害赔偿的民事责任起了重要作用。遗憾的是，这些规定却在下列几个方面存在着内容不一、甚至相悖的问题，使得执法者在实践中各行其是，受害者的利益在执法者态度的摇摆之中不断地发生着变化，如“闽燃供 2”轮泄油案等就说明了此类问题。这些冲突和不统一表现在以下几个方面：

1. 侵权的责任主体认定方面

根据我国《海洋环境保护法》第 90 条第 1 款的规定：“造成海洋环境污染损害的责任者，应当排除危害，并赔偿损失；完全由于第三者的故意或者过失，造成海洋环境污染损害的，由第三者排除危害，并承担赔偿责任。”根据这一规定，在第三者对漏油船舶负全部责任的情况下，受害者只能向其要求赔偿，由它单独承担排除危害、赔偿损失的责任，而漏油船舶的所有人不需要承担责任。这样规定的结果是，如果第三者的经济赔偿能力有限，受害者的损失就无法得到有效补偿。而我国《海事诉讼特别程序法》规定的责任主体可以是肇事船舶所有人，也可以是承担船舶所有人油污损害责任的保险人或者提供财务保证的其他人，给受害人提供多重保障，此规定和 1969 年《国际油污损害民事责任公约》规定基本一致，公约规定的责任主体严格限制于事故船舶的船舶所有人及承担其油污损害责任的保险人或提供财务保证人。船舶所有人的雇佣人员或代理人不属于责任人，而第三者只有被证明实施了有意造成损害的行为或不作为时才可能被认定为责任人。而 1992 年公约在 1969 年公约的基础上，进一步明确了油污责任主体的范围，明确规定了不能承担油污责任的主体。

而根据我国《民法通则》和《海商法》的规定，船舶碰撞引起油污损害赔偿责任的行为可认定为侵权行为，对受害人来说，碰撞双方均是致害人，均可被认定为赔偿的责任主体。

2. 侵权的法律适用方面

很明显，我国国内法对油污损害的民事责任没有直接的法律规定，对油污的责任主体、责任限制、赔偿范围、赔偿原则等问题在司法实践中缺乏可直接引用的法律条文，法院在审理案件时，法官只能根据民法通则、海商法、海洋环境保护法、及有关国际公约的相关规定自由地进行裁量。目前我国已经加入了 1969 年和 1992 年《国际油污损害民事责任公约》，但公约的内容没有直接地转化为国内

法，国内法与公约在某些问题的规定上有不一致，致使法院在审理涉外案件时可以直接援引国际公约的规定，而在审理国内油污案件时，有时援引国内法规定，有时援引国际公约的规定。

3. 侵权方的赔偿责任方面

实践中对受害人的赔偿责任问题看法不一致，有 3 种看法。

第一，由漏油船舶先赔偿原则，这是公约确立的原则。公约一方面规定漏油船舶所有人及责任保险人、财务保证人对损害承担第一位的赔偿责任;另一方面又规定，本公约的任何规定不得影响船舶所有人向第三者追偿的权利。

第二，连带赔偿责任原则。这是根据我国民法通则规定确立的原则。我国民法认定油污损害是属于特殊侵权行为，适用举证责任倒置，受害人只需证明碰撞事故的发生及油污损害的结果就可以，至于其他的责任问题，法律规定责任方承担连带赔偿。

第三，按照碰撞责任比例赔偿原则。这是我国《海商法》和《海洋环境保护法》所确立的赔偿原则。《海商法》第 168 条和 169 条规定，船舶发生碰撞由一方的过失造成的，由过失的船舶承担赔偿责任，双方互有过失的，各自按照过失比例承担赔偿责任。《海洋环境保护法》第 90 条规定，完全由第三者故意或过失造成损失的，由第三者承担全部责任。

4. 侵权责任方是否享受责任限制方面

1969 年公约第 5 条第 1 款规定，船舶所有人有权享有按照船舶吨位计算的每吨 2000 法郎（相当于 133 SDR）的赔偿责任限制，最高赔偿总额不得超过 2 亿 1 千万法郎（相当于 1400 万 SDR），如果属于船舶所有人的实际过失或私谋则丧失责任限制。1992 年公约进一步提高了责任限制数额，但船舶所有人却更加不轻易丧失享受责任限制的机会。只有证明油污损害是由于船舶所有人故意或明知可能造成而轻率地作为或不作为所致，才丧失责任限制。

我国《海商法》并未就此做出直接规定，油污损害赔偿债权如属于其第 11 章“海事赔偿责任限制”规定的“限制性债权”，可以参照适用;而民法通则和海洋环境保护法对此持否定态度。

5. 是否可以对第三者责任追偿方面

无论是 1969 年公约还是 1992 年公约都明确规定，漏油船舶的所有人或其保险人、财务保证人在赔付油污损害后，有权向负有责任的第三人进行追偿;而国内法对此没有明确的法律规定。

（三）统一和完善法律赔偿机制

据上分析，我们可以看出，我国油污损害赔偿的民事法律责任规定是不统一的和不完善的，缺乏专门的法律规定。所以，为了更好地保护油污受害人的利益，

更好地保护海洋环境，促进海洋事业的发展，有必要制定和统一油污损害赔偿责任的法律机制，在上述五个或更多方面进一步完善，和国际公约接轨。

六、建立和完善我国突发性海洋环境事件处理的法律责任机制

突发性海洋环境事件中有些是不可抗力所致，有些则是人为原因造成的。无论是哪一种，对其处理的过程都是一个行使权利、权力和承担义务、责任的过程。如果因处理者的故意或过失、责任者的故意或过失造成了人民的生命和财产损失，则应承担相应的法律责任，这些责任根据我国现行的刑法、行政处罚法、民法、经济法、海商法等相关规定包括刑事责任、行政责任和民事责任或经济责任。因此，建立和完善我国突发性海洋环境事件处理的法律责任机制是保护海洋环境、保障海洋可持续利用和海洋经济可持续发展的需要，是我国社会主义法制建设的需要。这种法律责任机制应该包括：

（一）刑事责任的法律机制

刑事法律责任机制是指对突发性海洋环境事件负有预警责任或组织处理责任的国家机关、事业单位工作人员以及引起事件发生的人员或事件处理过程中的违法人员追究其刑法惩罚性责任的机制，具有震撼性和警示性。如处理突发性海洋环境事件责任的领导和组织者负有责任，根据刑法或其他法律规定，应承担领导和组织不力的渎职责任；而作为突发性海洋环境事件的人为制造者，根据刑法或其他法律规定，应承担故意或过失致使人身或财产损害的刑事责任。应该说，我国已经建立了这种刑事责任机制，但是体系不完善，粗线条立法甚至有的地方是空白。在预警机制责任方面，根据 1993 年国家海洋局发布的《海洋环境预报与海洋灾害预报警报发布管理规定》，明确规定“国家对公开发布海洋环境预报与海洋灾害预报报警实行统一发布制度，由国家和地方各级海洋环境预报部门负责发布”，“其他组织和个人均不得向社会公开发布各类海洋环境预报与海洋灾害预报警报”（第 3 条）。由于是部委规章，无权对刑事责任立法，但是它同时又排除了个人承担刑事法律责任的可能性，加上我国刑法规定的渎职罪主体是“国家机关工作人员”，所以就我国目前的立法而言，虽然刑法在第 397 条规定了“滥用职权或玩忽职守罪”和第 398 条规定了“泄露国家秘密罪”，但是由于没有进一步地细化立法规定，预警技术层面处理和尺度掌握难以把握，在现实社会中无论是单位还是个人，在预警责任方面，追究个人的刑事责任是比较困难的。而预警阶段，又恰恰是突发性事件风险防范的最重要阶段，2004 年的印度洋海啸事件证实了这一

点。在事件处理机制责任方面，一方面是事件处理者（领导者和组织者）应承担的刑事责任，目前主要是依据刑法的相关规定进行惩罚，如渎职罪、贪污贿赂罪、挪用公款罪、挪用用于救灾、抢险、防汛、优抚、扶贫、移民、救济款物罪等等；另一方面是引起人为性事件的单位或个人以及突发性事件发生后处理过程中违法应受刑事处罚的单位或个人应承担的刑事责任，也主要根据刑法规定承担相应责任；特殊情况下可根据单行的行政立法承担刑事责任，如 1999 年修订的《海洋环境保护法》第 91 条第 3 款明确规定："对造成重大海洋环境污染事故，致使公私财产遭受重大损失或者人身伤亡严重后果的，依法追究刑事责任。"在地震发生的情况下，1995 年《破坏性地震应急条例》第 37 条的规定也可以适用。总的说来，由于没有专门的立法，这种刑事责任机制内容是分散的，不健全的。

（二）行政责任的法律机制

同刑事法律责任机制不同，突发性海洋环境事件处理的行政法律责任机制的内容相对是集中和比较完善的，这主要和我国环境保护立法、海洋环境保护立法的完善有很大的关系。现在在这方面的主要问题是关注执法和守法。行政责任的法律机制主要包括行政法律责任和行政纪律处分责任两个不同部分，前者是海洋环境监督主管部门针对环境事件制造者的违法行为而给予它们的诸如警告、罚款、责令限期改正、没收违法所得、限期撤除、责令关闭、吊销许可证等行政处罚，主要是针对人为性海洋环境事件的制造者进行的处罚，如 1999 年修订的《海洋环境保护法》第 9 章"法律责任"的专门规定。另依据我国的《行政复议法》和《行政诉讼法》的相关规定，被处罚者如果不服可以提请行政复议，也可以直接提起行政诉讼。至于行政纪律处分，是针对直接责任人（包括单位）所实施的，包括环境事件制造者单位的负责人和制造者本人，也包括处理环境事件不力的领导者和执法者，对他们的违纪违法行为给予责令改正、通报批评、警告、降级、降职、撤职、开除等行政处分。同样没有专门的立法，这部分内容只能参照相关的公务员立法以及相关的规章制度处理，我国在《突发公共卫生事件应急条例》中对违反法律责任的行政处分方面的立法比较成功，可值得借鉴。

（三）民事责任或经济责任的法律机制

这主要是造成损害的经济赔偿责任。此外根据我国民法通则的规定，如果属于侵权行为致人或财产损害的，这种责任还可包括消除影响、恢复原状。如果属于海洋环境行政主管部门或其授权部门在处理海洋环境事件过程中造成的损害，受害人可以根据《国家赔偿法》的相关规定，请求国家赔偿。一般来说，针对突发性自然灾害事件如地震、海啸、台风等，国家应建立相应的责任保险机制，由保险

人承担事件的风险责任和赔偿责任，最大限度上化解事件带来的不利影响。当然，这种保险属于商业保险的范畴还是属于社会强制保险的范畴，不在本文讨论的范围之内，不叙。而人为性海洋环境事件的民事赔偿责任机制的体系也已经建立，但是一些问题仍没有得到很好的解决，如破坏海洋资源导致环境恶化的侵权事件中损失的认定问题以及间接损失的赔偿问题，特别是前文提到的油污损害民事赔偿的法律机制的统一是迫切要解决的问题。

上述 3 种责任机制应是相互补充、形成为一体的，只有这样，才能形成为有效的责任机制网络，用法律来处理突发性海洋环境事件，用法律来规范管理，用规范管理来处理突发性事件，形成成熟的机制和处理程序，本着对人民负责，对海洋环保负责的精神态度去处理问题，做好事情。

七、结　语

由于全球气候变暖和环境恶化，突发性海洋环境事件时有发生，造成的灾难性损失惊人，已经引起了各国政府的重视，并采取了一定的措施。但是 2004 年底印度洋海啸事件给沿海各国政府敲响了警钟，人类在预防突发性海洋环境事件和事件发生后的应急处理措施有时显得特别地苍白无力，这就需要从法律和政策上进行完善。从法律层面上来说，建立突发性海洋环境事件的预警法律机制，用法律明确体制和责任，预报在先，准备在先，可以减少损失或将风险降到最小，真正做到防患未然；而完善的应急处理的法律机制可以在灾害发生后迅速地消除不利影响，尽快地恢复社会的安宁和平静，体现了政府的应急处理能力和办事效力，用法律保障政府在灾害发生后临危不乱，保证稳定；明确的法律责任机制可以使得预警机制和处理机制得以顺利地施行，并发挥有效的作用，真正做到责、权、利的统一。虽然我国目前还没有发生过像印度洋海啸事件那样大的突发性海洋环境事件，但 2003 年发生的“非典”事件着实给我们上了一堂生动的预警课，以前的突发性海洋环境事件处理也都呈现了法律在这一问题上的苍白。因此，我国需要建立突发性海洋环境事件应急处理的法律法规。在这方面，《突发公共卫生事件应急条例》的颁布就是一个成功的范例。

论我国海洋环境保护中的公众参与

徐文君　胡增祥

内容摘要:本文首先辨析了海洋环境保护事务中公众参与的主体，而后阐述海洋环境保护公众参与的核心是公众对环境决策的参与。在此基础上论文分析了我国目前海洋环境保护事务中公众参与的现状，认为“在海洋环境保护实践中，重海洋行政管理，轻公众参与”以及公众参与只停留在初级和中级参与上是问题之实在。为此，论文提出了自己的对策:“提高公众参与的意识，开拓多种参与途径”和“完善立法，充分发挥公众参与在各个层次的作用”。

关键词:海洋环境　环境保护　公众参与

环境事务中的公众参与，已经逐渐成为环境保护中的一项重要原则，这一原则是民主理念在环境事务中的延伸，是可持续发展概念的基础。[1]《世界人权宣言》、《里约环境与发展宣言》、《21 世纪议程》、《公众在环境事务中获得信息，参与决策，诉诸司法权利的奥胡斯公约》等国际文件都为公众参与环境保护提供了国际法依据，包括我国在内的许多国家都在本国的环境法中对公众参与作了明确而具体的规定。在我国，《海洋环境保护法》第 4 条规定，一切单位和个人都有参与海洋环境保护的义务与权利;[2]《环境影响评价法》第 5 条也规定:“国家鼓励有关单位、专家和公众以适当方式参与环境影响评价。”实践证明，公众参与不仅在环境保护的理论和实践中具有十分重要的地位，而且是海洋环境保护和管理成功的先决条件，公众参与海洋环境保护可以充分利用公众的技能和资源，提高海洋环境保护的有效性。

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1　联合国环境规划署:《全球环境展望 2000》，北京:中国环境科学出版社 2000 年版，第 194 页。
2　《中华人民共和国海洋环境保护法》第 4 条:一切单位和个人都有保护海洋环境的义务，并有权对污染海洋环境的单位和个人，以及海洋环境监督管理人员的违法失职行为进行监督和检举。

一、公众参与的主体

在人们的一般性观念中，公众参与是指公民参与。但是，海洋环境保护中公众参与的主体具有广泛性，不仅局限于公民。《21 世纪议程》用几章论述了许多不同的群体，包括妇女、儿童、青年、土著民族、非政府组织、工人和工会、商业和工业组织、科学家和技术专家以及农民，在许多情况下，这些群体及其成员都可以作为主体参与到海洋环境保护中来。我国环境保护的有关法律也规定了公民以外的其他主体参与环境保护的权利。如《环境保护法》第 6 条规定："一切单位和个人都有保护环境的义务，并有权对污染和破坏环境的单位进行检举和控告"；《中国 21 世纪议程》指出："切实保障为有法律理由的个人、团体和组织，提供可靠的参与渠道，保护自身的合法权益和社会公共利益。"可见，公众参与的主体不仅包括公民，还应包括企业、社会团体等组织。

公众参与海洋环境保护，特别需要强调的是发挥非政府组织的重要作用。真正有效的环境保护除了强有力的政府行为以外，还需要广泛的公众参与，其中最重要的是积极发挥各种非政府组织的作用。[3] 社会团体等非政府组织代表着各自群体的利益，可以代表其成员与国家和地方政府进行环境事务的有效合作。较之于公民个人，非政府组织拥有较多的信息，掌握了较高的科学技术手段和专业知识，充分发挥非政府组织的作用无疑会对海洋环境保护产生更加积极有效的作用，而且可以在环境教育与提高环境意识等许多方面起到重要的作用。在参与过程中，非政府组织的行动是多方面的，既可以帮助政府制定海洋环境政策、方案和行动计划，制定海洋环境影响评价规范，还可以促进这些方案、政策、行动计划和规范的实施，并且可以为受到环境侵害的公民提供法律上的帮助，支持他们提起有关损害赔偿的诉讼。在海洋环境保护以外的环境实践中，各国的非政府组织已经通过各种环境运动发挥了积极的倡导作用，取得了良好的效果，例如，在斯里兰卡，非政府组织曾阻止了对森哈瑞加森林的砍伐，制止了在亭可马里建立热电厂。[4] 海洋环境保护与其他方面的环境保护一样，也需要多种主体的参与，所以，在海洋环境保护中，国家也应当采取措施鼓励非政府组织的成立与发展，推动公众在海洋环境保护中的参与。

二、公众参与的核心：公众参与决策

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3 随着环境问题的日益恶化，行政管理逐渐成为了环境保护的主要手段，但也造成了行政机关权限的不断扩大和环保预算的不断增加，这就使环境行政管理出现了自身不能克服的缺陷。

4 联合国环境规划署：《全球环境展望 2000》，北京：中国环境科学出版社 2000 年版，第 228 页。

公众参与海洋环境保护的表现是多方面的，包括积极参加海洋环境建设、参与对海洋环境执法部门的监督、参与海洋环境管理的过程、参与海洋环境保护法律法规政策的实施、参与海洋环境影响评价、参与对海洋环境损害的诉讼等等。其中最重要的是参与决策。参与决策是公众参与环境事务的核心，只有赋予公众在决策过程中的参与权，才能更好地发挥公众参与在海洋环境保护中的积极作用，促进环境的保护。台湾学者叶俊荣先生也给予了公众参与决策以极大的重视，他认为："宪法中若有环境权，则此权应以肯定民众适度参与环境决策的程序权为妥。"[5]

我国《环境保护法》第 6 条规定了公众参与环境事务的原则："一切单位和个人都有保护环境的义务，并有权对污染和破坏环境的单位进行检举和控告。"在《海洋环境保护法》中也有类似的规定。现行法律中的公众参与基本上都属于环境损害发生之后的"末端参与"。[6] 科学知识和环境保护的实践都表明，防止损害是环境保护的"黄金规则"。环境问题的特征决定了环境损害通常是不可弥补的，海洋动植物物种的灭绝、向海洋倾倒污染物都会造成不可挽回的损失;即使有的损害可以通过事后的努力加以补救，但恢复原状的过高成本也常常会使补救措施难以推行。所以，切实有效的环境保护必须在损害发生之前"防患于未然"，而不能在环境损害发生以后才靠公众参与环境诉讼要求损害赔偿或者追究海洋环境监督管理人员违法失职行为的责任来弥补环境的损失。公众参与海洋环境保护也应以参与决策为核心，在可能造成海洋环境损害的政策、法律、规划、项目制定的决策过程中就引入公众参与，由公众作为决策主体从公共利益出发制约政府和其他决策者的活动，只有这样才能真正有效地防止海洋环境损害。

在环境问题发展的初级阶段，社会各界对环境保护的认识存在着较大的差异，对公众参与也没有加以应有的关注，使环境政策、法律、环境规划的制定产生了许多无法调和的矛盾。随着环境保护实践活动的发展，人类社会对环境问题有了越来越深的认识，意识到公众参与是保护环境的有效手段。人类环境如何保护，公民需要什么样的环境品质，良好环境的品质如何认定，这些问题牵涉到科学的研究、经济上的分析和防治污染的水平等多方面的因素。政府在制定环境政策和规划，立法机关在制定环境法律的时候必然面临多方面的抉择，这些抉择多取决于政府和立法机关的价值理念，其中最重要的是成本的有效性、行政便捷、科技的创新和分配正义等因素，并且，不论是目标的拟定还是政策工具的选择，都会受社

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5 叶俊荣：《宪法位阶的环境权：从拥有环境到参与环境决策》，载于叶俊荣著《环境政策与法律》，北京：中国政法大学出版社 2003 年版，第 32 页。

6 吕忠梅教授将公众参与分为预案参与、过程参与、行为参与和末端参与 4 种，认为只有将这 4 种参与有机结合、同时运作，才是完整的公众参与。参见吕忠梅著：《环境法新视野》，北京：中国政法大学出版社 2000 年版，第 257~258 页。

会、政治、经济条件和法律传统的影响。企业在进行具体的建设项目时，更是仅注重考虑自身的经济利益而容易忽视公众的环境利益。所以，在环境政策、规划、法律以及具体建设项目的决策过程中，都必须重视公众的环境利益，努力实现经济发展与公众环境利益的协调。要实现这一目标，最有效的方法是允许公众参与决策。只有允许公众参与决策过程，才能使公众真正拥有权利以抵制环境损害，才能保证环境政策、规划、法律以及具体建设项目的科学性和有效性，从而在根本上保障公众的环境权益。因此，在海洋环境保护中也应将参与决策作为公众参与的核心。

那么，公众在海洋环境决策中应扮演什么样的角色呢？为了避免潜在的环境损害，环境政策、规划和法律的制定者以及项目的建设者应当考虑并选择运用正确的政策工具和建设方案去实现理想的环境品质，并应设计出有效的执行手段确保执行的效果。为了达到一定的环境标准，行政机关和立法机关采用的手段一般包括在政策和法律中创设各种环境标准，制定各种禁止措施，或是规定义务主体的作为或不作为，乃至利用污染者付费、污染许可等经济手段；可采用的执行手段更是多种多样的，对某一造成环境损害的行为，可以规定课以刑罚，或加以行政制裁，还可以要求其承担损害赔偿责任。具体项目的建设者的决策地位则体现在制定具体的建设方案上，在其设计和施行的方案中，应根据环境保护政策和法律谨慎地确保项目符合环境标准的要求。但是，公众在海洋环境保护中的决策作用却不同于上述的其他决策者。公众参与环境决策不以提出具体的政策、规划和法律的制定、执行方案为手段，也不以设计具体的建设项目方案为己任，而是以监督为主要方式，公众拥有的是否决权，未经公众同意的海洋环境政策、规划、法律不得通过，未经公众同意的建设项目不得施工。这是由公众的社会地位所决定的。公众不是法定的立法主体，不拥有制定法律法规的专门知识，无法制定具体的法律条文；公众更不是设计专家，不能承担设计和规划建设项目的重任。这就使得公众不能像其他决策主体一样，制定具体的政策规划和法律法规、设计具体的建设项目方案。因此，在环境保护中，公众应以监督者的身份参与环境决策，通过自己的行为影响其他决策者的决策，通过行使否决权，使可能造成环境损害的政策、法律、规划和建设项目无法通过和实施，从而在源头上制止环境损害，更好地保护环境。

三、我国海洋环境保护中公众参与的现状

根据《公众在环境事务中获得信息，参与决策，诉诸司法权利的奥胡斯公约》的有关规定，我们可以将公众参与决策的范围界定在 3 个方面：（1）公众对具体环境活动决策的参与；（2）公众对与环境有关的规划和政策决策的参与；（3）环境行政法规和环境法律决策的公众参与。

根据上述公众参与决策的范围及其影响，我们可以将公众参与环境决策相应地划分为初级、中级、高级三个层次。公众对具体环境活动决策的参与是初级决策参与，主要是指公众对具体海洋建设项目的环境影响评价；中级决策参与是指对与海洋环境有关的规划与政策等政府行为决策的参与；高级决策参与是指针对与海洋环境有关的法律（在我国主要包括法律、行政法规、地方性法规、部门规章、地方政府规章等）决策的参与。在我国海洋环境保护中，公众参与决策的层次较低，主要表现为法律法规层次和实践层次两个方面的不足：

1. 海洋环境保护的法律法规对公众参与重视不足，只规定了初级参与和中级参与

初级参与主要体现在环境影响评价中。许多国家的环境法都要求在建设公共或私人的项目之前进行环境影响评价，并将听证会等形式作为环境影响评价的重要组成部分。环境影响评价制度作为一项正式的法律制度在西方国家以及国际社会确立的过程，也是公众参与作为促进决策民主化的手段渗透到政府环境决策中的过程。[7] 环境影响评价是一个为决策提供科学依据的过程，环境影响评价的实施对防止环境侵害具有科学的预见性。在这一过程中鼓励公众参与，可以使社会各界的利益得到全面的考虑，可以推进决策的民主化，防止决策造成环境的侵害。我国从 20 世纪 90 年代初便开始在环境影响评价中推行公众参与。1993 年国家计委、国家环保局、财政部和人民银行联合发布的《关于加强国际金融组织贷款建设项目环境影响评价管理工作的通知》中，明确规定："公众参与是环境影响评价的重要组成部分，报告书应设专门章节予以表述，使可能受影响的公众或社会团体的利益得到考虑和补偿。" 1996 年修订的《水污染防治法》、1996 年制定的《环境噪声污染防治法》中，都规定了建设项目应当征求项目所在地单位和居民的意见的内容。但是，《海洋环境保护法》作为海洋环境保护的专门性法律，虽然规定了海岸工程建设项目的单位必须在建设项目可行性研究阶段编报环境影响报告书，并经海洋行政主管部门提出审核意见后，报环境保护行政主管部门审查批准，环境保护行政主管部门审查批准报告书之前，必须征求海事、渔业行政主管部门和军队环境保护部门的意见，但却未规定在此过程中征求公众的意见，未涉及公众在海洋环境影响评价中的作用。[8] 该法第 47 条关于海洋工程建设项目的环境影响评价也作了类似的规定，均未涉及公众在海洋环境影响评价中的作用。

2002 年 10 月，我国制定了专门的《环境影响评价法》，该法就公众参与作了多方面的原则性规定，不仅在总则中规定"国家鼓励有关单位、专家和公众以适当方式参与环境影响评价"，并且还在专项规划的环境影响评价和建设项目的环境影响评价两个方面分别规定了公众参与条款。但是，《环境影响评价法》并未就综

7　汪劲：《环境影响评价程序之公众参与问题研究》，载于《法学评论》2004 年第 2 期。
8　《中华人民共和国海洋环境保护法》第 43 条。

合利用规划的环境影响评价是否应当征求公众的意见做出规定。[9] 而且，我国环境评价的对象当前主要限于建设项目的评价，而不是政府的政策。

我国《环境影响评价法》较之过去的法律在公众参与环境保护方面有了长足的发展，但也存在着诸多的不足，如仅就公众参与作了原则性的规定，而对公众参与环境影响评价的程序、方法以及救济措施等未做具体规定，并且仅就建设项目和专项规划允许公众参与决策，公众参与决策的层次较低。实践中，应对我国现行的法律、法规特别是《环境影响评价法》的规定加以完善，加强海洋环境影响评价的实施，将公众参与的重点从末端参与转移到决策层面上来，大力发挥公众在海洋环境决策方面的积极作用，从源头上防止环境损害的发生。

并且，在我国的立法实践中，许多地方性法规、行政法规的制定过程都不向社会公开，当然更谈不上公众参与决策。可见，我国公众参与决策属于初级与中级层次的决策参与，对于高级决策参与（即对环境行政法规和环境法律制定的公众参与），相关的法律法规并没有制定具体的参与方式。

2. 我国在海洋环境保护实践中，重海洋行政管理，轻公众参与

在我国，海洋环境保护主要是由海洋环境行政管理机构负责，海洋行政管理机构采用行政、经济、政策法规、科学技术、宣传教育等手段，对各种影响海洋环境的行为进行规划、调控和监督，以协调海洋环境保护和海洋经济发展的关系。但是，只注重海洋行政管理的加强并不能真正有效地保护海洋环境。我国正处于工业化的中期，同时又处于计划经济向市场经济的转化过程中，面对人口、资源、环境的巨大压力，可持续发展原则就成为中国经济体制改革所必须遵循的原则。目前，中国可持续发展战略的制定和环境保护重大决策是国务院以及地方各级人民政府负责的。国务院和地方各级人民政府作为行政机关，实行行政首长负责制。它的决策程序比较简单，在决策过程中容易受到长官意志支配和部门利益、地方利益的影响。因此，有些决策难免失误。特别是地方政府，在地方经济利益的驱使下，有些决策严重损害了可持续发展和环境保护的原则。[10] 实践证明，在海洋环境保护中加强行政管理是必要的，但仅限于此又是不够的，因为，在缺乏约束的条件下，政府部门难免更关心自己的利益而不是社会的利益。解决这一问题的有效方法是充分发挥公众参与的作用，使公众成为决策的一方主体，只有加强公众参与在海洋环境保护中的作用才能真正有效的保护好海洋环境。

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9 在我国《环境影响评价法》中，将应当进行环境影响评价的规划分为综合利用规划（含土地利用的有关规划，区域、流域、海域的建设、开发利用规划）和专项规划（含工业、农业、畜牧业、林业、能源、水利、交通、城市建设、旅游、自然资源开发的有关专项规划）两大类。

10 一些部门的生存实际上依赖于海洋环境资源的浪费，如向超标排放污染物的企业征收排污许可费成为一些环境管理部门的经费来源。

四、加强公众参与的对策

1. 提高公众参与的意识，开拓多种参与途径

在现阶段，我国公众参与环境保护的意识较低，要充分发挥公众在海洋环境中的作用，就必须采取有效的措施提高公众的参与意识，加强宣传，使公众认识到自己有保护海洋环境的权利，认识到保护海洋环境是每一个公民的义务，只有全社会一起努力才能保护好海洋环境。同时，应使行政机关及其工作人员认识到公众参与海洋环境保护的重要作用，克服环境保护中的“官本位”现象，为公众参与海洋环境决策扫清障碍，将公众纳入到公众参与的程序中，加强环境保护的民主性，使公众参与和海洋环境行政管理相结合，真正实现海洋环境的有效保护。而且，还应该开拓公众参与的多种途径，将公众参与决策落到实处。公众参与的途径和方式是多种多样的，如通过论证会、听证会、座谈会的途径参与决策，通过信访、游行、集会的途径提出批评建议，还可以通过组织环境保护社团的形式广泛地参与环境保护。

2. 完善立法，充分发挥公众参与在各个层次的作用

我国海洋环境保护中的公众参与决策层次较低，公众参与决策不应局限于针对具体建设项目的初级层次，在中级和高级决策阶段也应充分发挥公众参与决策的作用。相对于具体的建设项目而言，区域的建设及开发利用规划、自然资源的开发利用规划、行业的发展规划以及与环境有关的法律法规的制定和实施，对环境造成的影响更为广泛。如果在制定海洋环境政策、规划或制定法律、法规时，就做好环境影响评价工作，对实施后可能造成的环境影响进行科学地分析、预测和评估，提出预防或者减轻不良环境影响损害的措施和对策，保证政策、规划和法律、法规符合环境保护的要求，有利于从源头上控制对海洋环境的不良影响，促进可持续发展目标的实现。所以，海洋环境影响评价不应局限于具体的建设项目，在制定海洋环境政策、规划、与海洋环境有关的法律、行政法规时，也应充分利用环境影响评价这一制度，全面了解和认识评价对象的环境状况，揭示出潜在的环境问题，提高决策的科学化水平，加强海洋环境保护。而且，《中华人民共和国立法法》第 5 条规定：“立法应当体现人民的意志，发扬社会主义民主，保障人民通过多种途径参与立法活动。”。据此，有关部门在制定法律、行政法规、地方性法规、部门规章、地方政府规章的时候，应当进行海洋环境影响评价，对相关法律、法规、规章实施后的环境影响进行分析，并且允许公众参与立法活动的决策过程。[11]

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11 除此之外，要在环境决策中更好的发挥公众的作用，还需要一系列相关的配套改革，如立法机制的调整、政府机构改革的深化、决策民主化的加强等等，本文不再详述。

国际公约、政策、法律、管理
——生物安全比较研究

聂 鑫*

内容摘要: 面对海洋生物基因资源开发的机遇和挑战，我们应该树立科学发展观，在生物安全的前提下，面向国家资源可持续利用和环境可持续发展的需求，发现、挖掘和利用各种基因资源，用于种质改良、生产药物和高附加值产品，面向大洋和深海，开辟新的基因宝库。为此目的，本文主要就生物安全的相关国际公约以及美国、欧盟、日本、澳大利亚和中国等国有关生物安全的国家政策、法律和管理等几个方面进行了论述。从而得出这样的结论:国家在生物安全方面，最根本的是要把国际公约的基本精神、国家生物技术发展的政策、法规体系的控制、高效协调的管理等四个方面有机整合起来。

关键词: 生物安全 国际公约 政策 法律 管理 比较研究

一、问题的提出

（一）生物安全的涵义

以影响生命最基本物质——基因为特征的现代生物技术（包括基因重组技术、克隆技术、细胞融合技术等），极大地提高了人类干预和影响自然生命过程的能力。现代生物技术在解决人口、环境、能源等方面的问题已经并将继续发挥重大作用。譬如，由于捕捞过度、海洋污染及养殖种类的病害影响，沿海渔业资源迅速减少，利用海洋生物技术开发现有海洋生物资源、减少病害侵扰、保证增产稳产，把传统海洋养殖业转到以高新技术为指导的现代养殖业已成定势，生长激素转基因鱼、抗病毒转基因鱼虾的新苗种的产生就是很好的例子。[1] 但现代生物技术及其产生的转基因生物体在给人类带来巨大收益的同时，可能会给人类带来严重的危害，也就引发了生物安全的问题。关于生物安全的概念至今没有统一的说法。有

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1 《海洋生物基因工程》，下载于 http://www.biox.cn/content/water/20040920869.htm，2004 年 12 月 27 日。

的学者认为，生物安全是指生物种群的生存发展处于不受人类不当活动干扰、侵害、损害、威胁的正常状态，所谓正常状态即该生物种的个体总量处于动态平衡的稳定状态。[2] 这里的生物安全包含着比较广泛的内容，如生物技术引起的生物安全问题，外来物种入侵、物种灭绝以及人类和动物的健康等问题。有的学者则认为，生物安全是指生物技术及其产生的转基因生物体的潜在危害的社会防范。[3] 从《生物多样性公约卡塔赫纳生物安全议定书》（以下简称“《生物安全议定书》”）的规定来看，生物安全有其特定的含义，“本议定书应适用于可能对生物多样性的保护和可持续使用产生不利影响的所有改性活生物体的越境转移、过境、处理和使用，并考虑到对人类健康构成的威胁”。[4] 本文采用第二种概念来研究生物安全，这是因为第二种概念既涵盖了第三种概念，又不象第一种概念那样太宽泛。

（二）几个相关的概念

1. 转基因生物

转基因生物就是利用现代转基因生物技术对自然界物种进行基因转移、重组、改造而创造出来的新生物体。[5] 也就是说通过人工基因工程或 DNA 重组技术，而不是通过自然配对法，使遗传物质从一个生物体转移到另一个生物体，这种转移可以在不同物种之间进行。

2. 改性活生物体

《生物安全议定书》给改性活生物体下的定义是：任何具有凭借现代生物技术获得的遗传材料新型组合的活生物体。[6] 改性活生物体与转基因生物应无明显区别，有学者认为，在许多场合，这两个名词实际上毫无区别地交替使用着。[7] 但改性活生物体包括细胞融合产品，超出了基因工程范围，因此比转基因生物的含义略宽。[8]

3. 转基因食物

转基因食物是由转基因生物制造出的食品。转基因食物可以是有生命的有机体，像西红柿、土豆等，也可以是包含有转基因生物成分的食品。[9]

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2 蔡守秋：《论生物安全法》，载于《河南省政法管理干部学院学报》2002 年第 2 期。
3 柯坚：《我国生物安全立法问题探讨》，载于《中国环境管理》2000 年第 1 期。
4 《生物多样性公约卡塔赫纳生物安全议定书》第 4 条。
5 柯坚：《论生物安全法律保护的风险防范原则》，载于《法学杂志》2001 年第 3 期。
6 《生物多样性公约卡塔赫纳生物安全议定书》第 3 条。
7 王志文：《基因工程所引发的国际法问题》，载于《国际法论丛》2001 年第 3 期。
8 丁晓阳：《转基因农产品国际贸易争端的法律规则背景及解决机制》，载于《农业经济问题》2003 年第 8 期。
9 Michele M. Compton, Applying World Trade Organization Rules to the Labeling of Genetically Modified Foods, *Pace International Law Review*, Fall 2003, p. 362.

（三）关于生物安全的争论

现代生物技术给人类带来了巨大的经济、社会效益，也成为世界各国在高科技领域争相发展的重点。目前，在技术上尚未取得转基因生物对人类和生态环境有严重危害的确切证据，但对于生物安全的争论却十分热烈。一些支持者提供了充分的证据来表明转基因生物是安全的。他们认为，转基因农作物可以在贫瘠的土地上较好地生长，具有很好的抗虫性和抗杂草化，而且产量高。他们还说，转基因生物对于解决世界上贫穷国家的温饱问题是非常有好处的。[10]

相反，许多国家的消费者和非政府组织要求要么完全禁止转基因生物，要么至少对其进行严格的规定。他们认为现代生物技术使基因在生物之间进行人为的相互转移，有可能在以下方面给人类和环境造成一些不良后果：一是存在于转基因植物中的具有某种抗性的基因有可能通过杂交转移到其野生或半驯化种中去，这种转移的结果在特定条件下将增强这些植物抗杂草化的特性，并最终造成生态环境的破坏；一些具有抗虫特性的转基因植物，除了能对害虫产生毒害而使其死亡外，对许多有益生物也可产生直接或间接的影响，如曾经就有关于转基因抗虫玉米花粉可导致蝴蝶死亡的报导。[11] 二是转基因动物一般都具有普通动物所不具备的优势特征，如果逃逸到自然环境中，将有可能通过改变物种间的竞争关系而破坏原有自然生态平衡，比如有人担心，由于转基因鱼比普通鱼的生长快得多，如果它们逃离专门的渔场进入到河流、海洋，可能会威胁环境。[12] 三是转基因生物产品作为食物对人体健康可能带来影响。另外，转基因微生物可能与其他生物交换遗传物质，产生新的有害生物或增强有害生物的危害性，最终引起灾害。

（四）转基因生物的发展状况

时至今日，人类在现代生物技术领域的研究已经取得了累累硕果，转基因生物的商品化和产业化发展快速。尤其在农业领域，该技术具有极为广阔的前景，现代生物技术和传统农业相结合的方式被认为是保证 21 世纪农业可持续发展的最好途径。转基因农作物发展之迅速从下表 [13] 就可见一斑。

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10 Michele M. Compton, Applying World Trade Organization Rules to the Labeling of Genetically Modified Foods, *Pace International Law Review*, Fall 2003, pp. 360~362.

11 《生物安全》，下载于 http://www.phield.com/blog/blog.php?job=art&articleid=a_20040624_241106, 2004 年 12 月 27 日。

12 张小军：《美国专家称克隆和转基因动物食品是安全的》，下载于 http://www.gdbgn.cn/news/view.asp？ ID ＝ 632，2004 年 12 月 27 日。

13 GMO's background, at http://www.icgeb.org/~bsafesrv/background.htm, 27 December 2004.

全球转基因农作物种植面积

（面积单位：百万公顷）

年份	1996	1997	1998	1999	2000	2001	2002	2003
面积	1.7	11.0	27.8	39.9	44.2	52.6	58.7	67.7

2003 年各国转基因农作物种植面积

（面积单位：百万公顷）

国别	美国	阿根廷	加拿大	巴西	中国	南非	其他 *
面积	42.8	13.9	4.4	3.0	2.8	0.4	3.8
百分比	63%	21%	6%	4%	4%	1%	6%
与 2002 年相比	+10%	+3%	+26%	—	+33%	+33%	+533%

*包括：澳大利亚、印度、罗马尼亚、乌拉圭、西班牙、墨西哥、菲律宾、哥伦比亚、保加利亚、洪都拉斯、德国和印度尼西亚。（来源：Clive James, Preview: Global Status of Commercialized Transgenic Crops: 2003, *ISAAA Briefs*, No. 30, 2003.）

同时，发达国家率先提出的 21 世纪海洋可持续发展的新蓝图，已为世界各国所借鉴，如 1999 年 9 月，美国提出了 21 世纪海洋发展战略。[14] 新世纪，海洋生物及基因工程彰显整个海洋产业。在水生经济动物方面，美国启动最早，已经筛选到一批与发育、生殖及免疫相关的功能基因；日本针对疾病和免疫相关功能基因进行重点研究；国外目前工作重点，均集中到建立功能基因分析技术平台上。我国在水产养殖核心种质方面，开展了遗传连锁图谱的构建、功能基因的筛选与克隆，胚胎干细胞和基因打靶技术的研究，建立了淡水鱼类基因转移的完整技术体系，以及海水鱼类花鲈胚胎干细胞系，为建立鱼类功能基因分析的技术平台奠定了良好基础。[15]

伴随着现代生物技术研究的深入及其产品商品化、产业化的发展，由此引发的生物安全问题引起了世界各国的高度关注。国际组织和世界各国都在通过法律的手段加强对现代生物技术研究、应用的管理，以防患于未然。本文主要就生物安全的相关国际公约以及美国、欧盟、日本、澳大利亚和中国等国有关生物安全的国家政策、法律和管理等几个方面进行论述。

14 江伟钰：《21 世纪海洋开发国际法框架研究》，载于《法学杂志》2004 年第 25 卷。

15 《海洋生物基因资源的研究与利用》，下载于 http://www.biotech.org.cn/news/news/show.php?id=16998，2004 年 12 月 27 日。

二、有关生物安全的国际公约及相关冲突

（一）国际公约的概况

目前，国际上有关生物安全的公约主要有：

1.《21 世纪议程》

1992 年，里约热内卢联合国环境与发展大会上第一次在国际范围内讨论了生物技术的安全使用和管理问题。大会通过的《21 世纪议程》在第 16 章“对生物技术的无害环境管理”中对生物技术的开发、利用和管理做出了规定。它在肯定生物技术对人类具有重要作用的同时，强调只有谨慎地发展、利用生物技术才能获得生物技术的最大惠益，并要求各国通过达成包括风险评估和风险管理的可适用原则的国际协定，来确保安全开发、应用、交流和技术转让。[16]

2.《生物多样性公约》

《生物多样性公约》的起草与谈判开始于 1988 年，在 1992 年 6 月的联合国环境与发展大会上通过，并在 1993 年 12 月 29 日生效。我国是世界上最先加入该公约的少数国家之一，是最先批准该公约的发展中国家，现已有 188 个国家批准加入该公约（如日本、俄罗斯、澳大利亚和墨西哥等）。[17] 该公约是惟一一个囊括了各方面生物多样性——既包括海洋生物多样性也包括陆地生物多样性的全球性条约。它通过国际法律规范来调节生物技术对生物多样性的保护和利用、生物技术的安全作用和转让及其生物技术惠益的分配等问题。《生物多样性公约》第 8 条 g 款规定：缔约方应制定或采取办法，以酌情管制、管理、控制因使用和释放改性活生物体对生物多样性的保护和可持续利用可能产生有害的环境影响。第 19 条规定：缔约方应该考虑是否需要一项议定书，规定适当程序，特别包括提前知情协议，适用于可能对生物多样性保护和持续利用产生不利影响的生物技术改变的任何活生物体的安全转移、处理与使用，并考虑该议定书的形式。[18] 这条规定成为了《生物安全议定书》的制定依据。

3.《生物安全议定书》

《生物安全议定书》是一份为保护生物多样性和人体健康而控制和管理改性活生物体越境转移、过境、装卸和使用的国际法律文件，是迄今为止生物安全国际保护领域最重要的国际法。它是依据《生物多样性公约》相关条款而制定的。

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16 《21 世纪议程》，下载于 http://www.un.org/chinese/events/wssd/21 agenda.html，2004 年 12 月 27 日。

17 Parties to the Convention on Biological Diversity/Cartagena Protocol on Biosafety, at http://www.biodiv.org/ world/parties.asp, 27 December 2004.

18 《生物多样性公约》，下载于 http://www.chinabiodiversity.com/china-news/biodi.htm，2004 年 12 月 27 日。

2000 年 1 月 24—28 日，在《生物多样性公约》缔约国大会《生物安全议定书》特别会议上，来自 133 个政府、非政府组织、工业组织和科学界的 750 多名人士出席了此次会议，经过激烈的谈判，通过了生物安全议定书。2000 年 5 月 15—26 日，在肯尼亚内罗毕召开的《生物多样性公约》的缔约国大会上，64 个国家和欧盟签署了该议定书，使之成为第一部有关现代生物技术生产的改性活生物体的国际法。2003 年 9 月经 50 个国家批准后，《生物安全议定书》正式生效。它由序言、40 条正文和 3 个技术附件构成。正文的主要内容包括议定书的目标、适用范围、风险评估、风险管理、标识、国家主管部门、国家联络点生物安全信息交换所、能力建设、赔偿责任和补救以及财务机制等。议定书阐述了可能对生物多样性产生负效应的特别是通过越境转移的改性活生物体的安全转移、处理及利用，确定了预先通知协议（即在进行以向对方环境引入任何改性活生物体——如下种用种、放生鱼类或生物治理用微生物——为目的的出口时，出口方在发出首批货物之前，必须得到进口方的同意）和进口改性活生物体的程序，包括预防性原则、具体信息及文件要求等。[19] 截至 2004 年 12 月 21 日，已有 111 个国家和地区签署或批准了《生物安全议定书》。[20] 中国政府在 2000 年 8 月 8 日签署了该议定书，目前还没有进入批准程序。美国不是《生物多样性公约》的缔约国，因而不能成为《生物安全议定书》的成员，但是美国参加了公约文本的谈判以及随后相关的政府间委员会为《生物安全议定书》生效所做的准备。[21] 就在 2004 年 2 月于吉隆坡召开的《生物安全议定书》第一届缔约国大会上，并不是缔约国的美国派出了 45 人的最大代表团。[22]

4.《实施卫生与植物卫生措施协定》[23]、《技术性贸易壁垒协定》[24]

WTO 框架下与生物安全密切相关的重要多边协议主要有 2 个，即《实施卫生与植物卫生措施协定》、《技术性贸易壁垒协定》。乌拉圭回合签订的《实施卫生与植物卫生措施协定》是适用于国际贸易的动植物卫生检疫措施，也是对有关食品和农产品的国际贸易协议的重要补充条款。《技术性贸易壁垒协定》是特别针对《实施卫生与植物卫生措施协定》中的卫生检疫而制定的，它也包含了关于食品的所有其他方面的质量要求。就转基因产品来说，《实施卫生与植物卫生措施协定》

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19 《卡塔赫纳生物安全议定书》，下载于 http://www.chinabiodiversity.com/china-news/safety.htm，2004 年 12 月 27 日。

20 Ratification of the Cartagena Protocol on Biosafety and Its Entry into Force, at http://www.biodiv.org/biosafety/ratification.asp, 27 December 2004.

21 U.S. Department of State, The Cartagena Protocol on Biosafety, at http://usinfo.state.gov/regional/ea/mgck/archive03/ejbio5dos.htm, 27 December 2004.

22 《〈生物安全议定书〉与 WTO：一对矛盾体？》，下载于 http://www.foodsafety.org.cn/module/ article/index.php?article-id ＝ 250，2004 年 12 月 27 日。

23 《实施卫生与植物卫生措施协定》，下载于 http://www.wangqian.net/WTO/20.htm，2004 年 12 月 27 日。

24 《技术性贸易壁垒协定》，下载于 http: //law.chinalawinfo.com/other/WTO/Legal3/315.doc，2004 年 12 月 27 日。

的食品安全条款并不容易解决消费者关注的问题，仅可以处理短期的食品安全问题。而且《实施卫生与植物卫生措施协定》是专门用于处理那些企图滥用有关规定为生产商提供保护的贸易事宜，要想使之专门适用于转基因产品是不可能的。因而，只有改进世贸组织机制，拓宽世贸组织规则，才有可能化解转基因产品的潜在贸易争端。[25]

（二）有关生物安全的国际公约间的冲突

《生物安全议定书》中对改性活生物体的越境转移所加的各种限制，必然对国际贸易产生冲击，这一点与国际贸易的许多规则特别是 WTO 规则倡导的贸易自由化精神是有矛盾的。在 WTO 看来，议定书的很多条款其实就是在设置技术性壁垒。尽管 WTO 的规则中也有可对贸易进行限制的环境例外条款，但是，这些环境例外条款的适用条件是比较苛刻的，与《生物安全议定书》限制贸易的条件相比，不能相提并论。WTO 框架下的《实施卫生与植物卫生措施协定》要求所采取的管理措施必须有科学依据，而根据《生物安全议定书》，一个国家可以采取预防风险的管理措施，这显然与 WTO 贸易规则不相符。[26] 对于既是 WTO 成员国又是《生物安全议定书》缔约国的当事方而言，如果以后发生纠纷，到底是在哪个框架内解决问题呢？当事方一旦做出选择，则必然会导致对其中一个国际协议的违背。当然，打官司的双方都会选择对自己最有利的条件，这必然引起贸易战。尽管国际环境组织和国际贸易组织早已进行过有关研究和讨论，但要找到满意的解决方法还有待时日。

《生物多样性公约》第 22 条第 1 项是一个关于公约与其他协议冲突问题的规定：“本公约的规定不得影响任何缔约国在任何现有国际协定下的权利与义务，除非行使这些权利与义务将严重破坏或威胁生物多样性”，这意味着《生物多样性公约》规范的内容一旦与其他国际协定有所抵触时，《生物多样性公约》具有相对的优先性。《生物安全议定书》作为《生物多样性公约》的补充文件，却不享有公约相应的优先性。原因有两方面，一是《生物安全议定书》是一个具有独立法律地位和法律效力的国际条约，二是根据议定书第 32 条，《生物多样性公约》中只有“有关其议定书的规定”适用本议定书。因此，如果公约中的规定不是直接针对议定

25 《转基因产品贸易争端引起世贸成员关注》，下载于 http://www.exporteam.com/old_web/dongtaisudi/2002/2002-10/2002102803.htm，2004 年 12 月 27 日。

26 Patrick J. Valllely, Tension between the Gartagena Protocol and the WTO, the Significance of Recent WTO Development in an Ongoing Debate, *Chicago Journal of International Law*, Summer 2004, pp. 371~373.

书所作的（如第 22 条第 1 项的规定），是不应适用于议定书的。[27]

（三）国家间的冲突

在《生物安全议定书》起草和谈判过程中，矛盾和冲突始终存在。各国由于政治经济地位、生物技术发展水平以及公众态度的不同，在谈判过程中形成了五大集团："迈阿密集团"（包括美国、加拿大、智利、阿根廷、乌拉圭和澳大利亚）、欧盟、发展中国家集团、折衷集团（包括日本、墨西哥、新西兰、挪威、韩国、新加坡和瑞士）和中东欧集团。[28] 他们的矛盾主要体现在两大集团的对立：一是"迈阿密集团"，另一是欧盟和发展中国家集团。前者主张自由贸易，不愿见到转基因产品的贸易活动受到限制和阻碍，后者着眼于生态环境和消费者的健康和安全，主张对该种产品严格限制。[29]

国家间的现实贸易冲突也经常发生。欧盟对美国转基因玉米、大豆的限制导致美国出口大幅下降，种植面积减少。WTO 西雅图会议失败，劳工标准、保护自然资源和转基因生物之争曾被认为是三大争论焦点。中国 2001 年宣布管制转基因农产品，引起国际粮食市场波动，中美政治交涉报道见诸新闻媒体。[30]

目前，美国的转基因技术是非常先进的，当今一些主要的转基因产品多是由美国的生物技术公司开发，为了收回研发成本，美国势必会不遗余力地推销其转基因产品。在欧盟和一些发展中国家严格限制进口以后，美国将转基因食品作为援助食品，赠送给处于饥饿状态下的非洲和拉美国民。[31]

（四）小结

《生物安全议定书》的谈判及其以后的签署，其基础应该是科学，但在目前所有科学证据还难以正确评价改性活生物体及其产品的风险范围和程度的今天，其争论的焦点是贸易，是经济利益。

不管一个国家以基因工程为代表的现代生物技术处于什么水平，生物安全问题都是不可回避的。在关系到国家安全和利益的问题上，各国在短时间内难以达成共识，但是对生物安全进行国际立法是必然趋势。各国应在保护自身安全和利

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27 万霞：《生物安全的国际法律管制——〈卡塔赫纳生物安全议定书〉的视角》，载于《外交学院学报》2003 年第 1 期。

28 徐源泰：《生物安全议定书与其影响》，下载于 http://e-info.org.tw/issue/biotech/issue-biotech00121301.htm，2004 年 12 月 27 日。

29 王志文：《基因工程所引发的国际法问题》，载于《国际法论丛》2001 年第 3 期。

30 丁晓阳：《转基因农产品国际贸易争端的法律规则背景及解决机制》，载于《农业经济问题》2003 年第 8 期。

31 魏伟：《浅谈与生物安全立法有关的几个问题》，载于《科技与法律》2003 年第 1 期。

益的同时，适当地做出一些让步和妥协，以达成生物安全的国际公约，并使之得到较好的遵循。

三、国外现代生物技术政策之比较

世界各国尤其是现代生物技术发展较快的美国、欧盟和日本，政府都把该技术作为本国优先发展的领域，采取积极措施，大力推进现代生物技术的发展。

（一）美国

美国是转基因技术研究开发的最大投资国，在转基因产品的生产规模和商业化生产方面一直处于世界领先地位，加之美国公众对转基因生物的认同和生物公司很强的院外活动能力，美国反对限制或禁止转基因产品的发展。1986 年 6 月颁布的《生物技术管理协调大纲》与 1991 年 2 月颁布的美国生物工程政策报告，全面阐明了美国生物安全管理的基本政策，其基本原则是：（1）对生物技术的安全性管理应着重于生物技术产品本身的特性和危害性，而不是生产过程；（2）最大限度地减少政府所承受的审批负担；（3）必须有利于生物技术的迅速发展；（4）应根据产品的特性进行风险性评价，而不应设立特定的控制标准。[32]

（二）欧盟

相对而言，欧盟生物技术的发展整体上落后于美国。进入 90 年代，生物技术成为欧盟高技术发展的一个重点领域，德、英、法和欧盟其他国家都先后对国家应优先发展的关键技术进行了选择并制定了相应的关键计划，确定了科技发展的优先领域，其中包括生物技术；通过立法加快生物技术发展速度；提供税收优惠政策，以促进高新技术的产业化发展；发展风险资本，支持创新；促进生物技术人才的培养等。但是，欧盟的公众对转基因生物普遍比较反感，加上欧盟强调平衡地发展经济而不要有太大的风险，使得欧盟在现代生物技术发展方面，较之美国而言，态度谨慎。其对转基因产品的政策在于预防原则，其主旨是当制定政策时，主要着眼于防止某一特殊行动所造成的损害，而不是让其发生然后才应付其后果。当然，也有人认为，欧盟的公众对转基因商品的关注是人为制造出来的，是为了给欧盟的生物技术公司以生存空间，用以赶上美国享有的技术领先地位。[33]

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32 徐友刚：《考察美国生物安全立法情况的报告》，载于《科技与法律》2003 年第 1 期。

33 《转基因产品贸易争端引起世贸成员关注》，下载于 http://www.exporteam.com/oldweb/dongtaisudi/2002/2002-10/2002102803.htm，2004 年 12 月 27 日。

（三）日本

作为亚洲地区生物技术遥遥领先的国家，1999 年 1 月，日本政府正式宣布把扶植、振兴生物产业、完善相关研究体制作为国家重点科技战略之一，把“生物产业立国”确定为新的国家目标。日本政府计划在 10 年内培植 1000 家生物科技公司，使与生物有关的交易额达到 25 万亿日元。[34]

（四）澳大利亚

澳大利亚是世界最发达的畜牧业国家，有着独特的生物资源。为了鼓励生物技术的研究和创新，澳大利亚在“提升澳大利亚能力创新计划”中设立了“生物技术创新基金”，2001—2004 年经费为 4 千万澳元，由澳大利亚工业协会负责实施。此外，地方政府（州和领地）也有相应的配套基金计划。[35]

（五）小结

现代生物技术作为智力、资金、技术密集的新兴产业，有其特殊的发展规律。适应这些规律，促进现代生物技术的发展，关键是制度创新，而制度创新就需要政府部门对现行的政策进行调整。这种调整不是让生物技术的发展去适应现行和传统的制度，而是让现有制度通过创新和改革去适应并促进生物技术的发展。综观世界生物技术的发展，制度创新和政策引导起了非常重要的作用。同时，不同国家或地区由于在社会、历史、经济、文化背景、伦理道德和宗教信仰等方面各不相同，导致了它们在生物技术政策上的差异。

四、国外生物安全立法之比较

（一）国外生物安全立法现状

1. 美国

1973 年，美国加利福尼亚大学旧金山分校的 Herber Boyer 教授和斯坦福大学的 Stanley Cohen 教授进行了人类历史上第一次有目的的重组尝试，首创了重组 DNA 技术，开辟了分子生物学向工程化、实用化发展的新领域。就在 DNA 技

34 《高科技信息简报》第 63 期。
35 中国生物安全法制化管理赴澳大利亚考察团：《澳大利亚生物安全研究与法制化管理考察总结》，载于《科技与法律》2003 年第 3 期。

术诞生后不久的 1975 年，美国一些生物学家在加利福尼亚的会议上指出 DNA 技术可能对环境和人类产生巨大的风险或危险。1976 年 6 月 23 日，美国国立卫生研究院制定了世界上第一个实验室基因工程规则——《重组DNA 分子实验准则》。目前美国与生物安全有关的法规主要有：《联邦食品、药品和化妆品法》（1938 年制定，以后多次修改）、《有毒物质控制法》、《联邦植物杀虫法》、《植物检疫法》、《联邦种子法》、《濒危物种法》、《联邦杀虫、杀真菌、杀啮齿动物法》等。在动植物基因资源保护方面，美国于 1970 年颁布了《植物品种保护法》（1989 年和 1994 年作了两次修订）。值得一提的是，美国对生物安全管理没有制订专门的联邦法律，而是在有关法律中做出一些规定，[36] 如上述的一些法律。这源于美国认为利用生物技术开发出来的新产品是现有产品的扩延，可利用现有的法律以保证转基因产品的安全。此外，2002 年 5 月，5 项涉及转基因农作物安全问题的法案被提交美国国会讨论。其中转基因农作物和农民保护法案、转基因食品知情权法案、转基因生物责任法案等 3 项法案较为重要，但是这些法案目前还没有被国会通过。[37]

2. 欧盟

欧盟在 80 年代末建立了生物技术法规框架。生物技术法规框架由 2 部分组成，一是“水平”立法，涉及基因工程微生物封闭设施内的使用、转基因产品的有目的释放和接触生物试剂工作人员的职业安全；二是“垂直”立法（或称产品法规），包括医药产品、动物饲料添加剂、植保产品、新食品和种子。此外，有关生物技术知识产权保护的法规也是此法律框架的一个组成部分。[38] “水平”立法包括：转基因或病原生物体的隔离使用（90/219/EEC）、转基因生物的目的释放（90/220/EEC 和 2001/18/EC）、从事遗传工程工作人员的劳动保护（90/679/EEC 和 93/88/EEC）；“垂直”立法包括：欧盟关于含转基因生物及其产品进入市场的决定、转基因生物或病原生物体的运输、饲料添加剂、医药用品以及新食品方面的法规。欧洲议会于 2003 年 9 月 22 日通过了世界上最严格的转基因食品立法：《转基因食品及饲料管理条例》（1829/2003/EC）和《转基因生物追溯性及标识办法以及含转基因生物物质的食品及饲料产品的追溯性管理条例》（1830/2003/EC）。[39] 欧盟各成员国家根据这些指令制定法律，例如，英国制定的《转基因生物的封闭使用管理条例》、《转基因生物释放和市场化管理条例》、《新食品和新食品成分管理条例》，

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36 徐友刚：《考察美国生物安全立法情况的报告》，载于《科技与法律》2003 年第 1 期。

37 王灿发：《生物安全及其法律问题》，下载于 http://www.gzepb.gov.cn/ztbd/200411020024.htm，2004 年 12 月 27 日。

38 《欧盟的转基因食品管理》，下载于 http://www.bioon.com/biology/Print.aspArticleID=75637，2004 年 12 月 27 日。

39 Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed, *Official Journal of the European*, 18 October 2003.

德国制定的《基因工程法》等。[40]

3. 日本

日本于 1979 年 8 月颁布了重组 DNA 实验导则，规定了无论是进行物理控制还是生物控制的重组 DNA 实验，都必须确保其安全性，并且这个条例已经修订过多次。此后，日本通产省、厚生省、科学技术厅和农林水产省分别颁布了各自的生物安全准则，包括《转基因生物工业化准则》、《重组 DNA 实验准则》、《农林渔业及食品工业应用重组 DNA 准则》和《转基因食品管理准则》等。[41]

（二）生物安全立法模式的选择

生物安全立法应当与经济、社会发展与环境保护相协调。一个国家的生物安全立法模式主要取决于三个方面的因素：一是该国对现代生物技术和生物安全性的理解；二是该国在高科技领域的发展政策；最后还与国家在农产品国际贸易中的地位密切相关。国际上对生物安全的立法模式主要分为 2 个大类：一类是以产品为基础的立法模式，以美国、加拿大等国为代表，其立法原则是以基因工程为代表的现代生物技术与传统生物技术没有本质区别，制约对象是生物技术产品不是生物技术本身；另一类是欧盟等以技术为基础的立法模式，认为重组 DNA 技术本身具有潜在的危险性，由此只要与重组 DNA 有关的活动，都应进行安全性评价，并受法律制约。[42] 可以这样说，二者在生物安全管理方面的差异与各自对生物安全的理解有很大关系，但二者之间的分歧不仅仅是它们在文化与价值观方面的差异和它们对于转基因生物对环境和人体健康影响认识上的不同，对利益的争夺也是一个重要因素。其他国家的管理法规介于美加与欧盟之间，如日本、澳大利亚等。

（三）转基因生物标签管理

国外在转基因生物标签管理方面采取了不同的措施，基本上可以分为 2 类模式：一是北美的供给推动型管理措施，强调以科学为依据，重视对最终产品的管理，主张实行自愿标签；二是以欧盟、日本为代表的需求拉动型管理措施。它建立在预防原则的基础上，主张对生产过程进行管理，要求实行强制标签。[43] 从近几年各国的情况来看，实行对转基因生物的标签管理是必然趋势。日本于 2001 年 4 月起

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40 王灿发：《生物安全及其法律问题》，下载于 http://www.gzepb.gov.cn/ztbd/200411020024.htm，2004 年 12 月 27 日。

41 王灿发：《生物安全及其法律问题》，下载于 http://www.gzepb.gov.cn/ztbd/200411020024.htm，2004 年 12 月 27 日。

42 王小军：《论生物安全法》，下载于 http://www.riel.whu.edu.cn/show.asp?ID=1200，2004 年 12 月 27 日。

43 张巨勇：《WTO 背景下我国的转基因农产品标签管理》，载于《农业经济》2004 年第 6 期。

废止了此前实行的自愿性标识制度，取而代之的是强制性标识制度；俄罗斯规定，自 2000 年 7 月起转基因食品必须贴上标识，且有关转基因成分的信息必须在货运文件上标明；墨西哥于 2000 年 3 月通过的《健康法案》要求转基因食品均需贴上标识；尽管美国在发展转基因食品方面一直保持着比较激进的态度，但是近年来迫于各方面的压力，其态度已经有所改变，例如，2000 年 5 月美国通过总统法令，要求在将生物技术新产品推向市场之前，必须向食品与药品管理局提交报告，而在此前这一程序是自愿性的。[44] 尽管各国在转基因生物标签方面存在分歧，但转基因生物标签制度在全球范围内逐渐流行，在一定程度上说明了各国都在趋利避害。

（四）生物安全立法的趋势

1. 全过程监控与适度控制相结合。生物安全问题包括现代生物技术从研究、开发、生产到实际应用整个过程中的安全性问题，所以相应的立法应遵循全过程控制原则。各国对转基因生物体的研究、开发、释放、使用和产品的市场化诸环节分别做出的相应法律规定，也具有明显的“全过程控制”的倾向。适度控制则要求对生物安全的法律要求不能过高，否则会妨碍国家生物技术研究和应用的健康发展，反之则可能使人类健康和环境受到严重威胁，所以应该适度把握法律控制与科学研究自由的平衡关系。

2. 法规体系的发展与生物技术发展相适应。因为科学技术在发展，各国都需要一个与之同步的管理及其法规体系。要满足国内和国际的需要，就必须使生物安全管理法规体系的发展与生物技术发展相适应，生物安全管理法规的超前或滞后都会阻碍本国现代生物技术的发展。

3. 国家技术性法规与国际接轨。可以肯定，今后各国在转基因生物风险评价等技术法规上，将加强同国际植物保护协会、国际食品法典委员会、生物安全议定书以及 WTO 的合作，进一步加强对某些环节的技术研究，回答目前转基因生物安全评价中不能解决的问题，努力使其评价标准国际化。

五、国外生物安全管理之比较

（一）管理机构设置方面

美国政府于 1986 年颁布了《生物技术管理协调大纲》，将基因工程工作纳入

44 王灿发、于文轩：《生物安全的国际法原则》，载于《现代法学》2003 年第 4 期。

现有的法规进行管理。该框架规定，美国农业部、环境保护局和食品与药物管理局是转基因作物及其产品的主要管理机构，它们根据各自的职能对基因工程工作及其产品实施安全性管理。其管理的特点是：

1. 农业部、环境保护局和食品与药物管 3 局三个核心部门在管理中通力合作；
2. 审批程序比较明了而且对公众公开；
3. 不需要新的立法和机构；
4. 着重以科学为依据和以风险为基础进行管理评估与裁决；
5. 对不同的转基因作物联合批准；
6. 不需要为个别品种进行登记。[45]

在英国，国务大臣负责涉及人类健康和安全的转基因生物释放或市场化许可的审批。卫生与安全管理局主要负责转基因生物隔离使用管理，参与转基因生物的释放和市场化管理。环境、运输及政区部在转基因生物的释放和市场化管理以及隔离使用管理过程中起协调作用。农、渔、食品部和卫生部共同参与新食品和新食品成分的管理。[46]

在日本，生物安全管理所涉及的部门主要是科学技术厅、通产省、农林水产省和厚生省。科学技术厅依据《重组 DNA 实验准则》，主要负责试验阶段的重组 DNA 研究。厚生省依照《遗传工程体工业化准则》，负责对重组 DNA 技术生物药品和食品的管理。通产省依照《遗传工程体工业化标准》，对将重组 DNA 技术的成果应用于工业化活动进行管理。农林水产省依照《农、林、渔及食品工业重组 DNA 准则》负责管理转基因生物在农业、林业和食品工业中的应用，包括在本地栽培的转基因生物，或进口的可在自然环境中繁殖的这类生物体;用于制造饲料产品的转基因生物;用于制造食品的转基因生物。[47]

（二）管理的主要方面

各国生物安全管理的内容很多，主要体现在环境安全和食品安全 2 个方面。

1. 环境安全方面

在美国，农业部和环境保护局负责转基因植物环境释放的审批，但环境保护局只负责评价抗病虫转基因植物中杀病虫植物的安全。农业部在管理上有 2 个层次:环境释放（或田间试验）和解除监控状态。批准环境释放的依据是转基因植物不会带来任何危险，不会引起植物病虫害。批准解除监控状态的依据是田间试验

45 徐友刚:《考察美国生物安全立法情况的报告》，载于《科技与法律》2003 年第 1 期。
46 《英国生物安全管理》，下载于 http://www.sibs.ac.cn/sars/kbdetail.asp?did=3409，2004 年 12 月 27 日。
47 《日本生物安全管理》，下载于 http://www.sibs.ac.cn/sars/kbdetail.asp?did=3410，2004 年 12 月 27 日。

的资料和文献上收集的资料能证明新的转基因植物不存在任何引起植物病虫害发生的风险。1994 年，环境保护局将植物杀虫剂纳入法规管理。[48]

在日本，农林水产省规定：任何个人或机构试图生产转基因生物，或出售这类生物用于工农业生产，或用于转基因生物生产有关物质（不包括以前已在自然环境中应用的），必须根据所用的受体、重组 DNA 分子和载体的特性对转基因生物进行全面的安全性评价。应用转基因植物，首先要经过田间试验。田间试验肯定了安全性的转基因植物，才可以在开放系统中应用。[49]

在英国，转基因生物的目的释放依照 1990 年《环境法》和 1992 年的《转基因生物释放和市场化的管理条例》进行管理。国务大臣负责转基因生物释放或市场化许可，在批准前要征得卫生与安全管理局等部门的同意。对于转基因生物隔离使用，由卫生和安全管理局和环境、运输及政区部依据《转基因生物的隔离使用管理条例》进行管理。卫生和安全管理局具有强制执行转基因生物隔离使用法规的权利。[50]

2. 食品安全方面

在美国，转基因食品的安全由食品与药物管理局、环境保护局和动植物健康检疫局共同管理。3 个联邦局负责建立国家生物技术法规的框架，对所有食品的管理流程不断进行评价和完善。[51] 因美国对转基因食品基本持肯定态度，在转基因食品的上市流通和监管方面较为宽松。在英国，农、渔、食品部和卫生部依照《新食品和新食品成分管理条例》共同管理。新食品指以前在欧盟范围内没有用于食品消费，包括含有转基因生物或由其生产的食品。[52]

（三）小结

生物安全及其管理涉及多个部门的职能，技术领域广泛，并且与多方面的非科学因素紧密相关并受这些因素的强烈影响与制约，从某种意义上看，工作的成败，在于协调各部门的关系。各国都力求做到这一点。

各国虽对转基因生物的安全管理已积累了一些数据，但从总体上看这方面的

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48 《美国生物安全管理》，下载于 http://www.sibs.ac.cn/sars/kbdetail.asp?did=3407，2004 年 12 月 27 日。

49 《日本生物安全管理》，下载于 http://www.sibs.ac.cn/sars/kbdetail.asp?did=3410，2004 年 12 月 27 日。

50 《英国生物安全管理》，下载于 http://www.sibs.ac.cn/sars/kbdetail.asp?did=3409，2004 年 12 月 27 日。

51 陈德敏、邓禾：《对我国转基因食品安全性的立法探讨》，载于《重庆大学学报（社会科学版）》2004 年第 3 期。

52 《英国生物安全管理》，下载于 http://www.sibs.ac.cn/sars/kbdetail.asp?did=3409，2004 年 12 月 27 日。

研究还处于初期阶段，存在许多有待完善、修订和补充的地方，需遵循逐步完善的原则。由于所涉及的转基因生物种类、生物环境等的不同，不可能有一个通用、统一的方法或程序在其安全管理中采用，需遵循个案分析的原则。

六、中国的生物安全立法、管理及相关政策

（一）中国的生物安全立法

我国于 1990 年制定了《基因工程产品质量控制标准》，该标准规定了基因工程药物的质量必须满足安全性要求。1993 年 12 月，当时的国家科学技术委员会发布了《基因工程安全性管理办法》，该办法规定了我国基因工程工作的管理体系，按潜在危险程度，将基因工程工作分为 4 个安全等级，并对基因工程工作在实验室阶段、中间试验阶段以及工业化阶段的安全等级的划分、批准部门以及申报和批准程序都作了规定。1996 年农业部以《基因工程安全性管理办法》为基础颁布实施了《农业生物基因工程安全管理实施办法》，该办法内容较为具体，针对性强，涉及面较广，对不同的遗传工程体及其产品的安全性评价都作了相对明确的说明，同时考虑到了外国研制的农业生物遗传工程体及其产品到我国境内进行中试、环境释放或商品化生产的问题，并做出了具体规定，具有比较强的可操作性。2001 年 6 月国务院又发布了《农业转基因生物安全管理条例》，对农业转基因生物的研究、生产提出了具体要求。农业部于 2002 年 1 月 5 日发布了《农业转基因生物安全评价管理办法》、《农业转基因生物进口安全管理办法》和《农业转基因生物标识管理办法》3 个配套规章，自 2002 年 3 月 20 日起施行。《条例》及 3 个配套规章的发布，标志着我国对农业转基因生物的研究、试验、生产、加工、经营和进出口活动开始实施全面管理，表明了我国政府试图利用生物安全法律法规来保护国内农业和农产品市场的努力。《中华人民共和国生物安全管理条例》和《生物安全法》也在制定之中。同美国、欧盟和日本等国家和地区相比，我国的生物安全立法须进一步加强。

（二）中国生物安全的管理情况

在中国，1993 年在国家科学技术委员会领导下成立了国家生物遗传工程安全委员会，由来自卫生部、农业部、轻工业部的专家组成，负责医药、农业和轻工业部门的生物安全，此时生物安全的主管部门是国家科学技术委员会。1994 年以后，由于农业生物技术，特别是转基因作物和转基因饲养动物的发展，农业部成为生物技术安全管理的主要部门。此后，国家环保总局作为主管全国环境问题的政府部门，开始介入生物安全管理事务，特别是在《生物多样性公约》各次缔约国大会

和拟定《生物安全议定书》的过程中，环保总局作为中国政府的主管单位代表参加了议定书的谈判，同时又作为联合国环境署《国际生物技术安全技术指南》在我国的实施机构。当前，在我国负责生物安全的部门包括国家科技部、国家环保总局、农业部、卫生部、中国科学院和国家教育部等部门。为协调这些部门在生物安全管理领域的关系，国务院还建立了专门的生物安全管理部际联席会议制度。

（三）中国的生物技术政策

目前，我国的生物技术在全世界处于中等偏上的水平，与美国、欧盟、日本等发达国家相比，还有相当大的距离。但由于我国劳动力成本较低，有一大批人在国外做研究，很多取得相当成就的人员回国从事研究，并且在某些领域我国还一直处于领先地位，如 20 世纪 80 年代我国成功做出了世界上首例转基因鱼，因此我国的生物技术发展前景乐观。中国人口众多，要解决吃饭问题，仅仅依靠原有的农业技术是很难的，必须通过生物技术来解决这一难题。向海洋要食物、要蛋白、要药物是我国生存和发展的重要出路，对 21 世纪中国的经济发展和社会进步具有战略意义，海洋生物技术正是促使海水养殖业向优质、高产、持续、健康的方向发展的关键技术。因此，我国在保证环境安全和贸易安全的前提下，一直在积极推进现代生物技术的发展。

（四）对中国生物安全立法的思考

1. 中国生物安全立法的体例选择

我国的生物安全立法应采取高立法层次的综合性法律、相关问题专门立法与其他相关法律专门条款“三位一体”的立法体例。首先，要制定一部具有高效力等级的生物安全专门法律，即《生物安全法》，对生物安全管理的原则、目标、基本管理制度和措施、实施程序、监督管理体制、违法责任、损害赔偿等做出明确的规定。其次，可在《生物安全法》的基础上，分清轻重缓急地制定出相关的专门性立法，如生物技术（基因工程）安全条例、克隆技术管理条例、转基因生物体进出口管理条例、生物技术成果越境转移管理办法、生物安全标准管理办法和微生物学实验室安全管理办法等法规。同时，在环境保护法、动植物资源法、食品卫生法、药品法等相关法律中，设立生物安全的相关法律条款。

2. 中国生物安全立法应遵循的指导原则

一是国家利益与科学、效率相结合的原则。生物安全立法应该是国家组织、管理和鼓励生物资源开发与生物技术运用的重要手段。国家通过制定生物安全法规来规定生物资源开发和生物技术发展的方针、政策和规划，规定生物资源和生物技术研究与管理机构的设置、组织原则、权限职能和活动方式。同时，生物安

全法必须能够推动生物技术的健康发展和更有效地利用生物资源，提高我国在生物安全领域的国际竞争力。二是主动预防原则。由于生物资源的开发利用和生物技术的发明运用所具有的风险是滞后性的，其造成的损害后果往往是不可逆的，因此生物安全问题需要进行长期系统的研究。我国急需通过立法的形式，将这方面的研究列入重点科研和投资项目计划，加强生物安全的研究和能力建设，提高公众的生物安全意识和我国的生物安全管理水平。我们还应看到，利用生物手段来进行大规模的恐怖活动已经不再是幻想。所以，必须将主动防范原则作为生物安全立法的非常重要的指导原则。三是创新原则。生物安全领域具有很强的创新性，这也决定了生物安全立法的生命力和活力在于对传统法学理论的创新，即解释、解决传统法学理论或其他法学分科理论所不能解决或难以解决的新问题、新现象、新观念，如环境安全、克隆技术和遗传工程、动物权利、越境污染、全球性生物安全问题等所引起的法律问题。由此，生物安全的立法必须贯彻创新原则。四是可持续发展原则。现在人们倡导绿色理念、倡导可持续发展，也无非是用有限的利益来换取相对无限的、永久的发展。因此，生物安全立法要突出生物资源和生物技术的可持续发展的意义，在立法宗旨上要由功利主义向可持续发展倾斜。

七、结　语

从上述比较分析中，我们不难看出，不同国家和地区由于在政治、经济和文化背景等方面的差异，导致了他们对生物安全的不同理解，在实际操作中也有较大差距。但这里面也有许多共同之处。比如，虽然有关国际公约争论的焦点是经济利益，但对生物安全进行国际立法是必然趋势，各国应适当地做出一些让步和妥协，以促成有关生物安全的国际立法。再比如，各国都应调整现行的政策以适应于现代生物技术的发展。举例说，在海洋现代生物技术方面，面对海洋生物基因资源开发的机遇和挑战，应该树立科学发展观，在生物安全的前提下，面向国家资源可持续利用和环境可持续发展的需求，发现、挖掘和利用各种基因资源，用于种质改良、生产药物和高附加值产品，面向大洋和深海，开辟新的基因宝库。还比如，在生物安全立法上应体现“全过程控制”的意图，法规体系的发展应与生物技术发展相适应，并力求与国际接轨。最后，生物安全及其管理涉及多个部门的职能和多个技术领域，协调好部门间的关系非常重要。看到了这些共性，还应结合本国的具体国情。例如，随着我国经济的高速发展，生物技术的跨国转让，还有生物技术产品的越境转移，都会越来越普遍。所以我们要及早准备，进行有效的法律控制，从而防止生物安全风险的跨国境转移，使这既符合国际惯例及国际立法的规定，又能够维护我国生物安全的国家利益。总而言之，国家在生物安全方面，最根本的是要把国际公约的基本精神、国家生物技术发展的政策、法规体系的控制、高效协调的管理等 4 个方面有机整合起来。

《联合国海洋法公约》附件七仲裁庭第一案的启示
——南方金枪鱼案述评

赵秋丹 *

内容摘要: 南方金枪鱼案是第一个按照《联合国海洋法公约》附件七组成的仲裁庭审理的案件，也是国际仲裁庭拒绝管辖权的第一个案例。虽然仲裁庭在最终裁决中推翻了国际海洋法法庭关于管辖权的初步裁定，而没有进入实质审查阶段，但是南方金枪鱼案充分体现了国际仲裁的“预防性外交”功能，同时为《联合国海洋法公约》争端解决机制的发展做出了里程碑式的贡献。该案还涉及对科学不确定性因素的法律应对，被认为间接承认了“预警原则”的在国际海洋法中的法律地位。

关键词: 南方金枪鱼案　海洋法公约　强制争端解决机制　预警原则

一、南方金枪鱼案的简要回顾

南方金枪鱼是一类具有极高经济价值的鱼种。一条成熟的南方金枪鱼重达 200 公斤，长 2 米，市场价值高达 3~5 万美元。[1] 南方金枪鱼主要分布于南太平洋，是被列入《联合国海洋法公约》附件一的高度洄游鱼种之一。据美洲间热带金枪鱼委员会统计，太平洋南方金枪鱼 1999 年产量为 23488 吨。[2] 日本、澳大利亚和新西兰是南方金枪鱼的 3 个主要捕捞国；而日本是南方金枪鱼的最大消费国，消费量占全球南方金枪鱼捕获量的 90%。

和其他经济鱼种一样，由于过度捕捞，南方金枪鱼的种群数量锐减。到上世

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1 Australia, Statement of Claims and Grounds on Which It Is Based, paras. 2~3. 转引自赵理海：《南方金枪鱼案——国际海洋法法庭的首例渔业争端》，载于《中外法学》2000 年第 1 期。

2 农业部渔业局资料：《金枪鱼渔业的管理现状、趋势和对策》，下载于 http://www.cnfm.gov.cn/info/display.asp?id ＝ 987，2004 年 12 月 12 日。

纪 80 年代初，其种群数量只有 60 年代的 23%~30%。[3] 南方金枪鱼种群面临不可恢复的灭减危险。为管理和养护南方金枪鱼种群，3 个主要捕捞国日本、澳大利亚和新西兰于 1993 年缔结了一项多边条约——《养护南方金枪鱼公约》，根据公约成立了养护南方金枪鱼委员会，委员会的一项重要工作就是对南方金枪鱼的捕捞总量和在 3 个国家之间的捕捞配额做出规定。

尽管日本在 3 个国家议定的捕捞总量中所占份额超过半数，但仍然不能满足其国内渔业需求，因此日本提出对捕捞总量和捕捞配额进行重新协商。但 3 个国家就此不能达成一致，养护南方金枪鱼委员会决定通过开展一项试验性捕捞计划来确定南方金枪鱼的种群状况，以做出科学判断。然而，3 个国家对试验性捕捞计划也无法达成一致意见，使委员会的工作陷于瘫痪。

1998 年 7 月至 8 月，日本单方面进行了一项所谓的“pilot programme”，较之其配额多捕捞了 1464 吨南方金枪鱼，并计划于 1999 年 7 月进行更多的实验性捕捞。澳大利亚和新西兰随即照会日本政府，表示争议的存在。其后三国展开了一系列外交努力。1999 年 6 月，日本照会澳新两国，提出根据 1993 年缔结的《养护南方金枪鱼公约》通过调解解决争端。澳新两国表示愿意接受调解，条件是：1. 日本同意停止单方面试验性捕捞；2. 调解应在合理的时间表内迅速进行，建议于 1999 年 8 月 31 日前完成调解。日本拒绝了上述条件，通知澳新两国准备按照《养护南方金枪鱼公约》第 16 条第 2 款将争端提交仲裁解决，但重申它不准备停止单方面试验性捕捞的计划，而是继续增加多于先前同意的捕捞配额。

鉴于情况的急迫性，1999 年 7 月 15 日，澳新启动《海洋法公约》附件七的强制仲裁程序。在仲裁庭未组成前，澳新两国于 7 月 30 日向国际海洋法法庭（国际海洋法法庭）申请制定《海洋法公约》第 15 部分第 290 条规定之临时措施。

1999 年 8 月 27 日，国际海洋法法庭做出裁决，初步认定将来组成的仲裁庭对南方金枪鱼案有管辖权，并制定了其他 5 项临时措施，包括各当事方应维持原捕捞配额，立即停止试验性捕捞。[4]

随后，由前国际法院主席 Stephen M. Schwebel 法官以及 Kenneth Keith，Chusei Yamada, Florentino Feliciano 和 Per Tresselt 法官担任仲裁员的仲裁庭按照海洋法公约附件七的规定成立。日本再次就仲裁庭的管辖权提出异议。经过 11 个月的审理，2000 年 8 月 4 日，仲裁庭做出裁决：1. 以 4 票对 1 票裁定仲裁庭对南方金枪鱼案的实体问题无管辖权；2. 以全票通过撤销国际海洋法法庭于 1999

3 Award of Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), (Jurisdiction and Admissibility), SBT Award, para. 22, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

4 ITLOS, Proceedings and Judgments of Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, (SBT Provisional Measures), at http://www.itlos.org/start2-en.html, 12 December 2004.

年 8 月 27 日制定的临时措施。[5] 南方金枪鱼争端的最终解决，交由养护南方金枪鱼委员会及独立科学家来完成。

二、南方金枪鱼案涉及的主要法律问题

由于南方金枪鱼案是《海洋法公约》通过后使用第十五章第二节强制仲裁程序的首个案例，也是第一个国际争端解决机构裁定拒绝管辖权的案例，[6] 因此无论在程序上还是在实体法律问题上都留下了颇多值得探讨之处。特别是仲裁庭最终裁决推翻了国际海洋法法庭先前做出的关于管辖权问题的初步裁定，这在国际法学界引发了广泛的讨论。

首先，对于仲裁庭推翻国际海洋法法庭初步裁定的问题，Stephen M. Schwebel 法官认为两者并不必然矛盾，而且也为国际司法实践所认可。按照《海洋法公约》的规定，如果仲裁庭对案件实质问题没有管辖权，那毫无疑问，仲裁庭将不能采取临时措施。但是，国际争端往往错综复杂，而申请方所提出的情况又往往具有紧迫性，不尽快做出决定可能造成不可弥补的损失。因此，国际法院等国际争端解决机构的实践已经确认，法庭在初步认定法庭可能对实体问题具有管辖权的情况下，就可以采取临时措施，以防止事态的进一步恶化。

其次，仲裁庭在长达 72 段的裁决中，提出了一系列重要问题。这些问题的回答，体现了仲裁庭——在海洋法领域具有高度权威性的国际司法机构——对《海洋法公约》第十五章第二节强制争端解决机制的阐释，因此对海洋法的发展具有重要意义。这些问题包括：

1. 提交的争端是属于《养护南方金枪鱼公约》管辖范围，还是属于《海洋法公约》管辖范围，或是都可适用？是否可根据“特别法优于普通法”或“后法优于前法”的原则排除《海洋法公约》的适用而仅适用《养护南方金枪鱼公约》？

2. 是否可认为《海洋法公约》第 281 条第 1 款所规定的条件（已诉诸和平解决争端方法，而争端仍未得到解决）已被满足，而可以适用第十五章第二节的强制仲裁程序？第 283 条的规定是否已被满足？

3. 第 282 条是否可作为国际海洋法法庭和仲裁庭不享有管辖权的依据？

4. 争端是否属于第 297 条第 3 款规定的例外？

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5 Pleadings, Hearings, and Award of Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Jurisdiction and Admissibility, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

6 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 240.

5. 争端是否具有法律上的不可受理性？

6. 争端的解决是否已不具有实际意义？

7. 是否可认为《海洋法公约》第 281 条第 1 款的条件——争端各方之间的协议（本案中为《养护南方金枪鱼公约》）并不排除任何其他程序的适用——已被满足，而可以适用第十五章第二节的强制仲裁程序？

国际海洋法法庭和仲裁庭对前 6 个问题都做出了否定回答，然而对于最后一个问题，在国际海洋法法庭开庭审理中并没有涉及。但正是这最后一个问题，使仲裁庭最终做出了推翻国际海洋法法庭管辖权初裁的决定。

仲裁庭首先确认，本案不仅涉及《养护南方金枪鱼公约》，同时与《海洋法公约》息息相关。贯穿本案的一个问题是，本案的实质争议是科学争议（仅适用《养护南方金枪鱼公约》），还是还涉及法律争议（涉及《海洋法公约》的解释和适用）？仲裁庭认为，《养护南方金枪鱼公约》在当事国之间的适用，并不排除任何一方引用《海洋法公约》有关养护和管理南方金枪鱼各项规定的权利。[7]《海洋法公约》的适用，是仲裁庭强制管辖权成立的前提。

《海洋法公约》第十五部分建立起了一个极其复杂的争端解决机制，被认为是“在海洋领域中新的世界秩序的支柱之一”。[8] 根据公约第 286 条，在公约第十五部分第三节限制下，有关公约解释或适用的任何争端，在诉诸争端各方自行选择的和平解决争端方法而仍未得到解决时，经争端任何一方申请，不论另一方是否同意，即可将争端提交国际海洋法法庭、国际法院、按照附件七组成的仲裁庭、按照附件八组成的特别仲裁庭之一的司法程序。这一规定突破了仲裁的合意性原则，是迄今国际司法机构中管辖权强制程度最高的，也被认为是公约得以有效发挥作用的重要保障。然而，正如国际海洋法法庭主席 Thomas A. Mensah 所述，“不可否认，为使公约得到广泛接受，必须做出一定牺牲——包括对公约强制使用的限制和例外。而在这些对公约实质性的限制和里外是否适当的问题上，则是仁者见仁，智者见智”。[9] 公约第十五部分第三节专门规定了适用第二节强制争端解决程序的限制和例外。此外，公约第 281 条至第 283 条的规定也被认为对适用强制争端解决程序做出了实质性限制。本案争议的另一焦点，即这些强制管辖权的限制和例外是否成立。

仲裁庭在对第 2~6 个问题上的裁决上，都一致确认了国际海洋法法庭所作的裁决，并且更加详尽和深入地解释了裁决理由。但在最后一个问题上，存在意见

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7 South Bluefin Tuna Case Order 1999/2 of 3 August 1999, paras. 43, 50, 51, at http://www.itlos.org/start2_en.html, 12 December 2004.

8 J. G. Merrills, *International Dispute Settlement*, 3rd ed., Cambridge: Cambridge University Press, 1998, p. 196.

9 T. A. Mensah, The Role of Peaceful Settlement in Contemporary Ocean Policy and Law, in D. Vidas and W. Ostreng eds., *Order for the Oceans at the Turn of the Century*, The Hague: Kluwer Law International, 1999, p. 81.

分歧。仲裁庭有 4 人赞成第 286 条第 1 款的条件未被满足，从而排除公约强制仲裁程序的适用。Kenneth Keith 法官提交了单独意见。该问题涉及公约第 286 条第 1 款与《养护南方金枪鱼公约》第 16 条之间的关系。

按照公约第 286 条第 1 款规定，强制争端解决程序适用的前提条件之一是争端各方之间的协议并不排除任何其他程序。在本案中，日本、澳大利亚和新西兰三国之间就争议事项存在《养护南方金枪鱼公约》协议。该协议第 16 条第 1 款要求缔约国为解决它们之间就协议产生的争议，可自行选择谈判、质询、调解、调停、仲裁、司法程序或其他和平解决争端方法。在上述方法失败时，缔约国可在争端各方的同意下，将争议提交国际法院或者仲裁。仲裁庭据此认为，“根据第 16 条的措辞，可以认定争议并不能在任一当事方要求下就可以提交国际法院或仲裁。当事方之间的一致同意是必不可少的。”[10] 同时，第 16 条第 2 款还规定，若争端当事方对提交国际法院或仲裁不能达成一致，并不排除其继续寻求第 1 款所列方法解决争端的权利。仲裁庭由此得出结论：“第 16 条明显旨在排除该条以外的任何强制程序的适用。”[11] 因此，该争议未满足公约第 286 条规定的条件，仲裁庭不具有强制管辖权。对于仲裁庭的这一结论，存在争议，下文将进一步作评论。

除了上述管辖权争议，南方金枪鱼案还涉及，当一个争端包含科学上的不确定性时，以何种途径进行解决最佳这一重大问题。正如荷兰海洋法研究所副所长 Kwiatkowska 教授所言，如果南方金枪鱼案最终进入到实体审理阶段，那么它的影响无疑将更加深远，甚至可能与国际法院在 1972/1974 渔业纠纷管辖权案中做出的裁决对现代渔业法律发展产生的里程碑式的影响相媲美。[12] 尽管如此，本案对国际海洋法、渔业法、环境法实体法的发展，仍然具有不可忽视的影响。日本在案件审理过程中一直主张，本案的实质问题是科学争议而非法律争议。仲裁庭否定了日本的主张，认为本案既涉及科学因素，也存在法律的解释与适用问题。但是，对于这类涉及科学因素的法律争议，有关的思考却超越了案件本身的范围，如：[13]

1. 什么是好的或最佳的科学证据？

2. 以国际司法或仲裁手段解决科学争议是否适当？

3. “预警原则”适用的适当性。

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10 SBT Award, para. 57, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

11 SBT Award, para. 57, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

12 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 292.

13 See Caroline E Foster, The “Real Dispute” in the Southern Bluefin Tuna Case: a Scientific Dispute? *The International Journal of Marine and Coastal Law*, Vol. 16, No. 4.

4. 究竟何为最为有效的争端解决途径？

这些都是值得进一步思考的问题。也是国际司法亟待研究的崭新领域。可以预料，类似的争端还将继续在海洋法、环境法等领域出现。

三、南方金枪鱼案的重要意义

南方金枪鱼案本身程序和实体上的复杂性，以及其中涉及的诸多政治、经济和外交因素使得对案件的争议和关注远远超过了案件本身。南方金枪鱼案解决的过程向人们全面展示了国际争端解决中法律手段的运用，争端当事国都派出了强大的国际律师团，对海洋法公约相关国际法问题进行了充分阐述，也提出了许多富有创见的观点，而仲裁庭以长达 72 段的裁决书详细剖析了案件的来龙去脉，并在详尽的法律分析中体现了近年来国际海洋法发展的成果，为海洋法公约争端解决机制的完善发展做出了贡献。笔者认为，该案在以下几个方面尤其值得注意：

1. 南方金枪鱼案展示了国际仲裁在国际争端解决过程中可以发挥的作用

Kwiatkowska 教授认为，将争端提交一个独立的第三方进行仲裁，其裁决的权威性将有助于败诉方接受于己不利的结论。[14] 在南方金枪鱼案中，以前国际法院院长 Stephen M. Schwebel 法官为首的 5 人仲裁庭的高度权威性，减轻了澳新两国对仲裁庭拒绝实体问题管辖权裁决的失望程度。[15] 同时，仲裁庭也确认了国际海洋法法庭裁决中的多数结论，这无疑使败诉方更易于接受裁决的结论。对胜诉方日本而言，同样，仲裁庭的权威性增加了其对国际第三方争端解决的信心，有助于日本采取更加建设性的态度。并且，裁决本身也在一定程度上平衡了自国际海洋法法庭裁决以来当事方力量的对比。鉴于本案实体问题尚留待双方协商解决，这种平衡将有助于争端最终的成功解决。

更重要的是，南方金枪鱼案充分体现了国际仲裁的“预防性外交”功能，即仲裁除了本身是一种通过法律手段解决国际争端的方式之外，还可以作为一种施压机制在更加宽泛的意义上推动争端的和平解决。作为申请方澳新两国律师团成员之一，Bill Mansfield 大律师在本案结束后发表的评论中认为本案的最终处理结

14 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 283.

15 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 283.

果不应该简单地以“胜诉”或“败诉”评判。[16] 他认为，仲裁庭在对多个重要问题的回答上，确认了国际海洋法法庭裁决的结论，而这些结论无论是对本案，还是对整个国际渔业法律体系的发展，都是有深远法律意义的。其次，在综合考察本案的全部发展进程后，Mansfield 认为，从表面上看，直接引发本案诉讼的原因是日本的单方面试验性捕捞计划，但是隐藏在背后的问题实际上是澳新日三方在南方金枪鱼种群状况及其未来问题上存在的严重分歧，以及由此导致的养护南方金枪鱼委员会的无法有效运作。尽管澳新两国在申请中没有明确提出，国际海洋法法庭在裁决中也没有要求日本应在养护南方金枪鱼委员会中与澳新两国积极合作以制定双方都能接受的捕捞总量及捕捞配额，但是通过长达 1 年多的仲裁程序，可以明显感觉到，养护南方金枪鱼委员会中的气氛正在向着更加建设性的方向发展，在一些重要事项上已取得进展。特别是，一些非《养护南方金枪鱼公约》成员方的国家表示出加入《养护南方金枪鱼公约》的意愿，一个由独立外部科学家参与的科学研究计划也得到一致同意。

虽然 Mansfield 作为申请方律师，不免会站在申请方立场上为其辩护，但我们的确应注意到仲裁作为一种争端解决手段，其功能的演变发展已超出了单纯的法律意义本身。国际争端的和平解决往往需要多种手段并用。通过仲裁程序，当事双方有机会检讨事实，陈述观点，提出科学论据；而权威的第三方也可以通过要求回答问题，做出临时措施或者裁决的形式，避免争端的进一步恶化，推动当事双方更有诚意、更有建设性地解决分歧，实现“预防性外交”的功能。如果从这一点上来看，澳新两国充分发掘了国际仲裁的这一价值。

南方金枪鱼案还前所未有地突破了仲裁保密性原则。不但仲裁裁决在互联网上发布，书面材料和口头答辩内容也在网上发布，甚至允许公众旁听庭审。这种空前的曝光度使仲裁程序和争端当事方被置于国际舆论压力下，在一定程度上有利于争端的公正解决。另一方面，鉴于金枪鱼种群所面临的灭种威胁，仲裁程序本身也提高了公众对这一领域的关注程度，对保护海洋环境资源发挥了很好的公众效益。

2. 本案对海洋法公约强制争端解决机制的发展具有深远意义

如前所述，公约第 15 部分规定的争端解决机制极其复杂，条文规定又不乏原则性，因此公约争端解决机制的发展，有赖于国际司法实践对公约的适用和解释。虽然无论是国际法院还是国际仲裁庭都没有遵循先例的原则，但是由于这些机构的权威性，其通过判例做出的解释往往在以后类似的案件中得到尊重。

南方金枪鱼案的贡献之一在于它确认了海洋法公约和相关特别条约之间的关

16 Bill Mansfield, The Southern Bluefin Tuna Arbitration. Comments on Professor Barbara Kwiatkowska’s Article, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 3, p. 361.

系。在国际法和国内法中，“特别法优于普通法”是一条被广泛遵守的原则。但在海洋法公约体系中，公约本身和与之相关或由其派生的渔业、环境等特别条约之间在适用上却是并行不悖的。当争端产生后，可能既属于特别条约的调整范围，又属于公约的调整范围。这正如一个国家行为可能同时违反多个条约设定的义务一样，也是为国际法理论和实践所认可的。[17] 基于此，仲裁庭认为虽然本案争端属于《养护南方金枪鱼公约》调整范围，但是并不排除适用公约的强制争端解决程序。

南方金枪鱼案的贡献之二在于它深入细致地考查了海洋法公约强制争端解决机制的各种限制和例外，而这些限制和例外除了第十五部分第三节的规定外，在此之前的学术研究和法庭审理中都涉及很少，[18] 但却具有极其重要的现实意义。

在案件审理中，除《养护南方金枪鱼公约》外，日本作为被申请方，还列出了多达 107 项它认为包含了排除海洋法公约强制争端解决机制的条款的特别条约，涉及海洋渔业、倾废、油污等多个方面。[19] 尽管其中一些条约实际上与公约并不相关，但是仲裁庭的裁定至少对具有与《养护南方金枪鱼公约》类似的争端解决条款的条约和公约的适用关系提供了一个相当权威的先例。同时反映了仲裁庭的这样一种观点，即海洋法公约第 15 部分“还远未真正建立起一个广泛的强制管辖体系”。[20] 应当视海洋法公约体系下的各特别条约为一个完整、成熟和自治的机制，尊重其自身争端解决机制的有效性，尊重当事国的意思自治。

仲裁庭的这种观点给人们带来一种担忧：这一个先例是否会导致海洋法公约强制争端解决机制的有效性受到挑战？如同 WTO 体系，海洋法公约体系是一个广泛综合的条约体系。它的有效执行，一方面需要一个具体执行条约体系，另一方面需要一个强有力的争端解决机制，确保缔约国的行为置于公约的监督之下。如果缔约国通过单独缔结的双边、多边或区域性条约，规定协商一致的争端解决程序，排除国际司法的管辖，使很多争端无法提交国际仲裁解决，那么对于海洋法公约作为一个法律体系的完整性，以及海洋法的继续发展都将是一个损失。但也有学者认为这种担心是不必要的。首先，仲裁庭的裁定没有先例效力。即使今后出现类似的案件，也必须根据具体案情对涉及的特别条约的措辞进行具体解释来判断是否排除了公约的争端解决机制，而其时的仲裁庭完全可能做出相反的结论。因此，南方金枪鱼案的影响是有限的。其次，从整个国际社会来看，加强法治的

17 SBT Award, para. 52, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

18 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention AnnexVII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 290.

19 Pleadings of Japan, Annex 47.

20 SBT Award, para. 62, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

趋势是明显的。国际司法机构和仲裁庭在解决国际争端中发挥出越来越重要的作用，而强化管辖权也成为一种被广泛认同的观点。这可以从国际法院强制任择管辖权条款得到越来越多的信任，以及越来越多的国际争端采取单方提交法院或仲裁的形式[21]这一点上得到证明。同时，值得注意的是，即使一些海洋法体系下的特别条约排除了公约的争端解决机制，但其自身也规定了强制解决程序，[22]而且这一缔约实践正在为更多的条约所采纳。总而言之，海洋领域法治化的步伐是在不断迈进的。

3. 南方金枪鱼案也再次引起了人们对科学争议的法律关注

南方金枪鱼案不仅涉及复杂的程序问题，而且也涉及海洋资源保护中一些棘手课题。毕竟除了管辖权问题，人们更关注的是南方金枪鱼种群的命运。在现有海洋科学还不能给出满意答案的问题，法律是否能够以及如何做出贡献？这是近年来海洋法、环境法中日益受到学者关注的一个领域。很多学者认为，南方金枪鱼案的一个重要贡献在于，国际海洋法法庭的裁决间接确认了“预警原则”在国际海洋渔业管理上的法律地位。尽管这一判断尚存争议。

在案件审理中，作为对日本的指控之一，澳新两国提出，日本的试验性捕捞计划违反了习惯国际法，特别是预警原则。[23]就此，国际海洋法法庭向当事方提出了两个问题：（1）在《养护南方金枪鱼公约》只约束其缔约国的情况下，非缔约国就南方金枪鱼的捕捞是否受海洋法公约或任何习惯国际法的约束？（2）如果回答是肯定的，这种约束的内容是什么？[24]毫无疑问，预警原则是在仲裁员的考量范围之中的。Tullio Treves 法官也提及，预警方法似乎已经当然包含在公约“临时措施”的概念中了。[25]

排除政治、经济方面的考虑，南方金枪鱼案涉及这样一个问题：当海洋渔业资源可能面临严重或不可恢复的威胁时，利用最佳可得证据仍无法建立一套准确的科学数据来进行评估或控制的情况下，法律应该如何来弥补这样的科学上的欠缺，以防止资源不可逆转的破坏？这就是所谓的预警原则的问题。实际上，从海洋法公约所规定的 maximum sustainable yield, optimum utilization 等用语上已可以看到预警原则的轮廓。在其后的多个国际海洋法律文件，如《负责任渔业行为

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21 在 Schwebel 法官任国际法院院长任期内（1997 － 2000），在提交审理的 23 个案件中，有 21 个是单方面提起诉讼的。

22 例 如：the 1991 Madrid Protocol on Environmental Protection to Antarctic Treaty (Arts. 18~20); the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Art. 32); the Convention on the Protection of the Marine Environment of the North-East Atlantic (Art. 32).

23 SBT Award, paras. 27~33, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

24 SBT Award Oral Hearings, Vol. III, 10 May2000.

25 SBT Award Provisional Measures, para.34, at http://www.itlos.org/start2_en.html, 12 December 2004.

守则》、1995 年《联合国鱼类种群协定》中，预警原则一再被确认。而南方金枪鱼案则首次涉及国际司法机构对预警原则的态度。国际海洋法法庭临时措施的制定，虽然并没有以预警原则为理由，但是从法官的措辞以及态度上不难看出，预警原则的确对他们的判决起到了重要影响。预警原则影响的逐渐扩大，不排除在今后类似案件中法官即使不援引预警原则但是实际运用其法理做出判决的可能。

四、结　语

南方金枪鱼案作为第一个按照《海洋法公约》附件七组成的仲裁庭审理的案件，也是国际仲裁庭拒绝管辖权的第一个案例，无论程序问题还是实体问题都是值得深入研究的。仲裁庭对公约第 15 部分争端解决机制进行了详细的分析，最后以第 286 条第 1 款规定的条件未被满足，推翻了国际海洋法法庭的裁定。尽管这一裁定还存在一定争议，但是本案无疑对海洋法强制争端解决机制的完善和发展做出了里程碑式的贡献。同时，本案也涉及海洋法、环境法实体法发展的重要问题，引发学者和研究人员对这些新兴法律领域更多的思考。

圣文森特及格林纳丁斯向国际海洋法法庭申请几内亚比绍立即释放“Juno Trader”号一案

熊良敏* 译

国际海洋法法庭判令圣文森特和格林纳丁斯向几内亚比绍交付 30 万欧元保证金，几内亚比绍立即释放“Juno Trader”号船舶。[1]

“Juno Trader”号是一艘装载冷冻货物的船舶，登记国和船旗国均为圣文森特及格林纳丁斯。船东为 Juno Reefers 有限公司，该公司在英属处女岛设立。船长是俄罗斯人。圣文森特及格林纳丁斯按照《联合国海洋法公约》（以下简称“《公约》”）第 292 条就迅速释放“Juno Trader”号及其船员这一争端向国际海洋法法庭对几内亚比绍提起了诉讼。

当事人双方对争议事实（关于渔船“Juno Trader”号被逮捕和扣留的经过）各执一词、互不相让。

圣文森特及格林纳丁斯声称，2004 年 9 月底，“Juno Trader”号的姊妹船“Juno Warrior”号在毛利塔尼亚水域将冷冻鱼和鱼肉转运到该船。其姊妹船经毛利塔尼亚许可在毛利塔尼亚的专属经济区内作业，并且货物的转运也得到了毛利塔尼亚官方的批准。在转运货物之后，“Juno Trader”号离开了毛利塔尼亚开往加纳。船舶在目的港开始卸货。2004 年 9 月 24 日，“Juno Trader”号横越几内亚比绍的专属经济区（距离海岸 40 海里）。几个小时后，几内亚比绍的巡逻艇出现在现场，并且开始射击该船舶，其中一位船员受伤。

而据几内亚比绍介绍，它的船舶“Cacine”号当日正在几内亚比绍专属经济区执行航道控制和监督任务时，在该区域发现一艘 Juno Reefers 有限公司的船

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1 原文见 The International Tribunal for the Law of the Sea: The “Juno Trader” Case (Saint Vincent and the Grenadines v. Guinea-Bissau) Application for Prompt Release (December 18, 2004). 与该案相关的案件有：塞舍尔诉法国 The “Monte Confurco Case” (Seychelles v. France)；比利时诉法国 The “Grand Prince” Case (Belize v. France), 迅速释放案件；巴拿马诉也门 “Chaisiri Reefer 2” Case (Panama v. Yemen) 迅速释放案件；爱尔兰诉英国 “MOX Plant” Case (Ireland v. United Kingdom) 临时措施案件。

舶。他们对该船舶的身份一无所知，并且该船也未向其声明身份。另外，依照圣文森特及格林纳丁斯后来签发的捕鱼处罚书上所陈述的事实，事件发生时“Juno Trader”号正在非法捕鱼，看到巡视船就伺机逃跑。几内亚比绍进一步宣称，“Juno Trader”号三番五次不服从巡逻艇要求其关闭发动机、登临船舶的命令。当日深夜，几内亚比绍的国家渔业监督控制公务人员对“Juno Trader”号装载的货物进行了检查，并且检验了从该船中抽取的鱼类样品。该报告得出结论：有证据证明大多数鱼种来自几内亚比绍。

随后，部级海洋控制委员会举行了会议，作出这样一个决定：处以“Juno Trader”号 175398 欧元的罚款，处以船长 8770 欧元的罚款。同时宣布，考虑到该船未经授权就擅自捕捞且在几内亚比绍的海洋水域转运，因此要将从扣押船上找到的所有捕捞物交还给几内亚比绍。在 2004 年 11 月，“Juno Trader”号的船东支付给几内亚比绍 5 万欧元作为释放船舶和船员的交换条件。

而在该月月底，经“Juno Trader”号船东的申请，几内亚比绍地方法院作出判决，判令立即取缔部级海洋控制委员会的决定，并且进一步宣布任何旨在出售“Juno Trader”号船上的鱼的程序无效。同时，该法院判令部级海洋控制委员会立即解除禁止“Juno Trader”号船员离开比绍港的禁令，并且立即归还船员护照。

但是，几内亚比绍的渔业委员会发函至圣文森特及格林纳丁斯，在函中声称 2004 年 10 月 19 日部级渔业控制委员会对圣文森特及格林纳丁斯业已作出了处以罚金的决议，而自 2004 年 11 月 5 日以来圣文森特及格林纳丁斯从未支付罚金，因此该船的所有权已经转移给几内亚比绍国。

圣文森特及格林纳丁斯依据《1982 年联合国海洋法公约》第 292 条，向联合国海洋法法庭提出申请，在其起诉状中提出了 2 项要求：(1) 认定几内亚比绍违背了《联合国海洋法公约》第 2 段第 73 条规定的留置船舶、软禁船员的条件；(2) 几内亚比绍立即释放船只和 19 位船员。圣文森特及格林纳丁斯还特别请求法院判令几内亚比绍在不提供保证金的前提下立即释放船舶和船员。

法院注意到以下几点：第一，几内亚比绍在该申请提出时还未向圣文森特和格林纳丁斯索要保证金；第二，当该船向其提供保证金时，几内亚比绍也无动于衷，甚至没有通知圣文森特和格林纳丁斯保证金不足额；第三，在圣文森特和格林纳丁斯向法院申请释放船舶时，该船仍被扣押在几内亚港口。

鉴于以上事实，法庭认定几内亚比绍违反了《联合国海洋法公约》第 2 段第 73 条的有关规定，并且判令其迅速释放“Juno Trader”号以及船上的货物和船员。对于保证金的数量，法院参照了“Camouco”案和“Monte Confurco”案。法院首先权衡了圣文森特和格林纳丁斯主张的几内亚比绍违法行为的严重性，同时还考虑了几内亚比绍对“Juno Trader”号处罚的罚金数量（175398 欧元加上对船长的 8770 欧元罚金），也考虑“Juno Trader”号船舶的实际价值（几内亚比绍认为值 80 万美元，圣文森特及格林纳丁斯认为值 46 万美元）。由此，法院判决圣文森特

及格林纳丁斯向几内亚比绍缴纳 30 万欧元保证金。

马来西亚诉新加坡围海造地案

熊良敏 *

一、案　情

新加坡、马来西亚两国在地理、历史、血缘等方面关系十分密切，其间仅相隔一条 1400 米宽的柔佛海峡。1966 年两国划分了该水域的国际界限。自 1965 年从马来西亚独立后，新加坡在柔佛海峡一带围海造地，从而使其国土面积增加了 100 多平方公里。2000 年 6 月，新加坡在柔佛海峡西面的大士进行填海工程，随后同年 11 月，在柔佛海峡东面的德光岛开始填海工程。这种做法引起了邻国马来西亚的强烈不满，自 2002 年 1 月 18 日以来马来西亚多次向新加坡发出通告，抗议在马来西亚海域填海，但新加坡回应称该指责没有根据。于是，2003 年 7 月 4 日，马来西亚通知新加坡，马来西亚将根据《联合国海洋法公约》，要求进行仲裁。且于同年 9 月 5 日，马来西亚向国际海洋法法庭提出临时措施的申请。国际海洋法法庭在 2003 年 10 月 8 日对此案作出了判决。

马来西亚认为，新加坡所为不仅影响马来西亚的船运和渔民的收入，而且侵犯了其领海，也对附近的海洋环境造成了无可弥补的破坏。在 2003 年 9 月 5 日（此时双方处于针对填海争执寻求国际仲裁期间），马来西亚向国际海洋法法庭提出申请，提出了以下几点要求：新加坡应立即停止在柔佛海峡东面的德光岛和西面的大士填海工程，新加坡应提供给马来西亚目前和计划进行的活动的完整资料，新加坡应让马来西亚有充分机会去评估这项填海活动和其潜在影响，新加坡应同意与马来西亚谈判任何其他的未解决问题。

新加坡则针锋相对，坚持认为马新双方业已在 2003 年 8 月 13 日、14 日就该问题开始了协商谈判，而根据《联合国海洋法公约》第 283 条，发生争执的国家在诉诸法律行动之前，必须先设法通过谈判寻求解决方案。马来西亚没有针对这个争执与新加坡进行足够的协商，也没有尝试跟新加坡谈判解决争议，却在同新加坡举行一次会谈后就停止谈判，然后单方面入禀国际海洋法法庭，采取预防性的法律行动，其所作所为违反了《联合国海洋法公约》的规定。据此，新加坡要求法

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庭下令马国遵守国际法的规定回到谈判桌上，在诉诸法律行动之前先同新加坡就填海争执寻求和平解决方案。

同时新加坡提出，马来西亚国没有依照法律规定，证明它有必要马上采取这项预防性的法律行动，以避免它在开庭之日至 10 月 9 日期间所蒙受的无法弥补的损失。而且马来西亚无法证明在法庭判决前，其所遭受的所谓无可弥补的损失。况且，10 月 9 日是负责仲裁这起填海争执的国际仲裁庭成立的日期。在此期间，国际海洋法法庭无权采取临时措施。

新加坡进一步指出，关于新加坡的填海工程侵犯了马国领海的指控，并不符合新马两国在 1927 年和 1995 年所签署的双边条约。马国声称它拥有所谓的“第 20 点”的领海地区，马来西亚对工程所牵涉的领土没有管辖权。因此，其要求法庭批准的临时措施，缺乏根据。

二、判　决[1]

国际海洋法法庭全体 23 名法官判新加坡胜诉，直接驳回马来西亚要求阻止新加坡在柔佛海峡东面的德光岛和西面的大士地区进行填海工程的申请；裁决在新马针对填海争执寻求国际仲裁期间，可以继续进行填海工程。

国际海洋法法庭经审理认为：

1. 新加坡、马来西亚两国尽快成立一个独立专家团，目的在于：

（1）两国必须在双方都同意遵守的条件下设立一个独立的专家团，立即研究新加坡填海工程所造成的影响，并且必须在法庭判决之后的一年内提交研究报告。一旦填海工程对周围的水域造成影响，有关的报告也必须提出合理的解决方案，以解决这些问题。

（2）法庭也谕令两国必须尽快准备一份中期报告，以汇报德光岛南端“D 区”的填海工程情况。

2. 新加坡、马来西亚两国必须定期针对填海工程的进展交换意见，从而使双方能随时评估新加坡填海工程的风险和影响。

3. 双方应履行本裁决中的义务，避免任何同积极履行义务相悖的行为。就德光岛填海工程的临时措施进行磋商，达成暂停或者调整填海工程的协议。

法庭也要求新加坡采纳独立专家团的建议，不能进行任何可能对马国的权利造成不可弥补的损害以及对海洋环境造成严重破坏的填海工程。

针对新马的填海争执，全体法官一致裁决新马双方最迟必须在 2004 年 1 月 9 日，根据《联合国海洋法公约》第 95 条第 1 节的规定，各自提交一份初步报告给

1　下载于 http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=12&lang=en，2005 年 1 月 28 日。

国际海洋法法庭和国际仲裁庭。如果仲裁庭作出新的判决，则另当别论。

三、争　点

1. 本案牵涉到的一个问题是按照《联合国海洋法公约》附件七组成的仲裁法庭对争端有无管辖权

《联合国海洋法公约》第 283 条明确规定了缔约国双方交换意见的义务，该条规定："（1）如果缔约国之间对本公约的解释或适用发生争端，争端各方应迅速就谈判或其他和平方法解决争端一事交换意见。（2）如果解决这种争端的程序已经终止，而争端仍未得到解决，或如已达成解决办法，而情况要求就解决办法的实施方式进行协商时，争端各方也应迅速着手交换意见。"对于缔约国交换意见的义务问题，《联合国海洋法公约》第 286 条同时也作出限定："如已诉诸第一节而仍未得到解决，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。"

本案中两国的专家在 8 月 13 日和 14 日举行了会谈，且在 7 月底，双方也进一步交换了文件。双方还处于会谈刚开始，而彼此还在审查对方的文件的阶段。这种交换并没有积极成效，因此马来西亚并没有义务同新加坡继续交换意见。况且双方的谈判是在仲裁庭组建程序启动之后举办的，马来西亚也明确表明该谈判会议无损其要求根据附件Ⅶ组成的仲裁庭仲裁或者请求国际海洋法法庭制定临时措施的权利。可见，马来西亚在法律上有权依据国际海洋法，单方面入禀国际海洋法法庭，要求下令新加坡在国际仲裁期间暂停填海工程。该争议属于根据附件Ⅶ组成的仲裁法庭的仲裁范围，该仲裁法庭对该争端有合法管辖权。

2. 本案所涉的第二个问题就是国际海洋法法庭是否有权发布临时措施

新加坡指出，马来西亚向国际海洋法法庭提出临时措施阻止新加坡继续填海，而目前的情况是仲裁庭最早也要 2003 年 10 月 9 日才能成立。在成立仲裁庭之前，没有必要制定临时禁令。

而根据《联合国海洋法公约》第 287 条第 1 款规定："按照附件六设立的国际海洋法法庭、国际法院、按照附件七组成的仲裁法院、按照附件Ⅷ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"都可以成为缔约国自由选择的审理机构。国际海洋法法庭只是《联合国海洋法公约》规定的导致有拘束力裁判的众多强制程序之一。缔约国可在任何时间以书面方式选择法庭或《联合国海洋法公约》规定的其他争端解决程序，如国际法院、仲裁法庭等解决争端。同时，《联合国海洋法公约》第 290 条第 5 款规定："如果争端已经正式提交法院或法庭，而该法院或法庭依据初步证明认为其根据本部分或第十一部分第五节具有管辖权，该法院或法庭可在最后裁判前，规定其根据情况认为适当的任何临时措施，以保全争端各方的各自权利或防止对海洋环境的严重损害。"这样就使得有关临时措施

的制定权可以由国际海洋法法庭在仲裁法庭组成之前得以行使。国际海洋法法庭由此认定，“国际海洋法法庭能够在仲裁庭之前发布临时禁令。”

3. 本案的第三个争议焦点就是马来西亚所依据的事实是否符合发布临时措施的条件，是否应当对新加坡采取临时措施

《联合国海洋法公约》第 290 条第 5 款规定：“如果根据初步证明认为将予组成的法庭具有管辖权，而且认为情况紧急有此必要，可按照本条规定、修改或撤销临时措施。”

而本案中马来西亚不能证明该填海工程已对马来西亚的环境与生态造成无可弥补的破坏的紧急状态或者有任何此类风险。据此，国际海洋法法庭认为，对新加坡在大士地区填海工程不适合颁布临时措施，新加坡可以继续在柔佛海峡进行填海工程，但必须在把造地的范围控制在柔佛海峡靠近新加坡自己所在的一边。同时，国际海洋法法庭指出，马来西亚和新加坡必须联合成立一个独立专家组，对这项工程进行监督，并且新加坡也必须确保造地工程不会对马来西亚的权益和柔佛海峡的海洋生态环境造成破坏。鉴于此，国际海洋法法庭要求马新两国就填海工程的信息和影响评价建立交换机制。

海上执法

Myron Nordquist *
卢佳 ** 译

在美国，海上执法权由美国海岸警卫队行使。美国海岸警卫队过去隶属于交通部，由于恐怖主义的威胁及海岸警卫队所承担的重要职责，现已转入国土安全部。今天演讲的内容包括：司法管辖权和职权、紧追权、靠近并登船检查、登船的程序、各个机构间的合作，最重要的是武力的使用和相关政策。

一、司法管辖权和职权

海上执法必须在对船舶和航空器享有国际法规定的管辖权的前提下进行，但管辖权的实际行使还要取决于一系列的具体因素，如船舶的国籍、其停靠的港口、所属船级社及其当时所进行的活动等。国际法上的管辖权必须经过明确的国内法授权才可以得到行使。我们对悬挂本国国旗的商业船舶和航空器拥有司法管辖权，无论它停靠在什么地方、哪个港口。美国对位于外国港口或领海的外国船舶不享有管辖权。船旗国是由国内法决定的，这意味着在国内法与国际法之间必须建立某种联系。船旗国对悬挂本国国旗的船舶享有管辖权，必须为其颁发相关文件，对其实施有效的控制。对于外国船舶，只有当其违反了国内法的时候才能对其实施管辖。我们必须明确，我们对悬挂本国国旗的商业船舶和航空器，无论它停靠在什么地方，都拥有管辖权。我们对违反了我国国内法规定的外国船舶也拥有管辖权。在领海中，这种管辖权是相当重要的，因为外国船舶在这一水域享有无害通过权。在毗连区、专属经济区和大陆架，这种管辖权的产生，取决于沿海国家是否有相应的立法权限。沿海国并不拥有大陆架，它只是对大陆架上的各项资源享有主权性权利。比如说一艘中国船在阿拉斯加 200 海里专属经济区之外的海底捕捞王蟹，美国可以对其采取相应措施，因为其侵犯了沿海国家在大陆架的主

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权性权利。这种管辖权不适用于军舰，因为军舰享有国际法上的豁免权。

《联合国海洋公约》只是针对和平时期，并不适用于战时，因此你想要在里面找到任何关于战争法或者关于敌对国家之间的规则都是徒劳的。这是一份关于和平时期的海洋规则的公约。

二、紧追权

关于紧追权有 2 个法律问题：一、紧追权的行使必须源于合法的开始，而且必须是连续且不能停顿的。因此它必然起因于外国船舶在沿海国享有管辖权的水域内非法侵犯了沿海国的权利，如此开始行使紧追权方为合法；二、行使紧追权必须是连续的。执法的官员一般会命令肇事船舶停下来。当肇事船舶驶入其本国水域，包括领海及内水，紧追权不得再继续行使。

三、靠近及调查

进行执法的船舶和航空器必须先确认船舶的国籍，这一点可以通过观察其悬挂的国旗来辨认，法律上规定可以这样做。如果无法看清或是在夜间，就不得不通过无线电来进行辨认，也可以出动直升机辨认其悬挂的国旗。在国际法上，进行执法的船舶有权知道在其水域内通过船舶的国籍，在确定国籍的情况下才能登船检查其文件。当然登船检查只有下面 2 种情况是合理的：一是违反了美国的法律，二是有国际犯罪的嫌疑，比如海盗或贩运奴隶。当然这种司法管辖权不适用于军舰，军舰通常享有豁免权。靠近船舶进行调查，如果不是行为非常可疑需立刻采取行动的话，登船必须在征得许可的前提下进行。这种许可可以从 2 种途径获得：一是来自船主，这种情形在加勒比海地区非常突出，这一地区毒品买卖非常猖獗，海岸警卫队非常担心（毒品入境）因而经常要求登船检查；二是来自船旗国，这种登临的请求是有技巧的。美国的法律规定，非法搜查和经非法程序得到的证据是不能在法庭上使用的。如果他们登船后，发现那些人把可卡因放在桌上，可以立刻上前逮捕他们；如果可卡因藏在甲板下必须掀开甲板才能找到，这样的检查是无法从船主那征得许可的。那么另外一个征得登船许可的途径是通过船旗国，通常的做法是订立特定的条约。美国和加勒比海的许多国家都订立过此类条约，大多数是关于毒品问题。请求船旗国的许可一般要经过一些特定的程序通常包括外交途径，请求允许执法船舶登临他们的船舶进行检查。登船的许可还可以通过一些双边协定获得。

在没有条约的情况下，可以依据总括授权，订立总括协议，以英国为例，他们有权登上美国的船舶，美国也有权登上他们的船舶。登船必须取得许可，或是船

主的许可，或是船旗国的许可。

四、登船检查的程序

登船检查的检察官首先要考虑的第一个问题就是：登上这艘船检查的理由是什么。比如说要检查文件资料等。在美国有特定的小组负责这项行动。如果他们怀疑船舶非法走私毒品，可以带走毒品和嫌疑者。如果怀疑非法运输放射性物质，他们还需担任警戒。他们上船需要携带特定的装备和武器。一旦登船后，他们首先要进行安全检查，这只是目测。接下来很典型的就是检查文件资料，看看船主是否有资格驾驶这艘船，船的规格、吨位、国籍、船级、是否受过处罚等。接下来就要进行全面的检查了。执法要遵守国内法和国际法，如果违法就有可能被解雇。他们在船上检查和搜索，正确地执法。当船舶涉嫌非法走私毒品、非法捕鱼（包括渔网规格不符合要求、漂网作业及禁渔期或禁渔海域作业）、非法污染环境等，他们也有逮捕权。登船的整个过程一般都有直升机跟随，并全程摄像，这样可以清楚地记录他们违法的事实及执法人员执法过程。这在国际海事组织的规定中是非常重要的。以一条英国船为例，已经知晓他们违反了英国的法律，美国跟英国之间也有相关的条约，因此海岸警卫队就可以登船检查。登临检查是谨慎取证的一项工作。

五、各机构间合作

各个机构之间相互合作的一个基本的观点就是必须有一个具体负责的机构。十几个机构互相竞争却不共享情报信息资源，怎能产生高效率的执法呢？在美国，涉及执法的部门有：国会、交通部、国土安全部、国务院、财政部、司法部及白宫（视所涉及的具体问题而定）。具体的执法程序法律都有明确的规定，他们共同的一点就是：由美国海岸警卫队进行执法，它代表了这些机构。他们也知道出现违法情况时他们需要做的是哪一部分工作。美国的法律和政策禁止国防部进行执法，无论是海上还是陆上。我们不信任军队，法律规定他们没有执法权，不能进行任何的执法活动。这种情况可以追溯到 1865 年，从历史我们可以知道，那时国内战争刚刚结束，联合部队开始南下，在南下的过程中他们开始进行一些执法活动，议会获悉他们执法的方式后通过法案规定此后军队不得参与执法。因此美国的法律和政策都限制军队执法。当然这种限制在美国领土之外不总是这么严格。目前，这种限制也有例外，他们也间接地参加执法，比如说军队的某些装备对执法来说是非常有用的，他们帮助海岸警卫队实施监控，培训人员，叫他们如何使用拦截装备、通信设备和航空器。在紧急情况下，需立刻采取行动时他们也会采取相应的

行动。

六、执法过程中使用武力的相关政策

最主要的一点是：在执法时使用武力其意义和战争法上使用武力的意义是完全不同的。武力的使用必须是必不可少的、合理的，有时候武力的使用还是有比例的。在美国有相当多的法规非常清楚地规定了关于执法时使用武力的规章制度，执法工作人员通常受过良好培训，并且对法律制度非常熟悉。参与执法的人明白自己该怎么做，什么时候才能开枪。在单独执法时该怎么做。下面情况是可以使用武力的：1. 自卫或保护他人；2. 阻止犯罪；3. 执行司法逮捕；4. 保护财产；5. 强制服从法律（比如缴械）。不过在美国一般执法时必须使用武力的情况很少。致命的武力的使用必须符合 3 个要求：一是有人想要造成他人死亡或重伤，二是这个人是否有机会这样做，三是是否已经明显地表现出这种随时侵犯他人的故意。在执法中，没有撤退的义务，但有可能会撤退。

在海岸警卫队，开枪射击或者拦截射击都必须遵循特定的程序，由高级官员做出决定并且需确认对船舶的管辖权。首先应该尝试其他的解决方法，在动用武力是阻止船舶和航空器的唯一途径的前提下，以及从案件具体情况分析动用武力是正确的情况下，才可以使用武力。他们没有撤退的义务，但必须将受伤的人员数和损失的财产降到最低。致命武力的使用通常是解决问题的最后方法。实际执行过程中，一般会先给出停止航行的命令，尽量采取措施控制可疑船舶。如果可疑船舶仍然继续航行，那么就会采取武力行动，但他们进攻射击的目的不是致人于死地而是要阻止船舶的继续航行。因此涉及的目标通常是船舶的操纵机构（舵机）或者是船桥（船的驾驶舱上横跨的平台或封闭部分）。

“历史性水域”和“群岛制度”研讨会综述

2004 年 6 月 4 日，由海南南海研究中心[1]和厦门大学海洋政策与法律中心联合举办了“历史性水域”和“群岛制度”课题研讨会。早在 2003 年，厦门大学海洋政策与法律中心接受海南南海研究中心的委托，承担了“历史性水域”与“群岛制度”这两个课题的研究工作。一年以来，厦门大学海洋政策与法律中心的一位博士研究生、三位硕士研究生在傅崐成教授的指导下，针对这两个课题，广泛搜集资料，进行了深入的研究，已经形成了数十万字的科研成果。该成果对从国际海洋法角度促进南海问题的解决，有着积极意义。兹将两课题报告的主要内容，简介如下：

一、《历史性权利与历史性水域》

首先，该课题报告回顾了“历史性权利”这一概念的起源，认为“‘历史性权利’是一种‘远古权利’，这种权利长期以来被普遍认为其本身已经构成一种充分的权利”，并指出“历史性权利”是“一种通过时效或默认的过程产生或巩固的权利，或通过长期连续的占有以至于被法律接受为一种权利的权利”。

其次，该报告分析了“历史性权利与历史性水域”概念的发展，考察了 1958 年《领海与毗连区公约》相关规定，以及 1957 年与 1962 年联合国秘书处做出的关于历史性水域制度的报告。作者着重探讨了第三届海洋法会议对这一概念的影响。逐项考察了第三届联合国海洋法大会期间，与会国提出的有关历史性权利与历史性水域的议案，以及 1982 年《联合国海洋法公约》最终文本中的相关条款。

再次，该报告讨论了现行国际海洋法制度中“历史性水域”的法律地位。一方面介绍了关于“历史性水域”的各种学说；另一方面又通过“英挪渔业案”、“突尼斯／利比亚大陆架划界案”、“萨尔瓦多／洪都拉斯／尼加拉瓜陆地、岛屿和海域边界案”、“厄立特里亚与也门岛屿争议和海域划界仲裁案”、“俄日大彼得湾争端”、“加拿大／美国北极群岛及西北水道争端”等相关国际司法实践进一步探讨了“历史性水域”的法律性质。

1　2004 年 7 月，经国务院批准，海南南海研究中心正式更名为中国南海研究院。

之后，该报告分析了历史性水域在法律上的构成要件。认为这方面最权威的国际文件为联合国秘书处于 1962 年做出的关于历史性水域制度报告，但总体而言，目前对这一问题并不存在统一的国际标准。报告着重指出，我国历史悠久，立足于我国的情况，应该强调历史性证据和历史性惯常做法在证明历史性权利的过程中所发挥的核心作用，反对将“外国的态度”这一因素作为产生历史性权利与历史性水域的必要条件的学说。

而后，报告谈及我国在南海的历史性水域和历史性权利。认为U型线[2]内水域为我国的历史性水域。“中国在U型线内的历史性权利从本质上说是一种优先权，具体表现在生物资源的养护利用，人工岛屿、设施和结构的建造和管理，海上科学研究，警察执法权，军事使用以及航道划定和部分水域的污染控制等方面。”

考虑到周边国家在U型线内的历史利益及其与我国历史性权利的协调，报告又指出：“越南基于历史证据确实可以主张贸易、行军、缉盗和捕鱼方面的历史利益，享有一定的优先权；菲律宾、泰国、柬埔寨只有一些有关航海贸易方面的局部利益；其他国家基本没有历史利益可言。基于历史上这些国家与中国之间的关系，它们的历史利益都是以中国在这一地区占据统治地位为前提的，这片水域还是中国的历史性水域，中国享有的优先权是这些国家所不能比拟的。”

最后，该报告讨论了中国的历史性权利与《海洋法公约》第 123 条的关系，并最终得出了南海水域三层级论的结论。

报告指出，根据《海洋法公约》第 123 条，闭海半闭海周边国家负有合作义务，但是从中国的立场出发，U型线内外的海域性质不同，第 123 条不能在整个南海一视同仁地适用。中国有充分的历史证据主张南海诸岛的主权，以及U型线内的历史性权利。虽然，公约第 123 条并没有就闭海、半闭海内不同区域的合作做出具体规定，但从公约的上下文以及公约精神看来，公约对于历史性权利采取的是尊重与保护的态度。既然中国已经主张U型线内的历史性权利，在该水域内的国际合作就应尊重中国的此种权利。

在上述分析的基础上，针对南海水域的法律地位，该报告采用了中国学者傅崐成提出的南海水域三层级论：[3]

第一级：整个半闭海——依照《海洋法公约》第 123 条有关合作项目进行合作。

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2 我国在南海的 9 段不连续基线构成一个巨大的“U 型”，故称其为“U 型线”。

3 傅崐成著：《南（中国）海法律地位之研究》，台北：123 咨讯有限公司 1995 年版，第 208~209 页。

第二级：U 型线内水域为中国的历史性水域——中国在生物资源的养护利用，人工岛屿、设施和结构的建造和管理，海上科学研究，警察执法权（尤其是缉拿海盗方面），军事使用以及航道划定和部分水域的污染控制这些方面享有优先权。该水域内的合作必须以享有历史性权利的国家为主导，由享有历史性权利的国家优先协调。

第三级：南海诸岛及十二海里领海内——依照海洋法公约及其他国际法规范，主权明确属于中国，合作必须依照中国国内法进行。

二、《国际海洋法上的群岛制度研究》

首先，该报告回顾了群岛问题的起源。“群岛”之所以能够成为一个国际法问题，在于群岛基线的划定—是各个岛屿单独划定领海基线，还是整个群岛作为一个整体划定领海基线。前一种方法可能会在各个岛屿间形成大片“公海”，会给群岛国家的安全防务、经济发展和日常管理等带来不利影响；而后一种方法可能会导致传统上被视为“公海”的大片水域处于群岛所有者的专属管辖之下，对国际航行、远洋渔业等产带来消极后果。如何协调这些相冲突的利益，是建立群岛制度的目的所在。

其次，该报告分析了国际海洋法上群岛制度的发展过程。根据 1930 年海牙国际法编纂会议有关群岛问题的调查结果表明，20 世纪前期，有关群岛制度的主张仍不被国际社会所接受。但就大多数国家来说，它们已经意识到了单个岛屿和岛屿群在划定领海上的不同。此时问题的焦点集中在岛屿之间和岛屿与大陆之间的距离为多少，岛屿群才能被视为一个整体拥有自己的领海。因为当时各国对领海的宽度有争议，因此这个距离的问题也就悬而未决；当时已经对沿岸群岛和洋中群岛加以区分。联合国第一次海洋法会议之前，国际公法学者对群岛问题的关注主要集中在如何将直线基线法应用于沿岸群岛的领海划定上。虽然众说纷纭，观点各异，但对于沿岸群岛，各位公法学家毫无疑问都认同将其视作一个整体用直线基线法来测算其领海，而对于大陆国家的洋中群岛和群岛国问题，学者们则鲜有论及。原因在于，20 世纪中叶以前，几乎所有的洋中岛屿和群岛国都被大陆国家或以完全的所有权形式或以殖民地的形式所持有，直到反殖民化运动开始后，才有群岛国家——即整个领土由岛屿所构成的国家出现在政治版图上。因此联合国第一次海洋法会议之前有关群岛的国家实践，主要体现在沿岸群岛上，其中以挪威、芬兰等比较典型。群岛国家的实践是以菲律宾和印度尼西亚这两个典型的群岛国家为始的，因为它们独立得比较早，所以在联合国第一次海洋法会议召开之前就有其本国对群岛的立法实践，只是这种实践在当时不占主流，并且还遭到了主要海洋强国的反对和抵制。20 世纪 60 年代，尤其是到了 70 年代和第三次海

洋法会议期间，国际公法学家们的注意力都转向了群岛国，同时广大发展中国家尤其是拥有群岛的国家在此段时间内作了很多有益的研究，推动了群岛制度的发展。

再次，该报告分析了 1982 年《联合国海洋法公约》有关群岛问题的规定。报告认为：“从公约第四部分关于群岛国的规定来看，首先，它满足了群岛国家的要求。其次，公约的有关规定也体现了对国际社会利益的考虑。总体而言，与直线基线制度相比，群岛基线制度是一种更加温和的制度：如果适用直线基线，则基线内的水域为内水，其他国家仅可以依照 1982 年公约第 8 条第 2 款主张无害通过权，而采用群岛基线后，基线内的水域为群岛水域，其他国家除了享有无害通过的权利之外，还可以行使群岛海道通过权，直接相邻国家还可以继续行使其在群岛水域内的某些传统捕鱼权利，以及进行其他合法活动的权利，其他国家对其现有的海底电缆也可以行使维修和更换的权利。总之，公约的规定是权衡各方利益的结果，较好地平衡了各方的利益需求。”

之后，该报告分析了大陆国家所属洋中群岛制度。依据海洋法公约，群岛国与大陆国家的洋中群岛适用不同的法律制度。这种现状的原因之一在于，在第三次联合国海洋法会议上，对大陆国家所属洋中群岛问题的讨论并没有像群岛国问题那样引起重视，而大陆国家对自己的洋中群岛的权利主张也不似群岛国家的群岛制度主张那么积极强烈。

报告进而考察了厄瓜多尔、丹麦、挪威、西班牙等有关大陆国家的洋中群岛实践，在此基础上探讨了我国的西沙群岛和南沙群岛是否可以适用群岛制度的问题。

而后，该报告指出了群岛体制适用于大陆国家洋中群岛的可行性与必要性，并提出海洋法公约所规定的群岛制度应当同样适用于大陆国家所属洋中群岛的三大理由：1. 群岛国家所提出的有关群岛制度的理由对于大陆国家所属的洋中群岛也同样有效，因为这两类群岛所面临的问题是一样的，所以，其解决方法也不应有所不同。2. 如果对大陆国家所属的洋中群岛不适用群岛体制，就会造成国际法事实上的不公平。3. 1982 年海洋法公约仅仅规定了群岛国的群岛体制，只要其他国家承认大陆国家对其洋中群岛所划定的直线基线，就应当认为，依据习惯国际法，这些做法是有效合法的。

最后，该报告提出了相关立法建议：“有机会则应联合其他有同样难题的国家，考虑修改 1982 年公约的规定，将群岛体制扩大适用于大陆国家所属的洋中群岛。”

水下文化遗产保护专家研讨会综述

2004年6月5日，由厦门大学海洋政策与法律中心主办，在厦门大学召开了“水下文化遗产保护专家研讨会”。这次研讨会是在2001年11月20日联合国教科文组织通过了《保护水下文化遗产公约》的背景下进行的。与会专家来自国家文化遗产局、国家博物馆、海南南海研究中心、福建省考古研究所、厦门市博物馆、厦门大学历史系以及厦门大学海洋政策与法律中心等部门。本次研讨会针对我国水下文化遗产保护的现状、面临的问题以及可能的解决方案进行了探讨，并且讨论了《保护水下文化遗产公约》与我国《水下文物保护条例》在立法上的差异，其各自对我国水下文物保护的利弊等诸多问题。下面就本次研讨会的主要内容作一综述。

一、我国水下文化遗产保护的现状和问题

国家文化遗产局政策法规处的何戍中处长谈了我国水下文化遗产保护的现状。他认为，我国目前在这一领域“家底不清，投入太少”。与陆上文物保护相比，水下文物保护同样也面临着社会对中国文化遗产的冷漠、忽视，以及盗掘文物等问题。文物管理部门在理念、制度和力量等方面存在欠缺。水下文物保护难度大，要求高，在大海下从事文物保护似乎是一件很奢侈的事情。何戍中处长认为，水下文物保护，最关键的就是理念问题，就是要防止对文物破坏，坚决反对商业性打捞。他认为中国必须要加入《保护水下文化遗产公约》，同时可以借加入公约的机会吸收国际上对水下文物保护的科学方法和先进理念。此外他还谈及了增加财政投入和营造良好社会环境对水下文物保护的重要意义。

海南南海研究中心吴士存主任针对南海地区的水下文化遗产保护问题作了发言。他着重提出了文物流失的问题，文物大盗在南海活动相当频繁，盗掘活动触目惊心。而南海尚存在周边各国对岛屿主权、海域管辖权的争议，在争议地区，许多文物具有历史证据的意义，因而超出了文化保护的单一价值而具有主权宣示的意义。对于争议地区的水下文化遗产，吴士存主任提出了“搁置争议，共同不开发”的主张。

厦门大学历史系吴春明教授具体介绍了目前已探明的分布在世界各大洋洋底上的具有较高历史、文化价值的中国沉船和船货。

二、《保护水下文化遗产公约》与《水下文物保护条例》

厦门大学海洋政策与法律中心的傅崐成教授做了题为《联合国教科文组织 2001 年〈保护水下文化遗产公约〉与中国》[1] 的报告。从国际法的角度对该公约做了概述，指出公约中对水下文化遗产保护的两大原则：非商业化原则和就地保护原则。傅崐成教授着重谈了该公约与我国水下文物保护条例的冲突之处。傅崐成教授认为，中国采取了依照文物起源国来区分文物管理权限的立场，而新公约并未依照这一思路来制定规范，可以预见，将来对于保护、打捞世界各地起源自中国的水下文化遗产，会发生争执。对于这一问题，中国应该根据国际法上对等和一致性的要求，以及根据联合国海洋法公约第 149 条的规定，主张自己对于领海以外起源于中国的沉船或文物的优先权，并依据其《水下文物管理条例》来确定所有权的归属。

国家博物馆水下考古研究中心张威主任介绍了《水下文物管理条例》（以下简称“《条例》”）的修改问题。2004 年国家文物局要求修订《条例》。在修订中遇到的主要问题有：

1. 国家管辖权问题，现有的条例没有充分行使公约赋予的对于在毗连区、专属经济区和大陆架等区域的水下文物的管辖权力。

2. 关于文物的认定问题，公约与我国法律规定存在差异。

3.《条例》中规定的国家文物的范围大于《文物法》的规定，不符合《立法法》。

4. 条例的可操作性需要加强。

5. 条例中的管理体制模糊不清，管理方式呆板。需要建立统筹全局的主管部门和工作体系。

福建省考古研究所栗建安所长在发言中强调了目前我国的水下文物保护工作缺乏法律专家的参与，法律专家应该发挥自己的作用。

厦门市博物馆彭景元副研究员从地理位置和学科优势的角度提出，厦门大学应该在水下文化遗产保护中发挥更大的作用。

在自由讨论时间，与会专家和厦门大学海洋政策与法律中心的硕士、博士研究生们就非法打捞与文物走私、商业打捞与文物保护、文物保护从业人员的培养、台湾海峡内水下文物保护的特殊意义和困难等问题做了探讨。

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1 报告内容参见要《联合国教科文组织 2001 年〈保护水下文化遗产公约〉评析》，载于傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 1~20 页。

最后，与会专家一致认为，本次研讨会是一次跨部门、跨学科的研讨会。针对水下文化遗产保护问题由法律专家发起举办这样的研讨会，具有开创性意义。厦门大学海洋政策与法律中心在水下文化遗产保护工作中作出了积极的努力。

中华人民共和国和越南社会主义共和国关于两国在北部湾领海、专属经济区和大陆架的划界协定

中华人民共和国和越南社会主义共和国（以下简称“缔约双方”），为巩固和发展中越两国和两国人民之间的传统睦邻友好关系，维护和促进北部湾的稳定和发展，在相互尊重独立、主权和领土完整，互不侵犯，互不干涉内政，平等互利和和平共处的原则基础上，本着互谅互让、友好协商和公平合理地解决划分北部湾问题的精神，达成协议如下：

第一条

一、缔约双方根据一九八二年《联合国海洋法公约》，公认的国际法各项原则和国际实践，在充分考虑北部湾所有有关情况的基础上，按照公平原则，通过友好协商，确定了两国在北部湾的领海、专属经济区和大陆架的分界线。

二、在本协定中，“北部湾”系指北面为中国和越南两国陆地领土海岸、东面为中国雷州半岛和海南岛海岸、西面为越南大陆海岸所环抱的半封闭海湾，其南部界限是自地理坐标为北纬 18 度 30 分 19 秒、东经 108 度 41 分 17 秒的中国海南岛莺歌嘴最外缘突出点经越南昏果岛至越南海岸上地理坐标为北纬 16 度 57 分 40 秒、东经 107 度 08 分 42 秒的一点之间的直线连线。

缔约双方确定，上述区域构成本协定的划界范围。

第二条

缔约双方同意，两国在北部湾的领海、专属经济区和大陆架分界线由以下 21 个界点以直线顺次连接确定，其地理坐标如下：

第 1 界点　北纬 21 度 28 分 12.5 秒，东经 108 度 06 分 04.3 秒；

第 2 界点　北纬 21 度 28 分 01.7 秒，东经 108 度 06 分 01.6 秒；

第 3 界点　北纬 21 度 27 分 50.1 秒，东经 108 度 05 分 57.7 秒；

第 4 界点　北纬 21 度 27 分 39.5 秒，东经 108 度 05 分 51.5 秒；

第 5 界点　北纬 21 度 27 分 28.2 秒，东经 108 度 05 分 39.9 秒；

第 6 界点　北纬 21 度 27 分 23.1 秒，东经 108 度 05 分 38.8 秒；

第 7 界点　北纬 21 度 27 分 08.2 秒，东经 108 度 05 分 43.7 秒；

第 8 界点　北纬 21 度 16 分 32 秒，东经 108 度 08 分 05 秒；

第 9 界点　北纬 21 度 12 分 35 秒，东经 108 度 12 分 31 秒；

第 10 界点　北纬 20 度 24 分 05 秒，东经 108 度 22 分 45 秒；
第 11 界点　北纬 19 度 57 分 33 秒，东经 107 度 55 分 47 秒；
第 12 界点　北纬 19 度 39 分 33 秒，东经 107 度 31 分 40 秒；
第 13 界点　北纬 19 度 25 分 26 秒，东经 107 度 21 分 00 秒；
第 14 界点　北纬 19 度 25 分 26 秒，东经 107 度 12 分 43 秒；
第 15 界点　北纬 19 度 16 分 04 秒，东经 107 度 11 分 23 秒；
第 16 界点　北纬 19 度 12 分 55 秒，东经 107 度 09 分 34 秒；
第 17 界点　北纬 18 度 42 分 52 秒，东经 107 度 09 分 34 秒；
第 18 界点　北纬 18 度 13 分 49 秒，东经 107 度 34 分 00 秒；
第 19 界点　北纬 18 度 07 分 08 秒，东经 107 度 37 分 34 秒；
第 20 界点　北纬 18 度 04 分 13 秒，东经 107 度 39 分 09 秒；
第 21 界点　北纬 17 度 47 分 00 秒，东经 107 度 58 分 00 秒。

第三条

一、本协定第二条所规定的第 1 界点至第 9 界点的分界线是两国在北部湾的领海分界线。

二、本条第一款所规定的两国领海分界线沿垂直方向划分两国领海的上空、海床和底土。

三、除非缔约双方另有协议，任何地形变化不改变本条第一款所规定的第 1 界点至第 7 界点的两国领海分界线。

第四条

本协定第二条所规定的第 9 界点至第 21 界点的分界线是两国在北部湾的专属经济区和大陆架的分界线。

第五条

本协定第二条所规定的第 1 界点至第 7 界点的两国领海分界线用黑线标绘在缔约双方于二〇〇〇年共同测制的比例尺为一万分之一的北仑河口专题地图上，第 7 界点至第 21 界点的两国领海、专属经济区和大陆架分界线用黑线标绘在由缔约双方于二〇〇〇年共同测制的比例尺为五十万分之一的北部湾全图上。上述分界线均为大地线。

上述北仑河口专题地图和北部湾全图为本协定的附图。上述地图采用 ITRF-96 坐标系。本协定第二条所规定各界点的地理坐标均系从上述地图上量取。本协定所规定的分界线标绘在本协定附图上，仅用于说明的目的。

第六条

缔约双方应相互尊重按照本协定所确定的两国各自在北部湾的领海、专属经济区和大陆架的主权、主权权利和管辖权。

第七条

如果任何石油、天然气单一地质构造或其他矿藏跨越本协定第二条所规定的

分界线，缔约双方应通过友好协商就该构造或矿藏的最有效开发以及公平分享开发收益达成协议。

第八条

缔约双方同意就北部湾生物资源的合理利用和可持续发展以及两国在北部湾专属经济区的生物资源养护、管理和利用的有关合作事项进行协商。

第九条

两国根据本协定对北部湾领海、专属经济区和大陆架分界线的划定对缔约各方有关海洋法方面国际法规则的立场不造成任何影响或妨害。

第十条

缔约双方对本协定的解释或适用所产生的任何争议，应通过友好协商和谈判予以解决。

第十一条

本协定须经缔约双方批准，并自互换批准书之日起生效。批准书在河内互换。

本协定于二〇〇〇年十二月二十五日在北京签订，一式两份，每份都用中文和越文写成，两种文本同等作准。

全国人民代表大会常务委员会关于批准《中华人民共和国和越南社会主义共和国关于两国在北部湾领海、专属经济区和大陆架的划界协定》的决定

（2004 年 6 月 25 日通过）

第十届全国人民代表大会常务委员会第十次会议决定：批准外交部部长唐家璇代表中华人民共和国于 2000 年 12 月 25 日在北京签署的《中华人民共和国和越南社会主义共和国关于两国在北部湾领海、专属经济区和大陆架的划界协定》。

中华人民共和国政府和越南社会主义共和国政府北部湾渔业合作协定

中华人民共和国政府和越南社会主义共和国政府（以下简称“缔约双方”），为了维护和发展中越两国和两国人民之间的传统睦邻友好关系，养护和持续利用北部湾协定水域的海洋生物资源，加强两国在北部湾的渔业合作，根据国际法，特别是一九八二年十二月十日《联合国海洋法公约》的有关规定以及二〇〇〇年十二月二十五日签订的《中华人民共和国和越南社会主义共和国关于两国在北部湾领海、专属经济区和大陆架的划界协定》（以下简称“北部湾划界协定”），经友好协商，在相互尊重各自在北部湾的主权、主权权利和管辖权、平等互利的基础上，达成协议如下：

第一部分　总则

第一条

本协定适用于北部湾两国专属经济区的一部分和两国领海相邻水域的一部分（以下简称“协定水域”）。

第二条

缔约双方在相互尊重主权、主权权利和管辖权的基础上，在协定水域进行渔业合作。这种渔业合作不影响两国各自的领海主权和两国各自在专属经济区享有的其他权益。

第二部分　共同渔区

第三条

一、缔约双方同意在北部湾封口线以北、北纬 20 度以南、距北部湾划界协定所确定的分界线（以下简称“分界线”）各自 30. 5 海里的两国各自专属经济区设立共同渔区。

二、共同渔区的具体范围为下列各点顺次用直线连接而围成的水域：

1．北纬 17 度 23 分 38 秒，东经 107 度 34 分 43 秒之点

2．北纬 18 度 09 分 20 秒，东经 108 度 20 分 18 秒之点

3．北纬 18 度 44 分 25 秒，东经 107 度 41 分 51 秒之点
4．北纬 19 度 08 分 09 秒，东经 107 度 41 分 51 秒之点
5．北纬 19 度 43 分 00 秒，东经 108 度 20 分 30 秒之点
6．北纬 20 度 00 分 00 秒，东经 108 度 42 分 32 秒之点
7．北纬 20 度 00 分 00 秒，东经 107 度 57 分 42 秒之点
8．北纬 19 度 52 分 34 秒，东经 107 度 57 分 42 秒之点
9．北纬 19 度 52 分 34 秒，东经 107 度 29 分 00 秒之点
10．北纬 20 度 00 分 00 秒，东经 107 度 29 分 00 秒之点
11．北纬 20 度 00 分 00 秒，东经 107 度 07 分 41 秒之点
12．北纬 19 度 33 分 07 秒，东经 106 度 37 分 17 秒之点
13．北纬 18 度 40 分 00 秒，东经 106 度 37 分 17 秒之点
14．北纬 18 度 18 分 58 秒，东经 106 度 53 分 08 秒之点
15．北纬 18 度 00 分 00 秒，东经 107 度 01 分 55 秒之点
16．北纬 17 度 23 分 38 秒，东经 107 度 34 分 43 秒之点

第四条

缔约双方本着互利的精神，在共同渔区内进行长期渔业合作。

第五条

缔约双方根据共同渔区的自然环境条件、生物资源特点、可持续发展的需要和环境保护以及对缔约各方渔业活动的影响，共同制订共同渔区生物资源的养护、管理和可持续利用措施。

第六条

缔约双方尊重平等互利的原则，根据在定期联合渔业资源调查结果的基础上所确定的可捕量和对缔约各方渔业活动的影响，以及可持续发展的需要，通过根据本协定第十三条设立的中越北部湾渔业联合委员会每年确定缔约各方在共同渔区内的作业渔船数量。

第七条

一、缔约各方对在共同渔区从事渔业活动的己方渔船实行捕捞许可制度。捕捞许可证须按照中越北部湾渔业联合委员会确定的当年作业渔船数量发放，并将获得许可证的渔船船名号通报缔约另一方。缔约双方有义务对进入共同渔区从事渔业活动的渔民进行教育和培训。

二、凡进入共同渔区从事渔业活动的渔船均须向本国政府授权机关提出申请，并在领取捕捞许可证后，方可进入共同渔区从事渔业活动。缔约双方进入共同渔区从事渔业活动的渔船应按照中越北部湾渔业联合委员会的规定进行标识。

第八条

缔约各方进入共同渔区从事渔业活动的国民和渔船在进行渔业活动时须遵守中越北部湾渔业联合委员会关于渔业资源养护和管理的规定，依照中越北部湾渔

业联合委员会的要求正确填写捕捞日志并在规定时间内上交本国政府授权机关。

第九条

一、根据中越北部湾渔业联合委员会在符合共同渔区特点以及符合两国各自关于渔业资源养护和管理的国内法的基础上制订的规定，缔约各方授权机关对进入共同渔区内己方一侧水域的缔约双方国民和渔船进行监督检查。

二、缔约一方授权机关发现缔约另一方国民和渔船在共同渔区内己方一侧水域违反中越北部湾渔业联合委员会的规定时，有权按中越北部湾渔业联合委员会的规定对该违规行为进行处理，并应通过中越北部湾渔业联合委员会商定的途径，将有关情况和处理结果迅速通知缔约另一方。被扣留的渔船和船员，在提出适当的保证书或其他担保后，应迅速获得释放。

三、必要时，缔约双方授权机关可相互配合进行联合监督检查，对在共同渔区内违反中越北部湾渔业联合委员会关于渔业资源养护和管理规定的行为进行处理。

四、缔约各方有权根据各自国内法对未获许可证进入共同渔区内己方一侧水域从事渔业活动或虽获许可证进入共同渔区但从事渔业活动以外不合法活动的渔船进行处罚。

五、缔约各方应为获得许可证进入共同渔区的缔约另一方渔船提供便利。缔约各方授权机关不得滥用职权，妨碍缔约另一方获得许可证的国民和渔船在共同渔区内从事正常渔业活动。缔约一方如发现缔约另一方授权机关未按照中越北部湾渔业联合委员会制订的共同管理措施进行执法，有权要求该授权机关做出解释，必要时，可提交中越北部湾渔业联合委员会予以讨论和解决。

第十条

缔约各方在共同渔区己方作业规模框架内，可采取任何一种国际合作或联营方式。所有获许可证在共同渔区内以上述合作或联营方式从事渔业活动的渔船均须遵守中越北部湾渔业联合委员会制订的渔业资源养护和管理的规定，悬挂向其颁发许可证的缔约一方的国旗，按中越北部湾渔业联合委员会的规定进行标识，在共同渔区向其颁发许可证的缔约一方一侧水域从事渔业活动。

第三部分　过渡性安排

第十一条

一、缔约各方应对共同渔区以北（自北纬 20 度起算）本国专属经济区内缔约另一方的现有渔业活动做出过渡性安排。自本协定生效之日起，过渡性安排开始实施。缔约另一方应采取措施，逐年削减上述渔业活动。过渡性安排自本协定生效之日起四年内结束。

二、关于过渡性安排水域的范围和过渡性安排的管理办法，由缔约双方以补充议定书形式加以规定，该补充议定书为本协定不可分割的组成部分。

三、过渡性安排结束后，缔约各方应在相同条件下优先准许缔约另一方在本国专属经济区入渔。

第四部分　小型渔船缓冲区

第十二条

一、为避免缔约双方小型渔船误入缔约另一方领海引起纠纷，缔约双方在两国领海相邻部分自分界线第一界点起沿分界线向南延伸 10 海里、距分界线各自 3 海里的范围内设立小型渔船缓冲区，具体范围为下列各点顺次用直线连接而围成的水域：

1．北纬 21 度 28 分 12.5 秒，东经 108 度 06 分 04.3 秒之点

2．北纬 21 度 25 分 40.7 秒，东经 108 度 02 分 46.1 秒之点

3．北纬 21 度 17 分 52.1 秒，东经 108 度 04 分 30.3 秒之点

4．北纬 21 度 18 分 29.0 秒，东经 108 度 07 分 39.0 秒之点

5．北纬 21 度 19 分 05.7 秒，东经 108 度 10 分 47.8 秒之点

6．北纬 21 度 25 分 41.7 秒，东经 108 度 09 分 20.0 秒之点

7．北纬 21 度 28 分 12.5 秒，东经 108 度 06 分 04.3 秒之点

二、缔约一方如发现缔约另一方小型渔船进入小型渔船缓冲区己方一侧水域从事渔业活动，可予以警告，并采取必要措施令其离开该水域，但应克制：不扣留，不逮捕，不处罚或使用武力。如发生有关渔业活动的争议，应报告中越北部湾渔业联合委员会予以解决；如发生有关渔业活动以外的争议，由两国各自相关授权机关依照国内法予以解决。

第五部分　中越北部湾渔业联合委员会

第十三条

一、为实施本协定，缔约双方决定设立中越北部湾渔业联合委员会（以下简称“渔委会”）。渔委会由两国政府各自任命的一名代表和若干名委员组成。

二、渔委会将对其活动机制做出具体规定。

三、渔委会的职责如下：

（一）协商协定水域渔业资源养护和可持续利用的有关问题，并向两国政府提出建议；

（二）协商两国在协定水域渔业合作的有关事项，并向两国政府提出建议；

（三）根据本协定第五条，制订共同渔区的渔业资源养护和管理规定及其实施办法；

（四）根据本协定第六条，每年确定缔约各方进人共同渔区的作业渔船数量；

（五）协商和决定与共同渔区有关的其他事项

（六）根据过渡性安排补充议定书的规定履行其职能；

（七）解决发生在小型渔船缓冲区内的有关渔业活动的争议；

（八）在其职能范围内对渔业纠纷和海损事故的处理进行指导；

（九）对本协定执行情况进行评估并向两国政府报告；

（十）可就本协定、本协定附件和本协定补充议定书的补充和修改向两国政府提出建议；

（十一）对缔约双方共同关注的其他事项进行协商。

四、渔委会的一切建议和决定均须经缔约双方代表一致同意。

五、渔委会每年举行一至二次会议，在两国轮流举行。必要时，经缔约双方同意可举行临时会议。

第六部分　其他条款

第十四条

为确保航行安全，维护海上捕捞作业秩序和安全，并顺利及时处理协定水域海上事故，缔约各方应对本国国民和渔船进行指导、法律教育并采取其他必要措施。

第十五条

一、缔约一方国民和渔船在缔约另一方一侧海域遭遇海难或发生其他紧急事态需要救助时，缔约另一方有义务予以救助和保护，同时迅速将有关情况通报缔约一方的有关部门。

二、缔约一方的国民和渔船因天气恶劣或其他紧急事态需要避难时，可按本协定附件和渔委会的规定，经与缔约另一方有关部门联系，到缔约另一方避难。该国民和渔船在避难期间须遵守缔约另一方的有关法律和法规，并服从缔约另一方有关部门的管理。

第十六条

缔约各方按照一九八二年十二月十日《联合国海洋法公约》的规定确保缔约另一方渔船的无害通过权和航行便利。

第十七条

一、缔约双方应在协定水域就渔业科学研究和海洋生物资源养护进行合作。

二、缔约各方可在协定水域己方一侧进行国际渔业科研合作。

第七部分　最后条款

第十八条

缔约双方之间对本协定的解释或适用而产生的任何争端，应通过友好协商予以解决。

第十九条

本协定附件和本协定补充议定书为本协定不可分割的组成部分。

第二十条

经协商，缔约双方可对本协定、本协定附件和本协定补充议定书进行补充和修改。

第二十一条

本协定第三条第二款规定的共同渔区的地理坐标和本协定第十二条第一款规定的小型渔船缓冲区的地理坐标均从作为北部湾划界协定附图的北部湾全图和北仑河口专题地图上量取。

第二十二条

一、本协定经缔约双方履行各自国内法律程序后，自两国政府换文商定之日起生效。

二、本协定有效期为十二年，其后自动顺延三年。顺延期满后，继续合作事宜由缔约双方通过协商商定。

本协定于二〇〇〇年十二月二十五日在北京签订，一式两份，每份均用中文和越文写成，两种文本同等作准。

附件：

关于紧急避难的规定

为实施本协定第十五条第二款的规定：

一、中华人民共和国政府指定的联络部门为农业部南海区渔政渔港监督管理局。越南社会主义共和国政府指定的联络部门为水产部水产资源保护局。

二、紧急避难的联络办法由缔约双方在渔委会上相互通报。

三、紧急避难的联系内容应包括：船名、呼号、当时船位（纬度、经度）、船籍港、总吨位、全长、船长姓名、船员数、避难理由、请求避难的目的地、预计到达时间和联络方法。

北部湾共同渔区
渔业资源养护和管理规定

根据2000年12月25日在北京签订的《中华人民共和国政府和越南社会主义共和国政府北部湾渔业合作协定》（以下简称《协定》），为养护、管理和持续利用北部湾共同渔区（以下简称“共同渔区”）的渔业资源，维护共同渔区捕捞作业秩序和安全，中越北部湾渔业联合委员会（以下简称“渔委会”）制定本规定。

第一条 任何人和渔船进入共同渔区从事渔业活动，必须取得共同渔区渔业捕捞许可证（以下简称“许可证”），并遵守本规定和《协定》的有关规定。

第二条 中华人民共和国和越南社会主义共和国（以下简称“双方”）执行本规定的主管机关分别是中华人民共和国农业部和越南社会主义共和国水产部（以下简称“主管机关”）。

中华人民共和国南海区渔政渔港监督管理局和越南水产部水产资源保护与开发局（以下简称“实施机关”）负责组织协调本规定的具体实施。

中国的渔政渔港监督管理机构、公安边防、海军部队和越南的水产资源监察保护机关、海军、海警、边防部队（以下简称“监督机关”）负责对共同渔区渔业活动进行监督检查和对违规渔业活动进行处理。中方协调联络单位为：渔政渔港监督管理机构，越方为：海警部队。

第三条 双方实施机关根据渔委会每年确定的共同渔区作业渔船数量，向本国渔船发放许可证。双方按已达成一致的渔船数量互相提供防伪标识。发放许可证时，发放方应将对方提供的防伪标识粘贴在规定的栏目中。

许可证应包括下列主要内容：渔船名号、船籍港和国籍、渔船登记号码、作业类型、总吨位（含船舶自重和载重）、主机功率、船长姓名、渔船所有人姓名和地址。

许可证有效期自签发之日起一年有效。

许可证的样式由渔委会规定，见附件一。

第四条 双方实施机关应编制本国每年获得许可证的渔船名册，并互相交换，具体交换时间和方式在每年渔委会确定共同渔区作业船数的会议上商定。

渔船名册应包括以下内容：渔船名号、作业类型、总吨位（含船舶自重和载重）、主机功率、渔船登记号码、许可证号码。

第五条 获得许可证在共同渔区从事渔业活动的渔船和人员，须随船携带许可证、船舶登记证和船上人员随身证件，按许可证规定的内容开展捕捞活动。

渔船应悬挂本国国旗，并按渔委会的规定进行标识。具体标识方法见附件

第六条 获得许可证的渔船在共同渔区作业时应按渔委会规定的样式（见附件三）填写《北部湾共同渔区渔捞日志》（以下简称“渔捞日志”）。每年的渔捞日志应上交本国实施机关。

第七条 在共同渔区实行休渔制度。休渔的具体办法和内容由渔委会规定。

第八条 禁止使用炸鱼、毒鱼、电鱼及渔委会规定禁用的渔具和作业方式进行捕捞。

第九条 禁止捕捞下列珍稀濒危水生野生动物：鲸、海豚、儒良、海龟、珊瑚。

在从事正常捕捞活动时，无意兼捕到上述禁止捕捞的珍稀濒危水生野生动物，应立即将其释放于海中。

第十条 双方应采取措施，防止污染，保护和改善共同渔区的生态环境。

第十一条 渔船作业或航行时，应遵守渔船避碰规则，不得影响其他渔船正常捕捞作业。

双方渔船之间发生纠纷或海损事故时双方船长应协商解决，禁止采取打、砸、抢、扣人或破坏渔船等不法行为。现场无法解决的，双方当事船长应按附件四规定样式填写《北部湾共同渔区事故确认书》，并交本国实施机关。双方实施机关将协调解决，或提交渔委会解决。

第十二条 双方监督机关公务人员对进人共同渔区己方一侧水域的双方渔船和人员进行监督检查。

双方监督机关公务人员进行监督检查时，应按照本国规定穿着制服、佩带标志，使用公务船艇并悬挂本国国旗和专用标识。双方互相通报本国授权公务人员的制服、标志和公务船艇专用标识的样式。

第十三条 双方监督机关公务人员进行监督检查时，应尊重和不妨碍获得许可证的渔船和人员从事正常渔业活动，避免重复检查和处罚。

双方监督机关公务人员发现渔船违规作业，或有合理根据认为其有非法作业嫌疑，或必要时，可以登临检查。

在登临检查时，监督机关公务人员应填写《北部湾共同渔区检查记录》（以下简称《检查记录》，样式见附件五）。检查记录应客观、真实，经监督机关公务人员和当事渔船船长签字确认。

第十四条 双方监督机关公务人员在共同渔区己方一侧发现对方一侧海域有渔船违规或有违规嫌疑时，应立即利用现有通讯工具向对方实施机关通报。接到通报一方的实施机关应立即进行处理。

第十五条 在监督检查过程中，各方监督机关公务人员如在共同渔区己方一侧水域发现违反本规定的渔船和人员，则应根据本规定进行处理，并通报己方实施机关。对于达到处罚程度的违规行为，由各方具有处罚权的机关根据本规定第二十条规定进行处罚，并填写《北部湾共同渔区处罚决定书》，样式见附件六。

第十六条 双方监督机关公务人员有权根据各自国内法对未获许可证进人共

同渔区内己方一侧水域从事渔业活动或虽获许可证进入共同渔区但从事渔业活动以外不合法活动的渔船进行处罚。

第十七条 一方监督机关或具有处罚权的机关对另一方的渔船和人员的违规行为进行处理时，应及时告知己方实施机关。该实施机关应在案件发生后 72 小时内，将本规定第十三条所述的《检查记录》或包括《检查记录》主要内容的违规案件情况通报到另一方实施机关，需暂扣渔船至港口处理的，应在 48 小时内通报；在做出处罚决定后 72 小时内，将处罚决定通报到另一方实施机关。

第十八条 双方监督机关可在共同渔区进行联合检查，可采取互派公务人员上对方公务船或双方公务船联合检查的方式。联合检查时，由各方监督机关公务人员对发生在共同渔区己方一侧水域的违规案件做出处理决定。联合检查的具体方案由双方实施机关研究提出，经渔委会同意后实施。

第十九条 双方监督机关公务人员要求对渔船进行检查时，船上人员有责任给予配合，停船接受检查，出示本规定第五条规定的证件，为公务人员执行公务提供便利条件和帮助，并协助保障公务人员的人身安全。

公务人员应严格按照有关法律和本规定文明执法，除非其人身安全受到威胁时，不得使用武力。

第二十条 持有许可证的渔船和人员在共同渔区捕捞时，有违反本规定行为的，将按以下规定进行处理：

（一）不按规定悬挂国旗的，责令悬挂；未按规定携带国旗，责令返回，并处以 200 至 1 000 元人民币或 40 万至 200 万越盾罚款；如执意不悬挂国旗，则处以 500 至 2 500 元人民币或 100 万至 500 万越盾罚款，同时强制其离开共同渔区。如属再犯或执意不缴纳罚款和挂旗，则记录在案，并禁止其在共同渔区捕捞一个月，同时应及时通报双方实施机关以便共同监督管理；如在禁止捕捞期间，该船又进入共同渔区进行捕捞，则暂扣许可证，并及时通报双方实施机关。

（二）渔船已进行标识，但不符合本规定要求的，由监督机关根据违规情节在许可证上做记录，并责令其离开共同渔区；渔船未标识的，除上述处罚外，还处以 1 000 至 5 000 元人民币或 200 至 1 000 万越盾罚款。如渔船拒不接受处罚，并继续从事捕捞活动的，监督机关除适用上述处罚外，还暂扣许可证，并及时通报双方实施机关。

（三）没有携带许可证的渔船，将处以 25 000 元人民币或 5 000 万越盾罚款，并责令其离开共同渔区。许可证有效期内重犯的，将处以 35 000 元人民币或 7000 万越盾罚款，并责令其离开共同渔区。

没有携带船舶登记证的渔船将处以 10 000 元人民币或 2 000 万越盾罚款，并责令其离开共同渔区。

没有填写捕捞日志的渔船，将处以 500 元人民币或 100 万越盾罚款。

没有携带船员身份证件的，将处以 200 元人民币或 40 万越盾罚款。重犯的将

处以 400 元人民币或 80 万越盾罚款。本款所述船员身份证件的样本由双方实施机关相互通报，以便监督机关查验。如一方更换船员身份证件样式，应及时通知对方实施机关。

（四）不按捕捞许可证所注作业类型、时间进行捕捞活动的，将处以 5 000 至 30 000 元人民币或 1 000 至 6 000 万越盾罚款，并责令其离开共同渔区。再犯的，除上述处罚外还将被没收渔获物、渔具，暂扣捕捞许可证。

如渔船主机与许可证所注功率不相符，可在其许可证上进行标识，责令其离开共同渔区，并通报对方实施机关。对方应对渔船主机功率重新进行法定检验，如确定渔船主机与许可证所注功率不相符，须按本国法律法规追究相关人员的责任，并向对方实施机关通报法定检验和处理结果。再犯的，将处以 15 000 至 35 000 元人民币或 3 000 至 7 000 万越盾罚款，没收渔获物、渔具，暂扣许可证，责令其离开共同渔区。

（五）违反渔委会制定的共同渔区休渔规定，将处以 5 000 至 40 000 元人民币或 1 000 至 8 000 万越盾罚款，暂扣许可证，并责令其离开共同渔区；再犯的，将处以 10 000 至 75 000 元人民币或 2 000 万至 1.5 亿越盾罚款，并暂扣许可证，没收渔获物、渔具，责令其离开共同渔区。

（六）使用炸鱼、毒鱼、电鱼或渔委会规定禁用的渔具、作业方式进行捕捞的，处以 10 000 至 50 000 元人民币或 2 000 万至 1 亿越盾罚款，没收渔获物和从事上述违规行为的渔具和工具，暂扣许可证，责令其离开共同渔区己方一侧。再犯的，将处以 20 000 至 75 000 元人民币或 4 000 万至 1.5 亿越盾罚款，暂扣许可证，没收渔获物和从事上述违规行为的渔具和工具，责令其离开共同渔区，还可按照所在国法律追究船长的刑事责任，并及时通报双方实施机关。

（七）故意违反本规定第 9 条关于禁止捕捞珍稀濒危水生野生动物的，处以 5 000 至 15 000 元人民币或 1 000 至 3 000 万越盾罚款，没收所捕获的珍稀濒危水生野生动物，暂扣许可证，责令其离开共同渔区己方一侧。再犯的，除上述处罚外，没收渔具，还可按照所在国法律追究船长的刑事责任，并及时通报双方实施机关。

（八）妨碍、抗拒、逃避监督机关公务人员检查的，应视具体违规行为从重处罚。故意对监督机关公务人员或船只造成损害的，则需赔偿；造成公务人员严重伤亡的，按所在国法律追究肇事人的责任。拒不执行处罚决定的，则强制执行。

（九）同时发生多种违规行为的，分别处罚，但现金处罚的总金额不得超过 75 000 万元人民币或 1.5 亿越盾。

（十）违规渔船不接受检查逃逸的，监督机关应将其船名号记录在案，及时通知对方实施机关，经核实无误后，收缴其当年在北部湾共同渔区的许可证；情节严重的，可提请对方实施机关取消违规渔船在北部湾共同渔区一至两年的作业资格，处理一方将有关处理结果及时通报对方。

第二十一条 根据第二十条规定作出的处罚当场不能执行时，可暂扣渔船至

港口处理。

双方监督机关和公务人员应对暂扣渔船船员给予人道主义待遇，保证船上设备和财物安全。

暂扣渔船和船员具备下列条件之一时，应迅速获得释放：

（一）已全额交纳罚款，并按照第二十条相关条款规定已赔偿造成的损失和交纳渔船、船员暂扣期间按现行规定承担的费用；

（二）提出适当的金钱担保或双方实施机关接受的其它担保；具体的担保形式和内容由双方实施机关商定。

第二十二条 双方实施机关收到缔约另一方实施机关根据本规定第十七条所作的通报后，应对该违规渔船进行调查。对于案情属实的，可以根据本国法律、法规作出进一步处理。对于另一方的处罚有疑问的，可要求另一方实施机关作出解释。

被处罚的组织或个人认为处罚不妥当的，有权通过己方实施机关向对方实施机关或渔委会提出申诉。

第二十三条 本规定附件是本规定不可分割的组成部分。

第二十四条 渔委会可以对本规定和本规定附件进行补充和修改。

第二十五条 对本规定和本规定附件的理解发生异议时，由渔委会负责解释。

第二十六条 本规定自《协定》生效之日起施行。

《中华人民共和国政府和越南社会主义共和国政府北部湾渔业合作协定》补充议定书

中华人民共和国政府和越南社会主义共和国政府（以下简称“缔约双方”），根据二〇〇〇年十二月二十五日签订的《中华人民共和国政府和越南社会主义共和国政府北部湾渔业合作协定》（以下简称“渔业合作协定”）第十一条的规定，经友好协商，就过渡性安排达成协议如下：

第一条

一、本补充议定书适用于被称为“过渡性安排水域”的共同渔区以北两国各自专属经济区的一部分。

二、过渡性安排水域为北纬 20 度以北的下列各点顺次用直线连接而围成的水域，但 K、L 点之间用以白龙尾岛灯塔（北纬 20° 08′ 00″、东经 107° 43′ 40″）为圆心，半径 15 海里的圆弧连接：

序号	北纬	东经
A	20° 00′ 00″	108° 42′ 32″
B	20° 04′ 25″	108° 48′ 15″
C	20° 37′ 30″	108° 41′ 30″
D	20° 49′ 40″	108° 34′ 10″
E	20° 54′ 00″	108° 16′ 25″
F	20° 43′ 20″	108° 01′ 40″
G	20° 25′ 35″	107° 37′ 40″
H	20° 19′ 25″	107° 23′ 00″
I	20° 09′ 30″	107° 07′ 41″
J	20° 00′ 00″	107° 07′ 41″
K	20° 00′ 00″	107° 30′ 00″
L	20° 00′ 00″	107° 57′ 00″
A	20° 00′ 00″	108° 42′ 32″

以上地理坐标从作为北部湾划界协定附图的北部湾全图上量取°

第二条

缔约双方就进入过渡性安排水域从事渔业活动的渔船数量，达成协议如下：

渔业合作协定生效后的第一年内，中国渔船进入北部湾划界线西侧过渡性安排水域的数量为920艘；拖网渔船比例不超过35％，其他作业类型的船数由中方自行调整，但应遵守越南有关法律；单船作业功率范围为20-200马力；单船平均功率为85马力，中国渔船准入作业总功率为78 200马力。

上述船数逐年削减25％，相当于230艘船、19 550马力，削减后的渔船数量中拖网渔船比例不超过35％。4年后中国渔船全部撤出北部湾划界线西侧过渡性安排水域。

越南渔船进入北部湾划界线东侧过渡性安排水域的船数、总功率与中国渔船进入北部湾划界线西侧过渡性安排水域的船数、总功率相同，并按相同比例削减。

第三条

一、缔约双方对在过渡性安排水域已方一侧从事渔业活动的渔船进行管理。

二、缔约各方授权机关每年根据缔约双方之间的协议和缔约另一方关于申请作业的渔船名册的通报，以简便的方式向缔约另一方国民和渔船发放在过渡性安排水域已方一侧作业的许可证。申请作业的渔船名册的通报应包括船名号、船主及船长姓名、渔船的吨位、主机功率和作业方式。获得许可证的渔船须交纳捕捞许可证发放费用（200美元／艘／年）。

三、缔约双方获得许可证进入过渡性安排水域从事渔业活动的渔船须按照中越北部湾渔业联合委员会的规定进行标识。缔约双方有义务指导本国渔民按照北部湾渔业联合委员会的统一格式正确填写捕捞日志，在确有必要时，向沿海国海上监督检查人员出示。缔约双方应及时向缔约另一方通报缔约另一方渔民未按要求填写捕捞日志的情况，但不得以未填写捕捞日志为由进行处罚。

四、缔约各方应采取必要措施，确保已获得许可证的本国国民和渔船在过渡性安排水域缔约另一方一侧从事渔业活动时遵守本补充议定书和缔约另一方有关法律和法规的规定，特别是有关渔业活动、海洋生物资源养护措施和海洋环境保护的规定。

五、缔约双方应及时相互通报本条所指的本国有关法律和法规，包括有关法律和法规的生效、修改和废止情况。

第四条

一、缔约双方有义务对进入过渡性安排水域从事渔业活动的本国渔民进行教育和培训。

二、缔约各方有权根据本国国内法对未获得许可证进入过渡性安排水域己方一侧从事渔业活动的渔船进行处罚。对获得许可证进入过渡性安排水域己方一侧，但从事违规活动的渔船按照北部湾共同渔区养护和管理规定第二十条进行处罚。

三、缔约一方授权机关根据本补充议定书的规定进行处罚时，应将有关情况和处理结果迅速通知缔约另一方授权机关。被扣留的渔船和船员，在提出适当的

保证书或其他担保后，应迅速得到释放。

四、缔约各方授权机关应为获得许可证进入过渡性安排水域己方一侧的缔约另一方渔船提供便利。缔约各方授权机关不得滥用职权，妨碍缔约另一方获得许可证的国民和渔船在过渡性安排水域己方一侧从事正常渔业活动。

第五条

一、为执行本补充议定书的目的，渔委会的职责如下：

1. 协商过渡性安排水域内渔业资源养护和可持续利用的有关问题，并向两国政府提出建议；

2. 协商处理缔约双方交付的发生在过渡性安排水域内的有关渔业活动的争议；

3．对本补充议定书执行情况进行评估并向两国政府报告；

4. 对缔约双方共同关注的其他事项进行协商。

二、渔委会的一切建议和决定均须经缔约双方代表一致同意。

第六条

缔约双方之间对本补充议定书的解释或适用而产生的任何争端，应通过友好协商予以解决。

第七条

一、本补充议定书为渔业合作协定不可分割的组成部分。

二、经缔约双方同意可对本补充议定书进行补充和修改。

第八条

一、本补充议定书经缔约双方履行各自国内法律程序后，自渔业合作协定生效之日起生效。

二、本补充议定书的有效期为四年。

本补充议定书于二〇〇四年四月二十九日在北京签订，一式两份，每份均用中文和越文写成，两种文本同等作准。

中华人民共和国农业部关于实施《中越北部湾渔业合作协定》的通告

《中华人民共和国政府和越南社会主义共和国政府北部湾渔业合作协定》（以下简称《渔业协定》）将于近日生效实施。为做好协定的实施工作，维护正常的渔业秩序，保护沿湾渔民合法利益，现通告如下：

一、凡进入北部湾“共同渔区”和“过渡性安排水域”作业的渔船必须遵守《渔业协定》、《北部湾共同渔区渔业资源养护和管理规定》和《＜渔业协定＞补充议定书》的有关规定。

二、凡进入北部湾从事渔业活动的生产单位和个人必须取得渔业行政主管部门核发、代发的合法有效证件。未经批准不得进入划界分界线越方一侧水域从事渔业活动。

三、凡需进入“共同渔区”划界分界线越方一侧水域生产的渔船，必须取得农业部南海区渔政渔港监督管理局核发的北部湾共同渔区专项捕捞许可证，并不得越过“共同渔区”西侧线进入越方管辖水域作业。

四、凡需进入“过渡性安排水域”划界分界线越方一侧水域生产的渔船必须持有越方发放的过渡性安排水域捕捞许可证，并遵守越方的有关法律法规，不得越过“过渡性安排水域”西侧线进入越方管辖水域作业。

五、我渔船不得进入以白龙尾岛灯塔为圆心，半径 15 海里的水域从事渔业活动。

六、经批准在“共同渔区”、“过渡性安排水域”作业的渔船必须悬挂我国国旗和渔船标识牌，填写渔捞日志，并随船携带捕捞许可证及船员身份证件。

七、严禁渔船越过“小型渔船缓冲区”划界分界线进入越方一侧水域进行作业，误入“小型渔船缓冲区”划界分界线越方一侧水域的渔船必须迅速离开。

八、在“共同渔区”和“过渡性安排水域”从事渔业活动的渔船必须接受监督机关的检查。按照《北部湾共同渔区渔业资源养护和管理规定》，划界分界线中方一侧的监督机关为中华人民共和国渔政渔港监督管理机构、公安边防、海军部队，越方一侧为越南社会主义共和国的水产资源监察保护机关、海军、海警、边防部队。

九、各级渔业行政主管部门及其所属的渔政渔港监督管理机构应在同级人民政府领导下，积极做好对渔民的宣传教育工作。加强监督检查，对违反本通告的有关单位、船只及人员，严格按照《北部湾共同渔区渔业资源养护与管理规定》和

有关法律、法规规定进行处罚。

举报电话：中国渔政指挥中心 010-64192948

农业部南海区渔政渔港监督管理局 020-87776584

特此通告

农业部

二〇〇四年六月十五日

中华人民共和国渔业法

（1986 年 1 月 20 日第六届全国人民代表大会常务委员会第十四次会议通过，根据 2000 年 10 月 31 日第九届全国人民代表大会常务委员会第十八次会议《关于修改〈中华人民共和国渔业法〉的决定，第一次修正。根据 2004 年 8 月 28 日第十届全国人民代表大会常务委员会第十一次会议《关于修改〈中华人民共和国渔业法〉的决定，第二次修正）

第一章　总则

第一条　为了加强渔业资源的保护、增殖、开发和合理利用，发展人工养殖，保障渔业生产者的合法权益，促进渔业生产的发展，适应社会主义建设和人民生活的需要，特制定本法。

第二条　在中华人民共和国的内水、滩涂、领海、专属经济区以及中华人民共和国管辖的一切其他海域从事养殖和捕捞水生动物、水生植物等渔业生产活动，都必须遵守本法。

第三条　国家对渔业生产实行以养殖为主，养殖、捕捞、加工并举，因地制宜，各有侧重的方针。各级人民政府应当把渔业生产纳入国民经济发展计划，采取措施，加强水域的统一规划和综合利用。

第四条　国家鼓励渔业科学技术研究，推广先进技术，提高渔业科学技术水平。

第五条　在增殖和保护渔业资源、发展渔业生产、进行渔业科学技术研究等方面成绩显著的单位和个人，由各级人民政府给予精神的或者物质的奖励。

第六条　国务院渔业行政主管部门主管全国的渔业工作。

县级以上地方人民政府渔业行政主管部门主管本行政区域内的渔业工作。

县级以上人民政府渔业行政主管部门可以在重要渔业水域、渔港设渔政监督管理机构。

县级以上人民政府渔业行政主管部门及其所属的渔政监督管理机构可以设渔政检查人员。

渔政检查人员执行渔业行政主管部门及其所属的渔政监督管理机构交付的任务。

第七条　国家对渔业的监督管理，实行统一领导、分级管理。

海洋渔业，除国务院划定由国务院渔业行政主管部门及其所属的渔政监督管理机构监督管理的海域和特定渔业资源渔场外，由毗邻海域的省、自治区、直辖市人民政府渔业行政主管部门监督管理。

江河、湖泊等水域的渔业，按照行政区划由有关县级以上人民政府渔业行政主管部门监督管理；跨行政区域的，由有关县级以上地方人民政府协商制定管理办法，或者由上一级人民政府渔业行政主管部门及其所属的渔政监督管理机构监督管理。

第八条 外国人、外国渔业船舶进入中华人民共和国管辖水域，从事渔业生产或者渔业资源调查活动，必须经国务院有关主管部门批准，并遵守本法和中华人民共和国其他有关法律、法规的规定；同中华人民共和国订有条约、协定的，按照条约、协定办理。

国家渔政渔港监督管理机构对外行使渔政渔港监督管理权。

第九条 渔业行政主管部门和其所属的渔政监督管理机构及其工作人员不得参与和从事渔业生产经营活动。

第二章 养殖业

第十条 国家鼓励全民所有制单位、集体所有制单位和个人充分利用适于养殖的水域、滩涂，发展养殖业。

第十一条 国家对水域利用进行统一规划，确定可以用于养殖业的水域和滩涂。单位和个人使用国家规划确定用于养殖业的全民所有的水域、滩涂的，使用者应当向县级以上地方人民政府渔业行政主管部门提出申请，由本级人民政府核发养殖证，许可其使用该水域、滩涂从事养殖生产。核发养殖证的具体办法由国务院规定。集体所有的或者全民所有由农业集体经济组织使用的水域、滩涂，可以由个人或者集体承包，从事养殖生产。

第十二条 县级以上地方人民政府在核发养殖证时，应当优先安排当地的渔业生产者。

第十三条 当事人因使用国家规划确定用于养殖业的水域、滩涂从事养殖生产发生争议的，按照有关法律规定的程序处理。在争议解决以前，任何一方不得破坏养殖生产。

第十四条 国家建设征用集体所有的水域、滩涂，按照《中华人民共和国土地管理法》有关征地的规定办理。

第十五条 县级以上地方人民政府应当采取措施，加强对商品鱼生产基地和城市郊区重要养殖水域的保护。

第十六条 国家鼓励和支持水产优良品种的选育、培育和推广。水产新品种

必须经全国水产原种和良种审定委员会审定，由国务院渔业行政主管部门公告后推广。水产苗种的进口、出口由国务院渔业行政主管部门或者省、自治区、直辖市人民政府渔业行政主管部门审批。水产苗种的生产由县级以上地方人民政府渔业行政主管部门审批。但是，渔业生产者自育、自用水产苗种的除外。

第十七条 水产苗种的进口、出口必须实施检疫，防止病害传入境内和传出境外，具体检疫工作按照有关动植物进出境检疫法律、行政法规的规定执行。引进转基因水产苗种必须进行安全性评价，具体管理工作按照国务院有关规定执行。

第十八条 县级以上人民政府渔业行政主管部门应当加强对养殖生产的技术指导和病害防治工作。

第十九条 从事养殖生产不得使用含有毒有害物质的饵料、饲料。

第二十条 从事养殖生产应当保护水域生态环境，科学确定养殖密度，合理投饵、施肥、使用药物，不得造成水域的环境污染。

第三章 捕捞业

第二十一条 国家在财政、信贷和税收等方面采取措施，鼓励、扶持远洋捕捞业的发展，并根据渔业资源的可捕捞量，安排内水和近海捕捞力量。

第二十二条 国家根据捕捞量低于渔业资源增长量的原则，确定渔业资源的总可捕捞量，实行捕捞限额制度。国务院渔业行政主管部门负责组织渔业资源的调查和评估，为实行捕捞限额制度提供科学依据。中华人民共和国内海、领海、专属经济区和其他管辖海域的捕捞限额总量由国务院渔业行政主管部门确定，报国务院批准后逐级分解下达；国家确定的重要江河、湖泊的捕捞限额总量由有关省、自治区、直辖市人民政府确定或者协商确定，逐级分解下达。捕捞限额总量的分配应当体现公平、公正的原则，分配办法和分配结果必须向社会公开，并接受监督。国务院渔业行政主管部门和省、自治区、直辖市人民政府渔业行政主管部门应当加强对捕捞限额制度实施情况的监督检查，对超过上级下达的捕捞限额指标的，应当在其次年捕捞限额指标中予以核减。

第二十三条 国家对捕捞业实行捕捞许可证制度。海洋大型拖网、围网作业以及到中华人民共和国与有关国家缔结的协定确定的共同管理的渔区或者公海从事捕捞作业的捕捞许可证，由国务院渔业行政主管部门批准发放。其他作业的捕捞许可证，由县级以上地方人民政府渔业行政主管部门批准发放；但是，批准发放海洋作业的捕捞许可证不得超过国家下达的船网工具控制指标，具体办法由省、自治区、直辖市人民政府规定。捕捞许可证不得买卖、出租和以其他形式转让，不得涂改、伪造、变造。

到他国管辖海域从事捕捞作业的，应当经国务院渔业行政主管部门批准，并

遵守中华人民共和国缔结的或者参加的有关条约、协定和有关国家的法律。

第二十四条 具备下列条件的，方可发给捕捞许可证：

（一）有渔业船舶检验证书；

（二）有渔业船舶登记证书；

（三）符合国务院渔业行政主管部门规定的其他条件。县级以上地方人民政府渔业行政主管部门批准发放的捕捞许可证，应当与上级人民政府渔业行政主管部门下达的捕捞限额指标相适应。

第二十五条 从事捕捞作业的单位和个人，必须按照捕捞许可证关于作业类型、场所、时限、渔具数量和捕捞限额的规定进行作业，并遵守国家有关保护渔业资源的规定，大中型渔船应当填写渔捞日志。

第二十六条 制造、更新改造、购置、进口的从事捕捞作业的船舶必须经渔业船舶检验部门检验合格后，方可下水作业。具体管理办法由国务院规定。

第二十七条 渔港建设应当遵守国家的统一规划，实行谁投资谁受益的原则。县级以上地方人民政府应当对位于本行政区域内的渔港加强监督管理，维护渔港的正常秩序。第四章 渔业资源的增殖和保护

第二十八条 县级以上人民政府渔业行政主管部门应当对其管理的渔业水域统一规划，采取措施，增殖渔业资源。县级以上人民政府渔业行政主管部门可以向受益的单位和个人征收渔业资源增殖保护费，专门用于增殖和保护渔业资源。渔业资源增殖保护费的征收办法由国务院渔业行政主管部门会同财政部门制定，报国务院批准后施行。

第二十九条 国家保护水产种质资源及其生存环境，并在具有较高经济价值和遗传育种价值的水产种质资源的主要生长繁育区域建立水产种质资源保护区。未经国务院渔业行政主管部门批准，任何单位或者个人不得在水产种质资源保护区内从事捕捞活动。

第三十条 禁止使用炸鱼、毒鱼、电鱼等破坏渔业资源的方法进行捕捞。禁止制造、销售、使用禁用的渔具。禁止在禁渔区、禁渔期进行捕捞。禁止使用小于最小网目尺寸的网具进行捕捞。捕捞的渔获物中幼鱼不得超过规定的比例。在禁渔区或者禁渔期内禁止销售非法捕捞的渔获物。

重点保护的渔业资源品种及其可捕捞标准，禁渔区和禁渔期，禁止使用或者限制使用的渔具和捕捞方法，最小网目尺寸以及其他保护渔业资源的措施，由国务院渔业行政主管部门或者省、自治区、直辖市人民政府渔业行政主管部门规定。

第三十一条 禁止捕捞有重要经济价值的水生动物苗种。因养殖或者其他特殊需要，捕捞有重要经济价值的苗种或者禁捕的怀卵亲体的，必须经国务院渔业行政主管部门或者省、自治区、直辖市人民政府渔业行政主管部门批准，在指定的区域和时间内，按照限额捕捞。在水生动物苗种重点产区引水用水时，应当采取措施，保护苗种。

第三十二条 在鱼、虾、蟹洄游通道建闸、筑坝，对渔业资源有严重影响的，建设单位应当建造过鱼设施或者采取其他补救措施。

第三十三条 用于渔业并兼有调蓄、灌溉等功能的水体，有关主管部门应当确定渔业生产所需的最低水位线。

第三十四条 禁止围湖造田。沿海滩涂未经县级以上人民政府批准，不得围垦；重要的苗种基地和养殖场所不得围垦。

第三十五条 进行水下爆破、勘探、施工作业，对渔业资源有严重影响的，作业单位应当事先同有关县级以上人民政府渔业行政主管部门协商，采取措施，防止或者减少对渔业资源的损害；造成渔业资源损失的，由有关县级以上人民政府责令赔偿。

第三十六条 各级人民政府应当采取措施，保护和改善渔业水域的生态环境，防治污染。

渔业水域生态环境的监督管理和渔业污染事故的调查处理，依照《中华人民共和国海洋环境保护法》和《中华人民共和国水污染防治法》的有关规定执行。

第三十七条 国家对白鳍豚等珍贵、濒危水生野生动物实行重点保护，防止其灭绝。禁止捕杀、伤害国家重点保护的水生野生动物。因科学研究、驯养繁殖、展览或者其他特殊情况，需要捕捞国家重点保护的水生野生动物的，依照《中华人民共和国野生动物保护法》的规定执行。

第五章 法律责任

第三十八条 使用炸鱼、毒鱼、电鱼等破坏渔业资源方法进行捕捞的，违反关于禁渔区、禁渔期的规定进行捕捞的，或者使用禁用的渔具、捕捞方法和小于最小网目尺寸的网具进行捕捞或者渔获物中幼鱼超过规定比例的，没收渔获物和违法所得，处五万元以下的罚款；情节严重的，没收渔具，吊销捕捞许可证；情节特别严重的，可以没收渔船；构成犯罪的，依法追究刑事责任。在禁渔区或者禁渔期内销售非法捕捞的渔获物的，县级以上地方人民政府渔业行政主管部门应当及时进行调查处理。

制造、销售禁用的渔具的，没收非法制造、销售的渔具和违法所得，并处一万元以下的罚款。

第三十九条 偷捕、抢夺他人养殖的水产品的，或者破坏他人养殖水体、养殖设施的，责令改正，可以处二万元以下的罚款；造成他人损失的，依法承担赔偿责任；构成犯罪的，依法追究刑事责任。

第四十条 使用全民所有的水域、滩涂从事养殖生产，无正当理由使水域、滩涂荒芜满一年的，由发放养殖证的机关责令限期开发利用；逾期未开发利用的，吊

销养殖证，可以并处一万元以下的罚款。

未依法取得养殖证擅自在全民所有的水域从事养殖生产的，责令改正，补办养殖证或者限期拆除养殖设施。未依法取得养殖证或者超越养殖证许可范围在全民所有的水域从事养殖生产，妨碍航运、行洪的，责令限期拆除养殖设施，可以并处一万元以下的罚款。

第四十一条 未依法取得捕捞许可证擅自进行捕捞的，没收渔获物和违法所得，并处十万元以下的罚款；情节严重的，并可以没收渔具和渔船。

第四十二条 违反捕捞许可证关于作业类型、场所、时限和渔具数量的规定进行捕捞的，没收渔获物和违法所得，可以并处五万元以下的罚款；情节严重的，并可以没收渔具，吊销捕捞许可证。

第四十三条 涂改、买卖、出租或者以其他形式转让捕捞许可证的，没收违法所得，吊销捕捞许可证，可以并处一万元以下的罚款；伪造、变造、买卖捕捞许可证，构成犯罪的，依法追究刑事责任。

第四十四条 非法生产、进口、出口水产苗种的，没收苗种和违法所得，并处五万元以下的罚款。经营未经审定的水产苗种的，责令立即停止经营，没收违法所得，可以并处五万元以下的罚款。

第四十五条 未经批准在水产种质资源保护区内从事捕捞活动的，责令立即停止捕捞，没收渔获物和渔具，可以并处一万元以下的罚款。

第四十六条 外国人、外国渔船违反本法规定，擅自进入中华人民共和国管辖水域从事渔业生产和渔业资源调查活动的，责令其离开或者将其驱逐，可以没收渔获物、渔具，并处五十万元以下的罚款；情节严重的，可以没收渔船；构成犯罪的，依法追究刑事责任。

第四十七条 造成渔业水域生态环境破坏或者渔业污染事故的，依照《中华人民共和国海洋环境保护法》和《中华人民共和国水污染防治法》的规定追究法律责任。

第四十八条 本法规定的行政处罚，由县级以上人民政府渔业行政主管部门或者其所属的渔政监督管理机构决定。但是，本法已对处罚机关作出规定的除外。在海上执法时，对违反禁渔区、禁渔期的规定或者使用禁用的渔具、捕捞方法进行捕捞，以及未取得捕捞许可证进行捕捞的，事实清楚、证据充分，但是当场不能按照法定程序作出和执行行政处罚决定的，可以先暂时扣押捕捞许可证、渔具或者渔船，回港后依法作出和执行行政处罚决定。

第四十九条 渔业行政主管部门和其所属的渔政监督管理机构及其工作人员违反本法规定核发许可证、分配捕捞限额或者从事渔业生产经营活动的，或者有其他玩忽职守不履行法定义务、滥用职权、徇私舞弊的行为的，依法给予行政处分；构成犯罪的，依法追究刑事责任。

第六章　附则

第五十条　本法自 1986 年 7 月 1 日起施行。

中华人民共和国海关行政处罚实施条例

（2004 年 9 月 1 日国务院第六十二次常务会议通过，自 2004 年 11 月 1 日起施行。）

第一章 总则

第一条 为了规范海关行政处罚，保障海关依法行使职权，保护公民、法人或者其他组织的合法权益，根据《中华人民共和国海关法》（以下简称海关法）及其他有关法律的规定，制定本实施条例。

第二条 依法不追究刑事责任的走私行为和违反海关监管规定的行为，以及法律、行政法规规定由海关实施行政处罚的行为的处理，适用本实施条例。

第三条 海关行政处罚由发现违法行为的海关管辖，也可以由违法行为发生地海关管辖。

2 个以上海关都有管辖权的案件，由最先发现违法行为的海关管辖。

管辖不明确的案件，由有关海关协商确定管辖，协商不成的，报请共同的上级海关指定管辖。

重大、复杂的案件，可以由海关总署指定管辖。

第四条 海关发现的依法应当由其他行政机关处理的违法行为，应当移送有关行政机关处理；违法行为涉嫌犯罪的，应当移送海关侦查走私犯罪公安机构、地方公安机关依法办理。

第五条 依照本实施条例处以警告、罚款等行政处罚，但不没收进出境货物、物品、运输工具的，不免除有关当事人依法缴纳税款、提交进出口许可证件、办理有关海关手续的义务。

第六条 抗拒、阻碍海关侦查走私犯罪公安机构依法执行职务的，由设在直属海关、隶属海关的海关侦查走私犯罪公安机构依照治安管理处罚的有关规定给予处罚。

抗拒、阻碍其他海关工作人员依法执行职务的，应当报告地方公安机关依法处理。

第二章 走私行为及其处罚

第七条 违反海关法及其他有关法律、行政法规，逃避海关监管，偷逃应纳税款、逃避国家有关进出境的禁止性或者限制性管理，有下列情形之一的，是走私行为：

（一）未经国务院或者国务院授权的机关批准，从未设立海关的地点运输、携带国家禁止或者限制进出境的货物、物品或者依法应当缴纳税款的货物、物品进出境的；

（二）经过设立海关的地点，以藏匿、伪装、瞒报、伪报或者其他方式逃避海关监管，运输、携带、邮寄国家禁止或者限制进出境的货物、物品或者依法应当缴纳税款的货物、物品进出境的；

（三）使用伪造、变造的手册、单证、印章、账册、电子数据或者以其他方式逃避海关监管，擅自将海关监管货物、物品、进境的境外运输工具，在境内销售的；

（四）使用伪造、变造的手册、单证、印章、账册、电子数据或者以伪报加工贸易制成品单位耗料量等方式，致使海关监管货物、物品脱离监管的；

（五）以藏匿、伪装、瞒报、伪报或者其他方式逃避海关监管，擅自将保税区、出口加工区等海关特殊监管区域内的海关监管货物、物品，运出区外的；

（六）有逃避海关监管，构成走私的其他行为的。

第八条 有下列行为之一的，按走私行为论处：

（一）明知是走私进口的货物、物品，直接向走私人非法收购的；

（二）在内海、领海、界河、界湖，船舶及所载人员运输、收购、贩卖国家禁止或者限制进出境的货物、物品，或者运输、收购、贩卖依法应当缴纳税款的货物，没有合法证明的。

第九条 有本实施条例第七条、第八条所列行为之一的，依照下列规定处罚：

（一）走私国家禁止进出口的货物的，没收走私货物及违法所得，可以并处100万元以下罚款；走私国家禁止进出境的物品的，没收走私物品及违法所得，可以并处10万元以下罚款；

（二）应当提交许可证件而未提交但未偷逃税款，走私国家限制进出境的货物、物品的，没收走私货物、物品及违法所得，可以并处走私货物、物品等值以下罚款；

（三）偷逃应纳税款但未逃避许可证件管理，走私依法应当缴纳税款的货物、物品的，没收走私货物、物品及违法所得，可以并处偷逃应纳税款3倍以下罚款。

专门用于走私的运输工具或者用于掩护走私的货物、物品，2年内3次以上用于走私的运输工具或者用于掩护走私的货物、物品，应当予以没收。藏匿走私货物、物品的特制设备、夹层、暗格，应当予以没收或者责令拆毁。使用特制设备、夹层、暗格实施走私的，应当从重处罚。

第十条 与走私人通谋为走私人提供贷款、资金、账号、发票、证明、海关单证的，与走私人通谋为走私人提供走私货物、物品的提取、发运、运输、保管、邮

寄或者其他方便的，以走私的共同当事人论处，没收违法所得，并依照本实施条例第九条的规定予以处罚。

第十一条 报关企业、报关人员和海关准予从事海关监管货物的运输、储存、加工、装配、寄售、展示等业务的企业，构成走私犯罪或者 1 年内有 2 次以上走私行为的，海关可以撤销其注册登记、取消其报关从业资格。第三章 违反海关监管规定的行为及其处罚

第三章 违反海关监管规定的行为及其处罚

第十二条 违反海关法及其他有关法律、行政法规和规章但不构成走私行为的，是违反海关监管规定的行为。

第十三条 违反国家进出口管理规定，进出口国家禁止进出口的货物的，责令退运，处 100 万元以下罚款。

第十四条 违反国家进出口管理规定，进出口国家限制进出口的货物，进出口货物的收发货人向海关申报时不能提交许可证件的，进出口货物不予放行，处货物价值 30%以下罚款。

违反国家进出口管理规定，进出口属于自动进出口许可管理的货物，进出口货物的收发货人向海关申报时不能提交自动许可证明的，进出口货物不予放行。

第十五条 进出口货物的品名、税则号列、数量、规格、价格、贸易方式、原产地、启运地、运抵地、最终目的地或者其他应当申报的项目未申报或者申报不实的，分别依照下列规定予以处罚，有违法所得的，没收违法所得：

（一）影响海关统计准确性的，予以警告或者处 1 000 元以上 1 万元以下罚款；

（二）影响海关监管秩序的，予以警告或者处 1 000 元以上 3 万元以下罚款；

（三）影响国家许可证件管理的，处货物价值 5％以上 30％以下罚款；

（四）影响国家税款征收的，处漏缴税款 30％以上 2 倍以下罚款；

（五）影响国家外汇、出口退税管理的，处申报价格 10%以上 50％以下罚款。

第十六条 进出口货物收发货人未按照规定向报关企业提供所委托报关事项的真实情况，致使发生本实施条例第十五条规定情形的，对委托人依照本实施条例第十五条的规定予以处罚。

第十七条 报关企业、报关人员对委托人所提供情况的真实性未进行合理审查，或者因工作疏忽致使发生本实施条例第十五条规定情形的，可以对报关企业处货物价值 10%以下罚款，暂停其 6 个月以内从事报关业务或者执业；情节严重的，撤销其报关注册登记、取消其报关从业资格。

第十八条 有下列行为之一的，处货物价值 5%以上 30%以下罚款，有违法所得的，没收违法所得：

（一）未经海关许可，擅自将海关监管货物开拆、提取、交付、发运、调换、改装、抵押、质押、留置、转让、更换标记、移作他用或者进行其他处置的；

（二）未经海关许可，在海关监管区以外存放海关监管货物的；

（三）经营海关监管货物的运输、储存、加工、装配、寄售、展示

业务，有关货物灭失、数量短少或者记录不真实，不能提供正当理由的；

（四）经营保税货物的运输、储存、加工、装配、寄售、展示等业务，不依照规定办理收存、交付、结转、核销等手续，或者中止、延长、变更、转让有关合同不依照规定向海关办理手续的；

（五）未如实向海关申报加工贸易制成品单位耗料量的；

（六）未按照规定期限将过境、转运、通运货物运输出境，擅自留在境内的；

（七）未按照规定期限将暂时进出口货物复运出境或者复运进境，擅自留在境内或者境外的；

（八）有违反海关监管规定的其他行为，致使海关不能或者中断对进出口货物实施监管的。

前款规定所涉货物属于国家限制进出口需要提交许可证件，当事人在规定期限内不能提交许可证件的，另处货物价值30%以下罚款；漏缴税款的，可以另处漏缴税款1倍以下罚款。

第十九条 有下列行为之一的，予以警告，可以处物品价值20%以下罚款，有违法所得的，没收违法所得：

（一）未经海关许可，擅自将海关尚未放行的进出境物品开拆、交付、投递、转移或者进行其他处置的；

（二）个人运输、携带、邮寄超过合理数量的自用物品进出境未向海关申报的；

（三）个人运输、携带、邮寄超过规定数量但仍属自用的国家限制进出境物品进出境，未向海关申报但没有以藏匿、伪装等方式逃避海关监管的；

（四）个人运输、携带、邮寄物品进出境，申报不实的；

（五）经海关登记准予暂时免税进境或者暂时免税出境的物品，未按照规定复带出境或者复带进境的；

（六）未经海关批准，过境人员将其所带物品留在境内的。

第二十条 运输、携带、邮寄国家禁止进出境的物品进出境，未向海关申报但没有以藏匿、伪装等方式逃避海关监管的，予以没收，或者责令退回，或者在海关监管下予以销毁或者进行技术处理。

第二十一条 有下列行为之一的，予以警告，可以处10万元以下罚款，有违法所得的，没收违法所得：

（一）运输工具不经设立海关的地点进出境的；

（二）在海关监管区停留的进出境运输工具，未经海关同意擅自驶离的；

（三）进出境运输工具从一个设立海关的地点驶往另一个设立海关的地点，

尚未办结海关手续又未经海关批准，中途改驶境外或者境内未设立海关的地点的；

（四）进出境运输工具到达或者驶离设立海关的地点，未按照规定向海关申报、交验有关单证或者交验的单证不真实的。

第二十二条 有下列行为之一的，予以警告，可以处 5 万元以下罚款，有违法所得的，没收违法所得：

（一）未经海关同意，进出境运输工具擅自装卸进出境货物、物品或者上下进出境旅客的；

（二）未经海关同意，进出境运输工具擅自兼营境内客货运输或者用于进出境运输以外的其他用途的；

（三）未按照规定办理海关手续，进出境运输工具擅自改营境内运输的；

（四）未按照规定期限向海关传输舱单等电子数据、传输的电子数据不准确或者未按照规定期限保存相关电子数据，影响海关监管的；

（五）进境运输工具在进境以后向海关申报以前，出境运输工具在办结海关手续以后出境以前，不按照交通主管部门或者海关指定的路线行进的；

（六）载运海关监管货物的船舶、汽车不按照海关指定的路线行进的；

（七）进出境船舶和航空器，由于不可抗力被迫在未设立海关的地点停泊、降落或者在境内抛掷、起卸货物、物品，无正当理由不向附近海关报告的；

（八）无特殊原因，未将进出境船舶、火车、航空器到达的时间、停留的地点或者更换的时间、地点事先通知海关的；

（九）不按照规定接受海关对进出境运输工具、货物、物品进行检查、查验的。

第二十三条 有下列行为之一的，予以警告，可以处 3 万元以下罚款：

（一）擅自开启或者损毁海关封志的；

（二）遗失海关制发的监管单证、手册等凭证，妨碍海关监管的；（三）有违反海关监管规定的其他行为，致使海关不能或者中断对进出境运输工具、物品实施监管的。

第二十四条 伪造、变造、买卖海关单证的，处 5 万元以上 50 万元以下罚款，有违法所得的，没收违法所得；构成犯罪的，依法追究刑事责任。

第二十五条 进出口侵犯中华人民共和国法律、行政法规保护的知识产权的货物的，没收侵权货物，并处货物价值 30％以下罚款；构成犯罪的，依法追究刑事责任。

需要向海关申报知识产权状况，进出口货物收发货人及其代理人未按照规定向海关如实申报有关知识产权状况，或者未提交合法使用有关知识产权的证明文件的，可以处 5 万元以下罚款。

第二十六条 报关企业、报关人员和海关准予从事海关监管货物的运输、储存、加工、装配、寄售、展示等业务的企业，有下列情形之一的，责令改正，给予警

告，可以暂停其 6 个月以内从事有关业务或者执业：

（一）拖欠税款或者不履行纳税义务的；

（二）报关企业出让其名义供他人办理进出口货物报关纳税事宜的；

（三）损坏或者丢失海关监管货物，不能提供正当理由的；

（四）有需要暂停其从事有关业务或者执业的其他违法行为的。

第二十七条 报关企业、报关人员和海关准予从事海关监管货物的运输、储存、加工、装配、寄售、展示等业务的企业，有下列情形之一的，海关可以撤销其注册登记、取消其报关从业资格：

（一）1 年内 3 人次以上被海关暂停执业的；

（二）被海关暂停从事有关业务或者执业，恢复从事有关业务或者执业后 1 年内再次发生本实施条例第二十六条规定情形的；

（三）有需要撤销其注册登记或者取消其报关从业资格的其他违法行为的。

第二十八条 报关企业、报关人员非法代理他人报关或者超出海关准予的从业范围进行报关活动的，责令改正，处 5 万元以下罚款，暂停其 6 个月以内从事报关业务或者执业；情节严重的，撤销其报关注册登记、取消其报关从业资格。

第二十九条 进出口货物收发货人、报关企业、报关人员向海关工作人员行贿的，撤销其报关注册登记、取消其报关从业资格，并处 10 万元以下罚款；构成犯罪的，依法追究刑事责任，并不得重新注册登记为报关企业和取得报关从业资格。

第三十条 未经海关注册登记和未取得报关从业资格从事报关业务的，予以取缔，没收违法所得，可以并处 10 万元以下罚款。

第三十一条 提供虚假资料骗取海关注册登记、报关从业资格的，撤销其注册登记、取消其报关从业资格，并处 30 万元以下罚款。

第三十二条 法人或者其他组织有违反海关法的行为，除处罚该法人或者组织外，对其主管人员和直接责任人员予以警告，可以处 5 万元以下罚款，有违法所得的，没收违法所得。

第四章 对违反海关法行为的调查

第三十三条 海关发现公民、法人或者其他组织有依法应当由海关给予行政处罚的行为的，应当立案调查。

第三十四条 海关立案后，应当全面、客观、公正、及时地进行调查、收集证据。

海关调查、收集证据，应当按照法律、行政法规及其他有关规定的要求办理。

海关调查、收集证据时，海关工作人员不得少于 2 人，并应当向被调查人出示证件。

调查、收集的证据涉及国家秘密、商业秘密或者个人隐私的，海关应当保守秘密。

第三十五条 海关依法检查走私嫌疑人的身体，应当在隐蔽的场所或者非检查人员的视线之外，由 2 名以上与被检查人同性别的海关工作人员执行。

走私嫌疑人应当接受检查，不得阻挠。

第三十六条 海关依法检查运输工具和场所，查验货物、物品，应当制作检查、查验记录。

第三十七条 海关依法扣留走私犯罪嫌疑人，应当制发扣留走私犯罪嫌疑人决定书。对走私犯罪嫌疑人，扣留时间不超过 24 小时，在特殊情况下可以延长至 48 小时。

海关应当在法定扣留期限内对被扣留人进行审查。排除犯罪嫌疑或者法定扣留期限届满的，应当立即解除扣留，并制发解除扣留决定书。

第三十八条 下列货物、物品、运输工具及有关账册、单据等资料，海关可以依法扣留：

（一）有走私嫌疑的货物、物品、运输工具；

（二）违反海关法或者其他有关法律、行政法规的货物、物品、运输工具；

（三）与违反海关法或者其他有关法律、行政法规的货物、物品、运输工具有牵连的账册、单据等资料；

（四）法律、行政法规规定可以扣留的其他货物、物品、运输工具及有关账册、单据等资料。

第三十九条 有违法嫌疑的货物、物品、运输工具无法或者不便扣留的，当事人或者运输工具负责人应当向海关提供等值的担保，未提供等值担保的，海关可以扣留当事人等值的其他财产。

第四十条 海关扣留货物、物品、运输工具以及账册、单据等资料的期限不得超过 1 年。因案件调查需要，经直属海关关长或者其授权的隶属海关关长批准，可以延长，延长期限不得超过 1 年。但复议、诉讼期间不计算在内。

第四十一条 有下列情形之一的，海关应当及时解除扣留：

（一）排除违法嫌疑的；

（二）扣留期限、延长期限届满的；

（三）已经履行海关行政处罚决定的；

（四）法律、行政法规规定应当解除扣留的其他情形。

第四十二条 海关依法扣留货物、物品、运输工具、其他财产以及账册、单据等资料，应当制发海关扣留凭单，由海关工作人员、当事人或者其代理人、保管人、见证人签字或者盖章，并可以加施海关封志。加施海关封志的，当事人或者其代理人、保管人应当妥善保管。

海关解除对货物、物品、运输工具、其他财产以及账册、单据等资料的扣留，

或者发还等值的担保，应当制发海关解除扣留通知书、海关解除担保通知书，并由海关工作人员、当事人或者其代理人、保管人、见证人签字或者盖章。

第四十三条 海关查问违法嫌疑人或者询问证人，应当个别进行，并告知其权利和作伪证应当承担的法律责任。违法嫌疑人、证人必须如实陈述、提供证据。

海关查问违法嫌疑人或者询问证人应当制作笔录，并当场交其辨认，没有异议的，立即签字确认；有异议的，予以更正后签字确认。

严禁刑讯逼供或者以威胁、引诱、欺骗等非法手段收集证据。

海关查问违法嫌疑人，可以到违法嫌疑人的所在单位或者住处进行，也可以要求其到海关或者海关指定的地点进行。

第四十四条 海关收集的物证、书证应当是原物、原件。收集原物、原件确有困难的，可以拍摄、复制，并可以指定或者委托有关单位或者个人对原物、原件予以妥善保管。

海关收集物证、书证，应当开列清单，注明收集的日期，由有关单位或者个人确认后签字或者盖章。

海关收集电子数据或者录音、录像等视听资料，应当收集原始载体。收集原始载体确有困难的，可以收集复制件，注明制作方法、制作时间、制作人等，并由有关单位或者个人确认后签字或者盖章。

第四十五条 根据案件调查需要，海关可以对有关货物、物品进行取样化验、鉴定。

海关提取样品时，当事人或者其代理人应当到场；当事人或者其代理人未到场的，海关应当邀请见证人到场。提取的样品，海关应当予以加封，并由海关工作人员及当事人或者其代理人、见证人确认后签字或者盖章。

化验、鉴定应当交由海关化验鉴定机构或者委托国家认可的其他机构进行。

化验人、鉴定人进行化验、鉴定后，应当出具化验报告、鉴定结论，并签字或者盖章。

第四十六条 根据海关法有关规定，海关可以查询案件涉嫌单位和涉嫌人员在金融机构、邮政企业的存款、汇款。

海关查询案件涉嫌单位和涉嫌人员在金融机构、邮政企业的存款、汇款，应当出示海关协助查询通知书。

第四十七条 海关依法扣留的货物、物品、运输工具，在人民法院判决或者海关行政处罚决定作出之前，不得处理。但是，危险品或者鲜活、易腐、易烂、易失效、易变质等不宜长期保存的货物、物品以及所有人申请先行变卖的货物、物品、运输工具，经直属海关关长或者其授权的隶属海关关长批准，可以先行依法变卖，变卖所得价款由海关保存，并通知其所有人。

第四十八条 当事人有权根据海关法的规定要求海关工作人员回避。

第五章　海关行政处罚的决定和执行

第四十九条　海关作出暂停从事有关业务、暂停报关执业、撤销海关注册登记、取消报关从业资格、对公民处 1 万元以上罚款、对法人或者其他组织处 10 万元以上罚款、没收有关货物、物品、走私运输工具等行政处罚决定之前，应当告知当事人有要求举行听证的权利；当事人要求听证的，海关应当组织听证。

海关行政处罚听证办法由海关总署制定。

第五十条　案件调查终结，海关关长应当对调查结果进行审查，根据不同情况，依法作出决定。

对情节复杂或者重大违法行为给予较重的行政处罚，应当由海关案件审理委员会集体讨论决定。

第五十一条　同一当事人实施了走私和违反海关监管规定的行为且二者之间有因果关系的，依照本实施条例对走私行为的规定从重处罚，对其违反海关监管规定的行为不再另行处罚。

同一当事人就同一批货物、物品分别实施了 2 个以上违反海关监管规定的行为且二者之间有因果关系的，依照本实施条例分别规定的处罚幅度，择其重者处罚。

第五十二条　对 2 个以上当事人共同实施的违法行为，应当区别情节及责任，分别给予处罚。

第五十三条　有下列情形之一的，应当从重处罚：

（一）因走私被判处刑罚或者被海关行政处罚后在 2 年内又实施走私行为的；

（二）因违反海关监管规定被海关行政处罚后在 1 年内又实施同一违反海关监管规定的行为的；

（三）有其他依法应当从重处罚的情形的。

第五十四条　海关对当事人违反海关法的行为依法给予行政处罚的，应当制作行政处罚决定书。

对同一当事人实施的 2 个以上违反海关法的行为，可以制发 1 份行政处罚决定书。

对 2 个以上当事人分别实施的违反海关法的行为，应当分别制发行政处罚决定书。

对 2 个以上当事人共同实施的违反海关法的行为，应当制发 1 份行政处罚决定书，区别情况对各当事人分别予以处罚，但需另案处理的除外。

第五十五条　行政处罚决定书应当依照有关法律规定送达当事人。

依法予以公告送达的，海关应当将行政处罚决定书的正本张贴在海关公告栏内，并在报纸上刊登公告。

第五十六条 海关作出没收货物、物品、走私运输工具的行政处罚决定，有关货物、物品、走私运输工具无法或者不便没收的，海关应当追缴上述货物、物品、走私运输工具的等值价款。

第五十七条 法人或者其他组织实施违反海关法的行为后，有合并、分立或者其他资产重组情形的，海关应当以原法人、组织作为当事人。

对原法人、组织处以罚款、没收违法所得或者依法追缴货物、物品、走私运输工具的等值价款的，应当以承受其权利义务的法人、组织作为被执行人。

第五十八条 罚款、违法所得和依法追缴的货物、物品、走私运输工具的等值价款，应当在海关行政处罚决定规定的期限内缴清。

当事人按期履行行政处罚决定、办结海关手续的，海关应当及时解除其担保。

第五十九条 受海关处罚的当事人或者其法定代表人、主要负责人应当在出境前缴清罚款、违法所得和依法追缴的货物、物品、走私运输工具的等值价款。在出境前未缴清上述款项的，应当向海关提供相当于上述款项的担保。未提供担保，当事人是自然人的，海关可以通知出境管理机关阻止其出境；当事人是法人或者其他组织的，海关可以通知出境管理机关阻止其法定代表人或者主要负责人出境。

第六十条 当事人逾期不履行行政处罚决定的，海关可以采取下列措施：

（一）到期不缴纳罚款的，每日按罚款数额的3%加处罚款；

（二）根据海关法规定，将扣留的货物、物品、运输工具变价抵缴，或者以当事人提供的担保抵缴；

（三）申请人民法院强制执行。

第六十一条 当事人确有经济困难，申请延期或者分期缴纳罚款的，经海关批准，可以暂缓或者分期缴纳罚款。

当事人申请延期或者分期缴纳罚款的，应当以书面形式提出，海关收到申请后，应当在10个工作日内作出决定，并通知申请人。海关同意当事人暂缓或者分期缴纳的，应当及时通知收缴罚款的机构。

第六十二条 有下列情形之一的，有关货物、物品、违法所得、运输工具、特制设备由海关予以收缴：

（一）依照《中华人民共和国行政处罚法》第二十五条、第二十六条规定不予行政处罚的当事人携带、邮寄国家禁止进出境的货物、物品进出境的；

（二）散发性邮寄国家禁止、限制进出境的物品进出境或者携带数量零星的国家禁止进出境的物品进出境，依法可以不予行政处罚的；

（三）依法应当没收的货物、物品、违法所得、走私运输工具、特制设备，在海关作出行政处罚决定前，作为当事人的自然人死亡或者作为当事人的法人、其他组织终止，且无权利义务承受人的；

（四）走私违法事实基本清楚，但当事人无法查清，自海关公告之日起满3个月的；

（五）有违反法律、行政法规，应当予以收缴的其他情形的。

海关收缴前款规定的货物、物品、违法所得、运输工具、特制设备，应当制发清单，由被收缴人或者其代理人、见证人签字或者盖章。被收缴人无法查清且无见证人的，应当予以公告。

第六十三条 人民法院判决没收的走私货物、物品、违法所得、走私运输工具、特制设备，或者海关决定没收、收缴的货物、物品、违法所得、走私运输工具、特制设备，由海关依法统一处理，所得价款和海关收缴的罚款，全部上缴中央国库。

第六章 附则

第六十四条 本实施条例下列用语的含义是：

“设立海关的地点”，指海关在港口、车站、机场、国界孔道、国际邮件互换局（交换站）等海关监管区设立的卡口，海关在保税区、出口加工区等海关特殊监管区域设立的卡口，以及海关在海上设立的中途监管站。

“许可证件”，指依照国家有关规定，当事人应当事先申领，并由国家有关主管部门颁发的准予进口或者出口的证明、文件。

“合法证明”，指船舶及所载人员依照国家有关规定或者依照国际运输惯例所必须持有的证明其运输、携带、收购、贩卖所载货物、物品真实、合法、有效的商业单证、运输单证及其他有关证明、文件。

“物品”，指个人以运输、携带等方式进出境的行李物品、邮寄进出境的物品，包括货币、金银等。超出自用、合理数量的，视为货物。

“自用”，指旅客或者收件人本人自用、馈赠亲友而非为出售或者出租。

“合理数量”，指海关根据旅客或者收件人的情况、旅行目的和居留时间所确定的正常数量。

“货物价值”，指进出口货物的完税价格、关税、进口环节海关代征税之和。

“物品价值”，指进出境物品的完税价格、进口税之和。

“应纳税款”，指进出口货物、物品应当缴纳的进出口关税、进口环节海关代征税之和。

“专门用于走私的运输工具”，指专为走私而制造、改造、购买的运输工具。

“以上”、“以下”、“以内”、“届满”，均包括本数在内。

第六十五条 海关对外国人、无国籍人、外国企业或者其他组织给予行政处罚的，适用本实施条例。

第六十六条 国家禁止或者限制进出口的货物目录，由国务院对外贸易主管部门依照《中华人民共和国对外贸易法》的规定办理；国家禁止或者限制进出境的物品目录，由海关总署公布。

第六十七条 依照海关规章给予行政处罚的，应当遵守本实施条例规定的程序。

第六十八条 本实施条例自2004年11月1日起施行。1993年2月17日国务院批准修订、1993年4月1日海关总署发布的《中华人民共和国海关法行政处罚实施细则》同时废止。

港口经营管理规定

（2003 年 12 月 26 日经第 18 次交通部部务会议通过，自 2004 年 6 月 1 日起施行。）

第一章 总则

第一条 为规范港口经营行为，维护港口经营秩序，依据《中华人民共和国港口法》和其他有关法律、法规，制定本规定。

第二条 本规定适用于港口经营及相关活动。

第三条 本规定下列用语的含义是：

（一）港口经营，是指港口经营人在港口区域内为船舶、旅客和货物提供港口设施或者服务的活动，主要包括下列各项：

1．为船舶提供码头、过驳锚地、浮筒等设施；

2．为旅客提供候船和上下船舶设施和服务；

3．为委托人提供货物装卸（含过驳）、仓储、港内驳运、集装箱堆放、拆拼箱以及对货物及其包装进行简单加工处理等；

4．为船舶进出港、靠离码头、移泊提供顶推、拖带等服务；

5．为委托人提供货物交接过程中的点数和检查货物表面状况的理货服务；

6．为船舶提供岸电、燃物料、生活品供应、船员接送及提供垃圾接收、压舱水（含残油、污水收集）处理、围油栏供应服务等船舶港口服务；

7．从事港口设施、设备和港口机械的租赁、维修业务。

（二）港口经营人，是指依法取得经营资格从事港口经营活动的组织和个人。

（三）港口设施，是指为从事港口经营而建造和设置的建（构）筑物。

第四条 交通部负责全国港口经营管理工作。

省、自治区、直辖市人民政府交通（港口）主管部门负责本行政区的港口经营管理工作。

省、自治区、直辖市人民政府、港口所在地设区的市（地）、县人民政府确定的具体实施港口行政管理的部门负责该港口经营管理工作。本款上述部门统称港口行政管理部门。

第五条 国家鼓励港口经营性业务实行多家经营、公平竞争。港口经营人不得实施垄断行为。任何组织和部门不得以任何形式实施地区保护和部门保护。

第二章　资质管理

第六条　从事港口经营，应当申请取得港口经营许可。

实施港口经营许可，应当遵循公平、公正和公开透明的原则，不得收取费用，并应当接受社会监督。

第七条　从事港口经营（港口理货除外），应当具备下列条件：

（一）有固定的经营场所；

（二）有与经营范围、规模相适应的港口设施、设备，其中：

1. 码头、客运站、库场、储罐、污水处理设施等固定设施应当符合港口总体规划和法律、法规及有关技术标准的要求；

2. 为旅客提供上、下船服务的，应当具备至少能遮蔽风、雨、雪的候船和上、下船设施；

3. 为国际航线船舶服务的码头（包括过驳锚地、浮筒），应当具备对外开放资格；

4. 为船舶提供码头、过驳锚地、浮筒等设施的，应当有相应的船舶污染物、废弃物接收能力和相应污染应急处理能力，包括必要的设施、设备和器材。

（三）有与经营规模、范围相适应的专业技术人员、管理人员。

第八条　从事港口理货，应当具备下列条件：

（一）与经营范围、规模相适应的组织机构和管理人员、理货员；

（二）有固定的办公场所和经营设施；

（三）有业务章程和管理制度。

第九条　从事港口装卸和仓储业务的经营人不得兼营理货业务。理货业务经营人不得兼营港口货物装卸经营业务和仓储经营业务。

第十条　申请从事港口经营，应当提交下列相应文件和资料：

（一）港口经营业务申请书；

（二）经营管理机构的组成及其办公用房的所有权或者者使用权证明；

（三）港口码头、库场、储罐、污水处理等固定设施符合国家有关规定的竣工验收证（明）书及港口岸线使用批准文件；

（四）使用港作船舶的，港作船舶的船舶证书；

（五）负责安全生产的主要管理人员通过安全生产法律法规要求的培训证明材料；

（六）证明符合第七条规定条件的其他文件和资料。

从事港口理货业务的，应当提供上述（一）、（二）项规定的材料和理货人员名录以及表明其理货员身份的相应证明材料。

第十一条 申请从事港口经营（申请从事港口理货除外），申请人应当向港口行政管理部门提出书面申请（式样附后）和第十条第一款规定的相关文件资料。港口行政管理部门应当自受理申请之日起三十个工作日内作出许可或者不许可的决定。符合资质条件的，由港口行政管理部门发给《港口经营许可证》（式样附后），并在因特网或者报纸上公布；不符合条件的，不予行政许可，并应当将不予许可的决定及理由书面通知申请人。《港口经营许可证》应当明确许可经营的港口业务种类。

第十二条 申请从事港口理货，应当向交通部提出书面申请和第十条第二款规定的相关文件资料。交通部在收到申请和相关材料后，可根据需要征求地方交通（港口）主管部门和相关港口行政管理部门意见。上述部门应当在七个工作日内提出反馈意见。交通部应当在受理申请人的申请之日起二十个工作日内作出许可或者不许可的决定。予以许可的，核发《港口经营许可证》，并在交通部网站或者报纸上公布；不予许可的，应当将不予许可的决定及理由书面通知申请人。交通部在作出许可决定的同时，应当将许可情况通知相关港口的港口行政管理部门。

第十三条 交通部和港口行政管理部门对申请人提出的港口经营许可申请，应当根据下列情况分别做出处理：

（一）申请事项依法不需要取得行政许可的，应当即时告知申请人不受理；

（二）申请事项依法不属于交通部或者港口行政管理部门职权范围的，应当即时告知申请人向有关行政机关申请；

（三）申请材料存在可以当场更正的错误的，应当允许申请人当场更正；

（四）申请材料不齐全或者不符合法定形式的，应当当场或者在五日内一次告知申请人需要补正的全部内容，逾期不告知的，自收到申请材料之日起即为受理；

（五）申请事项属于交通部或者港口行政管理部门职权范围，申请材料齐全、符合法定形式，或者申请人按照要求提交全部补正申请材料的，应当受理经营业务许可申请。

受理或者不受理经营业务许可申请，应当出具加盖许可机关专用印章和注明日期的书面凭证。

第十四条 申请人凭港口行政管理部门或者交通部核发的《港口经营许可证》到工商管理部门办理工商登记，取得营业执照后方可从事港口业务。

第十五条 港口经营人应当按照港口行政管理部门许可的经营范围从事港口经营活动。

第十六条 港口经营人变更经营范围的，应当就变更事项按照本规定第十一条或者第十二条规定办理许可手续，并到工商部门办理相应的变更登记手续。

港口经营人变更企业法定代表人或者办公地点的，应当向港口行政管理部门备案。

第十七条 港口经营人停业或者歇业，应当提前三十个工作日告知原许可机关。原许可机关应当收回并注销其《港口经营许可证》，并以适当方式向社会公布。

第三章 经营管理

第十八条 港口行政管理部门及相关部门应当保证港口公用基础设施的完好、畅通。

港口经营人应当按照核定的功能使用和维护港口经营设施、设备，并使其保持正常状态。

第十九条 港口经营人变更或者改造码头、堆场、仓库、储罐和污水垃圾处理设施等固定经营设施，应当依照有关法律、法规和规章的规定履行相应手续。依照有关规定无需经港口行政管理部门审批的，港口经营人应当向港口行政管理部门备案。

第二十条 从事港口旅客运输服务的经营人，应当采取必要措施保证旅客运输的安全、快捷、便利，保证旅客基本生活用品的供应，保持良好的候船条件和环境。

第二十一条 港口经营人应当优先安排抢险、救灾和国防建设急需物资的港口作业。

政府在紧急情况下征用港口设施，港口经营人应当服从行政指挥。港口经营人因此而产生费用或者遭受损失的，下达行政任务的机关应当依法给予相应的经济补偿。

第二十二条 在旅客严重滞留或者货物严重积压阻塞港口的紧急情况下，港口行政管理部门应当采取措施进行疏港。港口所在地的市、县人民政府认为必要时，可以直接采取措施，进行疏港。港口内的单位、个人及船舶、车辆应当服从疏港指挥。

第二十三条 港口行政管理部门应当依法制定可能危及社会公共利益的港口危险货物事故应急预案、重大生产安全事故的旅客紧急疏散和救援预案以及预防自然灾害预案，建立健全港口重大生产安全事故的应急救援体系。

港口行政管理部门按照前款规定制定的各项预案应当予以公布，并报送交通部和上级交通（港口）主管部门备案。

第二十四条 港口经营人应当依照有关法律、法规和交通部有关港口安全作业的规定，加强安全生产管理，完善安全生产条件，建立健全安全生产责任制等规章制度，确保安全生产。

港口经营人应当依法制定本单位的危险货物事故应急预案、重大生产安全事故的旅客紧急疏散和救援预案以及预防自然灾害预案，并保障组织实施。

港口经营人按照前款规定制定的各项预案应当报送港口行政管理部门和港口所在地海事管理机构备案。

第二十五条 港口经营人从事港口经营业务，应当遵守有关法律、法规和交通部规章的规定，依法履行合同约定的义务，为客户提供公平、良好的服务。

第二十六条 港口经营人应当遵守国家有关港口经营价格和收费的规定，应当在其经营场所公布经营服务收费项目和收费标准，使用国家规定的港口经营票据。

第二十七条 港口经营人不得采取不正当手段，排挤竞争对手，限制或者妨碍公平竞争；不得对具有同等条件的服务对象实行歧视；不得以任何手段强迫他人接受其提供的港口服务。

第二十八条 港口经营人应当按照有关规定及时足额交纳港口行政性收费。

港口经营人的合法权益受法律保护。任何单位和个人不得向港口经营人摊派或者违法收取费用。

港口经营人有权拒绝违反规定收取或者摊派的各种费用。

第二十九条 港口行政管理部门应当依法做好港口行政性收费的征管工作，保证港口行政性收费征收到位，并及时足额解缴。

港口行政性收费实行专户管理，专款专用。

第三十条 港口经营人应当按照国家有关规定，及时向港口行政管理部门如实提供港口统计资料及有关信息。

各级交通（港口）主管部门和港口行政管理部门应当按照有关规定向交通部和上级交通（港口）主管部门报送港口统计资料和相关信息，并结合本地区的实际建设港口管理信息系统。

上述部门的工作人员应当为港口经营人保守商业秘密。

第四章 监督检查

第三十一条 港口行政管理部门应当依法对港口安全生产情况和本规定执行情况实施监督检查。并将检查的结果向社会公布。港口行政管理部门应当对旅客集中、货物装卸量较大或者特殊用途的码头进行重点巡查。检查中发现安全隐患的，应当责令被检查人立即排除或者限期排除。

各级交通（港口）主管部门应当加强对港口行政管理部门实施《中华人民共和国港口法》和本规定的监督管理，切实落实法律规定的各项制度，及时纠正行政执法中的违法行为。

第三十二条 港口行政管理部门的监督检查人员依法实施监督检查时，有权向被检查单位和有关人员了解情况，并可查阅、复制有关资料。

监督检查人员对检查中知悉的商业秘密，应当保密。

监督检查人员实施监督检查，应当两个人以上，并出示执法证件。

第三十三条 监督检查人员应当将监督检查的时间、地点、内容、发现的问题及处理情况作出书面记录，并由监督检查人员和被检查单位的负责人签字；被检查单位的负责人拒绝签字的，监督检查人员应当将情况记录在案，并向港口行政管理部门报告。

第三十四条 被检查单位和有关人员应当接受港口行政管理部门依法实施的监督检查，如实提供有关情况和资料，不得拒绝检查或者隐匿、谎报有关情况和资料。

第五章 法律责任

第三十五条 有下列行为之一的，由港口行政管理部门责令停止违法经营，没收违法所得；违法所得十万元以上的，并处违法所得二倍以上五倍以下罚款；违法所得不足十万元的，处五万元以上二十万元以下罚款：

（一）未依法取得港口经营许可证，从事港口经营的；

（二）未经依法许可，经营港口理货业务的；

（三）港口理货业务经营人兼营货物装卸经营业务、仓储经营业务的。

有前款第（三）项行为，情节严重的，由交通部吊销港口理货业务经营许可证，并以适当方式向社会公布。

第三十六条 经检查或者调查证实，港口经营人在取得经营许可后又不符合本规定第七、八条规定一项或者几项条件的，由港口行政管理部门责令其停止经营，限期改正；逾期不改正的，由作出行政许可决定的行政机关吊销《港口经营许可证》，并以适当方式向社会公布。

第三十七条 港口经营人不优先安排抢险物资、救灾物资、国防建设急需物资的作业的，由港口行政管理部门责令改正；造成严重后果的，吊销《港口经营许可证》，并以适当方式向社会公布。

第三十八条 港口经营人违反本规定第二十四条关于安全生产规定的，由港口行政管理部门或者其他依法负有安全生产监督管理职责的部门依法给予处罚；情节严重的，由港口行政管理部门吊销《港口经营许可证》；构成犯罪的，依法追究刑事责任。

第三十九条 港口经营人违反本规定第二十五条、第二十六条规定，港口行政管理部门应当进行调查，并协助相关部门进行处理。

第四十条 港口经营人违反本规定第三十条规定不及时和不如实向港口行政管理部门提供港口统计资料及有关信息的，由港口行政管理部门按照有关法律、

法规的规定予以处罚。

第四十一条 港口行政管理部门不依法履行职责，有下列行为之一的，对直接负责的主管人员和其他直接责任人员依法给予行政处分；构成犯罪的，依法追究刑事责任：

（一）对不符合法定条件的申请人给予港口经营许可的；

（二）发现取得经营许可的港口经营人不再具备法定许可条件而不及时吊销许可证的；

（三）不依法履行监督检查职责，对未经依法许可从事港口经营的行为，不遵守安全生产管理规定的行为，危及港口作业安全的行为，以及其他违反本法规定的行为，不依法予以查处的。

第四十二条 港口行政管理部门违法干预港口经营人的经营自主权的，由其上级行政机关或者监察机关责令改正。向港口经营人摊派财物或者违法收取费用的，责令退回；情节严重的，对直接负责的主管人员和其他直接责任人员依法给予行政处分。

第六章 附则

第四十三条 港口行政管理部门按照《中华人民共和国港口法》制定的港口章程应当在公布的同时送上级交通（港口）主管部门和交通部备案。

第四十四条 港口引航适用交通部公布的《船舶引航管理规定》。从事危险货物港口作业的，应当同时遵守交通部公布的《港口危险货物管理规定》。

第四十五条 本规定由交通部负责解释。

第四十六条 本规定自 2004 年 6 月 1 日起施行

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*, 以下简称《评论》) 是全国性的海洋法领域优秀学术著述的汇辑，着重研究与海洋相关的法律与政策，秉承“海纳百川，有容乃大”的精神，力求吸取国内外该领域的一切先进成果。同时在现有法学学科划分的基础上，打破学科藩篱，将视野拓展到一切关于海洋的法学理论、司法实践以及法律运作实务。本刊对于理论探索与实证究并重，以期推动海洋相关法律科学的发展，为各位专家学者提供学术研究和交流的平台。

《评论》由厦门大学法学院以及厦门大学海洋政策与法律中心（Xiamen University Center for Oceans Policy and Law, XMU-COPL）主办，由（香港）中国评论文化有限公司出版，每年两期。为此，热忱欢迎各位学界同仁及实务界人士不吝赐稿，并立稿约如下：

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《中国海洋法学评论》编辑部 敬启

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（3）国家海洋局政策法规办公室编：《中华人民共和国海洋法规选编》，海洋出版社 2001 年第 3 版，第 56 页。——不是初版的著作应注明“修订版”或“第 2 版”等。

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（2）联合国新闻部编，高之国译：《〈联合国海洋法公约〉评介》，海洋出版社 1986 年版，第 67 页。

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（2）司玉琢、朱曾杰：《有关海事国际公约与国内法关系的立法建议》，载于《海商法年刊》1999 年卷，大连海事大学出版社 2000 年版，第 5 页。

（3）傅崐成：《联合国教科文组织 2001 年〈水下文化遗产保护公约〉评析》，

载于厦门大学海洋法律研究中心编：《纪念〈联合国海洋法公约〉签署 20 周年学术研讨会论文集》（2002 年），第 58 页。——载于论文集中的论文。

（4）褚晓琳、傅崐成：《两岸合作开发南海渔业资源规划研究》，载于《中国海洋法学评论》2012 年第 2 期，第 7 页。

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（1）Christopher Hill, *Maritime Law*, 3rd ed., London: Lloyd's of London Press Ltd, 1989, p. 69.

（2）Connie Peck and Yoy S. Lee ed., *Increasing the Effectiveness of the International Court of Justice*, Hague: Martinus Nijhoff Publishers, 1997, pp. 109~110. —— 编著应以 "ed." 标出。

7．引用外文论文的注解格式为：

Jonathan I. Charney, Compromise Clauses and the Jurisdiction of the ICJ, *American Journal of International Law*, Vol. 81, 1987, pp. 855~856.

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（2）John Hare, Maritime Law Update South Africa 2002, at http://www.ports.co.za/legalnews/article_0732.html, 14 May 2004.

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（2）《中方重申钓鱼岛问题原则立场》（新华社北京 12 月 26 日电），载于《人民日报》2003 年 12 月 27 日第 3 版。

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3. 表示数值范围的起讫用“～”表示，如第 10 ~15 页；表示时间的起讫用“－”表示，如 1980 年－ 1982 年，1990 年 7 月－ 8 月。

四、图表

1. 表格规范：表的顺序号用阿拉伯数字，表号与表题空一个汉字位置，表题末不加标点。表题置于表格正上方，表内数据用阿拉伯数字。

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《中国海洋法学评论》编辑部编订

On the Jurisdiction of the International Tribunal for the Law of the Sea

ZHOU Zhonghai *

Abstract: The United Nations recognizes the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") as an independent international judicial body with jurisdiction as provided for in relevant provisions of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and the Statute of the International Tribunal for the Law of the Sea (hereinafter "the Statute") annexed thereto. The Tribunal is only one of several compulsory procedures with binding judgment under the Convention. States Parties may, at any time, in writing, choose to submit cases to the Tribunal or use any other dispute settlement procedure set up by the Convention, such as the International Court of Justice (hereinafter "the Court"), arbitral tribunals, etc. However, Russia's first claim of continental shelf beyond 200 nautical miles symbolizes the coastal states' extension of jurisdiction over the international seabed area, which generated intense responses from the United States, Canada, Denmark and Japan, and had a significant impact on the regime under the law of the sea. Particularly, Japan responded by claiming the continental shelf in the East China Sea and causing disturbance. Consequently, the jurisdiction of the Tribunal, the conflict between the Court and the Tribunal, the functions of the Commission on the Limits of the Continental Shelf, the conflicts of jurisdiction and application of legal rules of the WTO dispute settlement regime and the Tribunal and China's position and countermeasures are highly debated issues in current international law.

Key Words: The International Tribunal for the Law of the Sea; United Nations Convention on the Law of the Sea; Jurisdiction of the International Court of Justice; Conflict

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Since the founding of the United Nations, the number of global and regional multilateral and bilateral treaties has been increasing rapidly. Most of these treaties contain rules regarding dispute settlement based on the interpretation and application of such treaties, but only some of the provisions prescribe compulsory jurisdiction. Efforts made in the 20th century to gain global acceptance of compulsory jurisdiction over all legal disputes between States have not fully or not yet succeeded.[1] However, an important trend in this field is to establish *ad hoc* dispute settlement regimes through multilateral treaties, for instance, the WTO dispute settlement regime. The fragmentation of international law and the lack of a central legislative organ and a supreme juridical organ have caused conflicts of international legal rules and jurisdiction. The General Assembly of the United Nations considered and adopted the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea in its 52nd session,[2] which in which it noted the role of the Tribunal in the peaceful settlement of disputes in relation to the uses of the seas and their resources. It also noted that the functions of the Tribunal are consistent with Article 2(3) of the Charter of the United Nations with respect to peaceful settlement of international disputes. The United Nations recognizes the Tribunal as an independent international judicial body with jurisdiction as provided for in the relevant provisions of the Convention and the Statute of the International Tribunal for the Law of the Sea annexed thereto. The United Nations and the Tribunal both undertake to respect the status and mandate of each other and to establish cooperative working relations pursuant to the provisions of the Agreement. The United Nations Convention on the Law of the Sea applies to two-thirds of the planet. Its substantive range is broader than that of any other treaty. The Convention contains provisions regarding defense and international security, scientific research, preservation of cultural heritage, and human rights; it has been described as "the most comprehensive environmental treaty so far in existence or likely to emerge for quite some time," and is a constitution for the sea.[3] The Convention explicitly provides for compulsory jurisdiction of the Tribunal. So far, most of the cases admitted by the Tribunal are accepted according to Articles 290 and 292 of the

1 Bernard H. Oxman, Complementary Agreements and Compulsory Jurisdiction, *AJIL*, Vol. 95, p. 277.
2 A/52/968, Annex.
3 Bernard H. Oxman, Complementary Agreements and Compulsory Jurisdiction, *AJIL*, Vol. 95, p. 277.

Convention.

The issue of the outer continental shelf includes both the extended range of sovereign rights over the continental shelf and the delimitation of coastal States' continental shelf and the international seabed area. Russia's request to investigate its outer continental shelf symbolized the first attempt to extend jurisdiction to the international sea area by coastal States, which would have significant effect on the legal regime of the law of the sea. Japan listed as a national program its Coast Guard-centered investigation of its outer continental shelf for the right of exploiting seabed resources of surrounding sea area. The investigation plans to execute a complete mapping of the seabed terrain and geology before May 2009, in order to prove the connection between the seabed and Japanese domestic land and submit the data analysis to the Commission on the Limits of the Continental Shelf of the United Nations. In early July, the Japanese Government also decided unexpectedly that sea investigation vessels will be sent to the East China Sea to probe for seabed oil and gas resources and unilaterally attempted to exploit these resources. Japan wished to pass away the sham as the genuine, involving the Chinese territory of the Diaoyu Islands and investigating the continental shelf in the East China Sea in an ostentatious manner. These actions are completely illegal and are absolutely not accepted by China. Besides, the *Southern Bluefin Tuna* case[4] and the *Turtle* case[5] are the first cases involving a conflict between the jurisdiction of the Tribunal and rules of international law. This is a legal and practical issue concerning supplemental agreements and compulsory jurisdiction, and concerning the conflict between the compulsory jurisdiction under the Convention and the jurisdiction of the Court, which is closely related to international security, environment, resources, sustainable trade and exploitation of ocean space. For this purpose, the author visited the Tribunal located in Hamburg, Germany in June 2004 and exchanged views with the Registrar of the Tribunal and Head of the Office of Legal Affairs regarding jurisdiction of the Tribunal, functions of the Commission on the Limits of the Continental Shelf, the relationship between the Court and the Tribunal and other issues.

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4 Southern Bluefin Tuna Case (Austl. & N. Z. v. Japan), Jurisdiction and Admissibility, *ILM*, Vol. 39, 2000, p. 1359, at http://www.oceanlaw.net/cases/tuna2a.htm, 14 January 2005. See case notes by Barbara Kwiatkowska, Case Report: Southern Bluefin Tuna (Australia and New Zealand v. Japan), *AJIL*, Vol. 95, 2001, p. 162, and by Philippe Weckel & Eddin Helali, *Revue Generale de Droit International Public*, Vol. 104, 2000, p. 1037.

5 WTO/TBTTurtle Case analysis, at http://www.Translaws.com, 4 January 2005.

I. Jurisdiction of the International Tribunal for the Law of the Sea

The Tribunal came into existence in October 1996 with its headquarters in Hamburg, Germany. According to the Convention, the Tribunal shall be composed of a body of 21 independent judges, who shall meet the following conditions: 1. enjoying the highest reputation for fairness and integrity and possessing recognized competence in the field of the law of the sea; 2. in exercise of no political or administrative function, or with no "active association" with or "financial interest" in any of the operations of any enterprise "concerning the exploration for or exploitation of the resources of the sea or the seabed" or "other commercial use of the sea or the seabed". In the Tribunal as a whole, the representation of the principal legal systems of the world and equitable geographical distribution should be assured. Current President of the Tribunal is Judge Nelson of Grenadian nationality. Chinese Judge, Xu Guangjian has been re-elected in 2002 and his term will end in 2011. The Rules of Procedure of the Tribunal were completed and adopted on the October 28, 1997 and the first case was accepted on November 13, 1997. For the last 8 years since its establishment, 12 cases were accepted, 8 judgments were delivered and 26 orders were issued, involving 17 States concerned. The 12 cases that have been heard so far by the Tribunal mainly concerned prompt release of vessels and crews and provisional measures. During the period from September to October in 2003, the Tribunal heard its 12th case, namely the *Malaysia v. Singapore Concerning Land Reclamation* case, requesting for provisional measures.[6] [Editor's note: for this case, please refer to the article introducing this case in the current issue of this journal.]

The Tribunal, as provided for by the Convention, is one of several judicial procedures of dispute settlement regarding interpretation and application of the Convention. The United Nations recognizes the Tribunal as an independent international judicial body with jurisdiction and as one of several compulsory procedures that may result in biding judgment provided for by the Convention.[7] States Parties may, at any time, in writing, choose to submit cases to the Tribunal

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6 ITLOS Press Release No. 90, at http://www.itlos.org and http://www.tidm.org, 14 January 2005.

7 52/251. Article 1(1), Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea.

or any other dispute settlement procedures under the Convention, such as the Court, an arbitral tribunal and *ad hoc* arbitral tribunal, mediation and compulsory mediation, and binding commercial arbitration, and make use of 10 or more existing methods to solve the dispute.[8] Among them, the jurisdiction of mediation, *ad hoc* arbitral tribunal, *ad hoc* Chamber and the Seabed Disputes Chamber is compulsory. In accordance with the Convention, the jurisdiction of the Tribunal extends to the following cases: 1. any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part; 2. 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. The *ad hoc* procedures for resolving disputes concerning the interpretation or application prescribed in Part XI of the Convention are mostly compulsory procedures. This is also the function of the Seabed Disputes Chamber. The Seabed Disputes Chamber may give advisory opinions at the Assembly's request or that of the Council of International Seabed Authority on legal questions arising within the scope of their activities. 3. If all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.[9] The Tribunal, as a residual and compulsory regime, can resolve certain disputes identified by the Convention, including the prompt release of arrested vessels and crews and prescription of provisional measures pending a final judgment. The Tribunal may also resolve disputes arising out of another marine agreement, if the agreement contains such provisions.

In addition, the Convention prescribes certain limitations or exceptions of the compulsory dispute settlement procedures, including disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction; disputes concerning the interpretation or application of articles of the Convention relating to sea boundary delimitations; disputes concerning military activities and disputes in respect of which the Security Council of the United Nations is

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8 Zhou Zhonghai, *International Law of the Sea*, Beijing: China University of Political Science and Law Press, 1987, p. 284 (in Chinese). A Brief Introduction to the International Tribunal for the Law of Sea, at http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/wjzdtyflgz/zgzhyflydgz/t146192.htm, 14 January 2005. (in Chinese)

9 A Brief Introduction to the International Tribunal for the Law of Sea, at http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/wjzdtyflgz/zgzhyflydgz/t146192.htm, 14 January 2005. (in Chinese)

exercising the functions assigned to it by the Charter of the United Nations. At any time, a State Party may declare in writing that it does not accept the compulsory dispute settlement procedures under the Convention with respect to the above categories of disputes.

A. The Jurisdiction of the Tribunal over States Parties to the Convention

The Convention stipulates that States Parties thereto shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2(3) of the Charter of the United Nations and, to this end, shall seek a solution by means indicated in Article 33(1) of the Charter of the United Nations. Nothing in this Convention shall impair the right of any State Party to agree at any time to settle a dispute concerning the interpretation or application of this Convention by any peaceful means of their own choice.[10] Furthermore, the Convention explicitly prescribes that at the time of 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: 1. the Tribunal established in accordance with Annex VI; 2. the Court; 3. an arbitral tribunal constituted in accordance with Annex VII; 4. an *ad hoc* arbitral tribunal constituted in accordance with Annex VIII for dealing with one or more of the categories of disputes specified therein. States Parties are obliged to make a choice. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.[11] If a State Party chooses to accept jurisdiction of the Tribunal, the Tribunal becomes a compulsory procedure provided for by the Convention that leads to a legally binding judgment and the tribunal for resolving disputes. It is thus clear that the Tribunal's jurisdiction extends to disputes regarding the interpretation and application of the Convention between States Parties that accept jurisdiction of the Tribunal under Article 287 of the Convention and disputes submitted to the Tribunal at the parties' request. The scope of admitting cases by the Tribunal is further regulated by Article 297 of the Convention, which

10 Obligation to settle disputes by peaceful means, Article 279; Settlement of disputes by any peaceful means chosen by the disputing parties, Article 280, United Nations Convention on the Law of the Sea.

11 Article 287(3), United Nations Convention on the Law of the Sea.

mainly covers: 1. when it is alleged that a coastal State has acted contrary to the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in Article 58;[12] 2. when it is alleged that a State exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or 3. when it is alleged that a coastal State has acted in contravention of specific international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention. A coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in Article 58.[13]

B. The Tribunal's Jurisdiction under Part XV of the Convention

Section 2, Part XV of the Convention establishes compulsory procedures entailing binding decisions. Article 286 provides for that 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 282 stipulates that if the States Parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree. This illustrates that no

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12 Article 58 of the United Nations Convention on the Law of the Sea, regarding the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of this Convention

13 Article 297 (1), United Nations Convention on the Law of the Sea.

exception exists for the compulsory principle and the binding force on the third party. The choice for the tribunal is made by the two disputing parties. Compulsory and binding force is the essence; choice of the forum is secondary.[14] Article 281 of the Convention establishes procedures for situations where no settlement has been reached by the parties: 1. If the parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedures. 2. If the parties to the dispute have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit. For instance, in the *Southern Bluefin Tuna* case, Australia and New Zealand accused Japan of its high seas fishing for southern bluefin tuna conducted in violation of their obligations of conservation and management under the Convention. The dispute had not been settled by negotiation or other means under Section 1 by the disputing parties and was submitted to arbitration. The arbitral tribunal dismissed the case for lack of jurisdiction.

C. The Seabed Disputes Chamber's Jurisdiction under Part XI of the Convention

1. The Seabed Disputes Chamber's Jurisdiction

The Seabed Disputes Chamber has jurisdiction over disputes regarding activities in the Area falling within the following categories, namely the jurisdiction over the disputes arising out of resources exploration and exploitation activities in the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction:

(1) disputes between States Parties concerning the interpretation or application of this Part and Annexes relating thereto;

(2) disputes between a State Party and the Authority concerning: (i) acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations or procedures of the Authority adopted in accordance therewith; or (ii) acts of the Authority alleged to be beyond its jurisdiction or a misuse of power;

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14 Bernard H. Oxman, Complementary Agreements and Compulsory Jurisdiction, *AJIL*, Vol. 95, 277, p. 280.

(3) disputes between States Parties, the Authority or Enterprise, State-owned enterprises and natural or juridical persons as parties to a contract as referred to in Article 153, paragraph 2(b), concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests;

(4) disputes between the Authority and a prospective contractor who has been sponsored by a State as provided in Article 153, paragraph 2(b), and has duly fulfilled the conditions referred to in Annex III, Article 4, paragraph 6, and Article 13, paragraph 2, concerning the refusal of a contract or a legal issue arising in the negotiation of a contract;

(5) disputes between the Authority and a State Party, a State-owned enterprise or a natural or juridical person sponsored by a State Party as provided for in Article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, Article 22;

(6) any other dispute for which the jurisdiction of the Chamber is specifically provided in this Convention.

Parties to a contract can be States Parties, the Authority or Enterprise, State-owned enterprises as well as natural and juridical persons. Therefore, the jurisdiction of the Chamber can extend to States, international organizations, and enterprises, judicial persons or private-owned commercial companies participating in seabed exploitation activities, and even individuals, which is a breakthrough in terms of progress of the international dispute settlement regimes.

2. Limitations of the Seabed Disputes Chamber's Authority

The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to Article 191, in exercising its jurisdiction pursuant to Article 187, the Seabed Disputes Chamber shall neither express views on the question of whether any rule, regulation and procedure of the Authority is in conformity with this Convention, nor declare invalid any such rule, regulation and procedure. Its jurisdiction in this regard shall be confined to decisions with respect to the claims that the application of any rule, regulation and procedure of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and claims for damages to be paid or other remedy to be given to

the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention.[15]

3. The Seabed Disputes Chamber's Authority of Prescribing Provisional Measures

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties to the dispute or, failing such agreement within two weeks from the date of the request for the prescription of provisional measures, the Tribunal or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this Article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

4. The Seabed Disputes Chamber's Jurisdiction of Advisory Opinions

The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.[16]

D. The Jurisdiction over Special Disputes

The Tribunal, as the organ bound to promptly resolve certain disputes with compulsory jurisdiction in accordance with the Convention, has to settle mainly two categories of disputes promptly: first, disputes regarding prompt release of arrested vessels and crews; secondly, request for prescribing provisional measures before the final judgment is made.

1. Prompt Release of Vessels and Crews

The Convention prescribes that a coastal State may arrest vessels which are in violation of relevant international and national laws and regulations formulated in consistence with the Convention. However, arrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security.[17] Where the authorities of a State Party have detained a vessel flying the flag of

15 Article 189, United Nations Convention on the Law of the Sea.
16 Article 191, United Nations Convention on the Law of the Sea.
17 Article 73, United Nations Convention on the Law of the Sea.

another State Party and it is alleged that the detaining State Party has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the issue of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to the Tribunal, unless the parties otherwise agree. The application for such release may be made only by or in the name of the flag State of the vessel. The tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The detaining States' authorities maintain their power to release the vessel or its crew at any time.[18] Upon the posting of the bond or other financial security determined by the tribunal, the authorities of the detaining State shall comply promptly with the tribunal's decision concerning the release of the vessel or its crew.

2. Prescribing Provisional Measures

Pending the final decision, the Tribunal may prescribe any provisional measures which are considered appropriate under the circumstances. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist. Provisional measures may be prescribed, modified or revoked under this article only at a party's request and after all parties have been given an opportunity to be heard. The Court or Tribunal shall forthwith give notice to all parties to the dispute, and to other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures. Requesting the Tribunal to prescribe provisional measures is one option, but the Tribunal has a special competence in prescribing provisional measures, which means the Tribunal's jurisdiction is a "conditional and residual" power.[19] In other words, pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the request date for provisional measures, the Tribunal or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this

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18 Article 292, Prompt release of vessels and crews, United Nations Convention on the Law of the Sea.

19 Thomas A. Mensah, The International Tribunal for the Law of the Sea, ITLOS FOCUS, *LJIL*, Vol. 11, 1998, p. 537. (Thomas A. Mensah: President, International Tribunal for the Law of the Sea, Hamburg, Federal Republic of Germany)

article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.[20]

E. The Tribunal's Jurisdiction beyond the Convention

The third main function of the Tribunal is to deal with general maritime disputes which are out of the Convention's direct scope, which means that the Tribunal's jurisdiction is not limited to the interpretation and application of the Convention. It is prescribed in the Statute that its jurisdiction comprises of all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction to the Tribunal.[21] Article 288 of the Convention further extends the Tribunal's jurisdiction to "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." This means that the Tribunal has jurisdiction over relevant disputes of non-State Parties to the Convention concerning the interpretation or application of an international agreement related to the purposes of the Convention. The exercise of such jurisdiction is limited to the extent that the treaty or agreement confers jurisdiction on the Tribunal.

Moreover, different from the Court, the Tribunal's jurisdiction is not limited to inter-State disputes. According to Article 20 of the Statute, it has jurisdiction over any case as expressly provided for in Part VI or any case submitted as per any other agreement accepted by all parties to the case which confers the jurisdiction to the Tribunal. The Tribunal shall be open to entities other than State Parties. Consequently, following the disputing parties' desire, the Tribunal is empowered to deal with disputes arising out of maritime agreements other than the Convention. Furthermore, according to provisions of the agreement, the Tribunal is authorized to deal with disputes in which all or some of the disputing parties are non-State entities, including privately owned companies, inter-governmental organizations and even disputes between individuals.

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20 Article 290, United Nations Convention on the Law of the Sea.
21 Article 21, Statute of the International Tribunal for the Law of the Sea, Annex VI.

F. Limitations and Exceptions to the Tribunal's Jurisdiction

Some limitations and exceptions exist with respect to the Tribunal's jurisdiction. Additionally, the Convention also prescribes certain limitations and exceptions of the application of compulsory dispute settlement procedures, including disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction; disputes concerning the interpretation or application of articles of the Convention relating to sea boundary delimitations; disputes concerning military activities and disputes in which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. A State Party may, at any time, declare in writing that it does not accept the compulsory dispute settlement procedures with respect to the above categories of disputes. The limitations and exceptions are explicitly provided for in Section 3, Part XV of the Convention. The general limitations of the first category on the Tribunal's jurisdiction are as follows:[22]

1. Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of: (i) the exercise by the coastal State of a right or discretion in accordance with Article 246; or (ii) a decision by the coastal State to order suspension or cessation of a research program in accordance with Article 253.

2. A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under Articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to the conciliation procedure under Annex V, Section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in Article 246, paragraph 6, or of its discretion to withhold consent in accordance with Article 246, paragraph 5.

3. Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement procedure of any dispute relating to its sovereign rights with respect to

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22 Article 297(2), United Nations Convention on the Law of the Sea.

the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

4. Where no settlement has been reached by recourse to Section 1, a dispute shall be submitted to the conciliation procedure under Annex V, Section 2, at the request of any party to the dispute, when it is alleged that: (i) a coastal State has manifestly failed to comply with its obligations to, through proper conservation and management measures, ensure that the maintenance of the living resources in the exclusive economic zone is not seriously impaired; (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or (iii) a coastal State has arbitrarily refused to allocate to any State, under Articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

5. In no case shall the conciliation commission substitute its discretion for that of the coastal State.

6. The report of the conciliation commission shall be delivered to the appropriate international organizations.

7. In negotiating agreements pursuant to Articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

G. Finality and Binding Force of the Tribunal's Judgment

The finality and binding force are important characteristics of the Tribunal's jurisdiction. Similar to verdicts of other judicial organs prescribed in Section 2, Part XV of the Convention, the judgment of the Tribunal is final and legally binding upon the disputing parties. Relevant parties are obliged to execute the judgment. Article 296 of the Convention explicitly states that any decision rendered by the Tribunal shall be final and shall be followed by all parties to the dispute. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

II. Conflicts and Cooperation between the International Court of Justice and the International Tribunal for the Law of the Sea

The significant increase in the number of international courts and tribunals certainly leads to issues of conflict and cooperation among these courts and tribunals. Since the number of courts and tribunals is increasing in an international legal system without a unified judicial organ, the issue is becoming increasingly worse. The Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia once stated, "In international law, every tribunal is a self-contained system (unless otherwise provided for)."Obviously, a general rule of resolving coordination and conflicts does not exist here. These issues can only be solved within the "self-contained system," namely in the international court or tribunal to which a case is submitted. Sometimes, relevant documents establish special courts or tribunals for this purpose. However, the issues would usually be solved by the applicable law of the Court or the Tribunal. If the Court or the Tribunal fails to foresee such issues under the provisions of the legal documents, then it will become an issue of interpretation. Possible conflicts between the Court and the Tribunal are the issues we are going to elaborate on further.

Conflicts can be divided in two categories: conflict of jurisdiction and conflict of jurisprudence. Whether it is an issue of the law of the sea or a general issue of the international law, opinions of the Court and the Tribunal may be completely different in terms of jurisprudence. Fragmentation of international law carries risks, but such risks should not be exaggerated. Various and not necessarily the same voices can promote the development of international law and dispute settlement. However, this paper mainly focuses on the conflict of jurisdiction between the Court and the Tribunal.

A. General Conflicts of Jurisdiction between the Court and the Tribunal

Undoubtedly, the Court and the Tribunal have jurisdiction over any dispute concerning the interpretation or application of the present Convention.[23] Such conflict is better classified as practical conflict than theoretical conflict. However, it

23 Articles 279 and 286, United Nations Convention on the Law of the Sea.

is not realistic to submit one case to both the Court and the Tribunal. In particular cases submitted by special agreements, the disputing parties need to notify the Court or the Tribunal. Jurisdiction of judicial organs which do not admit the case does not need further elaboration. Nevertheless, from the perspective of the disputing parties, it is relevant to the choice of judicial organs which have the power to deliver a judgment. In the negotiation of a special agreement, a new standard applies to choosing a court, which helps solve the dilemma of choosing arbitration or a court. This new standard is to make a choice between two permanent judicial organs of different characteristics: one is an old judicial organ established a long time ago with general jurisdiction; the other is a special judicial organ newly established.

If submitting an application, the possibility of "forum shopping" is imaginable. To some extent, the disputing party with initiative, has the priority of choosing a court it prefers, just like choosing the Court or the Tribunal. However, the situation in practice is different. Article 282 of the Convention can effectively preclude forum shopping and parallel proceedings, i.e. the issue of making a conflict-based choice by disputing parties. This article claims that if the States which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.[24] This article supports all the dispute settlement regimes entailing binding decisions upon disputing parties, at the expense of the Tribunal and other dispute settlement organs with compulsory jurisdiction provided for by Articles 286 and 287 of the Convention. If disputing parties have agreed to confer jurisdiction on a particular judicial organ through an agreement, any party can be subject to the jurisdiction of the organ which has jurisdiction in accordance with Articles 286 and 287 of the Convention.

With respect to the relations between the Court and the Tribunal, the most interesting part in Article 282 is that the acceptance of compulsory jurisdiction of the Court by disputing parties under Article 36 (2) of the Statute of the Court can be considered as an "agreement as defined in Article 282. This may be disputed in formal terms, but the consent does exist, so it is reasonable that the disputing

24 Article 282, United Nations Convention on the Law of the Sea.

parties "have agreed otherwise." In light of Article 282, whenever both parties to a dispute have accepted the "optional clause," the Tribunal which has accepted the case shall declare that it has no jurisdiction. Conversely, after the Court accepts the case, it shall reject the defendant's claim, because the parties to the dispute have chosen the Tribunal as per Article 282 and the Court does not have jurisdiction.[25]

In accordance with Article 282, the jurisdictional priority of the Court over the Tribunal, as between States accepting the optional clause, applies to all cases in which the Tribunal has compulsory jurisdiction under Part XV of the Convention. Surely, Article 282 is not applicable to the compulsory jurisdiction of the Seabed Disputes Chamber, since its jurisdiction is stipulated by Article 187 of the Convention, which is in Part XI, not Part XV. The impact is relatively small considering that it concerns only disputes between States. Other disputes involving non-States Parties, as provided for by Article 187, fall out of the scope of the Court's jurisdiction.

However, a real conflict may arise. In theory, in a dispute concerning the interpretation of Part XI of the Convention, it is highly possible that one State submits the dispute to the Court under Article 36(2) of the Statute of the Court and the other State submits the dispute to the Seabed Disputes Chamber under Article 187 of the Convention.

B. The Impact of Reservations to the Acceptance of the Court's Compulsory Jurisdiction

The priority prescribed in Article 282 applies only when the dispute is subject to the compulsory jurisdiction agreement in force between the parties to the dispute. If either party precludes the dispute from the agreement, the priority will not apply. Reservations to declarations which accept the Court's compulsory jurisdiction are one way for such preclusion. The reservations have general or particular functions for matters in the law of the sea. For instance, general reservations can preclude disputes within the scope of compulsory jurisdiction which came into existence less than 12 months prior to the filing of the application (such as reservations of New Zealand, Philippines and the United Kingdom) or preclude disputes with States which do not recognize the reservation (such as the declaration of India). The Law

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25 Tullio Treves, Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice, *International Law And Politics*, Vol. 31, p. 812.

of the Sea as referred in reservations may have a broad scope (for instance, in the reservation declarations made by India and Malta, all disputes within the areas under its sovereignty and jurisdiction, including the delimitation of the areas, are precluded). Reservations may also focus on specific issues (such as reservations made by New Zealand and the Philippines, which concern only disputes regarding fisheries in the exclusive economic zone and, respectively, natural resources of the seabed of archipelagic waters and of the continental shelf).[26]

It can be seen from these reservations that States have precluded disputes from compulsory jurisdiction of the Court even though they cannot preclude the compulsory jurisdiction of the Court or the Tribunal under the Convention. The recent *Fisheries Jurisdiction* case between Spain and Canada serves as an interesting example, since both States were not parties to the Convention when the case occurred.[27] The case concerned the boarding to a Spanish fishing vessel on the high seas by a Canadian patrol boat, in light of the Canadian Coastal Fisheries Protection Act of the Northwest Atlantic Fisheries Organization. Canada argued that the compulsory jurisdiction of the Court it has accepted did not apply to that case because it fell into the scope of Canada's reservations which precluded disputes "arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the Northwest Atlantic Fisheries Organization Regulatory area."[28] In a judgment dated December 4, 1998, the Court held that it had no jurisdiction over the case. Had both Spain and Canada been parties to the Convention when the case took place, the result would be completely different. Article 297(3) of the Convention precludes disputes relating to the coastal State's sovereign rights with respect to living resources in the exclusive economic zone or relating to the exercise of such sovereign rights. It is clearly provided for that "the coastal State shall not be obliged to accept the submission to such settlement procedure of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established

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26 Tullio Treves, Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice, *International Law And Politics*, Vol. 31, p. 813.

27 Fisheries Jurisdiction Case (Spain v. Canada) 1998 I. C. J. (Dec. 4), at http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment(s)/iec_ ijudgment_981204_frame.htm, 6 July 1999.

28 See Counter-Memorial of Canada (Jurisdiction) (Spain v. Canada), 1996. I. C. J. Pleadings (Fisheries Jurisdiction Case) (Feb. 29, 1996), at http://www.icj-cij.org/icjwww/idock-et/iec/iecpleadings/iec_ipleading_860200_countermemo rialcanada.htm, 6 July 1999.

in its conservation and management laws and regulations."[29] Article 298 allows declarations precluding compulsory jurisdiction with regard to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial services, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of the Court or the Tribunal under Article 297, paragraphs 2 and 3."[30] Once a reservation precludes a dispute from compulsory jurisdiction of the Court, Article 282 does not apply and thus the rules of compulsory jurisdiction under the Convention shall apply.

C. The Relationship between Limitations and Choices of Compulsory Jurisdiction of the Tribunal

It is of significant importance to examine the impact of the reservation of the acceptance of the optional clauses by the disputing parties to determine what kind of disputes can be unilaterally brought to the Court or the Tribunal. It is necessary to determine the applicability of Articles 297 and 298 of the Convention in respect of rules of compulsory jurisdiction and whether one or more of the limitations or choices are exceptional. For instance, if one disputing party has accepted the optional clause and made a reservation relating to disputes of the "determination and delimitation of its maritime boundaries," the ability to bring the case to a court or tribunal is dependent on whether a declaration of not accepting the jurisdiction of such court or tribunal under Article 298(1)(a) has been made by one of the parties. If there is such a declaration, no effective compulsory settlement clause would exist between the disputing parties, unless the requirements of "compulsory" conciliation under Article 298 are met. If there is no such declaration, a disputing party has the right to invoke the obligation under the Convention and submit the dispute to a court or tribunal with jurisdiction.

Some aspects of a complicated case may be under the jurisdiction of the Court and other aspects may be under the jurisdiction of the Tribunal or another court or tribunal with jurisdiction under the Convention. This situation may take place for several reasons: 1. the effect of reservations of acceptance of the optional clause of Article 36(2) of the Statute of the Court; 2. the Statute of the Court; 3. limitations

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29 Article 297, United Nations Convention on the Law of the Sea.
30 Article 298, United Nations Convention on the Law of the Sea.

and exceptions under Articles 297 and 298 of the Convention. However, it is impractical and risky for the court or tribunal to hear the same related issues at the same time. The disputing parties must submit the dispute flexibly as a whole to one court or tribunal. They can also prevent that situation skillfully by declarations. For instance, Norway's declaration on June 25, 1996 of modification of its acceptance of the compulsory jurisdiction of the Court is an interesting example. The declaration confirmed such acceptance and recognition, "Provided, however, that the limitations and exceptions relating to the settlement of disputes pursuant to the provisions of, and the Norwegian declarations applicable at any given time to, the United Nations Convention on the Law of the Sea dated December 10, 1982 […] shall apply to all disputes concerning the law of the sea."[31] Norway precludes all the disputes which cannot be attributed to the compulsory jurisdiction of the Court or the Tribunal in accordance with the Convention, either because of the limitations under Article 297 or because of using the optional exception under Article 298 in Norway's declaration. Therefore, for the disputes concerning the law of the sea, Norway accepts the jurisdiction of the Court.

In most situations, if reservations of the optional clause preclude the jurisdiction of a Court due to rare precedents preferring for a court, arbitration will become the applicable procedure.

III. The Status and Functions of the Commission on the Limits of the Continental Shelf

The Commission on the Limits of the Continental Shelf ("Commission") is established under Annex II to the Convention as the commission on the limits of the continental shelf beyond 200 nautical miles. The functions of the Commission are to consider the data and other materials submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, provide advisory opinions on matters related to delimitation of outer limits of the continental shelf and provide scientific and technical advice in preparing materials, if requested by the respective coastal State. Coastal States' delimitations of the continental shelf on the basis of the Commission's

31 Declarations Recognizing Jurisdiction: Norway, 1995~1996 Y. B. I. I. C. J. 108, 109.

advisory opinions shall be final and binding.[32] However, the Commission is not an adjudicatory organ. Its actions shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. Delimitations of overlapping areas are the issues of the disputing parties, and the Commission shall not affect or intervene in inter-State disputes of delimitations either on land or in the sea. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts or consider or qualify a submission made by any of the States concerned in the dispute. In cases where a submission involves existing land or maritime disputes, the coastal States making the submission shall inform the Commission. The submissions made before the Commission and the advisory opinions approved by the Commission thereon shall not prejudice the positions of the States which are parties to a land or maritime dispute. Therefore, it is clear that the Commission shall follow the above principles in its own work. The Commission was ready to accept information submitted by the States concerned and offer some advice in 2001. Annex II provides for that the information shall be submitted within 10 years of the entry into force of the Convention, i.e. by November 16, 2004. However, considering the process of entering into force of the Convention, the States Parties decided to calculate the 10 years from the date of May 13, 1999. This offered many States more time to prepare for intelligence reports. Russia became the first State submitting the report to the Commission on December 20, 2001. During the period from January to February in 2002, Canada, Denmark, Japan and the United States responded successively with rather negative comments. The Commission began to consider Russia's submission in March. The issue of the outer continental shelf involves the scope of extension of a State's continental shelf and its sovereign rights, and delimitations of the continental shelf of coastal States and the international seabed area. So far, the Commission has received 9 reports.

As for the continental shelf beyond 200 nautical miles, the Convention regulates its outer limits from both positive and negative aspects. Its purpose is to make clear delimitations between the continental shelf under the jurisdiction of coastal States and the international seabed area as common heritage of human kind. Article 76(4) first proposes two formulas from a positive aspect to delimitate the continental shelf: 1. according to the thickness of sedimentary rocks, its outer

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32 Article 3, Annex II (Commission on the Limits of the Continental Shelf) to the United Nations Convention on the Law of the Sea.

limitation is a line delineated by reference at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental slope; 2. a line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. Article 76(5) limits the maximum width of the continental shelf from a negative aspect, i.e., the continental shelf of one State, whichever formula it adopts in paragraph 4, shall not (1) exceed 350 nautical miles (2) 100 nautical miles from the 2,500-meter isobath, which is a line connecting the depth of 2,500 meters. Outside the limit is the international seabed area under the management and protection of the International Seabed Authority. The continental shelf beyond 200 nautical miles enjoys a special legal status. Coastal States do not have sovereign rights or jurisdiction over the outer continental shelf. The coastal States shall make payments or contributions in kind in respect of the exploitation of non-living resources of this area, but they have the priority of exploitation. The superjacent waters and air space on the continental shelf beyond 200 nautical miles belong to the high seas. It emerges that the seabed which is 200 to 350 nautical miles from the baselines from which the breadth of the territorial sea is measured (or100 nautical miles from the 2,500-meter isobath, which is a line connecting the depth of 2,500 meters), is where the outer continental shelf may possibly exist. The issue of the outer continental shelf beyond 200 nautical miles is the last frontier field in the law of the sea and the United Nations attach great importance to it. The Commission has started to accept submissions of coastal States for the outer continental shelf beyond 200 nautical miles. Various coastal States have conducted investigations and explorations for the outer continental shelf beyond 200 nautical miles and filed their submissions to the Commission in order to expand and protect their own maritime interests. According to statistics, nearly 100 countries and regions all over the world have filed applications to the Commission claiming the outer continental shelf beyond 200 nautical miles. All the investigations conducted by coastal States with unprecedented enthusiasm during the 1990s were related to this issue. The Russian Federation filed its submission to the Commission via the Secretary General of the United Nations, and it contained its request for delimitating its outer continental shelf beyond 200 nautical miles. It requested four outer continental shelves in three sea areas of the Arctic Ocean, the Bering Strait and the Okhotsk Sea respectively, with the total area reaching more than 1 million square kilometers, with the requested continental shelf in the Arctic Ocean being the largest. This was the first submission with respect to delimitations of the outer continental shelf received

by the Commission since its establishment. Russia's submission symbolized the beginning of its extension of jurisdiction to the international seabed area, which would have significant effects on the legal regime of the law of the sea.[33]

The so-called continental shelf investigation performed by Japan is another outer continental shelf investigation after Russia's submission. Japan listed the Japan Coast Guard-centered investigation of its outer continental shelf as a national program for the right of exploiting seabed resources of its surrounding sea area. This action plans to complete a precise investigation of the seabed terrain and geology before May 2009, in order to prove the connection between the seabed and Japanese domestic land and submit the data analysis to the Commission. The Japanese Government issued the Basic Guidelines of the Continental Shelf Investigations in the Near Future, which stated that the first stage of this investigation would be in 2004 and the second stage of investigation would be in 2005.

It is well-known that Japan reacted intensely to Russia's application for the outer continental shelf investigation. However, Japan's concern was not the four outer continental shelves claimed by Russia, but the delimitations of its 200 nautical miles exclusive economic zone and the continental shelf delineated by Russia. Japan claimed that Russia's 200 nautical miles line in the Southern Section of the Pacific Ocean was drawn from the baselines of the four northern islands of Japan. Japan pointed out that Japan and Russia disputed on the sovereignty of the four northern islands which were Japan's inherent territory. It was unacceptable to Japan that Russia unilaterally made the delimitations of its 200 nautical miles exclusive economic zone and the continental shelf from the baselines of the four northern islands. Japan requested that the Commission's considerations and recommendations shall not affect the issue of sovereignty of the four northern islands and related sea areas. However, Japan hurried in listing the Japan Coast Guard-centered investigation of its outer continental shelf as a national program and submitted the data analysis to the Commission. What was its purpose for this? Isn't it obvious that Japan's menacing intention was to incorporate the Diaoyu Islands into its continental shelf investigation plan? The Japanese government also unexpectedly decided that sea investigation vessels would be sent to the East China Sea to probe for seabed oil and gas resources in early July and also attempted

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33 Xiao Xiao, Russia Initiated the First Case of the Continental Shelf beyond 200 Nautical Miles, *Survey*, 3 April 2002. (in Chinese)

to unilaterally exploit this area's seabed resources. The marching of Japanese investigation vessels to the oil field in the East China Sea has brought new variables in the Sino-Japanese relations.

The continental shelf in the East China Sea is the natural prolongation of China's land territory and is definitely its continental shelf. The continental shelf beyond 200 nautical miles is China's outer continental shelf. Japan has insisted in arguing that it is a common continental shelf of both China and Japan and a medium line delimits the continental shelf. However, the continental shelf in the East China Sea is obviously not Japan's outer continental shelf, as Japan brazenly argues. Japan adopts Russia's approach although it does not accept Russia's submission of outer continental shelf, attempting vainly to initiate a dispute concerning Diaoyu Islands, which are a part of China's sacred territory. This will never be accepted by China. Whether or not a coastal State is entitled to the outer continental shelf beyond 200 nautical miles is mainly dependent on evidence in natural science. Therefore, before submitting the request to the Commission, coastal States should be fully prepared in terms of science, law and diplomacy. What is the purpose of the Japanese Government's plan to conduct resources investigation in the continental shelf of the East China Sea towards west? According to relevant provisions of the Convention, China should be notified in advance of the continental shelf investigation in the East China Sea, which shall not be carried out without China's consent or involvement No one is authorized to conduct such activities without the explicit consent of the coastal State because the rights of coastal States in respect of continental shelf are exclusive under the Convention. The delimitation of the continental shelf in the East China Sea is a disputed issue related to delimitation between China and Japan, especially in the sea area of the Diaoyu Islands. Otherwise, the investigation lacks its basis in international law and the law of the sea.

The East China Sea is still not delimited and is a disputed issue between China and Japan. The so-called "medium line" is only claimed by Japan unilaterally, which is not and will never be recognized by China. The provocative act by Japan is extremely dangerous and strongly objected by China.

IV. Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea

The International Court of Justice is a general international judicial organ established by the Charter of the United Nations and the Statute of the Court. The International Tribunal for the Law of the Sea is a special international judicial organ established by the United Nations Convention on the Law of the Sea and the Statute of the International Tribunal for the Law of Sea. The two judicial organs each perform their respective functions and are not subordinated to each other. One is in charge of settling international disputes peacefully under the instruction of the Security Council; the other takes responsibility for settling disputes peacefully regarding the sea and its resources. However, for the United Nations, it has to enhance cooperation with the Tribunal, a special judicial organ, in order to play its due role. It is under such circumstance that the United Nations noted the role of the Tribunal in the peaceful settlement of disputes and that the functions of the Tribunal are consistent with Article 2(3) of the Charter of the United Nations, which provides for that international disputes shall be settled by peaceful means. The Tribunal, as an independent international judicial body, called for the conclusion of a relationship agreement with the United Nations in order to enhance the relations and cooperation between the United Nations and the Tribunal.

The 92nd plenary meeting of the United Nations held on September 8, 1998 considered and approved the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea.[34] The agreement stipulates that the United Nations recognizes the Tribunal as an independent international judicial body with jurisdiction as provided for in the relevant provisions of the Convention and the Statute of the International Tribunal annexed thereto. The Tribunal recognizes the responsibilities of the United Nations under the Charter of the United Nations, in particular in the fields of international peace and security, economic, social, cultural and humanitarian development and the peaceful settlement of international disputes. The United Nations and the Tribunal both undertake to respect the status and mandate of each other and to establish cooperative working relations pursuant to the provisions of the Agreement. The United Nations and the Tribunal, with a view to facilitating the effective attainment of their objectives and the coordination of their activities, shall consult and cooperate with each other, whenever appropriate, on matters of mutual concern and pursue, whenever appropriate, initiatives to coordinate their activities. Subject to the applicable provisions of the rules of the Tribunal, the

34 A/52/968, Annex A/RES/52/251.

Secretary-General of the United Nations or representatives of the Secretary-General may attend public meetings of the Tribunal or its Seabed Disputes Chamber, including oral hearings. The United Nations shall periodically deliver to the Tribunal information on developments relating to the Convention that are relevant to the work of the Tribunal, including copies of correspondences received by the Secretary-General in its capacity of depositary of the Convention or depositary of any other agreement which confers jurisdiction on the Tribunal; transmit to the Tribunal copies of any documents notified to the Secretary-General or otherwise communicated to the United Nations by the Court pursuant to the Court's Statute and Rules of Court; subject to the applicable rules, regulations and obligations of the United Nations under the relevant agreements, present any relevant information requested by the Tribunal in its case analysis. The Registrar of the Tribunal shall periodically deliver to the United Nations information concerning developments under the Convention that are related to the activities of the Tribunal; deliver to the United Nations information and documentation relating to the work of the Tribunal, including documentation relating to pleadings, oral proceedings, orders, judgments and other communications and documentation, including those relating to applications submitted to the Tribunal in accordance with Articles 29 and 292 of the Convention; deliver to the United Nations, with the consensus of the Tribunal and subject to the Tribunal's Statute and Rules, any information relating to the work of the Tribunal requested by the Court.

The United Nations and the Tribunal shall make every effort to achieve maximum cooperation while aiming to avoid undesirable duplication in the collection, analysis, publication and dissemination of information related to matters of mutual interest. They shall strive to combine their efforts, where appropriate, to secure the greatest possible usefulness and utilization of such information and to minimize the burdens placed upon Governments and other organizations from which such information may be collected. The Tribunal shall keep the United Nations informed of its activities that may require the attention of the United Nations. For this purpose, the Tribunal may, when it deems it appropriate, submit reports to the United Nations through the Secretary-General of the United Nations, and notify the Secretary-General of the United Nations whenever, in its opinion, an issue within the competence of the Security Council, in particular relating to the application of Article 298(1)(c), of the Convention, arises in connection with the work of the Tribunal.

V. Conclusion

The Tribunal is an independent international judicial body with jurisdiction and one of several compulsory procedures that may result in binding judgment provided for by the Convention. It can offer a binding judgment by judicial process with regard to any dispute concerning the interpretation or application of the Convention. However, in many situations, the Tribunal can do much more. The Convention grants the Tribunal jurisdiction in fields beyond the Convention, which enables the Tribunal to create a new and important situation in international dispute settlement and procedure.

The Convention allows non-State entities to be disputing parties under the Seabed Disputes Chamber (and even disputing parties under the Tribunal), demonstrating that the Tribunal welcomes and recognizes the legal status of non-State entities in the crucial fields of exploiting, utilizing and managing maritime resources. This recognition gives the opportunity and right of non-State entities to seek remedies from the International Seabed Authority, States or other entities which were not able to participate in seabed activities previously. This also makes non-State entities fall into the jurisdiction of the Tribunal with respect to seabed activities, which means their utilization of maritime resources in the Area and impact on the quality and changes of the maritime environment are subject to rigorous control and legal limitation, and that they enjoy the same important status as States and other participants.

Jurisdiction of mediation, *ad hoc* arbitral tribunal, *ad hoc* Chamber and Seabed Disputes Chamber are compulsory. The compulsory jurisdiction of the Tribunal offers a new method of peaceful settlement of maritime disputes. It provides certain guarantees and procedure with the disputing parties in making their claims, when they cannot reach an agreement on settling the dispute through judicial proceedings after the occurrence of the dispute. It helps develop and protect vital interest of the international society through the peaceful settlement of international disputes.

The Tribunal shall be open to entities other than States Parties. Following the intentions of the disputing parties, the Tribunal may deal with disputes arising out of maritime agreements other than the Convention. In other words, as per provisions of the Agreement, the Tribunal is authorized to deal with disputes in which all or some of the disputing parties are non-State entities, including private-owned companies, inter-governmental organizations and even disputes among individuals. This establishes a professional, competent and standing judicial organ

with recognition and attention from States all over the world and international representativeness for international maritime affairs. It helps to resolve maritime disputes in accordance with prospective and current maritime agreements. Therefore, it represents a new and hopefully widely-accepted opportunity and an important approach of peaceful settlement of international disputes.

The significant increase of the number of international courts and tribunals in the international law without a unified judicial organ definitely leads to issues of conflict and coordination among these courts and tribunals and these issues are increasingly worse. The Appeal Chamber of the International Criminal Tribunal for former Yugoslavia once stated, "In the international law, every tribunal is a self-contained system (unless otherwise provided for)." Obviously, a general rule of resolving coordination and conflicts does not exist here. The issues can only be solved within the "self-contained system," namely in the Court or the Tribunal to which the case is submitted. Sometimes, relevant documents establish *ad hoc* courts or tribunals for this purpose. However, the issues would usually be solved by applicable law of the Court or Tribunal accepting the case. If the Court or the Tribunal fails to foresee such issues under the provisions of the legal documents, then it will become an issue of interpretation.

The functions of the Commission are to consider the data and other materials submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and provide advisory opinions on matters related to delimitation of outer limits of the continental shelf to coastal States. Coastal States' delimitations of the continental shelf on the basis of the Commission's advisory opinions shall be final and binding. Its purpose is to make clear delimitations between the continental shelf under coastal States' jurisdiction and the international seabed area as common heritage of human kind. However, the Commission is not an adjudicatory organ. The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. The Commission shall not affect or intervene in inter-State disputes of delimitations either on land or in the sea.

The International Court of Justice is a general international judicial organ established by the Charter of the United Nations and the Statute of the Court. The International Tribunal for the Law of the Sea is a special international judicial organ established by the United Nations Convention on the Law of the Sea and the Statute of the International Tribunal for the Law of Sea. The two judicial organs each perform their respective functions and are not subordinated to each other.

One is in charge of settling international disputes peacefully under the instruction of the Security Council; the other takes responsibility for settling disputes peacefully regarding the sea and its resources. However, for the United Nations, it has to enhance cooperation with the Tribunal, a special judicial organ, in order to play its due role. The United Nations recognizes the Tribunal as an independent international judicial body with jurisdiction as provided for in the relevant provisions of the Convention and the Statute of the International Tribunal annexed thereto. The Tribunal recognizes the responsibilities of the United Nations under the Charter of the United Nations, in particular in the fields of international peace and security, economic, social, cultural and humanitarian development and the peaceful settlement of international disputes. The United Nations and the Tribunal both undertake to respect the status and mandate of each other and to establish cooperative working relations pursuant to the provisions of the Agreement.

China is a State with large sea areas. In order to move towards the sea, make full use of and preserve marine resources, maintain maritime peace and security, and handle the relations with its neighboring States and other States in the world, besides enhancing worldwide and regional cooperation, China also has to get ready for peaceful settlement of disputes through the Tribunal and international dispute settlement regimes for the promotion of world peace.

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A Comparative Study on the International Tribunal for the Law of the Sea and the International Court of Justice – Focusing on the Tribunal's Characteristics in Respect of Constitution, Jurisdiction, Procedure and Judgment

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Abstract: The International Tribunal for the Law of the Sea (hereinafter "the Tribunal") established in accordance with the United Nations Convention on the Law of the Sea (hereinafter "the Convention") is a permanent tribunal within the regime of the Convention, and its Statute and Rules have been developed with reference to the Statute and the Rules of the International Court of Justice (hereinafter "the Court") with improvements based thereon. Hence, on the occasion of the tenth anniversary of the Convention's entry into force, a comparative study on the Tribunal and the Court would be considered worthwhile and assume great importance to the recurring event. This paper firstly compares relevant provisions of the Statute and the Rules of the Court with those of the Tribunal, pointing out the difference and characteristics of the Tribunal and the Court in terms of constitution, jurisdiction, procedure and judgment. It is finally proposed that the role of the specialized Tribunal shall be given to play.

Key Words: International Tribunal for the Law of the Sea; International Court of Justice; Difference; Characteristics

Three institutions with different responsibilities have been established under

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the United Nations Convention on the Law of the Sea of 1982 (hereinafter "the Convention"), i.e., the Commission on the Limits of the Continental Shelf (CLCS), the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") and the International Seabed Authority. On the occasion of the tenth anniversary of the Convention's entry into force, it is worthwhile to elaborate on the constitution, jurisdiction, procedure and other aspects of the Tribunal. Prior to the establishment of the Tribunal, the International Court of Justice (hereinafter "the Court") had been the exclusive international permanent judicial organ. However, following the Convention's entry into force, the Tribunal established in 1996 has also become a permanent specialized international forum with mandatory authority. Besides, the Statute and the Rules of the Tribunal[1] have been developed with reference to the Statute and the Rules of the Court with improvements based thereon. As a result, it is particularly necessary to focus on the constitution, jurisdiction and procedure of the Tribunal and make comparison thereof with the regime of the Court.

I. Overview of the Dispute Settlement Regime under the Convention

The Convention has rendered a detailed and flexible dispute settlement regime. It has not only provided for dispute settlement methods but also established

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1 The Rules of the Tribunal was adopted in 1997 pursuant to Article 16 of the Statute of the International Tribunal for the Law of the Sea (the Statute of the Tribunal) and was amended twice in 2001. The first amendment was related to the procedure of release of relevant vessels, i.e., amendments were made to Articles 111 and 112 mainly as follows. Article 112, Paragraph 3 of the Rules states originally that the Tribunal, or the President, if the Tribunal is not sitting, shall fix the earliest possible date, within a period of 10 days commencing with the first working day following the date on which the application is received. In the amendment, 10 days was amended as 15 days. Article 112, Paragraph 4 of the Rules states originally that the judgment shall be adopted as soon as possible and shall be read at a public sitting of the Tribunal to be held not later than 10 days after the closure of the hearing. In the amendment, 10 days was amended as 14 days. Article 111, Paragraph 4 of the Rules states originally that the detaining State, which may submit a statement in response with supporting documents annexed, to be filed as soon as possible but not later than 24 hours before the hearing referred to in Article 112, Paragraph 3. In the amendment, 24 hours was amended as 96 hours. The second amendment was made in connection with the term of the Registrar of the Tribunal. Article 32, Paragraph 1 of the Rules originally states that the Tribunal shall elect its Registrar by secret ballot from among candidates nominated by Members. The Registrar shall be elected for a term of seven years and may be reelected. In the second amendment, seven years was amended as five years. These rules consist of 138 articles arranged respectively in the Preamble, Part I (Use of Terms), Part II (Organization) and Part III (Procedure).

dispute settlement procedures and organs,[2] thereby overcoming the disadvantage of the Geneva Conventions on the Law of the Sea of 1958, i.e., not stipulating any dispute settlement regime in the main text but rather including such provision in the annexed protocol. The Convention has managed to incorporate the dispute settlement procedure in its Part XV, i.e., States Parties shall settle any dispute by peaceful means and pay respect to any peaceful means of dispute settlement chosen by any State Party pursuant to an agreement executed thereby; moreover, in accordance with the principle of sovereign equality of States, any State has the right to freely choose its own dispute settlement methods.[3] The scope of the provision below is enormous in terms of significance and State rights.

1. Significance of the Dispute Settlement Regime under the Convention

The dispute settlement regime under the Convention plays an important role in the development of the international dispute regime. First, any dispute arising from the interpretation or application of the Convention shall, in principle, be submitted to a binding international court of justice, and a mandatory dispute settlement procedure shall be applied. Second, in the dispute settlement regime under the Convention, it is specified that not only States but also self-governing associated States, non-autonomous regions and organs having transferred authority concerning relevant matters of the Convention from the States Parties to international organizations, are competent as contentious parties. With respect to disputes concerning activities addressed to the International Seabed Area, regardless disputes between States Parties, disputes between a State Party and the International Seabed Authority, or disputes between parties to a contract, being the States Parties, the International Seabed Authority or the Enterprise, State enterprises and natural or juridical persons, the Seabed Disputes Chamber shall also have jurisdiction. In other words, an entity other than a State may also lodge a complaint to an international court of justice.[4] This has affected the issue of subject under international law, but since the approval of the States has been obtained and

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2 John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law*, London: Oxford University Press, 2000, p. 84.

3 Souji Yamamoto, *The Law of the Sea*, Tokyo: Sanseido, 1997, pp. 267~268 (in Japanese); Yukito Makita, Legal Structure of Dispute Settlement Regime under the United Nations Convention on the Law of the Sea (II), *Journal of International Law and Diplomacy*, Vol. 82, No. 4, 1983, pp. 68~69 (in Japanese); Carnegie A. R., The Law of the Sea Tribunal, *International and Comparative Law Quarterly*, Vol. 28, 1979, pp. 669~684.

4 Hideo Takabayasi, *Achievements and Topics of the United Nations Convention on the Law of the Sea*, Tokyo: Toshindo Publishing, 1996, pp. 202~203. (in Japanese)

the scope remains very limited, the impact on the subject under international law would not be huge in principle.

2. Necessity of Establishing the Tribunal

During the Third Session of the United Nations on the Law of the Sea, hot debates were carried out regarding whether or not the Tribunal shall be established. Developed countries, which were against the establishment of the Tribunal, claimed that disputes arising in relation with the law of the sea shall be handled by the Court on a continual basis. The main grounds put forward were that the Court had played a significant role in the international dispute settlement regime, established its position as the supreme judicial organ in the international community and proved itself competent for settling disputes concerning the law of the sea. They emphasized that disputes arising out of the interpretation and application of the new Convention shall be settled within the Court playing a core role. With regard to the expansion of the parties to the Convention, they envisaged that a review of the Statute of the Court would be sufficient and no need for the establishment of the Tribunal has been advanced. They support the view that it would also be advisable to establish a new chamber under the Court and dedicate it to handling the disputes relating to the law of the sea, thereby strengthening the Court's capability to entertain new disputes involving the law of the sea. Developing countries, which were in favor of the establishment of the Tribunal, held that disputes under the Convention were highly particular and specialized, and along with the diversification of the subject, the scope of *ratione personae* had been expanded. In their opinion, even if the Court's qualification as a party was expanded, it would still be necessary to constitute a tribunal for the law of the sea for comprehensively handling disputes regarding the law of the sea. Meanwhile, they stressed that judgments over the interpretation of and disputes over the Convention should be made by a professional tribunal in order to comply with the purpose of the Convention. Concurrently, developing countries had sought active

reform by the Court and had been dissatisfied with the performance thereof.[5] In the end, developing countries succeeded in the debates and a provision of establishing a tribunal was incorporated into the Convention. The establishment of the Tribunal has been highly beneficial for a uniform interpretation of the Convention and the handling of disputes and special activities in relation to the law of the sea.[6] It is also of great significance to the realization of the purpose of the Convention and the construction of the new international maritime order.

II. Comparing the Organization of the Tribunal and the Court

1. Different Status

The Court shall be one of the principal organs of the United Nations and the principal judicial organ thereof.[7] Judging upon Article 287, Paragraph 1 of the Convention[8] and Annex VI, Article 1, Paragraph 1 of the Convention[9], the Tribunal is constituted in accordance with Annex VI to the Convention. In other words, the Court is a permanent judicial organ of the United Nations, while the Tribunal is a

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5 Wu Hui, *Research on the International Tribunal for the Law of the Sea*, Beijing: China Ocean Press, 2002, pp. 10~13 (in Chinese); Yukito Makita, Legal Structure of Dispute Settlement Regime under the United Nations Convention on the Law of the Sea (II), *Journal of International Law and Diplomacy*, Vol. 82, No. 4, 1983, pp. 64~65 (in Japanese). Additionally, when handling disputes in the field of the law of the sea, some scholars spare no effort in asserting that the due effect of the Court shall be given full rein to. See Shigeru Oda, The New Fishery System and Dispute Settlement – A Blind Spot in the Deliberation at the Third United Nations Conference on the Law of the Sea, *Journal of International Law and Diplomacy*, Vol. 79, No. 4, 1980, pp. 1~8. (in Japanese)

6 Tadao Kuribayashi, *Comment on the United Nations Convention on the Law of the Sea (II)*, Tokyo: Yuhihaku Publishing, 1994, p. 248 (in Japanese). L. Sohn, *Settlement of Disputes Arising out of the Law of the Sea Convention*, pp. 516~517.

7 Article 7, Paragraph 1 and Article 94 of the Charter of the United Nations.

8 Article 287, Paragraph 1 of the Convention states that: 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.

9 Annex VI, i.e., the Statute of the International Tribunal for the Law of the Sea, Article 1, Paragraph 1 of the Convention prescribes that, the International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute.

permanent specialized institution within the regime of the Convention.

2. Election of Judges

The Court shall be composed of a body of 15 independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law. The members of the Court shall be elected for nine years and may be re-elected. The Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea. The members of the Tribunal shall be elected for nine years and may be re-elected.[10] The reason why the number of members of the Tribunal has been increased to 21 is that 11 of them shall be elected to compose the permanent Seabed Disputes Chamber of the Tribunal. At the same time, members of the Tribunal shall be experts in the field of the law of the sea. On the other hand, the Tribunal of the Court stipulates that, at every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that, in the body as a whole, the representation of the main forms of civilization and of the principal legal regimes of the world should be assured. On the other hand, the Statute of the Tribunal provides that in the Tribunal as a whole, the representation of the principal legal regimes of the world and equitable geographical distribution shall be ensured, and that there shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations.[11] The above regulations have been embodied judging from the composition of members of the Tribunal established in 1996.

The members of the Court shall be elected from a list of not more than four persons nominated by the national groups in the Permanent Court of Arbitration. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, and submit this list to the General Assembly and to the Security Council. The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court. Those candidates who obtain an absolute majority of votes in the General

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10 Article 2, Article 3 and Article 13, Paragraph 1 of the Statute of the Court; Article 2, Paragraph 1 and Article 5, Paragraph 1 of the Statute of the Tribunal.

11 Article 9 of the Statute of the Court; Article 2, Paragraph 2 and Article 3, Paragraph 2 of the Statute of the Tribunal.

Assembly and in the Security Council shall be considered as elected. In the case of electing members of the Tribunal, each State Party may nominate not more than two persons. The Secretary-General of the United Nations or the Registrar of the Tribunal shall prepare a list in alphabetical order of all the persons thus nominated. The members of the Tribunal shall be elected by secret ballot at meetings attended by over two-thirds of the States Parties. The person elected to the Tribunal shall be those nominees who obtain the largest number of votes and a two-thirds majority of the States Parties present and voting, provided that such majority includes a majority of the States Parties.[12] At the election of judges of the Tribunal, not only States but also subjects set out in Article 305, Paragraph 1 of the Convention such as self-governing associated States and international organizations can get involved. However, the international organization of the European Union cannot participate in voting for the purpose of preventing its member States from repeatedly exercising the right of representation at the time of voting.[13]

The "political color" of electing judges of the Tribunal is stronger than that of electing judges of the Court for the following reasons: When voting candidates of the Tribunal, the States will take into account the status of the States Parties which have directly nominated; at the time of electing judges of the Court, the exercise of voting rights at the General Assembly and the Security Council by members of the Security Council constitutes double voting, while the principle of one country one vote is abided by at the election of judges of the Tribunal. Meanwhile, according to the Statute of the Tribunal, in the event of more than one national of the same State having obtained necessary votes and getting elected, and in the event that not all the seats are filled at the first election, provisions like Article 10, Paragraph 3 and

12 Articles 4 to 10 of the Statute of the Court; Article 4 of the Statute of the Tribunal.

13 Article 4(4) of Annex IX (Participation by International Organizations) to the Convention states that: participation of such an international organization shall in no case entail an increase of the representation to which its member States which are States Parties otherwise be entitled, including rights in decision-making.

Article 12 of the Statute of the Court[14] do not exist.

3. Functions and Authority of Judges

No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature. Likewise, no member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration or the exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed. Therefore, a member of the Tribunal may engage in a profession not forbidden in this article, and any doubt on these points shall be resolved by decision of the majority of the other members of the standing Tribunal. It is also provided that all available members of the Tribunal shall sit. The Tribunal shall determine which members are suitable to constitute the Tribunal for the consideration of a particular dispute.[15] In other words, the members of the Tribunal do not work on a full-time basis and their position is essentially different from that of members of the Court, difference which can also be deduced from the following regulations. First, each member of the Court shall receive an annual salary. The President shall receive a special annual allowance. On the other hand, each elected member of the Tribunal shall receive an annual allowance and, for each day on which he exercises his functions, a special allowance. Moreover, the salaries, allowances and compensation shall be determined from time to time at meetings of the States Parties, taking into account

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14 Article 10, Paragraph 3 of the Statute of the Court stipulates that in the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected. Article 12, Paragraph 1 provides that: if, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance. Paragraph 2 prescribes that: if the joint conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7. Paragraph 3 regulates that: if the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council. Paragraph 4 indicates that: in the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

15 Article 16, Paragraph 1 of the Statute of the Court; Article 7, Paragraph 1, Article 7, Paragraph 3 and Article 13, Paragraphs 1 and 2 of the Statute of the Tribunal.

the workload of the Tribunal.[16] Second, the members of the Tribunal, when engaged on the business of the Tribunal, shall enjoy diplomatic privileges and immunities. Such stipulation agrees with Article 19 of the Statute of the Court. However, the Court is under the protection of Article 105 of the Charter of the United Nations with respect to the United Nations treaty on privileges and immunities. On the contrary, the Tribunal is not an organ under the United Nations and hence has to enter into a new agreement in order to ensure the privileges and immunities of its members.[17] Such an agreement has been entered into in 1997.

4. Nationality of the Judge

Article 17, Paragraphs 1 to 3 of the Statute of the Tribunal regulate: "Members of the Tribunal of the nationality of any of the parties to a dispute shall retain their right to participate as members of the Tribunal. If the Tribunal, when hearing a dispute, includes upon the bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal. If the Tribunal, when hearing a dispute, does not include upon the bench a member of the nationality of the parties, each of those parties may choose a person to participate as a member of the Tribunal". These provisions are identical with those in Article 31, Paragraphs 1 to 3 of the Statute of the Court. Article 31, Paragraph 2 of the Statute of the Court sets out: The judge of the nationality of one of the parties shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5. Namely, it would be preferable that such a judge be chosen from nominated judge candidates, which precondition does not apply under the Statute of the Tribunal. The regime concerning the nationality of judge also applies to the Seabed Disputes Chamber and the Special Chamber. Such a regime applies equally to the regulations applicable to a chamber established

16 Article 32, Paragraphs 1 and 2 of the Statute of the Court; Article 18, Paragraphs 1 and 5 of the Statute of the Tribunal.

17 Article 10 of the Statute of the Tribunal; Article 19 of the Statute of the Court prescribes that: the members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities. Article 105, Paragraph 1 of the Charter of the United Nations states that: the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. Paragraph 2 stipulates that: representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. Moreover, Article 7 of the Charter of the United Nations indicates that the International Court of Justice is established as the principal organs of the United Nations; Article 92 provides that the International Court of Justice shall be the principal judicial organ of the United Nations.

by the Court for dealing with particular categories of cases and to a chamber of summary procedure established thereby.[18]

Article 31, Paragraph 4 of the Statute of the Court provides: "the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties". Article 26, Paragraph 2 states: "The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties". Article 17, Paragraph 4 of the Statute of the Tribunal prescribes: The President, in consultation with the parties, shall request specified members of the Tribunal forming the chamber, as many as necessary, to give place to the members of the Tribunal of the nationality of the parties concerned or to the members specially chosen by the parties. Moreover, Article 15, Paragraph 2, referring to chambers dealing with a particular dispute, thereof provides: "The composition of such a chamber shall be determined by the Tribunal with the approval of the parties". It is thus clear that, in terms of the composition of a chamber, the Tribunal pays more respect to the will of the parties concerned.

Article 17, Paragraph 5 of the Statute of the Tribunal stipulates: "Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be considered as one party only". This provision agrees with Article 31, Paragraph 5 of the Statute of the Court. Nevertheless, since a chamber is made up of a small number of members, it is not that simple when it deals with the application of the regime concerning the nationality of judge and the regime of judge chosen *ad hoc*. Additionally, the Tribunal shall be open to each State Party and to entities other than States Parties (Article 20 of the Statute of the Tribunal). In particular, where such a regime is applied to the Seabed Disputes Chamber, the situation will be even more complicated. In this regard, Article 22 of the Statute of the Tribunal contains specific provisions. For instance, Paragraph 1 in this article states that an entity other than a State may choose a judge *ad hoc* only if: (1) one of the other parties is a State Party and there is upon the bench a judge of its nationality or, where such party is an international organization, there is upon the bench a judge of the nationality of one of its member States or the State Party

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18 Article 17, Paragraph 4 of the Statute of the Tribunal; Article 31, Paragraph 4 of the Statute of the Court.

has itself chosen a judge *ad hoc*; or (2) there is upon the bench a judge of the nationality of the sponsoring State of one of the other parties.

The regime concerning the nationality of judge has been developed in keeping with the arbitral tradition. Allowing judges of nationality of the parties concerned or judges chosen *ad hoc* to participate in the proceedings is actually against the will of the adjudication organ even though they do not represent the interests of the States concerned but rather are at the stance of a third party. The Tribunal has adopted such a regime on the grounds that these judges can soundly understand the claims of the parties to the dispute, participate in the whole hearing process and get involved in the preparation of the judgment, which are helpful for enhancing confidence in the Court or the Tribunal on the part of the parties to the dispute and thus explaining the judgment to the nationals. Such a regime has been proved convenient during the development of international judgment.

5. Experts

Article 289 of the Convention stipulates: "In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII (Special Arbitration), article 2, to sit with the court or tribunal but without the right to vote". Article 9 of the Statute of the Court states: "The Court may […] decide, for the purpose of a contentious case or request for advisory opinion, to appoint assessors to sit with it without the right to vote". Article 15 of the Statute of the Tribunal specifies: "Where the Tribunal selects experts at the request of a party or *proprio motu*, it shall make such selection in accordance with the Tribunal President's proposal". In this provision of the Statute of the Tribunal, the assessor in the case of the Court is substituted by an expert, which is decided by the Tribunal's specialization.

6. Special Chamber

Article 26 of the Statute of the Court provides: "The Court may from time to time form one or more chambers for dealing with particular categories of cases, and may at any time form a chamber for dealing with a particular case". Such provision is equal to that of Article 15, Paragraphs 1 and 2 of the Statute of the Tribunal. Concurrently, Article 15, Paragraph 3 of the Statute of the Tribunal states: "With a view to the speedy dispatch of business, the Tribunal shall form annually a chamber, which may hear and determine disputes by summary procedure". Paragraph 5 in that article prescribes: "A judgment given by a chamber shall be

considered as rendered by the Tribunal". Article 27 of the Statute of the Court bears the same content as this provision.

III. Comparing Jurisdiction of the Tribunal and the Court

1. *Ratione Personae*

Article 34, Paragraph 1 of the Statute of the Court states: Only States may be parties in cases before the Court. Article 35, Paragraphs 1 and 2 stipulate: The Court shall be open to the States Parties to the present Statute. The conditions under which the Court shall be open to other States shall be laid down by the Security Council. It can be seen that only States may be parties in cases before the Court. Article 291 of the Convention also stipulates: "All the dispute settlement procedures specified in Part XV shall be open to States Parties. The dispute settlement procedures specified in Part XV shall be open to entities other than States Parties only as specifically provided for in this Convention". Article 20 of the Statute of the Tribunal prescribes thereby: "The Tribunal shall be open to each State Party and to entities other than States Parties which have met certain conditions". Namely, the Tribunal's *ratione personae* stays as follows: (1) Not only the States Parties to the Convention but also the self-governing associated States, non-autonomous regions and international organizations which have met conditions specified in Article 305, Paragraph 1 of the Convention are included; (2) With respect to any case expressly stated in Part XI, besides the States Parties, the International Seabed Authority, the Enterprise, state enterprises and natural or juridical persons can also be a party (Article 187 of the Convention); (3) As regard to any case submitted in accordance with any other agreement which confers jurisdiction on the Tribunal as accepted by all the parties to the case, the Tribunal shall be open to entities other than the States Parties. Of course, these agreements are not limited to international agreements. Provided that all the parties to the case accept jurisdiction by the Tribunal, the scope of subject is unlimited.[19]

2. *Ratione Materiae*

Article 36, Paragraph 1 of the Statute of the Court regulates: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and

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19 Hideo Takabayasi, *Achievements and Topics of the United Nations Convention on the Law of the Sea*, Tokyo: Toshindo Publishing, 1996, p. 221. (in Japanese)

conventions in force".

Article 288 of the Convention prescribes: "A court or tribunal shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part. A court or tribunal shall also have jurisdiction over 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". The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, and any other chamber or arbitral tribunal referred to in Part XI, Section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith. Article 21 of the Statute of the Tribunal states: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". With regard to *ratione materiae*, all cases shall be included under the Statute of the Court, while all disputes and applications relating to the Convention shall apply under the Statute of the Tribunal. As such, the scope of jurisdiction of the Court is wider than that of the Tribunal, which is decided by the nature of the Tribunal.

Article 22 of the Statute of the Tribunal specifies: "If all the parties to a treaty or convention already in force and concerning the subject matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal". In other words, a dispute may be submitted to the Tribunal as along as all the parties to a treaty so agree. However, the time basis of "treaty already in force" is not made clear, and it is uncertain whether or not it can be construed as treaty in force when the Convention is enacted.

3. Choosing Jurisdiction

Article 287, Paragraph 1 of the Convention stipulates: "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 (i.e. the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal and a special arbitral tribunal) for the settlement of disputes concerning the interpretation or application of this Convention". Namely, the States Parties have chosen jurisdiction by the Court or the Tribunal by accepting dispute settlement methods in advance. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, the dispute may be submitted only

to that procedure. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, the dispute may be submitted only to the arbitral tribunal, unless the parties otherwise agree.

In accordance with Article 287 of the Convention, the States Parties can declare in writing that they accept mandatory jurisdiction by the court or tribunal. Simultaneously, with respect to disputes set out in Article 298 of the Convention, the States Parties can also declare in writing that they do not accept mandatory jurisdiction by the court or tribunal they have selected, with respect to one or more of the following optional exceptions: disputes concerning sea boundary delimitations or those involving historic bays or titles; disputes concerning military activities, disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction, and 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. Besides, a State Party, which has made such a declaration, may at any time withdraw it.[20]

IV. Comparing Procedures of the Tribunal and the Court

A. Proceedings of the Tribunal and the Court

Article 24, Paragraph 1 of the Statute of the Tribunal states: "Disputes are submitted to the Tribunal, as the case may be, either by notification of a special agreement or by written application, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated". Such provision is the same with that in Article 40, Paragraph 1 of the Statute of the Court. In terms of procedure, where there is no corresponding stipulation in the Statute of the Tribunal, supplementary provision shall be made therein. For example, as regards the official language of the Tribunal, Article 43 of the Statute of the Tribunal prescribes: "The official languages of the Tribunal are English and French", which corresponds to Article 39 of the Statute of the Court. Article 53 of the Statute of the Tribunal specifies: "The parties shall be represented by agents". The parties may have the assistance of counsel or advocates before the Tribunal. Such contents are identical to those of Article 42, Paragraphs 1 and 2 of the Statute of the Court.

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20 Article 298, Paragraphs 1 and 2 of the Convention.

Provisions on the proceedings (written proceedings and oral proceedings) can be found in Article 44 of the Rules of the Tribunal corresponding to Article 43 of the Statute of the Court. However, provision like Article 43, Paragraph 3[21] of the Statute of the Court does not exist in the Statute of the Tribunal. Provisions relevant to the revision of a judgment can be found in Articles 127 to 129 of the Statute of the Tribunal and Article 61 of the Statute of the Court.

Article 26, Paragraph 1 of the Statute of the Tribunal regulates: "The hearing shall be under the control of the President"; Article 27 further prescribes: "The Tribunal shall make orders for the conduct of the case, decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence". Furthermore, regarding written proceedings, relevant provisions can be found in Articles 44 to 53 of the Statute of the Court and in Articles 59 to 68 of the Statute of the Tribunal. With regard to trial by default, Article 53, Paragraph 1 of the Statute of the Court indicates: "Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim". Accordingly, Article 28 of the Statute of the Tribunal sets out: "When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision". Absence of a party or failure of a party to defend its case shall not constitute a barrier to the proceedings. It is visible that the Tribunal takes a neutral stance in the case of a party failing to appear before the Tribunal or failing to defend its case.

B. (Accessary) Special Procedures of the Tribunal and the Court

1. Provisional Measures

It takes a considerable long time for the final judgment to be made following the submission of the dispute to the Court. For the purpose of preserving the rights of all the parties and preventing the occurrence of irreversible situations, the Court can take provisional measures. For this purpose, Article 41 of the Statute of the Court provides: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". Notwithstanding, as to whether or

21 Article 43, Paragraph 3 of the Statute of the Court states: "These communications shall be made through the Registrar, in the order and within the time fixed by the Court".

not the provisional measures are legally binding and whether or not the parties to a dispute are obliged to observe the provisional measures, there is no definite provision under the Statute of the Court. In this regard, explicit prescription can be indeed found in the Convention. For instance, Article 290, Paragraph 1 of the Convention stipulates: "the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision". And Paragraph 6 states: "The parties to the dispute shall comply promptly with any provisional measures prescribed under this article". It can be seen that the Convention has explicitly provided for the parties' obligation of complying with the provisional measures and provided that the court or tribunal may prescribe any provisional measures in order to prevent serious harm to the marine environment.

Article 75, Paragraph 1 of the Rules of the Court stipulates: "The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties". Article 290, Paragraph 3 of the Convention states: "Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard". In the meantime, Article 74, Paragraphs 1 and 2 of the Rules of the Court regulates: "A request for the indication of provisional measures shall have priority over all other cases". The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency. Article 25, Paragraph 1 of the Statute of the Tribunal indicates: "In accordance with Article 290, the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures". Article 90, Paragraph 1 of the Statute of the Tribunal prescribes: "Subject to Article 112, Paragraph 1, a request for the prescription of provisional measures has priority over all other proceedings before the Tribunal".[22] Article 25, Paragraph 2 of the Statute of the Tribunal states: "If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum, the provisional measures shall be prescribed by the chamber of summary procedure, and shall be

22 Article 112, Paragraph 1 of the Rules of the Tribunal stipulates: "If the Tribunal is seized of an application for release of a vessel or its crew and of a request for the prescription of provisional measures, it shall take the necessary measures to ensure that both the application and the request are dealt with without delay".

subject to review and revision by the Tribunal".

With regard to the dispute settlement regime under the Convention, it can be perceived from the provisions of Article 287 and Article 290, Paragraph 3 of the Convention that in terms of the prescription of provisional measures, the Tribunal's authority overrides that of the Court, an arbitral tribunal and a special arbitral tribunal.

2. Preliminary Proceedings

Article 294, Paragraph 1 of the Convention sets out: "A court or tribunal provided for in Article 287 to which an application is made in respect of a dispute referred to in Article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case". Paragraph 2 states: "Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with Paragraph 1". Paragraph 3 finally prescribes: "Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure". The regime of preliminary proceedings means that a court or tribunal does not take any action until the evidence is clear-cut for the purpose of preventing the applicant's abuse of legal process. It differs from the regime of preliminary objection concerning disputes in respect of whether or not the court or tribunal has jurisdiction.

3. Preliminary Objection

Article 288, Paragraph 4 of the Convention indicates: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal". Such provision matches perfectly with Article 36, Paragraph 6 of the Statute of the Court. Article 79 of the Rules of the

International Court of Justice[23] provides for preliminary objection, and so does Article 97 of the Rules of the Tribunal.

4. Intervention in the Proceedings

In respect of a third party's intervention in the proceedings, relevant provisions can be found in Articles 62 and 63 of the Statute of the Court as well as in Articles 31 and 32 of the Statute of the Tribunal. Article 31, Paragraph 1 of the Statute of the Tribunal stipulates: "Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit to the Tribunal to be permitted to intervene". States entitled to request to intervene in the proceedings are limited to those whose interest of a legal nature may be affected by the decision in any dispute. A similar provision also exists in the Statute of the Court, but while the Statute of the Court puts it as States whose "judgment in any case" may be affected, the Statute of the Tribunal puts it as States whose "decision in any dispute" may be affected. Despite the scope of request to intervene in the proceedings before the Tribunal is somewhat expanded, the subject of request is limited to States Parties, which is restrictive, to some degree, compared with the subject of request before the Court. Meanwhile, provision of Article 31,

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23 Article 79, Paragraph 1 of the Rules of the Court provides: "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time-limit fixed for the delivery of that party's first pleading". Paragraph 4 states: "The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence, which the party may desire to produce. Copies of the supporting documents shall be attached". Paragraph 5 prescribes: "Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time-limit within which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned". Paragraph 6 notes: "Unless otherwise decided by the Court, the further proceedings shall be oral". Paragraph 7 indicates: "The statements of facts and law in the pleadings referred to in paragraphs 4 and 5 of this Article, and the statements and evidence presented at the hearings contemplated by paragraph 6, shall be confined to those matters that are relevant to the objection". Paragraph 8 regulates: "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue". Paragraph 9 provides: "After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

Paragraph 3[24] is added in the Statute of the Tribunal. Additionally, Article 63 of the Statute of the Court prescribes: intervention in the proceedings applies only "when the construction of a convention is in question". Article 32 of the Statute of the Tribunal provides: intervention in the proceedings applies where "the interpretation or application of an international agreement is in question". As can be deduced, the scope of intervention in the proceedings is expanded before the Tribunal.

With reference to the Rules of the Court (Articles 81 to 86), the Rules of the Tribunal (Articles 99 to 104) provide for intervention in the proceedings almost the same way. Article 100, Paragraph 1 of the Rules of the Tribunal states: "A State Party or an entity other than a State Party referred to in Article 32, Paragraphs 1 and 2, of the Statute which desires to avail itself of the right of intervention conferred upon it by Article 32, Paragraph 3, of the Statute shall file a declaration to that effect". As such, regarding the interpretation of the Convention, a State other than a State Party and a subject other than a State can also intervene in the proceedings.

5. Prompt Release of Vessels and Crews

The regime of release of vessels and crews is newly added into the Convention concurrently with the introduction of the regime of exclusive economic zone.[25] After the issue of prompt release of vessels and crews is submitted to a court or tribunal, if there is an agreement between the parties to a dispute, it is not required that a decision in the dispute should be adopted by an international court or tribunal set out in Article 287 of the Convention. Meanwhile, since it takes time for an arbitral tribunal and a special arbitral tribunal to form a tribunal upon the receipt of a case, it is very foreseeable that the issue of prompt release of vessels and crews will be submitted to the Tribunal. The judicial practices of the Tribunal have also proved this point. Article 292, Paragraph 3 of the Convention prescribes: "The court or tribunal shall deal without delay with the application for release". Article 112 of the Rules of the Tribunal stipulates: "The Tribunal shall give priority to applications for release of vessels or crews over all other proceedings before the Tribunal. If the applicant has so requested in the application, the application shall be dealt with by the Chamber of Summary Procedure, provided that, within five days of the receipt

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24 Article 31, Paragraph 3 of the Statute of the Tribunal states: "If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened".

25 Takashi Aoki, Five Years of the International Tribunal for the Law of the Sea, *Study of Law*, Vol. 75, No. 2, 2002. (in Japanese)

of notice of the application, the detaining State notifies the Tribunal that it concurs with the request. The Tribunal, or the President if the Tribunal is not sitting, shall fix the earliest possible date, within a period of 15 days commencing with the first working day following the date on which the application is received". Article 292, Paragraph 2 of the Convention regulates: "The application for release may be made only by or on behalf of the flag State of the vessel". Article 110, Paragraph 2 of the Rules of the Tribunal indicates: "A State Party may at any time notify the Tribunal of: (a) the State authorities competent to authorize persons to make applications on its behalf under article 292 of the Convention; (b) the name and address of any person who is authorized to make an application on its behalf". In addition, it is generally believed that the principle of the exhaustion of local remedies should not apply, when it comes to application for release.

Article 292, Paragraph 1 of the Convention states: the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security; Paragraph 3 prescribes: "The court or tribunal shall deal without delay with the application for release". In spite of the above provisions, the Convention does not contain any prescription on the applicable standard for determining a reasonable bond, while in practice the determination is extremely difficult. Pursuant to Tribunal's judicial practices, the Tribunal decides on the bond by considering the price of the vessel and the cargo loaded therein. Article 113, Paragraph 1 of the Rules of the Tribunal stipulates: "The Tribunal shall in its judgment determine in each case in accordance with Article 292 of the Convention whether or not the allegation made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded". At the same time, Article 113, Paragraph 2 of the Rules of the Tribunal regulates: "If the Tribunal decides that the allegation is well-founded, it shall determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel or the crew". In this regard, it is generally deemed that where the detaining State unlawfully demands a large sum of bond and refuses to implement the release on the ground that the applicant has failed to post such a bond, it shall be affirmed that the detaining State has breached relevant provisions of the Convention.

Article 292, Paragraph 4 of the Convention sets out: "Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or

tribunal concerning the release of the vessel or its crew. Such decision shall be final and binding and shall be complied with by all the parties to the dispute".[26]

V. Comparing Judgment of the Tribunal and the Court

Articles 29, 30 and 33 of the Statute of the Tribunal provide for the decision method of the Judgment, the content of the Judgment and the finality and binding force of decisions respectively, corresponding to Articles 55 to 60 of the Statute of the Court.

As regards the enforcement of a judgment, Article 94 of the Charter of the United Nations prescribes: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment". With respect to the enforcement of relevant judgments by a tribunal, the Convention contains two provisions exclusively: First, Article 165, Paragraph 2(j) of the Convention indicates that the Legal and Technical Commission shall make recommendations to the Council with respect to measures to be taken, upon a decision by the Seabed Disputes Chamber; second, Article 162, Paragraph 2(V) of the Convention states that the Legal and Technical Commission shall notify the Assembly upon a decision by the Seabed Disputes Chamber, and make any recommendations which it may find appropriate with respect to measures to be taken. Simultaneously, Article 39 of the Statute of the Tribunal provides: "The decisions of the chamber shall be enforceable in the territories of the States Parties". It is therefore that the Tribunal's enforcement of a judgment lacks follow-up measures as those that are in the possession of the Court.

1. Construction of a Judgment

Article 33, Paragraph 3 of the Statute of the Tribunal prescribes: "In the event of dispute as to the meaning or scope of the decision, the Tribunal shall construe it

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26 Article 286 of the Convention 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".

upon the request of any party". Article 60 of the Statute of the Court also stipulates: "In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party". The Court's object of construction is limited to the meaning or scope of the "judgment", while the Tribunal's object of construction is the meaning or scope of the "decision", which also includes the "order". Article 126, Paragraph 1 of the Rules of the Tribunal regulates: "In the event of dispute as to the meaning or scope of a judgment, any party may make a request for its interpretation". Here, only "judgment" constitutes the object of construction.

2. Revision of a Judgment

Article 61 of the Statute of the Court provides for revision of a judgment, but no corresponding provisions can be found in the Convention or in the Statute of the Tribunal. To this end, with reference to the Statute of the Court (Article 61) and the Rules of the Court (Articles 99 and 100), provisions on revision have been developed in the Rules of the Tribunal, mainly Article 127, Paragraph 1, Article 128, Paragraph 3 and Article 129 thereof.[27]

3. Appeal

Article 287, Paragraph 1 of the Convention grants equal status to the Tribunal, the Court, an arbitral tribunal and a special arbitral tribunal. It seems that with regard to a judgment made by any court or tribunal, no appeal shall be made with another tribunal or court. However, the provisions of the Convention reveal that the circumstance is really not so. A dispute, which has been dealt with by other international courts or other international organizations, can still be referred to a

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27 Article 127, Paragraph 1 of the Rules of the Tribunal states: "A request for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Tribunal and also to the party requesting revision, always provided that such ignorance was not due to negligence. Such request must be made at the latest within six months of the discovery of the new fact and before the lapse of ten years from the date of the judgment". Article 128, Paragraph 3 stipulates: "The Tribunal, before giving its judgment on the admissibility of the application, may afford the parties a further opportunity of presenting their views thereon". Article 129 prescribes: "If the judgment to be revised or to be interpreted was given by the Tribunal, the request for its revision or interpretation shall be dealt with by the Tribunal. If the judgment was given by a chamber, the request for its revision or interpretation shall, if possible, be dealt with by that chamber. If that is not possible, the request shall be dealt with by a chamber composed in conformity with the relevant provisions of the Statute and these Rules. If, according to the Statute and these Rules, the composition of the chamber requires the approval of the parties which cannot be obtained within time-limits fixed by the Tribunal, the request shall be dealt with by the Tribunal."

different court or tribunal specified in Article 287 of the Convention for appeal. Specific circumstances are as follows: (1) circumstances specified in Article 281, Paragraph 1 of the Convention[28] and in Article 286, Paragraph 1 of the Convention; (2) circumstances specified in Article 188, Paragraph 2(2) of the Convention[29]; (3) circumstances specified in Annex VII, Article 11 and Annex VIII, Article 4[30]; conversely, provided that the parties to the dispute have agreed in advance to an appellate procedure, an appeal may be made to another court or tribunal; (4) circumstances specified in Article 298, Paragraph 1(c) of the Convention[31]; (5) circumstances specified in Articles 21 and 22 of the Statute of the Tribunal[32], i.e., as long as the parties to a dispute so agree, the Tribunal can play the role of a superior court. In addition, Article 60 of the Statute of the Court stipulates: "The judgment is final and without appeal". In this article, appeal is explicitly forbidden. Article 33, Paragraph 1 of the Statute of the Tribunal regulates: "The decision of the Tribunal is final and shall be complied with by all the parties to the dispute". It is clear that the Tribunal does not prohibit appeal. Nevertheless, if mutual appeal, among the

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28 Article 281, Paragraph 1 of the Convention states: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure".

29 Article 188, Paragraph 2(2) of the Convention stipulates: "If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or *proprio motu*, that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer such question to the Seabed Disputes Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Seabed Disputes Chamber."

30 Article 11 of Annex VII to the Convention prescribes: "The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute". Annex VIII, Article 4 indicates: "Annex VII, Articles 4 to 13, apply *mutatis mutandis* to the special arbitration proceedings in accordance with this Annex."

31 Article 298, Paragraph 1(c) of the Convention regulates: "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."

32 Article 21 of the Statute of the Tribunal sets out: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". Article 22 states: "If all the parties to a treaty or convention already in force and concerning the subject matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal".

four courts or tribunals set out in Article 287 of the Convention is allowed, except where the parties before the arbitral tribunal and the special arbitral tribunal have agreed in advance to an appellate procedure, inconsistent judgment regarding the interpretation of the Convention and the dispute settlement will be generated, disputes will arise and then the authoritativeness of the judgment will be materially affected. Moreover, even if appeal is not acknowledged, since these four courts or tribunals make judgment independently, inconsistent legal precedents are very likely to occur. We expect that along with the accumulation of legal precedents concerning disputes under the law of the sea, including the less diversified judgment forms and the organic development of the law of the sea, these problems will be gradually overcome and the unification of legal precedents will be achieved eventually.[33] It is left to judicial practice for the proof.

VI. Conclusion

In summary, relevant provisions of the Convention, the Statute of the Tribunal and the Rules of the Tribunal have been analyzed by comparison with the Statute of the Court and the Rules of the Court, and the characteristics of the Tribunal in terms of composition, jurisdiction, procedure and judgment have been expounded.

The Tribunal, which is established in accordance with Annex VI to the Convention, is an international permanent specialized tribunal designed to settle the disputes arising in relation with the interpretation and application of the Convention and of the international agreements relating to the purpose of the Convention. In spite of the limited jurisdiction of the Tribunal, it is still a universal global judicial organ just like the Court. Moreover, the Court has had abundant legal precedents and experience so far and has developed into an authoritative international judicial organ. For the newly established Tribunal, the Court serves as a template, and relevant regulations on the Tribunal's constitution and procedure have been developed with reference to and by revising the Statute of the Court and the Rules of the Court. In order to give full rein to the role of a specialized tribunal, the Tribunal shall overcome the defects of the Court, i.e., long case deciding duration and low efficiency, change the situation of a minority of developed countries controlling the Court, and endeavor to handle and settle disputes in a fair,

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33 Takane Sugihara, Selection of Ocean Dispute Settlement Procedure, *Ocean Times*, No. 29, 1983. (in Japanese)

prompt and reasonable manner. The Tribunal's judicial practice has proved this point. However, the cases having been submitted to the Tribunal so far are mostly request for prompt release of vessels and crews and for prescription of provisional measures. As such, it is necessary to enhance the Tribunal's position. On the basis of fairly and reasonably handling cases and claims, the Tribunal shall continuously accumulate judicial practice experience, build up prestige, boost the States' trust in it and enhance its own position, so as to duly contribute to the realization of the purpose of establishing the Tribunal under the Convention and of the development of a new international maritime order.

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A Study on Regional Cooperation on Fishery Resources Conservation and Management in the South China Sea

Kuen-chen FU *

Abstract: For the eight bordering countries and the whole region, conservation and preservation of the fishery resources in South China Sea is a complicated issue, which cannot be effectively solved by the effort from any single country. It requires cooperation of all relevant countries in the region. With the gradual depletion of the fishery resources in South China Sea and continuous demand for more effective management mechanism of this region, it has become more urgent for all relevant parties in the region to conduct cooperation with regard to fishery resources in South China Sea. According to the relevant regulations in the 1982 United Nations Convention on Law of the Sea and 1995 Agreement on Straddling Fish Stocks, this article discusses the possible ways to establish regional cooperation mechanism concerning South China Sea fishery resources and the basic principle of cooperation on the basis of the legal status of the South China Sea determined by the "three-tier theory".

Key Words: Regional cooperation; Fishery; United Nations Convention on Law of the Sea; Straddling fish stocks; South China Sea

I. Introduction

South China Sea, a semi-closed inland sea surrounded by Vietnam, Cambodia, Thailand, Malaysia, Singapore, Indonesia, the Philippines and China (including the China Mainland and China Taiwan) with a total area of 3.3 million square kilometer, spans over 24 latitudes from north to south (north latitude 3°30' to

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27°40'), forming a large marine ecosystem (LME) in which there are a lot of sub-ecosystems and habitats, including mangrove, seaweed beds and coral reefs hosting abundant fishery resources. The whole South China Sea is home to 1064 fish stocks, 135 shrimp stocks and 73 siphonopods on record, among which about 100 fish stocks are of important economic value,[1] such as ribbon fish/trichiurus haumela, ink fish/sepia, butter fish/psenopsis, olden thread/nemipterus vigatus and other economic fish stocks spreading in the whole South China Sea. Those in the bottom layer are mainly snail mullet/saurida, ribbon fish/trichiurus haumela, golden thread/nemipterus vigatus, grouper/epinephelus, etc., and in the middle and upper layer are mainly golden sardine/sardinella aurita, wart/psenopsis auomala and roundscad/decapterusmaruadsi, while in the middle and south of the South China Sea there are also tuna/thunnus, sail fish/istiophorus and other oceanic fish stocks.[2] The original fishery resources in South China Sea are considerably large in quantity. According to the relevant estimation of researchers, when motor vessels were used for operation in large scale before 1975, the density of fishery resources in northern sea area had reached 1,100 kilograms per square kilometer; while in Beibu Gulf area it had been 2,300 kilograms per square kilometer;[3] and in Xisha Fishing Ground, 1,120 kilogram per square kilometer.[4]

Since 1970s, with the development of fishery operation technology, the fishery resources in South China Sea have rapidly declined and the environmental protection, conservation and management of fishery resources have become a pressing issue for the countries surrounding the South China Sea. The economic fish stocks in this region are all straddling stocks which live in not only exclusive economic zone of a certain country but also in that of other countries or the high seas. In this connection, an effective mechanism of conserving and managing the regional fishery resources may only be established based on the cooperation between the countries surrounding the South China Sea. However, the disputes over sovereignty among relevant countries adjacent to South China Sea have become

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1 LME 36: South China Sea, at http://www.gd-fishmarket.com/fishcondition.htm, 24 January 2004.

2 Editorial Board of Investigation and Division for China Fishery Resources, *China Marine Fishery Resources*, Hangzhou: Zhejiang Science and Technology Publishing House, 1990. (in Chinese)

3 Wu Zhuang, Influence of Prohibition of Fishing on South China Sea Fishery Resources, *Selected Theses for the Seminar on South China Sea Resources and Cross Strait Cooperation*, 12 January 2004. (in Chinese)

4 At http://202.100.218.58/gov/thaiyang/hybl-7.htm, 28 January 2005.

one of the biggest challenges in the world. If the relevant maritime areas are not delimited, any cooperation is infeasible or difficult to be carried out. Luckily, with relevant countries in this region having realized the significance of this problem, the regional political situation has been improving in recent years and the possibility of establishing a regional cooperation mechanism for fishery resources is increasing.

II. Status Quo of Fishery Management in South China Sea

A. Overfishing Makes the Density and Quality of Fishery Resources Rapidly Decline and Fishery Resources Gradually Depleted

The fish yield in South China Sea was 80,000 tons in 1950, which rose to 425,000 tons in 1955, and stayed between 400,000 tons and 800,000 tons from 1956 to 1979. After 1980, due to the increasing motor vessels operating in this region, the fish yield increased rapidly, reaching 3,340,000 tons in 1999, which was 40 times of that in 1950.[5] According to the result of a research team for the investigation of China's exclusive economic zone and the continental shelf in 2000, the fish yield in China, Indonesia, Thailand, the Philippines, Vietnam and Malaysia in South China Sea even reached 12,200,000 tons, about 153 times of that of 1950,[6] whereas the potential catch of fishery resources in South China Sea is only about 2,800,000 tons.[7] Overfishing has seriously threatened the future development of fishery in South China Sea. A special investigation of the Ministry of Agriculture of China shows that, the resource density in the northern area of South China Sea declined by 280% in 1999 from the original 290 kilogram per square kilometer; the resource density in Beibu Gulf, one of the best fishing grounds in this region was 528 kilogram per square kilometer in 1990, declining more than 4 times as compared with the original density.[8] Moreover, with the decline of quantity or

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5 LME 36: South China Sea, at http://www.gd-fishmarket.com/fishcondition.htm, 24 January 2004.

6 Wu Shicun and Guo Wenlu, Preliminary Study on Regional Cooperation and Joint Conservation of South China Sea Fishery Resources, *Collection of Papers for the Seminar on South China Sea Resources and Cross Strait Cooperation*, 12 January 2004. (in Chinese)

7 LME 36: South China Sea, at http://www.gd-fishmarket.com/fishcondition.htm, 24 January 2004.

8 Wu Zhuang, Influence of Prohibition of Fishing on South China Sea Fishery Resources, *Collection of Papers for the Seminar on South China Sea Resources and Cross Strait Cooperation*, 12 January 2004. (in Chinese)

resources, the quality of catches also became worse. For example, the percentage of economic fish stocks among bottom trawl catches in northern area of South China Sea declined by 20% in 1970s as compared with that in 1950s and most of the economic fish stock catches are young fish that are not older than one year old. The catches tend to be low-valued fish with small size and young age.[9]

B. Overlapping Sea Areas and Frequent Conflict in Fishery Administration Destroy Trust among Relevant Countries

After 1970s, countries around the South China Sea issued statements or regulations in succession and established exclusive economic zones or continental shelves. Vietnam, in 1977, Cambodia and the Philippines in 1978, Indonesia, Malaysia and Thailand in 1980 and Brunei in 1982 issued statements on exclusive economic zone one after another;[10] China also promulgated and enacted law on territorial waters and exclusive economic zone in 1998. The exclusive economic zones in South China Sea declared by each country are overlapped, making the existing South China Sea territorial disputes more complicated. On one hand, illegal fishing is serious; on the other hand, conflicts over fishery jurisdiction continuously occur among these countries. Only in October of 2003, 11 "illegal" fishing boats from Vietnam along with over 101 kilogram of explosive materials were found at the South China Sea area under China's jurisdiction catching and bombing fish. From February to October of 2003, "maritime patrolling" personnel of China Taiwan drove 22 fishing boats of Vietnam from its local waters.[11] On the China side, take China Taiwan for example, 104 fishing boats were seized by the Philippines and Indonesia surrounding the South China Sea, according to incomplete statistics from 1992 to 1999.[12] In January 2003, when the author visited Haimen Town, Hainan Province, the local fishermen who used to fish in Nansha

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9 Wu Shicun and Guo Wenlu, Preliminary Study on Regional Cooperation and Joint Conservation of South China Sea Fishery Resources, *Collection of Papers for the Seminar on South China Sea Resources and Cross Strait Cooperation*, 12 January 2004. (in Chinese)

10 Li Jinming, Influence of United Nation Convention on Law of the Sea on Nansha Sovereignty Disputes and Complication of the Disputes, *Collection of Papers for Seminar to Commemorate the 20th Anniversary of Execution of United Nation Convention on Law of the Sea*, August 2002. (in Chinese)

11 At http://news.sohu.com, 3 November 2003. (in Chinese)

12 Kuen-chen FU, Illegal Fishing and Underlying Conflicts on National Jurisdiction – Views of China Taiwan, in Kuen-chen FU, *Legal Issues in Management of the Sea*, Taipei: Wen Sheng Book Store, 2003. pp. 122. (in Chinese)

complained that the Philippines soldiers were very barbarous to them. Chinese fishermen even "take the risk of losing their lives" to fish in legitimate waters in the South China Sea. In terms of scope, conflicts arose in almost all the sea areas in the South China Sea.

C. Ecosystem Is on the Verge of Breakdown Due to the Uncertain Resource Conditions and Outdated Conservation Technology

Some countries around the South China Sea blindly explore and utilize the fishery resources with no interest in collecting fishery resource data necessary for scientific conservation. Up till now, there have been no reliable, complete and detailed evaluation data about the South China Sea fishery resources. Statistics released by different organizations were considerably discrepant. For example, according to certain statistics, 5 million tons and two-thirds of the fish stocks were overfished in 2000,[13] while another survey result shows over 12.2 million tons.[14] The latter is more than twice of the former one. As to original resource density, apart from the northern sea area, that of Beibu Gulf and Xisha sea area has been overestimated, while the original resource density and the maximum potential yield in the middle and southern sea areas are basically beyond knowledge.[15] Under such circumstances, it is almost impossible to determine the total allowable catch, optimal utilization, management reference point, conservation reference point or other criteria required in the United Nations Convention on the Law of the Sea (hereinafter the "Convention").

In terms of conservation technology, the surrounding countries mainly adopt the investment control method at present, which, specifically, takes the forms of fishing licenses and restrictions upon fishing tools and methods. China also adopts forbidden zone, period for fishing, total quota control on motor boat and master power, fishery yield "zero growth" and other technologies.[16]

The development of international fishery management technology has

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13 LME 36: South China Sea, at http://na.neaa.gov/lme/text/1me36.htm, 24 January 2004.

14 Wu Shicun and Guo Wenlu, Preliminary Study on Regional Cooperation and Joint Conservation of South China Sea Fishery Resources, *Collection of Papers for the Seminar on South China Sea Resources and Cross Strait Cooperation*, 12 January 2004. (in Chinese)

15 At http://202.100.218.58/gov/thaiyang/hybl-7.htm, 28 January 2005. (in Chinese)

16 Wu Shicun and Guo Wenlu, Preliminary Study on Regional Cooperation and Joint Conservation of South China Sea Fishery Resources, *Collection of Papers for the Seminar on South China Sea Resources and Cross Strait Cooperation*, 12 January 2004. (in Chinese)

experienced three large development stages by far. In the first stage investment control method based on total allowable catch was used, mainly government management of catching capacity by controlling quantity and master power of fishing boats; in the second stage, more reasonable investment control technology was used in line with the maximum sustainable yield concept; in the third stage, new technology represented by precautionary principle management method and ecosystem management method was used. And now, the international fishery management technology is evolving from the second stage to the third.[17] Presently, the technology we used has considerably lagged behind even in respect of the investment control technology.

In the South China Sea, the adverse impact brought by the exploration of non-living resources on fishery resource conservation and management is also a factor that cannot be neglected. Since 1970s, Vietnam, the Philippines, Malaysia, Indonesia, Brunei and other countries have started a large-scale exploration of oil and gas resources. The sea areas near Wan-an Bank, Reed Bank and Kepulauan Natuna are most famous exploration areas of all. These countries carry out mineral resource exploration and development activities by unilaterally executing national license agreement with Occidental Petroleum Corporation, completely ignoring requirements from China Mainland and China Taiwan. Malaysia have explored 18 oil fields and 40 gas fields inside the U-shaped line of China, and some oil-gas wells even extended 100 nautical miles into the U-shaped line drawn and declared by China in 1947.[18] Such unilateral activity has caused serious damage to the living resources in the South China Sea, making the already fragile ecosystem deteriorate in this region.

Besides, cargo ships carrying spent fuel used by nine large nuclear power plants in Japan have posed a real and serious threat to living resources in the South China Sea.[19] These wastes of high radioactivity are shipped from Japan to two factories in Europe for reprocessing, one in UK and the other in France. However, these Japanese ships always sail in secret. According to Article 22 of the Convention, such actions obviously go against the international statute laws, which

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17 Stuart M. Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 44, 88.

18 Wu Shicun, Energy Security of China and Exploration of Oil Fields in Disputed Areas in South China Sea, *Collection of Papers for the Seminar on South China Sea Resources and Cross Strait Cooperation*, 12 January 2004. (in Chinese)

19 Kuen-chen FU, *Legal Issues in Management of the Sea*, Taipei: Wen Sheng Book Store, 2003. p. 81. (in Chinese)

threaten the safety of the people and living resources of the countries around the South China Sea.

The South China Sea fishery resource conservation is making an urgent call for cooperation between the surrounding countries. However, the established regional cooperation mechanism requires corresponding political, legal, technical and other conditions. In the last ten years of the 20th century, these prerequisites were not met, but now conditions are mature for cooperation.

III. New Developments of Regional Politics

Since 1990s, the international situation has significantly changed. Probably due to the rapid economic development of China, a growing tendency of interdependence has formed in the countries around the South China Sea. With the cooperation going deep and extensive, the trust relationship among them has been strengthened. Under such circumstances, it becomes feasible to establish regional cooperation mechanism for fishery resources.

A. Enhanced Cooperative Awareness in International Community

After the end of the Cold War, peace and development were the themes of the time. Developing economy has become a major task for every country in the world and economic integration and globalization has become the present target of all countries. It has been universally recognized that without communication and cooperation with other countries, any country or region will not be able to develop its own economy. At the same time, new problems and difficulties keep arising. Ecosystem crisis, international terrorism, weapons of mass destruction, nuclear proliferation and other global difficulties are calling for cooperation across borders. Therefore, cooperative awareness in the world has been strengthened unprecedentedly. In 1992, the United Nations Conference on Environment and Development was held; in 1995, World Trade Organization founded; 1997 saw the outbreak of world financial crisis; in 2001, "9/11" terrorist attacks happened. Those events are all milestones of such change and development.

B. Trust among Countries around the South China Sea Has Continuously Improved

With the changes of the international situation, bilateral and multilateral relationships among the 7 countries around the South China Sea have improved and friendly cooperation has continuously developed. On the Fourth Session of ASEAN Summit in 1992, ASEAN Agreement on Enhancing Economic Cooperation and the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area were signed to strengthen economic cooperation and provide more preferential tariff to each other. After this summit, cooperation among countries in the fields such as antiterrorism, combating transnational crimes and security has been carried out more effectively. On the Ninth Session of ASEAN Summit in 2003, Declaration of ASEAN Concord II (Bali Concord II) was signed, declaring that by 2020 an ASEAN community similar to the European Union will be formed. Afterwards, the political, economic, security and cultural cooperation in ASEAN entered a new historical stage and strode forward towards regional integration. Great progress has also been made in multilateral and bilateral cooperative relationship between China and other ASEAN countries. Since the formal recognition of the existence of ASEAN in 1975, China has established or reestablished diplomatic relationships with other ASEAN countries in succession since 1990; in 1992, China became the "Partner for Consultation" of ASEAN; in 1996, China rose to "Partner for Dialogue".[20] After the Southeast Asian financial crisis in 1997, China firmly implemented "No-Depreciation of RMB" policy and made tremendous contributions to the solution of the financial crisis. China's bravery in undertaking obligations nullified the "China threat theory" and built the image of a major responsible country in this region, strengthening the confidence of other ASEAN countries. "10+1" and "10+3" cooperative frameworks were results of strengthened confidence of the ASEAN countries. On November 4, 2002, both parties signed the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China, planning to preliminarily establish China-ASEAN Free Trade Zone by 2010, which was kicked off in full scale on July 1, 2003.[21]

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20 Chronicle of Relationship between China and ASEAN, at http://www.yn.xinhuanet.com/asean/chinaasean/materials/xlym_3070 807.htm, 24 January 2005. (in Chinese)

21 HU Guanghui and Ouyang Huiran, *China – ASEAN Free Competition Zone and Hainan Economy*, Haikou: Hainan Publishing House, 2003, pp. 30~36. (in Chinese)

C. Increasing Consensus on South China Sea Issue among Countries Surrounding the South China Sea Gives Rise to the Initiation of Fishery Cooperation

In the early 1980s, China proposed a solution to South China Sea disputes, "China's sovereignty, shelving disputes and seeking joint development". During the ASEAN conference of foreign ministers in 1992, China discussed with relevant countries about strengthening cooperation.[22] Increasing consensus has been reached by China and other countries surrounding the South China Sea over the relevant issue. In 1999, the Philippines proposed to enter into a fishery agreement with China in the South China Sea and to develop it into a multilateral treaty among surrounding countries; this fishery agreement aimed at protecting fishery resources without linking it with sovereignty issues. In 2000, China and Vietnam signed the China-Vietnam Agreement on the Delimitation of Beibu Gulf and the China-Vietnam Agreement on Fishery Cooperation in Beibu Gulf. In 2001, China and Indonesia signed the Memorandum of Understanding on Fishery Cooperation between the Ministry of Agriculture of the People's Republic of China and the Ministry of Marine Affairs and Fisheries of the Republic of Indonesia, stipulating the cooperation in catching, processing, education, fishing port and fishing boats.[23] Among ASEAN countries, Working Group on ASEAN Seas and Marine Environment, ASEAN Fishery Coordination Group and Southeast Asia Fishery Development Center and other cooperative organizations have been established in succession. On November 4, 2002, foreign ministers or their representatives from China and other ASEAN countries signed the Declaration on the Conduct of Parties in South China Sea in Phnoh Penh, Laos. It was the first formal multilateral document signed between China and the ASEAN on the South China Sea issue. According to the Declaration, all parties commit to solving the South China Sea disputes peacefully through friendly negotiations; all parties shall show self-restraint and shall not take action to make the disputes complicated and enlarged; in the spirit of cooperation and understanding, all parties shall try to seek all kinds of ways to establish mutual trust mechanism, such as mutual notification of

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22 Chronicle of Relationship between China and ASEAN, at http://www.yn.xinhuanet.com/asean/chinaasean/materials/xlym_3070 807.htm, 24 January 2005. (in Chinese)

23 Wu Shicun and Guo Wenlu, Preliminary Study on Regional Cooperation and Joint Conservation of South China Sea Fishery Resources, *Collection of Papers for the Seminar on South China Sea Resources and Cross Strait Cooperation*, 12 January 2004. (in Chinese)

general information on voluntary basis and other channels; all parties shall carry out cooperation in the fields of marine environmental protection, marine scientific research, transportation safety, search and rescue.[24]

IV. International Convention – Legal Basis for Establishing Regional Cooperation Mechanism

To establish a regional fishery resource conservation mechanism, the following two international treaties must be taken as a legal basis. First, the Convention signed in 1982 has made stipulations in principle on this issue; second, the 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 (hereinafter referred to as "United Nations Agreement on Straddling Fish Stocks") adopted in 1995, sets out principles for the conservation and preservation of straddling fishery resources in the high seas through international coordination and cooperation.

The Convention took effect on November 16, 1994. The countries surrounding South China Sea have all joined it, except China Taiwan which, however, has adopted most of the rules of the Convention in legislation. The United Nations Agreement on Straddling Fish Stocks also came into effect on November 12, 2001. The Philippines, China and Indonesia have signed, but no countries have formally approved of this agreement.[25] From the following provisions in these two treaties, we can see the basic rules for regional cooperation for the conservation and preservation of fishery resources.

A. Provisions on Regional Cooperation on Conservation and Preservation in the Convention

The South China Sea is a semi-closed sea. Under Article 123 of the Convention, coastal States bordering an enclosed or semi-enclosed sea shall cooperate with

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24 Hu Guanghui and Ouyang Huiran, *China – ASEAN Free Competition Zone and Hainan Economy*, Haikou: Hainan Publishing House, 2003, pp. 30~36. (in Chinese)

25 Table Recapitulating the Status of the Convention and of Related Agreements, at http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm, 24 January 2005.

each other in the exercise of their rights and in the performance of their obligations provided in the Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Therefore, the future mechanism for the cooperation on the conservation and preservation for South China Sea fishery resources shall cover all countries surrounding it and specify their obligation to provide coordination. When necessary, an international organization can also be established to perform such obligation.

B. Provisions on Regional Cooperation on Conservation and Preservation in the United Nations Agreement on Straddling Fish Stocks

As ruled in Article 5, in order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention:

(a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization;

(b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(c) apply the precautionary approach in accordance with article 6;

(d) assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated

with or dependent upon the target stocks;

(e) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

(f) minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;

(g) protect biodiversity in the marine environment;

(h) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;

(i) take into account the interests of artisanal and subsistence fishers;

(j) collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species and fishing effort, as set out in Annex I, as well as information from national and international research programmes;

(k) promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management; and

(l) implement and enforce conservation and management measures through effective monitoring, control and surveillance.

In the provision on the precautionary approach in Article 6, the Agreement further provides that:

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.

2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be taken as a reason for postponing or failing to take conservation and management measures.

3. In implementing the precautionary approach, States shall:

(a) improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing

improved techniques in dealing with risks and uncertainty;

(b) apply the guidelines listed in Annex II and determine, on the basis of the best scientific information available, the stock-specific reference points and the action to be taken if they are exceeded;

(c) take into account, *inter alia*, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities on non-target and associated or dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and

(d) Develop data collection and research programs to evaluate the impact of fishing on non-target and associated or dependent species and their environment, and formulate necessary to ensure the conservation of such species and protect habitats especially concerned.

4. States shall take measures to ensure that, when reference points are approached, they will not be exceeded. In the event that they are exceeded, States shall, without any delay, take the action ruled in Article 3(b) to restore the stocks.

5. Where the conditions of target stocks or non-target or associated or dependent species are of concern, States shall enhance monitoring in order to examine their conditions and the efficacy of conservation and management measures. They shall revise these measures regularly in the light of new information.

6. For new or exploratory fisheries, States shall adopt as soon as possible cautious conservation and management measures, including, inter alia, catch and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment shall be implemented. The latter measures shall, if appropriate, allow for the gradual development of the fisheries.

7. If a natural phenomenon has a significantly adverse impact on the status of straddling fish stocks or highly migratory fish stocks, States shall adopt conservation and management measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impact. States shall also adopt such measures on an emergency basis where fishing activity poses a serious threat to the sustainability of such stocks. Measures taken on an emergency basis shall be temporary and based on the best scientific evidence available.

In Article 8, provisions on cooperation for conservation and management

require that:

1. Coastal states and States fishing on the high seas shall, in accordance with the Convention, seek cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fishery management organizations or arrangements, taking into account the specific characteristics of the subregions or regions to ensure effective conservation and management of such stocks.

2. All States shall enter into negotiations with sincerity and without delay, especially when there is evidence of the straddling fish catches concerned. For this purpose, negotiations may be initiated at the request of any related States with a view to establishing appropriate arrangements to ensure conservation and management of the stocks. Pending agreement on such arrangements, States shall observe the provisions of this Agreement and shall act in good faith and with due regard to the rights, interest and duties of other States.

3. Where there is no subregional or regional fisheries management organization or arrangement to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for such stock in the subregion or region shall cooperate to establish such an organization or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organization or arrangement.

V. Development of Fishery Cooperation Technology

Since the 1990s, the management technology for regional cooperation for fishery resources conservation and preservation has continuously improved and relevant organizations or arrangements have appeared in large numbers. The experience from practice provides precious references for us in establishing the cooperation mechanism in the South China Sea region.

1. United Nations Food and Agricultural Organization (FAO), the Most Powerful Promoter of New Technology in International Fishery Management, Has Continually Proposed New Concept and New Method for Fishery Resource Conservation and Management Since the Conclusion of the 1982 Convention

(1) Fishing Effort Limit Technology

In 1991, the Committee on Fisheries (COFI)[26] under FAO proposed the concept of "responsible fisheries". In 1995, the 28th Session of the Conference of the FAO adopted the Code of Conduct for Responsible Fisheries (hereinafter referred to as the "Code"), which provides that in fishery resource conservation, total allowable catch (TAC) method shall be utilized and the method of utilization is identified. Afterwards, under the guidance of the Code, it formulated International Plan of Action for the Management of Fishing Capacity in 1999 and required national or regional conservation organizations and arrangements to formulate State-level "action plans" according to this Plan of Action.

(2) Precautionary Management Technology

The Code provides that all national or subregional or regional fishery organizations and arrangements shall determine, according to the best scientific evidence available, the stock-specific target reference point and actions to be taken if it is exceeded; at the same time, these fishery organizations and arrangements shall determine the stock-specific limit reference point and the actions to be taken if it is exceeded. The United Nations Agreement on Straddling Fish Stocks of 1995 provides in Annex II specific rules and utilization method for determination of aforesaid reference points.[27]

(3) Operation Transparency Management Technology

In 1993 the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas was approved, which specifies the method of management and control by flag States on fishing vessels hanging their flags. On the 24th Session of FAO's COFI on March 2, 2001, International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing was adopted, which further improves the transparency management rules of fishery operation.

(4) Ecological-Social System Management Technology

In 1999, the FAO approved the Rome Declaration on the Implementation of the Code, which proposes to develop more accurate ecological way for fishery

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26 The COFI is an organization under FAO founded by 13th Session of FAO Conference in 1965. This Committee is presently the only global intergovernmental forum in relation to international fishery and cultivation industry issue. The Committee continuously provides advice to governments of all nations, regional fishery groups, non-government organizations, fishery workers, FAO and the international community. The COFI is also used as negotiation venue for world fishery agreement and non-binding agreements.

27 Kuen-chen FU, Precautionary Method or Precautionary Principle in International Fishery Management, *Law Monthly*, Vol. 54, No. 9, 2003. (in Chinese)

management and conservation and requests to take into accounts trade and environmental factors relevant with fishing and cultivation.[28]

2. Worldwide Regional Cooperative Conservation and Preservation Arrangements for Fishery Resources Will Be Continuously Expanded as the Cooperation Technologies and Management Rules of Conservation and Preservation for Fishery Resources Are Continuously Improved

According to incomplete estimates, up till now 40 regional cooperation mechanisms of conservation and preservation for fishery resources have been established in all kinds of forms.[29] After the Code and United Nations Agreement on Straddling Fish Stocks were adopted, the international community proactively responded by establishing regional cooperative mechanism through conclusion of new treaties or amendments to original treaties. In terms of forms of cooperation organizations, they can be divided into all member States meeting for cooperation and standing committee for cooperation.

(1) All member States meeting for cooperation: two or more relevant States reach agreements regarding cooperation for conservation and preservation of marine living resources through negotiations. The agreement provides that all relevant member States shall hold plenary sessions at regular or irregular intervals and make resolution on data collection, status quo of resources and conservation measures. Each member State shall take action according to requirements of the resolutions. The meetings are divided into two kinds, bilateral and multilateral plenary sessions. The joint conference regime established under fishery agreement signed by China, Japan and South Korea is an example of the former form; the plenary session held once every year according to the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea is an example of the latter. Organizations adopting this form of cooperation often emphasize on economic factors and often adopt traditional methods including TAC and quota as their conservation measures.[30]

(2) Standing committee for cooperation: all relevant States conclude through negotiation multilateral agreement on cooperation for conservation and preservation of marine living resources. Such agreement provides that a standing

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28 Stuart M. Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 264~286.

29 At http://www.fao.org/fi/body/rfb/chooserfb.htm, 28 January 2005..

30 Stuart M. Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 337~341.

committee formed by representatives of each member State shall be established to decide on conservation measures and carry out cooperation for conservation of marine living resources. The Convention on the Conservation of Antarctic Marine Living Resources is an example of this form. Organizations adopting this form of cooperation often take protection of living resources as their main target, emphasizing on improvement of conservation technology; the conservation technology utilized to decide the conservation measures to be taken includes precautionary method and ecological-economic system management method; correspondingly, they require more complete and more accurate data.[31]

The aforesaid analysis shows that it is very necessary to establish regional cooperation mechanism for fishery resources in the South China Sea. The subsequent question is how to establish such a regional cooperation mechanism.

VI. Proposed Solution to the Regional Cooperation Mechanism for the South China Sea Fishery Resources

A. Basic Legal Characteristics of the South China Sea Areas

Disputes among the countries surrounding the South China Sea over territorial sovereignty have hindered the exploration and development of fishery resources in this region. In order to establish a cooperation mechanism for conservation and preservation of fishery resources in this region, these disputes must be solved first. If a final solution cannot be found, a temporary solution shall be made. According to the provisions in the Convention and UN Agreement on Straddling Fish Stocks and sufficient historical evidences (which cannot be stated in detail due to limited length of the article),[32] on the standpoint of Chinese, the "three-tier theory" shall be particularly emphasized. Only by adhering to this theory and its determination of

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31 Stuart M.Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 377~385.

32 As ordinary persons can reasonably expect, China has sufficient historical evidence to prove that it has significant historic rights to this area. In the past few years, the author has taken field trips to all countries surrounding the South China Sea and has come to this conclusion. Many other scholars have expressed the same views in their articles. As early as the Western Han and Eastern Han Dynasties (206 BC – 220 AD), Chinese warships and civil vessels often sailed in South China Sea area. Since then, China has left rich historical records. For detailed information, please refer to Kuen-chen FU, *Legal Status of the South China Sea*, Taipei: 123 Information Co., 1996. (in Chinese)

the legal nature of the South China Sea can the regional cooperation mechanism of South China Sea fishery resources be legitimately and reasonably established and implemented.

According to the legal nature determined by this theory, the South China Sea shall be divided into sea areas of three different tiers. In sea areas of each tier, different cooperation method and means shall be adopted.[33]

The first tier is the whole semi-closed South China Sea. According to Article 123 of the Convention, all State shall coordinate and cooperate in the fields of marine research, living resource conservation, marine environment protection and other fields. China and other countries in this region shall comply with the provisions of the Convention.

The second tier is the historic waters in the South China Sea. In this area, China is not the only country that has historic waters. Just as China has priority inside the U-shaped line, Thailand also has the same right in the Gulf of Siam; Indonesia also has certain priority in sea areas near the Natuna Island. In fact, the archipelagic waters claimed by Indonesia and the Philippines are also a type of historic waters, which have nevertheless been specially regulated by the Convention.

The third tier is islands and reefs in the South China Sea and their 12-nautical-mile territorial waters. China has sovereignty over 4 archipelagos and reefs inside the U-shaped line and their 12-nautical-mile territorial waters; just as Indonesia has sovereignty over the Natuna Island and its 12-nautical-mile territorial waters. Any illegal encroachment and pilferage of islands and reefs and territorial waters of other countries will never be legitimate only because of the elapse of time.

The international law never allows “prescription” used as legitimate basis for obtaining sovereignty over territory; even in the *Palmas Island Case* and the *East Greenland Island Case*, prescription was not admitted. If it is permitted to obtain sovereignty over territory with prescription, the whole world will certainly confront more not less conflicts. For the South China Sea, elapsed time does not and will not support those countries that explore resources regardless of historical evidences, because China has repeatedly and publicly protested against the illegal exploration activities and more importantly, the international law will never support illegal occupation of territory of other countries by military force.

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33 Kuen-chen FU, *Legal Status of the South China Sea*, Taipei: 123 Information Co., 1995, pp. 201~211. (in Chinese)

The author has been advocating "three-tier theory for South China Sea" in the region for many years. This concept has been accepted by China Mainland and China Taiwan at any rate and has been written into relevant legal documents. Article 14 of the Law of the People's Republic of China on Exclusive Economic Zone and Continental Shelf promulgated in 1998 by China Mainland provides that "The provisions of this Law do not prejudice the historic rights enjoyed by the People's Republic of China".[34] When the China Taiwan administration announced territorial sea baseline in 1999, they made the following special note in relation to territorial sea issue of the Nansha Islands under the list of geological coordinates of baseline points announced in it: "The islands inside the historical U-shaped line belong to China and the territorial sea baseline will be announced later."[35]

It has yet to be confirmed whether other countries surrounding the South China Sea will accept this theory or not. However, this is a sovereignty issue and the foundation for future cooperation, the author proposes that other countries in this region shall seriously consider this issue. In any case, they know clearly deep down in their heart that these South China Sea islands and reefs have always been the territory of China; the spirit of the Convention also requests all nations to give due respect to acquired rights based on historical evidences.

Obviously, in order to reach the target of cooperation, coastal States in the South China Sea shall designate a common conservation area unanimously agreed by all the relevant countries for the sake of South China Sea fishery resource management. Such area should include the whole "semi-closed sea", the abovementioned first-tier sea area. According to the provision on fishery resource conservation and preservation in Article 123 of the Convention, this is the legal obligation of every coastal State bordering the South China Sea.

In this case, coastal States around the South China Sea must make an arrangement, invite all bordering countries to join the arrangement and formally waive some of their preferential rights to their historic waters (sea area of the second tier) respectively.

The sovereignty of bordering countries over their reefs or low-tide elevations will not be affected. As to some reefs in the Nansha Islands occupied by other

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34 Department of Policies, Laws and Regulations, and Planning of State Oceanic Administration ed., *Compilation of Laws and Regulations of the People's Republic of China*, 2001, p. 214~215. (in Chinese)

35 China Taiwan "Executive Yuan" Order No. 88 – Internal No. 05161, 10 February 1999. (in Chinese)

countries, China will solve this issue by its own means on its own. Luckily these occupied reefs are very small and have little influence on fishery management, so they are not essential to anchor, rear services and other fishery research work. Therefore, sovereignty disputes over the Nansha Islands will not become the absolute obstacle to the establishment of this cooperative conservation mechanism.

B. Targets of Cooperation

The targets of cooperation shall include the following two items:

1. To maintain ecological balance in the South China Sea;

2. To ensure the fishing activities in this region will not include any "illegal, unreported and unregulated" (IUU) fishing.

C. Steps for Cooperation

1. Stage one is the preparation stage respectively carried out by each State. The main task of each State is to spend about two years improving the conservation status of its islands and reefs and their 12 nautical mile territorial seas and adopt effective measures and generally accepted scientific methods to evaluate the resources in its sea areas. Because only sea areas of the third tier in the South China Sea are involved, implementation of any measures shall not infringe upon sovereignty of other countries.

(1) Forms of cooperation organizations. It is unnecessary to establish a special international organization. All nations shall encourage their nationals to involve in the cooperation system through regional meetings and agreements.[36] Direct involvement by the public will help to make data collected more complete and resource evaluation more accurate. Besides, future cooperation among bordering States will also gain more public support.

(2) Scientific research. The main target is to find out the distribution of fishery resources in its sea area and impact of fishing activities on the South China Sea ecosystem and determine the balance point of sustainable exploration of fishery resources.

(3) Control technology. The relevant States shall promote "investment control

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36 Stuart M. Kaye, International Fisheries Management, *Kluwer Law International*, 2001, pp. 287~302.

method" conservation technology through regional meetings and agreements. The bordering countries shall perfect their respective closed season system and minimize IUU fishing. At the same time, States must implement measures for zero growth and negative growth of the total of fishing boats and power quantity.

(4) Legal system. States shall carry out regional cooperation through direct or indirect mutual assistance; amend domestic fishery laws and regulations, amend and complete fishing license, restriction upon fishing tools and fishery laws, fishery statistics, law enforcement and other systems in accordance with international standards.

(5) Supervision. Cooperating with FAO, States shall communicate information with each other to improve the transparency of their respective fishery and policies formulated by governments.

2. Stage two is the kick-off and development stage of regional cooperation. The main task is to carry out cooperation in historic waters of each nation, including archipelagic waters which were in fact historic waters, and establish and implement multilateral cooperative arrangement participated by countries with claims on historic waters. Because this stage mainly involves the second tier sea areas in the South China Sea, countries having historically acquired rights shall proactively undertake main responsibility for fishery resources conservation and preservation in their historic waters (including archipelagic waters).

(1) Forms of cooperation organizations. In the preliminary phase, countries with historically acquired interest and countries fishing in such areas shall carry out bilateral cooperation through meetings and agreements. On this basis, the cooperation scope shall be gradually expanded to attract all countries fishing in all historic waters in South China Sea to join the organization.

(2) Scientific research. The relevant States shall carry out more detailed investigation and research on fishery resources and impact on environment and generally implement onboard observation system in the historic waters to obtain reliable data and information in relation to fishery resources density, target fish stocks and their change pattern in a more scientific way.

(3) Control technology. The relevant States shall implement conservation technology mainly by setting total allowable catch and determining the maximum allowable catch in historic waters (including archipelagic waters) of each State according to maximum sustainable yield of fishery resources. When the actual catch exceeds the determined TAC, fishing activities shall be totally prohibited.

(4) Legal system. Two or more cooperating States fishing in historic waters

(or archipelagic waters) shall mutually assist and implement uniform regulations on allocation of allowable catch quota in historic waters, exchange of fishery data, coordination in law enforcement, formulation and implementation of practical and feasible conservative measures and other aspects.

(5) Supervision. The relevant States shall establish bilateral or multilateral member State regular meeting system to regularly deliberate on conservation measures and execution conditions of each nation; at the same time, it shall establish interim meeting system to discuss urgent or important issues and make resolutions.

(6) Dispute settlement. The aforesaid bilateral or multilateral meetings can establish their own dispute settlement mechanism to deal with disputes arising from historic waters with the "reverse consensus" rule.[37] Under member State plenary session, technical and legal expert teams shall be set up to provide technical and legal consultancy for dispute solution of the plenary session.

3. Stage three is an all-round cooperation stage, in which, cooperation shall be carried out in the whole semi-closed sea area, the first tier of the South China Sea. 5 to 6 years will be used to establish a regional cooperative organization joined by all countries bordering to the South China Sea and implement the conservation measures provided in the Convention and UN Agreement on Straddling Fish Stocks. According to Article 123 of the Convention, all countries bordering the South China Sea shall be obligated to coordinate conservation and management of the living resource in the region.

(1) Form of the cooperation organization. The relevant States shall use "ASEAN + 1" as platform and eventually establish standing institutions and several special committees joined by all member States to handle daily conservation and management affairs.

(2) Scientific research. The relevant States shall formulate and implement fishery resources and environmental protection plans in the whole region according to the requirement of the following control measures.

(3) Control technology. When implementing TAC technology, the relevant States shall gradually promote the "precautionary method and ecological economic

37 Annex II to Marrakesh Agreement on Establishing the World Trade Organization and Article 16 of Understanding on Rules and Procedures Governing the Settlement of Disputes, The "reverse consensus" rule means that unless all persons entitled to vote unanimously disagree on certain affairs, such affairs shall be deemed as unanimously agreed. This rule avoids the disadvantages of "consensus" rule provided in GATT of 1947.

system method" to conserve resources. According to the requirement of UN Agreement on Straddling Fish Stocks and its Annexes, it shall determine and implement "limitation (conservation) reference point" and "target (management) reference point"[38] and determine the stock-specific total allowable catch and respective catch quota according to the best available scientific evidence and regional cooperation spirit.

(4) Legal system. In order to implement regional conservation agreement, all bordering countries shall formulate uniform regulations on total allowable catch and quota of each nation, allocation of fishing area and fishing period, coordination in law enforcement, standard of fishing tools and fishery laws, exchange and sharing of fishery information and data, sharing of fund and labor service of the regional cooperative organizations, dispute settlement and other aspects.

(5) Supervision. The regional cooperative organization shall establish daily review meeting system with the technical committee and supervision institution appointed by the organization to carry out the specific review task. When necessary, the member States can invite FAO, IMO and other international supervision organizations to participate according to Article 123 of the Convention. At the same time, the regional cooperative organization shall also formulate the contingency plan in case of emergency.

(6) Dispute settlement. Borrowing ideas from WTO, the relevant States shall set up an arbitration institution as a dispute settlement organ for the regional cooperative organization.

VII. Cross-strait Fishery Cooperation as a Trial Mechanism

When discussing the issue of establishing the South China Sea fishery resource cooperative conservation mechanism, relations across the Taiwan Strait should be given priority to. This is not only because China Taiwan is an active fishing entity in this region which occupies Taiping Island, the largest island in Nansha, but more importantly, in view of cross-strait relations, if not handled properly, it will cause military conflicts and may pose real threat to the peaceful environment necessary for natural resource conservation and environmental protection in the region.

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38 Annex II of UN Agreement on Straddling Fish Stocks.

A. Feasibility of First Establishing Cross-Strait Cooperation Mechanism

To establish the aforesaid regional fishery cooperative conservation mechanism in the South China Sea is conditional on the willingness for cooperation of all bordering countries. Superficially, it is impossible to establish this cooperation mechanism between China Mainland and China Taiwan. However, based on examination and weighing of the following three aspects, we have reason to believe that it is absolutely feasible to first establish the cross-strait cooperative conservation mechanism.

First, after China Mainland and China Taiwan both joined WTO, Taiwan has actually been recognized by international community as "non-State entity" in legal status. Therefore, on the issue of fishery resource conservation, it can be anticipated that Taiwan will be willing to participate in cooperation instead of sticking to the so-called "State identity".[39]

Second, China Taiwan relies much on its economic trade relationship with the China Mainland presently. According to relevant estimates, by the end of 2002, the total amount of direct investment made by Taiwan businessmen in the Mainland had reached USD 3,970,640,000.[40] According to Lin Yifu, former "Minister of Economic Affairs" of China Taiwan, China Mainland has become the largest market of exported products of Taiwan and the third largest source of imported products and the largest source of trade surplus.[41]

Third, China Mainland and China Taiwan are complementary to each other in the field of fishery. For many years, private sectors of the Mainland and Taiwan have been carrying out fruitful fishery cooperation in other regions of the world. In the South China Sea area, a win-win arrangement across the Strait is a more realistic idea. The author believes that if the Chinese government takes appropriate encouragement measures, it will be easier to first establish a cross-Strait fishery resource conservation cooperation mechanism in the South China Sea.

B. Key Technical Problems in Cross-Strait Fishery Cooperation

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39 China Mainland joined the WTO on 11 December 2001 as a State. And China Taiwan joined the WTO on 1 January 2002 as "separate customs territory" instead of "State".

40 *China Statistics Year Book*, 2003. (in Chinese)

41 A Central News Agency dispatch from Taipei at 27 October 2003, 13:27 by its journalist Chen Shunxie.

At the technical level, the author believes the following issues are most important in achieving fishery conservation cooperation across the Strait in the South China Sea:[42]

1. To establish fishery resource evaluation mechanism implemented by China in historic waters in the South China Sea within the U-shaped line defined by Chinese government in 1947 is the foundation of further cooperation.

2. To provide administrative and economic encouragement to fishery joint ventures established by private sectors of China Mainland and China Taiwan in the South China Sea.

3. To explore new methods to protect the interest of the Mainland fishermen.

4. To strengthen education, improve the educational level and environmental protection awareness of fishermen across the Strait to complete the collection of catch data.

5. To formulate emergency search and rescue plan to maintain the safety of fishermen in this region.

6. To establish resupply base in order to facilitate operation of fishermen from both sides.

7. To amend relevant fishery laws and regulations of both sides on the basis of "precautionary principle".

8. To establish more reasonable and meticulous closed season system. The existing closed season system in China Mainland is not only unilateral and inapplicable to fishing boats from China Taiwan, but also does not have a long-term effect.

9. To establish uniform law enforcement standards in this region.

10. To build law enforcement forces that may coordinate each other and are effective in protecting fishery and enforcing the laws.

C. Implementation Steps for Cross-strait Fishery Cooperation Mechanism

The fishery cooperation activities between both sides across the Strait can be carried out by establishing a South China economic integration entity. Such an

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42 The author has been a director of External Fishery Cooperation Development Association, China Taiwan and convener of its Legal Commission for 18 years since 1986.

entity shall not be free trade zone under strict definition of WTO or GATT rules. Instead, a step-by-step integration entity including the Mainland, Taiwan, Hong Kong and Macau of China shall be established according to CEPA model.[43] In principle, such cooperation shall be initiated by private sectors under the support of the government. Fishery as an integral part of cross-strait economic relationship shall be cultivated and protected in the same way as in the Mainland. Once cross-strait cooperative conservation mechanism is established in the South China Sea, it will not only be helpful to safeguarding historic rights of the Chinese people in the South China Sea, but also promote conservation of living resources and benefit people in the whole region.

The implementation of cross-strait cooperation mechanism for the South China Sea fishery shall be promoted in three steps:

Step one shall start with encouraging cross-strait fisheries to establish joint ventures. At any rate, China Mainland shall support the initiative by providing administrative and economic preferential treatment to joint ventures established in the South China Sea by cross-strait private sectors; explore new method to ensure the interest of the Mainland fishermen; formulate search and rescue contingency plans; establish resupply base to facilitate operation of fishing boats from both sides. All these are made for facilitating private fishery companies from both sides to establish joint venture.

Step two, apart from jointly carrying out fishery cooperation activities in the South China Sea, governments of both sides can conduct scientific research to make a comprehensive and objective evaluation on the living resources with the assistance of educated fishermen. In this stage, the main objective is to lay a foundation for Chinese on both sides to adopt feasible fishery resource conservation measures.

In Step three, both sides shall amend their laws and regulations including signing bilateral agreement on more reasonable and effective closed season system to carry out fishery resource conservation; and launch more effective joint law enforcement activities in historic waters of China.

It can be anticipated when the Chinese fishery activities in this region are

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43 For detailed discussion on this issue, see Kuen-chen FU, Four Seats for One China inside WTO System – Suggestion for Establishing South China Integrated Economic Zone, *Collection of Papers for the Joint Symposium between China International Economic Law Society and Xiamen University International Economic Law Research Institute*, 4 – 5 November 2004. (in Chinese)

carried out fruitfully and orderly, IUU fishing will be effectively prohibited and other countries bordering the South China Sea will be more willing to cooperate with China in implementing fishery resource conservation and management work in this region. In this way, driven by common interests, the regional cooperative conservation mechanism for the South China Sea fisheries can be successfully achieved.

The Progress of the Issue of WTO Fisheries Subsidies and the Relevant System Reform

LIU Bin *

Abstract: The serious exhaustion of world fishery resources is in direct relation to the huge amount of fisheries subsidies granted by governments. Fisheries subsidies are governed by the WTO Agreement on Subsidies and Countervailing Measures (hereinafter referred to as the "SCM Agreement"). However, the "traffic light" system under the SCM Agreement has exposed many defects in relation to the fisheries subsidies issue and thus needs reforming. After introducing the negotiation and consultation history and progress of the WTO fisheries subsidies issue, this article presents a detailed analysis on the defects of the "red light", "yellow light" and "green light" rules of the SCM Agreement and proposes some corresponding thoughts on reform.

Key Words: WTO; Fishery; Subsidy reform

I. The Status Quo of Global Fisheries Subsidies

A. A Brief Introduction to Fisheries Subsidies

Many data on fisheries resources acquired by China and foreign countries reveal that the global fishery resources are in a highly depleted state. The extensive and serious over-capacity and over-fishing in the fisheries industry are, in many cases, directly related to the huge amount of government fisheries subsidies. An obvious factor is that due to the provision of subsidies, fishing fleets can continue to operate under originally unprofitable circumstances, which has directly caused overfishing and other fishing activities violating the sustainable development principle.

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For various reasons, the exact data on fisheries subsidies are often difficult to obtain. Yet in the past ten years, some work has been done by certain organizations on regional and worldwide basis, such as the Food and Agriculture Organization (FAO), Organization for Economic Co-operation and Development (OECD) and Asia-Pacific Economic Cooperation (APEC), to categorize fisheries subsidies and estimate their quantity. It is difficult to obtain accurate data on the amount of subsidies, partly due to the lack of transparency of the subsidy system and partly due to the obscure definition of some terms and other technical complexity; however, thanks to the efforts of the organizations mentioned above, the approximate scale of subsidy is still relatively clear. A conservative estimate of the worldwide subsidy from 1993 to 1999 is between US $10 billion and US $15 billion each year. As the catch of world (wildlife) capture fisheries fluctuates between US $70 billion and US $80 billion, it can be reasonably assumed that the world fisheries subsidies at that time account for 15% ~ 20% of the total value of such catch.[1] Statistics of relevant institutions under the United Nations show that, the subsidies used for fisheries every year worldwide even reach US $20 billion, amounting up to one fourth of the total value of catch of US $80 billion.[2]

Fisheries subsidies have various forms and serve various purposes. The typical ones are as follows.

1. Low-cost loans, guarantees for loans, tax incentives for fishing boat construction or maintenance or modernization of fishing tools.

2. Providing price support for fish and relevant fish products.

3. Providing low-cost loans or other financial interests to support the transportation and processing of fish and relevant fish products.

4. Income or salary support or unemployment benefits or other social benefits for fishermen or their families.

5. Exportation promotion plans.

6. Providing discountable or free maritime insurance.

7. The government promises to compensate the owners of fishing boats if their boats are imposed fines and held in custody by foreign authorities.

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1 Alice L. Mattice FN, The Fisheries Subsidies Negotiations in the World Trade Organization: A "Win-Win-Win" for Trade, the Environment and Sustainable Development, *Golden Gate University Law Review*, Vol. 34, Spring 2004, p. 576.

2 Li Jie, New Zealand Calles for Fishery Subsidy Ban by the WTO, at http://www.sccwto.net:7001/wto/content.jsp?id=6706, 2 November 2004. (in Chinese)

8. Construction and maintenance of port facilities.[3]

B. A Brief Analysis of the Impact of Fisheries Subsidies

Subsidies can help the subsidized persons or entities reduce costs and/or increase incomes and therefore will cause competition and trade distortions between the subsidized and the unsubsidized ones. This is the common characteristic of almost all subsidies. Apart from the aforesaid common characteristic, fisheries subsidies have their unique characteristics in causing production distortions as well.

Different from other production industries, the subsidies granted to fishers will affect the production costs of other competitive fishers. That is because when fishery resources are increasingly scarce and the yield per unit effort is continuously declining, if subsidized fishers can obtain yields exceeding their due share, the production costs of other competitive fishers will become increasingly high, involving more difficulty in searching for fish and correspondingly uneconomic catches. The result is that those unsubsidized producers are restricted by lower production capacity and in extreme cases even cannot find any fish when the stock is exhausted. In this way, subsidized producers will gain bigger and bigger shares in domestic and foreign markets. Internationally, this effect is mainly reflected in some industries targeted at straddling and migratory fish stocks and the circumstances of foreign fishing fleets operating in sea areas of other countries, mostly developing ones.

Even in fishery industries with effective management, unregulated fisheries subsidies still constitute a threat to resources and distort production and competition, which are reflected in the following two aspects: First, despite the existence of control measures, the specific economic and social demands of the States will still drive the governments to grant subsidies, which objectively encourages over-capacity and unsustainable grabbing of resources and fosters illegal, unreported and unregulated (IUU) fisheries, despite the fact that the governments are often unintentional. Second, maintaining the production and employment level in the fishery industry through subsidies will create a psychological inclination among fishermen and fishery enterprises to continue

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3 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 11, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

fishing activities and make those recommended measures established on the basis of scientific research on fishing control cannot be effectively implemented under considerable political pressure.

Undoubtedly, subsidies cause even greater harms to fishery industries lacking effective management. Actually, restricted by funds, technology, means of law enforcement, economic and social needs and other complicated factors, few fishery industries are truly under good management. Therefore, the people assert that improving fishery management provides a better solution than reforming subsidy disciplines to deal with negative consequences of fisheries subsidies will have to face the following reality: how and when can good fishery management be realized? In the process of WTO negotiations, even those delegates with doubts over the necessity of formulating new disciplines under the WTO for fisheries subsidies could not deny that subsidies aggravated the negative consequences of the already bad management.

Developing countries are more vulnerable to the harms of subsidies. First, most developing countries have limited financial resources and cannot provide huge amounts of subsidies like developed countries, which makes their fishing fleets less competitive than those of developed countries and thus caught in a vicious circle. Second, the fishery resources under the jurisdictions of developing countries are easier to be exhausted by foreign seagoing fishing fleets. Due to serious overcapacity and resource exhaustion problems, those seagoing fishing fleets from developed countries getting huge amounts of subsidies are increasingly active in the sea areas of developing countries and have created pressure on fishery resources in these regions and aggravated the competitive pressure on small-scale national fishing fleets of developing countries. Although foreign fleets often operate under access agreements with developing countries, these agreements cannot absolutely guarantee the sustainable development and management of fishery resources of the host countries, or the conditions of these agreements do not necessarily guarantee the maximum benefits of the host countries. In practice, as many developing countries have low level of management over fisheries, they often lack strength against IUU fisheries of those foreign fishing fleets who receive huge amounts of subsidies from their native countries. Third, many developing countries seriously rely on fisheries for food and employment and will undoubtedly suffer disproportionate harm from the negative impacts of fisheries subsidies on the declining worldwide fishery resources and fiercer fishery competition.

However, not all subsidies are harmful, neither are fisheries subsidies. The

World Wildlife Fund (WWF) believes that government supportive measures favorable to resource conservation and the transformation to sustainable exploration are still necessary. (The so-called "green light" subsidies in WTO negotiations involve this aspect, which will be discussed later.)

C. Policy Orientation on Fisheries Subsidies of Present Major Fishery States

Although the total amount of fishing subsidies in present world is huge, the distribution is much imbalanced. The United States, Japan, the European Union, Canada, Russia, Korea and other developed countries (regions) or other major seagoing fishery States account for most of the total amount of subsidies published in all official reports. Other smaller and weaker developing countries are out of this subsidy game. Besides, governments often have an obvious bias which has aggravated this concentration status, that is, more subsidies are provided to larger and more advanced fishing fleets rather than smaller ones. Those large-scale industrialized fleet enterprises get more subsidies than small-scale fishermen.

The United States has tuna seiner fleets in the Pacific Ocean. Particularly the tuna fishing fleet active in the middle and west regions of the Pacific Ocean is a capital intensive fleet and is generally regarded as highly efficient by the worldwide fishery industry. However, from the late 1990s, the fleet has been unable to make profits in large amounts constantly. It seems the main reason for low profitability of American fleets is the low canning grade of tuna fish and the American government also believes this is the direct reason for providing subsidies to seagoing fishing fleets. When providing subsidies to fishing fleets, the US government was under more pressure compared with Japan, South Korean, and other Asian and European countries that offer more subsidies to fishing fleets in the Atlantic Ocean. Subsidies lead to unfair competition, which is harmful to the interests of other nations and America's own interests as well, as such subsidies have created financial pressure on its government.[4] Since the Doha Round of WTO negotiations, America has always advocated negotiations on fisheries subsidies. According to some American scholars, America has regarded the success of this negotiation as a key factor of US

4 Jin Lingen, A Tentative Analysis of the Standpoint of US Government on Fisheries Subsidies, *China Fisheries*, No. 3, 2000. (in Chinese)

trade and environment agenda.[5] However, the commercial interests of America in fishery issues are complicated and its coastal and seagoing fleets in New England, the Gulf of Mexico and the Pacific Ocean have different interests.[6]

The European Union originally took a passive attitude towards fisheries subsidies negotiation in the Uruguay Round, but its standpoint changed in 2003 due to pressure from other Member States and the reform tendency in common fishery policies. The EU submitted a proposal on prohibiting fisheries subsidies to WTO on 22 April that year to avoid over-capacity and suggested the international community to take actions to stop overfishing fishery resources, advocating conditional and appropriate elimination of fisheries subsidies.

In the current fishery field, the most conspicuous government subsidy actions are taken by Japan and Korea, which harbor the most stubborn standpoints in relevant consultations. This is closely related to the advanced seagoing fisheries of these two countries and the reliance of their national economy on seagoing fisheries. Taking Japan as an example, Japan has a time-honored tradition in fishery trade and the elder generation still clearly remembers the famine in the late World War II period. Therefore, the food security issue in relation to major sources of animal protein for Japan is still given special attention. For most OECD countries, fish is merely another option apart from beef or mutton, but in Japan things are different.[7] For example, a support program of Japan aims to provide 24 billion Japanese Yen as aids for the construction of fishing boats in the form of government loans. According to a senior fishery official of Japanese government, if these loans are withdrawn, the ship building cost will rapidly go up. Usually fishing boat operators have little cash in deposit and the average profit is only 10% of the sales volume. The 5 billion Japanese Yen for helping Japanese fishermen will also be cut down substantially. The Ministry of Agriculture, Forestry and Fisheries of Japan conducted an evaluation on fisheries once every five years. According to the report published in 2003, the total number of enterprises engaged in seagoing fisheries was 132,417, reduced by 12.1% as compared to the number in 1998. With the number of Japanese fishery operators falling continuously, fishery yield continues

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5 Alice L. Mattice FN, The Fisheries Subsidies Negotiations in the World Trade Organization: A "Win-Win-Win" for Trade, the Environment and Sustainable Development, *Golden Gate University Law Review*, Vol. 34, Spring 2004, p. 574.

6 Roman Grynberg, Fisheries Subsidies: Casting a Net too Small, *Bridges*, No .7, 2002, pp. 5~6.

7 Roman Grynberg, Fisheries Subsidies: Casting a Net too Small, *Bridges*, No .7, 2002, pp. 5~6.

to decline from 183 trillion Japanese Yen in 1992 to 1.14 trillion Japanese Yen in 2002. Even if Japan is successful in limiting subsidy reduction, Japanese fishery will still face many difficulties in the future.[8] Therefore, it is no wonder that Japan has taken a negative attitude towards consultations on fisheries subsidies.

II. Progress of Fishery Issues within WTO Framework

The WTO is an inter-government institution specialized in dealing with the subsidy issue, which affects the world trade system. Therefore, the FAO, WWF and other inter-government and non-government organizations all count on the WTO. Moreover, the rules made by other organizations, such as the FAO's International Action Plan, are carried out on voluntary basis, while the rules of the WTO on subsidy have binding force of international law and have potential enforceability through its regime of dispute settlement understanding.

In 1994, soon after the foundation of the WTO, the WTO's Committee on Trade and Environment (CTE), a non-negotiating institution established for studying the environmental consequences of trade, started to discuss the effects of subsidies in the fishery field. Although the CTE has studied the fisheries subsidies issue for some time, only in recent years has it made substantive progress. To include the fisheries subsidies issue in a new round of WTO negotiations is an important target of the United States and other countries with similar thoughts. These countries, popularly referred to as "Friends of Fish",[9] started to cooperate informally before the Third WTO Ministerial Conference held in 1999 in Seattle. Before the Seattle Conference, the US and other "Friends of Fish" proposed that as a part of the new round of WTO negotiations, all Member States should agree to eliminate fisheries subsidies fostering overcapacity in view of the fact that fisheries subsidies had distorted trade, seriously jeopardized the sustainable utilization of fishery resources and hindered sustainable development.

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8 Japan Will Raise Objection to Withdrawal of Fisheries Subsidies at WTO Fisheries Meeting, at http://www.china-fisher-les.com/info/display.asp?id=9764, 6 November 2004. (in Chinese)

9 Friends of Fish include Australia, Chile, Ecuador, Iceland, New Zealand, Peru, the Philippines and the United States. They believe that the SCM rules emphasize on market distortions caused by subsidies, lacking stress on other adverse effects caused by fisheries subsidies on trade, environment and sustainable development, particularly obvious production distortions caused by subsidies in fishery sector. They advocate improving the WTO disciplines regarding fisheries subsidies.

The Declaration of the Fourth Ministerial Conference held in Doha, Qatar in November, 2001 authorized negotiations on fisheries subsidies and agreed that the WTO rules in this field should be clarified and improved. The relevant negotiations were carried out by the negotiating group on rules.

The discussion on fisheries subsidies during the Ministerial Conference held in Cancun, Mexico in September, 2003 was represented in the report approved at the CTE regular meeting held in Geneva in 7 July, 2003, and submitted to this Ministerial Conference.[10] The following paragraphs are a summary of this report.

The importance of achieving the target of sustainable development in the fishery field is generally admitted. Several Member States recalled that the kickoff of negotiations on fishery issue at the Doha Ministerial Conference is substantially established on the basis of the previous analysis by CTE. Afterwards, World Summit on Sustainable Development (WSSD) Plan of Implementation[11] reconfirmed such requirements as clarifying and improving WTO disciplines on fisheries subsidies and considering the importance of this field to developing countries.[12]

Some Member States believe that, even under the circumstance of the existence of an apparently reasonable fishery management system, subsidies will also shake fishery management and hinder the achievement of the target of reducing overcapacity. The highly valuable tuna fish stock is an example of a specific fishery already collapsing under the management system of many countries. It is emphasized that trade measures (such as subsidies) have caused overcapacity and must be restricted. Trade liberalization plus sustainable resource management can stimulate more efficient production activities with environmental benefits for a longer term. The trade barrier in the form of tariff or other non-tariff barriers cannot substitute effective resource management. Most Member States emphasized that since relevant negotiations were conducted in the negotiating group on rules and the negotiating group on market access, the fishery issue is better left for these institutions for resolution.

All Member States unanimously agreed that through various international environmental organizations in the fishery field, more technical support for natural

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10 A Summary of Recent Work on Subsidies in the Fishing Sector, p. 22, at http:///url?q=ftp://ftp.fao.org/fi/DOCUMENT/tc-sub/2004/inf3e.pdf, 5 November 2004.

11 WSSD refers to World Summit on Sustainable Development held in Johannesburg from August to September in 2002.

12 WSSD Plan of Implementation, Paragraph 31(f).

resource conservation and management can be provided. Some Member States reiterated the importance of deeper research on fisheries subsidies and particularly pointed out the work of the FAO, the United Nations Environment Programme and the OECD in this aspect.[13]

The work of the WTO negotiating group on rules in the first stage of Doha Round Negotiations about fisheries subsidies was devoted to determining the problems to be dealt with by WTO Member States in clarifying and improving the disciplines on fisheries subsidies, including determining the defects in existing WTO rules. As a part of such first stage, eight major advocators for negotiation, including the United States, submitted a report in April, 2002, attempting to determine the reasons why the existing WTO SCM Agreement lacked strength in restricting fisheries subsidies with an extensive outline.

However, in this first stage, Member States who were not so enthusiastic about fishery consultation (particularly Japan and South Korea) continued to deny the existence of notable connection between fisheries subsidies and adverse consequences on trade and resource conservation. These Member States seemed to doubt the Doha authorization itself and believed fisheries subsidies should be generally included in more extensive consultations on subsidies and the environmental aspect of this issue should be transferred to (non-consulting) CTE regular meetings for discussion. In October, 2002, the United States submitted another informal report, intending to respond to these objections by reviewing substantive work already completed by other forums focusing on the adverse impacts of fisheries subsidies on trade and resource conservation. Japan and South Korea remained unconvinced.

The United Stated submitted in March, 2003, an important report through its ambassador to the WTO, Linnet Deily. In this report, the US suggested that the most beneficial start point for this consultation should aim to amend the existing "traffic light" system under the SCM Agreement. Following the America's footsteps, other Member States also voluntarily submitted proposals concerning the method of promoting consultation on fisheries subsidies before the WTO Ministerial Conference held in September, 2003 in Cancun, Mexico. The previous change of the EU's standpoint in April this year strengthened this opinion. According to the proposal by the EU, all government financial subsidies intending

13 A Summary of Recent Work on Subsidies in the Fishing Sector, pp. 22~23, at http:///url?q=ftp://ftp.fao.org/fi/DOCUMENT/tc-sub/2004/inf3e.pdf, 5 November 2004.

to strengthen fishery production capacity shall be prohibited, including subsidies for building new ships and updating seagoing ships and subsidies for transferring or selling fishing boats to a third country. The EU proposed at the same time that those subsidies intending to reduce capacity and reconstruct existing fishing boats for safety and environmental protection concerns and promote the restructuring of the fishery industry shall not be prohibited; provided that, however, these subsidies shall comply with the "transparency" principle and be reported to the WTO.[14]

The fisheries subsidies consultation fell silent for a while under the context of overall failure of the Cancun Meeting, and Japan and South Korea still held a suspicious attitude; nevertheless, fisheries subsidies consultation had got new momentums after all and it seemed that a consensus had been reached, at least among promoters of consultation, that the "traffic light" system should be put under examination. Under such pressure, on 8 June, 2004, Japanese delegates submitted a proposal on fisheries subsidies at the meeting of the negotiating group on rules of the WTO. Although parties present at the meeting had different opinions on the content of the proposal, they all expressed welcome to this action of Japan. That is because it showed that the largest user of fisheries subsidies had finally joined the negotiation on prohibiting this subsidy.

The proposal made by Japan on prohibition of fisheries subsidies was opposite to the proposal made by New Zealand in April of the same year. New Zealand requested for all-round prohibition on subsidies "that are prone to cause overcapacity, overfishing and other trade distortions" and on this basis, WTO Member States shall determine through negotiations which subsidies are friendly to the environment and development of fisheries and thus can be excluded. This proposal was supported by the United States, Australia, Norway, Chile, the Philippines, Thailand and other Member States, but it was opposed by the EU, Japan and South Korea. Japan's proposal requested for a focus on subsidies "with real problems", for example, subsidies that were prone to cause overcapacity and illegal, unauthorized or discretional fisheries. Japanese delegates stated that although Japan had the most fisheries subsidies, most of the subsidies were used for infrastructure construction and this type of subsidies would not distort trade. New Zealand retorted that Japan's proposal ignored subsidies for price support, operation cost and infrastructure construction, and in this way 90% of Japanese

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14 Zhang Jin, the EU Recommends WTO to Prohibit Fisheries Subsidies, at http://economy.enorth.corn.cn/system/2003/04/24/00 0549876.shtml, 21 December 2004. (in Chinese)

fisheries subsidies would be excluded from prohibition.

South Korea and China Taiwan both agreed with Japan's proposal. China also expressed support to certain extent and advocated that further discussions should be conducted in future consultations on granting special and differential treatments to developing countries.[15]

However, things will not proceed smoothly without a hitch. According to relevant reports, due to the existence of significant vital interests, Japan will still stubbornly resist the withdrawal of fisheries subsidies.[16] Besides, because the standpoint of the EU is substantially close to that of Japan, and the major fishery country China holds a cautious attitude, there remain many uncertainties as to when the negotiation will succeed.

III. Discussion on Rules of the WTO on Fisheries Subsidies

At present, it is generally known that the subsidies defined in the WTO SCM Agreement do not include agricultural subsidies, which are governed by the Agreement on Agriculture. Fisheries subsidies are excluded from the Agreement on Agriculture. In this connection, they shall still be regulated under the SCM Agreement.

The SCM Agreement provides that a subsidy should be deemed to exist, if "there is a financial contribution by a government or any public body within the territory of a Member" and such contributions satisfy certain specific conditions, or "there is any form of income or price support in the sense of Article XVI of GATT 1994". Besides, provision of interests must be involved. For subsidies to be illegal, they must be "specific", "prohibited" or "actionable" and have caused adverse effects.[17]

The SCM Agreement implements a "traffic light" system, that is, to differentiate subsidies into prohibited subsidies (the red light), actionable subsidies (the yellow light) and non-actionable subsidies (the green light); among them,

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15 Li Jie, Japan Starts to Join WTO Negotiations on the Prohibition of Fisheries Subsidies, at http://www.sccwto.net:7001/wto/content.jsp?id=7102, 5 November 2004. (in Chinese)

16 Japan Will Raise Objection to Withdrawal of Fisheries Subsidies at WTO Fisheries Meeting, at http://www.china-fisher-les.com/info/display. asp?id=9764, 6 November 2004. (in Chinese)

17 A Summary of Recent Work on Subsidies in the Fishing Sector, p. 22, at http:///url?q=ftp://ftp.fao.org/fi/DOCUMENT/tc-sub/2004/inf3e.pdf, 5 November 2004.

the "green light" type is only applicable on a temporary basis for 5 years upon effectiveness of the WTO Agreement and is now invalidated. Four types of the "yellow light" subsidies are deemed as "dark amber", which means they are assumed to cause serious harm, unless Member States providing such subsidies have evidence to the opposite. However, this "dark amber" clause also expired in 1999 and invalidated, as the "green light" clause.

A. Applicability of Present Rules of the SCM Agreement to Fisheries Subsidies

1. The "Red Light" Rule

The two regulations set out in Article 3 of the present SCM Agreement on prohibited subsidies have little relevance with the fisheries subsidies issue. First, governments seldom grant fisheries subsidies contingent upon export performance; on the contrary, most fisheries subsidies are provided by those net importers of fishery products. Being aware of the importance of fishery to national economy, the governments often grant subsidies aiming to maintain the production capability by reducing costs or increasing incomes without contingency upon export performance.

Second, although granting fisheries subsidies strengthens the capability of domestic fishery enterprises to supply the domestic market and to great extent plays a role in substituting and preventing importation from foreign countries, it cannot prove that fisheries subsidies are those "contingent upon the use of domestic over imported goods" as stipulated in Subparagraph b, Paragraph 1, Article 3 of the SCM Agreement. The Subparagraph b, Paragraph 1, Article 3 of the SCM Agreement provides that: "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." This clause refers to the subsidies granted to producers for using domestic other than imported goods as investment in the production process, rather than subsidies merely provided to domestic suppliers. As stated above, the purpose of providing subsidies is often to maintain the production capability of fishers by reducing costs or increasing incomes without contingency upon substitution of imported products as investment in the production process, notwithstanding that these subsidies have objectively hindered importation. The fact that domestic consumers of fishery products prefer domestic products to imported products often has objective relevance with the domestic fishery producers' accepting of government subsidies, but subsidies are

provided to producers rather than consumers, and the two kinds of subsidies are irrelevant based on the logic of the SCM Agreement clauses.

However, it should be pointed out that, an important difference between the "red light" rule and the "yellow light" rule is that in disputes regarding "red light" subsidies, the complaining Member does not bear the burden of proof. It is provided in Article 4.5 of the SCM Agreement that, "upon its establishment, the panel may request the assistance of the Permanent Group of Experts (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification." Therefore, the "red light" rule represents an *ex ante* prohibition and if it is effectively implemented in the field of fisheries subsidies, the impact will be more obvious compared with the "yellow light" rule feature by *ex post* remedies. So it is indeed a great pity that the "red light" rule is ineffective in the field of fisheries subsidies presently. In this connection, the reform with regard to the SCM Agreement clauses should still put an emphasis on and, more importantly, improve the "red light" measures.

2. The "Green Light" Rule

The "green light" rule with regard to non-actionable subsidies has almost never been formally referred to by WTO Member States in the five years of its valid term. Among the three categories of green light subsidies as stated in Article 8.2 of the SCM Agreement, Paragraph (c) is relevant with environmental protection focusing on updating equipment by fishery enterprises for the purpose of eliminating pollution and is regarded as "the greenest among green"; provided that five conditions must be satisfied at the same time, among which, Subparagraph (iv) is "the subsidy is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution". Compared with various forms of fisheries subsidies mentioned above, including the fisheries subsidies for reducing fishing effort to achieve sustainable production, such as fishing boat repurchase, employee retraining programs and subsidies for updating fishing tools to protect the fishery ecological environment, it can be found that almost no subsidies can fit in with the provisions of Subparagraph (iv). On the other hand, Paragraphs (a) and (b)

under Article 8.2 have a potential possibility of being applied to fisheries subsidies. Several countries have notified the WTO with regard to the fisheries subsidies provided by them for research activities and underdeveloped regions, although it is still disputable whether these subsidies satisfy the provision of Paragraphs (a) and (b) under Article 8.2.

It can be concluded that, on the whole, the "green light" rule in the present SCM Agreement has limited actual significance for fisheries subsidies. While in practice, many Member States including the EU and Japan have stated that some fisheries subsidies implemented by them are beneficial to economic development and environmental protection and thus should be allowed. If some fisheries subsidies with positive influence in practice intend to obtain the "green" status, the "green light" rule must be re-established.

3. The "Yellow Light" Rule

Compared with the *ex ante* prohibitions of the "red light" rule, the "yellow light" rule represents *ex post* remedies and focuses on whether the subsidies provided by one Member State has caused adverse effects on the interests of other Member States. Except for four types in the "dark amber" category, the burden of proof is to be borne by the complaining Member, which means that the complaining Member must first prove the subsidy measure of other Member States has caused "adverse effects" on its interests; otherwise it will lose the case. Even if the Member providing subsidy loses the case, after eliminating the "adverse effects" or providing corresponding compensation to the complaining Member, the losing party will no longer undertake any liability, even though it will maintain the subsidy measure in question. Moreover, the "yellow light" rule adheres to the principle of "no trial without complaint", which means that the Member providing the subsidy only has the liability to eliminate the adverse effects incurred to the complaining Member, without any liability to any Member States not participating in the complaint. If other affected Member States do not directly complain, they can only participate as third parties with limited rights.

Since the "red light" rule and "green light" rule are feeble in the fisheries subsidies field, at present, most fisheries subsidies fall within the scope of the "yellow light" rule. However, due to heavy burden of proof, many Member States are unsatisfied with the "yellow light" rule. And they have more complaints about the fisheries subsidies issue, which can be concluded as follows: (1) it is said that, due to the different nature and extensive distribution of fishery industries, compared with most other industries, it is much more difficult to directly calculate

the impact of subsidies on price and market share.[18] Besides, owing to the lack of transparency in most fisheries subsidies programs and imperfectness of enquiry mechanisms for the origins and final processing places of fishery products, the burden of proof becomes more difficult to fulfill. (2) As stated above, to challenge the "yellow light" subsidy, a Member State must complain to the WTO. Developing countries not only lack corresponding human, financial and material resources to bear the cost of lawsuit, but also face the following dilemma: on one hand, their fisheries are vital to their national economy; on the other hand, the absolute scale of their fishery economy is relatively small, as compared with the agricultural industry for example. Moreover, developing countries often rely on developed countries economically, so even if they win the case, the countervailing measures authorized by the Dispute Settlement Body will bring great political risks to these countries and the gains from the fishery industries may not equals the losses in other fields, such as the political relationship and economic cooperation between the two parties. When straddling and highly migratory fish stocks are involved, the countervailing measures will actually involve more countries and more complicated interest relationships.

Due to the aforesaid problems, the "yellow light" rule is often useless in prohibiting fisheries subsidies with great harm and little transparency, which inevitably reminds the Member States of the attractiveness of the *ex ante* prohibition under the "red light" rule.

4. Other Rules

The SCM Agreement also sets out rules on special and differential treatment for developing countries, notification and supervision systems. The special and preferential treatment for developing countries is a general issue under the WTO framework, and the article in this respect in the SCM Agreement is Article 27, which contains some temporary special and preferential provisions. Many developing countries believe that the contents of Article 27 still cannot satisfy their practical demands and they hold that the original "green light" rule better represents the interests of developed countries, yet some of their developmental positive subsidies are not included therein. Therefore, they wish to expand some temporary benefits provided in Article 27 and make them permanent. Additionally, they hope their requests for special and preferential benefits will be represented better in the

18 Fisheries Subsidies: Limitations of Existing Subsidy Disciplines, Submission from New Zealand, 4 July 2002.

reestablished "green light" rule. The first requirement of the developing countries is more difficult to satisfy, since developed countries insist that the special and preferential treatments provided under Article 27 can only be temporary. However, the second requirement is authorized in relevant document of the Doha Ministerial Conference and is possible to be fulfilled through trial of strength in specific negotiations.[19]

It is noteworthy that rules with regard to notifications are deemed as problematic in practice and particularly useless in the fisheries subsidies field. At present, the content regarding notifications is set out in Article 25 of the SCM Agreement. The discontent with Article 25 concentrates on the following two aspects: (1) the requirements of Article 25 are seldom duly complied with. As stated previously, most fisheries subsidies have not been notified to the WTO by relevant Member States and seriously lack transparency, which create great difficulty for the complaining Member to fulfill the burden of proof under the "yellow light" rule. According to estimates of the WWF, fisheries subsidies not notified to the WTO probably account for 90% of all fisheries subsidies.[20] Lacking strong regulation on the consequences of violating the notification obligation under Article 25 is an important cause, and Articles 25.9 and 25.10 both use expressions similar to "Any Member…may bring the matter to the attention of the Committee" without providing for any hard-and-fast rules and punitive measures. (2) Article 25 has not contained sufficient provisions on the contents and requirements of notification in details. For example, Article 25.3 provides that, "the content of notifications should be sufficiently specific to enable other Member States to evaluate the trade effects and to understand the operation of notified subsidy programs" and itemizes the five types of contents that shall be included in the notice. However, the adverse effects of fisheries subsidies are more represented in the production process and fishery resource status apart from the trade section, so it is insufficient to enable

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19 Ministerial Decision on Implementation - Related Issues and Concerns (WT/MIN(01)/17, 20 November 2001), 10.2, which reads in part: "The Ministerial Conference takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in the context of the Doha Round negotiations."

20 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 48, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

other Member States to evaluate trade effects only, the production effects and influence on fishery resource status of other nations must be added. Besides, for such questions in the questionnaire as "to whom these subsidies will be given", the Member States' answers are often "producers" or "exporters" but not specific to industries, enterprises, individuals or vessels. Furthermore, the evaluation of adverse effects of fisheries subsidies cannot be separated from the background of the relevant fishery industry (including present resource, laws and regulations, fishing capacity, effort and fishing quota of each State), while Article 25.3 contains no such clear requirements for information, and only generally provides for "statistical data permitting an assessment of the trade effects of a subsidy" in Paragraph (V), which cannot satisfy the requirements of relevant evaluation.

5. Summary

The main defects of the SCM Agreement regarding fisheries subsidies can be briefly summarized as follows.

(1) The unenforceability of the "red light" rule in the fisheries subsidies field has caused the lack of *ex ante* prohibitions in this field.

(2) The challenge against the "yellow light" rule is that this rule is restricted by the burden of proof and the lack of information transparency.

(3) The protection measures for positive fisheries subsidies are insufficient.

(4) The weakness of the notification system has caused extremely insufficient transparency of fisheries subsidies provided by each State.

B. Reform of Rules

1. Prohibition of "Red Light" Subsidies and Exceptions

Fisheries subsidies causing great harm must be strictly restricted by *ex ante* prohibition measures embodied in the "red light" rule. They shall be automatically regarded as specific according to Article 2.3 of the SCM Agreement. Undoubtedly, two categories of subsidies bear the major share of blame: (1) subsidies fostering or maintaining over-capacity and fishing effort; and (2) subsidies fostering IUU fisheries.

The former category is given priority in documents submitted by many delegations that participate in the consultations on fisheries subsidies. In these documents, the delegations often emphasize fishing capacity, including fishing

effort in an implicit way.[21] Since subsidies fostering or maintaining overcapacity and the increase of fishing effort exist in various forms and kinds, the target of the new rule must be both extensive and specific and the best method is to provide its general concept and make a list of examples and exceptions in an annex, resembling the way "export subsidy" is treated in the SCM Agreement.

As to the latter one, there are few objections to the harm caused by IUU fisheries, such as damaging national and international laws and regulations, distorting competition, fostering overfishing and prejudicing fishery resources in the sea areas of developing countries. IUU fisheries shall be restricted by the "red light" rule without any exception unless under very special circumstances. However, to restrict IUU fisheries with the "red light" rule, the definition of IUU fisheries must be confirmed first. In this respect, in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU, a part of Code of Conduct for Responsible Fisheries) approved in the 24th Session of FAO Committee on Fisheries held from February to March, 2001, IUU fisheries are respectively defined in itemized way.[22] It can be said that it provides the authoritative version of definition of IUU fisheries. But after all, the functions of the WTO are different from those of the FAO and other environmental organizations such as the WWF. If all definitions under IPOA-IUU are copied, the WTO may go beyond its functions and scope of authority. We may simplify and summarize to some extent on the basis of the definitions under IPOA-IUU to adapt to the context of the WTO system.

The WTO legal system is a typical product of combining principles with flexibility. To make the rules flexible so as to meet actual needs, it is necessary to set up some exceptions to the new "red light" rule. According to suggestions of relevant researchers, such exceptions may include: short-term emergent reliefs and adjustments and some subsidies for artisanal fishing.[23] But these exceptions shall still comply with the requirement of prior notice. Provisions on special and preferential treatment for developing countries in this respect shall be formulated separately.

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21 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 59, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

22 The whole text can be found on FAO website.

23 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 71, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

2. Reestablishing the "Green Light" Rule

Clauses giving exceptional and special treatments to some positive subsidies as set out in the "traffic light" system of the SCM Agreement include the "green light" rule, apart from exceptions of the "red light" rule and special and preferential treatment for developing countries. However, "Friends of Fish" countries have remained passive and silent on this issue and America only vaguely stated that "some subsidies that may help reduce overcapacity and overfishing and may help sustainable development of fisheries are not the focus of consultation".[24] Such statement actually reflects that these countries wish to intensify the reduction of fisheries subsidies and do not want the so-called "green light" subsidies become the pretexts and stakes for holding off actions by the EU, Japan and other Member States. As stated above, the EU and Japan stated that some fisheries subsidies implemented by them are beneficial to economic development and environmental protection and shall be allowed and protected. Among the so-called developmental positive subsidies, some indeed have positive economic and social influence, as described below in part of the proposal by the EU. However, the problem is that many developmental positive subsidies foster or maintain overcapacity and overfishing and unavoidably conflict with the aforesaid "red light" rule; in this connection, we must be cautious in categorizing these subsidies under the "green light" rule. On the other hand, the influence of environmental positive subsidies has been appreciated by people under the context of stressing the "win-win-win" for trade, environment and sustainable development in the new century.

Two proposals made by the EU and China respectively are noteworthy. The EU advocates in its proposal that subsidies conducive to reducing fishing capacity and mitigating negative economic and social consequences of the restructuring of the fishery sector shall be categorized under the "green light" rule. The EU specifically points out these "green light" subsidies include: (1) subsidies to support the retraining of fishers, early retirement schemes and others; (2) limited subsidies for modernization of fishing vessels to improve safety, product quality or working conditions or to promote more environmentally friendly fishing methods (however, any such modernization must not increase the ability of the vessel to catch fish); (3) subsidies to fishers and vessel owners who have to temporarily stop

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24 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, p. 77, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

their fishing activity, when stoppages are due to unforeseeable circumstances such as natural disasters, or in the framework of tie-up schemes linked to permanent capacity reduction measures in the context of recovery plans for overexploited fish stocks; (4) subsidies to assist in the establishment of biologically important "no take zones"; and (5) subsidies for the scrapping of vessels and the withdrawal of capacity. China presented a non-exhaustive list of "green" subsidies that have no adverse impact on trade, environment or sustainable development, including subsidies provided for (1) infrastructure construction; (2) the prevention and control of diseases; (3) scientific research and training; and (4) for assistance to fishers switching to other businesses.[25]

All in all, some reasonable subsidies can obtain wider recognition, for example, if the provision of subsidies is based on the following needs: inter alia, for carrying out scientific research activities (such as the research for improvement of fishery management) and for adopting fishing tools and methods that are environmental positive or satisfy safety and hygienic requirements.

The original "green light" rule in the SCM Agreement provides that if a Member State has reasons to believe that a program has resulted in serious adverse effects to the domestic industry of that Member State, such as to cause damage which would be difficult to repair, such Member State may request consultations with the Member State granting or maintaining the subsidy. If no mutually acceptable solution has been reached in consultation, the requesting Member State may refer the matter to the Committee on Subsidies and Countervailing Measures (hereinafter referred to as the "Committee"). The Committee shall authorize the requesting Member States to take appropriate countermeasures.[26] This is actually a compromising clause. In order to harmonize the contradiction between "Friends of Fish" States and Japan, the EU and other Member States, it is a practical method for solving disagreements to continue to adopt this clause in the reestablished "green light" rule.

Besides, the "green light" subsidies shall also satisfy the requirements on transparency, and Member States providing such subsidies shall have the obligation to notify relevant information to the WTO.

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25 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, pp. 77~78, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

26 Article 9 of the SCM Agreement.

3. Restriction on Subsidies Uncovered by the "Red Light" and "Green Light" Rules - the "Yellow Light" Rule

As mentioned above, many Member States are very unsatisfied with the original "yellow light" rule. This rule needs improvement indeed, but to a great extent the blame shall not fall on the "yellow light" rule itself. The unenforceability of the original "red light" and "green light" rules in fisheries subsidies field shifts most of the burden to the "yellow light" rule, while the innate features of the "yellow light" rule make it unable to satisfy this requirement. When effective reform of the "red light" and "green light" rules as stated above is carried out, the fisheries subsidies can be put under powerful regulation and the remaining obscure parts can be left to be dealt with by the "yellow light" rule. For example, if certain subsidies which are neither directly prohibited by the "red light" rule, nor directly protected by the "green light" rule, can be proven to cause increase in fishing capacity and effort, they can be complained under the "yellow light" rule.

The original "yellow light" rule enumerated three adverse effects: injury, nullification or impairment of benefits and serious prejudice. Among them, "injury" mainly refers to the injury sustained by domestic industry of one Member State due to changes in importation caused by a subsidy provided by the government of another Member State, which may be subject to domestic countervailing measures; a typical case of "nullification or impairment of benefits" is that a Member State believes that, the improved market access opportunity, as the result of any tariff binding imposed by another Member State, that should have been obtained by it is mitigated due to the impact of the subsidy provided by that Member State;[27] and the "serious prejudice" is a more extensive concept and Article 6.3 of the SCM Agreement has enumerated four types of cases prone to incur "serious prejudice". Although fisheries subsidies are related to the first two effects, it seems on the whole "serious prejudice" can better cover various adverse consequences caused by fisheries subsidies. Therefore, it is appropriate to establish the "yellow light" rule in relation to fisheries subsidies on this basis.

Nevertheless, like other clauses of the SCM Agreement, the original "yellow light" rule focuses on the impact on importation and exportation trade, while the unique characteristic making fisheries subsidies different from ordinary subsidies is that they not only affect sales, but also directly affect the production process.

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27 WTO Secretariat, translated by Suo Bicheng and Hu Yingzhi, An Introduction to the Uruguay Round Agreement, Beijing: Law Press China, 2000, pp. 142~143. (in Chinese)

Hence, apart from the four items listed in Article 6.3, the new "yellow light" rule in relation to fisheries subsidies shall also give due regard to the impact of a subsidy on the fishery production of other Member States, and it is necessary to add some factors in this respect, such as the unreasonable increase of fishing quota.

As to complaints for heavy burden of proof under the "yellow light" rule, the "dark ember" rule should continue to exist. The four types of cases listed in Article 6.1 of SCM Agreement shall also apply to fisheries subsidies. Besides, because developing countries lack funds and talents, accompanied by outdated technologies and relatively blocked information, and are disturbed by fishing fleets from developed countries operating in their sea areas, they have more difficulties in fulfilling the burden of proof for complaints about subsidies of developed countries, therefore, the "dark amber" rule should also be considered to be applicable to complaints made by developing countries about subsidies provided by developed countries under the "yellow light" rule. In this case, it shall be presumed that the subsidies provided by developed countries cause serious prejudice and the developed countries shall undertake the burden of proof. This can be included in the separate provisions on special and preferential treatment for developing countries. Articles 27.8 and 27.9 in Part VIII of the present SCM Agreement only provide for the special treatments applicable to subsidies of developing countries under the "yellow light" rule. If the above mentioned contents are added, developing countries are entitled to two-way special treatments and their interests can be better protected.

4. Intensify the Notification System

The analysis on defects in the notification system under the SCM Agreement mentioned above has actually included some thoughts for reform of the notification system according to the features of fisheries subsidies, which will not be stated further. In the following paragraphs, we need to examine the establishment of rules on the legal consequences of non-notification. Obviously, some hard and fast punitive measures in this respect are necessary. It may begin from two aspects. The first is to raise the cost of non-notification. For example, the Committee will make public the performance of the notification obligation after reviewing the notifications, or it will directly impose fines on Member States which have not fulfilled the notification obligation, disregarding whether the subsidies of such Member States are legitimate or not. However, since the Committee is not likely to discover in its review all subsidies which are not notified, sometimes restricted by the fact that "the law will not punish everybody", the publicity method will become

a mere formality; and how to deal with Member States refusing to pay a penalty to the Committee is another difficulty. Thus, the following judicial solution is also necessary, that is, to aggravate the Member States' legal liability in the judicial process of the WTO. In a complaint filed under the "yellow light" rule, if it is found that any subsidy is not notified, the PGE can impose a fine or automatically presume that the subsidy has caused serious prejudice or request relevant Member State to withdraw a subsidy found to cause adverse effects, instead of merely removing the adverse effects or compensating the affected parties, disregarding whether the relevant subsidy will cause adverse effects or not. With regards to non-notified subsidies later found to violate the red light provisions, apart from any recommendations given by the PGE to withdraw the subsidy and any authorization granted by the Dispute Settlement Body to the complaining Member State to take countermeasures according to Articles 4.7 and 4.10, the PGE may directly impose a fine, and even if the Member State withdraws relevant subsidy according to the recommendations of the PGE, such fine shall still be paid and increased in proportion to the duration of the violation prior to withdrawal.[28] If the Member State refuses to pay the aforesaid fine, the amount of such fine shall be included in the extent of the authorized countermeasures.

Violation of the notification obligation has two forms. The first is no notification at all and the second is the form and content of notice do not comply with the requirements. Obviously, the illegality of the former is greater. Of course, sometimes a notice not complying with the requirements has no much difference with non-notification. In the design of clauses for reform measures on the aforesaid two aspects, these two cases shall be treated differently and the Member's liability shall be determined according to the specific circumstances.

5. Others

Other issues such as special and differential treatment for developing countries have been mentioned above. Due to limited length and learning, the author will not elaborate on these issues.

IV. Conclusion

28 David. K. Schorr, Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization, pp. 95~96, at http://www.panda.org/news-facts/publications/publication.cfm?uNew sld=13543&uLangld=1, 5 November 2004.

It can be concluded that, compared with ordinary subsidies, fisheries subsidies has many unique features. It is inconvenient to wholly incorporate the issue concerning fisheries subsidies into the general framework of the SCM Agreement for resolution. The more reasonable method is to formulate separate protocol under a certain agreement like the way financial service issue is settled.

In negotiations of specific issues, the stubborn attitude of a few important countries will often hinder the whole process. The role of the United States in the negotiations on ocean shipping service is an example. During negotiations on fisheries subsidies, "Friends of Fish" countries lead an active campaign, but the negative impact of the standpoints of Japan, South Korea, and even the EU on the negotiation progress still cannot be underestimated.

It should be pointed out that WTO consultations are for "a package of undertakings", which mean that the result must be achieved in all fields of consultation and applicable to all Member States. Therefore, all parties to the negotiations will bargain over different issues. If the fisheries subsidies issue must become a part of the Doha Round Negotiation, it will certainly be restricted by negotiations on other issues. The timetable requirements listed in Doha Declaration has obviously been unrealistic. According to the Doha Work Programme approved on 1 August, 2004 by the General Council of the WTO, the Doha Round Negotiation will not end until the Hong Kong Ministerial Conference commences in December, 2005.[29] When and in what way will the negotiation succeed should still be expected.

In the modern WTO system, the issues of "trade and …" have become increasingly trendy, such as trade and environment, trade and investment, and even trade and labor standards. Apart from the WTO, many other intergovernmental and non-governmental organizations, including some specialized in relevant fields, also earnestly devote themselves to the settlement of these issues. The interaction of the various issues under the authority of different organizations and institutions has shown that it is not feasible to solve all "trade and …" issues by fitting them into the WTO framework; instead, it is necessary to seek cooperation, coordination and sharing of information among government institutions, professional organizations and analyzers and promote relevant reform process through making analysis and reaching consensus. When the WTO makes efforts to reach its aims and targets

29 Doha Work Programme -Decision adopted by the General Council on 1 August 2004, Article 3.

within its functional authority, it should pay attention to the communication and cooperation with these organizations and establish relevant cooperative mechanisms. The fisheries subsidies issue represents the trinity relationship among trade, environment and sustainable development. In this respect, the WTO should particularly notice the roles of the FAO, UN-EP and WWF. Besides, some regional organizations such as the OECD and APEC have also done some work on fisheries subsidies and they will also have interaction with the WTO.

The Development Trends in the Marine Fisheries Management Regime Viewed from the Evolution of the Principle of Freedom of Fishing on the High Seas

MU Yaping * JIANG Ying **

Abstract: The principle of freedom of fishing on the high seas is an integral part of the doctrine of "freedom of the high seas", whose contents and rules change with the development and progress of international relations, science and technology. By elaborating on the establishment and evolution of the principle of "freedom of fishing on the high seas", this essay focuses on describing the impact of the Straddling Fish Stocks Agreement on the said principle and its fisheries management regime. The essay also looks at the future trends of development of the marine fisheries management regime.

Key Words: Freedom of fishing on the high seas; Straddling Fish Stocks Agreement; Marine fisheries management regime

As a part of "freedom of the high seas", the principle of "freedom of fishing on the high seas" was at one time advocated as an "absolute freedom". However, with the continuous improvement of application of new technologies in ocean exploitation and mankind's ever-increasing attention to environmental protection along with sustainable development strategies, it becomes restricted, and affects the regime and rules of modern international marine fisheries management. This essay aims to reveal the development trends in marine fisheries management regime and the legal value embodied in the process of this change, through an analysis and evaluation of the formation, development and evolution of the principle of "freedom

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of fishing on the high seas".

I. Establishment and Evolution of the Principle of Freedom of Fishing on the High Seas

A. Proposition of the Principle of Freedom of Fishing on the High Seas

During the ancient times and the first half of the Middle Ages, there were no concepts of territorial sea and high sea; the world's oceans were open to all.[1] In the 13th century or so, some coastal States began to claim sovereignty over certain parts of the oceans, and a few marine powers started to contend for maritime supremacy, by forcibly levying taxes and prohibiting foreigners from fishing and navigating in the sea areas under their control, which destroyed the previous order of the oceans. In this setting, Hugo Grotius, a Dutch jurist known as the "father of international law", published Mare Liberum (The Free Sea) in 1609, which proposed the doctrine of "freedom of the seas". He asserted that, the vast and boundless oceans should not be possessed by any person, and should conversely be open for fishing and navigation by all. In essence, the oceans are not under the sovereignty of any State, and all States may exploit the oceans freely. Nevertheless, his proposition was opposed at that time and attacked by many scholars led by John Selden of England, who directly objected to Grotius's "freedom of the seas" in his Mare Clausum (The Closed Sea), and defended energetically the proposition of maritime sovereignty, which prevailed in the 17th century, when all States actively put policies upholding maritime sovereignty into force.[2]

The influence of Grotius's assertion could not be erased in spite of the oppositions, and as a matter of fact, vessels of various States were allowed to navigate all parts of the high seas freely during the second half of the 17th century.[3] However, the concept of "freedom of the high seas" at that time was basically limited to the category of "freedom of navigation". The French scholar

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1 Robert Jennings and Arthur Watts, translated by Wang Tieya et al, *Oppenheim's International Law*, Book Two, Vol. 1, Beijing: Encyclopedia of China Publishing House, 1998, p. 153. (in Chinese)

2 Zhou Ziya and Fan Yong, *The High Seas*, Beijing: China Ocean Press, 1990, pp. 22~25. (in Chinese)

3 Robert Jennings and Arthur Watts, translated by Wang Tieya et al, *Oppenheim's International Law*, Book Two, Vol. 1, Beijing: Encyclopedia of China Publishing House, 1998, p. 155. (in Chinese)

of international law, Gidel believed that, the basic concept of freedom of the high seas does not permit any ship to disturb any other ship at sea during peace time.[4] At the same time, he also recognizes that, the freedom of the high seas cannot exclude positive results, and that this freedom when used as compared to exclusive right, will eventually lead to the concept of equality of use …[5] In other words, the implication of the "freedom of the high seas" does not merely assure the freedom of navigation on the high seas by means of "omission" of States or individuals, but also includes the freedom of active exploitation of the high seas. Thus the "freedom of fishing" is doubtlessly a part of the "freedom of active exploitation".

Although the natural law basis of "freedom of fishing on the high seas" is untenable today, it was well-understood hundreds of years ago that for anything which could be harmlessly used by any person and was abundant for use by all human beings, nature did not confer a right on any person to possess it as personal property. Obviously, to people at that time, the fishery resources in the seas and oceans were such a "thing", based on which the original implication of the "freedom of fishing on the high seas" was formed.

During the second half of the 17th century, the Netherlands carried out policies of freedom of navigation and freedom of fishing on the high seas. In 1689, William Orange, governor of the Netherlands, appeased the dispute between the Netherlands and the United Kingdom over fisheries, after taking the throne of the Netherlands, thus the Netherlands obtained the right to fish. Those examples together with subsequent rich international practices adequately prove the existence of the principle of "freedom of fishing on the high seas" as a kind of customary international law.[6] Whereas, it was the *Behring Sea Fur Seal Arbitration Case* in 1893 between the United Kingdom and the United States which eventually made "fishery on the high seas definitely undoubted on the surface".[7] In this case, the two countries disputed, because the United States arrested an English ship in British

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4 Zhou Ziya and Fan Yong, *The High Seas*, Beijing: China Ocean Press, 1990, p. 29. (in Chinese)

5 Zhou Ziya and Fan Yong, *The High Seas*, Beijing: China Ocean Press, 1990, pp. 29~30. (in Chinese)

6 Robert Jennings and Arthur Watts, translated by Wang Tieya et al., *Oppenheim's International Law*, 9 th, Book Two, Vol. 1, Beijing: Encyclopedia of China Publishing House, 1998, p. 182. (in Chinese)

7 Robert Jennings and Arthur Watts, translated by Wang Tieya et al, *Oppenheim's International Law*, Book Two, Vol. 1, Beijing: Encyclopedia of China Publishing House, 1998, p. 182. (in Chinese)

Columbia fishing fur seals on the Behring Sea which is outside the territorial sea of the United States. The final verdict rejected America's proposition that the United States was entitled to enforce rules designed to conserve endangered seal breeds on the high seas against English ships. This case not only positively affirmed the principle of "freedom of fishing on the high seas", but also revealed the contradiction between the "freedom of fishing on the high seas" and the "restrictions necessary for implementing conservation rules".[8] In essence, this contradiction reflected the conflict of interests between countries carrying out fishing activities on the high seas and those neighboring coastal States, and became the fundamental reason affecting the changes in the meaning of the "freedom of fishing on the high seas".

B. Restrictions on the Principle of Freedom of Fishing on the High Seas by Regional and Specific Treaties

As can be seen from the rulings of the *Behring Sea Fur Seal Arbitration Case*, at least during the period from the end of 19th century to the beginning of 20th century, the understanding of "freedom of fishing on the high seas" itself was inclined to be an absolute freedom, "unless relevant States enjoy certain monopoly within certain areas of fishing on the high seas for this or that reason, and unless other relevant States having identical fisheries agree on appropriate rules in accordance with applicable treaties, and may also mutually confer the power of enforcement against ships of each other …"[9] Such situations are not rare in actual fishing activities on the high seas. This is attributed to the fact that, because of the fishing technologies at that time, the capacity of fishing the fishery resources on the high seas was restricted to a limited scope, so that the fishing density within these traditional sea areas might be relatively high. Therefore, for the purpose of assuring the stability of quantity and varieties of fishes within the scope of their reach, it is necessary to take appropriate conservation measures.

Before World War II, restrictions on the "freedom of fishing on the high seas"

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8 Robert Jennings and Arthur Watts, translated by Wang Tieya et al, *Oppenheim's International Law*, Book Two, Vol. 1, Beijing: Encyclopedia of China Publishing House, 1998, p. 182. (in Chinese)

9 Robert Jennings and Arthur Watts, translated by Wang Tieya et al, *Oppenheim's International Law*, Book Two, Vol. 1, Beijing: Encyclopedia of China Publishing House, 1998, p. 183. (in Chinese)

were primarily laid down in treaties, regional and specific treaties in particular, and "the category of important treaties adopting the solution of unanimously agreed rules of fishing on the high seas were naturally and reasonably inclined to be entered into on regional and geographical basis". The overall objective of these arrangements is to guarantee the conservation and development of fish resources, and to ensure a relatively equitable distribution of the production by means of good and efficient management.[10] One of the early regional treaties is the North Sea Fisheries Convention of 1882 signed by the United Kingdom, France, Germany, Belgium, Holland and Denmark, whose primary objective was to establish fisheries police on the North Sea, which was to regulate matters such as fishing boat registration, number and port of registry, anchorage, fishing boat documents, net casting and fishing gear rescue. The Convention also provides that the countries retain punishment jurisdiction over their respective fishing boats in violation. Specific treaties are the Convention for the Regulation of Whaling of 1931 and a series of subsequent amendments and protocols. And there are even more treaties both regional and specific, such as: the North Pacific Fur Seal Convention of 1911 and the 1923 Convention between the United States of America and Great Britain for the preservation of the halibut fishery of the Northern Pacific Ocean, including Bering Sea.

C. Restrictions of Two Conventions of 1958 on the Principle of Freedom of Fishing on the High Seas

The Convention on the High Seas and the Convention on Fishing and Conservation of the Living Resources of the High Seas were passed at the First United Nations Conference on the Law of the Sea held in 1958, which included restrictions on the "freedom of fishing on the high seas".

Article 2 of the Convention on the High Seas expressly provides that freedom on the high seas include the freedom of fishing. The Convention's restrictions on the foregoing freedom are limited to "with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." The concept of "reasonable regard" as used in this article appeared for the first time in a case

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10 Robert Jennings and Arthur Watts, translated by Wang Tieya et al, *Oppenheim's International Law*, Book Two, Vol. 1, Beijing: Encyclopedia of China Publishing House, 1998, p. 183. (in Chinese)

of 1826 in which the U.S. detained a Portuguese fishing boat on the high seas. The judgment of the Federal Supreme Court of the U.S. held that, every ship has the undisputable right to navigate on the high seas for the purpose of pursuing its lawful objectives, the exercise of which however shall be without prejudice to identical rights of others.[11] This concept of "reasonable regard" is generally considered to have limited function in practice in the management of marine fishery resources, since it cannot be used to resolve some specific problems. For instance, is the freedom of fishing still allowed when certain conservation measures are proved to be urgent and necessary? In this circumstance, is the exercise of "freedom" by a State "unreasonable" when such State refuses to abide by such measures? And the most crucial thing is who has the right to formulate such measures?[12] The above-mentioned questions have no complete answers in the Convention on the High Seas.

Article 1 of the Convention on Fishing and Conservation of the Living Resources of the High Seas sets forth three restrictions on the principle of "freedom of fishing on the high seas": "All States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of coastal States as provided for in this Conventions, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas." This materializes and makes explicit the "reasonable regard" obligation as contained in the Convention on the High Seas. Other articles of the Convention also provide for conservation measures which shall be taken by certain States proactively, as well as conservation obligations of other States that are engaged in the capture of a particular variety of fish, since the Convention requires all contracting States to carry out such conservation measures by themselves alone or together with other States.

The afore-said Conventions expressly deny the absoluteness of the principle of "freedom of fishing on the high seas". Some previous regional or specific treaties and arrangements set out certain restrictions on the principle of "freedom on fishing on the high seas". However, these restrictions are but some restrictions voluntarily made by the contracting States for mutual benefit under the loose context of acknowledging "freedom of fishing on the high seas", without touching the

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11 The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826), at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=24&invol=l, 21 December 2004.

12 M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone*, Leiden: Martinus Nijhoff, 1987, pp. 2~3.

principle itself. Nevertheless, these two Conventions aim to restrict any arbitrary and absolute "freedom of fishing on the high seas" explicitly, in terms of both wording and specific provisions, and to establish this restriction as a binding code of conduct. We may say that, the Geneva Conventions of 1958 mark a transition in the principle of "freedom of fishing on the high seas" from "absoluteness" to "relativity".

D. Further Restrictions on the Principle of Freedom of Fishing on the High Seas by the United Nations Convention on the Law of the Sea (1982)

"The interests and rights of coastal States" as set out in Article 1(b) of the Convention on Fishing and Conservation of the Living Resources of the High Seas of 1958 point to Articles 6 and 7 of that Convention. Article 6 acknowledges that "a coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea."[13] And Article 7 further provides that "any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high sea adjacent to its territorial sea".[14] The Convention's original intention for such provision was to restrict further demands of coastal States for exclusive fishing zones. However, the contrary took place. The Convention was resisted by some major coastal States, such as Latin America and Iceland. Only 35 States eventually ratified this Convention, mainly some high sea fishing States. What's more, the coastal States continued to claim exclusive fishing zones of wide range, and demanded to have the fishing right exclusively retained by nationals of their own countries.[15] Up to April 1980, nearly three quarters of 136 coastal States proclaimed a fishery jurisdiction over 12 nautical miles, and nearly two thirds proclaimed a scope of jurisdiction of 200 nautical miles.[16]

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13 Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 6(1).

14 Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 7(1).

15 Liu Nanlai et al, *International Law of the Sea*, Beijing: China Ocean Press, 1986, p. 106. (in Chinese)

16 Gerald R. Moore, *Coastal States Requirements for Foreign Fishing*, Rome: United Nations Food and Agriculture Organization, 1981, p. 2.

The Convention on Fishing and Conservation of the Living Resources of the High Seas of 1958 paved the way for coastal States to generally claim their fishing rights within the areas of the high seas adjacent to their territorial seas. In order to satisfy the aspirations of most coastal States to enlarge their State fishing rights, the Third United Nations Conference on the Law of the Sea laid down the "exclusive economic zone regime" in Part V of the United Nations Convention on the Law of the Sea of 1982. This in fact acknowledged the demand of some coastal States for an exclusive fishery jurisdiction over sea areas of 200 nautical miles, which had not been recognized during the two previous UN Conferences on the Law of the Sea.

1. The Impact of the Establishment of the Exclusive Economic Zone Regime on the Principle of Freedom of Fishing on the High Seas

Article 56(1) of the United Nations Convention on the Law of the Sea provides that: "In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil … "[17] Furthermore, this Convention provides in Article 86 of Part VII that: "The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58."[18] That is to say the exclusive economic zones fall within the jurisdiction of sovereignty of relevant coastal States, and the so-called principle of "freedom of the high seas" may no longer be applied to such zones as a matter of course. In other words, sea areas to which the "freedom of fishing on the high seas" principle applies have been substantially reduced in terms of geographical area.

Paragraphs 1 and 2 of Article 58 of the Convention provide that: "(1) In the exclusive economic zone, all States, whether coastal or land locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention. (2) Articles

17 *UN Convention on the Law of the Sea*, Beijing: China Ocean Press, 1983, p. 38. (in Chinese)
18 *UN Convention on the Law of the Sea*, Beijing: China Ocean Press, 1983, p. 63. (in Chinese)

88 to 115 and other rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part."[19] It follows that, according to the design of the exclusive economic zone regime of the Convention, the previous principle of "freedom of the high seas" is not entirely non-applicable within an exclusive economic zone, but just not applied as a matter of course. Actually, according to explicit provisions of the Convention, the "freedoms of navigation and overflight" and the "freedom of laying submarine cables and pipelines" contained in the "freedom of the high seas" are applicable to exclusive economic zones, while the other two freedoms of the "freedom of the high seas", i.e. the "freedom of fishing on the high seas" and the "freedom of scientific research of the high seas" are excluded. It is evident that the establishment of exclusive economic zone regime has greatly reduced the principle of "freedom of fishing on the high seas". Since the "exclusive economic zone" is no longer a part of the "high seas", the "freedom of fishing" of nationals of other States in that zone is not just restricted but entirely denied.

2. The Impact of New Regulations concerning the Regime of High Seas on the Principle of Freedom of Fishing on the High Seas

Provisions of Part VII of the UNCLOS on high seas are nearly identical to those of the two Geneva Conventions of 1958 in relation to the regime of high seas. Due to the fact that there were limited fishing activities beyond 200 nautical miles during the mid 1970s, according to the development situation of the marine fisheries industry at the time, this issue was hardly discussed at the United Nations Conferences on the Law of the Sea.[20] As a result, the "freedom of fishing on the high seas" was provided in Article 87 of the Convention of 1982, which also provided for a "due regard" obligation; while Articles 116 to 120 were very similar to the provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas. No wonder William Burke acutely analyzed and criticized the fishery provisions contained in the UNCLOS during the late 1980s and the early 1990s. William Burke comes to the conclusion after a detailed analysis in *New International Law and Fisheries: UNCLOS 1982 and beyond*: "Save for Article 116, other guiding principles contained in the Convention are useless; what needs to be changed is exactly the core principle of 'freedom of fishing' which

19 *UN Convention on the Law of the Sea*, Beijing: China Ocean Press, 1983, pp. 39~40.

20 David H. Anderson, The Straddling Stocks Agreement of 1995 – An Initial Assessment, *International and Comparative Law Quarterly*, Vol. 45, 1996, p. 464.

is still in use today."[21]

Indeed, only Article 116(b) of the Convention of 1982 is slightly different, which provides that, all States engaged in fishing on the high seas shall be subject to the rights and duties, as well as the interests of coastal States provided for, *inter alia*, Article 63(2), and Articles 64 to 67. These provisions mainly contain the requirements for the conservation and management of straddling fish stocks and highly migratory fish stocks, as a new content incorporated into the Convention of 1982. This regulation is basically explicit, in spite of its over-simplicity. The question lies in the vagueness resulting from the determination of the scope of the term "inter *alia"*. Does it also include the preferential rights of coastal States? After adoption of the Convention, two opposite stances came into being as a result of the comprehension of this clause. Some hold that it confers certain preferential rights on coastal States in respect of fishery resources of the high seas adjacent to their exclusive economic zones; while others believe that pursuant to the provisions contained in Article 87(2)[22] of the Convention, fishing States only assume the obligation to give "due regard" to the rights of the coastal State, and Article 116(b) does not constitute the basis for coastal States that intend to exercise jurisdiction beyond 200 nautical miles. This debate however, did not arrive at a relatively definite conclusion until the birth of the Straddling Fish Stocks Agreement in 1995.

II. Further Improvement of the Marine Fisheries Management Regime by the Straddling Fish Stocks Agreement

Fishing activities on the high seas beyond 200 nautical miles began to grow rapidly, along with the quick improvement of global fishing technologies. States engaged in high sea fishing, should consider how to take advantage of all provisions concerning the "freedom of fishing on the high seas"; while coastal States, should ensure that their fishery interests within their respective exclusive economic zones will not be adversely affected by high sea fishing activities. Furthermore,

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21 William Burke, *The New International Law and Fisheries: UNCLOS 1982 and Beyond*, Oxford: Oxford University Press 1994, p. 350.

22 Article 87(2) of the UN Convention on the Law of the Sea provides that: "These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area."

the activities of fishes are not affected by the limits of sea areas delimited by man. People cannot ignore the objective fact that the entire ocean is an ecological unity, both for those who want to implement a set of fisheries management regime within exclusive economic zones and those who intend to establish a set of high sea fishing institutions. The focus of this contradiction is on the conservation and management of straddling fish stocks and highly migratory fish stocks. The proper exploitation and effective conservation of these fish resources cannot be truly realized, if the institutions and management in respect of the exclusive economic zones of different States, and those between exclusive economic zones and the high seas are not well-coordinated. Nevertheless, in the absence of foresight at the Third United Nations Conference on the Law of the Sea for the flourishing development of fishing activities on the high seas beyond 200 nautical miles, provisions of the Convention in this regard are not adept to meet actual needs.

Articles 63 and 64 of the Convention of 1982 set up a framework for resolving the conservation and management problems in respect of straddling fish stocks and highly migratory fish stocks, that is coastal States and fishing States enter into appropriate agreements through sub-regional or regional organizations to cooperate with each other. However, the remaining problem of the framework set up by the Convention is: what if no agreement can be reached between the coastal States and the fishing States?[23]

Apart from the legal problem remaining unresolved in the UNCLOS, some current situations existing in the global fishery industry also cause general anxiety among people. As for fishing and conservation issues, the amount of fishing around the globe had been ascending in the 1980s, and reached a summit in 1989. According to a report of the Food and Agriculture Organization in 1995, 70% of all fish stocks are overexploited, or on the verge of extinction. At the same time, with respect to management, people notice the following phenomena: 1. The lack of accurate statistical data on fishing on the high seas; 2. The phenomenon of flying flags of convenience in the process of fishing attributable to the fact that some flag States are unable to effectively control the flying of flags by ships of their nationalities; and 3. Individual coastal States worry that fishing in adjacent areas will have adverse impact on their fishing and conservation in their exclusive

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23 Some coastal States proposed to refer the dispute to arbitration but was forced to withdraw it due to the opposition of high sea fishing States. See Proposal by Argentina and others, A/CONF. 62/L. 114 of 15 April 1982.

economic zones, and intend to extend the domain for the implementation of their management measures.

These notable problems were raised during the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992. According to the proposal of Canada, the problem on "straddling fish stocks and highly migratory fish stocks" was included in a series of conference agenda of the UNCED. In the meantime, however, due to insistence of the EU, it was agreed that the conference would operate under the framework of the UNCLOS only, i.e. neither existing terms may be modified nor new terms may be proposed, in particular, the restriction of 200 nautical miles on exclusive economic zones may not be modified.

On August 4, 1995, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Fish Stocks Agreement) was adopted at the Fourth Session of the Conference of the United Nations on Straddling Fish Stocks and Highly Migratory Fish Stocks. The provisions set out in this Agreement are basically designed for the high seas beyond 200 nautical miles.[24] This Agreement is an important development of the UNCLOS, which significantly influences the conservation and management of living marine resources, especially the conservation and management of fishery resources of the high seas, as well as international fishery cooperation. The Agreement includes fifty articles in thirteen parts, accompanied by two annexes.

Part I (Articles 1 to 4) contains some general provisions covering the use of terms and scope, objective, application and relationship between this Agreement and the UNCLOS. There is a sentence in Article 3 on Application worthy of special notice which provides that, this Agreement applies beyond areas under national jurisdiction, except Articles 6 and 7 which also apply within areas under national jurisdiction, "subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in

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24 See Article 3(1) of the Straddling Fish Stocks Agreement: "Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction…" Department of Policies and Regulations of State Environmental Protection Administration ed., *Collection of International Environmental Treaties Contracted and Signed by China*, Beijing: Academy Press, 1999, p. 251.

the Convention." This paragraph is understood as a restriction on the denial of the intention of coastal States to extend their areas of jurisdiction at will.

Part II (Articles 5 to 7) provides for detailed conservation and management obligations of relevant contracting States. Only these articles apply within 200 nautical miles under national jurisdiction.[25] Provisions of Article 7 are intended for ensuring compatibility of conservation measures within and beyond 200 nautical miles. Article 7(2) calls upon all States to take into account measures of the same kind made by coastal States in accordance with articles of the Convention for application in exclusive economic zones, as well as prior agreements concluded with respect to neighboring high seas, in deciding such measures.

Part III (articles 8 to 16) and Party IV (article 17) are about "international cooperation mechanisms". Part III of the Agreement lays down operable provisions on "international cooperation mechanisms" for straddling fish stocks and highly migratory fish stocks which are not provided for in the Convention. The Agreement provides that, coastal States and States engaged in high sea fishing shall establish sub-regional and regional fisheries management organizations (Regional Fishery Organizations, RFOs) to conserve and manage straddling fish stocks and highly migratory fish stocks. Only States which are members of or participants in such organizations or arrangements, or which agree to apply the conservation and management measures made by such organizations or in such arrangements, may fish the fishery resources to which these measures apply. In the absence of conservation and management measures with respect to certain straddling fish stocks or highly migratory fish stocks made by RFOs or arrangements, relevant coastal States and States engaged in fishing such fish stocks on sub-regional or regional high seas shall promptly work with each other to establish such organizations or to enter into other appropriate arrangements so as to effectively conserve and manage such fish stocks, and shall participate in the work of such organizations or arrangements.[26] Part IV (article 17) also particularly points out that, even States which are not a member of the RFOs and not a party to regional

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25 See Article 3(1) of the Straddling Fish Stocks Agreement: "Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction…" Department of Policies and Regulations of State Environmental Protection Administration ed., *Collection of International Environmental Treaties Contracted and Signed by China*, Beijing: Academy Press, 1999, p. 251.

26 Art. 19, Straddling Fish Stocks Agreement.

agreements may not be discharged from such cooperation obligation.

Part V (article 18) provides for the duties of the flag States. This Part is designed for the present situation that flag States are unable to effectively exercise jurisdiction over fishing activities of the ships on the high seas, and the phenomenon of flying flags of convenience when fishing on the high seas due to the indulgence of the flag States. The Agreement encourages flag States to introduce a licensing mechanism, and require flag States to detect, regulate and supervise ships flying the national flags of the flag States and their fishing activities.

Party VI (article 19 to 23) is on the compliance and enforcement of the Agreement, which primarily rests on the shoulders of flag States[27], while the Agreement at the same time encourages enforcement by international cooperation[28]. The most detailed part is about sub-regional and regional cooperation in enforcement. Article 21 establishes a relatively perfect regional implementation mechanism, which is in the meantime a mechanism that shocks the freedom of fishing on the high seas most thoroughly. This article provides that, once a State joins such organizations, it must accept the possibility of boarding and inspection by other States under the authority of an RFO on the high seas with regard to ships flying its flag. Such boarding and inspection are regarded as a "special application" in fisheries of the boarding and inspection powers of warships or Coast Guard ships we are familiar with. Provisions of article 110 of the Convention on boarding and inspection powers are open-ended, in that it allows State A and State B to authorize each other by agreements to board and inspect ships flying the national flag of the other. Article 21 of the Agreement may be considered as an authorization clause similar in nature to such agreements, such that the power of inspection may even be applied to fishing boats whose flag State is not an RFO member but a State party to this Agreement. Considering the severity of this clause, it may be applied to member States to the Agreement, furthermore, in order to prevent abuse of such power, article 22 provides for the most basic procedural requirements for the exercise of series of boarding and inspection powers in detail.

Part VII (articles 24 to 26) mainly deals with the special requirements of developing States, forms of cooperation with developing States and special assistance. Wordings of the treaty also convey certain information, for instance, the object of such assistance does not impact such major high sea fishing States such

27 Art. 19, Straddling Fish Stocks Agreement.
28 Art. 20, Straddling Fish Stocks Agreement.

as China and South Korea. [29]

Part VIII (article 27 to 32) provides for mechanisms for peaceful settlement of disputes, which are in its entirety provisions of Part XV of the Convention. According to this Part, a State which ratifies this Agreement has agreed on certain forms of compulsory procedures for settlement of disputes, including reconciliation, arbitration, appeal to the International Court of Justice or the International Tribunal for the Law of the Sea.

Parts IX, X, XI and XII (articles 33 to 36) contain one article each, providing for non-parties, performance in good faith, limitation of liability and review conference respectively. Part XIII contains the final provisions (articles 37 to 50). No reservations or exceptions may be made to the Agreement.

The two annexes are: Annex I: Standard Requirements for the Collection and Sharing of Data and Annex II: Guidelines for the Application of Precautionary Reference Points in Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

The influence of the Straddling Fish Stocks Agreement can never be underestimated, although it is only an executive document. What's more significant is that it establishes a powerful and operable mechanism for coastal States and States engaged in high sea fishing to conduct inter-State cooperation in performing the conservation and management obligations with regard to straddling fish stocks and highly migratory fish stocks. A State which ratifies this Agreement agrees to certain forms of compulsory procedures for settlement of disputes, including reconciliation, arbitration, appeal to the International Court of Justice or the International Tribunal for the Law of the Sea. The reasons are as follows: firstly, the Agreement is a document passed at a global conference upon unanimous agreement, and it is unmatched by other regional or specific treaties in terms of its relatively extensive global will, which is embodied in it; secondly, the Agreement further reflects general restrictions on the "freedom of fishing on the high seas", i.e. the "reasonable" and "due regard" standards, and stresses that the "freedom of fishing on the high seas" must be understood as restricted due to the obligation of conserving fish stocks and the obligation of inter-State cooperation for the purpose of such conservation. We may say that, it is this Agreement that truly embodies the fact that "freedom of fishing on the high seas" is a limited freedom from the

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29 David H. Anderson, The Straddling Stocks Agreement of 1995-an Initial Assessment, *International and Comparative Law Quarterly*, Vol. 45, 1996, p. 473.

perspective of legal regime.

III. Prospect of the Development Trends in the Marine Fisheries Management Regime

The Straddling Fish Stocks Agreement of 1995 is an important reform in the marine fisheries management regime, which indicates progress in the marine fisheries management regime, and a new order in the marine fishery industry is forming and improving steadily. At present, the main features and trends in the marine fisheries management regime are as follows:

A. Marine Fishery Industry Enters into an Age of Comprehensive Management

When formally passed in 1982, the Convention on the Law of the Sea foretold the end of the freedom of fishing on the high seas and the coming of fishery resources management. At that time it was mainly limited to coastal States which had the right to implement the regime of exclusive economic zone of 200 nautical miles. These States enjoyed the sovereign right to explore, exploit, conserve and manage their living marine resources, which substantially reduced the range of the high seas. The management of fisheries on the high seas were conducted through fishery commissions under international or multilateral agreements by conducting joint scientific research, resource surveys, resource status evaluation and proposal of suggestions on conservation measures, with jurisdiction over fishing boats on the high seas exercised by flag States as before. Presently, in addition to the foregoing contents, management of fisheries on the high seas may have observers of other States onboard. Furthermore, civil servants authorized by governments of relevant States may board the fishing boats of other States to inspect the fishing gears, items harvested and statistical literature on fishing. States may be required to implement authorization and licensing systems with respect to fishing. They must abide by all standards for the building and facilities of fishing boats, and sailors onboard such fishing boats shall receive trainings as required by international standards and obtain internationally uniform certificates of competency. All States shall report their basic data on high seas fishing boats to relevant international organizations. It implies that, from a global perspective, marine fisheries as a whole not only include the management of living marine resources, but also cover the management of the

methods of fishing activities and the entire procedure of fishing, whether within the exclusive economic zones or on the high seas.

B. Coastal States and High Sea Fishing States Intensify Cooperation in Implementing Fishery Laws

From the actual situations of development, on one hand, the situation of absolute freedom of fishing on the high seas is no longer in existence, and the flag States of high seas fishing boats will be required to assume the responsibility of managing the fishing activities of their fishing boats; on the other hand, cooperation in the management of high sea fisheries will be intensified, especially with regard to the regime of collection of data on the operations of fishing boats on the high seas.

Certainly, the implementation of international fishery laws and regulations on the high seas tends to be fairly difficult. However, to establish a management regime acceptable to all parties by means of cooperation between coastal States and high sea fishing States is worthy of imitation by all States. The joint implementation regime established by the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea is no doubt a direction in the development of high sea fisheries management regime in the future. This Convention provides for a series of management systems, including the determination of catchability, country-specific quota system, joint implementation regime and flag State responsibility regime, among which, the joint implementation regime allows authorized officials of any member State to board fishing boats of other member States on the high seas to inspect the fishing boats, fishing gears, items harvested, fishing logs and other documents, and to inquire the captains, fishing chief and other senior officers.

C. Consistent Reinforcement of Regional Fisheries Management and Formation of Substantive Fisheries Management Organizations

Presently, international marine fisheries management is developing and intensifying towards regionalization The primary trends of regionalization of marine fisheries management is based on the two different sea areas under and beyond national jurisdiction, which are as follows:

1. Sea areas under national jurisdiction mainly refer to exclusive economic

zones. Fishery management by States in their exclusive economic zones is consistently improving and intensifying. The requirements for common piscary of foreign fishing boats are becoming higher and higher, the management more and more rigorous, and the regional management measures or fisheries management regionalization are taken designedly.

2. High sea fisheries beyond national jurisdiction. The main trend is to reinforce regional management or establish regional fishery organizations through relevant national organizations and agreements. The establishment and implementation of management measures for the whole process of high sea fishery resources conservation and fishing activities, as well as dispute resolution shall be included in the management scope of regional fishery organizations. To this end, close attention must be paid to the activities and trends of relevant regional fishery organizations, and their fisheries management and implementation measures.

D. High Sea Fisheries Management Measures Tend to be Enforced Coercively and Non-contracting States shall also Assume Certain Responsibilities

The United Nations resolution on banning the use of large drift-net fishing on the high seas was carried out in 1993, and measures including relevant economic sanctions were taken against States which did not enforce the resolution. Many multilateral fishery agreements also provide that, both contracting and non-contracting States shall coercively enforce relevant marine fisheries management measures. Meanwhile, for authorized inspection, States may board and inspect the fishing boats of non-member States provided they follow the procedure laid down by regional organization and they may carry out relevant treatment when necessary. Port States may also board fishing boats arriving at their ports or at their wharfs to inspect their credentials, fishing gears and items harvested. As a matter of fact, non-contracting States do not enjoy the right set out in relevant agreements, but are forced to assume obligations contained therein, which objectively deny the freedom of fishing on the high seas of States which are not members of the regional organizations.

The Straddling Fish Stocks Agreement of 1995 further provides for grave breaches specifically, which provides a basis for international marine fisheries management and the treatment of relevant breaches. The Agreement provides that, where a member State of any regional fishery organization or "arrangement"

determines through its authorized inspectors that any contracting State or non-contracting State commits any breach, it may unconditionally exercise the right of boarding and may employ force. Although relevant States had opposite opinions while discussing whether force may be employed since the employment of force violates the spirit of the Charter of the United Nations,[30] the Straddling Fish Stocks Agreement eventually reserved the provision that: the use of force shall be avoided, except for ensuring the safety of inspectors and in case force is necessary when an inspector's performance of tasks is obstructed. These are unprecedented provisions on marine fisheries management.

It is not difficult to infer from the "rise and fall" of the principle of "freedom of fishing on the high seas" that, both its rise and fall are inevitable from the perspective of the whole history of its development, among which, non-legal factors play an important role. If the establishment of the principle of "freedom of the seas" benefits from the need for freedom of trading and transport during the preliminary stage of the development of capitalism, the decline of the "freedom of fishing on the high seas" from the beginning of this century is attributable to a great extent to the development of science and technology. Its influence has two sides: One is the improvement of fishing technologies, which directly leads to resource crisis; the other is people's deepened awareness of the ecological environment, which leads them to protect the environment and ecological balance consciously. The value of international law, and even the value of law, will be well represented, if we comprehend the development of the principle of "freedom of fishing on the high seas" from this perspective.

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30 Guo Wenlu, Huang Shuolin and Cao Shijuan, Analysis of the Development of International Legal Regime for Fisheries and its Impact on Global Marine Fisheries, *Marine Exploitation and Management*, No. 2, 2002. (in Chinese)

The Implementation of the Right of Hot Pursuit and China's Maritime Law Enforcement

YU Mincai *

Abstract: The right of hot pursuit refers to the right of a coastal State to pursue and seize foreign ships which violate any of its laws and regulations and escape from the sea areas under its jurisdiction to the high seas. This essay examines the various general issues in relation to the implementation of the right of hot pursuit, including the parties involved in the legal relationship, legal basis, commencement, immediacy and continuation, and the cessation of hot pursuit, and discusses the use of force in the process of hot pursuit. On this basis, the essay puts forward suggestions for improving the implementation mechanisms of the right of hot pursuit in China on account of the problems existing in the implementation of the right of hot pursuit in China.

Key Words: Right of hot pursuit; United Nations Convention on the Law of the Sea; Maritime law enforcement

I. General Issues in the Implementation of the Right of Hot Pursuit

A. Parties Involved in the Legal Relationship of Hot Pursuit

Two opposite parties involved in hot pursuit are: the pursuer and the pursued. The pursuers are the tools a coastal State may employ to lawfully exercise the right of hot pursuit, and are limited to certain kinds of ships and aircraft having special connection with the governmental powers of a State. According to Article 23(4) of the 1958 Convention on the High Seas, the right of hot pursuit may be exercised

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only by warships or military aircraft. This Convention further provides that, other ships or aircraft specially authorized to that effect may also exercise the right of hot pursuit. Article 111(5) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) maintains this distinction between warships and military aircraft and ships and aircraft with special authorization, but additionally provides that the latter must be "clearly marked and identifiable." Both Conventions confine exercise of the right of hot pursuit to ships and aircraft permitted by national authorities, aiming to ensure the responsibility of the States for pursuers which act on behalf of these States upon authorization. It is not necessary for a State to expressly manifest its connection with its warships and military aircraft, which is self-evident. On the contrary, other pursuers may not exercise the right of hot pursuit unless as specially authorized, and this special authorization does not mean that a pursuer must be specially authorized for carrying out hot pursuit in any particular event, but is a general authorization for special kinds of instruments performing specific responsibilities, such as Coast Guard Cutters, fisheries administration ships and anti-smuggling patrol boats.[1] Except for the two categories of pursuing instruments mentioned above, no any other ship or aircraft of a coastal State, such as merchant ships and fishing boats, may exercise hot pursuit.

The pursued means any foreign ship in violation of any law or regulations of a coastal State. The ship mentioned here has an express definition. According to Article 95 and 96 of the UNCLOS, warships and ships used only on government non-commercial service shall on the high seas have complete immunity from the jurisdiction of any State other than the flag State. Therefore, the pursued is any illegal foreign ship other than those entitled to complete immunity. It means that, a coastal State's exercise of jurisdiction over ships of its nationality has nothing to do with the right of hot pursuit, and it may not exercise hot pursuit of any foreign ship which is entitled to complete immunity and any other foreign ship which exercises maritime rights lawfully. Even if any foreign warship does not abide by the laws and regulations of a coastal State on passing through its territorial sea, and gives no consideration to any requirement of this coastal State for compliance with such laws and regulations, appropriate remedial measures this coastal State may take are confined to requiring that warship to leave its territorial sea. Only other illegal foreign ships which are not entitled to complete immunity may be pursued hotly,

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1 See Myres S. McDougal & William T. Burke, *The Public Order of the Oceans*, 1962, pp. 919~920.

whether they are merchant ships, fishing boats or any other ships.

B. Basis for Hot Pursuit

1. Violation of the Laws and Regulations of a Coastal State

A foreign ship's violation of the laws and regulations of a coastal State is the reasonable basis for hot pursuit exercisable by that coastal State. Article 111(1) of the UNCLOS provides that, "the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State." The legal reason for hot pursuit is associated with the legislative power of the coastal State with regard to specific sea areas. Differences in the legal status of the sea areas under the jurisdiction of the coastal States lead to differences in the legislative power, which results in differences in the reasons for hot pursuit. The types of non-territorial violations are obviously more limited in comparison with the types of territorial violations. Within internal water, the coastal States have complete legislative power; in territorial seas, the legislative power of coastal States is only subject to the restriction of innocent passage of foreign ships; in archipelagic waters, subject to the restrictions of the traditional fishing right, the right of innocent passage and the right of archipelagic sea lanes passage; and in contiguous zones and other non-territorial jurisdictions, subject to more restrictions. Therefore, only hot pursuit exercised on the basis of any violation by a foreign ship of any laws or regulations which are made by a coastal State in accordance with international laws and applicable to certain areas under its jurisdiction, otherwise, any hot pursuit is illegal. In the *Saiga Case* in 1999, the International Tribunal for the Law of the Sea (ITLOS) holds that, Guinea's application of its Customs Law to its customs zone covering part of its exclusive economic zone violates the UNCLOS, and that the *Saiga* does not violate any Guinean laws and regulations applicable under the UNCLOS, consequently, there is no legal basis for Guinea to exercise the right hot pursuit.[2]

What is the scope of violations giving rise to hot pursuit? Is there a problem of extent with regard to violations? Can hot pursuit be exercised against intentions to commit violations, prior violations or individual violations? These are not explicit

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2 See International Tribunal for the Law of the Sea, Judgment on The M/V "Saiga" (No. 2) Case (Saint Vincent and The Grenadines v. Guinea), 1999, paras. 136~149.

in the UNCLOS. One opinion holds that, trivial violations of foreign ships shall not be pursued hotly. O'Connell says, if any hot pursuit arising from a trivial violation equals to a restriction on the freedom of navigation, it is an excessive exercise of power. He consequently proposes that, Article 23 of the Convention on the High Seas shall seemingly incorporate certain qualitative concept.[3] Reuland points out that, although international law does not strictly limit the exercise of the right of hot pursuit to serious violations of local law, international comity and goodwill counsel against exercising the right in response to innocuous or trivial offenses. States abide by established principles of comity because it is in their best interest to do so. A state that fails to act hospitably to its neighbors and pursues their ships without good cause may well find its own merchant fleet subject to the same abuse.[4]

The opinion described above is doubtful. Freedom of navigation applies to the high seas, but it is not applicable to internal waters and territorial seas. Even if in exclusive economic zones, the freedom of navigation enjoyed by other States does not equal to freedom of the high seas. For this reason, to exercise hot pursuit of trivial violations occurring in waters under the jurisdiction of coastal States does not contravene the freedom of navigation. After all, international comity is not a legally binding principle upon the States, the omission of a State with regard to ships involved in harmless or trivial violations is but a unilateral behavior in the hope of identical treatment, which does not occur at all times as expected. Hence, the commencement of hot pursuit does not depend on the severity of violations, although it might influence a coastal State in deciding the exercise of this right and in what way this right may be executed effectively (such as the use of force). Actually, the open wording of Article 111(1) of the UNCLOS signifies that, coastal States may exercise hot pursuit on foreign ships in violation of their laws and regulations, regardless of the severity of such violations. However, the coastal State may be influenced by some actual conditions in deciding the exercise of hot pursuit. For instance, such State might find that the trivial violations are not worthy of hot pursuit or the foreign ships involved in trivial violations might consider it not necessary to escape. McDougal and Burke comment that, it seems not very practical to lay emphasis on the severity of violations, in that it is suspicious that a suspected ship which harmlessly violates local laws is worthy of escaping or not.

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3 D. P. O'Connell, *The International Law of the Sea*, pp. 1080~1989.

4 See Robert C. Reuland, The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, p. 567.

From a practical perspective, except for political reasons, it is also fairly suspicious that a coastal State will intend to take drastic measures in arresting and detaining ships involved in trivial violations.[5] Anyway, from the perspective of the law, it is discretion of the coastal State to decide whether it will pursue a foreign ship in violation of its laws and regulations, and international laws have not provided that it must be a gross violation. Deciding not to pursue innocuous or trivial offenses and the prohibition of hot pursuit of this kind of violations provided by the law are two different things.

According to Article 111 of the UNCLOS, hot pursuit may be applied to foreign ships which have actually committed or are suspected to have committed violations. The answer to whether hot pursuit may be applied to a foreign ship which is trying to commit a violation is affirmative, according to relevant terms of the UNCLOS and preparatory literature of the International Law Commission of the United Nations. According to Article 33 of the UNCLOS, a coastal State may exercise control over certain matters in its contiguous zone as necessary to prevent violations within its territory or territorial sea. Obviously, violations to be prevented here shall include violations the ships are trying to commit. In making preparations for the First United Nations Conference on the Law of the Sea, when the Brazilian representative proposed to the International Law Commission that the terms of the draft Convention on the Law of the Sea shall mention violations in preparation, the Special Rapporteur thought it redundant, and the Commission also considered that the proposal had been included in the draft.[6] According to the judgment for the "Guillaume v. United States, 1928" case entered by American court, the U.S. has the right to seize a ship that is trying to violate its laws.[7] Therefore, coastal States may exercise hot pursuit of a foreign ship which has actually violated or which is trying to violate the laws and regulations of such State.

Whether a prior violation of a foreign ship can lead to hot pursuit, i.e. whether a coastal State may affect hot pursuit of a foreign ship escaping to the high seas for the purpose of avoiding arrest due to its prior violation? Judging from relevant provisions of Article 111 of the UNCLOS, hot pursuit is seemingly not allowed for such violation. Nevertheless, if it is not allowed, then such State has to cease hot pursuit when the foreign ship enters the high seas by way of the territorial sea. A

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5 See Myres S. McDougal and William T. Burke, *The Public Order of the Oceans*, p. 895.
6 See *Yearbook of International Law Commission*, Vol. 1, 1956, pp. 49~50.
7 See Thomas A. Clingan, *The Law of the Sea: Ocean Law and Policy*, 1994, p. 68.

"rule" like this will no doubt obstruct the effective implementation of the laws of the coastal State, and its practicability will be questioned a lot. Reuland proposes a possible solution to this dilemma is to view the second flight itself as a new offense. If a State may arrest a vessel for prior delicts, and if the vessel takes to the high seas to avoid such lawful arrest, such flight would constitute a new wrong and the State may then give pursuit.[8] This proposition has no legal basis in that the escape itself does not constitute a violation. As a matter of fact, it is not necessary to justify the hot pursuit affected by the coastal State against a foreign ship with a prior violation by this reason. The reason for this is that, the second appearance of a foreign ship with prior violation in any sea area under the jurisdiction of the coastal State itself constitutes evidence to the effect that it is trying to commit a violation.

Generally speaking, violations of sailors and passengers aboard a foreign ship do not lead to hot pursuit. Under the right of hot pursuit, a coastal State may claim jurisdiction over the ship only, rather than its sailors and passengers. If a passenger or sailor aboard the foreign ship is suspected of a violation of any local law, the coastal State may be remedied by diplomatic channels, such as extradition of the individual suspected (if possible). But it may not pursue such ship to the high seas. However, if the violation of such passenger or sailor has any actual connection with such ship, it may be attributed to the ship and become a violation of such ship, in which case, hot pursuit may be applied to such ship. For instance, a violation is committed by a person in command of the ship, or a person acts in the name of any authority of the ship or a person under the control of the ship, or such person knows but does not do anything to prevent such violation, or take steps upon it occurrence to obstruct law enforcement by the coastal State against the violators, or escapes when a warship is approaching.

2. Good Reason to Believe the Foreign Ship's Violation

The reasons for hot pursuit by a coastal State must be sufficient. The UNCLOS however does not lay down a specific definition on the standard of "good reason". Obviously, mere suspicion or speculation is insufficient. Likewise, actual knowledge of a violation is unnecessary.[9] "Good reason" requires that, the competent authorities of a coastal State must have strong evidences to determine a foreign ship as in violation. In the absence of justifiable reasons for the exercise

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8 See Robert C. Reuland, The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, p. 571.

9 See D. P. O'Connell, *The International Law of the Sea*, p. 1088.

of hot pursuit, the ship which is ordered to stop navigation or arrested outside the territorial sea may claim compensation for any loss or damage as sustained by it. It must be stressed that, the premise giving rise to the liability for damage is "exercise of hot pursuit without justifiable reasons". Hot pursuit is justifiable if a coastal State has good reason to believe a suspected ship is in violation of its laws and regulations, even if the suspicion is subsequently proved to be unjustifiable. Therefore, only loss or damage arising from hot pursuit which is unjustifiable from the very beginning may be subject to compensation.

C. Commencement of Hot Pursuit

1. The Foreign Ship Must Be in Sea Areas under Jurisdiction of a Coastal State

Since hot pursuit is the continuation of the jurisdiction of a coastal State which has already been commenced against a foreign ship suspected of a violation, it must be commenced from a sea area where the coastal State may exercise jurisdiction over foreign ships. International law defines the sea areas where a coastal State may lawfully commence hot pursuit. According to Article 111(1), (2) and (4) of the UNCLOS, hot pursuit may be commenced when a foreign ship or one of its small boats is in the internal waters, archipelagic waters, territorial sea, contiguous zone, exclusive economic zone or above the continental shelf of the pursuing State. Furthermore, only when the pursuing ship determines that the ship pursued is actually in the above-mentioned sea areas by practical means as may be available, hot pursuit may be considered as has commenced. In other words, hot pursuit may not be commenced if the illegal ship is discovered after it is on the high seas. As to the "practical means as may be available" to determine the location of the suspected ship, the UNCLOS contains no further definitions. It is conceivable that, the broad wording of "practical means as may be available" enables warships to apply any means available to them to determine the location of the suspected ships. If a warship firmly believes that a suspected ship is within the limits of sea areas where hot pursuit may be commenced, it may exercise hot pursuit appropriately. However, this "firmly believe" does not require and shall not require that the determination of the warship must be accurate.[10]

Compared to the location of the ship pursued, international law provides for

10 See Myres S. McDougal and William T. Burke, *The Public Order of the Oceans*, p. 917.

few restrictions as to the location of the pursuing ship. As long as an illegal foreign ship receives an order of stopping navigation within the limits of the territorial sea or contiguous zone, the pursuing ship is not required to be within these areas.

2. A Visual or Auditory Signal to Stop Shall Be Given at a Distance which Can Be Seen or Heard by the Foreign Ship

The commencement of hot pursuit not only require that a foreign ship must be actually within the limits of sea areas under the jurisdiction of the coastal State, but also that a visual or auditory signal to stop must be given in a distance which can be seen or heard by the foreign ship. The purpose of "in a distance which enables it to be seen or heard" is to ensure the effective communication of signals to stop navigation, which requires that signals to stop must be given in a distance as close as possible between the pursuing ship and the ship pursued. Visual and auditory signals include singing sirens and crying, excluding wireless signals.[11] According to Article 111(6) of the UNCLOS, aircraft must give effective signals to stop before beginning hot pursuit. If the aircraft only finds that a ship is in violation or suspected of a violation and the aircraft itself or other aircraft or ship continuously undertakes hot pursuit after taking over the pursuit neither orders the ship to stop nor undertakes hot pursuit, it is not sufficient to constitute a reason for arrest outside the territorial sea. It seems that, in case of taking over the hot pursuit, both the initial pursuing aircraft and other aircraft or ship taking over the pursuit shall give a signal to stop. As a result, when a coastal State discovers any infringing foreign ship, if this State undertakes hot pursuit without giving a signal to stop within a distance which enable such signal to be seen or heard by the foreign ship, such pursuit is invalid. In the 1979 *La Rosa Case*, the American court adjudicates that the U.S. Coast Guard's arrest of *La Rosa* is illegal, because "it did not give a visual or auditory signal to stop prior to its second visit beyond 12 nautical miles." In *The M/V "Saiga" (No.2) Case*, the ITLOS notes the evidence adduced by Guinea does not support its claim that the necessary auditory or visual signals to stop were given to the *Saiga* prior to the commencement of the alleged pursuit, as required by Article 111(4) of the UNCLOS. In any case, any signals given at the time claimed by Guinea cannot be said to have been given at the commencement of the alleged pursuit.[12]

Cases in some countries give express affirmative answers as to whether

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11 See *Yearbook of the International Law Commission*, Vol. II, 1956, p. 285.

12 See Judgment on The M/V "Saiga" (No. 2) Case, paras. 147, 148, 152.

exceptions to the requirements for giving visual or auditory signals are permitted. For example, in the 1929 *Newton Bay Case*, the American court adjudges that, the absence of a signal shall be without prejudice to the lawful arrest of the British ship which is pursued by U.S. Coast Guard onto the high seas. The court holds that, the rules of hot pursuit do not require the giving of an express signal to stop to the ship, and the reasons are as follows: firstly, from a practical perspective, to give a signal by singing sirens or firing to the air is useless, since the ship is trying to escape; secondly, the acts of the ship *Newton Bay* of trying to escape and avoid the arrest of the Coast Guard clearly demonstrate that the captain and sailors aboard the ship American officials are pursuing them for the purpose of enforcing American laws. Reuland therefore concludes that, in some circumstances, the signal requirement may be unnecessary, because when a suspected ship conspicuously refuses to wait for the inspection, the signal requirement becomes a form having no practical significance.[13]

The afore-mentioned opinion is untenable. Firstly, we cannot define the accurate conditions for the exercise of hot pursuit purely by use of a domestic court judgment entered before the rules of hot pursuit become a written law in treaty law; secondly, the express of "The pursuit may only be commenced … after … signal to stop 'has' been given" fairly clearly indicates that, hot pursuit is not deemed to have begun if no signal to stop has been given; thirdly, the ignorance by the ship pursued of the signal to stop does not render the signal requirement practically meaningless, by contract, it is the ignorance by the foreign ship of the signal to stop that enables the coastal State to continue its pursuit onto the high seas; fourthly, the signal requirement provides the foreign ship with a chance to respect or resist the right of law enforcement of the coastal State, so as to eliminate or increase the opportunity of being suspected. Hence, the giving of a visual or auditory signal to stop is a necessary condition for the lawful commencement of hot pursuit.

D. Immediacy and Continuation of Hot Pursuit

The hot pursuit undertaken by a coastal State must be "urgent", that is, it shall immediately take steps to carry out hot pursuit when it believes a foreign

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13 See Robert C. Reuland, The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, pp. 583~584.

ship commits any infringement; and it shall immediately undertake hot pursuit when a foreign ship refuses to an order to stop and escapes toward the high seas. A famous remark was made by the British defense lawyer in the *Bering Sea Fur Seals Arbitration Case*, the hot pursuit must be urgent, that is to say, a State may not wait for a number of days or weeks, and say you committed a crime within our sea area weeks ago, and we traced you by miles or hundreds of miles and pursued you. With respect to this issue, the hot pursuit must be urgent and undertaken immediately within appropriate range.[14] What's more, the hot pursuit must be "continued" without any interruption. The hot pursuit may be continued onto the high seas or contiguous zone only when it has been undertaken continuously without any interruption. Therefore, if the hot pursuit is not undertaken immediately or if there is any interruption, then the hot pursuit is not urgent, in which case, the right of hot pursuit shall be terminated and the pursuing ship must give up further pursuit.

Will in the process of hot pursuit the temporary stoppage of the pursuing ship or aircraft due to certain reasons interrupt the continuity of the hot pursuit? Must an interruption be of gross nature? These are not provided for in the UNCLOS. However, according to Article 111(6) of the UNCLOS, in the event of an airplane commencing a hot pursuit, if the hot pursuit is taken over and continued by another ship or another airplane of the coastal State, no interruption is deemed as constituted. In other words, a ship or another airplane may take over and continue the hot pursuit commenced by an airplane. Whether another ship's taking over of the hot pursuit which is commenced by a ship constitutes an interruption is unclear in the UNCLOS, but an affirmative attitude is seen in practice in some State. In the 1935 *The I'm Alone Case*, Canada held that the hot pursuit undertaken by the U.S. was illegal, because the American ship which sunk the ship *The I'm Alone* did not participate in the initial hot pursuit, but came from the opposite direction two days later and took over the pursuing ship when the latter's firearms were blocked. However, the Anglo-United States arbitral tribunal did not look into this issue. According to the context of the entire Article 111 of the UNCLOS and legal theories, ships shall be allowed to take over the hot pursuit, and there is no grounds for consistency between the ship commencing the hot pursuit and the ship which actually enforces the arrest. The comment of the International Law Commission on the draft terms in respect of the right of hot pursuit supports the rule that ships may

14 D. P. O'Connell, *The International Law of the Sea*, p. 1076.

take over a hot pursuit, which is generally accepted by international law scholars.[15] Therefore, continuity is not interrupted when another ship takes over the hot pursuit commenced by the initial pursuing ship. But, the ship or airplane withdrawing from the hog pursuit is required to do so when the successor has arrived; otherwise, the hot pursuit is interrupted.

According to judicial decisions, in other circumstances, an interruption must be significant, and a temporary stoppage in hot pursuit does not constitute an interruption. Hence, the recall of pursuing patrol constituted a clear interruption of any pursuit;[16] while continuity of the hot pursuit is not interrupted when the pursuing ship suspends to seize a small boat abandoned by the ship pursued, or when the pursuing ship catches up with and approaches the ship pursued which lasts for a period of time, or the ship pursued temporarily disappears into any fog.[17]

If the pursuing ship is obstructed in the process of hot pursuit by warships or other law enforcement ships of the State of the ship pursued, whether this constitutes an interruption of the hot pursuit may depend on the specific circumstances. In the 1962 *Red Crusader Case*, the Danish warship encountered with two British warships after it pursued the British fishing boat onto the high seas, with one standing between the Danish warship and the fishing boat, enabling the fishing boat escaped successfully. The Danish government protested to the British government by criticizing that the British warship hampered its lawful exercise of the right of hot pursuit. The two countries therefore set up an international investigation commission, which however did not consider whether the hot pursuit was interrupted, but believed that it was blameless that the act of the British warships was aimed to avoid the use of force and the escalation of the situation.[18] It can be seemingly inferred from this that, if the obstruction is successful, then the hot pursuit is interrupted, if unsuccessful, it is not interrupted.

E. Cessation of Hot Pursuit

Hot pursuit shall not be continued into the territorial sea of a third State,

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15 See *Yearbook of the International Law Commission*, Vol. I, 1956, p. 52; R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 1983, p. 152.

16 See Judgment on The M/V "Saiga" (No. 2) Case, Para.147.

17 See D. P. O'Connell, *The International Law of the Sea*, p. 1091.

18 See Chen Zhizhong ed., *Cases in International Law*, Beijing: Law Press China, 1998, pp. 183~184. (in Chinese)

otherwise it will constitute an infringement of the sovereignty of that third State. Article 111(3) of the UNCLOS confirms this rule by providing that the right of pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or a third State.

Restrictions on the right of hot pursuit within the territorial sea of other States do not apply to other sea areas excluding the territorial sea. The UNCLOS only provides that the right of hot pursuit shall cease at the outer boundary of the territorial sea, without mentioning other sea areas. It follows that, a State may pursue foreign ships into the exclusive economic zones or contiguous zones of itself or third States without obstruction. Oppenheim's International Law explicitly points out that, hot pursuit may be continued into the exclusive economic zones of foreign States.[19] O'Connell likewise says that, now that contiguous zones, adjacent fishery zones and exclusive economic zones are high seas at least from the point of hot pursuit, there shall be no grounds in theory to the effect that hot pursuit may not be continued into these areas of a neighboring foreign State.[20]

Cessation of the right of hot pursuit at the outer boundary of the territorial sea is beyond question. But, does this rule prohibit a pursuing ship from waiting outside the territorial sea of a third State so as to resume the hot pursuit when the ship pursued enters sea areas other than the territorial sea again? Or is continuous pursuit prohibited within the territorial sea of that third State under exceptional circumstances? The UNCLOS contains no express answers to these questions. As to the former, the UNCLOS seemingly disallows the hot pursuit to be resumed. Furthermore, Denmark withdrew its proposal for a waiting period of six hours at the First United Nations Convention on the Law of the Sea. Yet, this cannot eliminate the divergence in theory. One opinion disagrees with any resumption of hot pursuit. Colombos remarks that, this kind of resumption seems to be inappropriate, in that it extends the right which should be an exception. What's more, as a deviation from the general principle of prohibiting a State from interfering with foreign ships on the high seas, the right of hot pursuit must be construed in a narrow sense.[21] Reuland expresses a similar opinion. In his view, although the fact remains that the "no resumption" rule hampers effective law enforcement, the enforcement of law is

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19 Robert Jennings and Arthur Watts, translated by Wang Tieya et al., *Oppenheim's International Law*, Book Two, Vol. 1, Beijing: Encyclopedia of China Publishing House, 1998, p. 169. (in Chinese)

20 D. P. O'Connell, *The International Law of the Sea*, p. 1090.

21 C. John Colombos, *The International Law of the Sea*, 6th edition, 1967, pp. 169~170.

not the sole concern. The right of hot pursuit, therefore, strikes a balance between the need for effective law enforcement and the rule of exclusive jurisdiction. An expansion of the right of hot pursuit to allow resumption of pursuit may tip this balance precariously against the sovereign rights of the flag State.[22] The opposite point of view agrees with the resumption of hot pursuit, regardless of the length of intervals. McDougal and Burke hold that, there appears to be no sound reason for considering that the pursuit cannot be commenced again as soon as the suspect vessel again appears on the high seas. The general interest in navigation seems no more offended by the pursuit and arrest of a vessel which occurs after this interval of time has intervened than where pursuit and arrest occur immediately after the proscribed conduct.[23] Nevertheless, a balanced viewpoint between these two opposite views supports short intervals. Poulantzas comments that, what the view of resumption of hot pursuit overlooks is that the cessation of the pursuit resulted already in the discontinuance of the jurisdictional link existing between the two vessels in question. Indeed, the exceptional circumstances obtaining after an in flagrante delict and an immediate and continuous pursuit did cease to exist. Moreover ... the Convention on the High Seas explicitly provided for cessation of the right of hot pursuit and not for an interruption of hot pursuit. Besides, the State of the pursuing vessel may have recourse – if possible – to the procedure of extradition of the offenders following the cessation of the pursuit. Nevertheless, Poulantzas argues that "a short stay or passage of the pursued vessel through the territorial waters of a State, obviously undertaken with the intention of evading the law, does not preclude the resumption of hot pursuit."[24]

If international laws disallow the resumption of hot pursuit, the territorial seas of other States will become paradise for the ships pursued to clear of the illegality of acts. Such "rule" will no doubt jeopardize the interests of coastal States and the international community. The purpose of cessation of the right of hot pursuit is to prohibit such right from being extended into the territorial seas of other States, yet it not necessarily prohibits the resumption of hot pursuit of ships which enter the high seas again. What's more, to resort to extradition procedures against violators

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22 See Robert C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, p. 581.

23 Myres S. McDougal and William T. Burke, *The Public Order of the Oceans*, p. 898.

24 See Robert C. Reuland, The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 33, 1993, pp. 581~582.

entering the territorial seas of other States is not always effective. After all, not all violations are crimes, so it is difficult to satisfy the principle of double criminality. However, the resumption of hot pursuit without restrictions may lead to abuse of such right, and impair the basic interest of navigation. Consequently, this issue may be resolved based on the specific circumstances of each case. If the ship pursued enters the territorial sea of a third State for a short stay for the purpose of avoiding legal sanctions, this stay may not be taken as an adequate legal reason for prohibiting the resumption of hot pursuit when it appears again in a place outside the territorial sea. Just as indicated by the rules of interruption of hot pursuit, if a stay within the territorial sea of a third State is not significant, the continuity of hot pursuit is not impeded. It is difficult to abuse this "rule" which allows the resumption of hot pursuit after short intervals, because it is impossible for a State to consider a trivial violation as serious as necessary to wait for a long time outside the territorial sea of a third State by costing an arm and a leg.

As far as the latter issue is concerned, Bowett believes that, the pursuit of pirate ships may be continued into the territorial sea of a third State, if such State does not exercise hot pursuit.[25] According to this point of view, in special cases, there are exceptions to the rule of discontinuing hot pursuit into the territorial sea of a third State. This proposition is reasonable in that without this exception, a pirate ship may escape to any other State which is unwilling or unable to continue the pursuit so as to avoid arrest. However, this exception is conditioned on the consent of that third State. Continued pursuit into the territorial sea of that State upon its consent shall not be prohibited by the rule on cessation of the right of hot pursuit. Yet, the legal basis for the consent of a third State remains to be clarified. If a third State has no jurisdiction over the escaping ship, it may not confer such jurisdiction on the pursuing State.

According to Articles 17, 19 and 25 of the UNCLOS, ships within the limits of the territorial seas of other States are entitled to the right of innocent passage, as long as the passage does no harm to the peace, good order or security of such States. Such States are empowered to take appropriate steps against any passage that is not innocent. Apparently, the key point here is whether the passage of the ship pursued is determined as innocent. The mere presence of a ship in the territorial sea without taking any specific action is sufficient to constitute non-innocence. Article 14(4) of the Convention on the Territorial Sea and the Contiguous Zone (1958) and other

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25 See D. W. Bowett, *Self-Defence in International Law*, 1958, p. 83.

related provisions do not enumerate the specific acts in the passage of a foreign ship that give rise to non-innocence, which conspicuously indicates that non-innocence depends neither on any specific act nor on violation of any law. Article 19 of the UNCLOS reserves Article 14(4) of the Convention on the Territorial Sea and the Contiguous Zone, and further enumerates the specific acts giving rise to non-innocence. This enumeration cannot be deemed as an all-inclusive summary of non-innocence, but it merely includes some most obvious forms of non-innocence. This is manifest from the wording of "any other activity with no direct bearing on passage" in this article. Churchill and Lowe comment that, the UNCLOS defines the innocent passage by "damage to the interests of the coastal State", "no matter it is caused by any specific act of a ship, or by a violation of any law of the coastal State".[26] Moreover, the right of innocent passage is a special restriction on the sovereignty of a coastal State designed to ensure the prompt passage of ships engaged in peaceful undertakings, rather than a green channel for ships seeking to avoid arrest.

From a realistic point of view, even if the ship pursued does not carry out any prejudicial act within the territorial sea of the coastal State, such State does not expect to make an impression on the international community that the territorial sea is a shelter for violations. And such State may also worry about its own security. For instance, if a ship suspected of polluting the territorial sea of State A is pursued and enters the territorial sea of State B, State B might have good reason to believe that such ship threats its security and stop the ship from passing through its territorial sea on the basis of its prior violation and escape. It follows that, the presence of the ship pursued is sufficient to serve as a reasons for other States to believe that it is not innocent and deprive of its right of innocent passage. As a result, such State may exercise hot pursuit by itself, or allow the pursuing ship to continue the hot pursuit within its territorial sea.

II. Particular Issues in the Implementation of the Right of Hot Pursuit

A frequently encountered problem in practice closely related to the exercise of the right of hot pursuit is whether the pursuing ship or aircraft may use force in

26 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, p. 67.

the process of pursuit against the ship pursued for the purpose of making an arrest effectively.

Both the Convention on the High Seas and the UNCLOS contain no express provisions in this regard. In principle, the coastal State shall avoid using force in the law enforcement against an illegal foreign ship. According to the preamble of the UNCLOS, relevant States shall settle in a spirit of mutual understanding and cooperation all issues relating to the law of the sea, and the sea shall become a place for the maintenance of peace, justice and progress for all peoples of the world. No provision contained in the UNCLOS in relation to the law enforcement power of a coastal State mentions the use of force. Furthermore, it is the violation of a foreign ship that gives rise to the hot pursuit, and this violation is not necessarily a crime. A violation may be not so grave as to necessitate an arrest by the use of force. However, the absence of such provisions in the UNCLOS does not mean that the use of force is prohibited under certain conditions and within certain limits.

Actually, the use of force is allowed by international law. Articles 111(5) and (6) of the UNCLOS allow warships to arrest a ship pursued. Now that a warship has the right to arrest a ship, it may certainly use necessary force as reasonable to perform such power. From the perspective of jurisprudence, the coastal State may resort to force after an ineffective warning to stop — after all, the right of hot pursuit is also a police power. Within the limits of national territory, the police may apply measures of force to an escaped criminal who ignores its warnings. Churchill and Lowe believe that, the pursuing ship may use any necessary and reasonable force to make an arrest, even if this may sink the ship pursued unavoidably.[27] More importantly, "necessary and reasonable force" is a principle established by customary international law. In *The I'm Alone Case*, the arbitral tribunal rules that, on the assumption that the right of hot pursuit exists, a State may use necessary and reasonable force in order to visit, search and arrest a suspected ship and escort it to a port of that State. If the use of necessary and reasonable force for this purpose leads to contingent sinking of the ship pursued, the pursuing ship shall never be condemned. But if the "intention to sink" apparently goes beyond the limits of authority as permitted by the treaty, the sinking by the U.S. is unlawful, and the U.S. shall apologize for this to Canada and provide compensation. In *The Red Crusader Case*, the International Investigation Commission considers that, Denmark's bombarding goes beyond the scope of "lawful exercise of force", which

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27 See R. R. Churchill and A. V. Lowe, *The Law of the Sea*, p. 152.

is kind of "live-fire bombarding without prior warnings" and "causes unnecessary danger to human life", so its bombarding is unlawful.[28] The International Court of Justice authoritatively acknowledged in 1998 in the "fisheries jurisdiction" case between Spain and Canada that force can be used in the process of pursuit. And the principle of "necessary and reasonable force" was declared once more in the recent *Saiga Case*. The ITLOS points out that, although the UNCLOS does not contain express provisions on the use of force in the arrest of ships, international law requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. These principles have been followed over the years in law enforcement operations at sea.[29] Furthermore, the "necessary and reasonable force" principle is compiled in international treaties. According to Article 22(1)(f) 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 (hereinafter "the Fishing on the High Seas Agreement"), inspectors duly authorized by a State shall avoid the use of force, unless it's necessary for the purpose of ensuring their safety and in the case of discharge of their duties being obstructed. The use of force shall not go beyond the extent as reasonably required under the circumstances.

Customary international law does not put forward a universal definition as to the content of the "necessary and reasonable force" principle. Obviously, if other means available for arresting a suspected ship have been exhausted, the use of force becomes necessary; and if such force is proportionate and appropriate to the resistance of the suspected ship, the reasonable requirement is satisfied. However, in specific cases, whether the use of force is necessary and reasonable may still be disputed by the States concerned. Consequently, it is quite meaningful to provide a reference standard for the use of necessary and reasonable force by coastal States in maritime law enforcement. The *Saiga Case* has reference value in this regard. With respect to the necessity and reasonableness of the use of forced involved in this case, the International Tribunal for Law of the Sea adjudicates as follows: in the

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28 See Wei Jingfen, Implementation of Maritime Police Power, *Fu Jen Law Review*, Vol. 19, 2000. (in Chinese)

29 See Judgment on The M/V "Saiga" (No. 2) Case, paras. 155~156.

first place, in order to stop a ship on the high seas, the usual practice is to give an internationally-recognized visual or auditory signal to stop. If this is invalid, there are various actions which may be taken, including firing cannon over the bow of the ship. Only when all appropriate actions taken are ineffective can the pursuing ship use force as the last resort. Even so, the pursuer must give appropriate warnings to the ship pursued, and exert all efforts to ensure the safety of human life. Considering that the *Saiga* was nearly full of gasoline and at low speed when it was approached, Guinean officials could visit the ship without any difficulty. Although Guinea asserted that its patrol boat fired on the basis of the belief that the *Saiga* intended to sink it. Whatever the circumstances, Guinean officials did not give any signal or warning in accordance with international law and practice before firing live at the ship from the fast patrol boat. This is unforgivable. Furthermore, Guinean officials used excessive force after boarding the *Saiga*. Firstly, although there was no evidence to the effect that the sailors used force or threatened with force, they fired guns at will on deck, and used artillery fire to stop operation of machines of the ship. Guinean officials did so disregarding the security of the ship and its people. Secondly, Guinea's use of force caused significant damage to the ship and important equipment within the machine room. Thirdly, more seriously, two sailors onboard were seriously injured by wild shots. As a result, the use of excessive force by Guinea before and after boarding which endangered human life constitutes a violation of international law.[30]

Based on the judgments or reports regarding the *Saiga Case* and afore-said cases as well as the terms of the Fishing on the High Seas Agreement, it can be summarized that "necessary and reasonable force" shall satisfy the following conditions: (1) Invalid warnings. This includes three progressive tiers based on the severity of warnings: blank cartridge warning after the ship pursued ignores the visual or auditory signal to stop; live ammunition warning to the water area around the ship or over the bow when the blank cartridge warning is invalid; and use of force against the ship itself if the live ammunition warning is also invalid. No live ammunition firing may be applied without giving any prior live ammunition warning. (2) The use of force as the last resort in case there is no other effective means of seizure available. (3) The safety of the pursuing ship and/or its people is threatened or the ship pursued and its people resist arrest with violence. (4) The ship pursued cannot be sunk intentionally. (5) The principle of humanitarianism

30 See Judgment on The M/V "Saiga" (No. 2) Case, paras. 156~159.

shall be taken into account, so that no unnecessary danger is caused to the ship pursued and its people. (6) Be in reasonable proportion to the circumstances.

III. Problems Existing in China's Implementation of the Right of Hot Pursuit

The right of hot pursuit is an integral part of China's power of maritime law enforcement. Article 14 of the Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China (1992) and article 12 of the Exclusive Economic Zone and the Continental Shelf Act of the People's Republic of China (1998) provide for the right of hot pursuit and its exercise. The legal basis, commencement, continuation, cessation and subjects of enforcement of hot pursuit are mainly provided for in the Law on the Territorial Sea and the Contiguous Zone (1992), whose wording is basically consistent with Article 111 of the UNCLOS.[31] However, compared with the UNCLOS, the Law still has certain drawbacks, specifically as follows:

Firstly, the subjects of law enforcement are inexplicit. China's marine management involves many departments, including the National Ocean Service, the Army, the Customs, the Ministry of Public Security, the Ministry of Agriculture and the Ministry of Communication. Each of the foregoing departments has its own marine law enforcement team, such as the Marine Surveillance, Frontier Defense of the Navy, Customs Anti-smuggling Bureau, Coast Guard, Fishery Administration and Maritime Safety Administration. Although the Law on the Territorial Sea and the Contiguous Zone provides that the exercise of the right of hot pursuit shall be decided by "competent authority", the "competent authority" here is indeterminate. Furthermore, except for warships and military aircraft, other ships or aircraft which can be authorized to exercise the right of hot pursuit are also unclear.

Secondly, as to the commencement of hot pursuit, a necessary constituent requirement of lawful hot pursuit is not provided for, that is, "The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship."

Thirdly, there is a lack of provisions on continued pursuit after the hot pursuit undertaken by the pursuing ship or aircraft is taken over.

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31 China ratified this Convention on May 15, 1996.

Fourthly, China's jurisdiction within the contiguous zone is extended to cover "security" matters. This is to say, according to the Law on the Territorial Sea and the Contiguous Zone, China may exercise hot pursuit of a foreign ship for security reasons within the contiguous zone. While the UNCLOS provides that, hot pursuit can only be undertaken in the contiguous zone when protected rights are infringed. According to Article 33 of the UNCLOS, rights protected by a coastal State within the contiguous zone do not include security matters.

Fifthly, the scope of means of hot pursuit is shortened. The Law on the Territorial Sea and the Contiguous Zone provides for the additional wording of "performing government affairs" in respect of the exercise of the right of hot pursuit by other authorized ships or aircraft other than warships or military aircraft, while the UNCLOS uses the term "on government service". Apparently, the connotation of the former concept is narrower than the latter, which naturally derogates the rights conferred by international law on China.

Article 12(2) of the Exclusive Economic Zone and the Continental Shelf Act only mentions the right of hot pursuit, without further provisions on its exercise. But Article 13 of the Act contains a provision as follows, "Matters uncovered hereunder shall follow international laws and other laws and regulations of the People's Republic of China." It shows that, according to this Act the right of hot pursuit may be exercised in accordance with Article 111 of the UNCLOS and the Law on the Territorial Sea and the Contiguous Zone.

It follows that China's laws on the right of hot pursuit is too general, disperse, and short of operability, inevitably bringing difficulties in marine law enforcement and affecting the efficiency of exercising hot pursuit. The indeterminacy of subjects of law enforcement is likely to lead to the phenomena of competition for management, non-management and mutual evasiveness. Since the Territorial Sea and the Contiguous Zone does not provide for a visual or auditory signal to stop before commencement of hot pursuit, and the Law contains no terms regarding the relationship between the Law and the UNCLOS and other Chinese laws and regulations as set out in Article 13 of the Exclusive Economic Zone and Continental Shelf Act of the People's Republic of China. As a result, it may be seemingly presumed that, no prior visual or auditory signal to sop is required for commencing hot pursuit in the territorial sea or the contiguous zone of China. However, according to relevant provisions of the Exclusive Economic Zone and Continental Shelf Act, a prior visual or auditory signal to stop must be given before commencing hot pursuit within the exclusive economic zone or over the continental

shelf of China or this condition may be dispensed with. The differences in the constitutive requirements of the same power of marine law enforcement in different water areas under the jurisdiction of China are very likely to give rise to a vacancy in actual operation. Whereas with respect to the jurisdiction over the contiguous zone, the two basic laws on the sea likewise will lead to a conflict between allowing the exercise of hot pursuit concerning "security" matters and prohibition on the exercise of hot pursuit for such reasons. And the use of "necessary and reasonable force" in the exercise of hot pursuit by relevant marine law enforcement departments to realize the objectives of law enforcement is never mentioned in these two basic laws of the sea and other special laws applicable to the water areas under the jurisdiction of China. Additionally, there is a lack of notification and collaborative mechanisms between and among the administrative departments relating to the sea in respect of law enforcement.

IV. Suggestions for Improving China's Implementation Mechanisms for the Right of Hot Pursuit

The right of hot pursuit is an important legal means for maintaining maritime rights and interests, and securing China's peaceful development. In consideration of the severe situations facing the present maritime law enforcement, it is necessary for China to make a Law on Maritime Law Enforcement or implementing rules supporting the Law on the Territorial Sea and the Contiguous Zone and the Exclusive Economic Zone and Continental Shelf Act, in accordance with the UNCLOS and customary international law, to unify and specify the exercise of the right of hot pursuit and the use of force. Specifically, we can, on the basis of Article 14 of the Law on the Territorial Sea and the Contiguous Zone, make specific provisions on the subjects of law enforcement and their limits of authority, the commencement of hot pursuit, the takeover of hot pursuit commenced by the pursuing ship or aircraft, and the use of force in hot pursuit, accompanied by an uncovered matters clause, that is, "Matters uncovered hereunder in relation to the right of hot pursuit may be resolved by reference to applicable international laws and other laws and regulations of the People's Republic of China."

Apart from the improvement of substantive law, it is quite necessary to establish and improve mechanisms for implementing the right of hot pursuit in procedural law. This may be commenced as follows: (1) Set up a consultation mechanism involving specific persons in charge from all departments of maritime

law enforcement; (2) Set up a notification and collaborative mechanism between and among all subjects of maritime law enforcement; (3) Formulate handbooks on maritime law enforcement and provide trainings for law enforcement personnel.

V. Conclusion

The right of hot pursuit is exceptional to the principle of freedom of the high seas, the exercise of which is restricted by rigorous conditions that are accumulative.[32] In order to realize the objectives of law enforcement, the coastal State may use "necessary and reasonable force" in the process of hot pursuit. Hot pursuit is lawful only when it is undertaken in accordance with the conditions as set out in the UNCLOS, and the means of force (if applicable) as used does not go beyond the "necessary and reasonable" scope.

The improvement of China's implementation mechanisms for the right of hot pursuit is one of the important measures for China to reinforce maritime law enforcement and ensure peaceful development. This improvement can be realized from legislation and law enforcement. As to the former, the enactment of implementing rules supporting the Law on the Territorial Sea and the Contiguous Zone and the Exclusive Economic Zone and Continental Shelf Act is a realistic and viable legal choice. In this connection, we should work out detailed provisions on the exercise of the right of hot pursuit and the use of force in light of the UNCLOS and customary international law. As to the latter, considering the fact that China is still unable to establish a unified maritime law enforcement team, the emphasis should be put on reinforcing the construction of consultation, collaboration and notification mechanisms between and among all departments involved in maritime law enforcement.

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32 See Judgment on The M/V "Saiga" (No. 2) Case, para. 146.

An Analysis of the Grounds for Defending the Carrier's Delivery of Goods without Original Bill of Lading – Based on 165 Effective Written Judgments

HE Lixin *

Abstract: The frequent occurrence of delivery of goods without original bill of lading results in constant claims for compensation against carriers. This paper provides certain analysis and suggestions on the possible *ex ante* precautionary measures and *ex post* grounds for the defense that may be taken by carriers.

Key Words: Carrier; Delivery of goods without original bill of lading; Claims; Defense

I. Introduction

China's Maritime Law expressly provides that a bill of lading (B/L) is a document against the presentation of which the carrier guarantees to deliver the goods.[1] It is widely accepted in the shipping community that, this provision is the legal basis for the principle of delivery against presentation of B/L, and shows that a carrier may deliver goods to the holder of an original B/L only; otherwise, it will assume appropriate legal liabilities.[2] The principle of delivery against presentation

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1 Maritime Law of China, Art. 71.

2 Some scholars believe that, "against the presentation of which a carrier guarantees to deliver goods" means that the carrier shall deliver goods to the party named in the B/L, i.e., the consignee as set out therein, rather than against the presentation of a B/L itself.

of B/L is acknowledged by the maritime law of all countries and relevant international conventions, and has become a fundamental principle observed by all parties involved in international marine transport and trading in practice.[3] Delivery against presentation of B/L, on one hand, ensures the correctness of the subject to whom a carrier delivers goods, on the other hand protects the B/L holder's rights to the goods, and guarantees the performance of trade contracts and the provision of remedy to the seller. However, different views still exist in the academia on the question whether delivery against presentation of B/L is a mandatory legal requirement or a contractual liability.

In shipping practice, there are abundant cases in which the carrier actually delivers goods without original B/L. Due to the time difference caused by the rapid circulation of ships and the slow circulation of B/Ls, documents not conforming to the provisions of the letter of credit or trade disputes, the consignee's inability to make payments against documents because of fund shortage, as well as a B/L being lost, damaged or stolen, many goods are delivered without the production of original B/Ls in reality, which give rise to the most common type of dispute with regard to B/Ls. According to statistics, delivery of goods without original B/L makes up 15% in liner transport, 50% in charter transport, and 100% in transactions of such important merchandise as oils.[4] Carriers' failure to pay due regard to the consequences of delivery of goods without original B/L is one of the main reasons that give rise to its prevalence.

Delivery of goods without original B/L refers to the delivery of goods by a carrier without being presented an original B/L,[5] whose constitution should satisfy certain conditions as follows:[6] firstly, the carrier knowingly issues a delivery document to any party without holding an original B/L; secondly, declaration and clearance formalities for the goods have been performed with the customs; thirdly, the holder of a non-original B/L is in complete possession of the goods covering

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3 Si Yuzhuo ed., *Study on Special Issues of Maritime Law*, Dalian: Dalian Maritime University Press, 2002, p. 193. (in Chinese)

4 Si Yuzhuo ed., Theories and Practice in Release of Cargo without Production of an Original B/L, *Annual of China Maritime Law*, 2000. (in Chinese)

5 Few carriers deliver goods directly at the port of discharge, except for ship side delivery. In most cases, delivery of goods is completed by a lesser document (delivery order) issued by an agent of the carrier.

6 Kong Qingde, Conditions Required by a Release of Cargo without Production of an Original B/L, in *Collected Papers of the Maritime Law Symposium of Chinese Lawyers 2001*. (in Chinese)

the rights of control, disposal and use of the goods, such that the carrier is unable to physically deliver the goods to any holder of an original B/L. Delivery of goods without original B/L generally includes two circumstances according to the subjects of delivery: one is that the carrier correctly delivers the goods to the right buyer as set out in the trade contract; the other is that the carrier delivers the goods to a wrong party against a letter of guarantee. Delivery of goods without original B/L results in carriers' loss of the limitation of liability and the right of defense based on exceptions from liability, and the insurers under the marine insurance contracts may refuse to pay insurance money, and more seriously, the carriers will be subjected to legal liabilities for delivery of goods without original B/L.[7]

As a phenomenon in international ocean shipping, delivery of goods without original B/L is relatively common in China's maritime trials. From the end of 1980s to the beginning of 1990s, it was believed in maritime trials that a carrier should assume legal liabilities as long as such carrier has released cargo without the presentation original B/L. However, at present, some people contend that certain special legal facts might make a B/L lose a particular function, such that the rights of its holder are weakened, and the carrier may defend itself lawfully and validly against its delivery of goods without original B/L.[8] By summarizing and generalizing various grounds for defending carriers' delivery of goods without original B/L, the paper does not fully aim to save carriers from the dilemma of claims arising from the delivery of goods without original B/L, but more to reexamine this troublesome legal issue by analyzing the grounds for defense.

II. Carriers' Grounds for Defending Delivery of Goods without Original B/L

7 Presently, there is still a dispute over the nature of legal liability for carriers' release of cargo without production of an original B/L, that is, whether it is a liability for breach of contract, liability for tort or a concurrence of both. Yet the Supreme People's Court tends to subject the carriers to a liability for breach of contract as reflected in relevant reply letters.

8 The case of 1994 in which China Resources Textiles sued Zhanjiang Ship Agency et al. for infringing its title to goods under the B/L attributable to the latter's release of cargo against a letter of guarantee without production of an original B/L (also, the *Keda Mazhu Case*) was the first case of its kind decided in the history of China's maritime trials in which the carrier prevailed.

A. Ground for Defense 1: Is the Plaintiff a Right Holder? Is the Plaintiff Entitled to Bring a Suit to Claim Damages against Delivery of Goods without Original B/L?

According to the Civil Procedure Law of China, a plaintiff must be a citizen, legal person or other organization having a direct stake in the case. If the plaintiff claims damages for delivery of goods without original B/L, he must produce the full set of original B/Ls to prove that he is the only lawful right holder, and thus entitled to claim liability for delivery of goods without original B/L. Due to the negotiability of B/Ls, if the plaintiff is unable to produce the full set of original B/Ls, there is a possibility that other obligees may make a claim under the B/L. Therefore, even if the plaintiff produces a photocopied B/L, the court still cannot support his claim.[9] Nevertheless, the plaintiff may be discharged from such obligation, only if he can adequately prove that he is really unable to produce the whole set of original B/Ls due to objective reasons.

The fundamental significance for a plaintiff to produce the full set of original B/Ls is to show that he is a lawful B/L holder. A B/L holder is entitled to a right of action because he obtains the B/L lawfully and the B/L is valid. "Legality" requires that the holder should obtain the B/L after paying certain consideration and going through an uninterrupted series of endorsement. The Maritime Law of China provides that the relationship of rights and obligations between the holder and the carrier shall be based on the terms of the B/L,[10] and the plaintiff is not entitled to bring a claim against the carrier for legal liability for delivery of goods without original B/L, unless the plaintiff is a lawful B/L holder. A plaintiff lacks the legal basis for making a claim, if he becomes a B/L holder through illegal means. For instance, an order B/L must be endorsed by a proper assignor or the shipper in order to become a valid document enabling the holder to take delivery of the goods.

The plaintiff is also required to obtain a B/L before the delivery of goods without original B/L. The 2002 UNCITRAL Draft Instrument on Carriage of Goods [Wholly or Partly] [by Sea] provides that, where the B/L holder obtains such B/L after the delivery of goods without original B/L, and he knows or has reasons to know beforehand that the goods have been delivered, he is not entitled to make

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9 Chen Zilong, Certain Legal Issues in Trying Cases Involving Release of Cargo without Production of an Original B/L, *Application of Law*, No. 3, 2002. (in Chinese)

10 The Maritime Law of China, Art. 78.

a claim against such delivery of goods. In this case, the B/L holder shall be deemed as a transferee in bad faith. Since the goods have been delivered, and the rights under the B/L have been nullified, the B/L holder may not claim rights under the B/L. In the absence of a causal relationship between the loss caused and the delivery of goods without original B/L, and there is no legal basis for making a claim.

Though the plaintiff holds an original B/L, the front side of the B/L lacks a signature of the shipper in the shipper column, and some courts determine that the plaintiff in this case is not a party to the relationship under the B/L, and therefore does not have a substantive right to require the carrier to deliver the goods or claim real rights to the goods.[11] Under FOB, the foreign seller is the one who books cargo space, and the domestic buyer is the one who delivers goods. According to the Maritime Law of China, both may act as the shipper.[12] If the carrier issues to seller a B/L consigned "to order of shipper", but the B/L provides that the buyer is the shipper, and the seller raises no objection upon accepting the B/L and is thus presumed as recognizing the status of the buyer as the shipper, and agrees to transfer to the buyer the title to or the right of control of the goods upon shipment, then the seller would lose control of the goods once the goods are shipped onboard the vessel. As a result, even if the seller obtains a B/L again thereafter due to such reasons as a return in settlement of exchange, he is no longer entitled to make a claim based on the delivery of goods without original B/L. As to identification of the shipper, the academia and the practical circle still hold different views: some scholars hold that, the premise for the seller under FOB to serve as the shipper is that he signs his name in the shipper column;[13] some others argue that, it is a statutory requirement for the seller to be the shipper under FOB, and there is no other conditions outside the law. As long as the seller actually delivers the goods, even if the shipper column of the B/L contains no signature of the seller, he shall also have the statutory status as the shipper.[14] The author of this paper considers that, by delivering the goods to the carrier under FOB, the seller is just performing his obligations under the sales contract. The relationship between him and the carrier is limited to the B/L, and no contract of carriage of goods by sea exists, and

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11 See details in the *Hetian Carriage Contract Case* tried by Tianjin Admiralty Court.

12 The Maritime Law of China, Art. 42(3).

13 Yao Hongxiu, On Determination of Shipper under the Maritime Law, *China Maritime Law Yearbook*, 1996. (in Chinese)

14 Zheng Tianwei, Legal Reflection and Cognitional Reconstruction of the Concept of Shipper, *Annual of China Maritime Trial*, 2000. (in Chinese)

all rights and obligations between them shall be as set out in the B/L. Consequently, if the shipper column contains no signature of the seller, he will be deprived of the status as a party to the B/L. In this case, although the plaintiff becomes a so-called "holder of B/L" by holding a B/L consigned to order of shipper, this B/L is not lawfully transferred by endorsement of the shipper named in the B/L. As a result, no relationship under a B/L is established between the plaintiff and the carrier as the defendant, and the plaintiff is deprived of the right to bring a suit against the carrier for delivering goods without original B/L by law.

B. Ground for Defense 2: Does the Fact That the Defendant Gives Counterarguments in a Case Concerning the Delivery of Goods without Original Bill of Lading Case Mean That the Plaintiff Has Sued the Wrong Party?

1. The Case in Which an Agent of the Carrier is Sued as the Defendant

Under a contract of carriage of goods by sea, the carrier should be the party who is obliged to deliver the goods. But domestic importers often adopt CIF price term in international trade, under which the carrier is usually designated by the buyer. In most cases, the carrier is located at a foreign State; however, its agents are usually powerful domestic State-owned enterprises with strong contract performing ability and thus become ideal party to be claimed against. The B/L holder is likely to directly charge such agent as the defendant for legal liability for delivery of goods without original B/L.

From the perspective of agency theories in civil law, if an agent carries out civil juristic acts in the name of the principal within the limits of the delegated authority, the principal shall assume civil liabilities arising from the acts conducted by the agent. Even if the agent has no power of agency, acts beyond the limits of its power of agency or acts after termination of a power of agency, as long as such act is subsequently confirmed by the principal, the civil liability for such acts shall still be borne by the principal. The agent of the carrier has no relationship with the B/L holder, whether under the contract of carriage of goods by sea or the B/L. Even if he delivers goods without production of an original B/L, he is performing his obligations under the commission contract. Hence, if the agent releases the goods without production of an original B/L under authorization of the carrier, the legal consequences shall be borne by the carrier. There is a problem of improper subject as defendant to charge the agent as defendant based on delivery of goods without

original B/L. Certainly, if the agent releases cargo without production of an original B/L without permission or in its own discretion, beyond the authorization of the carrier, which is not confirmed subsequently by the carrier, this liability shall be borne by the agent.

Another viewpoint holds that, delivery of goods without original B/L is an illegal act, if the agent carries out agent activities after knowing that the matter delegated is illegal, or the principal raises no objection when he knows the agent activities are illegal, the agent and the principal shall be held jointly and severally liable. Therefore, even if the agent conducts delivery of goods without original B/L upon express instruction of the carrier, both parties shall still be held jointly and severally liable therefor, and the agent has no right of defense as a defendant. The author argues that, an illegal act must be an act strictly prohibited by the law, but the function of a B/L as set out in the Maritime Law is to serve as a voucher against which the carrier shall release the goods. This is not a prohibitive and exclusive provision on delivery of goods without original B/L. For this reason, delivery of goods without original B/L will not necessarily lead to a violation of the law.[15] The delivery against presentation of B/L is originally more of a usage of trade formed by repetitive shipping practice, whose application may be precluded by the laws of all countries and the parties concerned. In this connection, delivery of goods without original B/L is not sufficient to be an illegal act subject to rigorous sanction, and agency theories in civil law may still be applied.

Still others assert that, a B/L is an evidence of title. When a carrier's rights under the B/L are infringed by an agent's delivery of goods without original B/L, although the agent has no relationship under a contract or B/L with the B/L holder, his act still constitutes a tort. The author believes that, a B/L has different effect in different stages, places and time in the hands of different people. When it is in the transportation link where the carrier is obliged to deliver goods against it, the holder cannot assign the B/L which has no effect of real right and may not be used to take delivery of goods. The carrier is obliged to deliver the goods as set out in the contract of carriage, and the agent only needs to perform his delegated matters. If there is sufficient evidence to the effect that the person taking delivery of the goods is the eventual person entitled to take delivery, delivery of goods without original B/L is not equivalent to wrong delivery, and will not infringe upon the real

15 Dong Hui, Ship Agent and Delivery of Imported Goods, *Newsletter of China Maritime Law Association*, No. 3, 1999. (in Chinese)

owner's title to the goods, as a result, it is unreasonable to charge the agent of the carrier as defendant directly for tort liability.

2. The Case in Which the Actual Carrier Is Sued as the Defendant

A carrier as defined in the Maritime Law of China includes contracting carrier and actual carrier. An actual carrier engages in the carriage or partial carriage of the goods under the entrustment of a carrier, including other persons who engage in such carriage under a subcontract.[16] Since an actual carrier engages in the carriage by virtue of an entrustment or charter party relationship with the carrier, without establishing a contract of carriage of goods by sea or B/L relationship with the B/L holder, due to the relativity of a debt, the B/L holder is not entitled to holding the actual carrier legally liable for delivery of goods without original B/L. Meanwhile, Article 60(1) of the Maritime Law of China also explicitly provides that, if a carrier entrusts the carriage of goods or part thereof to an actual carrier, the carrier shall still be responsible for the entire carriage as provided by the law. With respect to carriage undertaken by the actual carrier, the carrier shall be responsible for the acts of the actual carrier or any agent or servant of the actual carrier within the scope for which they are employed or within the limits of entrustment. Consequently, as long as the actual carrier's delivery of goods without original B/L upon authorization of the carrier does not go beyond the limits of the entrustment, the consequences shall be borne by the carrier. If the B/L holder makes a claim against the actual carrier, the actual carrier may defend based on this fact. In a sense, by unloading the goods at the port of discharge, the actual carrier has discharged his obligation as the actual carrier for the carriage of goods by sea in this voyage as entrusted by the carrier, and is not obligated to deliver the goods to any holder of an original B/L issued by the carrier. His delivery of goods according to the instruction of the carrier does not constitute a breach with regard to any B/L holder. At the same time, the carrier's delivery of goods without original B/L is not equivalent to the actual carrier's delivery of goods without original B/L. The actual carrier is not required to assume the carrier's liability, as long as he does not act beyond the limits of the entrustment.

Nevertheless, some scholars object to this point above, saying that, according to Article 61 of the Maritime Law of China, provisions of chapter 4 of the Maritime Law on carrier's liability applies to actual carriers. Therefore, actual carriers shall also bear the legal liability for delivery of goods without original B/L. According to

16 The Maritime Law of China, Art. 42(2).

the author's analysis, the provisions of chapter 4 of the Maritime Law on "carrier's liability" is confined to section 2, therefore, not all liabilities applicable to a carrier are applicable to actual carriers, and the provisions on carrier's liability for delivery against presentation of B/L and delivery of goods are not contained in section 2, and thus do not fall within the scope of liability of an actual carrier.

Still other argue that, Article 46 of the Maritime Law provides that, the responsibility of a carrier of container cargo shall be continued until "delivery of goods", which is also one of the basic obligations of actual carriers. In the meanwhile, actual carriers objectively take part in the delivery of goods, such that there is a transportation relationship between actual carriers and holders of B/Ls in fact. Consequently, an actual carrier shall also bear legal liabilities caused by his participation in any delivery of goods without original B/L.[17] In the author's view, an actual carrier that engages in the carriage of goods upon entrustment of a carrier is deemed to have discharged his obligation of carriage so delegated when he delivers the goods in good condition to an agent of the carrier at the port of discharge, and the actual carrier has no obligation to deliver the goods directly to the consignee holding an original B/L. Even if a carrier issues a house B/L to a shipper, and an actual carrier issues an ocean B/L to the carrier (particularly a non-vessel operating common carrier), according to the principle of "one property for one title", only the former is an evidence of title, and the latter is just a document for internal handover between the carrier and the actual carrier, which cannot be assigned. The actual carrier's delivery of goods to the carrier under the B/L issued by himself constitutes discharge of his obligation under the carrier's entrustment, and the carrier's delivery of goods to the consignee under the B/L issued by himself constitutes completion of the contract of carriage of goods by sea and the relationship under the B/L. Therefore, unless the actual carrier enters into any special agreement with the carrier,[18] or releases cargo to an agent of the carrier

17 Wang Wei et al., On Carriers' Liability for Release of Cargo without Production of an Original B/L, *Maritime Law Review*, No. 1, 2002. (in Chinese)

18 According to Article 60(2) of the Maritime Law of China, if a contract of carriage of goods by sea expressly provides that a particular part of carriage is to be performed by a designated actual carrier other than the carrier, the contract may also provide that, the carrier is not responsible for any loss, damage or late delivery of the goods during the period when such goods are under the control of the designated actual carrier. Therefore, if the responsibility for delivery of goods is agreed to be entirely borne by the actual carrier, the carrier is not responsible to the consignee for release of cargo without production of an original B/L.

at the port of discharge without production of an original B/L or acts beyond the scope of entrustment, he may not be held liable directly to any B/L holder for any delivery of goods without original B/L provided that he has delivered the goods upon accepting the carrier's entrustment.

3. The Case in Which a Freight Forwarder Is Sued as the Defendant

By issuing B/Ls in the name of a carrier, a freight forwarder obtains the status of a non-vessel operating common carrier, and except for the risks and responsibilities of a freight forwarder, he shall also be responsible for the legal liabilities in the carriage of goods borne by the carrier. Therefore, a non-vessel operating common carrier shall bear corresponding legal consequences arising from delivery of goods without original B/L. However, without issuing any B/L, a freight forwarder cannot obtain the status of a carrier, and thus does not need to perform the statutory and contractual obligations to deliver any goods. He is only required to perform the cargo agency contract concluded with the shipper. When the shipper re-obtains a B/L due to various reasons, he is not entitled to make a claim against the carrier for his release of goods without being presented an original B/L, but only for the consequences caused by improper agency.

C. Ground for Defense 3: Does the Plaintiff's Charge for Liability for Delivery of Goods without Original B/L Exceed the Limitation of Action?

A B/L holder is deprived of the right to win a case, if he brings a suit after the limitation of action for claiming delivery of goods without original B/L expires, and the carrier may defend himself relying on this fact. The limitation of action for delivery of goods without original B/L depends on the law applicable to the case. The Hague Rules and the Maritime Law of China both provide that, the limitation of action for claiming compensation in respect of the carriage of goods by sea against the carrier is one year, commencing from the date the carrier delivers or is required to deliver the goods. However, the provision concerning the "carriage of goods by sea" does not specify it is an action of contract of carriage of goods by sea or all kinds of actions with respect to carriage of goods by sea, whether in contract or tort. Some courts adjudge that the carrier involved in delivery of goods without original B/L shall be liable for tort, and shall be subject to a limitation of action of two years as provided in the General Rules of Civil Law. According to the principle of special law taking precedence over general law, this judgment is

wrong. However, this limitation of action of two years still applies to suits brought against other parties other than the carrier, such as the party taking delivery of the goods. As to the understanding of the terms of the Maritime Law, the impact of distinguishing an action in contract and an action in tort on the limitation of action for delivery of goods without original B/L is not great. The limitation of action shall be one year in case of any suit brought against the carrier in respect of the carriage of goods by sea. The Supreme People's Court also believes in trying the *Yuehai* case that, according to the one year limitation of action as provided by the Hague Rules applicable as set out on the reverse side of the B/L, the limitation of action for the B/L holder to sue the carrier for delivery of goods without original B/L has expired. It is confirmed at the National Symposium on Foreign-related Civil, Commercial and Maritime Trials in 2002 that, the limitation of action for claims brought against carriers with regard to the carriage of goods by sea for whatever cause of action shall be one year.[19]

However, as to the time when the limitation of action for delivery of goods without original B/L shall commence, there are two different views in the academia: one is to commence from the date when the carrier delivers or shall deliver the goods; the other is to commence from the date when the obligee becomes aware of or shall be aware of the infringement of his rights. Some scholars maintain that, if the limitation of action commences from the date when the consignee becomes aware of or shall be aware of the infringement of his rights, since a B/L always reaches the consignee after the delivery of goods without original B/L, this method of calculation is not fair for the consignee. Furthermore, the time when the consignee "shall be aware of" is hard to determine. Other scholars believe that, the limitation of action for delivery of goods without original B/L shall commence from the date when the carrier "shall deliver", since "shall deliver" goods is a basic obligation of the carrier provided by the law, and a basic obligation of the consignee, i.e., to take delivery of the goods. The method of calculation can also accelerate the consignee's timely taking delivery of the goods. In the meanwhile, the last day of "shall deliver" goods is equal to the date when the holder of B/L shall be aware of the infringement of his rights. Because such holder receives no goods or relevant notice of taking delivery on the last day when the goods shall

19 Si Yuzhuo, *Study on Special Issues of Maritime Law*, Dalian: Dalian Maritime University Press, 2002, p. 279. (in Chinese)

be delivered, he will certainly become aware of the infringement of his rights.[20] The author contends that, if the limitation of action for delivery of goods without original B/L commences from the date of the actual release of the goods or when the goods actually arrive at the port, then since delivery of goods without original B/L constitutes improper delivery, such commencement is too early, and the limitation of action is completely under the easy control of the carrier, which is not helpful for protecting the consignee. Moreover, delivery of goods without original B/L is illegal "delivery"; it therefore does not constitute "delivery" in maritime law. As a result, the limitation of action for delivery of goods without original B/L may only commence from the time when the carrier "shall deliver" the goods. There are different interpretations to the expression "shall deliver". Some contend that, when the goods carried by sea arrive at the port of discharge along the regular shipping line and satisfies the conditions of delivery, the date when the carrier "shall deliver" arrives upon the expiration of a reasonable time limit. Others believe that, the time when a holder of an original B/L asks for delivery but the carrier fails to do so shall be deemed as "shall deliver". Still others hold that, it is the consignee's basic obligation and responsibility to timely take delivery of goods after obtaining an original B/L. The consignee will automatically know the fact of delivery of goods without original B/L and know the infringement of his rights, when he timely claims the goods under the B/L against the carrier. Hence, the date when the holder obtains the original B/L is deemed as the time of "shall deliver". As a result, we believe that the limitation of action shall commence from the date when the carrier is required to deliver the goods. This method of calculation is also employed by the Supreme People's Court in the *Case Zhejiang Native Produce & Animal By-product I/E Group Co., Ltd. v. IFB International Freightbridge (China) Ltd. Concerning Delivery of Goods without Original B/L*.

Provisions of the Maritime Law on limitation of action are a set of complete regime, which is different from that of the General Rules of Civil Law, especially with respect to the interruption of limitation of action. Article 267 of the Maritime Law of China provides that, the limitation of action is interrupted if a claimant brings a suit, refers to arbitration or the respondent agrees to perform his obligations. However, the limitation of action will not be interrupted if the claimant makes a claim, applies to withdraw a charge, arbitration or if the charge is rejected.

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20 Wang Wei, On Legal Countermeasures for Release of Cargo without Production of an Original B/L, *Journal of International Economic Law*, Vol. 6. (in Chinese)

Consequently, except for such cases as a lawsuit or arbitration initiated by a party concerned, interruption of the limitation of action may occur only when the debtor agrees to perform his obligations; and it will not occur, if the debtor only agrees to consult with the creditor on compensation but no specific compensation agreement is reached.[21]

D. Ground for Defense 4: Shall a Carrier be Held Liable for Delivery of Goods without Original B/L, if Such Carrier Does So According to the Order of an Assignor under an Order B/L?

If a carrier releases the goods to a designated consignee without production of an original B/L according to an explicit delivery instruction given by an assignor under an order B/L, he is properly performing the obligation to deliver the goods as required by the law. Because Article 71 of the Maritime Law of China provides that, "… as specified in a B/L … on the delivery of goods according to the instruction of an assignor … constitutes a guarantee for the carrier to deliver the goods." Hence, in case of any loss arising from the assignor's inability to settle exchange for certain reasons, he is not entitled to require the delivery of goods or compensation from the carrier by virtue of the order B/L held.[22] An instruction for delivering goods given by the B/L holder to the carrier constitutes disposal of the goods under the B/L, invalidating the right to claim Delivery of goods the carrier. However, it is notable that such assignor must be a lawful B/L holder when giving the instruction for delivering the goods, and is entitled to give such instruction.[23]

E. Ground for Defense 5: Is the Carrier Still Liable for Delivery of Goods without Original B/L, When the Act of the B/L Holder Constitutes a Waiver of the Right to Require the Carrier to Deliver Goods against an Original Bill of Lading?

If a carrier releases cargo without production of an original B/L by relying on

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21 Minutes of the Symposium of Chief Justices of Maritime Courts around China 2001. (in Chinese)

22 Lei Ting, Nature of and Legal Liabilities for Release of Cargo without Production of an Original B/L and Its Legal Liability, *Annual of China Maritime Trial*, 2000. (in Chinese)

23 Li Shouqin, An Insight into Focal Issues of Marine B/L, *Maritime Law Review*, No. 4, 2001. (in Chinese)

any prior act of the B/L holder, then the B/L holder may be deprived of the right to claim against the carrier. For instance, the seller tells the carrier by language or behavior as the shipper that he may release cargo without production of an original B/L, and actively works with and induces the carrier to do so, such that the carrier believes that the shipper has waived the right to require him to deliver goods against an original B/L. In this case, even if the B/L is subsequently still at the hand of the shipper, he may not require the carrier compensate him for any loss arising from delivery of goods without original B/L. For another example, if it is agreed in a trade contract that the goods may be received by non-original B/L, and the B/L holder (issuing bank) holds a trade contract and has reviewed the trade contract, the holder shall be aware of the special covenant of the contract on delivery of goods without original B/L, and also know that such covenant may result in adverse legal consequences on him, but raises no objection, which evidences his consent to such covenant. When the holder of an original B/L agrees on the delivery of goods without production of the original B/L, he is deemed as have waived the right to require the carrier to deliver the goods against an original B/L, and the carrier is thus relieved from the obligation to do so,[24] and the carrier's delivery of goods without original B/L according to the common declaration of will of the holder of an original B/L and parties to the trade contract is an agreed act, which does not infringe upon the legitimate rights and interests of the plaintiff.

This is similar to the application the principle of estoppels in common law. But there is a restriction on this principle. It requires that a waiver of the right to require a carrier to release the goods against an original B/L must occur before the carrier does so, and the waiver must be expressly made. This induces carriers to release cargo without production of an original B/L, and only this kind of waiver will constitute a ground for defense by carriers. However, no estoppels will be constituted after a carrier's delivery of goods without original B/L.

F. Ground for Defense 6: Is the Carrier Still Liable for Delivery of Goods without Original B/L, When the B/L Holder after the Release Enters into a Repayment Agreement with the Consignee Which Has Been Partially Performed?

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24 The Case of Bank of China Hunan Branch v. Guangzhou Zhenghua Shipping Co., Ltd and Guangzhou Ocean Shipping (Group) Co., Ltd. with Respect to a Dispute over Delivery of Goods Carried by Sea, *Annual of China Maritime Trial*, 1999. (in Chinese)

When the B/L holder actually accepts partial payment after a repayment agreement is entered into between such holder and the consignee, the title to the goods under the B/L has been transferred. In this case, it only involves a trade contract dispute, and the B/L no longer has the effect of a document of title. The purpose of setting up B/Ls as document of title in the law is to facilitate cargo owners to transfer the title to the goods which are under actual control of the carrier. If a carrier delivers goods to the correct consignee without production of an original B/L, the right to take delivery under the B/L is terminated according to the agreement of the parties concerned. It is not fair to place the trade contract completely above the contract of carriage, overemphasize the formal function of B/Ls in the delivery of goods, and have the carriers assume the risk of payment for goods in transactions. Both the *Keda Mazhu Case* tried by Guangzhou Maritime Court and the *Xinglong Case* by Tianjin High People's Court ruled that the carrier's grounds for defense on the basis of the theory mentioned above were valid and reasonable. The Supreme People's Court further remarked in August 2000 in the Letter of Reply on Whether the B/L Holder May after Actual Taking Delivery of the Goods from the Consignee Claim Real Rights to the Goods under the B/L against the Carrier that, the holder of the security interest under the B/L, Fujian Donghai Trading Company Limited by Shares obtained the right to possess the goods under the B/L by signing a supplementary agreement with the consignee and the person taking delivery of the goods, and received partial payment, such that the B/L lost the effect of a document of security interest. Therefore, Fujian Donghai Trading Company Limited by Shares lost the right to claim payments under the B/L against the carrier due to delivery of goods without original B/L.

The author contends that, this defense of the carrier should not be valid. The reasons are as follows:

1. Before the carrier's delivery of goods without original B/L, the B/L holder, by language or behavior, has not showed his consent to the carrier's delivery of goods without original B/L, and the buyer (B/L holder) and the seller consult with each other on the payment for goods after such delivery of goods, therefore, no induction to such delivery of goods has occurred. Some believe that, what the B/L holder waived is not the right to require the carrier to deliver goods against an original B/L, but the right to claim against the carrier for damages arising from the delivery of goods without original B/L. There is something unreasonable in this point of view. The seller contacts as the B/L holder with the buyer other than the carrier. According reasonable literal interpretation of the agreement, the settlement

agreement between the seller and the buyer neither discharges the carrier's responsibilities, or waives the right to claim damages against the carrier, and the seller has no obligation to specially indicate in the settlement agreement with the buyer an intention to reserve the right to claim damages against the carrier.[25]

2. The seller aims to recover or reduce its loss in reaching an agreement for payment of goods by negotiating payment terms through the trade channel, and this effort conforms to the legal requirement that an injured party shall take appropriate steps to prevent further loss. Article 119 of the Contract Law of China provides that, where a party is in breach of contract, the other party shall take appropriate steps to prevent further loss, and if such other party fails to do so, he may not claim damages for further loss. In the event of a carrier's delivery of goods without original B/L, the seller often sustains a loss of all payment for goods. If the seller's efforts to reduce loss by the trade channel become the carrier's ground for defending his delivery of goods without original B/L, the seller will give up such efforts entirely and take the carrier as the only party in recovering all loss, which on the contrary aggravates the carrier's risks and responsibilities. Therefore, this behavior reduces and even discharges the carrier's responsibilities, thus having positive legal meaning.

3. Usually, the B/L holder is not only the right holder under the B/L, but also the right holder under the relevant trade contract. Therefore, the B/L holder has two independent creditor's rights enabling him to make a claim based on either of them, and a charge against one of them will not necessarily exclude the other. This is called the unreal joint and several liabilities,[26] based on which the B/L holder may claim rights against the carrier or claim payment for goods against the buyer. If the holder is compensated full by one party, he may not receive compensation from another. According to the mechanisms of B/L, a B/L confers on the B/L holder direct rights against the carrier, for the purpose of providing double protection, rather than replacing his rights under the sales contract against the buyer. The conclusion of an agreement between the seller and the buyer for the payment for goods will not affect his right of claim against the carrier by virtue of the B/L with

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25 Wang Wei, On Legal Countermeasures for Release of Cargo without Production of an Original B/L, *Journal of International Economic Law*, Vol. 6. (In Chinese)

26 Unreal joint and several liability is an obligation of delivery of the same contents by several debtors arising from different reasons, with each of them responsible for the entire obligation, and all debts of all debtors will be discharged when one of them performs such obligation in its entirety.

respect to the contract of carriage of goods by sea.

4. The debtor-creditor relationship under a B/L is an independent legal relationship, whose subjects only include the carrier and the B/L holder. The carrier is responsible to the B/L holder as specified in the B/L, and he is assuming obligations predictable by him in issuing the B/L. The function of a B/L as a document of title is nowadays criticized by many scholars. A B/L is formed and cancelled in the transportation stage and has no effect of a document of title in the transportation stage. It is only a proof of the contract of carriage of goods by sea and a receipt of goods, as well as a certificate against which the carrier guarantees the delivery of goods. A B/L evidences the existence of a debt between the B/L holder and the carrier,[27] and the B/L holder is entitled to require delivery of goods by the carrier.

G. Ground for Defense 7: Is the Carrier Still Liable for Delivery of Goods without Original B/L, if Such Delivery of Goods Causes No Loss or the B/L Holder Has Been Satisfied by Other Legal Remedy?

There are usually three methods for determining the economic loss sustained by the B/L holder due to delivery of goods without original B/L: the first is the sales value of the goods under the B/L as reflected in such exchange settlement documents as B/L, letter of credit and invoices; the second is the sales value of the goods as agreed in the trade contract; and the third is the purchasing price of the goods under the B/L in domestic market, which may be based on the price at which the trade contract is actually performed as reflected in relevant exchange settlement documents; in the absence of such exchange settlement documents, reference may be made to the sales price of the goods as agreed in the trade contract or verification documents for customs clearance. If the carrier's delivery of goods without original B/L causes no loss as mentioned above or the B/L holder has been satisfied by other remedy, for example, the B/L holder has received the exact amount of payment for goods paid by the person taking delivery of the goods, the B/L holder cannot obtain unjust enrichment, due to the lack of a cause of action, whether to investigate the carrier for liabilities for delivery of goods without original B/L in contract or in tort.

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27 Si Yuzhuo ed., Theories and Practice of Release of Cargo without Production of an Original B/L, *Annual of China Maritime Law*, 2000. (in Chinese)

H. Ground for Defense 8: Is the Carrier still Liable for Delivery of Goods without Original B/L, if There Is No Causation between Delivery of Goods without Original B/L and the Loss Incurred in the Case?

Causation between the facts of damage and a breach or tort is a constitutive requirement for investigating the carrier's for liability for breach of contract and tort. The Minutes of Symposium of Chief Justices of Maritime Courts around China 2001 also emphasizes that; the carrier shall be liable for damages for losses arising directly from the carrier's delivery of goods without original B/L.

After the carrier's delivery of goods without original B/L, if the goods are confiscated by the customs in customs clearance because the person taking delivery of the goods is suspected of smuggling, the purchase of smuggled goods by the B/L holder is not protected by the law and his loss will definitely occur despite carrier's delivery of goods without original B/L, since the goods under the B/L are smuggled goods. And there is no causation between the loss and the carrier's delivery of goods without original B/L, and the loss of the goods is not caused by delivery of goods without original B/L but due to confiscation and recovery of the customs. Therefore, the carrier shall not be held liable for damages. However, some believe that, the carrier's delivery of goods without original B/L occurs before the delivery of goods by the person taking such delivery. Although the goods under the B/L are suspected of smuggling, the carrier shall still be liable for the B/L holder for delivery of goods without original B/L, since the carrier's delivery of goods has been completed. We believe that, according to an analysis of the constitutive requirements for investigating the carrier for liabilities for delivery of goods without original B/L, both the liability for breach of contract and the liability for tort emphasize the existence of causation between such breach or tort and the loss caused, and the problem of which occurs first is not a determinant factor, but rather a factor that affects the time of establishment of the causation. Smuggling of goods is not allowed by the law and constitutes a violation of the law or crime, which must be investigated for liabilities according to the principle of social equality and justice. It cannot be exempted or avoid legal liabilities, let alone receiving legal remedies due to delivery of goods without original B/L, such that the criminal suspect receives the exact amount of compensation for the smuggled goods.

Is the shipper who still becomes the B/L holder after the carrier's delivery of goods without original B/L entitled to bring a suit against the carrier to claim

damages for loss of payment for goods, if the parties to the sales contract dispute over the quality of the goods, and the bank refuses to make payments for goods under the acceptance letter of credit due to discrepancies of relevant documents? In the author's opinion, the fundamental reason for the bank to dishonor the payment for goods is that the quality of the goods does not conform to the terms of the sales contract, and that the shipper may not impute its liability for fault in international trade to the carrier by reason of delivery of goods without original B/L. If we apply the function of the B/L as a document of real rights to the transportation stage completely, the commercial risks of the seller and the buyer may easily be transferred to the transportation stage, such that the carrier may assume unnecessary liabilities, which is not fair.[28] There is no direct causation between the shipper's failure to recover the payments for goods in the sales contract and the carrier's delivery of goods without original B/L, therefore the carrier shall be exempted from liabilities for his delivery of goods without original B/L. The *Xinglong Case* tried by Tianjin High People's Court was so adjudged.

I. Ground for Defense 9: Is the Carrier Still Liable for Delivery of Goods without Original B/L after Verifying the Identity of the Consignee under a Straight B/L?

The Maritime Law of China stipulates that, the provision contained in a B/L stating that the goods is to be delivered to a named person constitutes a guarantee against which the carrier shall deliver the goods.[29] The Maritime Law of China also provides that a straight B/L may not be assigned. According to these provisions, we believe that, a straight B/L will have the following legal consequences: (a) a straight B/L specifies the name of the consignee and is non-negotiable, hence, only the consignee may take delivery of the goods. Neither the shipper nor the consignee may have the carrier obliged to deliver the goods to any other person other than the consignee by assigning the B/L. (b) The Maritime Law does not compulsively require the carrier to deliver the goods to the holder of the straight B/L, but provides that the carrier shall deliver the goods the person as set out in the B/L. The holding of an original straight B/L by the person taking delivery of

28 Guo Feng, My Views on Release of Cargo without Production of an Original B/L, *Newsletter of China Maritime Law Association*, No. 3, 2001. (in Chinese)

29 The Maritime Law of China, Art. 71.

the goods is only one important basis for the carrier to identify the consignee, and the consignee takes delivery of goods as the holder of a straight B/L by showing that he is the person as named in the straight B/L, rather than by presentation of the straight B/L. Therefore, if there is any other evidence that can prove the true identity of the consignee, even if the person taking delivery of the goods does not present an original straight B/L, the carrier may also deliver the goods to him after confirming his identity as correct. (c) In practice, a straight B/L is usually only used in the carriage of such special items as exhibitions and personal valuables and often used in short-distance transportation, in which the late arrival of the original B/L is a common occurrence, making the compulsory requirement for delivery of goods an original straight B/L infeasible. In the meanwhile, a straight B/L is in substance a non-negotiable receipt, although it is a B/L in form. Therefore, the carrier only needs to correctly identify the object of delivery, and it is not necessary for him to affirm the attribution of the ownership of the goods, and he may release the goods upon verifying the identity of the consignee. As a result, the carrier is not liable for delivery of goods without production of an original straight B/L.

Nevertheless, some believe that, despite the fact that the object to be delivered is rights; the reasons directly giving rise to the losses sustained by the B/L holder are that he is deprived of the guarantee for recovering payment for goods, and the right of control and disposal of the goods. Due to its non-negotiable nature, a straight B/L cannot have the effect of real rights whether in the transportation or the trading stage, and the reason causing the holder's inability to recover the payment for goods is entirely attributable to the dispute over the trade contract. By safely transporting the goods to the port of discharge and delivering them to the right consignee as provided in the carriage contract, the carrier has fulfilled all of his obligations under the carriage contract. It is not fair to place the trade contract above the carriage contract and to overemphasize the formal function of the B/L in the delivery of goods, and thus have the carrier assume payment risks under the trade contract.

J. Ground for Defense 10: Is the Carrier Still Liable for Delivery of Goods without Original B/L Which is Permitted by the Laws or Customs Applicable at the Port of Discharge?

1. The Case in Which Delivery of Goods without Original B/L Is Permitted by the Laws or Regulations Applicable at the Port of Discharge

Where delivery of goods without an original B/L is permitted by laws or regulations applicable at the port of discharge, the party concerned shall provide sufficient evidence to that effect, and the carrier may release cargo without production of an original B/L according to such laws or regulations, and may not be held liable therefor.

2. The Case in Which Laws Applicable at the Port of Discharge Require the Carrier to Release Cargo to a Third Party Directly

If laws applicable at the port of discharge provide that, the goods shall be firstly handed over to the port or the customs, and then delivered by the port or the customs to the consignee, the consignee may take delivery of the goods without producing a B/L. It is a commonplace in countries of Central and South America to deliver goods to the customs and for the customs to keep and release goods without production of an original B/L. As per Article 4 of the Hamburg Rules, to deliver goods to relevant authorities or other third parties as required by laws or regulations applicable at the port of discharge is one of the three methods of delivery provided in such Rules.[30] The 2002 UNCITRAL Draft Instrument on Carriage of Goods [Wholly or Partly] [by Sea] also provides that, the carrier may not be held liable for delivery of goods without original B/L, if laws or regulations applicable at the port of discharge require the goods to be delivered to third parties. In the *Case Jiangmen Jinyi Hardware Co., Ltd. v. Israel Navigation Co., Ltd. Concerning the Delivery of Goods without Original B/L*, Guangzhou Maritime Court adjudged that the carrier shall not be held liable for delivery of goods without original B/L.

3. The Case in Which Delivery of Goods without Original B/L Is Consistent with the Customs of the Port of Discharge

If delivery of goods without original B/L is in line with the customs of the port of discharge, which has become a shipping custom and usage through repeated practice, then the carrier may not be held liable for delivery of goods without original B/L, provided that such custom and usage do not violate local compulsory laws, and the parties concerned agree to apply such custom and usage. However, port customs should be rigorously distinguished from a practice. A carrier's delivery of goods without original B/L according to any practice will not be protected.[31]

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30 See Wang Wei, On Legal Countermeasures for Release of Cargo without Production of an Original B/L, *Journal of International Economic Law*, Vol. 6.

31 See Yang Liangyi, Release of Cargo without Production of a B/L, *Annual of China Maritime Law*, 1994.

Legal Reflections on Japan's Marine Transportation of Extremely Dangerous Nuclear Substances Secretly

ZHAO Yajuan *

Abstract: Japan transported extremely dangerous nuclear substances by sea secretly for decades. If those substances were to leak, the surrounding environment would suffer from severe long-term and widespread radioactive contamination, including not only the devastating impact on marine living resources and destruction of tourism resources, but also the long-term adverse consequences for nearby coastal residents. As a result, coastal States lodged strong protests. The author holds that the transportation of these nuclear substances went against the principle of international law requiring States to act without prejudice to other States in all circumstances, and also violated the general obligations of protection and preservation of the marine environment, as well as the precautionary principle and the principle of cooperation. This illegality cannot be absolved even by the defense of the right of innocent passage and freedom of navigation. Besides, the author anticipates that the analysis of this illegality could also offer rewarding thoughts on the corresponding measures that China could take.

Key Words: Precautionary principle concerning extremely dangerous nuclear substances; Without prejudice to other States; Principle of cooperation; 1982 United Nations Convention on the Law of the Sea

Japan has recycled uranium and plutonium as fresh fuel by reprocessing spent nuclear fuels in order to separate the radioactive waste from it for decades on the pretext that Japan has limited local sources and has to fully utilize nuclear energy.

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Accordingly Japan concluded contracts with two State-owned companies, the France Cogema (now Areva NC) and the U.K. British Nuclear Fuels Ltd. respectively, for reprocessing their used fuel. Over the past three decades, hundreds of tons of spent nuclear fuels have been transported from Japan to Europe by sea for the purpose of reprocessing, and then Plutonium extracted therefrom and the Vitrified High-Level Waste（VHLW）were shipped back to Japan. For instance, 250 kg of Plutonium extracted from spent nuclear fuels, equivalent to the amount needed to produce at least 30 pieces of nuclear weapons, was shipped back to Japan in 1984. And about 1.7 tons of Plutonium was shipped from France to Japan via the Cape of Good Hope by Akatsuki Maru in 1992,[1] starting off a crazy wave of shipment of nuclear substances. 28 canisters of radioactive VHLW were shipped from France to Japan via the Cape Horn by the British ship Pacific Pintail in February 1995; 40 canisters of radioactive VHLW were shipped back to Japan via the Cape of Good Hope by the British ship Pacific Teal in January 1997; 60 canisters of VHLW were shipped back to Japan via the Caribbean Sea and the Panama Canal by the British ship Pacific Swan in January 1998; 104 canisters of VHLW (over 40 tons) were shipped from France to Japan via the Panama Canal by the British ship Pacific Swan in December 1999; 40 mixed Uranium-Plutonium oxide fuel elements（containing about 446 kg of Plutonium which could be used to produce nuclear weapons）carried in Pacific Teal and Pacific Pintail were returned from U.K. and France to Japan in July 1999. 192 VHLWs were returned from France to Japan via the Cape of Good Hope by Pacific Swan in December 2000, the largest quantity ever to be transported. Almost at the same time, the Pacific Teal and the Pacific Pintail started off from U.K. and France respectively, carrying 28 mixed Uranium-Plutonium oxide fuel elements, and arrived in Japan in March 2001. 1320 nuclear waste elements were shipped from Japan to U.K. via the Panama Canal by Pacific Sand-piper in June 2001. By then, Japan had sent all of its nuclear waste under the contract to U.K. for reprocessing.[2] However there are still over 3000 canisters of VHLW about to be returned from U.K. and France to Japan and, in the 15 years to come, 15~30 shipments are to be needed to transport the rest

1 "Pu Sea Shipments", at http://www.nci.org, 23 December 2003.
2 "Pu Sea Shipments", at http://www.nci.org, 23 December 2003.

of the VHLW.[3]

The international community responded with strong protests and condemnation of this wave of shipments of nuclear substances, for these substances differed from the usual kind of cargo. Once accidents happen to those long-term substances with high-level radioactive character, the following consequences would be devastating. Each shipment contains more highly radioactive material than was released in the 1986 Chernobyl accident. European States suffered and experienced a painful lesson from the Chernobyl Disaster, and the international community responded quickly by developing and adopting two significant conventions in that very year, the Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency, and these conventions came into force in 1986 itself, with an unique efficiency of bring convention into being. Coastal States are under severe threat of radioactive contamination by the frequent shipments of high-level radioactive substances to and from Japan. For instance, during the shipment of the Pacific Swan in December 1999, 104 canisters of VHLW containing the fatally high-level radioactive nuclear substance were placed in four bigger containers, and the amount of Cesium contained in each container was equivalent to the amount of radioactive material that was leaked in the Chernobyl Disaster.[4] Leakage of these long-term toxic substances with high-level radioactivity will cause long-term and widespread radiation pollution in coastal States and irreversible damage to marine ecosystems, and there is no means to cure the adverse consequences, that is to say, there having been no specific devices to salvage high-level radioactive substances or none experience in doing so far. In another instance, when shipping two canisters of high-level radioactive Cesium Chloride, a freighter flying the State flag of Panama was hit by a storm near the Azores Islands and eventually sank in November 1997. However the French Nuclear Safety Authority declared that they did not have the plan to retrieve those two tanks of Cesium Chloride, because that those high-level radioactive substances would only have a slight impact on humans.[5]

Therefore, coastal States condemned and boycotted Japan's activities. Brazil,

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3 Paul Leventhal and Steven Dolley, Understanding Japan's Nuclear Transports: The Plutonium Context, Nuclear Control Institute, Presented to the Conference on Carriage of Ultrahazardous Radioactive Cargo by Sea: Implications and Responses, Maritime Institute of Malaysia, Kuala Lumpur, Malaysia, 18 October 1999, at http://www.nci.org/k-m/mmi.htm, 23 December 2003.

4 "Pu Sea Shipments", at http://www.nci.org, 23 December 2003.

5 "Pu Sea Shipments", at http://www.nci.org, 23 December 2003.

Argentina, Chile, South Africa, Nauru and Kiribati forbade ships carrying nuclear wastes from navigating into their exclusive economic zones in 1995, and Chile even sent a warship out to force the ships to change course and leave immediately. In 1996, 13 States, under the leadership of Argentina, urged to pass a comprehensive and mandatory code on marine transportation of radioactive substances in the conference of the International Maritime Organization. On 8 March, 1999, the heads of governments of the Caribbean Community reiterated their "unswerving opposition" to the flagrant disregard and continuous use of the Caribbean Sea for transporting toxic nuclear substances with high-level radioactivity, expressed their outrage on the more and more frequent transportation of increasingly larger quantities of toxic nuclear substances, and called on Japan, UK and France "to stop the dangerous abuse of the Caribbean Sea".[6] In 2001, the Environment Defense Foundation of Argentina (FUNAM) even brought an accusation against Argentinian senior government officials claiming that permitting the "Ship of Death", namely the Pacific Swan, to traverse through the waters of Argentina violated Article 41 of Argentina's Constitution.[7]

In recognition of the special character of these cargoes and strong reactions from the international community, the author proposes that China, as a neighboring State of Japan as well as a coastal State, should not turn a blind eye to the matter. The author holds that these shipments to and from Japan constitute fundamental violations of international law according to the principles of international law or on the ground of the provisions of conventions concerned.

I. Violating the Basic Principle of International Law: Without Prejudice to Other States

To respect States' sovereignty is indeed a fundamental principle of international law. International law ensures that all States enjoy the sovereign rights of exploring domestic natural resources pursuant to their own policies of environmental preservation and economic development. But it does not mean that States can do anything within their respective jurisdictions without considering

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6 Jon M. Van Dyke, Sea Shipment of Japanese Plutonium under International Law, *Ocean Development and International Law*, Vol. 24, 1993, p. 399; "Pu Sea Shipments", at http://www.nci.org, 23 December 2003.

7 "Pu Sea Shipments", at http://www.nci.org, 23 December 2003.

the interests of other States and of the entire international community. In the *Corfu Channel Case* (1949), the International Court of Justice (hereinafter referred as the ICJ) said that each State is under an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States,[8] and in the *Trail Smelter Arbitration Case (U.S.A. v. Canada, 1938-41)*, the arbitral tribunal held that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another' State".[9] As of now, "without prejudice to other States" has developed into an acknowledged principle of international law, which is embodied in a series of international legal documents, such as the Convention on the High Seas in 1958,[10] the Stockholm Declaration on the Human Environment which the United Nations Conference on the Human Environment adopted in 1972,[11] the Charter of Economic Rights and Duties of States which the UN General Assembly adopted in 1974,[12] the World Charter for Nature which the United Nations General Assembly adopted in 1982,[13] as well as the Rio Declaration on Environment and Development that United Nations

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8 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 333.

9 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 333.

10 Art. 2 of the High Seas Convention in 1958 stipulates that: "These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

11 Art. 21 of the Stockholm Declaration on the Human Environment adopted by the United Nations Conference on the Human Environment in 1972 stipulates that: "States have, in accordance with the Charter of the United Nations and the principles of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

12 Art. 30 of the Charter of Economic Rights and Duties of States which the UN General Assembly adopted in 1974 stipulates: "All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

13 Part III, Art. 21(d) of the World Charter for Nature which the United Nations General Assembly passed in 1982 stipulates: "States … shall… ensure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction."

Conference on Environment and Development adopted in 1992,[14] etc.

The United Nations Convention on the Law of the Sea, 1982 (hereinafter referred to as UNCLOS) defines the rights and obligations of nations with respect to their use of the world's oceans and establishes that "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."[15] Other conventions reaffirmed this principle as well.[16]

Japan, for the sake of domestic interests, carried out marine transportation of extremely dangerous high-level radioactive substances, resulting in coastal States and the whole international community being exposed to enormous risks of radioactive contamination. Furthermore, protective measures taken in the course of transportation were fundamentally insufficient to ensure the impairments will not come or extend to other States,[17] which constitutes a fundamental breach of national security interests of these States, violating the acknowledged principle of international law and obligations under the Art. 194(2) of UNCLOS.

II. Violating the General Obligations of Protecting and Preserving Marine Environment

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14 Principle 2 of the Rio Declaration on Environment and Development that United Nations Conference on Environment and Development adopted in 1992 stipulates: "States have, in accordance with the Charter of the United Nations and the principles of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

15 Art. 194(2) of the United Nations Convention on the Law of the Sea (1982)

16 Preamble of the United Nations Framework Convention on Climate Change in 1992, Art. 3 of the Convention on Biological Diversity in 1992.

17 For example, when shipment of mixed Uranium-Plutonium oxide fuel elements, it requires the strictest physical security measures as to shipment of Plutonium. According to agreement between America and Japan, Japan transporting Plutonium required that the US gave permission first and arranged warships to protect the courses . However, America yielded to the pressure from Japan in 1999 and did not insist on the warships escorting. Actually, shipment without the warship protection is extremely dangerous. Besides, datas show that those packages of nuclear waste had severe deficiency, and did not reach the efficient safety standards. See more details on website of NCI, at http://www.nci.org under, 23 December 2002.

All States on this planet coexist in an integrated global environment where all are mutually connected, mutually dependent and mutually restricted by others. The destruction of the earth's environment would jeopardize the interests of all States. Thus, global environmental protection is a shared responsibility of all States.

A series of international legal documents confirm that all States bear the common legal obligation of protecting the global environment.[18] UNCLOS, as international convention, provided notable provisions in Part XII (a total of 46 Articles) for the protection and preservation of marine environment – an essential part of global environment for the first time.

> *States have the general obligation to protect and preserve the marine environment ... States shall take ... all measures ... that are necessary to prevent, reduce and control pollution of the marine environment from any source; The measures taken ... shall deal with all sources of pollution of the marine environment; These measures shall include, inter alia, those designed to minimize to the fullest possible extent: ... pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels.*[19]

Since "States shall take all measures… that are necessary to prevent, reduce and control pollution of the marine environment from any source", and the shipment of extremely dangerous high-level radioactive substances poses enormous risk of severe radiation pollution for coastal States, shippers should take minimum necessary measures, at least, to avoid accidents and spills, such as: to carry out prior environmental monitoring and assessment, to inform coastal States of, the courses and dates of the planned voyages and negotiate with them in order to determine the best courses, to jointly formulate contingency plans with relevant States to nip the threats in the bud and minimize environmental damage in case of accidents,

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18 As Stated in the Stockholm Declaration on the Human Environment of 1972, the World Charter of Nature of 1982, Vienna Convention for the Protection of the Ozone Layer of 1985, the Rio Declaration on Environment and Development of 1992; United Nations Framework Convention on Climate Change of 1992 and the Convention on Biological Diversity of 1992, etc.

19 Arts. 192 and 194 of the United Nations Convention on the Law of the Sea (1982).

to notify promptly and request for assistance at the time of accidents, to set up necessary mechanisms to establish responsibility and schemes for compensation (such as compulsory insurance), etc. However, through secret shipments, Japan neither conducted the prior environmental monitoring and assessment of the areas that the shipment will go through, nor gave a prior notice to coastal States of the courses and dates of the planned voyages, not to speak of having negotiations or making the joint contingency plans with coastal States. In this regard, Japan's behaviors have constituted a violation of the essential obligations under UNCLOS, and defied the international law.

III. Violating the Precautionary Principle

On the one hand, environmental pollution causes huge damage to human life and health as well as the social and economic life of countries. On the other hand, treatment of the damage and cleaning up the pollution costs a huge amount but proceeds slowly. What's worse, pollution cannot be treated and the ecological environment cannot be restored in most cases. Prevention is always better than cure. Hence, the precautionary principle becomes the most vital principle of international law in the field of environmental protection. Some documents brought up this principle earlier as well.[20] Principle 15 of the Rio Declaration on Environment and Development of 1992 provides that:

> *In order to protect the environment, the precautionary approaches shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

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20 For instance, the Declaration of the Principles on Air Pollution Control, approved by the European Parliament and the Ministers' Deputies in 1968 took the precautionary principle as the foundation of the legislation for air pollution control; Art. 9 of the Nairobi Declaration, adopted at the 13th meeting of the session on 18 May 1982, states that "Prevention of damage to the environment is preferable to the burdensome and extensive repair of damage already done. Preventive action should include proper planning of all activities that have an impact on the environment"; The World Charter for Nature of 1982 also took prevention of ecological damage as the guiding principle throughout; the Ministerial Declarations and Statements of the North Sea in 1984, 1987 and 1990 affirmed the precautionary methods under which Ministers are to continue to adopt and implement the precautionary principle.

Almost all the international legal documents passed after 1990 prescribe the precautionary principle.[21]

UNCLOS does not prescribe the precautionary principle explicitly, but provides that "States have the general obligation to protect and preserve the marine environment" and "States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection."[22] In this sense, there is no ground to believe that "all measures consistent with this Convention" exclude precautionary measures.[23]

From the perspective of the author, the essence of the precautionary principle lies in being cautious, taking precautionary measures, being ready and planning ahead to face accidents and mishaps if there is even the slightest threat of any serious or irreversible damage. Therefore, to adopt the precautionary measures, the following basic steps are essential: 1. to carry out regular environmental monitoring and assessment, 2. to inform negotiate with other States which might be affected, 3. to jointly establish contingency plans in cooperation with other States.

1. Necessity of Carrying Out Marine Pollution Monitoring and Assessment

Firstly, in order to prevent marine pollution and to protect the marine environment, the quality and content of marine areas should be assessed and pollution conditions and development trends should be mapped out. Thus, there exists the necessity of carrying out marine pollution monitoring and assessment ahead of time in order to evaluate and analyze the possible dangers and effects

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21 For instance, Art. 2(2)(a) of the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992; Art. 3(2) of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992; Art. 4(3)(f) of Bamako Convention on the Ban of the Import into Africa and the Control of Trans boundary Movement and Management of Hazardous Wastes Within Africa, 1991; Agenda 21.

22 Art. 192, Art. 194(1) of the United Nations Convention on the Law of the Sea (1982).

23 Art. 22 of Chapter 17 of Agenda 21 provides that: "States, in accordance with the provisions of the United Nations Convention on the Law of the Sea on protection and preservation of the marine environment, commit themselves, in accordance with their policies, priorities and resources, to prevent, reduce and control degradation of the marine environment so as to maintain and improve its life-support and productive capacities. To this end, it is necessary to: a. Apply preventive, precautionary and anticipatory approaches so as to avoid degradation of the marine environment, as well as to reduce the risk of long-term or irreversible adverse effects upon it."

of marine environmental pollution, and to determine effective countermeasures. UNCLOS clearly provides that:

> *States shall ... endeavor ... to observe, measure, evaluate and analyses, by recognized scientific methods, the risks or effects of pollution of the marine environment. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.*
>
> *States shall publish reports of the results or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.*
>
> *When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments.*[24]

UNCLOS merely stipulates that States may make and publish reports of assessment, without requirement of detailed contents of reports. Accordingly, reports of assessment could be holonomic, sufficient and up to date, or they could be non-holonomic, insufficient and out of date. In the view of author, as the essence of the precautionary principle calls for, reports of assessment should be holonomic, i.e., sufficient and up to date. The ICJ pointed out in the *Gabčíkoko-Nagymaros Case* in 1972 that：

> *The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such*

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24 Arts. 204~206 of the United Nations Convention on the Law of the Sea (1982).

interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.[25]

Applying the legal doctrine from the *Gabčíkoko-Nagymaros Case* into the Japan's case, which requires all States in a scientific insight to take considerations of the effect upon environment when engaged in economic activities for economic interests, also given the UNCLOS provisions, obviously, Japan should have carried out the environmental monitoring and environmental assessment not only pursuant to the UNCLOS but also in accordance with international practice. Furthermore, Japan should have made the holonomic, sufficient reports with considerations of current standards and practices and should have published the reports. Actually, on the opposite, Japan conducted these activities secretly and refused to reveal relevant intelligence, which constitutes a significant violation of international law.

2. Duty of Notification to States That Are Likely to Be Affected

Secondly, when planning or approving to engage in activities that may result in trans-boundary severe environmental harm, a State should inform such other States in danger and communicate relevant facts, data and other materials to them in detail, as long as the disclosure of those materials is not forbidden by domestic laws or international law.[26]

In the Corfu Channel case (1949), British warships crossed the Corfu Channel with a prior inspection and clearing of the Strait, and then the Albania government opposed to the passage for the British fleet trespassed its territory sea, but the British government claimed its activity as "innocent passage". Later when going through the Strait again, the British fleet encountered the mining zone under the water and got severe damages, and as a result, the UK sued Albania to the ICJ for damages. The Albania government claimed that it did not lay the mining under the water, and furthermore, it was the British fleet trespassed its territorial waters

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25 Judgement of the Gabcikoko-Nagymaros Case, International Legal Materials, Vol. 37, No. 1, para. 140.

26 There are scholars holding that "notification and negotiation in trans-boundary relationship" constitutes a fundamental principle of international environment law". Alexandre Kiss, tranlated by Zhang Siyi, *International Environmental Law*, Beijing: Law Press China, 2000, pp. 103~105. (in Chinese)

since "innocent passage" did not include any inspecting activity, and thus it was not responsible for the British damages. The ICJ observed that the mining zone could not been constructed without the acknowledgment of the Albanian government, thus, such acknowledgement indisputably creating the legal obligation of the government, i.e., to inform the British warships the existence of the mine zone in its territory sea for the general interests, and to warn the threat that the British fleet may encounter. The Albanian government had ample time to give the warning to the British fleet; however, it did not attempt to take any measures to prevent the disaster and "this severe act of omission causes international liability of the Albania government". In consequence, the Albanian government compensated the UK.[27] In other words, this case indicates that a State has the obligations to inform other States of any and every situation in the territory under its jurisdiction or in the area under its control which may result in adverse consequences for them, otherwise the State may undertake the international liability for these consequences.

Some international legal documents affirm such obligations of States. For instance, Principle 19 of Rio Declaration on Environment and Development stipulates explicitly that: "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse trans-boundary environmental effect and shall consult with those States at an early stage and in good faith."

Some conventions on preventing rivers and lakes from pollution prescribe the same principle. UNCLOS provides particularly that:

> *When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged …it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations*.[28]

Pursuant to this provision, States may evaluate, in the first place, the consequence of activities that may exert adverse effects on other States (to determine which States belong to potentially affected States). Then, notification is required to be sent in a timely manner. Without these steps, a notification is meaningless.

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27 Liang Shuying ed., *International Law Case Study*, Beijing: Intellectual Property Press, 2001, pp. 70~75. (in Chinese)

28 Art. 198 of the United Nations Convention on the Law of the Sea (1982).

After notification, States should consult with those States that are likely to be affected honestly and in good faith. States should make consultation with those States that are likely to be affected, at the requests of the latter, which is deemed to be a necessary supplement to the notification. In other words, States that are likely to pollute other States is supposed to allow States that are likely to be affected to criticize and comment on contents of the notification. Otherwise, the notification will have been of no use. The consultation should be carried on in good faith, and parties concerned should pay due attention to rights and legal interests of counterparties. However, international law has not given clear provisions as to whether the States that are likely to pollute other States have to abort their planned activities or only adopt the suggestions or the mitigative and precautionary measures, when States that are likely to be affected disapprove of their proposed plans or offer suggestions or insist on alternative approaches. From the perspective of the author, the purpose of the precautionary principle is to nip the cause of the problem in the bud, to prevent possible pollution to the maximum possible extent, without allowing lack of full scientific certainty to be used as an excuse for postponing cost-effective measures to prevent environmental degradation. This means that if States that are likely to pollute other States insist on conducting planned activities, parties concerned should at least jointly establish a set of practical contingency plans.

3. Necessity of Establish a Set of Practical Contingency Plans

Thirdly, to establish a set of practical contingency plans is of utmost importance to this principle. In case of environmental disasters, only actions taken quickly and pursuant to settled contingency plans will make it possible to prevent, reduce or control pollution effectively. The Chernobyl disaster in 1986 drew international attention to the importance of establishing such contingency plans. As a matter of fact, more and more bilateral and regional contingency plans have already come into being. The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC) is a paragon for global contingency plans. UNCLOS provides in particular that, in eliminating the effects of pollution and preventing or minimizing the damage, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.[29]

Given special characteristics of extremely dangerous nuclear substances with high-level radioactivity, to minimize the risk of long-term adverse effects on marine

29 Art. 199 of the United Nations Convention on the Law of the Sea (1982).

environment in case of accidents, there exists the necessity for parties concerned to consult, cooperate and launch a set of contingency plans before the actual transportation, for responding to incidents such as fire, collision, stranding, sinking. The Marine Environment Protection Committee (MEPC) of the International Marine Organization (IMO) has already developed a draft manual for establishing marine contingency plans, and intends to combine this draft with the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel (INF), Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code).[30] Even though establishment of offshore contingency plans is crucial, to establish a set of on-shore contingency plans is even more practical and urgently needed by the coastal States（such as saving and salvaging） But till now, as Japan persisted in secret transportation of its nuclear waste, neither prior notification or consultation took place, nor were contingency plans jointly devised and implemented, and consequently an essential departure from international law has arisen.

IV. Violating the Principle of Cooperation

As a fundamental principle of modern international law, States cooperate in international affairs. For there is only one earth for mankind to share and so, the principle of cooperation operates predominantly for the protection of the global environment, and several resolutions and declarations on environmental protection emphasize the need for immediate and active international cooperation repeatedly.[31] The same has also been enthusiastically affirmed in several cases. For instance, in the recent MOX Plant case (Ireland v. United Kingdom), the International Tribunal for the Law of the Sea (hereinafter referred to as ITLOS) observed that:

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30 The INF Code was passed on 18th conference of IMO on 4 October 1993, IMO Resolution A/18/Res.748, Annex. The Code regulates mainly the package of radioactive substances, and other technical issues, like the design, construction, equipment, operation and manning of vessels which transport the substances. Parties of IMO decided to combine this Code into the International Convention for the Safety of Life at Sea. And this Code took effect officially in 2001.

31 For instance, the Stockholm Declaration on the Human Environment of 1972, the Nairobi Declaration of 1982, the Vienna Convention for the Protection of the Ozone Layer of 1985, the Rio Declaration on Environment and Development of 1992; the United Nations Framework Convention on Climate Change of 1992 and the Convention on Biological Diversity of 1992, and other multilateral and regional treaties as well as bilateral treaties; the 44/229 Resolution on International Cooperation in the field of Environment was adopted by UN General Assembly in 1989.

The duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention.[32]

UNCLOS provides for "Global and Regional Cooperation" in Section 2 (Art. 197~Art. 201).

The author holds that the cooperation should be widespread and comprehensive. Since the damage to environment is often irreversible, and the key to recovery is not all about money, States, when conducting activities that may exert influences on other States, should undertake to cooperate with all interested parties in good faith and with honesty, and take all parties' interests and needs into account. It takes good faith and honesty of all parties concerned to cooperate on prior notifications, consultations and establishment of the contingency mechanisms, and also on later notifications, assistance and establishment of the responsibility mechanisms after accidents. However, Japan persisted in its activities, regardless of the interests of other States, which constitutes a serious departure from the principles of international law.

V. The Illegality Would Not Be Absolved by the Defense of the Right of "Innocent Passage" and "Freedom of Navigation"

In the light of the above analysis, Japan's secret marine shipments of extremely dangerous nuclear substances violate international law. Japan always defends its illegality with the right of innocent passage and freedom of navigation over the years.[33] However, upon scrutinizing the relevant provisions of UNCLOS, it is clear that defense of the right of innocent passage and freedom of navigation cannot

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32 International tribunal for the law of the sea (ITLOS), The MOX Plant Case (Ireland v. United Kingdom), para. 82, *International Legal Materials*, Vol. 41, No. 2, p. 405.

33 H. Tani, A Notification of Radioactive Materials Shipment and the United Nations Convention on the Law of the Sea, Contributed Papers, International Conference on the Safety of Transport of Radioactive Material, 7-11 July 2003, Vienna, Austria, p. 46, at http://www-ns.iaea.org/meetings/rw-summaries/vienna-transport-safety-2003.asp?s=10&l=80, 23 December 2003.

justify the legality of the transportation.

First, UNCLOS provides that ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea, channels for international navigation, archipelagic waters, internal waters of particular instances, but the innocent passage has plenty of restrictions, including:[34] 1. the passage should not be prejudicial to the peace, good order or security of the coastal States; 2. if foreign ships engage in acts of willful and serious pollution contrary to UNCLOS, the passage shall be considered to be prejudicial to the peace, good order or security of the coastal State; 3. foreign ships exercising the right of innocent passage shall comply with laws and regulations, in conformity with the provisions of UNCLOS and other rules of international law relating to the preservation of the environment of the coastal States and the prevention, reduction and control of pollution thereof; 4. coastal States shall require foreign ships carrying nuclear substances to use special sea lanes and traffic separation schemes, and those ships should carry documents established for such ships by international agreements and shall observe special precautionary measures established for such ships by international agreements; 5. the coastal States may take the necessary steps to prevent passage which is not innocent, and to suspend temporarily or stop innocent passage.

Hence, the coastal States could: 1. impose the requirement of prior notification and consultation on freighters; 2. prohibit harmful passage on the ground of it (the coastal State) undertaking potentially enormous risks of pollution, and on the ground of the passage being prejudicial to the peace, good order or security of the coastal States,[35] 3. exercise the civil jurisdiction to board and inspect the freighter's certificates and special measures to prevent pollution and to protect marine environment and coastal residents, and reject the innocent passage of the ships not in conformity with the requirements as such or levy the execution against or arrest the ship;[36] 4. designate sea lanes and traffic separation schemes.

Secondly, UNCLOS provides that all States, whether coastal or landlocked, enjoy the freedom of navigation in exclusive economic zones, while at

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34 Arts. 19 (1), (2)(h), 21~23, of the United Nations Convention on the Law of the Sea (1982).

35 Part III (BASIC PRINCIPLES). Art.3 of the Code of Practice on the International Transboundary Movement of Radioactive Waste, which was adopted International Atomic Energy Agency in 1990, provides that: It is the sovereign right of every State to prohibit the movement of radioactive waste into from or through its territory. The provision is not meaningless and does have point.

36 Art. 23 and Art. 28 of the United Nations Convention on the Law of the Sea (1982).

the same time stipulating that the coastal States have jurisdiction with regard to the protection and preservation of the marine environment, and sovereign rights for the purpose of conserving and managing the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil. In exercising its rights and performing its duties in the exclusive economic zone, the coastal States shall have due regard for the rights and duties of other States and shall comply with laws and regulations, in conformity with the provisions of the UNCLOS and other rules of international law (laws and regulations relating to the preservation of the environment included), and act in a manner compatible with the provisions of the UNCLOS (restrictions from Part XII included for certainty).[37] In this sense, coastal States possess a considerable control of ships carrying nuclear substances. Specifically, 1. States may require prior notification and consultation with freighters (which is the reasonable requirement based on Part XII, UNCLOS); 2. States may, in the exercise of its sovereign rights to conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary;[38] 3. States may declare, on the ground that foreign ships fulfill no interests of the coastal States that bear the enormous risks of pollution, that violation of laws and regulations in regard to environmental protection interferes with its sovereign rights to conserve and manage the living resources in the exclusive economic zone.[39]

Last but not the least, the high seas are open for all States and, whether coastal or land-locked, States enjoy the freedom of navigation. However, this freedom is constrained:- the high seas are beyond the jurisdiction of any one State, but States undertake the general obligation of protecting and preserving marine environment, and the duty not to bring the high seas under risks of nuclear pollution, and at the same time, when implementing plans or projects under their jurisdiction or control, States shall bear the obligation of ensuring that those plans or projects are

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37 Art. 56 and Art. 58 of the United Nations Convention on the Law of the Sea (1982).

38 Art. 73 of the United Nations Convention on the Law of the Sea (1982).

39 For example, Brazil, Argentina, Chile, South Africa, Nauru and Kiribati forbade ships of nuclear waste navigating into the Exclusive Economic Zone of their own in 1995, and Chile even called a warship out to force the ships to change the route and leave eventually; when Pacific Swan transported VHLW from France back to Japan at the end of 2000, the Buenos Aires federal court of appeals awarded, on the ground that the shipment may cause "irreversible" damage to the environment and public health grounds, that the government must take measures, in order to stop the ship through the exclusive economic zone of Argentina. "Pu Sea Shipments", at http://www.nci.org, 22 December 2002.

completed without prejudice to the "environment beyond the jurisdiction of the States", environment of high seas included obviously.[40]

VI. Conclusion

That Japan carries out marine shipment of extremely dangerous substances with high-level radioactivity concerns the interests of coastal States and the whole international community. What's more, Japan did not publish the reports of marine pollution monitoring and environment assessment, and did not undertake international cooperation with potentially affected States/regions (such as by giving prior notifications to get suggestions and jointly establish contingency plans). Consequently, international law was breached. China is one of the coastal States along the course of the Japan shipment as such and the ships carrying radioactive waste navigated at least once through the Strait of Malacca, across the South China Sea, around Taiwan Island and eventually returned to Japan.[41] The South China Sea is a semi-enclosed sea as per the UNCLOS. Limited by its special geographical conditions, this kind of an area, with poor self-purification capability, more easily accumulating pollutants and suffering from pollution damage, can be classified as a "fragile ecosystem", while the Taiwan Strait of China, whose relatively wide south is about 350 nautical miles, and the relatively narrow north is about 135 nautical miles, is a channel for international navigation. Pursuant to laws and regulations that Mainland China and Taiwan published separately,[42] the territorial sea, contiguous zones and exclusive economic zone of 200 nautical miles were delineated on their own. If the ships carrying the high-level nuclear substances

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40 See in the provisions of the previously discussed international legal documents.

41 See The Sea Shipment Chart "Pu Sea Shipments", at http://www.nci.org, 20 February 2003. Since Japan always kept its route a secret, the map does not list every route. – full url needed for the map.

42 The laws and regulations of Mainland China are: the Declaration on Baseline of the Territorial Sea of the People's Republic of China, the Law of the People's Republic of China on the Territoral Sea and the Contiguous Zone, both of which were published in May 1996, and the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, adopted in June 1998； Taiwan published the first batch of territorial sea baselines on December 31 1998, and the Law on the Territorial Sea and the Contiguous Zone, and the Law on Exclusive Economic Zone and the Continental Shelf in January 1998, etc. See also, FU Kuen-chen, Proposition of China's Marine Rights---Discussion on the Publication of Delimitation of the Territorial Sea Baselines, *Haixia Information*, No. 99 (in Chinese); FU Kuen-chen, Study on the Legal Status of Taiwan Strait, *Taiwan University Law Review*, Vol. 24, No. 2. (in Chinese)

navigated across the South China Sea or the Taiwan Strait and met with accidents, disastrous consequences would be generated for the marine environment, living resources therein would be destroyed, and long-term adverse impacts may be fall the people on the west coast of Taiwan Strait, their communities and livelihood. After the above analysis of UNCLOS and relevant principles of international law, with respect to those shipments, China should exert utmost efforts to argue strongly on just grounds to decline the right of passage to those "Ships of Death". Of course, China Mainland and China Taiwan should maintain close cooperation on this issue as well, to protect the vital interests of China.

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An Analysis of the Evolution of the United States' Position on the United Nations Convention on the Law of the Sea

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Abstract: The United Nations Convention on the Law of the Sea (the "UNCLOS") was under preparation for negotiations in 1967, adopted and signed in 1982, and put into force in 1994. As a marine power, the U.S. repeatedly changes its position on ratifying the UNCLOS. Before 1980s, the U.S. actively participated in formulating the UNCLOS, but it refused to accept the UNCLOS during the 1980s and 1990s, and the Senate and the House of Representatives of the U.S. held three hearings on accession to the UNCLOS in 2003 and 2004. By reviewing the different attitudes of the U.S. toward the ratification of the UNCLOS at various periods, this paper aims to analyze the reasons behind these attitudes, and puts forward the author's own understanding, on the basis of a preliminary analysis of relevant provisions of the UNCLOS in light of several cases including the negotiation on the U.S.-China Spy Plane Incident.

Key Words: UNCLOS; U.S.; Interests; Customary international law

I. Preparation and Negotiation: the U.S. Was Basically Supportive

The United Nations held a drafting assembly of the United Nations Convention on the Law of the Sea (hereinafter referred to as the "UNCLOS") in 1958, in which the U.S. government played a leading role. In the following twenty-four years, the U.S. actively participated in the drafting of all articles of the UNCLOS as the main negotiator. The Department of Defense and the Navy of the U.S. assigned a large number of personnel to participate in the negotiations, and the U.S. for a time con-

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sidered that the UNCLOS to a large extent secured the freedoms of navigation and overflight of the U.S. Navy, and satisfied the interests of the U.S. At the end of the Conference on the Law of the Sea, the outgoing Carter Administration thought that most articles and provisions of the UNCLOS accorded with the interests of the U.S., and was prepared to accept the UNCLOS as a whole, including the international seabed area regime.

The international seabed area regime was established on account of the political situation and forecasts on the prospects of international metals market, and is a product of compromises among all interest groups through long-term bargaining.[1] However, after the international seabed area regime as established by the UNCLOS was basically finalized, some industrialized countries of the West, beginning from the promulgation of the Deep Seabed Hard Mineral Resources Act by the U.S. in 1980, enacted one after another laws on deep sea-bed mining contrary to the seabed area regime established by the UNCLOS. The new U.S. administration overturned the position of the previous one, and demanded at the tenth Session of the Conference on the Law of the Sea held in 1981 for re-examining the draft UNCLOS, especially the issues relating to the international seabed area regime. Until the Third United Nations Conference on the Law of the Sea came to a close, while an agreement was basically reached among all interest groups on other issues, the Conference on the Law of the Sea had to give up the previously agreed Gentlemen's Agreement primarily due to discrepancies in the international sea-bed area regime, that is, a vote may not be taken before reaching an agreement by exerting all efforts. Upon the request of the U.S. delegation, a vote was taken on the adoption of the UNCLOS on April 30, 1982. As a result, the UNCLOS was adopted by an overwhelming majority by 130 affirmative votes versus 4 negative votes and 17 abstention votes. However, the vote by ballot itself signifies the existence of discrepancies among relevant countries and interest groups on international sea-bed area issues.[2]

II. Ratification and Implementation of UNCLOS: the U.S. Refused to Sign

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1 International Sea-bed Issues and the UNCLOS, at http://www.comra.org/gljdt/zl/020705.htm, 15 December 2004. (in Chinese)

2 International Sea-bed Issues and the UNCLOS, at http://www.comra.org/gljdt/zl/020705.htm, 15 December 2004. (in Chinese)

The UNCLOS was open for signing on December 10, 1982, and 159 countries and entities signed the UNCLOS. On July 9, 1982, U.S. president Regan formally announced that, the U.S. refused to sign the UNCLOS. At the same time, he explained the reason why the U.S. refused to sign it: "the part of the UNCLOS on deep seabed mining does not accord with the objective of the U.S."[3]

The U.S. held that, the provisions on "production policy", "mandatory transfer of technology" and the parallel development by the Enterprise of the International Seabed Authority as set out in Part XI and Annex III of the UNCLOS were contrary to the principle of free competition advocated by the U.S. and the economic interests of the U.S., therefore, these provisions were not acceptable. And the U.S. proposed some revisions: firstly, cancel the provisions on mandatory transfer of technology; secondly, delete the provisions relating to production constraints; thirdly, modify the voting procedure of the International Seabed Authority; fourthly, adjust the provisions on the review conference.[4]

In particular, the U.S. held a grudge against Article 144 of Part XI of the UNCLOS on the transfer of technology. Leitner, a member of the U.S. negotiators for the UNCLOS, said that the transfer of technologies not only involved sea-bed mining technologies, but also technologies for military applications. "Technologies as underwater drawing, ocean bathymetry systems, reflection and refraction seismology, magnetic reconnaissance technology, optical image, remote control communication means, diving communication device, assistance and salvage at sea, active or passive military acoustic system, confidential bathymetry, geographical data and seabed robots will greatly enhance the underwater military operation capability of our rivals, such as China."[5]

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3 Arvid Pardo, Malta ambassador to the United Nations, submitted a revolutionary proposal in 1967 to the United Nations General Assembly stating that: mineral resources in the deep sea-bed shall be declared by the United Nations as "common heritage of mankind", and the mining and exploitation of such resources may not be monopolized by a minority of developed countries, but should be managed as a whole by an organ established by the United Nations. This proposal was accepted by the United Nations General Assembly, and after more than ten years of extensive discussions, an institutional framework for managing the mining of deep sea-bed mineral resources was eventually established in Part XI of the UNCLOS.

4 Gao Zhiguo, Causes and Effects of the U.S. Refusal to Ratify the UNCLOS, at http://www.soa.gov.cn/news/200102/10123g.htm, 15 December 2004. (in Chinese)

5 GOP to Sneak Law of Sea Treaty, at http://news.phaseiii.org/article2726.html, 15 October 2004.

In a word, the Reagan Administration could not tolerate Part XI of the UNCLOS, although the U.S. was quite supportive of other parts of the UNCLOS (such as the provision of Article 58 that all States shall enjoy the freedoms of navigation and overflight within the exclusive economic zones of other States). In 1980, the U.S. unilaterally passed the Deep Seabed Hard Mineral Resources Act, which protected the interests of for U.S. miners during the transition to the UNCLOS. The U.S. held that such legislation should have become a formal treaty in collaboration with similar acts of other developed countries, needless to take great pains to establish the UNCLOS. Hence, Reagan announced in March 10, 1983, that, the U.S. would accept the UNCLOS as a "customary international law", except for its Part XI.

It is not consistent with legal theories for a State to unilaterally proclaim parts of an international convention that are needed by this State to be a "customary international law". One should know that, the UNCLOS submitted after more than ten years of arduous negotiations for signing of all States is an organic whole. It may be the provision that all deep sea-bed mineral resources are "common heritage of mankind" that makes many developing countries to agree with such other articles as the freedom of overflight. The unilateral announcement by the U.S. of parts of the UNCLOS as a "customary international law" naturally led to protests from other countries, which may restrict or refuse to confer the rights as set out in the UNCLOS on the U.S.

III. From 1994 up to Now: a Wavering Attitude

In 1994, when the United Nations made a substantial concession in respect of deep sea-bed mineral resources, President Clinton proposed the Senate to ratify U.S. accession to the UNCLOS. Those who were supportive of Clinton's motion were itching to do something, crying out that the U.S. had lost its "moral leadership" in the international community in terms of issues on the law of the sea. However, the Senate still refuses to ratify the UNCLOS up to now. It can clearly be seen how powerful the forces in opposition to the proposition that deep sea-bed mineral resources are "common heritage of mankind".[6]

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6 Cui Zhiyuan, Sino-U.S. Negotiations and the UNCLOS, at http://www.zaobao.com/cgi-bin/asianet/gb2big5/g2b.p1?/special/china/sino_us/pages2/crash210401e.html, 15 December 2004. (in Chinese)

If the Reagan Administration' refusal to ratify the UNCLOS is rooted in the mining of deep sea-bed mineral resources, then the reasons for the U.S. Senate's recent refusal to ratify the UNCLOS have some new voices.

1. Economic Interests

The interested party of the U.S. holds that, under the UNCLOS, 70% of the global oceans will be controlled by the International Seabed Authority, depriving the control of the oceans from the U.S. and its alliance. It asserts that, the International Seabed Authority is a self-financing entity, and it will be bound to levy taxes on the countries engaged in exploiting marine natural resources in order to maintain its operation. This will have an adverse impact on the U.S. who exploits seabed resources by a large margin.

Doug Bandow, former special assistant to Reagan, remarks that, many of the non-seabed provisions contained in the UNCLOS are marginally beneficial, while a number are harmful to the interests of the U.S. For instance, the boundary-setting process strips some resources away from the U.S; provisions of Party XII on Protection of the Marine Environment restrict the U.S. ability to control some emission sources; and the U.S. would eventually share with other countries oil revenues from development of the outer-continental shelf.[7]

2. National Security

Some U.S. national security experts once warned that, if the Senate ratified the UNCLOS, the U.S. Navy would be impaired, such that the strengths of its potential rivals including China would be enhanced, making the U.S. apt to be attacked by submarine cruise missiles, and it would facilitate terrorists.

Leitner once commented the UNCLOS in his book that this was a gravely wrong instrument. President Reagan refused to ratify it, because it contained articles, obligations and restrictions harmful to U.S. national security and economic security and interests. As a matter of fact, the UNCLOS directly harmed the sovereignty of the U.S., and jeopardized the dominant role consistently played by the U.S. in world affairs. And he added: "The US-led multinational program of high seas interdiction and vessel boarding would be barred by the [UNCLOS], yet it is our overriding national security interest to execute. Ratification of the Treaty would effectively gut our ability to intercept the vessels of terrorists or hostile foreign governments even if they were transporting nuclear weapons. We must ensure that

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7 Doug Bandow, The Law of the Sea Treaty: Inconsistent with American Interests, at http://www.cato.org/testi mony/ct-db040408.html, 15 October 2004.

we not binding the government of the United States to a legal regime that makes us more vulnerable and trades the lives of our innocent citizens for the sake of participating in yet another unnecessary Treaty". Leitner further argued that, the UNCLOS reinforced "limitation on measures we might take to assure our national security and homeland defense. If, for instance, foreign vessels operating on the high seas do not fit into one of three categories (i.e., they are engaged in piracy, flying no flag or transmitting radio broadcasts), the [UNCLOS] would prohibit U.S. Navy or Coast Guard vessels from intercepting, searching or seizing them."[8]

According to a report of the U.S. Congressional Research Service (CRS), "the increasing number of claims made by other States over offshore high-seas areas – such as territorial sea, fishing zones, economic zones – were expected to limit freedom of navigation to an unacceptable extent and increase the likelihood of international disputes over access to the world's oceans."[9]

This report points out that, the provision of Article 20 of the UNCLOS that "in the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag" will have great impact on the U.S. For instance, American submarines may become easy to be attacked because they are forced to show their positions on the sea. The UNCLOS will prevent the development of fleets of the U.S., and hinder submarine commandos involved in joint special operations from penetrating into hostile areas. Words contained in the UNCLOS made before the September 11 attacks will prevent the U.S. from carrying out anti-terror campaigns around the globe.

The report of the CRS enumerated three pages of "unresolved issues". For instance, the "conditions for mandatory resolution of disputes" the U.S. Senate has long been unwilling to accept; "relations between all parts of the UNCLOS and current laws of the U.S. remain to be surveyed"; the vagueness of the definition that marine resources are "common heritage of mankind".

Some dissenting voices also criticize that the UNCLOS make China watch for a chance to control the South China Sea area. A report from the Asia and the Pacific - Heritage Foundation titled How Bush Administration Should Handle China and South China Sea Maritime Territorial Dispute argues that: "If Washington continues to allow Beijing's willful misinterpretation of the United Nations Convention on

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8 GOP to Sneak Law of Sea Treaty, at http://news.phaseiii.org/article2726.html, 15 October 2004.

9 GOP to Sneak Law of Sea Treaty, at http://news.phaseiii.org/article2726.html, 15 October 2004.

the Law of the Sea (UNCLOS) to remain unchallenged, the South China Sea will become a de facto Chinese lake, the countries of Southeast Asia will be subject to Beijing's interpretations of international law and sovereignty, and the American Navy will have to ask permission from China to transit this vital international waterway". "To avoid this outcome, the Bush Administration must make it clear to China and other claimants that the United States opposes extreme claims that interfere with or threaten freedom of navigation."[10]

As to the belief that ratifying the UNCLOS will secure U.S. freedom of navigation on the high seas, opponents to the UNCLOS contradicts that, friendly nations or allied nations of the U.S. in Asia and Europe will provide protection for its freedom of navigation. As long as the U.S. maintains friendly relationships with them, the interests of the U.S. will be maintained indirectly through them. If those countries which benefit most from the freedom of navigation of the U.S. are unwilling to provide the U.S. with assistance when the U.S. is not a party to the UNCLOS, then, even if the U.S. becomes a party to the UNCLOS, they will neither take any action favorable to the U.S.

Another concern of Americans is whether the UNCLOS will deprive its Navy or Coast Guard of the right to prevent ships of terrorist organizations or hostile States. The U.S. Government's Proliferation Security Initiative aiming to combat the proliferation of weapons of mass destruction will become illegal under the constraints of the UNCLOS. Although proponents of the UNCLOS say that the UNCLOSE will provide a forum to promote the 'proposal', opponents argue that ratifying the UNCLOS will restrict the ability of the U.S. in intercepting ships that may be legitimate under international laws but really problematic. All policies against the proliferation of weapons take differentiated standards against countries on the basis of subjective estimations. The UNCLOS contains no classification on this, and contains a vague concept on the capture of ships carrying weapons of mass destruction. The adoption of a treaty like this will not enhance the stance of the U.S.

With regard to these dissenting voices, the Foreign Relations Committee of the U.S. Senate held two hearings on accession to the UNCLOS on October 14 and 21, 2003, respectively. Senior senators from the U.S. Senate and representatives

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10 Dana Robert Killion, How the Bush Administration Should Handle China and South China Sea Maritime Territorial Dispute, at http://www.heritage.org/Research/AsiaandthePacific/BG1470.cfm, 15 October 2004.

from such government departments as the Department of State, the Army, oceanic mining, environmental, shipping and fishery industries produced their testimonies, all of which strongly supported and urged the Senate to ratify U.S. accession to the UNCLOS as soon as possible. In February 25, 2004, the Foreign Relations Committee of the U.S. Senate passed the UNCLOS by a full number of 15 votes, and the Bush Administration also expressed its supportive attitude. However, some senators in the U.S. Senate still obstructed the U.S. from ratifying the UNCLOS by relying on the view that the UNCLOS would impair the sovereignty of the U.S. In May12, the Foreign Affairs Committee of the U.S. House of Representatives discussed on the ratification of the UNCLOS, during which the proponents and the opponents stalemated. Legal advisers of the U.S. Department of State and officials from the U.S. Navy testified to support the ratification of the UNCLOS, insisting that ratifying the UNCLOS would promote maritime stability, the motility and national security of the U.S. Whereas the opponents objected to the ratification of the UNCLOS on the basis of damage to sovereignty, unnecessary imposition of constraints on mining resources, potential international taxation and challenge of the national security of the U.S.

IV. Case Analysis: Diplomatic Conflicts between Signatories of the UNCLOS and the U.S.

Since the U.S. has not ratified the UNCLOS up to now, it is untenable from the perspective of legal theories principle for the U.S. to turn to provisions of the UNCLOS when in maritime conflict with other countries. On the contrary, in the event of a maritime conflict with the U.S., a signatory of the UNCLOS should make full use of international laws and the UNCLOS to protect its maritime rights and interests, relying on its membership.

1. The UNCLOS and Negotiations on U.S. – China Spy Plane Incident

After occurrence of the incident, both sides invoked international laws in the hope of winning the support of public opinion, both domestic and international. Since the collision took place in the sky 104 km to the southeast of Hainan Island of China, belonging to the airspace above China's costal exclusive economic zone, Article 58 of the UNCLOS on exclusive economic zones became the legal basis for both sides for a time, despite the fact that the interpretations of two sides were at opposite poles.

The U.S. invoked Article 58(1), which provides that all States enjoy the

freedoms of navigation and overflight in the exclusive economic zones of other States. Whereas China invoked Article 58(3), which provides that in exercising their freedom of overflight above the exclusive economic zones, the States "shall have due regard to the rights and obligations of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with this Convention and other rules of international law in so far as they are not incompatible with this Part." By virtue of this provision, China further pointed out that, in exercising the freedom of overflight above the exclusive economic zone of a costal State, an airplane of a State must respect the sovereignty and territorial integrity of the coastal State, and may not impair the national security and peaceful order of the coastal State, and any ignorance of the afore-said rights of the coastal State is an abuse of the freedom of overflight.[11]

Some international law scholars hold that, both viewpoints mentioned above neglect an important fact, that is, the U.S. is up to now not a contracting State to the UNCLOS. Hence, the freedom of the U.S. of flying over the exclusive economic zone of a coastal State may be restricted by any contracting State (such as China), requiring the U.S. to "have due regard to the rights and obligations of the coastal State".[12]

Brazil enacted a law in 1983 to prohibit other States from carrying out military activities within the exclusive economic zone of Brazil (including a restriction on the freedom of overflight of military airplanes).[13] Although international law scholars hold different viewpoints as to whether the Brazilian legislation complies with the UNCLOS, the explicit point is that, the Brazilian legislation is hardly

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11 Cui Zhiyuan, Sino-U.S. Negotiations and the UNCLOS, at http://www.zaobao.com/cgi-bin/asianet/gb2big5/g2b.pl?/special/china/sino_us/pages2/crash210401e.html, 15 December 2004. (in Chinese)

12 Cui Zhiyuan, Sino-U.S. Negotiations and the UNCLOS, at http://www.zaobao.com/cgi-bin/asianet/gb2big5/g2b.pl?/special/china/sino_us/pages2/crash210401e.html, 15 December 2004. (in Chinese)

13 According to Article 301 of the UNCLOS, in exercising its rights and performing their duties under this Convention, a State party "shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the principles of international law embodied in the Charter of the United Nations." The Brazilian government believes that, this is the international legal basis for prohibiting other States from carrying out military activities within its exclusive economic zone, although Article 58 of the UNCLOS as invoked in the beginning of this text does not expressly provide that the freedoms of navigation and overflight do not include military activities. To this day, Peru and Ecuador also have passed laws prohibiting other States from conducting military activities in their exclusive economic zones.

questionable against a non-contracting State to the UNCLOS such as the U.S. Cui Zhiyuan, a visiting scholar at Stanford Law School, remarks that, if China could surpass the entanglement of the U.S. on the details of the collision, and put the focus on the restrictions on the freedom of overflight of a non-contracting State above the exclusive economic zone of a coastal State, it will take the initiative in the negotiations, and thus promote the U.S. to make substantive concessions, obtain corresponding interests compensation, and win support of public opinion, both domestic and international. We would rather look back at past mistakes to ask who is better at applying the rules of international law to remain invincible, than try to find out who has violated the principles of international law.

2. The U.S. Army Intended to Enter the Malacca

According to coverage of the Liberation Daily, on June 23 this year, military representatives of Indonesia and Malaysia concluded an agreement in Bali Island, agreeing to conduct joint military exercise at the Strait of Malacca in order to jointly deal with pirates and terrorist threats, and to ensure that all foreign fleets passing through the Strait will comply with all appropriate procedures set out in the UNCLOS. This move of Indonesia and Malaysia is a substantive reaction to the Regional Maritime Security Initiative (RMSI)[14] that the U.S. is actively promoting.

In the face of the strong disagreement of Indonesia and Malaysia, Admiral Thomas Fargo explained at a meeting in Canada on May 3, 2004 that, the RMSI will take actions within the scope of existing international and domestic laws. However, Fargo also explicitly said that it was necessary to establish the maritime interception capability to deal with threats. U.S. Defense Secretary Rumsfeld affirmatively expressed during the Asian Security Summit held in Singapore at the beginning of June that, the U.S. should dispatch troops to Southeast Asia to participate in anti-terrorist activities. The present focus of dispatch of troops

14 RMSI was put forward by Admiral Thomas Fargo, the commanding officer of the U.S. Pacific Command, in March 2004 in making the annual statement to the Congress, and the main idea was that the U.S. should dispatch marine corps and special forces to station at the Strait of Malacca, and to patrol the strait in high-speed warships, so as to provide assistance for anti-terrorism campaigns there. However, the RMSI was opposed strongly by Malaysia and Indonesia bordering the Strait of Malacca.

mentioned by Rumsfeld refers to the Strait of Malacca.[15]

According to Article 38 of the UNCLOS, in straits used for international navigation, "all ships and aircraft enjoy the right of transit passage", and transit passage means "the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." Article 34 of the UNCLOS specially provides that, "The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil." The RMSI of the U.S. goes beyond the right of transit passage through straits, which infringes the sovereignty of States bordering the straits, and obviously fails to conform to the UNCLOS.[16]

3. U.S. Unauthorized Entry into China's Exclusive Economic Zone

According to the coverage of the Global Times in September, 2002, China's military airplane and naval ship constantly "encountered" with *Bowditch*, an American vessel conducting prospecting work at the Yellow Sea water, within a closest distance of 60 meters. China's warship sent signals for many times to the U.S. vessel to stop operation and leave the sea area by "bridge to bridge communication". The Ministry of Foreign Affairs of China presented a diplomatic note to the U.S. Department of State, protesting the unauthorized entry of the U.S. marine surveying vessel *Bowditch* into the exclusive economic zone in Yellow Sea under China's jurisdiction to conduct such "activities" as monitoring and reconnaissance.

According to the Washington Times, some U.S. Defense official criticized that

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15 The Strait of Malacca is funnel-shaped and has many small islands in it. It is 800 km long, with a width of only 35 nautical miles in the south that broadens northward, 134.5 nautical miles at its widest point, and an average width of 40 nautical miles at its middle part. Except that States bordering the strait each have a territorial sea of 12 nautical miles and small islands within the strait each have at least 12 nautical miles, the remaining parts are waters of the exclusive economic zone. States bordering the strait enjoy sovereignty over waters of the territorial sea within the strait and enjoy sovereign rights to the waters of the exclusive economic zone within the strait.

16 Ji Guoxing, Expert: the U.S. Army's Presence at the Strait of Malacca Would be in Non-conformity with the UNCLOS, *Liberation Daily*, 17 June 2004. (in Chinese)

China's protest was "quite unreasonable", because *Bowditch*[17] was not equipped with any weapon, and it only operated on the high seas about 100 km away from the coast of the Northern China. "A boat unequipped with any weapon conducting hydrographic survey can hardly be a threat," said this official. He even said that, *Bowditch* had an unspecified mission, that is, to "propagate the U.S. Navy's freedom of navigation on the high seas."

The U.S. Department of Defense held that, *Bowditch* was operating beyond 12 nautical miles from the baseline of the territorial sea. But as a matter of fact, this sea area is still within China's "exclusive economic zone", according to relevant provisions of the UNCLOS. Pursuant to the UNCLOS, all foreign States enjoy the freedoms of navigation, overflight, and laying submarine cables and pipelines within the exclusive economic zone, provided that the exercise of such rights must comply with applicable laws and regulations of the coastal State. Differing from the high seas, the exclusive economic zone is a sea area under the jurisdiction and control of the coastal State which enjoys sovereignty over all natural resources within this area, and enjoys jurisdiction over other respects, so as to impose restrictions on the illegal activities of other States within this area.

The UNCLOS also provides that, in exercising their freedoms of navigation and overflight, foreign ship and aircraft shall have due regard to the right of the coastal State, and comply with the laws of the coastal State and the rules of international law, and may not engage in any activity harmful to the sovereignty, security and national interests of the coastal State, that is, only the commonly referred "innocent passage" is allowed. Article 11 of the Exclusive Economic zone

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17 According to investigation, although the U.S. Army asserts that *Bowditch* is only a marine surveying vessel, it is actually equipped with advanced intelligence reconnaissance systems. Except for the chart surveying and mapping system, and marine hydrological analysis equipment and underwater reconnaissance equipment that may be used for military purposes, *Bowditch* is also equipped with advanced towed sonar system, which can obtain intelligence of activities from such underwater targets as submarines in the surrounding sea area by underwater monitoring. Although we do not have detailed information on the sonar system of this vessel, analyzing from the technical level of sonar system of the U.S. Navy, it is entirely possible for *Bowditch* to obtain intelligence regarding activities of China's naval submarines operating at coastal bases and offshore waters, by operating at a place 52 nautical miles away from China's coast. In addition, according to the disclosure of an U.S. media, a Chinese fishing boat destroyed an underwater sound receiver of the towed sonar equipped on *Bowditch*. It is thus clear that, this vessel is not only carrying out illegal intelligence activities jeopardizing China's national security, but also endangering the fishing activities of Chinese fishing boats within the exclusive economic zone, which severely impair China's security interests and economic interests.

and Continental Shelf Act of the People's Republic of China explicitly provides that, China has the right to monitor, manage and control its exclusive economic zone.

The principle of "freedom of navigation on the high seas" as mentioned in the coverage of the U.S. media is actually a custom in international law, usually with regard to international straits, international waters and important channel tunnels. However, the implementation of the UNCLOS gave rise to some controversies over the definition of the high seas. According to traditional international law, sea areas outside the territorial seas are the high seas, while new maritime law regime delimits contiguous zones and exclusive economic zones outside the territorial seas. The U.S. still uses the traditional territorial sea regime of three nautical miles up to now, holding that U.S. warships or merchant ships may pass through the territorial sea of a foreign State at peace time without prior notice. The U.S. believes that it has the power to "freely navigate and fly over all sea areas outside the twelve nautical miles of territorial sea including international straits," that is, U.S. warships may navigate at will within the contiguous zones and exclusive economic zones of foreign States outside the territorial seas, and its fighters on aircraft carriers may take off and land freely, missiles, cannons and torpedoes may drill conveniently, and it surely may carry out such actions as intelligence reconnaissance, military exercise and deterring on the sea by use of force.

In contrast, most countries around the world abide by the provisions of the UNCLOS, and generally define their territorial seas based on the twelve nautical miles rule, and delineate contiguous zones and exclusive economic zones outside the territorial sea. Many coastal States believe that, a foreign warship or airplane must obtain an authorization of the coastal State in order to "innocently pass" through the territorial sea of that coastal State, and shall show respect to the jurisdiction of the coastal State when navigating within the exclusive economic zones. Obviously, the continued application by the U.S. of its own logic incompatible with international rules will naturally lead to contradictions in this or that way with coastal States complying with international rules.

V. Conclusion

By a comprehensive survey of the evolution of the positions of the U.S. government toward the UNCLOS from 1958 up to now, it can be observed that, the key to the attitude of the U.S. government toward the UNCLOS lies in the

fact whether its provisions satisfy the interests of the U.S. or not. The Carter Administration thought that the UNCLOS accorded with the interests of the U.S. and was prepared to accept the UNCLOS as a whole including the seabed regime; and then the Reagan Administration refused to ratify the UNCLOS relying on the fact that the part on deep seabed mining did not accord with the interests of the U.S., and announced to accept the UNCLOS except for Part XI as a "customary international law"; and after the United Nations made a substantial concession to the U.S. with regard to mining in the deep seabed, the Clinton Administration proposed to the Senate to ratify U.S. accession to the UNCLOS, which remains inconclusive up to now. During the period from October 2003 to May 2004, relevant departments of the Senate and the House of Representatives of the U.S. held three hearings, resulting in higher support of the UNCLOS. However, there are still dissenting voices. Except for such economic and security interests as the concern that control of the oceans may be grasped by the United Nations, the unwillingness to share the revenues from exploiting resources of the high seas with other countries, and the reluctance to lose the hegemony on the sea, some criticize that some provisions of the UNCLOS impose restrictions on the U.S capability of combating terrorism, under the pretext of anti-terrorism operations after the September 11 attacks.

By analyzing such cases as the negotiations on U.S.-China Spy Plane Incident, we can see that it is untenable in jurisprudence for the U.S. to invoke provisions of the UNCLOS to defend itself in the event of any maritime conflict between the U.S. and any other country, since the U.S. has not ratified the UNCLOS to this day. Although the U.S. may be luckily victorious in the near future by sophistically defending its hegemony relying on its powerful military force, when more and more countries start to apply the rules of international law and the UNCLOS to protect their maritime rights and interests, the non-ratification of the UNCLOS will be bound to put the U.S. in a position unfavorable to itself.

The establishment of a maritime order taking the UNCLOS as the legal basis is a global trend. The adjustment of the global strategic layout of the U.S. will definitely lead to interest conflicts with other countries, and challenge the current legal order of the sea. As a result, the attitude and position of the U.S. in respect of the UNCLOS will change along with the changes in its domestic politics and global strategies.

Methodology for Regulating the Management of Sea Areas

LUO Manli *

Abstract: The Law on the Management of Sea Area Use of the People's Republic of China, effective on 1 January 2002, provides a regime for the State ownership of sea areas and a system, though incomplete, for the circulation of the sea use right. The Law, more of principles, is difficult to implement. The question on how to achieve the purpose of the legislators should be resolved as soon as possible in practice. The paper presents the status quo of ascertainment of the sea use right in the primary market and the circulation of the sea use right in the secondary market. It goes on to analyze the problems existing in these markets and provide constructive opinions with respect to the regulation of the management of sea areas. Based on it, it sums up the supporting work that needs to be done in order to help achieve the target, to build up a scientific and reasonable title management system for sea areas and to provide systemic support to the marine economy of China.

Key Words: Sea areas; Immovable property; Review; Circulation

I. Posing of Question to be Answered

The development of society and economy highlights the importance of the utilization efficiency of natural resources to the sustainable growth of economy. In the past 20 years, China has established an effective utilization system for land use rights. The Law on the Management of Lands of the People's Republic of China was enacted in 1986 and revised in 1988, 1998 and 2004 respectively. The Regulation for the Implementation of the Law on the Management of Lands of the People's Republic of China was issued by the State Council in 1999. The Law on

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Land Contracts in Rural Areas of the People's Republic of China was promulgated by the State in 2002. These laws and regulations, together with the Law on the Management of Real Estates in Urban Areas of the People's Republic of China (effective in 1994), the Guarantee Law of the People's Republic of China (effective in 1995), the General Principles of Civil Law of the People's Republic of China (effective in 1986), the Contract Law of the People's Republic of China (effective in 1999), form the legal system with respect to the land utilization and build up the system for the circulation of the land use right, which provide legal protection for the reasonable and effective utilization of the land resources.

However, as China started later than the other countries in the exploitation of marine resources and insufficiently understood the importance of marine resources in the national economic growth, Chinese existing legislations on the utilization of marine resources are less enforceable and contain much backward contents. This is shown in the following aspects:

1. Article 17 of the Law on the Management of Sea Area Use of the People's Republic of China (hereinafter referred to as the "Law on Sea Area Use") provides that the competent marine administrative departments at the county level or above shall review the application for the utilization of sea areas, and the application shall be submitted for approval to the people's government at the county level or above. Article 16 provides that any entity or individual may apply to the competent marine administrative department for the utilization of sea areas. However, as the competent marine administrative department was only established a short time ago, its staff members, few in number, will bear new responsibilities and heavy tasks. In addition, such department is located far away from the sea, leaving it difficult to carry out its duties in a sufficient and independent manner. Sometimes in practice, the sea use right is first approved and given to collective economic organizations in rural areas or townships and later leased by the collectives to entities or individuals that use the sea areas. Such practice strips an actual user, be it an entity or individual, their right to compete fairly, which violates the original legislative purpose of the Law on Sea Area Use.

2. According to the Law on Sea Area Use, all entities or individuals that use sea areas should pay the fee for the sea use and obtain a certificate of right of sea area use, unless exempted from doing so according to the law. As there has been no provision on the confirmation of rights with respect to aquiculture areas under long-term cultivation contracts in the past, fishermen are unwilling to accept such certificate. In some aquiculture areas, such certificate cannot be issued at all.

3. The Law on Sea Area Use, issued and implemented in 2002, prescribes expressly that the sea use right can be obtained through bidding or auction and that the right can be transferred or succeeded according to law. However, it does not provide for the conditions and procedures for the bidding, auction, transfer or succession. In particular, there is no provision on the lease, pledge or other circulations of the sea use right. Certainly, this will affect the freedom of the sea use right owner to dispose of its right when it cannot effectively exploit the sea area covered by the right. It will further reduce the efficiency of the utilization of marine resources, and in a certain sense waste the sea areas – 30% of China's total territorial areas.

Thus, following the fast growing social economy and the need of the market economy, the sea use application should be regulated, the conditions and procedures for the bidding and auction of the sea use right should be explored and improved, and issues left over from the past should be duly dealt with. A standard and orderly secondary market for the sea use right is needed by the economic growth and practice. Currently, it is quite common that the sea use right is transferred, leased or contracted in private. Without supports from laws, the dispute over the sea use right become a usual occurrence. Therefore, in practice, it is urgently needed to perfect the sea use management regime and make the Law on Sea Area Use be more enforceable as soon as possible. The author contends that, for now and a period of time hereafter, in order to perfect the management regime, the most pressing matter is to improve the circulation of the sea use right.

The circulation of the sea use right means how the right circulates among different right holders, including the original right that is obtained through assignment and the acquired right that is obtained through transfer, lease, pledge or succession. The assignment forms the primary market for the circulation of the sea use right. The transfer, lease, pledge or succession forms the secondary market for the circulation of the sea use right. The regulation of the secondary market is preconditioned on the regulation of the primary market. Standard and orderly primary and secondary markets are prerequisites for the development of the marine economy.

II. Regulate the Primary Market for the Circulation of the Sea Use Right

A. Standardize the Conditions and Procedures for the Application and Approval of the Assignment of the Sea Use Right

Article 3 of the Law on Sea Area Use, provides that the sea areas shall be owned by the State. The ownership is exercised by the State Council on behalf of the State. According to the principle that the ownership and the use right should be separated from each other in order to make things well utilized, Article 16 of the Law provides that an entity or individual may obtain the sea use right through application or bidding or auction. Article 17 provides that the competent marine administrative department of the government at the county level or above is the department to review any application for the sea use and that the government at the county level or above is the competent government to approve such application. According to the existing administrative structure, the competent marine administrative department is the main department responsible for the main work involved in the approval of the sea use right. Thus, the competent marine administrative department undertakes the main job in the approval of the sea use right within its jurisdiction.[1] The competent marine administrative department, especially such department at city or county (or county-level city or district) level, was not set up until the mid 1990s. Currently, in some counties (or county-level cities) or districts, such department is just a section under the agricultural department rather than an independent one. Its staff members, though few in number, shoulder new responsibilities. In addition, the administrative organ is located in the urban area and far away from the sea, making it difficult for it to manage the sea areas. The governments of towns and townships and the villagers' autonomous organizations do not give enough support to the management of the sea areas, so that the competent marine administrative department can hardly perform its functions and the regimes specified in the Law on Sea Area Use cannot be

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1 It means that when reviewing any application for the sea use, the competent marine administrative department should examine the relevant records, conduct field survey or try other approaches to review the application. After the examination and review, the department will give its opinions and submit them to the competent government for approval. The government will only examine the application by reviewing the relevant records or the forms, that is, they will only give their opinion to approval or disapprove the application. After the government gives its approval, the competent marine administrative department will issue the certificate on behalf of the government. That's why the author believes that in the examination and approval of applications for sea use, the competent marine administrative department undertakes the main substantive work.

implemented. On the whole, Chinese sea areas have not been managed according to law.

Thus, considering that natural resources are being depleted and environmental pollution seriously reduces resources utilization efficiency, the previous experiences must be summed up and the thoughts must be cleared up, in order to explore new approaches to the management of the sea under relevant laws and regulations and to utilize marine resources in a sustainable way.

1. Status Quo and Countermeasures for the Management of Sea Use Projects Beginning after 1 January 2002

In the past two years, the following approaches have been used to manage the sea areas:

(1) The certificate of right of sea area use is first issued to the collective economic organization in towns or townships, so that the collective economic organization can lease the certificate to the entity or individual that actually uses the sea areas. The person in charge (commonly known as "manager") of the collective economic organization (commonly known as "company") is a member of the government of the town or township. Thus the management of these sea areas is conducted by the government of the towns or townships.

(2) The certificate of right of sea area use is first issued to the rural collective economic organization (also known as "company"), so that the collective economic organization (mainly referring to villagers' committee) can lease the permit to the entity or individual that actually uses the sea areas. Thus the management of these sea areas is conducted by the rural collective economic organization.

These approaches, in one way or the other, mitigate the competent marine administrative department and the related government's difficulty or pressure in conducting marine management. However, both of them have violated the relevant laws and regulations. First, by issuing the certificate of right of sea area use to the collective economic organizations in towns or townships, the competent marine administrative department and the related government originally intended to encourage the government of the town or township to help and support the marine management work. However, as the leader (manager) of the collective economic organization is also a public servant in the government of the town or township, the approach violates Article 58 of the Company Law of the People's Republic of China and Article 13, Paragraph 13 of the Provisional Regulation for Public Servants of the State, which provides that a public servant is forbidden to co-hold any other job at a business entity.

Second, when the public servant from the government of the town or township co-holds another job at a collective economic organization, government administration may not be separate from enterprise management. As the government is both the player and the judge, it deprives other pure private enterprises of the chance to compete fairly. It also creates the soil for the corruption of public servants.

Third, the existing law in the aquiculture area prescribes that the cultivator must have the certificate of right of sea area use and the aquiculture permit. If the competent marine administrative department and the related government grant the certificate of right of sea area use to the collective economic organizations in towns or townships or rural areas, it means that they must also give the aquiculture permit to the same organizations. However, Article 12 of the Fisheries Law of the People's Republic of China provides expressly that the local government at the county level or above shall, when issuing the aquiculture permit, give priority to the local fishery producers. As a collective economic organization is not the actual fishery producers, the approach violates Article 12 of the Fishers Law with respect to the priority given to fishery producers.

Last but not least, after obtaining the certificate of right of sea area use, the collective economic organization of the town, township or rural area will not invest in the relevant sea area, but lease it out directly. This practice leads to the illegal selling of sea areas that are owned by the State. It damages the interests of the State and true fishers. Moreover, as the legal nature of the villagers' committee is still unclear (which can be either a civil subject or an administrative subject), and stronger supervision is still needed over the exercise of the financial power of the rural collective economic organization or the villagers' committee, the rent collected from leasing the certificate of right of sea area use will go to the pocket of a few people.

Article 16 of the Law on Sea Area Use provides that, any entity or individual who begins to use sea areas after 1 January 2002 may file its application to the competent marine administrative department at county level or above and shall be granted the sea use right, if the legal conditions are satisfied. Therefore, if the competent marine administrative department and the related government provide the certificate of right of sea area use to a collective economic organization so that the latter can lease the certificate and manage the related sea areas, it will violate the relevant law and thus is unacceptable.

The author argues that, in light of few staff members and heavy workload,

the competent marine administrative department may, pursuant to Article 24 of the Law on Administrative Licenses of the People's Republic of China, delegate part of its approving power to the government of towns or townships with respect to the sea use applications filed after 1 January 2002, in order to alleviate its difficulty and pressure to manage sea areas.

Article 24 of the Law on Administrative Licenses provides that, an administrative organ may, within its statutory functions, authorize another administrative organ to implement an administrative license pursuant to relevant laws, regulations and rules. The authorizing administrative organ shall be responsible for supervising the implementation of the administrative license by the authorized administrative organ, and shall bear the legal liabilities for the consequences of implementation. The authorized administrative organ shall, within the authorized scope, implement the administrative license in the name of the authorizing administrative organ; it shall not authorize any other organization or individual to implement the administrative license. The article is theoretically based on the agency system. In legal terms, the agency system means that the agent conducts a legal act for and in the name of the principal, and the legal consequence of the act will be taken by the principal. In the agency system, the principal and the agent negotiate and determine the scope and period of the agency, with the power of attorney to be issued by the principal to the agent. The agent has the right to conduct any legal act at its discretion pursuant to the relevant law and the power of attorney, provided that he has done so within the scope of the delegated authority and the period of the agency. The act of the agent will be deemed as the act of the principal, that is, any and all consequences in law for such act will be taken by the principal. On the basis of the mandatory requirement that the principal shall take the legal consequence for the act of the agent, the law grants the principal the right to supervise the act of the agent.

During the period of the agency, if the government of the town or township grants approvals by violating any law or engages in any other violations, the competent marine administrative department may, at any time, terminate the agency and withdraw the delegated authority. Also, other governments at the same level may make a decision that denies the approval given to the application. Upon the expiration of the agency, the agent may decline to continue with the agent work and the principal may terminate the delegated authority. The parties may also renew the agency agreement and continue to carry out the agency matters. As the competent marine administrative department has few staff members and heavy workloads

and is far away from the sea, the existing system is advantageous in that the competent marine administrative department delegates the approving authority for some sea areas to the government of the town or township. It makes full use of the experience accumulated by the local government in managing aquiculture in history and encourages the local government to cooperate with the competent marine administrative department to reduce the latter's difficulty and pressure. In this way, the competent marine administrative department can concentrate on approving project-related sea use in a larger area, which is more difficult to manage, and on the administrative enforcement of the law for sea areas and oceans. The powerful administrative enforcement of maritime laws will improve the effectiveness and efficiency of sea area management, so that sea areas can be managed in accordance with the law and the use of sea areas will be regulated. Specifically:

(1) The competent marine administrative department delegates its authority to the government of the town or township by concluding with the latter a written agency agreement to specify the rights and obligations of the parties. The agreement must clearly provide for the scope of the matters entrusted to the agent, the period of the agency and the rights and obligations of the parties. The scope of the matters entrusted to the agent, as we would like to suggest, should be determined on the size of the sea area (such as, below …. *mu*), the intended use of the sea area (such as, used for aquiculture), the difficulty to manage the sea area. For a small sea area used for aquiculture that is easy to manage, the approving authority can be delegated to the government of the town or township concerned. For a large sea area used for aquiculture that is difficult to manage (as stated in Sections II and III herein) and all those used for construction projects, the competent marine administrative department shall reserve the approving authority. Regarding the rights and obligations of the parties, it is suggested that the agency agreement should specify: a. the competent marine administrative department as the principal and the government of the town or township as the agent; b. the right of the competent marine administrative department to supervise the related personnel of the government of the town or township; c. the obligation of the government of the town or township to develop a working system to supervise and manage the review personnel, so that the responsible person can be brought to account; d. the delegated power may be withdrawn prematurely; and e. the period of the agency and how to deal with it upon the expiration of the period. (2) The government of the town or township, after it signs and approved the sea use application, submits the materials directly to any other government that has the power to approve. (3)

If such other government gives its approval, the competent marine administrative department at the same level will make a certificate of right of sea area use so that the government of the town or township can issue such certificate to the applicant who has paid the fee for sea use. If such other government does not approve, the government of the town or township will return the related materials to the applicant. (4) The competent marine administrative department puts the approval-related data into files for later inspection pursuant to relevant laws.

In the case of any new application for the sea use within the scope of the delegated authority of the government of the town or township, such government shall (1) review the application strictly in accordance with the conditions and procedures under relevant laws and regulations; (2) reasonably arrange applicants' receiving order of certificates of right of sea area use . The Law on Sea Area Use provides that any entity or individual may obtain the sea use right pursuant to law. The Fisheries Law provides that when issuing the aquiculture permit, the local fishery producer should be given priority. As for the same sea area, the aquiculture permit and the certificate of right of sea area use shall have the same boundary, the government of the town or township shall consider the following order of priorities when it grants to the fishery producers the aquiculture area that is close to its administrative area pursuant to the marine functional zoning. (1) a. full-time fishermen of the town or township; b. part-time fishermen of the town or township; and c. economic organizations engaged in the fishery production in the town or township; (2) If there are any aquiculture areas left after the above condition has been met, then the order of priorities should be: (1) full-time fishermen living in the county (or county-level city) or district where the town or township is located; b. part-time fishermen living in the county (or county-level city) or district where the town or township is located; c. economic organizations engaging in the fishery production in the county (or county-level city) or district where the town or township is located; non-fishers living in the county (or county-level city) or district where the town or township is located; and e. other economic organizations in the county (or county-level city) or district where the town or township is located.

To encourage the government of the town or township to manage the sea areas, the local governments that have actually reviewed the applications for sea use should, depending upon the payment of the sea use charges of the previous year, give a certain percentage of its annual budget to the construction of the town or township.

When the government of the town or township exercises its approving

authority according to the above systemic design, the approval document will be attached with the seal of the competent marine administrative department that has delegated its authority to the government of the town or township. Thus, any legal consequence, including any adverse consequence, arising from the approving act of the government of the town or township will be undertaken by the competent marine administrative department.

In light of the current situation, it is both practical and legal for the competent marine administrative department to delegate some of its approval-related matters to the related government of the town or township. When the agency period expires and the competent marine administrative department becomes fully staffed, the delegated approval authority can be withdrawn by the competent marine administrative department.

As the power to review or approve the sea use is an administrative management power that the law grants to administrative organs, the administrative management power, pursuant to the general principle of the administrative law, can only be exercised by administrative organs. That is to say, except the organizations that have been authorized by the law or administrative regulation to manage public affairs, no other organizations or individuals can have the administrative management power. Moreover, an administrative management organ cannot delegate its administrative management power to any other organization or individual without authorization. According to the Constitution of China, neither a villagers' autonomous organization nor a collective economic organization is an administrative organ. Thus, the competent marine administrative department should not delegate its approving authority to a villagers' autonomous organization or a collective economic organization.

The above measures ensure that entities and individuals will be entitled to obtain the sea use right on an equal basis, preventing any speculation on the sea areas.

2. Status Quo of the Management of Sea Use that Begins Prior to 1 January 2002 and Continues thereafter and Has Been Issued a Certificate of Right of Sea Area Use by the Relevant Department, and the Relevant Suggestions

In 1980s, some coastal towns or townships issued deeds (or contracts) for the use of the sea (mostly of mudflat) to the local fishermen or economic organizations engaged in fisheries. Such deeds provided that the sea use right was permanent, for the sea areas were used free of charge then. The Law on Sea Area Use, effective on 1 January 2002, provides for the paid use of sea areas, meaning that fees must

be paid for using sea areas for aquiculture unless otherwise exempted with due approval. To properly implement the Law on Sea Area Use, we should first know how to ascertain the rights and issue certificates to the fishermen or economic organizations engaged in fisheries that have concluded deeds on mudflat, and how to deal with the payment of the sea use fees. In practice, the certificates of right of sea area use are rejected and the sea use fees are not paid by the relevant individuals or entities. Fishermen continue to use the sea area free without obtaining a certificate of right of sea area use. Economic organizations engaged in fisheries continue to lease or contract sea areas to make a profit without paying for the sea use.

The author contends that the legality of administrative acts is one of the fundamental requirements of the administrative law. Such legality involves "the legality of the subject, the legality of the power, the legality of the content and the legality of the procedure."[2] The "legality of power" means that the administrative organ can only have power that is expressly provided for by the law. Without the legal empowerment, the administrative organ cannot have the power.[3] In 1980s, there were no express provisions on the title to sea areas and the exercise of such title through an agent. The government of the town or township did not have the legal basis, but acted in violation of the law to enter into contracts with fishermen or economic organizations engaged in fisheries for the use of the mudflat. Article 52, Paragraph 5 of the Contract Law of the People's Republic of China provides that any contract that violates the mandatory provision of any law or administrative regulation shall be null and void. Thus, the above contracts were void, which mean that they were not binding from the very beginning.

Regarding how to deal with the void contracts, the author holds that, the government of the town or township, as an administrative organ of the State, should have known its scope of functions, but acted contravening to the law due to its own fault. Therefore, the government of the town or township had fault in doing so. On the other side, fishermen or economic organizations engaged in fisheries, which were subject to administrative management, did not have the necessary legal knowledge. In particular, in light of the level of the social and economic development, it was impossible for them to know whether an administrative organ

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2 Fang Shirong, *Administrative Law and Administrative Procedural Law*, Beijing: China University of Political Science and Law Press, 1999, pp. 121~123. (in Chinese)

3 Fang Shirong, *Administrative Law and Administrative Procedural Law*, Beijing: China University of Political Science and Law Press, 1999, pp. 121~123. (in Chinese)

had or had not such an administrative management power. They entered into a long-term contract with the government for the sea use right based on their trust in the government – one of the basic conditions of any country. Thus, fishermen or economic organizations engaged in fisheries had no fault in their act. Article 58 of the Contract Law provides that "after a contract is invalidated or canceled, the parties shall make restitution of any property acquired thereunder; where restitution in kind is not possible or necessary, allowance shall be made in money based on the value of the property. The party at fault shall indemnify the other party for its loss sustained as a result." Pursuant to this provision, after the contract is invalidated, the government of the town or township should have the right to request fishermen to repay the proceeds from the aquiculture over the past 20 years, and the obligation to indemnify the fishermen for their losses as a result of its fault. The repayment of the proceeds by the fishermen should constitute the circumstance under Article 58 of the Contract Law, where restitution in kind is not possible or necessary, allowance shall be made in money based on the value of the property.

Therefore, the author proposes the following solution. First, it is the fishermen other than the economic organization engaged in fisheries that will enjoy the preferential treatment or be indemnified.

Second, the assessment should be done separately on the aquiculture proceeds over the past 20 years and the loss sustained by the fishermen after the contract was invalidated. The aquiculture proceeds should be the annual average production of the sea area (mudflat) per unit in the county multiplied by the period of the aquiculture. For the loss sustained, consideration should be given to the fishermen's reliance upon the sea area (mudflat), which means that they had no other living skills, so that the sea area (mudflat) became one of their fundamental means of production and the aquiculture was their basic way to make a living. Thus, the loss that should be indemnified should be the amount of the fund that the fishermen may need to acquire new living skills.

Third, if the assessed proceeds minus the assessed loss remain a positive number, then the State will give up its right to ask the fishermen to submit their proceeds. In that case, if the fishermen want to continue to use the sea area (mudflat) for aquiculture, they must pay the sea use charge and obtain the certificate of right of sea area use. If the assessed proceeds minus the assessed loss are a negative number, there will be two solutions. One solution is that when the fishermen want to continue to use the sea area (mudflat) for aquiculture, they may receive the certificate of right of sea area use but be exempted from paying the sea use charge

for a certain number of years. After the exemption period expires, the fishermen must pay the sea use charge and obtain the certificate of right of sea area use if they want to continue to use the sea area. The other solution is that for fishermen who stop their aquiculture and turn to other jobs, the standard indemnification should be the amount of investment for them to acquire new living skills. Such investment can be made in form of provision of free technical training programs for the fishermen by the government. The government at the level of county or above, which has the authority to approve sea areas (mudflats) use after 2002, should indemnify the fishermen pursuant to its approving authority. It should formulate a specific indemnification program on the basis of the actual situation. Although it was at fault, its administrative act without due authorization was the direct result of the State's negligence in the management of sea areas and the unclear title of sea areas. In other words, the act was not entirely caused by the fault of the government of the town or townships. In this connection, after the fishermen have been indemnified, the employees of the government of the town or townships should not be investigated of their legal responsibility. After the indemnification fund has been allocated, the paid use of the sea area must be implemented. The aquiculture farmers who want to continue to use the seas must, pursuant to the Law on Sea Area Use, apply and pay for the certificate of right of sea area use within the timeframe specified by the competent marine administrative department. For the economic organizations engaged in fisheries, they cannot be indemnified, as they profited by using the State owned sea areas (mudflats) for free over the years. If they intend to continue to use the sea areas after 2002, they must pay the sea use charge and obtain the certificate of right of sea area use pursuant to the Law on Sea Area Use. The economic development has been proved that it is totally wrong to believe that China is a big country with abundant and inexhaustible natural resources. To protect the natural resources and their sustainability, previous free use of such resources must be changed.

3. Status Quo of the Management of the Sea Areas Used by Fishermen Who Make a Living by Fishing but Failed to Conclude Sea Use Contracts, and the Relevant Solution

Fishermen in the coastal areas have depended on the sea for a living as a result of their low productivity level and geographic location in history. The relationship between the sea and the fishermen is just like that between the land and the farmers. The fishermen believe that they are deprived of their basic means of living by the State, if they have to pay the sea use charge and obtain the certificate of right of sea

area use. This leads to the difficulty with the ascertaining of their sea use right and the issuance of the certificate of right of sea area use. By far, the issuance rate has been extremely low for this kind of sea use in China. To fully carry out the Law on Sea Area Use and request all the entities and individuals who use the sea to obtain the certificate of right of sea area use, the author holds that this kind of sea use should be handled differently under two circumstances. If the entity or individual continues to use the sea, he must pay the sea use charge and obtain the certificate of right of sea area use pursuant to the relevant provisions. The reason is that social and economic development requires the shift from the free use to the paid use of natural resources. The inefficient use of natural resources must be limited or restricted by economic means, in order to fully tap into the economic value of the natural resources and to make their use sustainable. Fishermen who turn to any other industrial sectors should be indemnified pursuant to the State policy for fishermen changing to other industries. The indemnification may be made through monetary sponsorship, aiming to help the fishermen to obtain new living skills. For the indemnification, one of the preconditions is that only traditional full-time fishermen can be indemnified. The so-called "traditional full-time fishermen" mean the fishermen who do not have any land, but have to rely on the sea as the only or main source of living over the years. Except fishing, they do not have any other productive skills. As it is much more difficult for them to turn to other industries, they should get the help or support from the government.

4. Status Quo of Sea Areas for Aquiculture Operated and Managed by the Rural Collective Economic Organizations or the Villagers' Committee without a Certificate of Right of Sea Area Use before 2002 and the Relevant Solutions

With regards to the sea use described above, the ascertainment of the sea use right and the issuing of the certificate of right of sea area use should be done pursuant to Article 22 of the Law on Sea Area Use. Pursuant to the marine functional zoning program, subject to the approval by the local government at the county level, the sea use right can be given to the rural collective economic organizations or the villagers' committee, which then subcontract the sea use right to their members for aquiculture production. However, the rural collective economic organization or the villagers' committee should obtain the certificate of right of sea area use and pay the sea use charge according to law.

Any other entities or individuals intend to file an application for sea use after 1 January 2002, should pay the sea use charge and obtain the certificate of right of sea area use pursuant to the Law on Sea Area Use and the above approach.

The standard charge for the use of sea areas for fishing (or fishery operations) should be less than that for construction. The standard charge for the use of sea areas for fishery operations (where the operator gains an income by leasing or transferring the sea areas) should be higher than that for direct fishing (where the fishermen, either individually or jointly with their family members, use the sea area).

B. Explore and Improve the Bidding and Auction Procedures for the Transfer of Sea Use Right

Although Article 20 of the Law on Sea Area Use provides that the sea use right can be obtained through bidding or auction, China started late in the development of marine resources due to insufficient understanding of the role of the marine resources in the economic development. Also the seas and oceans have special natural qualities and geographical characteristics, which decide that the development of marine resources will require huge investments and a longer period of time to get profits from investments. Under the Law on Bidding and Tendering of the People's Republic of China, the bidding or auction may be used only for construction projects. Under the Law on Auction of the People's Republic of China, auction refers to the auction conducted by an auction enterprise. Thus, obviously, it would be improper to apply these laws directly to the bidding or auction of the sea use right. As a result, different places have had different approaches and procedures for the bidding or auction of the sea use right. Now, as people's focus is shifting from the land to the sea, the marine resources increasingly become a hotspot of investment. To make it open, fair and just and maximize the use of the marine resources, it is pressing at the moment to explore and perfect the procedures for the bidding and auction of the sea use right.

1. Conditions for the Bidding and Auction of the Sea Use Right

(1) The sea area concerned must be the type of sea area which is suitable for development and utilization under the marine functional zoning plan. According to the marine functional zoning plan chart of the State, Zhejiang Province and Ningbo City, the marine functional zones can be classified into the sea area suitable for development and utilization, the sea area needing control and protection, the sea area needing protection, the reserved sea area and the sea area with special function. Among them, only the sea area suitable for development and utilization is allowed to be developed and utilized. The other four types can only be used

for control and protection purposes and their sea use right cannot be transferred through bidding or auction.

(2) The sea area offered for bidding or auction must be a sea area for constructional use or any other operational sea area, excluding the sea areas needed for the aquiculture by fishermen individually. For the operational sea area, the user mostly gains an economic interest by operating and managing the sea area. If all the other conditions are the same, the operator will receive a higher profit from a higher level of operation. In this way, the resources will be utilized more effectively and the State will benefit more from it. For sea area used for construction, the investor mostly invests to maximize his profit. The investor's objective is to invest as little as possible and gain as much as possible.[4] For the State, more investments will benefit the country more. If a sea area is offered for bidding or auction, the highest bidder will have the sea use right. Consequently, in order to increase the utilization efficiency of the State-owned resources and maximize the profit for the operator, the investor and the State, the sea area used for construction or operation should have its sea use right transferred through bidding or auction. But, things are different with sea areas used for aquiculture by fishermen or their family members. As the coastal fishermen depend on the sea for a living, the sea area (mudflat) constitutes one of their fundamental means of living. As compared with an aquiculture enterprise, fishermen or their families are very weak financially and technologically, and their source of income will be cut off if all the sea areas used for aquiculture are offered to the highest bidder through bidding or auction. Thus, for the sea area used for aquiculture, an application must be first filed and approved to obtain the sea use right. That is to say, when the aquiculture need of the coastal fishermen is satisfied, any remaining sea area can have its sea use right transferred through bidding or auction. Only fishermen or their family members, rather than aquiculture companies (including economic organizations of different natures) can apply for and obtain the sea use right.

(3) There must be two or more entities or individuals who intend to have the sea use right. As the highest bidder will be the winner in bidding or auction, the bidding or auction cannot exist or proceed if there is only one bidder. In this case, the sea use right can only be transferred by means of application.

(4) The successful bidder must utilize the sea area pursuant to the marine functional zoning plan and the provisions as specified in the documents of the

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4 The "investment" herein also includes the sea use charge.

bidding or auction, but should not change its intended purpose without due authorization.

2. Procedure for the Bidding and Auction of the Sea Use Right

(1) The competent marine administrative department identifies the location of the sea area whose the sea use right is offered for bidding or auction, including all sea areas that may be developed and utilized. For the sea area used for aquiculture, the department must investigate the size of the area and the number of the coastal fishermen and their aquiculture need. It must make sure the availability of sea areas used for aquiculture, which sea areas are or are not suitable for the bidding or auction, and what sea areas will have their sea use right offered for bidding or auction.

(2) The competent marine administrative department decides the lowest price for the bidding or auction, which should not be less than the lowest price that has been approved for the type of the sea area concerned.

(3) The competent marine administrative department prepares the bidding or auction document, to specify the qualifications of bidders, be it entities or individuals.

(4) The competent marine administrative department makes the bidding or auction announcement and publishes the same on at least two media.

(5) Bidders obtain the bidding or auction documents and related materials.

(6) Bidders pay a security to the competent marine administrative department and cast their sealed bids to the tender box.

(7) The evaluation group of the competent marine administrative department selects the successful bidder in the case of bidding or the highest bidder in the case of auction.

(8) The competent marine administrative department notifies the successful bidder in writing, and informs unsuccessful bidders to withdraw their security.

(9) The successful bidder signs with the competent marine administrative department a contract on the transfer of the sea use right, and pays the sea use charge and obtains the certificate of right of sea area use pursuant to relevant provisions.

Through bidding or auction, the sea use right is transferred to the highest bidder in an open, fair and just manner to maximize the economic value of the marine resources.

Ascertaining the right and issuing the certificate in the way above will help to manage the primary market for the sea use right regularly and orderly, so as to lay

a firm basis for the operation and management of the secondary market for the sea use right.

III. Establish a Standard and Orderly Secondary Market for the Circulation of the Sea Use Right

A. The Publicity Rule for the Circulation of the Sea Use Right

Article 2 of the Law on Sea Area Use provides that "the sea area hereunder shall mean the water surface, water body, seabed and subsoil of the internal waters and territorial sea of the People's Republic of China. The internal waters herein shall mean the sea area from the landward side of the baseline of the territorial sea to the coastline of the People's Republic of China". The above provision shows that the "sea area" under the Law on the Sea Area Use refers to the area between the coastline and the outer margin of the territorial sea (specifically the internal waters and the 12 nautical miles territorial sea), including any mudflat or water area in the region.

According to the traditional classification of movable and immovable property in the civil law, the "movables" are things that can be moved in space without damaging its economic value and the "immovables" are things that are fixed in space and cannot be moved without damaging their economic value because of their nature.[5] In this connection, sea areas and mudflats should be immovables. However, due to the limitation of the productive forces and the special nature of the sea area as different from the land, the boundaries of the land, once confirmed, will remain fixed, but those of the sea area will not because the water flows within the boundaries. Traditionally the civil law only regards the land and buildings as immovables and does not expressly include sea areas as immovables. With the economic development and the improvement of productive forces, the available resources are increasingly in short supply. Thus, the sea areas, as an important part of the national territory, must be treated as immovables, so that the utilization of sea areas and mudflats will be governed by the legal regime applicable to immovable property. As the sea area belongs to immovable property, the sea use right constitutes a right *in rem*. According to the fundamental theory of civil law, to

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5 Li Kaiguo, Zhang Yumin et al, *A Textbook on the Civil Law of China*, Beijing: Law Press China, 1997, p. 261. (in Chinese)

maximize the use of things, the owner of the right *in rem* may, at his discretion or will, transfer or lease the right *in rem* to other people so that he can gain an income from the transfer or lease in a lump sum or installments. He may also use the right *in rem* as a security for financial purposes. The right *in rem* can be succeeded when the cause of succession occurs. In view of the above, the sea use right can be transferred, leased, pledge and succeeded. Although Article 27 of the Law on Sea Area Use provides that the sea use right can be transferred or succeeded according to law, it does not prescribe the conditions and procedure for the transfer or succession, but delegate the power to the State Council. Up to now, the State Council has made no provisions in this respect. Hence, it can be said that no legal formalities exist for the transfer, lease or pledge of the sea use right in practice. In this case, disputes over the sea use right will continue to occur.

A publicity rule exists in the civil law theory, aiming to prevent a debtor from selling his properties to two or more buyers or re-pledging his properties, which will damage the interests of the creditor in the circulation of the right *in rem*. The publicity of the right *in rem* is an announcement of the ownership or change of the right *in rem* to the social public.[6] It helps to solve the problem in connection with the *prima facie* ownership of the right *in rem*. For the circulation of the right *in rem*, the publicity of the right *in rem* is both a legal indicator of the realization of the creditor's right and a legal prerequisite for the next change to the right *in rem*. Essentially the publicity rule is about the method and effect of publicizing the right *in rem*. The publicizing method can be different between movables and immovables. For the right *in rem* of immovables, registration is used as the way of publicity to indicate the ownership or change of the right *in rem*. For the right *in rem* of movables, possession is used as the way of publicity to indicate the ownership of the right *in rem*, and delivery is used as the condition for the change of the right *in rem*.

Two instances of legislation exist in the world regarding the effect of the registration of the right *in rem* of immovables. First, no change to the right *in rem* will be effective unless registered. After they have agreed to the change to the right *in rem*, the parties must register the change with the competent department before the change becomes effective; otherwise it will be deemed that no change has happened at all. Second, except registered, no change to the right *in rem* can be

6 Li Kaiguo, Zhang Yumin et al, *A Textbook on the Civil Law of China*, Beijing: Law Press China, 1997, p. 272. (in Chinese)

effective against a *bona fide* third party. If the parties have agreed to the change to the right *in rem*, but have not registered the change with the competent department, then the change will be effective only between the parties, but not against any ignorant third party. A third party may deny the effectiveness of the change on the ground that the change has not been publicized. Whether the non-registration will cause the change to the right *in rem* to be ineffective or unable to be used against a *bona fide* third party is dependent upon a country's legal tradition, the strict or loose management of the right *in rem* by the State, and the nature of the immovable property. The legislation tends to make an unregistered change to the right *in rem* of immovables to be ineffective, if (a) the immovables are essential to the economic life of people; (b) disputes may easily arise from the non-registration of the immovable property; (c) the dispute, if any, will have much influence on the lives of the parties; (d) the non-registration of the immovable property will bring difficulties for the competent department and often damage to the resources of the State.

In addition to the land, the sea is another important natural resource that can be used for purposes similar to those for the land (for the fishermen, the sea constitutes one of the basic sources of income, just like the land; it is also like a construction site for construction investors). The unique geographical location and natural properties of the sea determine that the investment will be huge and the period of return will be long for the development and utilization of the sea. Any dispute over the sea use right, if any, will certainly heavily impact the production and life of the parties to the dispute. Also due to its special qualities, the sea can only be used on the basis of the marine functional zones and with scientific proof. The user can only utilize the sea according to the approved purpose, but cannot change its intended use without due authorization.

In the author's view, in order to alleviate the disputes over the sea use right, reduce the loss sustained by the parties to the dispute, and ensure that the user utilizes the sea pursuant to the approved purpose, the circulation of the sea use right should be done through registration. That is to say, after the parties have agreed to the circulation of the right, they must register the circulation with the competent department; otherwise the circulation will not be effective. If the parties have the sea use right circulated between them without due authorization, any financial penalty under the administrative law should be assumed by the parties through consultation or if consultation fails, shared equally between the parties. In the case of a behavioral penalty, it should be borne by the at-fault party. When both

parties have fault in their actions, they should be both penalized. The consequential liability in the civil law should be assumed by the at-fault party pursuant to the fault principle. In the case of equal or mutual fault, each party should be liable for its own fault.

B. Conditions and Procedure for the Circulation of the Sea Use Right

1. The sea user who has obtained the sea use right through assignment must invest a certain amount of money into the sea area or put the sea area into use for a certain period, before he may transfer or lease the sea area.

To prevent a couple of people from taking their financial advantage and depriving others of their chance to compete fairly or using the State-owned sea area as a source of illegal income, it should be prohibited that users may not circulate their sea areas before making any investment. The author suggests that the provisions on the investment amount in the Law on the Management of the Land of the People's Republic of China should be used as a reference. The user who has obtained the sea use right to a sea area used for construction or other operational sea areas must invest a certain percentage (such as, 25%) of the total amount of the project, before he may transfer the sea use right together with the project. This author also proposes that a user of the sea area used for aquiculture could not transfer or lease the sea area until he has used the sea area for one third of the specified term. He should be prohibited from transferring or leasing the sea area without development or utilization. Also he should be prohibited from transferring the related project or the sea use right separately, as the separation of the project from the sea use right will make the owner of the sea use right or the owner of the project subject to unfair control.

2. The approved purpose should not be changed because of the transfer or lease. If the sea area is transferred or leased by changing the intended purpose of the sea area without due authorization, such transfer or lease should be void. The competent marine administrative department should not recognize the related contract, but should impose penalties on the parties pursuant to Article 46 of the Law on Sea Area Use. Each of the parties should take its civil liability according to its fault.

3. The period of the transfer or lease should be the remaining period of the sea use right.

4. If the sea use charge is paid in installments, the parties must negotiate to

agree on a method to pay the sea use charge for the remaining period and register the same with the competent marine administrative department. If there is no negotiation or the negotiation fails, the competent marine administrative department should not register it. The sea use charge for the remaining period should be paid by the original owner of the sea use right. Any dispute between the original owner and the transferee or lessee should be dealt with pursuant to the relevant provisions of the civil law.

5. If the sea use right is pledged, the amount pledged should not be higher than the amount of the total obligation. The sea area under a pledge should not be re-pledged against the already pledged amount. Certainly, it concerns with the evaluation of the sea use right. Thus, the rules should be gradually improved for the management of the qualifications of evaluation organizations.

6. The parties enter into a written contract and register the same with the competent marine administrative department.

7. The contract on the transfer, lease or pledge of the sea use right should not be effective unless registered. As the void contract is ineffective from the very beginning, the interests of the parties are not protected by law from the very beginning. In addition, the parties should bear their liabilities under the administrative law, such as, to stop the violation of the law, to have their illegal gains confiscated, and to be imposed a financial penalty.

8. When a cause of succession occurs, any successor should have the right to succeed the right in the remaining period of the sea use right. The successor should provide documents proving the existence of the cause of succession and his qualification as a successor and register the change to the sea use right with the competent marine administrative department. He must utilize the sea area concerned according to the original purpose and pay the sea use charge for the remaining period.

9. When a pledge on the sea use right is realized, the pledger must transfer his sea use right, and the pledgee must use the sea area so transferred, according to the original purpose of the sea area which should not be changed without due authorization.

C. Materials to be Submitted for the Transfer, Lease, Pledge or Succession of the Sea Use Right

1. Materials to be submitted for the transfer, lease, pledge or succession of

the sea use right:

(1) photocopies of the business licenses (in the case of entities) or personal ID cards of the parties;

(2) photocopies of the certificates for the sea use right;

(3) the original of the contract on the transfer, lease or pledge (which should specify, including without limitation, the remaining period of the sea use right, the purpose of the sea area, the size of the sea area, the fee and payment terms for the transfer or lease; in the case that the sea use charge is paid in installments, the contract should specify the payment terms for the sea use charge in the remaining period. In the case of a contract on pledge, the materials on the evaluation of the sea use right, the amount of any obligation secured by the pledge on the sea use right, and the liability for the breach of contract should also be provided).

2. Materials to be submitted when a fact requires the succession of the sea use right occurs:

(1) the original personal ID card of the successor and its photocopies;

(2) the death certificate of the deceased;

(3) the certificate on the qualification of the successor;

(4) photocopies of the certificate for the sea use right;

(5) In the case of succession with a will, the written will should be submitted; in the case of an oral will, two witnesses that are not interested should be provided.

IV. Supporting Work to Be Done Now

A. Formulate Local Regulations Supporting the Law on Sea Area Use to Make the Law More Enforceable

In the previous years, the State failed to pay due regard to management of marine resources, so that large precious State-owned sea areas were used by some people free of charges to gain illegal incomes. To change the situation, we once placed our hope on the implementation of the Law on Sea Area Use. However, as the Law on Sea Area Use consists mostly of principles, due to the poor awareness of the short supply of resources in history, the implementation of the Law on Sea Area Use has met with many obstacles. The resources are increasingly in short supply and hence sustainable development has been widely recognized. Under this context, the State should either revise the Law on Sea Area Use or reenact the Detailed Rules for the Implementation of the Law on Sea Area Use, so that the

Law on Sea Area Use can be more enforceable. In the case that the Law on Sea Area Use has not been revised and the Detailed Rules for the Implementation of the Law on Sea Area Use has not been released, it becomes necessary to formulate local rules for the sea area management to support the Law on Sea Area Use. The local rules so formulated can be used to give detailed provisions on the application and review system, the bidding and auction system, the paid use system, and the transfer, lease, pledge and succession of the sea use right, as specified in the Law on Sea Area Use. These provisions will constitute the legal basis for establishing the standard primary and secondary markets of sea use rights, making the sea area resource a pillar for the sound development of the marine economy.

B. Accelerate the Survey of Boundaries between Cities or Counties

Under the Law on Sea Area Use, the application and review of the use of sea areas, and the bidding and auction of the sea use right are carried out by counties. However, the fluidity of the water determines that there is no natural administrative boundary between sea areas. No survey has been conducted on the administrative boundaries between sea areas in history. As a result, disputes keep on emerging between neighboring administrative zones on the sea use right. In the last year, the boundary survey of sea areas began in China in different counties. Due to historical issues, numerous disputes and the difficulty to provide evidence, delineation of boundaries becomes quite demanding.

The author contends that the sea boundary survey can be proceeded from the following aspects. First, the competent marine administrative departments in the city, county (or county-level city) and district, the related working departments and the survey personnel, especially their leaders, should be trained and informed of the relevant administrative law, so as to improve their awareness of administration by law and the consistency between rights and obligations. According to the theories on the exercise of the administrative power, administrative organs shall have the power and the duty to carry out their work. They should be held liable in law for nonperformance or inappropriate performance of their work. In this way, they are encouraged to change their previous assumptions that power determines one's social status and to harbor the idea that more power means more responsibility, so that they should take the responsibility while exercising their power.

Second, the sea boundary should be delineated on the basis of historical evidence and data, seeking for the truth and taking the current situation into

account, so that disputes can be reduced. In the case that a dispute does exist, but either or both parties do not have sufficient evidence to substantiate their arguments, both parties are suggested to settle their dispute over the boundary through consultation on equal basis, in the spirit of mutual understanding and concession.

Third, the boundary survey work which is less demanding should be carried out first. The boundary should be delineated first for sea areas with clear historical facts, sufficient evidence and fewer disputes over their ownership, and later for sea areas with great disputes. The survey leading group should strengthen its coordination when the survey involves intricate historical situations, many disputes and insufficient evidence from all the parties. If necessary, it may give its opinion on the boundary survey to the competent government for approval.

C. Conduct Sea Cadastral Survey, Complete the Fundamental Work in the Management of Sea Use, and Establish a Fundamental Database for Sea Use, so as to Provide a Basis for Marine Administration and Law Enforcement

The sea cadastral survey means to investigate the location, boundaries, title, size, purpose, and other basic information on the use of a parcel of the sea area, pursuant to the relevant legal procedure. Cadastral survey aims to collect the information on all the sea areas used in different projects, so that people can get knowledge about the entire picture of such sea areas that have or have not been approved, know the current use of the sea area, and provide a legal basis for the application, approval, enforcement and supervision of the sea use. A correct and effective cadastral survey of the sea can be helpful to reduce the disputes over the sea use right. In this connection, cadastral survey is one of the most fundamental preconditions for the management of the sea use. In the previous years, cadastral survey was not formally started in China due to the poor understanding level of and the technical restrictions on the survey. After the promulgation of Law on Sea Area Use, the sea areas were managed in a general and causal way, without normal and effective cadastral management. For example, the approved sea area used for project does not have clear coordinates within the jurisdiction; its size is just an approximate number other than a precise one; the surrounding sea areas and their use are unclear; the law enforcement is weak and fails to give effective warning to people. In order to truly manage sea areas in a regularized way, in addition to the

administrative boundary settlement, cadastral survey of the sea should be improved. Specifically:

1. The government should invest more money in cadastral survey. The cadastral survey of the sea involves the preparation of materials, technological design and standards, the GPS equipment and the markings on the electronic map, which require financial support. For the successful completion of this fundamental work for sea management, the government should increase its monetary input for the cadastral survey.

2. The competent marine administrative department should select and choose qualified sea survey entities to conduct the cadastral survey. The cadastral survey involves the power of the competent marine administrative department, the interests of China and the personal interests of the owner of the sea use right, therefore, the survey result must be accurate and effective in law. For this sake, pursuant to the relevant provisions of China, the survey entity must have the relevant qualification, use the benchmarks and coordinates of China, and follow the technology, standard and norm of China for mapping and surveying; otherwise, the survey result will not be legally binding.

3. The acceptance inspection of the survey result and the filing of the acceptance-related materials should be improved. After the cadastral survey of a sea area is complete, the competent marine administrative department should organize related entities or experts to inspect and accept the survey result with respect to the boundary measurements and identification, the sketch map of the sea area, the measurement of the size, and the preparation or revision of the cadastral map. The survey result should not be inspected by the survey entity itself or by an amateur. After the inspection and acceptance, the competent marine administrative department should put on file the cadastral materials that have been examined as satisfactory and build the basic database on the sea use management.

4. The law enforcement on sea use should be strengthened. Based on the cadastral survey, the competent marine administrative department can have a clear view of the sea use by checking the cadastral map. Any unauthorized use of the sea, or any unauthorized expanded use of an approved sea area, or any violation of the Law on Sea Area Use should be timely investigated and punished by the competent marine administrative department or any other marine enforcement agency it authorizes.

D. Educate Fishermen about the Relevant Laws, and Engage in the Ascertainment of Sea Use Right and the Issuance of the Certificate of Right of Sea Area Use for Sea Areas Used for Aquiculture

With regards to the issuance of the certificate of right of sea area use, it is challenging to deal with the payment of the sea use charge for the sea areas used for aquiculture, which is a problem unsolved for centuries. Fishermen should follow the law of their own free will, which is one of the preconditions for the ascertaining of the sea use right and the issuing of the certificate of right of sea area use. For this sake, first they should receive training about the relevant laws, so that they can understand the current laws of China. Moreover, on the basis of the cadastral survey, the information about the fishermen and their sea areas should be collected, such as, the size of sea areas used for aquiculture and situation of such aquiculture. Then an evaluation should be conducted on the income and loss of the fishermen, using the approach specified in Part II above. Compensation or indemnification should be made for the sea areas used for aquiculture or for the fishermen to turn to other industries, so as to prepare for the issuing of the certificate of right of sea area use.

Legal Analysis on the Countermeasures against Maritime Environmental Emergencies

YIN Nianchang *

Abstract: How on earth can we improve our countermeasures legally when in face of more and more maritime environmental emergencies in the realistic society? To establish a systematic legal warning mechanism, emergency response mechanism and legal liability mechanism for dealing with maritime environmental emergencies, especially a legal mechanism unifying and improving the current civil liabilities for oil pollution damages in China, are the burning issues to be solved by Chinese law.

Key Words: Emergency incident; Maritime environmental emergencies; Countermeasures; Legal analysis

I. The Definition and Types of Maritime Environmental Emergencies

It should be said that there is no clear definition in our existing marine laws and regulations in term of "maritime environmental emergencies". Article 17 of the Marine Environmental Protection Law of the People's Republic of China revised in 1999 (hereinafter "Marine Environmental Protection Law") just mentions the phrase of "contingency" without concrete definition. But this does not mean that all of our laws and regulations have no similar definition over this term. In fact, Article 2 of the Regulations on Response to Public Health Emergencies promulgated and implemented by the State Council in May, 2003 stipulates the public health emergencies as referred to in these Regulations refer to the major infectious disea-

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ses, unexplained mass illness or major food and occupational poisoning events that happen unexpectedly and have caused or may cause serious threats to the social public health, and other events seriously threatening to the public health, which is a complete definition of the "public health emergencies". The Provisions on Dealing with the Emergencies Occurred to Yellow River Water Transfer issued by the Yellow River Conservancy Commission in May 22, 2003 provide a clear definition over the term of "the emergencies occurred to Yellow River water transfer" in its chapter "I. Categories of Emergencies". We can get the conditions of constituting a qualified "emergencies" from such similar definitions:

First, an event happens unexpectedly without elements of inevitability, which is an inherent characteristic of emergencies. From a legal perspective, some events are caused by force majeure and emergent, but some do not exclude man-made causes, such as an explosion, poisoning, and destruction of mangroves and beaches.

Second, it causes or may cause serious harm, and is of certain social harm or danger, which is an external characteristic of emergencies, and also another significant aspect that attracts highly attentions.

Third, once happened, it may pose serious threats to people's lives and property in large or some areas, and sometimes may restrict the development of national economy, causing adverse effects to the economic development and people's lives.

Therefore, the "emergencies" are different from the "force majeure" under the Contract Law to certain extent. The "force majeure" refers to the unforeseeable, unavoidable and insurmountable conditions, and it is a statutory event releasing the parties to contracts from relevant liabilities; while the "emergencies" also include some unexpected events and man-made events. Based on the above analysis, and taking into account of the definition of "damage from marine environment pollution" under the Marine Environmental Protection Law, we may as well define the "maritime environmental emergencies" as: The significant marine environmental event that happens unexpectedly and brings large and disastrous effects to marine environment and causes potential or substantial harms to people's lives and property safety.

According to the existing marine disasters, the maritime environmental emergencies can be categorized as follows: 1. storm surge event; 2. red tide event; 3. tsunami and waves; 4. sea ice events; 5. oil and other marine pollution incidents; 6. environmental degradation events caused by marine resources damage and so

on.[1] The first four can be characterized as force majeure event; the latter two can be included into the scope of accident or man-made event only.

II. Effects of Maritime Environmental Emergencies to China's Economic Development and Regulations and Conventions concerning Marine Environmental Protections

A. Maritime Environmental Emergencies Cause Severe Losses to National Economy

There is no doubt that, the effects of maritime environmental emergencies to the economy is tremendous. Whether it is natural or man-made disaster, it brings huge threats to the people's lives and property safety, seriously affecting the development of the national economy, in particular marine economy. The tsunami events occurring in the Indian Ocean at the end of 2004 caused nearly 150,000 deaths, and hundreds of thousands of people became homeless, and the Thai tourism industry alone suffered a loss of $ 510 million. While it is estimated in insurance industry the total loss caused by the Asian tsunami disaster to global insurance industry may be between 5 billion to 10 billion U.S. dollars.[2] [Editor's Note: The above data is as of the time of writing and tsunami death toll has risen to 165,000 as of the time of editing]; In China, according to statistics, the economic losses caused by marine disasters were less than 100 million yuan on average each year in the 1950s, 500 million yuan on average each year in the early 1980s, more than 10 billion yuan on average each year in the 1990s, but such figures climbed up as high as over 30 billion yuan in 2007. While according to the statistics by the State Oceanic Administration in the China Marine Disasters Gazette, the direct economic loss caused by marine disasters (mainly storm surge, red tide, waves and sea ice) in 2001 was 10 billion yuan, with the number of death and missing totaling 401, and 14 million people affected by the disasters. Such disasters, according to the statistics of the last ten years, are only above average; in 2002, it was below the average throughout the year. In that year, the economic loss directly caused by

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1 State Oceanic Administration ed., *China Marine Disasters Gazette*, 2001/2002. (in Chinese)
2 *Global News*, at http://www.chinadaily.com.cn/english/home/index.html, 9 January 2005. (in Chinese)

marine disasters (mainly storm surge, red tide, waves, sea ice and oil pollution) to China were approximately 6.6 billion yuan, with the number of death and missing totaling 124, and affected a population of approximately 10 million.[3] Such figures are astonishing, but the key is how to prevent and reduce loss and how to establish a sound legal risk prevention mechanism to minimize such loss in order to protect people's lives and property and create a favorable legal environment for the development of national economy, in particular the marine economy.

B. China's Laws and Regulations concerning Marine Environmental Protection

Some scholars divided the environmental legislations made after the founding of new China into three stages, namely the environmental law at the early stage of new China, the environmental law at the pioneering stage and the environmental law during economic transition period.[4] The first two are periods when the environmental law developed slowly and thrived gradually, and the third is a period when the environmental law experienced vigorous development. This division basically accords with China's national conditions. China's framework for the basic marine environmental protection laws and regulations, formed and developed mainly during the third period, comprises both the domestic legislations and international conventions, and the domestic legislations include:

1. The Marine Environmental Protection Law adopted in 1982 and amended in 1999;

2. The Regulations of the People's Republic of China on the Administration of Environmental Protection in the Exploration and Development of Offshore Petroleum promulgated in 1983;

3. The Regulations of the People's Republic of China on the Prevention of Vessel- induced Sea Pollution promulgated in 1983;

4. The Regulations of the People's Republic of China on Control over Dumping of Wastes in the Ocean promulgated in 1985;

5. The Regulations of the People's Republic of China on the Prevention of Environmental Pollutions from Shipbreaking promulgated in 1988;

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3 State Oceanic Administration ed., *China Marine Disasters Gazette*, 2001/2002. (in Chinese)

4 Cai Shouqiu ed., *The Course of Environment and Resources Laws*, Wuhan: Wuhan University Press, 2000, p. 121. (in Chinese)

6. The Regulations of the People's Republic of China on the Prevention and Control of Pollution Damage to the Marine Environment by Land-Sourced Pollutants promulgated in 1990;

7. The Administrative Regulations on the Prevention and Control of Pollution Damages to the Marine Environment by Coastal Engineering Constructions or Projects promulgated in 1990;

8. The Administrative Regulations on Marine Environmental Forecasting and Release of Marine Disasters Forecasting or Warning issued by the State Oceanic Administration in 1993.

9. The Administrative Measures on Marine Natural Reserves issued by the State Oceanic Administration in 1995[5]

The international conventions to which China is a party include the 1982 United Nations Convention on the Law of the Sea, the 1969 and 1992 International Convention on Civil Liability for Oil Pollution Damage, and other relevant provisions concerning marine environmental protection.

In addition to the above basic legal rules and regulations, other provisions concerning the development, use and protection of environmental resources that exist under the civil law, economic law, criminal law, administrative law and other relevant laws, the provisions of the Constitution "the State shall protect the environment and natural resources, and prevent pollutions and other public hazards", and the provisions of the Environmental Protection Law of the People's Republic of China constitute an integral part of the legal system of marine environmental protection. These laws and regulations fill the gaps in our marine environmental laws, and set up a structural framework for marine environmental law, marking the formation of our legal system for marine environmental protection. But undeniably, this system is still being improved.

C. Relevant International Conventions on Marine Environmental Protection

In 1954, the international community signed the first international agreement on marine environmental protection − the International Convention for the

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5 Department of Policy, Legislation and Planning of the State Oceanic Administration ed., *Collection of the Sea Laws and Regulations of the People's Republic of China*, Beijing: China Ocean Press, 2001. (in Chinese)

Prevention of Pollution of the Sea by Oil in London, England, marking the emergence of international law of marine environmental protection. Since then, the evolution of international conventions on marine environmental protection has experienced the following three periods:

1. The first period: From 1954 when the International Convention for the Prevention of Pollution of the Sea by Oil was concluded until the eve of the Conference on the Human Environment in 1972. During this period, the international conventions on environmental protection mainly involved the prevention against marine oil pollution, and there was no further consideration of the overall marine environment. The major conventions included:

(1) The International Convention for the Prevention of Pollution of the Sea by Oil in 1954

(2) The International Convention on Civil Liability for Oil Pollution Damage in 1969

(3) The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties in 1969

(4) The Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil in 1969

(5) The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage in 1971

(6) The Agreement between Denmark, Finland, Norway and Sweden concerning Cooperation in Taking Measures against Pollution of the Sea by Oil in 1971

There are a number of international conventions concluded at this stage for other purposes, and these conventions have certain impacts on the international marine environmental protection, such as the Convention on Fishing and Conservation of the Living Resources of the High Seas in 1958, the Antarctic Treaty in 1959, the Partial Test Ban Treaty in 1963 and the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof in 1971, etc.

2. The Second Period: From the publication of the 1972 Declaration on the Human Environment in Stockholm until the eve of 1982 when the United Nations Convention on the Law of the Sea was signed. There were much more international treaties on marine environmental protection during this period, and they were mainly:

(1) The Declaration on the Human Environment and Action Plan for the Human Environment adopted at the Stockholm Conference on the Human Environment in 1972

(2) The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter in 1972 (London Convention)

(3) The International Convention for the Prevention of Pollution from Ships (MARPOL) in 1973

(4) The Protocol Relating to Intervention on the High Seas in Cases of marine Pollution by Substances Other Than Oil in 1973

(5) The Convention on Prevention of Marine Pollution from Land Sources in 1974

(6) The Regional Convention between Denmark, Finland, Norway and Swedish on Protection of Environmental in 1974

(7) The Convention on the Protection of the Marine Environment of the Baltic Sea Area in 1974

(8) The Convention for the Protection of the Mediterranean Sea against Pollution in 1976

(9) The Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources in 1977

(10) The 1978 Protocol of the 1973 International Convention for the Prevention of Pollution from Ships

(11) The Convention on the Conservation of Antarctic Marine Living Resources in 1980

(12) The Protocol concerning Cooperation in Combating Marine Pollution in Cases of Emergency in 1981

(13) The Conventions for the Protection of the Marine Environment and Coastal Areas of the South-East Pacific in 1981

(14) The Convention on Regional Cooperation in Combating Pollution of the South-East Pacific by Hydrocarbons and Other Harmful Substances in Cases of Emergency in 1981

(15) The Protocol concerning Regional Cooperation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency in 1982

(16) The Convention for the Conservation of North Atlantic Sardines in 1982, etc..

The international conventions at this stage were obviously tend to be comprehensive, and the agreements with the aim to prevent a variety of pollution

sources and to regulate multiple layers of behavioral relations emerged, i.e. the "umbrella treaty". Some of the treaties, with new principles of international law, have exceeded the scope of traditional international law, and began to reflect the will of the member States of the international community in a wider context, laying a solid foundation for the formulation of new laws concerning international marine environmental protection.

3. The third period: from the conclusion of UNCLOS in 1982 till now, it is the third period and also a rapid development period for the conclusion of international treaties on marine environmental protection. Especially the conclusion of UNCLOS, which is a milestone for the international community to protect marine environment, marks the formation of a new international maritime order and initial shaping of the management mechanism of international protection of the marine environment, and makes the international law on marine environmental protection to enter into a period of improvement. During this period, it mainly centers on the following work:

(1) Amendments of the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The 1969 Convention on Civil Liability, the 1971 Fund Convention, the Tanker Owners' Voluntary Agreement concerning Liability for Oil Pollution and the Contract regarding an Interim Supplement to Tanker Liabilities for Oil Pollution constitute the international compensation regime for oil pollution at sea. The international community carried out two revisions in 1976 and 1984, and it conducted the third revision of the Convention on Civil Liability and Fund Convention in 1992, greatly improving the limit of liability.

(2) Expansion of regional agreements on marine pollution prevention to the global scale. For example, followed by the Montreal Guideline, the five nations in the Southeast Pacific region formulated the Quito Protocol on Protection of the Ocean from Land-based Sources of Pollution in 1983. These are the guideline and reference of the said countries to prevent land-based pollution.

(3) Continuous implementation of the Regional Seas Programme of the United Nations Environment Programme. The Planning, launched in 1974, divides the world ocean into 11 regions, and the counties at each region should conclude a comprehensive agreement on marine environmental protection, i.e. the "umbrella treaty."

(4) Conclusion of a new treaty. From 1982, the International Maritime

Organization Council considered and passed the draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea for discussion among all member countries[6].

In addition, the international community's emphasis on global environment greatly increased during this period, and population, resources and the environment have become the three hot issues of global economic growth, with the sustainable economic development becoming a strategic policy of governments. Since 1972 when the Conference on the Human Environment was held, the conferences and activities initiated by the United Nations with the theme of environment and development have never stopped. For example, the World Commission on Environment and Development was established in October 1984; the Proposal of Legal Principles for Environmental Protection and Sustainable Development and Tokyo Declaration were adopted in the Tokyo Conference by the World Commission on Environment and Development in 1987; five documents - Rio Declaration on Environment and Development, Agenda 21, Statement of Forest Principles, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity were signed at the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992, making long-term arrangements for the continuing environment protection and improvement and producing a significant impact on the improvement of international law on environmental protection.

The domestic laws and international conventions as discussed above are enough to illustrate the important role of marine environmental protection today. The humans have made their greatest possible positive efforts in law to ensure marine environmental protection and sustainable development of marine economy. However, "something unexpected may happen any time", and how to prevent and deal with the maritime environmental emergencies are still important issues faced by various States which need to be solved urgently. The 2004 tsunami event has put forward higher requirements to coastal States in terms of legislation and enforcement of law in this regard.

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6 Ouyang Xin and Dou Yuzhen, *The International Law on Marine Environmental Protection*, Beijing: China Ocean Press, 1994, pp. 7~18. (in Chinese)

III. Establishment and Improvement of the Legal Warning Mechanism to Deal with Maritime Environmental Emergencies

Article 6 of the Administrative Regulations on Marine Environmental Forecasting and Release of Marine Disasters Forecasting or Warning issued by the State Oceanic Administration in 1993 clearly states "national and local departments at all levels in charge of marine environmental forecasting shall release the marine environmental forecasting and marine disaster forecasting & warning in the sea areas under their respective jurisdiction." Article 17 of the Marine Environmental Protection Law amended in 1999 also states: "any unit or individual that has caused or may possibly cause marine environmental pollutions because of an accident or any other contingency must adopt effective measures, promptly inform all parties that are potentially endangered, report to the department empowered by this Law to conduct marine environment supervision and control and accept investigation and treatment." For unexpected event, to establish an effective legal warning mechanism is an effective method for disaster prevention and loss mitigation, and is also a summary of years' experience.

How to build an effective legal warning mechanism of maritime environmental emergencies? This is a very real and practical problem which directly relates to the effect of solution. The existing laws and regulations just make abstract provisions which scatter among different files. Under these provisions, combined with the practices, we believe that a sound legal warning mechanism should include the following elements:

1. A Warning Mechanism Covering Unified and Improved Organizations

It should be mentioned that the existing warning mechanism designed for marine environmental incidents has been equipped with a set of systematic administrative organizations that are responsible for the monitoring, forecast and news release of marine environmental incidents and plays a significant role in protecting marine environment and ensuring sustainable development of marine economy. Article 3 of the Administrative Regulations on Marine Environmental Forecasting and Release of Marine Disasters Forecasting or Warning clearly states: "the State adopts a unified regime to release marine environmental forecasting and marine disaster forecasting and warning under which such marine forecasting and warning shall be released by the national and local departments at all levels in

charge of marine environmental forecasting." For a long time, although the State adopts a unified approach, the situation of "multi-department involvements and divided management" in terms of China's marine administration has not changed till now, and an integrated administration has not been effectively implemented. The diversified marine enforcement teams lead to a repeated construction of warning organizational mechanism and uncoordinated internal management of environmental monitoring by departments in charge of various industrial, making it difficult to improve the warning and monitoring system. It is also a tough question to ensure mutual coordination and mutual cooperation among the warning organizational mechanisms of relevant enforcement teams.

In addition, the problem of professional training is also an issue that should be considered in establishing the warning organizational mechanism. Due to the length of this article, we will not elaborate on it here.

2. Active Fiscal Budget Funds and Reserve Funds

Prevention of environmental incidents, especially disaster prevention and relief require a lot of financial backing. All the effective operation of warning organizational systems and their maintenance and development, construction and maintenance of prevention projects in advance, rescue of life and property and subsequent relocation of affected population, etc. need large capital supports. These funds must be given overall consideration and budgetary support, and must be used for specified purpose without misappropriation.

3. Establishment and Formation of a Substantive and Effective System of Disaster Prevention Projects

Prevention projects system is a systematic project that must be based on a warning organizational mechanism. It makes overall arrangement of limited human, property and material to achieve the best disaster prevention effect by learning the experiences of effective response of previous disasters on the basis of the scientific forecasting and monitoring. For example, conduct studies on disasters that occurred before, build a safe haven for ships and prepare decontamination equipment and facilities, adequate disaster prevention and relief supplies, and daily necessities.

4. Establishment of a Sound Social Insurance and Risk Transfer Mechanism

In the marine cargo insurance, the risks that shall be undertaken by insurer under the Marine Cargo Insurance Clauses revised by the People's Insurance Company of China in 1981 include natural disasters and contingency occurred at sea, of which, natural disasters refer to adverse weather, lightning, tsunamis,

earthquakes, floods and other disasters beyond control. A plenty of events included into maritime environmental emergencies, such as storm surges, are caused by force majeure and they cause damages to human's life and property which have an operating value of the object of commercial insurance. In fact, this kind of commercial insurance, though not widely promoted, has been under actual operation whether in terms of insurance type or insurable object. The coverage and level of either the insured or insurer in this regard shall be pushed forward. For example, the impacts of maritime environmental emergencies on aquaculture tend to be significant; however, commercial insurance has not functioned effectively as the risk in this area is too large. Although there are other reasons for this, the establishment of risk transfer mechanism is beneficial to both individuals and the society as a whole.

In addition to commercial insurance mechanism, the other is the social insurance system. These are two different mechanisms; the latter is a national compulsory insurance which refers to the type of insurance program mandatorily implemented by a State for social stability and development and reflects the level of social civilization and economic development of a State. After the maritime environmental emergencies, people tend to think only of the governments comforting and stabilizing by means of social relief, special care for the deaths and disabled and by other means. However, the government's financial resources are limited, and the limited government assistance alone is far from enough in the absence of commercial insurance coverage and effective legal remedy for damages. Therefore, certain funds should be reserved in social security area and a mandatory social insurance program should be established so that after risk occurring, its role of "timely rain" can be played and it can play an important role in post-disaster reconstruction and rehabilitation.

The above four points should be emergency measures that must be prepared before maritime environmental emergencies occur. They should be consistent and indispensable with each other. Only by doing this can an improved prevention system be formed. We can at least not fuss and panic in the event of maritime environmental emergencies, and can face them calmly.

IV. Establishment and Improvement of Legal Mechanism for Dealing with the Maritime Environmental Emergencies

The Department of Transport made a series of provisions concerning the reporting, investigation, handling and mediation of maritime accidents happening within China's coastal sea areas in the Regulations on the Investigation and Handling of Maritime Traffic Accidents issued in 1990.

The Ministry of Agriculture also issued the Regulations and Procedure of Investigation and Handling of Pollution Accidents in Fishery Waters in 1997 and made clear provisions on the jurisdiction, evidence collection and procedures of the pollution accidents in fishery waters. The Marine Environmental Protection Law revised in 1999 provides the pollution damages to marine environmental pollutions, such as "land-based pollutants", "coastal construction projects", "marine construction projects", "dumping of wastes" and "ships and their relevant operations". It also stipulates in Article 17 that "any unit or individual that has caused or may possibly cause marine environment pollution because of an accident or any other contingency must immediately adopt effective measures, promptly inform all parties that are potentially endangered, report to the department empowered by this Law to conduct marine environment supervision and control and accept investigation and treatment. Coastal local people's government at or above the county level must, whenever the offshore environment within their administration is seriously polluted, adopt effective measures to relieve or mitigate the pollution damage"; and in Article 18 that "the State shall, in accordance with the necessity to prevent marine environment pollution, draw up State contingency schemes to cope with major marine pollution accidents. The State oceanic administrative department shall be responsible for drawing up a State contingency scheme to cope with any major oil spill accidents on the sea caused by offshore oil exploration and exploitation and report to the administrative department in charge of environment protection under the State Council for the record. The State administrative department in charge of maritime affairs shall be responsible for drawing up a contingency scheme to cope with any nation-wide major vessel oil spill accidents on the sea and report to the administrative department in charge of environment protection under the State Council for the record. All units in the coastal areas where marine environment pollution accidents may happen shall draw up in accordance with the State regulations contingency schemes to cope with pollution accidents and report to the local administrative departments respectively in charge of environment protection and maritime affairs for the record. The coastal people's governments at or above county level and the relevant departments

thereunder shall relieve or mitigate damages in accordance with the contingence schemes in case of any major marine pollution accidents."

Under the current legislation, the legal articles concerning the emergency measures to deal with marine environmental pollutions are either abstract, principled or segmented, and there is no unified concept of the overall arrangements and overall situation. These provisions can cope with certain environmental events that have relatively small effects or occur in certain areas, but if it involves relatively large events and maritime environmental emergencies that have effects on certain region, it becomes somewhat inadequate as the measures to deal with unexpected events must be global and holistic. While in practice, we tend to deal with such events afterwards by setting up a temporary team for incidents investigation and handling led by the government and assisted by relevant governmental departments. After solving the incidents, the temporary team will be disassembled. Therefore, it is difficult to play a regular role if there is no stable official organization.

How to establish and improve the legal mechanism for emergency response? The author holds that the following aspects should be included:

First of all, unify the powers of law enforcement for maritime environmental emergencies.

Who has the power to tackle if question arises? Who is entitled to deal with? After solving this important question, the subject of liability will be clear and the issues left are to deal with in accordance with the substantial and procedural provisions of law. But whether the power of enforcement is exercised uniformly by one department or separately by multi department just as the current situation is a quite significant question which has not been well resolved by the existing laws and practices.

Second, build a reporting mechanism for event forecast and evaluation, and pre-arranged treatment.

This mechanism should be connected with the above mentioned legal warning mechanism as an act undertaken on the basis of the latter after events occur. The competent department in charge of marine environment should establish a system for the forecasting and evaluation of maritime environmental emergencies, and enhance cooperation with meteorological department in terms of the force majeure events, such as storm surges, red tides, tsunamis to conduct forecast studies, make thorough forecasts for the specific circumstances, develop a thorough response plan and make preventive preparations. For oil pollution and other man-made events,

it should timely take monitoring, assess the hazard results of events, develop appropriate emergency response program and report to competent authority and the government.

Third, authorized by law or government, division of responsibility, coordinated arrangements and thorough plan.

Under the emergency response plan, the departments responsible for such response shall clearly divide their responsibilities and functions, and make coordinated arrangements within the authorizations granted by law or government to face the events and consequences in a positive and steady manner. When facing such events, emergency prevention plans, special authorizations and specific actions that comply with relevant procedures could help competent departments to handle the situation. After such events, they should try to reduce the adverse effects and hazards, restore to original conditions in the shortest possible time and maintain social stability and ensure residents to live and work in peace and contentment.

Fourth, adequate financial resources, and a sound financial and life support system.

It will take time, effort and money to handle maritime environmental emergencies, and we cannot imagine what would happen if there is no strong financial support after the unexpected oil spill happens. This is inseparable from the financial support and reserve funds within the warning mechanism: the latter is a "preventive measure", while the former is a "timely rain" and a "timely help".

Fifth, establish a systematic organization for event handling.

After making clear who has the law enforcement power and handling power, it is critical to organize a dynamic team to deal with problems, which should also be considered firstly in taking emergency measures. The organization and its members, depending on the extent, influence, degree of harm, areas affected or possible affected by disasters, consequences and other factors of the event, should be professional rather than temporary.

V. Unify and Improve China's Legal Mechanism of Civil Liability and Compensation for Oil Pollution Damage

The reason why this issue is individually raised signifies its importance. Maritime environmental emergencies include marine environmental pollution, among which the marine oil pollution belongs to major marine pollution incident. If happens, it may have certain effects on the ocean's ecological environment,

aquaculture, navigation, protection of the coastal zone and coastal agriculture and forestry, etc. In 2002, a total of six oil spill incidents occurred in China's coastal area.

1. On February 19, a 6~7 km long and 1~2 meters wide crude oil belt was found off coast of Huanghua, Hebei Province which caused some losses to the fishery production;

2. On May 21, the *Daqing 232* Ship spilled oil in the sea area of Dalian Petrochemical Company port;

3. On October 6, pipelines between Guangxi Weizhou 11-4 and 12-1 oilfields spilled oil;

4. On November 11 (the author's note: it should be September 11), *Ningqingyou 4* Ship exploded and sank in the sea area of Lemen Islands, Nanao County, Guangdong Province after striking a reef, causing direct economic losses up to more than RMB 4.60 million;

5. On November 23, the Maltese tanker *Tasman Sea* collided with the Chinese tanker *Shunkai No. 1* in the east sea area of Dagukou, Tianjin, and caused oil spill, producing a 4.6 km long and 2.6 km wide crude oil belt;

6. On November 26, the central platform of Bohai Suizhong 36-1 oilfield spilled oil;[7]

The damage of environmental pollution caused by oil spill is huge, especially the offshore oil pollution often affects people's production and life along the coastal area, and brings series of social and legal issues. The author makes an analysis of the civil liability for oil pollution damages in China for your reference.

A. China's Current Legislation

1. Governance by Domestic Laws

Currently, the laws governing the disputes over oil pollution damages caused by vessel collision mainly include the General Principles of the Civil Law, Maritime Code and Marine Environmental Protection Law, as well as relevant provisions of the Civil Procedure Law and Special Maritime Procedure Law.

The General Principles of the Civil Law stipulate that, the oil pollution accident caused by vessel collision belongs to special tort, and shall be applied to strict liability regime under which the shifting burden of proof rules shall be

7 State Oceanic Administration ed., *China Marine Disasters Gazette*, 2002. (in Chinese)

adopted. For the losses incurred, the damaging party shall restore them into original conditions and make compensations.

However, the Maritime Code, drawing on the provisions of the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 23 September 1910), adopts the principle of limitation of liability, rather than the principle of restitution and full compensation established in the General Principles of the Civil Law.

Article 66 of the Marine Environmental Protection Law provides "the State shall perfect and put into practice the civil liability system of compensation for vessel-reduced oil pollution, and shall establish a fund system for vessel-induced oil pollution insurance and oil pollution compensation based on the principle of the vessel owner and cargo owner jointly undertaking the risks of any vessel-induced oil pollution compensation liability." This administrative law, which should govern the vertical relationship between the subjects with unequal status, makes more specific and clearer provisions on the shares of civil liability for the environmental pollution damage due to some reasons we may not know. However, it is contrary to the relevant provisions of international conventions, causing incompatibility and confusion.

The Civil Procedure Law and Special Maritime Procedure Law are procedural laws which grant judicial remedies in procedure to victims and provide the procedural rights and obligations of right holders. Especially, the Special Maritime Procedure Law for Oil Pollution Damage provides that the sufferer can put forward a request for damage compensation against not only the shipowner but also the insurer assuming the compensation liability for oil pollution of vessel owner or any other person providing financial guarantee, providing a strong protection for the person suffered pollution damage.

2. Governance by International Conventions

Till now, there are four international conventions governing the disputes over damage compensation for oil pollution caused by vessel incidents: the International Convention on Civil Liability for Oil Pollution Damage in 1969 and 1992, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage in 1971 and 1992. China joined the 1969 International Convention on Civil Liability for Oil Pollution Damage in 1980 and the 1992 version in 2000 respectively while it has not joined the two Fund Conventions. However, either the 1969 Fund Convention or 1992 Fund Convention has relatively narrow scope of governance in terms of the vessel thereunder, which

simply refer to any type of marine ship and vessel that actually carries 2000 tons of bulk oil cargo or above. The convention does not apply to the tanker carrying gasoline or light diesel oil. In addition, China also joined the 1910 International Convention for the Unification of Certain Rules of Law with Respect to Collision between Vessels, some content of which are absorbed in Chapter 8 "Vessel Collision" of China's Maritime Code.

B. Conflict and Non-unification between Relevant Domestic Laws and International Conventions

It should be said that, the above mentioned domestic laws and conventions to which China is a party play an important role in regulating the civil liability for oil pollution damage. Unfortunately, these provisions contain inconsistencies and even conflicts in terms of the following aspects which in practices make the law enforcement agencies act in their own ways and make the interests of the victims change constantly, as illustrated by the oil spill case of *Min Ran Gong 2* Ship. These conflicts and inconsistencies are:

1. Identification of the Subject of Tort Liability

Article 90(1) of the Marine Environmental Protection Law stipulates: "any party that is directly responsible for a pollution damage to the marine environment shall relieve the damage and compensate for the losses; in case the pollution damage to the marine environment is entirely caused by an intentional act or a fault of a third party, that third party shall relieve the damage and be liable for the compensation." Under this Article, if the third party shall be held fully liable for the vessel spilling oil, the party suffered therefrom can claim damage against the third party only, and the third party shall assume the liability of relieving the damage and compensating losses while the owner of the vessel spilling oil does not need to assume responsibilities. The result of making this provision is that, if the third party has limited capacity for economic compensation, the loss incurred to the suffering party will not be effectively reimbursed. However, the subject of liability under the Special Maritime Procedural Law which gives multiple safeguards to victims may either be the owner of the vessel or the insurer or any other person providing financial guarantees. This provision is basically consistent with the 1969 International Convention on Civil Liability for Oil Pollution Damage, according to which the subject of liability is strictly limited to the owner of the vessels and the insurer assuming liability for oil damage or other person providing financial

guarantee. Employees or agents of the shipowner do not belong to the responsible persons, while the third party is regarded as the responsible person only after it is proved to commit any act or omission that causes such damages. The 1992 Convention further defines the scope of liability subject, with a clear provision on the subject that shall not hold liability for oil pollution.

Nevertheless, according to China's General Principles of the Civil Law and the Maritime Code, the behavior causing liability of compensation for oil pollution damage caused by vessel collision can be regarded as tort, and to the victims, the two colliding parties are all damaging parties and can be regarded as the subject of liability for compensation.

2. Application of Tort

Obviously, China's domestic laws have no direct provisions concerning the civil liability for oil pollution damage, and the issues such as the subject liable for oil pollution, limitation of liability, scope of compensation and principle of compensation are in lack of the legal articles that can be directly invoked in judicial practice. A judge has to decide at his discretion in accordance with the relevant provisions of the General Principles of the Civil Law, Maritime Code, Marine Environmental Protection Law, and the relevant international conventions when a case is being heard. Currently, China has joined the 1969 International Convention on the Civil Liability for Oil Pollution Damage and the 1992 version, but the contents of the Conventions are not directly introduced into domestic laws, leading to the inconformity between the Conventions and domestic laws on certain issues. As a result, the court would directly invoke the international conventions when hearing foreign cases, and the domestic laws or international conventions when hearing domestic oil pollution cases.

3. The Infringing Party's Compensation Liability

Viewpoints on the issues of compensation liability for the victims vary in practice and there are mainly three views about this:

First, conventions have established a principle of compensation first by the vessel spilling oil. Conventions provide on one hand that the owner of the vessel spilling oil, the insurer assuming responsibilities and financial guarantee shall take the responsibility first and on the other hand that, no provision of this convention shall affect the rights of shipowner to recover from the third party.

Second, joint and several liabilities for compensation. This is a principle established in accordance with the General Principles of the Civil Law. The oil pollution damage identified under the China's civil law belongs to a special tort

which shall apply the shifting burden of proof rule. That is to say, the victims need only to prove collision accident occurred and the consequence of oil pollution damage. As for other issues of liability, as stipulated by laws, the involved party shall assume the several and joint liabilities.

Third, the principle of compensation in proportion to the liability for collision. This is a principle of compensation established by China's Maritime Code and the Marine Environmental Protection Law. Articles 168 and 169 of the Maritime Code stipulates that, if the collision is caused by the fault of one of the ships, the one in fault shall be liable therefor, and if the colliding ships are all in fault, each ship shall be liable in proportion to the extent of its fault;. Article 90 of the Marine Environmental Protection Law stipulates, in case the pollution damage to the marine environment is entirely caused by an intentional act or a fault of a third party, that third party shall relieve the damage and be liable for the compensation.

4. Whether the Infringing Party is Subject to Limitation of Liability

Article 5(1) of the 1969 Convention stipulates, the owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount of 2,000 francs (equivalent to 133 SDR) for each ton of the ship's tonnage. However, this aggregate amount shall not in any event exceed 210 million francs (equivalent to 14 million SDR) unless it is due to actual omission or privities of the shipowner. The 1992 Convention further improves the limitation of liability and the shipowners will not lose the opportunity to get themselves subject to liability limits. Only by proving the oil pollution was caused due to the intentional fault, or reckless act or omission of the shipowner despite knowing that might happen can the shipowner lose the entitlement of liability limit.

China's Maritime Code contains no express provisions concerning this, and if the claim for oil pollution damages belongs to the "restrictive claim" under the Chapter 11 "limitation of liability for maritime claims", it can applied with reference to the restrictive claim; while the General Principles of the Civil Law and the Marine Environmental Protection Law hold a negative attitude towards this.

5. Whether It Can Recover against the Third Party

Both the 1969 Convention and the 1992 Convention expressly specify, the owner of the vessels spilling oil or its insurer and financial guarantee, after compensating for the oil pollution damages, are entitled to recover such loss against the third party; while the domestic laws have no express provisions on this.

C. Unify and Improve the Legal Mechanism of Compensation

According to the above analysis, we can see that the provisions concerning civil liability for oil pollution damage in China is not unified and complete, and in lack of special laws and regulations. So, in order to better protect the interests of victims, better protect the marine environment and promote the development of marine law mechanism, it is necessary to formulate and unify the legal mechanism of compensation liability for oil pollution damage, to further improve it from the above five or more aspects and to bring it in line with international conventions.

VI. Establishment and Improvement of the Legal Liability Mechanism for Dealing with Maritime Environmental Emergencies in China

Some of the maritime environmental emergencies are caused by force majeure, and some are caused due to human reasons. No matter by which factors, the process of handling is one of exercising the rights, powers and performing obligations and responsibilities. If the person dealing with such events causes the damages in people's life or property due to his intentional fault or negligence, he shall assume the corresponding legal liabilities, including criminal, administrative and civil liabilities or economic liabilities under the criminal law, administrative penalty law, civil law, maritime code and other relevant laws and regulations in China. Therefore, to establish and improve the legal liability mechanism for dealing with marine environmental protection is necessary to protect the marine environment, to ensure the sustainable utilization of marine and sustainable development of marine economy, and to develop China's socialist legal system. This legal liability mechanism shall include:

A. Legal Mechanism of Criminal Responsibility

Legal liability mechanism of criminal liability refers to the warning mechanism of criminal penalty to investigate into the governmental authority and public institution responsible for warning or dealing with maritime environmental emergencies, and the personnel causing events or the personnel who violates relevant laws in dealing with relevant events. If it is the leader and organizer responsible for dealing with marine environment events, he shall assume the

liability for dereliction of duty for the lack of leadership and organization under the criminal law or other laws and regulations; while the person causing maritime environmental emergencies, under the criminal law or other laws and regulations, shall assume the criminal liability for intentionally or negligently causing physical or property damages. It should be mentioned that, China has established this type of legal mechanism of criminal liability though it is not perfect yet or even its legislation only has a rough outline or even some is blank. In terms of the liability of warning mechanism, the Administrative Regulations on Marine Environmental Forecasting and Release of Marine Disasters Forecasting or Warning issued by the State Oceanic Administration in 1993 expressly stipulate "the State adopts a unified regime to release marine environmental forecasting and marine disaster forecasting and warning under which such marine forecasting and warning shall be released by the national and local departments at all levels in charge of marine environmental forecasting." "Any other organization or individual is not allowed to issue to the public various marine environment forecasting and marine disaster forecasting and warning" (Article 3). As the Regulations belong to administrative regulation, and it has no power to make legislations in relations to criminal liabilities, it also excludes the possibility that individuals assume the legal liability. Coupled with the provision of China's criminal law that the subject of crime of misconduct in office shall be the "civil servant", with respect to the current China's legislation, although Article 397 of the criminal law provides for the "crime of abuse of power or dereliction of duty" and Article 398 provides for "the crime of leaking State secrets", it is difficult to investigate individuals into criminal liabilities in reality from the aspect of warning liability as the two articles have no detailed provisions. It is also difficult to deal with the technical level and the extent of early warning. However, the warning stage is just the most important stage for the risk prevention of emergencies which is evident from the 2004 Indian Ocean tsunami event. From the perspective of the liability under events handling mechanism, on one hand, currently, the criminal liability the person handling events (leader and organizer) shall be subject to is mainly defined in accordance with relevant provisions of the criminal law, such as the crime of dereliction of duty, corruption and bribery, embezzlement of public funds, embezzlement the funds or materials that should be used for disaster relief, rescue, flood prevention, special care, poverty support, immigration and relief funds and materials; on the other hand, the criminal liability the unit or individual causing man-made events and the unit or individual violates relevant laws in dealing with incidents shall also be subject to the criminal law. In

special conditions, such person can assume criminal liability in accordance with the single administrative legislations, for example, Article 91(3) of the Marine Environmental Protection Law revised in 1999 express stipulates: "For any accident that causes major marine environment pollution and results thus in grave consequences of heavy losses in public and private properties or in injury and death of persons, criminal responsibility shall be investigated according to law." In the case of earthquake, Article 37 of the 1995 the Regulations on the Emergency Preplans for Destructive Earthquakes can also apply. In general, due to the absence of specific legislation, the content of this mechanism for criminal liability is decentralized and unsound.

B. Legal Mechanism for Administrative Liability

Different from the legal mechanism for criminal liability, the content of legal mechanism of administrative liability for dealing with maritime environmental emergencies is relatively concentrated and improved, and this has a lot to do with the improvement of China's legislations in environmental protection and marine environmental protection the focus of which now is mainly on law enforcement and law-abiding. The legal mechanism for administrative liability mainly includes two different sections, administrative legal liability and administrative disciplinary responsibility, and the former belongs to the administrative penalty such as warning, fine, order to make corrections within specified time limit, confiscation of illegal income, cancellation within specified time limit, order to close, revocation of license, rendered by the supervision department in charge of marine environment to the persons causing environment incidents in violation of relevant laws, and mainly focuses on the persons creating man-made marine environmental incidents, such as the special provision of Chapter 9 "Legal Liability" of the 1999 revised Marine Environmental Protection Law. In addition, in accordance with relevant provisions of the Administrative Reconsideration Law and Administrative Procedure Law, the person subject to administrative penalty, if refusing to accept such penalty, may apply for administrative reconsideration or directly lodge an administrative lawsuit. As for administrative disciplinary action, it refers to the disciplinary sanctions such as orders to make correction, notice of criticism, warning, reduction to a lower rank, demotion, dismissal expulsion, rendered to the directly responsible person (including units), against the principal of the unit whose person caused environment events and the person causing environment events, as well as the

leader and law enforcer in lack of leadership in dealing with environment events for such person's disciplinary or law violations. Without specific legislation, this part can only refer to the relevant legislation of public servants and relevant regulations and rules. China's regulations on administrative sanction for legal liabilities in the Regulations on Response to Public Health Emergencies are successful, and may be worth learning.

C. The Legal Mechanism for Civil or Economic Liability

This is mainly economic compensation liability. In addition, under the General Principle of the Civil Law, if it is a tort act causing property damage or personal injuries, the liability shall also include eliminating the effects, restoring loss into its original conditions. If the damage is caused by the administrative department in charge of marine environment or any department authorized by it in dealing with maritime environmental emergencies, the victims may request compensations against the said department in accordance with relevant provisions of State Compensation Law. Generally, it can minimize the negative impacts if the State establishes accordingly a liability insurance mechanism for unexpected natural disasters such as earthquakes, tsunamis, typhoons and other events under which the risk, liability and liability of compensation are assumed by the insurer. Of course, whether this insurance belongs to commercial coverage or mandatory social security is beyond the scope of this paper, and we will not elaborate on it here. However, although the system comprising the mechanism for civil compensation liability for the maritime environmental emergencies caused by humans has been established, some issues remain unresolved yet, for example, the issues of how to identify the loss of infringement event caused due to environmental deterioration arising from the destruction of marine environment and issues of compensation for incidental loss, especially the unification of legal mechanism for civil compensation liability for oil pollution damage as mentioned above.

The three liability mechanism should complement each other to form as a whole, and only in this way can an effective network of liability mechanism be formed so as to be used to deal with maritime environmental emergencies, to regulate management by law and to handle incidents through standardized management. Ultimately, we can form a mature mechanism and procedure of handing to deal with the issues in the spirit of being responsible for people and marine environmental protection.

VII. Conclusion

Due to global warming and environmental deterioration, maritime environmental emergencies occur occasionally, causing amazing catastrophic loss and attracting the attention of governments which have taken certain measures. However, the Indian Ocean tsunami occurring at the end of 2004 has sounded an alarm to the coastal States. Humans' efforts to prevent maritime environmental emergencies and emergency measures taken afterwards sometimes become particularly helpless, so it needs to make improvements from the perspectives of law and policy. For the former, to establish a legal warning mechanism in response to maritime environmental emergencies, identifying the systems and liabilities by law, and making early forecasts and preparations, can minimize the loss or risk and only in this way can we take preventive measures; while an improved legal mechanism for emergency response can quickly eliminate the adverse effects after the disaster occurs, and restore the peace and calm of society as soon as possible, reflecting the capacity of governments to deal with emergencies and effectiveness of their work. The law can help the government to keep calm after disasters and maintain social stability; a clear legal liability mechanism can make the warning mechanism and response mechanism function smoothly and play their effective roles. Only by doing so can the responsibilities, rights and interests be unified. Although China has not suffered such a huge maritime environmental emergency like the Indian Ocean tsunami yet, the "SARS" event that occurred in 2003 really gave us a vivid lesson of warning, and the previous handling of maritime environmental emergencies also shows the legal gaps on this issue. Therefore, China needs to establish a set of laws and regulations with respect to the emergency response to maritime environmental emergencies. In this regard, the Regulations on Response to Public Health Emergencies are good examples.

Public Participation in the Protection of the Marine Environment in China

XU Wenjun* HU Zengxiang**

Abstract: The thesis begins by identifying the subject of public participation in the protection of the marine environment and goes on to discuss the core of public participation – the participation in environmental decision-making. From there, it analyzes the status quo of public participation in the protection of the marine environment in China, arguing that the existing problems are "overemphasis on marine administration and underestimation of public participation in the practice of marine environment protection" and that the public participation remains at the primary or intermediate level. Thus it purposes its solution – to "increase the awareness of public participation and develop various ways of participation" and to "perfect the legislation and give full play to public participation at all levels."

Key Words: Marine environment; Environmental protection; Public participation

The participation of the public in environmental matters has increasingly become an essential rule in environmental protection. The rule, as an extension of democratic ideas in the environmental arena, forms the basis for sustainable development.[1] The Universal Declaration of Human Rights, the Rio Declaration on Environment and Development, the Agenda 21, and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) provide the basis in international law for the public to participate in the environmental protection. Many countries,

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1 UNEP, *Global Environment Outlook 2000*, Beijing: China Environmental Science Press, 2000, p. 194. (in Chinese)

including China, have provided clear and specific clauses on public participation in their domestic environment laws. Article 4 of the Marine Environment Protection Law of the People's Republic of China provides that all units and individuals have the obligation and right to participate in the protection of the marine environment.[2] Article 5 of the Law of the People's Republic of China on Evaluation of Environmental Effects provides that "the State encourages relevant units, specialists and the public to participate in the evaluation of environmental effects in an appropriate manner." The practice proves that public participation is not only very important in the theories and practice of the protection of the marine environment, but also constitutes a prerequisite to the success of the protection and management of the marine environment. For the public participation, the skills and resources of the public can be fully utilized to improve the effectiveness of the protection.

I. Subject of Public Participation

In the general concept, the public participation means the participation by citizens. However, in the protection of the marine environment, the participants are extensive and not limited to citizens. Agenda 21 contains a few sections on many different groups, including women, children, youth, indigenous peoples, NGOs, workers and trade unions, scientists and technical experts, and farmers, who in many occasions may participate in the protection of the marine environment. In China, laws on the environmental protection provide for citizens and other subjects that have the right to participate. Article 6 of the Environmental Protection Law of the People's Republic Law of China provides that "all units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment." The China's Agenda 21 states to "practically protect individuals, groups and organizations on legal reasons by providing reliable channels for their participation, and protect their legal rights and interests and the interests of the

2 Article 4 of the Marine Environment Protection Law of the People's Republic of China: "All units and individuals shall have the obligation to protect the marine environment and have the right to supervise and expose the act of any unit or individual that causes pollution damage to the marine environment, as well as the act of any functionary engaged in marine environment supervision and control that constitutes a neglect of duty in violation of the law."

public." As shown, the subjects of the public participation include citizens, and businesses and social groups.

In particular, the important role that NGOs play should be emphasized for the public participation in the protection of the marine environment. The true and effective environmental protection cannot be without powerful government actions, as well as the public participation on a broad basis and most importantly the positive role of various NGOs.[3] Social groups and other NGOs, which represent the interests of their communities, can, on behalf of their members, cooperate effectively with national or local governments. Compared to individuals, NGOs have access to much more information and more advanced technology and expertise. If given full play, they will certainly be more active and effective in the protection of the marine environment and in environmental education and heightening the awareness. For their participation, NGOs can help the government to formulate policies, programs and action plans for the marine environment and set out codes for the assessment of the impacts upon the marine environment. Also they can work to cause such programs, policies and plans and codes to be implemented, provide legal support to citizens victimized for environmental harms in proceedings to claim for damages. In addition to the protection of the marine environment, NGOs in different countries have played a leading role and achieved good results in various environmental campaigns. In Sri Lanka, for example, NGOs stopped the cutting of the Singharaja forest and the building of a thermal power plant at Trincomalee.[4] The protection of the marine environment, like the environmental protection in other areas, requires the participation of various subjects. Thus, the State should take actions to encourage the establishment and development of NGOs and to promote the participation of the general public.

II. The Core of Public Participation – the Participation in Decision-making

The public participation in the protection of the marine environment can

3 With deteriorating environmental problems, public administration has gradually become the main means to protect the environment. As a result, administrative organs tend to increase in size and require more budgets. The deficiency cannot be overcome by the administrative organs themselves.

4 UNEP, *Global Environment Outlook 2000*, Beijing: China Environmental Science Press, 2000, p. 228. (in Chinese)

have many aspects, including the participation in the construction of the marine environment, the participation in the supervision of the law enforcement agencies, the participation in the management of the marine environment, the participation in the implementation of laws, regulations and policies for the marine environment protection, the participation in the assessment of the impacts upon the marine environment, and the participation in the proceedings on the harm to the marine environment. Among them, the most import is to participate in the decision-making. The participation in the decision-making is at the core of the public participation in environmental matters. The right, if granted, will cause the public to play an active role in the protection of the marine environment and to promote the environmental protection. Yeh Jiunn-rong, a scholar from China Taiwan, attaches much importance to the public participation in decision-making. He said that "If there were an environmental right in the Constitution, the right should rest upon the affirmation of the procedural right of the public to the environmental decision-making." [5]

Article 6 of the Environmental Protection Law of the People's Republic of China provides for a rule for the public participation in environmental matters, that is, "all units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment." Similar provisions can also be found in the Law on the Protection of the Marine Environment. The public participation as specified in existing laws is mostly the "terminal participation" that occurs after the harm is done to the environment. [6]The protection against harm is the golden rule in the protection of the environment, which has been proved by scientific knowledge and the practice of environmental protection. The characteristic of environmental issues decides that environmental harm is usually irreparable. The extinction of ocean plants and animals and the dumping of pollutants will cause damage that cannot be undone. Even if some harm can be

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5 Yep Junn-rong, Environmental Right at the Level of the Constitution, from Owning the Environment to Participating in the Environmental Decision-Making, in *Environmental Policies and Laws*, Beijing: Press of China University of Political Science and Law, 2003, p. 32. (in Chinese)

6 Professor Lv Zhongmei divides the public participation into the participation in planning, the participation in the process, the participation in the action, and the participation at the end, and believes that the public participation is incomplete without the organic combination of these four components. See Lv Zhongmei, *New Visions for the Environmental Law*, Beijing: Press of China University of Political Science and Law, 2000, pp. 257~258.

repaired afterwards, the high cost will often make the repair work unfeasible. Thus, the practical and effective protection must be done to crush the source of the trouble in the egg, rather than relying upon the public participation in the environmental proceedings to claim for damages or investigating the act of any functionary engaged in marine environment supervision and control that constitutes a neglect of duty in violation of the law, in order to make good the environmental loss. The public participation in the decision-making should be at the core of the public participation in the protection of the marine environment. For example, the public participation should be introduced at the stage when decisions are to be made on policies, laws, plans or programs that may damage the marine environment. The public, as one of the decision-makers, will be in the position to protect the public interests and thereby restrict the actions of the government and other decision-makers. In this way the damage to the marine environment can be prevented in a true and effective manner.

When environmental issues first emerged, different social circles understood the environmental protection in very different ways. They did not give proper attention to the public participation so that many irreconcilable contradictions came from the formulation of policies, laws, and plans for the environment. As the practice of environmental protection develops, the human society begins to have deeper understandings and become aware of the public participation as an effective means for environmental protection. How to protect the environment of the human beings? What quality environment is needed by citizens? How to define the quality of good environment? These questions are connected with scientific research, economic analysis and pollution prevention. When the government formulates environmental policies and plans or when legislators make laws, they must have many choices in many ways. The choice they make is mostly dependent upon their values, the most import of which are the cost effectiveness, administrative convenience, scientific or technological innovation and distributive justice. In addition, the target that they set or the policy tool that they use will be subject to society, politics, economic conditions and legal tradition. However, when companies have a construction project, they will value their own economic interests, but neglect the environmental interests of the public. Thus, in the decision-making for environmental policies, plans, laws or construction projects, the environmental interests of the public must be taken into account, to try to achieve the balance between the economic development and the environmental interests of the public. For this sake, the most effective way is to allow the public

to participate in the decision-making. Only in this way can the public have the true right to fight against environmental harm, can scientific and effective environmental policies, plans, laws and construction projects be made, and can the environmental interests of the public be protected fundamentally. Therefore, the public participation in decision-making should also be placed at the core of the protection of the marine environment.

Then, what is the role for the public in the decision-making for the marine environment? To prevent any potential harm to the environment, the makers of environmental laws, plans and laws and the constructors of projects should consider and use proper policy tools and construction plans to achieve the desired environmental quality, and design effective ways to implement them and ensure the good result. To meet certain environmental standards, generally administrative agencies and legislators will set out environmental standards in their policies or laws, formulate prohibitive measures, or prescribe obligators' action or omission, or even use economic methods to, for example, require the polluter to pay for its pollution or obtain a pollution permit. For enforcement, they will try more ways to criminalize, impose administrative sanctions, or claim for damages against the actor who caused the environmental harm. Project constructors participate in the decision-making by preparing construction programs. In the program they design and implement, they should work carefully to ensure they meet the relevant environmental standard pursuant to policies or laws on environmental protection. However, for the protection of the marine environment, the decision-making role of the public is different from that of the other decision-makers. The public do not participate by proposing specific policies, plans or laws or their implementation or by designing specific schemes for construction projects, but mostly through supervision. They have the veto power, that is, without the consent of the public, no policy, plan or law on the marine environment may be adopted and no construction project may begin. This is decided by the social status of the public. The public are not a legislator, and they do not have the special knowledge and are unable to make laws or regulations. They are not an expert designer and cannot be tasked with the designing or planning of a construction project. This decides that the public can never work like other decision-makers in making polices, plans, laws and regulations or in designing specific construction programs. Therefore, for the environmental protection, the public should participate in the decision-making as supervisors. They should act to influence the decision of the other decision-makers. They should use their veto power so that any policy, law, plan or construction that

causes environmental harm cannot be adopted or implemented. In this way, they stop the environmental harm and protect the environment from the source.

III. Status Quo of Public Participation in the Protection of the Marine Environment in China

According to the Aarhus Convention, the public participation in decision-making can involve: (1) specific decisions on environmental activities; (2) plans and policies in connection with the environment; and (3) environment-related administrative regulations and legal decisions.

From the above scope and influence of the public participation in decision-making, the public participation in environmental decision-making can be also divided into the primary, intermediate and advanced levels. The primary participation means that the public participate in the decision-making involving evaluation of environmental effects of specific marine construction projects. The intermediate participation means that the public participate in the decision-making for government actions, including plans and policies, which are related to the marine environment. The advanced participation means that the public participate in the decision-making for laws, including laws, administrative regulations, local regulations, departmental regulations and local government rules, that are related to the marine environment. In the protection of the marine environment in China, the public participation in decision-making is at the primary level and is insufficient at the level of laws and regulations or the level of practice.

1. Laws and Regulations on the Protection of the Marine Environment Fail to Take Due Account of the Public Participation, but Prescribe Only the Primary and Intermediary Participations

The primary participation is mainly in the evaluation of environmental effects. Many countries have developed environmental laws that require an environmental effects evaluation before any public or private project can be started and that include hearings as an essential component of the assessment. In western countries and the international society, the environmental effects evaluation, as a formal legal regime, was established along with the public participation entering the government decisions in relation to the environment as a means to promote

democracy in decision-making. [7]The environmental effects evaluation is a process to provide a scientific basis for decision-making. The implementation of it foresees the prevention of environmental harm in a scientific manner. For the process, the public participation will cause decision-makers to give full consideration to the interests of all social circles, promote democracy in the decision-making process and prevent any harm that decisions may have on the environment. China began to promote the public participation in the environmental effects evaluation as early as in 1990s. In the Notice on Strengthening the Management of the Environmental Effects Evaluation for Construction Project with Loans from International Financial Organizations that were issued by the National Planning Commission, the National Administration of Environmental Protection, the Ministry of Finance and the People's Bank of China in 1993, it is expressly provided that "The public participation is an essential component of the environmental effects evaluation. The assessment report shall contain a section specifically for the public participation, so that the interests of the public or social groups that may be affected will be taken into account and compensated." In the Law on the Prevention and Control of Water Pollution as revised in 1996 and the Law on the Prevention and Control of Ambient Noise Pollution, it is also provided that the opinions from the local units or residents shall be sought for any construction projects. However, the Marine Environment Protection Law of the People's Republic of China, as a special law on the marine environmental protection, provides only that constructors of coastal engineering projects must prepare and submit an environmental assessment report during the phase of feasibility study and after being given a review opinion from the competent administrative department of the oceans, submit the same to the competent administrative department of environmental protection for examination and approval. The administrative department of environmental protection shall seek for opinions from the other environmental departments of maritime affairs, fishers and the military before it may give its approval. The Law fails to provide that the opinions of the public must also be sought or the role of the public in the assessment of the impacts on the marine environment.[8] Similar provisions can also be found in Article 47 of the Law for the environmental effects evaluation for marine engineering projects, giving no respect to the role of the public in the

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7 Wang Jin, Study on Public Participation in the Environmental Effects Evaluation, *Law Review*, No. 2, 2004. (in Chinese)

8 Article 43 of the Marine Environment Protection Law of the People's Republic of China.

evaluation.

In October 2002, the special Law of the People's Republic of China on Evaluation of Environmental Effects was enacted, which provides for the principles for the public participation in many ways. In the section of General Principles, it says that "the State encourages relevant units, specialists and the public to participate in the evaluation of environmental effects in an appropriate manner." It also contains separate provisions for the public participation in the environment impact assessment of special plans and construction projects. However, the Law does not prescribe whether the opinions of the public should be sought in the environmental effects evaluation of integrated utilization plans.[9] In addition, the environmental effects evaluation is mainly for construction projects rather than for government policies.

Despite its big progress as compared with the previous laws with respect to the public participation in the environmental protection, the Law on the Environmental Effects Evaluation remains insufficient in many ways. For example, it only prescribes principles, but contains no detailed provisions on the procedure, method and remedy for the public participation in the environmental effects evaluation. It only allows the public to participate in the decision-making for construction projects and special programs, so that the level of the public participation remains low. In practice, in China, the existing laws and regulations and in particular, the Law on the Environmental Effects Evaluation should be perfected of their provisions. The implementation of the environmental effects evaluation should be strengthened. The public participation should be moved from the terminal participation to the participation at the decision-making level. The public should have a more active role in the decision-making for the marine environment, so that the environmental harm can be prevented at the source.

Moreover, in the legislative practice, the enactment of a number of local or administrative regulations is not published to society, let alone the public participation in the decision-making for the enactment. Thus, the public can only participate in the decision-making at the primary or intermediate level. There

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9 In the Law on the Environmental Effects Evaluation, the plans for environmental effects evaluation are classified into the integrated utilization plans (which include the programs for land utilization and the construction, development and utilization plans for regions, drainage areas or sea waters) and special programs (which include special programs for industry, agriculture, animal husbandry, forestry, energy sources, water conservancy, transportation, urban construction, tourism, and natural resources development).

have been no specific provisions in relevant laws or regulations on the public participation at the advanced level (that is, the participation in the making of administrative regulations or laws for the environment).

2. The Public Administration for Maritime Matters Is Overestimated and the Public Participation Underestimated, in the Protection of the Marine Environment

In China, mostly the administrative agency for the marine environment is responsible for the protection of the marine environment. It uses administrative means, economic means, policies or regulations, science or technology, propaganda or education, and other means to plan, control and supervise the actions that impact upon the marine environment, in order to coordinate between the protection of the marine environment and the development of the marine economy. However, the public administration alone cannot be truly effective in the protection of the marine environment. For China is in the medium period of industrialization and in the transition from the planned economy to the market economy, with the huge challenge from the population, resources and environment, sustainability has become one of the principles that must be followed in the reform of the economic regime. Currently the sustainability strategy and major decisions for the environmental protection are made by the State Council and local governments at different levels. The responsibilities of the State Council and local governments reside with their chief administrative officers. The decision-making process is relatively simple, leaving the decision-making vulnerable to the personal will of the leaders or the protectionism of departmental or local interests. Therefore, it is easy for some decisions to contain errors. In particular, drive by local economic interests, local governments may make decisions that seriously damages the principles for sustainability and environmental protection. [10]As proved in practice, for the protection of the marine environment, it is necessary to strengthen the public administration. But, the public administration alone does not constitute the entire picture, because if not restricted, government departments tend to care more of their own interests rather than the interests of society. The effective solution is to give full play to the public participation and to make the public as one of the decision-makers. The strengthening of the public participation in the decision-

10 Certain departments live by wasting marine resources. For example, the pollution charge for companies that discharge excessive pollutants has become a source of fund for some environmental administrations.

making will help realize the truly effective protection of the marine environment.

IV. Measures to Strengthen the Public Participation

1. Increase the Awareness of Public Participation and Develop Ways for Public to Participate

At the current stage in China, the public participation and the awareness of environmental protection have been at the low level. To fully tap into the public for their role in the protection of the marine environment, effective actions must be taken to increase the public awareness and strength the publicity work, so that the public understands their right and obligation to protect the marine environment and that the entire society must work together in the efforts. In addition, administrative agencies and their staff should understand the important role of the public in the protection of the marine environment, overcome the officialdom in the environmental protection, and clear the road to the public participation in the decision-making. They should incorporate the general public in the public participation, promote the democracy in the environmental protection, and combine the public participation with the public administration, to realize the truly effective protection of the marine environment. Moreover, they should develop more ways for the public to participate, so that the public participation in the decision-making does not stop in words but in actions. The public can participate in various ways. For example, they can participate in the decision-making by attending feasibility study meetings, hearings or panel discussions. They can provide their criticisms and suggestions by calling government departments to lodge complaints or staging demonstrations or assemblies. They can also set up environmental protection organizations to participate in the environmental protection.

2. Perfect the Legislations and Give Full Play to the Role of the Public at All Levels

In light of the low level of the public participation in the decision-making for the protection of the marine environment, the public participation should not be limited to the primary level of specific construction projects, but should be allowed at the intermediate or advanced level. Compared with specific construction projects, the programs for the development, construction or utilization of a region, a natural resource or an industry, or the making or implementation of environmental laws or regulations will have more extensive impacts upon the environment. If the environmental effects evaluation is done when any policy, program, or law or regulation is made for the marine environment, the possible environmental effects

as a result of such policy, program, or law or regulation can be analyzed, predicted and assessed scientifically and measures or solutions can be provided to prevent or mitigate the environmental harm. This will ensure that the policy, program, or law or regulation satisfies the requirements of environmental protection. This will help control the adverse impact from the source and promote the realization of sustainability-related targets. Thus, the assessment of the impact upon the marine environment should not be limited to specific construction projects. When making policies, programs or laws or regulations for the marine environment, the assessment should be fully utilized to understand the entire picture of the environment, reveal potential environmental issues, promote the scientific decision-making, and improve the marine environmental protection. Moreover, Article 5 of the Legislative Law of the People's Republic of China provides that "Laws shall be made in order to embody the will of the people, enhance socialist democracy and guarantee that the people participate in legislative activities through various channels." For this, when making laws, administrative regulations, local regulations, department rules and local government rules, the relevant departments should assess the impacts of such laws and regulations on the marine environment and allow the public to participate in the decision-making for legislative activities.[11]

11 In addition, to have the public to be more active in the decision-making for the environment, a series of supporting reforms will be needed, such as, to adjust the legislative mechanism, deepen the reform of government structures, and the promotion of democratic decision-making. This article will not elaborate on it.

International Conventions, Policies, Laws and Management: A Comparative Study on the Biosafety

NIE Xin *

Abstract: In face of the opportunities and challenges of the development of marine bio-genetic resources, we should establish the scientific concept of development, discover, excavate and utilize various genetic resources for germplasm improvement, production of drugs and high added-value products, and develop new genetic treasure from the ocean and deep sea, provided that it can ensure the biosafety and conform to the State's demands for sustainable use of national resources and environmental sustainability. To this end, this paper mainly discusses the international conventions concerning biosafety and national policies, laws and management in this regard of the United States, European Union, Japan, Australia and China, and concludes: with respect to the biosafety, the most fundamental thing for a State is to achieve an organic integration of the basic spirit of international conventions, national policies on biotechnology development, control over laws and regulations and highly coordinated management.

Key Words: Biosafety; International conventions; Policies; Laws; Management; Comparative study

I. Posing of Question

A. Definition of the Biosafety

Modern biotechnology, which includes gene recombination, cloning and cell fusion technology, etc. and is characterized by genes – the basic substance of life, has greatly improved the ability of human beings to intervene with and influence the

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natural process of life. Modern biotechnology has played and will continue to play a major role in addressing the issues of population, environment, energy and other areas. For example, due to overfishing, marine pollution and diseases of aquaculture species, coastal fishery resources decline rapidly. Adopting marine biotechnology to develop the existing marine biological resources, reduce disease infestation, ensure a stable yield, and to transform the traditional marine aquaculture into the high-tech directed modern aquaculture has become an irrevocable trend, which can be evident from the creation of growth hormone transgenic fish and antiviral transgenic fish & shrimp.[1] While the modern biotechnology and the genetically modified organisms (GMO) produced by it bring enormous benefits to mankind, it might cause serious harm to humans, and the biosafety issue arises therefrom. There has been no unified view till now in relation to the concept of biosafety. Some scholars believe that the biosafety refers to the normal state in which the survival and development of biological populations is free from any interference, destruction, damages and threat of humans' improper activities. The normal state refers to a stable state in which the total number of individual species is in dynamic equilibrium.[2] The biosafety here has relatively wide range of content, such as biosafety issues caused by biological technology, alien species invasion, extinction of species and the health of humans and animals, etc. Some scholars argue that the biosafety refers to the social prevention against the potential hazards of biotechnology and the GMO produced by it.[3] According to the provisions of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (hereinafter "the Biosafety Protocol"), biosafety has its specific meaning "this Protocol shall apply to the transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health".[4] This paper adopts the second definition to study the biosafety as it covers the third one, yet is not as broad as the first one.

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1 Genetic Engineering of Marine Organism, at http://www.biox.cn/content/water/20040920869.htm, 27 December 2004. (in Chinese)

2 Cai Shouqiu, On Biosafety Law, *Journal of Henan Administrative Institute of Politics and Law*, No. 2, 2002. (in Chinese)

3 Ke Jian, Discussions on Issues of Biosafety Legislation in China, *Chinese Journal of Environmental Management*, No. 1, 2000. (in Chinese)

4 Article 4 of the Cartagena Protocol on Biosafety to the Convention on Biodiversity.

B. Several Relevant Concepts

1. GMO

GMO is a new organism created by the gene transfer, recombination and modification of nature species through adopting the modern GMO technology.[5] In other words, by adopting the artificial genetic engineering or recombinant DNA technology rather than the natural pairing method, the transfer of genetic material from one organism to another organism can be achieved even between different species.

2. Living Modified Organisms (LMO)

The Biosafety Protocol defines LMO as any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology.[6] There should be no significant difference between LMO and GMO, and some scholars believe that, in many cases, in fact, the two terms are used interchangeably with no distinction.[7] However, LMO includes cell fusion products, which is beyond the scope of genetic engineering. Therefore, the meaning of LMO is slightly wider than that of GMO.[8]

3. Genetically Modified Foods (GMF)

GMF is manufactured by GMO. GMF may be living organisms, such as tomatoes, potatoes, etc., or a food containing GMO ingredients.[9]

C. Debate on Biosafety

Modern biotechnology, which brings great economic and social benefits to human beings, has become the focus of various countries scrambling to develop in high-tech fields. Currently, there is no technically conclusive evidence showing that GMO seriously harms the human and ecological environment yet, but the debate

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5 Ke Jian, On the Principle of Risk Prevention of Biosafety Legal Protection, *Law Science Magazine*, No. 3, 2001. (in Chinese)

6 Article 3 of the Cartagena Protocol on Biosafety to the Convention on Biodiversity.

7 Wang Zhiwen, International Law Issues Caused by Genetic Engineering, *International Law Review*, No. 3, 2001. (in Chinese)

8 Ding Xiaoyang, The Legal Rule Background of the International Trade Disputes over GM Agricultural Products and Settlement Mechanism, *Issues in Agricultural Economy*, No. 8, 2003. (in Chinese)

9 Michele M. Compton, Applying World Trade Organization Rules to the Labeling of Genetically Modified Foods, *Pace International Law Review*, Fall 2003, p. 362.

over biosafety is very heated. Some supporters provide sufficient evidences to show that GMO is safe, believing that genetically modified crops can grow well on poor land, with strong insect resistance, weeds resistance and high yields. They also argue that GMO is extremely beneficial to solve the food and clothing problems in poor countries worldwide.[10]

Instead, consumers and non-governmental organization either completely prohibit GMO or at least impose stringent restrictions, believing that the modern biotechnology allowing genes to transform artificially between organisms, is likely to cause some adverse consequences to humans and the environment from the following aspects: First, the gene contained in transgenic plants that has certain resistance is likely to pass onto its wild or semi-domesticated species by virtue of hybridization, which will enhance the properties of these plants to resist weeds in a particular situation, and eventually destroys the ecological environment; some transgenic plants with insect resistance may also have direct or indirect impact on some beneficial organisms in addition to poisoning and killing pests, for example, there was a report of insect-resistant transgenic corn pollen causing death of butterflies.[11] Second, transgenic animals generally have advantageous features that ordinary animals do not have, and if escaping into the natural environment, they may destroy the natural ecological balance by changing the competitive relationship among species. For example, it was feared that the transgenic fish, growing faster than normal fish, may pose threats to the environment if escaping from special fishing ground to rivers or oceans.[12] Third, GMF may affect humans' health. In addition, genetically modified micro-organisms may exchange genetic materials with other organisms to produce new pests or enhance the dangers of pests which may ultimately lead to disasters.

D. Development of GMO

Today, the study in the field of modern biotechnology has yielded fruitful results, and the commercialization and industrialization of GMO develop fast.

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10 Michele M. Compton, Applying World Trade Organization Rules to the Labeling of Genetically Modified Foods, *Pace International Law Review*, Fall 2003, pp. 360~362.

11 Biosafety, at http://www.phield.com/blog/blog.php?job=art&articleid=a_20040624_241106, 27 December 2004. (in Chinese)

12 Zhang Xiaojun, U.S. Experts Say Cloning and Transgenic Animal Foods Are Safe, at http://www.gdbgn.cn/news/view.asp?ID=632, 27 December 2004. (in Chinese)

Especially in agricultural field, the technology has very broad prospects, and the combination of modern biotechnology and traditional agriculture is considered to be the best way to ensure the sustainable development of agriculture in the 21st century. The rapid development of genetically modified crops can be seen from the following table.[13]

Global Acreage of Genetically Modified Crops

(Size unit: million hectares)

Year	1996	1997	1998	1999	2000	2001	2002	2003
Area	1.7	11.0	27.8	39.9	44.2	52.6	58.7	67.7

Acreage of Genetically Modified Crops in Various Countries in 2003

(Size unit: million hectares)

Country	USA	Argentina	Canada	Brazil	China	South Africa	Other*
Area	42.8	13.9	4.4	3.0	2.8	0.4	3.8
Percentage	63%	21%	6%	4%	4%	1%	6%
Compared with 2002	+10%	+3%	+26%	—	+33%	+33%	+533%

*Including: Australia, India, Romania, Uruguay, Spain, Mexico, the Philippines, Colombia, Bulgaria, Honduras, Germany and Indonesia. (Source: Clive James, Preview: Global Status of Commercialized Transgenic Crops: 2003, *ISAAA Briefs*, No. 30, 2003.)

Meanwhile, the new blueprint for marine sustainable development in the 21st century, first proposed in developed countries, has been referred to by various countries around the world, such as the US marine development strategy in the 21st century proposed in September, 1999.[14] In the new century, marine biotechnology and genetic engineering highlight in the entire marine industry. In terms of aquatic and economical animals, the United States started at the earliest, and has screened for a number of functional genes associated with the growth, reproduction

13 GMO's background, at http://www.icgeb.org/~bsafesrv/background.htm, 27 December 2004.

14 Jiang Weiyu, Study of International Law Framework of Ocean Development in the 21st Century*, Law Science Magazine*, Vol. 25, 2004. (in Chinese)

and immunity; Japan has focused on research of diseases and immune-related functional genes; foreign countries currently are concentrated on establishing a technology platform for functional gene analysis. In terms of aquaculture core germplasm, China carried out the establishment of genetic linkage maps, screening for and cloning of functional genes, and researches on embryonic stem cells and gene targeting technology. In addition, China also established a complete technical system of freshwater fish gene transfer and embryonic stem cell lines of a marine fish – Lateolabrax japonicus, laying a good foundation for the establishment of technology platform used for fish functional genes analysis.[15]

With the deepening of modern biotechnology research and its commercialization and industrialization, the biosafety problems so caused have attracted high attentions of the world. International organizations and various countries are strengthening by legal means the management of modern biotechnology research and its application as a preventive measure. This paper mainly illustrates the international conventions concerning biosafety and national policies, laws and management in this regard of the United States, European Union, Japan, Australia and China.

II. The International Conventions Relating to Biosafety and Relevant Conflicts

A. Overview of International Conventions

Currently, the international conventions on biosafety mainly include:

1. Agenda 21

In 1992, the safe use and management of biotechnology were discussed for the first time at the UN Conference on Environment and Development held in Rio de Janeiro. The Agenda 21 adopted at this conference provides for the development, utilization and management of biotechnology in its Chapter 16 "Environmentally Sound Management of Biotechnology". While affirming the important role of biotechnology in human life, it stresses that only by developing and utilizing the biotechnology in a prudent manner can we maximize the benefits from it. Furthermore, it requires countries to ensure safety in biotechnology development,

15 Research and Utilization of Marine Biological Genetic Resources, at http://www.biotech.org.cn/news/news/show.php?id=16998, 27 December 2004. (in Chinese)

application, exchange and transfer through international agreement on principles to be applied on risk assessment and management. [16]

2. Convention on Biological Diversity

The drafting and negotiation of the Convention on Biological Diversity began in 1988. It was adopted at the United Nations Conference on Environment and Development in June 1992, and came into force on December 29, 1993. China is one of the first few countries in the world to join the Convention, and the first developing country to ratify it which now has 188 State Parties, including Japan, Russia, Australia and Mexico.[17] This Convention is the only one global treaty covering the various aspects of biodiversity – both marine biodiversity and terrestrial biodiversity. It regulates, through international laws and regulations, the conservation and utilization of biodiversity from the perspective of biotechnology and the safeguard and transfer of biotechnology, as well as the distribution of its benefits among others. Article 8 (g) of the Convention on Biological Diversity states: "Each Contracting Party shall, as far as possible and as appropriate establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity." Article 19 states: "The Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity."[18] This provision becomes the basis for the formulation of the Biosafety Protocol.

3. Biosafety Protocol

The Biosafety Protocol is an international legal document that controls and regulates the transboundary movement, transit, handling and use of LMO for the purpose of the protection of biodiversity and human health. So far, it is the most important international law that gives international protection in biosafety

16 Agenda 21, at http://www.un.org/chinese/events/wssd/21 agenda.html, 27 December 2004. (in Chinese)

17 Parties to the Convention on Biological Diversity/Cartagena Protocol on Biosafety, at http://www.biodiv.org/ world/parties.asp, 27 December 2004. (in Chinese)

18 The Convention on Biological Diversity, at http://www.chinabiodiversity.com/china-news/biodi.htm, 27 December 2004. (in Chinese)

field, which is developed on the basis of relevant provisions of the Convention on Biological Diversity. On January 24 to 28, 2000, after intensive negotiations, the Biosafety Protocol was adopted at the extraordinary meeting of the Conference of the Parties to the Convention on Biological Diversity attended by more than 750 participants from 133 governmental, non-governmental and industrial organizations and the scientific community. On May 15 to 26, 2000, 64 States and the European Union signed the Biosafety Protocol at the Conference of the Parties to the Convention on Biological Diversity held in Nairobi, Kenya, making it the first international law concerning the production of LMO resulting from modern biological technology. The Biosafety Protocol came into force officially after it was approved by 50 States in September, 2003. It consists of a preamble, 40 articles and 3 technical annexes. Its main body includes the objective, scope, risk assessment, risk management, identification, competent national authorities, information sharing and the biosafety clearing-house, capacity-building, liability and redress, and financial mechanism. The Biosafety Protocol provides that the advance informed agreement procedure shall apply to the safe transfer, handling and use of LMO especially through transboundary movement that may have adverse effects on the conservation and sustainable use of biological diversity. Advance informed agreement refers to the consent of importer must be obtained before the first intentional transboundary movement of a specific LMO, such as the following breeding species, release fish or microorganisms used for biological treatment, for intentional introduction into the environment of the Party of import). The Biosafety Protocol also provides for the procedures of importing LMOs, including the precautionary principle and requirements on specific information and documentation.[19] As of December 21, 2004, 111 countries or regions have signed or ratified the Biosafety Protocol.[20] The Chinese government signed the Protocol on August 8, 2000 and has not yet entered the approval procedure. The United States is not a party to the Convention on Biological Diversity, and therefore cannot become a member of the Biosafety Protocol. However, it participated in the negotiations on the text of the Biosafety Convention and the subsequent preparations of Intergovernmental Committee for the Biosafety Protocol for the entry into force

19 The Cartagena Protocol on Biosafet*y*, at http://www.chinabiodiversity.com/china-news/safety.htm, 27 December 2004. (in Chinese)

20 Ratification of the Cartagena Protocol on Biosafety and Its Entry into force, at http://www.biodiv.org/bio safety/ratification.asp, 27 December 2004.

of the Biosafety Protocol.[21] At the first session of the Conference of the Parties to the Biosafety Protocol held in Kuala Lumpur in February, 2004, the United States, though not a party to the Protocol, sent the largest delegation of 45 people. [22]

4. Agreement on the Implementation of Sanitary and Phytosanitary Measure, (SPS)[23] and Agreement on Technical Barrier to Trade (TBT)[24]

There are mainly two important multilateral agreements under the WTO framework that are closely related to biosafety, namely, the SPS and the TBT. The SPS signed at the Uruguay Round adopts sanitary and phytosanitary measures applied to international trade, which is also an important supplementation to the international trade agreement concerning food and agricultural products. The TBT is prepared specifically for the sanitary quarantine set forth in the SPS, and contains all the other aspects of the quality requirements for foods. In terms of genetically modified products, it is not easy for the food security clause of the SPS to solve the problems concerned by consumers. It can deal with some short-term food security issues only. Moreover, the SPS is specially designed to deal with those trade matters of attempts to provide protections for manufacturers by abusing relevant provisions, therefore it is impossible to make it especially applicable to genetically modified products. Thus, only by improving the WTO mechanism and expanding the WTO rules, can it be possible to resolve the potential trade disputes of genetically modified products. [25]

B. Conflicts between the International Conventions on Biosafety

The constraints imposed by the Biosafety Protocol upon the transboundary movements of LMO will inevitably have impacts on international trade, which is in contradiction with many of the rules in international trade, especially the spirit of trade liberalization as advocated by the WTO rules. For WTO, it appears that

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21 U.S. Department of State, The Cartagena Protocol on Biosafety, at http://usinfo.state.gov/regional/ea/mgck/archive03/ejbio5dos.htm, 27 December 2004.

22 The Cartagena Protocol on Biosafety and WTO: A Pair of Contradiction, at http://www.foodsafety.org.cn/module/ article/index.php?article-id=250, 27 December 2004.

23 Agreement on the Implementation of Sanitary and Phytosanitary Measure, at http://www.wangqian.net/WTO/20.htm, 27 December 2004.

24 Agreement on Technical Barrier to Trade, at http://law.chinalawinfo.com/other/WTO/Legal3/315.doc, 27 December 2004.

25 GM Products Trade Disputes Attracted the Attentions of WTO Members, at http://www.exporteam.com/old_web/dongtaisudi/2002/2002-10/2002102803.htm,, 27 December 2004. (in Chinese)

many provisions of the Protocol are in fact setting up technical barriers. Although the WTO rules also contain the exception clauses of environmental protection that may impose restrictions over trade, the conditions of applying such exemption clause of environmental protection is quite stringent, which cannot be compared with the trade restrictions of the Biosafety Protocol. The management measures required by the SPS under WTO framework must has basis in science, while under the Biosafety Protocol, a country can take management measures to prevent against risks, which is obviously in conflict with WTO trade rules.[26] For those who are both the WTO members and parties to the Biosafety Protocol, which framework shall be chosen to resolve the disputes between the two sides? Once they make a choice, it will inevitably lead to a breach of the other international agreement. Of course, the parties in a lawsuit will choose the most favorable conditions, and this will inevitably lead to a trade war. Although international environmental organizations and international trade organizations have already conducted studies and discussions over this issue, a satisfactory solution remains to be seen.

Article 22(1) of the Convention on Biological Diversity, a provision concerning the conflicts with other agreements, states: "The provisions of this Convention shall not affect the rights and obligations of any Contractiong Party deriving from any existing international agreements, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity." This means that in the event of any discrepancy between the Convention on Biological Diversity and other international agreements, the former shall have relative priority. The Biosafety Protocol, as a supplementary document of the Convention on Biological Diversity, has no corresponding priority as the Convention on Biological Diversity may have. There are two reasons for this: First, the Biosafety Protocol is an international treaty with independent legal status and legal effect; second, in accordance with Article 32 of the Biosafety Protocol, only "the provisions of the Convention relating to its protocol" shall apply to this Protocol. Therefore, if the provisions of the Convention on Biological Diversity are not made related to the Protocol (such as Article 22(1)), they are not applicable to the Protocol.[27]

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26 Patrick J. Vallely, Tension between the Cartagena Protocol and the WTO, the Significance of Recent WTO Development in an Ongoing Debate, *Chicago Journal of International Law*, summer 2004, pp. 371~373.

27 Wan Xia, International Legal Management and Control of Biosafety – from the Perspective of the Cartagena Protocol on Biosafety, *Foreign Affairs Review*, No. 1, 2003. (in Chinese)

C. The Conflicts between Countries

Contradictions and conflicts always exist in the course of the drafting and negations of the Biosafety Protocol. Due to the different political and economic status, development level of biotechnology and public attitudes, the countries formed five groups in the course of negations: the "Miami Group" (including the United States, Canada, Chile, Argentina, Uruguay and Australia), the EU, Like-minded Group (essentially developing countries), Compromise Group (including Japan, Mexico, New Zealand, Norway, South Korea, Singapore and Switzerland) and the Central and Eastern European countries (CEE).[28] Their contradictions are mainly reflected in the opposites of two groups: the "Miami Group" v. the EU and Like-minded Group. The former advocates free trade, unwilling to see the restricted and hampered trade activities of genetically modified products, while the latter focuses on the health and safety of consumers and ecological environment, advocating stringent restrictions over this type of products.[29]

Real trade conflicts also occur frequently between countries. EU's restrictions over the export of United States' genetically modified maize and soybean lead to a significant drop in export of the United States and a reduction in its planting acreage. At the failing WTO Seattle Meeting, disputes over labor standards, protection of natural resources and GMO are considered as the major three focuses of debate. China's announcement to control the genetically modified agricultural products in 2001 caused international grain market fluctuations, with Sino-US political bargaining seen in many news media.[30]

Currently, the United States owns advanced genetically modified technology, and many of the main genetically modified products are developed by American biotechnology companies. In order to recover research and development costs, the United States is bound to spare no effort to sell its genetically modified products. After the EU and some developing countries imposed stringent restrictions on the import of genetically modified products, the United States donated the GMF as

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28 Xu Yuantai, The Gartagena Protocol on Biosafety and Its Effects, at http://e-info.org.tw/issue/biotech/issue-biotech00121301.htm, 27 December 2004. (in Chinese)

29 Wang Zhiwen, International Law Issues Caused by Genetic Engineering, *International Law Review*, No. 3, 2001. (in Chinese)

30 Ding Xiaoyang, The Legal Rule Background of the International Trade Disputes over GM Agricultural Products and Settlement Mechanism, *Issues in Agricultural Economy*, No. 8, 2003. (in Chinese)

food aids to African and Latin American in poverty.[31]

D. Summary

The negotiation and subsequent signature of the Biosafety Protocol shall be based on science. However, according to all science evidences till now, it is difficult to properly evaluate the scope and extent of the risks of LMO and its product, and the focus of debate is on trade and economic interests.

No matter at which level a country's modern biotechnology is, represented by genetic engineering, the biosafety issues are unavoidable. On the issues relating to national security and interests, it is difficult for various States to reach a consensus in a short time, but making international legislations on biosafety is an inevitable trend. While safeguarding their national security and interests, all States should make some appropriate concessions and compromises in order to reach international convention on biological safety, and make it better followed.

III. A Comparative Study of Foreign Policies on Modern Biotechnology

In all countries across the globe, especially the United States, the European Union and Japan with a rapid development in modern biotechnology, the governments regard such technology as the priorities of development, and take active measures to vigorously promote the development of modern biotechnology.

A. United States

The United States is the country providing largest investments into transgenic technology research and development, and has been a world leader in the scale of production and commercialized production of genetically modified products. Additionally, the American public's recognition on GMO and biotech companies' strong lobbying capabilities also promote the United States to oppose the restrictions or prohibition of the development of genetically modified products. The Coordinated Framework for Regulation of Biotechnology issued in June,

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31 Wei Wei, Introduction to Several Issues concerning Biosafety Legislation, *Science-Technology and Law*, No. 1, 2003. (in Chinese)

1986 and the Report on National Biotechnology Policy issued in February, 1991, outline comprehensively the basic policies of the United States on biosafety management as follows: (a) the biotechnology safety management should focus on the characteristics and dangers of biotechnology products itself, rather than the manufacturing process; (2) minimize the approval burden of the government; (3) must be conducive to the rapid development of biotechnology; (4) risk assessment should be based on the characteristics of products, rather than setting up specific control standards.[32]

B. EU

Relatively speaking, the development of biotechnology in the EU as a whole lagged behind the United States. In the 1990s, biotechnology has become a focus area of the EU's high-tech development, and Germany, Britain, France and other EU countries have selected the key technologies that should be given top priority and developed the corresponding key program to determine the priority areas for scientific and technological development, including biotechnology; accelerated the pace of development of biotechnology through legislations; provided tax incentives to promote high-tech industrialized development; developed venture capital to support innovation; promoted the cultivation of talents, such as talents in biotechnology. However, the general disgust of GMO in the EU's public and the emphasis on a balanced economy without too many risks make the EU keep a cautious attitude towards the development of modern biotechnology, compared with the United States. Its policies on genetically modified products are based on precautionary measures, which means to focus on the prevention of damage caused by a particular action, rather than just dealing with it after happening. Of course, some people hold that the EU's public concern on genetically modified goods is artificially created, so as to give the biotech companies in the EU a space to live and to catch up with the United States, leading the world in biotechnology.[33]

C. Japan

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32 Xu Yougang, Report on Investigations into the Biosafety Legislation Situations of the United States, *Science-Technology and Law*, No. 1, 2003. (in Chinese)

33 GM Products Trade Disputes Attracted the Attentions of WTO Members, at http://www.exporteam.com/old_web/dongtaisudi/2002/2002-10/2002102803.htm, 27 December 2004. (in Chinese)

As a country far ahead of other Asian countries in biotechnology, the Japanese government officially announced in January, 1999 to regard the support of the revitalization of biological industry and the improvement of relevant research mechanism as one of the national key scientific and technological strategies, and identified "developing the country via biotechnology" as the new national target. The Japanese government planned to cultivate 1,000 biotechnology companies in 10 years, and increase the sum of bio-related transactions up to 25 trillion yen. [34]

D. Australia

Australia, as a country most developed in livestock in the world, has unique biological resources. In order to encourage biotechnology research and innovation, Australia sets up a Biotechnology Innovation Fund in the programs of raising Australia's innovation capacity, granting 40 million Australian Dollars between 2001 and 2004 which is implemented by the Australian Industry Association. In addition, local governments (states and territories) also have the corresponding supporting fund program. [35]

E. Summary

The modern biotechnology, as an intelligence, capital and technology-intensive industry, has its own special rules of evolution. Institutional innovation is the key to adapt to these rules and to promote the development of modern biotechnology, which requires government departments to adjust the existing policy. This adjustment is not to let the development of biotechnology adapt to the existing and traditional systems, but let the existing systems adapt to and promote the development of biotechnology through innovation and reform. Throughout the development of biotechnology, institutional innovation and policy guidance play a very important role. Meanwhile, due to different social, historical, economic and cultural background, ethics, religion and other aspects, different countries or regions may have different biotechnology policies.

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34 *High-tech Information Bulletin*, No. 63. (in Chinese)

35 China Biosafety Legalized Management - Delegation to Australia, Summary of the Investigations into Australia Biosafety Research and Legalized Management, *Science-Technology and Law*, No. 3, 2003. (in Chinese)

IV. A Comparative Study of Foreign Biosafety Legislations

A. Current Situation of Foreign Biosafety Legislations

1. United States

In 1973, Professor Herber Boye from University of California, San Francisco and Professor Stanley Cohen from Stanford University conducted the first goal-directed recombination attempts in human history, pioneering the recombinant DNA technology and breaking a new path for molecular biology to develop towards engineering and practicality. In 1975, shortly after the DNA technology was born, some American biologists pointed out at one meeting in California that DNA technology could cause a huge risk or danger to the environment and humans. On June 23, 1976, the U.S. National Institutes of Health (NIH) developed the world's first genetically engineered laboratory rules – the Guidelines for Research Involving Recombinant DNA Molecule. Currently, the biosafety regulations in the United States are mainly: the Federal Food, Drug and Cosmetic Act (enacted in 1938, amended several times), Toxic Substances Control Act, Federal Insecticide Act, Plant Quarantine Act, Federal Seed Act, Endangered Species Act, and the Federal Insecticide, Fungicide and Rodenticide Act and so on. In terms of the protection of animal and plant genetic resources, the United States enacted the Plant Variety Protection Act (amended in 1989 and 1994) in 1970. It is worth mentioning that the United States has not formulated a special federal act concerning biosafety management yet, instead, it makes some provisions in relevant acts,[36] such as some of the above laws. This is because the United States believes that the new products developed by the use of biotechnology are extensions of the existing products, and the safety of genetically modified products can be ensured under the existing laws. In addition, in May, 2002, five bills involving the safety of genetically modified crops were presented to the U.S. Congress for discussion. Among these bills, the bill relating to the protection of genetically modified crops and farmers, GMO and right-to-know bill, and GMO accountability bill are the three most important bills, though not being approved yet by the Congress. [37]

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36 Xu Yougang, Report on Investigations into the Biosafety Legislation Situations of the United States, *Science-Technology and Law*, No. 1, 2003. (in Chinese)

37 Wang Canfa, Biosafety and Its Legal Issues, at http://www.gzepb.gov.cn/ztbd/20041102002 4.htm, 27 December 2004. (in Chinese)

2. EU

The EU established a regulatory framework for biotechnology in the late 1980s. The biotechnology regulatory framework consists of two parts: First, horizontal legislation, including the use of genetically engineered microorganisms within closed facility, the purposeful release of genetically modified products and occupational safety of the working personnel exposed to biological reagent; second, vertical legislation (or product legislation), including pharmaceutical products, animal feed additives, plant protection products, new food and seeds. In addition, regulations on biotechnology's intellectual property protection are an integral part of this legal framework.[38] The horizontal legislation includes: contained use of genetically modified micro-organisms (90/219/EEC), deliberate release into the environment of GMO (90/220/EEC and 2001/18/EC), protection of workers from risks related to exposure to biological agents at work (90/679/EEC and 93/88/EEC); the vertical legislation includes: decisions of the EU to allow the products containing GMOs or genetically modified products to enter market and regulations on transport of GMOs or pathogenic organisms, feed additives, medical supplies and new food. The European Parliament passed the world's most stringent legislations on GMF on 22 September, 2003: Regulation on Genetically Modified Food and Feed (1829/2003/EC) and Regulation on Traceability and Labeling of GMOs and Food and Feed Produced from GMOs (1830/2003/EC).[39] The EU member countries enacted acts in accordance with these decrees, for example, the United Kingdom enacted the GMOs Contained Use Regulations, Regulations on Management of GMOs Release and Marketization, and Regulations on Management of Novel Foods and New Food Ingredients, and Germany enacted the Genetic Engineering Act.[40]

3. Japan

Japan issued guidelines for recombinant DNA experiments in August 1979, specifying that safety must be ensured whether the recombinant DNA experiments are by physical or biological controls, and the guidelines have experienced several revisions. Since then, the Ministry of International Trade and Industry, Ministry of

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38 EU's GM Products Management, at http://www.bioon.com/biology/Print.aspArticleID=75637, 27 December 2004. (in Chinese)

39 Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed, *Official Journal of the European*, 18 October 2003

40 Wang Canfa, Biosafety and Its Legal Issues, at http://www.gzepb.gov.cn/ztbd/20041102002 4.htm, 27 December 2004. (in Chinese)

Health, Science and Technology Agency and the Ministry of Agriculture, Forestry and Fisheries enacted their own biosafety guidelines, including the Guidelines for the Industrialization of GMO, Guidelines for the Recombinant DNA Experiment, the Guidelines for the Application of Recombinant DNA Organisms in Agriculture, Forestry, Fisheries, the Food Industry and other Related Industries, and the Management Guidelines for Genetically Modified Food, etc.[41]

B. Selection of the Legislation Model on Biosafety

Biosafety legislation shall be coordinated with the economic & social development and environmental protection. One country's biosafety legislation model depends primarily on three factors: First, the country's understanding of modern biotechnology and biosafety; Second, the country's policies on the development in high-tech fields; Finally, the position of that country's agricultural products in international trade. International legislation model on biosafety is mainly divided into two categories: the first category is product-based legislative model represented by the United States, Canada and other countries whose legislative principle is that the modern biotechnology, represented by genetic engineering, has no essential difference with the traditional biotechnology and that the target of restriction is biotechnology products rather than biotechnology itself; the other is the EU's technology-based legislative model, believing that the recombinant DNA technology itself has potential dangers, and that any activities, so long as relating to the recombinant DNA, should be subject to safety assessment and relevant laws.[42] It can be seen that the difference of the two legislation models on biosafety management has much to do with their understanding of biosafety. However, the differences between the two lie in not only their differences in terms of culture and values, but also their different perceptions of GMOs' effects on environment and human health, and the fight of interests. Other countries' management regulations, such as Japan, Australia and so on are between US-Canada and the EU.

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41 Wang Canfa, Biosafety and Its Legal Issues, at http://www.gzepb.gov.cn/ztbd/20041102002 4.htm, 27 December 2004. (in Chinese)

42 Wang Xiaojun, On Biosafety Law, at http://www.riel.whu.edu.cn/show.asp?ID = 1200, 27 December 2004. (in Chinese)

C. Management of GMO Labeling

Foreign countries adopted different measures to regulate GMO labeling, and it is basically categorized as follows: the first is the North America's supply-push management measures which emphasize on basing on technology, pay attention to the management of final products and advocate the implementation of voluntary labeling; the second is the demand-pull management measures represented by the EU and Japan. Based on the precautionary principle, it advocates the management of manufacturing process and requires mandatory labeling.[43] From the perspective of the situation of various countries in recent years, the implementation of the GMO labeling management is an inevitable trend. Japan abolished the previous voluntary labeling rules from April, 2001, and replaced it with the mandatory labeling rules; it is required in Russia that, all GMFs must be accompanied with label from July 2000, and the information concerning genetically modified ingredients must be marked on freight documents; in Mexico, the Health Act promulgated in March 2000 stipulates that all GMFs are required to be accompanied with labels. Despite the United States has been holding radical attitude towards the development of GMF, it has changed its attitude under pressure from all sides in recent years. For example, in May 2000, the United States passed presidential decree, requiring that a report must be submitted to the Food and Drug Administration (FDA) before new biotechnology products were launched to market, while in the past, this procedure was voluntary.[44] Although there are differences over GMO labeling between countries, the GMO labeling system is gaining popularity across the globe, which explains to a certain extent that all countries are seeking advantages ans avoiding disadvantages.

D. Biosafety Legislation Trends

1. Entire-course monitoring combined with appropriate control. Biosafety issues include the entire-course safety of the modern biotechnology ranging from research, development, production to practical application, therefore, the corresponding legislation should follow the principle of entire-course control.

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43 Zhang Juyong, Labeling Management of Genetically Modified Agricultural Products in Our Country Under the WTO Background*, Agricultural Economy*, No. 6, 2004. (in Chinese)

44 Wang Canfa and Yu Wenxuan, International Law Principle of the Biosafety, *Modern Law Science*, No. 4, 2003. (in Chinese)

The various countries' laws and regulations on the research, development, release, use and products marketization of GMO are also "entire-course-control" inclined obviously. Appropriate control requires that the legal requirements over biosafety not be too high, otherwise, it may hinder the sound development of national biotechnology research and application. But if too low, it may cause serious threats to human health and the environment, so it should properly control the balance relationship between legal control and the freedom of scientific research.

2. Development of legal system coordinates with biotechnology development. As science and technology develops, all countries need a synchronized management and legal system. To meet the domestic and international needs, the development of legal system for biosafety management must be coordinated with the evolution of biotechnology, and the legal system for biosafety management, whether pulling ahead or lagging behind, would hinder the development of modern biotechnology.

3. National technical regulations are geared to international standards. It may be confirmed that all countries would enhance their collaborations with the International Association for the Plant Protection Sciences, the Codex Alimentarius Commission, the Biosafety Protocol and WTO in the future in terms of their GMO risk assessment regulations and other technical regulations, further enhance their technical researches in certain sections, solve the problems not addressed in the current GMO safety assessments and endeavor to internationalize their assessment standards.

V. A Comparative Study of Foreign Biosafety Management

A. Establishment of Governing Bodies

The U.S. government promulgated the Coordinated Framework for Regulation of Biotechnology in 1986, incorporating the governance of genetic engineering work into the existing regulations. The framework stipulates that the United States Department of Agriculture (USDA), the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA) are the main governing bodies of genetically modified crops and their products, carrying out management over the safety of genetic engineering and products within their respective powers and duties. The management has following features:

1. The three core departments, USDA, EPA and FD work together in such management;

2. Approval process is relatively straightforward and open to the public;

3. It requires no new legislation and agency;

4. Focus on science-based and risk-based assessment and ruling;

5. Joint approval for different genetically modified crops;

6. Register for individual varieties is not mandatory.[45]

In the UK, the Secretary of State is responsible for approving the release or marketization application of GMO involving human health and safety. The Health and Safety Executive is mainly responsible for the isolation use and management of GMO, participatory GMO release and marketization management. The Environment, Transport and Works Bureau play a coordinating role in the GMO release, marketization management and the management on isolation use. The agriculture, fisheries, food departments and the Ministry of Health jointly participate in the management of novel foods and new food ingredients.[46]

In Japan, the authorities involved in biosafety management are primarily the Science and Technology Agency, Ministry of International Trade and Industry, Ministry of Agriculture, Forestry and Fisheries, and the Ministry of Health. The Science and Technology Agency is mainly responsible for the test-phase recombinant DNA research in accordance with the Guidelines for the Recombinant DNA Experiment. The Ministry of Health is responsible for the management of recombinant DNA technology, bio-pharmaceuticals and foods in accordance with the Guidelines for the Industrialization of GMOs. The Ministry of International Trade and Industry is responsible for the management of the applications of recombinant DNA technology to industrial activities in accordance with the Guidelines for the Industrialization of GMOs. The Ministry of Agriculture, Forestry and Fisheries of Japan is responsible for the management of the application of GMO in agriculture, forestry and food industry, including the GMO cultivated locally, or such imported organisms that can breed in natural environment; GMO that is used to produce feed-products; and GMO that is used to manufacture food,[47] in accordance with the Guidelines for the Application of Recombinant DNA Organisms in Agriculture, Forestry, Fisheries, the Food Industry and other Related

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45 Xu Yougang, Report on Investigations into the Biosafety Legislations of the United States, *Science-Technology and Law*, No. 1, 2003. (in Chinese)

46 Biosafety Management in the UK, at http://www.sibs.ac.cn/sars/kbdetail.asp?did=3409, 27 December 2004. (in Chinese)

47 Biosafety Management in Japan, at http://www.sibs.ac.cn/sars/kbdetail.asp?did=3410, 27 December 2004 (in Chinese)

Industries.

B. Main Aspects of Management

The biosafety management of various countries covers many aspects, which is mainly reflected from the aspects of environmental safety and food safety.

1. Environmental Safety

In the United States, the USDA and the EPA are responsible for approving the environmental release of transgenic plants, but the EPA is responsible only for evaluating whether the plants, among the pests-resistant transgenic plants, that can kill insects are safe. The USDA has two levels of management: environmental release (or field trials) and cancelation of the monitoring status. The basis the environmental release shall be approved is that the genetically modified plants will not bring any danger, or cause plant diseases and insects. The basis the monitoring status shall be cancelled is that the data and literature data collected in field trials demonstrate that the new genetically modified plants no longer have any risks of plants diseases and insects. In 1994, the EPA incorporated plant pesticides into the scope of regulatory management.[48]

In Japan, the Ministry of Agriculture, Forestry and Fisheries states: Any person or organization attempting to produce GMO, or sell such organisms for industrial and agricultural production or for the production of relevant substances (other than those previously applied in the natural environment) is required to carry out a comprehensive safety assessment of the GMO on the basis of the characteristics of receptors, recombinant DNA molecules and carriers. Field trials should be conducted first before the transgenic plants are applied. The transgenic plants can be applied at open systems only after the safety of such transgenic plants is affirmed during field trials.[49]

In the UK, the GMO's purposeful release is regulated in accordance with the 1990 Environmental Law and 1992 Regulations on Management of GMO Release and Marketization. The Minister of State is responsible for approving the GMO release or marketization applications, provided however that it shall obtain the consent of the Health and Safety Executive before approval decision is made. The

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48 Biosafety Management in the United States, at http://www.sibs.ac.cn/sars/kbdetail.asp?did=3407,27 December 2004. (in Chinese)

49 Biosafety Management in Japan, at http://www.sibs.ac.cn/sars/kbdetail.asp?did=3410, 27 December 2004. (in Chinese)

isolation use of GMO shall be managed by the Health and Safety Executive and the Environment, Transport and Works Bureau in accordance with the Regulations on the Management of Isolation Use of GMOs. The Health and Safety Executive has the power to enforce the regulations on GMO's isolation use. [50]

2. Food Safety

In the United States, the safety of GMF is under the joint management of the FDA, the EPA and the Animal and Plant Health Inspection Service (APHIS) The three federal agencies are responsible for establishing the framework for national biotechnology regulations, and for continuous assessment and improvement of the management process of all food.[51] As the United States holds a basically positive attitude towards GMF, the trading, circulation and supervision of GMF are relatively loose. In the UK, the Ministry of Agriculture, Forestry and Fisheries, th Ministry of Food and the Ministry of Health carry out joint management in accordance with the Regulations on Management of Novel Foods and New Food Ingredients. Novel food refers to the food that is not used for consumption within the EU, including the food containing GMO or that produced from the GMO.[52]

C. Summary

Biosafety, together with its management relates to the duties of multiple departments, covering an extensive technical field, and is closely related to many non-scientific factors which strongly influence the biosafety. In certain sense, the success of work lies in the coordination of various departments and States are striving to do so.

Although the countries have accumulated some data concerning GMO's safety management, the research in this area, in general, is still in its infancy, and need improvement, amendment and supplement which should follow the principle of gradual improvement. Furthermore, due to the different species of GMO and their biological environment, it is impossible to adopt a general and unified method or procedure in the safety management, instead, it should follow the principle of case-

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50 Biosafety Management in the UK, at http://www.sibs.ac.cn/sars/kbdetail.asp?did=3409, 27 December 2004. (in Chinese)

51 Chen Demin and Deng He, To Explore the Legislations concerning the Safety of Genetically Modified Food in China, *Journal of Chongqing University (Social Edition)*, No. 3, 2004, (in Chinese)

52 Biosafety Management in the U*K*, at http://www.sibs.ac.cn/sars/kbdetail.asp?did=3409, 27 December 2004. (in Chinese)

by-case analysis.

VI. China's Biosafety Legislation, Management and Relevant Policies

A. China's Legislation on Biosafety

China formulated the Standards for the Quality Control of Genetic Engineering Products in 1990, and the Standards specify that the quality of genetic engineering drugs must meet the safety requirements. In December 1993, the former National Science and Technology Commission issued the Regulations on the Management of Genetic Engineering Safety which draw the management system of China's genetic engineering work, divide the genetic engineering work into four safety layers as per the level of potential danger, and describe the classification of the safety levels of genetic engineering at laboratory stage, polite plant test stage and industrialization, approval department and reporting & approval procedures. In 1996, the Ministry of Agriculture promulgated and implemented the Implementation Methods on the Safety Management of Genetic Engineering for Agricultural Organisms on the basis of the Regulations on the Management of the Genetic Engineering Safety. The Methods, much more specific, targeted and widely covered, makes a relatively clear description of the safety assessment of different genetic engineering organisms and their products. Taking into account of the pilotscale experiment, environmental release or commercial production of the foreign genetic engineering organisms of agricultural living things and their products in China, the Methods make detailed provisions which are of relatively strong operability. In June 2001 the State Council issued the Regulations on Administration of Agricultural GMOs Safety, raising specific requirements over the study and production of agricultural GMOs. The Ministry of Agriculture issued in January 5, 2002 three supporting documents, i.e. the Methods on Administration of Safety Assessment of Agricultural GMOs, the Methods on Administration of Import Safety of Agricultural GMOs and the Methods on Administration of Labeling of Agricultural GMOs, which entered into force on March 20, 2002. The issue of the Regulations and its three supporting regulations mark a comprehensive management by China over the study, experiment, production, processing, operation, import and export and other activities of agricultural GMOs, and show the efforts of the Chinese government to attempt to protect domestic agriculture and agricultural markets

through biosafety laws and regulations. The Regulations of the People's Republic of China on Biosafety Management and the Biosafety Law are also being enacted. Compared with the U.S., the EU, Japan and other countries and regions, China's biosafety legislation needs to be further enhanced.

B. Management of Biosafety in China

In China, the National Safety Committee of Biological Genetic Engineering was established in 1993 under the leadership of the National Science and Technology Committee. The Safety Committee is composed of the experts from the Ministry of Health, Ministry of Agriculture and Ministry of Light Industry who are responsible for biological safety in medicine, agriculture and light industry sectors respectively. At that time, the competent department in charge of biosafety affairs was the National Science and Technology Commission. After 1994, due to the development of agricultural biotechnology, particularly genetically modified crops and transgenic animals, the Ministry of Agriculture became the main department in charge of biosafety management. Since then, the Ministry of Environmental Protection, as a governmental department in charge of national environmental issues, started to involve in the biosafety management affairs. Especially, at the conferences of States parties to the Convention on Biological Diversity and during the drafting of the Biosafety Protocol, the Ministry of Environmental Protection participated in negotiations on behalf of the Chinese government as the competent department, and at the same while, it also acted as the implementing agency in China of the UNEP International Technical Guidelines for Safety in Biotechnology. Now the departments responsible for biosafety in China include the Ministry of Science and Technology, the State Environmental Protection Administration, the Ministry of Agriculture, Ministry of Health, Chinese Academy of Sciences and the Ministry of Education and other departments. To coordinate the relationship between these departments in the field of biosafety management, the State Council also sets up a special inter-ministerial joint conference mechanism for biosafety management.

C. China's Biotechnology Policy

Now, China's biotechnology is above the middle level in the world, but compared with the United States, the EU, Japan and other developed countries, it

still has a considerable distance. However, due to lower labor costs, a large number of people who have achieved considerable success in foreign countries return to China, and in some areas, China has been in a leading position, for example, in the 1980s, China successfully made the world's first transgenic fish, so the prospects of biotechnology development in China is optimistic. China is a country with large population, and it is quite difficult to solve the food problems by merely relying on the existing agricultural technology, and this problem must be resolved through biotechnology. Asking for food, protein and drug from the ocean is an important way to survive and develop China, and it is strategically significant for China's economic development and social progress the 21st century. Marine biotechnology is the key technology to promote the aquaculture industry to be oriented to high quality, high yield, and sustainable and sound development. Therefore, subject to ensuring environmental safety and trade safety, China has been actively promoting the development of modern biotechnology.

D. Considerations over China's Biosafety Legislation

1. Pattern of Biosafety Legislation in China

China's biosafety legislation should adopt the "trinity" legislative style comprising high-level comprehensive laws, specialized laws on relevant issues and other relevant special clauses. First, we must formulate a special law on biosafety which has a high hierarchy, i.e. the Biosafety Law, making express provisions on the principle of biosafety management, its objective, basic management rules and measures, procedures of implementation, rules of supervision and management, liability of violation, compensation for damages and other items. Second, to formulate relevant specialized laws on the basis the Biosafety Law, according to the prioritization, such as biotechnology (genetic engineering) safety regulations, technical regulations on cloning, regulations on the management of genetically modified organisms and import & export, measures on the management of transboundary movements of biotechnology achievements, regulations on the management of biosafety standards, regulations on the management of microbiology laboratory safety and other regulations. Meanwhile, insert relevant clauses into the Environmental Protection Law, Animal and Plant Resources Law, the Food Sanitation Law, Drugs Law and other relevant laws.

2. The Principle That Should be Followed in China's Biosafety Legislation

Firstly, combination of national interests with science and efficiency. Biosafety

legislation should be an important tool for a country to organize, manage and encourage biological resources development and to use bio-technology. By formulating national biosafety regulations, a country can specify the principle, policy and plan of biological resources development and biotechnology policy development, and specify the establishment, organizational principles, authority functions and mode of activities of research and management organizations of biological resources & biotechnology. At the meanwhile, biosafety legislations should be able to promote the sound development of biotechnology and more efficient use of biological resources and improve China's international competitiveness in the field of biosafety. Secondly, the principle of initiative prevention. As the risk in development and utilization of biological resources, and invention and application of biotechnology is always postponed, and the consequence of the damage caused is often irreversible, so it needs to conduct long-term and systematic study of biosafety issues. China urgently needs to include the studies on this issue into major research, development and investment programs in the form of legislation, to strengthen the research on biosafety and capacity building and improve the public's biosafety awareness and level of biosafety management in China. We should also see that it is no longer a fantasy to carry out a large-scale terrorist activity by biological means. Therefore, we must regard initiative prevention principle as an important principle of guiding biosafety legislation. Thirdly, the principle of innovation. The biosafety field needs strong innovation, and this also determines that the vitality and vigor of biosafety legislation lie in the innovation of traditional legal theory, namely to explain and solve the new problems, new phenomena and new concepts the traditional legal theory or other disciplinary theory cannot solve or are difficult to solve, such as the legal issues arising from environmental safety, cloning and genetic engineering, animal rights, transboundary pollution and global biosafety. Thus, biosafety legislation must follow the principle of innovation. Fourthly, the principle of sustainable development. Now people advocate green ideas and sustainable development, and it is nothing but using limited benefits in exchange for relatively unlimited and perpetual development. Therefore, biosafety legislation should stress on the significance of sustainable development of biological resources and biotechnology and the purpose of legislation should be shifted from the utilitarian to sustainable development.

VII. Conclusion

From the above comparative analysis, we can see that due to differences in political, economic and cultural background, different countries and regions may have different comprehensions of biosafety, as well as a big gap in practice. Nevertheless, there are many similarities. For example, although the focus of debate of relevant international conventions is on economic interests, international legislation on biosafety is an inevitable trend, and countries should make some appropriate concessions and compromises in order to contribute to international legislation on biosafety. Moreover, countries should adjust the existing policies in order to adapt to the development of modern biotechnology. For example, in terms of modern marine biotechnology, in face of the opportunities and challenges in developing marine biological genetic resources, the countries should establish the scientific concept of development, discover, excavate and utilize various genetic resources for germplasm improvement, production of drugs and high added-value products, and develop new genetic treasure from the ocean and deep sea, provided that it can ensure the biosafety and conform to the State's demands for sustainable use of national resources and environmental sustainability. Take another example, biosafety legislation should reflect the intent of "entire-process control" and the improvement of the legal system should adapt to the development of biotechnology, and strive to be geared to international standards. Finally, biosafety and its management involve the functions of multiple departments and fields of technology, thus it is important to coordinate the interdepartmental relations. In addition to these commonalities, it should be combined with the specific national conditions. For example, with China's rapid economic development, cross-border transfer of biotechnology, as well as transboundary movement of biotechnology products will become increasingly common. So we have to prepare early and give effective legal controls to prevent cross-border transfer of biosafety risk, which not only is in line with the international practice and international legislation but also can safeguard the national interests of the biosafety in Chins. In words, with respect to the biosafety, the most fundamental thing for a country is to achieve an organic integration of the basic spirit of international conventions, national policies on biotechnology development, legal framework control and highly coordinated management.

The First Case of the Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea and Its Inspiration - Commentary on the *Southern Bluefin Tuna Case*

ZHAO Qiudan*

Abstract: The *Southern Bluefin Tuna Case* was the first case that was heard by the arbitral tribunal constituted pursuant to Annex VII of the United Nations Convention on the Law of the Sea. It was also the first of its kind where the jurisdiction was rejected by an international arbitral tribunal. The tribunal finally ruled to reverse the preliminary ruling of the ITLOS on jurisdiction, leaving the case not entering the substantive examination stage. Despite this, the case fully exemplifies "preventive diplomacy" as a function of international arbitration. It has been a milestone in the development of the dispute settlement mechanism under the UNCLOS. The case is also related to the reaction in law to scientific uncertainties. It is deemed to have accepted the legal status of the precautionary principle in international law of the sea.

Key Words: *Southern Bluefin Tuna Case*; United Nations Convention on the Law of the Sea, Compulsory dispute settlement mechanism; Precautionary principle

I. Case Review

The southern bluefin tuna (SBT) is one of the fish species with extremely high economic value. A mature SBT can grow 200 kilograms and 2 meters, and the

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value in the market will be US$ 30,000~50,000[1] The SBT, mainly distributed in the Southern Pacific Ocean, is listed in Annex I of the United Nations Convention on the Law of the Sea (UNCLOS) as one of the highly migratory species. According to the statistics of the Inter-American Tropical Tuna Commission (IATTC), the SBT catch was 23,488 tons in the Pacific Ocean in 1999.[2] Japan, Australia and New Zealand are the three major fishing nations of the SBT. Japan, as the largest consumer nation of SBT, consumes up to 90% of the SBT catch in the world.

Like other economic species, the SBT population has been on the rapid decrease due to overfishing. By the early 1980s, it was estimated that the parental stock had declined to 23~30% of its 1960 level.[3] The SBT population is on the verge of irreparable decrease and extinction. To manage and preserve the SBT population, Japan, Australia and New Zealand, as the three major fishing nations, entered into the multilateral Convention for the Conservation of Southern Bluefin Tuna (CSBT) in 1993. Pursuant to the Convention, the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) was established, one of its main tasks being to prescribe the total allowable catch (TAC) and its rationing among the three fishing nations.

Although Japan was allocated more than half of the TAC agreed among the three countries, the allocation was still unable to meet the domestic demand. Thus, Japan requested renegotiating the TAC and its ration. As the three countries could not reach an agreement, the Commission decided to develop an experimental fishing program (EFP), to determine the condition of the SBT population and reach a scientific judgment. However, these countries still failed to agree on the EFP, leaving the Commission at a standstill.

From July to August 1998, Japan unilaterally implemented the so-called "pilot program," to catch SBT 1,464 tons more than its ration. It also planned to do more pilot fishing in July 1999. Immediately Australia and New Zealand notified the Japanese government to indicate the existence of the dispute among them. Then

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1 Australia, Statement of Claims and Grounds on Which It Is Based, paras. 2~3. Quoted from ZHAO Lihai, The Southern Bluefin Tuna Case – the First Dispute on Fishing before the ITLOS Tribunal, *Chinese and Foreign Jurisprudence*, No. 1, 2000. (in Chinese)

2 Bureau of Fisheries, Ministry of Agriculture, Status Quo, Trends and Measures for Tuna Industry, at http://www.cnfm.gov.cn/info/display.asp?id=987, 12 December 2004. (in Chinese)

3 Award of Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), (Jurisdiction and Admissibility), SBT Award, para. 22, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

these countries started a series of political maneuvers. In June 1999, Japan notified the other two countries, proposing to settle the dispute through the CSBT 1993. The other two countries said that they were willing to accept mediation provided that: 1. Japan agree to stop the unilateral pilot fishing; and 2. mediation start as soon as practicable within a reasonable timeframe. They proposed that the mediation be finished by August 31, 1999. Japan rejected these conditions and notified that the other two countries should prepare to bring the dispute before an arbitral tribunal pursuant to Article 16(2) of the CSBT. It restated that it would not readily stop the unilateral pilot fishing program, but would continue to catch more than the quota it had agreed to previously.

In light of the emergent situation, Australia and New Zealand initiated the compulsory arbitral procedure pursuant to Annex VII of the UNCLOS on July 15, 1999. Before the tribunal was constituted, the countries requested the International Tribunal for the Law of the Sea (ITLOS) to prescribe provisional measures pursuant to Article 290, Part XV of the UNCLOS.

On August 27, 1999, the ITLOS ruled that *prima facie* the arbitral tribunal to be constituted would have jurisdiction over the *SBT Case*. It prescribed other five provisional measures, including the parties to maintain their original quotas and to immediately stop the pilot fishing.[4]

Soon after, pursuant to Annex VII of the UNCLOS, the arbitral tribunal was constituted, consisting of Stephen M. Schwebel (who was former president of the International Court of Justice) and Kenneth Keith, Chusei Yamada, Florentino Feliciano and Per Tresselt. Japan went on to challenge the jurisdiction of the arbitral tribunal. On August 4, 2000, after 11 months of hearing, the arbitral tribunal rendered its judgment: 1. With 4 Pros and 1 Cons, it ruled that it shall not have jurisdiction over the substantial issues of the case; and 2. the judges unanimously agreed to reverse the provisional measures prescribed by the ITLOS on August 27, 1999.[5] The SBT dispute will be settled finally by the CCSBT and independent scientists.

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4 ITLOS, Proceedings and Judgments of Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, (SBT Provisional Measures), at http://www.itlos.org/start2-en.html, 12 December 2004.

5 Pleadings, Hearings, and Award of Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Jurisdiction and Admissibility, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

II. Main Legal Issues Involved

As the first case that was judged pursuant to Section 2, Part XV of the UNCLOS that was just adopted and as the first case where an international dispute settlement mechanism ruled to reject jurisdiction,[6] the *SBT Case* contains a few worthy points for us to explore in terms of procedure and substantive law. In particular, the arbitral tribunal finally reversed the preliminary decision that the ITLOS had made concerning jurisdiction, which leads to wide debate in the international law field.

First, regarding the arbitral tribunal's reversal of the preliminary ruling of the ITLOS, Judge Stephen M. Schwebel said that the decision of the arbitral tribunal and that that of the ITLOS are not conflicting with each other and that this is acceptable in the international law practice. According to the UNCLOS, when an arbitral tribunal does not have jurisdiction over substantive issues, it certainly cannot prescribe any provisional measures. However, as international disputes are often complicated and the party to the dispute often has urgent requests, it may lead to irreparable harm if the decision is not made as soon as practicable. Therefore, as proved in the practice of the ICJ and other international dispute settlement mechanism, the tribunal may prescribe provisional measures if it determines that *prima facie* it has jurisdiction over the dispute, in order to prevent the situation from deteriorating.

Second, in the decision of 72 paragraphs, the arbitral tribunal raised a number of questions. The answers reflect how the arbitral tribunal, as an international judicial authority in international maritime law, interpreted the compulsory dispute settlement mechanism specified in Section 2, Part XV of the UNCLOS. They are significant for the future development of the maritime law. These questions include the following:

1. Is the dispute submitted within the jurisdiction of the CSBT or the UNCLOS, or both? Is it possible to exclude the applicability of the UNCLOS pursuant to the principle that "special law derogates general law" or that "later law derogates prior law", so that only the CSBT becomes applicable?

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6 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 240.

2. Does it satisfy the conditions specified in Article 281(1) of the UNCLOS (that is, the parties have agreed to "seek settlement of the dispute by a peaceful means" and "no settlement has been reached by recourse to such means"), so that the compulsory arbitration procedure specified in Section 2, Part XV becomes applicable? Does it satisfy the conditions specified in Article 283?

3. Can Article 282 be used as the basis that neither the ITLOS nor the arbitral tribunal has the jurisdiction over the dispute?

4. Does the dispute constitute an exception specified in Article 297(3)?

5. Is the dispute inadmissible in law?

6. Will the settlement of the dispute end up being meaningless in practice?

7. Is it acceptable to deem that the dispute satisfies Article 281(1) of the UNCLOS, that is, "the agreement (which is the CSBT in the case concerned) between the parties does not exclude any further procedure," so that the compulsory arbitration procedure in Section 2, Part XV becomes applicable?

The ITLOS and the arbitral tribunal answered "NO" to the first six questions. The last question, however, was not touch upon in the proceedings at the ITLOS. But, this last question finally caused the arbitral tribunal to reverse the *prima facie* decision of the ITLOS.

First the arbitral tribunal confirmed that the *SBT Case* is not only concerned with the CSBT, but also closely related to the UNCLOS. The question through the case is whether the substantive dispute is a scientific one (for which only the CSBT is applicable) or also a legal one (for which the interpretation and applicability of the UNCLOS will get involved). The arbitral tribunal held that the applicability of the CSBT among the parties does not exclude the right of any party to refer to any provisions concerning the conservation and management of SBT in the UNCLOS.[7] The applicability of the UNCLOS is the precondition for the establishment of the compulsory jurisdiction of the arbitral tribunal.

Part XV of the UNCLOS leads to a dispute settlement mechanism that is extremely intricate, which is deemed as "one of the pillars for the new global order in the sea areas."[8] According to Article 286 of the UNCLOS, subject to Section 3, Part XV, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to any peaceful means

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7 South Bluefin Tuna Case Order 1999/2 of 3 August 1999, paras. 43, 50, 51, at http://www.itlos.org/start2_en.html, 12 December 2004.

8 J. G. Merrills, *International Dispute Settlement*, 3rd ed., Cambridge: Cambridge University Press, 1998, p. 196.

that the parties have chosen by themselves, be submitted at the request of any party, without consent of the other party to the dispute, to the ITLOS, the ICJ, the tribunal constituted pursuant to Annex VII, or any other special arbitral tribunal constituted pursuant to Annex VIII. The provision, as a breakthrough to the consensus principle, has been the most intensive in compulsory jurisdiction in international judiciary and is deemed as an essential guarantee to the functioning of the UNCLOS. However, Thomas A Mensa, president of the ITLOS, said that "there can be no denying that the compromise made to the system wide acceptance involves some sacrifice – the inclusion of certain limitations and exceptions to the compulsory application of the system. And the question whether the actual limitations and exceptions incorporated in the Convention are appropriate, reasonable minds may and will differ."[9] Section 3, Part XV of the UNCLOS specifically provides for limitations and exceptions to the compulsory dispute settlement mechanism specified in Section 2. Articles 281 and 281 are also deemed as setting out substantive limitations to the applicability of Section 2. In the *SBT Case*, another point of dispute is the tenability of the limitation or exception to the applicability of compulsory jurisdiction.

Regarding questions 2~6, all the judges of the arbitral tribunal agreed to affirm the decisions of the ITLOS and went into more details and deeper to explain the reasoning behind the decisions. However, as the 7th question was concerned, difference appeared among them. Four of them agreed that the dispute does not satisfy the conditions specified in Article 286(1), so that the applicability of compulsory arbitration is excluded. Kenneth Keith presented his opinion separately. The question is concerned with the relationship between Article 286.1 of the UNCLOS and Article 16 of the CSBT.

Article 286(1) of the UNCLOS provides that as one of the preconditions for the applicability of the compulsory procedure, the parties to the dispute shall not agree to exclude any other procedures. In the *SBT Case*, Japan, Australia and New Zealand had agreed to the CSBT for the matters in dispute. Article 16(1) of the CSBT provides that if any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by

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9 T. A. Mensah, The Role of Peaceful Settlement in Contemporary Ocean Policy and Law, in D. Vidas and W. Ostreng eds., *Order for the Oceans at the Turn of the Century*, The Hague: Kluwer Law International, 1999, p. 81.

negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. Any dispute not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration. From the above, the arbitral tribunal in the *SBT Case* held that "the ordinary meaning of these terms of Article 16 makes it clear that the dispute is not referable to adjudication by the International Court of Justice (or, for that matter, ITLOS), or to arbitration, at the request of any party to the dispute. The consent in each case of all parties to the dispute is required."[10] Moreover, Article 16.2 provides that failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above. Thus, the arbitral tribunal concluded that "the intent of Article 16 is to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute."[11] Therefore, the dispute does not satisfy the conditions provided in Article 286 of the UNCLOS, so that the arbitral tribunal does not have compulsory jurisdiction over the dispute. However, controversy does exist for the conclusion, which will be discussed later herein.

In addition to the jurisdiction-related dispute, the *SBT Case* is also concerned with a major issue, that is, what is the best approach when a dispute involves scientific uncertainties. Kwiatkowska, Deputy Director of Netherlands Institute for the Law of the Sea, said that if the *SBT Case* finally enters the stage of the trial on merits, its impact will undoubtedly be more far-reaching and become a milestone just as the impact of the Fisheries Jurisdiction Case 1972/1974 of the International Court of Law on the development of the law on the modern fishing industry.[12] Despite this, the *SBT Case* has impacted impressively upon the development of the international maritime law, the fisheries law and the environmental law, and other substantive laws. During the hearing, Japan insisted that the substantive issue concerned is a scientific other than legal dispute. The claim was disaffirmed by

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10 SBT Award, para. 57, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

11 SBT Award, para. 57, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

12 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 292.

the arbitral tribunal, holding that the case involves both scientific elements and the interpretation and applicability of law. However, for the legal dispute involving scientific elements, the thinking has gone beyond the case, such as:[13]

1. What makes good or best scientific evidence?

2. Is it appropriate to settle a scientific dispute by using international judiciary or arbitration?

3. Is it appropriate to apply the precautionary approach?

4. What on earth is the most effective approach to the settlement of disputes?

These questions should intrigue our deeper thinking and are brand new areas to research for the international judiciary. Similar disputes are expected to continue to emerge in the areas of maritime law or environmental law.

III. Significance of the *SBT Case*

For its procedural and substantive complexity, as well as many other political, economic or diplomatic elements involved, the *SBT Case* has led to a debate and attention far more than that which the case should have. Its settlement provides a good example how to use legal means in the settlement of international disputes. Each of the parties to the dispute had a powerful team of international legal counsels, who elaborated on the international law issues concerning the UNCLOS and presented a number of quite innovative ideas. The 72-paragraph judgment analyzed the ins and outs of the case, representing the latest developments of international maritime law and contributing positively to the perfection of the dispute settlement mechanism under the UNCLOS. As far as this author sees it, the following aspects should have our particular attention:

1. The *SBT Case* Demonstrates the Role of International Arbitration in the Settlement of International Disputes

Professor Kwiatkowska believed that if a dispute is submitted for arbitration to an independent third party, the authoritativeness of the independent party will

13 See Caroline E Foster, The "Real Dispute" in the Southern Bluefin Tuna Case: a Scientific Dispute? *The International Journal of Marine and Coastal Law*, Vol. 16, No. 4.

be helpful for the losing party to accept any unfavorable decision to it.[14] In the *SBT Case*, the tribunal of five arbitrators headed by Stephen M. Schwebel, former president of the International Court of Justice, was highly authoritative, which lessens the disappointment of Australia and New Zealand with the tribunal's rejecting its jurisdiction over substantive issues.[15] Moreover, as the tribunal affirmed most of the conclusions of the ITLOS ruling, it certainly would lead to the losing party accepting the tribunal's decision more easily. Also, for the authoritativeness of the tribunal, Japan, as the winner, would be more confident with the settlement of disputes by an international third party, so that it would become more constructive in attitude in the future. Also to a certain extent, the arbitral award balanced the power of the parties as of the decision of the ITLOS. The balance will be helpful to the successful settlement of the dispute finally, considering that the substantive issues of the case remaining for the parties to negotiate and resolve.

More importantly, the *SBT Case* fully reflects the role of international arbitration as *preventive diplomacy*, that is, international arbitration is not only a legal means to settle international dispute in and by itself, but also works as pressure mechanism to push the settlement of the dispute in a broader sense. Bill Mansfield, barrister and one of the international legal counsels for Australia and New Zealand, presented his comments after the case ended, stating that the final disposition should not be simply viewed as one party winning or the other party losing.[16] He said that on a few essential issues, the arbitral tribunal affirmed the ITLOS conclusions, which have far-reaching legal impact upon the case and the development of the entire international legal system for fisheries. Second, after reconsidering the entire development process of the case, Mansfield said that apparently it is Japan's unilateral pilot fishing that directly led to the proceedings. However, in the ground the problem was that Australia, New Zealand and Japan differed seriously in their opinions about the SBT stocks and their future, and as a

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14 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 283.

15 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 283.

16 Bill Mansfield, The Southern Bluefin Tuna Arbitration. Comments on Professor Barbara Kwiatkowska's Article, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 3, p. 361.

consequence, the CCSBT unable to operate effectively. Although it was not clearly presented in the request of Australia and New Zealand, nor it was clearly required in the ITLOS ruling that Japan should work proactively with Australia and New Zealand in the CCSBT in order to determine the total allowable catch and the quotes for each of the countries, the over-a-year arbitration procedure obviously indicates a more constructive atmosphere in the CCSBT, with progress in a few essential matters. In particular, a number of non-members to the CSBT showed their intention to accede to the CSBT, and a scientific research program with the participation of independent external scientists has been agreed to unanimously.

Although it is probably for Mansfield, as the attorney for the requestor countries, to defend the requestors and speak for their positions, notably arbitration, as a means to settle disputes, has changing functions other than the simple legal meaning. Often the peaceful settlement will only be possible by resorting to a number of means. In the arbitration procedure, the parties have the chance to check the facts, state their opinions and present scientific arguments. An authoritative third party can, by asking for responses or prescribing provisional measures or making decisions, prevent the dispute from going even worse, pushing the parties to resolve their difference in a more faithful and constructive manner, and realize "preventive diplomacy." In the above sense, Australia and New Zealand has sufficiently tapped into international arbitration.

Moreover, the *SBT Case* broke through the confidentiality principle in arbitration, which was unprecedented. The arbitral award, as well as written information and oral responses, were published on the Internet, and even the public was allowed to audit in trial. Due to the unparalleled exposure, the arbitration procedure and the parties to the dispute were placed under the pressure from opinions of the world. To a certain extent, this was helpful to the fair resolution of the dispute. On the other side, for the SBT population on the verge of extinction, the arbitration in and by itself increases the public awareness of the area and becomes effective publicly in the conservation of marine environment and resources.

2. The *SBT Case* Bears Far-Reaching Significance for the Development of the Compulsory Dispute Settlement Mechanism under the UNCLOS

As stated, the dispute settlement mechanism specified in Part XV of the UNCLOS is extremely intricate, with some clauses being principles in nature. Therefore, the development of the mechanism is reliant upon the application and interpretation of the UNCLOS in international judiciary practice. As an authoritative institution, the International Court of Justice or the international

arbitration tribunal, though it does not have the rule of precedents, often sees that its interpretations in leading cases are respected in similar cases later.

One contribution of the *SBT Case* is that it confirms the relationship between the UNCLOS and other related special treaties. It recognizes that there is support in international law and in the legal systems of States for the application of a *lex specialis* that governs general provisions of an antecedent treaty or statute. However, in the system of the UNCLOS, the Convention and other related or derivative special treaties for fisheries or environment run parallel with each other in their applicability. A dispute, as soon as it forms, can be subject to a special treaty or the UNCLOS. It is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute.[17] For this reason, the arbitral tribunal held that the dispute being subject to the CSBT does not exclude the applicability of the compulsory dispute settlement mechanism specified in the UNCLOS.

The second contribution of the *SBT Case* is that it examines the limitations and exceptions to the compulsory dispute settlement mechanism under the UNCLOS in a meticulous manner. The limitations and exceptions, except those specified in Section 3, Part XV of the UNCLOS, have seldom been touched upon in academics or court hearing.[18] They are significant for practice.

During the hearing, in addition to the CSBT, Japan, against which the request was submitted, presented 107 special treaties that it believed contained provisions to exclude the applicability of the compulsory dispute settlement mechanism under the UNCLOS. These special treaties were concerned with sea fisheries, ocean dumping and oil pollution, etc.[19] Although some of the special treaties are irrelevant to the UNCLOS, the decision of the arbitral tribunal has created a quite authoritative precedent for the relationship between any treaty that contains similar provisions on the settlement of disputes as in the CSBT and the UNCLOS in their applicability. Also it reflects such a view of the arbitral tribunal that Part XV of the UNCLOS "falls significantly short of establishing a truly comprehensive regime

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17 SBT Award, para. 52, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

18 Barbara Kwiatkowska, The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal, *The International Journal of Marine and Coastal Law*, Vol. 16, No. 2, p. 290.

19 Pleadings of Japan, Annex 47.

of compulsory jurisdiction entailing binding decisions."[20] Under the UNCLOS system, all special treaties should be deemed as compete, mature and self sufficient mechanism. The effectiveness of their dispute settlement mechanism should be respected. Also the party autonomy should be respected.

The opinion of the arbitral tribunal brings a concern - will the precedent invite challenges to the working of the compulsory dispute settlement mechanism? The UNCLOS system, like the WTO system, combines various treaties in a broad range. Its effective operation is dependent upon a concrete system to carry it out and a powerful dispute settlement mechanism to ensure the actions of the State parties are supervised under the UNCLOS. If State parties prescribe and agree to a dispute settlement procedure and exclude the jurisdiction of the international judiciary by separately entering into bilateral, multilateral or regional treaties, so that many disputes cannot be submitted to international arbitration for settlement, then it will be a loss to the UNCLOS as an integrate legal system and to the continuous development of maritime law. There are scholars who believe that the concern is never necessary. First, the arbitral award of the tribunal cannot work as a precedent. For similar cases that emerge later, the arbitral tribunal must study the situation of the specific case and interpret the wording of relevant special treaties, in order to determine the exclusion or not of the dispute settlement mechanism under the UNCLOS. It is fully possible for the arbitral tribunal to reach totally different conclusions. Thus, the impact of the *SBT Case* will be limited. Second, obviously the rule of law becomes even stronger in the entire international society. International judiciaries and arbitral tribunals play a bigger role in the settlement of international disputes, and to strengthen their jurisdiction has been widely recognized. It can be proved from the compulsory jurisdiction of the ICJ that gains more and more trust and from more international disputes that are submitted to court or arbitration by a party to the dispute unilaterally.[21] Moreover, it should be noted that even if they exclude the dispute settlement mechanism under the UNCLOS, a few special treaties under the maritime law system have provided for

20 SBT Award, para. 62, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

21 During the term of Schwebel in the office of president of the ICJ (1997–2000), 21 of the 23 cases submitted were raised unilaterally.

their own compulsory settlement procedures,[22] this practice being adopted more other treaties. After all, the marine area will continue to progress in the government of law.

3. Once Again, the *SBT Case* Raises the Public Interest in Scientific Disputes Legally

The *SBT Case* is more than an intricate procedure matter, but involves a few delicate issues in the conservation of marine resources. In addition to the jurisdiction, people are more concerned with the destiny of the SBT stocks. As the existing marine science fails to give a satisfactory answer, will law be able to do it and how? This is one of the areas focused on by scholars in maritime law or environmental law recently. Many scholars believe that as one of the contributions of the *SBT Case*, the decision of the ITLOS has indirectly established the legal status for the precautionary principle in the international management of sea fisheries, which is, however, with controversy.

In the hearing of the *SBT Case*, one of the charges that Australia and New Zealand raised against Japan was that the pilot program of Japan violated customary international law and the precautionary principle in particular.[23] For this, the ITLOS provided the parties to the dispute two questions: (1) As the CSBT is binding only upon its signatory States, will a non-signatory State be bound by the UNCLOS or any customary international law with respect to the SBT catching? (2) If the answer to the first question is "yes", what is the bound?[24] Undoubtedly the precautionary principle was within the consideration of the arbitrators. Judge Tullio Treves said that the precautionary principle seemed to be certainly incorporated in the concept of "provisional measures."[25]

When political and economic considerations are excluded, the *SBT Case* is concerned with the following issue: When marine fish stocks are seriously threatened or may not be recovered, if the best available evidence is insufficient to build accurate scientific data for assessment or control, then how should the law

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22 For example, the 1991 Madrid Protocol on Environmental Protection to Antarctic Treaty (Arts 18~20); the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Art. 32); the Convention on the Protection of the Marine Environment of the North-East Atlantic (Art. 32).

23 SBT Award, paras. 27~33, at http://www.worldbank.org/icsid/bluefintuna/main.htm, 12 December 2004.

24 SBT Oral Hearings, Vol. Ⅲ , 10 May2000.

25 SBT Provisional Measures, para. 34, at http://www.itlos.org/start2_en.html, 12 December 2004.

make good the scientific deficiency and prevent the resources from irreparable harm? This is the so-called precautionary principle. In fact, the precautionary principle can be viewed in such terms as "maximum sustainable yield" or "optimum utilization" in the UNCLOS. The principle is reaffirmed in a number of international maritime law documents that came later, such as Code of Conduct for Responsible Fisheries and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks in 1995. The *SBT Case* was the first case that came to the attitude of the international judiciary towards the precautionary principle. Although the ITLOS did not use the rule as a reason to prescribe the provisional measures, the wording and attitude of the judges show obviously that the rule did influence their judgments. As the precautionary principle becomes more influential, it is possible that for similar cases in the future, judges may make decisions using the theory rather than referring directly to the rule.

IV. Conclusion

The *SBT Case* was the first case that was heard by the arbitral tribunal constituted pursuant to Annex VII of the UNCLOS. It was also the first of its kind where the jurisdiction was rejected by the international arbitral tribunal. It is worthy of our exploration for the procedural and substantive issues. The arbitral tribunal made a detailed analysis of the dispute settlement mechanism specified in Part XV of the UNCLOS and finally reversed the decision of the ITLOS on the ground that the conditions provided in Article 286(1) were not satisfied. Despite the controversy, the final decision is certainly a milestone in the perfection and development of the compulsory dispute settlement mechanism in maritime law. In addition, the *SBT Case* involves the issues concerning the development of such substantive law as the maritime law and the environmental law, which will encourage more thinking from scholars and researchers in these emerging legal areas.

Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)

XIONG Liangmin *

I. Case Overview

Singapore and Malaysia, with the 1,400 meter-long Straits of Johor in between, are closely related to each other in geography, history and blood lineage. The waters of the Straits of Johor were delimited between the States in 1966. After its independence from Malaysia in 1965, Singapore began to reclaim the waters on its side of the Straits of Johor, increasing its territory by over 100 square kilometers. The reclamation work began at Tuas (which is west to the Straits of Johor) in June 2000 and at Pulau Tekong (which is east to the Straits of Johor) in November. The work raised strong dissatisfaction from the neighbor. Since January 18, 2002, Malaysia notified Singapore for many times to protest against Singapore's reclamation work on the waters under the jurisdiction of Malaysia. But Singapore responded to say that the charge was baseless. On July 4, 2003, Malaysia notified Singapore that it would file for arbitration in accordance with the United Nations Convention on the Law of the Sea (UNCLOS). On September 5, Malaysia requested provisional measures against Singapore before the International Tribunal for the Law of the Sea (ITLOS). The ITLOS rendered its judgment on October 8, 2003.

Malaysia argued that the action of Singapore had impacted adversely upon its shipping and fishermen's income, violated its territorial sea, and caused irreparable harm to the adjacent marine environment. On September 5, 2003 when the parties were still seeking for international arbitration on the land reclamation work, Malay-

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sia filed an application at the ITLOS, requesting that: Singapore shall immediately cease its reclamation work at Pualu Tekong east to the Straits of Johor and Tuas west to the Straits of Johor; Singapore shall supply Malaysia with full and complete materials on its existing and planned actions against Malaysia; Singapore shall provide Malaysia with sufficient opportunity so that the latter can assess the reclamation work and its potential impact; and Singapore shall agree to negotiate with Malaysia on any pending issues.

Quite contrary to the above, Singapore argued by insisting that the negotiation had begun between the States on the 13 and 14 August 2003. Article 283 of the UNCLOS provides that States in dispute shall reach a solution through negotiation before they may resort to legal proceedings. Regarding the dispute, Malaysia neither negotiated with Singapore in a sufficient manner nor tried to settle it through negotiation. Instead, it stopped the negotiation after only one meeting with Singapore, and took preventive legal action by bringing the issue before the ITLOS unilaterally. In that doing, it breached the relevant provision of the UNCLOS. From the above, Singapore requested the ITLOS to order that Malaysia shall, pursuant to the international law, return to the negotiation table and seek for a peaceful settlement before it may resort to legal proceedings.

In addition, Singapore stated that Malaysia had failed to prove, pursuant to the relevant international law, that it was necessary for it to take the preventive measures in order to avoid possible irreparable damage to it between the date of hearing and October 9. Malaysia also failed to prove that the damage that it might sustain prior to the judgment was irreparable. Also the international arbitral tribunal was not constituted until October 9, which meant that the tribunal did not have the due authority to enforce the provisional measures.

Moreover, Singapore indicated that the charge that Singapore's reclamation work violated the territorial sea of Malaysia was inconsistent with the bilateral treaties between the States in 1927 and 1995. Malaysia, though it claimed the ownership of the territorial sea at the so-called "Point 20," did not have jurisdiction over the territory concerned in the reclamation work of Singapore. Therefore the provisional measures that it requested were baseless.

II. Order [1]

1 At http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=12&lang=en, 28 January 2005.

The 23 judges from the ITLOS ruled unanimously that Singapore shall win the case; the request of Malaysia to stop Singapore from reclaiming the sea at Tuas (which is west to the Straits of Johor) and at Pulau Tekong (which is east to the Straits of Johor) was dismissed; Singapore might continue with the reclamation during the period that the two States seek for international arbitration over the reclamation work.

After hearing, the ITLOS prescribed:

Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:

(a) establish promptly a group of independent experts with the mandate

(i) to conduct a study, on terms of reference to be agreed by Malaysia and Singapore, to determine, within a period not exceeding one year from the date of this Order, the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation;

(ii) to prepare, as soon as possible, an interim report on the subject of infilling works in Area D at Pulau Tekong;

(b) exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works;

(c) implement the commitments noted in this Order and avoid any action incompatible with their effective implementation and consult with a view to reaching a prompt agreement on such temporary measures with respect to Area D at Pulau Tekong, including suspension or adjustment.

The ITLOS unanimously directs Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts; and decides that Malaysia and Singapore shall each submit the initial report referred to in Article 95, Paragraph 1, of the Rules, not later than 9 January 2004 to this Tribunal and to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise.

III. Points of Dispute

1. One of the issues concerned in the case is whether the international tribunal of arbitration that is organized pursuant to Annex VII of the UNCLOS has jurisdiction over the dispute.

Article 283 of the UNCLOS expressly provides for the duty of the State parties to exchange views. It states that "1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement." Regarding the exchange of views between the State parties, Article 286 also states that "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."

In the *Case concerning Land Reclamation*, the experts from Singapore and Malaysia met on August 13 and 14 and exchanged their documents at the end of July. That was the beginning of consultation when the parties were examining the other parties' documents. As the exchange failed to achieve any positive result, Malaysia did not have the duty to continue with the exchange of views with Singapore. Moreover, the parties had not started to negotiate until the procedure to establish the arbitration tribunal was started. Malaysia stated expressly that the negotiation would not prejudice its right to request arbitration by an arbitration tribunal organized pursuant to Annex VII of the UNCLOS or its right to request the ITLOS to provide provisional measures. As shown, in terms of law, Malaysia was entitled to bring the case before the ITLOS and request and order that Singapore shall suspend the reclamation work during the international arbitration, in accordance with the UNCLOS. As the dispute is within the scope of arbitration by an arbitral tribunal constituted under Annex VII of the UNCLOS, this arbitral tribunal shall have jurisdiction over the dispute.

2. The second issue is whether the ITLOS is competent to prescribe provisional measures.

Singapore indicated that the arbitral tribunal would not be constituted until October 9, 2003, considering Malaysia's request to the ITLOS for provisional measures to stop Singapore from continuing with the reclamation work. This made it unnecessary for the tribunal to prescribe provisional measures prior to the constitution of the arbitral tribunal.

Article 287(1) of the UNCLOS provides that a state shall be free to choose (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. The ITLOS is nothing more than one of the many compulsory procedures that lead to binding judgments pursuant to the UNCLOS. A state party may choose, at any time and in writing, the ITLOS or any other dispute settlement procedure, such as the International Court of Justice or an arbitration tribunal. Moreover, Article 290(5) of the UNCLOS provides that "if a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, Section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision." In this way, the power to prescribe provisional measures may be exercised by the ITLOS before the arbitral tribunal is constituted. From this, the ITLOS found that "The ITLOS can prescribe provisional measures pending the constitution of an arbitral tribunal."

3. Whether the facts that Malaysia provided satisfy the conditions for the prescription of provisional measures and whether any provisional measure should be taken against Singapore.

Article 290(5) of the UNCLOS provides that "…any tribunal… may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires."

In the *Case concerning Land Reclamation*, however, Malaysia was unable to prove the urgency or any other similar risk of irreparable harm that the reclamation work might lead to the environment or ecology of Malaysia. For this sake, the ITLOS does not consider it appropriate in the circumstances to prescribe provisional measures with respect to the land reclamation by Singapore in the sector of Tuas. Singapore may continue with the reclamation work at the Straits of Johor, but must control such work to its own side of the Straits. Moreover, the ITLOS stated that Malaysia and Singapore must jointly establish an independent expert group to monitor the work. Singapore must ensure that the reclamation work will not damage the interests of Malaysia or the marine environment of the Straits of Johor. Therefore, the ITLOS required that the parties shall establish a mechanism for the exchange of views for the information and impact assessment of

Overview of the Workshop on Historic Waters and Archipelagic Regimes

The Workshop on Historic Waters and Archipelagic Regimes was held jointly by the Center for South China Sea Studies of Hainan Province (CSCSS)[1] and the Center for Oceans Policy and Law of Xiamen University (COPL) on June 4, 2004. As early as in 2003, the COPL was commissioned by the CSCSS to conduct studies on historic waters and the archipelagic regime. In the past one year, one doctoral student and three postgraduate students of the COPL, led by Professor Kuen-chen FU, began to collect materials and engaged in studies for the two topics. They have now written works of hundreds of thousands of words. Their achievements will play a positive role in solving the problem with the South China Sea between China and other countries concerned from the perspective of international law. Now the research studies are summarized in the following:

I. Historic Titles and Historic Waters

First, the report reviews the origin of the term "historic title". It argues that the historic title is "an ancient title, which has long been generally accepted to be a self-sufficient right." It defines the historic title as "a right that is generated or solidified through prescription or tacit acquiescence, or a right that has been accepted in law through long and continuous possession."

Second, the report analyzes the development of the concepts of historic tile and historic waters by looking into the relevant provisions of the Convention on the Territorial Sea and the Contiguous Zone 1958, and the reports of the United Nations Secretariat on the regime of historic waters in 1957 and 1962. In particular, it discusses the impact of the Third United Nations Conference on the Law of the Sea. It reviews, one by one, the proposals of the participants in the Conference regarding historic title and historic waters, as well as related provisions in the final

1 In July 2004, with the approval from the State Council, the CSCSS was formally renamed as the Institute for the South China Sea Studies of China (ISCSS).

draft of the United Nations Convention on the Law of the Sea 1982 (UNCLOS).

Third, the report highlights the legal status of historic waters in the international law of the sea. It begins by introducing different schools on historic waters and goes on to explore the legal nature of historic waters through international judicial practice, including the cases concerning *Fisheries (United Kingdom v. Norway)*, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*, *Territorial Sovereignty, Scope of the Dispute and Maritime Delimitation (Eritrea/Yemen)*, *Dispute of Peter the Great Bay (Russia v. Japan)*, and *Arctic Archipelago and Northwest Passage (Canada v. the United States of America)*.

Fourth, the report analyzes the constituent elements in law of historic waters. It states that the most authoritative international document has been the report of the United Nations Secretariat made in 1962 for the historic water regime. However, in general, the issue does not have a unified international standard. It indicates that considering its long history and situation. China should focus more on historic evidence and historic usual practice as the core elements in substantiating its historic titles. It opposes to the school that deems the "attitude of foreign countries" as a required constituent element for the generation of historic titles or historic waters.

Fifth, the report touches upon the historic waters and historic titles of China in the South China Sea. It argues that the internal waters of the U-shaped line [2] are the historic waters of China. "Essentially the historic title of China within the U-shaped line is a preferential right in terms of the conservation and utilization of the biological resources, the construction and management of man-made islands, facilities and structures, the research on the sea, the enforcement of law by the police, the military usage, the delimitation of navigation channels, and the pollution control of certain waters."

In light of the historic interests of the surrounding countries within the U-shaped line, as well as how to coordinate between such interests and the historic title of China, the report remarks that "Vietnam, on the basis of historical evidence, can claim its historic interests and enjoy preferential rights in trade, military movement, hunting for robbers and fishing. The Philippines, Thailand and

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2 There are 9 non-continuous baselines of China in the South China Sea, which are connected to form a huge "U". Thus they are called the "U-shaped line."

Cambodia only have partial interests in navigation and trade. The other countries do not have any historic interests." From their relationship with China in the old days, all of their historic interests came into being under China's dominance over the region. Their preferential rights are never a match to China which owns these historic waters.

Last but not least, the report studies the relationship between the historic title of China and Article 123 of the UNCLOS. It concludes that the South China Sea can be divided into three classes.

It points out that although Article 123 provides for the cooperative duty of countries that surround an enclosed or semi-enclosed sea, the provision can never be applied equally to the entire region of the South China Sea from the standpoint of China, considering the different nature of the internal water from the external waters of the U-shaped line. China has sufficient evidence to prove its sovereignty over the islands in the region and its historic title within the U-shaped line. Despite that no specific rules are set out in Article 123 with respect to the cooperation in different areas of enclosed or semi-enclosed seas, it can be seen that historic titles are respected and protected from the context and the spirit. As China has argued for its historic title within the U-shaped line, the historic title should be respected in the international cooperation for the internal waters.

On the basis of the above, regarding the legal status of the waters of the South China Sea, the report adopts the three-hierarchy theory created by Professor Kuen0-chen FU from China:[3]

Level 1: For the entire semi-enclosed sea, the international cooperation should proceed in accordance with Article 123 of the UNCLOS.

Level 2: For the internal waters within the U-shaped line, which are historic waters of China, China should have the preferential right for the conservation and utilization of the biological resources, the construction and management of man-made islands, facilities and structures, the research on the sea, the enforcement of law by the police, the military usage, the delimitation of navigation channels, and the pollution control of certain waters. For these waters, the international cooperation should be led and coordinated primarily by the country that has the historic title.

Level 3: For the islands on the South China Sea and the territorial seas

3 Kuen-chen FU, *Legal Status of the South China Sea*, Taipei: 123 Information Company, 1995, pp. 208~209. (in Chinese)

extending 12 nautical miles from the baseline, the sovereignty over them expressly belong to China according to the UNCLOS and other international rules. As a result, the international cooperation must be conducted pursuant to the national law of China.

II. Archipelagic Regime in the International Law of the Sea

First, the report reviews the origin of the issue with archipelagoes. Archipelagoes have become a subject of international law as a result of the territorial sea baseline which can be measured either on the basis of individual islands or the entire archipelago. If the first method of measurement is used, extensive large areas of high seas would appear between islands, to affect the island country adversely in its national defense, economic development and routine management. If the second method is adopted, the extensive waters of the sea that are conventionally deemed as high seas would be brought under the jurisdiction of the island countries, to affect negatively international navigation and pelagic fishing. The archipelagic regime has been set up to coordinate the conflicting interests.

Second, the report looks into the growth of the archipelagic regime in the international law of the sea. The investigation of archipelagic issues conducted by Hague conference for compiling the international law in 1930 found that no claims for archipelagic regimes had been acceptable to the international society in the early 1920s. Despite this, most countries understood the different roles of individual islands and island chains in the territorial sea delimitation. At that time, the dispute was on the distance between islands or between an island and the continent which could make the island chain become a wholly-owned territorial sea. The distance issue was left unresolved, as the countries failed to reach an agreement on the width of their territorial seas. Moreover, they distinguished between coastal islands and oceanic islands. International law scholars mostly focused on how to apply the straight baseline method to the delimitation of coastal islands, before the First United Nations Conference on the Law of the Sea. Despite their various and possible opposite ideas, they certainly agreed that for costal islands, the straight baseline method should be used to measure the territorial sea of a country. But, they almost never touched upon the oceanic islands of continental countries and island countries. This is because before the middle of the 1920s, almost all oceanic islands

and island countries were possessed by continental countries by means of titles or colonies. Island countries, whose territory consists of islands, did not come into being in the political world until the anti-colonist movement began. Thus, before the First United Nations Conference on the Law of the Sea, the practice of states was mostly on coastal islands, with Norway and Finland being the typical countries. Among island countries, Philippines and Indonesia were typical, as they won independence earlier. They developed their legislative practice on islands before the First United Nations Conference on the Law of the Sea. However, the practice did not enter the mainstream and was opposed to and boycotted by major oceanic powers. International public law scholars turned to island countries in the 1960s and 1970s, particularly during the Third United Nations Conference on the Law of the Sea. Moreover, all the developing countries, especially those with islands, did many more beneficial studies to stimulate the growth of the archipelagic regime.

Third, the report analyzes the island-related provisions of the UNCLOS. It says that "First, from the provisions of Part IV, the Convention has satisfied the need of island countries. Also it reflects consideration for the international society. Generally speaking, the island baseline is gentler than the straight baseline. Where the straight baseline is applicable, the waters within the baseline are internal waters, for which foreign countries can only claim innocent passage in accordance with Article 8.2 of the UNCLOS. Where the island baseline is applicable, the waters within the baseline become archipelagic waters, for which a foreign country can claim innocent passage, as well as the right of archipelagic sea lane passage, the traditional right of fishing and other activities (in the case of a bordering foreign country), and the right to maintain or replace the existing submarine cables. In sum, the UNCLOS was the result of balancing the interests among countries. It has done a good job in this respect."

Forth, the report analyzes the regime of oceanic islands owned by continental countries. The UNCLOS provides for a different legal system for oceanic islands of an island country from that for a continental country. One of the causes that have led to the current situation is that in the Third United Nations Conference on the Law of the Sea, the issue with the oceanic islands of continental countries was not deemed as important as that of island countries. Also continental countries were not as keen as island countries in claiming their rights to oceanic islands.

The report goes on to look at the oceanic island-related practice of continental countries including Ecuador, Denmark, Norway and Spain, and on that basis, explores the applicability of the archipelagic regime to Xisha Islands or Nansha

Islands of China.

It points out the feasibility and necessity of applying the archipelagic regime to oceanic islands of continental countries. For doing that, it sets out three reasons: 1. The reason that an island country may use in connection with the archipelagic regime can be equally useful to a continental country for its oceanic islands. As the two island types face the same challenges, their solutions should be the same. 2. The international law would be made unfair in fact, if the archipelagic regime were not applicable to the oceanic islands of continental countries. 3. As the UNCLOS only provides for the archipelagic regime for island countries, as long as the straight baseline delimitation of a continental country for its oceanic islands is recognized by other countries, it should be accepted as effective and legitimate according to the customary international law.

Finally, the report proposes that "when the time is right, China may work with other countries facing the same challenge to revise the relevant provisions of the UNCLOS and to extend the applicability of the archipelagic regime to the oceanic islands of continental countries."

Summary of the Expert Workshop for Underwater Cultural Heritage Protection

The Expert Workshop for the Underwater Cultural Heritage Protection was unveiled at Xiamen University on June 5, 2004, which was hosted by the Center for Oceans Policy and Law of the university. The workshop was held under the Convention on the Protection of the Underwater Cultural Heritage adopted by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) on November 20, 2001. The participants were from the State Administration of the Cultural Heritage, the National Museum of China, the Center for the South China Sea Studies of Hainan Province, the Institute of Archeology of Fujian Province, Xiamen Museum, and the Department of History and the Center for Oceans Policy and Law of Xiamen University. They discussed the *status quo*, challenges and possible solutions to the underwater cultural heritage protection in China, as well as the legislative difference between, and the advantages and disadvantages of, the Convention on the Protection of the Underwater Cultural Heritage and the Regulation on the Protection of the Underwater Cultural Heritage of the People's Republic of China. The workshop is summarized in the following.

I. Status Quo and Challenges for the Cultural Heritage Protection in China

Regarding the *status quo* of the cultural heritage protection in China, He Shengzhong, Chief of the Section for Policy and Regulation of the State Administration of the Cultural Heritage, said that "we do not know what we have got, and our input is too little in this area." Similar to the land-based heritage, the underwater heritage has been the victim of indifference, negligence and pillaging. The heritage administration remains insufficient in awareness, regime and power. The underwater heritage is difficult to protect, placing higher demand and making it seem like a luxury. He believed that for the underwater heritage protection, the key was the awareness to protect it from damage and stand fast against commercial salvage. He said that China must accede to the Convention on the Protection of the

Underwater Cultural Heritage and by doing that, absorb the scientific methodology and advanced ideas of other countries in this respect. He also mentioned the significance of increasing financial input and creating a good social environment for the protection of the underwater cultural heritage.

Wu Shicun, Director of the Center for the South China Sea Studies of Hainan Province, presented the work to protect the cultural heritage under the South China Sea. He emphasized the loss of cultural relics and the shockingly rampant robbery in the area. For the dispute among countries around the region over the sovereignty of some islands and waters, a number of the cultural relics have remained as historical evidence, which is protected both as cultural heritage and a means to declare a country's sovereignty. Regarding the disputed cultural heritage in the region, Wu suggested that that "the dispute could be shelved and the countries involved could agree NOT to exploit it (the cultural heritage)."

Wu Chunming, Professor of the Department of History of Xiamen University, introduced some sunken ships and cargos of China that are valuable in historical or cultural terms and that are dispersed on the ocean floors around the world.

II. Convention on the Protection of the Underwater Cultural Heritage vs. Regulation on the Protection of the Underwater Cultural Heritage

Kuen-chen FU, Professor of the Center for Oceans Policy and Law of Xiamen University, presented "The Convention on the Protection of the Underwater Cultural Heritage of UNESCO 2001, and Its Relationship with China".[1] He gave an overview of the Convention from the perspective of international law. He pointed out two principles in the protection of the underwater cultural heritage as specified in the Convention – no commercial exploitation and the *in situ* preservation. He also spent time explaining the conflicts between the Convention and the Regulation on the Protection of the Underwater Cultural Heritage of China. Professor Fu said that China tries to classify the power to manage the cultural heritage according to the country of origin. But this is not the way that the Convention sets out in its provisions. Expectedly dispute will arise from other countries in the protection and

1 A Critique of the Convention on the Protection of the Underwater Cultural Heritage of the UNESCO 2001, in Kuen-chen FU, *Studies on Maritime Law*, Xiamen: Xiamen University Press, 2004, pp. 1~20. (in Chinese)

salvage of the underwater cultural heritage that has its origin in China. Regarding the issue, China should, on the principles of equality and consistence and pursuant to Article 149 of the Convention, claim the preferential rights and determine the ownership of sunken ships or cultural heritage that originated from China in accordance with the Regulation on the Protection of the Underwater Cultural Heritage.

Zhang Wei, Director of the Center for Underwater Archeological Studies of the National Museum, updated the meeting on the amendments to the Regulation on the Protection of Underwater Cultural Heritage (hereinafter "the Regulation"). In 2004, the State Administration of Cultural Heritage required an amendment to be made to the Regulation. The amendment incurred the following issues:

1. Jurisdiction. The existing Regulation failed to effect the jurisdiction that the Convention grants with respect to the underwater cultural heritage in the contiguous zone, the exclusive economic zone and the continental platform.

2. The assessment of the cultural heritage. The provisions in the Convention were different in this respect.

3. The scope of the cultural heritage owned by the State that the Regulation provided for was larger than that provided for in the Law on the Cultural Heritage, which is inconsistent with the Legislative Law.

4. The Regulation was required to be more operable.

5. The management regime was ambiguous and inflexible in the Regulation. An administrative department and a working system were required to take the whole situation into account and plan accordingly.

Li Jian'an, Chairman of the Institute of Archeology of Fujian Province, indicated that the participation of legal experts is insufficient for the current protection of the underwater cultural heritage in China. They should play their role in the work.

Peng Jingyuan, Associate Research Fellow of Xiamen Museum, suggested that Xiamen University should have a bigger role in the protection of the underwater cultural heritage, considering its geographical location and academic advantage.

During the open discussion, the participating experts and the postgraduate or doctor-degree students from the Center for Oceans Policy and Law of Xiamen University discussed the illegal salvage and the smuggling, the commercial salvage and the protection, the training of professionals for the protection, and the special significance and challenges facing the protection of the cultural heritage in the Taiwan Straits.

Finally, the participants agreed that this multi-departmental and multi-disciplinary workshop was the first of its kind started and held by legal experts in the protection of the underwater cultural heritage. The Center for Oceans Policy and Law of Xiamen University has contributed actively to the cause.

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