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EDITORIAL BOARD

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卷首语

本期《中国海洋法学评论》重点为读者带来有关水下文化遗产保护的文章。

对古老的沉没军舰是否仍然享有国家豁免这个问题，国际法则没有明确的规定，法学界分歧也较大。学者林蓁将焦点放在中国和东盟国家在这个问题上的立法实践方面。虽然中国和东盟水域里都存在大量满足《保护水下文化遗产公约》水下文化遗产定义的军舰遗址，但其国内法完全没有涉及该问题，这些国家几乎面临无法可依的状态。为了保护此类特殊的水下文化遗产，中国和东盟国家需要及时填补关于军舰遗址保护的法律空白。

由于南海沿岸国之间争端不断，南海水下文化遗产的保护经常遭到忽视。从法律方面来说，南海水下文化遗产保护面临两大问题：一是可适用的国际法不足，二是南海沿岸各国的国内法规定不一致。作者巫晓发认为，缔结有关南海水下文化遗产保护的多边合作协议是一种可行的方法，并尝试拟定了该协议可能包含的条款，以及分析这些条款的法理基础。

此外，本期还探讨了国家管辖范围外海洋保护区的第三方效力问题，比较了中国和欧盟海上油气作业立法。

在国家管辖范围外区域建立海洋保护区的方式，已被多个全球性及区域性法律制度所接受。但这些制度缺乏系统性，没有形成一个和谐一致的统一整体，因此不清楚由部分国家建立的这类保护区是否对第三方具备约束力。作者段文以南极海域建立的 2 个保护区为例，探讨了海洋保护区的第三方效力问题。

随着海上油气开发活动逐渐增多，以及逐渐向深海推进，防范海上溢油已成为海洋环境保护的重要环节。为减少发生重大事故的风险并限制其影响，欧盟在 2013 年颁布了《海上油气作业安全指令》。作者杨苑比较研究了欧盟立法与我国立法为海上油气作业者设定的义务，得出结论认为，我国应统一并巩固有关海上油气作业安全的法律框架，并为作业者设置更严格的安全标准。

最后，本期收录了“远洋群岛法律制度和 21 世纪海上丝绸之路国际研

讨会”的会议综述，为读者整合了各位与会专家的集体智慧。本次会议围绕 2 个议题进行了交流和探讨：(1) 各国关于远洋群岛管理的法律与实践；(2) 群岛实践与中国。会议通过探索各国在远洋群岛方面的经验，为有效构建中国南海地区的群岛法律制度奠定了法理基础。

编辑部 谨识

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EDITOR'S NOTE

The current Issue of *China Oceans Law Review* focuses on the protection of underwater cultural heritage (UCH).

Regarding the question whether the ancient wrecks of warships can enjoy State immunity, no express rule could be found in international law, and considerable controversies on this issue can be seen among legal scholars. Dr. LIN Zhen presents readers with an article focusing on the legislations of China and ASEAN States on the issue under discussion. Although abundant remains of warships, which meet the definition of UCH under the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, are scattered in the territorial waters of China and ASEAN States, these States do not have internal laws addressing this issue. That is to say, China and ASEAN States have no legal rules to follow when facing existing and potential conflicts with respect to the ancient wrecks of warships. In order to protect such special UCH, China and ASEAN States need to fill in time the legal lacuna concerning the protection of the remains of warships.

Due to high-level disputes between the States bordering the South China Sea (SCS), the protection of UCH in the SCS is often overlooked. In relation to this, there are two primary legal issues concerning UCH protection in the SCS: insufficiency of applicable international laws, and inconsistency in the domestic laws of SCS littoral States. To settle such issues, Mr. Yodsapon Nitiruchirot proposes the conclusion of a multilateral cooperative agreement on UCH protection in the SCS and discusses possible provisions for such a cooperative agreement and their rationale.

Additionally, this Issue covers discussions on the third party effects of marine protected areas (MPAs) established in areas beyond national jurisdiction (ABNJ) and the legislations of China and the European Union concerning offshore oil and gas operations.

The establishment of MPAs in ABNJ has been accepted by many global and regional legal regimes. Due to the fragmentation of these regimes, however, it is unclear whether MPAs in ABNJ designated by a limited number of States

are binding on third parties. Mr. DUAN Wen discusses the third party effects of MPAs, by taking the two MPAs established in the Antarctic waters as examples.

With offshore oil and gas activities growing and moving to further and deeper waters, offshore oil spill prevention has become a significant component of marine environmental protection. To reduce the risk of major accidents and limit their consequences, the European Union issued the Offshore Safety Directive (OSD) in 2013. By providing a comparative study of the obligations for operators, Ms. YANG Yuan suggests that China unify and reinforce its legal framework for the safety of offshore operations while establishing higher safety standards for operators.

This Issue concludes with a summary of the "International Symposium on Distant Offshore Archipelago Management and the 21st Century Maritime Silk Road: State Practice and Lessons Learnt", which offers readers with the collective wisdom of the symposium participants. The participants primarily discussed and communicated with each other over the following topics: (a) national laws and practice in relation to distant offshore archipelago management; (b) State practice concerning distant offshore archipelago and China. The symposium, by exploring many States' experiences in distant offshore archipelago management, provides legal foundation for China's building of archipelagic regime in the South China Sea region.

COLR Editorial

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领海内满足水下文化遗产定义的军舰的法律地位：中国和东盟国家立法研究

林　蓁*

内容摘要：对古老的沉没军舰是否仍然享有国家豁免这个问题，国际法则没有明确的规定，法学界分歧也较大。《保护水下文化遗产公约》对水下文化遗产的定义包含了沉没100年以上的军舰遗骸。对于古老的沉船，安全因素就不再是一国排除其他国家管辖的理由，各国国家实践在这个问题上分歧较大，甚至一个国家在不同时期的做法也不尽相同。本文关注的焦点是中国和东盟国家在这个问题上的立法实践。虽然中国和东盟水域里都存在大量满足《保护水下文化遗产公约》水下文化遗产定义的军舰遗址，但其国内法完全没有涉及该问题。面对现存或潜在的有关古老军舰遗址的冲突，中国和东盟国家几乎面临无法可依的状态。中国迅速发展的水下考古事业和21世纪海上丝绸之路倡议的提出，都给该地区水下文化遗产保护管理提供了全新的契机，关于军舰遗址保护的法律空白也需要及时填补。

关键词：《保护水下文化遗产公约》　东盟国家　水下文化遗产保护

在国际法上，军舰毫无疑问拥有特殊的地位。军舰享有豁免权，除其船旗国以外任何国家都不能对其行使管辖权。根据《联合国海洋法公约》（以下简称“《海洋法公约》”），

> “军舰”是指属于一国武装部队、具备辨别军舰国籍的外部标志、由该国政府正式委任并名列相应的现役名册或类似名册的军官指挥和配备有服从正规武装部队纪律的船员的船舶。[1]

《保护水下文化遗产公约》（以下简称“《2001年公约》”）对水下文化遗产的

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1　《联合国海洋法公约》第29条。

定义做出了如下规定：

> “水下文化遗产”系指至少 100 年来，周期性地或连续地，部分或全部位于水下的具有文化、历史或考古价值的所有人类生存的遗迹，比如：（i）遗址、建筑、房屋、工艺品和人的遗骸，及其有考古价值的环境和自然环境；（ii）船只、飞行器、其它运输工具或上述三类的任何部分，所载货物或其它物品，及其有考古价值的环境和自然环境；（iii）具有史前意义的物品。

沉没超过 100 年的军舰也满足水下文化遗产的定义，那么这类沉船的法律地位如何？在此种沉船位于别国领海内时，应当如何协调船旗国和沿海国之间的利益？

一般来说，沉没不久的军舰，毫无疑问，依然享有豁免权。但对沉没超过 100 年的军舰是否仍然享有国家豁免这个问题，国际法则没有明确的规定，法学界分歧也较大，部分学者认为沉没军舰的豁免权不能无限制地持续存在。[2] 沉没于水下超过一个世纪之久的、腐烂的军舰残骸是否还能享有军舰的法律地位？如果沉没的军舰非常古老，例如 16 世纪的西班牙无敌舰队大帆船或是明朝水师的平底帆船，安全因素就不再是一国排除其他国家管辖的理由，那么这样的沉船是否还能享有普通军舰所享有的豁免权？各国国家实践在这个问题上分歧较大，甚至一个国家在不同时期的做法也不尽相同。

长期以来，学界并没有对中国和东盟国家有关这个问题的立法进行系统研究。学者论著多集中于对《2001 年公约》具体条文和欧美海洋大国立场的探讨。但近些年，中国水下考古事业的迅速发展和中国建设 21 世纪海上丝绸之路倡议的提出，为该地区水下文化遗产保护与管理提供了全新的契机，也使得对中国和东盟国家相关立场的研究愈加具有现实意义。

本研究将首先确定该领域是否存在相应的国际法规则，随后将对《2001 年公约》的有关规定作出简要分析，然后重点分析中国和东盟国家的相关立法，最后提出相应的立法建议。

一、习惯法规则

习惯法规则的形成有 2 个要素：国家实践和法律确信。从国家实践的角度来

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2 Willem Riphagen, Some Reflections on “Functional Sovereignty”, *Netherlands Yearbook International Law*, 1975; Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, 2003, p. 45.

看，各国，尤其是水下文化遗产大国，对待这一问题的态度并没有很强的一贯性。

美国水域内存在大量满足水下文化遗产定义的沉没军舰，同时，美国军舰的遗骸也遍布全球，例如在南海，我们还可以找到大量二战时沉没的美国军舰遗址。也许正是因为如此，美国在这个问题上常常表现出前后矛盾的态度，这一点我们可以从一系列相互冲突的美国国内判例看出。一般来说，对于美国领海内沉没的他国军舰，年代较早的美国法院判决很少支持船旗国对此类沉船的权利；[3] 相反的是，近几年的案例更倾向于尊重船旗国的权利，例如“梅赛德斯”号沉船案、“朱诺”号案等等。[4] 当然，这些判决背后的考虑也许是出于国际礼让，也可能是考虑到大量美国军舰沉没在别国的领海，出于维护美国国家利益的需求。[5] 一些美国官员认为，应当将不同时期沉没的军舰区别对待：沉没不久的军舰仍然享有豁免权，以维护各国的国家安全；而古老的沉船则推定已经为船旗国所放弃，不再享有国家豁免。[6] 然而，实践中则不尽如此。[7]

至于其他国家，英国政府的立场是坚定维护其对沉没在世界各地水域内的英国军舰的权利，不管这些军舰沉没时间为何。[8] 然而，在具体个案中，英国也不得不和沿海国进行协商，放弃部分主张。例如，对于沉没于南非领海的“伯肯黑德”号沉船，英国和南非都主张对沉船和船上装载的黄金享有所有权，两者协商的结

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3 Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, pp. 312~313, 332~333.

4 David J. Bederman, Rethinking the Legal Status of Sunken Warships, *Ocean Development & International Law*, Vol. 31, Issue 1~2, 2000, p. 100; 赵亚娟：《沉没的军舰和其他国家船舶的法律地位——以水下文化遗产保护为视角》，载于《时代法学》2005 年第 5 期，第 119 页 ; Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, p. 320; Jack Coker III, Colonial-Era Treasure Lost in the Murky Depths of Foreign Sovereign Immunity: *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, *Florida Coastal Law Review*, Vol. 15, p. 165.

5 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, p. 346.

6 Christine Nicole Burns, Finders Weepers & Losers Keepers, The Eleventh Circuit Denies Salvage Company’s Claims to a Sunken Military Vessel Found in International Waters in *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, *Tulane Maritime Law Journal*, Vol. 36, Issue 2, 2012, pp. 805~806; Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, pp. 349~350.

7 Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, p. 335.

8 Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, p. 336.

果就是双方分享打捞上来的黄金。[9]

总体来说，各国的国家实践缺乏一致性和连贯性，更遑论法律确信的存在，众多学者认为在这一问题上尚未形成国际习惯法规则。[10] 笔者也赞同这一观点。

二、《2001 公约》中有关条款的解读

《海洋法公约》是海洋法领域最重要的国际条约，但遗憾的是，《海洋法公约》中关于水下文化遗产保护的条款仅有第 149 条和第 303 条。这 2 条都没有直接涉及军舰遗骸，而其所涉及的海域范围也只有毗连区和国际海底区域。由于《海洋法公约》的不足，专门规制水下文化遗产保护的国际条约就成为必需。

在《2001 年公约》最初的谈判中，海洋强国极力阻挠《2001 年公约》对军舰残骸的适用，以维护对本国沉没军舰的专属管辖。较早一版的《2001 年公约》文本规定："本公约不适用于军舰、海军辅助舰船与在沉没时仅限于政府使用而非商用的其他船只或飞行器的遗迹及装载物品。"[11] 然而，将军舰这一重要的船舶种类排除，不利于对水下文化遗产提供最大程度的保护。为此，77 国集团做出了如今成为《2001 年公约》第 2 条第 8 款的提议：

> 本公约须与各国的惯例和包括《海洋法公约》在内的国际法相一致，任何条款均不应被理解为对有关主权豁免的国际法和国家惯例的规定的修正，也不改变任何国家对本国的船只和飞行器拥有的权利。[12]

该条一方面保证《2001 年公约》，特别是附件《规章》中所有保护水下文化遗产的措施和标准可以适用于符合水下文化遗产定义的军舰遗骸，另一方面也向海洋大国的诉求做出了妥协。

《2001 年公约》第 1 条第 8 款对"国家的船只和飞行器"做出了如下定义：

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9 Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa Regarding the Salvage of *HMS Birkenhead*, 27 September 1989.

10 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, pp. 371~372; Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 45; 赵亚娟：《沉没的军舰和其他国家船舶的法律地位——以水下文化遗产保护为视角》，载于《时代法学》2005 年第 5 期，第 119 页 .

11 Art. 2, Draft Convention on the Protection of Underwater Cultural Heritage, at http://unesdoc.unesco.org/images/0011/001159/115994Eo.pdf, 16 March 2018.

12 Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 50.

“国家的船只和飞行器”系指属于某国或由其使用，且在沉没时仅限于政府使用而非商用的，并经确定属实又符合水下文化遗产的定义的军舰和其他船只或飞行器。

《2001 年公约》第 7 条第 3 款对处于他国领海内的这类特殊沉船做出了安排：

缔约国在其群岛水域和领海内行使其主权时，根据国与国之间的通行做法，为了在保护国家船只和飞行器的最佳办法方面进行合作，要向是本公约缔约国的船旗国，并根据情况，向与该水下文化遗产确有联系，尤其是文化、历史或考古方面的联系的其他国家通知发现可认出国籍的船只和飞行器的情况。

但对军舰遗骸的法律地位问题，《2001 年公约》第 7 条第 3 款的含义也不够明确。“国与国之间的通行做法”究竟指什么？究竟是指国际礼让之类的做法还是真正的国际习惯法？另外，正如许多学者指出的，关于通知船旗国的义务，《公约》英文文本所使用的词语是“should”，而非国际条约描述缔约国义务时所通常使用的“shall”这个词。这很可能表示《2001 年公约》并没有强加给沿海国通知的义务。[13] 这样模糊的措辞，可能说明了公约起草者不愿对是否存在有关古老军舰遗址法律地位的习惯法规则这一问题表明自己的态度。[14]

正如很多学者指出的，实践中，通知的义务也并非可以轻易实现。实际上，沉没 100 年以上的船舶，不经过相当程度的调查和打捞，很难确定其身份。在这些工作完成之前，很难确定并通知相关国家。另一方面，随着历史的变迁，船旗国本身地位很可能已经发生变化，可能不存在能够继承其主张的国家，或者原船旗国已经分裂，或与他国合并成为新的国家。[15]

因此，美国等海洋强国对《2001 年公约》的相关条款并不满意，认为《2001 年公约》没能为包括军舰在内的国家的船只和飞行器提供足够的保护。[16] 实践中，存在不少西方国家通过协议合作保护处于别国领海的军舰沉船遗址的例子，例如美国和法国关于“拉贝拉”号的协议。两国在承认法国所有权的基础上，共同采取

13 Tullio Scovazzi, Convention on the Protection of Underwater Cultural Heritage, *Environmental Policy and Law*, Vol. 32, Issue 3~4, 2002, p. 156.

14 赵亚娟：《沉没的军舰和其他国家船舶的法律地位——以水下文化遗产保护为视角》，载于《时代法学》2005 年第 5 期，第 119 页。

15 Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 43.

16 Sean D. Murphy, U.S. Concerns Regarding UNESCO Convention on Underwater Heritage, *American Journal of International Law*, Vol. 96, Issue 2, 2002, p. 470.

措施，为“拉贝拉”号遗址提供最大程度的保护。[17] 此外，澳大利亚和荷兰通过协商，同意共同保护澳大利亚水域内的几艘东印度公司古沉船。荷兰将其对这几艘沉船的所有权移交给澳大利亚，却保留了分享打捞起来的物品的权利，只要这种分享不致造成文物不可挽回的散佚。[18] 值得注意的是，也有些双边协议不承认船旗国的所有权，仅仅同意合作打捞沉船，平分打捞上来的文物，这可以理解为部分国家认为，古老的沉船已经为船旗国所放弃。[19]

另一个问题在于沉船所载货物的所有权归属。《2001 年公约》第 7 条第 3 款考虑了“与该水下文化遗产确有联系，尤其是文化、历史或考古方面的联系的其他国家”的权利。虽然有些国家声称沉船装载货物属于沉船一部分，[20] 但这一条款似乎指向了相反的方向。在“梅赛德斯”号沉船案中，秘鲁认为西班牙军舰上所装载的货物来源于秘鲁，和秘鲁有着文化和历史的联系，[21] 而且秘鲁认为基于“禁止掠夺被占领土地”的原则，其权利优先于西班牙的权利。[22] 美国国内法院拒绝受理秘鲁的要求，认为自己不对此问题享有管辖权。法院认为秘鲁的声索日后会在别的场合（例如国际法院）得到解决。[23] 该法院并没有否认秘鲁的权利，相反，从某种程度上，反而承认了这种权利。

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17 Agreement between the Government of United States and the Government of the Republic of France Regarding the Wreck of *La Belle*, at http://www.gc.noaa.gov/documents/gcil_la_belle_agmt.pdf, 16 March 2018. 该协议第 1 条第 2 款规定，法兰西共和国未放弃或让渡“拉贝拉”号沉船的所有权，其将继续保留该沉船的所有权。第 2 条第 1 款规定，法兰西共和国不欲将“拉贝拉”号沉船运回本国领土。第 3 条第 1 款规定，法国国防部下属公共机构国家航海博物馆和遗产专员，应依据本协议，协商并达成一份有关“拉贝拉”号沉船管理（包括安保、存储、保存和保护）、研究、相关档案编制和展览的管理安排。

18 Agreement between the Netherlands and Australia concerning old Dutch shipwrecks, adopted 6 Nov. 1972, at http://www.austlii.edu.au/au/legis/cth/consol_act/hsa1976235/sch1.html, 16 March 2018. 该协议第 1 条规定，作为东印度公司财产和资产的继承人，荷兰将其对位于西澳大利亚州水域的几艘东印度公司古沉船及船上物品的所有权益和所有权转让给澳大利亚，澳大利亚应接受该等权益和所有权。第 4 条规定，澳大利亚承认荷兰继续对从本协议第 1 条中提及的沉船中打捞出来的物品，特别是具有历史价值及其他文化价值的物品，享有权益。

19 Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 48.

20 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, pp. 344, 349, 353.

21 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, pp. 359~360.

22 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, pp. 359~360.

23 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, p. 377.

三、中国和东盟国家立法

（一）中国的立法

在中国水域内，存在大量外国军舰遗址，这是近代中国饱受外国侵略的历史见证。在可辨认来源国的沉船中，既有满足 100 年标准的殖民势力的沉船，也有年代更近的侵华日军留下的军舰。那么如何对待这些沉船，就成为中国的主管机关面临的一个棘手问题。

中国在 1982 年通过了《中华人民共和国文物保护法》（以下简称“《文物法》”），随后在 1991、2002、2007 和 2013 年对《文物法》进行了多次修改。《文物法》为陆上文物和水下文物的保护制定了基本原则。上世纪 80 年代，面对愈加严重的水下文物盗捞问题，中国于 1989 年 10 月 20 日颁布了《中华人民共和国水下文物保护管理条例》（以下简称“《条例》”）。这是中国第一部有关水下文化遗产保护的专门法律，该法订立了水下文化遗产保护的基本原则，并对水下文化遗产的所有权和管辖权做了详细规定。

中国主张对领海内的所有水下文物享有所有权和管辖权，理论上也包含了所有满足水下文物定义的外国军舰遗址。根据中国的法律规定，即使沉没水下不满 100 年的沉船也可以满足水下文物的定义（《条例》第 2 条），所以甚至一些年代较近的沉船遗址也可以包含在内。问题在于中国是否对这些特殊的水下文物进行了特殊的安排。沉没在中国领海内的外国军舰的法律地位如何？中国政府是否有意给予这些沉船豁免权？《2001 年公约》谈判期间，中国没有就这个问题发表意见。[24]《文物法》和《条例》也没有直接和外国军舰遗址相关的条款。但随着中国水下文化遗产保护事业的迅速发展，这个问题已经引起了考古工作者的注意。

迄今为止，中国文物部门仅发掘过中国籍沉没军舰，并没有对任何外国军舰遗址进行过考古发掘，所以并未引起任何争议。事实上，中国的考古学家们也对这个问题心存疑虑，并不能确定是否可以对沉没 100 年以上的外国军舰遗址进行发掘，担心对此类沉船的发掘会损害别国的利益。

由于无论《文物法》还是《条例》都没有提及外国军舰遗址的法律地位，笔者仅能从少数涉及外国军舰的案例入手，分析中国政府的态度。近几年来，俄罗斯

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24 Synoptic Report of Comments on the Draft Convention on the Protection of the Underwater Cultural Heritage Made by Member States and Associate Member States of UNESCO and by Member States of the United Nations, Second Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage, UNESCO CLT-99/CONF.204/5, at http://unesdoc.unesco.org/images/0011/001160/116085eo.pdf, 12 September 2017.

一直试图找到日俄战争期间沉没于辽东半岛领海内的“彼得罗巴甫洛夫斯克”号。中国出于安全考虑，拒绝了俄罗斯的请求。[25] 很难说中国是否承认“彼得罗巴甫洛夫斯克”号享有国家豁免权，也很难判断中国是否承认俄罗斯的所有权，因为根据中国法律，处于中国领海内的沉船属于中国水下文化遗产的一部分。

另一案例就是中国对“阿波丸”号的打捞。二战期间，运载了大量锡、橡胶以及日本士兵的“阿波丸”号被美国海军的鱼雷击中，沉没在台湾海峡。20 世纪 70 年代，“阿波丸”号被打捞出水。然而负责发掘的是中国海军而不是水下文化遗产保护部门。[26] 严格地说，这一例子并不涉及沿海国和船旗国就符合水下文化遗产定义的军舰遗址所产生的矛盾，然而本案例依然对我们讨论的问题具有参考意义。中国海军回收了船只装载的锡和橡胶，并将打捞上来的私人物品转交给日本。一些日本学者声称“阿波丸”号是沉没时仅限于政府使用而非商用的国家船只，属于日本国家所有，未经日本同意，他国不得发掘。[27] 中方并没有解释打捞“阿波丸”号的原因，也没有解释这么做的法律依据。[28]

（二）东盟国家的立法

东盟国家水域内，存在大量从殖民时代到第二次世界大战期间沉没的军舰遗址。与此形成鲜明对比的是在东盟国家里，只有柬埔寨加入了《2001 年公约》。而且，东盟国家的法律很少提及领海内军舰的法律地位。实践中，东盟国家也很少就本国领海内这些遗址的保护和他国尤其是船旗国进行合作。

笔者努力从东盟国家的立法和实践中找出其对军舰遗址态度的蛛丝马迹。越南在其 2001 年通过的《文化遗产法》[29] 中规定：所有处于越南社会主义共和国陆地上、岛屿上、内水中、领海内、特殊海洋经济区或海床上的文化遗产都属于越南全体人民所有（第 6 条）。这一规定似乎表明越南并未对商船和军舰遗址做出区分。只要这些遗址处于越南水域中，越南就对其享有排他的管辖权和所有权。其 2005

25 At http://bbs.tiexue.net/post2_2946846_1.html, 16 March 2018.
26 At http://www.guancha.cn/history/2014_04_05_219875_s.shtml, 16 March 2018.
27 Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, p. 338.
28 如中国政府以安全为由进行打捞，那也是完全合理的，因为该沉船位于台湾海峡，很可能影响航行安全。至于船载货物，由于这些资源是日本侵略者从受害国掠夺的，所以日本理应不再对这些资源享有所有权。
29 Law on Cultural Heritage, Law #28/2001/QH10, at http://www.unesco.org/culture/natlaws/media/pdf/indonesie/indonesia_compilation_of_law_2003_engl_orof.pdf, 16 March 2018.

年通过的《水下文化遗产保护管理法令》也采取了类似的立场。[30]

菲律宾 2009 年《国家文化遗产法》也没有直接涉及这一问题。[31] 该法令第 7 条第 30(1) 款规定：所有菲律宾陆上或水下考古遗址中发现的文化财产都属于国家所有。根据该法，“文化财产”是指所有人为创造的体现某一民族或某一国家特性的造物，无论私人所有还是国家所有，亦无论可移动还是不可移动，物质遗产还是非物质遗产，包括教堂、清真寺以及其他宗教场所，学校、自然历史标本和遗址等等。因此，沉没的军舰可以归类为国家所有的文化财产。菲律宾国会尚待通过的 S.512 号法案，主张对领海内所有的文物享有所有权。[32] 而“文物”又包含“所有”沉没 100 年以上的“沉船遗骸”，[33] 似乎也包含了沉没 100 年以上的军舰。

马来西亚 2005 年《国家遗产法》受到《2001 年公约》的较大影响，不仅采用了《2001 年公约》对于水下文化遗产的定义，[34] 也试图遵循该公约的一些基本精神。[35] 然而，该法也没有明确提及国家船只的问题。在马来西亚，打捞法可以适用于水下文化遗产，这显然对水下文化遗产的保护是不利的。该法第 66(3) 条对水下文化遗产的归属做出了规定：

> 水下文化遗产的所有人，在能够证明其所有权的情况下，在支付了打捞费及其他费用后，可以依据遗产保护专员可能规定的条款与条件，在遗产保护专员得到该文化遗产 1 年内取得对该遗产的所有权。

由于不存在关于军舰遗址的特殊法律，一般法律规则将适用于这些满足水下

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30 Art. 4 of Decree no.86/2005/ND-CP of 8th July 2005 on Management and Protection of Underwater Cultural Heritage, at http://faolex.fao.org/docs/pdf/vie60607.pdf, 12 September 2017.

31 Republic Act No. 10066, An Act Providing for the Protection and Conservation of the National Cultural Heritage, Strengthening the National Commission for Culture and the Arts (NCCA) and Its Affiliated Cultural Agencies, and for Other Purposes, at http://www.lawphil.net/statutes/repacts/ra2010/ra_10066_2010.html, 16 March 2018.

32 Section 6, An Act Providing for the Protection and Conservation of All Objects [of] Underwater Cultural Heritage in Philippine Waters, at https://www.senate.gov.ph/lisdata/2395220626!.pdf, 12 September 2017.

33 Section 3, An Act Providing for the Protection and Conservation of All Objects [of] Underwater Cultural Heritage in Philippine Waters, at https://www.senate.gov.ph/lisdata/2395220626!.pdf, 12 September 2017.

34 “水下文化遗产”系指至少 100 年来，周期性地或连续地，部分或全部位于水下的具有文化、历史或考古价值的所有人类生存的遗迹，比如：(i) 遗址、建筑、房屋、工艺品和人的遗骸，及其有考古价值的环境和自然环境；(ii) 船只、飞行器、其它运输工具或上述三类的任何部分，所载货物或其它物品，及其有考古价值的环境和自然环境；(iii) 具有史前意义的物品。Art. 2, National Heritage Act 2005, at http://www.hbp.usm.my/conservation/laws/nationalheritageact.htm, 16 March 2018.

35 例如，《国家遗产法》第 66(6) 条建议原址保护应当是水下文化遗产保护最优先的选择，除非负责遗产保护的部长另有指示，遗产保护专员应当对这些遗产采取原址保护。

文化遗产定义的沉船遗址，包括沉没 100 年以上的军舰。因此，根据马来西亚法律，船旗国的允许并不是打捞该国军舰的前提条件。

印度尼西亚《1992 年 5 号有关文化财产的法令》第三章[36] 第 4 条规定："（1）所有文化财产受国家支配。（2）第（1）段规定的文化财产包括在印度尼西亚法定领土界限内发现的所有文化财产。"所以相同的问题再次出现：如果没有法条明确提及沉没的军舰，是否意味着既然军舰遗址也符合以上定义，那么这些遗址也属于受印尼支配的文化财产？没有任何证据可以表明印度尼西亚政府予以沉没在其水域内的外国军舰任何特殊地位。沉没在印尼水域内的美国军舰"USAT 自由"号已经成为了著名的潜水胜地，当地居民以部落的习惯法来管理这一遗址。[37]

（三）立法建议

总体来说，中国和东盟国家的国内立法都没有正面涉及满足水下文化遗产定义的军舰遗骸的法律地位问题。从现在仅有的资料来看，对于满足水下文化遗产定义的私人船只和军舰遗址，中国和东盟国家似乎并没有对两者做出区分。

虽然中国和大部分东盟国家都没有加入《2001 年公约》，但这些国家的立法似乎都愿意遵循《2001 年公约》的精神和基本原则。本地区部分国家的国内法也采用了《2001 年公约》制定的 100 年标准来定义水下文化遗产，因此可以适用 100 年标准来区分"古老"和"最近"的沉船。沉没 100 年以上的军舰应当视为水下文化遗产，而沉没不到 100 年的仍然享有国家豁免权，其发掘应当得到船旗国的同意方可进行。从现存的国家实践来看，沿海国和船旗国合作是保护这种沉船遗骸最为常见和现实的方法。一方面，实践中，沉没军舰船旗国在沿海国不予合作的情况下，难以实施任何有效的保护措施，也很难阻止沿海国进行打捞或采取其他行动。另一方面，从保护水下文化遗产的角度来说，船旗国和其他相关国家的协作无疑对保护这种特殊的水下文化遗产具有重要意义。这点对商船遗址的保护也同样适用。

中国和东盟海域范围内水下文化遗产的最主要威胁来自各种盗捞行为。从这一意义上说，商船和军舰的遗址面临着同样的命运。二战期间众多沉没于南海的军舰就成为了非法打捞的牺牲品。荷兰潜艇"HNMS O-16"号 1941 年沉没于马来西亚刁曼岛水域，目前受到了非法打捞的极大破坏，在荷兰议会引起了极大震

36 Law of the Republic of Indonesia Number 5 of the Year 1992 Concerning Items of Cultural Property, at http://www.unesco.org/culture/natlaws/media/pdf/indonesie/indonesia_compilation_of_law_2003_engl_orof.pdf, 16 March 2018.

37 Nia Naelul Hasanah Ridwan, The Importance of Empowering Local Community in Preserving Underwater Cultural Heritage in Indonesia: Case Study in Tulamben, Bali and in Taka Kappala, Selayar-South Sulawesi, at http://www.themua.org/collections/items/show/1236, 21 December 2014.

动。拥有类似命运的还有沉没于马来西亚彭享地区的英国军舰“HMS 威尔士王子”号、“HMS 反击”号以及印尼水域的澳大利亚军舰“HMAS 珀斯”号。[38] “HMAS 珀斯”号被盗捞行为严重破坏的消息在澳大利亚国内引起了极大的关注。[39] 值得庆幸的是，自 2016 年起，澳大利亚和印尼两国就该军舰的保护展开了联合行动。[40]

因此，中国和东盟国家立法中应当增加类似《2001 年公约》第 7 条第 3 款的内容，即在保护军舰遗骸的最佳办法方面进行合作。实际上，可以将比利时加入公约后对本国立法的修订作为参考。对于满足水下文化遗产定义的军舰，比利时在修订立法时，加上了将就此类沉船的保护与其船旗国进行协商的内容。[41] 但如果此类船只受到包括抢劫在内的紧急危险的威胁，在咨询船旗国意见之前，比利时有权采取任何措施保护此类船只。[42] 一方面，我们应保证沉没 100 年以上军舰的船旗国参与在保护机制中，这和国际上保护此类特殊水下文化遗产的趋势相符，另一方面，这样也为我国主张对沉没在他国海域 100 年以上军舰（例如“高升”号）的权益提供法律基础。南海区域的水下文化遗产保护合作机制中也应当有相似的内容，以更好地保护这类特殊的水下文化遗产。

四、结　论

古老军舰遗址的法律地位问题，核心就在于这样的军舰是否仍然拥有沉没前所享有的国家豁免权。当船旗国对军舰的权利和沿海国对本国领海内水下文化遗产的权利产生冲突时，谁的权利优先？如果存在关于这个问题的习惯规则，《2001 年公约》的制定是一个将习惯规则法典化的机会。然而，《2001 年公约》的措辞似乎极力避免承认存在这样的习惯规则。在这个问题上，国家实践千差万别，更遑论法律确信的存在，所以笔者认为在这个问题上，国际法并没有形成习惯规则来加以约束。

虽然国际法上不存在解决这一问题的习惯规则，但《2001 年公约》规定了水下文化遗产保护的基本原则，缔约国应该遵循。沉没 100 年以上的军舰符合《2001 年公约》水下文化遗产的定义，受到《2001 年公约》的保护。一国毫无疑问地在其内水、领海和群岛水域中享有完全的主权，也理所当然享有立法管理处于其中的满足水下文化遗产定义的军舰遗址的权利。但是，沿海国仍然应当顾及船旗国

38 At http://www.thestar.com.my/news/nation/2014/05/23/sub-and-hmas-perth-damaged-and-there-could-be-more/, 16 March 2018.
39 At http://www.theage.com.au/world/hmas-perth-20170126-gtzm7x, 16 March 2018.
40 Indonesia and Australia battle to save WWII shipwreck *HMAS Perth* from salvagers, at http://www.theguardian.com.au/story/4461155/indonesia-and-australia-battle-to-save-wwii-shipwreck-hmas-perth-from-salvagers/?cs=5, 16 March 2018.
41 Law on the Protection of the Underwater Cultural Heritage, Art. 5(2).
42 Law on the Protection of the Underwater Cultural Heritage, Art. 6(2), para. 2.

的利益，并邀请后者以及其他相关国家参与此类遗址的保护工作。《2001 年公约》的处理方式是鼓励沿海国和船旗国进行合作，共同保护这些特殊的水下文化遗产。

在中国和东盟国家领海内，存在大量从殖民时代到第二次世界大战期间沉没的军舰遗址。这些遗址中，有些是符合《2001 年公约》定义的水下文化遗产，有些是符合当地法律定义的文化遗产。仔细研究这些国家的法律后，笔者发现相关法律几乎没有涉及沉没军舰的法律地位，只有在相关国家主管部门处理具体军舰遗址时，才能窥见相关国家的态度。从现有资料来看，中国和东盟国家似乎并不情愿给予其领海内沉没超过 100 年的军舰遗址特殊的法律地位。

这种无法可依的状态当然不利于为水下文化遗产提供最大程度的保护。因此，笔者建议中国和东盟国家基于《2001 年公约》中 100 年的时间标准，区分在不同年代沉没于本国领海内的军舰遗骸。各国对所有权的规定不同，中国和大多东盟国家主张对领海内所有水下文化遗产的所有权和管辖权，这必然会和军舰的船旗国产生权利冲突。但是，为了保护此类特殊水下文化遗产，中国和东盟国家依然可以参照已经加入公约的国家（如比利时）的做法，将与沉没 100 年以上军舰船旗国的合作写入立法，与船旗国协商以保证为此类水下文化遗产提供最大程度的保护。

Legal Status of Sunken Warships That Meet the Definition of Underwater Cultural Heritage in Territorial Waters: Legislations of China and ASEAN States

LIN Zhen*

Abstract: Regarding the question whether the ancient wrecks of warships can enjoy State immunity, no express rule could be found in international law, and considerable controversies on this issue can be seen among legal scholars. Warships that have been submerged for more than 100 years are included in the definition of underwater cultural heritage (UCH) under the UNESCO Convention on the Protection of the Underwater Cultural Heritage. With respect to ancient shipwrecks, security concerns may no longer be used as a reason for excluding the jurisdiction of any other States. State practice differs tremendously in this domain and even the practice of one single State can vary from time to time. This paper focuses on the legislations of China and ASEAN States on the issue under discussion. Although abundant remains of warships, which meet the definition of UCH under the Convention, are scattered in the territorial waters of China and ASEAN States, these States do not have internal laws addressing this issue. That is to say, China and ASEAN States have no legal rules to follow when facing existing and potential conflicts with respect to the ancient wrecks of warships. In recent years, underwater archaeology developed rapidly in China, and the Chinese government raised the initiative to build the 21st-Century Maritime Silk Road. This new situation presents golden opportunities for the protection and management of UCH in the region

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along the Road. And the legal lacuna concerning the protection of remains of warships needs to be filled in time.

Key Words: Convention on the Protection of the Underwater Cultural Heritage; ASEAN States; Protection of underwater cultural heritage

There is little doubt that warships have a special legal status on international law. A warship enjoys immunity and no State other than its flag State could exercise jurisdiction over it. According to the United Nations Convention on the Law of the Sea (UNCLOS),

> *"warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.*[1]

The UNESCO Convention on the Protection of the Underwater Cultural Heritage, adopted in 2001, hereinafter referred to as the "2001 Convention", defines

> "*underwater cultural heritage" as all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.*

Thus, warships that have been submerged for more than 100 years are also included in the definition of underwater cultural heritage (UCH). This raises a question about the legal status of such warships. And if the wreck of an ancient warship is located in the territorial sea of another State, how can we coordinate the interests of its flag State and the coastal State?

Generally, there is little doubt that State immunity continues to apply to

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1 UNCLOS, Article 29.

recently sunken warships. However, when it comes to the immunity of warships that have been submerged for over 100 years, no express rules can be found in international law. This also stirred up considerable controversies among legal scholars. Some scholars argue that a sunken warship can not enjoy State immunity indefinitely.[2] Could the wreck of a warship that has been submerged for a century maintain its legal status of warship? Could the principle of State immunity continue to apply to such a shipwreck as national security may no longer be an issue when it comes to a wrecked 16th century Spanish galleon or a wooden junk dating back to the Ming Dynasty? State practice differs tremendously in this domain and even the practice of one single State can vary from time to time.

In the academia, systematic research is absent regarding the legislations of China and ASEAN States on the legal status of sunken warships. The existing researches primarily focus on some specific provisions of the 2001 Convention and the positions of European and American maritime powers in this domain. In recent years, underwater archaeology developed rapidly in China, and the Chinese government raised the initiative to build the 21st-Century Maritime Silk Road. This new situation presents golden opportunities for the protection and management of UCH in the region along the Road. And the research on the positions of China and ASEAN States in this area becomes more meaningful.

This paper will first try to determine whether there are applicable rules of international law in this area, and then briefly analyze the relevant provisions under the 2001 Convention. After that, the paper will focus its analysis on the pertinent provisions of China and ASEAN States, and offer some legislative recommendations.

I. Rules of Customary Law

The formation of a customary rule requires both State practice and *opinio juris*. Examined in this light, the practice of States, especially those possessing abundant UCH, shows no consistency during the last few decades.

The United States has abundant warship wrecks that can be defined as UCH in its surrounding waters. At the meanwhile, it has a giant navy which has left a

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2 Willem Riphagen, Some Reflections on "Functional Sovereignty", *Netherlands Yearbook International Law*, 1975; Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, 2003, p. 45.

significant number of shipwrecks around the world during wars. In the South China Sea, we could still find the shipwrecks of U.S. navy which date back to the Second World War. The attitude of the U.S. towards the legal status of sunken warships may seem to be controversial from time to time. A series of contradictory court verdicts over the status of foreign sunken warships in waters of the U.S. show the lack of clearly defined rules in this domain. While the older cases seldom uphold a foreign State's rights to its sunken warship,[3] we have witnessed a tendency to respect such rights in more recent court verdicts, like those in the cases of *Mercedes* and *Juno*.[4] The consideration behind these cases might be international comity and America's growing interest in safeguarding its sunken warships located in other States' waters.[5] Some U.S. governmental officials believe that State immunity may stop applying to those remains of warships sunken in the distant past as loss of title of the flag State over such ships can be implied, while State immunity should be accorded to more recent warships for security reasons.[6] However, in reality, it is not always the case.[7]

As to other States' attitude towards this question, the United Kingdom is among those States who assert firmly their title to their sunken warships around

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3 Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, pp. 312~313, 332~333.

4 David J. Bederman, Rethinking the Legal Status of Sunken Warships, *Ocean Development & International Law*, Vol. 31, Issue 1~2, 2000, p. 100; ZHAO Yajuan, Legal Status of Sunken Warships and Other State Vessels as Underwater Cultural Heritage, *Presentday Law Science*, No. 5, 2005, p. 119 (in Chinese); Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, p. 320; Jack Coker III, Colonial-Era Treasure Lost in the Murky Depths of Foreign Sovereign Immunity: *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, *Florida Coastal Law Review*, Vol. 15, p. 165.

5 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, p. 346.

6 Christine Nicole Burns, Finders Weepers & Losers Keepers, The Eleventh Circuit Denies Salvage Company's Claims to a Sunken Military Vessel Found in International Waters in *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, *Tulane Maritime Law Journal*, Vol. 36, Issue 2, 2012, pp. 805~806; Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, pp. 349~350.

7 Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, p. 335.

the world, regardless of their sinking time.[8] Nevertheless, in some cases, it also has to negotiate with the coastal States in whose territorial seas its shipwreck has been found and is obliged to give up some of its claims. For example, in the case of *H.M.S. Birkenhead*, a shipwreck lying in the territorial waters of South Africa, both the United Kingdom and South Africa claimed title to the sunken warship as well as the gold it carried. Finally, the two States reached an agreement to share any gold recovered from the shipwreck.[9]

In general, State practice shows no consistency and continuity in this domain, let alone the existence of *opinio juris*. Therefore, many scholars, including the author, believe that no rule of customary international law has formed in this regard.[10]

II. Interpretation of the Relevant Provisions under the 2001 Convention

The UNCLOS is the most important international treaty in the field of the law of the sea. It, however, merely contains two articles (i.e., Arts. 149 & 303) with respect to UCH protection. Furthermore, these two articles made no direct reference to the remains of warships; and they merely mention archaeological and historical objects found in the contiguous zone and the international seabed area, without mentioning other waters. The insufficiency of UNCLOS necessitates the creation of a special international treaty dealing with the protection of UCH.

At the beginning of the negotiations of the 2001 Convention, maritime powers have tried to exclude the application of the forthcoming convention to warships, seeking to maintain exclusive control over their sunken warships. One draft of the Convention states that "[t]his Convention shall not apply to the remains and

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8 Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, p. 336.

9 Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa Regarding the Salvage of *HMS Birkenhead*, 27 September 1989.

10 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, pp. 371~372; Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 45; ZHAO Yajuan, Legal Status of Sunken Warships and Other State Vessels as Underwater Cultural Heritage, *Presentday Law Science*, No. 5, 2005, p. 119 (in Chinese).

contents of any warship, naval auxiliary, other vessel or aircraft owned or operated by a State and used, at the time of its sinking, only for non-commercial purposes."[11] Excluding warships, an essential kind of vessels, from the application of the convention, would not facilitate the provision of maximum protection to UCH. Under this circumstance, the Group of 77 submitted the following proposal, which was later absorbed in Art. 2(8) of the present version of the 2001 Convention:

> *Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.*[12]

This provision, on the one hand, ensures that the measures and criteria for UCH protection laid down by the 2001 Convention and, particularly by its Annex – Rules Concerning Activities Directed at Underwater Cultural Heritage, could apply to the remains of warships that meet the definition of UCH. On the other hand, it is also the result of a compromise to the claims of maritime powers.

Art. 1(8) of the 2001 Convention defines "State vessels and aircraft" as,

> *warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.*

Art. 7(3) of the 2001 Convention states that,

> *Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical*

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11 Art. 2, Draft Convention on the Protection of Underwater Cultural Heritage, at http://unesdoc.unesco.org/images/0011/001159/115994Eo.pdf, 16 March 2018.

12 Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 50.

or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.

The meaning of Art. 7(3) remains uncertain with regard to the legal status of sunken warships. One might ask what is the exact content of "general practice among States". Does it equal to international comity or a customary rule which has already come into existence. Additionally, as many scholars rightly pointed out, when describing the coastal State's obligation to inform the flag State, the Convention uses the word "should", rather than the most generally used word "shall". This probably implies that the Convention did not intend to impose upon the coastal State a legal obligation to inform the flag State.[13] This vagueness might be a proof of reluctance of the Convention drafters to affirm or deny the existence of a customary rule with regard to the legal status of ancient wrecks of warships.[14]

In practice, as many scholars argued, it is not easy for a coastal State to fulfill its obligation to inform the flag State. Actually, without sufficient investigation and recovery, it is quite difficult to determine the status of a ship which has been underwater for at least 100 years. In that case, before the end of such investigation and recovery work, the coastal State would find it challenging to discharge its obligation to inform the State concerned. On the other hand, the status of the flag State might have changed by the passage of time. For example, in some cases, no State is able to continue the claim of the original flag State; or the original flag State was divided into several States, or merged with another State to form a new one.[15]

Therefore, maritime powers, like the United States, are dissatisfied with the relevant provisions of the 2001 Convention, since they believe that the Convention fails to provide sufficient protection to State vessels and aircraft, including warships.[16] In reality, several agreements have been reached on the conservation of sunken warships of one State in another State's territorial waters. The agreement between France and the United States regarding the sunken vessel *La Belle* is an

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13 Tullio Scovazzi, Convention on the Protection of Underwater Cultural Heritage, *Environmental Policy and Law*, Vol. 32, Issue 3~4, 2002, p. 156.

14 ZHAO Yajuan, Legal Status of Sunken Warships and Other State Vessels as Underwater Cultural Heritage, *Presentday Law Science*, No. 5, 2005, p. 119. (in Chinese)

15 Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 43.

16 Sean D. Murphy, U.S. Concerns Regarding UNESCO Convention on Underwater Heritage, *American Journal of International Law*, Vol. 96, Issue 2, 2002, p. 470.

example. While acknowledging French title over the ship, the two States have managed to work together for the best protection of the shipwreck.[17] Australia and the Netherlands have also made arrangements for the protection of multiple V.O.C ships in Australian waters. The Netherlands transferred its property right over these shipwrecks to Australia but nevertheless retains its right to share the objects recovered, as long as the split does not result in their irreversible dispersal.[18] Notably, there are also bilateral agreements denying the flag State's title over the shipwrecks. In these agreements, the States concerned solely agreed to cooperate to remove the ship from seabed and share the objects recovered. Such agreements show that some States assert that ancient shipwrecks have been abandoned by their flag States.[19]

Another question arises concerning the ownership of the cargo on board the warship. The 2001 Convention, Art. 7(3) also takes into consideration the rights of "other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft". Some States claim that the cargo on board should be considered a part of the shipwreck itself,[20] this article, however, seems to point at another direction. In the case of *Mercedes*, Peru contended that the cargo on board the Spanish warship

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17 Agreement between the Government of United States and the Government of the Republic of France Regarding the Wreck of *La Belle*, at http://www.gc.noaa.gov/documents/gcil_la_belle_agmt.pdf, 16 March 2018. Art. 1(2), the French Republic has not abandoned or transferred title of the wreck of *La Belle* and continues to retain title to the wreck of *La Belle*. Art. 2(1), the French Republic does not desire the return of the wreck of *La Belle* to its territory. Art. 3(1), the *Musée national de la Marine*, a public agency under the authority of the French Ministry of Defense, and the Commission shall negotiate and conclude, consistent with this Agreement, an administrative arrangement relating to the curation (including the security, storage, preservation and conservation), research, documentation, and exhibition of the wreck of *La Belle*.

18 Agreement between the Netherlands and Australia concerning old Dutch shipwrecks, adopted 6 Nov. 1972, at http://www.austlii.edu.au/au/legis/cth/consol_act/hsa1976235/sch1.html, 16 March 2018. Art. 1, the Netherlands, as successor to the property and assets of the V.O.C., transfers all its right, title and interest in and to wrecked vessels of the V.O.C. lying on or off the coast of the State of Western Australia and in and to any articles thereof to Australia which shall accept such right, title and interest. Art. 4, Australia recognizes that the Netherlands has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels referred to in Art. 1 of this Agreement.

19 Craig Forrest, An International Perspective on Sunken State Vessels as Underwater Cultural Heritage, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 48.

20 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, pp. 344, 349, 353.

"physically, culturally and historically originat[ed] in Peru"[21] and its rights should prevail over the Spanish rights on the basis of "prohibition against pillage of occupied countries".[22] The American district court dismissed the case, as it held that it did not have jurisdiction over it and suggested that Peru's "challenges might be dealt with in another forum on another day."[23] The court did not deny any right that Peru might have over the cargo on board, to the contrary, it has to some extent acknowledged the existence of such rights.

III. Legislations of China and ASEAN States

A. Legislation of China

In Chinese waters, there exist large quantities of sunken warships which have witnessed fierce wars and conflicts raging on in this country for centuries. Among the identifiable shipwrecks, there are warships of the colonial powers dating more than 100 years ago and there are also more recent shipwrecks of the Japanese invaders. How to deal with the wrecks of these foreign warships? This remains a quite thorny question to Chinese authorities.

The Chinese government enacted in 1982 the Law of the People's Republic of China on Protection of Cultural Relics (hereinafter "the 1982 Law"), which was amended in 1991, 2002, 2007 and most recently in 2013. The law establishes the basic standards to be followed to protect land and underwater heritage. Faced with serious looting of UCH during the 1980s, China promulgated the Regulation of the People's Republic of China on the Protection of Underwater Cultural Heritage (hereinafter "the 1989 Regulation") on 20 October 1989. Being China's first instrument dealing this specific issue, the Regulation sets forth the basic rules for the protection of such heritage, and also contains detailed provisions on the jurisdiction and the ownership over such heritage.

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21 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, pp. 359~360.

22 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, pp. 359~360.

23 Valentina Vadi, War, Memory, and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law, *Tulane Maritime Law Journal*, Vol. 37, No. 2, 2013, p. 377.

China claims the ownership and jurisdiction over all the UCH found in its territorial waters, which includes, technically, the remains of foreign warships that meet the definition of UCH. Shipwrecks submerged underwater for less than 100 years could also be defined as UCH under Chinese legislation (Art. 2 of the 1989 Regulation), therefore, even some recent shipwrecks could be included. However, the key point is whether or not China has made any special arrangements for these special heritages. What is the status of sunken foreign warships found in the territorial waters of China? Does the Chinese government intend to apply State immunity to them? During the negotiations on the 2001 Convention, China failed to express its views on this issue.[24] Neither the 1982 Law nor the 1989 Regulation contains provisions in direct relation to sunken foreign warships. The rapid development of China's undertaking to protect UCH, however, brought this issue to the attention of archaeologists.

No archeological excavation has ever been carried out at the sites of foreign warships located in China's territorial sea. Such excavation work of sunken warships, by now, concerns only Chinese ships, which arouses no question from legal perspective. Actually, Chinese archeologists are not always sure if any excavation work could be carried out over a foreign warship sunken for more than 100 years in China's territorial sea, worrying that such work might impede on other States' rights.

Due to the absence of provisions concerning the legal status of sunken foreign warships in the 1982 Law and the 1989 Regulation, the author has to analyze the attitude of the Chinese government in this regard, on the basis of several cases concerning foreign warships. For years, Russia had tried to locate its warship *Petropavlovsk* which sank in the territorial sea of Liaodong Peninsula in 1904 during the war between Russia and Japan. The attempt was not approved by China due to security concerns.[25] It will be difficult to tell from this case if the Chinese government accepts to apply State immunity to the shipwreck or accept Russia's ownership to the wreck which forms a part of the UCH of China under Chinese law.

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24 Synoptic Report of Comments on the Draft Convention on the Protection of the Underwater Cultural Heritage Made by Member States and Associate Member States of UNESCO and by Member States of the United Nations, Second Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage, UNESCO CLT-99/CONF.204/5, at http://unesdoc.unesco.org/images/0011/001160/116085eo.pdf, 12 September 2017.

25 At http://bbs.tiexue.net/post2_2946846_1.html, 16 March 2018.

Another case which has aroused controversy was the salvage of *MV Awa Maru* in the 1970s. The ship, carrying tin, rubber and Japanese soldiers, was torpedoed by U.S. Navy in the Taiwan Strait during the Second World War. It was salvaged by the Chinese Navy, rather than the UCH protection team in the 1970s.[26] The case does not really concern the conflicting interests of the coastal State and the flag State over a warship which could also be defined as UCH, but it might still shed some light on this ongoing discussion. The Chinese government recovered the tin and rubber on board and handed the personal artifacts to Japan. Some Japanese authors assert that the shipwreck of *Awa Maru*, a State vessel used, at the time of its sinking, only for non-commercial purposes, belongs to Japan and no salvage should be carried out without its consent.[27] The Chinese authorities did not offer any reason or the legal basis for the salvage.[28]

B. Legislations of ASEAN States

Sunken warships, dating from the colonial era to the Second World War, are abundant in the waters of ASEAN States. In sharp contrast, among all ASEAN States, only Cambodia has joined the 2001 Convention. Furthermore, laws and regulations of these States seldom deal with the legal status of the sunken warships located in their territorial waters. In practice, there are few cases where an ASEAN State cooperates with any other States, particularly the flag State, to conserve such wrecks found in its territorial waters.

The author endeavors to find clues of the attitude of some ASEAN States with regard to the sunken warships from their legislations and relevant practice. In its Law on Cultural Heritage adopted in 2001,[29] Vietnam states that "All cultural heritage located under the surface of the mainland, on islands, internal waters, territorial waters, areas of special maritime economic rights, or on the ocean floor of the Socialist Republic of Vietnam belongs to the public cultural heritage of the

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26 At http://www.guancha.cn/history/2014_04_05_219875_s.shtml, 16 March 2018.

27 Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, *University of San Francisco Maritime Law Journal*, Vol. 12, Issue 2, 2000, p. 338.

28 Being located in the Taiwan Strait, the shipwreck would possibly undermine navigation safety. It is, therefore, reasonable for China to recover the vessel for securities concerns. With regards to the cargo on board, Japan should no longer enjoy the title to it, since it was snatched from the injured States.

29 Law on Cultural Heritage, Law #28/2001/QH10, at http://www.unesco.org/culture/natlaws/media/pdf/indonesie/indonesia_compilation_of_law_2003_engl_orof.pdf, 16 March 2018.

people" (Art. 6). It seems that Vietnam makes no difference between the remains of a commercial ship and those of a warship. As long as these shipwrecks lie in its territorial waters, Vietnam claims exclusive jurisdiction and ownership over them. In the Decree on Management and Protection of Underwater Cultural Heritage adopted in 2005, Vietnam takes a similar position on the issue under discussion.[30]

Similarly, National Cultural Heritage Act of 2009 of the Philippines barely touches upon this question.[31] Art. VII, Section 30(1) states that "All cultural properties found in terrestrial and/or underwater archaeological sites belong to the State". The same law gives the following definition of cultural property: "Cultural property" shall refer to all products of human creativity by which a people and a nation reveal their identity, including churches, mosques and other places of religious worship, schools and natural history specimens and sites, whether public or privately-owned, movable or immovable, and tangible or intangible. Therefore, sunken warships can also be included under the category of public-owned cultural property. Act S. No. 512, which has been submitted to the Philippine Congress for adoption, claims that the object of UCH found in Philippine territorial waters shall be vested in the State.[32] And objects of UCH include all shipwrecks at least 100 years old,[33] which seemingly include sunken warships having stayed underwater for more than 100 years.

The National Heritage Act of Malaysia enacted in 2005 was deeply affected by the 2001 Convention. For example, it defines UCH in the same way as the

30 Art. 4 of Decree no.86/2005/ND-CP of 8th July 2005 on Management and Protection of Underwater Cultural Heritage, at http://faolex.fao.org/docs/pdf/vie60607.pdf, 12 September 2017.

31 Republic Act No. 10066, An Act Providing for the Protection and Conservation of the National Cultural Heritage, Strengthening the National Commission for Culture and the Arts (NCCA) and Its Affiliated Cultural Agencies, and for Other Purposes, at http://www.lawphil.net/statutes/repacts/ra2010/ra_10066_2010.html, 16 March 2018.

32 Section 6, An Act Providing for the Protection and Conservation of All Objects [of] Underwater Cultural Heritage in Philippine Waters, at https://www.senate.gov.ph/lisdata/2395220626!.pdf, 12 September 2017.

33 Section 3, An Act Providing for the Protection and Conservation of All Objects [of] Underwater Cultural Heritage in Philippine Waters, at https://www.senate.gov.ph/lisdata/2395220626!.pdf, 12 September 2017.

2001 Convention,[34] and tries to follow the basic spirit of the Convention.[35] However, no clear reference to State vessels can be found in this Act. The salvage law is applicable to UCH in Malaysia, which is, obviously, detrimental to UCH protection. Art. 66(3) of the Act talks about the ownership of the UCH:

> *Any owner of the underwater cultural heritage may, upon establishing his claim to the satisfaction of the Commissioner, within one year from the time at which the underwater cultural heritage came into the possession of the Commissioner, and upon paying the salvage fees and expenses due, be entitled to have the possession of the underwater cultural heritage upon such terms and conditions as may be imposed by the Commissioner.*

As no *lex specialis* exists for sunken warships, *lex generalis* applies to all shipwrecks qualified as UCH, including warships sunken for more than 100 years. In that case, it is presumed that no permit is needed from the flag State of the warship to salvage it.

Chapter III, Art. 4 of the Law of the Republic of Indonesia Number 5 of the Year 1992 Concerning Items of Cultural Property[36] states that,

> *(1) All items of cultural property are controlled by the State. (2) The authority to control items of cultural property as meant in paragraph (1) includes items of cultural property found within the boundaries of the legal territory of the Republic of Indonesia.*

Hence, the same question arises again: If no clear reference is made to sunken

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34 "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least one hundred years such as – (a) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (b) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (c) objects of prehistoric character. Art. 2, National Heritage Act 2005, at http://www.hbp.usm.my/conservation/laws/nationalheritageact.htm, 16 March 2018.

35 For example, the National Heritage Act of Malaysia, Art. 66(6), provides that "unless otherwise directed by the Minister, the Commissioner may preserve the underwater cultural heritage *in situ*", suggesting that *in situ* preservation is the first option for UCH protection.

36 Law of the Republic of Indonesia Number 5 of the Year 1992 Concerning Items of Cultural Property, at http://www.unesco.org/culture/natlaws/media/pdf/indonesie/indonesia_compilation_of_law_2003_engl_orof.pdf, 16 March 2018.

warships, are they also included in all items of cultural property when they definitely fit in the definition of such items? There is little evidence that the Indonesian government accords any special status to foreign warships sunken in its waters. The wreck of *USAT Liberty* situated in Indonesian waters has become a famous diving site and the local communities manage this shipwreck according to the customary rules of the clan.[37]

C. Legislative Recommendations

The status of warships that meet the definition of UCH has not been addressed directly by the current legislations of both China and ASEAN States. The very few cases and legislations we have at hand show that China and ASEAN States have made no distinction between private ships and warships that meet the definition of UCH.

Although China and most ASEAN States have not yet acceded to the 2001 Convention, they still follow its guidelines and basic principles. The time criterion established by the Convention to define the UCH, for example, has been incorporated into the domestic laws of some States in the region. In that case, it is reasonable to use "100 years" as the time criterion to separate "ancient shipwrecks" from "recent shipwrecks". Warships sunken for more than 100 years should be considered as UCH, while State immunity continues to apply to those sunken for less than 100 years. With regard to the latter, the consent of the flag State is, with no doubt, necessary for their excavation. Cooperation between the flag and coastal States is the most sensible way for the protection of sunken warships. That is because, on the one hand, without the cooperation of the coastal State, the flag State would find it difficult to implement any effective protection measures, or to stop the coastal State from excavation or any other work; on the other hand, the cooperation between the flag State and other States concerned is, undoubtedly, of great significance to the protection of this special kind of UCH. This is also applicable to the protection of commercial shipwrecks.

Illegal salvage poses the principal threat to the cultural heritage in the waters of China and ASEAN States. In this connection, the remains of warships face the

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37 Nia Naelul Hasanah Ridwan, The Importance of Empowering Local Community in Preserving Underwater Cultural Heritage in Indonesia: Case Study in Tulamben, Bali and in Taka Kappala, Selayar-South Sulawesi, at http://www.themua.org/collections/items/show/1236, 21 December 2014.

same threat with those of commercial vessels. Many warships submerged in the South China Sea during the Second World War were ransacked by illegal salvagers. For example, Dutch submarine *HNMS O-16*, which was submerged in 1941 in the waters surrounding Tioman Island, Malaysia, was devastated by illegal salvage. This event upset the Dutch Parliament. Other examples include British Royal Navy battleship *HMS Prince of Wales* and battlecruiser *HMS Repulse*, which sank off the coast of Malaya, near Kuantan, Pahang, and Australian warship *HMAS Perth* sunken in the waters of Indonesia.[38] The illegal salvage of *HMAS Perth* brought great concerns to all walks of people in Australia.[39] Fortunately, the governments of Australia and Indonesia started to take joint operation regarding the protection of this warship in 2016.[40]

Therefore, China and ASEAN States should incorporate the pertinent provisions of the 2001 Convention, Art. 7(3), into their domestic laws, with a view to cooperating on the best methods of protecting the wrecks of warships. In this regard, we may learn something from Belgium's amendments to national legislation upon accession to the Convention. For example, Belgium amended its legislation to include the requirement to consult the flag States for views on the protection of warships that meet the definition of UCH.[41] However, before consulting the flag States, if such vessels are facing immediate danger, including pillage, Belgium has the right to take any measures to protect them.[42] That is to say, we should ensure that the flag States of warships submerged for over 100 years are able to participate in the relevant protection mechanism, which is, on the one hand, consistent with the international practice in this field, and on the other hand, provides legal basis for China's claim of rights over Chinese warships that have been submerged in the waters of other States for more than 100 years, such as the warship *Gaosheng*. The cooperative mechanism for UCH protection in the South China Sea should contain similar provisions, so as to provide best protection to this special kind of UCH.

IV. Conclusions

38 At http://www.thestar.com.my/news/nation/2014/05/23/sub-and-hmas-perth-damaged-and-there-could-be-more/, 16 March 2018.

39 At http://www.theage.com.au/world/hmas-perth-20170126-gtzm7x, 16 March 2018.

40 Indonesia and Australia battle to save WWII shipwreck *HMAS Perth* from salvagers, at http://www.theguardian.com.au/story/4461155/indonesia-and-australia-battle-to-save-wwii-shipwreck-hmas-perth-from-salvagers/?cs=5, 16 March 2018.

41 Law on the Protection of the Underwater Cultural Heritage, Art. 5(2).

42 Law on the Protection of the Underwater Cultural Heritage, Art. 6(2), para. 2.

The essential question concerning the warship sunken for more than 100 years is whether the shipwreck could or could not continue to enjoy State immunity as it once did. When the right of a State over its warship collides with the right of another State over its territorial waters where the shipwreck lies, whose rights will prevail? The drafting of the 2001 Convention might have been an opportunity to codify the customary rules regarding this issue, if such rules did exist. However, the wording of the Convention seemingly avoids acknowledging or denying existence of such rules. As State practice in this domain varies and States' opinions differ tremendously, the author holds the view that there exists no customary rule regulating the legal status of sunken warships.

Despite of the lack of customary rules on the legal status of warships sunken for more than 100 years, the 2001 Convention does set up the basic rules of UCH protection for its States Parties to follow. Warships sunken for more than 100 years are included in the definition of UCH. Therefore, the Convention does apply to such shipwrecks. A State enjoys, without any doubt, sovereignty within its internal waters, archipelagic waters and territorial sea, and absolutely has the right to regulate activities directed at any warship sunken for over 100 years found therein. Nevertheless, the coastal State still should pay due regard to the rights of the flag State, and invite the flag State or any other relevant States to cooperate in the protection of the shipwreck. However, the 2001 Convention provides another option which encourages cooperation between coastal and flag States in jointly preserving the sunken warship which can be defined as UCH.

Abundant remains of warships, which can be traced back to the time from the colonial period to the Second World War, are scattered in the territorial waters of China and ASEAN States. Some of them meet the definition of UCH under the 2001 Convention and others also fall into the category of cultural heritage under domestic laws. However, a close study of the basic laws of the relevant States shows that no reference is made to the legal status of sunken warships. In general, we could only find clues about government's reaction when such a shipwreck is actually getting involved. The cases and legal documents available seemingly indicate that China and most ASEAN States are reluctant to accord any special status to the foreign warships sunken for over 100 years in their territorial waters.

The absence of pertinent rules will, absolutely, not contribute to the best protection of UCH. The author, therefore, suggests that China and ASEAN States employ the "100-year" time criterion to differentiate the wrecks of warships that

sank in their territorial waters in different periods. The provisions concerning the title to UCH vary in different countries. China and the majority of ASEAN States claim the title to and jurisdiction over all the UCH found in their territorial waters. Such claims would definitely conflict with rights of the flag States of sunken warships. However, in order to protect such special UCH, China and ASEAN States could still, with reference to the practice of States Parties to the 2001 Convention (like Belgium), include the cooperation with the flag States of warships sunken for over 100 years into their domestic laws, with the purpose of providing best protection to such heritage by consulting the flag States.

Translators: LIN Zhen and XIE Hongyue

南海水下文化遗产保护合作协议草案编制研究

巫晓发 *

内容摘要: 长期以来，很多重要的贸易路线都途经南海。南海不仅在现代经济生活中占据重要地位，而且还具有重大的历史意义。据估计，南海海域现在仍有超过 2000 艘沉船。然而，由于南海沿岸国之间争端不断，南海水下文化遗产的保护经常遭到忽视。这些争端导致各国难以对南海水下文化遗产行使管辖权，同时也阻碍了各国就水下文化遗产保护开展必要的合作。从法律方面来说，南海水下文化遗产保护面临两大问题:一是可适用的国际法不足，二是南海沿岸各国的国内法规定不一致。这给南海水下文化遗产保护工作带来了巨大挑战。本文认为，可以从 2 个方面来改善南海水下文化遗产保护的法律框架:一是对南海沿岸各国适用 2001 年联合国教科文组织的《保护水下文化遗产公约》，二是缔结有关南海水下文化遗产保护的多边合作协议。由于第一种方法实施起来比较困难，本文主要探讨第二种方法，并尝试拟定该协议可能包含的条款，以及分析这些条款的法理基础。

关键词: 南海　水下文化遗产　合作协议

一、引　言

根据 1982 年《联合国海洋法公约》（以下简称“《海洋法公约》”）和 2001 年联合国教科文组织《保护水下文化遗产公约》（以下简称“《2001 年公约》”）的相关规定，合作对水下文化遗产的保护极其重要。南海的范围涵盖北部湾和泰国湾，连接了安达曼海和太平洋，是世界上最繁忙的国际海道之一。世界上超过一半的

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油轮运输都途径该海域。[1] 南海沿岸国有文莱、柬埔寨、中国、印度尼西亚、马来西亚、菲律宾、泰国、新加坡和越南。自古以来，南海就是主要的海上贸易航线，也被称为“海上丝绸之路”。换言之，南海在历史上就占据重要的经济地位，因此毫不奇怪，南海水域有超过 2000 艘沉船。[2]

遗憾的是，虽然南海蕴藏着丰富的水下文化遗产，但南海地区却存在许多领土和海洋边界争端。领土争端包括中越西沙群岛争端、[3] 中马菲越南沙群岛争端、[4] 中菲黄岩岛争端，[5] 以及马菲沙巴争端。[6] 在海洋边界争端方面，柬埔寨与泰国、马来西亚与泰国之间存在主张重叠海域，而文莱、中国、印度尼西亚、马来西亚、菲律宾和越南在南海的海域主张也存在重叠。南海沿岸各国多次尝试通过外交和法律手段解决这些争端，但一直未获得成功。这些争端使得沿岸国举步维艰，难以在南海地区行使管辖权来保护水下文化遗产。

为保护南海的水下文化遗产，沿岸各国有必要签署一项合作协议，详细规定各国的权利和义务。因此，本文旨在研究缔结这类合作协议应考虑的一些因素，指出南海水下文化遗产保护方面存在的法律问题，以及如何解决这些问题。为此，本文将首先分析缔结合作协议的法理基础，接着探讨缔结协议的方式，并针对协议应包含的主要条款提出建议，其中包括水下文化遗产的定义、领海以外区域的水下文化遗产保护、争端解决机制，以及水下文化遗产的所有权问题。

二、缔结合作协议应考量的一些因素

南海沿岸各国缔结合作协议的法律依据是合作原则。在南海沿岸国中，除柬埔寨只签署但未批准《海洋法公约》外，[7] 其他各国均是公约缔约国。因此，依据

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1 David Rosenberg and Christopher Chung, Maritime Security in the South China Sea: Coordinating Coastal and User State Priorities, *Ocean Development and International Law*, Vol. 39, Issue 1, 2008, p. 51.

2 QU Jinliang, Protecting China’s Maritime Heritage: Current Conditions and National Policy, *Journal of Marine and Island Cultures*, Vol. 1, Issue 1, 2012, p. 47.

3 Robert Beckman, China, UNCLOS and the South China Sea, at http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/AsianSIL-Beckman-China-UNCLOS-and-the-South-China-Sea-26-July-2011.pdf, 18 March 2018.

4 Robert Beckman, China, UNCLOS and the South China Sea, at http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/AsianSIL-Beckman-China-UNCLOS-and-the-South-China-Sea-26-July-2011.pdf, 18 March 2018.

5 Robert Beckman, China, UNCLOS and the South China Sea, at http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/AsianSIL-Beckman-China-UNCLOS-and-the-South-China-Sea-26-July-2011.pdf, 18 March 2018.

6 Orlando M. Hernando, *The Philippine Claim to North Borneo* (Master of Arts Thesis), Kansas: Kansas State University, 1966, p. 7.

7 柬埔寨只签署但未批准《海洋法公约》，但需要指出的是，柬埔寨已通过《2001 年公约》承诺与其他国家一起保护水下文化遗产。

该公约第 303 条第 1 款，这些国家都同意为保护在海洋发现的考古和历史性文物进行合作，不论文物年代或所处的海域。根据第 303 条第 1 款“应……进行合作”的通常含义，缔约国有合作保护水下文化遗产的法律义务。[8] 然而，对于各国需要在多大程度上进行合作，这一条款并未明确。

为方便各国就水下文化遗产保护开展合作，《海洋法公约》和《2001 年公约》[9] 都鼓励各国签署并遵守国际协议，承认和支持相关国家缔结南海水下文化遗产保护方面的合作协议。具体而言，《海洋法公约》第 303 条第 4 款默许各缔约国缔结专项条约，而《2001 年公约》第 6 条第 1 款则鼓励各缔约国“签订双边、地区或其他多边协定，或对现有的协定加以补充，以保护水下文化遗产”。但在缔结这类合作协议之前，还应考虑一些因素，例如：我们为何必须缔结合作协议，我们是否还可以通过其他方式达成目的，以及缔结协议的方式有哪些优缺点。因此，本部分将重点研究这些考量因素。首先，文章将阐述南海水下文化遗产保护面临的两大法律问题：一是缺乏可适用的国际法，二是南海沿岸各国国内法的规定不一致。接着，本文将探讨完善保护南海水下文化遗产的法律框架，以及鼓励各国参与相关合作的方法。最后，文章将阐述采取缔结合作协议这种方式的优点。

（一）南海水下文化遗产保护涉及的法律问题

《海洋法公约》和《2001 年公约》是水下文化遗产保护方面的两大主要国际法。《海洋法公约》是适用于海洋管理的一般法律，被公认为“海洋宪章”。[10]《海洋法公约》的规定大致涵盖了所有海洋活动，包括海域划界、海洋资源勘探和开发、海洋环境保护、海洋科学研究等。然而，该公约中有关水下文化遗产保护的规定却只有 2 条，即第 149 条和第 303 条。第 149 条规定各缔约国应保护“区域”内发现的水下文化遗产，第 303 条规定各缔约国有义务保护在海洋发现的水下文化遗产，并应为此目的进行合作，无论该遗产位置为何。然而，在很多方面，《海洋法公约》的规定并不明确，更多的细节亟待补充。为弥补这方面的不足，《2001 年公约》应运而生。《2001 年公约》是水下文化遗产保护方面的专门法，由 35 条正文和 1 个附件组成。

尽管上述 2 个公约制定了有关水下文化遗产保护的规定，但南海沿岸国并没有全部都加入这 2 个公约。除柬埔寨外，南海周边所有国家都是《海洋法公约》的

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8 Michail Risvas, The Duty to Cooperate and the Protection of Underwater Cultural Heritage, *Cambridge Journal of International and Comparative Law*, Vol. 2, Issue 3, 2013, p. 568.

9 《2001 年公约》序言第 11 段和第 2 条第 2 款。

10 Tommy T.B. Koh, A Constitution for the Oceans, at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf, 18 March 2018.

缔约国，[11] 而柬埔寨则是南海沿岸国中《2001 年公约》的唯一缔约国。因此，目前仍缺乏对所有南海沿岸国均适用的关于水下文化遗产保护的国际法。

除缺乏可适用的国际机制外，南海沿岸各国有关水下文化遗产保护的国内法也存在差异。在南海沿岸国中，只有中国和越南颁布了关于水下文化遗产保护的专门法，而其他沿岸国则仅适用有关文化遗产的一般法律来保护水下文化遗产。这些法律的内容各不相同，存在不一致性。这种情况导致南海的水下文化遗产保护缺乏统一的标准，不利于合作的开展。[12] 首先，南海沿岸各国的国内法对“水下文化遗产”的定义各不相同。在准许勘探和打捞水下文化遗产之前，南海沿岸国要求申请方满足的条件也不相同。其次，各国对水下文化遗产行使管辖权的具体做法也不尽相同。比如，大多数南海沿岸国都仅对其领海内的水下文化遗产行使管辖权，但中国、泰国和越南则可对位于其领海以外区域的文化遗产行使管辖权。除了印尼、菲律宾、马来西亚和越南，其他南海沿岸国都遵守水下文化遗产的非商业开发原则。[13] 再者，南海周边大部分国家，包括文莱、[14] 柬埔寨、[15] 印度尼西亚、[16] 菲律宾、[17] 新加坡 [18] 和马来西亚，[19] 都主张对其领海内无法辨识物主的水下文化遗产享有所有权，但各国的做法却不一致。例如，中国对遗存于中国内水、领海内的一切起源国不明的文物，以及遗存于外国管辖海域和公海区域内的起源于中国的文物主张所有权。[20] 泰国根据 1961 年《古迹、古物、艺术品与国家博物馆法案》第 24 条，对遗存于其专属经济区内无法辨识物主的所有水下文化遗产主张所有权。而越南则对遗存于其内陆水域、内水、领海、专属经济区内和大陆架上不可辨识物主的所有水下文化遗产主张所有权。[21]

鉴于南海沿岸国并非都是《海洋法公约》和《2001 年公约》的缔约国，再加上各国国内法的不一致性，沿岸国很可能因水下文化遗产所有权主张产生冲突。例如，在越南专属经济区内或大陆架上发现了一件无法辨识物主的水下文化遗产，

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11 文莱（1996 年 11 月 5 日）、中国（1996 年 6 月 7 日）、印度尼西亚（1986 年 2 月 3 日）、马来西亚（1996 年 10 月 14 日）、菲律宾（1984 年 5 月 8 日）、泰国（2011 年 5 月 15 日）和越南（1994 年 7 月 25 日）都批准了《海洋法公约》，下载于 http://www.un.org/depts/los/referencefiles/chronologicallistsof-ratifications.htm#TheUnitedNations，2018 年 3 月 17 日。

12 Yodsapon Nitiruchirot, The Challenges of Underwater Cultural Heritage Protection in the South China Sea, *China Oceans Law Review*, Vol. 2016, No. 2, 2016, pp. 244~267.

13 Michael Flecker, The Ethics, Politics, and Realities of Maritime Archaeology in Southeast Asia, *The International Journal of Nautical Archaeology*, Vol. 31, Issue 1, 2002, pp. 16~20.

14 Antiquities and Treasure Trove Act 1967, Section 3(3).

15 Law on the Protection of Cultural Heritage 1996, Article 39.

16 Act Concerning Cultural Heritage 2010, Article 15.

17 Civil Code of the Philippines, Article 719.

18 National Heritage Board Act 1994, Section 46(8).

19 National Heritage Act 2005, Section 61(5).

20 1989 年《中华人民共和国水下文物保护管理条例》第 2 条。

21 Decree 2005, Article 4(1).

但该遗产却起源于中国，在这种情况下，中越两国均可对其主张所有权，这样两国就可能发生冲突。

（二）各国合作保护南海水下文化遗产的方式

如上所述，南海沿岸国中只有柬埔寨是《2001 年公约》的缔约国，因此该公约无法适用于南海地区的水下文化遗产保护。如需适用，南海所有沿岸国都必须承认、接受、批准或加入该公约。然而，即使南海沿岸国都在考虑批准《2001 年公约》，但要他们付诸实际行动并非易事，特别是在部分国家对公约的条文还存在误解的情况下。对合作保护南海水下文化遗产，另一种可行的方式是缔结有关南海水下文化遗产保护的合作协议。如采取这种方式，还需要解决与协议内容和缔结相关的一些问题，如与海洋争端有关的主权问题，协议由谁发起，协议的形式，以及其他相关机制问题等。

虽然缔结合作协议的方式也有优缺点，但与承认、接受或批准《2001 年公约》相比，缔结合作协议具有更高的灵活度，如在合作协议中，南海沿岸国可以对不赞成的条款表示反对。而加入《2001 年公约》，各国仅有权作出保留，要求公约不适用于其领土、内水、群岛水域或领海等特定区域。[22]

（三）缔结合作协议的益处

南海地区充斥着领土争端和划界争端，当南海沿岸国对位于这些争议海域的水下文化遗产行使管辖权时，就可能会产生争端。因此，签署合作协议，建立共同行使管辖权的机制和法律框架，对保护水下文化遗产益处颇多。合作协议可以包含一些加强南海沿岸国合作的规定，如在保护和管理水下文化遗产方面开展合作或相互协助，与其他缔约国共享水下文化遗产的相关信息，以及确立南海水下文化遗产保护的标准。这样，南海沿岸各国就可以在不加入《2001 年公约》的情况下，参考该公约或其他国际文书的相关规定，因地制宜，制定符合南海地区特殊情况的合作协议。

三、缔结南海水下文化遗产保护合作协议的方式

合作协议的缔结有几种方式，可以是双边协议，也可以是多边协议，可以是具有法律约束力，也可以是不具有法律约束力的协议。此外，协议可由沿岸各国直

22 《2001 年公约》第 29~30 条。

接缔结，也可通过一个组织来缔结。有鉴于此，本部分将考察缔结南海水下文化遗产保护合作协议的具体方式。

（一）双边协议或多边协议

根据缔约国的数量，国际协议可以分为双边协议和多边协议，这 2 种协议都可用来保护南海的水下文化遗产。以多边协议来看，缔约方可以是南海所有沿岸国，也可以是根据地理位置划分的国家集团，如泰国湾沿岸国（柬埔寨、马来西亚、泰国和越南）。通常情况下，双边协议比多边协议更容易达成，因为双方比多方之间更容易形成共识。要缔结一项多边协议，需要所有缔约国都必须接受协议的所有条款，除非协议允许作出保留，[23] 而且相关国家也依此作出了保留。[24] 因此，缔结多边协议并不容易。关于保护“泰坦尼克号”沉船遗迹的协议就是一个很好的例子，起初，美、英、加、法四国参与协议谈判，协议文本于 2001 年起草完毕，但目前只有美英两国签署了协议。[25]

根据《海洋法公约》第 122 条，[26] 南海属于半闭海，具有其特定的特征。依据该公约第 123 条，南海沿岸国应有义务与其他国家相互合作在南海开展某些活动。[27]《海洋法公约》本应制定具体的法律制度，系统地规范相关国家的行为，将因在南海开展这些活动而可能产生的争端最小化，但事实上却没有这样的法律制度。在此情况下，如南海所有沿岸国都可以参与一项多边协议，那么这项协议将可以有效地保护水下文化遗产。

（二）具有或不具有法律约束力的协议

按照法律地位来划分，国际协议可以分为具有法律约束力的协议和不具法律约束力的协议（或外交文件）。要判定协议的法律地位，首先应考虑条约的定义。《维也纳条约法公约》第 2 条规定，[28] 条约应为“国家之间根据国际法以书面形式缔结

23 The 1969 Vienna Convention, Article19.
24 The 1969 Vienna Convention, Article 2(d).
25 Sarah Dromgoole, The International Agreement for the Protection of the Titanic: Problems and Prospects, *Ocean Development and International Law*, Vol. 37, Issue 1, 2006, pp. 1~32.
26 Christopher Linebaugh, Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing the Natural Resources of the South China Sea, *Columbia Journal of Transnational Law*, Vol. 52, Issue 2, 2014, p. 553.
27 《海洋法公约》第 123 条。
28 The 1969 Vienna Convention, Article 2(a).

的国际协议”，无论其名称为何，如谅解备忘录、联合公报或纪要。[29] 具有法律约束力的国际协议应包含 3 个要素。首先，缔约方应具有缔结协议的能力；第二，协议应包含具体的权利和义务；第三，每个缔约方都应在主观上认为该协议具有法律约束力。[30] 相较于具有法律约束力的协议，不具有法律约束力的协议更容易缔结，因为后者不向缔约国施加任何法律义务。尽管不具有拘束力，这类协议仍然是有效的，而且有可能在将来转变成具有法律约束力的协议。例如，在“地中海海洋文化遗产保护和旅游推广方法”国际研讨会上，《锡拉库萨宣言》在地中海国家正式通过。[31] 另一例子就是 2008 年由水下遗产工作小组和监测小组议定的《波罗的海地区水下文化遗产管理良好做法守则》。[32]

针对南海水下文化遗产保护，缔结具有法律约束力的协议并不容易，例如，东盟国家和中国在起草和通过《行为准则》时就遇到了重重困难。但是，尽管困难重重，南海沿岸国也应尽力缔结具有法律约束力的协议。如不可能，则可以考虑先签署不具有法律约束力的协议，即国际软法，这也是有用的。

（三）由各国直接缔结或通过国际组织缔结的协议

有关水下文化遗产保护的国际协议可以分为相关国家通过的协议和国际组织通过的协议。前者有 1972 年《澳大利亚与荷兰关于荷兰古沉船的协定》[33] 和 1989 年《南非与联合王国关于规范“伯肯黑德”号沉船救捞之解决方案的换文》；[34] 对

29 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1994*, p. 120, para. 25. “因此，与巴林的论点相反，会议纪要并非简单的会议记录，其不同于依据三方委员会框架撰写的会议记录；这些会议纪要不仅仅记录了讨论情况，还总结了各方同意和反对的观点，列举了各方同意作出的承诺。因此这些会议纪要构成了一项国际协议，能为各方创造权利和义务。”

30 ZHANG Linping, A Review of the 4th Forum on Regional Cooperation in the South China Sea – the Symposium on Cross-Strait Cooperation in the South China Sea, *China Oceans Law Review*, Vol. 2016, No. 2, 2016, p. 282.

31 Roberta Garabello and Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2003, pp. 274~275.

32 Report 5 on Cultural Heritage Cooperation in the Baltic Sea States, agreed upon by the Monitoring Group in Helsinki, 2008, p. 25.

33 Australian Legal Information Institute, Australian Treaty Series 1972 No. 18, at http://www.austlii.edu.au, 20 March 2018.

34 United Kingdom of Great Britain and Northern Ireland and South Africa: Exchange of Letters Constituting an Agreement Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS Birkenhead, Pretoria, 22 September 1989, at https://treaties.un.org/doc/Publication/UNTS/Volume%201584/volume-1584-I-27662-English.pdf, 20 March 2018.

后者而言，欧洲理事会[35]议定的关于水下文化遗产的几项协议就是典型的例子。在南海地区，即存在有能力缔结协议的国家，也存在有缔约能力的国际组织，如东盟等。

但问题是，如果由东盟来签署合作协议，那么作为东盟的非成员国，中国是否可以加入这一协议？

对于这个问题，我们不必过于担忧，因为中国确实可以加入东盟签署的协议，例如，中国于 2003 年加入了 1976 年由东盟创始成员缔结的《东南亚友好合作条约》，[36] 2002 年在金边通过了《中国—东盟全面经济合作框架协议》。[37]

值得注意的是，2000 年 7 月 24—25 日，第 33 次东盟部长级会议在泰国曼谷举行。[38] 此次会议上，东盟达成了《2000 年东盟文化遗产宣言》，该宣言旨在促进文化教育，提高文化意识和素养。该宣言规定“每个东盟国家都有责任鉴定、划定、保护、保存、促进、发展和向后代传播其领土内重要的文化遗产，并在必要和合适时为区域和国际援助与合作提供便利。”[39] 该宣言还规定：“成员国的国家文化遗产就是东南亚的遗产，东盟作为一个整体有义务进行合作，保护这些文化遗产。”[40]《2000 年东盟文化遗产宣言》将来可能发展成一项专门的协议，并对中国开放加入。

四、合作协议中的条款分析

缔结关于南海水下文化遗产保护的合作协议，需要考虑几个问题。首先是合作协议与其他国际公约以及南海沿岸国国内法之间的关系。如上所述，南海沿岸国是《海洋法公约》或《2001 年公约》的缔约国，因此，合作协议的实质内容必须符合上述两大有关水下文化遗产保护的公约，否则南海沿岸国在加入合作协议时，就会遇到诸多困难。如违反《2001 年公约》的相关规定，南海沿岸国（柬埔寨

35 The Council of Europe, Statute of the Council of Europe, at http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052, 13 March 2018.

36 ASEAN, Treaty of Amity and Cooperation in Southeast Asia Indonesia, 24 February 1976, at http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/, 19 March 2018.

37 ASEAN, Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People’s Republic of China Phnom Penh, 4 November 2002, at http://asean.org/?static_post=framework-agreement-on-comprehensive-economic-co-operation-between-asean-and-the-people-s-republic-of-china-phnom-penh-4-november-2002-4, 19 March 2018.

38 Joint Commuique of the 33rd ASEAN Ministerial Meeting Bangkok, Thailand, 24-25 July 2000, at http://asean.org/?static_post=joint-communique-of-the-33rd-asean-ministerial-meeting-bangkok-thailand-24-25-july-2000, 19 March 2018.

39 The ASEAN Declaration 2000, Article 1.

40 The ASEAN Declaration 2000, Article 1.

除外）今后想要批准《2001 年公约》，就会遇到重重障碍。此外，南海沿岸国的相关国内法尚不统一，有鉴于此，合作协议应试图协调各国国内法之间的冲突和差异。

签订合作协议的宗旨应是加强南海沿岸国之间保护该地区水下文化遗产的合作。从这个角度来说，合作协议又必须与《2001 年公约》有所区别。《2001 年公约》注重规范缔约国的权利和义务，以全面保护水下文化遗产。然而，考虑到南海问题的独特性，作者认为，合作协议只需关注南海沿岸国在水下文化遗产保护事宜上的合作即可。

《2001 年公约》中有很多值得借鉴的条款，可以用于南海水下文化遗产的保护，例如合作机制、协调国制度，以及水下文化遗产的就地保护。这些条款都可以吸收进合作协议中。当然，也有些条款因涉及敏感问题而不适合写入协议中。例如，《2001 年公约》第 25 条的争端解决机制并不适合南海地区。此外，禁止商业开发的规定也不符合南海地区的特殊情况，主要原因在于马来西亚、菲律宾、印度尼西亚和越南等沿岸国会因该条款而不愿加入合作协议。其他一些规定，如公约附件、船旗国措施、港口国措施，以及沿海国措施，则可列入合作协议，以鼓励缔约国如此行事。当然，合作协议也可以加入一些新的条款，如“水下文化遗产”的定义，有关领海以外区域水下文化遗产的保护，水下文化遗产的所有权，以及争端解决机制的条款。

（一）水下文化遗产的定义

南海沿岸国国内法对水下文化遗产的定义各不相同，主要可以分为 3 类：一类规定了文物本身的年限，一类规定了文物在水下遗存的年限，还有一类没有对文物的年限作出规定。[41] 在这种情况下，合作协议就很难为“水下文化遗产”提供一个令各方均满意的定义。有些国际文书采用了 100 年作为遗存水下的时间标准，如《2001 年公约》[42] 和 1970 年联合国教科文组织《关于禁止和防止非法进出口文化财产和非法转让其所有权的方法的公约》。[43] 然而，这一时间标准并不符合海洋考古原则，在很多时候显得过于随意。[44] 根据《2001 年公约》，将 100 年作为时间标准的原因有 2 个，一个是为了排除对水下文化遗产适用打捞法，另一个是为了

41 Yodsapon Nitiruchirot, The Challenges of Underwater Cultural Heritage Protection in the South China Sea, *China Oceans Law Review*, Vol. 2016, No. 2, 2016, pp. 259~261.

42 《2001 年公约》第 1 条第 1(a) 款规定：“‘水下文化遗产’系指至少 100 年来，周期性地或连续地，部分或全部位于水下的具有文化、历史或考古价值的所有人类生存的遗迹……”

43 The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Article 1(e) & (k).

44 ZHANG Xianglan and ZHU Qiang, Comments on the Convention on the Protection of the Underwater Cultural Heritage, *China Oceans Law Review*, Vol. 2006, No. 1, 2006, p. 451.

避免各国争相主张水下文化遗产的所有权。

1. 排除对水下文化遗产适用打捞法

在《2001 年公约》的起草阶段，国际社会对打捞法的适用存在 2 种不同的看法。一种认为打捞法只适用于处于危险中的沉船，这种看法为国际社会普遍接受；另一种认为打捞法适用于所有水下文化遗产，不论其是否处于危险中，这种看法在少数普通法系国家中比较盛行。值得注意的是，打捞法与水下考古原则互不相容，因为前者鼓励打捞每一艘沉船，而后者则支持就地保护。[45] 作为对这 2 种看法妥协的产物，《2001 年公约》适用了在水下遗存 100 年作为划分标准，区分可适用和不可适用《2001 年公约》的文物。

中国、泰国、印度尼西亚、菲律宾和越南都明确规定，将打捞法适用于处于危险中的水下文物。中国是南海沿岸国中唯一的《1989 年国际救助公约》缔约国，但中国根据该公约第 30 条第 1(d) 款作出保留，将水下文化遗产排除出公约的适用范围。[46] 此外，中国于 1957 年颁布了《中华人民共和国打捞沉船管理办法》。该管理办法只允许为了确保航行安全而开展的打捞作业，而水下文化遗产与航行安全几乎无关。[47] 印度尼西亚《2008 年第 17 号航运法》将救捞作业定义为“向受损或处于危险中的船舶和 / 或货船提供救济的作业”，[48] 本法适用于“所有沉没、触礁或搁浅并被遗弃的船舶”。[49] 泰国《2007 年海上救助法》将救捞作业定义为“协助海上或任何水域中处于危险的船舶或其他财产的行为或活动”。[50] 越南《2005 年海商法》规定，“海上救捞是指解救遇险的船舶或船上财产，以及向海上……处于危险中的船舶提供援助的行为”。[51]《2009 年菲律宾海岸警卫队法》规定了该国的海上救捞法律框架。菲律宾海岸警卫队依据该法成立，并拥有发放船舶救捞许可证，以及监督所有海上救捞作业的权利。[52] 根据该法，可以救捞的对象为“船舶，包括船上货物、船舶残骸、遗弃物和其他危及航行的物体。”[53] 根据该法实施救捞作业的目的是为确保航行安全。然而，文莱、[54] 马来西亚 [55] 和新加坡 [56] 等国却倾向

45 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge: Cambridge University Press, 2013, p. 168.
46 KX Li and CWM Ingram, *Maritime Law and Policy in China*, London/Sydney: Cavendish Publishing Limited, 2002, p. 52.
47 LIU Xiaotong and FU Tingzhong, Salvage of Sunken Ships in the South China Sea: Legal Basis and Practical Approach, *China Oceans Law Review*, Vol. 2013, No. 1, 2013, p. 121.
48 The Law of the Republic of Indonesia Number 17 of 2008 about Shipping, Article 1(55).
49 The Law of the Republic of Indonesia Number 17 of 2008 about Shipping, Article 1(54).
50 The Thai Marine Salvage Act, B.E. 2550 (2007), Section 4.
51 The Vietnam Maritime Code 2005, Article 185.
52 The Philippines Coast Guard Law of 2009, Section 3(h).
53 The Philippine Position Paper on Salvage of Wrecks, at http://scubatechphilippines.com/archives/Wreck%20Salvage%20Philippines.pdf, 12 March 2018.
54 Law of Brunei Merchant Shipping Order 2002, Section 142.
55 Merchant Shipping Ordinance 1952, Section 1.
56 Merchant Shipping Act 1995, Section 145.

于对水下文化遗产适用打捞法。

2. 避免主张水下文化遗产的所有权

在《2001 年公约》的起草过程中，最具争议的一点就是所有权问题。一般认为，淹没在水下超过 100 年的水下文化遗产是已遭遗弃的，[57] 这也是《2001 年公约》没有包含关于遗产所有权规定的原因之一。然而，这并不意味着各国就不能对在水下超过 100 年的文化遗产主张所有权。[58] 因此，如合作协议中的“水下文化遗产”定义未像《2001 年公约》那样规定时间标准，就不可避免地会面临能否适用打捞法，以及遗产所有权的问题。然而，另一方面，这也不意味着，若合作协议中的定义包含时间标准，则不会产生这些问题。

因此，作者认为，合作协议中的保护对象的定义不一定需要时间标准。实际上，不包含时间标准，更符合历史和考古原则，因为遗存于水下不足 100 年的文物，也具有历史或考古价值。大部分南海沿岸国都承认这一点。然而，文莱、马来西亚和新加坡必须确保不将打捞法适用于水下文化遗产。另外，如包含时间标准，则合作协议应赋予缔约国一定的权利，允许他们将遗存在水下不到 100 年，但具有文化、历史或考古价值的文物界定为水下文化遗产。这种做法更折中、更具灵活性。马来西亚《2005 年国家遗产法令》第 2 条第 1 款和第 63 条第 1 款就是这样规定的。

（二）领海以外区域的水下文化遗产保护

对于领海以外区域的水下文化遗产保护，《海洋法公约》留下了很多空白。比如，《海洋法公约》未明确指出沿海国是否对位于毗连区的水下文化遗产享有立法管辖权。此外，《海洋法公约》也未针对位于专属经济区内和大陆架上的水下文化遗产保护作出规定。而《2001 年公约》在一定程度上弥补了这些空白。《2001 年公约》第 8 条授予沿海国立法管辖权，以便沿海国保护在其毗连区的水下文化遗产。此外，该公约还试图通过“协调国制度”，为专属经济区内和大陆架上的水下文化遗产提供保护。“协调国制度”属于一种合作机制，具体体现在《2001 年公约》第 9~10 条中。该制度主要分为 3 步：（1）报告和通知，（2）磋商，（3）实施和授权。[59] 有学者认为，协调国制度似乎扩大了沿海国的管辖权，然而作者认为，事实并非如此。对于专属经济区内和大陆架上的水下文化遗产，协调国制度并未赋予沿海国对其直接行使管辖权的权利。相反，该制度要求沿海国必须通过与所有相关国家

57 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge: Cambridge University Press, 2013, p. 113.

58 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge: Cambridge University Press, 2013, p. 113.

59 Yodsapon Nitiruchirot, The Challenges of Underwater Cultural Heritage Protection in the South China Sea, *China Oceans Law Review*, Vol. 2016, No. 2, 2016, pp. 251~253.

合作来行使管辖权。实际上，除中国、[60] 泰国 [61] 和越南 [62] 以外，大多数南海沿岸国都不对其毗连区、专属经济区内或大陆架上的水下文化遗产行使管辖权。[63] 因此，有关这些海域的水下文化遗产保护，法律上还存在空白之处，这也可能会导致相关国家在合作保护这些区域的水下文化遗产时存在困难。

目前，大多数南海沿岸国都不是《2001 年公约》的缔约国，故尚不清楚是否所有南海沿岸国都可以适用协调国制度。南海沿岸国仅有勘探、开发、保护和管理其自然资源的权利，然而根据《海洋法公约》第 56 条和第 77 条，水下文化遗产作为人造资源，不属于自然资源，所以，专属经济区内和大陆架上的水下文化遗产的打捞和发掘，遵循公海自由和先到先得的原则。应该指出的是，尽管《海洋法公约》并未规定沿海国对其专属经济区内和大陆架上的水下文化遗产享有权利，但这并不意味着沿海国就无法享受其他相关法律下的权利。与此同时，根据《海洋法公约》第 303 条第 1 款，各国有责任保护海洋（包括所有海域）中的水下文化遗产，并与其他国家就此进行合作。此外，《海洋法公约》第 87 条关于航行自由的规定，不包含打捞和发掘水下文化遗产的自由。因此，合作协议中应包含协调国制度。尽管如此，如沿海国和其他国家在实施协调国制度的过程中产生冲突，应根据《海洋法公约》第 59 条，在公平的基础上加以解决。

总而言之，合作协议应包括沿岸国对其毗连区内水下文化遗产行使立法管辖权的条款。此外，协议还应包含协调国制度的有关规定，并表明在争议区域，协调国制度适用于所有争端国家。

（三）争端解决

根据《联合国宪章》，国际争端可以通过政治和司法 2 种途径来解决。这 2 种途径南海沿岸国都使用过，但大部分国家不愿采用司法途径。[64] 因此，合作协议中

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60 Regulations of the PRC Concerning the Administration of the Protection of Underwater Cultural Relics 1989, Articles 2~3.

61 Act of Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961), Article 24.

62 Article 6 of the Law on Cultural Heritage 2001, Article 21 of the Decree on the Detailed Regulations to Implement Some Articles of the Law on Cultural Heritage 2002, Article 1 of the Decree on Management and Protection of Underwater Cultural Heritage 2005.

63 除《2001 年公约》缔约国柬埔寨外，其他多数南海沿岸国，如文莱（1967 年《文物与宝藏法》第 3 条第 3 款）、印度尼西亚（2010 年《文化遗产法》第 2 条与第 4 条）和马来西亚（2005 年《国家遗产法》第 61 条），都对位于其领海内的水下文化遗产行使管辖权。菲律宾和新加坡两国没有规定保护位于其专属经济区内和大陆架上的水下文化遗产的权利和义务。

64 Lowell Bautista, Dispute Settlement in the Law of the Sea Convention and Territorial and Maritime Disputes in Southeast Asia: Issues, Opportunities and Challenges, *Asian Politics and Policy*, Vol. 6, No. 3, pp. 16~21.

采取的争端解决机制更可能依赖政治途径，如谈判、调查、调停、和解[65]等。此外，政治途径也与东盟国家谙熟的《东盟宪章》中的争端解决机制一致。[66]

（四）水下文化遗产的所有权

如上所述，南海沿岸国的国内法对水下文化遗产所有权的规定尚不一致，这就可能引发争议。要解决这个问题，需要考虑 2 点，一是水下文化遗产物主的定义，二是在无法辨识物主的情况下，水下文化遗产应归属何人？辨别水下文化遗产的物主会涉及一个问题，即应适用哪国的法律来判断水下文化遗产所有权的取得或放弃？是适用沿海国、船旗国还是其他有关国家的法律？如水下文化遗产的物主是私营企业，那么还需平衡个体权利和文化遗产的历史和考古价值，进而会引发另一个问题。在《海洋法公约》和《2001 年公约》的起草过程中，水下文化遗产所有权的问题得到了广泛关注和讨论。

1.《海洋法公约》中有关水下文化遗产所有权的规定

《海洋法公约》第 303 条第 3 款承认可辨识的物主的权利。然而，这一条款能否适用于在另一国家领土或领海内发现的历史或考古文物，却值得商榷。实际上，沿海国和物主国之间的争端通常都是通过双边协议解决的，如《1972 年东印度公司“巴达维亚”号沉船协议》、《1989 年“阿拉巴马”号协议》和《2003 年“拉贝拉”号协议》。[67] 根据《海洋法公约》，“区域”内水下文化遗产的所有权问题，可以依据全人类共同利益和优先权利原则间接解决。[68] 具体而言，对于“区域”内的考古和历史性文物的保护或处置，来源国，或文化上的发源国，或历史和考古上的来源国应享有优先权利。但是，公约并未明确优先权利的确切含义，以及如何判定一国是否享有优先权利。所以，当一国主张为历史上的来源国，另一国主张为文化上的发源国时，对于到底哪国享有优先权利，就可能产生争议。[69]

2.《2001 年公约》起草阶段对所有权问题的讨论

在早期起草《2001 年公约》的阶段，为避免出现所有权问题，曾有代表提议公约的适用范围仅限于被遗弃的水下文化遗产，但却未明确“被遗弃的水下文化遗产”的定义。1998 年，联合国教科文组织的公约草案提供了判断水下文化遗产是否遭到遗弃的 2 个标准：（1）物主在可用技术采取行动的 25 年内并未对其财产采取行动，（2）在没有可用技术的情况下，自物主最后一次声明权益起已有 50

65 《联合国宪章》第 33 条第 1 款。
66 《东盟宪章》第 22 条。
67 LIU Lina, Ownership of Underwater Cultural Heritage in the Area, *Creighton International and Comparative Law Journal*, Vol. 1, Issue 1, 2011, p. 65.
68 《海洋法公约》第 149 条。
69 LIU Lina, Ownership of Underwater Cultural Heritage in the Area, *Creighton International and Comparative Law Journal*, Vol. 1, Issue 1, 2011, p. 65.

年。[70] 然而，这一提案并未得到接受，因为美国坚持认为，只有在相关国家明确声明放弃时，其才会丧失国家船舶和飞行器的所有权。[71] 在此情况下，公约起草者无法为“遗弃”一词提供令各方皆满意的定义，最终，《2001 年公约》并未规定有关水下文化遗产所有权的条款。尽管如此，《2001 年公约》还是试图通过引入“与水下文化遗产确有联系的国家”[72] 的概念来解决所有权问题，这与《海洋法公约》中的“优先权利”概念非常相似。但这 2 个概念还是略有不同，因为与水下文化遗产有文化、历史或考古联系的国家只有机会进行磋商，并作出有关保护和保存的决定，并没有优先权利。此外，《2001 年公约》还使用了“全人类之利益”的概念，这与《海洋法公约》中的“全人类共同利益”如出一辙。[73]

3. 明确所有权问题的困难

《海洋法公约》和《2001 年公约》的相关经验表明，很难制定一条关于水下文化遗产所有权的具体规定，这牵涉到非常敏感与复杂的问题。尽管如此，如水下文化遗产位于沿海国的内水或领海等主权区域，那么将适用沿海国的国内法来判定其所有权。如在沿海国主权区域发现国家船舶或飞行器，那么物主国可以通过双边协议，或 1970 年《关于禁止和防止非法进出口文化财产和非法转让其所有权的方法的公约》（以下简称“《1970 年公约》”）、1995 年《国际统一私法协会关于被盗或者非法出口文物的公约》（以下简称“《1995 年公约》”）等国际公约确立的机制，来对这些水下文化遗产主张所有权。应该指出的是，这 2 项公约并不适用于所有南海沿岸国，因为只有柬埔寨、中国和越南是《1970 年公约》的缔约国，[74] 而且只有柬埔寨和中国是《1995 年公约》的缔约国。[75]

另一方面，对于在南海沿岸国专属经济区内或大陆架上发现的水下文化遗产，应适用“全人类共同利益”原则，以及国际私法上的“最密切联系”原则。这意味着所有相关国家都必须考虑到水下文化遗产将为全人类所拥有，并特别顾及与水下文化遗产有最密切联系的国家。

五、南海水下文化遗产保护合作协议草案条款建议

本部分将根据上文的分析，草拟一份南海水下文化遗产保护合作协议的模拟草案，以供南海沿岸国参考。

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70 1998 UNESCO Draft, Article 1(2); 1994 ILA Draft, Article 1(2).

71 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge: Cambridge University Press, 2013, p. 117.

72 《2001 年公约》第 6、7、9、11、18 条。

73 《2001 年公约》前言，第 2 条第 3 款，第 12 条第 6 款。

74 At http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha, 24 January 2018.

75 At https://www.unidroit.org/status-cp, 24 January 2018.

主题	建议条文	相关解释
前言	鉴于《联合国宪章》、《和平共处五项原则》、1976 年《东南亚友好合作条约》、2002 年《南海各方行为宣言》被认为是南海地区重要的国际文书，	这些文书为南海沿岸国处理国际关系提供了基本的指导准则。国际协议的缔结，甚至是国内法的颁布，都应以这些文书及其确立的准则为基础。
	考虑到《联合国海洋法公约》和 2001 年联合国教科文组织《保护水下文化遗产公约》是水下文化遗产保护方面的主要国际法，	该条规定提醒各方，《海洋法公约》和《2001 年公约》是水下文化遗产保护方面的两大国际法，南海沿岸国是前一公约或后一公约的缔约国，合作协议的条款不应损害这两大公约的宗旨。
	忆及合作协议缔结的法律依据是《联合国海洋法公约》第 303 条第 3 款和《保护水下文化遗产公约》第 6 条第 1 款， 经协议如下：	该条规定指明了缔结有关水下文化遗产保护国际协议的法律基础。
定义	方案一：“水下文化遗产”是指南海地区所有具有文化、历史或考古价值的人类生存的遗迹。 方案二：“水下文化遗产”系指至少 100 年来，周期性地或连续地，部分或全部位于水下的具有文化、历史或考古价值的所有人类生存的遗迹。但是，对于位于水下不超过 100 年的文物和遗址，如具有文化、历史或考古价值，缔约国也可以宣布其为水下文化遗产。	参见本文第四部分第一点对此的分析。
	“南海”是一个半闭海，连接太平洋和印度洋，西接泰国，东临菲律宾，南面印度尼西亚和马来西亚，北临中国，包括泰国湾和北部湾。	一些学者认为，泰国湾并不属于南海。因此，南海的范围应明确界定。
	“确有联系的国家”是指与水下文化遗产在文化、历史或考古方面有联系的国家。	这一规定参考了《2001 年公约》的有关条款。
目标	本协议旨在确保和加强南海水下文化遗产保护方面的合作。	明确协议的目标。
范围	本协议适用于整个南海。	明确协议的适用范围。

所有权	在缔约国专属经济区内和大陆架上发现的水下文化遗产，应为全人类的利益予以保存或处置，但应特别顾及与水下文化遗产有最密切联系的国家。	本条款处理在南海沿岸国专属经济区内或大陆架上发现的水下文化遗产所有权的问题，其综合了全人类共同利益原则和“最密切联系”原则。
就地保护	就地保护应作为保护水下文化遗产的首选方案。因此，批准开发水下文化遗产的活动必须看它是否符合保护该遗产之要求，在符合这种要求的情况下，可以批准进行一些有助于保护、认识或改善水下文化遗产的活动。	就地保护可以有效地保护水下文化遗产，以及解决国家间由此产生的冲突。这一规定参考了《2001 年公约》的有关条款。
与其他国际文书和法律之间的关系	本协议不得损害《联合国海洋法公约》赋予各国的权利、管辖权和义务。	大多数南海沿岸国都是《海洋法公约》的缔约国，《海洋法公约》的大部分条款都被广泛认可，即使是《2001 年公约》也没有损害《海洋法公约》。
	适用本协议的与水下文化遗产有关的任何活动都不得适用打捞法和打捞物法，除非：（1）得到主管当局的批准，同时（2）完全符合本协议的规定，同时又（3）确保任何打捞出来的水下文化遗产都能得到最大限度的保护。	这一条款参考了《2001 年公约》的有关条款，旨在排除对水下文化遗产适用打捞法。
毗连区内的水下文化遗产保护	缔约国可以管理和批准在其毗连区内的水下文化遗产开发活动。	协议有必要明确规定沿海国对其毗连区内的水下文化遗产拥有立法管辖权，这为南海水下文化遗产的保护制定了一项标准，并有助于南海沿岸国就水下文化遗产保护进行合作。

专属经济区内和大陆架上的水下文化遗产保护	1. 所有缔约国都有责任保护其专属经济区内和大陆架上的水下文化遗产。 2. 当一缔约国的国民，或悬挂其国旗的船只发现或者有意开发该国在南海的专属经济区内或大陆架上的水下文化遗产时，该缔约国应要求该国国民或船主报告其发现或活动，并应确保迅速有效地将该报告转告所有其他缔约国，以及与该水下文化遗产确有联系的其他国家。 3. 不得授权开发专属经济区内或大陆架上的水下文化遗产，除经沿海缔约国和与该水下文化遗产确有联系的国家的同意。	专属经济区内和大陆架上水下文化遗产保护的相关规定，是在《2001 年公约》第 10 条的基础上修订而来。
	4. 沿海缔约国应与和水下文化遗产确有联系的国家商讨保护该遗产的最佳措施，并指定协调国负责执行各方一致同意的保护措施，为实施一致同意的保护措施进行必要的授权，对水下文化遗产进行必要的初步研究，并为此进行必要的授权，并应及时将这些信息通报所有缔约国。 5. 协调国在根据本条款协调缔约国之间的协商，对水下文化遗产采取保护措施，进行初步研究和 / 或进行授权时，应代表所有缔约国的整体利益，而不应只代表本国的利益。协调国在采取上述行动时不能就此认为自己享有包括《联合国海洋法公约》在内的国际法没有赋予它的优先权和管辖权。 6. 当与文物确有联系的国家未提出愿意参与商讨如何确保水下文化遗产得到有效保护时，应考虑沿海缔约国为协调国。 7. 如有必要，在协商之前，为防止水下文化遗产遭到任何人类活动（包括掠夺）或其他原因的直接威胁，沿海缔约国可以采取一切切实可行的措施，和 / 或根据本协议进行任何必要的授权。 8. 在无法指定协调国的情况下，协调国应由南海所有沿岸国的多数投票选出。	改编自《2001 年公约》的协调国制度。该制度可以有效促进南海沿岸国之间的合作。
争议区域或主张重叠区域的水下文化遗产	1. 所有争端国应努力相互合作，保护位于南海争议水域或主张重叠区域的水下文化遗产。 2. 争端国应被视为沿海国，并应适用上一条第 7 款的规定。	本条旨在解决因履行本协议规定义务而产生的争议。

合作机制	1. 缔约国应就海洋考古学家的培养交换信息并进行合作。 2. 缔约国应鼓励其主管当局与地方政府、科学机构、非政府组织、渔民、海员、潜水员和其他专业人员协会就保护和促进水下文化遗产进行合作。 3. 缔约国应开展合作，提供水下考古、水下文化遗产保存技术方面的培训，并按商定的条件进行与水下文化遗产有关的技术的转让。	这一规定参考了《2001 年公约》的有关条款。
港口国措施	缔约国应采取措施，阻止非法出口和 / 或以违反本协议的方式非法打捞的水下文化遗产进入其领土，以及在其领土上买卖或拥有这种水下文化遗产。	这一规定参考了《2001 年公约》的有关条款。
沿海国措施	缔约国应采取措施禁止使用其领土，包括完全处于其管辖权和控制之下的海港及人工岛、设施和结构，进行违反本协议开发水下文化遗产的活动。	这一规定参考了《2001 年公约》的有关条款。
船旗国措施	缔约国应采取一切可行的措施，以确保其国民和悬挂其国旗的船只不进行任何不符合本协议的水下文化遗产的开发活动。	这一规定参考了《2001 年公约》的有关条款。
公众意识	缔约国应采取一切可行的措施，提高公众对水下文化遗产的价值与重要性的认识，以及对依照本协议保护水下文化遗产之重要性的认识。	这一规定参考了《2001 年公约》的有关条款，以及《波罗的海地区水下文化遗产管理良好做法守则》第 3 款。
开发水下文化遗产的活动	只有确保充分尊重科学考古的基本原则，如《保护水下文化遗产公约》附件所示，才能进行开发南海水下文化遗产的活动。	这一规定参考了 2001 年《锡拉库萨宣言》的有关条款。
争端解决	两个或两个以上缔约国在解释或实施本协议时出现的任何争端，都应以诚恳的协商或他们所选择的其他和平方式加以解决。	对于南海地区的争端，很多人认为有多种解决方式，但是作者认为，本条表述的方法是解决南海沿岸国之间争端的适宜方式。

六、结　论

以国际法中的相关规定为法律基础，缔结保护南海水下文化遗产的合作协议，对保护南海水下文化遗产至关重要。缔结合作协议的方式可以有多种，但根据南海特殊的地形特征，具有法律约束力的多边协议应该是最有效的。就协议的实质内容而言，可以吸收《2001 年公约》的部分条款。但必须指出的是，该公约也有些条款并不适合南海地区，如争端解决机制。此外，公约的一些条款也是把双刃剑，在给南海水下文化遗产保护带来好处时，也会给南海沿岸国带来各种义务。然而，大部分南海沿岸国都是发展中国家，他们在履行义务时可能会遇到各种难题。

尽管面临各种困难，南海沿岸国还是存在很多选择和机会。例如，中国国家主席习近平于 2013 年提出了与东盟国家共同建设 21 世纪海上丝绸之路的倡议，在此倡议下，丝路基金于 2014 年正式成立。这一倡议主要是为了支持丝路沿线国家的交流和互通，而南海水下文化遗产保护也应涵盖在内，因此，丝路基金将可以为南海水下文化遗产保护合作协议的缔结提供资金支持。

值得注意的是，本文的提议仅是作者个人的观点，南海沿岸国可能不会就本文建议的所有条款达成一致。南海地区地理位置关键，而且具有重要的历史意义，本文就合作协议提供建议，是希望南海沿岸国能提高合作意识，以便更好地保护这一地区的水下文化遗产。

（中译：赵菊芬）

Drafting a Cooperative Agreement for the Protection of Underwater Cultural Heritage in the South China Sea

Yodsapon Nitiruchirot*

Abstract: The South China Sea (SCS) has long been an important trade route. In spite of its modern importance as an economic lifeline, it also has significant historic importance as it is estimated that it contains more than 2,000 sunken ships. Nevertheless, due to high-level disputes between the littoral States, the protection of underwater cultural heritage (UCH) in the SCS is often overlooked. Such disputes make it difficult for States to exercise jurisdiction over UCH in the SCS, hindering much needed cooperation for the protection of UCH. In relation to this, there are two primary legal issues concerning UCH protection in the SCS: insufficiency of applicable international laws, and inconsistency in the domestic laws of SCS littoral States. Together, this makes protection of UCH in the SCS challenging. This article suggests two approaches for the improvement of the legal framework for UCH protection in the SCS, including: (a) the application of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage for SCS littoral States, and (b) the conclusion of a multilateral cooperative agreement on UCH protection in the SCS. Since it is difficult to implement the first approach, the paper will focus on the second one and discuss possible provisions for such a cooperative agreement and their rationale.

Key Words: South China Sea; Underwater cultural heritage; Cooperative agreement

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I. Introduction

Cooperation, supported by the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the UNESCO Convention on the Protection of the Underwater Cultural Heritage adopted in 2001 (hereinafter "2001 Convention"), is an important factor for the protection of underwater cultural heritage (UCH). The South China Sea (SCS), including the Gulf of Tonkin and the Gulf of Thailand, is one of the world's busiest international sea-lanes connecting the Andaman Sea and the Pacific Ocean, with, for example, more than half of the world's oil tanker traffic sailing through its waters.[1] Surrounded by Brunei, Cambodia, China, Indonesia, Malaysia, the Philippines, Thailand, Singapore, and Vietnam (hereinafter "SCS littoral States"), these waters have traditionally been used as a seaborne trading route, often referred to as the "Maritime Silk Road". With this rich history and economic importance, it is unsurprising that more than 2,000 sunken ships are estimated to exist in the SCS.[2]

Unfortunately, even though the SCS contains many items of UCH, the region has been at the center of various territorial and maritime boundary disputes. For example, there are territorial disputes over the Xisha Islands between China and Vietnam,[3] over the Nansha Islands among China, Malaysia, the Philippines, and Vietnam,[4] over Scarborough Shoal between China and the Philippines,[5] and over Sabah between Malaysia and the Philippines.[6] Furthermore, there are areas of overlapping claims between Cambodia and Thailand, and between Malaysia and Thailand; maritime zones claimed by Brunei, China, Indonesia, Malaysia, the Philippines, and Vietnam in the SCS are also overlapping. Attempts by SCS littoral

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1 David Rosenberg and Christopher Chung, Maritime Security in the South China Sea: Coordinating Coastal and User State Priorities, *Ocean Development and International Law*, Vol. 39, Issue 1, 2008, p. 51.

2 QU Jinliang, Protecting China's Maritime Heritage: Current Conditions and National Policy, *Journal of Marine and Island Cultures*, Vol. 1, Issue 1, 2012, p. 47.

3 Robert Beckman, China, UNCLOS and the South China Sea, at http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/AsianSIL-Beckman-China-UNCLOS-and-the-South-China-Sea-26-July-2011.pdf, 18 March 2018.

4 Robert Beckman, China, UNCLOS and the South China Sea, at http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/AsianSIL-Beckman-China-UNCLOS-and-the-South-China-Sea-26-July-2011.pdf, 18 March 2018.

5 Robert Beckman, China, UNCLOS and the South China Sea, at http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/AsianSIL-Beckman-China-UNCLOS-and-the-South-China-Sea-26-July-2011.pdf, 18 March 2018.

6 Orlando M. Hernando, *The Philippine Claim to North Borneo* (Master of Arts Thesis), Kansas: Kansas State University, 1966, p. 7.

States to resolve these disputes through both diplomatic and legal channels have thus far proven to be unsuccessful. These overlapping claims and disputes make exercising jurisdiction for the protection of UCH in these areas extremely difficult.

In order to protect UCH in the SCS, it is necessary to identify a common path through the adoption of a cooperative agreement that elaborates upon the rights and duties of SCS littoral States. As such, this article aims to examine some considerations for the conclusion of such a cooperative agreement, identifying the legal problems related to the protection of UCH in the SCS and methods for their resolution. In order to do so, this article will first provide justification for a cooperative agreement. It will then explore approaches to concluding such a agreement and provide suggestions for various provisions, including definition of the UCH, UCH protection in areas beyond the territorial sea, dispute settlement mechanisms, and the ownership of UCH.

II. Some Considerations on Concluding a Cooperative Agreement

The legal basis for the conclusion of a cooperative agreement in the SCS is the principle of cooperation. All SCS littoral States are parties to the UNCLOS, except Cambodia who has signed but not ratified it.[7] As such, according to UNCLOS Article 303(1), they agree to cooperate in the protection of "objects of an archaeological and historical nature found at sea" regardless of their age or maritime zone. In light of the ordinary meaning of "shall cooperate" under Article 303(1), each party has a legal obligation to cooperate for the protection of UCH.[8] The extent of cooperation required by this provision, however, is unclear.

With a view to implementing cooperation on UCH protection, both the UNCLOS and the 2001 Convention[9] encourage States to conclude and abide by international agreements, legally recognizing and supporting the conclusion of such an agreement in the SCS. Specifically, Article 303(4) of the UNCLOS implicitly allows States Parties to conclude specialized treaties, while the 2001 Convention

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7 Cambodia is a signatory but has not ratified the Convention. It should be noted, however, that Cambodia has undertaken to protect UCH with other States via the 2001 UNESCO Convention.

8 Michail Risvas, The Duty to Cooperate and the Protection of Underwater Cultural Heritage, *Cambridge Journal of International and Comparative Law*, Vol. 2, Issue 3, 2013, p. 568.

9 The 2001 Convention, Preamble para. 11, Article 2(2).

encourages States Parties to "enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage" (Article 6.1). There are some considerations which should be discussed before concluding such a cooperative agreement, however, including reasons why, potential alternatives, as well as advantages and disadvantages. Therefore, this section aims to study those considerations. First, the section will address the two main legal issues concerning UCH protection in the SCS, including the insufficiency of international law and the inconsistency of the relevant domestic laws of SCS littoral States. Second, this section explores approaches to improving the legal framework and encouraging cooperation for the protection of UCH in the SCS. Finally, the paper outlines the advantages of concluding a cooperative agreement.

A. Legal Issues Concerning the Protection of Underwater Cultural Heritage in the South China Sea

There are two primary international conventions concerning the protection of UCH, including the UNCLOS and the 2001 Convention. The UNCLOS, recognized as the "constitution for the oceans",[10] is a general law applied to the management of the sea. Its provisions broadly cover all of the activities in the sea, including delimitation of sea areas, exploration and exploitation of marine resources, marine environmental protection, marine scientific research, and more. Only two provisions of the UNCLOS concern UCH protection. First, Article 149 requires States Parties to protect UCH in the Area. Second, Article 303 obliges States Parties to protect the UCH found at the sea and to cooperate for this purpose, regardless of its location. In many respects, however, the UNCLOS is unclear. This lack of clarity resulted into the adoption of the 2001 Convention, which elaborated upon and supplemented the UNCLOS. Regarded as a specific law on UCH protection, it contains 35 articles and an annex.

Although these two conventions regulate the protection of UCH, not all SCS littoral States are parties to these mechanisms. All the SCS littoral States, except

10 Tommy T.B. Koh, A Constitution for the Oceans, at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf, 18 March 2018.

Cambodia, are parties to the UNCLOS,[11] while Cambodia is the only SCS littoral State that is a party to the 2001 Convention. Therefore, the international laws concerning UCH protection applicable to all States bordering the SCS are currently insufficient.

Beyond the insufficiency of applicable international mechanisms, SCS littoral States also have varying domestic regimes. Only China and Vietnam have specific laws regarding UCH protection, while other SCS littoral States apply general laws on cultural heritage to protect UCH. The content of these various regimes, however, are inconsistent with each other, resulting in limited standards and cooperation for the protection of UCH in the region.[12] First, variations can be found in the definition of the term "UCH" under the domestic laws of the SCS littoral States. These various regimes also involve different factors that SCS littoral States must consider before granting permission to the relevant entities to explore and excavate UCH. Second, these domestic regimes also have different practices surrounding the exercise of jurisdiction over UCH. For example, most SCS littoral States exercise jurisdiction merely over UCH lying within their territorial seas, but China, Thailand, and Vietnam also exercise jurisdiction over UCH in the areas beyond their territorial seas. Most of the SCS littoral States, except Indonesia, the Philippines, Malaysia, and Vietnam, abide by the principle of non-commercial exploitation of UCH.[13] Third, most of the SCS littoral States, including Brunei,[14] Cambodia,[15] Indonesia,[16] the Philippines,[17] Singapore,[18] and Malaysia,[19] claim ownership over UCH without an identified owner in their territorial seas, however, they do so differently. For example, China claims ownership over (a) all UCH of unidentified owners situated in its internal waters and territorial sea, and (b) UCH

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11 Brunei ratified the UNCLOS on 5 November 1996, China on 7 June 1996, Indonesia on 3 February 1986, Malaysia on 14 October 1996, the Philippines on 8 May 1984, Thailand on 15 May 2011, and Vietnam on 25 July 1994. For more information, at http://www.un.org/depts/los/referencefiles/chronologicallistsof-ratifications.htm#TheUnitedNations, 17 March 2018.

12 Yodsapon Nitiruchirot, The Challenges of Underwater Cultural Heritage Protection in the South China Sea, *China Oceans Law Review*, Vol. 2016, No. 2, 2016, pp. 244~267.

13 Michael Flecker, The Ethics, Politics, and Realities of Maritime Archaeology in Southeast Asia, *The International Journal of Nautical Archaeology*, Vol. 31, Issue 1, 2002, pp. 16~20.

14 Antiquities and Treasure Trove Act 1967, Section 3(3).

15 Law on the Protection of Cultural Heritage 1996, Article 39.

16 Act Concerning Cultural Heritage 2010, Article 15.

17 Civil Code of the Philippines, Article 719.

18 National Heritage Board Act 1994, Section 46(8).

19 National Heritage Act 2005, Section 61(5).

of Chinese origin that remains in sea areas under the jurisdiction of a foreign country, or in the high seas.[20] Thailand claims ownership of all UCH situated in its exclusive economic zone whose owner is unidentified pursuant to Section 24 of the Act on Ancient Monuments, Antiques, Objects of Art and National Museums (1961). Vietnam claims all UCH with unidentified owners in its inland and internal waters, territorial sea and exclusive economic zone, as well as on its continental shelf.[21]

Given varying membership of SCS littoral States to international conventions and very different domestic regimes, conflicts between SCS littoral States regarding claims over UCH may easily arise. For example, if a UCH site with an unidentified owner was discovered in the exclusive economic zone or continental shelf of Vietnam, but that site was of Chinese origin, then both States may make a claim of ownership over that site, leading to potential conflicts between those two States.

B. Ways to Establish Cooperation on the Protection of Underwater Cultural Heritage in the South China Sea

With only one SCS littoral State party, the 2001 Convention cannot be applied in the SCS. Successful application of its provisions would require ratification, acceptance, approval or accession of all SCS littoral States. Encouraging States to do so, however, even if they are now considering ratification, will be difficult, especially as there are misunderstandings to many of its provisions. An alternative would be the conclusion of a cooperative agreement on UCH protection in the SCS. While such an approach has many advantages and disadvantages, the States bordering the SCS should first tackle the questions related to its content and conclusion, including sovereignty issues related to maritime disputes, which State would initiate such an agreement, its form as well as any related institutional mechanisms.

Nevertheless, in comparison to ratification, acceptance or approval of the 2001 Convention, the conclusion of a cooperative agreement would provide greater flexibility as States could express disagreement with various provisions. In contrast, if a State were to accede to the 2001 Convention, the State could only make reservations so that the Convention would not apply to the specific parts of

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20 Regulations of the PRC Concerning the Administration of the Protection of Underwater Cultural Relics 1989, Article 2.

21 Decree 2005, Article 4(1).

its territory, internal waters, archipelagic waters or territorial sea.[22]

C. Advantages of Concluding a Cooperative Agreement

Given several territorial and delimitation disputes in the SCS, exercising jurisdiction over UCH in these areas may cause disputes between claimants. As such, there are many advantages of creating a common framework through a cooperative agreement that includes provisions for the establishment of a co-exercising jurisdiction mechanism. A cooperative agreement may contain provisions which could enhance cooperation between SCS littoral States, including cooperation and assistance for the protection and management of UCH, sharing information concerning UCH amongst the parties, as well as the establishment of a standard for UCH protection. Such provisions could be guided by the 2001 Convention or any other international instruments for the protection of UHC, while offering SCS littoral States the opportunity to establish an agreement that is suitable to the region without becoming parties to the 2001 Convention.

III. Approaches to the Conclusion of a Cooperative Agreement on Underwater Cultural Heritage Protection in the South China Sea

Cooperative agreements can be concluded in several ways. They may be bilateral or multilateral, legally-binding, or non-legally binding. Furthermore, such an agreement may be concluded by the littoral States themselves or through an international organization. With these various options, this section examines various approaches to the conclusion of a cooperative agreement on UCH protection in the SCS.

A. Bilateral or Multilateral Agreements

International agreements can be divided into bilateral or multilateral agreements, both of which could be utilised for the protection of UCH in the SCS. A multilateral agreement may be concluded by all SCS littoral States or a group of States guided by the natural divisions of these States, such as the Gulf of Thailand

22 The 2001 Convention, Articles 29~30.

group (Cambodia, Malaysia, Thailand, and Vietnam). Bilateral agreements, however, are often considered to be easier to conclude as finding consensus and common ground between two parties would be easier than among multiple parties. In order to conclude a multilateral agreement, all States Parties must accept all of its provisions, unless they have submitted a reservation,[23] if permitted to do so.[24] For example, the agreement for the protection of the remains of the *RMS Titanic* highlights these difficulties. The agreement was first finalized by four countries in 2001, including the U.S., the U.K., Canada, and France. It has, however, only been signed by the U.S. and the U.K.[25]

Nevertheless, as a semi-enclosed sea by virtue of Article 122 of the UNCLOS,[26] where the littoral States undertake to coordinate with other States in certain activities pursuant to Article 123 of the UNCLOS,[27] the SCS has specific features. The UNCLOS should have provided for a specific legal regime to systematically regulate State conducts and to minimize the potential disputes arising from activities in the SCS. Given the absence of such a specific regime, a multilateral agreement should be effective for protecting UCH if it includes all SCS littoral States.

B. Legally or Non-legally Binding Agreements

The legal status of international agreements can be classified as legally binding and non-binding (or diplomatic documents). In order to identify the legal status of an agreement, we must refer to the definition of the treaty as found in Article 2 of the Vienna Convention on the Law of Treaties (1969).[28] Namely, a treaty should be "an international agreement concluded between States in written form and governed by international law", regardless of what it is designated, for example,

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23 The 1969 Vienna Convention, Article 2(d).
24 The 1969 Vienna Convention, Article19.
25 Sarah Dromgoole, The International Agreement for the Protection of the Titanic: Problems and Prospects, *Ocean Development and International Law*, Vol. 37, Issue 1, 2006, pp. 1~32.
26 Christopher Linebaugh, Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing the Natural Resources of the South China Sea, *Columbia Journal of Transnational Law*, Vol. 52, Issue 2, 2014, p. 553.
27 The UNCLOS, Article 123.
28 The 1969 Vienna Convention, Article 2(a).

memorandum of understanding, joint communiqués, or minutes.[29] These legally binding international agreements should be comprised of three elements. First, the party concluding an agreement should have the competence to do so. Second, such an agreement shall contain specific rights and obligations. Third, each contracting party should subjectively deem the agreement to be legally binding.[30] Given that non-legally binding agreements do not impose any legal obligations on States Parties, it is often the case that they are easier to conclude. Although non-binding, they are still effective and have the potential to develop into legally binding agreements in the future. For example, at the international conference "Means for the Protection and Touristic Promotion of the Marine Cultural Heritage in the Mediterranean", the Mediterranean Sea States adopted the Siracusa Declaration on the Submarine Cultural Heritage of the Mediterranean Sea (2001).[31] Another example is the Code of Good Practice for the Management of the Underwater Cultural Heritage in the Baltic Sea Region concluded by the Working Group on Underwater Heritage and Monitoring Group in 2008.[32]

The conclusion of a legally binding agreement for the protection of UCH in the SCS, would be difficult, illustrated by, for example, the difficulties in drafting and adopting the Code of Conduct between ASEAN Countries and China. However, in spite of the difficulties, SCS littoral States should strive to conclude legally binding agreements, if possible. Nonetheless, a non-legally binding agreement, which is a soft version of international law, may still prove useful.

C. Agreements Adopted by States or International Organizations

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29 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1994*, p. 120, para. 25. "Accordingly, and contrary to the contentions of Bahrain, the Minutes are not a simple record of a meeting similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement creating rights and obligations for the Parties."

30 ZHANG Linping, A Review of the 4th Forum on Regional Cooperation in the South China Sea – the Symposium on Cross-Strait Cooperation in the South China Sea, *China Oceans Law Review*, Vol. 2016, No. 2, 2016, p. 282.

31 Roberta Garabello and Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2003, pp. 274~275.

32 Report 5 on Cultural Heritage Cooperation in the Baltic Sea States, agreed upon by the Monitoring Group in Helsinki, 2008, p. 25.

International agreements concerning UCH protection can be separated into agreements adopted by States and those adopted by international organizations. There are several examples of State drafted agreements, including the Old Dutch Shipwrecks Agreement (1972) between the Netherlands and Australia,[33] or the *HMS Birkenhead* Agreement (1989) concluded by the exchange of notes between the UK and South Africa.[34] International organizations have also adopted several agreements relating to UCH, for example, those concluded by the Council of Europe.[35] In the SCS region there exist both States and international organizations, such as the Association of Southeast Asian Nations (ASEAN), which are capable of concluding such agreements.

If ASEAN were to conclude such a cooperative agreement, then there may be some concerns as to whether or not China, who is not a member of ASEAN, can join this agreement. These concerns, however, are unfounded as there are several agreements between China and ASEAN which illustrates that China can indeed become parties to agreements concluded by ASEAN. Examples of this include the Treaty of Amity and Cooperation in Southeast Asia (1976), concluded by the founding members of ASEAN[36] and acceded to by China in 2003. Other examples include the Framework Agreement on Comprehensive Economic Co-Operation between ASEAN and the People's Republic of China (2002) adopted in Phnom Penh.[37]

Notably, during 24-25 July 2000, the 33rd ASEAN Ministerial Meeting

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33 Australian Legal Information Institute, Australian Treaty Series 1972 No. 18, at http://www.austlii.edu.au, 20 March 2018.

34 United Kingdom of Great Britain and Northern Ireland and South Africa: Exchange of Letters Constituting an Agreement Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS Birkenhead, Pretoria, 22 September 1989, at https://treaties.un.org/doc/Publication/UNTS/Volume%201584/volume-1584-I-27662-English.pdf, 20 March 2018.

35 The Council of Europe, Statute of the Council of Europe, at http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052, 13 March 2018.

36 ASEAN, Treaty of Amity and Cooperation in Southeast Asia Indonesia, 24 February 1976, at http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/, 19 March 2018.

37 ASEAN, Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People's Republic of China Phnom Penh, 4 November 2002, at http://asean.org/?static_post=framework-agreement-on-comprehensive-economic-co-operation-between-asean-and-the-people-s-republic-of-china-phnom-penh-4-november-2002-4, 19 March 2018.

was held in Bangkok, Thailand.[38] At this meeting ASEAN members adopted the ASEAN Declaration on Cultural Heritage (2000) to promote cultural education, awareness, and literacy. The Declaration defines the "duty of each ASEAN member country to identify, delineate, protect, conserve, promote, develop and transmit to future generations the significant cultural heritage within its territory and to avail of regional and international assistance and cooperation, where necessary and appropriate."[39] It goes on to state that "the national cultural heritage of Member Countries constitutes the heritage of Southeast Asia for whose protection it is the duty of ASEAN as a whole to cooperate."[40] This Declaration may, in the future, develop into a specific agreement that is open for accession by China.

IV. Analysis of Provisions to Be Contained in a Cooperative Agreement

There are several points that should be considered for the conclusion of a cooperative agreement on UCH protection in the SCS. The first is the relationship between the agreement and other international conventions as well as the domestic laws of SCS bordering States. As mentioned above, the SCS littoral States are either parties to the UNCLOS or the 2001 Convention, which are the two primary conventions concerning the protection of UCH. Therefore, the provisions of any new agreement regarding the protection of UCH in the SCS must be in line with these conventions, otherwise the SCS littoral States will face major difficulties when participating in any new agreement. In addition, provisions that are contrary to the 2001 Convention will be a barrier to the future ratification by SCS littoral States, with the exception of Cambodia who is already a party. Moreover, there are multiple variations in the domestic laws of SCS littoral States, thus the conclusion of any agreement shall attempt to harmonize these domestic regimes.

The overall objective of any such agreement, however, shall be to enhance cooperation between SCS littoral States for the protection of UCH in the SCS. In this sense, such an agreement should differ from the 2001 Convention as the convention focuses more on the rights and duties of States Parties to

38 Joint Commuique of the 33rd ASEAN Ministerial Meeting Bangkok, Thailand, 24-25 July 2000, at http://asean.org/?static_post=joint-communique-of-the-33rd-asean-ministerial-meeting-bangkok-thailand-24-25-july-2000, 19 March 2018.

39 The ASEAN Declaration 2000, Article 1.

40 The ASEAN Declaration 2000, Article 1.

comprehensively protect UCH. As such, it is recommended that any cooperative agreement focus solely on the cooperation concerning the protection of UCH between SCS littoral States. Such a cooperative agreement should take into consideration the uniqueness of the situation within the SCS.

The 2001 Convention provides many useful provisions which can be applied to the protection of UCH in the SCS. These include many cooperative schemes, the coordinating State system, and preservation *in situ*. Such provisions can be absorbed into the cooperative agreement. Other provisions, however, are less helpful as they are considered to involve sensitive issues. For example, the dispute settlement mechanism under Article 25 of the 2001 Convention is not suitable to use in the SCS region. Furthermore, provisions that forbid commercial exploitation are also unhelpful in the SCS, as these provisions would make some littoral States especially Malaysia, the Philippines, Indonesia, and Vietnam reluctant to participate in the agreement. Other provisions, such as the Annex to the Convention, as well as flag State, port State, and coastal State measures may be included so as to encourage States Parties to do so. And some additional provisions might be included as well, including a definition of the UCH, provisions concerning the protection of UCH in areas beyond the territorial sea, ownership of UCH, as well as dispute settlement mechanisms.

A. The Definition of Underwater Cultural Heritage

The domestic laws of SCS littoral States include a variety of definitions for UCH that can be divided into three categories: (a) definitions that provide an age limit for the object, (b) definitions that provide a time limit regarding the period in which an artefact has been submerged underwater, and (c) definitions that provide no related time limit.[41] Such a variety of definitions makes it difficult to determine how to define UCH in any new cooperative agreement. Several international instruments, such as the 2001 Convention[42] and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of

41 Yodsapon Nitiruchirot, The Challenges of Underwater Cultural Heritage Protection in the South China Sea, *China Oceans Law Review*, Vol. 2016, No. 2, 2016, pp. 259~261.

42 The 2001 Convention, Article 1(1)(a), "'Underwater Cultural Heritage' means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years[…]".

Ownership of Cultural Property 1970[43] employ a 100 year time limit regarding the submerged period. Nevertheless, such a limit is inconsistent with the principles of maritime archaeology and in many situations is considered to be arbitrary.[44] In light of the 2001 Convention, however, there are two reasons for defining 100 years as the cut-off criterion, namely excluding the application of the salvage law and avoiding claims of ownership.

1. Excluding the Application of Salvage Law to UCH

At the time of drafting the 2001 Convention, there were two methods for the application of salvage law. The first, accepted globally, is that salvage law applies merely to shipwrecks in danger. The second, used by a small number of common law States, applies salvage law to all UCH regardless of being in danger or not. It should be noted, however, that this is incompatible with the principles of underwater archaeology as it encourages the salvaging of every shipwreck, whereas underwater archaeology supports preservation *in situ*.[45] As a compromise between these two notions, the 2001 Convention applies a 100 year time limit as a cut-off criterion to divide the objects to which the Convention will or will not be applied.

China, Thailand, Indonesia, the Philippines, and Vietnam explicitly apply salvage law to submerged objects in danger. China is the only SCS littoral State who is a party to the International Convention on Salvage 1989, however it has made a reservation under Article 30(1)(d) of the Convention to exclude UCH from the scope of the Convention.[46] Its domestic law related to this area, the Procedures for Administration of Sunken Ship Salvaging Regulation (1957), only permits salvaging to ensure navigational safety, while UCH is barely related to "navigational safety."[47] The Law of the Republic of Indonesia Number 17 of 2008 about Shipping, which defines a salvage operation as "a job to provide relief to the vessel and/or cargo vessel that is injured or in danger[…]",[48] applies to "every ship that sunk or

43 The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Article 1(e) & (k).

44 ZHANG Xianglan and ZHU Qiang, Comments on the Convention on the Protection of the Underwater Cultural Heritage, *China Oceans Law Review*, Vol. 2006, No. 1, 2006, p. 451.

45 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge: Cambridge University Press, 2013, p. 168.

46 KX Li and CWM Ingram, *Maritime Law and Policy in China*, London/Sydney: Cavendish Publishing Limited, 2002, p. 52.

47 LIU Xiaotong and FU Tingzhong, Salvage of Sunken Ships in the South China Sea: Legal Basis and Practical Approach, *China Oceans Law Review*, Vol. 2013, No. 1, 2013, p. 121.

48 The Law of the Republic of Indonesia Number 17 of 2008 about Shipping, Article 1(55).

run aground or stranded and have been abandoned.[49] Thailand's Marine Salvage Act (2007) defines salvage operation as "any act or activity undertaken to assist a vessel or any other property in danger at sea or in any waters whatsoever".[50] The Vietnam Maritime Code (2005) stipulates that "a maritime salvage is an action for saving a ship or properties on board thereof from danger as well as for rendering assistance to a ship in peril at sea […]."[51] The legal framework for salvage in the Philippines is provided by the Philippines Coast Guard Law (2009). The Philippines Coast Guard (PCG), established under this law, is entitled to issue permits for the salvage of vessels and to supervise all marine salvage operations.[52] The subject matter that may be salvaged under the law is "vessels, including cargo thereof, wrecks, derelicts, and other hazards to navigation."[53] The objective of salvage operations under this law is to ensure the safety of navigation. Nevertheless, some States, such as Brunei,[54] Malaysia,[55] and Singapore,[56] apply their salvage laws to UCH.

2. Avoiding Claims of Ownership over UCH

The issue of ownership was one of the most highly contested notions during the drafting process of the 2001 Convention. Typically, any piece of UCH which is submerged underwater for more than 100 years is assumed to be abandoned.[57] This is one reason why the 2001 Convention does not contain any provisions concerning ownership. Nevertheless, it does not mean that States cannot claim ownership of UCH that has been submerged for over 100 years.[58] If a temporal requirement similar to that under the 2001 Convention were excluded from the definition of UCH in a cooperative agreement, the issues concerning the application of salvage law and claims of ownership are unavoidable. Its inclusion, however, does not preclude the possibility such issues will arise.

As such, in the author's opinion, the definition of objects to be protected under a cooperative agreement does not necessarily require a temporal criterion.

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49 The Law of the Republic of Indonesia Number 17 of 2008 about Shipping, Article 1(54).
50 The Thai Marine Salvage Act, B.E. 2550 (2007), Section 4.
51 The Vietnam Maritime Code 2005, Article 185.
52 The Philippines Coast Guard Law of 2009, Section 3(h).
53 The Philippine Position Paper on Salvage of Wrecks, at http://scubatechphilippines.com/archives/Wreck%20Salvage%20Philippines.pdf, 12 March 2018.
54 Law of Brunei Merchant Shipping Order 2002, Section 142.
55 Merchant Shipping Ordinance 1952, Section 1.
56 Merchant Shipping Act 1995, Section 145.
57 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge: Cambridge University Press, 2013, p. 113.
58 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge: Cambridge University Press, 2013, p. 113.

The non-inclusion of a temporal requirement is consistent with historical and archaeological principles, as objects that have been underwater for less than 100 years will often have historical or archaeological significance. This is recognized by most SCS bordering States, however, some, including, Brunei, Malaysia, and Singapore, must ensure that salvage law will not be applied to UCH. If a temporal criterion is included, then the agreement shall entitle States Parties to designate objects that have been underwater less than 100 years but have cultural, historic or archaeological value as UCH. This approach, which is flexible and allows for compromise, is exemplified by Malaysia's Heritage Act (2005), Section 2(1) and Section 63(1).

B. Protection of Underwater Cultural Heritage in Areas Beyond the Territorial Sea

In terms of the protection of UCH in areas beyond the territorial sea, there are several gaps in the UNCLOS. For example, the UNCLOS does not clearly indicate whether or not coastal States enjoy legislative jurisdiction over the UCH found in their contiguous zones. Furthermore, it does not contain provisions concerning the protection of UCH in the exclusive economic zone or on the continental shelf. The 2001 Convention, however, elaborates on this issue. Article 8 grants coastal States legislative jurisdiction to protect UCH in their contiguous zones. In addition, the Convention aims to provide protection for UCH situated in the exclusive economic zone and on the continental shelf through the coordinating State system. This cooperative system, contained in Articles 9~10, is comprised of three steps: (a) reporting and notification, (b) consultation and (c) implementation and authorization.[59] Some may argue that the system appears to exemplify creeping jurisdiction as it seems to extend the coastal State's jurisdiction, however this is not the case. It does not entitle coastal States to exercise jurisdiction over UCH in their exclusive economic zones or on their continental shelves. Instead, States must exercise jurisdiction through cooperation with all States concerned. In practice,

59 Yodsapon Nitiruchirot, The Challenges of Underwater Cultural Heritage Protection in the South China Sea, *China Oceans Law Review*, Vol. 2016, No. 2, 2016, pp. 251~253.

most of the SCS littoral States, except China,[60] Thailand,[61] and Vietnam,[62] do not exercise jurisdiction over the UCH located in their contiguous zones, exclusive economic zones, or on their continental shelves.[63] This creates a gap in the protection of UCH in those areas, potentially leading to difficulties when States cooperate to protect the UCH in these areas.

Whether or not all SCS littoral States could apply this system, however, is unclear, as most of the SCS littoral States are not parties to the 2001 Convention. These States merely enjoy the right to explore, exploit, conserve, and manage their natural resources. This excludes UCH which, by virtue of Articles 56 and 77 of the UNCLOS, are regarded as a man-made resources. In that case, the recovery and excavation of UCH found in exclusive economic zones or on continental shelves falls under the principle of freedom of the high seas and a first-come-first-served approach. It should be noted, however, that even though the UNCLOS does not provide for the rights of coastal States over the UCH in their exclusive economic zones or on their continental shelves, this does not mean that coastal States are not entitled to rights under other relevant laws. Meanwhile, pursuant to Article 303(1) of UNCLOS, States have duties to protect and cooperate with other States for the protection of UCH located at sea (including all maritime zones). Moreover, Article 87 of the UNCLOS concerning freedom of navigation, does not contain the freedom in regards to the recovery or excavation of UCH. Therefore, the coordinating State system should be incorporated into a cooperative agreement. Nevertheless, if conflicts arise due to the implementation of the coordinating State system between coastal States and any other States, the conflicts should be resolved on the basis of equity in accordance with Article 59 of the UNCLOS.

In conclusion, the cooperative agreement to be concluded should contain provisions prescribing the coastal State's legislative jurisdiction over the UCH in

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60 Regulations of the PRC Concerning the Administration of the Protection of Underwater Cultural Relics 1989, Articles 2~3.

61 Act of Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961), Article 24.

62 Article 6 of the Law on Cultural Heritage 2001, Article 21 of the Decree on the Detailed Regulations to Implement Some Articles of the Law on Cultural Heritage 2002, Article 1 of the Decree on Management and Protection of Underwater Cultural Heritage 2005.

63 Except Cambodia which is a party to the 2001 Convention, most of the remaining SCS littoral States, namely Brunei (Antiquities and Treasure Trove Act 1967, Section 3.3), Indonesia (Act Concerning Cultural Heritage 2010, Articles 2 & 4), Malaysia (National Heritage Act 2005, Section 61) exercise jurisdiction over the UCH within their territorial seas. The Philippines and Singapore fail to provide any rights or duties to protect UCH in their exclusive economic zones or on their continental shelves.

its contiguous zone. It should also include articles about the coordinating State system, which should be applied to all disputing States in the disputed areas.

C. Dispute Settlement

According to the United Nations Charter, disputes can be settled via political and judicial means. In the SCS, both means have been used by littoral States, however, the majority of these States are reluctant to apply judicial means.[64] Thus any cooperative agreement would be more likely to rely on political means, including negotiation, inquiry, mediation and conciliation,[65] as a mechanism of dispute settlement. Such an approach is in line with the dispute settlement mechanisms of the ASEAN Charter, which ASEAN States are familiar with.[66]

D. Ownership of Underwater Cultural Heritage

As discussed above, differences in States' domestic laws concerning claims of ownership of UCH may be the source of disputes. In order to address this issue, two things should be considered: the definition of the owner of UCH, and in instances when an owner cannot be identified, who shall own the UCH. The determination of the owner of UCH is a question of which law should be applied to consider its acquisition or abandonment: the law of the coastal State, flag State or any other State concerned. If a private company is the owner of UCH, then this raises another issue, as there is a need to balance the rights of individuals and the historical and archaeological value of the artefact. At the time of drafting the UNCLOS and the 2001 Convention, the issue over ownership of UCH was widely discussed and hotly debated.

1. Ownership of UCH under the UNCLOS

Article 303(3) of the UNCLOS recognizes the rights of identifiable owners, however it is unclear if it applies to historically or archaeologically significant objects found in the territory or territorial sea of another State. In practice, disputes between the coastal States and the owner State were often settled through

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64 Lowell Bautista, Dispute Settlement in the Law of the Sea Convention and Territorial and Maritime Disputes in Southeast Asia: Issues, Opportunities and Challenges, *Asian Politics and Policy*, Vol. 6, No. 3, pp. 16~21.

65 The UN Charter, Article 33(1).

66 The ASEAN Charter, Article 22.

bilateral agreements exemplified by those concerning the *V.O.C shipwreck Batavia* (1972), the *CSS Alabama* (1989), and the *La Belle* wreck (2003).[67] According to the UNCLOS, the issue of ownership of UCH in the Area is indirectly resolved through the notion of the benefit of mankind as a whole and of preferential right.[68] These principles indicate that in order to preserve or dispose of objects of an archaeological and historical nature in the Area, the State of origin, State of cultural origin, or the State of historical and archaeological origin shall have preferential rights. It is unclear what exactly such a preferential right is and how it shall be determined, however, and disputes may arise when one State claims itself as the State of historical origin while another claims itself as the State of cultural origin.[69]

2. Ownership of UCH under the 2001 Convention

In the early drafting stage of the 2001 Convention, it was proposed that the Convention would only apply to abandoned UCH so as to avoid issues of ownership. However, the definition of abandoned UCH was unclear. In 1998 the UNESCO Draft provided two sets of criteria to determine if a piece of UCH was abandoned. Namely, a piece of UCH was considered to be abandoned (a) when "the owner had not taken action in respect of its property within twenty-five years of the availability of technology making the action possible", and (b) "where such technology was not available, after the lapse of a period of fifty years since the owner last asserted an interest."[70] This proposal, however, was not accepted because the U.S. insisted that the title to sovereign vessels and aircraft "can be lost only through express relinquishment."[71] Therefore, the drafters were unable to provide a satisfactory definition of abandonment, and the provision concerning the ownership of UCH was not included in the 2001 Convention. Nevertheless, the 2001 Convention attempted to resolve this issue through the notion of States with a verifiable link.[72] Although similar to the concept of preferential rights found in the UNCLOS, these two concepts differ in the sense that States with a verifiable link, those that have a cultural, historical or archaeological link to the UCH, merely have an opportunity to consult and make a decision in its protection and preservation.

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67 LIU Lina, Ownership of Underwater Cultural Heritage in the Area, *Creighton International and Comparative Law Journal*, Vol. 1, Issue 1, 2011, p. 65.

68 The UNCLOS, Article 149.

69 LIU Lina, Ownership of Underwater Cultural Heritage in the Area, *Creighton International and Comparative Law Journal*, Vol. 1, Issue 1, 2011, p. 65.

70 1998 UNESCO Draft, Article 1(2); 1994 ILA Draft, Article 1(2).

71 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge: Cambridge University Press, 2013, p. 117.

72 The 2001 Convention, Articles 6, 7, 9, 11 & 18.

They do not, however, have any priority. Furthermore, the notion of the benefit of humanity, similar to that of the benefit of mankind as a whole found in the UNCLOS, is applied in this Convention.[73]

3. The Difficulty of Defining Ownership

The experiences of the UNCLOS and the 2001 Convention showcase the difficulty in defining a specific provision concerning ownership of UCH, which involves very sensitive and complicated issues. Nevertheless, if UCH is found in an area subject to a coastal State's sovereignty, including its internal waters or territorial sea, the ownership of that UCH will be determined by the domestic law of the coastal State. If State-owned vessels or aircraft are discovered in the area subject to a coastal State's sovereignty, the owner State may claim the ownership of such UCH using a bilateral agreement or through the mechanisms found in international conventions, such as the Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) or the UNIDROIT Convention on Stolen or Illegal Exported Cultural Objects (1995). It should be noted, however, that not all SCS littoral States may utilise these two conventions, as only Cambodia, China, and Vietnam are parties to the 1970 Convention,[74] and only Cambodia and China are parties to the 1995 UNIDROIT Convention.[75]

When UCH is discovered in the exclusive economic zone or on the continental shelf of a SCS bordering State, the notion of "the benefit of mankind as a whole" and that of "most significance" on private international law should be applied, implying that all States concerned must take into account that the UCH site will be available for humankind, paying particular regard to the State of most significance.

V. Potential Provisions for a Draft Cooperative Agreement for the Protection of Underwater Cultural Heritage in the South China Sea

Based on the study above, this section will provide a mock model of a cooperative agreement on UCH protection in the SCS, which will be a proposal for all SCS littoral States to consider in the future.

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73 The 2001 Convention, Preamble, Articles 2(3) & 12(6).

74 At http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha, 24 January 2018.

75 At https://www.unidroit.org/status-cp, 24 January 2018.

Topic	Suggested Provision	Reason for Its Inclusion
Preamble	Whereas the Charter of the United Nations, the Five Principles of Peaceful Co-Existence, the Treaty of Amity and Cooperation in Southeast Asia (1976), the Declaration on the Conduct of Parties in the South China Sea (2002) are regarded as essential international instruments in the South China Sea region,	These documents codify the basic principles which manage international State relations in the SCS region. The conclusion of international agreements and even domestic laws shall be based on these documents and the principles within.
	Considering the 1982 United Nations Convention on the Law of the Sea and the 2001 Convention on the Protection of the Underwater Cultural Heritage are recognized as the main international laws concerning underwater cultural heritage protection,	This reminds parties that the UNCLOS and the 2001 Convention are the two main international conventions concerning UCH and that SCS littoral States are parties to the UNCLOS or the 2001 Convention. Furthermore, it reminds States that the provisions of any agreement shall not prejudice the objectives of these international conventions.
	Recalling this Agreement is concluded on a legal basis under Article 303(3) of the United Nations Convention on the Law of the Sea and Article 6(1) of the 2001 UNESCO Convention on the Underwater Cultural Heritage Protection, Have agreed as follows:	This provision refers to the legal basis supporting the conclusion of an international agreement concerning UCH protection.

Definition	Option 1: "Underwater Cultural Heritage" means all traces of human existence having a cultural, historical or archaeological character located in the SCS. Option 2: "Underwater Cultural Heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years. Nevertheless, if an object or site that has been under water for less than 100 years is of cultural, historical or archaeological significance, the State Party may declare the object or site to be underwater cultural heritage.	See the analysis of this provision in section IV.A.
	"The South China Sea" refers to a semi-enclosed sea, connecting the Pacific Ocean and Indian Ocean, bordered on the west by Thailand, on the east by the Philippines, on the south by Indonesia and Malaysia, and on the north by China, including the Gulf of Thailand and the Gulf of Tonkin.	The scope of the "South China Sea" should be clearly defined as some scholars argue that the SCS does not include the Gulf of Thailand.
	"State having a verifiable link" means a State or States having a historical, cultural, or archaeological link with the underwater cultural heritage.	This provision quotes the provision of the 2001 Convention.
Objective	This Agreement aims to ensure and strengthen cooperation on the protection of underwater cultural heritage in the South China Sea.	To define the objective of the agreement.
Scope	The agreement is applicable to the entire South China Sea.	To clearly state the scope of application.
Ownership	Underwater cultural heritage found in the exclusive economic zone or on the continental shelf of a State Party shall be preserved or disposed of for the benefit of mankind as a whole, with particular regard being paid to the State of most significance to the underwater cultural heritage.	This provision addresses the issue of ownership of UCH found in the exclusive economic zone or on the continental shelf of States bordering the SCS. It incorporates the notions of the "benefit of mankind as a whole" and the State of most significance.

In situ Preservation	The protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.	*In situ* preservation is very useful for the protection of UCH and in the resolution of disputes between States regarding its protection. This provision quotes the provision of the 2001 Convention.
Relationship with Other International Laws and Instruments	Nothing in this Agreement shall prejudice the rights, jurisdiction, and duties of States under the United Nations Convention on the Law of the Sea.	Most SCS littoral States are parties to the UNCLOS and most of the provisions of the UNCLOS are widely recognized. Even the 2001 Convention does not prejudice the UNCLOS.
	Any activity relating to underwater cultural heritage to which this Agreement applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Agreement, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.	Quoting the provision of the 2001 Convention, this provision aims to exclude the application of salvage law to UCH.
Protection of UCH in the Contiguous Zone	State Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zones.	It is necessary to clearly state that littoral States have legislative jurisdiction over the UCH located in their contiguous zones. This establishes a standard of UCH protection in the SCS and serves cooperation for its protection between SCS littoral States.

Protection of UCH in the Exclusive Economic Zone and on the Continental Shelf	1. All State Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf. 2. A State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf in the South China Sea, the national or the master of the vessel shall report such discovery or intention to it and shall ensure the rapid and effective transmission of such reports to all other State Parties as well as the States having a verifiable link with the objects in question. 3. No authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except when agreed on by the coastal State Party and the States having a verifiable link with the objects in question.	The provision concerning protection of UCH in the Exclusive Economic Zone and on the Continental Shelf is adapted from Article 10 of the 2001 Convention.
	4. The coastal State Party should consult States which have a verifiable link on the best measure to protect the underwater cultural heritage, and appoint the coordinating State which shall implement measures of protection which have been agreed upon, issue all necessary authorizations for such agreed measures, and conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorization therefore, and promptly inform all States Parties. 5. In coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea. 6. The coastal State Party should be considered as a coordinating State when States having a verifiable link with the objects do not declare their interest in being consulted on how to ensure the effective protection of the underwater cultural heritage. 7. If necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting, the coastal State Party may take all practicable measures, and/or issue any necessary authorizations in conformity with this Agreement. 8. In a case where the appointment of the coordinating State cannot be made, the coordinating States shall be selected by the majority vote of all SCS littoral States.	These provisions are adjusted from the coordinating State system of the 2001 Convention. This system is very useful for the promotion of cooperation between SCS littoral States.

Underwater Cultural Heritage in the Disputed Areas or Over-lapping Zones	1. All disputing States shall endeavor to cooperate with each other on underwater cultural heritage protection in the disputed areas or overlapping zones in the South China Sea. 2. The disputing State shall be regarded as the coastal State and the provision provided in paragraph 7 under the preceding topic shall be applied.	This provision aims to resolve disputes arising from the implementing of obligations under this agreement.
Cooperative Provisions	1. State Parties should exchange information on, and cooperate in, the training of marine archaeologists. 2. State Parties should encourage the cooperation of their competent authorities with local governments, scientific institutions, non-governmental organizations, and associations of fishermen, seafarers, divers and other professionals in the protection and promotion of underwater cultural heritage. 3. State Parties shall cooperate in the provision of training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage.	This provision quotes the provision of the 2001 Convention.
Port State Measures	State Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Agreement.	This provision quotes the provision of the 2001 Convention.
Coastal State Measures	State Parties shall take measures to prohibit the use of their territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity with this Agreement.	This provision quotes the provision of the 2001 Convention.
Flag State Measures	State Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Agreement.	This provision quotes the provision of the 2001 Convention.

Public Awareness	States Parties shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Agreement.	This provision quotes the provision of the 2001 Convention and Sub-section 3 of the Code of Good Practice for the Management of Underwater Cultural Heritage in the Baltic Sea Region.
Activities Directed at UCH	Activities directed at the underwater cultural heritage in the South China Sea should take place only if full respect of the fundamental principles of scientific archaeology is ensured, as reflected in the Annex to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage.	This provision quotes the 2001 Siracusa Declaration.
Dispute Settlement	Any dispute between two or more States Parties concerning the interpretation or application of this Agreement shall be subject to negotiation in good faith or other peaceful means of settlement of their own choice.	Given the wide range of views on dispute settlement in the region, this broad statement is a suitable means to settle disputes between SCS littoral States.

VI. Conclusion

The conclusion of a cooperative agreement concerning the protection of UCH in the SCS, with its legal basis in international law, is essential. Although there are many approaches to the conclusion of such an agreement, the geography of the SCS lends itself to a legally binding, multilateral agreement that is based on various provisions of the 2001 Convention. Given the unique characteristics of the region, however, not all provisions of the 2001 Convention are suitable for the SCS region, most evident in its dispute settlement mechanisms. Furthermore, many of these provisions entail not only benefits to protect UCH in the SCS, but also the obligations of the SCS littoral States. However, as developing States, they could have problems in fulfilling such obligations.

In spite of the difficulties, options and assistance are available to these States through, for example, the Silk Road Fund established in 2014 under the initiative proposed by Chinese President Xi Jinping in 2013 to jointly build the 21st Century Maritime Silk Road with ASEAN States. Although it is initiated to support people-to-people exchange and connection along the Road, the protection of UCH in the SCS can be regarded as one aspect of this project with potential support from the Silk Road Fund for the conclusion of a cooperative agreement on the protection of UCH in the SCS.

Even with the proposals found in this article, it is unlikely that all suggested provisions will be agreed upon by SCS littoral States. The conclusion of such an agreement and the guidance offered here does, however, aim to induce a sense of cooperation for the protection of UCH with all SCS littoral States in this historically and geographically important region.

Editor (English): David Devlaeminck

国家管辖范围外海洋保护区的第三方效力——以南极海洋生物资源养护委员会建立的海洋保护区为例

段　文*

内容摘要:在国家管辖范围外区域建立海洋保护区，是保护海洋环境、海洋生物多样性和海洋生态系统的有效方式，这种方式已被多个全球性及区域性法律制度所接受。但这些制度缺乏系统性，没有形成一个和谐一致的统一整体，因此不清楚由部分国家建立的这类保护区是否对第三方具备约束力。南极周边海域属于公海，南极海洋生物资源养护委员会（以下简称“委员会”）在这片海域建立了2个保护区:南奥克尼群岛南大陆架海洋保护区和罗斯海海洋保护区。鉴于委员会订立的措施具有法律约束力，且这2个保护区的参与国广泛，本文将选取这2个保护区为研究案例，探讨海洋保护区的第三方效力问题。从条约法的角度看，依据《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“《鱼类种群协定》”）第8条的规定，缔约国具有参与或遵守委员会安排的义务。这一规定表明委员会建立的保护区可以间接对第三方产生约束力。然而，并非所有国家都是《鱼类种群协定》的缔约国，而且该协定也仅适用于跨界鱼类种群和高度洄游鱼类种群。因此，本文将进一步讨论下述2个问题，一是委员会保护区的规则是否或在多大程度上适用于《鱼类种群协定》调整范围外的其他鱼类种群？二是该等规则是否或在多大程度上适用于不属于该协定缔约方的第三方？为回答上述问题，本文拟从习惯国际法入手，特别是考察与委员会保护区相关的国家实践和法律确信因素，分析这些保护区的规则是否构成了可以约束第三方的习惯法。

关键词:海洋保护区　国家管辖范围外区域　第三方效力　国际习惯法　南极海洋生物资源养护委员会

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一、引 言

（一）国家管辖范围外海洋保护区的定义

1988 年，世界自然保护联盟颁布正式文件，首次给出了“海洋保护区”的定义，指出“海洋保护区”是“任何通过法律或其他有效方式建立的，对其中部分或全部环境进行封闭保护的潮间带或潮下带陆架区域，包括其上覆水体及相关的动植物群落、历史及文化属性。”[1]《东北大西洋区域组织关于海洋保护区网络的 2003/3 建议》强调，海洋保护区是指为保护和养护海洋生物物种、栖息地、生态系统或生态过程，已采取各种措施的海域。[2] 根据上述定义可知，海洋保护区是一个概括性术语，包含一系列为不同目的并基于不同法律依据建立的海洋区域，各海洋区域采取的管理或养护措施（全球性、区域性或部门性措施）也各不相同。[3] 因此，海洋保护区可以根据目的划分为几种，包括保护生物资源 / 生物多样性的海洋保护区、保护历史和景观价值的海洋保护区，以及防治海洋污染的保护区。[4] 根据上述定义可知，国家管辖范围外保护区就是指建立在国家管辖范围以外海域的海洋保护区，具体而言，就是指建立在公海或国际海底区域的海洋保护区。[5]

（二）国家管辖范围外海洋保护区的成立背景

国际社会普遍承认，建立海洋保护区是保护海洋环境、生物多样性和生态系统的有效方式，《生物多样性公约》第十届缔约方会议设定的“爱知指标”就说明了这一点。“爱知指标”规定，到 2020 年，10% 的沿海与海洋区域将通过保护区系统及其他基于保护区的保护措施得到保护。[6] 这一指标既适用于国家管辖范围内区域，也适用于国家管辖范围外区域，因后者占全球海洋面积的 64%，所以对该区域的保护将在海洋生物资源和生物多样性保护方面起重要作用。在这种情况

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1 Resolution 17.38 (1988) by the General Assembly of the IUCN, reconfirmed in Resolution 19.46 (1994).

2 OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, adopted by OSPAR 2003 (OSPAR 03/17/1, Annex 9), Article 1.

3 Sarah Wolf and Jan Asmus Bischoff, Marine Protected Areas, *Max Planck Encyclopedia of Public International Law*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2029?rskey=jE0lQD&result=1&prd=EPIL, 9 January 2018.

4 Sarah Wolf and Jan Asmus Bischoff, Marine Protected Areas, *Max Planck Encyclopedia of Public International Law*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2029?rskey=jE0lQD&result=1&prd=EPIL, 9 January 2018.

5 根据《联合国海洋法公约》，公海和国际海底区域均在国家管辖范围以外，因此均可称为国家管辖范围外区域。See UNCLOS Articles 86 & 1.

6 Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting, UNEP/CBD/COP/DEC/X/2, 29 October 2010, p. 6.

下，为完成《生物多样性公约》第十届缔约方会议设定的“指标”，在国家管辖范围外区域设立海洋保护区就显得尤为重要。

截至目前，国家管辖范围外区域已建有 4 个海洋保护区：（1）地中海派拉格斯保护区，该保护区由法国、意大利和摩纳哥三国共同建立，后被列入根据 1995 年《巴塞罗那公约》所设立的地中海特别保护区名单；（2）奥斯巴东北大西洋公海海洋保护区网络；（3）南极海洋生物资源养护委员会（以下简称“委员会”）在南极建立的南奥克尼群岛南大陆架海洋保护区（以下简称“南奥克尼保护区”）；（4）委员会在南极建立的罗斯海海洋保护区。[7] 在国家管辖范围以外区域既有的这些海洋保护区中，委员会所设立的保护区最具代表性，这不仅是因为其建立了全球最大的海洋保护区——罗斯海保护区，还因为其制定了具有法律约束力的限制性措施，并且拥有广泛的成员国。相比较而言，派拉格斯保护区和奥斯巴公海海洋保护区网络仅涉及地中海周边国家和东北大西洋周边国家。此外，在奥斯巴公海海洋保护区网络中，尽管决定建立公海海洋保护区的决议具有法律约束力，但这个网络却并未制定具有法律约束力的管理措施。[8] 因此，本文将选取委员会所设立的保护区为研究案例。

目前，有关国家管辖范围外海洋保护区的法律制度是高度碎片化的，缺乏系统性，没有形成一个和谐统一的整体。此外，也缺乏一个综合的条约或法律制度专门处理国家管辖范围外保护区的建立问题，已有的这类保护区均是根据区域性，而非全球性法律制度建立的。现有法律制度的碎片化造成了下述现状，即目前已有的国家管辖范围外保护区仅由少数国家建立，换言之，大部分国家并未参与这些保护区的划定。

（三）相关的法律问题

在此情况下，国家管辖范围外保护区是否会影响未参与保护区建立的国家（即第三方）的权利和义务便成了一个有待解决的问题。也就是说，由部分国家建立的国家管辖范围外保护区是否对第三方具有法律约束力？为回答这一问题，本文将首先简单分析这类保护区与第三方之间的关系，接着选取委员会所设立的保护区（以下简称“委员会保护区”）作为案例进行分析，以确定委员会保护区是否对第三方具有法律效力。

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7 OSPAR Decisions 2010/1, 2010/2, 2010/3, 2010/4, 2010/5, 2010/6. 根据《奥斯巴公约》第 13 条，这些决议具有约束力。Bethan C. O’Leary, R. L. Brown, D. E. Johnson, H. von Nordheim, Jeff A. Ardron, Tim Packeiser and Callum M. Roberts, The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next, *Marine Policy*, Vol. 36, Issue 3, 2012, pp. 598~605.

8 奥斯巴公海海洋保护区网络的管理措施是由奥斯巴委员会通过的相关建议规定的，然而，依据《奥斯巴公约》，这些建议却不具有法律约束力。

需要说明的是，本文所讨论的范围有限，对上述法律问题作出的分析也不尽全面。另外，鉴于与委员会保护区相关的管理措施主要涉及渔业管理，因此，本案例研究得出的有关第三方效力的结论仅适用于与国家管辖范围外保护区相关的渔业管理措施的第三方效力。

二、第三方效力问题的一般分析

由于现有的国家管辖范围外海洋保护区都是依据一项条约或公约中的法律制度建立的，因此，本文将先从条约法的角度分析条约与第三方之间的关系。

（一）条约与第三方之间的关系

1969 年《维也纳条约法公约》第 34~36 条对条约与第三国间的关系通则作出了规定。[9] 总体而言，条约非经第三国同意，不对该国具有约束力（“条约对第三方无损益原则”）。然而，针对创设义务和创设权利两者，“同意”一词的含义却不尽相同。对创设义务的条款，需经第三国的明示同意，方对该国具有约束力。然而，对创设权利的条款，经第三国默示同意即可。

条约款项还可以通过形成国际习惯法对第三国产生拘束力。这又引出了如何判定国际习惯法的问题，下文将对此进行详细讨论。

（二）国家管辖范围外保护区与第三方之间的关系

现有的国家管辖范围外保护区主要侧重于为各国创设义务，[10] 故须经第三国明示同意，这些管理措施方能对第三国产生拘束力。目前的情况是，没有哪个第三方国家直接明示同意这些保护区的法律制度。然而缺乏第三国的明示同意，并不意味着这类保护区就无法对第三方国家产生拘束力。这一点可以通过《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“《鱼类种群协定》”）的间接第三方效力进行说明，下文将会对此进行探讨。

对第三方产生效力的另一个可能途径是通过形成国际习惯法。就习惯法而言，在本研究案例中，不对国家管辖范围外的海洋环境造成损害的原则，就为国家

9 Vienna Convention on the Law of Treaties, Articles 34~36.

10 例如，委员会保护区主要限制渔业活动；派拉格斯保护区主要要求各国防治航运污染，以及禁止捕获海洋哺乳动物；奥斯巴公海海洋保护区主要涉及一些有关海洋科学研究的义务。

管辖外保护区的第三方效力提供了法律基础。这一原则可以在《联合国海洋法公约》中找到，而且还被国际社会普遍视作国际习惯法。[11] 根据这一原则，一国应具有保护他国或国家管辖范围外区域海洋环境的一般义务。如海洋环境和生态系统的保护需要部分国家在国家管辖范围外区域建立海洋保护区，那么，为履行上述一般义务，第三方国家就可能需要受这些保护区的约束。然而，由于该环境法原则的一般性质，其无法回答国家管辖范围外某一特定保护区的设立对环境保护而言是否必要，这也就导致支撑对第三方产生效力的法律基础出现了问题。因此，光靠这一原则，尚不足以让国家管辖范围外保护区对第三方产生拘束力。

除了可能通过国际习惯法产生第三方效力外，国家管辖范围外海洋保护区的建立是否本身就构成了国际习惯法，进而可以对第三方产生约束力？在回答这一问题前，必须先阐明应如何判定国际习惯法。形成国际习惯法的两大要件是一般国家实践和法律确信。[12] 对于“一般国家实践”，“一般”并非指各国全部赞同或统一的实践，而是指可以适用该惯行的绝大多数国家的一致行为，同时适当顾及利益受到特别影响的国家的实践。[13] 因此，即使只有部分国家参与某一实践，该实践也可能成为国际习惯法。至于法律确信，则要求认为自身有法律义务实施某一国家实践的国家必须实施该实践。[14]

在判定国家管辖范围外保护区的建立是否构成国际层面的习惯国际法时，首先要考察的是国家实践。目前，只有 3 个地区建有国家管辖范围外海洋保护区，这类保护区的数量非常有限，而且每个都是直接根据区域性环境制度或渔业制度，而非全球性法律制度设立的，这也说明了国家管辖范围外海洋保护区建立的碎片化特征，进而导致国家管辖范围外保护区的相关实践因地区而异，没有在全球层面形成一致。鉴于建立保护区的做法不够普遍，而且相关的法律制度也不统一，所以很难说建立国家管辖范围外保护区的做法已构成一般国家实践，并因此能够形成国际层面的习惯国际法。

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11 Tullio Scovazzi, Marine Protected Areas on the High Seas: Some Legal and Policy Considerations, *The International Journal of Marine and Coastal Law*, Vol. 19, No. 1, 2004, p. 5; Philippe Sands, *Principles of International Environmental Law: Frameworks, Standards and Implementation*, Manchester: Manchester University Press, 1994, pp. 190~194.

12 值得注意的是，习惯国际法的判定方法也存在争议。有些学者反对通过“两要素法”来判定，认为“法律确信”和“国家实践”这两个要素单独出现一个即可。但“两要素法”更广为接受，比如，国际法委员会和国际法院均将其视为判定习惯国际法的一般方法。See Michael Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, paras. 21~31; Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgement, *I.C.J. Reports*, 2012, p. 99.

13 Michael Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, paras. 52~54.

14 Michael Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, para. 60.

但上述分析也不意味着，根据区域性法律制度建立国家管辖范围外保护区及制定相关措施的做法就无法构成习惯国际法，并对第三方国家产生拘束力。关于这一点，需要具体情况具体分析。考虑到委员会成员包含大多数在南极水域捕鱼的国家，而且委员会保护区的建立是其成员国经协商一致通过的，因此委员会保护区的相关实践最有可能构成习惯国际法。所以，本文将选取委员会保护区作为研究案例，分析其是否可以构成习惯国际法并对第三国产生约束力。

三、委员会保护区案例分析

（一）委员会保护区概况及法律框架

《南极条约》冻结了对南极领土所有权的主张，所以任何国家均不得对南极行使主权或主权权利。[15] 在此情况下，南极周边海域可被视作公海，适用公海自由原则，在南极周边海域设立的海洋保护区也可以被视作国家管辖范围外保护区。

委员会是依据《南极海洋生物资源养护公约》（以下简称“《养护公约》”）而建立的。《养护公约》赋予委员会指定海洋保护区的权利，以及为养护该公约第 1 条规定的公约范围内海洋生物资源的目的而订立相关管理措施的权利。[16] 渔业资源属于需要养护的海洋生物资源，因此从保护渔业资源的角度来说，委员会属于区域渔业管理组织。

2011 年，委员会通过了《养护措施 91-04》，为委员会保护区的建立提供了一般法律框架。在该法律框架下，委员会建立保护区应基于“可获得的最佳”科学证据，也就是说要遵守预警原则，这样能避免有些国家以需要更多资料为借口迟迟不采取措施保护环境。[17] 此外，委员会建立海洋保护区还须遵循南极海洋生物资源养护科学委员会（以下简称“科学委员会”）给出的建议。[18] 这表明委员会拟建立保护区的提案必须经过科学委员会的科学审查，而且委员会必须以科学委员会的建议为基础来讨论该等提案。经上述科学审查和讨论后，委员会方能作出决议，采纳建立海洋保护区的提案，随后着手建立海洋保护区，将其作为一种养护措施。[19]

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15 The Antarctic Treaty (adoption: 23 June 1961, entry into force: 11 March 1978), *United Nations Treaty Series*, Vol. 402, Article IV(2).

16 The Convention on the Conservation of Antarctic Marine Living Resources (adoption: 20 May 1980, entry in force: 7 April 1982), *United Nations Treaty Series*, Vol. 1329, Article 9.

17 CCAMLR, Report of the Thirty-Third Meeting of the Commission (CCAMLR-XXXIII), Hobart, October 2014, para. 7.65.

18 CCAMLR, Conservation Measure 91-04 (2011): General Framework for the Establishment of CCAMLR Marine Protected Areas.

19 CCAMLR, Conservation Measure 91-04 (2011): General Framework for the Establishment of CCAMLR Marine Protected Areas.

如上所述，采纳该类提案的决议必须经成员国一致同意。

截至目前，委员会通过了《养护措施 91-03》和《养护措施 91-05》，并以其为基础建立了 2 个海洋保护区。2009 年，在科学委员会第 28 次会议上，英国代表团提交了建立南奥克尼保护区的提案。科学委员会批准了这一提案，并建议委员会通过该提案。[20] 同年，根据科学委员会的建议，委员会在其第 28 次会议上一致通过了《养护措施 91-03》，并依此建立了南奥克尼保护区。[21] 南奥克尼保护区是委员会建立的首个保护区，也是世界上首个完全位于公海的保护区。[22] 该保护区禁止捕鱼、倾倒废物，[23] 以及涉及渔船的转运等一系列活动。[24] 2016 年，委员会一致通过了《养护措施 91-05》，并依此建立了罗斯海海洋保护区。罗斯海保护区共分为 3 个区域，分别为一般保护区、磷虾研究区和特别研究区。该保护区禁止渔业活动，但下述活动除外：（1）经委员会批准并按《养护措施 24-01》开展的研究性捕鱼活动；（2）按《养护措施 41-09》在特别研究区开展的犬牙鱼捕捞活动；（3）按《养护措施 51-04》在磷虾研究区和特别研究区进行的磷虾捕捞活动。[25] 此外，南奥克尼保护区禁止的活动，如废物倾倒和涉及渔船的转运，在罗斯海保护区也遭到禁止。[26]

上述 2 个保护区将被选为研究案例，用来分析国家管辖范围外保护区的第三方效力问题。本案例研究将从《鱼类种群协定》切入，探讨委员会保护区的间接第三方效力，接着从习惯国际法的角度考察委员会保护区是否对《鱼类种群协定》非缔约方具有法律约束力。[27]

（二）间接第三方效力与《鱼类种群协定》

根据《鱼类种群协定》，委员会属于区域渔业管理组织，[28] 故委员会与非组织

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20 SC-CAMLR XXVIII, Final Report, para. 3.19.

21 CCAMLR XXVIII, Final Report, para. 7.1.

22 UNEP, High Seas MPAs: Regional Approaches and Experience, 22 September 2010, UNEP(DEPI)/RS.12/INF.6.RS, p. 25.

23 “倾倒”是指“渔船倾倒任何种类废物的行为”。See Conservation Measure 91-03 (2009) – Protection of the South Orkney Islands Southern Shelf, para. 3.

24 Conservation Measure 91-03 (2009) – Protection of the South Orkney Islands Southern Shelf.

25 CCAMLR, Conservation Measure 91-05 (2016): Ross Sea Region Marine Protected Area. 依据《养护措施 41-09》和《养护措施 51-04》，磷虾和犬牙鱼的捕捞应出于探索性目的。

26 CCAMLR, Conservation Measure 91-05 (2016): Ross Sea Region Marine Protected Area.

27 值得注意的是，区域渔业管理组织或《鱼类种群协定》为养护鱼类资源而关闭特定区域的措施与委员会保护区有所不同，但委员会保护区采取的管理措施并不排除关闭特定区域。

28 Rosemary Rayfuse, Regional Fisheries Management Organizations, in Donald Rothwell, Alex Oude Elferink, Karen N. Scott and Tim Stephens eds., *The Oxford Handbook of the Law of the Sea*, Oxford: Oxford University Press, 2015, pp. 443~444.

成员的关系可从该协定第 8 条中找到相关规定。该第 8 条规定，在公海捕捞跨界鱼类种群和高度洄游鱼类种群的国家均应履行相关义务，适用区域渔业管理主管组织订立的养护和管理措施，即使这些国家不是该组织的成员。如果这些国家不履行前述义务，他们将无法捕捞相关的渔业资源。[29] 由此可知，区域渔业管理组织的养护和管理措施可以通过《鱼类种群协定》第 8 条对第三方产生约束力，这也可以被看作是间接第三方效力。然而，这样的间接第三方效力仅限于协定缔约国，以及跨界鱼类种群和高度洄游鱼类种群这两种特定的鱼类种群。

原则上，委员会建立的保护区均禁止渔业活动。[30] 禁止渔业活动无疑属于《鱼类种群协定》下的“养护和管理措施”。[31] 根据《鱼类种群协定》第 8 条的要求，不是委员会成员国，但是协定缔约国的国家，如在规定区域内捕捞跨界鱼类种群和高度洄游鱼类种群，也必须受委员会保护区的法律约束。因此，就跨界鱼类种群和高度洄游鱼类种群的养护和管理而言，作为区域渔业管理组织，委员会所建立的国家管辖范围外保护区可以通过《鱼类种群协定》对第三方间接产生约束力。[32]

除禁止渔业活动外，南奥克尼保护区还禁止渔船倾倒废物和转运。这些措施是否也可被视作“养护和管理措施”，进而依据《鱼类种群协定》第 8 条对第三方产生效力？回答这一问题，应先依据《维也纳条约法公约》第 31 条对“养护和管理措施”作出解释。《鱼类种群协定》第 1 条将“养护和管理措施”定义为养护和管理一种或多种海洋生物资源物种的措施，但关键是能否将禁止废物倾倒和转运视作养护和管理海洋生物资源物种的措施？按《维也纳条约法公约》之规定，条约应参照其上下文和目的依其所具有之通常意义进行解释。依据《鱼类种群协定》第 2 条规定的协定目的，第 5 条规定的一般原则，以及《养护措施 26-01》中的相关规定，[33] “养护和管理措施”应包含禁止可能对鱼类物种产生影响的排放或倾倒活动的措施。因排放或倾倒活动可能影响受保护的鱼类种群，所以禁止此类活动可视作养护和管理海洋生物资源物种的措施，进而属于“养护和管理措施”。依据《养护措施 10-09》的规定，转运是指“将捕获的海洋生物资源及任何其他货物

29 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, *United Nations Treaty Series*, Vol. 2167, Article 8. [hereinafter “FSA”]

30 Conservation Measure 91-03 (2009) – Protection of the South Orkney Islands Southern Shelf; CCAMLR, Conservation Measure 91-05 (2016): Ross Sea Region Marine Protected Area.

31 《鱼类种群协定》第 1 条规定：“养护和管理措施”是指为养护和管理一种或多种海洋生物资源物种而制定和适用，符合《联合国海洋法公约》和本协定所载示的国际法有关规则的措施。

32 值得注意的是，罗斯海保护区于 2017 年 12 月 1 日开始生效，在此前无法产生法律约束力。

33 FSA, Article 5.f and 5.g.

或材料转至渔船或从渔船将该等货物转至其他船只”。[34] 综合加拿大法国圣劳伦斯湾鱼类切片案的启示可知，禁止渔船转运不属于《鱼类种群协定》中的“养护和管理措施”，这是因为渔船转运与海洋生物资源之间难以产生直接的联系。由此可知，南奥克尼保护区禁止倾倒的规定可以通过《鱼类种群协定》对第三方产生法律约束力，但禁止转运的规定却不具有这种效力。[35]

值得注意的是，并不是所有的委员会非成员国均是《鱼类种群协定》的缔约国，[36] 而且《鱼类种群协定》的调整范围并不涵盖委员会所调整的所有鱼类种群。[37] 这就引出了另外两个需要进一步讨论的问题：委员会保护区通过《鱼类种群协定》间接产生的第三方效力是否适用于高度洄游和跨界鱼类种群之外的其他鱼种？委员会保护区能否对不属于《鱼类种群协定》成员国的第三方产生约束力？

从条约法的角度来看，任何条约的解释均不能偏离条约的通常意义。《鱼类种群协定》第 2~3 条以及该协定名称，已将协定的适用范围和养护目的限为高度洄游鱼类种群和跨界鱼类种群。如将其解释为该协定的适用范围包含其他鱼类种群，则必然偏离了第 2~3 条的通常意义，这种解释因而也是无效的。由此推之，委员会保护区无法通过《鱼类种群协定》对捕捞高度洄游和跨界鱼类种群之外的其他种群的第三方产生法律约束力。

（三）第三方效力与习惯国际法

根据条约对第三方无损益原则，对既未签署《鱼类种群协定》也不属于委员会成员的国家，委员会保护区不具有法律约束力。但是，不排除这些保护区可以通过习惯国际法对此类国家产生约束力。因此，有必要考察一下委员会保护区能否

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34 CCAMLR, Conservation Measure 10-09 (2011): Notification System for Transhipments within the Convention Area.

35 在加拿大法国圣劳伦斯湾鱼类切片案裁决书中，仲裁庭指出，《维也纳条约法公约》第 31 条规定了有关条约解释的习惯国际法规则。依据这一解释通则，仲裁庭按“渔业法规”的通常意思，将其解释为包含指定国内法中有关渔业的法律法规要求，但不涉及将鱼切成片这种加工处理方式。若采取同样的方法来严格解释《鱼类种群协定》中的“养护和管理措施”一词，“转运活动”按其原意，不应包含在养护和管理跨界鱼类种群和高度洄游鱼类种群的措施中。See Irene Couzigou, La Bretagne, Arbitral Award, *Max Planck Encyclopedia of Public International Law*, at http://opil.ouplaw.com, 28 November 2017.

36 截至 2017 年 11 月 6 日，共有 87 个国家批准或加入了《鱼类种群协定》。See Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#, 21 March 2018.

37 《鱼类种群协定》适用于跨界鱼类种群和高度洄游鱼类种群。然而，该协定调整的这 2 个鱼类种群并不涵盖委员会规管的所有鱼类种群。例如，南极磷虾和南极犬牙鱼既不属于《联合国海洋法公约》附件一中的高度洄游鱼类，也不属于跨界鱼类，因此也不在《鱼类种群协定》的调整范围内。

通过习惯法规则对第三方产生约束力。

1. 对于跨界鱼类种群和高度洄游鱼类种群，《鱼类种群协定》第 8 条第 3 款能否构成习惯国际法？

如《鱼类种群协定》第 8 条第 3 款构成习惯国际法，区域渔业管理组织依据该协定对第三方间接产生的效力，也可适用于捕捞高度洄游鱼类种群和跨界鱼类种群的非协定缔约国，换言之，非缔约国就有义务遵守区域渔业管理组织为养护和管理上述两种鱼类种群而制定的措施。如此，在委员会保护区捕捞上述两种鱼类种群的国家，即使未签署《鱼类种群协定》也不属于委员会成员，保护区也能对其产生约束力。

现在，关键问题就在于《鱼类种群协定》第 8 条第 3 款能否构成习惯国际法。第 8 条第 3 款规定，如存在区域渔业管理主管组织，相关国家应履行其合作义务，成为这种组织的成员，或同意适用这种组织所订立的养护和管理措施。[38] 可以说，这一条款体现了为养护海洋生物资源进行合作的一般义务，《鱼类种群协定》第 8 条第 1 款和《联合国海洋法公约》第 117~118 条都对此作出了规定。

毫无争议，一般的合作义务已被接受为习惯国际法。[39] 就公海渔业养护和管理而言，这一合作义务已得到参加协商《鱼类种群协定》的所有 105 个国家的普遍接受，包括最终未签署或批准协定的国家。[40] 实际上，参加协商的国家几乎包含对捕捞这两种鱼类种群感兴趣的所有国家。[41] 由此推之，为养护和管理跨界鱼类种群和高度洄游鱼类种群进行合作的一般义务可以被视作习惯国际法。[42]

然而，从习惯国际法的角度考虑，我们尚不清楚一般的合作义务是否就意味着如存在区域渔业管理主管组织，相关国家就有义务参与这种组织，或同意适用该组织所订立的养护和管理措施。

图里奥•斯科瓦齐认为，合作义务指各国为达成一项新协议而参与相关协商

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38 FSA, Article 8(3).

39 在 MOX 工厂案中，国际海洋法法庭认为一般的合作义务不仅是《联合国海洋法公约》的基本原则，也是一项习惯国际法。See ITLOS, *The MOX Plant Case (Ireland v. UK)*, Order of 3 December 2001, para. 82.

40 参与《鱼类种群协定》协商的 105 个国家，均普遍接受合作养护和管理的一般义务。See Rosemary Gail Rayfuse, *Enforcement by Non-flag States of High Seas Fisheries Conservation and Management Measures Adopted by Regional Fisheries Organizations* (PhD Dissertation), Utrecht: Utrecht University, 2003, p. 34; See UN Document A/CONF.164/12, 21 July 1993, p. 2.

41 Rosemary Gail Rayfuse, *Enforcement by Non-flag States of High Seas Fisheries Conservation and Management Measures Adopted by Regional Fisheries Organization*s (PhD Dissertation), Utrecht: Utrecht University, 2003, p. 72

42 也可以说，该义务在《鱼类种群协定》协商期间就已构成习惯国际法。See Rosemary Gail Rayfuse, *Enforcement by Non-flag States of High Seas Fisheries Conservation and Management Measures Adopted by Regional Fisheries Organization*s (PhD Dissertation), Utrecht: Utrecht University, 2003, pp. 72~73.

的义务。[43] 依据国际法院在北海大陆架案中作出的判决，此类协商应本着善意参与，并考虑其他国家的观点。[44] 因此，如已存在一项协议或区域安排，比如区域渔业管理组织，则合作义务应要求非成员国在该安排框架下进行合作。此类安排就是有兴趣的国家前期协商的成果，因此，如一国拒不参与或合作，该国就未履行其合作义务。可以说，在有区域渔业管理组织存在的情况下，一般合作义务意味着国家有义务参与，或同意适用该组织订立的养护和管理跨界鱼类种群和高度洄游鱼类种群的措施。这一结论也表明，就南极地区跨界鱼类种群和高度洄游鱼类种群的养护而言，委员会保护区对既未缔结《鱼类种群协定》也不属于委员会成员的国家也具有法律约束力。

2. 对于其他鱼类种群，委员会保护区的建立和管理是不是本身就构成了习惯国际法？

在南极地区，除跨界鱼类种群和高度洄游鱼类种群之外的其他鱼类种群，不受《鱼类种群协定》及相关习惯国际法调整。因此，对于这类其他种群，委员会保护区无法通过《鱼类种群协定》对第三方产生间接法律效力。对于其他种群，委员会保护区能否对第三方适用取决于委员会保护区的实践是否本身就构成了习惯国际法。若委员会保护区的建立和管理可以构成习惯国际法，则对于不属于《鱼类种群协定》调整范围的鱼类种群的养护，第三方也要受到保护区的约束。由于判定习惯国际法的基本方法是考察是否存在一般国家实践和法律确信，因此，回答这一问题需要检验涉及委员会保护区的国家实践和法律确信。

委员会拥有 25 个成员和 11 个参加国。只有成员能够参与委员会的决策制定。建立保护区的决议是由委员会全体成员一致同意通过的，因此，根据《养护公约》第 9 条，委员会决议对这些国家具有法律约束力，委员会保护区的建立可以被视作委员会全体成员的一般实践。关于参加国，尽管他们对南极海洋生物资源相关的研究和捕捞活动感兴趣，但不被允许在《养护公约》适用的区域内从事捕鱼活动。[45] 因此对这些参加国而言，委员会有关保护区的决定并没有机会得到适用。

尽管委员会缔约国的数量占比不高，但必须注意的是，“一般国家实践”不是指“所有国家的实践”。国际法委员会指出，有机会适用某一惯行的绝大多数国家

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43 Tullio Scovazzi, Marine Protected Areas on the High Seas: Some Legal and Policy Considerations, *The International Journal of Marine and Coastal Law*, Vol. 19, No. 1, 2004, p. 6.

44 以北海大陆架案为例，图利奥•斯科瓦齐认为，“各国均有义务善意行事，这样协商才有意义，如各执己见，不愿作出退让，则无法履行这项义务。”See Tullio Scovazzi, Marine Protected Areas on the High Seas: Some Legal and Policy Considerations, *The International Journal of Marine and Coastal Law*, Vol. 19, No. 1, 2004, p. 6.

45 Explanation of Terms, at https://www.ccamlr.org/en/organisation/explanation-terms, 21 March 2018.

的一致行为即可构成“一般国家实践”，进而构成习惯国际法。[46] 所以说，即使只有部分国家参与某一实践，也足以构成习惯国际法。[47]

目前，在南极水域捕鱼时，仅极少数国家的渔船未遵守委员会制定的相关规则。[48] 换言之，多数国家的渔船均遵守委员会制定的相关规则，包括保护区的养护措施。[49] 尽管委员会的缔约国数量有限，但按委员会要求行事的缔约国及非缔约国，构成了有能力在南极水域开展捕捞活动的绝大多数国家。从这个角度来看，在南极渔业资源管理方面，委员会保护区的建立可以被视作一种一般国家实践。

至于法律确信，建立南奥克尼保护区和罗斯海保护区的决议是在委员会会议上一致通过的。“一致通过”则表示每个成员均同意上述决议，意味着这些成员国均具有遵守成立委员会保护区决议的法律义务，表明了所有成员国共同的法律确信。考虑到没有其他国家反对国家管辖范围外保护区的建立，委员会保护区的实践具有构成习惯国际法的可能性。

然而，另一方面，对于在南极水域捕鱼的非缔约国，我们尚不确定其是否接受将委员会保护区的建立和管理当成法律，并认为自身有义务遵守。因此，目前我们尚无法确定委员会保护区的建立和管理是否可以构成习惯国际法。

四、结　语

总而言之，在《联合国海洋法公约》框架下，国家管辖范围外海洋保护区只对参与其建立的国家具有法律约束力。[50] 这是因为，根据“条约对第三方无损益原则”和公海自由原则，由部分国家建立的国家管辖范围外保护区，未经第三方的明示同意，不得约束第三方，或限制其公海自由。

然而，在一定范围内，委员会保护区存在下述例外：

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46 Michael Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, paras. 52~54. 例如，只有具备太空能力的国家的实践，才可能构成有关太空的国际惯例；只有具有核武器的国家的实践，才可能构成有关使用和减少核武器方面的国际惯例。

47 Micheal Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, para. 53.

48 这些规则具体指《养护公约》以及委员会制定的相关养护措施，包括建立海洋保护区。

49 我们很难估计南极水域的捕鱼国到底有多少。但依据非法、未报告和无管制（IUU）的非缔约国渔船名单可知，只有少数国家的渔船在作业时未遵守委员会制定的规则。这些国家包括圣文森特和格林纳丁斯、坦桑尼亚、尼日利亚、伊朗和毛里塔尼亚。与按委员会规则进行捕捞作业的国家相比，这些国家的 IUU 渔业活动微不足道。由此推之，大多数国家的渔船均遵守委员会规则。For the data on IUU fishing of non-contracting parties, at https://www.ccamlr.org/en/compliance/non-contracting-party-iuu-vessel-list, 27 February 2018.

50 Petra Drankier, Marine Protected Areas in Areas beyond National Jurisdiction, *The International Journal of Marine and Coastal Law*, Vol. 27, 2012, p. 295.

第一个例外是，委员会建立的保护区，可以依据《鱼类种群协定》第 8 条，在跨界鱼类种群和高度洄游鱼类种群的养护方面，对属于该协定缔约国的第三方产生约束力。原因在于一国批准或加入《鱼类种群协定》，就表明该国明示同意接受该协定的约束。具体而言，在养护南极水域的高度洄游鱼类和跨界鱼类种群方面，委员会保护区可以通过《鱼类种群协定》间接对第三方产生约束力。然而，对涉及既不属于《鱼类种群协定》缔约国也不是委员会成员的第三方，或涉及不属于该协定调整范围的其他鱼类种群，这一例外也不奏效。

第二个例外是习惯国际法。可以说，《鱼类种群协定》第 8 条第 3 款构成了习惯国际法，因此，可以要求第三方遵守区域渔业管理组织为养护保护区内的跨界鱼类种群和高度洄游鱼类种群而订立的措施。至于其他鱼类种群的养护，还需具体分析委员会保护区的相关规章或措施是否构成了习惯国际法，进而对第三方具有约束力。以委员会保护区为例，鉴于存在一般国家实践，委员会保护区的实践是有可能被视作习惯国际法的。然而，由于法律确信方面尚不确定是否满足，故而这种可能性目前尚无法准确判定。

（中译：谢红月）

A Case Study on the Third Party Effects of Marine Protected Areas Established by the Commission for the Conservation of Antarctic Marine Living Resources

DUAN Wen*

Abstract: The establishment of marine protected areas (MPAs) in areas beyond national jurisdiction (ABNJ), as a means to protect marine environment, biodiversity and ecosystems, has been accepted by many global and regional legal regimes. Due to the fragmentation of these regimes, however, it is unclear whether MPAs in ABNJ designated by a limited number of States are binding on third parties. In the marine areas surrounding Antarctica, considered as high seas, the South Orkney Islands Southern Shelf MPA and more recently the Ross Sea Region MPA have been established by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). Due to the legally binding measures made by the CCAMLR and the participation of States from different regions, the MPAs established by the CCAMLR act as a representative case study on third party effects. From the perspective of treaty law, in accordance with Article 8 of 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 (FSA), contracting parties to the FSA are obligated to participate in or comply with the arrangements of CCAMLR, illustrating the indirect third party effects of CCAMLR MPAs. However, not all States are parties to the FSA, and the application of the FSA is limited to straddling fish stocks and highly migratory fish stocks. As such, this article will explore two issues, namely whether or to what

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extent the rules of the CCAMLR MPAs could apply to stocks other than those stipulated in FSA, and whether or to what extent the rules could apply to third parties other than the contracting parties to FSA. In order to do so, this article will embark on customary international law, particularly by ascertaining state practice and *opinio juris* in relation to the CCAMLR MPAs. Based on the analysis, the paper attempts to answer whether or not the rules relevant to those MPAs have constituted customary law that could bind third parties.

Key Words: Marine protected area; Areas beyond national jurisdiction; Third party effects; Customary international law; Commission for the Conservation of Antarctic Marine Living Resources

I. Introduction

A. Defining Marine Protected Areas in Areas Beyond National Jurisdiction

The first official document defining marine protected areas (MPAs) was issued by International Union of Conservation for Nature in 1988. It defined an MPA as "[a]ny area of intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment".[1] The OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas regards MPAs as areas within maritime areas for which various measures have been taken to protect and conserve species, habitats, ecosystem or ecological processes of the marine environment.[2] On the basis of these definitions, "MPA" can be considered as an umbrella term covering a wide range of maritime areas established for different purposes and on various legal bases with different management or conservation measures (global, regional or sectoral).[3] Therefore, MPAs can be divided into different categories according to their purposes, including: MPAs for the protection of living resources/biodiversity, MPAs for the conservation of

1 Resolution 17.38 (1988) by the General Assembly of the IUCN, reconfirmed in Resolution 19.46 (1994).

2 OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, adopted by OSPAR 2003 (OSPAR 03/17/1, Annex 9), Article 1.

3 Sarah Wolf and Jan Asmus Bischoff, Marine Protected Areas, *Max Planck Encyclopedia of Public International Law*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2029?rskey=jE0lQD&result=1&prd=EPIL, 9 January 2018.

historic and scenic significance, and MPAs for the prevention of marine pollution.[4] Given the definition of MPAs, those that are in areas beyond national jurisdiction (ABNJ) would include those MPAs that are established in the areas beyond national jurisdiction. To be more specific, this would include those MPAs that are established in high seas or the international seabed area.[5]

B. Background of the Establishment of MPAs in ABNJ

The establishment of MPAs has been accepted by the international community as an effective means to protect the marine environment, biodiversity and ecosystems. This acceptance is illustrated by the Aichi Targets set by the tenth conference of the parties (COP 10) of the Convention on Biological Diversity (CBD). These targets, which apply to both areas within national jurisdiction and ABNJ, indicate that by 2020, 10% of coastal and marine areas shall be managed through systems of protected areas and other area-based conservation measures.[6] As ABNJ make up 64% of the oceans and seas, their protection will play an important role in conserving marine living resources and biological diversity. In that case, the establishment of MPAs in ABNJ will be absolutely fundamental in achieving the targets set by COP 10 of CBD.

At present, four MPAs have been established in ABNJ. They include: (1) the Pelagos Sanctuary established in the Mediterranean by France, Italy and Monaco, which was later included in the Specially Protected Areas of Mediterranean Importance (SPAMI) designed under the 1995 Barcelona Convention; (2) the OSPAR network of high seas MPAs established in the Northeast Atlantic; (3) the South Orkney Islands Southern Shelf MPA (SOISS MPA) established by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in the Antarctic; and (4) the Ross Sea Region Marine Protected Area

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4 Sarah Wolf and Jan Asmus Bischoff, Marine Protected Areas, *Max Planck Encyclopedia of Public International Law*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2029?rskey=jE0lQD&result=1&prd=EPIL, 9 January 2018.

5 According to UNCLOS, the high seas and international seabed area are beyond the limits of national jurisdiction, and therefore can be defined as areas beyond national jurisdiction. See UNCLOS Articles 86 & 1.

6 Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting, UNEP/CBD/COP/DEC/X/2, 29 October 2010, p. 6.

(RSRMPA) established by the CCAMLR in the Antarctic.[7] Among these existing MPAs in ABNJ, the CCAMLR MPAs will act as a case study for this paper. That is because RSRMPA, one of the CCAMLR MPAs, is the largest MPA in the world. And the CCAMLR MPAs have formulated legally binding restrictive measures with high levels of general participation from States. In contrast, the Pelagos Sanctuary and the OSPAR network of high seas MPAs only involve the States neighbouring the Mediterranean and Northeast Atlantic. Furthermore, the OSPAR network has no legally binding management measures even though the decisions to establish those high seas MPAs are legally binding.[8]

The existing legal regimes of MPAs in ABNJ are highly fragmented. There is, at present, no comprehensive treaty or regime that can deal with the establishment of MPAs in ABNJ, and all existing MPAs in ABNJ are based on regional rather than global regimes. Such fragmentation underlies the current status of this area of international law, as every existing MPA in ABNJ is established by a limited number of States. In other words, most States have not participated in the designation of those MPAs.

C. A Relevant Legal Issue

As such, it is unclear whether or not the MPAs in ABNJ will affect the rights and obligations of those States that do not participate in their establishment (namely the third parties). In other words, can MPAs in ABNJ, established by a limited number of States be legally binding on third parties? In order to explore this issue, this paper will first conduct a general analysis on the relationship between MPAs in ABNJ and third parties. Then, taking CCAMLR MPAs as a case study, the paper will determine whether or not the CCAMLR MPAs have legal effects on third parties.

Given the limited scope of this paper, the response to this legal issue will

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7 OSPAR Decisions 2010/1, 2010/2, 2010/3, 2010/4, 2010/5, 2010/6. These decisions have binding force according to Article 13 of OSPAR Convention. Bethan C. O'Leary, R. L. Brown, D. E. Johnson, H. von Nordheim, Jeff A. Ardron, Tim Packeiser and Callum M. Roberts, The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next, *Marine Policy*, Vol. 36, Issue 3, 2012, pp. 598~605.

8 The management measures for OSPAR high seas MPAs are provided for by relevant recommendations adopted by the OSPAR Commission. The recommendations, however, are not legally binding in accordance with OSPAR Convention.

not be comprehensive. Given that the management measures associated with CCAMLR MPAs primarily concern fisheries management, the implications of this case study for the third party effects issue would be limited to the third party effects of fisheries management measures associated with MPAs in ABNJ.

II. General Analysis of Third Party Effects

Since existing MPAs in ABNJ are established under the legal regimes of a treaty or convention, this section will first analyse the relationship between treaty and third parties from the perspective of the law of treaties.

A. The Relationship between Treaties and Third Parties

Articles 34~36 of the 1969 Vienna Convention on the Law of Treaties provide general rules concerning the relationship between a treaty and third States.[9] Generally speaking, a treaty cannot bind a third State without its consent (*pacta tertiis* rule). The term "consent", however, has different meanings when concerning the establishment of obligations and the creation of rights. In order for a third party to be bound, provisions creating obligations require express consent, however, provisions establishing rights only require tacit consent.

The provisions of a treaty may also bind third States through the formation of customary international law. This raises another question as to how to identify customary international law, which will be discussed further in the next section of this article.

B. Relationship between MPAs in ABNJ and Third Parties

Considering that existing MPAs in ABNJ primarily focus on creating State obligations,[10] express consent would be required for third States to be bound by these management measures. However, there is no third-party State which has directly given its express consent to the legal regimes of the current MPAs in

9 Vienna Convention on the Law of Treaties, Articles 34~36.

10 For example, CCAMLR MPAs primarily limit fishing activities; Pelagos Sanctuary primarily requires States to prevent shipping pollution and prohibit taking marine mammals; OSPAR high seas MPAs primarily involve some obligations concerning marine scientific research.

ABNJ. This lack of express consent, however, does not mean it is impossible for MPAs in ABNJ to bind third States. This can be illustrated by the indirect third party effects of 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 (FSA) discussed later in this article.

Another possibility for third party effects might be customary international law. Customary law, in this case the principle not to cause damage to the marine environment beyond national jurisdiction, may provide the legal basis for third party effects of MPAs in ABNJ. This principle, found in the United Nations Convention on the Law of the Sea (UNCLOS), is widely recognized as customary international law.[11] Under this principle, States have the general obligation to protect the marine environment of other States or the ABNJ. If the establishment of MPAs in ABNJ by a limited number of States is necessary for the protection of the marine environment and ecosystem, then third States may be bound by those MPAs in ABNJ in order to fulfil their general obligations as described above. However, given the general nature of this environmental legal principle, the foundation of this third party effect is brought into question as it cannot answer whether a specific MPA in ABNJ is necessary for protection of the marine environment. Therefore, this principle does not necessarily permit MPAs in ABNJ to bind third States.

Apart from customary international law as a potential foundation for third party effects, does the establishment of MPAs in ABNJ itself constitute customary international law and thus can bind third parties? Before answering this question, the identification of customary international law must be elaborated upon. The formation of customary international law requires general state practice and *opinio juris*.[12] In relation to general state practice, the use of the term "general" does

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11 Tullio Scovazzi, Marine Protected Areas on the High Seas: Some Legal and Policy Considerations, *The International Journal of Marine and Coastal Law*, Vol. 19, No. 1, 2004, p. 5; Philippe Sands, *Principles of International Environmental Law: Frameworks, Standards and Implementation*, Manchester: Manchester University Press, 1994, pp. 190~194.

12 It should be noted that there are controversies concerning the identification of customary international law. Some scholars disagree with the two-element approach and argue that only *opinio juris* or state practice is enough. The two-element approach, however, is more widely recognized, for example by the ILC and ICJ, as a general approach to identify customary international law. See Michael Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, paras. 21~31; Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgement, *I.C.J. Reports*, 2012, p. 99.

not refer to unanimous or universal practice amongst States, but to the consistent practice of an overwhelming majority of States having chance to apply it (the practice), with due regard to the practice of States whose interests are specially affected.[13] Therefore, even if only a limited number of States participate in a practice, it might be possible for that practice to constitute customary international law. As for *opinio juris*, it requires that the state practice be performed by States who believe they are legally obligated to do so.[14]

In order to identify whether the establishment of MPAs in ABNJ forms customary international law at the global level, state practice must first be investigated. There exist only three regions where MPAs have been established in ABNJ, and the number of existing MPAs in ABNJ is very limited. Illustrative of the levels of fragmentation in the practice of their establishment, each of the existing MPAs in ABNJ was directly established by a regional environmental or fisheries regime rather than global regimes. Such fragmentation underlies the situation where the practice of MPAs in ABNJ varies from region to region and is inconsistent at the global level. Due to low levels of practice and the fragmentation of relevant legal regimes, it is difficult to argue that the establishment of MPAs in ABNJ constitutes general state practice and is thus able to form customary international law at the global level.

This does not mean, however, that the establishment of MPAs in ABNJ and relevant measures under a regional regime are unable to form customary international law and bind third States. It does, however, require a more detailed, case-by-case study. Considering that members of the CCAMLR include most States fishing in the Antarctic waters and that the establishment of CCAMLR MPAs is adopted by consensus, the practice of CCAMLR MPAs is the most likely candidate to constitute customary international law. Therefore, using the practice of CCAMLR MPAs as a case study, this article will investigate whether or not such practice can be considered as customary international law and therefore binding on third States.

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13 Michael Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, paras. 52~54.

14 Michael Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, para. 60.

III. A Case Study of the CCAMLR MPAs

A. Overview and Legal Framework of MPAs under CCAMLR

As the Antarctic Treaty suspends claims of sovereignty, no State is able to exercise sovereignty or sovereign rights over Antarctica.[15] This status entails that the marine areas surrounding Antarctica are high seas, to which the freedoms of the high seas apply. With this status as high seas, MPAs established within the marine areas surrounding Antarctica can be regarded as MPAs in ABNJ.

The Convention on the Conservation of Antarctic Marine Living Resources ("CAMLR Convention") establishes the CCAMLR and grants CCAMLR the competence to designate MPAs and adopt relevant management measures for the purpose of conserving marine living resources within the convention area as defined in Article 1 of the CAMLR Convention.[16] As fishery resource is included in the marine living resources to be conserved, the CCAMLR qualifies as a regional fisheries management organisation (RFMO) from the perspective of conserving fishing resources.

The general legal framework to establish CCAMLR MPAs is stipulated by Conservation Measure 91-04, adopted by the CCAMLR in 2011. In accordance with this legal framework, the establishment of MPAs by the CCAMLR shall be based on the "best available" scientific evidence, entailing the use of a precautionary approach so that the need for more information shall not excuse deferring action to protect the environment.[17] Furthermore, the establishment of MPAs by CCAMLR shall follow advice from the Scientific Committee for the Conservation of Antarctic Marine Living Resources (SC-CAMLR).[18] This signifies that a proposal to establish a CCAMLR MPA shall be scientifically reviewed by the SC-CAMLR, whose advice will act as the basis for its discussions of that MPA proposal. After the said scientific review and discussion, the CCAMLR can establish an MPA by making a decision to adopt the MPA proposal as a

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15 The Antarctic Treaty (adoption: 23 June 1961, entry into force: 11 March 1978), *United Nations Treaty Series*, Vol. 402, Article IV(2).

16 The Convention on the Conservation of Antarctic Marine Living Resources (adoption: 20 May 1980, entry in force: 7 April 1982), *United Nations Treaty Series*, Vol. 1329, Article 9.

17 CCAMLR, Report of the Thirty-Third Meeting of the Commission (CCAMLR-XXXIII), Hobart, October 2014, para. 7.65.

18 CCAMLR, Conservation Measure 91-04 (2011): General Framework for the Establishment of CCAMLR Marine Protected Areas.

conservation measure.[19] As observed above, the decision to adopt such a proposal must be made by consensus.

Thus far, two MPAs have been established by CCAMLR through the adoption of Conservation Measure 91-03 and Conservation Measure 91-05. In 2009, at the 28th Meeting of the SC-CAMLR (SC-CAMLR-XXVIII) the UK delegation presented a proposal for the establishment of the SOISS MPA. The proposal was endorsed by the SC-CAMLR, which recommended its adoption to the CCAMLR.[20] The same year, the CCAMLR established the SOISS MPA, its first MPA, by adopting Conservation Measure 91-03 by consensus at its 28th meeting (CCAMLR-XXVIII).[21] Considered to be the world's first MPA completely located on the high seas,[22] it prohibits a wide range of activities including fishing, dumping,[23] and transshipment involving fishing vessels, among other things.[24] In 2016, the CCAMLR adopted, by consensus, Conservation Measure 91-05, thus establishing the RSRMPA. Divided into three different zones, the General Protection Zone, the Krill Research Zone, and the Special Research Zone, this MPA prohibits fishing activities except: (a) research fishing approved by the CCAMLR and conducted in accordance with Conservation Measure 24-01; (b) toothfish fishing in the Special Research Zone in accordance with Conservation Measure 41-09; and (c) krill fishing in the Krill Research Zone and the Special Research Zone in accordance with Conservation Measure 51-04.[25] Similar to the SOISS MPA, dumping and transshipment involving fishing vessels are also prohibited in the RSRMPA.[26]

These two MPAs will be selected as the case study to discuss the third party effects of MPAs in ABNJ. This case study will first discuss the indirect third party effects of CCAMLR MPAs on the basis of FSA. It will then, from the perspective

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19 CCAMLR, Conservation Measure 91-04 (2011): General Framework for the Establishment of CCAMLR Marine Protected Areas.

20 SC-CAMLR XXVIII, Final Report, para. 3.19.

21 CCAMLR XXVIII, Final Report, para. 7.1.

22 UNEP, High Seas MPAs: Regional Approaches and Experience, 22 September 2010, UNEP(DEPI)/RS.12/INF.6.RS, p. 25.

23 "Dumping" means "dumping of any type of waste by any fishing vessel", see Conservation Measure 91-03 (2009) – Protection of the South Orkney Islands Southern Shelf, para. 3.

24 Conservation Measure 91-03 (2009) – Protection of the South Orkney Islands Southern Shelf.

25 CCAMLR, Conservation Measure 91-05 (2016): Ross Sea Region Marine Protected Area. The fishing for krill and toothfish shall be for the exploratory purpose in accordance with Conservation Measure 41-09 and Conservation Measure 51-04.

26 CCAMLR, Conservation Measure 91-05 (2016): Ross Sea Region Marine Protected Area.

of customary international law, investigate whether a non-party to FSA is legally bound by CCAMLR MPAs.[27]

B. Indirect Third Party Effects and FSA

As CCAMLR, under FSA, is considered an RFMO,[28] the relationship between CCAMLR and non-parties is provided for by FSA, Article 8. In accordance with Article 8, those States fishing for straddling and highly migratory fish stocks on high seas are obligated to apply the conservation and management measures established by a competent RFMO, even if they are not members of that RFMO. If they do not do so, they shall not have access to the relevant fishery resources.[29] With this in mind, the conservation and management measures of an RFMO could bind third parties via Article 8 of FSA. Such binding rules could be considered as indirect third party effects. Such indirect third party effects, however, are limited to the State parties to FSA and the two specific fish stocks – straddling and highly migratory stocks.

Fishing activities are in principle prohibited within the MPAs established by the CCAMLR.[30] Prohibition of fishing, undoubtedly, falls under "the conservation and management measures" defined by FSA.[31] As required by FSA Article 8, parties to the FSA that are non-member States of CCAMLR are legally bound by the CCAMLR MPAs while fishing highly migratory or straddling stocks within the defined areas. Therefore, the MPAs in ABNJ established by CCAMLR, as an RFMO, can indirectly bind third parties via FSA in terms of the conservation and

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27 It might be noted that, although closures under RFMOs/ FSA are different from CCAMLR MPAs, the measures such as closures are not excluded from the management measures of CCAMLR MPAs.

28 Rosemary Rayfuse, Regional Fisheries Management Organizations, in Donald Rothwell, Alex Oude Elferink, Karen N. Scott and Tim Stephens eds., *The Oxford Handbook of the Law of the Sea*, Oxford: Oxford University Press, 2015, pp. 443~444.

29 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, *United Nations Treaty Series*, Vol. 2167, Article 8. [hereinafter "FSA"]

30 Conservation Measure 91-03 (2009) – Protection of the South Orkney Islands Southern Shelf; CCAMLR, Conservation Measure 91-05 (2016): Ross Sea Region Marine Protected Area.

31 FSA, Article 1: "conservation and management measures" means measures to conserve and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the Convention and this Agreement.

management of straddling and highly migratory stocks.[32]

In addition to the ban on fishing activities, the SOISS MPA prohibits fishing vessels from dumping and transshipment activities. Could these measures also be considered as "conservation and management measures" and thus bind third parties in accordance with Article 8 of FSA? In order to respond to this question, the definition of "conservation and management measures" should be interpreted on the basis of Article 31 of Vienna Convention on the Law of Treaties (VCLT). As Article 1 of FSA defines the "conservation and management measures" as measures to conserve and manage one or more species of living marine resources, the key point is whether prohibition of dumping and transshipment could be considered as such. In accordance with the VCLT, the interpretation of a treaty shall be based on its ordinary meaning in light of the context and its purpose. In light of the purpose of the FSA as stipulated by Article 2, the general principle stipulated by Article 5, as well as Conservation Measure 26-01,[33] "conservation and management measures" shall include measures to prohibit discharge or dumping that may impact fish species as such activities may affect protected fish stocks. Thus the prohibition of such activities could be considered as measures to conserve and manage species of marine living resources, and would be included in "conservation and management measures". In accordance with Conservation Measure 10-09, transshipment refers to "the transfer of harvested marine living resources and any other goods or materials to or from fishing vessels".[34] Considering the implications of the *Case Concerning Filleting within the Gulf of St. Lawrence between Canada and France*, it could be argued that the prohibition of the transshipment of fishing vessels is not included in "conservation and management measures" defined by FSA as it is difficult to establish a direct linkage between transshipment and marine living resources. Therefore, the prohibition of dumping within SOISS MPA can

32 It should be noted that, as the Ross Sea Region MPA commences on 1 December 2017, it cannot be legally binding before that time.

33 FSA, Article 5.f and 5.g.

34 CCAMLR, Conservation Measure 10-09 (2011): Notification System for Transhipments within the Convention Area.

legally bind third parties via FSA, while the prohibition of transshipment cannot.[35]

However, not all non-member States of CCAMLR are States parties to FSA,[36] and not all fish stocks regulated by CCAMLR are covered by FSA.[37] This raises two issues for further discussion, namely whether the indirect third party effects of CCAMLR MPAs based on FSA could apply to fish stocks other than highly migratory and straddling stocks, and whether the CCAMLR MPAs could bind third parties that are non-parties to FSA.

From the perspective of the law of treaties, it must be noted that any interpretation of a treaty cannot deviate from the ordinary meaning of that treaty. Articles 2~3 and the title of FSA already limited the application and purpose of conservation to two defined fish stocks, namely straddling and highly migratory fish stocks. Interpreting this to include other fish stocks in the application of FSA would inevitably depart from the ordinary meaning of Articles 2~3 of FSA and thus not be a valid interpretation. To conclude, the CCAMLR MPAs cannot legally bind third parties fishing for fish stocks other than the defined two via FSA.

C. Third Party Effects and Customary International Law

Non-parties to FSA and CCAMLR, according to the *pacta tertiis* principle, are not legally bound by the CCAMLR MPAs. This, however, does not exclude the possibility that these MPAs may bind those non-parties via customary international

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35 In the award of the *Case Concerning Filleting within the Gulf of St. Lawrence between Canada and France*, the Tribunal held the view that Article 31 of VCLT codified customary international law on treaty interpretation. In accordance with this general rule of interpretation, the Tribunal interpreted the term "fishing regulations", in its natural and ordinary meaning, as consisting in designating legislative and regulatory requirements relating to fishing contained in internal laws, which did not include the filleting of fish. If we use the same method as the Tribunal to restrictively interpret the "conservation and management measures" of the FSA, transshipment activity, in its original meaning, cannot be included in such measures to conserve and manage the straddling fish stock and highly migratory fish stocks. See Irene Couzigou, La Bretagne, Arbitral Award, *Max Planck Encyclopedia of Public International Law*, at http://opil.ouplaw.com, 28 November 2017.

36 Up to 6 November 2017, 87 States have ratified or acceded to FSA. See Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#, 21 March 2018.

37 FSA applies to highly migratory and straddling fish stocks. However, not all fish stocks regulated by CCAMLR are included in FSA classifications of highly migratory and straddling fish stocks. For example, *Euphausia superba* (Antarctic krill) and *Dissostichus spp.* (Patagonian toothfish or Antarctic toothfish) are not considered as highly migratory species listed in Annex I of UNCLOS nor straddling species, and thus not covered by FSA.

law. It is therefore necessary to determine whether or not CCAMLR MPAs could bind third parties through customary rules.

1. In Regards to Straddling and Highly Migratory Fish Stocks, Does Article 8(3) of FSA Constitute Customary International Law?

If Article 8(3) of FSA constitutes customary international law, the indirect third party effects of RFMOs based on FSA could also apply to non-parties fishing for highly migratory and straddling stocks. In other words, they would be obligated to comply with the measures of RFMOs to conserve and manage highly migratory and straddling fish stocks. If this is the case, the CCAMLR MPAs could also bind non-parties to both FSA and CCAMLR while they are fishing for such fish stocks.

The key issue is whether Article 8(3) of FSA constitutes customary international law. In accordance with Article 8(3), where an RFMO with relevant competence exists, States have the duty to cooperate by participating in the organization or agreeing to apply the conservation and management measures established by such organization.[38] This provision could be considered as the embodiment of the general obligation to cooperate for the conservation of marine living resources, as stipulated by Article 8(1) of FSA and Articles 117~118 of the UNCLOS.

There is no controversy whether the general obligation to cooperate has been accepted as customary international law.[39] In regards to the conservation and management of fisheries on high seas, the duty to cooperate was generally accepted by all 105 States participating in the negotiations of FSA, including those which did not sign or ratify the agreement at last.[40] The negotiations were considered as covering virtually every State having or desiring to take an interest in fishing for the two stocks.[41] Therefore, the general obligation to cooperate for the conservation and management of straddling and highly migratory fish stocks can be considered

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38 FSA, Article 8(3).

39 In *The MOX Plant Case*, ITLOS determined that the general duty to cooperate is not just a fundamental principle in the UNCLOS, but also customary international law. See ITLOS, *The MOX Plant Case (Ireland v. UK)*, Order of 3 December 2001, para. 82.

40 All 105 States participating in the negotiations of FSA generally accepted the duty to cooperate to conserve and manage as a general duty. See Rosemary Gail Rayfuse, *Enforcement by Non-flag States of High Seas Fisheries Conservation and Management Measures Adopted by Regional Fisheries Organizations* (PhD Dissertation), Utrecht: Utrecht University, 2003, p. 34; See UN Document A/CONF.164/12, 21 July 1993, p. 2.

41 Rosemary Gail Rayfuse, *Enforcement by Non-flag States of High Seas Fisheries Conservation and Management Measures Adopted by Regional Fisheries Organization*s (PhD Dissertation), Utrecht: Utrecht University, 2003, p. 72

as customary international law.[42]

However, from the perspective of customary international law, it is unclear whether or not the general duty to cooperate provides the obligation for States to participate in or agree to apply the conservation and management measures established by a competent RFMO where such an organization exists.

As discussed by Tullio Scovazzi, the duty to cooperate is an obligation for States to participate in negotiations to achieve a new agreement.[43] In accordance with the ICJ judgement in the *North Sea Continental Shelf Cases*, such participation should include acting in good faith and taking into consideration the viewpoints of other States.[44] Thus, if an agreement or regional arrangement such as RFMO exists, it can be inferred that the duty to cooperate shall obligate non-parties to cooperate within the framework of this arrangement. Such an arrangement is an outcome of previous negotiations among interested States, thus if a State refuses to participate or cooperate then it is impossible for that State to fulfill its duty to cooperate. It can therefore be argued that if a competent RFMO exists, the general duty to cooperate implies the obligations for States to participate in or agree to apply the measures made by that RFMO in respect to the conservation and management of straddling and highly migratory fish stocks. This conclusion also implies that CCAMLR MPAs could legally bind non-parties of both FSA and CCAMLR in regards to the conservation of highly migratory fish stocks and straddling fish stocks within the Antarctic.

2. Does the Establishment and Management of the CCAMLR MPAs Itself Constitute Customary International Law in Regards to Other Fish Stocks?

Antarctic fish stocks other than straddling and highly migratory stocks are not regulated by FSA and the relevant customary international law. As such, CCAMLR MPAs, with regards to those fish stocks, have no indirect legal effects

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42 It could also be argued that such a duty has constituted customary international law when the FSA was under negotiation. See Rosemary Gail Rayfuse, *Enforcement by Non-flag States of High Seas Fisheries Conservation and Management Measures Adopted by Regional Fisheries Organization*s (PhD Dissertation), Utrecht: Utrecht University, 2003, pp. 72~73.

43 Tullio Scovazzi, Marine Protected Areas on the High Seas: Some Legal and Policy Considerations, *The International Journal of Marine and Coastal Law*, Vol. 19, No. 1, 2004, p. 6.

44 By taking *North Sea Continental Shelf Cases* as an example, Tullio Scovazzi believes that "states are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it". See Tullio Scovazzi, Marine Protected Areas on the High Seas: Some Legal and Policy Considerations, *The International Journal of Marine and Coastal Law*, Vol. 19, No. 1, 2004, p. 6.

on third parties via the FSA. In that case, whether the CCAMLR MPAs apply to those stocks for third parties depends on whether the practice of CCAMLR MPAs constitutes customary international law. If the establishment and management of CCAMLR MPAs can be considered customary international law, third parties would be bound in regards to the conservation of those fish stocks not covered by FSA. Considering that the basic approach to the identification of customary international law is to ascertain the existence of both general state practice and *opinio juris*, answering this issue requires the assessment of state practice and *opinio juris* in relation to CCAMLR MPAs.

The CCAMLR has 25 members and 11 acceding States. Only members could participate in the decision-making of CCAMLR. As the decisions to establish MPAs are made by consensus among all CCAMLR members, they are legally bound by the decisions of CCAMLR in accordance with Article 9 of the CAMLR Convention. As such, the establishment of CCAMLR MPAs could be considered as the general practice of all the members of CCAMLR. Notably, although the acceding States are interested in research and harvesting activities in relation to Antarctic marine living resources, they are not permitted to fish in the CAMLR Convention Area.[45] Therefore, there is no chance for those CCAMLR decisions to apply to the acceding States.

Although CCAMLR members do not make up a large proportion of the total number of States, it should be noted that "general state practice" does not refer to the "practice of all states". As mentioned by the International Law Commission (ILC), the practice of an overwhelming majority of States having a chance to apply the practice may constitute "general state practice" and thus create customary international law.[46] Therefore, it can be argued that customary international law can be created in instances when only a limited number of States engage in a practice.[47]

Only a few States have vessels that are fishing inconsistent with the rules of

45 Explanation of Terms, at https://www.ccamlr.org/en/organisation/explanation-terms, 21 March 2018.

46 Michael Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, paras. 52~54. For example, only the practice of States that have space abilities may create international custom relevant to outer space, and only the practice of States that have nuclear weapons may create custom related to the use and reduction of nuclear weapons.

47 Micheal Wood, Second Report on Identification of Customary International Law, UN Doc A/CN.4/672, 2014, para. 53.

CCAMLR regulating fishery activities conducted in Antarctic waters.[48] In other words, the vessels of most States, when fishing in the Antarctic, comply with the rules of the CCAMLR, including conservation measures of the MPAs.[49] Although the CCAMLR has a limited number of contracting parties, as the contracting parties and non-contracting parties acting in consistent with the CCAMLR constitute the overwhelming majority of States able to conduct harvesting activities within Antarctic waters. Thus, the establishment of CCAMLR MPAs can be considered as a kind of general state practice in relation to the management of fishery resources within Antarctic waters.

As for *opinio juris*, the decisions to establish both the SOISS MPA and the RSRMPA were adopted by consensus at two meetings of CCAMLR, meaning every member agreed to their establishment. Such consensus can be read as the belief that these States are legally obligated to comply with the decisions to establish CCAMLR MPAs, indicating the *opinio juris* of every member. As no other States objected to the establishment of MPAs in ABNJ, it is possible for the practice of CCAMLR MPAs to constitute customary international law.

On the other hand, however, it has not been ascertained whether those non-contracting parties fishing within Antarctic waters accept the establishment and management of MPAs as law and feel obligated to comply with it. In that case, at present, a definite answer cannot be given to the question whether the establishment and management of CCAMLR MPAs constitutes customary international law.

IV. Concluding Remarks

In general, within the framework of the UNCLOS, an MPA in ABNJ can only legally bind those States who participated in its establishment.[50] This is because, in

48 The rules refer to the CAMLR Convention and relevant conservation measures adopted by the CCAMLR, including the establishment of MPAs under the CCAMLR.

49 It is difficult to estimate how many States fish in Antarctic waters. According to non-contracting parties IUU vessel list, however, only a few non-party States have vessels fishing inconsistent with the rules stipulated by CCAMLR. Those States include Saint Vincent and the Grenadines, Tanzania, Nigeria, Iran and Mauritania. The IUU fishing activities of those States can, compared to the remaining States whose vessels act in consistent with the rules of CCAMLR, only be considered as marginal inconsistent practice. Therefore, it can be inferred that the vessels of most States comply with the rules of CCAMLR. For the data on IUU fishing of non-contracting parties, at https://www.ccamlr.org/en/compliance/non-contracting-party-iuu-vessel-list, 27 February 2018.

50 Petra Drankier, Marine Protected Areas in Areas beyond National Jurisdiction, *The International Journal of Marine and Coastal Law*, Vol. 27, 2012, p. 295.

light of the *pacta tertiis* rule and freedoms of high seas, MPAs in ABNJ established by a limited number of States cannot bind third parties or limit their high seas freedoms without their express consent.

However, to a limited extent and scope, two exceptions exist in the case of CCAMLR MPAs.

First, if an MPA is established by the CCAMLR it could bind third parties that are State parties to FSA via Article 8 of FSA in the conservation and management of straddling and highly migratory fish stocks. This is because the ratification of or accession to the FSA can be considered as express consent of a State to be bound. Specifically, the CCAMLR MPAs could legally bind third parties indirectly via FSA in respect to the conservation of highly migratory stocks and straddling stocks within Antarctic waters. This exception, however, cannot answer questions regarding third party effects concerning States that are neither party to the FSA nor the CCAMLR, or issues concerning fish stocks other than the two stocks regulated by FSA.

The second exception is customary international law. It can be argued that FSA, Article 8(3) constitutes customary international law and thus obligates third parties to comply with the measures established by an RFMO for the conservation of straddling and highly migratory stocks in an MPA. As for the conservation of other fish stocks, further analysis is needed to determine whether the regulations/ measures associated with the CCAMLR MPAs constitute customary international law and bind third parties. Taking CCAMLR MPAs as an example, it should be noted that it is possible for the practice of CCAMLR MPAs to be considered customary international law due to the existence of general state practice. However, as it is unclear whether the criterion of *opinio juris* has been satisfied, its status as customary law cannot be ascertained at present.

Editor (English): David Devlaeminck

欧盟海上油气作业安全指令对我国预防海上重大溢油事故的启示

杨 苑*

内容摘要：随着海上油气开发活动逐渐增多，以及逐渐向深海推进，防范海上溢油已成为海洋环境保护的重要环节。为减少发生重大事故的风险以及限制其影响，欧盟在2013年颁布了《海上油气作业安全指令》，为海上油气作业安全设立了一套高标准，与此同时，还建立了风险管理和事故防范的综合法律框架。我国正在改革海上油气作业立法，提高预防海上溢油的能力，而欧盟设立的法律框架可以为我国立法改革提供参考。从环境法原则的适用情况出发，本文比较研究了欧盟立法与我国立法为作业者设定的义务。在此基础上，本文认为，我国应统一并巩固有关海上油气作业安全的法律框架，并为作业者设置更严格的安全标准。

关键词：环境法 比较法学 海上油气作业 《海上油气作业安全指令》 欧盟 中国

一、引 言

自2010年“深海地平线”溢油事故发生后，欧盟展开了一系列调查，评估欧盟海域中海上[1]油气开采区的安全。在海上油气作业安全领域，欧盟当时的监管框架尚不统一，存在碎片化的特征。在认识到这一点以后，欧盟颁布了《海上油气作

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1 “海上”是指位于欧盟成员国的领海、专属经济区内或大陆架上，领海、专属经济区、大陆架三者的定义参照《联合国海洋法公约》的相关规定。See Article 2.2 of Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on Safety of Offshore Oil and Gas Operations and Amending Directive 2004/35/EC, *Official Journal of the European Union*, L 178, 28 June 2013, p. 66. 在海上油气业中，“安全”是指油气作业固有的或与环境有关的风险管理能力，下载于 http://www.offshore-technology.com/features/feature577/，2018年5月1日。

业安全指令》（以下简称“《安全指令》”）。[2] 该指令全面规定了欧盟各国海上油气作业应遵守的规则，旨在“确立预防重大事故的最低要求”，[3] 并“限制该类事故产生的影响”。[4] 该指令制定了全球最严格的海上油气作业安全标准，规定了作业者（所有者）、欧盟成员国和欧盟委员会的义务。[5] 该指令建立的安全制度适用于欧盟海域的所有油气设施，但其效果还有待实践检验。

在我国，海上重大漏油事故，如 2011 年的渤海湾漏油事故，[6] 给人类生命健康、附近的海洋生态和地方经济带来了巨大危害。与欧盟颁布《安全指令》之前一样，我国有关海上油气作业安全的法律与政策也是比较分散的，没有形成系统。为减少发生重大事故的风险，提高海上作业的安全水平，我国也开始进行海上油气作业立法改革，提升海上溢油事故的预防能力。了解欧盟《安全指令》的运作模式，从中吸取经验和教训，将对我国大有裨益，而且法学学者、决策者和公众也应该对此感兴趣。因此，本文将探讨我国在预防海上事故方面所存在的监管不足，详细分析可以从欧盟《安全指令》中吸取哪些经验和教训，来弥补这方面的不足。

本文将比较欧盟《安全指令》和我国相关的法律法规在预防海上重大事故方面的异同，并通过比较，找出可供中国参考和借鉴的法律解决方案。《安全指令》中的环境法原则，不仅对设置海上油气作业安全水平及争取达到这一水平至关重要，而且也对设置作业者必须满足的最低安全标准的监管范围至关重要。有鉴于此，本文第二部分将介绍欧盟《安全指令》的发展历程，探讨其环境法原则，以及作业者应达到的最低安全要求。第三部分将先介绍我国有关海上油气作业安全的法律和政策，接着探讨这些法律政策中的环境法原则，并具体分析部分条款中所

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2 Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on Safety of Offshore Oil and Gas Operations and Amending Directive 2004/35/EC, *Official Journal of the European Union*, L 178, 28 June 2013. [hereinafter “the OSD”]

3 就设备或相关设施而言，“重大事故”是指：（1）涉及爆炸、火灾、油井失控或油气或危险物质泄漏的事件，或有重大可能造成死亡或严重人身伤害的事件；（2）严重损坏设备或相关设施，且涉及或有重大可能造成死亡或严重人身伤害的事件；（3）任何导致 5 名或 5 名以上人员死亡或严重人身伤害的其他事件，而事故发生时该等人员正处在属于危险源的海上设备上，或正在从事与设备或相关设施有关的海上油气作业；（4）由上述（1）、（2）和（3）点提到的事件引起的任何重大环境事件。在判定一起事故是否构成（1）、（2）或（3）点所指的重大事故时，通常情况下无人看管的设备应被视为有人看管。“重大环境事件”是指，依据 2004/35/EC 号指令，导致或可能导致对环境产生重大不利影响的事件。See Article 2 of the OSD.

4 Article 1.1 of the OSD.

5 European Commission (EC), Commissioner Oettinger Welcomes Political Agreement on Offshore Legislation, at http://europa.eu/rapid/press-release_IP-13-149_en.htm, 1 May 2018.

6 2011 年 6 月，我国渤海湾最大的海上油田蓬莱 19-3 油田发生 2 起溢油事故。据中国国家海洋局 2012 年 6 月公布的一份报告可知，事故主要是由作业公司违反相关作业标准造成的。事故造成面积约 6200 平方公里的海域海水污染，给辽宁、河北两省的旅游业和水产业造成了巨大损失。下载于 http://www.soa.gov.cn/xw/hyyw_90/201211/t20121109_884.html，2018 年 5 月 1 日。

规定的作业者义务。第四部分从法律框架、环境法原则的应用以及作业者的义务等三个方面出发，比较了我国相关的海上油气作业安全法规与欧盟《安全指令》之间的差距。文章最后一部分得出结论，认为我国应统一并加强其法律框架，为海上油气作业制定更高的安全标准。鉴于海上油气作业涉及到的安全和环境风险，本文认为，在预防海上重大事故时，我国应严格遵守预警原则。与此同时，我国的海上安全立法还应依据预防原则，制定更详细、更严格的措施，特别是必须要求作业者评估重大事故的危险，并确保溢油应急反应的有效性。

二、欧盟预防重大海上溢油事故的举措：《安全指令》

（一）背景情况

在欧洲，90% 以上的石油，以及 60% 以上的天然气都来自海上。在欧洲水域中从事勘探开采作业的海上设施超过 1000 座。[7] 海上作业规模大，蕴含着巨大的风险，具体表现为自 20 世纪 80 年代以来发生的一系列重大事故，如挪威“亚历山大•基尔兰”号半潜式平台沉没事故、英国北海“派珀•阿尔法”平台爆炸事故。[8] 这些事故促使相关国家或组织作出改革，设计更安全的海上设施，这在一定程度上降低了欧盟范围内海上作业的相关风险。然而，在过去 10 年中，2010 年“深海地平线”[9] 等事故的发生表明，海上事故仍然会带来灾难性的后果。根据欧盟委员会的一份报告可知，这类事故在欧盟发生的风险很高。[10] 因此，欧盟领导层希望进一步降低海上油气作业发生重大事故的风险。

“深海地平线”事故发生后，欧盟委员会随即组织调查，并发布了一份题为“海上油气活动面临的安全挑战”的报告。[11] 该报告审查了有关海上油气活动的监管框架，指出欧盟的海上油气活动“在一定程度上是由多元化的健康、安全和环境制

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7 Commission Staff Working Paper – Impact Assessment, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Safety of Offshore Oil and Gas Prospection, Exploration and Production Activities, p. 9, at https://www.eumonitor.nl/9353000/1/j9vvik7m1c3gyxp/viua6aufcfzt, 1 May 2018. [hereinafter “Impact Assessment”]

8 1980 年，“亚历山大•基尔兰”号半潜式平台在挪威北海沉没，导致 123 人死亡。1988 年，“派珀•阿尔法”钻井平台在北海发生大爆炸，导致 167 人死亡。这 2 起事故导致海上设施，特别是可移动平台的结构弹性发生改革。

9 2010 年，“深海地平线”号钻井平台因井喷失控在墨西哥湾发生爆炸，造成 11 名工作人员死亡。该起事故是美国水域中发生的最大溢油事故。

10 Impact Assessment, p. 7.

11 EC, Facing the Challenge of the Safety of Offshore Oil and Gas Activities, COM (2010) 0560, p. 15.

度调整”。[12] 报告认为，这种分散的制度可能无法为海上作业提供高安全标准。为进一步提高海上作业的安全水平，以及提升预防事故和事故发生后作出响应的能力，报告认为急需采取后续行动。[13]

调查结束后，欧盟委员会还进一步开展了调研、分析和咨询，[14] 并于 2011 年 10 月生成了一份工作文件《影响评估》。根据该文件，欧盟的举措应遵守下述 2 个总体目标：一是预防重大事故的发生，二是在事故发生后，能够有效地处理重大紧急事件。[15] 根据这 2 个目标，该文件还评估了其他的政策选择，包括实施这些政策所需要的相关费用，以及这些政策预期能在多大程度上减少海上重大事故发生的风险。[16] 该工作文件还包含欧盟委员会所做的一项研究，该研究揭示了海上油气业中发生井喷及其他重大事故的频率和损失。[17]

基于《影响评估》，欧盟委员会通过了设立关于海上油气作业安全规章的提案。这引起了英国等欧盟成员国的担忧，因为这些国家本身就已具有较完备的安全制度，而规章则不需要转化为国内法就能直接产生法律效力，因此，这些国家更希望欧盟颁布一个措词更合适的指令，尽可能小地干扰其国内法。[18] 有鉴于此，2012 年举办了 2 场同行评审会议，分析该规章在技术上的可行性。在会上，来自欧盟委员会、行业协会和非政府组织的利益相关者，根据官方评估报告与其他研究报告的不同成果，就海上事故的风险和损失进行了交流。[19] 考虑到各方的不同意见，欧盟委员会决定将规章的立法形式改为欧盟指令，这样成员国就可以自行决定如何执行指令。[20]

（二）《安全指令》的框架结构

12 EC, Facing the Challenge of the Safety of Offshore Oil and Gas Activities, COM (2010) 0560, p. 15.

13 Günther Oettinger, Oil Exploration and Extraction – Risks, Liability and Regulation, at http://europa.eu/rapid/press-release_SPEECH-10-368_en.htm, 1 May 2018.

14 Impact Assessment, p. 3.

15 EC, Executive Summary of the Impact Assessment, Proposal for a Regulation of the European Parliament and of the Council on Safety of Offshore Oil and Gas Prospection, Exploration and Production Activities, COM (2011) 688 final/SEC (2011) 1292 final/SEC (2011) 1293 final, p. 3.

16 Summary Report of the Peer Review Meetings on the Assessment of Risks in the Offshore Oil and Gas Industry, 18 March 2012 & 2 May 2012, p. 5. [hereinafter “Summary Report”]

17 Summary Report.

18 Ursula O’Donnell, New EU Directive on the Safety of Offshore Oil and Gas Operations, at http://www.standard-club.com/media/1557512/new-eu-directive-on-the-safety-of-offshore-oil-and-gas-operations.pdf, 1 May 2018.

19 Summary Report, p. 12.

20 Ursula O’Donnell, New EU Directive on the Safety of Offshore Oil and Gas Operations, at http://www.standard-club.com/media/1557512/new-eu-directive-on-the-safety-of-offshore-oil-and-gas-operations.pdf, 1 May 2018.

2013 年 6 月 10 日，欧盟理事会通过了《安全指令》，该指令于同年 7 月 18 日生效。《安全指令》的目标在于：（1）减少涉及海上油气作业的重大事故发生，以及限制事故产生的影响，（2）在发生事故的情况下，完善事故响应机制。[21] 依据这一目标，《安全指令》特别设定了“预防海上重大油气作业事故以及限制该类事故影响的最低要求”。[22] 该指令符合欧盟的海洋政策与法律，如《综合海事政策》[23] 和《海洋战略框架指令》，[24] 并扩大了这些政策和法律的调整范围，使其涵盖了这类事故对海洋区域造成污染的风险。

《安全指令》的实质内容包含 7 章（第二章至第八章），其不影响欧盟其他法案中的规定，[25] 特别是工作安全与健康方面的法案。第二章确立了海上油气作业风险管理的一般原则。该章还对许可证发放、责任、公众参与、主管机构安排等方面做出了规定。第三章规定了作业者和所有者应提交的文件。第四章详细规定了有关文件方面的 2 项义务，并强调了作业者、所有者和相关机构在预防重大事故方面的合规与保密规则。[26] 第五章规定了信息透明与信息分享方面的规则。第六章涉及欧盟成员国之间的合作。第七章确定了内外部应急方案的要求，以及重大事故的应急响应。最后，第八章总结出应急准备方面的规则，以及重大事故带来的跨境影响响应规则。考虑到欧盟成员国仍处在将上述章节中规定的义务转化为国内法的阶段，[27] 本文仅分析目前状态下的《安全指令》，暂不讨论指令在成员国

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21 Recital No. 2 of the OSD.

22 Article 1 of the OSD.

23 《综合海事政策》与海上油气作业有关，其要求将每个经济部门特别关注的问题与确保综合理解海洋及沿海地区的一般目标联系起来，目的在于通过使用海洋空间规划和海洋知识，综合考虑经济、环境和社会等方面，并在此基础上制定处理海洋问题的一贯方法。See Recital No. 7 of the OSD.

24 Directive 2008/56/EC of the European Parliament and the Council of 17 June 2008 Establishing a Framework for Community Action in the Field of Marine Environmental Policy, *Official Journal of the European Union*, L 164, 25 June 2008, p. 19. 作为《综合海事政策》的环境支柱，《海洋战略框架指令》旨在处理所有活动对海洋环境产生的累积影响。

25 其他法案包含有关从业人员工作安全与健康的法案（特别是 89/391/EEC 指令和 92/91/EEC 指令），有关授权及使用油气勘察、勘探和生产的条件的 94/22/EEC 指令，有关某些方案和计划的环境影响评估的 2001/42/EC 指令，有关公众获取环境资料的 2003/4/EC 指令，有关公众参与制定某些涉及环境的方案和计划的 2003/35/EC 指令，有关工业排放的 2010/75/EU 指令，有关某些公共项目及私人项目的环境影响评估的 2011/92/EU 指令，有关环境损害预防与救济的环境责任的 2004/35/EC 指令，而 2004/35/EC 指令将“水损害”的定义范围延展到包括《海洋战略框架指令》（2008/56/EC）下的“海水”。

26 “主管机关”是指《安全指令》所指定的负责履行该指令规定职责的公共机构。“主管机关”可以是一个或多个公共机构。See Article 2.14 of the OSD.

27 《安全指令》于 2013 年 6 月 12 日获得通过。欧盟成员国必须在 2015 年 7 月 19 日之前，施行遵守本指令所必需的法律、法规及行政规定。所有者和作业者必须在 2016 年 7 月 19 日之前，符合有关新设施的要求。已有设施必须在 2018 年 7 月 19 日之前符合新规则。欧盟委员会应在 2019 年 7 月 19 日之前，评估各成员国实施本指令的情况，并向欧洲议会提交相关报告。See Articles 41 and 42 of the OSD.

的实施情况。

（三）环境法原则的适用

作为二级立法，《安全指令》必须体现《欧盟运作条约》中列出的环境法原则。[28]《欧盟运作条约》第 191 条“确立了维护、保护和改善环境质量，以及谨慎而合理地利用自然资源的目标。其设置了一项义务，要求欧盟所有的行动均应着眼于高水平的保护，即以下列原则为基础：预警原则、应采取预防性行动的原则、环境破坏应在源头上优先纠正的原则，以及污染者付费的原则。”[29] 上述文字表明，《安全指令》建立在四大环境法原则的基础上，即预警、预防、在源头上纠正和污染者付费原则，这 4 个原则一起构成了欧盟成员国和作业者具体义务的基础。[30]

1. 预警原则

预警原则是欧盟及国际环境法律与政策的核心原则。[31] 预警原则要求在早期就对环境损害风险采取措施，即使科学证据尚无法完全证明这种风险与实际活动存在因果关系，甚至无法证明风险本身是否存在。[32] 预警原则要求各国采取“具有成本效益的措施，预防环境退化”，[33]《安全指令》中的许可流程解释并实践了这一要求。[34] 具体而言，许可证发放机构在评估申请单位的技术和财务能力时，应考虑海上作业风险和危害，包括海洋环境退化造成的代价。[35] 这与 1994 年油气开发指令的要求相比，[36] 已发生了重大变化，因为 1994 年的许可流程并未考虑环境因素。

值得注意的是，预警原则在《安全指令》中的适用稍显薄弱。《安全指令》要

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28 Article 191.1 of the Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012, pp. 47~390.

29 Recital No. 1 of the OSD.

30 Jan H. Jans and Hans H.B. Vedder, *European Environmental Law: After Lisbon*, 4th edition, Amsterdam: Europa Law Publishing, 2012, p. 41.

31 Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth Mackenzie, *Principles of International Environmental Law*, 3rd edition, Cambridge: Cambridge University Press, 2012, p. 222.

32 Arie Trouwborst, Prevention, Precaution, Logic and Law, *Erasmus Law Review*, Vol. 2, No. 2, 2009, p. 108.

33 Principle 15 of the Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I); 31 ILM 874 (1992).

34 Lorenzo Schiano di Pepe, Environmental Law Principles in the European Union Legislation Governing Offshore Oil and Gas Operations, in ZOU Keyuan ed., *Sustainable Development and the Law of the Sea*, Dordrecht: Brill, 2016, p. 110.

35 Article 4.2(a) of the OSD.

36 Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the Conditions for Granting and Using Authorizations for the Prospection, Exploration and Production of Hydrocarbons, *Official Journal of the European Communities*, L 164, 30 June 1994, p. 3.

求基于风险管理展开海上作业，目的在于将“重大事故给人类、环境和海上作业设施带来的剩余风险”控制在可接受的水平内。[37] 然而，《安全指令》却未指明，在评估行动的适当性时，到底怎样才算“可接受的”[38] 水平，[39] 这一点似乎也与预警原则不一致。导致存在不一致的原因可能是因为，产业安全是指识别、评估以及管理与生产经营有关的风险和危险的承诺，而不是提出一系列的不确定性。[40] 尽管未完全“整合预警原则”，也未协调“欧盟法律中有关环境影响评估的规则”，《安全指令》基本上还是与欧盟委员会 2000 年发布的《委员会关于预警原则的公报》保持了一致。[41]

2. 预防原则和在源头纠正的原则

预防原则是欧盟环境法律和政策中采用的主要方法，该原则也允许在早期采取保护环境的行动，但与预警原则不同的是，预防原则仅针对确定存在的环境危害或风险。预防原则不赞同使用末端治理技术来预防环境损害，[42] 因此，该原则与另一项原则紧密相关，即在源头上纠正的原则。在源头上纠正的原则偏向于使用严格的排放标准，而非环境质量标准。[43] 因《安全指令》中未明确运用这一原则，所以在此不详述。

从《安全指令》在海上油气作业风险管理中采用的一般做法可知，《安全指令》主要依据的是预防原则。[44] 依照该指令，作业者必须“采取一切合适的措施，预防重大事故”，并“限制事故对人类健康和环境造成的影响”。[45] 这一点与《安全指令》的总体目标（即预防海上重大油气作业事故的发生，并限制事故造成的影响）是一致的。[46] 在这方面，预防原则尤其是运用在准备和开展海上作业的阶段。此外，该原则还要求作业者采取最低的安全标准，并向主管机构提交一系列文件。

3. 污染者付费原则

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37 Article 3.4 of the OSD.

38 “可接受的”风险是指，若在此风险水平上继续削减风险，则花费的时间、成本或人力会与风险消减所带来的惠益严重失衡。See Article 2(8) of the OSD.

39 Kenisha Garnett and David J. Parsons, Multi-Case Review of the Application of the Precautionary Principle in European Union Law and Case Law, *Risk Analysis*, Vol. 37, 2017, p. 511.

40 Jean-Marc Jaubert, The Meaning of Safety, at http://www.offshore-technology.com/features/feature577/, 1 May 2018.

41 Communication from the Commission on the Precautionary Principle, COM (2000) 1 final.

42 Nicolas de Sadeleer, *Environmental Principles form Political Slogans to Legal Rules*, London: Oxford University Press, 2002, p. 61.

43 Jan H. Jans and Hans H.B. Vedder, *European Environmental Law: After Lisbon*, 4th edition, Amsterdam: Europa Law Publishing, 2012, p. 48.

44 Lorenzo Schiano di Pepe, Environmental Law Principles in the European Union Legislation Governing Offshore Oil and Gas Operations, in ZOU Keyuan ed., *Sustainable Development and the Law of the Sea*, Dordrecht: Brill, 2016, p. 110.

45 Article 3 of the OSD.

46 Article 1.1 of the OSD.

污染者付费原则是国际社会普遍认可的一条原则。该原则要求污染者，而非整个社会来承担环境保护措施的费用。[47] 从广义上说，这些费用不仅包含采取预防和控制污染措施产生的费用，也包含了一定的责任。一方面，责任制度激励潜在的污染者采取措施，开展将污染风险最小化的实践，另一方面，这一制度又为污染受害者获得相关赔偿提供保障。

要了解污染者付费原则在《安全指令》中的适用情况，应首先分析海上事故的责任和影响。《安全指令》协调了海上事故责任的 2 个方面。[48] 首先，该指令规定，被许可方应具有负担海上作业产生的损害的技术和财务能力，[49] 包括国内法中规定的经济损害。[50] 成员国应相应地“督促运用可持续性的财务文书，以及作出其他安排，以协助许可证申请方证实自身的财务能力。”[51] 其次，《安全指令》规定，被许可方具有预防和整治环境损害的财务责任。[52]《安全指令》第 38 条拓展了《环境责任指令》[53] 的规制范围，将其延伸至欧盟成员国的大陆架，要求海上油气作业被许可方对其作业产生的环境损害负严格责任。[54]

（三）作业者的最低安全标准

基于上述环境法原则，《安全指令》确立了海上油气作业风险管理的一般原则，[55] 其中主要涉及作业者应承担的法律义务。依据该等一般原则，为实施最低安全标准，《安全指令》不仅向海上作业者提出了相关要求，也对成员国及主管机构提出了要求。首先，成员国有责任将《安全指令》转化为国内法，确保本国的海上油气活动符合所有相关的欧盟安全与环境立法。其次，为避免潜在的或觉察到的利益冲突，成员国应确保《安全指令》中的监管职责 [56] 由一个独立的主管机构负

47 Commission Staff Working Document, Liability, Compensation and Financial Security for Offshore Accidents in the European Economic Area, SWD (2015) 167 final, p. 7.
48 Report from the Commission to the European Parliament and the Council on Liability, Compensation and Financial Security for Offshore Oil and Gas Operations Pursuant to Article 39 of Directive 2013/30/EU, COM (2015) 422 final, p. 6.
49 Article 4(2) of the OSD.
50 Article 4(2) of the OSD.
51 Article 4(3) of the OSD.
52 Article 7 of the OSD.
53 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedy of Environmental Damage, *Official Journal of the European Union*, L 143, 30 April 2004, p. 56.
54 Report from the Commission to the European Parliament and the Council on Liability, Compensation and Financial Security for Offshore Oil and Gas Operations Pursuant to Article 39 of Directive 2013/30/EU, COM (2015) 422 final/SWD (2015) 167 final, p. 2.
55 Article 3 of the OSD.
56 Article 8.1 of the OSD.

责，该机构必须独立于负责海洋资源经济开发和海上油气作业审批的职能部门。[57] 最后，作业者和所有者应编制一系列的安全文件，报主管部门审批。

首先，海上作业者和所有者具有制定企业重大事故预防政策的义务，其目的在于始终为海上作业提供高水平的保护。作业者必须确立“控制重大事故风险的总体目标和安排”，并明确“在企业层面实现总体目标、实施上述安排的方法”。[58]《安全指令》还列出了企业重大事故预防政策，以及作业者和所有者必须提交的其他文件中应包含的一系列安全要点。[59] 因此，对于重大事故风险控制，以及“风险控制的持续改善”，作业者和所有者负主要责任。[60]

其次，《安全指令》促进了安全与环境管理制度的一体化，这两方面在过去互为个体。[61] 阐述安全和环境管理制度的文件必须包含下述内容：（1）控制重大危险的机构设置，（2）依据相关的法律规定编制和提交文件的安排情况，（3）检验方案。[62] 安全和环境管理制度连同企业重大事故预防政策一起，构成了海上重大事故的预防机制。

第三，作业者或所有者必须编制生产设施或非生产设施的重大危险报告。这是一份重要的文件，必须在开展海上作业前完成编制，具体内容应包含风险评估和应急预案。重大危险报告旨在发现所有的重大危险，评估其发生的可能性和后果。[63]

第四，编制内部应急预案也是作业者必须履行的一项义务。内部应急预案必须考虑所有相关的方面，比如重大风险和危险，操作技术细节问题，以及当地环境状况。[64]“在发生任何重大事故，或存在发生重大事故紧迫风险的情况下”，该预案必须“立即启动”，且必须“与外部应急预案保持一致”。[65] 此外，预案中还必须包含对溢油响应效果进行评估的内容。[66]

最后，《安全指令》要求，有关危险的主报告，还必须对检验方案进行阐述，包括“独立检验单位的遴选，能确保安全和环境关键因素以及方案中提及的任何设备处于良好状态的检验方法。”[67] 作业者应确立独立检验方案，其中至少包含有

57 Article 8.2 of the OSD.
58 Article 19.5(a) of the OSD.
59 Annex I, Part 8 of the OSD.
60 Article 19.2 of the OSD.
61 “安全与环境关键因素”是指海洋油气作业设备中的组成部分，包括电脑程序，其目的在于预防或限制因重大溢油事故而导致的损害后果，以及实质构成溢油事故的原因。See Article 2(33) of the OSD.
62 Article 19.3 of the OSD.
63 Annex I, Part 2(5) of the OSD.
64 Annex I, Part 10(5) of the OSD.
65 Article 28.1 of the OSD.
66 Article 14.1 of the OSD.
67 Annex I, Part 5(b) of the OSD.

关设施、油井作业通知和重大变动方面的内容。[68]

三、我国对海上重大溢油事故的防范

（一）我国海上油气作业安全形势

我国从上世纪 60 年代开始发展海洋油气产业。海上油气开发活动具有“高投资、高技术和高风险”的特征。[69] 随着世界范围内海上重大作业事故的相继出现，特别是2010年墨西哥湾发生的“深海地平线”事故，我国也像欧盟一样，意识到“风险确确实实存在”，[70] 而且海上重大事故带来的影响是灾难性的。2011 年中国渤海湾漏油事故就证实了这一点。[71] 渤海湾事故造成了巨大的经济损失和环境损害，所幸的是，没有像欧洲 20 世纪 80 年代“亚历山大•基尔兰”事故和“派珀•阿尔法”事故那样造成人员伤亡。

“深海地平线”事故发生以后，我国的海上油气公司严查海上油气作业安全，检查结果表明，我国海洋油气开采近年来呈现快速增长态势，这无疑大大地增加了海洋油气开采面临的风险。[72] 造成风险增加的因素主要有：设备老化，开采靠近生态敏感区，人员素质和技术参差不齐，以及相关方的应急响应能力不足。[73] 此外，随着进一步向深水区域开发，要求采用的深海技术就更复杂，而且发生重大事故的风险就越大。

我国的油气生产中，超过 22.9% 的石油和 29% 的天然气来自海洋，[74] 而且随着海上油气勘探开发效率的提高，这一比重还会继续提升。[75] 国内的海上油气开发区域主要为渤海、黄海、东海和南海，目前在我国领海内工作的生产平台总数达

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68 Article 17.4 of the OSD.

69 SHENG Hong and QIAN Pu, *Opening up China's Markets of Crude Oil and Petroleum Products: Theoretical Research and Reform Solutions*, Singapore: World Scientific Publishing, 2015, p. 27.

70 EC, Impact Assessment, p. 6.

71 中国最大的海上油田——蓬莱 19-3 油田在渤海湾发生 2 起溢油事故，造成 3200 桶原油和钻井液泄漏，受影响的海域面积至少超过 324 平方英里。蓬莱 19-3 油田是中国海洋石油总公司和康菲石油中国有限公司合作开发的油田。At http://www.nytimes.com/2011/08/26/world/asia/26china.html, 1 May 2018.

72 金微、安蓓、卢荣荣、孙艳莉：《中国严查海上油气田安全》，下载于 http://old.globalview.cn/ReadNews.asp?NewsID=21600，2018 年 5 月 1 日。

73 金微、安蓓、卢荣荣、孙艳莉：《中国严查海上油气田安全》，下载于 http://old.globalview.cn/ReadNews.asp?NewsID=21600，2018 年 5 月 1 日。

74 下载于 http://www.sohu.com/a/107883249_157495，2018 年 5 月 1 日。

75 《全国油气资源动态评价（2015）成果发布》，下载于 http://www.sinooilgas.com/gzdt/gzdt/bc4de9c456bf3f420156c5b7c9d7001a.shtml，2018 年 5 月 1 日。

200 座以上。[76] 由于我国 70% 的海洋油气储量为重油，又蕴藏于深海区域，[77] 因此，开发深海油气资源是我国政府增加石油产量的新策略。[78] 深海环境复杂，具有很大的不确定性；与浅海区域相比，在深海作业的风险更大，面临的安全挑战也就更大。

在我国，油气等自然资源归国家所有。[79] 传统油气勘探开发权主要授予有资质的国有企业，[80] 并由他们与外企合作开发。根据《中华人民共和国对外合作开采海洋石油资源条例》，[81] 我国对外合作开采海洋石油资源的业务，统一由中国海洋石油总公司（以下简称“中海油”）全面负责，该公司享有在对外合作海区内进行石油勘探、开发、生产和销售的专营权。[82] 从长远来看，我国的海上油气产业会采取合作开发与自主开发 2 种方式。[83] 与合作开发相比，自主开发对国有企业提出了更高的安全要求，具体涉及许可审批、风险管理、员工培训 [84] 以及深海油气田的开发技术等。[85] 上述任何一个方面都可能导致海上事故的发生，造成人员伤亡、经济损失和环境损害。

（二）我国海上油气作业安全法律和政策

欧盟《安全指令》综合处理了海上油气作业涉及的方方面面，与此不同的是，对海上油气作业的监管，我国目前主要是通过一系列有关油气开发、安全和海洋

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76 下载于 http://www.cnooc.com.cn/art/2014/12/24/art_191_1707311.html，2018 年 5 月 1 日。

77 对于深水作业的最低水深标准，目前还未达成一致意见。传统上，水深 400 米以内为常规水深，400~1500 米之间为深水，大于 1500 米则为超深水。

78 *China Oil, Gas Sector Business and Investment Opportunities Yearbook*, Vol. 1, Washington DC: International Business Publications, 2007, p. 80.

79 《中华人民共和国宪法》（1982 年 12 月 4 日第五届全国人民代表大会第五次会议通过，1982 年 12 月 4 日公告施行，并经历了 1988 年、1993 年、1999 年、2004 年和 2018 年 5 次修订）第 9 条。

80 《中华人民共和国矿产资源法》（1986 年 3 月 19 日第六次全国人民代表大会常务委员会第十五次会议通过，自 1986 年 10 月 1 日起施行，并于 1996 年 8 月 29 日修订）第 4 条。

81 《中华人民共和国对外合作开采海洋石油资源条例》（1982 年 1 月 30 日国务院发布，2001 年 9 月 23 日、2011 年 9 月 30 日、2013 年 7 月 18 日修订）。

82 《中华人民共和国对外合作开采海洋石油资源条例》第 5 条。

83 合作开发和自主开发是中国油气业常采用的 2 种开发方式，主要区别在于中国国企是否会与外企进行合作。

84 ZOU Keyuan, China’s Governance over Offshore Oil and Gas Development and Management, *Ocean Development & International Law*, Vol. 35, 2004, p. 348.

85 黄悦华、任克忍：《我国海洋石油钻井平台现状与技术发展分析》，载于《石油机械》2007 年第 9 期。

环境的法律法规进行。总体而言，我国的《安全生产法》[86] 和《环境保护法》[87] 在我国的安全与环境法律体系中起重要作用。在安全生产方面，依据《安全生产法》及其他法律、行政法规和标准，我国颁布了《海洋石油安全生产规定》[88] 及《海洋石油安全管理细则》，[89] 为实际作业者设定了具体的安全标准。在环境保护方面，《环境保护法》规定：

> 国务院和沿海地方各级人民政府应当加强对海洋环境的保护。向海洋排放污染物、倾倒废弃物，进行海岸工程和海洋工程建设，应当符合法律法规规定和有关标准，防止和减少对海洋环境的污染损害。[90]

我国还依据《环境保护法》颁布了《海洋环境保护法》，[91] 专门为海洋环境保护的各个方面制定了基本规则。《海洋环境保护法》中专设一章，详述防治海洋工程建设项目对海洋环境造成污染损害的总则。为实施该法，国家海洋局还制定了《海洋石油勘探开发环境保护管理条例》（以下简称“《条例》”），[92] 详细规定了作业者在预防海上石油开发活动污染方面的义务。[93] 根据《海洋环境保护法》的规定，在开展海上作业前，作业者必须编制海洋环境影响报告书和溢油应急计划，并报主管部门审批。海上油气作业者应提交的文件要求可见于《条例》、《海洋石油安全生产规定》及《海洋石油安全管理细则》。这些法律法规一起构成了我国海上油气作业安全的基本法律框架。

2015 年，我国发布了国民经济和社会发展第十三个五年规划。[94] “十三五规划”详细规定了应采取的政策，以提升海洋油气生产，加大海洋环境保护力度，增

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86 《中华人民共和国安全生产法》（2002 年 6 月 29 日第九届全国人民代表大会常务委员会第二十八届会议通过，自 2002 年 11 月 1 日起施行，并经 2009 年 8 月 27 日和 2014 年 8 月 31 日 2 次修订）。

87 《中华人民共和国环境保护法》（1989 年 12 月 26 日第七届全国人民代表大会常务委员会第十一届会议通过，自 1989 年 12 月 26 日起施行，并于 2014 年修订）。

88 《海洋石油安全生产规定》（2006 年 2 月 7 日国家安全生产监督管理总局发布，并于 2013 年 8 月 29 日和 2015 年 5 月 26 日修订）。

89 《海洋石油安全管理细则》（2009 年 9 月 7 日国家安全生产监管管理总局公布，并于 2013 年 8 月 29 日和 2015 年 5 月 26 日修订）。

90 《中华人民共和国环境保护法》第 34 条。

91 《中华人民共和国海洋环境保护法》（1982 年 8 月 23 日第五届全国人民代表大会常务委员会第二十四次会议通过，自 1983 年 3 月 1 日起施行，经 1999 年、2013 年和 2016 年 3 次修订。）

92 《中华人民共和国海洋石油勘探开发环境保护管理条例》（中华人民共和国国务院于 1983 年 12 月 29 日发布，自 1983 年 12 月 29 日起施行）。[以下简称“《条例》”]

93 ZOU Keyuan, *China's Marine Legal System and the Law of the Sea*, Leiden: Martinus Nijhoff, 2005, p. 149.

94 《中华人民共和国国民经济和社会发展第十三个五年规划纲要》（2016 年 3 月 16 日中华人民共和国第十二届全国人民代表大会第四次会议批准，并于 2016 年 3 月 16 日生效）。[以下简称“《‘十三五’规划纲要》”]

强海岸经济防范污染的能力，完善海上突发事故应急机制。[95] 这些新政策表明，我国的油气开发产业继续从陆上转向海上区域，并正朝着提高海上作业安全水平的方向进行改革。

然而，目前我国有关海上油气作业安全及环境保护的立法还比较分散。与此同时，主管机构涉及多个部门，如国家海洋局、环境保护部、交通部和农业部，这些部门之间的职权存在重叠交叉的情况，容易造成部门沟通协作效率低下。为精简整合国务院各部委，国务院在 2018 年第十三届全国人民代表大会上进行了机构改革，组建了自然资源部、生态环境部和应急管理部，分别负责开发、环境保护和海上作业安全事宜。机构改革以后，各个主管机构的职责更为明确，能够更有效地运转和合作。

（三）环境法原则的适用

与欧盟的环境法律与政策相比，我国的环境立法起步较晚，大概始于 1979 年，这是因为我国的工业化与城市化进程在 1979 年左右明显加快，随之而来的环境污染及相关事故也相应地增加。我国在确立环境法律制度的过程中，起初，相关的法律法规中没有明确的环境法原则，[96] 后来才逐渐意识到预警、预防、公众参与和污染者付费等原则在环境立法中的重要性。2014 年，《环境保护法》中直接确立了主要的环境法原则，明确指出“环境保护坚持保护优先、预防为主、综合治理、公众参与、损害担责的原则”。[97] 基于上述规定，下文将对我国海上油气作业安全方面的法律和政策适用环境法原则的情况进行分析。

首先，“保护优先”是指遇到具有科学不确定性的环境风险时，应以保护环境而非经济发展为优先的原则。[98] 中国学者认为，尽管“保护优先”原则的内涵和外延尚不明确，该条原则的学理表述应为预警原则。[99] 我国的环境法律和政策中已隐含了预警原则，例如，国务院正在修订《条例》，并考虑要求在海洋环境影响报告书中必须包含风险分析的内容。[100] 风险分析属于一种传统的成本效益分析，通

95 《“十三五”规划纲要》第 41 章。
96 叶媛博：《环境基本法中基本原则的立法探析》，载于《2013 年全国环境资源法学研讨会（年会）论文集》。
97 《中华人民共和国环境保护法》第 5 条。
98 竺效：《论中国环境法基本原则的立法发展与再发展》，载于《华东政法大学学报》2014 年第 3 期，第 12 页。
99 竺效：《论中国环境法基本原则的立法发展与再发展》，载于《华东政法大学学报》2014 年第 3 期，第 12 页。
100 《中华人民共和国海洋石油勘探开发环境保护管理条例（修订草案征求意见稿）》第 8 条。[以下简称“《条例（修订草案）》”]

常与预警或反预警原则有关。[101]《“十三五”规划纲要》确立了我国海洋环境保护的总体目标，明确提出“加强海洋气候变化研究，提高海洋灾害监测、风险评估和防灾减灾能力，加强海上救灾战略预置，提升海上突发环境事故应急能力。”[102]这一总体目标表明，要预防海上突发事故的发生，必须考虑安全和环境风险。这就要求相关法律法规进一步明确和实施预警原则。

其次，“预防为主、综合治理”被广泛理解为一项统一的环境法原则，其在学理上的表述就是预防原则，要求对经济活动所产生的危害事先采取预测、分析和防范措施，以避免、消除由此可能带来的环境损害。[103]如欧盟《安全指令》一样，我国有关海上作业安全的法律和政策非常注重预防原则。总体而言，我国的海上作业安全立法不仅旨在预防海上事故，确保从业人员的生命和财产安全，[104]而且旨在减少海上作业给海洋环境带来的污染。[105]依据这一总体目标，预防原则特别应用在建造海上设施的阶段，一般要求作业者申请许可证，并编制海洋环境影响报告书和溢油应急计划，报主管部门审批。

第三，“公众参与”在学理上的表达就是公众参与原则。我国 2014 年的《环境保护法》也引入了这条重要的环境法原则。在过去，我国所谓的“公众参与”是让公众配合和支持政府行动的一种方法，现逐渐转变为“公众在公共决策过程中的知情权、表达权和发言权，与此同时，给政府设定一系列义务，确保公众能获取信息，参与决策，并获得司法赔偿。”[106]目前，我国海上安全法律法规也一定程度上适用了“公众参与原则”。依据 2016 年公布的《条例（修订草案）》，海洋环境影响报告书应包含有关公众参与的内容。[107]勘探开发者在编制海上建设项目环境影响报告书时，必须充分征求公众和利害关系人的意见。[108]主管部门在审查环境影响报告书时，应通过公开征求意见、听证会等形式，进一步听取意见。[109]上述情况表明，在我国，公众参与的范围及程度正稳步增长，并可能为我国海上作业安全法律和政策的统一和发展作出贡献。

最后，“损害担责”表明我国承认“污染者付费原则”，其中的“责”在我国主

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101 David M. Driesen, Cost-Benefit Analysis and the Precautionary Principle: Can They Be Reconciled?, *Michigan State Law Review*, Vol. 43, 2013, p. 773.

102 《“十三五”规划纲要》第 41 章第 2 节。

103 竺效：《论中国环境法基本原则的立法发展与再发展》，载于《华东政法大学学报》2014 年第 3 期，第 13 页。

104 《海洋石油安全生产规定》第 1 条。

105 《条例》第 1 条。

106 ZHAO Yuhong, Public Participation in China’s EIA Regime: Rhetoric or Reality?, *Journal of Environmental Law*, Vol. 22, Issue 1, 2010, pp. 92~93.

107 《条例（修订草案）》第 8 条。

108 下载于 http://energy.people.com.cn/n1/2016/0912/c71661-28709429.html，2018 年 5 月 1 日。

109 下载于 http://energy.people.com.cn/n1/2016/0912/c71661-28709429.html，2018 年 5 月 1 日。

要指环境责任。在我国的法律体系中，“环境责任”是个统称，具体包含 3 种类型的责任：民事责任、行政责任和刑事责任。[110]海上作业安全责任规则主要是通过《条例》确立的。首先，作业者应“具有有关污染损害民事责任保险或其他财务保证”。[111]其次，主管机构可以代表国家，向损害海洋生态、给环境和经济造成重大损失的作业者提出损害赔偿要求。[112] 此外，对于违反环境标准的企业或个人，还可予以警告或罚款等行政处分。《条例》还依据情节轻重规定了具体的罚款金额。[113]

（四）作业者在我国的法律义务

《海洋石油安全生产规定》及《海洋石油安全管理细则》规定了总体目标，即“为加强海洋石油安全管理工作，保障从业人员生命和财产安全，防止和减少海洋石油生产安全事故”。[114] 依据上述总体目标，作业者是海洋石油安全生产的责任主体。[115] 在这一点上，我国法律法规与欧盟《安全指令》十分相似。[116] 具体而言，作业者承担下述义务。

企业或作业者在海上建设项目开工前，必须编制海洋环境影响报告书，报主管机构核准。[117] 主管机构应组织审批，并明确作出同意与否的批示。[118] 作业者提交的材料中必须包含下述内容：海上建设项目的名称、地理位置、周围海域的环境、涉及的废弃物及其可能产生的影响。[119]自 2016 年起，国务院开始计划修订《条例》。《条例（修订草案）》建议在海洋环境影响报告书中加入溢油风险分析的内容。[120]报告书应基于风险分析，提出减少风险的措施和应急响应预案。此外，报告书还应包含公众参与的相关内容。[121]

依据《条例（修订草案）》，作业者应落实海洋环境影响报告书中确定的风险防范措施，在开展海上油气勘探开发作业的同时，应编制溢油应急计划，报主管部门备案。[122] 溢油应急计划应包含以下内容：（1）项目周边海域的基本情况，（2）溢

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110 ZHAO Xiaobo and ZHANG Jianwei, Environmental Liability, in QIN Tianbao ed., *Research Handbook on Chinese Environmental Law*, Cheltenham/Northampton: Edward Elgar, 2015, p. 320.
111 《条例》第 9 条。
112 《条例（修订草案）》第 45 条。
113 ZOU Keyuan, *China's Marine Legal System and the Law of the Sea*, Leiden: Martinus Nijhoff, 2005, p. 152.
114 《海洋石油安全管理细则》第 1 条。
115 《海洋石油安全生产规定》第 3 条。
116 《海洋石油安全生产规定》第 3 条及《海洋石油安全管理细则》。
117 《条例》第 4 条。
118 《条例》第 4 条。
119 《条例》第 5 条。
120 《条例（修订草案）》第 8 条。
121 《条例（修订草案）》第 8 条。
122 《条例（修订草案）》第 37 条。

油事故风险分析及风险防范措施，（3）溢油事故应急能力建设方案。[123] 负责核准海洋环境影响报告书及溢油应急计划的主管机构是环境保护部、国家海洋局及其派出机构。2018 年国务院机构改革后，主管机构变更为生态环境部和应急管理部。主管机构负责评估和监督海上油气作业安全法律法规的实施。

我国的《海洋石油安全生产规定》确立了一项发证检验制度，要求对海洋石油生产设施的设计、建造、安装以及生产的全过程进行检验，[124] 尽管其并未强调检验单位的独立性。鉴于海上油气开发业的高风险特征，作业者寻求独立检验的需求越来越高，经过独立检验，作业者可以获得安全保障，还可以获得如何提高安全的综合建议。[125] 目前，我国国有检测单位占据了一半以上的市场份额，检测行业的整体市场化程度不高。[126]

除法律和行政法规外，海上油气作业者还必须遵守我国制定的相关国家标准和行业标准。[127]《石油行业安全生产标准化》[128] 作为一套国家标准，为海上油气作业者规定了具体的义务，符合《海洋石油安全生产规定》及《海洋石油安全管理细则》中的相关规定。《石油行业安全生产标准化》特别要求进行风险评估，目的在于督促作业者识别出重大的危害因素，并采取有效的措施控制风险。[129] 尽管如此，在此需要说明的是，《石油行业安全生产标准化》的法律约束力不及海上油气作业安全的法律法规。

四、欧盟《安全指令》对我国提高海上油气作业安全水平的启示

在我国，海上油气勘探开发作业属于高风险活动。由于海上钻井设施的独特性和复杂性，海上作业引发的溢油事故与源自海洋船舶的漏油事故不同，[130] 前者会给海洋环境带来无法估量的污染。欧盟的《安全指令》属于比较成熟的海上油气作业安全监管体制，因此，有必要将我国的相关法律体系与欧盟的《安全指令》

123 《条例（修订草案）》第 37 条。
124 《海洋石油安全生产规定》第 25 条。
125 《中国第三方检测行业发展趋势与投资决策支持研究》，下载于 http://www.sohu.com/a/142658850_800248，2018 年 5 月 1 日。
126 《中国第三方检测行业发展趋势与投资决策支持研究》，下载于 http://www.sohu.com/a/142658850_800248，2018 年 5 月 1 日。
127 《海洋石油安全生产规定》第 5 条。
128 《石油行业安全生产标准化》（国家安全生产监督管理总局于 2012 年 12 月 10 日发布，自 2013 年 3 月 1 日起施行）。
129 《石油行业安全生产标准化》第 5 条第 3 款第 1 点。
130 YANG Yuan, Liability and Compensation for Oil Spill Accidents: International Regime and Its Implementation in China, *Natural Resource Journal*, Vol. 57, Issue 2, 2017, pp. 477~478.

进行比较。在比较我国的安全和环境法与欧盟的《安全指令》后发现，在预防海上事故监管体制方面，我国存在的差距主要包括：相关的监管法律零散、不充分，没有适用预警原则，针对海上油气作业者的安全标准有限。这些差距可能会使我国的法律法规无法识别海上事故高风险，也无法发挥法律措施对预防海上作业重大事故的最大效果。基于上述差距，下文将具体讨论我国可以从欧盟《安全指令》吸取哪些经验。

（一）通过比较双方法律框架获得的经验

《安全指令》统一了欧盟有关海上油气作业安全的法律法规，形成了一个相对独立的法律框架。在不影响欧盟相关法律的情况下，《安全指令》确立了一套综合规则，涉及许可证发放、环境保护、应急反应、责任等各方面的问题。[131] 相较于《安全指令》的整体性，我国有关海上油气作业安全的立法目前却显得有些分散，且由不同的部门负责实施，而这些部门之间存在沟通不畅的情况。我国的《安全生产法》、《环境保护法》和《海洋环境保护法》规定了海上油气作业安全与环境保护的基本规则。依据这些基本法律，《条例》和《海洋石油安全生产规定》等行政法规，在确定海上油气作业安全和环境标准方面起到了关键作用。海上油气勘探开发作业涉及方方面面，而不同方面的规定分散在不同的法律法规中，因此，安全和环境标准会存在重叠问题，在执行过程中，也难免会出现协调方面的问题。

我国海上油气作业安全法律框架存在碎片化和不足的问题，这可能与该领域法律法规的目标不统一有关。我国立法确立了预防和减少海上油气作业造成事故的目标，但并未特别针对重大事故，而只是笼统地泛指一般的海上溢油事故。相反，欧盟的《安全指令》强调重大事故，而非作业污染，因此，其预防海上重大事故的能力，似乎比我国的相关法律法规更强。这就意味着，我国的法律体系中急需引入防范重大事故风险的机制。面对海上油气勘探开发作业快速发展的态势，我国有必要统一所有相关的法律法规，确立一个综合性的法律体系，为海上作业制定高水平的安全标准。在启动我国海上油气作业法律框架改革之前，第一步可以是像欧盟一样，先对海上油气作业的影响进行评估。

（二）通过比较双方适用环境法原则的情况获得的经验

欧盟的《安全指令》是依据《欧盟运作条约》第 191 条中的环境法原则制定的，

131 此处特指 89/391/EEC 指令、92/91/EEC 指令、94/22/EC 指令、2001/42/EC 指令、2003/4/EC 指令、2003/35/EC 指令、2010/75/EU 指令和 2011/92/EU 指令。See Article 1 of the OSD.

其将预警、预防、在源头纠正和污染者付费原则细化为欧盟成员国、作业者和主管机构的具体义务。相反，我国的海上油气作业安全法律法规并未明确环境法原则。这是因为 2014 年修订《环境保护法》之前，尽管我国的环境法律法规中已经渗透了预防原则和污染者付费原则，但并没有严格确立环境法原则。[132] 我国《环境保护法》第 5 条中的原则，与欧盟版的预警、预防、公众参与及污染者付费原则十分相似。然而，在中国，这些原则仍需进一步细化，为确保环境法律和政策的一致性，相关规定也需要进行相应的调整。也就是说，我国的海上油气作业安全法律法规也需要融合环境法原则。

欧盟的《安全指令》和我国的海上油气作业安全立法都严重依赖预防原则，因此两者都主要针对油气作业中已知的危险，如密闭空间、油气泄漏和火灾。然而，《安全指令》也要求作业者采取适当的措施，控制重大事故给人类健康和环境带来的未知风险，这一点与预警原则是一致的。尽管预警原则只是微弱地体现在《安全指令》中，但却可以在欧盟立法中找到法律基础，而且无论如何，其在《安全指令》中的适用程度，还是要比在我国海上油气作业安全立法中的适用程度高。由于环境法原则近期才明确写入我国的《环境保护法》，我国正处于将预警原则融入我国环境法律体系的过渡期，以便有效地识别和消减环境风险。预警原则不是仅关注预防和补偿确定的风险和危害，其侧重的是缺乏科学确定性的风险。因此，将预警原则转化为具体的条文，将可以提高我国海上油气作业的安全水平。

（三）通过比较双方规定的作业者法律义务获得的经验

为预防海上作业事故的发生，欧盟《安全指令》和我国的海上油气作业安全立法都为作业者规定了一般义务。根据其旨在将海上重大事故风险最小化的目标，《安全指令》要求作业者在勘探开发时必须达到最低的安全标准，与此同时，采取一切恰当的措施，限制重大事故对人类健康和环境造成的影响。[133] 然而，对于防范海上作业中可能发生的溢油事故，我国相关法律法规却没有基于风险设立目标。作业者需要在油气勘探开发的各个阶段最大程度地消减风险，但我国立法并没有这方面的详细规则，因此，相较于《安全指令》，作业者在我国立法下承担的责任更少。我国海上油气作业安全标准的局限性，部分原因可能在于我国的海上油气业是由国有企业中海油全面负责的，尚未市场化。中海油通常与外企合作开采油

132 QIN Tianbao, Challenges for Sustainable Development and Its Legal Response in China: A Perspective for Social Transformation, *Sustainability*, 2014, Vol. 6, p. 5079.

133 Article 3(3) of the OSD.

气资源，但不与外国作业者承担同等责任。[134]

具体而言，我国的海上油气作业安全标准，要求作业者事先编制海洋环境影响报告书和应急响应计划，编制时间是在海上设施建设项目开工之前，而不是《安全指令》规定的在开展海上作业之前。实际上，上述报告书和应急计划属于海上建设工程环境影响评估的组成部分，其中多为海上设施的一般资料，对海上油气作业者提出的具体要求则少得多。相反，欧盟《安全指令》关注海上油气作业的全过程，对作业者必须提交的文件作出了详细规定。《安全指令》特别制定了安全和环境管理体系，以便作业者评估和管理安全和环境风险，确保海上油气作业维持一个较高的安全水平。

综上可知，在我国，仅要求在海洋环境影响报告书中加入溢油风险分析的内容是不够的。我国海上油气作业的开展必须以系统的风险管理为基础。想在相关法律法规中作出建立风险管理体制的要求，我国第一步要做的就是开放市场、改革国企，促进海上油气产业的竞争，激励作业者降低海上作业风险。为提供作业者履行自身法律义务的证据，并确保相关企业或个人始终遵守海上作业安全标准，我国立法还需制定独立的检验制度。

五、结　语

伴随着我国海洋油气业的快速发展，给环境带来的风险也快速增长，国家多年来一直在研究制定有关海上油气作业的法律和政策。为预防海上作业引发溢油事故，我国颁布了一系列法律法规，涉及许可证发放、环境保护、应急反应、从业人员安全和责任分配等方面。我国立法为海上油气作业安全提供了基本的法律框架，但相关规定比较零散，如同《安全指令》颁布之前的欧盟法律一样。《安全指令》统一并加强了监管欧盟水域范围内油气作业安全的法律框架，并旨在促进欧盟范围外的海上油气作业最佳实践，[135] 将来还可以进一步提高全球范围内的海上油气作业安全水平。尽管“只有在过渡期结束后，才能清楚真正的效果如何”，[136] 但就目前来说，《安全指令》为我国进一步提高海上油气作业安全水平提供了示范。

环境法原则是作业者义务的基础，欧盟《安全指令》中已明确提出并运用了环

134　郭楠、秦鹏：《能源体制改革下油气对外合作开采的规制失灵与规范路径——以〈对外合作开采海洋（陆上）石油资源条例〉为研究》，载于《国际经贸探索》2016 年第 3 期，第 106 页。

135　Article 20 of the OSD.

136　Academy of European Law (ERA), Directive 2013/30/EU on the Safety of Offshore Oil and Gas Operations, Annual Conference on European Environmental Law (6 March 2014), at http://docplayer.net/43946888-Directive-2013-30-eu-on-the-safety-of-offshore-oil-and-gas-operations-era-annual-conference-on-european-environmental-law-6-march-2014.html, 1 May 2018.

境法原则。相比较而言，我国2014 年修订的《环境保护法》虽然确定了环境法原则，但我国有关海上油气作业安全的立法却没有全面贯彻这些原则。特别是，我国几乎没有适用预警原则来预防海洋油气作业可能产生的重大事故，防范相关风险。尽管《条例（修订草案）》将溢油风险分析并入了海洋环境影响报告书，但总体而言，我国缺乏像欧盟《安全指令》那样综合考虑各种安全和环境风险，并将环境影响纳入重大事故风险评估的统一体系。此外，欧盟《安全指令》和我国的相关法律法规，都基于预防原则为作业者设置了法律义务，但通过比较可知，我国的相关法律法规没有特别针对重大事故，为作业者设置的义务也不如欧盟的严格。

总的来说，在统一和加强我国海上油气作业安全法律框架的同时，监管海上油气作业的规则应为作业者制定更高的安全标准。从长远来看，制定一项像欧盟《安全指令》那样的综合性法律，将是我国处理海上油气作业安全的各个方面，避免在实施的过程中因部门职能交叉而效率低下的有效方式。环境法原则是作业者承担相关义务的基础，我国的相关法律法规应进一步适用环境法原则。相关立法应进行适当的调整，使相关规定与环境法原则更为一致，尤其是预警原则。为全面实施预警原则，我国的海上油气作业安全立法应将风险评估也规定为作业者的法律义务，[137] 由此能够涵盖贯穿油气设施生命周期的安全与环境因素。为进一步实施预防原则，防范海上作业重大事故的发生，作业者应识别出所有重大危险，评估他们发生的可能性和影响。对中国而言，这意味着急需要求作业者进行重大事故风险评估，而不是仅关注建造新的海上油气设施的环境影响评估。在海上油气作业方面，也应该为作业者规定更严格的标准，例如制定预防政策、确立安全和环境管理体系、评估应急响应计划。依据欧盟的经验做出这类修订，可以提高我国有关海上油气作业的立法质量，使我国珍贵的沿海水域得到应有的保护。

（中译：谢红月）

137 田野、赵文喜：《环境风险评价在环境影响评价中的应用》，载于《中国环境科学学会 2006 年学术年会优秀论文集》，第 1269 页。

Preventing Major Offshore Oil Spill Accidents in China: Lessons from the EU Offshore Safety Directive

YANG Yuan*

Abstract: With offshore oil and gas activities growing and moving to further and deeper waters, offshore oil spill prevention has become a significant component of marine environmental protection. To reduce the risk of major accidents and limit their consequences, the European Union issued the Directive on the Safety of Offshore Oil and Gas Operations (OSD) in 2013, establishing a high standard for the safety of offshore oil and gas operations and a comprehensive legal framework for risk management and accident prevention. The EU OSD could be used as a referential framework for China, as China is reforming its offshore safety legislation and improving its prevention capacity for offshore oil spills. By providing a comparative study of the obligations for operators based on the application of environmental principles, this article suggests that China unify and reinforce its legal framework for the safety of offshore operations while establishing higher safety standards for operators.

Key Words: Environmental law; Comparative law; Offshore oil and gas operations; Offshore Safety Directive; European Union; China

I. Introduction

Since the 2010 Deepwater Horizon oil spill accident, the Europe Union (EU)

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has initiated a series of investigations to review the safety of offshore[1] oil and gas extraction areas in the EU waters. Recognizing the fragmentation and divergence of its regulatory framework on the safety of offshore oil and gas operations existing at that time, the EU enacted the Directive on the Safety of Offshore Oil and Gas Operations (OSD) in 2013.[2] The OSD provides comprehensive rules for offshore operations in EU countries, with the objective of "establishing minimum requirements for preventing major accidents"[3] and "limiting the consequences of such accidents".[4] With the world's highest safety standards on offshore operations, the OSD imposes duties on operators (owners), the Member States, and the European Commission (EC).[5] The safety regime under the OSD applies to each oil and gas facility across EU waters, but its effectiveness still needs to be proven by practices.

In China, major offshore oil spill accidents, such as the 2011 Bohai Bay

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1 'Offshore' means situated in the territorial sea, the exclusive economic zone or the continental shelf of a Member State within the meaning of the United Nations Convention on the Law of the Sea. See Article 2.2 of Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on Safety of Offshore Oil and Gas Operations and Amending Directive 2004/35/EC, *Official Journal of the European Union*, L 178, 28 June 2013, p. 66. The meaning of 'safety' in offshore industry can be understood as the ability to manage the risks inherent to operations or related to the environment, at http://www.offshore-technology.com/features/feature577/, 1 May 2018.

2 Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on Safety of Offshore Oil and Gas Operations and Amending Directive 2004/35/EC, *Official Journal of the European Union*, L 178, 28 June 2013. [hereinafter "OSD"]

3 'Major accidents' means, in relation to an installation or connected infrastructure: (a) an incident involving an explosion, fire, loss of well control, or release of oil, gas or dangerous substances involving, or with a significant potential to cause, fatalities or serious personal injury; (b) an incident leading to serious damage to the installation or connected infrastructure involving, or with a significant potential to cause, facilities or serious personal injury; (c) any other incident leading to facilities or serious injury to five or more persons who are on the offshore installation where the source of danger occurs or who are engaged in an offshore oil and gas operation in connection with the installation or connected infrastructure; or (d) any major environmental incident resulting from incidents referred to in points (a), (b) and (c). For the purpose of determining whether an incident constitutes a major accident under points (a), (b) or (d), an installation that is normally unattended shall be treated as if it were attended. 'Major environmental incident' means an incident which results, or is likely to result, in significant adverse effects on the environment in accordance with Directive 2004/35/EC. See Article 2 of the OSD.

4 Article 1.1 of the OSD.

5 European Commission (EC), Commissioner Oettinger Welcomes Political Agreement on Offshore Legislation, at http://europa.eu/rapid/press-release_IP-13-149_en.htm, 1 May 2018.

accident,[6] have imposed a tremendous toll on human lives and health, the surrounding marine ecology, and the local economy. Chinese policy and law on offshore safety are also fragmentary and divergent, similar to the EU regulatory framework before the enactment of the OSD. To reduce the risk of major accidents and improve the safety level of offshore operations, China is reforming its offshore safety legislation and improving its prevention capacity for offshore oil spills. Learning how the EU OSD functions would be significantly helpful to China and may be of interest to legal scholars, policy makers and the public. Against this background, this article explores what regulatory gaps exist in China with respect to the prevention of offshore accidents and what lessons China can learn from the OSD to fill these gaps.

The article analyzes the differences and similarities in preventing major offshore accidents between the EU OSD and Chinese relevant laws and regulations, with the aim to look for legal solutions from the OSD that could be adopted and adapted by China. Environmental principles under the OSD play a fundamental role not only in setting a safety level for offshore operations and striving for the attainment of the level, but also in determining the regulatory boundaries within which the minimum safety standards operators must meet. Following this instruction, the second section describes the development of the EU OSD, and discusses its environmental principles and minimum safety requirements for operators. The third section reviews Chinese law and policy related to offshore safety, again followed by a discussion of environmental principles and obligations for operators in specific provisions. The subsequent section reveals regulatory gaps for offshore operations in China, by comparing the EU OSD and Chinese offshore safety regulations mainly in three aspects: (a) the legal framework, (b) the application of environmental principles and (c) the obligations for operators. The final section concludes that China should unify and reinforce its legal framework to establish a higher safety standard for offshore oil and gas operations. Taking into account the safety and environmental risks involved in offshore operations, this paper believes that China, when preventing major offshore accidents, should

6 In June 2011, two oil spills occurred in the largest offshore oil field, Penglai 19-3, in China Bohai Bay. According to a report by the State Oceanic Administration in June 2012, the oil spill accident was mainly caused by the operator's violations to relevant operation criteria. The accident polluted more than 6,200 square km of waters, and caused huge losses to the tourist and aquatic farming industries in Liaoning and Hebei provinces. At http://www.soa.gov.cn/xw/hyyw_90/201211/t20121109_884.html, 1 May 2018. (in Chinese)

be strictly in line with the precautionary principle. Meanwhile, Chinese offshore safety legislation should adopt more detailed and stricter measures based on the prevention principle, particularly by requiring operators to assess major accident hazards and ensure the effectiveness of their oil spill responses.

II. Preventing Major Offshore Oil Spill Accidents in the EU: Offshore Safety Directive

A. Background

Over 90% of oil and 60% of gas produced in Europe comes from offshore operations, and more than 1,000 offshore installations are operating in European waters.[7] Such a significant scale of offshore operations entail risks, which have been manifested as major accidents such as the disasters of Alexander Kielland and Piper Alpha since the 1980s.[8] These accidents led to reforms for safer design of offshore structures, which to a certain degree reduced the risks associated with offshore operations in the EU. During the past decade, however, disasters like 2010 Deepwater Horizon[9] revealed that an offshore accident could still bring catastrophic consequences. According to a report by the EC, the risks of such accidents were high in the EU.[10] Hence, the EU leadership wished to further reduce the risk of major accidents in offshore oil and gas operations.

In response to the Deepwater Horizon accident, the EC initiated a review whose results were published in a report under the title "Facing the Challenge of the Safety of Offshore Oil and Gas Activities".[11] The report shows, after examining

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7 Commission Staff Working Paper – Impact Assessment, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Safety of Offshore Oil and Gas Prospection, Exploration and Production Activities, p. 9, at https://www.eumonitor.nl/9353000/1/j9vvik7m1c3gyxp/viua6aufcfzt, 1 May 2018. [hereinafter "Impact Assessment"]

8 In 1980, the Alexander Kielland platform capsized in the Norwegian North Sea, resulting in 123 deaths. In 1988, the Piper Alpha North Sea oil production platform exploded, killing 167 people. These two incidents led to reforms of the structural resilience of offshore structures, particularly mobile units.

9 In 2010, an uncontrollable blowout caused an explosion on the Deepwater Horizon drilling rig in the Gulf of Mexico, killing 11 crewmen. The accident was the largest oil spill in U.S. waters.

10 Impact Assessment, p. 7.

11 EC, Facing the Challenge of the Safety of Offshore Oil and Gas Activities, COM (2010) 0560, p. 15.

the regulatory framework related to offshore oil and gas activities, that offshore activities in the EU were "partly governed by a heterogeneous health, safety and environmental regime".[12] And the report does not believe that such a fragmented regime might offer a high safety standard to offshore operations. To improve safety, accident prevention and response, the report asserts that further actions are urgently required.[13]

Following the review, the EC conducted further research, analysis and consultations,[14] which resulted in a working paper – Impact Assessment in October 2011. According the paper, an EU initiative should follow two general objectives: (a) to prevent major accidents from occurring, and (b) to deal effectively with major emergencies.[15] Under these objectives, the paper evaluated alternative policy options, including their expected reductions of risks of a major offshore accident and the costs associated with the implementation of such alternatives.[16] The paper also included a study by the EC, which revealed the frequency and costs of oil blowouts and other major accidents in the offshore oil and gas industry.[17]

Based on the Impact Assessment, the EC adopted a proposal for a regulation on the safety of offshore operations. This caused concerns in some Member States, such as the United Kingdom (UK), that already had well-developed safety regimes in place. Since the regulation would not need to be transposed into national law and would have a direct legal effect, these States preferred a properly worded directive that would cause less disruption to their domestic legislations.[18] Therefore, in 2012, two peer review meetings were held to analyze the technical feasibility of the regulation. At the meetings, stakeholders from the EC, industry associations, and NGOs, exchanged their views on the risks and costs of offshore accidents based

12 EC, Facing the Challenge of the Safety of Offshore Oil and Gas Activities, COM (2010) 0560, p. 15.

13 Günther Oettinger, Oil Exploration and Extraction – Risks, Liability and Regulation, at http://europa.eu/rapid/press-release_SPEECH-10-368_en.htm, 1 May 2018.

14 Impact Assessment, p. 3.

15 EC, Executive Summary of the Impact Assessment, Proposal for a Regulation of the European Parliament and of the Council on Safety of Offshore Oil and Gas Prospection, Exploration and Production Activities, COM (2011) 688 final/SEC (2011) 1292 final/SEC (2011) 1293 final, p. 3.

16 Summary Report of the Peer Review Meetings on the Assessment of Risks in the Offshore Oil and Gas Industry, 18 March 2012 & 2 May 2012, p. 5. [hereinafter "Summary Report"]

17 Summary Report.

18 Ursula O'Donnell, New EU Directive on the Safety of Offshore Oil and Gas Operations, at http://www.standard-club.com/media/1557512/new-eu-directive-on-the-safety-of-offshore-oil-and-gas-operations.pdf, 1 May 2018.

on the different results between the official assessment and other studies.[19] Taking into account various opinions, the EC finally decided to change the regulation into a directive, which means that it is left to the Member States to decide how it should be implemented.[20]

B. The Framework of the OSD

On 10 June 2013, the Council of the EU adopted the OSD, which came into force on 18 July 2013. The objective of the Directive is: (a) to reduce the occurrence of major accidents relating to offshore oil and gas operations and to limit their consequences, and (b) to improve the response mechanisms in case of an accident.[21] Under the objective, the Directive specifically establishes "minimum requirements for preventing major accidents in offshore oil and gas operations and limiting the consequences of such accidents".[22] Being consistent with EU marine policy and law, such as the Integrated Maritime Policy[23] and the Marine Strategy Framework Directive,[24] the OSD extends their scope to cover the risk of pollution of offshore waters arising from accidents.

The OSD has seven substantive chapters (II-VIII), without prejudice to any

19 Summary Report, p. 12.

20 Ursula O'Donnell, New EU Directive on the Safety of Offshore Oil and Gas Operations, at http://www.standard-club.com/media/1557512/new-eu-directive-on-the-safety-of-offshore-oil-and-gas-operations.pdf, 1 May 2018.

21 Recital No. 2 of the OSD.

22 Article 1 of the OSD.

23 The Integrated Maritime Policy is relevant to offshore oil and gas operations as it requires the linking of particular concerns from each economic sector with the general aim of ensuring a comprehensive understanding of the ocean, sea and coastal areas, with the objective of developing a coherent approach to the seas taking into account all economic, environmental and social aspects through the use of the maritime spatial planning and marine knowledge. See Recital No. 7 of the OSD.

24 Directive 2008/56/EC of the European Parliament and the Council of 17 June 2008 Establishing a Framework for Community Action in the Field of Marine Environmental Policy, *Official Journal of the European Union*, L 164, 25 June 2008, p. 19. Aiming to address the cumulative impacts from all activities on the marine environment, the Marine Strategy Framework Directive is the environmental pillar of the Integrated Maritime Policy.

requirements under any other EU legal acts,[25] especially in the field of safety and health at work. Chapter II establishes general principles of risk management in offshore operations. It also addresses licensing, liability, public participation and institutional arrangements. Chapter III states the documentary requirements for operators and owners. Chapter IV further details two documentary obligations, and emphasizes relevant compliance and confidentiality rules on preventing major accidents for operators, owners and the competent authority.[26] Chapter V sets the rules on transparency and sharing of information. Chapter VI concerns cooperation among the Member States. Chapter VII establishes the requirements of both internal and external emergency plans, as well as emergency response for major accidents. Finally, Chapter VIII concludes with rules regarding emergency preparedness and response to transboundary effects caused by major accidents. Since the Member States are still in the process of transposing the obligations in the above chapters into national law,[27] this article focuses solely on the OSD as it is, without discussing its implementation in the Member States.

C. Application of Environmental Principles

The OSD, being secondary law, must reflect the environmental law principles

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25 Such acts include those on safety and health of workers at work, in particular Directive 89/391/EEC and 92/91/EEC, Directive 94/22/EEC on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ('SEA'), Directive 2003/4/EC on public access to environmental information, Directive 2003/35/EC on public participation in respect of the drawing up of certain plans and programmes relating to the environment, Directive 2010/75/EU on industrial emissions ('IPPC'), Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ('EIA'), Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage ('ELD') – extending scope of 'water damage' definition to cover 'marine waters' under the Marine Strategy Framework Directive (2008/56/EC).

26 'Competent authority' means the public authority, appointed pursuant to this Directive and responsible for the duties assigned to it in this Directive. The competent authority may be comprised of one or more public bodies. See Article 2.14 of the OSD.

27 The Directive was adopted on 12 June 2013. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 19 July 2015. Owners and operators need to comply with the requirements for new installations by 19 July 2016. Existing installations must be brought in line with the new rules by 19 July 2018. The Commission shall assess the experiences of implementing this Directive, and submit a report to the European Parliament (EP) by 19 July 2019. See Articles 41 and 42 of the OSD.

set out by the Treaty on the Functioning of the EU (TFEU).[28] Article 191 of the TFEU,

> *establishes the objectives of preserving, protecting and improving the quality of the environment and the prudent and rational utilization of natural resource. It creates an obligation for all EU actions to be supported by a high level of protection based on the precautionary principle, and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.*[29]

This statement demonstrates that the OSD is based upon four environmental principles: precautionary, prevention, rectification at source and polluter-pays, which together constitute the basis of the concrete obligations for the Member States and operators.[30]

1. Precautionary Principle

The precautionary principle has been a prominent tenet of EU and international environmental law and policy.[31] It calls for action at an early stage in response to threats of environmental damage, even if scientific evidence cannot yet conclusively demonstrate the existence of a causal relationship or the risk itself.[32] It requires States to take "cost-effective measures to prevent environmental degradation",[33] which is interpreted and operationalized in the OSD's licensing process.[34] Specifically, risks and hazards in offshore operations, which include the cost of degradation of the marine environment, must be taken into account when the licensing authority assesses the technical and financial capacity of the applicant.[35]

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28 Article 191.1 of the Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012, pp. 47~390.

29 Recital No. 1 of the OSD.

30 Jan H. Jans and Hans H.B. Vedder, *European Environmental Law: After Lisbon*, 4th edition, Amsterdam: Europa Law Publishing, 2012, p. 41.

31 Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth Mackenzie, *Principles of International Environmental Law*, 3rd edition, Cambridge: Cambridge University Press, 2012, p. 222.

32 Arie Trouwborst, Prevention, Precaution, Logic and Law, *Erasmus Law Review*, Vol. 2, No. 2, 2009, p. 108.

33 Principle 15 of the Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I); 31 ILM 874 (1992).

34 Lorenzo Schiano di Pepe, Environmental Law Principles in the European Union Legislation Governing Offshore Oil and Gas Operations, in ZOU Keyuan ed., *Sustainable Development and the Law of the Sea*, Dordrecht: Brill, 2016, p. 110.

35 Article 4.2(a) of the OSD.

This represents a significant change compared with the requirements established in the 1994 Directive on oil and gas exploration,[36] because the latter failed to include environmental considerations in the licensing process.

Notably, the precautionary principle tends to be applied weakly in the OSD. By requiring that offshore operations be carried out on the basis of risk management, the OSD aims to make "the residual risks of major accidents to persons, the environment and offshore installations" acceptable.[37] The "acceptable" level,[38] however, is not specified in the assessment of the appropriateness of action throughout the Directive,[39] which seems at odds with the precautionary principle. This could be because industrial safety is a commitment to clearly identify, assess and manage risks and hazards in relation to production operations, rather than propose uncertainties.[40] With neither "a full integration of the precautionary principle", nor "a co-ordination with the rules governing environmental impact assessment under EU law", the OSD is, nevertheless, basically consistent with the Communication from the Commission on the Precautionary Principle issued in 2000.[41]

2. Prevention Principle and Principle of Rectification at Source

The prevention principle, as a key approach to EU environmental law and policy, also allows action to be taken to protect the environment at an early stage. It is different from the precautionary principle in that it applies merely to environmental harms or risks that are certain. The prevention principle does not favor the use of end-of-pipe technologies to prevent environmental damage.[42] As such, it is closely related to another principle called "rectification at source", which prefers to use strict emission standards rather than environmental quality

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36 Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the Conditions for Granting and Using Authorizations for the Prospection, Exploration and Production of Hydrocarbons, *Official Journal of the European Communities*, L 164, 30 June 1994, p. 3.

37 Article 3.4 of the OSD.

38 'Acceptable', in relation to a risk, means a level of risk for which the time, cost or effort of further reducing it should be grossly disproportionate to the benefits of such reduction. See Article 2(8) of the OSD.

39 Kenisha Garnett and David J. Parsons, Multi-Case Review of the Application of the Precautionary Principle in European Union Law and Case Law, *Risk Analysis*, Vol. 37, 2017, p. 511.

40 Jean-Marc Jaubert, The Meaning of Safety, at http://www.offshore-technology.com/features/feature577/, 1 May 2018.

41 Communication from the Commission on the Precautionary Principle, COM (2000) 1 final.

42 Nicolas de Sadeleer, *Environmental Principles form Political Slogans to Legal Rules*, London: Oxford University Press, 2002, p. 61.

standards.[43] As the principle of rectification at source is not specifically applied in the OSD, this section will not elaborate on it.

The OSD is firmly based on the prevention principle, as can be seen from its general approach to risk management in offshore oil and gas operations.[44] Under the Directive, operators are required to "take all suitable measures to prevent major accidents" and "limit [their] consequences for human health and for the environment."[45] This is consistent with the overall objective of the OSD, namely, to prevent the occurrence of major accidents relating to offshore oil and gas operations and to limit the consequences of such accidents.[46] In this respect, the prevention principle is applied particularly in the stage of preparing and carrying out offshore operations. Furthermore, it requires the operators to adopt minimum safety standards and to submit a series of documents to the competent authority.

3. Polluter-Pays Principle

The polluter-pays principle, widely accepted in the international community, demands that those who cause pollution, instead of the society as a whole, bear the costs of measures that are taken to protect the environment.[47] Such costs, in a broad sense, are understood to cover not only the costs associated with pollution prevention and control measures but also liability. A liability regime, on the one hand, incentivizes potential polluters to adopt measures and develop practices minimizing pollution risks, and on the other hand, ensures compensation to any victims suffering pollution damage.

To examine the application of the polluter-pays principle in the OSD, we should first analyze the liability for offshore accidents and their consequences. The OSD harmonizes two aspects of liability for offshore accidents.[48] First, it requires that licensees shall be technically and financially able to pay damages deriving from

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43 Jan H. Jans and Hans H.B. Vedder, *European Environmental Law: After Lisbon*, 4th edition, Amsterdam: Europa Law Publishing, 2012, p. 48.

44 Lorenzo Schiano di Pepe, Environmental Law Principles in the European Union Legislation Governing Offshore Oil and Gas Operations, in ZOU Keyuan ed., *Sustainable Development and the Law of the Sea*, Dordrecht: Brill, 2016, p. 110.

45 Article 3 of the OSD.

46 Article 1.1 of the OSD.

47 Commission Staff Working Document, Liability, Compensation and Financial Security for Offshore Accidents in the European Economic Area, SWD (2015) 167 final, p. 7.

48 Report from the Commission to the European Parliament and the Council on Liability, Compensation and Financial Security for Offshore Oil and Gas Operations Pursuant to Article 39 of Directive 2013/30/EU, COM (2015) 422 final, p. 6.

their offshore operations,[49] including economic damages under the national law.[50] The Member States shall correspondingly "facilitate the deployment of sustainable financial instruments and other arrangements to assist applicants for licenses in demonstrating their financial capacity".[51] Second, the OSD declares that licensees are financially liable for prevention and remediation of environmental damage.[52] Article 38 of the OSD extends the scope of the Environmental Liability Directive (ELD)[53] to the Member States' continental shelves, making offshore licensees strictly liable for any environmental damage resulting from their operations.[54]

C. Minimum Safety Standards for Operators

Based on the environmental principles above, the OSD establishes general principles of risk management in offshore oil and gas operations,[55] which mainly include legal obligations for operators. Under the general principles, it implements minimum safety standards for not only offshore operators, but the Member States and the competent authority. Firstly, it is within the competence of the Member States to transpose the OSD into national law, ensuring their offshore oil and gas activities comply with all relevant EU safety and environmental legislation. Secondly, the Member States shall ensure that regulatory functions[56] under the OSD are carried out by a competent authority that is independent of the functions related to the economic development of the offshore resources and licensing of offshore oil and gas operations,[57] in order to avoid possible or perceived conflicts of interests. Thirdly, operators and owners shall prepare a series of safety documents and submit them to the competent authority.

First, the corporate major accident prevention policy (CMAPP), as a documentary obligation imposed on offshore operators and owners, aims to

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49 Article 4(2) of the OSD.
50 Article 4(2) of the OSD.
51 Article 4(3) of the OSD.
52 Article 7 of the OSD.
53 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedy of Environmental Damage, *Official Journal of the European Union*, L 143, 30 April 2004, p. 56.
54 Report from the Commission to the European Parliament and the Council on Liability, Compensation and Financial Security for Offshore Oil and Gas Operations Pursuant to Article 39 of Directive 2013/30/EU, COM (2015) 422 final/SWD (2015) 167 final, p. 2.
55 Article 3 of the OSD.
56 Article 8.1 of the OSD.
57 Article 8.2 of the OSD.

maintain a high level of protection for offshore operations at all times. Operators are required to establish "the overall aims and arrangements for controlling the risk of a major accident", and to make clear "how those aims are to be achieved and arrangements put into effect at corporate level."[58] The OSD also lists a series of safety elements that must be included in the CMAPP and other documents that the operators and owners must submit.[59] Operators and owners accordingly take primary responsibility to control risks of major accidents and "continually improve control of those risks."[60]

Second, the OSD promotes the integration of management systems for safety and environment, which used to be treated as separate entities,[61] by unifying the safety and environmental management system (SEMS) for operators. The document setting out the SEMS must include a description of (a) the organizational arrangements for the control of major hazards; (b) arrangements for preparing and submitting documents under the relevant statutory provisions; and (c) the verification scheme.[62] In conjunction with the CMAPP, the SEMS offers a prevention mechanism for major offshore accidents.

Third, the operator or owner is obliged to prepare a major hazard report (MHR) for a production or non-production installation. Being a substantial document that must be drafted before carrying out any offshore operations, the report should contain a risk assessment and an emergency response plan, aiming to identify all the major hazards, and assess their likelihood and consequences.[63]

Fourth, the preparation of an internal emergency response plan (IERP) is also an obligation for operators. The plan shall take into account all relevant aspects, such as major risks and hazards, technical details of operations and local environmental conditions.[64] The IERP must be "put into action without delay to respond to any major accident or a situation where there is an immediate risk of a major accident" and must be "consistent with the external emergency response

58 Article 19.5(a) of the OSD.
59 Annex I, Part 8 of the OSD.
60 Article 19.2 of the OSD.
61 'Safety and environmental critical elements' means parts of an installation, including computer programmes, the purpose of which is to prevent or limit the consequences of a major accident, or the failure of which could cause or contribute substantially to a major accident. See Article 2(33) of the OSD.
62 Article 19.3 of the OSD.
63 Annex I, Part 2(5) of the OSD.
64 Annex I, Part 10(5) of the OSD.

plan".[65] An assessment of oil spill response effectiveness shall also be included in the IERP.[66]

Finally, the OSD requires that a description of the verification schemes be in place as part of the major report on hazards, including "the selection of independent verifiers, the means of verification to ensure that safety and environmental critical elements and any specified plant in the scheme remain in good repair and condition."[67] The operator shall establish schemes for independent verification, at least with respect to installations, notifications of well operations as well as material changes.[68]

III. Preventing Major Offshore Oil Spill Accidents in China

A. The Safety of Offshore Oil and Gas Operations in China

Since China's offshore industry started in the 1960s, offshore oil and gas operations have been recognized as activities featured by "high investment, high technology and high risk".[69] As major accidents occurred in offshore operations worldwide, particularly the 2010 Deepwater Horizon accident in the Gulf of Mexico, China, like the EU, has been aware that "the risks are more real than they may appear",[70] and the consequences of major offshore accidents are catastrophic. One perfect example in this case is China Bohai oil spill accident in 2011.[71] This accident caused substantial environmental and economic damage, but fortunately without the personal injuries as seen in the European Alexander Kielland and Piper Alpha disasters of the 1980s.

Following the Deepwater Horizon accident, China's offshore oil and gas companies thoroughly examined the safety of their offshore operations, finding

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65 Article 28.1 of the OSD.
66 Article 14.1 of the OSD.
67 Annex I, Part 5(b) of the OSD.
68 Article 17.4 of the OSD.
69 SHENG Hong and QIAN Pu, *Opening up China's Markets of Crude Oil and Petroleum Products: Theoretical Research and Reform Solutions*, Singapore: World Scientific Publishing, 2015, p. 27.
70 EC, Impact Assessment, p. 6.
71 The two spills, involving 3,200 barrels of oil and drilling fluids, occurred in the country's largest offshore oilfield, called Penglai 19-3, and spread over at least 324 square miles in Bohai Bay. The Penglai field was co-developed by China National Offshore Oil Corporation, commonly known as CNOOC, and ConocoPhillips China. At http://www.nytimes.com/2011/08/26/world/asia/26china.html, 1 May 2018.

that the growing operations undoubtedly had exacerbated the risks of offshore accidents.[72] Several factors had resulted in the increasing risks of offshore accidents, including: the aging installations, operations close to ecologically sensitive zones, different levels of workers' qualification and skills, and insufficient emergency response capacities of the involved parties.[73] Furthermore, offshore operations have moved to further and deeper waters, which necessitates the use of more complex deep-water technology on the one hand, and increases the risk of major accidents on the other hand.

Over 22.9% of oil and 29% of gas produced in China come from offshore operations,[74] and these proportions are continuously increasing with the improvement of the efficiency of the exploration and exploitation of offshore resources.[75] Offshore operations are undergoing in the Bohai Sea, the Yellow Sea, the East China Sea and the South China Sea. And in total, over 200 offshore installations are operating in China's territorial waters.[76] As 70% of Chinese offshore reserves consist of heavy oil and are located in deep seas,[77] developing deep-sea deposits has become Chinese government's new strategy to increase oil production.[78] Due to the complexity and uncertainty surrounding the deep-water environment, the risks associated with the operations in deep water may be much higher than those of operating in shallow seas, which would produce increasing challenges to the safety of offshore oil and gas operations in China.

In China, mineral resources like oil and gas, are owned by the State.[79]

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72 JIN Wei, AN Bei, LU Rongrong and SUN Yanli, China Strictly Examined the Safety of Offshore Oil and Gas Operations, at http://old.globalview.cn/ReadNews.asp?NewsID=21600, 1 May 2018. (in Chinese)

73 JIN Wei, AN Bei, LU Rongrong and SUN Yanli, China Strictly Examined the Safety of Offshore Oil and Gas Operations, at http://old.globalview.cn/ReadNews.asp?NewsID=21600, 1 May 2018. (in Chinese)

74 At http://www.sohu.com/a/107883249_157495, 1 May 2018. (in Chinese)

75 Results of the Dynamic Assessment for the National Oil and Gas Resources (2015), at http://www.sinooilgas.com/gzdt/gzdt/bc4de9c456bf3f420156c5b7c9d7001a.shtml, 1 May 2018. (in Chinese)

76 At http://www.cnooc.com.cn/art/2014/12/24/art_191_1707311.html, 1 May 2018. (in Chinese)

77 There is no agreement on the minimum water depth that defines a deep-water operation. Traditionally, water domains less than 400m deep, 400-1500m deep and more than 1500m deep are named as conventional water depth, deep-water and ultra deep-water, respectively.

78 *China Oil, Gas Sector Business and Investment Opportunities Yearbook*, Vol. 1, Washington DC: International Business Publications, 2007, p. 80.

79 Article 9 of the Constitution of the People's Republic of China (adopted at the 5th Session of the 5th National People's Congress, 4 December 1982, entered into force on 4 December 1982, and revised in 1988, 1993, 1999, 2004 and 2018).

Conventional oil and gas exploration and exploitation rights are primarily granted to qualified state-owned enterprises (SOEs).[80] However, exploration and exploitation activities are usually carried out by Chinese SOEs in cooperation with foreign enterprises. According to the Regulation on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises,[81] the China National Offshore Oil Corporation (CNOOC) is responsible for the overall offshore work in cooperation with foreign enterprises, and has the exclusive right to explore, exploit, produce and market the petroleum within the zones of cooperation with foreign enterprises.[82] In the long term, China will adopt both cooperative exploitation and self-exploitation[83] in the offshore oil and gas industry. Compared with cooperative exploitation, self-exploitation imposes higher safety requirements on SOEs regarding licensing, risk management, workers' training,[84] deep-water technology, and other aspects.[85] Each aspect is possible to give rise to offshore accidents, causing personal injuries, economic loss and environmental damage.

B. Law and Policy on the Safety of Offshore Oil and Gas Operations in China

Unlike the EU OSD, which comprehensively addresses all aspects involved in offshore operations, offshore operations in China, at present, are loosely regulated by a series of laws and regulations concerning exploitation, safety and marine environment. Overall, China's Work Safety Law[86] and Environmental Protection

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80 Article 4 of the Mineral Resources Law of the People's Republic of China (adopted in the 15th Meeting of the Standing Committee of the 6th National People's Congress, 19 March 1986, came into force on 1 October 1986, and revised on 29 August 1996).

81 Regulation of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises (issued by the State Council on 30 January 1982, and revised on 23 September 2001, 30 September 2011 and 18 July 2013).

82 Article 5 of the Regulation of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises.

83 Cooperative exploitation and self-exploitation are two ways of developing in China's offshore oil and gas industry, namely, Chinese state-owned enterprises cooperating with foreign enterprises in the former or not in the latter.

84 ZOU Keyuan, China's Governance over Offshore Oil and Gas Development and Management, *Ocean Development & International Law*, Vol. 35, 2004, p. 348.

85 HUANG Yuehua and REN Keren, Current Situation and Development of China's Drilling Platform, *China Petroleum Machinery*, No. 9, 2007. (in Chinese)

86 Work Safety Law of the People's Republic of China (adopted at the 28th Session of the Standing Committee of the 9th National People's Congress on 29 June 2002, came into force on 1 November 2002, and revised on 27 August 2009 and 31 August 2014).

Law (EPL)[87] play a fundamental role in its safety and environmental legal system. For safe operations, the Regulation on the Safety of Offshore Oil Operations (OSR)[88] and the Detailed Rules for the Administration of Offshore Oil Safety[89] were enacted to impose specific safety standards on operators, in accordance with the Work Safety Law and other laws, administrative regulations and standards. With respect to environmental protection, the EPL stipulates:

> *The State Council and the people's governments at various levels in coastal areas shall provide better protection for the marine environment. The discharge of pollutants and the dumping of wastes into the seas, and the construction of coastal projects and marine projects shall be conducted in compliance with provisions of laws and regulations and relevant standards, so as to guard against and reduce the pollution and damage of the marine environment.*[90]

Based on China's EPL, the Marine Environmental Protection Law (MEPL)[91] was specifically issued to provide basic rules for each aspect of marine environmental protection. One chapter of the MEPL lays down the general provisions for preventing environmental damage caused by marine construction projects. To implement the MEPL, State Oceanic Administration (SOA) of China enacted the Regulation Concerning Environmental Protection in Offshore Oil Exploration and Exploitation (hereinafter "the Regulation"),[92] stipulating detailed obligations for

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87 Environmental Protection Law of the People's Republic of China (adopted at the 11th Session of the Standing Committee of the 7th National People's Congress on 26 December 1989, came into force on 26 December 1989, and revised in 2014).

88 Regulation on the Safety of Offshore Oil Operations (issued by the State Administration of Work Safety of China on 7 February 2006, and revised on 29 August 2013 and 26 May 2015). [hereinafter "OSR"]

89 Detailed Rules for the Administration of Offshore Oil Safety (issued by the State Administration of Work Safety on 7 September 2009, and revised on 29 August 2013 and 26 May 2015).

90 Article 34 of the Environmental Protection Law of the People's Republic of China.

91 Marine Environment Protection Law of the People's Republic of China (adopted at the 24th Session of the Standing Committee of the 5th National People's Congress on 23 August 1982, came into force on 1 March 1983, and revised in 1999, 2013 and 2016 respectively).

92 Regulation of the People's Republic of China Concerning Environmental Protection in Offshore Oil Exploration and Exploitation (issued by the State Council of the People's Republic of China on 29 December 1983, and came into force on 29 December 1983). [hereinafter "the Regulation"]

offshore operators in preventing pollution from offshore petroleum activities.[93] According to the MEPL, before carrying out offshore operations, operators must submit a marine environmental impact report (MEIR) and an oil spill emergency response plan (ERP) to the competent authorities. These documentary requirements for offshore operators are specified by the Regulation, the OSR and the Detailed Rules for the Administration of Offshore Oil Safety. Together, these laws and regulations create a basic framework for the safety of offshore oil and gas operations in China.

The 13th Five-Year Plan for the National Economic and Social Development of China was issued in 2015.[94] The plan elaborated its policies to increase offshore oil and gas production, enhance the protection of the marine environment and the coastal economies' ability to prevent pollution, and to improve the response mechanisms in case of an accident.[95] Such new policies reveal that China's oil and gas industry continues to move from onshore to offshore areas, and is undergoing a reform targeting to improve the safety level of its offshore operations.

Currently, however, China's legislation regarding offshore operation safety and environmental protection tends to be fragmented. At the meanwhile, the competent authorities involve multiple institutions such as the SOA, the Ministry of Environmental Protection, the Ministry of Transport and the Ministry of Agriculture. These institutions have overlapping functions, which may cause ineffective communication and cooperation. To streamline and integrate multiple ministries, the State Council of China initiated institutional reforms in the 13th National People's Congress of 2018, where the Ministry of Natural Resource, the Ministry of Ecology and Environment (MEE) and the Ministry of Emergency Management were established. The three new ministries are in charge of the issues concerning development, environmental protection and safety of offshore operations respectively. After the institutional reform, each competent authority will take clearer duties, and operate and cooperate more effectively.

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93 ZOU Keyuan, *China's Marine Legal System and the Law of the Sea*, Leiden: Martinus Nijhoff, 2005, p. 149.

94 Outline of the 13th Five-Year Plan for the National Economic and Social Development of the People's Republic of China (approved at the 4th Session of 12th National People's Congress of the People's Republic of China on 16 March 2016, and came into force on 16 March 2016). [hereinafter "the Outline of the 13th Five-Year Plan"]

95 Chapter 41 of the Outline of the 13th Five-Year Plan.

C. Application of Environmental Principles

Compared with EU environmental law and policy, China's environmental legislation was initiated late in 1979, since industrialization and urbanization of China expanded quickly around that time, and environmental pollution and related incidents were correspondingly increasing. In the process of establishing China's environmental legal system, environmental principles were, at first, not clearly defined in laws and regulations.[96] It was gradually recognized that the concepts of precautionary, prevention, public participation and polluter-pays should play a fundamental role in environmental legislation. In 2014, these key environmental principles were directly established in the EPL, which states:

> *Environmental protection shall adhere to the principles of giving priority to protection, focusing on prevention, integrated governance, engaging the general public, and enforcing liability for damage.*[97]

On the basis of the provision above, the application of environmental principles to China's law and policy concerning the safety of offshore operations will be discussed as follows.

First, "giving priority to protection" means that, when faced with risks that remain scientifically uncertain, environmental protection should take priority rather than economic development.[98] Chinese scholars assert that this rule is an expression of the precautionary principle, though its connotation and extension are unclear.[99] The precautionary principle could have been implied in China's environmental law and policy. For example, the State Council is revising the Regulation, and is considering to incorporate risk analysis in the MEIR.[100] Risk analysis, being a kind of traditional cost-benefit analysis, is normally connected with a precautionary or

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96 YE Yuanbo, Legislation of Basic Principle in the Environmental Basic Law, in *Proceedings of 2013 Annual Conference of Chinese Environmental and Natural Resources Law Research Association*. (in Chinese)

97 Environmental Protection Law of the People's Republic of China, Article 5.

98 ZHU Xiao, Study on the Development and Redevelopment of the Chinese Environmental Law Principles, *ECUPL Journal*, No. 3, 2014, p. 12.

99 ZHU Xiao, Study on the Development and Redevelopment of the Chinese Environmental Law Principles, *ECUPL Journal*, No. 3, 2014, p. 12.

100 The Regulation of the People's Republic of China Concerning Environmental Protection in Offshore Oil Exploration and Exploitation (Revised Draft), Article 8. [hereinafter "the Regulation (Revised Draft)"]

anti-precautionary approach.[101] The Outline of 13th Five-Year Plan establishes the overall objectives of marine environmental protection:

> *We aim to strengthen research on marine climate change, enhance capabilities for marine disaster monitoring, risk assessment, and disaster prevention and mitigation, strengthen strategic preparedness for conducting marine disaster relief, and develop capabilities to respond to marine environmental emergencies.*[102]

The objectives stated above potentially suggest that safety and environmental risks must be taken into consideration when trying to prevent marine accidents. This requires relevant laws and regulations to further define and enforce the precautionary principle.

Second, "focusing on prevention, integrated governance" is widely considered as an expression of the prevention principle, which calls for predicting, analyzing, and preventing hazards in economic activities, so as to avoid or reduce damage to the environment.[103] Like the EU OSD, China's law and policy regarding the safety of offshore operations rely heavily on the prevention principle. Overall, China's offshore safety legislation not only aims to prevent offshore accidents and ensure workers' life and property safety,[104] but also to reduce operational pollution to the marine environment.[105] Under the broad objectives, the prevention principle is applied particularly at the stage of constructing offshore installations, which typically requires operators to apply for a license and to submit a MEIR and an ERP to the competent authority.

Third, "engaging the general public" is an expression of the principle of public participation. It was also introduced into the 2014 EPL as a key environmental principle. Public participation used to be an approach for people to cooperate with and support the government in China. And it then gradually transformed into "the right of the people to be informed, consulted and heard in public decision-making while imposing a related set of obligations on the government to guarantee

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101 David M. Driesen, Cost-Benefit Analysis and the Precautionary Principle: Can They Be Reconciled?, *Michigan State Law Review*, Vol. 43, 2013, p. 773.
102 Chapter 41.2 of the Outline of the 13th Five-Year Plan of China.
103 ZHU Xiao, Study on the Development and Redevelopment of the Chinese Environmental Law Principles, *ECUPL Journal*, No. 3, 2014, p. 13.
104 Article 1 of the OSR.
105 The Regulation, Article 1.

public access to information, to decision-making and to judicial redress."[106] The principle of public participation presently has also been applied, to a limited degree, in China's offshore safety laws and regulations. According to a revised draft of the Regulation published in 2016, a MEIR shall contain a description regarding public participation.[107] Operators are required to widely seek opinions from the public and stakeholders when drafting MEIRs for offshore construction projects.[108] The competent authority, when examining the report, should be open for further comments by seeking public opinions or holding hearings.[109] All these facts demonstrate that public participation is being steadily expanded and improved in China, and will likely contribute to the unification and development of China's law and policy on the safety of offshore operations.

Finally, "enforcing liability for damage" indicates that China acknowledges the polluter-pays principle. The term "liability" in the expression mainly refers to environmental liability in China. In Chinese legal system, "environmental liability" is an umbrella term, which includes three types of liabilities: civil liability, administrative liability and criminal liability.[110] The rules governing the liabilities for the safety of offshore operations are primarily established under the Regulation. First, offshore operators are required to "carry insurance or other financial guaranties in respect of civil liabilities for pollution damage."[111] Second, the competent authority, on behalf of the State, may claim compensation against any operators that have destroyed marine ecology, and caused significant loss to environment and economy.[112] In addition, administrative punishments, including warnings and fines, may be imposed on those who have breached environmental standards. The Regulation provides the amounts of fines for different breaches.[113]

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106 ZHAO Yuhong, Public Participation in China's EIA Regime: Rhetoric or Reality?, *Journal of Environmental Law*, Vol. 22, Issue 1, 2010, pp. 92~93.

107 The Regulation (Revised Draft), Article 8.

108 At http://energy.people.com.cn/n1/2016/0912/c71661-28709429.html, 1 May 2018. (in Chinese)

109 At http://energy.people.com.cn/n1/2016/0912/c71661-28709429.html, 1 May 2018. (in Chinese)

110 ZHAO Xiaobo and ZHANG Jianwei, Environmental Liability, in QIN Tianbao ed., *Research Handbook on Chinese Environmental Law*, Cheltenham/Northampton: Edward Elgar, 2015, p. 320.

111 The Regulation, Article 9.

112 The Regulation (Revised Draft), Article 45.

113 ZOU Keyuan, *China's Marine Legal System and the Law of the Sea*, Leiden: Martinus Nijhoff, 2005, p. 152.

D. Legal Obligations for Operators in China

The OSR and the Detailed Rules for the Administration of Offshore Oil Safety set up the objectives of "strengthening the administration of offshore safety, guaranteeing workers' life and property safety, and preventing and reducing offshore accidents."[114] Under the objectives, offshore operators shall take the primary responsibilities for the safety of offshore operations.[115] In this regard, China's laws and regulations are similar to the EU OSD.[116] Specifically, operators have the following obligations.

Before carrying out any new offshore construction projects, an enterprise or operator shall draw up an MEIR and submit it to the competent authority.[117] The competent authority shall organize an examination of the report and then decide on whether to approve it or not.[118] The operator is required to include a list of the details regarding an offshore construction project, such as the project's name, location and surrounding environment, as well as the pollutants involved and their consequences.[119] Since 2016, the State Council has planned to revise the Regulation. The revised draft of the Regulation proposes to incorporate oil spill risk analysis into the MEIR.[120] Based on the risk analysis, measures on risk reduction and emergency response must be addressed in the report. Furthermore, the report should also contain a description regarding public participation.[121]

According to the revised draft of the Regulation, operators shall implement the risk reduction measures established in the MEIR, and submit an oil spill ERP to the competent authority for recordation while carrying out offshore operations.[122] The EPR should include the basic information of a project's surrounding sea conditions, oil spill risk analysis and reduction measures, and a proposal to reinforce oil spill response capacity.[123] The competent authorities for the review of the MEIR and the oil spill ERP were the Ministry of Environmental Protection, and the SOA and its local offices, which however have been replaced by the Ministry of Ecology

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114 Article 1 of the Detailed Rules for the Administration of Offshore Oil Safety.
115 Article 3 of the OSR.
116 Article 3 of the OSR and the Detailed Rules for the Administration of Offshore Oil Safety.
117 The Regulation, Article 4.
118 The Regulation, Article 4.
119 The Regulation, Article 5.
120 The Regulation (Revised Draft), Article 8.
121 The Regulation (Revised Draft), Article 8.
122 The Regulation (Revised Draft), Article 37.
123 The Regulation (Revised Draft), Article 37.

and Environment and the Ministry of Emergency Management after the 2018 institutional reform of the State Council. The competent authorities are responsible for assessing and overseeing the implementation of offshore safety laws and regulations.

China's OSR established a verification scheme. This scheme requires that the design, construction, installation and production of offshore projects be verified,[124] although the OSR does not emphasize the independence of verifiers. Given the high risks associated with the offshore oil and gas industry, there is an increasing need for operators to seek independent verification, so that they may obtain safety assurance and comprehensive advice on improving safety.[125] Presently, Chinese verification institutions are not fully independent or market-based, as the State runs half of these institutions.[126]

In addition to laws and administrative regulations, offshore operators should also comply with the relevant national standards and industry standards in China.[127] The Work Safety Standardization of the Petroleum Industry,[128] as a national standard, specifies obligations for offshore operators, which are consistent with the OSR and the Detailed Rules for the Administration of Offshore Oil Safety. The Standardization particularly requires the provision of a risk assessment, with the aim of urging operators to identify major hazards and take effective measures to control them.[129] It should be noted, though, that the Standardization has less legal binding force than the offshore safety laws and regulations.

IV. Towards a Higher Level of the Safety of Offshore Oil and Gas Operations in China: Lessons from the OSD

Offshore oil and gas operations are highly risky activities in China. Due to the complexity and unique features of each offshore drilling installation,

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124 Article 25 of the OSR.

125 Research on the Development and Investment Decisions of China's Independent Third Party Verification Industry, at http://www.sohu.com/a/142658850_800248, 1 May 2018. (in Chinese)

126 Research on the Development and Investment Decisions of China's Independent Third Party Verification Industry, at http://www.sohu.com/a/142658850_800248, 1 May 2018. (in Chinese)

127 Article 5 of the OSR.

128 Work Safety Standardization of the Petroleum Industry (issued by the State Administration of Work Safety on 10 December 2012, and came into force on 1 March 2013).

129 Article 5.3.1 of Work Safety Standardization of the Petroleum Industry.

oil spill accidents in offshore operations are different from those arising from marine vessels,[130] since the former can bring inestimable pollution to the marine environment. In this case, it is necessary to compare China's legal system in this regard with the EU OSD, which is believed to be a well-developed regulatory regime on the safety of offshore operations. By testing China's safety and environmental laws and regulations against the EU OSD, it is found that the regulatory gaps existing in China's prevention of offshore accidents include: insufficient and fragmented regulatory framework, the absence of the application of the precautionary principle, and limited safety standards for offshore operators. These gaps may make it hard for Chinese laws and regulations to identify the high risks of offshore accidents, and to maximize the effect of legal measures on preventing major accidents in offshore operations. Based on these regulatory gaps, the following lessons for China can be drawn from the EU OSD.

A. Lessons Obtained by Comparing Legal Frameworks

The OSD has unified the EU legal framework for the safety of offshore operations. Without prejudice to the relevant EU laws, the OSD established comprehensive rules governing various issues, including licensing, environmental protection, emergency response, and liability.[131] Compared with the integrity of the OSD, Chinese legislation regarding offshore safety currently tends to be fragmented. Furthermore, it is implemented by different institutions that sometimes communicate ineffectively. China's Work Safety Law, EPL and MEPL provide fundamental rules for safety and environmental protection related to offshore operations. Under the fundamental laws, administrative regulations such as the Regulation and the OSR play key roles in specifying the safety and environmental standards for offshore operations. Since the provisions on many different aspects of offshore operations are scattered in different laws and regulations, overlapping issues could be found in the safety and environmental standards, and non-coordination problems could emerge during the implementation of such laws and regulations.

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130 YANG Yuan, Liability and Compensation for Oil Spill Accidents: International Regime and Its Implementation in China, *Natural Resource Journal*, Vol. 57, Issue 2, 2017, pp. 477~478.

131 Here particularly means Directive 89/391/EEC, 92/91/EEC, 94/22/EC, 2001/42/EC, 2003/4/EC, 2003/35/EC, 2010/75/EU and 2011/92/EU. See Article 1 of the OSD.

The fragmentation and insufficiency of China's legal framework for offshore operations may be related to the inconsistent objectives of its offshore safety laws and regulations. China's legislation established an objective of preventing and reducing accidents caused by offshore operations, which does not particularly focus on major accidents, but offshore oil spills in general. On the contrary, the OSD pays attention to major accidents rather than operational pollution, which seems to be more capable of preventing the risks of offshore major accidents than China's offshore safety laws and regulations. This implies that China urgently needs to introduce the prevention of risks of major accidents into its legal system. Facing the rapid expansion of offshore oil and gas operations in China, China needs to unify all relevant laws and policies so that a comprehensive legal system and a high safety level for offshore operations can be established. To carry out an assessment on the impact of offshore operations – like that of the EU – could be the first step for China before reforming its legal framework for offshore operations.

B. Lessons Obtained by Comparing the Application of Environmental Principles

The OSD is developed in accordance with the environmental principles established in Article 191 of the TFEU, which operationalizes precautionary, prevention, rectification at source and polluter pays principles into concrete obligations for the Member States, operators and competent authorities. In contrast, China's offshore safety laws and regulations fail to clearly define the environmental principles. This is because environmental principles had not been strictly established in Chinese legislation until the EPL was revised in 2014, though the concepts of prevention and polluter pays had been implemented in the provisions of China's environmental laws and regulations before that time.[132] The principles reflected in Article 5 of China's EPL are very similar to the EU version of precautionary, prevention, public participation and polluter pays principles. However, in China, these principles still call for further elaboration, and relevant provisions should be adjusted accordingly to achieve consistency in Chinese environmental law and policy. That's to say, offshore safety laws and regulations in China also need to integrate environmental principles.

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132 QIN Tianbao, Challenges for Sustainable Development and Its Legal Response in China: A Perspective for Social Transformation, *Sustainability*, 2014, Vol. 6, p. 5079.

Firmly relying on the prevention principle, both the EU OSD and China's offshore safety legislation chiefly target those well-known hazards arising from offshore operations, such as confined space, hydrocarbon releases and fire. However, the OSD also requires operators to take suitable measures to control unknown risks of major accidents to human health and the environment, which is consistent with the precautionary principle. Although the precautionary principle seems to be weakly embodied in the OSD, it has legal foundations in EU law. Its application in the OSD, anyway, is much stronger than that in China's offshore safety legislation. Since environmental principles have only recently been codified in the EPL, China is experiencing a transitional phase of incorporating the precautionary principle into the environmental legal system so that environmental risks can be effectively identified and reduced. Instead of merely paying attention to preventing and compensating risks and hazards that are certain, the precautionary principle focuses on risks lacking full scientific certainty. Translating this principle into specific provisions would likely improve the safety level of offshore operations in China.

C. Lessons Obtained by Comparing Legal Obligations for Operators

To prevent the occurrence of accidents in offshore operations, both the EU OSD and China's offshore safety legislation impose general obligations on offshore operators. Under the goal of minimizing the risks of major offshore accidents, the OSD requires operators to achieve minimum safety standards in offshore operations while taking all suitable measures to limit the consequences of major accidents for human health and the environment.[133] However, China's offshore safety laws and regulations have not established a risk-based goal in preventing oil spill accidents in offshore operations. Operators should maximally reduce risks at each stage of offshore operations. Nevertheless, China has no specific rules in this regard. In that case, operators under Chinese legislation take on fewer obligations than those under the OSD. The limited safety standards for offshore operations may be because the current offshore oil and gas industry in China is not market-oriented but based on the state-owned-enterprise CNOOC. The CNOOC usually cooperates with foreign companies to exploit oil and gas resources, but may not equally take

133 Article 3(3) of the OSD.

the responsibilities with the foreign operators.[134]

Specifically, China's safety standards for offshore operations require operators to prepare the MEIR and the ERP in an earlier stage – before the construction of offshore installations – rather than before carrying out offshore operations as required by the OSD. The two documents, in effect, are parts of the environmental impact assessment (EIA) for offshore construction projects, containing more general information regarding offshore installations than detailed requirements for offshore operators. The OSD, on the contrary, focuses on the whole stage of offshore operations, specifying each documentary obligation for operators. The OSD particularly establishes the safety and environmental management system for operators to assess and manage safety and environmental risks, which ensures that offshore operations could maintain a high safety level.

Hence, it is not sufficient for China to merely introduce oil spill risk analysis into the MEIR. Offshore operations in China should be carried out on the basis of systematic risk management. To set out the requirement for establishing a risk management system in relevant laws and regulations, the first step for China could be to open the market and reform the SOEs, which would facilitate competition in offshore industry and push operators to mitigate risks in offshore operations. To provide evidence of operators' compliance with their legal obligations and ensure offshore safety standards are being adhered to at all times, China's legislation also needs to provide for the schemes for independent verification.

V. Conclusion

Facing the rapid expansion of China's offshore industry and the increasing risks to the environment, China has been developing offshore oil and gas law and policy for years. To prevent the occurrence of oil spill accidents in offshore operations, China has promulgated a series of laws and regulations covering issues like licensing, environmental protection, emergency response, worker safety and liability. Such laws and regulations provide a basic framework for the safety of offshore operations, but tend to be fragmented, like the EU law before the enactment of the OSD. The OSD has unified and reinforced the regulatory

134 GUO Nan and QIN Peng, The Market and Regulation Failure of Petroleum Foreign Cooperation in Energy System Reform: Take Regulations on the Foreign Cooperative Exploitation of Offshore (Onshore) Petroleum Resources as an Example, *International Economics and Trade Research*, Vol. 32, No. 3, 2016, p. 106. (in Chinese)

framework on the safety of offshore operations in EU waters. It also seeks to facilitate best practice in relation to offshore operations outside of the EU,[135] which could further promote offshore safety worldwide in the future. Although "the true impact will be felt only after the transitional period is over",[136] at this point, the OSD provides an example for China to further improve its safety level for offshore operations.

As the foundation of obligations for operators, environmental principles have been explicitly provided and applied in the EU OSD. In contrast, these principles have not been fully operationalized in China's offshore safety legislation after being confirmed in the 2014 EPL. In particular, the precautionary principle has hardly been applied in preventing major accidents and reducing risks arising from offshore operations in China. Although the revised draft of the Regulation incorporates oil spill risk analysis into the MEIR, overall, it lacks a consistent system – as the EU OSD has – that takes into consideration those safety and environmental risks, and considers environmental impacts when assessing the risks of major accidents. Furthermore, the prevention principle is taken as a basis for legal obligations for operators in both the EU OSD and China's offshore safety laws and regulations. Compared with the EU OSD, China's offshore safety legislation does not specifically target major accidents, and imposes less stringent obligations on operators.

In China, the rules governing offshore operations should include higher safety standards for operators while unifying and reinforcing its legal framework for the safety of offshore operations. In the long term, establishing a comprehensive law – like the EU OSD – would be an effective way for China to address each aspect concerning the safety in offshore operations, and to avoid inefficient implementation caused by overlapping of institutions and functions. As the foundation of obligations for operators, environmental principles need to be further applied in China's offshore safety laws and regulations. Corresponding adjustments to offshore safety legislation should also be made so that relevant provisions become more consistent with environmental principles, particularly the

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135 Article 20 of the OSD.

136 Academy of European Law (ERA), Directive 2013/30/EU on the Safety of Offshore Oil and Gas Operations, Annual Conference on European Environmental Law (6 March 2014), at http://docplayer.net/43946888-Directive-2013-30-eu-on-the-safety-of-offshore-oil-and-gas-operations-era-annual-conference-on-european-environmental-law-6-march-2014.html, 1 May 2018.

precautionary principle. To fully implement this principle, China's offshore safety legislation should include risk assessment into the legal obligations for operators,[137] which can cover safety and environmental critical elements throughout the life cycle of installations. To further implement the prevention principle in preventing major accidents in offshore operations, operators are supposed to identify all major hazards, assessing their likelihood and consequences. This implies, for China, that it is urgent to demand operators to assess major accident hazards, rather than simply focus on the EIA for constructing new offshore installations. Stricter obligations for operators should be extended to offshore operations, such as establishing prevention policy, developing SEMS, and evaluating the ERP. Amendments like these, based on EU experiences, can improve the quality of China's legislation on offshore oil and gas operations, so that China's precious coastal waters get the protection they deserve.

Editor (English): Andrew Vajhuabmuas Vangh

137 TIAN Ye and ZHAO Wenxi, The Application of Environmental Risk Assessment in Environmental Impact Assessment, in *Proceedings of the Chinese Society for Environmental Sciences*, 2006, p. 1269. (in Chinese)

“远洋群岛法律制度和21世纪海上丝绸之路国际研讨会”综述

钟 慧*

内容摘要: 2017年11月4日，由厦门市海洋与渔业局主办、厦门大学南海研究院承办的“远洋群岛法律制度和21世纪海上丝绸之路国际研讨会”在厦门大学隆重召开，该会议是厦门“国际海洋周”系列活动的一部分。本次会议围绕2个议题进行了交流和探讨：(1) 各国关于远洋群岛管理的法律与实践；(2) 群岛实践与中国。来自澳大利亚、英国、葡萄牙、印度尼西亚与中国的学者和研究人员，以及中国外交部边界与海洋事务司、国家海洋局海洋发展战略研究所、厦门市海洋与渔业局的官员40余人出席了会议。会议通过探索各国在远洋群岛方面的经验，为有效构建中国南海地区的群岛法律制度奠定了法理基础。

关键词: 非群岛国家　远洋群岛　国际习惯法　南海地区

为探索非群岛国家适用群岛法律制度的可行性，厦门大学南海研究院与厦门市海洋与渔业局、21世纪海上丝绸之路协同创新中心联合举办了“远洋群岛法律制度和21世纪海上丝绸之路国际研讨会”。厦门大学南海研究院院长傅崐成教授在开幕致辞中简要介绍了厦门大学的建校历史和发展历程，以及厦门大学南海研究院的研究领域和成果，并热烈欢迎各位专家、学者和官员分享各国在管理远洋群岛方面的法律和实践经验。厦门市海洋与渔业局副局长林国忠先生表示，希望通过本次研讨会借鉴他国在远洋群岛方面的经验，为有效构建中国南海地区的群岛法律制度奠定法理基础。外交部边界与海洋事务司副司长肖建国先生联系古今，简要介绍了中国的基线制度，强调不能忽视国际习惯法的作用，表示中国在南海的历史性权利不能被《联合国海洋法公约》（以下简称“《公约》”）的规定所替代，中国坚定维护其领土主权，重视国际法治，坚持以和平友好协商方式解决争端，维持南海地区的和平与稳定。

但是，在中菲“南海仲裁案”中，仲裁庭认为《公约》并未规定如南沙群岛的

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一系列岛屿可以作为一个整体共同产生海洋区域。仲裁庭因此将南沙争议岛礁作为一个整体的地位问题演绎为《公约》第 121 条第 3 款关于岛屿地位的解释与适用问题，从而对原本是群岛重要组成部分的岛礁与海洋地物单独进行法律地位界定。仲裁庭“从单个岛礁地位设定海洋权利”这一论点出发，其本身是一种逻辑预设，是对中国在南海权利主张的事先否定。

需要注意的是，第三次联合国海洋法会议仅仅解决了构成群岛国的那部分群岛的直线基线问题，而至于非群岛国家适用群岛法律制度这一问题在会议期间从未得到适当讨论，更未取得任何解决方案。在第三次联合国海洋法会议谈判的早期阶段，拥有远洋群岛的非群岛国家就曾主张新建立的群岛法律制度应无差别地适用于所有群岛。在非群岛国家远洋群岛问题被排除在会议谈判之外后，许多国家均表明了反对立场，至第三次联合国海洋法会议最后两轮会议，仍然有很多国家关注并要求大会对这一问题进行讨论。即便在会议的最后阶段，相关非群岛国家依然相继申明非群岛国家的远洋群岛问题属于《公约》未决事项。

既然《公约》尚未对这一问题予以规范，那么按照序言规定，“应继续以一般国际法的规则和原则为准据。”实际上，包括中国在内的拥有远洋群岛的非群岛国家的丰富实践，为国际法上的群岛概念提供了新的发展方向。中国已经于 1996 年和 2012 年分别将直线基线适用于西沙群岛和钓鱼岛列屿，并且不排除未来将直线基线适用于南海其他群岛的可能。

本次会议围绕两个议题，即（1）各国关于远洋群岛管理的法律与实践，以及（2）群岛实践与中国，探讨了非群岛国家适用群岛法律制度的合法性，为有效构建中国南海地区的群岛法律制度奠定了法理基础。

一、各国关于远洋群岛管理的法律与实践

《公约》虽然没有明文规定远洋群岛的领海划界问题，但无论是在第三次联合国海洋法会议之前，还是在《公约》出台之后，拥有远洋群岛的诸多国家都没有停止将直线基线适用于领海划界的实践。本次研讨会对这些典型的国家实践进行了探讨。

（一）澳大利亚

澳大利亚卧龙岗大学国家海洋资源与安全中心主任斯图尔特•凯伊教授在其题为《澳大利亚在管理太平洋和印度洋远洋群岛上的经验》的发言中，着重以两组群岛，即阿什莫尔和卡捷群岛以及赫德岛和麦克唐纳群岛为基础，介绍了澳大利亚的相关经验。基于阿什莫尔和卡捷群岛经常有印度尼西亚传统渔民捕鱼的情

况，澳大利亚和印度尼西亚首先于1974年签署了谅解备忘录，并于1989年对备忘录进行修订和重新确认。修订后的协议对传统捕鱼权的使用做出了更严格的规定：渔民不得使用发动机及冰柜；应当提供相应的历史证明，从而将适用范围局限于印度尼西亚的特定地区，并且通常需要有四代渔民在此地捕鱼的记录；仅允许登陆阿什莫尔岛；仅限于捕捞部分鱼群；在阿什莫尔和卡捷群岛附近水域设立海洋保护区。

对于位于印度洋南部的赫德岛和麦克唐纳群岛，澳大利亚在2005年与法国签订协议，希望借此完善对远洋群岛的管理。根据协议，澳大利亚与法国共同致力于渔业监察和海洋生物资源研究方面的合作，建立共同程序对渔业进行管理和检查，包括在渔船上安装监视系统（VMS），以及明确相关渔船标志等。协议还对双方的执法合作做出了规定，尤其指出在行使紧追权和进行合作方面应当提供相应的国内支持，具体涉及证据、执法差异、船上拘留、费用等相关问题。

（二）英国

英国莱卡斯特大学讲师索菲娅•考佩拉博士对英国在群岛管理方面的法律和实践做了介绍，发言包括四个部分：第一部分是英国对群岛法律制度的相关立场。具体而言，在第三次联合国海洋法会议之前，由于保障公海自由和航行利益的需要，英国反对群岛概念；在第三次联合国海洋法会议上，英国又提出草案，建议“关于群岛国的规定不应违背《公约》以及其他适用于非群岛国远洋群岛的相关国际法规定”。第二部分是直线基线在一些群岛的适用，具体包括福克兰群岛、特克斯和凯科斯群岛、南乔治亚和南桑威奇群岛，以及外赫布里底群岛等。第三部分是群岛在海洋划界中的作用，具体案例包括1993年《美英波多黎各、美属维尔京群岛与英属维尔京群岛海洋划界条约》和1993年《美英美属维尔京群岛与安圭拉岛海洋划界条约》等。考佩拉博士指出在海洋划界中，应该将群岛作为整体进行考虑，并结合群岛周围基点的使用情况以及岛屿的影响。第四部分是以南乔治亚和南桑威奇群岛，以及英属印度洋领地为例，介绍了英国在群岛水域管理和环境保护方面的相关规定及经验，其中之一为通过建立海洋保护区的模式实现英国对其群岛的管理。

考佩拉博士在发言的最后对英国的立场进行了总结：首先，由于群岛概念对公海问题尤其是航行自由的影响，英国并不愿意承认群岛概念。但是，英国在实践中却采用了不同的做法，比如在一些群岛适用直线基线，在海洋划界协议中考虑群岛的整体性问题，以及通过建立海洋保护区养护群岛各岛礁之间的生态相互依存性。

（三）葡萄牙

葡萄牙里斯本大学瓦斯科•贝克尔 - 温伯格教授首先简要回顾了第三次联合国海洋法会议对群岛问题的讨论和立法过程，然后重点探讨了葡萄牙有关岛屿的法律制度。他认为葡萄牙目前并没有关于远洋群岛基线的具有法律约束力的规定或相关的国家实践，因为 2006 年 7 月 8 日的第 34 号法令已经取消了 1985 年规定群岛基线问题的第 52 号法令。

（四）西班牙、挪威和丹麦

中国南海研究院助理研究员丁铎博士在题为《非群岛国家远洋群岛的相关实践及其对中国的启示》的发言中，对西班牙、挪威和丹麦三国在管理远洋群岛方面的实践和法律做了介绍。

西班牙的相关立法采取的是直线基线法，规定了 12 海里的领海、24 海里的毗连区，并在大西洋地区划定了 200 海里的专属经济区，在地中海地区设立了一块渔业保护区。西班牙于 1977 年 8 月 5 日颁布了第 2510 号皇室敕令，其中第 1 条规定为加纳利群岛划定直线基线。按照该敕令的划定方法，围绕兰萨罗特岛、富埃特文图拉岛、阿莱格兰萨岛、加斯奥沙岛、蒙大拿克拉拉岛和洛沃斯岛等 6 座岛屿的最外缘划定了直线基线，但这些基线并不完全相连，没有将这 6 座岛屿完全封闭起来。1978 年 2 月 20 日，西班牙颁布的第 15 号法令第 1 条明确规定：

> 为勘探和开发其海床、底土和上覆水域内自然资源的目的，西班牙在称为专属经济区的一带海域中，享有主权权利。专属经济区从领海外部界限开始，延伸至从测算领海宽度的基线量起 200 海里处。就群岛而言，经济区的外部界限应当从连接构成群岛之各岛屿和小岛的最外部各点的直线基线量起，以便由此形成的外部周界符合群岛的一般轮廓。

该法令的最后条款指出：“本法律规定的适用限于西班牙大陆和群岛在大西洋的海岸地区，包括坎塔布连海岸地区……”。据此，该 1978 年法令再次肯定了在加纳利群岛适用直线基线的做法。

丁铎博士在其发言中对挪威在管理斯瓦尔巴特群岛方面的实践和相关法律也做了介绍。挪威对斯瓦尔巴特群岛适用群岛体制的立法较早见于《1970 年 9 月 25 日关于划定斯瓦尔巴特群岛部分领水的皇家敕令》。该敕令规定：“挪威在斯瓦尔巴特群岛地区从费尔莱根角到哈尔夫莫讷岛以及围绕熊岛和希望岛的领水界线，应当……从位于下列各点之间的直线基线平行向外 4 海里划定。”该敕令同时确定了 83 个划定直线基线的坐标点，而距离群岛较远的两个岛则单独划定了直线基线。2001 年 6 月 1 日，挪威颁布了《关于斯瓦尔巴特群岛周围的挪威领海

界限的规定》，其中规定：“斯瓦尔巴特群岛周围的挪威领海应……从位于下面所列各坐标点之间的直线基线平行向外划定。”该规定一共列出了196个坐标点，与1970年9月25日的敕令相比，覆盖的岛屿更为广泛，且更加详细地确定了斯瓦尔巴特群岛的直线基线，并附有大比例尺海图。

最后，丁铎博士对丹麦在管理远洋群岛方面的实践和法律做了介绍。法罗群岛位于挪威、苏格兰和冰岛之间的北大西洋海域，由18个小岛（其中17个有人定居）组成，面积1398.9平方公里，现为丹麦的自治区。丹麦立法规定了直线基线，主张12海里的领海，确立了200海里的专属经济区，并为格陵兰岛和法罗群岛规定了200海里的捕鱼区域。1976年12月21日，丹麦公布了《第598号关于法罗群岛捕鱼区域敕令》，率先确立了用于测量法罗群岛周边捕鱼区域的直线基线。该敕令第1条规定：“法罗群岛周围水域内的捕鱼区域应当包括，除了内水之外，距离本敕令第2条提到的基线200海里（1海里＝1852米）的界限（渔场界限）所划定的水域。”该敕令的第2条规定：“依照本敕令第1条，测量渔场界限的直线基线应当按照指定的顺序连接下述各点……而划定”，并列出了12个基点坐标。依据该敕令，用于测量法罗群岛周围捕鱼区域界限的基线，应由连接该12个基点的12条线段相连而成。1976年12月21日，丹麦又公布了《第599号划定法罗群岛领海法令》，其中第1条规定：

> （1）法罗群岛的领海应当包括外部领水和内部领水。
>
> （2）外部领水的宽度应当自处于第2条规定的基线和距离该段基线3海里的一条界线之间的水域向外延伸。
>
> （3）内部领水包括位于第2条所规定的基线内的水域，比如海港、海港入口、泊船处、海湾、峡湾、海峡的水域及海水带。

该法令第2条规定：“按照第1条的规定，据以决定外部领水宽度的直线基线，应当依下述顺序连接下列各点……而划定”。通过比较这两份敕令，丁铎博士总结说第599号法令所列出的12个基点的坐标，与前文第598号敕令第2条的规定完全一致。显然，第599号法令再次肯定了第598号敕令中规定的法罗群岛的直线基线划法。

（五）印度尼西亚

印度尼西亚万隆伊斯兰大学法学院沙迪克•迪克迪克•穆罕默德教授首先介绍了印度尼西亚关于外国船舶和飞机在其群岛水域航行和飞越的相关法律规定：（1）《关于印度尼西亚水域的1996年第6号法》第18条第2款赋予了外国船舶和飞机在印度尼西亚群岛水域的群岛海道通过权；（2）《关于外国船舶和飞机行

使海道通过权通过指定群岛海道的权利和义务的 2002 年第 37 号政府条例》第 4 条规定了外国船舶和飞机在行使群岛海道通过权时应履行的义务；（3）《关于印度尼西亚水域的 1996 年第 6 号法》第 11 条和 12 条，以及《外国船舶在印度尼西亚水域行使无害通过权时的权利和义务的 2002 年第 36 号政府条例》（以下简称“《2002 年第 36 号政府条例》”）规定了外国船舶在领海和群岛水域的无害通过权；（4）《2002 年第 36 号政府条例》详细列出了不属于无害通过的一些情形。

即便印度尼西亚在群岛管理方面已经有相对完善的法律规定，穆罕默德教授指出印度尼西亚仍然需要应对来自海上的安全威胁和挑战，包括走私、人口贩运、非法开采资源和环境威胁、非法采伐和采砂、违反无害通过规定等。另外，印度尼西亚国内相关部门职责交叉重叠、缺少执法船舶、资金匮乏，这些也是导致印度尼西亚在管理群岛方面存在不足的原因。在发言最后，默罕默德教授强调国际合作的重要性，认为国际合作能够促进双边和区域性的海上安全，另外也强调印度尼西亚海军应发挥其在维护东南亚水域、南海地区的国际航运安全，以及促进 21 世纪海上丝绸之路方面的区域性作用。

（六）印度和缅甸

四川大学国际关系学院助理研究员郑凡博士的发言以《群岛原则在亚洲的起源与实践》为题，以印度和缅甸为例，检视了这两国沿群岛最外沿划定直线基线的实践，并从实践的背景与效果入手分析了印度与缅甸实践的动因。印度在第三次联合国海洋法会议上支持群岛原则同样适用于非群岛国。1976 年印度《领水、大陆架、专属经济区与其他海洋区域法案》第 2 条规定，将以相同的方式处理大陆与群岛的海洋区域界限；第 10 条规定，基线将留待中央政府公布。时隔 30 余年后，2009 年 5 月 11 日，印度外交部以通告的形式公布了直线基线的基点坐标，其中对安达曼和尼科巴群岛西侧与拉克沙群岛适用了直线基线。自 70 年代起，印度已与除巴基斯坦与孟加拉国之外的邻国完成划界，直线基线的效果不在于扩大专属经济区的面积，而是扩大内水、领海以及毗连区的面积。此外，在 2011 年印度环境与森林部针对安达曼和尼科巴群岛与拉克沙群岛发布的《岛屿保护区通告》中，主要采取的环境保护措施为海岸带管理，直线基线并未发挥作用。在经济与环境因素相对较弱时，印度实践表现出较强的安全考虑。自 2004 年印度发布了一系列海洋、海军战略文件，其中安达曼和尼科巴群岛与拉克沙群岛的重要地缘位置受到强调，印度还在这 2 个群岛分别部署了海军基地。而在 2008 年孟买遭受恐怖袭击之后，印度采取了一系列加强海岸安全的措施。从安全因素的角度来看，直线基线制度为印度的海岸防卫提供了便利，而特别就安达曼和尼科巴群岛与拉克沙群岛而言，直线基线制度使得印度可暂停经过其内水的航行，进而达到影响印度洋的战略目标。

在第三次联合国海洋法会议上，缅甸曾反对将群岛原则适用于非群岛国。1977年缅甸《领海与海洋区域法》“附件”说明缅甸采用的基线制度为混合基线，具体而言，缅甸大陆的绝大部分海岸线均采用直线基线，而其远洋群岛普雷帕里斯群岛与科科群岛则采用低潮线。在2008年12月5日《领海与海洋区域法修订法》中，缅甸补充了普雷帕里斯群岛与科科群岛的基点坐标。缅甸以这种方式将普雷帕里斯群岛与科科群岛的基线从低潮线改为了直线基线。自80年代起，缅甸已完成了与邻国在安达曼海的划界，普雷帕里斯群岛与科科群岛的直线基线主要扩大了内水、领海以及毗连区的面积，而非专属经济区。此外，环境保护并非缅甸的优先政策领域，既有的相关讨论也是针对沿岸群岛。相对而言，缅甸2008年实践中的安全因素更为突出。一方面，2008年5月29日缅甸通过了新宪法，标志着新的政治时代开启，安全策略也从国内逐步转向国外。另一方面，2008年11月缅甸与孟加拉国围绕孟加拉湾的油气开发与划界问题发生了海军对峙，在此次对峙中，缅方海军表现不佳，使得缅甸当局认识到海军与海岸安全的薄弱。在此视角下，直线基线为在此驻扎的海军提供了便利。

综合上述分析，郑凡博士总结指出，在亚洲国家的群岛原则实践中，安全因素自始起到了重要的推动作用。一方面，对安全因素的重视可以理解；另一方面也需尊重有重要国际航道经过这些群岛（不论是否构成群岛国）间水域或周边水域的现实。在共建21世纪海上丝绸之路的过程中，上述亚洲国家应形成的共识是：良好的海上秩序是保障海上安全以及“建设通畅安全高效的运输大通道”的共同基础。

（七）厄瓜多尔

厦门大学南海研究院博士研究生林亚将在其题为《非群岛国家远洋群岛适用直线基线制度研究》的发言中，对厄瓜多尔在管理加拉帕戈斯群岛方面的实践和法律做了介绍。1970年，厄瓜多尔通过了《第256-CLP号法令》，为加拉帕戈斯群岛划定了领海基线，测量点为群岛最外缘各岛的最外缘各点及低潮线。1971年，厄瓜多尔又通过了《第959-A号最高法令》，该法令为加拉帕戈斯群岛划定了领海基线，为8段直线，并宣布基线内水域为该国内水。1986年，厄瓜多尔宣布将加拉帕戈斯群岛基线内水域视作特别区域（即海洋资源保护区），同时还宣布直线基线向海15海里内的水域为生态保护区。2010年，厄瓜多尔颁布了《第450号法令》，命令并批准出版关于加拉帕戈斯群岛的海图，该图标绘了加拉帕戈斯群岛的直线基线。厄瓜多尔于2011年向联合国秘书长交存了《第450号法令》及其确立的相关内容。2016年9月9日，在加拉帕戈斯群岛的巴托洛梅岛，厄瓜多尔、哥斯达黎加、哥伦比亚三国总统签订了新的海洋保护区协议。同时，厄瓜多尔和哥斯达黎加还划定了两国的海上边界，并共享航海图。

综上所述，非群岛国家为其远洋群岛划定直线基线的做法由来已久，且涉及的国家分布范围很广，在《公约》生效之前，便已通过国家立法的形式而存在。这些非群岛国家对其远洋群岛单独或混合适用直线基线的做法，很大程度上丰富了相关国家对远洋群岛适用直线基线的国家实践。

二、非群岛国家适用群岛法律制度：演进中的国际习惯法？

非群岛国家远洋群岛的基线问题，虽然没有在联合国第三次海洋法会议上得到解决，但这类国家的丰富实践为国际法上群岛概念提供了新的发展方向。基于相关国家纷纷将直线基线适用于远洋群岛的实践，南京大学法学院张华副教授和河海大学法学院王志坚副教授分别以《中国远洋群岛适用直线基线的合法性：国际习惯法的视角》和《南中国海的群岛法律制度：特殊国际习惯法视角》为题，探讨了非群岛国家适用群岛法律制度这一新的国际习惯法规则是否正在形成。

国际习惯法由国际惯例和法律确信组成。构成国际惯例的国家实践应具有统一性、持续性和普遍性，同时需经历一定的时间阶段。所谓“法律确信”，通俗而言，就是指国家将国际惯例作为法律来遵守。换言之，国家遵守国际惯例的动机并非出于礼让或国际道德，而是将其作为具有法律约束力的规则来遵守。张华副教授在其发言中从这两个方面对相关国家将直线基线适用于远洋群岛的实践进行了考察。首先，自上世纪 60 年代以来，丹麦、厄瓜多尔、挪威、英国、法国、澳大利亚、西班牙、葡萄牙、缅甸、印度等国纷纷颁布国内法令，宣布将直线基线适用于远洋群岛，这种实践一定程度上符合了统一性、持续性和普遍性的要求。张华副教授指出，虽然各国适用直线基线的实践很大程度上取决于群岛的地理特征，导致各国使用直线基线的表现形式不一，但这并不影响国家实践的统一性和持续性。其次，虽然国际社会有 200 多个国家，拥有远洋群岛的国家毕竟只是其中一小部分，但是使用直线基线的国家却均是在海洋实践方面具有代表性的国家，因此并不排除国家实践的普遍性。最后，从时间方面来看，虽然相关国家对远洋群岛适用直线基线的时间不等，但张华副教授指出，上述国家从 20 世纪 60 年代就开始明确以国内立法的形式规定远洋群岛适用直接基线制度，而到目前为止，已经历了将近 50 年左右的时间。

其次对于法律信念，张华副教授指出各国都是通过颁布专门的国内法规，明确了远洋群岛应适用直线基线，同时注明了相关基点的地理坐标，并公布了海图。而像丹麦和厄瓜多尔等国还先后就同一群岛制定了一系列法规，以明确其直线基线，这些足以证明这部分国家坚持远洋群岛适用直线基线应该是一种法律规则。另外，在联合国第三次海洋法会议协商期间，挪威、印度、厄瓜多尔等多个国家都

提出远洋群岛应适用直线基线制度，并且在《公约》生效后，这些国家也始终坚持这一实践。

但是值得注意的是，由于国际社会成员众多，国际习惯法在形成过程中难免会遭到个别国家的反对。美国对直线基线持本能的排斥态度，但凡有国家适用直线基线划定领海基线时，美国国务院都会进行抗议。那么，美国一贯的反对态度是否会否定国际习惯法规则的形成？就此问题，张华副教授认为，在国际习惯法的形成过程中，一直持反对态度的国家有可能构成“持续反对者”。但需要注意的是，除美国外，国际社会对远洋群岛适用直线基线基本上采取了沉默的态度。因此，美国的持续反对并不妨碍“远洋群岛可以适用直线基线”这一国际习惯法规则的形成。

三、群岛法律制度和中国

作为南海争端的重要一方，中国对其远洋群岛——南海诸岛的立场和行动，对该争端的影响和顺利解决有着不容忽视的重要意义。国家海洋局海洋发展战略所张海文所长在其发言中，对《公约》的有关用词进行了评介，并重点介绍了我国在南海地区的政策立场，强调中国一贯将断续线内的东沙群岛、西沙群岛、中沙群岛和南沙群岛分别作为整体，以表明中国对南海诸岛的领土主权主张。中国完全可以借鉴其他拥有远洋群岛的非群岛国家的国家实践，将直线基线适用于我国的远洋群岛。

（一）南沙群岛作为一个整体的法律分析

香港大学梅利莎•洛亚博士研究生从将南沙群岛作为一个整体的角度对群岛法律制度进行了阐述，细致地比较了对日和平协定多个草案和正本之间用词的差异，包括涵盖范围以及单复数等等。报告人对比了美国和日本在1951年签订和平协定前后用词的区别，指出通过该协定日本和美国认为应将地物和周围水域作为一个整体确定领海制度，然后划界，避免将这一整体割裂。

张海文所长和林亚将同学在其发言中重点从地理、历史、法律三方面对中国南海四大群岛的整体性进行了分析。首先，在地理方面，根据1983年中国地名委员会授权公布的《南海诸岛部分标准地名》，西沙群岛总计有22个岛屿、7个沙洲及其他的滩、沙等自然地形。南沙群岛是中国南海诸岛中位置最南，岛屿礁滩最多、分布最广的一个群岛。根据1983年的《南海诸岛部分标准地名》，南沙群岛主要由6个群礁和近200个岛、礁、滩、沙等自然地形组成。

从历史上来看，中国政府是最早对南海诸岛及相关水域行使主权和管辖权的。

早在先秦时代，我国壮侗语族民族的共同祖先骆越人，已建立起中国岭南地方政权“骆越方国”，并根据中央王朝的指令，开发和管理岭南和南海。秦汉以后历朝历代直到今天，中国一直都在管理和开发南海。公元前 221 年，秦始皇统一六国后，分全国为 42 郡，其中南海郡管辖包括西沙群岛在内的整个南海诸岛。北宋时期（公元 960—1127 年），中国政府形成较为明确的海防观念，并在南海海域进行巡防。到了元代（公元 1127—1368 年），中国政府的海上管控能力已经覆盖至南海中南部。明朝时期（公元 1368—1644 年），海上打击海盗、对南海诸岛及相关海域的管控和巡辖更进一步体现了中国政府对南海的管理。

除了政府层面，中国先民至迟自汉代就开始开发利用南海。在古代，人们以“涨海”泛称南海。中国先民在南海进行开发利用的记载开始频现于典籍之中。三国时期（公元 220—265 年），吴国将领康泰所著的《扶南传》不仅提到了南沙群岛，而且对其形态描述道：“涨海中，到珊瑚洲，洲底有盘古，珊瑚生其上也。”唐朝（公元 618—907 年）杜佑《通典》记载，“五岭之南，涨海之北，三代以前，是为荒服。秦平天下，开置南海等三郡”。晋朝（公元 266—420 年）谢承《后汉书》记载，“交阯七郡贡献，皆从涨海出入”，说明汉代交阯七郡每年向朝廷交纳赋税主要通过海路。另外，南宋（公元 1127—1279 年）周去非在《岭外代答》中记载，“合浦产珠之地，名曰断望池，在海中孤岛下，去岸数十里，池深不十丈。蜑人没而得蚌，剖而得珠”，记载了宋代渔民在南海开采珍珠的情况。

在法律方面，1934 年 12 月 21 日，水陆地图审查委员会第 25 次会议审定了中国南海各岛屿的中英文岛名，并在 1935 年 1 月编印的第一期会刊上刊登了《中国南海各岛屿华英名对照表》，审定公布了南海诸岛 136 个岛礁名称（含 4 个群岛名），其中西沙群岛 28 个，团沙群岛（即今南沙群岛）96 个。这是中国政府第一次全面公布南海诸岛地名，并且第一次由官方将南海诸岛分为东沙群岛、西沙群岛、南沙群岛与团沙群岛四个部分。1947 年 3 月，中国政府在太平岛设立南沙群岛管理处，隶属广东省。中国还在太平岛设立气象台和电台，自该年 6 月起对外广播气象信息。在对南海诸岛重新进行地理测绘的基础上，中国政府于 1947 年组织编写了《南海诸岛地理志略》，审定《南海诸岛新旧名称对照表》，绘制完善标有南海断续线的《南海诸岛位置图》、南沙群岛图、太平岛图等。1948 年 2 月，中国政府公布《中华民国行政区域图》，包括其附图《南海诸岛位置图》。河海大学法学院王志坚副教授还指出，在正式公布南海诸岛名称后的几十年间，南海周边国家在内的国际社会并未对此提出异议或表示反对，很多国家甚至将这些名称采纳到其公开出版的地图中。

（二）我国南沙群岛适用基线制度的注意事项

依据上述分析，林亚将同学指出，中国对东沙群岛、西沙群岛、中沙群岛、南

沙群岛的群岛整体性主张，与非群岛国家远洋群岛的国家实践是一致的。但是，在对南海群岛适用基线制度的同时，中国也应当对周边国家的利益加以考虑和尊重。比如南沙群岛直线基线内的水域为内水，但是中国可以在管理该水域时进行某种程度的权利让渡，比如参照群岛水域的管理方法进行管理，允许他国船只在南沙群岛直线基线内水域拥有海道通行权、无害通过权，保障国际航行自由，尊重其他国家在南沙群岛水域客观存在的传统捕鱼权等，这是一种权利的自制，也是表达中国与南海周边国家和平相处的温和态度。

（三）群岛航道的分析

厦门大学南海研究院博士研究生景孝杰在其关于群岛海道的问题与实践的报告中指出，《公约》规定：群岛国可指定适当的海道和其上的空中航道，以便外国船舶和飞机继续不停和迅速通过或飞越其群岛水域和邻接的领海（第53条第1款）。所有船舶和飞机均享有在这种海道和空中航道内的群岛海道通过权（第53条第2款）。这种海道和空中航道应穿过群岛水域和邻接的领海，并应包括用作通过群岛水域或其上空的国际航行或飞越的航道的所有正常通道，并且在这种航道内，就船舶而言，包括所有正常航行水道，但无须在相同的进出点之间另设同样方便的其他航道（第53条第4款）。群岛国在指定或替换海道或在规定或替换分道通航制时，应向主管国际组织提出建议，以期得到采纳。该组织仅可采纳同群岛国议定的海道和分道通航制；在此以后，群岛国可对这些海道和分道通航制予以指定、规定或替换（第53条第9款）。然而，自《公约》1994年生效以来，仅印度尼西亚和菲律宾指定了群岛海道，且两国指定群岛海道的方式也不同。景孝杰同学在发言中结合印度尼西亚和菲律宾指定群岛海道的实践，分析《公约》规定存在的不足以及群岛海道指定实践中所产生的问题，并提出建议。

A Review of the "International Symposium on Distant Offshore Archipelago Management and the 21st Century Maritime Silk Road: State Practice and Lessons Learnt"

ZHONG Hui*

Abstract: On 4 November 2017, the "International Symposium on Distant Offshore Archipelago Management and the 21st Century Maritime Silk Road: State Practice and Lessons Learnt", sponsored by Xiamen Ocean and Fisheries Bureau, was successfully hosted by Xiamen University South China Sea Institute on the campus of Xiamen University. This symposium is one of the activities held during Xiamen International Ocean Week. The participants primarily discussed and communicated with each other over the following topics: (a) national laws and practice in relation to distant offshore archipelago management; (b) State practice concerning distant offshore archipelago and China. More than 40 people attended the symposium, including scholars and researchers from Australia, the United Kingdom, Portugal, Indonesia and China, and experts and officials from the Department of Boundary and Ocean Affairs of the Ministry of Foreign Affairs of China, China Institute for Marine Affairs, and Xiamen Ocean and Fisheries Bureau. The symposium, by exploring many States' experiences in distant offshore archipelago management, provides legal foundation for China's building of archipelagic regime in the South China Sea region.

Key Words: Non-archipelagic State; Distant offshore archipelago; International customary law; South China Sea region

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In order to explore the possibilities to apply the archipelagic regime to non-archipelagic States, Xiamen University South China Sea Institute, Xiamen Ocean and Fisheries Bureau, and the Collaborative Innovation Center for 21st-Century Maritime Silk Road Studies, jointly held the "International Symposium on Distant Offshore Archipelago Management and the 21st Century Maritime Silk Road: State Practice and Lessons Learnt".

Prof. FU Kuenchen of Xiamen University South China Sea Institute gave an opening address to the symposium. In the address, he briefly introduced the history and development of Xiamen University, and the research areas and achievements of South China Sea Institute. He warmly welcomed all the attending experts, scholars and officials to share their insights into the State practice and laws in relation to mid-ocean archipelago management. Mr. LIN Guozhong, Deputy Director of Xiamen Ocean and Fisheries Bureau, expressed the hope to learn from foreign States' experiences in mid-ocean archipelago management, with the purpose of providing legal basis for establishing archipelagic regime in the South China Sea region. Mr. XIAO Jianguo, Deputy Director General of Department of Boundary and Ocean Affairs of the Ministry of Foreign Affairs of China, introduced China's legal regime of baselines based on historical and modern documents. He emphasized that the role of customary international law can not be ignored, and China's historic rights to the relevant waters in the South China Sea cannot be repealed by the United Nations Convention on the Law of the Sea (UNCLOS). China firmly protects its territorial sovereignty, and at the same time respects international rule of law. It insists on settling disputes through peaceful and friendly negotiations, in order to maintain peace and stability in the South China Sea region.

However, in the Sino-Philippine Arbitration on the South China Sea Disputes, the Arbitral Tribunal held that the UNCLOS failed to provide that a group of islands, such as the Nansha Islands, may jointly generate maritime areas in its entirety. The Tribunal, accordingly, transformed the issue concerning the status of the disputed Nansha Islands as a single unit into an issue regarding the interpretation and application of UNCLOS Article 121(3) on the status of island. In that case, the Tribunal determined, individually, the legal status of some islands and maritime features that constituted an important part of an archipelago. The Tribunal started by "defining the maritime entitlement of an island group based on the status of a single feature", which is obviously a logic presumption. And this presumption

denies, ahead of time, China's claims of rights in the South China Sea.

Notably, the Third United Nations Conference on the Law of the Sea (UNCLOS III) merely addressed the issue concerning the straight baselines of archipelagic States, without properly discussing or resolving the issue concerning the application of the archipelagic regime to non-archipelagic States. During the early stage of negotiations at the UNCLOS III, non-archipelagic States possessing distant offshore archipelagos proposed that, the newly-established archipelagic regime should be applied, indiscriminately, to all archipelagos. When the issue on the mid-ocean archipelagos of non-archipelagic States was excluded from the negotiation table of UNCLOS III, a significant number of States voiced their objections. At the last two sessions of the UNCLOS III, many States continued to voice their concerns over the issue and requested the conference to reconsider it. Even at the last stage of UNCLOS III, the relevant non-archipelagic States still claimed that the issue on the mid-ocean archipelagos of non-archipelagic States was a matter unresolved under the UNCLOS.

Now that this issue is not regulated by the UNCLOS, it should, according to the Preamble, "be governed by the rules and principles of general international law." In fact, the abundant practice of non-archipelagic States possessing distant offshore archipelagos, including China, provides a new direction for the development of the archipelagic concept on international law. China applied, in 1996 and 2012 respectively, straight baselines to Xisha Islands and Diaoyu Islands, and it may possibly apply straight baselines to other groups of islands in the South China Sea.

Centering on two topics – (a) national laws and practice in relation to distant offshore archipelago management; (b) State practice concerning distant offshore archipelago and China, this symposium explored the legality of the application of archipelagic regime to non-archipelagic States, which provides a legal basis for China's building of archipelagic regime in the South China Sea region.

I. Distant Offshore Archipelago Management: National Laws and State Practice

The UNCLOS does not expressly provide for the drawing of the limits of territorial seas for distant offshore archipelagos, however, no matter before the UNCLOS III or after the adoption of UNCLOS, continental States possessing such offshore archipelagos have never stopped applying the straight baselines to draw

their territorial seas. This symposium examined some typical State practice in this regard.

A. Australia

Prof. Stuart Kaye, director of Australian National Center for Ocean Resources and Security, University of Wollongong, Australia, gave a presentation titled "Australia's Remote Islands: Cooperation and Management". He introduced Australia's experiences in this sphere based on two of Australia's remote island groups: (a) Ashmore and Cartier Islands; and (b) Heard and McDonald Islands. Since traditional Indonesian fishers visited Ashmore and Cartier Islands regularly for fishing, Australia and Indonesia signed a memorandum of understanding (MOU) in 1974, which was revised and reconfirmed in 1989. The revised MOU arrangement imposes stricter limitations on the exercise of traditional fishing rights by setting out the following provisions: fishers shall not use engines or freezers; fishers shall provide demonstrated history of the activity, which limits participants to those from certain regions in Indonesia with a fishing record of at least four generations; fishers are permitted to land on Ashmore Island only; they are limited to fish certain stocks; marine reserves should be established around Ashmore and Cartier Islands.

With respect to Heard and McDonald Islands in South Indian Ocean, Australia concluded an agreement with France in 2005, pursuing to improve the management of its distant islands. In accordance with the agreement, the two States aim to promote cooperative fisheries surveillance and cooperative research on marine living resources, and to establish common procedures to carry out fisheries management and surveillance, including installing Vessel Monitoring System (VMS) on fishing vessels, and specifying vessel marking requirements. The agreement also contains articles concerning enforcement cooperation, especially the provision of domestic support to permit hot pursuit and cooperation, which involves issues such as evidence, differences in enforcement, detention on board, and costs.

B. The United Kingdom

Dr. Sophia Kopela, a lecturer of Lancaster University, introduced UK's law and practice in relation to archipelago management. Her presentation includes four

parts: the first part is about the UK's position towards the archipelagic regime. Specifically, before the UNCLOS III, the UK rejected the archipelagic concept due to the need to preserve freedom of the high seas and navigational interests; during the UNCLOS III, the UK put forwards its draft proposals, stating that "the provisions of this article [on archipelagic States] are without prejudice to any rules of this Convention and international law applying to islands forming an archipelago which is not an archipelagic State"; the second part discusses the application of straight baselines to some groups of islands, including Falkland Islands, Turks and Caicos, South Georgia and the South Sandwich, and Outer Hebrides; the third part examines the role of archipelagos in maritime delimitation in cases such as USA (Puerto Rico and US Virgin Islands) – UK (British Virgin Islands) 1993 Maritime Delimitation Treaty and USA (USA Virgin Islands) – UK (Anguilla) 1993 Maritime Delimitation Treaty. Dr. Koplea argued that an island group should be considered as a single unit for maritime delimitation purposes, taking into account the use of base points in the circumference of the archipelago and the effect of islands; the fourth part, taking South Georgia and South Sandwich Islands and British Indian Ocean Territory as examples, introduces the UK's regulations and experiences with respect to the management of archipelagic waters and environmental protection. And one experience is the management of archipelagos via the establishment of marine protected areas (MPAs).

At the end of her presentation, Dr. Kopela concluded the UK's position and practice by saying: the UK was reluctant to recognize the archipelagic concept due to its impact on the high seas especially related to freedom of navigation; however, diverse practice can be detected. For example, the UK adopted straight baselines to some archipelagos; some of its maritime delimitation agreements take into account the unity of the archipelago; and the UK conserves the ecological interdependence of the maritime features of the archipelago via the establishment of MPAs.

C. Portugal

Prof. Vasco Becker-Weinberg of University of Lisbon, Portugal, firstly gave a brief overview of the discussions and law-making process concerning the archipelagic issue at the UNCLOS III. His presentation then focused on Portugal's legal system with regards to islands. He asserts that, currently, Portugal does not have any legally binding regulations regarding the baselines of mid-ocean archipelagos or relevant practice, since Law n.34/2006, 8 July has repealed Decree-

Law n. 52/1985 dealing with archipelagic baselines.

D. Spain, Norway and Denmark

Dr. DING Duo, an assistant research fellow at the National Institute for South China Sea Studies, introduced, in his presentation "Practice of Non-Archipelagic States in Relation to Mid-Ocean Archipelagos and Its Lessons for China", Spain's, Norway's and Denmark's laws and practice pertinent to distant offshore archipelago management.

The relevant legislation of Spain provides for the method of straight baselines, through which it establishes 12 nautical miles (nm) of territorial sea, 24 nm of contiguous zone, and 200 nm of EEZ in the Atlantic region, as well as a fishery conservation zone in the Mediterranean Sea. The Spanish government issued the Royal Decree No. 2510/1977 on 5 August 1977, whose Article 1 provides for the use of straight baselines for the delimitation of Spanish jurisdictional waters near the Canary Islands. In accordance with the delimitation method of the Royal Decree, straight baselines are drawn by joining the outermost points of the six islands – Lanzarote, Fuerteventura, Alegranza, Graciosa, Montana Clara and Labos. However, the segments of these baselines are not completely connected, without fully enclosing the six islands. Act No. 15/1978 on the Economic Zone of 20 February 1978, Article 1, specifies that,

> *In a belt of sea to be called the exclusive economic zone, which shall extend from the outer limit of the Spanish territorial sea for a distance of 200 nautical miles from the base lines used to measure the breadth of the territorial sea, the Spanish State shall have sovereign rights for the purposes of exploring and exploiting the natural resources of the seabed, subsoil thereof and its superjacent waters. In the case of archipelagos, the outer limit of the economic zone shall be measured from straight base lines joining the outermost points of the islands and islets forming the archipelagos, so that the resulting perimeter conforms to the general configuration of each archipelago.*

The final provisions of the Act state that "The application of the provisions of this law shall be limited to the Atlantic coasts of Spain, both of the mainland and the islands, including the coasts on the Cantabrian Sea…". The 1978 Act, accordingly, reconfirmed the straight baselines of the Canary Islands.

Dr. DING also gave the audience an overview of Norway's practice and law in relation to the management of Svalbard. The Royal Decree of 25 September 1970 concerning the Delimitation of the Territorial Waters of Parts of Svalbard represents Norway's early legislation concerning the application of the archipelagic regime to Svalbard. The decree stipulates that "The boundary of Norway's territorial waters in the area of Svalbard, from Verlegenhuken to Halvmaneoya and around Bjornoya and Nopen shall be drawn … four nautical miles outside and parallel with straight baselines drawn between the following points." This decree also lists the coordinates of 83 points for the drawing of straight baselines, but straight baselines are separately drawn for two islands far away from Svalbard. On 1 June 2001, Norway promulgated the Regulations Relating to the Limits of the Norweign Territorial Sea around Svalbard, which states that "The limit of the Norwegian territorial sea around Svalbard is to be drawn … outside and parallel to the straight lines between the points listed below by coordinates." The Regulations, attached with large-scale charts, lists the coordinates of 196 points. In comparison, it covers more islands than the Royal Decree of 25 September 1970, and provides for the straight baselines of Svalbard in a more specific way.

Lastly, Dr. DING introduced Denmark's practice and law in relation to distant offshore archipelago management. The Faroe Islands is an archipelago lying between Norway, Scotland and Iceland in the North Atlantic. Consisting of 18 islands or islets, 17 of which are inhabited, the archipelago has an area of 1398.9 square kilometres. The Faroe Islands is currently an autonomous region within the Kingdom of Denmark. The Danish legislation provides for the use of straight baselines, based on which Denmark claims 12 nm of territorial seas, established 200 nm of EEZ, and 200 nm of fishing territory in the waters around the Greenland Island and the Faroe Islands. The Decree No. 598 of 21 December 1976 – The Fishing Territory of the Faroe Islands, is the first Danish legislation establishing the straight baselines for measuring the fishing territory in the waters around the Faroe Islands. Section 1 of the Decree states, "The fishing territory in the waters around the Faroe Islands shall comprise, in addition to the internal waters, the waters delimited by a line (the fishing limit) at a distance of 200 nautical miles (1 nautical mile = 1,852 metres) from the baselines mentioned in section 2 of this Decree." Section 2 of the Decree states, "The straight baselines from which, pursuant to section 1 of this Decree, the fishing limit shall be measured, shall be drawn between the following points … in the sequence indicated". The Decree also lists the coordinates of 12 points. In line with the Decree, the baselines, from

which the limit of the fishing territory in the waters around the Faroe Islands is measured, shall be composed of 12 line segments joining the 12 points above. On 21 December 1976, Denmark issued the Ordinance No. 599 on the Delimitation of the Territorial Sea around the Faroe Islands. Section 1 of the Ordinance reads,

> *(1) The territorial sea of the Faroe Islands shall consist of external and internal territorial waters.*
>
> *(2) The breadth of the external territorial sea shall extend from the parts of the sea which are limited internally by the baselines set out in section 2 and externally by a line every point of which is at a distance of 3 nautical miles from the respective baselines.*
>
> *(3) The internal territorial sea shall consist of water areas such as harbours, harbour entrances, roadsteads, bays, fjords, sounds and belts which are situated within the baselines set out in section 2.*

Section 2 provides that "The straight baselines from which, pursuant to section 1, the breadth of the external territorial sea shall be determined shall be drawn between the following points … in the sequence stated below". As concluded by Dr. DING, a comparison between the decree and the ordinance shows that the coordinates of the 12 points listed in Ordinance No. 599 are completely consistent with the provisions of Decree No. 598, Section 2. The Ordinance No. 599, obviously, reconfirmed the method for drawing the straight baselines of the Faroe Islands as specified in Decree No. 598.

E. Indonesia

Prof. Sodik Dikdik Mohamad at the Faculty of Law, Bandung Islamic University Indonesia, first introduced Indonesia's legislation on the rights of foreign vessels and aircraft within or over Indonesia' archipelagic waters: (1) Article 18(2) of the Law No. 6 of 1996 on the Indonesian Waters confers foreign vessels and aircraft the right of archipelagic sea lanes passage in the archipelagic waters of Indonesia; (2) Article 4 of the Government Regulation No. 37 of 2002 on Rights and Duties of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lanes Passage Through Designated Archipelagic Sea Lanes imposes the duties on foreign vessels and aircraft in the exercise of their right of archipelagic sea lanes passage; (3) Articles 11 & 12 of the Law No. 6 of 1996 on the Indonesian Waters

and Government Regulation No. 36 of 2002 on Rights and Duties of Foreign Ships Exercising the Right of Innocent Passage Through Indonesian Waters provide for the rights of innocent passage of foreign ships through the territorial and archipelagic waters; (4) Government Regulation No. 36 of 2002 lists a number of activities that can not be qualified as innocent passage.

Even though Indonesia has a relatively well-developed regime on archipelago management, it still has to, as Prof. Mohamad rightly pointed out, face maritime security threats and challenges, including smuggling, human trafficking, illegal exploitation of natural resources and environmental threats, illegal logging and sand mining, and violation of the rules of innocent passage. Additionally, Indonesia also faces other problems, including overlapping of roles between the relevant departments of Indonesia, and lack of financial support and law enforcement vessels. These problems might have contributed to Indonesia's insufficiency in the management of archipelagos. At the end of his presentation, Prof. Mohamed underscored the significance of international cooperation, believing that international cooperation could boost bilateral and regional security at the sea. He also emphasized that the Indonesian Navy should fulfill its role as a regional player in ensuring the security of international shipping in the South East Asian waters and the South China Sea, and facilitating the 21st-Century Maritime Silk Road.

F. India and Myanmar

Dr. ZHENG Fan, an assistant research fellow at School of International Studies, Sichuan University, gave a presentation titled "Origin and Practice of Archipelagic Principle in Asia". Taking India and Myanmar as examples, Dr. ZHENG examines the two States' drawing of straight baselines by joining outermost points of the islands, and analyzes the driving forces for such practice based on its background and effects. During the UNCLOS III, India called for the application of archipelagic principle to non-archipelagic States also. And the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, section 2, draws the limit of the maritime zone of India's mainland and that of its island groups in the same way. And section 10 of this Act provides that the baselines would be proclaimed by the Central Government. About three decades later, the Ministry of External Affairs of India announced the coordinates of the points of the straight baselines through a notification dated 11 May 2009. Notably, straight baselines are applied to the west side of the Andaman

and Nicobar Islands (hereinafter "A&N Islands") and the Lakshadweep Islands. Since the 1970s, India has already delimited its maritime boundaries with its neighbors except Pakistan and Bangladesh. The use of straight baselines will not significantly enlarge the area of EEZ, but the area of internal waters, territorial sea and contiguous zone. Additionally, the Ministry of Environment and Forests released the Island Protection Zone Notification in 2011, aiming to protect the coastal environment of the A&N Islands and the Lakshadweep Islands. However, this notification primarily uses coastal zone management as a measure to protect the environment, but the role of straight baselines did not come into play. When economic and environmental issues are not severe, India shows great security concerns. India promulgated a series of documents on maritime military strategy after 2004. These documents underscore the important geographical location of A&N Islands and Lakshadweep Islands, where naval bases are deployed. Following the Mumbai terrorist attack in 2008, India adopted a series of measures to beef up its coastal security. From the security perspective, the system of straight baselines facilitates India's coast guard operation. In the case of A&N Islands and Lakshadweep Islands, this system may empower India to suspend the passage of foreign vessels through its internal waters, further to accomplish its strategic goals to influence the India Ocean.

Myanmar opposed to the application of archipelagic principle to non-archipelagic States at the UNCLOS III. According to the Annex to the Territorial Sea and Maritime Zones Law, 1977, Myanmar uses mixed baselines: straight baseline for most coasts of its mainland, and low-water line for its distant offshore islands – Preparis Islands and Co Co Islands. In the Law Amending the Territorial Sea and Maritime Zones Law, 5 December 2008, Myanmar listed the coordinates of the base points of Preparis Islands and Co Co Islands. By doing so, it changed the baselines of these two island groups from low-water lines to straight baselines. Since the 1980s, Myanmar has settled the maritime boundaries with its neighbors in the Andaman Sea. The straight baselines of Preparis Islands and Co Co Islands primarily extend the area of Myanmar's internal waters, territorial sea and contiguous zone, rather than that of EEZ. In addition, environmental protection is not a priority in Myanmar, and the existing discussions are solely about coastal islands. Comparatively, Myanmar's practice of 2008 suggests that it has salient security concerns. On the one hand, on 29 May 2008, the new Constitution of Republic of the Union of Myanmar was adopted, which marks the opening of a new political era. The new political era changed the State's security strategy from

domestic-oriented to foreign-oriented. On the other hand, in November 2008, due to conflicts over hydrocarbon exploration and maritime delimitation in the Bay of Bengal, the Myanmar Navy had a standoff with the Bangladesh Navy, during which the former was said to have made a poor showing. Then the Myanmar regime started to recognize the deficiencies in its naval capabilities and coastal security. In that case, the application of straight baselines facilitates the operation of the naval forces stationed on the islands.

Based on the foregoing analysis, Dr. ZHENG concludes that security concern, from the very beginning, is an essential driving force for States to use the archipelagic principle in Asia. Such concern is understandable on the one hand. On the other hand, we should respect the fact that there are key international shipping lanes passing through the waters between or surrounding these archipelagos, whether they constitute an archipelagic State or not. During the joint construction of the 21st-Century Maritime Silk Road, the Asian States discussed above need to reach the following consensus: good maritime order is the foundation both for national maritime security and the "smooth, secure and efficient transport routes".

G. Ecuador

Mr. LIN Yajiang, a Ph. D student of Xiamen University South China Sea Institute, introduced Ecuador's practice and law in relation to the management of the Galapagos Islands, in his presentation entitled "A Study on the Application of Straight Baseline Regime to Mid-Ocean Archipelagos of Non-Archipelagic States". In 1970, Ecuador adopted the Decree No. 256-CLP. The decree drew the baselines, at the low-water line and the outermost points of the outermost islands of the Galapagos Islands group, from which the breadth of territorial sea of the Galapagos Islands is measured. In 1971, Ecuador passed the Supreme Decree No. 959-A, which determines the baselines from which the territorial sea of the Galapagos Islands is measured. The baselines are composed of eight segments of straight lines. The decree declared that the waters within the baselines were internal waters of Ecuador. In 1986, Ecuador announced that the waters enclosed within the baselines of the Galapagos Islands should be treated as a special zone (i.e., marine resources protected area), and the waters within 15 nm measured from the straight baselines should constitute an ecological preservation area. In 2010, Ecuador enacted the Decree No. 450, which required and approved the publishing of a chart of the Galapagos Islands. The chart indicates the straight baselines of the

Galapagos Islands. Ecuador deposited Decree No. 450 and the contents established thereby to the Secretary General of the United Nations in 2011. On 9 September 2016, the presidents of Ecuador, Costa Rica, and Columbia signed a new agreement concerning marine protected areas on the Bartolomé Island of the Galapagos Islands group. At the meantime, Ecuador and Costa Rica had their maritime boundaries delimited, and agreed to share their charts.

To sum up, a significant number of non-archipelagic States have drawn straight baselines for their distant offshore archipelagos. This practice has continued for a long period of time, involving a wide range of States. Even before the entry into force of the UNCLOS, many States had done so by adopting national legislations. These non-archipelagic States' application of straight baselines or straight baselines mixed with other types of baselines, to a great extent, enriched State practice in relation to the application of straight baselines to distant offshore archipelagos.

II. Application of the Archipelagic Regime to Non-Archipelagic States: Customary International Law in Evolution?

The issue concerning the baselines for mid-ocean archipelagos of non-archipelagic States failed to be resolved during the UNCLOS III, the practice of such States, however, provides a new direction for the development of the archipelagic concept in international law. Based on the abundant State practice with respect to the application of straight baselines to mid-ocean archipelagos, Associate Prof. ZHANG Hua at the School of Law, Nanjing University, and Associate Prof. WANG Zhijian of Hohai University, expressed their views in the presentations titled "China's Application of Straight Baselines to the Mid-Ocean Archipelagos: Customary International Law as an Alternative" and "Archipelagic Regime of South China Sea: A Perspective from Special Customary International Law", respectively. In the presentations, the two professors explore whether a new rule of customary international law is being formed regarding the application of archipelagic regime to non-archipelagic States.

The existence of customary international law is determined by two elements: general practice and *opinion juris*. General practice requires the uniformity, consistency and generality of State practice, which needs the passage of a period of time. And "*opinion juris*" refers to the motive for States to abide by general practice as law. To put it in another way, the motive for States to abide by general practice

is not out of comity or international ethics, but to follow it as legally-binding rules. On the basis of these two elements, Associate Prof. ZHANG examines the relevant States' application of straight baselines to mid-ocean archipelagos. Firstly, since the 1960s, Denmark, Ecuador, Norway, the UK, France, Australia, Spain, Portugal, Burma and India have proclaimed, through domestic laws or decrees, that straight baselines should be applied to their mid-ocean archipelagos. Such practice, to some extent, met the requirements of uniformity, consistency and generality. In the view of Associate Prof. ZHANG, although State practice with respect to the application of straight baselines largely depends on the geographic features of archipelagos, which leads to the diverse methods that different States employ to apply the straight baselines, this does not affect the overall uniformity and consistency of the State practice. Secondly, compared to over 200 members of the international community, the number of States applying straight baselines to mid-ocean archipelagos seems to be limited. While taking into account the fact that those States are representative in ocean-related practice, one may know that their practice represents the mainstream in international community. Lastly, in terms of duration, the relevant States have applied straight baselines to mid-ocean archipelagos for different periods of time, however, as pointed out by ZHANG, these States have applied straight baselines to mid-ocean archipelagos through making domestic legislations since the 1960s. Up until now, this practice has continued for half a century approximately.

With respect to *opinion juris*, Associate Prof. ZHANG argued that many States stipulated, through domestic laws or decrees, that straight baselines should be applied to mid-ocean archipelagos. Such laws or decrees not only listed the geographic coordinates of the base points, but also annexed maps or charts. Some States, like Denmark and Ecuador, even promulgated a series of legislations on some specific archipelagos so as to indicate their straight baselines. These legislations demonstrate that the States concerned consider the application of straight baselines to mid-ocean archipelagos as legal rules. Additionally, during the negotiating stage of UNCLOS III, Norway, India, Ecuador and many other States proposed that the regime of straight baseline should be extended to mid-ocean archipelagos. Even after the entry into force of the UNCLOS, these States still maintain this practice.

Notably, due to the large number of the members in the international community, a rule of customary international law, during its formation, would inevitably meet protests from individual States. The United States instinctively rejects the application of straight baselines. Whenever a State applies the regime of

straight baselines, the US Department of State would express strong protest. The problem is, whether the United States' persistent objection would deny the existence of a customary rule? In the view of ZHANG, during the formation process of a new customary rule, a State persistently lodging objection might become a "persistent objector". However, other States in the international community, except the United States, keep silent to some States' application of straight baselines to their mid-ocean archipelagos. In that case, the persistent protests of the United States cannot preclude the "application of straight baselines to mid-ocean archipelagos" from forming a rule of customary international law.

III. Archipelagic Regime and China

As a party to the South China Sea disputes, China's position to and actions against its distant offshore archipelagos, i.e., the South China Sea Islands, have great impact on the disputes and big significance on their settlement. Director ZHANG Haiwen of China Institute for Marine Affairs, in her presentation, made comments on some terms of UNCLOS, and primarily analyzed China's policies and position to the South China Sea region. She underscores that, China has consistently treated the Dongsha Islands, Xisha Islands, Zhongsha Islands, and Nansha Islands within the dashed-line as four groups of islands, with each constituting a single unit, based on which China claims territorial sovereignty over the South China Sea Islands. China could, by reference to the State practice of other non-archipelagic States having mid-ocean archipelagos, apply straight baselines to its archipelagos in the South China Sea.

A. Legal Analysis on the Nansha Islands as a Single Unit

Melissa H. Loja, a Ph. D student of the University of Hong Kong, elaborated on the archipelagic regime from the perspective of treating the Nansha Islands as a single unit. She carefully examined the differences, including the form and scope, of some terms used in the drafts and text of Japanese peace treaties. She also noted the differences between the terms used by the United States and Japan before and after the execution of the peace treaties. Based on the treaties, the United States and Japan, as pointed out by Ms. Loja, believe that when establishing the regime of territorial waters and drawing the limits of relevant maritime zones, the features and adjacent waters should be considered as a single unit, which should not be

divided into several parts.

Director ZHANG Haiwen and Mr. LIN Yajiang primarily analyzed, from geographical, historical and legal perspectives, the integrity of each of China's island groups in the South China Sea. First, in terms of geography, in accordance with the *Nanhai Zhudao Bufen Biaozhun Diming* (Standard Geographical Names for Some Islands in the South China Sea) published by China Committee on Geographical Names in 1983, the Xisha Islands group is comprised of 22 islands, 7 cays, and other features like banks and shoals. Among China's four groups of islands in the South China Sea, the Nansha Islands group, lying at the southernmost point, has the greatest number of islands or features located in the widest sea area. According to the *Nanhai Zhudao Bufen Biaozhun Diming* of 1983, the Nansha Islands group consists primarily of 6 groups of reefs, and about 200 features like islands, reefs, banks and shoals.

In terms of history, the Chinese government is the first to exercise sovereignty and jurisdiction over the South China Sea Islands and the relevant areas. As early as the pre-Qin times, Luoyue people, the common ancestor of Chinese Minority Group of Zhuang-Dong Language, had established a local government called "Luoyue Kingdom" in South of the Five Ridges of China (roughly today's Guangdong and Guangxi Provinces). The local government, following the orders of the central government, developed and managed the South of the Five Ridges and the South China Sea. Ever since the Qin and Han Dynasties, the Chinese government has consistently developed and managed the South China Sea for thousands of years. After Qin Shi Huang (First Emperor of Qin) conquered all of the other Warring States and unified China in 221 BC, he divided the country into 42 prefectures. Among them, the Nanhai Prefecture administered the whole South China Sea Islands, including the Xisha Islands. In the Northern Song Dynasty (960-1127), the Chinese government, being clearly aware of the importance of coastal defense, patrolled the waters in the South China Sea. In the Yuan Dynasty (1127-1368), the Chinese government was capable of exercising maritime control in the central and southern areas of the South China Sea. In the Ming Dynasty (1368-1644), the Chinese government launched campaigns against pirates at the sea, and exercised control and patrol over the South China Sea Islands and the relevant waters, which further shows Chinese government's administration of the South China Sea.

Apart from the government level, the Chinese civilians have explored and exploited the South China Sea no later than the Han Dynasty. In ancient China,

the South China Sea is generally referred to as "Zhanghai". The descriptions about Chinese people's exploration and exploitation of the South China Sea can be frequently seen in ancient books and records. *Funan Zhuan* (Records of Funan), a manuscript drafted by general KANG Tai of the Kingdom of Wu during the Three Kingdoms Period (220-265), mentioned the Nansha Islands with vivid descriptions: "When reaching the coral shoal in Zhanghai, huge rocks can be seen under the shoal, and corals are growing on these rocks." *Tongdian* (Comprehensive Statutes) by DU You of the Tang Dynasty (618-907) states, "Before the three dynasties of Xia, Shang and Zhou, the area lying at the south of Five Ridges and the north of Zhanghai is desolate. After Qin unified China, it began to establish three prefectures in the area, including the Nanhai Prefecture." In the Jin Dynasty (266-420), *Houhan Shu* (Book of the Later Han) by XIE Cheng, says that "All the tributes paid by the seven prefectures of Jiaozhi to the central government are transported through Zhanghai." That is to say, in the Han Dynasty, the seven prefectures of Jiaozhi paid their annual taxation mainly through the sea. Additionally, in the Southern Song Dynasty (1127-1279), ZHOU Qufei wrote in his book *Lingwai Daida* (Answers to Questions about Lingnan): "The place producing pearls in Hepu is called Duanwang Pool. The pool, being situated near an island in the sea, is tens of Chinese miles from the coast, and less than 10 zhang (1 zhang=1/3 meter) deep. Pearl-catchers dive into the sea to get clams and open the clams to get the pearls inside." This passage records Chinese fishers' catching of pearls in the South China Sea in the Song Dynasty.

From legal perspective, at its 25th meeting held on 21 December 1934, the Land and Water Maps Inspection Committee of China examined and approved both Chinese and English names for all of Chinese islands in the South China Sea. And the *Zhongguo Nanhai Ge Daoyu Huayingming Duizhao Biao* (Comparison Table of the Names of the South China Sea Islands in Mandarin and English) was published in the first issue of the Committee's journal in January 1935. The table listed the names of 136 islands or features in the South China Sea (including the names of four archipelagos), of which 28 were in the Xisha Islands group and 96 in the Tuansha Islands (today's Nansha Islands) group. This is the first time that the Chinese government publicly announced the names of all its islands in the South China Sea, and officially divided these islands into four parts: Dongsha Islands, Xisha Islands, Nansha Islands, and Tuansha Islands. In March 1947, the Chinese government established the Nansha Islands Administration Office under the Guangdong Province on Taiping Island. China also set up a meteorological

observatory and a broadcasting station on Taiping Island, and began to broadcast weather report since June of the same year. Based on the data obtained by a new round of geographical survey on the South China Sea Islands, the Chinese government, in 1947, compiled *Nanhai Zhudao Dili Zhilüe* (A Brief Account of the Geography of the South China Sea Islands), reviewed and updated the *Nanhai Zhudao Xinjiu Mingcheng Duizhao Biao* (Table of New and Old Names of the Islands in the South China Sea), and drew *Nanhai Zhudao Weizhi Tu* (Location Map of the South China Sea Islands) on which the dashed-line is marked, as well as the map of Nansha Islands, and that of Taiping Island. In February 1948, the Chinese government issued the *Zhonghua Minguo Xingzheng Quyu Tu* (Administrative Division Map of the Republic of China), including its attached map – *Nanhai Zhudao Weizhi Tu*. As pointed out by Associate Prof. WANG Zhijian of Hohai University, the international community, including the States neighboring the South China Sea, has never expressed dissent or protest in the decades upon China's official declaration of the names of the islands or features in the South China Sea, and many States even used such names on their published maps.

B. Notes on the Application of Baseline Regime to China's Nansha Islands

Based on the foregoing analysis, Mr. LIN Yajiang says, China's treating of each of the four island groups (i.e., Dongsha Islands, Xiasha Islands, Zhongsha Islands, and Nansha Islands) as a single unit, is consistent with the State practice of non-archipelagic States. However, when applying the baseline regime to the Nansha Islands, China should consider and respect the interests of other neighboring States. For example, the waters within the straight baselines of Nansha Islands should be the internal waters of China, China however may transfer some of its rights when managing the waters. China may administrate the waters by reference to the approaches to managing archipelagic waters, such as granting foreign vessels the right of sea lanes passage and innocent passage through the internal waters enclosed by the straight baselines of the Nansha Islands, so as to guarantee international navigation freedom, and respecting other States' existing traditional fishing rights in the waters surrounding the Nansha Islands. By doing so, China may show self-restraint in exercising rights, and also show its modest attitude toward its neighbors bordering the South China Sea, pursuing to live in peace with them together.

C. Analysis on Archipelagic Sea Lanes

JING Xiaojie, a Ph. D student of Xiamen University South China Sea Institute, delivered a presentation about the problems and practice with respect to archipelagic sea lanes. As noted by Ms. JING, UNCLOS provides that an archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea (Article 53, para. 1). All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes (Article 53, para. 2). Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary (Article 53, para. 4). In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic State, after which the archipelagic State may designate, prescribe or substitute them (Article 53, para. 9). However, upon the entry into force of the UNCLOS in 1994, only two States (Indonesia and the Philippines) designated their archipelagic sea lanes through different means. Ms. JING examined, based on the practice of the two States with respect of designating sea lanes, the insufficiency of the relevant UNCLOS provisions and the problems arising out of the practice of designating sea lanes, and gave her suggestions to address such problems.

Translator: XIE Hongyue

Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* Summary of the Judgment of 2 February 2018

Procedural background (paras. 1-44)

The Court begins by recalling that, on 25 February 2014, the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Republic of Nicaragua (hereinafter "Nicaragua") with regard to a dispute concerning the "establishment of single maritime boundaries between the two States in the Caribbean Sea and the Pacific Ocean, respectively, delimiting all the maritime areas appertaining to each of them, in accordance with the applicable rules and principles of international law" (hereinafter the "case concerning Maritime Delimitation").

The Court then recalls that, by an Order dated 31 May 2016, it decided that an expert opinion would be arranged to inform it as to the state of the coast between the point suggested by Costa Rica and the point suggested by Nicaragua in their pleadings as the starting-point of the maritime boundary in the Caribbean Sea. By an Order dated 16 June 2016, the President of the Court appointed the following two experts: Mr. Eric Fouache, of French nationality, and Mr. Francisco Gutiérrez, of Spanish nationality. The experts conducted a first site visit from 4 to 9 December 2016.

The Court further recalls that, on 16 January 2017, Costa Rica instituted proceedings against Nicaragua in a dispute concerning "the precise location of the land boundary separating the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos" and "the … establishment of a military camp by Nicaragua on the beach of Isla Portillos" (hereinafter "the case concerning the Northern Part of Isla

Portillos"). The Court explains that, by an Order dated 2 February 2017, it decided to join the proceedings in the case concerning Maritime Delimitation and the case concerning the Northern Part of Isla Portillos.

The Court observes that the experts conducted a second site visit from 12 to 17 March 2017 and submitted their report to the Court on 1 May 2017. That report was transmitted to the Parties, which were given an opportunity to comment on it.

Finally, the Court recalls that public hearings were held in the joined cases from Monday 3 July to Thursday 13 July 2017.

I. JURISDICTION OF THE COURT (PARAS. 45-46)

The Court notes that, in both of the cases, Costa Rica invokes, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which the Parties have recognized the compulsory jurisdiction of the Court under Article 36 of the Statute, and that Nicaragua does not contest the Court's jurisdiction to entertain Costa Rica's claims. The Court finds that it has jurisdiction over both cases.

II. GENERAL BACKGROUND (PARAS. 47-58)

A. Geography (paras. 47-50)

The Court recalls the geographical context to the two cases. It explains in this regard that Isla Portillos, the northern part of which is the subject of the land boundary dispute, is an area (approximately 17 sq km) bounded to the west by the San Juan River and to the north by the Caribbean Sea. It observes that at the north-western extremity of Isla Portillos, a sandspit of variable length deflects the final course of the San Juan River, displacing its mouth towards the west. It notes that on the coast of Isla Portillos, approximately 3.6 km east of the mouth of the San Juan River, is a lagoon called Laguna Los Portillos by Costa Rica and Harbor Head Lagoon by Nicaragua, and that this lagoon is at present separated from the Caribbean Sea by a sandbar.

The Court observes that in the Caribbean Sea off the coast of Nicaragua there are several islands and cays, the most prominent of which are the Corn Islands, located approximately 26 nautical miles off its coast; these islands have an area of 9.6 sq km (Great Corn Island) and 3 sq km (Little Corn Island) and a population

of approximately 7,400 inhabitants. The Court points out that on the Pacific side, the coast of Nicaragua is relatively straight and generally follows a north-west to south-east direction, whereas the Costa Rican coast is more sinuous and includes the peninsulas of Santa Elena (near the land boundary terminus), Nicoya and Osa.

B. Historical context (paras. 51-56)

The Court then describes the historical context to the present disputes. It observes in this regard that, following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua concluded in 1858 a Treaty of Limits (hereinafter the "1858 Treaty"), which fixed the course of the land boundary between the two countries from the Pacific Ocean to the Caribbean Sea. Following challenges by Nicaragua on various occasions to the validity of this Treaty, Costa Rica and Nicaragua signed another instrument on 24 December 1886, whereby the two States agreed to submit the question of the validity of the 1858 Treaty, as well as various other points of "doubtful interpretation", to the President of the United States of America, Grover Cleveland, for arbitration. The Court notes that, in the Award he handed down in 1888, President Cleveland, inter alia, confirmed the validity of the Treaty, and found that the boundary line between the two States on the Atlantic side "begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858". Subsequent to that decision, in 1896, Costa Rica and Nicaragua agreed to establish two national Demarcation Commissions, which were to include an engineer, who "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final". United States General Edward Porter Alexander was so appointed. During the demarcation process (which began in 1897 and was concluded in 1900), General Alexander rendered five Awards. The Court recalls that, in his First Award, dated 30 September 1897, General Alexander determined the starting segment of the land boundary near the Caribbean Sea in light of geomorphological changes that had occurred since 1858. Following Alexander's First Award, the Demarcation Commissions recorded the co-ordinates of the starting-point of the land boundary determined by General Alexander by reference to the centre of Plaza Victoria in old San Juan de Nicaragua (Greytown) and other points on the ground.

The Court explains that since the time of the Alexander Awards and the work of the Demarcation Commissions, the northern part of Isla Portillos has continued

to undergo significant geomorphological changes. It recalls that, in 2010, a dispute arose between Costa Rica and Nicaragua with regard to certain activities carried out by Nicaragua in that area. The Court further recalls that, in its 2015 Judgment in the case concerning Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (hereinafter the "2015 Judgment"), it considered the impact of some of these changes on the issue of territorial sovereignty. The Court stated in its 2015 Judgment "that the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea". The Court thus concluded in the 2015 Judgment that Costa Rica had sovereignty over a 3 sq km area in the northern part of Isla Portillos, although noting in its description of this area that it did "not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River". The Court observes that the course of the land boundary on this stretch of coast is one of the subjects of dispute between the Parties in the present joined cases.

With respect to maritime areas, the Court recalls that a bilateral Sub-Commission was established by the two Parties in May 1997 to carry out preliminary technical studies regarding possible maritime delimitations in the Pacific Ocean and the Caribbean Sea. It held five meetings between 2002 and 2005, after which negotiations on maritime delimitations between the two States stalled.

C. Delimitations already effected in the Caribbean Sea and the Pacific Ocean (paras. 57-58)

The Court points out that, in the Caribbean Sea, Costa Rica concluded, on 2 February 1980, a treaty with Panama delimiting a maritime boundary; this treaty entered into force on 11 February 1982. Costa Rica negotiated and signed a maritime delimitation treaty with Colombia in 1977, but never ratified that instrument. Nicaragua's maritime boundaries with Honduras (to the north) and Colombia (to the east) have been established by Judgments of the Court in 2007 and 2012, respectively. Colombia and Panama also concluded a maritime delimitation treaty establishing their boundary in the Caribbean Sea on 20 November 1976.

The Court further observes that the 1980 treaty between Costa Rica and Panama also delimited their maritime boundary in the Pacific Ocean. For its part, Nicaragua has not concluded any treaty establishing a maritime boundary in the

Pacific Ocean.

III. LAND BOUNDARY IN THE NORTHERN PART OF ISLA PORTILLOS (PARAS. 59-78)

A. Issues concerning territorial sovereignty (paras. 59-73)

The Court explains that the case concerning the Land Boundary in the Northern Part of Isla Portillos raises issues of territorial sovereignty which it is expedient to examine first, because of their possible implications for the maritime delimitation in the Caribbean Sea.

The Court observes that the Parties express divergent views on the interpretation of the 2015 Judgment and advance opposing claims to sovereignty over the coast of the northern part of Isla Portillos. The Court recalls that the operative part of its 2015 Judgment stated that "Costa Rica has sovereignty over the 'disputed territory', as defined … in paragraphs 69-70" of that Judgment. The term "disputed territory" was described in those paragraphs as including "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed caño, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon". The Court noted in the 2015 Judgment, however, that "[t]he above definition of the "disputed territory" does not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River". The Court further noted in the 2015 Judgment that the Parties

> *"did not address the question of the precise location of the mouth of the river nor did they provide detailed information concerning the coast. Neither Party requested the Court to define the boundary more precisely with regard to this coast. Accordingly, the Court will refrain from doing so."*

In the present Judgment, the Court is of the view that these passages indicate that no decision was taken in its 2015 Judgment on the question of sovereignty concerning the coast of the northern part of Isla Portillos, since this question had been expressly excluded. This means that it is not possible for the issue of sovereignty over that part of the coast to be res judicata. Therefore, the Court

explains, it cannot declare inadmissible Nicaragua's claim concerning sovereignty over that stretch of coast of Isla Portillos.

The Court recalls that, in its 2015 Judgment, it interpreted the 1858 Treaty as providing that "the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea". However, the Court states, the absence of "detailed information", which had been observed in the 2015 Judgment, had left the geographical situation of the area in question somewhat unclear with regard to the configuration of the coast of Isla Portillos, in particular regarding the existence of maritime features off the coast and the presence of a channel separating the wetland from the coast.

For the Court, the assessment made by the Court-appointed experts, which was not challenged by the Parties, dispels all uncertainty about the present configuration of the coast and the existence of a channel linking the San Juan River with Harbor Head Lagoon. The experts ascertained that "[o]ff the coastline, there are no features above water even at low tide" and that, west of Harbor Head Lagoon, "the coast is made up of a broad sandy beach with discontinuous and coast-parallel enclosed lagoons in the backshore", while "[i]n the westernmost portion, close to the mouth of the San Juan River, there are no lagoons with free-standing water in the backshore". Significantly, the experts observed that there is no longer any water channel connecting the San Juan River with Harbor Head Lagoon. For the Court, since there is no channel, there cannot be a boundary running along it; Nicaragua's contention that "the boundary should continue to be defined by the approximate location of the former channel" linking the river with Harbor Head Lagoon ignores the fact that the channel in question, as it existed at the time of the Alexander Awards, was running well north of the present beach and has been submerged by the sea, as the Court-appointed experts noted, explaining that "such . . . continuous channel has disappeared due to coastal recession". In light of these findings, the Court determines that Costa Rica has sovereignty over the whole of Isla Portillos up to where the river reaches the Caribbean Sea, and that the starting-point of the land boundary is the point at which the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea, currently located at the end of the sandspit constituting the right bank of the San Juan River at its mouth.

The Court recalls, however, that the Parties agree that Nicaragua has sovereignty over Harbor Head Lagoon. According to the Court-appointed experts, "Los Portillos/Harbor Head Lagoon is commonly separated from the sea by [a] sand barrier", although there may be "temporary channels in the barrier". The Court

observes that this assessment, which implies that the barrier is above water even at high tide, was not challenged by the Parties. The Court therefore considers that the Parties agree that both Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea are under Nicaragua's sovereignty. According to the experts, the sandbar extends between the points at the edge of the north-eastern and north-western ends of the Lagoon. The current location of these points has been identified by the experts in their report as points Ple2 and Plw2 with respective co-ordinates of 10° 55' 47.23522" N, 83° 40' 03.02241" W and 10° 56' 01.38471" N, 83° 40' 24.12588" W in WGS 84 datum. The Court concludes that the sandbar extends between the points located at the north-eastern and north-western ends of the Lagoon, currently between points Ple2 and Plw2, respectively; from each of these two points, the land boundary should follow the shortest line across the sandbar to reach the low-water mark of the coast of the Caribbean Sea, as depicted on sketch-map No. 2 (reproduced in Annex 2 of the present summary).

B. Alleged violations of Costa Rica's sovereignty *(paras. 74-78)*

The Court recalls that Costa Rica's Application includes the claim that, "by establishing and maintaining a new military camp on the beach of Isla Portillos, Nicaragua has violated the sovereignty and territorial integrity of Costa Rica, and is in breach of the Judgment of the Court of 16 December 2015 in the Certain Activities case". Costa Rica requests the Court to declare that "Nicaragua must withdraw its military camp" and reserves its position with regard to further remedies. The Court notes that the experts have assessed that the edge of the north-western end of Harbor Head Lagoon lies east of the place where the military camp was located. The Court observes that it is now common ground that the military camp was placed by Nicaragua on the beach close to the sandbar, but not on it. The Court concludes that the installation of the camp thus violated Costa Rica's territorial sovereignty as defined above. It follows that the camp must be removed from Costa Rica's territory. However, there was no breach by Nicaragua of the 2015 Judgment because the boundary with regard to the coast had not been defined in that Judgment. The Court considers that the declaration of a violation of Costa Rica's sovereignty and the order addressed to Nicaragua to remove its camp from Costa Rica's territory constitute appropriate reparation.

IV. MARITIME DELIMITATION IN THE CARIBBEAN SEA (PARAS. 79-166)

A. Starting-point of the maritime delimitation (paras. 80-89)

The Court observes that, since the starting-point of the land boundary is currently located at the end of the sandspit bordering the San Juan River where the river reaches the Caribbean Sea, the same point would normally be the starting-point of the maritime delimitation. However, the great instability of the coastline in the area of the mouth of the San Juan River, as indicated by the Courtappointed experts, prevents the identification on the sandspit of a fixed point that would be suitable as the starting-point of the maritime delimitation. It is preferable, the Court reasons, to select a fixed point at sea and connect it to the starting-point on the coast by a mobile line. Taking into account the fact that the prevailing phenomenon characterizing the coastline at the mouth of the San Juan River is recession through erosion from the sea, the Court deems it appropriate to place a fixed point at sea at a distance of 2 nautical miles from the coast on the median line.

With regard to the enclave under Nicaragua's sovereignty, the Court notes that the sandbar separating Harbor Head Lagoon from the Caribbean Sea is a minor feature without vegetation and characterized by instability. In relation to this sandbar, the Court determines that the question of the starting-points of the maritime delimitation is bound up with the effects, if any, of this feature on the maritime delimitation. The Court addresses this latter issue later in its Judgment, taking into account the characteristics of the feature in question.

B. Delimitation of the territorial sea (paras. 90-106)

The Court recalls that, in accordance with its established jurisprudence, it proceeds in two stages to delimit the territorial sea: first, the Court draws a provisional median line; second, it considers whether any special circumstances exist which justify adjusting such a line.

The Court states that it will construct the provisional median line only on the basis of points situated on the natural coast, which may include points placed on islands or rocks. The base points used by the Court are located on salient points that are situated on solid land and thus have a relatively higher stability than points placed on sandy features. The Court observes that

Paxaro Bovo and Palmenta Cays do not affect the construction of the median line in the territorial sea.

The Court considers that, for the delimitation of the territorial sea, the combined effect of the concavity of Nicaragua's coast west of the mouth of the San Juan River and of the convexity of Costa Rica's coast east of Harbor Head Lagoon is of limited significance and does not represent a special circumstance that could justify an adjustment of the median line under Article 15 of UNCLOS.

However, the Court considers that a special circumstance affecting maritime delimitation in the territorial sea consists in the high instability and narrowness of the sandspit near the mouth of the San Juan River which constitutes a barrier between the Caribbean Sea and a sizable territory appertaining to Nicaragua. The instability of this sandspit does not allow one to select a base point on that part of Costa Rica's territory, as Costa Rica acknowledges, or to connect a point on the sandspit to the fixed point at sea for the first part of the delimitation line. The Court is of the view that it is more appropriate that the fixed point at sea on the median line be connected by a mobile line to the point on solid land on Costa Rica's coast which is closest to the mouth of the river. The Court observes that this point has been identified by the Court-appointed experts as point Pv but there may be geomorphological changes over time. For the present, the Court concludes, the delimitation line in the territorial sea extends from the fixed point at sea landwards to the point on the low-water mark of the coast of the Caribbean Sea that is closest to point Pv. From the fixed point seawards, the delimitation line in the territorial sea is the median line as determined by the base points selected in relation to the present situation of the coast.

The Court considers that another special circumstance is relevant for the delimitation of the territorial sea. The instability of the sandbar separating Harbor Head Lagoon from the Caribbean Sea and its situation as a small enclave within Costa Rica's territory call for a special solution. Should territorial waters be attributed to the enclave, they would be of little use to Nicaragua, while breaking the continuity of Costa Rica's territorial sea. Under these circumstances, the delimitation in the territorial sea between the Parties will not take into account any entitlement which might result from the enclave.

The Court concludes that the delimitation line in the territorial sea is obtained by joining landwards the fixed point at sea (with the co-ordinates given in paragraph 106 of the Judgment) with the point on solid land on Costa Rica's coast that is closest to the mouth of the river and by joining seawards with geodetic lines

the points set out in paragraph 106 of the Judgment, as depicted on sketch-map No. 5 (reproduced in Annex 2 of the present summary).

C. Delimitation of the exclusive economic zone and the continental shelf (paras. 107-166)

The Court then proceeds to the delimitation of the exclusive economic zones and continental shelves appertaining to Costa Rica and Nicaragua, for which both Parties requested the Court to draw a single delimitation line.

(a) Relevant coasts and relevant area (paras. 108-122)

(i) Relevant coasts (paras. 108-114)

The Court recalls that the relevant coasts for the delimitation are those that generate projections which overlap with projections form the coast of the other party. In the present case, the Court considers that the entire mainland coast of Costa Rica is relevant. In the Court's view, the mainland coast of Nicaragua is relevant up to Punta Gorda (north), where the coast shows a significant inflexion. The coasts of the Corn Islands that do not face north also have to be included when determining the length of the relevant coasts. On the other hand, no evidence concerning the capacity of the Cayos de Perlas to "sustain human habitation or economic life of their own" as required by Article 121 of UNCLOS was supplied by Nicaragua to support its assertion that "the Cayos de Perlas generate maritime projections". Therefore their coasts should not be included among the relevant coasts. Given the fact that the relevant coasts of Nicaragua and Costa Rica are not characterized by sinuosity, the length of the relevant coasts should preferably be measured on the basis of their natural configuration. This results in a total length of the coasts of 228.8 km for Costa Rica and of 465.8 km for Nicaragua, with a ratio of 1:2.04 in favour of Nicaragua.

(ii) Relevant area (paras. 115-122)

The Court recalls that the relevant area comprises that part of the maritime space in which the potential entitlements of the Parties overlap. Here, the Court considers that, except for the space attributed to Colombia in the 2012 Judgment, the area where there are overlapping projections in the north includes the whole maritime space situated within a distance of 200 nautical miles from Costa Rica's coast. In the south, the situation is more complicated because of the presence of claims of third States on which the Court cannot pronounce itself. The impact of the rights of third States in the areas that may be attributed to one of the Parties cannot

be determined, but the spaces where third States have a claim may nevertheless be included. The Court further analyses the issue of the relevant area in the Caribbean Sea later in its Judgment (see sub-section (e) below).

(b) Relevance of bilateral treaties and judgments involving third States (paras. 123-134)

The Court observes that the 1976 Treaty between Panama and Colombia involves third States and cannot be considered relevant for the delimitation between the Parties. With regard to the 1977 Treaty between Costa Rica and Colombia, there is no evidence that a renunciation by Costa Rica of its maritime entitlements, if it had ever taken place, was also intended to be effective with regard to a State other than Colombia.

(c) Provisional equidistance line (paras. 135-145)

The Court recalls that it delimits the exclusive economic zone and the continental shelf pursuant to its established methodology in three stages. First, it provisionally draws an equidistance line using the most appropriate base points on the relevant coasts of the Parties. Second, it considers whether there exist relevant circumstances which are capable of justifying an adjustment of the equidistance line provisionally drawn. Third, it assesses the overall equitableness of the boundary resulting from the first two stages by checking whether there exists a marked disproportionality between the length of the Parties' relevant coasts and the maritime areas found to appertain to them.

The Court then turns to the construction of the provisional equidistance line in the case at hand, observing that the Parties are generally in agreement with regard to the selection of base points, but are divided on two issues. The first issue concerns the placement of base points on the Corn Islands, and the second concerns the placement of base points on Paxaro Bovo and Palmenta Cays. The Court concludes that base points should be placed on the Corn Islands for the purpose of constructing a provisional equidistance line. It observes in this respect that these islands have a significant number of inhabitants and sustain economic life; they therefore amply satisfy the requirements set forth in Article 121 of UNCLOS for an island to be entitled to generate an exclusive economic zone and continental shelf. With regard to the Palmenta Cays and Paxaro Bovo, the Court notes that these features may be assimilated to the coast and thus it considers it appropriate to place base points on them for the construction of the provisional equidistance line. The Court concludes that the provisional equidistance line shall follow a series of geodetic lines described in paragraph 145 of the Judgment, as depicted on sketch-

map No. 9 (reproduced in Annex 2 of the present summary).

(d) Adjustment to the provisional equidistance line (paras. 146-158)

The Court then considers whether there are factors calling for the adjustment of the provisional equidistance line in order to achieve an equitable result. In the case of the Corn Islands, the Court considers that, given their limited size and significant distance from the mainland coast, it is appropriate to give them only half effect. This produces an adjustment of the equidistance line in favour of Costa Rica. The Court decides that the other arguments advanced by the Parties to support an adjustment of the provisional equidistance line cannot be accepted. Nicaragua's alleged combination of a convex coast of Costa Rica near Punta de Castilla and of its own concave coast has a limited effect on the boundary line, especially at a distance from the coast, and is not sufficiently significant to warrant an adjustment of the line. The overall concavity of Costa Rica's coast and its relations with Panama cannot justify an adjustment of the equidistance line in its relations with Nicaragua. When constructing the maritime boundary between the Parties, the relevant issue is whether the seaward projections from Nicaragua's coast create a cut-off for the projections from Costa Rica's coast as a result of the concavity of that coast. This alleged cut-off is not significant, even less so once the equidistance line has been adjusted by giving a half effect to the Corn Islands.

The resulting adjusted equidistance line is described in paragraph 156 of the Judgment and depicted on sketch-map No. 10 (reproduced in Annex 2 of the present summary). The Court recalls that this line is constructed without prejudice to any claims that a third State may have on part of the area crossed by the line. Given the complexity of that line, the Court considers it more appropriate to adopt a simplified line, on the basis of the most significant turning points. The resulting simplified line is set out in paragraph 158 of the Judgment and depicted on sketch-map No. 11 (reproduced in Annex 2 of the present summary).

(e) Disproportionality test (paras. 158-166)

The Court observes that the attribution of some maritime space to a third State will affect the part of the relevant area that appertains to each Party. Since the maritime space appertaining to third States cannot be identified in the present proceedings, it is impossible for the Court to calculate precisely the part of the relevant area of each Party. However, for the purpose of verifying whether the maritime delimitation shows a gross disproportion, an approximate calculation of the relevant area is sufficient. In the present case, the Court finds it appropriate to base this calculation on the "notional extension of the Costa Rica-Panama

boundary" as suggested by Costa Rica.

The Court then observes that the relevant area identified would be divided by the maritime boundary into 73,968 sq km for Nicaragua and 30,873 sq km for Costa Rica, with a resulting ratio of 1:2.4 in favour of Nicaragua. The Court concludes that a comparison with the ratio of coastal lengths (1:2.04 also in favour of Nicaragua) does not show any "marked disproportion".

The Court therefore finds that the delimitation concerning the exclusive economic zone and the continental shelf between the Parties in the Caribbean Sea shall follow the line described in paragraph 158 of the Judgment, as depicted on sketch-map No. 13 (reproduced in Annex 2 of the present summary).

V. MARITIME DELIMITATION IN THE PACIFIC OCEAN (PARAS. 167-204)

The Court then moves to the delimitation of the maritime boundary between the Parties in the Pacific Ocean. As with the maritime delimitation in the Caribbean Sea, the Court was requested with respect to the Pacific Ocean to delimit the boundary for the territorial sea, the exclusive economic zone and the continental shelf.

A. Starting-point of the maritime delimitation (para. 169)

With regard to the starting-point of the maritime delimitation in the Pacific Ocean, the Court observes that Costa Rica and Nicaragua agree that it is the midpoint of the closing line of Salinas Bay. In the oral proceedings, Costa Rica raised no objection to using the co-ordinates indicated by Nicaragua in its Counter-Memorial for the purposes of identifying the starting-point of the maritime boundary in the Pacific Ocean. Therefore, on the basis of the agreement between the Parties, the Court finds that the maritime boundary between Costa Rica and Nicaragua in the Pacific Ocean shall start at the midpoint of the closing line of Salinas Bay, with co-ordinates 11° 03' 56.3'' N, 85° 44' 28.3'' W (WGS 84 datum).

B. Delimitation of the territorial sea (paras. 170-175)

The Court next addresses the delimitation of the territorial sea. It notes that, for

the construction of the provisional median line in the present case, Costa Rica and Nicaragua selected the same base points, which are located on certain prominent features on their coasts. The Court sees no reason to depart from the base points selected by both Parties.

The Court recalls, however, that the Parties differ on whether the configuration of the coast constitutes a special circumstance within the meaning of Article 15 of UNCLOS which would justify an adjustment of the provisional median line in the territorial sea. The issue is whether locating base points on the Santa Elena Peninsula has a significant distorting effect on the provisional median line which would result in a cut-off of Nicaragua's coastal projections within the territorial sea. As the Court has noted in a previous case, "islets, rocks and minor coastal projections" can have a disproportionate effect on the median line. Such an effect can call for an adjustment of the provisional median line in the territorial sea. In the vicinity of Salinas Bay, however, the Court takes the view that the Santa Elena Peninsula cannot be considered to be a minor coastal projection that has a disproportionate effect on the delimitation line. It observes that the coast of the Santa Elena Peninsula accounts for a large portion of Costa Rica's coast in the area in which the Court is requested to delimit the territorial sea. Moreover, it notes, the adjustment proposed by Nicaragua in the territorial sea would push the boundary close to Costa Rica's coast, thus significantly cutting off Costa Rica's coastal projections within the territorial sea. The Court concludes that the territorial sea in the Pacific Ocean shall be delimited between the Parties by means of a median line which shall follow a series of geodetic lines connecting the points set out in paragraph 175 of the Judgment, as depicted on sketch-map No. 15 (reproduced in Annex 2 of the present summary).

C. Delimitation of the exclusive economic zone and the continental shelf (paras. 176-204)

(a) Relevant coasts and relevant area (paras. 177-185)

(i) Relevant coasts (paras. 177-181)

With respect to the relevant coasts, the Court reasons that since in the Pacific Ocean the coast of Costa Rica is characterized by a certain degree of sinuosity, whereas the coast of Nicaragua largely develops along a straight line, it is appropriate to identify the relevant coast of both Parties by means of straight lines.

The Court notes that the Parties' positions do not differ significantly with

respect to the identification of Nicaragua's relevant coast. It finds that the entire Nicaraguan coast, from Punta Arranca Barba to Punta Cosigüina, generates potential maritime entitlements overlapping with those of Costa Rica. The length of Nicaragua's relevant coast, thus identified and measured by the Court along a straight line, is 292.7 km long.

The Court observes that the Parties' arguments concerning Costa Rica's relevant coast differ significantly. The Court is of the view that the coast of Costa Rica between Punta Guiones and Cabo Blanco, as well as between Punta Herradura and Punta Salsipuedes, generates potential maritime entitlements overlapping with those of the relevant coast of Nicaragua as identified in the previous paragraph. Under the circumstances, the Court finds it appropriate to include within the relevant coast certain parts of Costa Rica's coast south of Punta Guiones. The Court notes that the coasts of Nicoya Gulf face each other and considers that they are not relevant for the purposes of delimitation. The Court concludes that the first segment of Costa Rica's relevant coast runs along the straight lines connecting Punta Zacate, Punta Santa Elena, Cabo Velas, Punta Guiones and Cabo Blanco. The second segment of Costa Rica's relevant coast runs along the straight lines connecting Punta Herradura, the Osa Peninsula, Punta Llorona and Punta Salsipuedes. Costa Rica's relevant coast, thus identified and measured by the Court along straight lines, is 416.4 km long.

(ii) Relevant area (paras. 182-185)

With respect to the relevant area, the Court is of the view that the potential maritime entitlements generated by both the northern and southern parts of Costa Rica's relevant coast overlap with the potential maritime entitlements generated by the relevant coast of Nicaragua. The Court considers that the relevant area is bordered in the north by a line starting at Punta Cosigüina and perpendicular to the straight line approximating the general direction of Nicaragua's coast. In the west and in the south, the Court determines that the relevant area is limited by the envelope of arcs marking the limits of the area in which the potential maritime entitlements of the Parties overlap. The relevant area thus identified measures approximately 164,500 sq km.

(b) Provisional equidistance line (paras. 186-189)

The Court next constructs a provisional equidistance line. The Court is satisfied that the base points selected by the Parties are appropriate for drawing a provisional equidistance line in the Pacific Ocean. It states that the provisional equidistance line for the exclusive economic zone and the continental shelf shall

begin at the end of the boundary in the territorial sea, and thence it shall follow a series of geodetic lines as described in paragraphs 188-189 of the Judgment and depicted on sketch-map No. 19 (reproduced in Annex 2 of the present summary).

(c) Adjustment to the provisional equidistance line (paras. 190-201)

The Court then turns to the arguments of the Parties concerning the adjustment of the provisional equidistance line, which focus on whether either the Santa Elena Peninsula or the Nicoya Peninsula create an inequitable cut-off of Nicaragua's coastal projections.

With respect to the Santa Elena Peninsula, a protrusion lying close to the starting-point of the maritime boundary between the Parties, the Court states that while it did not consider any adjustment of the provisional median line was necessary for that peninsula within the territorial sea, the situation is different for the exclusive economic zone and the continental shelf, for which the base points placed on the Santa Elena Peninsula control the course of the provisional equidistance line from the 12-nautical-mile limit of the territorial sea up to a point located approximately 120 nautical miles from the coasts of the Parties. The Court considers that such base points have a disproportionate effect on the direction of the provisional equidistance line, which results in a significant cut-off of Nicaragua's coastal projections. In the view of the Court, this cut-off effect is inequitable. Therefore, the Court finds it appropriate to adjust the provisional equidistance line for the exclusive economic zone and the continental shelf by giving half effect to the Santa Elena Peninsula.

With respect to the Nicoya Peninsula, the Court observes that this is a feature with a large landmass, corresponding to approximately one seventh of Costa Rica's territory, and with a large population. It notes that the coast of that peninsula accounts for a sizeable portion of the coast of Costa Rica in the area to be delimited and, as a consequence, its direction cannot be said to depart from the general direction of Costa Rica's coast. The Court further notes that it has drawn the provisional equidistance line using Cabo Velas, located on the Nicoya Peninsula, as a base point, and that Cabo Velas controls the equidistance line for approximately 80 nautical miles. The Court recalls that, in Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), the Chamber rejected proposals to give less than full effect to certain substantial mainland features, in particular Nova Scotia and Cape Cod. The Court observes that the Nicoya Peninsula is a prominent part of Costa Rica's mainland and is comparable to the Nova Scotian Peninsula or to Cape Cod; therefore, the Court considers that

it cannot be given less than full effect in delimiting the boundary in the exclusive economic zone and on the continental shelf. The Court finds that no adjustment of the provisional equidistance line is necessary on account of the presence of the Nicoya Peninsula.

The Court concludes that the maritime boundary in the exclusive economic zone and on the continental shelf between Costa Rica and Nicaragua in the Pacific Ocean follows an equidistance line starting at the endpoint of the boundary in the territorial sea and subsequently adjusted as just described. The adjusted line is described in paragraph 200 of the Judgment and depicted on sketchmap No. 20 (reproduced in Annex 2 of the present summary). Given the complexity of that line, the Court considers it more appropriate to adopt a simplified line, on the basis of the most significant turning points on the adjusted equidistance line, which indicate a change in the direction of that line. The resulting simplified line is described in paragraph 201 of the Judgment and is depicted on sketch-map No. 21 (reproduced in Annex 2 of the present summary).

(d) Disproportionality test (paras. 202-204)

The Court finally turns to the disproportionality test. It observes that the relevant coast of Costa Rica in the Pacific Ocean is 416.4 km long, and the relevant coast of Nicaragua in the Pacific Ocean is 292.7 km long. The two relevant coasts stand in a ratio of 1:1.42 in favour of Costa Rica. The Court finds that the maritime boundary it established between the Parties in the Pacific Ocean divides the relevant area in such a way that approximately 93,000 sq km of that area appertain to Costa Rica and 71,500 sq km of that area appertain to Nicaragua. The ratio between the maritime areas found to appertain to the Parties is 1:1.30 in Costa Rica's favour. The Court considers that, taking into account all the circumstances of the present case, the maritime boundary established between Costa Rica and Nicaragua in the Pacific Ocean does not result in gross disproportionality. Accordingly, the Court finds that the delimitation of the maritime boundary for the exclusive economic zone and the continental shelf achieves an equitable solution in accordance with Articles 74 and 83 of UNCLOS.

The Court therefore concludes that the delimitation concerning the exclusive economic zone and the continental shelf in the Pacific Ocean shall follow the line described in paragraph 201 of the Judgment. The course of the maritime boundary in the Pacific Ocean is depicted on sketch-map No. 22 (reproduced in Annex 2 of the present summary).

OPERATIVE PART (PARA. 205)

THE COURT,

(1) By fifteen votes to one,

Finds that the Republic of Nicaragua's claim concerning sovereignty over the northern coast of Isla Portillos is admissible;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Gevorgian; Judges ad hoc Simma, Al-Khasawneh;

AGAINST: Judge Robinson;

(2) By fourteen votes to two,

Finds that the Republic of Costa Rica has sovereignty over the whole northern part of Isla Portillos, including its coast up to the point at which the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea, with the exception of Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea, sovereignty over which appertains to Nicaragua within the boundary defined in paragraph 73 of the present Judgment;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; Judge ad hoc Simma;

AGAINST: Judge Gevorgian; Judge ad hoc Al-Khasawneh;

(3) (a) By fourteen votes to two,

Finds that, by establishing and maintaining a military camp on Costa Rican territory, the Republic of Nicaragua has violated the sovereignty of the Republic of Costa Rica;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; Judge ad hoc Simma;

AGAINST: Judge Gevorgian; Judge ad hoc Al-Khasawneh;

(b) Unanimously,

Finds that the Republic of Nicaragua must remove its military camp from Costa Rican territory;

(4) Unanimously,

Decides that the maritime boundary between the Republic of Costa Rica and the Republic of Nicaragua in the Caribbean Sea shall follow the course set out in paragraphs 106 and 158 of the present Judgment;

(5) Unanimously,

Decides that the maritime boundary between the Republic of Costa Rica and the Republic of Nicaragua in the Pacific Ocean shall follow the course set out in paragraphs 175 and 201 of the present Judgment.

Judge TOMKA appends a declaration to the Judgment of the Court; Judge XUE appends a separate opinion to the Judgment of the Court; Judge SEBUTINDE appends a declaration to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge ad hoc SIMMA appends a declaration to the Judgment of the Court; Judge ad hoc AL-KHASAWNEH appends a dissenting opinion and a declaration to the Judgment of the Court.

Annex 1 to Summary 2018/2

Declaration of Judge Tomka

Judge Tomka outlines in his declaration that he is not fully satisfied with the way in which the Court has delimited the maritime boundary between the Parties in the Caribbean Sea. He outlines that the Court, governed by Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea, is obliged to achieve "an equitable solution" in delimiting the maritime boundaries between the Parties in the exclusive economic zone and continental shelf. Its Judgment in this respect substitutes for an agreement of the Parties, which they failed to reach.

Judge Tomka observes that the jurisprudence of the Court and other international tribunals establishes that a provisional equidistance line ought to be adjusted where that line would significantly cut off the maritime projections of the coast of one of the parties. In this case, he considers that the Court has not avoided the cut-off effect generated by the first part of the delimitation line in the Caribbean Sea. Indeed, that line has the effect of cutting off Nicaragua's coastal projections as they relate to almost half of its significant concave coast in the Bahía de San Juan del Norte.

Judge Tomka considers that the Court's solution is not fully equitable and that the Court should have adjusted the line to alleviate this cut-off by joining, by way of a straight line, the endpoint of the maritime boundary in the territorial sea to a point further along the delimitation line. He considers that this would have been particularly appropriate in light of the fact that the Court did not take into account

any Nicaraguan maritime entitlements which might be generated by the sandbar separating Harbor Head Lagoon from the Caribbean Sea.

Separate opinion of Judge Xue

Notwithstanding her vote on subparagraph (4) of the operative part of the Judgment, Judge Xue disagrees with the reasoning in relation to the location of the starting-point of the land boundary between the Parties and the way in which this issue is treated in the maritime delimitation in the case.

First of all, Judge Xue is of the view that, under the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards, the starting-point of the land boundary should be located on the north-eastern end of the Harbor Head Lagoon rather than at the end of the sandspit of Isla Portillos at the mouth of the San Juan River (right bank).

In this joint case, the identification of the starting-point of the land boundary is an essential issue, both for the determination of the territorial sovereignty of the coast in dispute and for the maritime delimitation between the Parties in the Caribbean Sea. In her view, the starting-point of the land boundary has to be determined in accordance with the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards.

Judge Xue points out that the report of the Court-appointed experts demonstrates that the initial segment of the land boundary, including its starting-point, remains identifiable and actually identified. What is left of Harbor Head Lagoon and the accreted sandbar separating the lagoon and the sea is a broken part of the land boundary, now enclaved within Costa Rica's territory. The experts' answer to the first question put forward by the Court in its Order of 31 May 2016 in fact identified the current location of the point at which the San Juan River reaches the sea, in other words, the place where the original land boundary breaks.

Contrary to the Court's interpretation, Judge Xue takes the view that the Court has not determined the starting-point of the land boundary in its 2015 Judgment in the case concerning Certain Activities Carried Out by Nicaragua in the Border Area. Although the drafters of the 1858 Treaty and the arbitral awards well anticipated that the land boundary would necessarily be affected by gradual or sudden coastal changes in the future, they did not specifically spell out what principles of international law would apply in the event of such changes. The situation of what it now stands as partial disappearance of the watercourse was not

envisaged. In her view, if the starting-point of the boundary is to be automatically determined by the river's outlet to the sea, it would be difficult to explain why both Parties agree that Harbor Head Lagoon belongs to Nicaragua rather than Costa Rica; since the watercourse has now reached the Caribbean Sea at the mouth of the San Juan River, what is on the right bank of the River, including Harbor Head Lagoon, should automatically be merged with Costa Rica's territory.

Judge Xue observes that when the Court determines that there is no longer any water channel connecting the San Juan River with Harbor Head Lagoon and therefore the coast of the northern part of Isla Portillos belongs to Costa Rica, it virtually states that the land boundary is disrupted at the mouth of the San Juan River by the natural change of the coast. In her view, the Court's decision that Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea are under Nicaragua's sovereignty cannot simply be attributed to the agreement of the Parties; the underlying reason is Costa Rica's recognition that the line around Harbor Head Lagoon still constitutes part of the land boundary, albeit disconnected with the rest of the land boundary.

Situations with water boundaries vary from case to case. There is no established rule of customary international law governing the legal impact of watercourse change on boundaries. In the present case, Judge Xue considers that so far as the land boundary is concerned, two relevant factors should be taken into account. First, the starting-point of the land boundary, even after being relocated, remains in an unstable situation. To maintain stability and certainty of the boundary, more weight should be given to its legal title than to the factual change on the ground. Second, the enclave resulting from the break-up of the land boundary is not a self-standing geographical feature as such; until the Court's present decision on the sovereignty of the coast of the northern part of Isla Portillos, it formally constituted part of the land boundary.

The enclave, as it currently stands, should form part of the geomorphological circumstances of the coast for the maritime delimitation. Although the Court takes cognition of the great instability of the coastline in the area of the mouth of the San Juan River, Judge Xue considers that the Court does not give sufficient consideration to the coastal relationship between the Parties. With Costa Rica's coast now situated between Nicaragua's territories, Harbor Head Lagoon on the eastern side and the river mouth on the western side, it would be difficult, if not impossible, to choose a starting-point on land that would genuinely reflect a median point. Either way, there would be some cut-off effect to the detriment of one Party.

Recalling the Court's statement in the Nicaragua v. Honduras case that "[n]othing in the wording of Article 15 suggests that geomorphological problems are per se precluded from being 'special circumstances' within the meaning of the exception, nor that such 'special circumstances' may only be used as a corrective element to a line already drawn" (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 744, para. 280), Judge Xue takes the view that the geomorphological conditions of the coast of the northern part of Isla Portillos and the break-up of the land boundary constitute such special circumstances.

While she agrees with the majority that given the prevailing circumstances of the coast and the current location of the mouth of the San Juan River, it is reasonable and equitable to draw the provisional median line from the coast on the western side of Isla Portillos near the mouth of the San Juan River, Judge Xue doubts the wisdom to select as the starting-point of the maritime boundary a point on the solid land closest to the mouth of the river, currently identified as point Pv, because that point is equally unstable, and moreover, by selecting that starting-point, the Court would provide Nicaragua with no access to the enclave.

In paragraph 105 of the Judgment, the Court recognizes that the situation of the enclave is a special circumstance and calls for "a special solution". It nevertheless considers that "[s]hould territorial waters be attributed to the enclave, they would be of little use to Nicaragua, while breaking the continuity of Costa Rica's territorial sea". Therefore, the delimitation in the territorial sea between the Parties will not take into account any entitlement which might result from the enclave. In her opinion, this is not a convincing reasoning to ignore Nicaragua's entitlement from the enclave, no matter how small it is.

In order to overcome the difficulty arising from the repositioning of the starting-point of the land boundary at the mouth of the San Juan River as a result of the disappearance of the watercourse along the coast, Judge Xue is of the view that the maritime boundary may start from a fixed point (the same as the hinge point) on the median line at a distance of 2 nautical miles from the coast without being connected with a mobile line to a point on land. Although with 2 nautical miles' territorial sea undelimited, she considers that this approach would place the Parties in a better position to manage their coastal relations, particularly in respect of navigation. It would not be the first time that a delimitation begins at some distance out to the sea; the judicial and arbitral practices support such a resolution where there is an uncertain land boundary terminus.

Declaration of Judge Sebutinde

Judge Sebutinde concurs with all aspects of the Court's decision as stated in the operative paragraph 205 of the Judgment, but considers that in respect of the case concerning the Land Boundary in the Northern Part of Isla Portillos (Part III) the Court should, in its reasoning, have addressed more fully all the issues underlying its decisions in that case.

First, whilst Judge Sebutinde agrees with the Court's conclusion in paragraph 69 that the issue of territorial sovereignty over the coast of Isla Portillos is not res judicata, she notes that the present Judgment omits to address another important and related issue, namely, whether or not the Court in its Judgment of 16 December 2015 in the case concerning Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), I.C.J. Reports 2015 (II), p. 665 determined with the force of res judicata, the course of the land boundary in the northern part of Isla Portillos. Since this is part of the dispute between the Parties in the present case, the Court should in the interest of fully settling the case, have addressed this point. Her view is that the precise course of the land boundary in the northern part of Isla Portillos has never been determined by the Court and thus the matter is not res judicata.

Secondly, whilst she agrees with the land boundary in the northern part of Isla Portillos depicted in sketch-map No. 2 of the Judgment, Judge Sebutinde is of the view that the Court's reasoning in paragraphs 70-73 does not adequately explain the geographical changes that have occurred in the area and their effect on the historical land boundary described in the 1858 Treaty of Limits. Furthermore, she notes that although both Parties in their written and oral pleadings requested the Court to "determine the course of the land boundary in the northern part of Isla Portillos", the Court falls short of tracing the said boundary, focusing rather on the issue of territorial sovereignty over the coast of Isla Portillos. In her opinion, the Court should logically have determined the course of the said boundary before pronouncing itself on the related issue of territorial sovereignty.

Lastly, Judge Sebutinde opines that in determining the present course of the land boundary in the northern part of Isla Portillos as requested by both Parties, the Court should do so first, by reference to the historical land boundary as contained in the 1858 Treaty of Limits and interpreted by the various Cleveland and Alexander Awards, before taking into account any relevant geographical changes that may warrant an adjustment in the historical land boundary. In her view, such

an approach results in a land boundary comprising two distinct sectors with three termini as depicted in sketch-map No. 2 of the Judgment. Judge Sebutinde does however, concur with paragraph 71 of the Judgment that start of the maritime delimitation in the Caribbean Sea should, in principle, coincide with the point where "the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea", which point she considers the third terminus and starting-point of the second sector of the land boundary.

Separate opinion of Judge Robinson

Judge Robinson's separate opinion addresses a specific issue raised by Nicaragua in the proceedings, namely, whether there has been a "convergence in maritime delimitation methodology" in the delimitation of the territorial sea, EEZ and continental shelf, so that the principles for the delimitation of the EEZ and continental shelf as set out in Articles 74 and 83 of the United Nations Convention on the Law of the Sea ("the UNCLOS") would apply equally to the delimitation of the territorial sea under Article 15.

The separate opinion argues that based on a proper interpretation of Articles 15, 74 and 83 of the UNCLOS, including in particular its drafting history, there has been no such convergence in the maritime delimitation methodology for the three zones. A proper interpretation of the UNCLOS shows that it calls for a dichotomous approach whereby the territorial sea is delimited on the basis of the median line/special circumstances method, while the EEZ and continental shelf are delimited on the basis of any method that would result in an "equitable solution".

Judge Robinson comments that although it is possible for States to agree to utilize a uniform method under the UNCLOS, the difference in the legal régime for the territorial sea on the one hand, and for the EEZ and continental shelf on the other hand, explains why the Convention calls for a dichotomous approach in maritime delimitation methodology.

In Judge Robinson's opinion, different values are attached to the various elements relevant to the delimitation in the various zones. Therefore, the provisional median line in the territorial sea has a different value from the provisional equidistance line in the EEZ and continental shelf and, similarly, special circumstances in the territorial sea will have a different value from relevant circumstances in the EEZ and continental shelf.

Judge Robinson also reiterates that the Court's practice supports a dichotomous

approach. In that regard, he finds it difficult to understand the statement of the Arbitral Tribunal in Croatia/Slovenia that the practice of the Court supports a uniform approach for the delimitation of all three zones.

Declaration of Judge Gevorgian

In his declaration, Judge Gevorgian explains the reasons for his vote against the Court's findings on the land boundary at northern Isla Portillos and comments on certain aspects of the Court's delimitation of the maritime boundary in the Caribbean Sea.

In relation to the first question, Judge Gevorgian disagrees with the Court's finding that Costa Rica has sovereignty over the beach of northern Isla Portillos (he does agree, however, with the Court's determination of Nicaragua's sovereignty over Harbor Head Lagoon).

In his opinion, it results from Article II of the 1858 Treaty of Limits concluded between Costa Rica and Nicaragua, as interpreted by the Cleveland and Alexander Awards, that the point named "Punta de Castilla" was meant to be the starting-point of the boundary. The fact that important geomorphological changes have occurred both after 1858 and 1897-1900 (the latter being the time when General Alexander demarcated the boundary) does not change this conclusion. For this purpose, Judge Gevorgian relies on the Awards rendered by General Alexander and refers to the Court-appointed experts' findings on the existence of "discontinuous coast-parallel lagoons" that are the "remnants" of the channel that General Alexander took in 1897 as a reference to demarcate the boundary.

Judge Gevorgian also disagrees with the Court's finding that Nicaragua has violated Costa Rica's sovereignty as a consequence of its military camp on the beach of northern Isla Portillos. As the present Judgment indicates, the question of sovereignty over such a beach was not solved when the Court rendered its first Judgment on Isla Portillos in December 2015. So, the territory at stake until 2 February 2018, the date of delivery of the present Judgment, was "a disputed territory" and not a territory under the sovereignty of Nicaragua. Referring to his declaration on the 2015 Judgment and to the Court's case law, Judge Gevorgian considers that a statement on the sovereignty of this area (with which he does not agree, but which it is binding for the Parties) and an order to remove the camp from the beach would have constituted sufficient relief for the Applicant.

In relation to the maritime boundary in the Caribbean Sea, Judge Gevorgian

agrees with the Court's delimitation line. At the same time, he is inclined to consider that the starting-point of the maritime boundary should have been situated at the "Alexander Point" (that is, the point at which General Alexander fixed the starting-point of the land boundary). But since the starting-point identified by the Court does not significantly move the course of the would-be boundary line, he has voted in favour of the Court's findings on this issue.

Finally, Judge Gevorgian suggests that some aspects of the case could have been addressed in more detail. He mentions in particular the questions of Nicaragua's territorial sea in Harbor Head Lagoon (which the Court did not consider in fixing the delimitation line), the legal effects of the bilateral boundary treaties respectively concluded in 1977 and 1980 between Costa Rica, on the one hand, and Colombia and Panama, on the other; and the different methodologies employed to delimit the territorial sea and the economic exclusive zone and continental shelf. However, overall, he believes that the Judgment strikes a fair balance between the respective entitlements of the two Parties in the Caribbean Sea and the Pacific Ocean.

Declaration of Judge ad hoc Simma

Judge ad hoc Simma has voted in favour of each of the Judgment's operative paragraphs. In his short declaration, he comments on the relevance of Article 102 of the Charter of the United Nations to this case.

He outlines that both Parties made reference to the Treaty Concerning Delimitation of Marine Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama, which was signed on 2 February 1980 and entered into force on 11 February 1982, and which does not appear to have been registered with the United Nations Secretariat in accordance with the requirements of Article 102, paragraph 1, of the Charter.

While Judge ad hoc Simma observes that neither Party to this case was probably captured by the terms of Article 102, paragraph 2, of the Charter, which prevents a "party to any such treaty or international agreement which has not been registered" from "invok[ing] that treaty or agreement before any organ of the United Nations", it is nonetheless important that parties to treaties respect their obligations under the Charter. Judge ad hoc Simma would have wished for the Court to take the opportunity to acknowledge this in its Judgment.

Dissenting opinion and declaration of Judge ad hoc Al-Khasawneh

Judge ad hoc Al-Khasawneh dissented on the land delimitation and wrote a separate declaration on maritime delimitation in the Pacific Ocean.

I

In his dissenting opinion Judge ad hoc Al-Khasawneh started by stressing the importance of putting to rest on the basis of international law, a long-running dispute between the Parties that pre-dated the Treaty of Limits of 1858. The ambiguity in the treaty was responsible for a number of subsequent arbitrations, delimitation commissions and stalled diplomatic negotiations right up to the involvement of the Court, since 2005, in a number of cases dealing with various aspects of this dispute.

The Court is now faced with two conflicting sets of decisions, each possessing the force of res judicata. On the one hand, there is the Cleveland Award of 1888 and the First and Second Alexander Awards of 1897, in which the territorial delimitation was effected on the basis of the 1858 treaty even when the starting-point of that delimitation (the initial marker) had been submerged in the sea due to the general retreat of the coast. On the other hand, there is the 2015 Judgment, on which the findings in the present Judgment were predicated, namely that the so-called Alexander Point should be abandoned in favour of a new point at the mouth of the San Juan River as it presently stands.

Judge ad hoc Al-Khasawneh felt that there was no justification in the Court's approach, all the more so in view of the on-going general retreat of the Caribbean coast which may lead to the San Juan River emptying again into Harbor Head Lagoon, as it did in 1858, a possibility contemplated by the Court-appointed experts. The finality and permanence of territorial delimitation was not served by adopting a new point which is ephemeral.

Judge ad hoc Al-Khasawneh then analysed developments since 1858 to prove that the mouth of the river – after it had shifted – was not and could not have been the starting-point in the mind of arbitrator Alexander.

Turning to the existence or otherwise of a channel connecting Harbor Head Lagoon with the river, Judge ad hoc Al-Khasawneh, while acknowledging that at the time of their visit(s) no such channel existed, felt that the experts' reference to a channel like water gap in the recent past and the existence of discontinuous elongated lagoons parallel to the coast carries evidence that the Court should have taken into consideration. Moreover, in arid parts of the world, dried-up rivers are

often used to delimit boundaries. He believed that this partly dried channel is the border between the Parties.

Similarly, the existence of Harbor Head Lagoon and the sand barrier enclosing it from the Caribbean is acknowledged by both Parties to be Nicaraguan, this attests that the whole shore had a priori to be Nicaraguan.

He disagreed with the majority regarding their decision not to give the sand barrier any maritime entitlements, a decision that was not reasoned at all, but which rested on the hope that the sands of the barrier will be submerged by the sea, which may or may not happen.

II

With respect to maritime delimitation in the Pacific, Judge ad hoc Al-Khasawneh started by observing that maritime delimitation is, of necessity, a compromise between certitude of the law and the need to take cognizance of dissimilar situations.

While judges are enjoined not to "completely refashion nature" some refashioning must have been contemplated in the Law of the Sea Convention Articles 74 and 83. This attests to the discretion that the legislator must give the judge.

For their part, courts strive to decrease the space of their discretion and the three-stage technique favoured in recent cases is a prime example of this movement towards uniformity.

The low threshold of "no gross disproportionality" should not be the only criterion for what amounts to an equitable result.

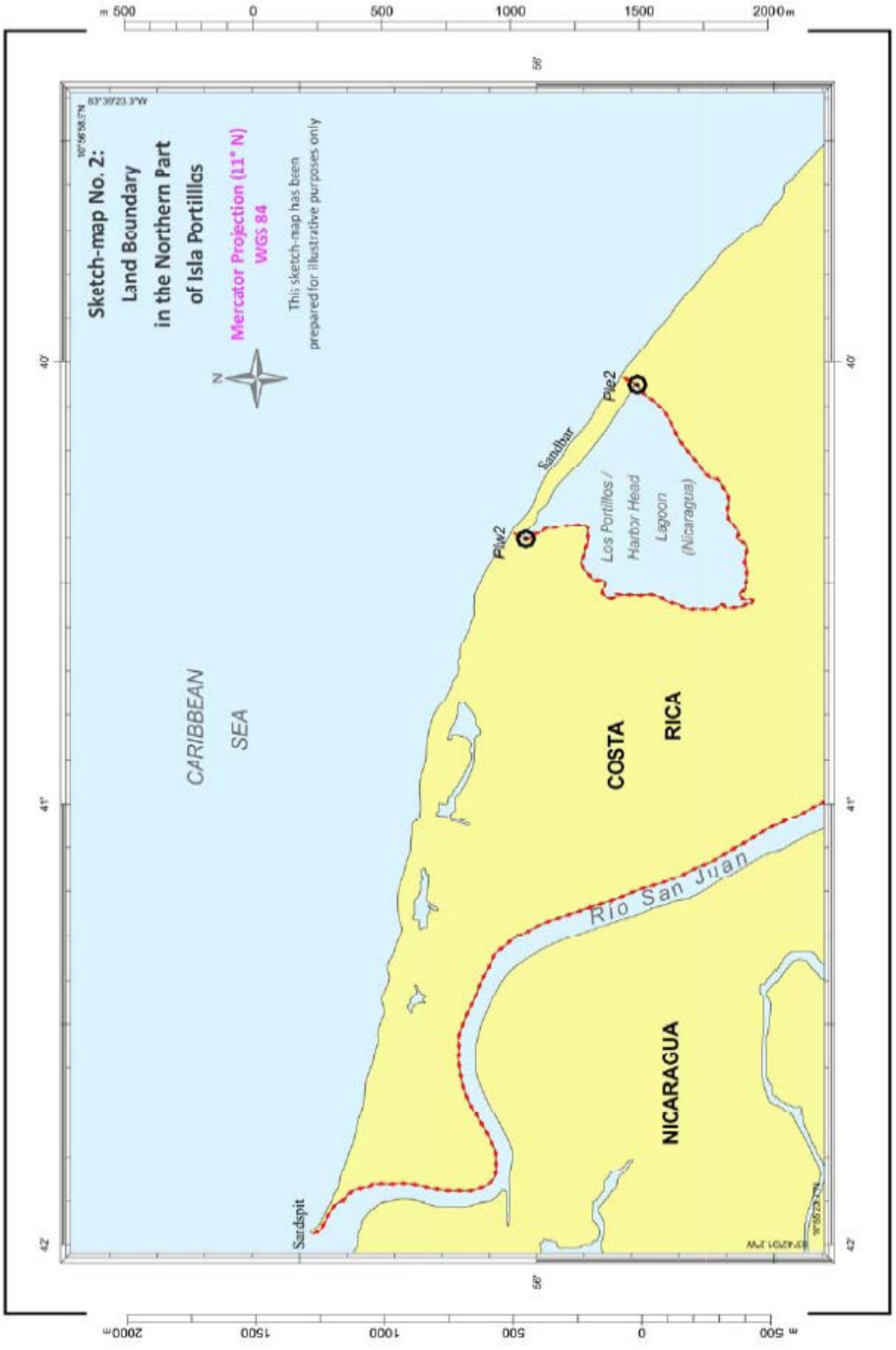
In the case of the Nicoya Peninsula, a more equitable result would have been obtained by giving it considerable but not complete weight with regard to delimitation in the exclusive economic zone and the continental shelf, given that is not qualitatively different from the Santa Elena Peninsula and that considerations other than size, e.g. its proximity to the starting-point of delimitation should be taken into account. This may amount to some refashioning of nature, figuratively speaking, but certainly not a complete one.

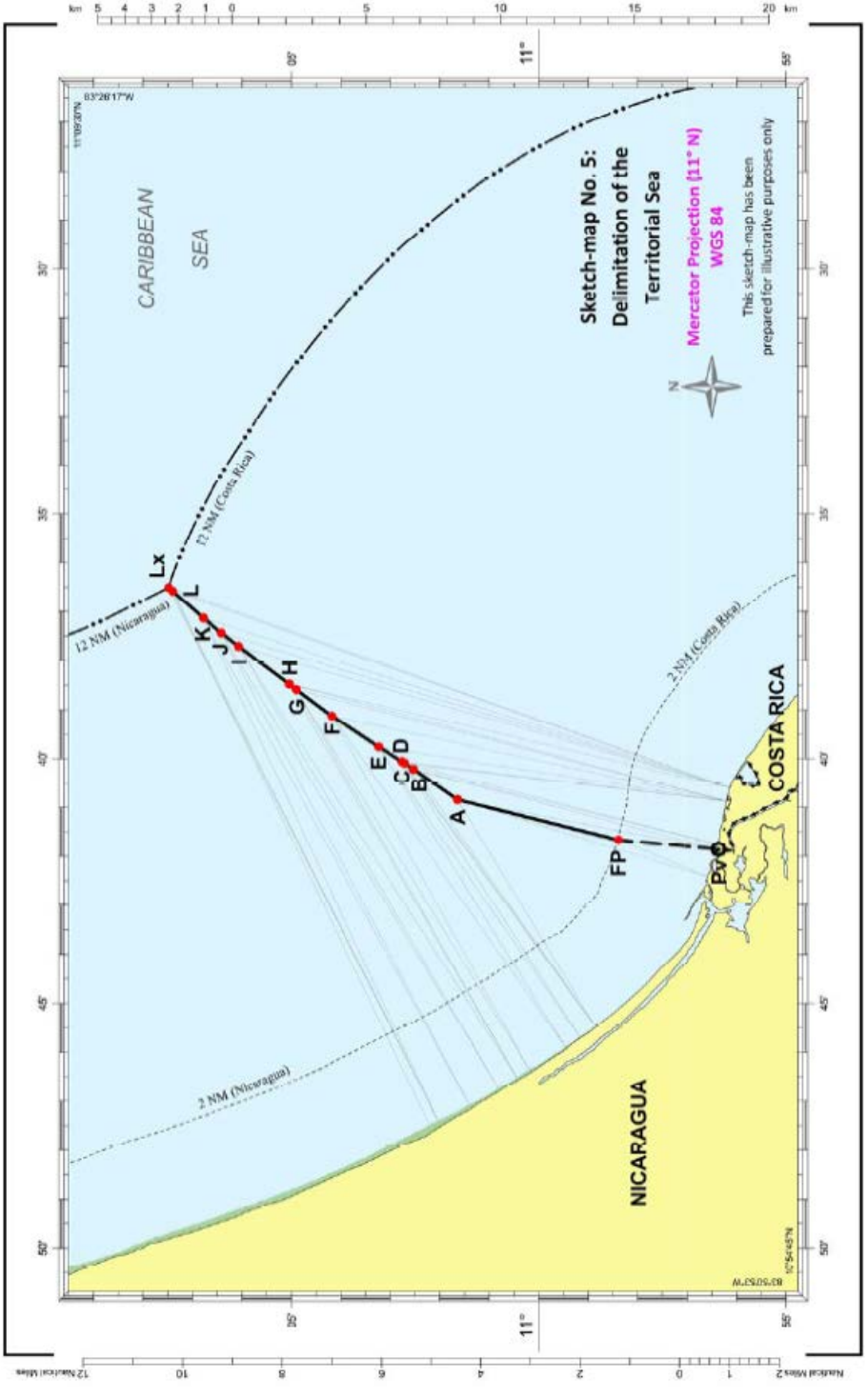
Annex 2 to Summary 2018/2

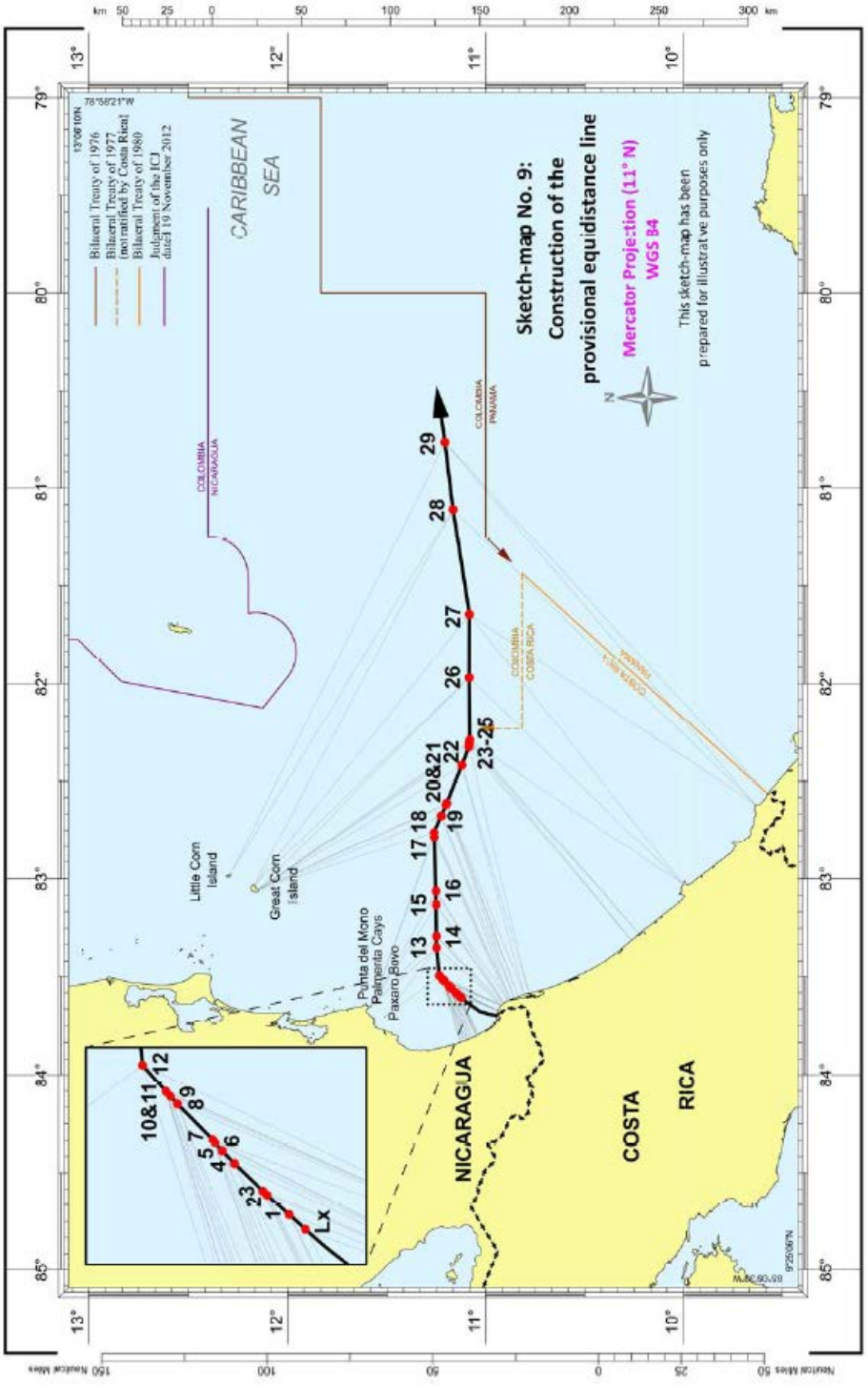
Sketch-map No. 2: Land Boundary in the Northern Part of Isla Portillos

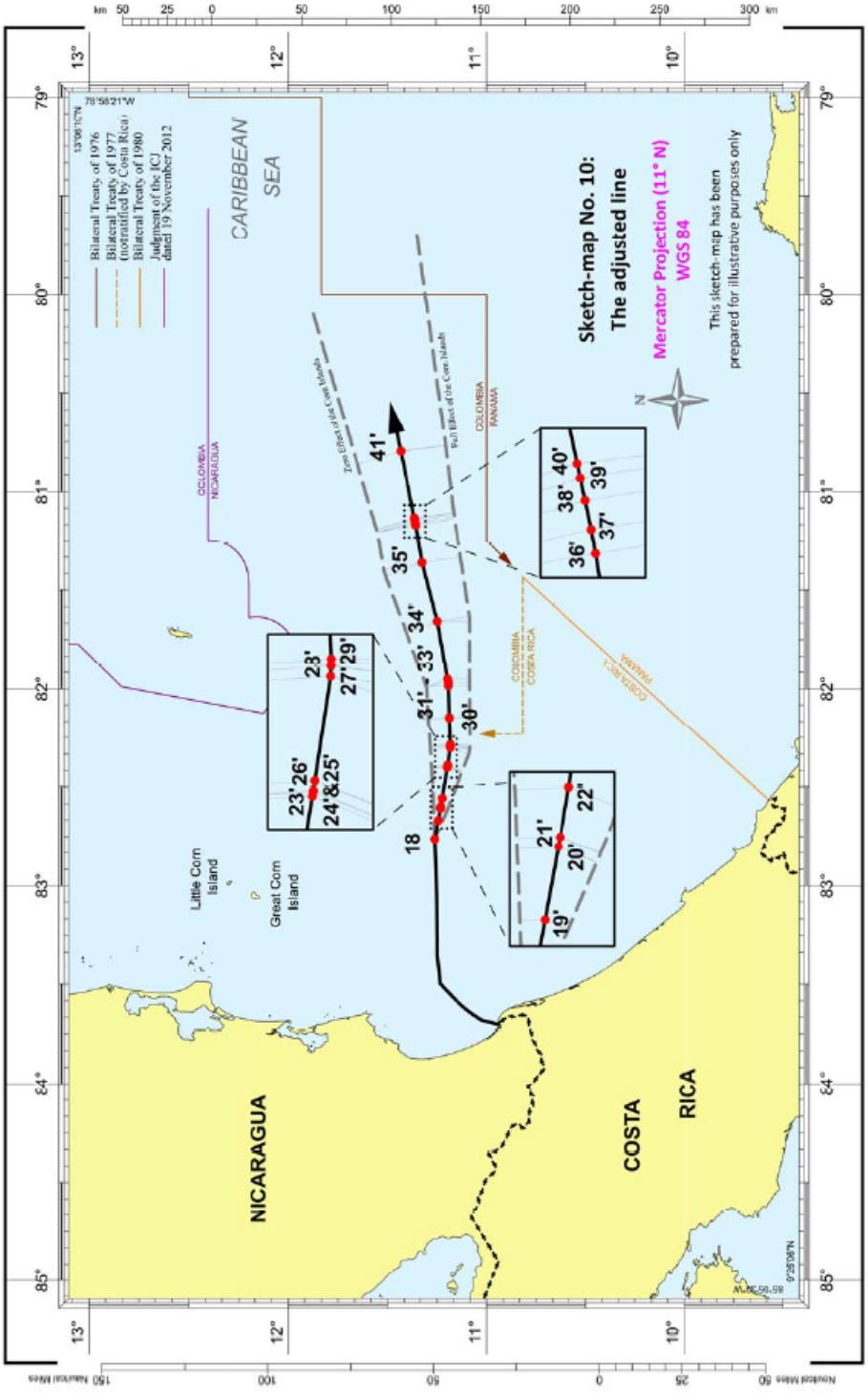
Sketch-map No. 5: Delimitation of the Territorial Sea (Caribbean Sea)

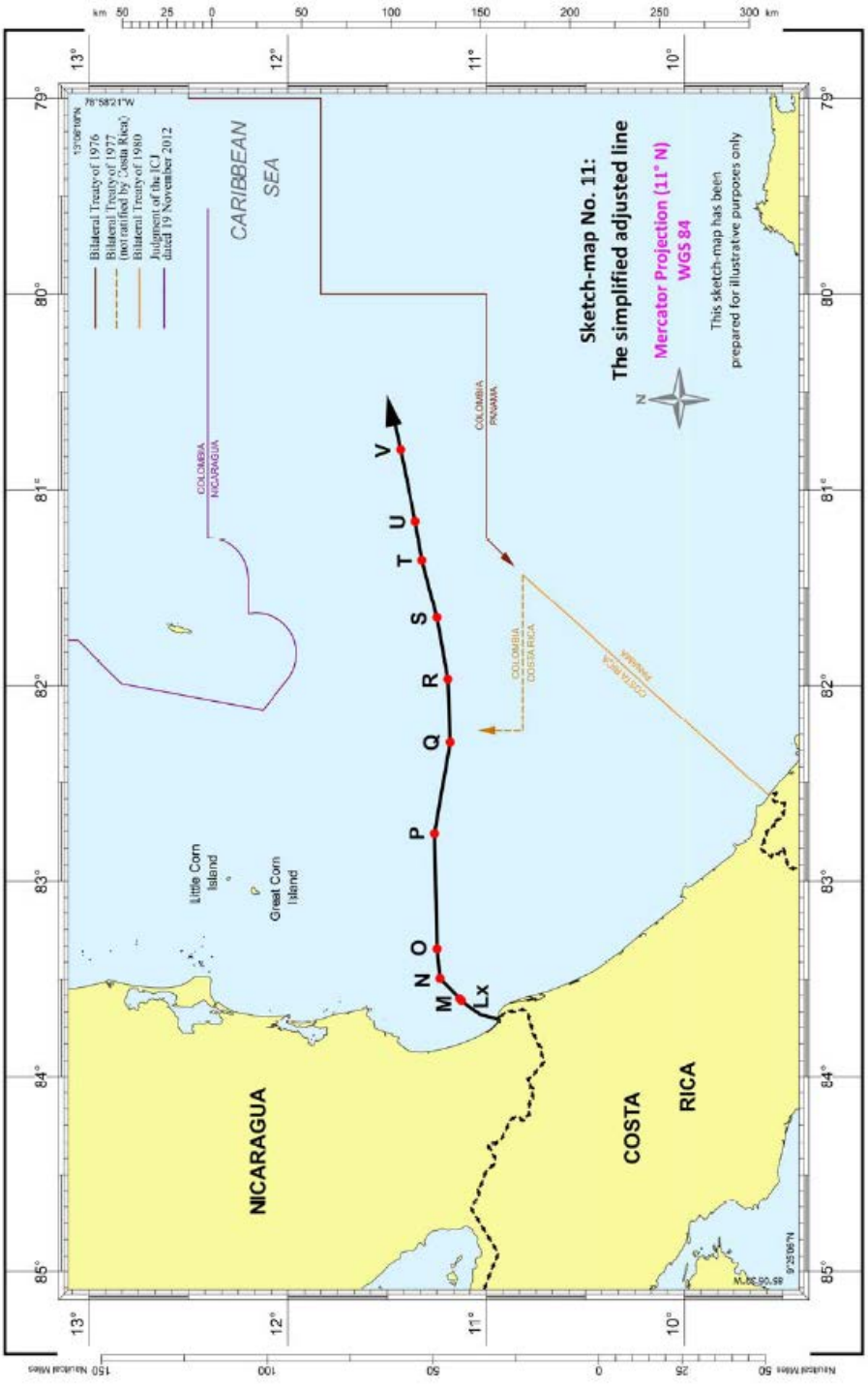
Sketch-map No. 9: Construction of the provisional equidistance line (Caribbean

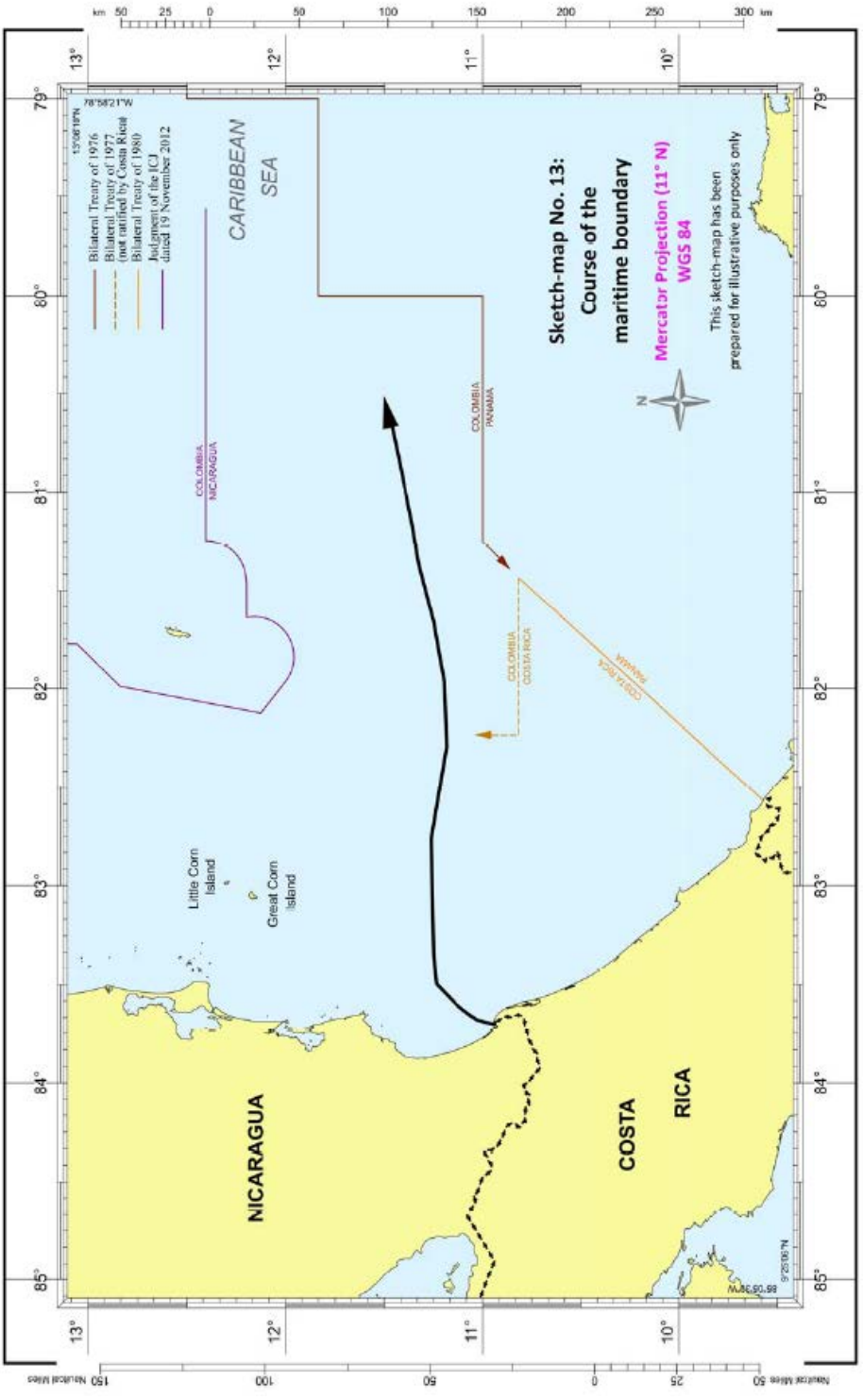

Sketch-map No. 2:
Land Boundary
in the Northern Part
of Isla Portillos
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
CARIBBEAN
SEA
COSTA
RICA
NICARAGUA
Río San Juan
Los Portillos / Harbor Head Lagoon (Nicaragua)
Pillar2
Pillar2
Sandbar
Sandspit
m 500
0
500
1000
1500
2000 m

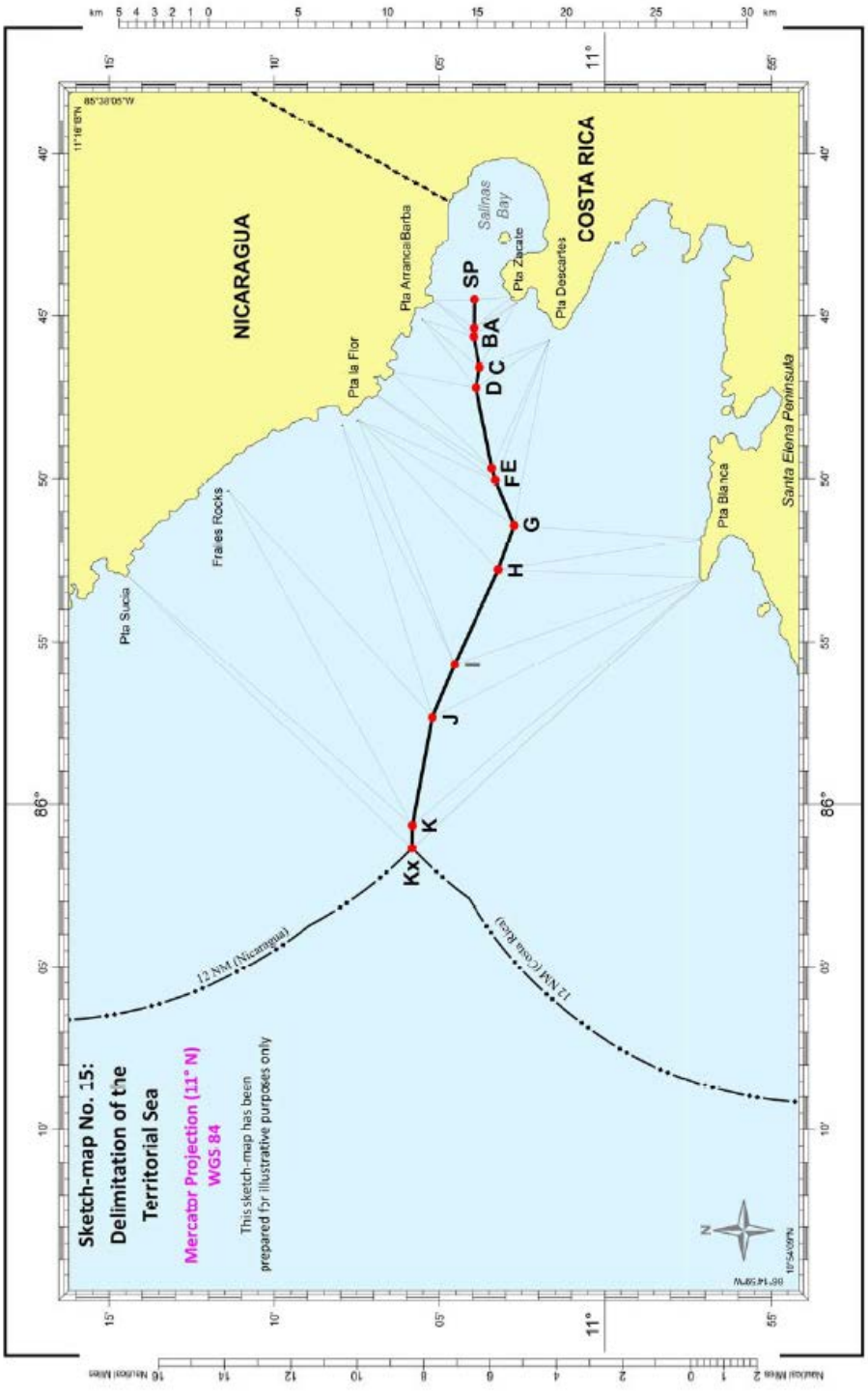

Sketch-map No. 5:
Delimitation of the
Territorial Sea
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
CARIBBEAN
SEA
12 NM (Nicaragua)
12 NM (Costa Rica)
2 NM (Nicaragua)
2 NM (Costa Rica)
Lx
L
K
J
I
G
H
F
E
C
D
B
A
FP
PV
COSTA RICA
NICARAGUA

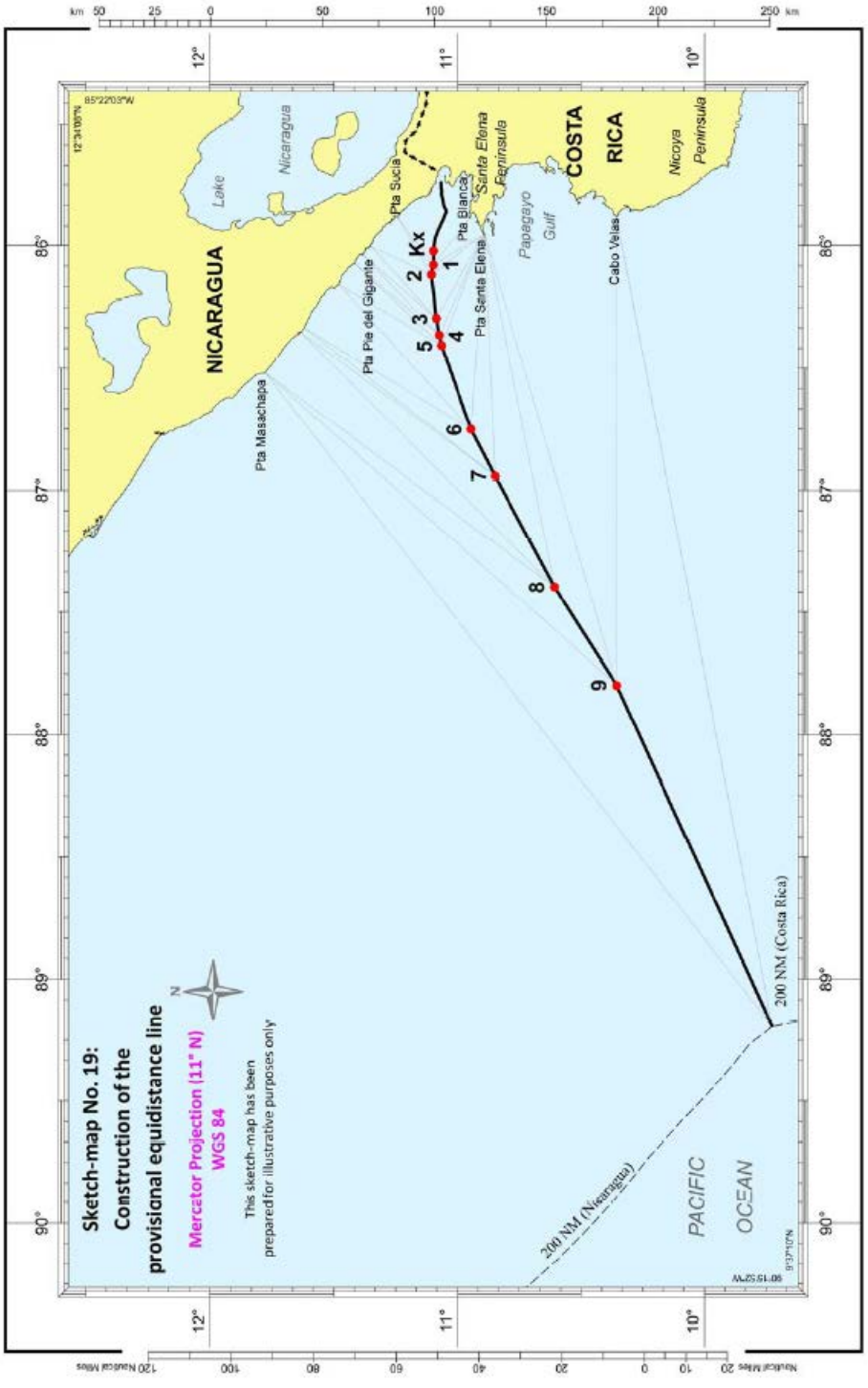

Sketch-map No. 9:
Construction of the provisional equidistance line
Mercator Projection (11° N) WGS 84
This sketch-map has been prepared for illustrative purposes only
Bilateral Treaty of 1976
Bilateral Treaty of 1977 (not ratified by Costa Rica)
Bilateral Treaty of 1980
Judgment of the ICJ dated 19 November 2012
CARIBBEAN SEA
NICARAGUA
COSTA RICA
COLOMBIA NICARAGUA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
PANAMA COSTA RICA
Little Corn Island
Great Corn Island
Punta del Mono
Palmenta Cays
Paxaro Bovo
29
28
27
26
23-25
22
20&21
19
18
17
16
15
14
13
12
10&11
9
8
7
6
5
4
3
2
1
Lx

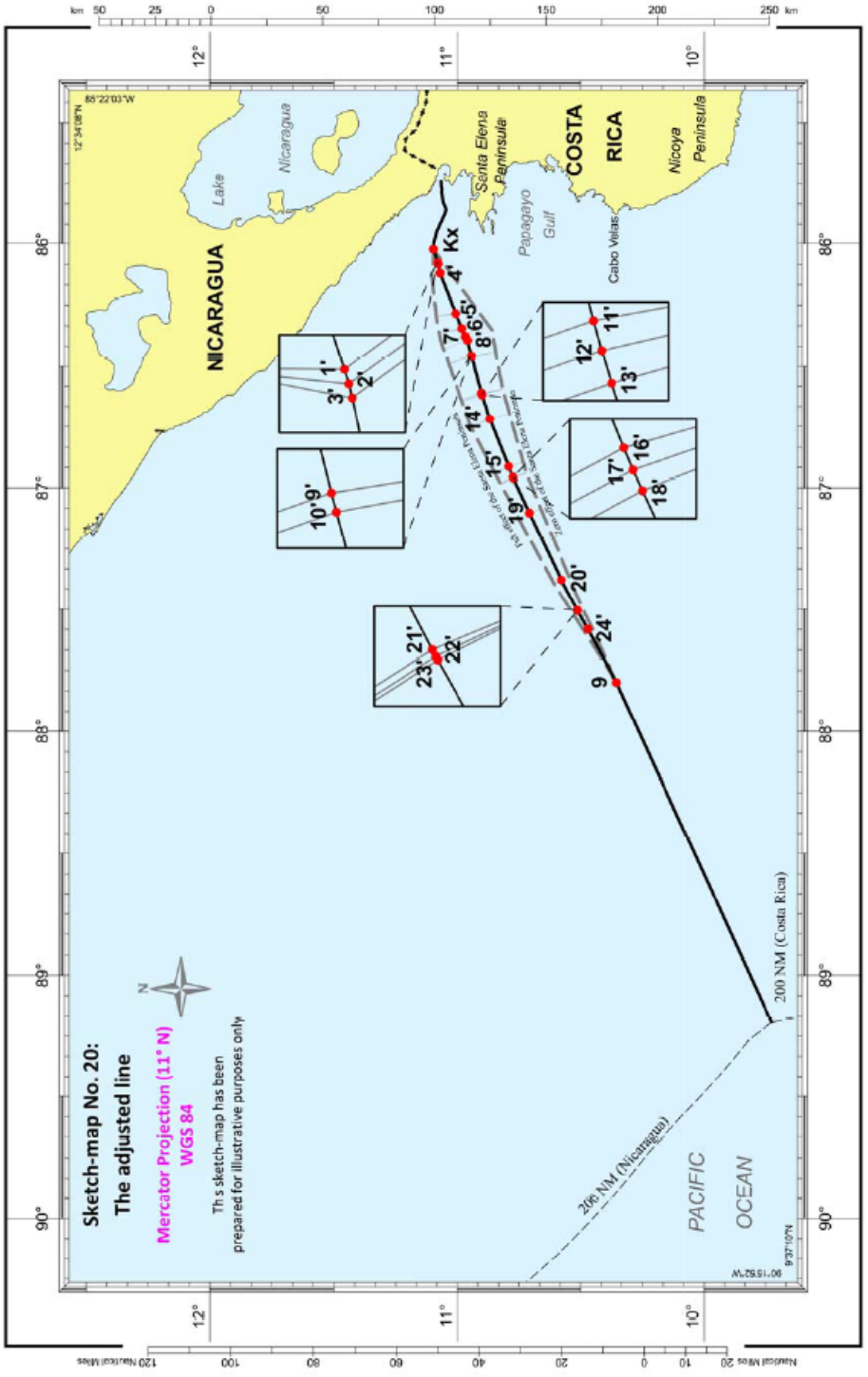

Sketch-map No. 10:
The adjusted line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
Bilateral Treaty of 1976
Bilateral Treaty of 1977 (notified by Costa Rica)
Bilateral Treaty of 1980
Judgment of the ICJ dated 19 November 2012
CARIBBEAN SEA
NICARAGUA
COSTA RICA
COLOMBIA
PANAMA
Little Corn Island
Great Corn Island
Zone Effect of the Corn Islands
Full Effect of the Corn Islands
41'
35'
34'
33'
31'
30'
18
23'
27'29'
23'26'
24'&25'
38'
40'
39'
37'
36'
21'
22'
20'
19'

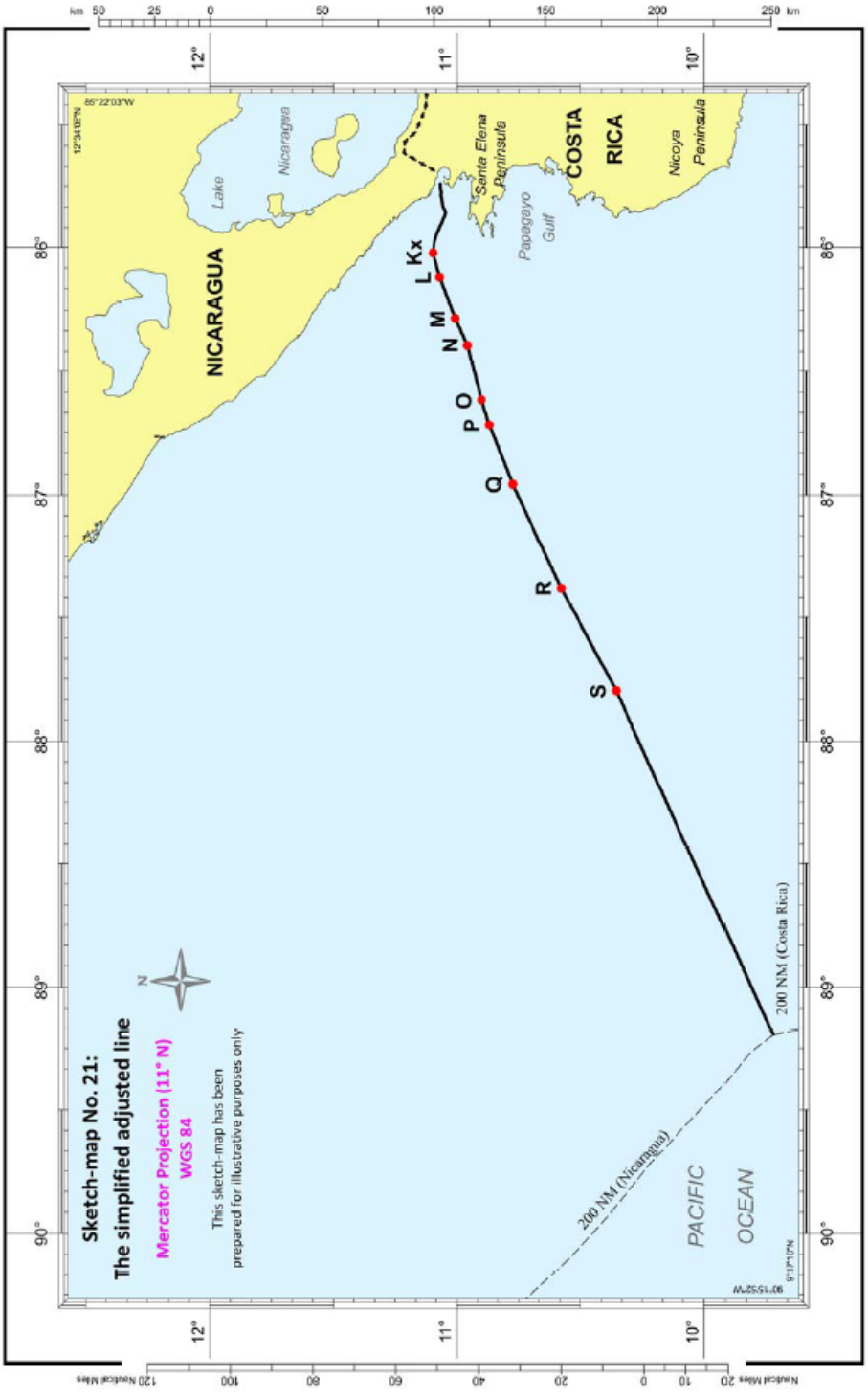

Sketch-map No. 11:
The simplified adjusted line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
Bilateral Treaty of 1976
Bilateral Treaty of 1977 (not ratified by Costa Rica)
Bilateral Treaty of 1980
Judgment of the ICJ dated 19 November 2012
CARIBBEAN SEA
COLOMBIA NICARAGUA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Little Corn Island
Great Corn Island
V
U
T
S
R
Q
P
O
N
M
Lx
NICARAGUA
COSTA RICA
km 50 25 0 50 100 150 200 250 300 km
Nautical Miles 150 100 50 0 25 50

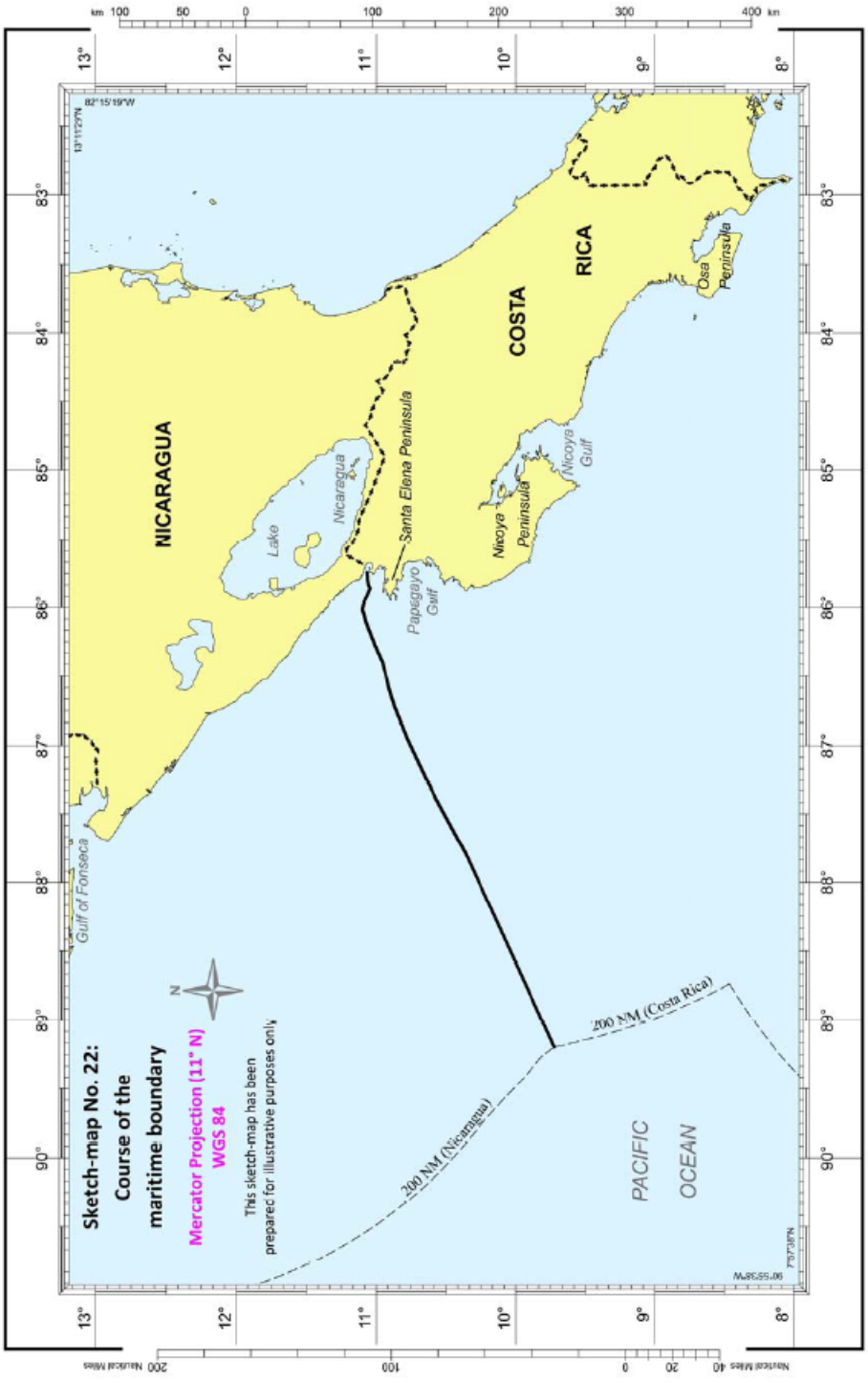

Sketch-map No. 13:
Course of the
maritime boundary
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
Bilateral Treaty of 1976
Bilateral Treaty of 1977
(not ratified by Costa Rica)
Bilateral Treaty of 1980
Judgment of the ICJ
dated 19 November 2012
CARIBBEAN
SEA
COLOMBIA
NICARAGUA
COLOMBIA
PANAMA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Little Corn
Island
Great Corn
Island
NICARAGUA
COSTA
RICA
km 50 25 0 50 100 150 200 250 300 km
13° 12° 11° 10°
79° 80° 81° 82° 83° 84° 85°


NICARAGUA
COSTA RICA
Salinas Bay
Pta Arranca Barba
Pta Zacate
Pta Descartes
Pta la Flor
Frailes Rocks
Pta Sucia
Pta Blanca
Santa Elena Peninsula
SP
BA
C
D
FE
G
H
I
J
K
Kx
12 NM (Nicaragua)
12 NM (Costa Rica)
Sketch-map No. 15:
Delimitation of the
Territorial Sea
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only


Sketch-map No. 19:
Construction of the
provisional equidistance line
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
NICARAGUA
COSTA
RICA
Lake
Nicaragua
Pta Sucia
Pta Blanca
Santa Elena
Peninsula
Nicoya
Peninsula
Papagayo
Gulf
Cabo Velas
Pta Santa Elena
Pta Pie del Gigante
Pta Masachapa
Kx
1
2
3
4
5
6
7
8
9
200 NM (Costa Rica)
200 NM (Nicaragua)
PACIFIC
OCEAN
85°22'03"W
12°34'06"N
90°15'52"W
9°31'0"N
km 50 25 0 50 100 150 200 250 km
Nautical Miles 20 10 0 20 40 60 80 100 120 Nautical Miles


NICARAGUA
Lake Nicaragua
COSTA RICA
Santa Elena Peninsula
Nicoya Peninsula
Papagayo Gulf
Cabo Velas
Kx
1'
2'
3'
4'
5'
6'
7'
8'
9
10'
11'
12'
13'
14'
15'
16'
17'
18'
19'
20'
21'
22'
23'
24'
200 NM (Costa Rica)
206 NM (Nicaragua)
PACIFIC OCEAN
Sketch-map No. 20:
The adjusted line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only


Sketch-map No. 21:
The simplified adjusted line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
NICARAGUA
Lake Nicaragua
COSTA RICA
Santa Elena Peninsula
Nicoya Peninsula
Papagayo Gulf
Kx
L
M
N
O
P
Q
R
S
200 NM (Costa Rica)
200 NM (Nicaragua)
PACIFIC OCEAN


Sketch-map No. 22:
Course of the maritime boundary
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
NICARAGUA
COSTA RICA
Lake Nicaragua
Santa Elena Peninsula
Papagayo Gulf
Nicoya Peninsula
Nicoya Gulf
Osa Peninsula
Gulf of Fonseca
200 NM (Costa Rica)
200 NM (Nicaragua)
PACIFIC OCEAN
82°15'19"W
13°11'27"N
83°55'38"W
7°37'38"N

全国人民代表大会常务委员会关于中国海警局行使海上维权执法职权的决定

（2018 年 6 月 22 日第十三届全国人民代表大会常务委员会第三次会议通过）

为了贯彻落实党的十九大和十九届三中全会精神，按照党中央批准的《深化党和国家机构改革方案》和《武警部队改革实施方案》决策部署，海警队伍整体划归中国人民武装警察部队领导指挥，调整组建中国人民武装警察部队海警总队，称中国海警局，中国海警局统一履行海上维权执法职责。现就中国海警局相关职权作出如下决定：

一、中国海警局履行海上维权执法职责，包括执行打击海上违法犯罪活动、维护海上治安和安全保卫、海洋资源开发利用、海洋生态环境保护、海洋渔业管理、海上缉私等方面的执法任务，以及协调指导地方海上执法工作。

二、中国海警局执行打击海上违法犯罪活动、维护海上治安和安全保卫等任务，行使法律规定的公安机关相应执法职权；执行海洋资源开发利用、海洋生态环境保护、海洋渔业管理、海上缉私等方面的执法任务，行使法律规定的有关行政机关相应执法职权。中国海警局与公安机关、有关行政机关建立执法协作机制。

三、条件成熟时，有关方面应当及时提出制定、修改有关法律的议案，依照法定程序提请审议。

四、本决定自 2018 年 7 月 1 日起施行。

中国的北极政策

（国务院，2018 年 1 月 26 日）

前 言

近年来，全球气候变暖，北极冰雪融化加速。在经济全球化、区域一体化不断深入发展的背景下，北极在战略、经济、科研、环保、航道、资源等方面的价值不断提升，受到国际社会的普遍关注。北极问题已超出北极国家间问题和区域问题的范畴，涉及北极域外国家的利益和国际社会的整体利益，攸关人类生存与发展的共同命运，具有全球意义和国际影响。

中国倡导构建人类命运共同体，是北极事务的积极参与者、建设者和贡献者，努力为北极发展贡献中国智慧和中国力量。为了阐明中国在北极问题上的基本立场，阐释中国参与北极事务的政策目标、基本原则和主要政策主张，指导中国相关部门和机构开展北极活动和北极合作，推动有关各方更好参与北极治理，与国际社会一道共同维护和促进北极的和平、稳定和可持续发展，中国政府发表本白皮书。

一、北极的形势与变化

北极具有特殊的地理位置。地理上的北极通常指北极圈（约北纬 66 度 34 分）以北的陆海兼备的区域，总面积约 2100 万平方公里。在国际法语境下，北极包括欧洲、亚洲和北美洲的毗邻北冰洋的北方大陆和相关岛屿，以及北冰洋中的国家管辖范围内海域、公海和国际海底区域。北极事务没有统一适用的单一国际条约，它由《联合国宪章》《联合国海洋法公约》《斯匹次卑尔根群岛条约》等国际条约和一般国际法予以规范。

北极的大陆和岛屿面积约 800 万平方公里，有关大陆和岛屿的领土主权分别属于加拿大、丹麦、芬兰、冰岛、挪威、俄罗斯、瑞典、美国八个北极国家。北冰洋海域的面积超过 1200 万平方公里，相关海洋权益根据国际法由沿岸国和各国分享。北冰洋沿岸国拥有内水、领海、毗连区、专属经济区和大陆架等管辖海域，北冰洋中还有公海和国际海底区域。

北极域外国家在北极不享有领土主权，但依据《联合国海洋法公约》等国际条

约和一般国际法在北冰洋公海等海域享有科研、航行、飞越、捕鱼、铺设海底电缆和管道等权利，在国际海底区域享有资源勘探和开发等权利。此外，《斯匹次卑尔根群岛条约》缔约国有权自由进出北极特定区域，并依法在该特定区域内平等享有开展科研以及从事生产和商业活动的权利，包括狩猎、捕鱼、采矿等。

北极具有独特的自然环境和丰富的资源，大部分海域常年被冰层覆盖。当前，北极自然环境正经历快速变化。过去 30 多年间，北极地区温度上升，使北极夏季海冰持续减少。据科学家预测，北极海域可能在本世纪中叶甚至更早出现季节性无冰现象。一方面，北极冰雪融化不仅导致北极自然环境变化，而且可能引发气候变暖加速、海平面上升、极端天气现象增多、生物多样性受损等全球性问题。另一方面，北极冰雪融化可能逐步改变北极开发利用的条件，为各国商业利用北极航道和开发北极资源提供机遇。北极的商业开发利用不仅将对全球航运、国际贸易和世界能源供应格局产生重要影响，对北极的经济社会发展带来巨大变化，对北极居民和土著人的生产和生活方式产生重要影响，还可能对北极生态环境造成潜在威胁。在处理涉北极全球性问题方面，国际社会命运与共。

二、中国与北极的关系

中国是北极事务的重要利益攸关方。中国在地缘上是“近北极国家”，是陆上最接近北极圈的国家之一。北极的自然状况及其变化对中国的气候系统和生态环境有着直接的影响，进而关系到中国在农业、林业、渔业、海洋等领域的经济利益。

同时，中国与北极的跨区域和全球性问题息息相关，特别是北极的气候变化、环境、科研、航道利用、资源勘探与开发、安全、国际治理等问题，关系到世界各国和人类的共同生存与发展，与包括中国在内的北极域外国家的利益密不可分。中国在北冰洋公海、国际海底区域等海域和特定区域享有《联合国海洋法公约》《斯匹次卑尔根群岛条约》等国际条约和一般国际法所规定的科研、航行、飞越、捕鱼、铺设海底电缆和管道、资源勘探与开发等自由或权利。中国是联合国安理会常任理事国，肩负着共同维护北极和平与安全的重要使命。中国是世界贸易大国和能源消费大国，北极的航道和资源开发利用可能对中国的能源战略和经济发展产生巨大影响。中国的资金、技术、市场、知识和经验在拓展北极航道网络和促进航道沿岸国经济社会发展方面可望发挥重要作用。中国在北极与北极国家利益相融合，与世界各国休戚与共。

中国参与北极事务由来已久。1925 年，中国加入《斯匹次卑尔根群岛条约》，正式开启参与北极事务的进程。此后，中国关于北极的探索不断深入，实践不断增加，活动不断扩展，合作不断深化。1996 年，中国成为国际北极科学委员会成员国，中国的北极科研活动日趋活跃。从 1999 年起，中国以“雪龙”号科考船为

平台，成功进行了多次北极科学考察。2004 年，中国在斯匹次卑尔根群岛的新奥尔松地区建成“中国北极黄河站”。截至 2017 年年底，中国在北极地区已成功开展了八次北冰洋科学考察和 14 个年度的黄河站站基科学考察。借助船站平台，中国在北极地区逐步建立起海洋、冰雪、大气、生物、地质等多学科观测体系。2005 年，中国成功承办了涉北极事务高级别会议的北极科学高峰周活动，开亚洲国家承办之先河。2013 年，中国成为北极理事会正式观察员。近年来，中国企业开始积极探索北极航道的商业利用。中国的北极活动已由单纯的科学研究拓展至北极事务的诸多方面，涉及全球治理、区域合作、多边和双边机制等多个层面，涵盖科学研究、生态环境、气候变化、经济开发和人文交流等多个领域。作为国际社会的重要成员，中国对北极国际规则的制定和北极治理机制的构建发挥了积极作用。中国发起共建“丝绸之路经济带”和“21 世纪海上丝绸之路”（“一带一路”）重要合作倡议，与各方共建“冰上丝绸之路”，为促进北极地区互联互通和经济社会可持续发展带来合作机遇。

三、中国的北极政策目标和基本原则

中国的北极政策目标是：认识北极、保护北极、利用北极和参与治理北极，维护各国和国际社会在北极的共同利益，推动北极的可持续发展。

认识北极就是要提高北极的科学研究水平和能力，不断深化对北极的科学认知和了解，探索北极变化和发展的客观规律，为增强人类保护、利用和治理北极的能力创造有利条件。

保护北极就是要积极应对北极气候变化，保护北极独特的自然环境和生态系统，不断提升北极自身的气候、环境和生态适应力，尊重多样化的社会文化以及土著人的历史传统。

利用北极就是要不断提高北极技术的应用水平和能力，不断加强在技术创新、环境保护、资源利用、航道开发等领域的北极活动，促进北极的经济社会发展和改善当地居民的生活条件，实现共同发展。

参与治理北极就是要依据规则、通过机制对北极事务和活动进行规范和管理。对外，中国坚持依据包括《联合国宪章》《联合国海洋法公约》和气候变化、环境等领域的国际条约以及国际海事组织有关规则在内的现有国际法框架，通过全球、区域、多边和双边机制应对各类传统与非传统安全挑战，构建和维护公正、合理、有序的北极治理体系。对内，中国坚持依法规范和管理国内北极事务和活动，稳步增强认识、保护和利用北极的能力，积极参与北极事务国际合作。

通过认识北极、保护北极、利用北极和参与治理北极，中国致力于同各国一道，在北极领域推动构建人类命运共同体。中国在追求本国利益时，将顾及他国利益

和国际社会整体利益，兼顾北极保护与发展，平衡北极当前利益与长远利益，以推动北极的可持续发展。

为了实现上述政策目标，中国本着“尊重、合作、共赢、可持续”的基本原则参与北极事务。

尊重是中国参与北极事务的重要基础。尊重就是要相互尊重，包括各国都应遵循《联合国宪章》《联合国海洋法公约》等国际条约和一般国际法，尊重北极国家在北极享有的主权、主权权利和管辖权，尊重北极土著人的传统和文化，也包括尊重北极域外国家依法在北极开展活动的权利和自由，尊重国际社会在北极的整体利益。

合作是中国参与北极事务的有效途径。合作就是要在北极建立多层次、全方位、宽领域的合作关系。通过全球、区域、多边和双边等多层次的合作形式，推动北极域内外国家、政府间国际组织、非国家实体等众多利益攸关方共同参与，在气候变化、科研、环保、航道、资源、人文等领域进行全方位的合作。

共赢是中国参与北极事务的价值追求。共赢就是要在北极事务各利益攸关方之间追求互利互惠，以及在各活动领域之间追求和谐共进。不仅要实现各参与方之间的共赢，确保北极国家、域外国家和非国家实体的普惠，并顾及北极居民和土著人群体的利益，而且要实现北极各领域活动的协调发展，确保北极的自然保护和社会发展相统一。

可持续是中国参与北极事务的根本目标。可持续就是要在北极推动环境保护、资源开发利用和人类活动的可持续性，致力于北极的永续发展。实现北极人与自然的和谐共存，实现生态环境保护与经济社会发展的有机协调，实现开发利用与管理保护的平衡兼顾，实现当代人利益与后代人利益的代际公平。

四、中国参与北极事务的主要政策主张

中国参与北极事务坚持科研先导，强调保护环境、主张合理利用、倡导依法治理和国际合作，并致力于维护和平、安全、稳定的北极秩序。

（一）不断深化对北极的探索和认知

北极具有重要的科研价值。探索和认知北极是中国北极活动的优先方向和重点领域。

中国积极推动北极科学考察和研究。中国尊重北极国家对其国家管辖范围内北极科考活动的专属管辖权，主张通过合作依法在北极国家管辖区域内开展北极科考活动，坚持各国在北冰洋公海享有科研自由。中国积极开展北极地质、地理、

冰雪、水文、气象、海冰、生物、生态、地球物理、海洋化学等领域的多学科科学考察;积极参与北极气候与环境变化的监测和评估，通过建立北极多要素协同观测体系，合作建设科学考察或观测站、建设和参与北极观测网络，对大气、海洋、海冰、冰川、土壤、生物生态、环境质量等要素进行多层次和多领域的连续观测。中国致力于提高北极科学考察和研究的能力建设，加强北极科考站点和科考船只等保障平台的建设与维护并提升其功能，推进极地科学考察破冰船的建造工作等。

中国支持和鼓励北极科研活动，不断加大北极科研投入的力度，支持构建现代化的北极科研平台，努力提高北极科研能力和水平。大力开展北极自然科学研究，加强北极气候变化和生态环境研究，进一步推动物理、化学、生命、地球等基础学科的发展。不断加强北极社会科学研究，包括北极政治、经济、法律、社会、历史、文化以及北极活动管理等方面，促进北极自然科学和社会科学研究的协同创新。加强北极人才培养和科普教育，支持高校和科研机构培养北极自然和社会科学领域的专业人才，建立北极科普教育基地，出版北极相关文化产品，提高公民的北极意识。积极推进北极科研国际合作，推动建立开放包容的国际北极环境监测网络，支持通过国际北极科学委员会等平台开展务实合作，鼓励中国科学家开展北极国际学术交流与合作，推动中国高校和科研机构加盟“北极大学”协作网络。

技术装备是认知、利用和保护北极的基础。中国鼓励发展注重生态环境保护的极地技术装备，积极参与北极开发的基础设施建设，推动深海远洋考察、冰区勘探、大气和生物观测等领域的装备升级，促进在北极海域石油与天然气钻采、可再生能源开发、冰区航行和监测以及新型冰级船舶建造等方面的技术创新。

（二）保护北极生态环境和应对气候变化

中国坚持依据国际法保护北极自然环境，保护北极生态系统，养护北极生物资源，积极参与应对北极环境和气候变化的挑战。

1. 保护环境

中国始终把解决全球性环境问题放在首要地位，认真履行有关国际条约的义务，承担环境保护责任。中国积极参加北极环境治理，加强北极活动的环境影响研究和环境背景调查，尊重北极国家的相关环保法规，强化环境管理并推动环境合作。

海洋环境是北极环境保护的重点领域。中国支持北冰洋沿岸国依照国际条约减少北极海域陆源污染物的努力，致力于提高公民和企业的环境责任意识，与各国一道加强对船舶排放、海洋倾废、大气污染等各类海洋环境污染源的管控，切实保护北极海洋环境。

2. 保护生态

北极是全球多种濒危野生动植物的重要分布区域。中国重视北极可持续发展

和生物多样性保护，开展全球变化与人类活动对北极生态系统影响的科学评估，加强对北极候鸟及其栖息地的保护，开展北极候鸟迁徙规律研究，提升北极生态系统的适应能力和自我恢复能力，推进在北极物种保护方面的国际合作。

3. 应对气候变化

应对北极气候变化是全球气候治理的重要环节。中国一贯高度重视气候变化问题，已将落实“国家自主贡献”等应对气候变化的措施列入国家整体发展议程和规划，为《巴黎协定》的缔结发挥了重要作用。中国的减排措施对北极的气候生态环境具有积极影响。中国致力于研究北极物质能量交换过程及其机理，评估北极与全球气候变化的相互作用，预测未来气候变化对北极自然资源和生态环境的潜在风险，推动北极冰冻圈科学的发展。加强应对气候变化的宣传、教育，提高公众对气候变化问题的认知水平，促进应对北极气候变化的国际合作。

（三）依法合理利用北极资源

北极资源丰富，但生态环境脆弱。中国倡导保护和合理利用北极，鼓励企业利用自身的资金、技术和国内市场优势，通过国际合作开发利用北极资源。中国一贯主张，开发利用北极的活动应遵循《联合国海洋法公约》《斯匹次卑尔根群岛条约》等国际条约和一般国际法，尊重北极国家的相关法律，并在保护北极生态环境、尊重北极土著人的利益和关切的前提下，以可持续的方式进行。

1. 参与北极航道开发利用

北极航道包括东北航道、西北航道和中央航道。全球变暖使北极航道有望成为国际贸易的重要运输干线。中国尊重北极国家依法对其国家管辖范围内海域行使立法权、执法权和司法权，主张根据《联合国海洋法公约》等国际条约和一般国际法管理北极航道，保障各国依法享有的航行自由以及利用北极航道的权利。中国主张有关国家应依据国际法妥善解决北极航道有关争议。

中国愿依托北极航道的开发利用，与各方共建“冰上丝绸之路”。中国鼓励企业参与北极航道基础设施建设，依法开展商业试航，稳步推进北极航道的商业化利用和常态化运行。中国重视北极航道的航行安全，积极开展北极航道研究，不断加强航运水文调查，提高北极航行、安全和后勤保障能力。切实遵守《极地水域船舶航行安全规则》，支持国际海事组织在北极航运规则制定方面发挥积极作用。主张在北极航道基础设施建设和运营方面加强国际合作。

2. 参与油气和矿产等非生物资源的开发利用

中国尊重北极国家根据国际法对其国家管辖范围内油气和矿产资源享有的主权权利，尊重北极地区居民的利益和关切，要求企业遵守相关国家的法律并开展资源开发风险评估，支持企业通过各种合作形式，在保护北极生态环境的前提下参与北极油气和矿产资源开发。

北极富含地热、风能等清洁能源。中国致力于加强与北极国家的清洁能源合作，推动与北极国家在清洁能源开发的技术、人才和经验方面开展交流，探索清洁能源的供应和替代利用，实现低碳发展。

3. 参与渔业等生物资源的养护和利用

鱼类资源受气候变化等因素影响出现向北迁移趋势，北冰洋未来可能成为新渔场。中国在北冰洋公海渔业问题上一贯坚持科学养护、合理利用的立场，主张各国依法享有在北冰洋公海从事渔业资源研究和开发利用活动的权利，同时承担养护渔业资源和保护生态系统的义务。

中国支持就北冰洋公海渔业管理制定有法律拘束力的国际协定，支持基于《联合国海洋法公约》建立北冰洋公海渔业管理组织或出台有关制度安排。中国致力于加强对北冰洋公海渔业资源的调查与研究，适时开展探捕活动，建设性地参与北冰洋公海渔业治理。中国愿加强与北冰洋沿岸国合作研究、养护和开发渔业资源。中国坚持保护北极生物多样性，倡导透明合理地勘探和使用北极遗传资源，公平公正地分享和利用遗传资源产生的惠益。

4. 参与旅游资源开发

北极旅游是新兴的北极活动，中国是北极游客的来源国之一。中国支持和鼓励企业与北极国家合作开发北极旅游资源，主张不断完善北极旅游安全、保险保障和救援保障体系，切实保障各国游客的安全。坚持对北极旅游从业机构与人员进行培训和监管，致力于提高中国游客的北极环保意识，积极倡导北极的低碳旅游、生态旅游和负责任旅游，推动北极旅游业可持续发展。

中国坚持在尊重北极地区居民和土著人的传统和文化，保护其独特的生活方式和价值观，以及尊重北极国家为加强北极地区居民能力建设、促进经济社会发展、提高教育和医疗水平所作努力的前提下，参与北极资源开发利用，使北极地区居民和土著人成为北极开发的真正受益者。

（四）积极参与北极治理和国际合作

中国主张构建和完善北极治理机制。坚持依法规范、管理和监督中国公民、法人或者其他组织的北极活动，努力确保相关活动符合国际法并尊重有关国家在环境保护、资源养护和可持续利用方面的国内法，切实加强中国北极对外政策和事务的统筹协调。在此基础上，中国积极参与北极国际治理，坚持维护以《联合国宪章》和《联合国海洋法公约》为核心的现行北极国际治理体系，努力在北极国际规则的制定、解释、适用和发展中发挥建设性作用，维护各国和国际社会的共同利益。

中国主张稳步推进北极国际合作。加强共建“一带一路”倡议框架下关于北极领域的国际合作，坚持共商、共建、共享原则，重点开展以政策沟通、设施联通、

贸易畅通、资金融通、民心相通为主要内容的务实合作，包括加强与北极国家发展战略对接、积极推动共建经北冰洋连接欧洲的蓝色经济通道、积极促进北极数字互联互通和逐步构建国际性基础设施网络等。中方愿与各方以北极为纽带增进共同福祉、发展共同利益。

在全球层面，中国积极参与全球环境、气候变化、国际海事、公海渔业管理等领域的规则制定，依法全面履行相关国际义务。中国不断加强与各国和国际组织的环保合作，大力推进节能减排和绿色低碳发展，积极推动全球应对气候变化进程与合作，坚持公平、共同但有区别的责任原则和各自能力原则，推动发达国家履行在《联合国气候变化框架公约》《京都议定书》《巴黎协定》中作出的承诺，为发展中国家应对气候变化提供支持。中国建设性地参与国际海事组织事务，积极履行保障海上航行安全、防止船舶对海洋环境造成污染等国际责任。中国主张加强国际海事技术合作，在国际海事组织框架内寻求全球协调一致的海运温室气体减排解决方案。中国积极参与北冰洋公海渔业管理问题相关谈判，主张通过制定有法律拘束力的国际协定管理北冰洋公海渔业资源，允许在北冰洋公海开展渔业科学研究和探捕活动，各国依据国际法享有的公海自由不受影响。

在区域层面，中国积极参与政府间北极区域性机制。中国是北极理事会正式观察员，高度重视北极理事会在北极事务中发挥的积极作用，认可北极理事会是关于北极环境与可持续发展等问题的主要政府间论坛。中国信守申请成为北极理事会观察员时所作各项承诺，全力支持北极理事会工作，委派专家参与北极理事会及其工作组和特别任务组的活动，尊重北极理事会通过的《北极海空搜救合作协定》《北极海洋油污预防与反应合作协定》《加强北极国际科学合作协定》。中国支持通过北极科技部长会议等平台开展国际合作。

在多边和双边层面，中国积极推动在北极各领域的务实合作，特别是大力开展在气候变化、科考、环保、生态、航道和资源开发、海底光缆建设、人文交流和人才培养等领域的沟通与合作。中国主张在北极国家与域外国家之间建立合作伙伴关系，已与所有北极国家开展北极事务双边磋商。2010 年，中美建立了海洋法和极地事务年度对话机制。自 2013 年起，中俄持续举行北极事务对话。2012 年，中国与冰岛签署《中华人民共和国政府与冰岛共和国政府关于北极合作的框架协议》，这是中国与北极国家缔结的首份北极领域专门协议。中国重视发展与其他北极域外国家之间的合作，已同英国、法国开展双边海洋法和极地事务对话。2016 年，中国、日本、韩国启动北极事务高级别对话，推动三国在加强北极国际合作、开展科学研究和探索商业合作等方面交流分享相关政策、实践和经验。

中国支持各利益攸关方共同参与北极治理和国际合作。支持“北极—对话区域”、北极圈论坛、“北极前沿”、中国—北欧北极研究中心等平台在促进各利益攸关方交流合作方面发挥作用。支持科研机构和企业发挥自身优势参与北极治理，鼓励科研机构与外国智库、学术机构开展交流和对话，支持企业依法有序参与

北极商业开发和利用。

（五）促进北极和平与稳定

北极的和平与稳定是各国开展各类北极活动的重要保障，符合包括中国在内的世界各国的根本利益。中国主张和平利用北极，致力于维护和促进北极的和平与稳定，保护北极地区人员和财产安全，保障海上贸易、海上作业和运输安全。中国支持有关各方依据《联合国宪章》《联合国海洋法公约》等国际条约和一般国际法，通过和平方式解决涉北极领土和海洋权益争议，支持有关各方维护北极安全稳定的努力。中国致力于加强与北极国家在海空搜救、海上预警、应急反应、情报交流等方面的国际合作，妥善应对海上事故、环境污染、海上犯罪等安全挑战。

结束语

北极的未来关乎北极国家的利益，关乎北极域外国家和全人类的福祉，北极治理需要各利益攸关方的参与和贡献。作为负责任的大国，中国愿本着“尊重、合作、共赢、可持续”的基本原则，与有关各方一道，抓住北极发展的历史性机遇，积极应对北极变化带来的挑战，共同认识北极、保护北极、利用北极和参与治理北极，积极推动共建“一带一路”倡议涉北极合作，积极推动构建人类命运共同体，为北极的和平稳定和可持续发展作出贡献。

《中国海洋法学评论》稿约

《中国海洋法学评论》（*China Oceans Law Review*），ISSN：1813-7350，是由厦门大学海洋法与中国东南海疆研究中心、香港理工大学董浩云国际海事研究中心、台湾中山大学海洋事务研究所、澳门大学高级法律研究所以及大连海事大学海法研究院两岸四地五校联合主办，（香港）中国评论文化有限公司出版的海洋法领域中英双语对照的优秀国际学术期刊。《中国海洋法学评论》秉承“海纳百川，有容乃大”的精神，力求刊发海内外与海洋法律、海洋政策相关的一切研究成果，热忱欢迎专家学者不吝赐稿，兹立稿约如下：

一、鼓励英文著述，同一学术水准稿件，英文著述将优先录用。

二、来稿形式不限，学术专论、评论、判解研究、译作等均可，篇幅长短不拘，不考虑稿件作者的身份和以往学术经历，只有学术水准和学术规范的要求。关于引证规范，请具体参见尾页所附之引证体例。

三、来稿须同一语言下未曾在任何纸质和电子媒介上发表。稿件请附中英文注明作者姓名、学位、工作单位及职务、职称、研究领域和通讯方式等。来稿必复，编辑部在收到来稿两个月内将安排匿名审稿。届时未接到录用通知者，作者可自做他用。来稿一律不退，请作者自留底稿。

四、译作请附寄原文，并附作者或出版者的翻译书面授权许可。译者需保证该译本未侵犯作者或出版者的任何权利，并在可能的损害产生时自行承担损害赔偿责任。《中国海洋法学评论》编辑部及其任何成员不承担由此产生的任何责任。

五、《中国海洋法学评论》欢迎对所刊文章的转载、摘登、翻译和结集出版，但应尊重原作者依照《著作权法》享有的权利，并在实施转载时注明“转自《中国海洋法学评论》20xx 年第 x 期”和原作者、译校者署名，同时书面通知《中国海洋法学评论》编辑部。

六、为扩大本刊及作者知识信息交流渠道，本刊已加入 Westlaw China、北大法宝、台湾华艺、维普、中国知网、超星法源、Heinonline 等中外相关数据库，除非作者在来稿时声明保留，否则即视为同意《中国海洋法学评论》拥有以非专有方式向第三人授予已刊作品电子出版权、信息网络传播权和数字化汇编、复制权；和向《中国社会科学文摘》、《高等学校文科学术文摘》和中国人民大学书报复印资料等文摘类刊物推荐转载已刊作品的权利。

七、《中国海洋法学评论》实行双向匿名审稿制度。来稿一经刊用，即从优支付稿酬，并提供样书两册，无需版面费。

八、凡向《中国海洋法学评论》编辑部投稿，即视为接受本稿约。来稿请寄电子邮箱：colr@xmu.edu.cn。为了实现办公信息化，要求作者必须以电子邮件方式投稿，本刊不再接受纸质投稿。

《中国海洋法学评论》编辑部

China Oceans Law Review Call For Papers

China Oceans Law Review (COLR – ISSN：1813-7350) is a compilation of research focusing on ocean-related laws and policies. This Chinese-English bilingual journal is jointly hosted by Xiamen University, Hong Kong Polytechnic University, University of Macau Institute for Advanced Legal Studies, (Taiwan) Sun Yat-sen University Institute of Marine Affairs and Dalian Maritime University Institute of Maritime Law and Ocean Law, and is published semi-annually. Beginning from Spring 2011，COLR is indexed by *Westlaw China*, *Lawinfochina.com, Airiti, Cqvip and Heinonline.*

Papers from all academics and industry practitioners are faithfully respected and welcomed. The agreements for all contributors are as follows:

1. There are no restrictions on the style, idea, perspective or length of the paper.

2. Potential contributors are expected to provide personal information; including your name, degree, occupation, and contact information.

3. Please strictly follow the format for academic writings which can be referred to in the "China Oceans Law Review Writing Format" in the appendix of COLR.

4. If your paper is a translation from other professionals, please attach the original paper and literary authority license from the original publisher.

5. Authors are responsible for the text of their contribution, unless declared otherwise. The editorial office reserves the discretion to edit the textual detail.

6. Submissions are subject to double-blind peer review within two months of submission. Authors of selected papers will be paid in a lump-sum. Two free copies of sample books will be offered to the author.

7. Submission of an article implies that the authors have read, understood and agreed to the above statements.

Please include an electronic copy with your submission, either by CD or e-mail (colr@xmu.edu.cn).

南强青年拔尖人才计划

厦门大学特别推出南强青年拔尖人才计划，面向海内外引进、培养 100 名左右在学术上崭露头角、创新能力强、发展潜力大的优秀青年人才，给予每位入选者为期 5 年的相应支持。

一、基本条件：具有博士学位，身体健康，能全职在校履职；理工医科类人选不超过 40 周岁，人文社会科学类人选不超过 45 周岁。同时具备以下条件之一：

1. 国家“青年千人计划”、国家“青年拔尖人才支持计划”、国家自然科学基金优秀青年科学基金项目或教育部“长江学者奖励计划”青年学者项目入选者；或学术成就达到上述人才计划、项目入选者相应水平的人文社会科学领域青年人才。

2. 系遴选当年人文社会科学领域引进人才，在本学科领域已崭露头角，并取得公认的、有影响力的重大成果；学术成就超过本校所在学科现有教授的平均水平或近五年取得下列学术成就之一：

（1）在本学科公认的顶尖学术刊物上发表不少于 3 篇学术论文（以第一作者或通讯作者身份），或出版过有重要科研价值或重大社会影响的著作（独立作者或主要贡献者）；

（2）持续获得国家级科研项目资助（仅限主持）；

（3）获得教育部高校人文社会科学研究优秀成果二等奖以上（一等奖限前三位完成人，二等奖限第一完成人），或省部级科研成果奖一等奖（仅限第一完成人）。

二、学校在支持期内为入选者提供以下待遇：

1. 如在原单位为教授，则直接可按照厦门大学特聘教授的标准发放薪酬；如在原单位为副教授，则直接可按照厦门大学教授的标准发放薪酬 .

2. 学校提供住房补贴 100 万元，以后根据当地房价变动调整。

3. 对于新引进人才，学校提供科研启动费支持：人文学科入选者 30~50 万元 , 社会科学、数学学科入选者 50~100 万元，自然科学、工程技术以及医科入选者 100~300 万元。

Top-notch Talents Recruitment Plan

Xiamen University launches its plan of soliciting around one hundred top-notch young talents who are highly capable in innovation and show prominent potentials both at home and abroad. Those admitted will be granted a five-year support.

I. Basic qualifications:

(I) Doctoral degree; healthy; able to work full time at the university; less than 45 years old (social sciences candidates) and less than 40 years old (natural sciences candidates); and

(II) In addition to the qualifications as specified in item (I), the candidates shall also meet up to any of the following conditions:

Those admitted into the "Young Overseas High-Level Talents Introduction Plan", National Plan for "Young Top-notch Talents", National Natural Sciences Foundation--Outstanding Youth Foundation, or Young Scholars Program of the Ministry of Education; or the young talents whose academic achievements have well matched with the above; or

(III) Those who have made influential and acknowledged academic achievements, which have surpassed the average level of the professors in corresponding fields in Xiamen University; or there is any of the following circumstances in recent five years:

(1)Those who have published no less than three papers in widely-acknowledged top academic journals in relevant fields (as first author or corresponding author);

(2) Those who have continuously obtained funding from national scientific research projects (only limited to the persons in charge)

(3) Those who have won the Outstanding Awards for Humanities and Social Sciences for Colleges and Universities granted by Chinese Ministry of Education: no less than Second Award (only limited to three of the most important participants in the First Award; the most important participant in the Second award); or those who have won First Prize for Provincial or Ministry-Level Scientific Research (only limited to the most important participant).

II. Those admitted will be entitled to:

1. Remuneration as specially-invited professors in Xiamen University if they are employed as professors by their former employers; or remuneration as professors in Xiamen University if they are employed as associate professors by their former employers.

2. One-million-yuan housing subsidy.

3. Funding for initiating scientific research (for newly-introduced talents): 300,000 to 500,000 yuan for humanities; 500,000 to 1,000,000 yuan for social sciences and mathematics; one million to three millions for natural sciences, engineering technology and medical sciences.

《中国海洋法学评论》订购单

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